VIA ELECTRONIC & OVERNIGHT MAIL

September 10, 2004

Chief Dale Bosworth
USDA Forest Service
Proposed Rule for Designated Routes and Areas for Motor Vehicle Use
c/o Content Analysis Team
P.O. Box 221150
Salt Lake City, UT 84122-1150
trvman@fs.fed.us

RE: THE PROPOSED RULE'S PROVISIONS CONCERNING R.S. 2477 RIGHTS-OF-WAY VIOLATE LAW AND POLICY, AND SHOULD BE WITHDRAWN.

Dear Chief Bosworth:

I appreciate the opportunity to comment on the Forest Service Proposed Rule on Travel Management; Designated Routes and Areas for Motor Vehicle Use (36 CFR Parts 212,251, 261, and 295) published in the Federal Register on July 15, 2004. The Wilderness Society is a non-profit conservation organization with 200,000 members nationwide. We are committed to preserving wilderness and wildlife, establishing a nationwide network of wildlands, and fostering an American land ethic. We have a strong commitment to the sound management and well-being of the Forest System lands and have been working for decades to protect forests from degradation due to poor road and off-road vehicle management. This comment letter specifically addresses our concerns regarding Revised Statute 2477 (43 U.S.C. 932) in the proposed rule.

The proposed rule's right-of-way provisions will permit Forest Service (FS) staff to effectively recognize R.S. 2477 rights-of-way without public input, notice, or environmental review. The proposal to permit the FS to "ascertain" ownership of rights-of-way violates a Congressional ban on rulemakings pertaining to R.S. 2477, overturns an agency moratorium on processing R.S. 2477 claims, and would permit the FS to revert to guidance that defines rights-of-way in an illegally broad manner. As the regulation is drafted, it would likely result in the FS abdicating its responsibility to protect forest resources from damaging vehicle use. . In short, the

FS proposal to permit the FS staff to "ascertain" whether R.S. 2477 right-of-way claims are valid is poor policy and threatens public resources. The final rule should eliminate this provision. In addition, the final rule must clearly reaffirm the Forest Service's affirmative duty to manage easements like rights-of-way to protect Forest System land, resources, and visitors.

I. BACKGROUND.

A. The Travel Management Proposed Rule.

The FS travel management proposed rule amends regulations concerning travel management on FS lands "to clarify policy related to motor vehicle use, including the use of off-highway vehicles and creates a new series of standards for the management of vehicles (and especially ORVs) on FS lands. The purpose of the proposed rule is to "provide for a system of National Forest System roads, National Forest System trails, and areas on National Forest System lands that are designated for motor vehicle use." Proposed 36 C.F.R. § 212.50(a); 69 Fed. Reg. 42393, column 1.

> The proposed rule would require the establishment of a system of roads, trails, and areas designated for motor vehicle use. The proposed rule also would prohibit the use of motor vehicles off the designated system, as well as motor vehicle use on the system that is not consistent with the classes of motor vehicles and, if applicable, the time of year, designated for use.

69 Fed. Reg. 42381, column 2.

The proposed rule provides for the regulation of vehicle use on "National Forest System roads" and "National Forest System trails" as well as areas of the Forest System. The rule defines these terms as follows:

> National Forest System road. A forest road under the jurisdiction of the Forest Service.
> National Forest System trail. A forest trail under the jurisdiction of the Forest Service.

Proposed 36 C.F.R. § 212.1; 69 Fed. Reg. 42392, column 1. The proposed rule then clarifies this definition further by defining "[r]oad or trail under Forest Service jurisdiction" as follows:

> For the purposes only of the definitions of National Forest System road and National Forest System trail, a road or trail located on National Forest System lands, other than a road or trail:
> (1) Which has been authorized by a legally documented right-of-way held by a State, County, or local public road authority; or
> (2) Which an authorized officer has ascertained, for administrative purposes and based on available evidence, is within a public right-of-way for a highway, such as a right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976).

Id. The proposed rule also identically modifies the definition of "[r]oad or trail under Forest Service jurisdiction" within the Forest Service regulations for special use permit. See proposed 36 C.F.R. § 251.51; 69 Fed. Reg. 42394, column 2.

