

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

KIRK TORGENSEN
Chief Deputy

January 12, 2004

Edward B. Zukoski, Staff Attorney
Earth Justice
1400 Glenarm Place, #300
Denver, Colorado 80202

Re: GRAMA request of January 2, 2004

Dear Mr. Zukoski:

In behalf of the R.S. 2477 roads section, John S. Boyden, Jr., and Norman Johnson, Division Chief of the Natural Resources Division of the Office of the Utah Attorney General, this responds to your GRAMA request of January 2, 2004, that you entitle, "GRAMA Request for Records Concerning Potential Applications for Recordable Disclaimer of Interest for Alleged R.S. 2477 Rights-of-Way." Your faxed letter asks for materials "**concerning or relating to the following:**

- Establishment, construction, maintenance, use, existence, extent, nature, termini, or **any other information** concerning the 20 routes identified on the State of Utah's website (<http://www.rs2477.utah.gov/Applications.htm>) 1 for which the State says it intends to apply for recordable disclaimers of interest for R.S. 2477 rights-of-way pursuant to 43 C.F.R. subpart 1864 and the Utah-Interior Memorandum of Understanding signed April 9, 2003.
- the withdrawal or reservation of the lands underlying the routes identified above.
- Any other records concerning any other potential applications for disclaimers pursuant to 43 C.F.R. subpart 1864 and the Utah-Interior Memorandum of Understanding signed April 9, 2003 generated, modified or acquired by the office of the Governor since April 9, 2003.

- All documents (including calendars and notes) which refer or relate to written or verbal communications between representatives of the State of Utah on the one hand and representatives of the Department of Interior (including the BLM) on the other at which 1) potential R.S. 2477 claims by the State of Utah counties were discussed; and 2) the standards for determining whether a claim satisfied R.S. 2477 were discussed.”

Your request is respectfully denied as to each of its four subparts for reasons discussed below.

A basic fact applies to all parts of your request and of itself requires denial of all parts of your request. This is that the R.S. 2477 matter is in process of litigation. The State of Utah is a joint owner, with the County in which a road is located, of all R.S. 2477 rights-of-way in Utah. See Utah Code Ann. §72-5-103(2)(b). As a joint owner of the rights-of-way, the State is a joint prosecutor of legal interests in the rights-of-way. On June 14, 2000, the State of Utah supplied to the federal government a Notice of Intent to Sue under the Quiet Title Act, subsequent to which the State and Counties have engaged in some settlement negotiations with the federal government regarding the subject of the intent to sue. A notice of intent to sue is a first, and legally required, step in quiet title litigation. See 28 U.S.C. § 2409a(m).

As you note, on April 9, 2003, the Department of the Interior and the Governor of the State of Utah signed a Memorandum of Understanding (“MOU”) under which the State of Utah and Counties in the State could apply for recordable disclaimers of interest acknowledging the State’s and Counties’ right-of-way ownership in R.S. 2477 roads. However, this MOU did not terminate the pending R.S. 2477 litigation or the possibility of other litigation regarding roads the State and Counties might assert as R.S. 2477 rights-of-way. First, the notice of intent to sue is broader in its inclusion of roads than the MOU, and that notice has never been rescinded. Second, as to the more limited category of roads covered by the Notice of Intent to Sue and the MOU, Paragraph 10 of page 4 of the MOU provides as follows:

10. After submitting a road to the Acknowledgment Process, the State or a county may withdraw it from consideration at any time prior to the actual recording of the disclaimer issued by the Department, for any reason, without prejudice. The submission of a road to the Acknowledgment Process does not prejudice the State’s or a county’s valid existing rights regarding that road under the law.

This paragraph 10 preserves to the State and Counties the right to withdraw an application “at any time prior to the actual recording of the disclaimer,” and continue to litigate the R.S. 2477 validity of the road as to which the application was withdrawn in the quiet title action already pending pursuant to the notice of intent to sue that has never been rescinded. Further, paragraph 10 of page 2 of the MOU provides that “[t]he State of Utah and Utah Counties have spent

considerable time and substantial resources to gather information about road claims and are prepared, if necessary, to litigate those claims.” Clearly, the quiet title litigation and the MOU/Recordable Disclaimer of Interest process, under the formal governing documents, are not mutually exclusive as to any road before recordation of a disclaimer as to that road and the Notice of Intent to Sue is still viable as to all roads subject to it, including those subject to the MOU. The notice of intent to sue has not been cancelled by a communication from the representing lawyers, by a document of equal dignity with the original intent to sue, or at all.

Your letter refers to comments of the former Utah Governor and the Department of the Interior exhorting the MOU/Recordable Disclaimer of Interest process as a means of precluding the need for litigation. Those comments are less formal than the documents cited above that preserve the continuity of the litigation, are not legally binding, and must be seen in the context of political expressions of hope that settlement could be reached and litigation avoided. Utah’s Governor was about to leave office, and hoped quickly to simplify and resolve a long-standing and complex legal controversy before his departure. Unfortunately, his comments do not reflect a finalized legal reality.

