



United States Department of the Interior



NATIONAL PARK SERVICE

Rocky Mountain Region

Utah State Office

324 South State

P.O. Box 45155

Salt Lake City, Utah 84145-0155

IN REPLY REFER TO

L3027 (RMR-UT)

January 14, 1993

Memorandum

To: R.S. 2477 Task Force Leader

From: Utah State Coordinator, National Park Service

Subject: National Park Service Response to House Report 102-901

Enclosed is the National Park Service response to House Report 102-901. Due to the difference in legislative authorities applicable to Alaska, the parks in that region are addressed separately in the report. Please contact me if I can assist further in this matter.


Martin C. Ott

Impact: RS 2477 Rights-of-way in National Park Units

The impact of RS 2477 rights-of-way in National Park units could be devastating. The actual impact will depend on how many potential rights-of-way are validated, what resources they affect, how each right-of-way is used, and to what extent the NPS is allowed to manage valid RS 2477 rights-of-way. *

(1) Number of RS 2477 rights-of-way

It is impossible to determine at this time how many possible RS 2477 rights-of-way will be validated. National Park Service areas within the following four NPS regions (excluding Alaska) could be affected:

Pacific Northwest Region	11 areas (2,212,855 acres)
Western Region	21 areas (8,189,103 acres)
Rocky Mountain Region	27 areas (6,782,804 acres)
Southwest Region	9 areas (495,865 acres)

(2) Affected Resources 8

Congress established the National Park System to conserve scenic, natural, historic, and wildlife resources for the enjoyment of current and future generations. Possible RS 2477 rights-of-ways in NPS areas could cross many miles of undisturbed fish and wildlife habitat, historical and archeological resources, and sensitive wetlands. Wilderness or potential wilderness could also be crossed by potential RS 2477 rights-of-ways. *

Validation of possible RS 2477 rights-of-way assertions would undoubtedly derogate most unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established. *

(3) Use

Most public highway use of possible RS 2477 rights-of-way has been by horse-drawn wagon, foot, horseback, 4-wheel drive vehicle, and, in recent years, passenger vehicle. Historically, RS 2477 rights-of-way were used for access to cattle operations and mining claims, and to exercise other private property rights. Many possible RS 2477 rights-of-way have been long disused; others are currently used as public highways.

State and local governments as well as individual interests have given recent indication that assertions for RS 2477 rights-of-way may be made for various purposes including mining, ranching, resource extraction, and diverse economic development pursuits. If validated, these assertions will have a severe negative impact on areas managed by the NPS, not only from the rights-of-way themselves but from the associated development.

(4) Management

The NPS has considerable authority to manage validated RS 2477 rights-of-way to prevent derogation of national park values. There is common thought among state and local governments that federal land management agencies have no control over use of RS 2477 rights-of-way, but federal case law suggests otherwise. In Sierra Club v. Hodel (Burr Trail), 848 F. 2d 1068 (10th Cir. 1988), the court found that the BLM has the authority and responsibility to regulate RS 2477 rights-of-way to prevent undue degradation of federal land. In U.S. v. Vogler, 859 F. 2d 638 (9th Cir., 1988) and Wilkenson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986), the courts found that the NPS can regulate RS 2477 rights-of-way. The Vogler court stated that the

RS 2477: NPS Response to House Report 102-901

The following information on RS 2477 was compiled to assist preparation of the report required by the 1993 Appropriations Committee Directives. Also, issues and alternatives that could be addressed in the report are noted. Due to the differences in legislative authorities applicable to Alaska, the parks in that region are addressed in a separate section of this report.

History: RS 2477 in National Park System

RS 2477 was enacted on July 26, 1866, and repealed on October 21, 1976, subject to valid existing rights. As this Act was applicable only to Public Land states and considering the date of the Act, NPS areas east of Colorado are unlikely to be affected.

Unreserved public lands in the western NPS units were open to RS 2477 from July 26, 1866, until the withdrawal for park purposes or until October 21, 1976, whichever was earlier. Not all western NPS units were created prior to the 1976 repeal of RS 2477.

In 1985, the DOI convened a task force on RS 2477 consisting of the Alaska offices of the DOI land managing bureaus, the State of Alaska, and other interested parties. A second RS 2477 task force consisting of the Alaska offices of the DOI land managing bureaus convened in 1987. The 1987 task force submitted a draft policy on RS 2477 to the Washington, D.C., office of the Bureau of Land Management (BLM) in July of 1987.

