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United States General Accounting Office
Washington, DC 20548

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February 6, 2004

The Honorable Jeff Bingaman
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

Subject: Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah

Dear Senator Bingaman:

This responds to your request for our opinion on actions by the Department of the Interior (the Department or DOI) in recognizing rights-of-way across public lands granted by Revised Statute 2477 (R.S. 2477), through use of a Federal Land Policy and Management Act (FLPMA) disclaimer-of-interest process which the Department has incorporated into a Memorandum of Understanding with the State of Utah (Utah MOU). Specifically, this opinion addresses:

> (1) Whether either the Department's January 2003 amendments to its disclaimer-of-interest regulations implementing FLPMA § 315, 43 U.S.C. § 1745 (2003 Disclaimer Rule),[1] or the Utah MOU entered into in April 2003[2] is a "final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]" prohibited from taking effect by section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108); and, independent of this Section 108 prohibition,
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> (2) Whether the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

Your request raises a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As summarized below and detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by

[1] "Conveyances, Disclaimers and Correction Documents," 68 Fed. Reg. 494 (Jan. 6, 2003).

[2] Memorandum of Understanding Between The State of Utah and The Department of the Interior On State and County Road Acknowledgment (Apr. 9, 2003).

Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

In preparing this opinion, we requested the legal views of the Department on the issues raised by your request. We obtained these views through the Department's written responses to our inquiries, an in-person conference, and a number of telephone interviews with the Department's legal staff. We also reviewed the Department's responses to separate inquiries by you and by Senator Lieberman on these matters,[3] as well as the Department's statements in various regulatory and policy documents and reports.

BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

> "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[4]

R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way. In an effort to resolve questions regarding the existence of particular R.S. 2477 rights-of-way, the Department has issued a series of policy and other documents over the years discussing how it would administratively recognize or validate specific rights-of-way. By 1993, according to the Department, the agency and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across Bureau of Land Management (BLM) lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims.[5] After the Department issued a proposed rule

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[3] *See* Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Jeff Bingaman (June 19, 2003), responding to Senator Bingaman's April 21, 2003 Letter to the Secretary of the Interior; Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Joseph Lieberman (Sept. 22, 2003), responding to Senator Lieberman's July 2, 2003 Letter to the Secretary of the Interior.

[4] "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes" (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

[5] U.S. Dep't of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-of-Way Claims on Federal and Other Lands* (June 1993) at 29.

in 1994 to establish a formal process for evaluating R.S. 2477 claims, Congress responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The permanent prohibition, set forth in Section 108, states that:

> "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 [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act."[6]

Mindful of this Section 108 restriction, DOI took two major actions in 2003 relating to R.S. 2477 rights-of-way that have generated considerable attention in Congress and elsewhere and are the focus of your request.[7] First, the Department issued the 2003 Disclaimer Rule on January 6, 2003, amending the Department's existing regulations, promulgated in 1984, implementing FLPMA § 315. FLPMA § 315 authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances. As pertinent here, § 315 provides that:

> "After consulting with any affected Federal agency, the [Department] is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where [the Department] determines [that] a record interest of the United States in lands has terminated by operation of law or is otherwise invalid . . .."

FLPMA § 315(a), 43 U.S.C. § 1745(a). DOI's FLPMA § 315 regulations establish a disclaimer application process, *see* 43 C.F.R. subpart 1864, and in the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this process to validate R.S. 2477 rights-of-way, although it stated that FLPMA § 315 has always provided such authority. The Department also stated in the January 2003 preamble that because the 2003 Disclaimer Rule did not contain "specific standards" for evaluating asserted R.S. 2477 rights-of-way, it did not "pertain" to their recognition, management, or validity and thus did not run afoul of Section 108. *See* 68 Fed. Reg. at 496-97.

The Department's second major R.S. 2477-related action in 2003 was issuance of the Utah MOU on April 9, 2003. The Utah MOU states that DOI will implement a "State and County Road Acknowledgment Process" to "acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah," and the process DOI will use to make these acknowledgements is the FLPMA § 315 disclaimer process. *See* Utah MOU at 2-3. The State of Utah or any Utah county may request initiation of this acknowledgment/disclaimer process for "eligible roads"; such roads must meet specified criteria including "meet[ing] the legal requirements of

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[6] Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). We have previously determined that Section 108 is permanent law. *See* B-277719, Aug. 20, 1997.

