Highway Rights-of-Way on Public Lands

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In many states it has been found that, in the past, highways were constructed over public lands without a formal easement or deed for right-of-way having been obtained from the federal government. Patents subsequently have been issued on such land in many cases without an express reservation of the right-of-way or with an ambiguous reservation that does not specify the extent of the right-of-way. When encroachments are found or when a state desires to improve the highway, a question arises regarding the relative rights of the highway agency and the holder of a subsequent patent to the land. This article reviews the general legal principles applicable to such conflicts, and suggests possible resolutions or steps that highway agencies might take to improve or preserve their legal position. The impact of recent federal legislation is also discussed.

I. Federal Offer to Dedicate Land for Highways

In the Act of July 26, 1866, Congress provided that "[t]he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[1]

The intent and effect of this statute has been well established primarily through litigation in the state courts. The statute constitutes an "express dedication" or "grant" by the federal government which becomes effective upon acceptance by the public or proper public authority.[2] The statute is

1. 43 U.S.C. § 932 (1970) (repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743 (1976)).

2. United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963); Ball v. Stephens, 68 Cal. App. 2d 843, 158 P.2d 207 (1945); Brown v. Jolley, 153 Colo. 530, 387 P.2d

also characterized as a "statutory offer to dedicate" lands for highway purposes.[3] Whether the offer has been accepted by establishment of a public highway, and whether the width and extent of the right-of-way so established is proper, are issues to be determined under the law of the state in which the land is located.[4] It is also clear that a patentee takes title subject to existing rights-of-way whether or not specifically reserved in the patent.[5] This was clearly seen in a 1968 Arizona case:

> It is true that a patent is "the highest evidence of title" and that a patent may not be "attacked" in a collateral proceeding. However, it is also clear from cases decided under 43 U.S.C.A. § 932 that a subsequent patentee takes subject to previous right-of-ways established under the grant contained in that federal statute . . . . The silence of the patents does not preclude the State from showing the full extent of its right-of-ways established prior to the time when the patents were issued . . . .[6]

II. Acceptance of the Grant

The grant may be accepted either by actual use of the land for highway purposes or by formal action by public authorities. Some courts have been very liberal in finding acceptance based on use. For example, the Colorado Supreme Court has summarized Colorado law as follows:

> The sum of our holdings is that the statute is an express dedication of right of way for roads over unappropriated government lands, acceptance of which by the public results from "use by those for whom it was necessary or convenient." It is not required that "work" shall be done on such a road or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices.[7]

In general, use of a road by the public for such length of time and under such circumstances as to indicate clearly an intention on the part of the public to accept the grant is sufficient. It is not a question of establishment by prescription or adverse use but a question of acceptance.[8] Nonetheless, some courts will look to the state law regarding establishment of roads by prescription over private lands for guidance.[9] Most of the reported cases involve roads which evolved from stock trails or paths.

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278 (1963); Kirk v. Schultz, 63 Colo. 278, 119 P.2d 266 (1941); Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946); Bishop v. Hawley, 33 Wyo. 271, 238 P. 284 (1925).

3. State v. Crawford, 7 Ariz. App. 551, 441 P.2d 586 (1968), *on remand*, 13 Ariz. App. 225, 475 P.2d 515 (1970).

4. *Id.*, 441 P.2d at 590; Ball v. Stephens, 68 Cal. App. 2d 843, 158 P.2d 207, 209 (1945).

5. City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593, 595 (1909); Sullivan v. Condas, 76 Utah 585, 290 P. 954, 957 (1930); Bishop v. Hawley, 33 Wyo. 271, 238 P. 284, 286 (1925).

6. State v. Crawford, 7 Ariz. App. 551, 441 P.2d 586, 589-90 (1968). *But cf.* Flint & P.M. Ry. v. Gordon, 41 Mich. 420, 2 N.W. 648, 655 (1879) (a subsequent patentee's equities could preclude the acquisition of adverse rights—although not on the facts presented).

7. Brown v. Jolley, 153 Colo. 530, 387 P.2d 278, 281 (1963), *quoting* Leach v. Manhart, 102 Colo. 129, 77 P.2d 652 (1938).

8. Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946); Montgomery v. Somers, 50 Ore. 259, 90 P. 674 (1907); Hatch Bros. Co. v. Black, 25 Wyo. 109, 165 P. 518 (1917).

9. *See, e.g.*, Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 422 (1941) and cases cited therein. Acceptance based on use was not permitted in Cross v. State, 147 Ala. 125, 41 So. 875 (1906).

Where highways are established by public authority rather than by use, there is some divergence of opinion on what acts are required to constitute acceptance. The more liberal majority view holds that "[a]ll that is needed for acceptance is 'some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept.' "[10] However, there are a few cases indicating that actual construction of the highway may be necessary before acceptance takes place.[11]

The better view appears to be that, as far as the federal government is concerned, any positive act on the part of local officials to accept the grant is sufficient to consummate the grant unless state law requires something more. The view is best expressed in *Smith v. Mitchell*,[12] an early case from Washington state where the court said:

> The act of Congress . . . does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located . . . .

Some western states enacted legislation while still territories or during early statehood dedicating public highways along all section lines in the state.[13] The courts in those states have held that the legislative declaration or dedication of section line highways alone constitutes an acceptance of the federal grant in the 1866 Act.[14] The acceptance of the grant takes place at the time of dedication even without any subsequent construction. Many western states are still constructing new highways along section lines with substantial savings in right-of-way acquisition costs.[15]

There appears to be only one case disputing the general interpretation given to 43 U.S.C. § 932. In *United States v. Dunn*,[16] the court in a footnote stated that section 8 of the Act of 1866[17] was enacted to protect persons who already have encroached upon the public domain without authorization. "It was not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefensible."[18] For this proposition the court cited

10. Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) (quoting Hamerly v. Denton, 359 P.2d 121, 123 (Alas. 1961).

11. *See* Warren v. Chouteau County, 82 Mont. 115, 265 P. 676, 679 (1928); Moulton v. Irish, 67 Mont. 504, 218 P. 1053, 1054 (1923).

12. 21 Wash. 536, 58 P. 667, 668 (1899).

13. *See, e.g.*, S.D. COMPILED LAWS ANN. § 31-18-1 (1976); N.D. CENT. CODE § 24-07-03 (1970).

14. Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975); Walbridge v. Russell County, 74 Kan. 341, 86 P. 473 (1906); Faxon v. Lallie Civil Tp., 36 N.D. 634, 163 N.W. 531 (1917); Pederson v. Canton Tp., 72 S.D. 332, 34 N.W.2d 172 (1948).

15. Most of the section line dedications specified a width, generally 66 feet, which is insufficient for modern highways. The additional width required by current standards must be obtained by purchase or condemnation.

16. 478 F.2d 443 (9th Cir. 1973).

17. 43 U.S.C. § 932 (1970).

18. United States v. Dunn, 478 F.2d 443, 445 (9th Cir. 1973).

Central Pacific Railway v. Alameda Co.[19] Although the Court held in *Central Pacific* that one purpose of section 8 of the 1866 Act was to confirm pre-existing rights, the Court did not rule on whether the statute was also to grant new rights. Much of the opinion discusses, by analogy, section 9 of the same act, dealing with rights-of-way for canals and ditches. Section 9 states, "The right of way for the construction of ditches and canals for the purposes aforesaid is hereby ackowledged and confirmed . . . ."[20] That language is significantly different from the "grant" language in section 8 dealing with highway rights-of-way. The Court's purpose in *Central Pacific* was to expand section 8 to cover pre-existing rights. The Court accomplished its purpose through analogy to the principles in section 9. The opinion, however, does not limit or nullify the grant language in section 8.

The question may arise whether the 1866 statute was superseded by the numerous subsequent statutes regarding rights-of-way over public lands. In *Wilderness Society v. Morton*,[21] it was argued that the statute was superseded in part by section 28 of the Mineral Leasing Act of 1920.[22] The court rejected the argument with the following language:

> A differently phrased yet similar principle of statutory construction is that where there are two acts on the same subject—here rights-of-way in federal lands—effect should be given to both if possible . . . . This doctrine should be of special significance when we deal with allegedly conflicting public land laws. As a cursory glance at those sections of the United States Code which deal with public lands will indicate, these laws are hardly a model of neat organization and uniform planning . . . . This is an area of the law where it truly can be said that most statutes are *sui generis*. It is an area where it is extremely doubtful that Congress, when passing certain legislation, was aware of, let alone intended, inconsistencies with prior legislation.[23]

