

Tuesday, May 25, 2004

PUBLIC LANDS

Utah AG says future RS 2477 highway claims unlikely

Dan Berman, *Greenwire* reporter

Future claims by the state of Utah to rights-of-way on public lands under the RS 2477 statute and a memorandum of understanding between Interior Secretary Gale Norton and former Gov. Mike Leavitt (R) appear unlikely as the state attorney general's office is now questioning the legality of the agreement.

In a recent filing with the State Records Committee, Utah Assistant Attorney General Ralph Finlayson said Utah has "no present intention" to make further claims to rights-of-way under the agreement Norton and Leavitt signed in April 2003. However, the position of the attorney general's office contradicts past statements from Norton and current Utah Gov. Olene Walker (R) on the status of the agreement.

The AG's filing came after environmentalists obtained records on 20 possible claims detailed by the state and posted on its RS 2477 [Web site](#). Environmentalists fear the memorandum of understanding, designed to create a process under which Utah could claim rights-of-way under the 1866 mining law RS 2477, will result in additional motor vehicle use and degrade environmental protections of federal land in Utah and other states.

Finlayson cited a recent General Accounting Office [opinion](#) that declared the agreement illegal because it violates a 1997 federal provision prohibiting any regulation regarding the recognition, management or validity of a right-of-way pursuant to RS 2477 without authorization by Congress.

"The possibility of any such claims in the future is speculative at best in view of the fact that any claims under an invalid MOU would be futile," the filing states.

However, Finlayson said yesterday the AG's office has not tried to determine if GAO's conclusion is valid. "I have not independently assessed whether that is incorrect or not," Finlayson said. "I reported that to show that there is some caution about whether at this time we will pursue applications under the MOU."

The AG's office also has not discussed the legal status of the agreement with Interior officials, Finlayson said, despite filing a supplemental notice of intent to sue Interior over the RS 2477 issue earlier this month. Utah first threatened litigation against the department in 2000, and Norton has said the memorandum of understanding was designed to prevent extended litigation with the state and provide some assurances that Utah will not pursue claims in national parks, wilderness areas and most national monuments.

"Our agreement with Utah was based on the fact that Utah spent several years getting ready to litigate against the federal government to claim title to roads," Norton told *Greenwire* earlier this year.

Interior also disagrees with GAO's opinion and believes GAO mischaracterized certain court decisions in its review. "The point of the GAO report -- which we think is quite wrong -- is that an agreement with a state is the same as a regulation," Norton said. "It's not. Those are two entirely separate things" ([Greenwire](#), Feb. 23).

Interior spokesman John Wright said the department has not changed its view on GAO's opinion or the legality of its agreement with Utah. "There has not been any change in status of that MOU," Wright said.

The two recent filings from the state AG's office also contradict earlier pledges from Walker to go ahead with RS 2477 claims under the agreement. Walker spokeswoman Amanda Covington noted that the attorney general's office represents Walker, but pointed to statements Walker made in February regarding the GAO's opinion and the agreement.

"I want to assure Utahans we will continue to move forward on resolving RS 2477 rights-of-way issues. [GAO's opinion] will not change our approach to solving these critical problems," Walker said ([E&E Daily](#), Feb. 12). "We are committed to a collaborative and reasonable public process to resolve road disputes."

Utah has made one rights-of-way claim under the agreement, the 99-mile [Weiss Highway](#), but environmental groups have produced evidence that Interior actually constructed the road in the 1930s, putting the state's ownership claim in jeopardy ([Greenwire](#), May 11).

Covington said the state now wants to see what happens with the Weiss Highway before proceeding with future claims. "While the Weiss Highway is being challenged we're trying to understand where we are on the playing field before we make our next call," Covington said. "You can't call a play until you know where you are in the middle of the field."

The confusion over the status of the agreement came without surprise to Heidi McIntosh of the Southern Utah Wilderness Alliance, which has opposed the agreement from its inception. "The MOU from the start had some serious flaws and I think those were identified by the GAO opinion," McIntosh said.

"In practice, it hasn't been particularly useful for RS 2477 claimants either," McIntosh added. "Their best claim turned out to be one the federal government constructed; I'm suspicious about the others."

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