R.S. 2477 SPIN[1] vs. REALITY[2]

Department Of Interior And State Of Utah
April 9, 2003 Memorandum Of Understanding On
"Resolution Of R.S. 2477 Right Of Way Claims"

Applies Only to Non-Controversial, Maintained Highways?

Their Spin: "Through the MOU, Interior and the State of Utah agree to focus their limited resources on acknowledging those R.S. 2477 rights-of-way that are ***unquestionably part of the State's transportation infrastructure****."* (emphasis added)

The Reality: Nowhere does the MOU say that the process is limited to claims that everyone would agree are highways, such as major routes which are constructed and maintained to a certain safety standard. **In fact, the MOU actually expands, rather than limits, what can be given away as a "highway" in several ways**:

- The MOU defines the terms "road" and "highway" to be "synonomous" [*sic]* and thereby eliminates the need for the State to show that a route is a "highway" — as required under the plain language of existing law under R.S.2477.
- The MOU requires only that the route "was and is public and capable of accommodating automobiles or trucks with four wheels," where current law requires actual construction of the highway. The Bush Justice Department argued in the federal court that the "mere passage of vehicles" cannot by itself constitute construction of a highway.
- The materials announcing this agreement talk about "publicly traveled and regularly maintained roads in Utah," but many routes – including old jeep trails to nowhere, wash bottoms, or off-road vehicle (ORV) tracks that were never constructed – may fit this definition because they are used by ORVs and are "maintained" by the passage of vehicles.
- The MOU could be interpreted to require the Department of the Interior to repudiate its current interpretation of key terms of R.S. 2477 and re-adopt the "Hodel Policy" from 1988. (The MOU revokes a policy directive from then-Secretary of Interior Bruce Babbitt that revoked the Hodel Policy). That policy defines "construction" of a "highway" to include the "[r]emoving high vegetation [or] moving large rocks out the way." Such an interpretation would permit a far broader range of routes – including, potentially, cow paths and pedestrian trails – to qualify as R.S. 2477 rights-of-way.

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[1] Based on "Memorandum of Understanding: Department of the Interior and State of Utah, *Resolution of R.S. 2477 Right-of-way Claims,* **Fact Sheet."** April 9, 2003. Available at www.doi.gov/news/moutalkingpoints.htm.

[2] Based on "Memorandum of Understanding between The State of Utah and The Department of the Interior on State and County Road Acknowledgement." April 9, 2003. Available at www.rs2477.com/documents/MOU_Utah_DOI.pdf

Protects Utah's Acknowledged Treasures?

Their Spin: The right-of-way acknowledgement process "**does not apply to environmentally sensitive areas."** (emphasis in original)

The Reality: The MOU does not protect environmentally sensitive areas in Utah from R.S. 2477 claims.

1) Although National Parks, National Wildlife Refuges and designated Wilderness Areas are not covered by the process outlined in the agreement, Utah counties, ORV groups or others can still assert claims to these routes in federal court. **The State of Utah did not abandon claims in National Parks, National Wildlife Refuges or designated Wilderness Areas** in this agreement.
2) **The Grand Staircase-Escalante National Monument will be subject to claims** under this agreement.
3) **2.6 million acres of land in Utah found by the BLM to have wilderness character** could be covered with miles of roads under this agreement.
4) **More than 3 million additional acres proposed by citizens for wilderness protection** because of their wild nature and outstanding scenic, recreational, archeological or other values could be covered with miles of roads under this agreement.
5) **More than 4 million acres of roadless lands on National Forests** could be subject to claims under this agreement.
6) Because this agreement lowers the standards for determining valid road claims, it could make it easier for others to prevail in claims for roads through environmentally sensitive areas.

Resolves a Long-Standing Controversy?

Their Spin: "The Department of the Interior and the State of Utah are **resolving a controversy** that has resulted in years of uncertainty about right-of-way claims on federal lands...."

