

In Reply Refer To:
WO 350 (1864, 2800)

June 25, 2003

MEMORANDUM

To: State Director, Utah

From: Deputy Director /s/ Jim Hughes

Subject: Processing Applications for Recordable Disclaimers of Interest-Acknowledgement of R.S. 2477 Rights-of-Way Pursuant to the Memorandum of Understanding (MOU) of April 9, 2003

This memorandum provides guidance for processing applications for recordable disclaimers of interest (disclaimers) pertaining to R.S. 2477 rights-of-way over public land administered by the Bureau of Land Management (BLM) pursuant to (1) the MOU of April 9, 2003, between the State of Utah (State) and the Department of the Interior on State and County Road Acknowledgment MOU and (2) the regulations at 43 CFR Subpart 1864.

The Secretary recognized in the MOU that many of the R.S. 2477 rights-of-way asserted by the State that actually have been part of the State's inventoried and maintained transportation infrastructure since before the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976 may be valid R.S. 2477 rights-of-way. Under the MOU, the State has agreed to submit only those claims for roads that existed prior to October 21, 1976, and were and continue to be public and capable of accommodating automobiles or trucks with four wheels and have been the subject of some type of periodic maintenance. Through the MOU, Interior and the State have agreed to focus their limited resources on acknowledging these R.S. 2477 rights-of-way, that satisfy the statutory requirements of "construction" and "highway" under almost any interpretation of those statutory terms. The State has spent considerable time and substantial resources cataloguing, photographing, documenting, and verifying the history and use of many roads in the State. Through this process, the State has developed information to submit in support of applications for disclaimers under the MOU.

For purposes of implementing the MOU no application for disclaimers will be processed by BLM for roads within Congressionally designated Wilderness Areas or Wilderness Study Areas designated on or before October 21, 1993, under Section 603 of FLPMA, or roads within the boundaries of any unit of the National Park System or any unit of the National Wildlife Refuge System.

For purposes of implementing the MOU, the requirements for determinations under the "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy," dated January 22, 1997, are inapplicable.

I. APPLICATIONS

An applicant should be encouraged to meet with BLM prior to filing an application so that the applicant has a clear understanding of the process and what the applicant is required to provide. Only applications submitted by or through the State pursuant to the MOU will be processed.

Applications for any claimed R.S. 2477 rights-of-way over lands administered by a Federal agency other than BLM will not be processed by BLM unless the Federal agency consents to the inclusion of the claimed right-of-way in the MOU process. BLM will coordinate with other Federal agencies as required.

All applications must be filed in the BLM Utah State Office. Applications may not be filed in any other BLM office, including BLM field offices. Each claimed right-of-way requires a separate application and must be accompanied by a nonrefundable \$100 fee. In addition, the applicant will be required to reimburse BLM for the administrative costs involved in processing the application. BLM will not begin work on an application (except for preapplication meetings) until the applicant pays the nonrefundable fee and the estimated administrative costs identified by BLM as discussed in Section II below.

The application should contain all the information the applicant wants BLM to consider in processing the application. The application should indicate the applicant's name, mailing address, telephone number, and point of contact or agent. Each application should identify the name of the claimed right-of-way and include a brief description of its location, length, and other characteristics that could be used in the description of the route that BLM will publish in the Federal Register notice of the application. Each application should contain information demonstrating that the claimed right-of-way existed prior to October 21, 1976, and was in use as of April 9, 2003; a legal description of the claimed right-of-way by aliquot parts (e.g., a ¼ ¼ section), as well as a centerline or GPS description; and information demonstrating that the claimed right-of-way meets the legal requirements of R.S. 2477; was and continues to be public and capable of accommodating automobiles or trucks with four wheels; and has been the subject of some type of periodic maintenance. The application should also contain a description of the road's character (surface type, beginning and ending points, and identifying name or number if applicable), usage or purposes, width, and improvements such as bridges or culverts and other ancillary features existing as of April 9, 2003. The application should also identify others known or believed to have a claim or interest in the claimed right-of-way.

Examples of the type of information that would assist BLM in processing an application are:

- Narrative as to when the claimed right-of-way was constructed and supporting evidence
- Maintenance records or other evidence of periodic maintenance

- Affidavits and/or other legally cognizable documents evidencing how the claimed right-of-way was established, its history, and usage
- Historic maps and photographs of the claimed right-of-way (pre October 21,1976)
- Current maps and photographs of the claimed right-of-way
- Information about which Federal land managing agency or agencies administers the land underlying the claimed right-of-way
- Documentation showing that the claimed right-of-way is capable of accommodating automobiles or trucks with four wheels

The application may be supplemented by the applicant at any time during BLM's consideration of the application, or it may be withdrawn by the applicant for any reason, without prejudice, at any time prior to the actual recording of a disclaimer issued by BLM. Any information submitted by the applicant will be subject to public review in accordance with applicable law, and with paragraph 12 of the MOU regarding review and release of information.

II. ADMINISTRATIVE COST REIMBURSEMENT

The obligation for cost reimbursement begins when BLM receives an application. Payment of the estimated administrative costs may be made in periodic installments in advance of individual work steps as identified by BLM. As soon as possible after receipt of the application, BLM will inform the applicant of the anticipated work steps and the estimated administrative costs for each step. BLM will discuss the costs with the applicant. If the applicant and BLM cannot agree on the costs, BLM will issue a decision on the costs, which the applicant may appeal to the Interior Board of Land Appeals (IBLA). The applicant must pay the administrative costs for each work step before BLM will perform the work step.

All cost reimbursement installments are credited toward the applicant's total cost reimbursement obligation. If excess funds remain after completion of the processing of the application, these funds are to be refunded to the applicant by BLM. However, BLM may re-estimate the direct and indirect costs of processing the application and adjust the applicant's cost reimbursement obligation whenever a significant change in the work involved in processing the application occurs. When a re-estimation of the administrative costs is made, BLM will discuss the costs with the applicant. If the applicant and BLM cannot agree on the costs, BLM will issue a decision on the costs, which the applicant may appeal to the IBLA. The applicant must pay the administrative costs for each work step before BLM will perform the work step.

Administrative costs include both estimated direct and indirect costs to BLM for processing an application. The cost recovery categories and schedules that have been established for FLPMA and Mineral Leasing Act rights-of-way under 43 CFR Subparts 2800 and 2880 do not apply to the determination of administrative costs for processing applications under the MOU. Direct costs are those costs that can be accurately and readily determined for processing the application. Any case work time for a specific application is a direct cost. These costs include, but are not limited to, procurement, travel, and personnel time for reviewing the application and attached documentation, site visits, equipment, supplies, publication costs, contracted services, preparing decisions, and

preparing disclaimer documents. Personnel costs are generally determined from the recorded labor cost of BLM staff.

Indirect costs are costs expressed as a percent of overall BLM costs, which are of such a nature that the amounts applicable to a specific application cannot be accurately or readily determined. Indirect costs are generally referred to as "overhead" costs and include such costs as BLM General Administration and Data activities. The current Fiscal Year 2003 fixed BLM "overhead" rate is 17.8 percent. The overhead cost rate is determined annually.

III. PUBLIC NOTICE AND COMMENT

Upon receipt of an application, and at least 90 days before BLM issues a decision on the application, BLM will publish a notice in the Federal Register informing the public of the application and summarizing the applicant's grounds for supporting the application. The notice will explain how the public may review the application and any supporting information. In addition, the applicant, at its own expense, will be required to publish a notice in a newspaper located in the vicinity of the lands covered by the application. The newspaper notice will be published once a week for three consecutive weeks during the period described above and will explain how the public may review the application and any supporting information. Information contained in the BLM case file for the application will be made available for public review in the BLM State Office at 324 South State Street, Salt Lake City, Utah, in electronic or digital form. Public comment will be accepted if received by BLM or postmarked no later than 60 days following the date of publication of the Federal Register notice.

BLM, in consultation with the applicant, will review all timely comments received on the application. In documentation to be placed in the case file, BLM will address all relevant, substantive issues raised by the commenters.

Because only an applicant or claimant has the right to appeal a decision on the application to the IBLA, the submission of comments by any other entities on the application shall not grant them a right of appeal to the IBLA. Further, there are no other administrative appeal procedures, such as filing a protest with the State Director, in the disclaimer process.

IV. PROCESSING APPLICATIONS

BLM will establish a serialized case file for each application upon receipt of payment of the nonrefundable fee and the estimated administrative costs as identified by BLM. The BLM State Office will inform affected field offices when applications are received. BLM will determine if there is a need for on-the-ground inspections of the claimed right-of-way. BLM will coordinate with the applicant and other Federal agencies affected by the claimed right-of-way as appropriate.

BLM will review its public land records to determine if the public lands underlying the claimed right-of-way were unreserved some time prior to October 21, 1976. The public land records may

be referenced and copies do not need to be included in the case file unless the records indicate that the public lands were not subject to operation of R.S. 2477. BLM will consult with the Solicitor's Office, on a case-by-case basis, as necessary to process the application.

BLM's processing of the application or issuance of a disclaimer is not subject to Section 102(C) of the National Environmental Policy Act, Section 106 of the National Historic Preservation Act, or Section 7 of the Endangered Species Act.

Following its review of the application, BLM will prepare a draft decision that documents whether the claimed right-of-way meets the legal requirements under R.S. 2477 and the provisions of the MOU and, if appropriate, BLM will prepare a draft disclaimer. The width of the road asserted and the width of the road disclaimed shall not exceed the width of ground disturbance that existed for the road as of April 9, 2003, the date of the MOU. Each draft decision and disclaimer will be reviewed by the Solicitor's Office for legal sufficiency.

V. DECISIONS AND APPEALS

Following review by the Solicitor's Office, BLM will make a final decision on the application. If BLM decides to issue a recordable disclaimer, the decision and the disclaimer will be forwarded to the applicant. Among other things, the disclaimer will describe the right-of-way width, surface type, and character. If BLM decides not to issue a disclaimer, BLM will issue a decision to the applicant or claimant explaining the rationale for BLM's decision. BLM will provide written notice of its decision on an application to any adverse claimant. The applicant or claimant adversely affected by the decision may appeal the decision to the IBLA as provided by 43 CFR 1864.4.

If the applicant records the disclaimer, the applicant should send a copy of the recorded disclaimer, with the appropriate certifications of the county office in which the disclaimer was recorded, to BLM. Once a disclaimer has been recorded by the applicant and a copy of the recorded document has been received by BLM, BLM will note its public land records to show the acknowledged right-of-way.

cc: all SDs:SOL:WO200:WO300
350:File Copy:350:Reading File:350:LSB:Rm.1000:JHoldren:jd-f:06/20/03:452-7780:RS2477
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