On December 7, 1988, the DOI adopted a policy prepared by the BLM after consultation with the State of Alaska and review by the other DOI land managing bureaus. This policy established criteria for evaluating possible RS 2477 rights-of-way and directed DOI land managing bureaus to develop internal procedures to administratively recognize possible RS 2477 rights-of-way that meet the criteria.

Status: RS 2477 Rights-of-way in NPS Units Other Than Alaska

Currently, no RS 2477 rights-of-way have been administratively recognized in NPS units. Several such rights-of-way have been judicially determined to exist, such as the Glade Park Road at Colorado National Monument, Colorado and the Burr Trail at both Capitol Reef National Park and Glen Canyon National Recreation Area in Utah.

The only NPS areas where RS 2477 assertions are currently pending are in Utah. An assertion by Kane County, Utah, of a 12 mile section of the Warm Creek Road within Glen Canyon National Recreation Area has been reviewed and a recommendation made to administratively acknowledge part of this claimed right-of-way. Two other rights-of-way have been asserted, but insufficient information has been provided to permit review of these assertions. Several rights-of-way are claimed in Washington and Idaho but have not been formally asserted.

While assertions of RS 2477 rights-of-way in other western NPS units are not currently pending, such are to be expected in the future. The current "wise use" movement, which is gaining momentum in the west, sees RS 2477 rights-of-way as a means of assuring access to areas which might otherwise be segregated in wilderness or parks.

Organic Act of the NPS [16 USC §1] and the Mining in the Parks Act [16 USC §1902] authorize the NPS to prevent derogation of park values.

(5) Conclusion

Potentially, there are thousands of possible RS 2477 rights-of-way in the western units of the National Park Service. Many of these possible rights-of-way are extensive and, if validated, would impair scenic, natural, historic, wildlife, and wilderness resources. Also impaired would be the ability of the NPS to manage its areas for purposes for which they were established. The NPS may be able to mitigate some impact pursuant to applicable law and regulations if current federal case law withstands future challenge.

Impact: Access to National Park Units

Access to national park units generally does not currently rely on RS 2477 rights-of-way. Future planning may identify RS 2477 rights-of-way that could provide such access. However, it is not expected that this would be a common circumstance.

Alternatives: Public Highways in National Park System Units

The NPS has no general authority to approve improved public highways across a national park unit unless the highway would serve NPS administration [16 USC §8], would be within the Federal-aid highway system [23 USC §317], or, in Alaska, would be necessary to provide adequate and feasible access to inholdings for economic and other purposes (ANILCA §1110 (b)).

At a few NPS areas the establishing legislation authorizes the granting of rights-of-way for highway purposes, thus providing an alternative to RS 2477. Congress can, of course, legislate access across any area.

Alternatives: Assessing the Validity of RS 2477 Rights-of-way

(1) Continue Current DOI Policy on RS 2477

Under this alternative, the National Park Service will implement DOI policy when Service-wide procedures are finalized. Draft procedures produced by the Alaska and Rocky Mountain Regions were submitted to the Washington, D.C., office of the NPS for review and adoption in November 1992. The Alaska Region, NPS, has delayed review of two current assertions pending completion of the procedures. Rocky Mountain Region has adopted the draft procedures on an interim basis to guide the processing of urgent cases.

(2) Review and Revise DOI Policy on RS 2477

Revision of the DOI policy could emphasize that administrative recognition is a discretionary action that will be taken only when a possible RS 2477 right-of-way would clearly be validated by a court of competent jurisdiction; all borderline and doubtful assertions would be denied administrative recognition and would need to be validated by the courts.

Elements of the current DOI policy the NPS recommends for revision include:

- The policy should require a formal assertion of possible RS 2477 rights-of-way for administrative recognition by DOI land managing bureaus.
- The policy should require incontrovertible documentation for an asserted RS 2477 right-of-way to qualify for administrative recognition and direct DOI land managing bureaus to withhold administrative recognition if an assertion does not provide adequate documentation. Although this may result in more litigation than the current policy, it would accurately reflect the Congressional intent to retain federal control over public land.
- The policy should explicitly recognize existing management authorities available to DOI land managing bureaus and state the standard of protection available under such authorities. The NPS is authorized to prevent derogation of values pursuant to the Organic Act of the NPS, the Mining in the Parks Act, etc. This would clarify Congressional intent and facilitate efficient land management.
- The policy's definition of construction should require actual and intentional modification of land for the purpose of creating a highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy's definition of construction could explicitly exclude survey, planning, or proclamation as qualifying actions. The policy could clearly state that DOI land managing bureaus will not administratively recognize unconstructed section line easements as RS 2477 rights-of-way.
- The policy should define "abandonment" and direct DOI land managing bureaus to withhold administrative recognition of possible RS 2477 rights-of-way in the event of demonstrable long-standing disuse as a public highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy should address seasonal rights-of-way and direct DOI land managing bureaus to limit administrative recognition of rights-of-way to the season for which a right-of-way was accepted. The policy could also state that rights-of-way that have to be remarked annually, were never physically modified for public highway purposes, and vary in location depending on weather conditions and will not be administratively recognized by DOI land managing bureaus.
- The policy should address designated and proposed wilderness and state that DOI land managing bureaus will not administratively recognize RS 2477 rights-of-way in such areas. Administrative recognition of RS 2477 rights-of-way in such areas contradicts the Congressional intent of the Wilderness Act.
- The policy should require coordination between all agencies affected by an RS 2477 assertion to ensure consistent application of the policy.

(3) Revoke DOI Policy

Under this alternative, the DOI could revoke the current policy and require all assertions of RS 2477 rights-of-way to be submitted to a court of competent jurisdiction for a determination of validity. This would clearly implement the Congressional mandate to retain control of federal lands, but it may result in avoidable litigation and contravene the mandate for efficient management of federal lands.

(4) Congressional Alternatives

Congress has several alternatives to address RS 2477 that could be addressed:

- Congress could legislatively delegate the authority to adjudicate the validity of RS 2477 rights-of-way to the appropriate agencies. This would allow DOI land managing bureaus to determine validity in light of their Congressional mandates and change the courts' role to review of administrative process rather than review of the facts.
- Congress could set a deadline to assert RS 2477 rights-of-way. This would facilitate efficient land management by identifying all possible RS 2477 rights-of-way and, eventually, all valid RS 2477 rights-of-way. This would, however, require additional appropriations for all affected federal land managers to respond to assertions in a timely manner.
- The policy should address the intent of the original 1866 Act. It seems unlikely that Congress intended a total abdication of control over the public lands as even the RS 2477 grant is subject to the restriction that the lands be unreserved for public purposes.

RS 2477: Alaska Regional Office Response to House Report 102-901

History: RS 2477 in Alaska National Park Units

RS 2477 was enacted on July 26, 1866, and appealed on October 21, 1976, subject to valid existing rights. According to the Alaska Regional Solicitor, RS 2477 was extended to the Territory of Alaska by the Organic Act of May 17, 1884 (23 Stat. 24). Therefore, unreserved public lands in Alaska were open to RS 2477 from Alaska May 17, 1884, until October 21, 1976.

All lands within the fifteen Alaska national park units were reserved and closed to RS 2477 prior to repeal of the statute:

- part of Sitka National Historical Park was reserved in 1890;
- part of Denali National Park was reserved in 1917;
- part of Katmai National Park was reserved in 1918;
- part of Glacier Bay National Park was reserved in 1925;
- all lands in Alaska were reserved on December 14, 1968, when the withdrawal application for Public Land Order (PLO) 4582 was posted.

This list is not exhaustive and other areas in Alaska national park units than those noted may have been reserved prior to PLO 4582.

In 1985, the DOI convened a task force on RS 2477 consisting of the Alaska offices of the DOI land managing bureaus, the State of Alaska, and other interested parties. A second RS 2477 task force consisting of the Alaska offices of the DOI land managing bureaus convened in 1987. The 1987 task force submitted a draft policy on RS 2477 to the Washington, D.C, office of the Bureau of Land Management (BLM) in July of 1987.

On December 7, 1988, the DOI adopted a policy prepared by the BLM after consultation with the State of Alaska and review by the other DOI land managing bureaus. This policy established criteria for evaluating possible RS 2477 rights-of-way and directed DOI land managing bureaus to develop internal procedures to administratively recognize possible RS 2477 rights-of-way that meet the criteria.

Status: RS 2477 Rights-of-way in Alaska National Park Units

Currently, no RS 2477 rights-of-way have been validated by a court or administratively recognized in Alaska national park units. The Alaska Region of the NPS has received only two RS 2477 assertions. Both were submitted by inholders in Wrangell-St. Elias National Park and Preserve. The first assertion was received in August 1990, for a one-mile right-of-way in the preserve. The second assertion was received in March 1992, for two routes: a 20-mile right-of-way in the Park and designated wilderness; and a 20-mile right-of-way in the Park.

The Alaska Region of the NPS has deferred review and administrative determinations of RS 2477 assertions pending completion of Service-wide procedures for RS 2477 assertions. In the interim, the two parties who have submitted assertions have been assured alternative access to their inholdings pursuant to other applicable law and regulations.

The Alaska Regional of the NPS has not received any RS 2477 assertions from the State or local governments. In 1974 the State of Alaska presented the BLM with an atlas of trails. This atlas identifies 1,700 trails throughout the

State including approximately 200 trails in Alaska national park units. Several of the trails identified cross over 100 miles of one of the Alaska national park units.

The State contends that the 1974 trail atlas asserted all 1,700 trails as RS 2477 rights-of-way. The Alaska State Office of the BLM, however, determined that the atlas does not provide sufficient information to constitute an assertion.

The State also contends that an airstrip in Denali National Park and two airstrips in Wrangell-St. Elias National Preserve are RS 2477 rights-of-way. However, the Alaska Region of the NPS and the Alaska Region Solicitor have determined that permanent airstrips are not highways for the purpose of RS 2477 and, therefore, could not be accepted by the State pursuant to RS 2477.

In May 1992, the State finalized regulations on RS 2477 to guide State review of "applications" for RS 2477 rights-of-way and State "certifications" of validity. The regulations imply that the State has authority to adjudicate RS 2477 assertions on federal land. The NPS notified the State that the regulations misrepresent federal authorities by omission and may result in unproductive confrontation and time-consuming litigation.

The State is currently reviewing approximately nine possible RS 2477 rights-of-way under the new regulations. One of the reviews is of an "application" by the first NPS inholder discussed above. The State's preliminary notification of their intent to "certify" that RS 2477 right-of-way has been mailed to the Superintendent of Wrangell-St. Elias National Park and Preserve.

The State also initiated eight reviews of possible RS 2477 rights-of-way in Denali National Park and Preserve. The State expects to notify the NPS of its preliminary determinations for those rights-of-way this winter.

Impact: RS 2477 Rights-of-way in Alaska National Park Units

The impact of RS 2477 rights-of-way in Alaska national park units could be devastating. The actual impact will depend on how many potential rights-of-way are validated, what resources they affect, how each right-of-way is used, and to what extent the NPS can manage valid RS 2477 rights-of-way.

(1) Number of RS 2477 rights-of-way

It is impossible to state at this time how many possible RS 2477 rights-of-way will be validated. An estimate based on the 1974 State of Alaska trail atlas indicates that as many as 200 rights-of-way could be validated in Alaska national park units. The atlas indicated the following number of possible RS 2477 rights-of-way in each Alaska national park unit:

Aniakchak National Monument and Preserve	1
Bering Land Bridge National Preserve	15
Cape Krusenstern National Monument	1
Denali National Park and Preserve	30
Gates of the Arctic National Park and Preserve	7
Glacier Bay National Park and Preserve	6
Katmai National Park and Preserve	3
Kenai Fjords National Park	1
Klondike Gold Rush National Historical Park	2
Kobuk Valley National Park	2
Lake Clark National Park and Preserve	5
Noatak National Preserve	0
Sitka National Historical Park	0
Wrangell-St. Elias National Park and Preserve	110
Yukon-Charley Rivers National Preserve	10

(2) Affected Resources

Congress established the National Park System to conserve scenic, natural, historic, and wildlife resources for the enjoyment of current and future generations. The Alaska National Interest Lands Conservation Act (ANILCA) specifically established or expanded thirteen of the fifteen Alaska national park units to maintain and protect, in a natural, undeveloped, and unimpaired state: habitat for and populations of fish and wildlife; natural environments; geologic and biological processes; and wilderness character. See ANILCA §§201 and 202.

Possible RS 2477 rights-of-way identified by the 1974 trail atlas cross many miles of undeveloped fish and wildlife habitat, historical and archeological resources, and sensitive coast lines and wetlands. Eleven of the Alaska national park units are bisected by possible RS 2477 rights-of-way some of which are over 100 miles long. Validation of possible RS 2477 rights-of-way in Alaska national park areas would derogate unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established.

In six of the Alaska national park units, the 1974 trail atlas identified possible RS 2477 rights-of-way in designated wilderness. In seven other units, the atlas identified possible RS 2477 rights-of-way in areas suitable for wilderness designation. Validation of possible RS 2477 rights-of-way in these areas would derogate designated wilderness resources and impair future designations of wilderness.

(3) Use

Most public highway use of possible RS 2477 rights-of-way in Alaska national park units has been by foot, dogsled, or snowmachine. Aside from irregular access to mines, off-road vehicles (ORV) and road vehicles have rarely been used on possible RS 2477 rights-of-way in Alaska national park units.

Foot, dogsled, and snowmachine travel in Alaska national park units is generally allowed without permit, and where such travel occurs on possible RS 2477 rights-of-way, it does not typically threaten unit resources. The use of ORV and road vehicles is generally prohibited off maintained roads and designated routes. The NPS has determined that these modes of transportation are inconsistent with the values of Alaska national park units.

The State of Alaska has stated that it intends to use RS 2477 to develop a modern transportation network for resource development and extraction. If validated RS 2477 rights-of-way are used for this purpose, they will have a negative impact on Alaska national park units.

(4) Management

The NPS has considerable authority to manage validated RS 2477 rights-of-way to prevent derogation of Alaska national park unit values. The State of Alaska believes that federal land managers would have no control over use of RS 2477 rights-of-way, but federal case law suggests otherwise.

In Sierra Club v. Hodel (Burr Trail), 848 F. 2d 1068 (10th Cir. 1988), the court found the BLM has the authority and responsibility to regulate RS 2477 rights-of-way to prevent undue degradation of federal land. In U.S. v. Vogler, 859 F. 2d 638 (9th Cir., 1988),

and Wilkenson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986), the courts found that the NPS can regulate RS 2477 rights-of-way. The Vogler court stated that the Organic Act of the NPS [16 USC §1] and the Mining in the Parks Act [16 USC §1902] authorize the NPS to prevent derogation of park values.

(5) Conclusion

There are 200 possible RS 2477 rights-of-way in Alaska national park units. Many of these possible rights-of-way are extensive and could impair scenic, natural, historic, wildlife, and wilderness resources. ORV or road-vehicle transportation on validated RS 2477 rights-of-way will derogate Alaska national park unit values. The NPS may be able to prevent such derogation pursuant to applicable law and regulations if current federal case law withstands future challenge.

Impact: Access to Alaska National Park Units

Access to Alaska national park units does not currently rely on RS 2477 rights-of-way. Future planning may identify RS 2477 rights-of-way that could provide such access. However, the Alaska Region of the NPS does not expect that this will be a common circumstance.

Alternatives: Public Highways in Alaska National Park Units

(1) Unimproved Rights-of-way

Existing law and regulations provide an alternative to RS 2477 rights-of-way for public transportation by foot, dogsled, and snowmachine. Existing law does not provide such an alternative for transportation by ORV.

Access across Alaska national park units by foot, dogsled, and snowmachine (during periods of adequate snow cover or frozen river conditions) was authorized by Congress [ANILCA §1100 (a)]. Most of the possible RS 2477 rights-of-way identified in the 1974 trail atlas are associated with such modes of transportation and have never been used in any other manner.

ORV use is generally prohibited in Alaska national park units by current law. Furthermore, a study in Wrangell-St. Elias National Park and Preserve documented that ORV use causes resource damage at even the lowest traffic levels.

(2) Improved Rights-of-way

Title XI and direct Congressional intervention provide two alternatives to RS 2477 rights-of-way for establishing improved rights-of-way in Alaska national park units.

The NPS has no general authority to approve improved public highways across a national park unit unless the highway would serve NPS administration [16 USC §8], would be within the Federal-aid highway system [23 USC §317], or, in Alaska, would be necessary to provide adequate and feasible access to inholdings for economic and other purposes [ANILCA §1110 (b)]. However, under Title XI of ANILCA, applications for improved public highways across Alaska national park units must be processed by the NPS and submitted to the President. If the President approves an application and Congress agrees, the NPS must issue a right-of-way permit for that application.

Congress could also legislate improved access across Alaska national park units. Congress has done this four times in the recent past: Public Law 99-96 authorized a mining road in Cape Krusenstern National Monument; ANILCA authorized an existing winter transportation route across Bering Land Bridge National Preserve; and ANILCA mandated future improved rights-of-way across Gates of the Arctic National Preserve and Yukon-Charley Rivers National Preserve.