Neither the existing rules regulating Forest Service ORV use (at 36 C.F.R. Part 295) nor the proposed rule defines the term "authorized officer." However, the proposed rule repeatedly references duties of the "Forest Supervisor or other responsible official." See, e.g., proposed 36 C.F.R. §§ 212.52, 212.53, 212.57; 69 Fed. Reg. 42393, column 2 and 69 Fed. Reg. 42393, column 1. Forest Service regulations concerning special uses define "authorized officer" as "any employee of the Forest Service to whom has been delegated the authority to perform the duties described in this part." 36 C.F.R. § 251.51.

B. R.S. 2477 and Forest Service Lands.

1. *R.S. 2477.*

R.S. 2477 states simply: "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, § 8, 14 Stat. 251, 253, formerly § 2477 of the Revised Statutes, later 43 U.S.C. § 932 (1970) (repealed). R.S. 2477 thus offered a grant of a right-of-way by the "construction" of a "highway" open to, and used by, the public on public lands that were not reserved at the time of highway construction. Id., emphasis added. Congress repealed R.S. 2477 in 1976, and replaced it with modern right-of-way provisions as part of Title V of the Federal Land Policy and Management Act (FLPMA). FLPMA, Pub.L. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976) (repealing R.S. 2477). Under FLPMA, perfected R.S. 2477 rights-of-way in existence on the date of R.S. 2477's repeal remain valid. 43 U.S.C. § 1769.

The creation of a National Forest is a reservation for purposes of R.S. 2477. United States v. Jenks, 804 F.Supp. 232, 236 (D.N.M.1992) rev'd in part on other grounds, 22 F.3d 1513 (10th Cir.1994); Barker v. Board of County Com'rs of County of La Plata, Colo., 49 F. Supp. 2d 1203, 1127-28 (D. Colo. 1999). Thus, once a National Forest was established, no right-of-way for a highway could be created by subsequent construction under R.S. 2477. Many national forests were created from 1895 to 1908.

2. *Forest Service Guidance on Recognizing R.S. 2477.*

There are currently no Forest Service regulations that address the recognition of R.S. 2477 rights-of-way. However, the FS previously adopted guidance in its Manual concerning the recognition and management of R.S. 2477 rights-of-way. See FS Manual 2734.51 (2002), available at http://www.fs.fed.us/im/directives/fsm/2700/2730.doc. That guidance adopted the Interior Department's so-called "Hodel Policy," that, among other things, directs that a highway can be "constructed" sufficient to establish a right-of-way through "[t]he passage of vehicles by users over time." See FS Manual 2734.51 at Exhibit 1.

3. *Congress's Prohibition on R.S. 2477 Rulemakings and FS Moratorium on Recognizing R.S. 2477 Claims*.

In 1994, the Interior Department proposed regulations to address recognition and management of R.S. 2477 rights-of-way, and to put in place standards that limited the recognition of rights-of-way to those highways where actual physical construction had occurred (as opposed to the more liberal "mere use" standard in the Hodel Policy). 59 Fed. Reg. 39216-29 (Aug. 1, 1994). However, beginning in 1995, Congress relieved the Executive Branch of any authority to promulgate such regulations. In 1995, Congress passed a provision which prohibits any agency of the Federal government from "tak[ing] any action to prepare, promulgate, or implement any rule or regulation addressing rights-of-way authorized pursuant to section 2477 of the Revised Statutes…." Section 349(a)(1) of the National Highway System Designation Act, Pub. L. No. 104-59, 109 Stat. 568, 617-618 (1995). This moratorium was effective through September 30, 1996.

Before this provision expired, Congress passed Section 108 of the Omnibus Interior Appropriations Bill for Fiscal Year 1997, which provided:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. § 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.

110 Stat. 3009-200. The Comptroller General, in a letter to numerous Congressional requesters dated August 20, 1997, # B-277719, concluded that the provision is permanent law. See http://www.rs2477.com/documents/GAO_Opinion_8-20-97.pdf.