You also refer to a comment in a DOI “Fact Sheet,” that the parties “are resolving a controversy.” That is a description prepared by the DOI without review or approval of the State of Utah or its Counties through its representing attorneys or at all, and the manner of its presentation has not been agreed to by the State or the Counties. In addition, that DOI presentation is not in a legal filing or other binding, mutually-signed document. It, again, is a hopeful reference to a process, and does not say that the controversy has been resolved. In context, the phrase “are resolving” is naturally understood to mean that the controversy has not yet been resolved, but that, optimistically, the parties are working on settlement.

You are mistaken in saying that GRAMA was “based on FOIA.” The GRAMA drafters adapted some of the disparate provisions of various state information practices acts, but did not pattern GRAMA after FOIA. Federal cases construing FOIA do not govern construction of the discreetly-phrased provisions of GRAMA, and in any case, as shown above, litigation on the R.S. 2477 assertions of the State and Counties continues to be viable and pending.

Based on the predicate established above that the documents requested relate to litigation, all parts of the request are denied as “protected” from disclosure by Utah Code Ann. § 63-2-304(16) as work product of the State and the Counties in anticipation of litigation, by § 63-2-304(17) as attorney work product of the representational attorneys who participate in the work product preparation, by § 63-2-304(18) as communications between the governmental entities and their attorneys and by § 63-2-304(33) as the contents of settlement negotiations. The information requested, taken together, would disclose litigation strategy if released.

In addition, all documents you request are protected under Utah Code Ann. § 63-2-304(9)(a) and (e) as records created or maintained for the purposes of enforcing Utah's rights in R.S. 2477 rights-of-way, and release reasonably could be expected to interfere with investigation by the State and Counties regarding the proceedings in which Utah is seeking to enforce its rights, and to disclose investigative techniques, procedures or policies in an interfering way.

Your request incorrectly assumes that it has been finally decided which, if any, roads the State and County will "claim[]" as R.S. 2477 rights-of-way. It has not yet been so decided. Adjustments to tentative plans the R.S. 2477 project has experienced in the past have demonstrated that until and unless an application is actually filed, which would then accommodate public review and comment regarding the application, it cannot be known which, if any, roads will be made the subject of an application. More specifically, the initial listing on the Governor's website of routes for which applications might be made for recordable disclaimers of interest did not reflect a final decision and is in process of review and revision. It has not been decided which, if any, of those 20 roads will be made the subject of an application for a recordable disclaimer of interest. Since the State and Counties have not yet determined which roads they will propose as R.S. 2477 rights-of-way and the road materials are undergoing continuing assessment and revision, any records we have on those roads are "temporary drafts or similar materials" under Utah Code Ann. §63-2-103(19)(b)(1) and therefore not disclosable "record[s]," and even if "records," are "protected" from disclosure as "not public," under Utah Code Ann. § 63-2-201(3)(a) because they are "drafts under Utah Code Ann. § 63-2-304(22).

There are additional bases for denial as to individual parts of the request. Your request in part three for "[a]ny other records concerning any other potential applications for disclaimers" is denied also on the grounds that the request for "any other potential applications" is so generalized, and in its reference to "potential items" refers to records of such inchoate uncertainty, that it does not "identify the record with reasonable specificity" as required by Utah Code Ann. § 63-2-204(1).

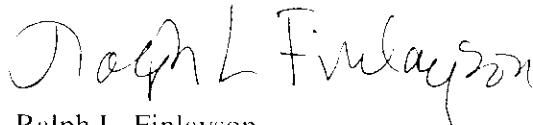
Part four of the request, for "[a]ll documents (including calendars and notes) which refer or relate to written or verbal communications between representatives of the State of Utah on the one hand and representatives of the Department of Interior (including the BLM) on the other at which 1) potential R.S. 2477 claims by the State of Utah Counties were discussed; and 2) the standards for determining whether a claim satisfied R.S. 2477 were discussed," is denied on additional grounds. First, the request for documents relating to "potential R.S. 2477 claims" is so generalized, and in its reference to "potential" items refers to items of such inchoate uncertainty, that it does not "identify the record with reasonable specificity" as required by Utah Code Ann. § 63-2-204(1). Second, the request for "calendars and notes" is a request for materials that are not "records" under GRAMA and hence are not disclosable thereunder. See Utah Code Ann. §63-2-103(19)(b)(vi).

Edward B. Zukoski, Staff Attorney
January 12, 2004
Page 5

It may be noted that on September 6, 2002, the Third District Court in Case No. 020903144 issued an Order acknowledging that records of the R.S. 2477 project subject to a request similar to yours were "private, controlled, or protected information or information exempt from disclosure under Subsection 63-2-201(3)(b)."

You have a right of appeal to "the chief administrator of the governmental entity" under Utah Code Ann. § 63-2-205(c). In this case, that would be Raymond A. Hintze, Chief Deputy Attorney General, 236 State Capitol, Salt Lake City, Utah 84114. The time limit for appeal is 30 days after denial. The date of denial is the date of this letter.

Very truly yours,



Ralph L. Finlayson
Assistant Attorney General

RLF:pb