III. Extent of Right-of-Way

The major issue is often not whether a public right-of-way exists but the extent or width of the right-of-way. The question of the width of the right-of-way is a mixed question of law and fact.[24] Where right-of-way has been acquired by use, its width "must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put."[25] The width is not confined to the beaten path or actual roadway. "Congress must have intended such a highway as is recognized by the local laws, customs, and usages."[26]

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19. 284 U.S. 463 (1932).
20. Act of July 26, 1866, § 9, 43 U.S.C. § 932 (1970) (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743).
21. 479 F.2d 842 (D.C. Cir. 1973).
22. 30 U.S.C. § 185 (1970).
23. Wilderness Society v. Morton, 479 F.2d 842, 881 (D.C. Cir. 1973).
24. Bishop v. Hawley, 33 Wyo. 271, 238 P. 284, 287 (1925).
25. Boyer v. Clark, 7 Utah 2d 395, 326 P.2d 107, 109 (1958).
26. City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593, 596 (1909).

> A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A bridle path abandoned to the public may not be expanded, by court decree, into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic.[27]

State statutes should always be consulted since many states have current or past legislation specifying normal right-of-way width.[28] Where a statute at the time of a grant specifies a normal right-of-way width, there is a presumption that the grant was for the width so specified.[29] Section line roads generally pose no problem regarding width because the statutes dedicating the section lines generally decreed the width.[30]

In the reported cases in which right-of-way width has been an issue under 43 U.S.C. § 932, the findings have ranged from 60 feet[31] to 100 feet.[32] Many of the cases are old and the decisions predate or relate back to a time when the 60 to 100-foot right-of-way was the norm. The principles, however, can be used to support any right-of-way that can be shown to have been reasonably necessary. One recent Arizona case, *State v. Crawford*,[33] indicates that, given sufficient facts, the court would have found a 400-foot right-of-way.

Crawford illustrates many of the problems that highway agencies face in attempting to prove right-of-way under the 1866 Act. It was an inverse condemnation proceeding against the state for allegedly taking a 200-foot strip of plaintiffs' land in constructing a second lane of highway parallel to an existing highway which had been constructed earlier on a concededly valid 100-foot right-of-way. The original highway was built in 1920 over unreserved United States public lands. Plaintiffs' patent, issued in 1954, contained no express reservation of right-of-way for the highway. The physical roadway and necessary appurtenances never extended beyond 100 feet. In 1964, the state constructed additional lanes which consumed 200 more feet of right-of-way.

The state attempted to show that in 1940 the state highway engineer had prepared a map on which he drew a 400-foot right-of-way for the road. In 1942, the Arizona State Highway Commission passed a resolution incorporating the map by reference and ordering the improvement of the highway. Unfortunately, the state was never able to produce a copy of the map. The resolution did not itself describe the width of the right-of-way. The

27. Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 424 (1941).
28. *See, e.g.*, S.D. COMPILED LAWS ANN. § 31-3-18 (1967).
29. Meservey v. Gulliford, 14 Idaho 133, 93 P. 780, 785 (1908); Hunsaker v. State, 29 Utah 2d 322, 509 P.2d 352, 354 (1973).
30. *See, e.g.*, N.D. CENT. CODE § 24-07-03 (1970) (two rods each side of section line); S.D. COMPILED LAWS ANN. § 31-18-2 (1976) (sixty-six feet to be taken equally from each side of the section line).
31. City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593 (1909).
32. Bishop v. Hawley, 33 Wyo. 271, 238 P. 284 (1925).
33. 7 Ariz. App. 551, 441 P.2d 586 (1968).

ultimate holding on remand was that the state had to pay $45,000 for the additional 200 feet of right-of-way.

The case is significant because the court indicated that if the state could have produced a map or resolution clearly manifesting its intent to accept the additional right-of-way prior to plaintiffs' patent, the state might have prevailed even though actual construction did not take place until more than twenty-two years later (and ten years after plaintiffs' patent). The case illustrates the necessity for preserving old files relating to highways for which the right-of-way has not been firmly established by a written easement or deed.

