

COMMENTS OF DAVID ENGDahl, PROFESSOR, SEATTLE UNIVERSITY
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Others better situated to do so than I will have commented on various practical aspects of the Interior Department's proposed rule on RS 2477 rights of way, 43 CFR Part 39. I confine my comments to certain fundamental legal points, and to consequent implications which leave me perplexed.

The proposed rule violates express directives of FLPMA regarding present and future consequences resulting from the operation of RS 2477 while it was in effect.

Congress obviously was quite aware of the force and effect of RS 2477 when it enacted the Federal Land Policy and Management Act of 1976 (FLPMA). For example, the House Report on FLPMA emphasized that "Section 2477 of the Revised Statutes, 43 U.S.C. 932, makes an *in praesenti* grant," not merely a contingent, revocable, or regulable permission to use. See H.R. 94-1163, at p. 30. Likewise, the consistent 110 year practice of ascertaining the fact and scope of each RS 2477 grant by recourse to the same territorial or state law that would apply if the grantor were a private party, was well known to Congress. That variations existed among those territorial and state laws, that uncertainties in some instances resulted from ambiguities of proof, and that some inconveniences resulted from the persistence of old rights incompatible with new federal land management aims, all were perfectly well understood.

Indeed, that knowledge and understanding is precisely what induced Congress to create a different regime to govern such access uses as might commence in the future: It was for these very reasons that RS 2477 was repealed and replaced with the elaborate provisions of FLPMA Title V, which deals with the delimited, conditional, and terminable allowances of temporary use which FLPMA (rather anomalously) calls "rights-of-way."

While changing the law for such access uses as might commence in the future, however, Congress also addressed in FLPMA, separately and specifically, the present and future consequences that result from the past operation of RS 2477 during the time when it was in force. The most fundamental problem with proposed 43 CFR Part 39 is that it flagrantly violates the express directives of Congress regarding such present and future consequences.

It is not that the proposed rule simply goes beyond Congress' directives, or tries to solve problems Congress did not try to solve. Rather, the proposed rule defies specific statutory provisions, while at the same time ignoring the one (and only) method FLPMA did provide for administratively ameliorating such inconveniences as the past operation of RS 2477 might entail.

Referring to FLPMA section 509, the House Report on that bill declared: "Rights of way granted under statutes superseded or repealed by the provisions of this Act are protected." H. Rep. 94-1163, at p. 23. "Protection," of course, can vary in degree; but that provided by sec. 509 is complete. As the same House Report recited, RS 2477 had operated as "an *in praesenti* grant." A "grant," once accepted, is an executed and concluded transaction. No subsequent stipulation by the grantor can affect a grantee's right, unless somehow the grant can be terminated; and FLPMA sec. 509 declared: "Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." 43 U.S.C. 1769 (a).

FLPMA sec. 509 does not merely forbid deliberate acts calculated to terminate RS 2477 rights; it is a declaration that nothing done pursuant to FLPMA *is capable of* having that *effect*, regardless what its purpose might be. Section 39.7 of the proposed rule, "Effect of failure to file a claim," is in the teeth of this declaration by Congress. So also is the whole premise underlying the

proposed rule: That the Department is legally competent to try, determine, conclude, and bar RS 2477 "claims."

For 110 years RS 2477 rights of way had been vesting, in virtually every instance *without* either adjudication or delineation by any administrative or judicial body; and it was the rights thus vested, disturbance of which FLPMA sec. 509 explicitly disavowed. For the Interior Department now to propose (by sec. 39.4) that it will not "recognize" any RS 2477 right of way absent "determination" and "description" either by a federal court or by a Department official under the proposed rule itself, looks like outright defiance of Congress.