In response to the Congressional prohibition, the Interior Department adopted a policy of not processing applications for R.S. 2477 claims except in a narrow set of circumstances. Memorandum of B. Babbitt, Interior Secretary to Ass't Secretaries (Jan. 22, 1997). See http://www.rs2477.com/documents/1-22-1997_memo_from_Bruce_Babbitt_RS2477_policy.pdf. The Forest Service ultimately adopted a similar moratorium of its own on September 25 1997 in which it "defer[ed]" administrative determinations of R.S. 2477 rights-of-way "except in cases where there is a demonstrated, compelling, and immediate need to make such determinations." Letter of R. Joslin, Deputy Chief to Regional Foresters et al. (Sep. 25, 1997), attached as Exhibit 1.

II. THE PROPOSED RULE'S PROVISIONS CONCERNING R.S. 2477 CREATE A NEW, EXCLUSIONARY PROCESS FOR EFFECTIVELY RECOGNIZING R.S. 2477 CLAIMS.

A. The Proposed Rule.

The proposed travel management regulation generally requires that the agency permit, limit, or prohibit ORV and other vehicle use on its lands, based on an analysis of the impacts of vehicle use on water quality, wildlife and other resources, and requires the FS to monitor the

impacts of vehicle use on its lands. However, among those routes exempt from these requirements are roads and trails:

> (1) Which has been authorized by a legally documented right-of-way held by a State, County, or local public road authority; or
> (2) Which an authorized officer has ascertained, for administrative purposes and based on available evidence, is within a public right-of-way for a highway, such as a right-of-way for a highway pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976).

Proposed 36 C.F.R. § 212.1; 69 Fed. Reg. 42392, column 1. In short, for these types of roads trails, the FS apparently abandons any authority to limit, prohibit, monitor, or otherwise manage vehicle use.[1]

Such abandonment could, of course, have tremendous environmental impacts. State and county governments and others have asserted the existence of R.S. 2477 claims to undermine FS measures to protect fragile alpine wetlands, tundra, wildlife habitat and/or roadless lands in Idaho, Colorado, Montana, Utah, Alaska, and other states. For example, counties in Montana have filed federal court challenges to road closures that protect habitat of the endangered grizzly bear on the Flathead National Forest. These counties allege that the routes are R.S. 2477 rights-of-way and thus cannot be closed. Montanans for Multiple Use v. Barbouletos, (D.D.C. 1:03cv01244 RWR) (preliminary injunction motion denied Aug. 16, 2004). The State of North Dakota sued to block implementation of the Roadless Area Conservation Rule, in part seeking ratification of alleged R.S. 2477 rights-of-way in the small remaining roadless lands of National Grasslands there. State of North Dakota v. Veneman, Civ. No. A1-01-087 (D. N.D.) (pending). One Colorado county asserted a right-of-way over a rough jeep track to Como Lake and Blue Lakes, alpine lakes in the Sangre de Cristo Range in Colorado, seeking to overturn a Forest Service proposal that limited off-road travel in the area to protect fragile alpine tundra and wetlands. See discussion below.

B. The Forest Service Fails to Acknowledge Its Duty to Manage Valid Rights-of-Way to Protect Public Resources.

As to the first category of routes exempted from FS travel management, where a State, County, or local public road authority has a "legally documented right-of-way," the FS is likely to have limited authority to regulate "use" of the route by vehicle. However, the FS is not completely without authority to regulate use of legally documented rights-of-way, as the proposed rule implies. As the FS Manual currently states (with regard to R.S. 2477 rights-of-way), the FS must:

> Ensure that the Government's servient estate [i.e., the FS property] does not suffer unnecessary degradation as a result of any actions by the holder of the [R.S. 2477]

[1] If it is the FS's position that it does, in fact, retain some authority to limit, prohibit, monitor, or otherwise manage vehicle use through some other set of regulations on such routes, it does not explain that in the draft rule.

> right-of-way. Activities on a right-of-way, which potentially may affect the servient estate, are subject to the National Environmental Policy Act (Tenth Circuit Court of Appeals ruling in Sierra Club v. Hodel, 848 F.2d 1068). Although the Forest Service has no jurisdiction over highway-related activities of the right-of-way holder, the agency is responsible for ensuring the Government's servient estate does not suffer unnecessary degradation.