It is interesting that even a survey predating the patent was not found to be controlling. A 1954 resurvey prior to plaintiffs' patent indicated the existence of a 400-foot right-of-way for the road in question. In spite of the fact that plaintiffs' patent referred to the survey which had been approved by the Department of Interior, the court found that the survey did not affect the conveyance. The primary reason cited was that the patent itself contained no reservation of right-of-way. The court also stated, "A surveyor is not a judicial officer. It is not within his province to make a determination as to whether land is within or without the operation of certain laws."[34] Another factor not mentioned is that the survey, having been prepared by the United States Government, does not evidence the *state's* intention to accept the additional right-of-way. One must look primarily to the actions of the state and not the actions of the federal government to determine whether a state has accepted the federal offer to dedicate under 43 U.S.C. § 932. Note, however, that if the patent had contained a general reservation for a highway, the results of the case would probably have been different.[35]

Although the extent of right-of-way is a matter of state law and may therefore vary from state to state, the following factors appear to be given significant weight by the courts (in order of probable weight):

(1) A permit from the federal agency having control over the land giving local authorities permission to occupy a specified amount of right-of-way for highway purposes.

(2) A city, county or state highway commission resolution regarding the particular highway which mentions right-of-way width.

(3) Statutes or regulations specifying a minimum or typical width of right-of-way for the class of road in question.

(4) A survey predating the patent showing a specific width of right-of-way. (In Arizona this is considered only if the patent also contains a general reservation for a highway.)

(5) Engineering plans predating the patent which indicate width of right-of-way.

34. *Id.*, 441 P.2d at 589.

35. *See* Allison v. State, 101 Ariz. 418, 420 P.2d 289 (1966).

(6) Evidence regarding the customary width of right-of-way for the class of road in the locality.

(7) Evidence regarding the minimum necessary width for convenient and safe travel and for proper maintenance.

All of the above must relate to the time predating any patents to the land.

IV. Measures to Improve or Preserve Rights-of-Way

A. Right-of-Way Where Patents Have Already Been Issued.

In the case of right-of-way on lands where patents have already been issued, the best that highway agencies can do is to take measures to insure that documentary evidence relating to the right-of-way and its width is preserved. Once a patent is issued, it is too late to obtain a deed from the appropriate federal agency. Only a judicial determination can establish title. The agency claiming the right-of-way should record all permits, resolutions, plans, or other documents which predate the patent and support the agency's claim to the right-of-way. Documents relating to right-of-way width are particularly important. The claimed right-of-way should also be vigorously defended against new encroachments.

B. Right-of-Way Where Patents Have Not Been Issued.

Coordination with the Bureau of Land Management should be maintained to insure that future patents reserve in detail all highway rights-of-way. Although a general reservation is better than none, a specific reservation setting forth the right-of-way width is desirable.

Ideally, recordable right-of-way instruments should be obtained for all existing rights-of-way over currently unpatented public lands. Whether this solution is practical would depend on the quantity of rights-of-way which falls in this category.[36] A compromise would be to obtain deeds for those highway sections on public land that are ripe for future development and particularly for those sections where no documentary evidence supports a claim to the right-of-way.

At the very least, all existing documents relating to claimed rights-of-way over public lands should be preserved when no deed exists to insure their availability when disputes arise in future years.

V. Rights-of-Way in National Forests

Since national forest lands are "reserved for public use," the grant in 43 U.S.C. § 932 does not apply to such lands. Right-of-way over national forest lands must be acquired under 23 U.S.C. § 317 (federal-aid) or 40 U.S.C. § 345c (non-federal aid). It should be noted, however, that the status of a public highway constructed on public domain land prior to the

36. Section line roads would have low priority where the highway agency is satisfied with the statutory width.

establishment of a forest reserve, is not changed by the subsequent establishment of a forest reserve.[37] The same is true with respect to Indian reservations.[38]

As in the case of unreserved lands, rights-of-way were acquired in the past in national forests without easement deeds and in many cases without even special use permits having been issued. Although forest lands, being reserved, are not open to settlement, they are generally open to mineral entry, and the Forest Service frequently allows use of its lands by permittees. Further, it is not uncommon for national forest lands to be transferred to private parties in exchange for other land. Right-of-way disputes with subsequent permittees or patentees or with holders of mineral rights are, therefore, a very real possibility.

As in the case of roads over unreserved public lands, the most common dispute will involve the width of the right-of-way rather than the existence of a right-of-way. The first published regulations regarding rights-of-way over national forest land appeared in the first volume of the *Federal Register*, and provided as follows:

> The right of way over national forest land for any State or county highway or road which is a part of the approved system of public roads shall be two chains in width [132 feet] for roads of class 1 or class 2, and one chain in width [66 feet] for roads of class 3 or other county roads of a secondary character; the center line of the highway or road to be the center line of the right of way except where otherwise provided by permit. National forest lands within the limits of such right of way shall continue to be administered by the Forest Service, but their use for highway or road purposes shall be the dominant use, and no occupancy for other purposes shall hereafter be authorized by the forest supervisor or regional forester unless approved and concurred in by the appropriate State or county officials, but if agreement can not be reached regarding other forms of use or occupancy regarded by the regional forester as essential to the proper use and management of the national forest the matter shall be submitted to the Secretary of Agriculture for final decision.
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> Approval by the Secretary of Agriculture of a forest highway construction program is ipso facto an authorization for the occupancy of national forest lands by the highways included in such construction program, but where a permit for a project included within a forest highway program is desired by a State or county as a means of meeting legal or fiscal requirements, or as a basis for the execution of road contracts, such permit shall be issued by the regional forester and shall contain such conditions or be supported by such stipulations as may be necessary adequately to protect national forest interests.[39]

The regulation remained in effect until it was revoked in 1968. Rights-of-way for class I and class II roads prior to 1968 can, therefore, be assumed to

37. Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820, 825 (1909).

38. Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975); Faxon v. Lallie Civil Tp., 36 N.D. 634, 163 N.W. 531 (1917), *appeal dismissed*, 250 U.S. 634, (1919).

39. 1 Fed. Reg. 1099 (1936) (codified in 36 C.F.R. § 251.7 (1938 ed.) and 36 C.F.R. § 251.5 (1960 ed.)) (revoked in 1968, 33 Fed. Reg. 12550 (1968)).

be 132 feet unless a special use permit or easement can be found granting a different amount.[40]

The main problem with relying on the Forest Service regulation or on special use permits for right-of-way is that neither can be characterized as a true "grant." They are only revocable permits by their literal terms. Being revocable, they are subject to arguments of implied revocation. They provide highway agencies little protection in the event of disputes with third parties. Of course, with respect to that portion of the right-of-way where the highway agency has expended a considerable investment in capital (the paved portions), the revocable permit may for all practical purposes be irrevocable. In *Wilderness Society v. Morton*,[41] the court said with respect to special use permits for pipelines, "If the use is really not temporary or occasional, but is permanent (or at least longlasting), the matter cannot be papered over merely by designating it as 'revocable' when it is not intended to be revocable and, in the nature of things, is not in fact revocable." However, right-of-way conflicts are most likely to arise on the unpaved maintenance area of the right-of-way where such reasoning may not be persuasive.

In addition to the above problems, unrecorded or poorly documented rights-of-way in national forests can be particularly troublesome in relationship to section 4(f) of the Department of Transportation Act.[42] Section 4(f) provides in part that the Secretary of Transportation shall not approve any project which requires the use of any publicly owned land from a public park or recreation area unless there is no feasible and prudent alternative to the use of such land. The Federal Highway Administration has issued regulations implementing section 4(f) of the DOT Act which require that detailed analysis and findings be prepared whenever land from a significant park, recreation area, or wildlife refuge is to be used for a highway project.[43] National forests are managed for multiple uses and the regulations provide that section 4(f) of the DOT Act does not apply where the portion of land to be taken for highway purposes is not in fact being used or planned for use as a park, recreation area or wildlife preserve.[44] Since national forests are increasingly being used for recreation purposes, acquisition of rights-of-way in the national forest increasingly presents a 4(f) situation. Poorly documented rights-of-way could result in time-consuming and costly section 4(f) procedures for the improvement of a forest highway that could be avoided if adequate rights-of-way were properly documented beforehand.

40. In Hunsaker v. State, 29 Utah 2d 322, 509 P.2d 352, 354 (1973), the court held that a public highway is presumed to be of the prescribed statutory width unless the contrary is proven. The same reasoning would apply to prescribed regulatory width.

