United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

TAKE PRIDE IN AMERICA

SEP 2 2 2003

The Honorable Joseph I. Lieberman
Ranking Minority Member
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Received 10/2/03

Dear Senator Lieberman:

This is in response to your letter of July 2, 2003, to Secretary of the Interior Gale Norton, requesting information regarding Revised Statute (R.S.) 2477 rights-of-way. The Secretary has asked that I respond. We have previously discussed many of the issues raised in your letter with you and your staff and trust the following responses help clarify and expand on those previous discussions.

We have restated each of the questions from your letter with a corresponding response in the order they were presented in your letter. Please note that the last two questions in your letter were numbered 19 (A), (B) and 19 (A), (B), (C). We have renumbered the last questions as 20 (A), (B), (C).

1. (A) Maps of all pending RS 2477 claims submitted to the Department of the Interior and its constituent agencies. If available, you may submit the information in electronic format.

This question is unclear. If "pending" is a reference to submitted, pending applications for recordable disclaimers of interest involving R.S. 2477, then that number is zero. On the other hand, if "pending" refers to any R.S. 2477 claims that are unresolved, then that is potentially a larger number. However, since these claims have not been submitted to Interior using the recordable disclaimer of interest process, the Department has no information regarding each potential R.S. 2477 claim that remains unresolved. A number of states and counties have expressed interest in working with the Department including Alaska, Colorado, Idaho, Oregon, and San Bernardino County, CA, but no applications have been submitted.

(B) Based on formal and informal communications with potential claimants by DOI officials and officials of its constituency [sic] agencies - including any other relevant information submitted to DOI, its agencies, or seen by its officials - what is your expectation regarding the total number and extent of RS 2477 rights-of-way claims that will be made during the next three years? Please identify by state and county the number of and nature of claims that you have reason to believe may be submitted.

In preparing our responses, we have made every effort to be as accurate and complete as possible. However, this question requires Interior to predict what non-Federal parties may do over the next three years without any basis for that prediction. States and counties may submit many claims or they may submit none at all. The States of Alaska, Colorado, Idaho, and Oregon and San Bernardino County, CA have each discussed interest in developing a memorandum of understanding (MOU) similar to the Utah MOU.

(C) How many of the claims that: (1) are pending, or (2) are likely to be submitted, are located in the areas which have been managed to protect wilderness values but which are no longer so managed, due to the Department's April 11, 2003, settlement agreement in State of Utah v. Norton? (In that case, DOI agreed with the State of Utah not to establish or manage certain lands throughout the western United States to protect wilderness values.)

First, your assumption that Interior agreed not to manage certain lands to protect wilderness values is not correct. The Department agreed not to designate new Wilderness Study Areas, but the settlement agreement provides for the management and protection of wilderness values using a variety of tools through the land use planning process. Like the previous question, this question requires Interior to predict what non-Federal parties may do in the future. At this point, Interior is not aware of any specific claims that would fit within the criteria of this question.

(D) In view of the decentralized nature of DOI's operations, how can you be confident that the information provided in response to the foregoing three questions is complete?

The responses to the foregoing three questions are unavoidably incomplete because the questions require Interior to engage in speculation about future events involving third parties (counties, towns, and states) over which we have no control and little ability to obtain timely information.

(E) Please clarify the status of the 5,000 pending Utah claims which were reported to Congress in 1993.

To the best of Interior's knowledge, the prior Administration made no progress between 1993 and 2001 in resolving any of the claims described in the 1993 report to Congress referenced in this question. The existence of those claims, however, did spawn a series of expensive and counterproductive lawsuits that likewise did nothing to bring resolution to the claims. Interior believes it has identified an alternative to this type of wasteful litigation in the recordable disclaimer of interest process.

2. How many additional claims were made viable by the broadening of the language in the disclaimer rule allowing counties and others to make such claims?

None. The recent technical amendments to the recordable disclaimer of interest rules simply make them more consistent with the actual language of section 315 of Federal Land Policy and Management Act (FLPMA) and the requirements of the Quiet Title Act (28 U.S.C. Section 2409a).

3. The disclaimer regulation was also changed to provide that "*any entity claiming title* to lands" (emphasis added) may make an application for a disclaimer. (Previously, the use of the disclaimer process was limited to the "present owner of record.")

(A) This change would appear to have a significant impact, in particular in the case of RS 2477 claims. What is the effect of this change?

This change makes the recordable disclaimer of interest rules more consistent with section 315 of FLPMA because the phrase "present owner of record" is not included in section 315. Section 315 speaks only of an "applicant" for a recordable disclaimer of interest. "Any entity claiming title to lands" more closely captures the generic concept of "applicant" than the language in the prior rule.