FS Manual 2734.51(4) (emphasis added). Thus, current FS guidance states that the agency does retain the authority for R.S. 2477 (and, by implication, other similar rights-of-way) to limit those actions and activities – including use of motor vehicles – that may result in "unnecessary degradation" to FS resources such as water quality, roadlessness, wildlife habitat, etc.

Federal courts agree that federal agencies charged with protecting public lands can regulate the use of R.S. 2477 rights-of-way over those lands in order to meet their legal land-protection duties. See Clouser v. Espy, 42 F.3d 1522, 1537-38 (9th Cir. 1994) (FS's authority to regulate national forest areas for their protection encompasses the authority to regulate use of R.S. 2477 rights-of-way); Adams v. United States, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993) (same); United States v. Vogler, 859 F.2d 638. 641-42 (9th Cir. 1988) (upholding National Park Service regulations that gave the agency authority to regulate the use and maintenance of R.S. 2477 rights-of-way); United States v. Garfield County, 122 F. Supp. 2d 1201, 38-41 (D. Utah 2000) (same).

The U.S. Constitution and other caselaw are in accord that the Federal government retains broad authority to manage its lands, even where others may have rights. Under the Property Clause of the U.S. Constitution, "[t]he United States, as owner of the underlying fee title to the public domain [as it is with R.S. 2477 rights-of-way over public lands], maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired." United States v. Locke, 471 U.S. 84, 104 (1985), citing Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). The Supreme Court and appeals courts have repeatedly upheld the authority of the federal government to regulate activity on state land adjacent to or surrounded by federal lands that threatens United States property or resources. See Camfield v. United States, 167 U.S. 518 (1897) (federal government could order removal of fences on private land interfering with public lands access); United States v. Alford, 274 U.S. 264 (1927) (Congress empowered to prohibit acts on private lands that imperil public forests); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) (Congress empowered to limit use of motor vehicles on state and private lands within wilderness area); United States v. Armstrong, 186 F.3d 1055, 1061-62 (8th Cir. 1999) (upholding National Park Service authority to regulate tour boat use on state waters in Voyageurs National Park) cert. denied, 529 U.S. 1033 (2000); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979) (upholding conviction for violation of federal campfire rules on state land within national recreation area).

The draft travel management rule does not address – in fact, it appears to reject – these authorities.

C. The Proposed Rule Creates an Illegal, Secret Process for Approving R.S. 2477 Rights-of-Way

The second category of routes exempted from FS travel management leads to other troubling outcomes. For a route to be exempted from FS travel management authority, an FS "authorized officer" – likely a Forest Supervisor or District Ranger – need only "ascertain" that the route is an R.S. 2477 right-of-way "based on available evidence." This is troubling for a number of reasons.

1. *The Proposed Rule Violates the Congressional Prohibition on R.S. 2477 Rulemakings*

First, the FS draft rulemaking appears to violate the Congressional prohibition on rulemakings "pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S.] 2477." This draft rule clearly pertains to the management (or lack thereof) of R.S. 2477 rights-of-way, given that rulemaking proposed that the FS will not limit vehicle use in anyway on these RS 2477 claims. The draft rule will also effectively result in recognition or validity of a right-of-way, since it permits an FS "authorized officer" to "ascertain[]" that an R.S. 2477 right-of-way exists. The fact that the route will be "ascertained" to be a right-of-way "for administrative purposes" means that "ascertaining" the existence of a right-of-way will have practical implications for FS's management of vehicles, and potentially a change from the status quo.

The use of the word "ascertain" may be an attempt to convey that the FS determination will be less than formal. However, Blacks Law Dictionary defines "ascertain" to mean, among other things, "[t]o fix; to render certain or definite; to estimate and determine." Black's Law Dictionary (5th Ed. 1979) at 104 (emphasis added). Thus, the FS action of "ascertain[ing]" whether an R.S. 2477 right-of-way exists will "fix" that right in a way that is prohibited by law.

2 *The Proposed Rule Appears to Vacate the Agency Directive Requiring the FS to Defer Processing R.S. 2477 Assertions.*

Second, the draft rule effectively overturns the FS's September 1997 decision to "defer any processing of R.S. 2477 assertions," letter of R. Joslin (Sep. 25, 1997). The FS draft rule neither acknowledges nor specifically vacates this guidance. The FS must at least explain whether it intends to and is in fact overturning prior FS guidance.