The Reality: This agreement does not *resolve* the controversy for the following reasons:

1) Neither the State nor the counties are bound by the determinations made under this MOU. The MOU specifically says that "[t]he submission of a road to the Acknowledgement Process does not prejudice the State's or a county's valid existing rights regarding that road under the law." This means that the State and the counties reserve the right to challenge or assert a claim in federal court regardless of the determination made under the terms of the MOU.
2) To the extent that this MOU limits the universe of lands on which claims to routes for roads can be made, counties, ORV users or others may seek to use other mechanisms (such as the Quiet Title Act) to make R.S.2477 claims. Neither the State nor the counties abandon any claims in this agreement.
3) Because the MOU weakens the standards used to determine the validity of claims, and because the new regulations under which the Department of the Interior will recognize claims are highly controversial, any determinations giving away rights-of-way will likely be subject to continued controversy and potential litigation.

Minimizes Future Road Conversions?

Their Spin: A road **"cannot be substantially changed beyond the scope of routine maintenance by expansion or relocation** without additional review by the Department." [emphasis in original]

The Reality: Unfortunately, this provision does not protect the public lands against the creation of roads and highways out of jeep trails or wash bottoms. The agreement says only that "[i]n cases where the State or county wishes to substantially alter a road that is subject to the Acknowledgment Process that is outside the scope of ordinary maintenance, it will do so only after notifying BLM of its intentions and giving BLM the opportunity to determine that no permit or other authorization is required under federal law. . . ." **The agreement does not prohibit the development, realignment or improvement of these routes, and it does not lay out a process by which the public would have any opportunity to participate in determining whether a permit or other authorization is required to change the character, alignment or use of these routes. It also fails to require any review of environmental impacts before such road upgrading could occur**. BLM could simply send a letter to the county with a simple "go ahead."

Relies on a Sound Process?

Their Spin: The recordable disclaimer of interest process that will be used under this agreement "provides a mechanism for acknowledging claims **...."**

The Reality: The recordable disclaimer of interest process created by Congress in the Federal Land Policy and Management Act (FLPMA) was not intended to be used to give away rights-of-way across public land. Congress intended the disclaimer process as a way of clearing private title to land in which the Federal Government had ***no*** legal interest. See 43 U.S.C. § 1745. Use of the provision — as recently revised through controversial regulations issued by the Interior Department — for R.S. 2477 claims is inappropriate and illegal. The new disclaimer regulations – squarely aimed at relaxing the standards by which states, counties, and other parties could be granted rights-of-way – also violates a 1997 Congressional mandate that prohibited the Interior Department from issuing final regulations concerning R.S.2477. Congress wanted to reserve to itself the authority to resolve the R.S.2477 issue.

Allows for Public Participation?

Their Spin: The recordable disclaimer of interest process that will be used to give away these lands "includes an ***opportunity for public participation*****...."**

The Reality: The recordable disclaimer of interest process as implemented by the BLM allows for public comment only ***after*** the BLM has made a decision on whether or not to grant a disclaimer of interest in land. Under current rules, the public is not notified of claims submitted for recordable disclaimers of interest in land nor is there a clear opportunity for the public to provide evidence about the validity of any such claim. Finally, the disclaimer regulations

provide only that the "applicant or claimant" can appeal a determination, potentially leaving no recourse for the public except to challenge a decision in court.

An Example of Sound Conflict Resolution?

Their Spin: This agreement to acknowledge R.S.2477 claims is an example of "Cooperating to Resolve a Conflict: Protecting Natural Resources and State Infrastructure."

The Reality:

1) **This agreement, which was struck by the Department of the Interior and the State of Utah during secret negotiations, fundamentally weakens the standards for determining what is a legitimate state or county road across federal public land, increases controversy, and puts our public lands at risk.** Cooperation in resolving the conflict over R.S. 2477 claims has not been extended to the American public in creating this agreement and, based on current BLM procedures, cooperation with the public will not be meaningful during the processes proposed to implement it. For more than two years, conservationists attempted to take part in the negotiations. For more than two years, conservationists were denied public information about the negotiations, and the Bureau of Land Management only provided information after the agency was forced to do so by a Federal Court order in January 2003.
2) **This agreement appears to be part of a broader attempt to undermine protection for roadless wildlands in Utah and across the West**. Just last week, the State of Utah filed a complaint in federal court that seeks to make it impossible for the BLM to ever again recommend areas for wilderness protection, or even inventory the agency's lands for wilderness character. Rumors are swirling that the BLM will shortly take action to implement the relief that the State of Utah has sought in court.

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