Congress in 1976 was aware that some RS 2477 rights of way might interfere with modern federal land management objectives. In part for that reason, while disavowing the expedients of curtailment, divestment, and "nonrecognition" espoused by the rule now proposed, Congress did provide a means for reconciling rights acquired under the prior statutory regime with goals espoused under the new. FLPMA sec. 509 provides that

with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

43 U.S.C. 1769 (a).

Obviously the Secretary need not sit and wait for holders of RS 2477 rights of way to volunteer them in exchange for FLPMA "rights of way"; this language of sec. 509 not only authorizes but--given its context--positively requires diligent and assertive efforts by the Department to identify RS 2477 holders and induce and persuade them to accept FLPMA "rights of way" in exchange. What Congress pointedly *refused* to allow, however--either by FLPMA or by any other of the statutes paraded by the Department in its proposed section 39.2--is any solution for inconveniences entailed by the century-long regime of RS 2477 that operates *without the consent of holders* of RS 2477 rights-of-way. FLPMA empowers the Department to negotiate, to motivate, to bargain, and to persuade--but not to coerce if these methods fail; for "nothing in [FLPMA] shall have the effect of terminating any right-of-way," unless with the holder's consent.

The proposed rule is not even compatible with the instructions contained in H. Rep. 102-901.

Experience after the enactment of FLPMA in 1976 showed the utility in some circumstances and States, but also some limitations in others, of this authorization for consensual RS 2477-to-FLPMA "right of way" exchange. Moreover, efforts like BLM's wilderness inventory process for the contiguous States pointed up more inconveniences resulting from the RS 2477 regime than had been identified before. As a result, by the early 1990's the possible desirability of more elaborate or more expensive ways to reconcile RS 2477 rights and the newer federal lands policies was receiving serious attention in Congress.

To date, however, those who wish enhanced Departmental authority in this matter have failed to persuade both houses of Congress. Relevant bills failed in both 1991 and 1992.

The managers in the Committee of Conference on the 1992 bill did ask the Department to prepare a report on RS 2477 rights of way, their likely impacts on federal lands management and multiple use activities, and "possible alternatives for assessing the validity of such claims" See Conference Report on the Fiscal Year 1993 Appropriations Bill for Interior and Related Agencies (Sept. 24, 1992), H. Rep. 102-901. The Department's "Report to Congress on R.S. 2477" was submitted in June, 1993.

In that Report, however, the Department made no serious effort to identify or evaluate "possible *alternatives* for assessing the validity of" RS 2477 rights of way. Now, having short-circuited the contemplated process so as practically to foreclose mature deliberation by Congress, the Department is undertaking to implement its own preferred expedient by this proposed rule. Not even the Conference Committee--let alone the whole Congress--authorized Interior thus to sally forth on its own. Congress itself still stands solidly by its 1976 FLPMA resolve that nothing the Interior Department might do (except with the holders' consent) is legally capable of impairing RS 2477 rights.

Moreover, the Department's proposed scheme for interim suspension or abridgment (see sec. 39.10), costly and burdensome documentation (see sec. 39.6 (c)), tedious, prolonged, and inhospitable scrutiny (see sec. 39.8, 39.9), and ultimate "determination" (in many cases, "termination") of RS 2477 rights of way (see sec. 39.8 (e), (g); sec. 39.7) *is not even an alternative eligible for consideration* according to the 1992 Conference Report! The Conference managers instructed the Department to report "possible alternatives for assessing the validity of" purported RS 2477 rights of way that are "consonant with the intent of Congress both in enacting R.S. 2477 and FLPMA ..."; and they further instructed that the "validity criteria should be drawn from the intent of R.S. 2477 and FLPMA." H. Rep. 102-901. The expressed, articulated intent of FLPMA sec. 509, as already pointed out, was specifically against termination of RS 2477 rights without the holders' assent; and the intent of RS 2477 clearly was to facilitate, rather than constrain, access across unreserved federal lands.

