



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
<http://www.blm.gov>



JUL 30 2010

Mr. Mark Ward
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Dear Mr. Ward:

This letter supplements my June 8th response to your letter of April 23, 2010, in which you clarify aspects of the pilot process you have proposed to resolve certain noncontroversial R.S. 2477 claims in Utah, as well as your earlier correspondence on this subject. The Secretary asked that I send this additional response to you on his behalf.

The Bureau of Land Management (Bureau) and the Department of the Interior (Department) welcome your proposal and are willing to facilitate and participate in your proposed pilot project to try to resolve specific R.S. 2477 claims in Iron County. We agree that piloting a process in a single county in Utah is a good approach and we would like to discuss that approach further with you, as well as the other matters set forth below.

We appreciate your proposal to engage in a “negotiated process that is open, voluntary, and consensus-based” to resolve R.S. 2477 claims. As described in more detail below, the Bureau and the Department are willing to participate in a pilot project that is open and transparent to all, addresses all interests, and is grounded in a reasonable consensus on all important issues. We agree that the pilot process should start with “open, obvious and/or non-controversial rights-of-way.” Any negotiation process must, above all, avoid creating additional controversies with regard to R.S. 2477 claims and rights. Moreover, an important purpose of a pilot project in Utah is to demonstrate that consensus is actually attainable with regard to particular R.S. 2477 claims—to the benefit of all.

In our discussions within the Department about your proposal, we identified several principles that are particularly important as we try to assemble a pilot project. We describe them here to help frame our discussions with you and others about this matter:

1. A pilot project will start with R.S. 2477 claims that all involved believe to be relatively noncontroversial at the outset. If a particular R.S. 2477 claim later proves to be overly controversial for some reason, it will be removed from consideration in the pilot project.
2. An obvious and important endpoint of a pilot project is the participants’ agreement—in some fashion—either that an R.S. 2477 right-of-way was established and exists today, or that a claim of an R.S. 2477 right-of-way has been relinquished or does not exist. As we all

potentially a very controversial matter, legally and practically. At the outset of discussions concerning a pilot project, we want to make clear that the Bureau and the Department will not select or use an approach or recognition device that proves to be substantially controversial.

3. The Department must comply with all laws and regulations in the course of a pilot project. This includes, among other laws, Section 108 of the Department of the Interior and Related Agencies Appropriations Act of 1997, which precludes any “final rule or regulation . . . pertaining to the recognition, management or validity of a right-of-way pursuant to [R.S. 2477]” from taking effect without prior Congressional authorization.¹ It also includes important court-described instructions about the nature and types of the evidence needed to determine whether an R.S. 2477 claim is valid, as well as the scope of any claim recognized to be valid.

4. Any pilot project must include full and continuing public participation and support throughout the project. We consider substantial public involvement and an open and transparent process vital to the success of a pilot project, and a prerequisite for the Bureau’s and the Department’s participation. Among other things, all interested members of the public must be brought into the process early and afforded an opportunity to participate in a meaningful way throughout.

5. A pilot project must have the support of governmental constituencies throughout Utah, including Utah’s Congressional delegation and other Federal and State agencies. The Bureau and the Department will not proceed with a pilot project that faces significant opposition from such institutions.

The remainder of this letter describes some aspects of these issues in more detail.

Your suggestion that the Department agree to the potential use of recordable disclaimers of interest (RDI) represents the kind of controversy that we intend to avoid through this process. The Department has never used a recordable disclaimer to recognize the validity of an R.S. 2477 claim; involving RDIs in the pilot process might prove unacceptable to, and estrange, stakeholders whose involvement and concurrence we agree are indispensable to the success of the pilot process.² Reliance upon the BLM RDI process would also entail regulatory

¹ 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). (“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.”).

² Suggestions that the Department can use RDIs to acknowledge the validity of R.S. 2477 claims have been controversial in the past. *See, e.g.*, 43 Fed. Reg. 494, 496 § 3 *Response to Comments* (noting the receipt of comments suggesting “that the . . . disclaimer-of-interest procedure was not intended to include R.S. 2477 claims with its scope and that the BLM has no legal authority to employ the disclaimer provisions to process, acknowledge or determine the existence or extent of R.S. 2477 rights-of-way”).

requirements that seem not to be anticipated in your proposal, and which may not be acceptable to you.

The Department will explore with you and other interested parties alternative means of recognizing a claim's validity at the end of the pilot process. In order to be meaningful and to allow a pilot project to proceed, we recognize that any means of recognition must be generally acceptable and useful to the State and counties. We welcome your continuing thoughts on this point.

Regarding the mechanics of assessing a claim's validity, the Department appreciates your clarification that the pilot process "should neither mandate nor preclude the use of any particular set or series of maps." The presence of a route on single USGS map alone cannot conclusively demonstrate ten years of continuous, pre-1976 public use.

In order to consider the most straightforward of cases in a pilot project, the Department thus proposes that the pilot program initially pursue only those rights-of-way in Utah that can be established, in whole or in substantial part, by evidence of (1) mechanical construction and (2) subsequent maintenance by the State or a county. This approach should allow the pilot project to "demonstrate that the negotiation process works," as you suggest in your letter, and it may well be better calibrated to reveal whether, as you suggest, "a collaborative effort will yield a transparent consensus among all stakeholders."

Should the state, counties, and other interested parties be amenable to this approach, additional details will need to be settled. Among other things, the pilot process must contain methods to reveal the particular forms of public use that historically occurred on a claimed right-of-way, and a means to address claim abandonment. Specifically regarding the latter, it may be helpful for the State to forward to the Department relevant portions of the R.S. 2477 GIS data maintained by the State in its AGRC database.³

Finally, the Department understands that some of the parties interested in a pilot R.S. 2477 process already are making substantial progress to resolve their claims in separate discussions. We are pleased that these discussions are taking place. We encourage those parties to fashion their own resolution of their claims in the form they think best. The Department would be pleased to review such a resolution carefully once it is reached. And the Department also would be pleased to support such a resolution—in a public process—so long as our support is possible and appropriate in our judgment.

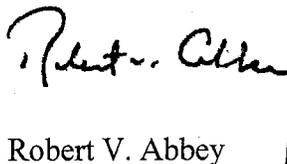
Since we first received your proposal, the Bureau and the Department have been contacted about it by many interested individuals and organizations. In the spirit of fostering public dialogue and promoting transparency in this potential pilot project, I am providing a copy of this response, as

³ See *SUWA v. Automated Geographic Reference Center*, 200 P.3d 643, 646-47 (Utah 2008) (citing UTAH CODE ANN. § 72-3-105(5) (2001)) ("In 1978 the [Utah State] legislature passed legislation that requires each county to prepare and file maps with the Utah Department of Transportation identifying 'roads within its boundaries which were in existence as of October 21, 1976.'").

well as a copy of your earlier correspondence, to those persons and groups. All recipients are listed below.

Again, we sincerely appreciate your efforts to foster an amiable resolution of R.S. 2477 claims in Utah. The Bureau and the Department look forward to discussing these ideas further with you.

Sincerely,



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Director

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