It may be that the FS does not intend to "ascertain[]" whether a route is a right-of-way for a highway pursuant to R.S. 2477 unless and until there is a "demonstrated, compelling, and immediate need to make such [a] determination[]." See Joslin letter. However, the FS does not make this clear, nor does it specify whether opposition by a purported right-of-way holder to a proposal to close a route through travel management planning would, in some or all cases, constitute a "demonstrated, compelling, and immediate need to make such [a] determination[]." Id.

3. *The Proposed Rule Appears to Establish a Process for Recognizing R.S. 2477 Rights-of-Way that Has No Opportunity for Public Comment or Involvement.*

Third, the process by which the FS will exempt routes from FS management – to the extent it can be called a process – raises a number of concerns. The draft rule:

- does not state to what extent documentation is required for the "ascertainment," thus making it possible that the authorized officer may reach a decision orally or without consideration of relevant factors.

- does not require the public to be notified regarding the "ascertainment," nor require that the authorized officer explain in a reasoned manner the "ascertainment."

- does not provide any opportunity for the public to providence evidence to contradict that which a self-interested party may submit in favor of recognition of the right-of-way, nor any other opportunity for the public to comment on the "ascertainment."

- does not provide for any environmental review of what is effectively a decision to permit uncontrolled vehicle use across FS lands within the alleged scope of the right-of-way. As the draft travel management rule itself acknowledges, uncontrolled vehicle use of trails or roads can have considerable adverse effects on FS resources. See 69 Fed. Reg. 42381-83.

- does not provide that the authorized officer seek any legal oversight or involvement from FS regional counsel or the Office of General Counsel which may have expertise in addressing the thorny legal issues related to effective recognition of rights-of-way.

The FS may argue that this procedure is not new at all; that it in fact dovetails with, supplements, or complements existing FS procedure for addressing title disputes as set out in FS Handbook 5509.11, which relates to "Title Claims, Sales, and Grants." See http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?5509.11. Such an argument would be invalid for at least three reasons. First, there is nothing in the FS Handbook that relates to an "ascertainment" process, nor is any guidance provided in the Handbook or this proposed rule (or the preamble to the rule) that addresses the interplay between the Handbook and the proposed rule. Second, the existing Handbook guidance is not adequate to address R.S. 2477 claims and would not provide FS staff with critical information needed to "ascertain" whether R.S. 2477 rights-of-way may be valid. For example, the Handbook provides no guidance on what evidence is relevant to addressing the key and unique elements of R.S. 2477 -- whether the route was "constructed" and whether it was a "highway." In addition, the Handbook (like the proposed rule) fails to mention or address the Chief's 1997 moratorium on processing R.S. 2477 claims except in cases "where there is a demonstrated, compelling, and immediate need to make such determinations."

In any event, even if the "ascertainment" process is directly tied to the process for determining title in the FS Handbook, the FS Handbook itself is not sound policy, because it fails

to provide any opportunity for public oversight, involvement or environmental review and analysis. Further, and as discussed below, the FS has taken the position that any decision made to surrender a right-of-way under R.S. 2477 is not subject to judicial review, no matter how specious that decision is.

For these reasons, it is clear that the "ascertainment" process proposed in the draft rule is not only exactly the type of recognition prohibited by Congress, it also establishes a new, behind-closed-doors process for recognizing rights-of-way that deprives the public of any opportunity for involvement.

4. *The Proposed Rule Will Rely upon the "Hodel Policy," an Unlawful Process that Does Not Effectively Protect Forest Resources.*

Fourth, the draft rule does not itself provide standards to help the authorized officer "ascertain" whether a route is within a valid R.S. 2477 right-of-way. This means that the FS authorized officers will be guided by agency policy on the books – the Hodel Policy contained in the FS Manual. The Hodel Policy, as noted above, takes a position that mere use of a route can "construct" the route. It further states that:

> Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.

