STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

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November 3, 2004

Honorable Gale A. Norton, Secretary
United States Department of the Interior
1849 "C" Street, N.W.
Washington, D.C. 20240

Re: *Amended Notice of Intention to File Suit as to Certain Utah R.S. 2477 Rights of Way*

Dear Secretary Norton:

On June 14, 2000, Stephen G. Boyden, Assistant Attorney General for the State of Utah, sent to you a letter entitled "Re: Utah R.S. 2477 rights-of-way - Notice of Intention to File Suit." Enclosed for purposes of reference is a copy of that letter. On August 31, 2004, we provided to you a supplementary notice of intention to file suit as to certain rights-of-way that were included in the original notice of intention to file suit. Enclosed also for purposes of reference is a copy of that August 31, 2004 letter. The instant amended notice of intention to sue amends the centerline descriptions of the roads specifically identified in the August 31, 2004 notice.

Pursuant to 28 U.S.C.A. § 2409a (m) [Real property quiet title actions], the State of Utah on behalf of itself and its political subdivisions (hereinafter collectively referred to as "the State"), hereby gives you amended notice, in your official capacity as Secretary of the U.S. Department of the Interior with jurisdiction to manage federal lands within the State of Utah, of the State's intention to file suit with regard to the ownership of certain highway rights-of-way acquired pursuant to R.S. 2477 (43 U.S.C. § 932).

The basis for the action is the continuing dispute by the Department of the Interior of the State's R.S. 2477 highway rights and the Department's policies and actions adverse to those rights. Federal officials in the Department of the Interior have closed or attempted to close highways, including those identified below, that were established under R.S. 2477 and are now part of the State's highway system across federal land. Furthermore, federal officials in the Department of the Interior have also interfered with the actions of State and local officials and personnel in connection with maintenance, improvement, construction, management, and other

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normal highway activities on those R.S. 2477 rights-of-way. Under law, approval by the federal government is not required in order to exercise rights granted by R.S. 2477. See 43 C.F.R. § 2822.1-1 (1979) (the longstanding DOI regulation first promulgated in 1939 providing that "no application should be filed under R.S. 2477, as no action on the part of the federal government is necessary"). Officials in your administration are now claiming that R.S. 2477 rights-of-way require their official recognition and that maintenance activities require their permission. This situation is intolerable and amounts to a federal claim of interest adverse to that of the State and a usurpation of property rights vested in the State.

More particularly, each of the rights-of-way herein described was established before 1976 over unreserved federal land in a manner consistent with law. See, Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988) (quoting the DOI regulation first published in 1939 that "[t]he grant referred to in [R.S. 2477][became] effective upon the construction or establishing of highways, in accordance with the State laws"). See also, Sierra Club v. Lujan, 949 F.2d 362, 365 (10th Cir. 1991) (stating that in Hodel, "we held that the district court was correct in deferring to Utah State law to determine the existence and scope of the right-of-way . . . ."). But see Southern Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130 (D. Utah 2001), appeal dismissed on jurisdictional grounds, 2003 WL 21480689 (10th Cir. 2003), second appeal pending (ruling that use under State law was not sufficient to establish the right of way). The manner of the establishment of construction of these highway rights-of-way before 1976 was by mechanical construction other than the passing of vehicles as well as by mechanical construction by the passing of vehicles ("use") and in other ways, under Utah law.

Describing the lands subject to this notice, they are those underlying the dominant estate right-of-way to the extent legally recognized for R.S. 2477 rights-of-way for the following rights-of-way: Copper Globe Road in Emery County, Devil's Canyon Road in Emery County, June's Bottom Road in Emery County, Link Flat Road Portions (referred to in the August 31, 2004, notice as "Link Flat Road Spurs 3779C & 3779D) in Emery County, Picture Flat to Miller's Canyon Road in Emery County, Red Hole Draw in Emery County, Short Canyon Road in Emery County, Swasey's Leap Road in Emery County, Mexican Mountain Road in Emery County, and the Seeger's Hole Road Portions (referred to in the August 31, 2004, notice as "Seeger's Hole Road Spurs 4002A and 4006) in Emery County. These roads are further identified in enclosures hereto by GPS mapping grade data or data digitized from Digital Orthophoto Quadrangles published by the United States Geological Survey ("USGS") or from 1:24,000 topographical maps as indicated in the metadata and/or the transportation data model of the State of Utah Geographical Information Database (SGID). This identifying data is accompanied by a segment index for each right of way.

The lands for each highway include a width "which is reasonable and necessary for the type of use to which the road has been put." Hodel at 846 F.2d at 1083. That width includes

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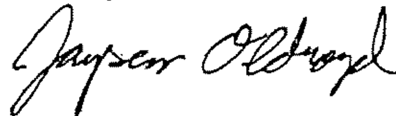
lands reasonable and necessary to maintain the road. Also, lands for the right-of-way are "not to be restricted to the actual beaten path but should be widened to meet the exigencies of increased travel" and "be wide enough to allow travelers to pass each other." Id. Such lands as are reasonable and necessary to accommodate "sound engineering practice" related to the right-of-way, including lands on which accouterments such as drainage ditches, culverts, shoulders, and cut slopes reasonably and necessarily existed as of October 21, 1976, or some earlier date of a disqualifying reservation, or reasonably and necessarily may be established to accommodate increased travel on the road, are "part of the reasonable and necessary use" and are therefore also part of the lands for each highway right-of-way. Id.

The State does not waive any rights to highways not herein identified and intends to file subsequent notices and complaints, as necessary, until such time as title to all R.S. 2477 highways has been quieted.

Sincerely,



Jaysen R. Oldroyd
Assistant Attorney General

Enclosures