[7] In addition to your request for our legal opinion and your correspondence to the Secretary, at least 88 members of the House of Representatives, as well as Senator Lieberman, have written to the Secretary in 2003 expressing concern about these actions.

a right-of-way granted under R.S. 2477." *Id.* at 3. On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgement and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way.

SUMMARY OF CONCLUSIONS

As detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude that FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

With respect to the first issue, although the 2003 Disclaimer Rule itself is clearly a "final rule or regulation," we do not believe it is a final rule or regulation "pertaining to the recognition, management, or validity" of R.S. 2477 rights-of-way subject to Section 108. Because the terms of the 2003 Disclaimer Rule (as well as the original 1984 regulations) are silent on R.S. 2477 rights-of-way, we do not believe the Rule pertains to R.S. 2477 rights-of-way as contemplated by Section 108. The preamble to the 2003 Disclaimer Rule does discuss recognition and validity of R.S. 2477 rights-of-way, but the preamble does not qualify as a substantive rule under the Administrative Procedure Act (APA), which we believe was Congress' intention in using the term "final rule or regulation" in Section 108. Moreover, because the 2003 Disclaimer Rule preamble does not prescribe procedural or substantive standards by which R.S. 2477 rights-of-way will be evaluated, it does not "pertain" to R.S. 2477 rights-of-way within the meaning of Section 108.

On the other hand, we conclude that the Utah MOU is a final rule or regulation subject to Section 108's prohibition. There is little question that the MOU pertains to the "recognition, management, or validity" of R.S. 2477 rights-of-way; the purpose of the MOU was to resolve years of conflict over these precise issues. We also believe the MOU is an APA substantive rule and thus a "final rule or regulation" under Section 108. It both satisfies the APA's definition of "rule"—"an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," *see* 5 U.S.C. § 551(4)—and meets the key test by which courts have defined substantive rules—it has a binding effect on the agency and other parties and represents a change in law and policy.

Apart from Section 108's prohibition, on balance, we conclude that FLPMA § 315 authorizes DOI to disclaim interests in R.S. 2477 rights-of-way. This interpretation of FLPMA § 315 represents a novel application of the statute by the Department, but one which, under applicable principles of statutory construction and administrative law, is entitled to substantial deference. A number of the key terms in FLPMA § 315 are ambiguous— notably, "lands," "interests in lands," and "cloud on title"—and in such instances, we afford considerable weight to the interpretation of the agency charged with implementing the statutes so long as the interpretation is reasonable. We find the Department's interpretations of these terms to be reasonable. The Department reads "lands" to include a partial interest in lands, consistent with its longstanding definition of that term in its FLPMA § 315 disclaimer regulations. Under this interpretation, a particular R.S. 2477 right-of-way—which is an "interest in lands"—suffers a "cloud on title" when there is uncertainty about whether the right-of-way has in fact been established, or whether instead the United States has retained its right to

exclusive use of the surface property at issue. The remaining requirement of FLPMA § 315—that a "record interest of the United States in lands has terminated by operation of law"—also is satisfied. When an easement such as an R.S. 2477 right-of-way is granted, it creates two separate property interests: a servient estate (here, owned by the United States) and a dominant estate (here, owned by the holder of the R.S. 2477 right-of-way). At the same time, a record interest of the United States terminates because its interest in exclusive use of the land over which the right-of-way now runs terminates. We recognize that this interpretation of FLPMA § 315 by DOI is a novel one and it is not the only reasonable interpretation. However, under established principles of statutory construction and firmly embedded in administrative law, courts give substantial deference, to an implementing agency's interpretation if it is one of several reasonable interpretations, and thus we do so here in opining on how courts would address these issues.

In sum, we conclude that the Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We conclude further that FLPMA § 315 otherwise authorizes the Department to disclaim the United States' interests in R.S. 2477 rights-of-way.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Karen Keegan, Assistant General Counsel, at (202) 512-8240, or Amy Webbink, Senior Attorney, at (202) 512-4764, if there are questions concerning this opinion.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosure