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# STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL



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July 16, 2004

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Honorable Gale A. Norton, Secretary  
United States Department of the Interior  
1849 "C" Street, N.W.  
Washington, D.C. 20240

*Re: Notice of Intention to File Suit as to a Certain Utah R.S. 2477  
Right-of-Way (Salt Creek/Cave Springs Road)*

Dear Secretary Norton:

Pursuant to 28 U.S.C.A. § 2409 (m) [Real property quiet title actions], the State of Utah hereby gives you notice, in your official capacity as Secretary of the U.S. Department of the Interior with jurisdiction to manage federal lands within the State of Utah, of the State's intention to file suit with regard to the ownership of certain highway right-of-way acquired pursuant to R.S. 2477 (43 U.S.C. § 932). That right-of-way is the Salt Creek/Cave Springs Road in San Juan County, Utah. A map showing the road and a printout of the centerline description of the road are enclosed to provide specific identification.

The basis for the action is the continuing dispute by the Department of the Interior of the State's R.S. 2477 highway rights and the Department's policies and actions adverse to those rights. Federal officials in the Department of the Interior have closed or attempted to close, and/or officially declined to recognize the indicated highway, that was established under R.S. 2477 and now part of the State's highway system across federal land and interfered with the actions of State and local officials and personnel in connection with maintenance, improvement, construction, management and other normal highway activities on R.S. 2477 rights-of-way. Under law, approval by the federal government is not required in order to exercise rights granted by R.S. 2477. See 43 C.F.R. § 2822.1-1 (1979) (the long-standing DOI regulation first promulgated in 1939 providing that "[n]o application should be filed under R.S. 2477, as no action on the part of the federal government is necessary"). Officials in your administration are

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now claiming that this R.S. 2477 right-of-way requires their official recognition and use of the road and maintenance activities require their permission. This situation is intolerable and amounts to a federal claim of interest adverse to that of the State and a usurpation of property rights vested in the State.

More particularly, the right-of-way herein described was established before 1976 over unreserved federal land in a manner consistent with law as recognized and set out in Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988) (quoting the DOI regulation first published in 1939 that "[t]he grant referred to in [R.S. 2477] [became] effective upon the construction or establishing of highways, in accordance with the State laws"). See also, Sierra Club v. Lujan, 949 F.2d 352, 365 (10th Cir. 1991) (stating that in Hodel, "we held that the district court was correct in deferring to Utah State law to determine the existence and scope of the right-of-way . . ."). But see Southern Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130 (D. Utah 2001), appeal dismissed on jurisdictional grounds, 2003 WL 21480689 (10th Cir. 2003), second appeal pending (ruling that use under State law is not sufficient to establish the right-of-way). The manner of the establishment or construction of these highway rights-of-way before 1976 was by mechanical construction other than the passing of vehicles as well as by mechanical construction by the passing of vehicles ("use") and in other ways, under Utah law.

Describing the lands subject to this notice, they are those underlying the dominant estate right-of-way of the extent legally recognized for R.S. 2477 rights-of-way for the following right-of-way: Salt Creek/Cave Springs Road in San Juan County. This road is further identified in enclosures hereto by GPS mapping grade data or data digitized from Digital Orthophoto Quadrangles published by the United States Geological Survey (USGS) or from 1:24,000 topographical maps as indicated in the metadata and/or the transportation data model of the State of Utah Geographical Information Database (SGID). This identifying data is accompanied by a segment index for each right-of-way.

The land for the right-of-way includes a width "which is reasonable and necessary for the type of use to which the road has been put." Hodel at 846 F.2d at 1083. That use and hence that width includes lands reasonable and necessary to maintain the road. Also, lands for the right-of-way are "not to be restricted to the actual beaten path but should be widened to meet the exigencies of increased travel." Id. Such lands as are reasonable and necessary to accommodate "sound engineering practices" related to the right-of-way, including lands on which accouterments such as drainage ditches, culverts, shoulders and cut slopes exist, or may be built to accommodate increased travel, are "part of the reasonable and necessary use" and are therefore also part of the lands for each R.S. 2477 right-of-way. Id.

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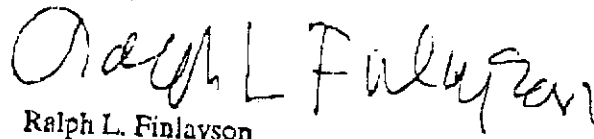
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The State does not waive any rights to highways not herein identified and intends to file subsequent notices and complaints, as necessary, until such time as title to all R.S. 2477 highways has been quieted.

Sincerely,



Ralph L. Finlayson  
Assistant Attorney General

Enclosures