FS Manual 2734.51, Exhibit 1 (Hodel Policy). Thus, trampling plants by foot on a hiking trail or kicking rocks out of the way, under FS guidance, is arguably sufficient to "construct" a highway and thus effect a grant of a right-of-way. The improperly broad interpretation of the term "construction" for purposes of R.S. 2477 – that the term encompasses "mere use" of a trail – has been rejected by at least one federal court. Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2nd 1130, 1138 (D. Utah 2001) (on appeal) (finding reasonable BLM's rejection of Utah counties' assertions that continued use of routes amounted to construction). Should the FS use the Hodel Policy to guide its "ascertainment" of rights-of-way, the agency will almost certainly "abandon management of land – where the plain language of the law itself would not actually result in a right-of-way grant.

5. *The Proposed Rule Will Result in Inconsistent Determinations*.

Fifth, permitting hundreds of different District Rangers and scores of Forest Supervisors to "ascertain" whether a R.S. 2477 right-of-way exists is a recipe for inconsistent outcomes. Given that claimed routes may cross ranger district, forest, and even regional boundaries, such an approach is likely to cause confusion and uncertainty among the public as well those pressing R.S. 2477 claims. While this Administration has stated that its R.S. 2477 policy seeks to reduce litigation, decentralizing decisionmaking would seem to only increase the opportunities for erroneous and legally-challengeable decisions.

6. *The Proposed Rule Reverses Long-Held Agency Policy*.

Sixth, the proposed rule effectively represents a 180-degree reversal of existing practice. In the last decade, numerous parties have attempted to overturn or undermine FS efforts to protect the public's forest resources by alleging the existence of R.S. 2477 rights-of-way that cannot be closed. Typically, when there has been a dispute about whether a route was within a right-of-way, the FS has taken the needed action to protect forest resources, while stating in its decision and environmental documents that the agency's action does not prejudice the right-of-way proponent's right to press their claim in court. This put the burden on right-of-way proponents to prove their claims through the legal avenue open to them: the Quiet Title Act. 28 U.S.C. § 2409a.[2] With this proposed rule, the FS will take the opposite approach, "ascertaining" without the assistance of the public or the courts (or any articulated evidentiary standard) whether a route is within a right-of-way and surrendering on its own the authority to protect forest resources.

7. *In the Past, Forest Service Staff Decided to "Ascertain" the Existence of R.S. 2477 Rights-of-Way Have Not Reflected Proper Decisionmaking or Have Attempted to Eliminate Public Oversight.*

Seventh, where FS authorized officers have in the past made "ascertainments" of rights-of-way, those decisions have not always been of high quality. Where purportedly more rigorous title determinations have been made by the Department of Agriculture's Office of General Counsel, those decisions have still fail to meet the standards required by law. More disturbingly, the FS has taken the position that such determinations cannot be challenged in court by members of the public.

a. The Como Lake/Blue Lakes Trail "Determination."

In late 1996, a district ranger made a decision to close a small portion of a jeep trail to Como Lake/Blue Lakes on the Rio Grande National Forest in order to protect fragile alpine

---

[2] Placing the burden on the right-of-way holder to prove its claim is, in fact, required by federal caselaw. The Supreme Court has held that federal land grants such as R.S. 2477 are subject to a clear statement rule, under which they are construed "favorably to the government. . . . [N]othing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1919) (emphasis added); Missouri, Kan. & Tex. Ry. v. Kansas Pac. Ry., 97 U.S. 491, 497 (1878); see also Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983) ("[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.") quoting United States v. Union Pacific R.R. Co., 353 U.S. 112, 116 (1957). This principle applies to the determination of R.S. 2477 rights-of-way. See United States v. Garfield County, 122 F. Supp. 2d 1201, 1225 (D. Utah 2000); Fitzgerald v. United States, 932 F. Supp. 1195, 1201 (D. Ariz. 1996) (doubt as to whether land was reserved for public use resolved in favor of government); see also Adams v. United States, 3 F.3d 1254, 1257 (9th Cir. 1993) (doubt as to the scope of R.S. 2477 right-of-way resolved in favor of government); Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982) (same).