41. 479 F.2d 842, 875 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

42. 49 U.S.C. § 1653(f) (1970) (similar provision at 23 U.S.C. § 138 (1970)).

43. 23 C.F.R. § 771.19 (1976). The statute does not specifically require formal findings or other special procedures. The procedures were instituted largely in response to judicial decisions such as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

44. 23 C.F.R. § 771.19(d) (1976).

The amount of right-of-way to be acquired will often be a major factor in determining whether an environmental impact statement need be prepared under the National Environmental Policy Act.[45] Where an existing right-of-way is not adequately documented, it may have to be "reacquired" with the use of otherwise unnecessary procedures.

In summary, inadequately documented rights-of-way in the national forests pose similar problems to those on unreserved public lands. An effort should be made to obtain recorded easements for all rights-of-way not currently so documented.

VI. Federal Land Policy and Management Act of 1976

The problem of undocumented rights-of-way should receive increased attention since Congress enacted the Federal Land Policy and Management Act of 1976.[46] A major purpose of the new "organic act" was to modernize and rationalize the public land laws which had grown haphazardly during 170 years of *ad hoc* legislation.[47] The new act repealed twenty-nine statutes relating to specific rights-of-way on public lands,[48] replacing them with one comprehensive title authorizing the Secretaries of Interior and Agriculture to grant most types of rights-of-way.[49] One of the statutes repealed was the 1866 Act granting rights-of-way for the construction of highways on public lands.[50]

One certain effect of the new legislation is that highway agencies will not be able to rely on actions occurring after October 21, 1976, to constitute acceptance of the 1866 grant. Since the new legislation provides that it shall have no effect on existing rights-of-way,[51] actions prior to October 21, 1976, can still be used to prove right-of-way under the repealed statute. However, reliance on the repealed statute entails many risks in those cases where particular rights-of-way have not been established by court decisions. In many instances, highway agencies have no way of knowing with certainty the extent of their right-of-way unless the matter has been litigated. In those cases where future conflicts or encroachments are likely to arise, they should consider obtaining new grants of right-of-way meeting current stand-

45. 42 U.S.C. § 4321 (1970). Also Federal Highway Administration requirements for public hearings are tied in part to acquisition of significant amounts of right-of-way. *See* 23 C.F.R. § 795.10(b)(7) (1976).

46. Pub. L. No. 94-579, 90 Stat. 2743.

47. The House Report on the new "organic act" noted that there were some 3,000 public land laws still in effect in 1976. H.R.Rep. No. 94-1163, 94th Cong., 2d Sess. 1 (1976).

48. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743.

49. *Id.* Title VI. A few specific grants of right-of-way are retained. *Id.* § 706(b).

50. 43 U.S.C. § 932 (1970) (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743).

51. Section 701(a) provides: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

ards rather than rely on the uncertain outcome of future litigation which at best may only confirm the existence of a substandard right-of-way.

The new legislation permits the cancellation of existing rights-of-way with consent of the holder and the reissuance of a new right-of-way.[52] Whether this procedure will be useful will depend largely on the kind of regulations that are issued to implement the legislation. For example, the new legislation provides that the grant or renewal of rights-of-way "shall be limited to a reasonable term in light of all circumstances concerning the project."[53] If by regulation or policy highway rights-of-way are limited to a term of years subject to renewal, a new grant right-of-way may be less desirable than the permanent grant under the repealed statute. It would be desirable if the new legislation is interpreted to allow the use of permanent grants (subject to reversion) for highway rights-of-way. A good case can be made for the proposition that a permanent grant is the only "reasonable term" for permanent facilities such as highways. The interest of the federal government is adequately protected by a reversionary interest. A term of years requiring periodic renewal would result in needless paperwork and could cause significant legal problems in cases of inadvertent failure to renew.

The new "organic act" has potential far-reaching effects on those who use public lands and on the agencies that administer public lands. The actual effects will not be known until the statute is implemented by policy and regulation. Highway agencies should closely monitor the implementation and participate in the rule making process to insure that their needs are brought to the attention of the federal agencies administering the legislation.

52. *Id.* § 509(a). The major effect of the new legislation will be on public highways which are not included in the federal-aid system. The statute provides that it shall not affect use of lands for highway purposes pursuant to 23 U.S.C. §§ 107 and 317. *Id.* § 510(b).

53. *Id.* § 504(b).