The Department, in the comments accompanying its proposed rule, asserts (59 Fed. Reg. at 39217, col. 3) that "There is no legislative history elaborating on Congress' intent in passing" RS 2477. In a technical sense that is true, but that narrow truth hardly means the purpose of RS 2477 is obscure. As the Department's own comments add, it was enacted "during a period when the Federal Government was promoting settlement of the West," and "[i]n the same era and in the same manner Congress granted rights-of-way for numerous purposes." (Id.) Indeed, the actual title of the 1866 statute was not the "Mining Act of 1866" (as is commonly assumed), but rather "An Act Granting Right of Way ... Over the Public Lands, and for Other Purposes." 1866 was still the age of disposal rather than retention of the federal public lands, and the manifest purpose of the latitudinous and procedurally unrestricted terms of RS 2477 was to *maximize* the convenience of access into and across all of the (unreserved) public domain.

The Conference Committee had directed the Department to bring in a report consonant not only with the newer goals of FLPMA, but also with the purposes of RS 2477, a statute enacted generations before FLPMA's commendable goals had even been conceived. Fairly accomodating these different purposes is not impossible, and the Committee had solicited the expertise and imagination of Interior Department personnel to assist in identifying and assessing ways in which this might be done. The Department, however, chose to disregard the Committee's directive, and refused even to consider ways of reconciling the old and the new. Now it puts forward a proposed rule to curtail the RS 2477 rights which even the Conference Committee had instructed it to respect. Consequently, the pretense that what it is doing comports with instructions of the 1992 Conference Committee, seems disingenuous.

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The proposed rule mistakenly posits that RS 2477 rights are determinable according to "federal law."

Finally, the proposed rule depends upon its false premise that the requisites and scope of RS 2477 rights of way are determinable by reference to purported "federal law." This error is compounded by the proposterous assertion (see, e.g., sec. 39.3 (e), (f); 39.5.) that rules of so-called "federal law" to circumscribe rights acquired decades or generations ago can be innovated by administrative regulations promulgated retrospectively today.

Actually, posing a dichotomy between federal and state law distorts this nineteenth-century statute by projecting it through a twentieth century lens: That pervasive dichotomy, taken for granted today, was no part of the milieu in which RS 2477 was framed.

In 1866, when RS 2477 was enacted, the vast majority of federal public lands lay outside the boundaries of any State, in the half of the continent⁽¹⁾ west of Minnesota, Iowa, Arkansas, and

Kansas which then was still in territorial status. There was no political jurisdiction there except the comprehensive sovereignty accorded the nation by international law and practice. Consequently, our Constitution's allocation of governance power between state and federal levels of government was inapplicable, and Congress could establish whatever law and institutions it wished to devise. In every instance, as it had done with the old Northwest Territory Congress *expressly* incorporated the familiar "common law" as the matrix for everything it or anyone else might do there--and, further, empowered (in the first instance) its territorial governors and (once they were organized) the territorial legislatures to modify that matrix by legislation.

By doing this, Congress enabled itself to proceed in the exercise of its public lands prerogatives without specially defining every term that it used, and without addressing every contingency and detail. For example, it could issue land patents (even in checkerboard fashion) without stipulating for access across the granted lands, because each territory had a legislature and questions of access over private land (in addition to being addressed by the incorporated "common law") are standard subjects of legislation. And it could grant rights of access across retained federal lands by a sentence no longer than RS 2477, not only because the words used were familiar to the "common law" but also because elaboration (if any were needed) of what should constitute a "highway" and what should be the scope of "rights of way" in each territory was within the general legislative competence Congress itself had elected to bestow on the governing organs of each.

When Congress admitted each erstwhile territory as a State, the Constitution's state/federal allocation of power became applicable there for the first time. Thereupon the generality of governance jurisdiction (as distinguished from the constitutionally "enumerated powers"), which during the territorial period had been subject to supervision by Congress, inexorably vested in the newly created State. It is this sequence of events--each public land State succeeding to the role Congress itself had assigned to territorial authorities in the operation of RS 2477--that compels reference now to each State's road and right-of-way laws rather than some pretended "federal law" in construing RS 2477 and determining what rights have accrued under it. Analogies to cases otherwise involving the application of state law to federal activities or federal interests simply do not hold.

The "public land States" of the West were admitted one-by-one over the course of many decades, the largest (Alaska) as recently as 1959. Consequently, a great many RS 2477 rights of way date to territorial days. To say now that the several territorial laws heretofore universally employed to determine both the fact and the scope of those rights of way (there having been no other pretended law to apply) really never operated at all, is an assertion of uncommon arrogance if it is not simply thoughtless and uninformed. To actually believe that this fraction of what had been governed by each territory's particular law somehow eluded the Constitution's sweep of general governing competence to the newly created States would require awful ignorance of the most elementary principles of American constitutional law.

Certainly Congress--without whose assent no adverse right whatever in any federal property can accrue--could have decided at any time that the role it had created under RS 2477 for the variable and potentially divergent laws of the territories was somehow inappropriate for the laws of the States by which those territories were replaced. Congress certainly could have amended RS 2477 to institute even so radically different a regime as that which proposed 43 CFR Part 39 posits now. But instead, until superseding it with FLPMA in 1976 Congress never altered RS 2477 at all.

Congress' assent to a practice regarding federal property has been inferred from long acquiescence even where Congress did not foster the practice in the first instance. See **United States v. Midwest Oil Co.**, 236 U.S. 459 (1915). The same conclusion follows *a fortiori* where Congress itself is responsible for the practice having been followed. The proposed rule's pretended "federal law" for determining the fact and the scope of RS 2477 rights of way is proffered more than a century too late.

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The proposed rule has troubling implications.

The implications of all this are unsettling. The defects I have identified are not arguable flaws of policy, nor are they oversights pardonable because the relevant law is obscure. The legal faults identified above are flagrant.

The department acknowledges that the rules of decision employed in prior RS 2477 adjudications are incompatible with the precepts put forward in the proposed rule, and it asserts a prerogative of "nonacquiescence." See, e.g. 59 Fed. Reg. at 39218 col. 3. That by itself I would not find offensive: I have rigorously critiqued the mischievous assumption that judicial interpretations of the Constitution, at least, bind more than the parties and the case.⁽²⁾

But nonacquiescence is justifiable only because judicial mistakes, when they occur, should have no greater influence than the necessities of resolving particular disputes might require. Nonacquiescence does not mean that one view of the law is as good as another; still less does it mean that "anything goes." On the contrary, it not only presumes but accentuates the solemn obligation of officials outside the judiciary to diligently ascertain the law with candor, not simply to assert that it is what they want it to be.

It is significant that this proposed rule on RS 2477 rights of way, purportedly aimed to eliminate debilitating inconsistencies and uncertainties that prevent responsible land management, is not supported by the Department of Agriculture or its Forest Service. I wish to be neither cynical nor naive, but the substance of this proposed rule cannot be reconciled simultaneously with diligence

and good faith. I am left, therefore, to wonder whether its proponents deliberately set about to unsettle settled law and divest vested rights, or simply had paid too little attention in school.

To those immediately impacted by curtailment or loss of access rights heretofore enjoyed, it might make little difference whether the harm be attributable to brigands or dolts, to ideologues or ignoramuses, to rogues or to fools. More is at stake, however, than those particular rights.

Unless attributable to greater ignorance of history and principle than persons charged to care for the public interest should admit, this proposed rule discloses shocking disdain for the American law-making process--not to say for democracy itself. There are some who conceive of this planet in such peril that hopes of survival through regular and democratic processes are vain; but I had not thought such myopians were yet insinuated into positions of power. I had not expected to find in the Federal Register the forensic equivalent of spiking trees.

This proposed rule seems to have been drafted by zealots who think rights can be recalled, history undone, and adverse interests impeding favorite ambitions dispelled, all by simple strokes of a regulator's pen once partisans of a cause have ridden political coattails into administrative posts. That, however, is government by outlaws. Apparently, in this country at this time, outlaws with pens are more dangerous to liberty and democracy than outlaws with guns.

1.¹. Except California, Oregon, and Nevada.

2.². See "John Marshall's 'Jeffersonian' Concept of Judicial Review," 42 Duke Law Journal 279 (1992).

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