wetlands. After the appeal period had closed, and the appeal was denied, county commissioners and off-road enthusiasts held a meeting with Forest Supervisor Jim Webb, asserting that the FS was without jurisdiction over the route because it was an R.S. 2477 right-of-way and therefore that the FS could not close it.. Supervisor Webb drafted a one-page "worksheet," looked at some county-provided "mineral surveys" and "lots of map[s]" and thereupon signed the worksheet to "Validate [the] Claim." R.S. 2477 Worksheet (May 5, 1997), attached as Exhibit 2. The worksheet does not indicate such critical information as the location, nature and extent of the validated right-of-way. Supervisor Webb's action was later invalidated by the Regional Forester. Letter of E. Estill, Regional Forester to R. Wiygul (Oct. 23, 1997), attached as Exhibit 3.

Clearly, this is not an example of high-quality decisionmaking by FS staff concerning R.S. 2477. If FS staff are given, by regulation, the authority to "ascertain[]" the existence of rights-of-way with no further guidance, similar decisions are likely to result.

b. The Forestdale Creek Road Title Determination.

A case currently pending in federal court, Friends of Hope Valley v. U.S. Forest Service, Case No. Civ.S-00-1900 DFL KJM (E.D. Cal.) (pending), involves a decision made on the Carson Ranger District of the Humboldt-Toiyabe National Forest. There, the FS initially considered limiting snowmachine use of the Forestdale Road as part of an environmental review. At the same time that an environmental assessment (EA) was being circulated for public review, the FS was determining its jurisdiction over Forestdale Road entirely out of public view. In October 1998, the FS prepared an internal agency document entitled "Road Jurisdiction Investigation Report for Forestdale Creek Road, Carson Ranger District, Humboldt-Toiyabe National Forest, October 1998" ("Jurisdiction Report") which concluded that Alpine County, not the FS, had jurisdiction over the road. The Report was never circulated for public review or comment, and conservationists did not receive a copy of the document until after the NEPA public comment process concluded. The Jurisdiction Report includes a brief, anecdotal description of travel and resource activities in the broader area prior to its inclusion in the National Forest System, identifies maps purportedly showing some type of trail or road in the general vicinity of Forestdale Road as far back as the 1890s, explains that in 1893 Alpine County expressly abandoned any jurisdiction over almost all roads in the county, including Forestdale Road, and lists certain post-withdrawal actions, activities and declarations concerning the road.

After the close of the EA public comment period, the Department of Agriculture's Office of the General Counsel prepared a document entitled "Title Opinion – Forestdale Road." The Title Opinion attached the earlier Jurisdiction Report and expressly provided that the Office of the General Counsel "has done no independent investigation of the historical facts related to construction and dedication of the road, and all conclusions are therefore based on the Report submitted by the Forest Service." Conservationists were never provided with a copy of this document during either the NEPA comment period or the FS administrative appeal process, and had no prior opportunity to challenge either the "evidence" on which the report relies or the FS's ultimate conclusions. The Title Report itself contained no evidence that the road was purposefully, mechanically constructed, as required by R.S. 2477, nor any evidence that the route was open and used by the public as a highway.

Despite the lack of evidence supporting the claim, the FS took the position that even where the FS's determination is entirely without basis, the determination is not subject to judicial review or court oversight.[3] In short, once the FS has made its title determination, no member of the public can do anything to challenge it.

Opening the doors through regulation to additional determinations (or "ascertainments") that will be insulated not only from public review but court oversight, regardless of the merits or content of these decisions, would greatly undermine the sound management of public lands.

8. *The Proposed Rule May Permit Grave Damage to FS Resources with No Oversight.*

Eighth, an "ascertainment" decision may result in the FS abandoning not only oversight of the use of the route, but could also allow grading and paving the route far beyond the exiting extent of the route on the ground. Newly adopted regulations exempt right-of-way holders from the need to obtain special use permits where they propose to engage in "routine operation or maintenance" of R.S. 2477 rights-of-way. 36 C.F.R. § 251.50(e)(3) (effective August 11); see 69 Fed. Reg. 41965, columns 1. This exemption applies only to "R.S. 2477 rights-of-way that have been adjudicated by a court or otherwise recognized by the Forest Service." 69 Fed. Reg. 41956, column 2 (emphasis added). A decision "ascertain[ing], for administrative purposes" that a route is within an R.S. 2477 right-of-way would appear to be a way that the FS could "otherwise recognize" an R.S. 2477 right-of-way. FS Manual changes adopted contemporaneously with the special use regulations define "routine operation or maintenance" to "include a variety of activities to preserve the integrity and safe use of the road, such as grading … seal coats and asphalt overlays … [and] culvert and bridge replacements." 69 Fed. Reg. 41957, column 2. The scope within which these activities can take place is "the boundaries that existed at the time the grant was accepted, unless State law existing at the time provides for a different width." Id. While state laws vary widely, it is clear that the FS exemption for routine operation or maintenance could permit a significant increase in the area disturbed on FS lands, since the scope of a right-of-way is often far larger than the area actually disturbed. Thus, the "ascertainment" provision may not only permit the Forest Service to abdicate its authority to manage vehicle use that it is currently regulating, but it may result in significant damage to FS resources through "routine operation or maintenance" of such routes, all without public notice, public involvement or environmental review.

D. The Forest Service Must Not, as an Alternative to the Proposed Rule, Embrace the Disclaimer Rule as a Vehicle for Addressing R.S. 2477 Right-of-Way Claims.

On January 6, 2003, the Department of the Interior completed its revision of regulations concerning the Conveyances, Disclaimers, and Corrections Documents regulation also know as

---

[3] See Defendant's Memorandum of Points and Authorities in Support of Defendant's Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, July 7, 2003, at 29-34, in the matter of Friends of Hope Valley v. U.S. Forest Service, Case No. Civ.S-00-1900 DFL KJM (E.D. Cal.), excerpts attached as Exhibit 4.

the "Disclaimer Rule." 43 C.F.R. Part 1864; see 68 Fed. Reg. 494 (Jan. 6, 2004). The Disclaimer Rule applies to all federal public land unit including those in the National Forest System. In the preamble to the 2003 changes, the Interior Department, for the first time, took the position that the United States could surrender rights-of-way under R.S. 2477 through the disclaimer process. We believe the disclaimer rule is an enormous loophole that provides the Bureau of Land Management with the authority to give away Forest System lands with little regard to Forest Service laws, policies, and regulations, public notice and input, and environmental review under the National Environmental Policy Act. In addition, the rule is illegal. Our concerns with the rule are more fully set out in an attached analysis of the Bureau of Land Management's initial attempt to process an R.S. 2477 claim, which we attach and incorporate by reference in these comments. Letter of E. Zukoski to S. Wisely (May 6, 2004), excerpts attached as Exhibit 5, and full text available at http://www.rs2477.com/documents/Weiss_Highway_May_6_2004.pdf.

While we disagree with the Forest Service's approach to "ascertaining" information regarding RS 2477 in these regulations, we strongly urge the Forest Service to steer clear of the Disclaimer Rule either as an alternative or complement to these proposed regulations.

E. Conclusion and Recommendations.

The proposed rule's right-of-way provisions will permit district rangers and/or Forest Supervisors to effectively recognize R.S. 2477 rights-of-way without public input, notice, or environmental review. The proposal appears to violate a Congressional ban on rulemakings pertaining to R.S. 2477, overturns an agency moratorium on processing R.S. 2477 claims, and would permit the FS to revert to guidance that defines rights-of-way in an illegally broad manner. These changes would likely result in the FS abdicating its responsibility to protect forest resources from damaging vehicle use on numerous routes.

In order to avoid these results, we urge the Forest Service to eliminate proposed regulation 36 C.F.R. § 212.1's parenthetical numbered (2) in the definition of "National Forest System road and National Forest System trail."

In addition, if the FS intends to retain parenthetical numbered (1) in the definition of "National Forest System road and National Forest System trail," we urge the Forest Service to make clear that the FS retains the authority to manage use and administration of such rights-of-way to the extent necessary to preserve the FS's resources, as discussed above and as required by law.

Again, thank you for the opportunity to comment. Please contact me at (202) 429-2694 or Leslie Jones at (202) 429-2628 with any inquiries or questions.

Sincerely,

Kristen Brengel