(B) What is the impact of allowing non-governmental entities to make a claim through the disclaimer process? Will they now be able to accept RS 2477 rights-of-way under the disclaimer provisions? If so, is there any limit to that entity's control over the use of the right-of-way? What is that limit? What is DOI's position regarding who would be the title holder of the RS 2477 right-of-way?

This question reflects a common misunderstanding of the recordable disclaimer of interest process. Non-governmental entities have always been able to apply for a recordable disclaimer of interest. The BLM's 1984 regulations established a twelve-year filing deadline for all claims. The technical amendments to the recordable disclaimer of interest regulations simply create an exception to the regulatory limitation period for State and local governments that is similar to the exemption to the statute of limitations for states in the Quiet Title Act. Non-governmental entities that apply for recordable disclaimers of interest continue to be subject to the twelve-year limitation period. Finally, it is important to note that section 315 of FLPMA does not contain any statute of limitations on applications. The limitation discussed in this response is solely an administrative creature.

(C) According to a January 21, 2003 news article, a private organization had made three right-of-way claims, seeking motorized access across hundreds of miles of wilderness in California in Sequoia National Forest, through the King Range National Conservation Area on the north coast and in non-wilderness tracts in the Six Rivers National Forest.

(1) What claims, or notices of intent to file claims, have been submitted by private organizations for these three areas?

The BLM has not received any applications for recordable disclaimers by private organizations involving right-of-way claims within the King Range National Conservation Area. Interior has no knowledge of any right-of-way claims submitted by private entities in California in the Sequoia National Forest or in the Six Rivers National Forest. Those areas are managed by the U.S. Forest Service.

(2) Have any additional claims or notices of intent been filed by non-governmental entities elsewhere on Federal lands since January 2002? If so, identify the location of the claim, the party, and the date on which the claim or notice was submitted.

As a matter of clarification, the final rule was published in January 2003 not January 2002. However, the BLM is not aware of any right-of-way claims filed by non-governmental entities under the disclaimer of interest regulations since January 2002. The BLM has issued one recordable disclaimer of interest, on June 5, 2003, to disclaim any mineral interest in Progress Quarry, L.L.C. in the State of Oregon. Interior is not aware of any other claims by private entities.

(3) How will these claims be processed?

Claims submitted for a recordable disclaimer of interest will be processed pursuant to the recordable disclaimer of interest rules, as amended in January 2003. See Appendix A.

(D) Please describe the nature and extent of claims that will be processed under the disclaimer of interest rule. For example, according to news reports, Alaska recently become the first state to claim a riverbed using the rule, making a claim for 500 miles of the Black River.

Recordable disclaimers of interest can be used to disclaim Federal interests in certain mineral estates, fee lands, navigable water ways, interest in land created by survey errors, R.S. 2477 claims, and easements. It is not clear what "nature and extent" refers to, but Interior can confirm that it is currently processing a recordable disclaimer of interest application for Alaska's Black River. Beyond that, the question asks Interior to speculate about the future. Interior cannot tell what would be processed in the future for claims that may be submitted. If the question asks whether there is any size limitation to a claim, the answer is no. However, claims submitted must demonstrate all legal criteria listed in the recordable disclaimer of interest process and, in the case of Utah, information outlined in the June 25, 2003, memorandum to the Utah State Director. See Appendix B.

(1) Will DOI be processing such claims under the disclaimer rule?

It is not clear what the phrase "such claims" refers to, but, as the answer to the previous question indicates, Interior can confirm that it is processing a recordable disclaimer of interest application for Alaska's Black River. Beyond that, the question asks Interior to speculate about

the future. Interior cannot tell what would be processed in the future for claims that may be submitted.

(2) If so, how many such claims are projected?

Interior cannot answer this question for the same reason that it was unable to answer questions 3(A)-(D), above. Specifically, the question requires Interior to speculate about the future acts of non-Federal parties.

4. It is my understanding that prior to publication of the January 6, 2003 changes in the disclaimer of interest rule, of the 62 disclaimers issued under the disclaimer authority, none were in recognition of RS 2477 claims. If that is not correct, please identify specifically the claims that were recognized as RS 2477 rights-of-way and the date the disclaimer was issued.

Interior has never issued any recordable disclaimers of interest for R.S. 2477 rights-of-way. However, a number of recordable disclaimers of interest have been granted for rights-of-way created by other Federal laws.

5. (A) Private landowners and title companies did not submit comments on the proposed changes to the disclaimer of interest rule. On what did DOI base its assertion that it will have no affect [sic] on private landowners? What communications did DOI and its constituent agencies have with private landowners regarding these issues? When did these communications occur?

Under the provisions of the Utah MOU, Interior and Utah agreed that Utah will only submit application for recordable disclaimers of interest that involve R.S. 2477 rights-of-way across BLM lands. BLM received 17,389 comments on the proposed amendments to the disclaimer of interest regulations. Most of the comments were from private individuals. It is unknown how many of those individuals are landowners, but it is safe to assume that some of the commentors are landowners.

The effect a recordable disclaimer of interest can have on a private property owner is that title is no longer clouded by a potentially competing claim by the United States. It is important to note that the issuance of a recordable disclaimer of interest does not automatically resolve all ownership disputes. It does nothing more than clarify that the United States is disclaiming some or all of its interest in a particular piece of real estate. A recordable disclaimer of interest does not, and cannot, resolve title disputes between competing non-Federal claimants.

(B) In which states, besides Alaska, could this be an issue for private landowners?

This question is unclear. As answered in the response to the previous question, the recordable disclaimer of interest does not resolve title disputes between competing non-Federal claimants.

(C) How and when will private landowners be notified regarding specific RS 2477 claims which could affect them and that are pending before DOI/BLM?

The recordable disclaimer of interest rules have general public notice requirements for everyone and specific notice requirements for those who may assert a competing claim. In addition, the applicant must list competing claims he/she is aware of in the recordable disclaimer of interest application.

6. (A) Both military and the Department of Energy have facilities which are located on public land withdrawn from the public domain. In general, what are the implications of RS 2477 rights-of-way assertions for military installations and the Department of Energy?

Interior negotiated a Memorandum of Understanding with the State of Utah (See Appendix C.) to address those roads for which there is no legitimate debate about their legal sufficiency under R.S. 2477. Under the provisions of the recent MOU between Interior and Utah, Utah will only submit applications for recordable disclaimers of interest that involve R.S. 2477 rights-of-way across BLM land. As a result, there are no implications for the Department of Defense or Department of Energy. The Utah MOU exempts and thus provides explicit protection for National Parks, Fish and Wildlife Refuges, Wilderness Areas and Wilderness Study Areas.

(B) Identify those facilities which may be subject to RS 2477 claims, identifying the dates on which the currently effective withdrawals occurred and the dates of any previous reservations of the land.

As the answer to the previous question explains, under the provisions of the recent MOU between Interior and Utah, Utah will only submit applications for recordable disclaimers of interest that involve R.S. 2477 rights-of-way across BLM land. As a result, there are no implications for other land management agencies.

7. (A) The January 6, 2003 disclaimer rule provides that BLM will not approve an application that "pertains to trust or restricted Indian Lands." Reportedly, one of the maps of claims prepared by the State of Utah contains claims for RS 2477 rights-of-way across the Navajo Nation. Would the Department process such claims under any procedure other than the disclaimer of interest rule?

As the answers to the two previous questions explain, under the provisions of the recent MOU between Interior and Utah, Utah will only submit applications for recordable disclaimers of interest that involve R.S. 2477 rights-of-way across BLM land. As a result, there are no

implications for "trust or restricted Indian Lands."

(B) In general, what are the implications for tribal sovereignty of RS 2477 claims?

As the answers to the three previous questions explain, under the provisions of the recent MOU between Interior and Utah, Utah will only submit applications for recordable disclaimers of interest that involve R.S. 2477 rights-of-way across BLM land. As a result, there are no implications for "tribal sovereignty."

8. (A) Please describe specifically the nature of the information which will be made available to the public for comment. Will this include all information in the possession of DOI and its constituent agencies that is relevant to the determination of the RS 2477 claim, as well as all information on which the claimant justifies its claim? How and where will this information be made available?

Information contained in the BLM case file for the application will be made available for public review in the appropriate BLM State Office.

(B) Where in the decision making process will public notification and disclosure occur?

Unlike R.S. 2477 processes under prior policy, recordable disclaimers of interest allow for public participation. Upon receipt of an application, and at least 90 days before the 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 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 in 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.

(C) How will public comment be taken into account?

Public comment will be accepted if received by the BLM or postmarked no later than 60 days following the date of publication of the Federal Register notice. The BLM, in consultation with the applicant, will review all timely comments received on the application. In documentation to be placed in the case file, the BLM will address all relevant, substantive issues raised by the commentors.

(D) What is the procedure that the Department will follow in adjudicating these claims? Please describe in detail, with reference to applicable regulations or policies.

In accordance with the process outlined in the June 25, 2003, Memorandum to the Utah State Director (See Appendix B.), the 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. BLM will consult and coordinate with affected field offices, the Solicitor's Office, other Federal agencies, and the applicant as necessary to process the application. Following its review of the application, the 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 Memorandum of Understanding; and if appropriate, the BLM will prepare a disclaimer. Each draft decision and disclaimer will be reviewed by the Solicitor's Office for legal sufficiency.

(E) Under the January 2003 disclaimer rule, only "*applicants* or *claimants* adversely affected by a written decision" may appeal a decision (emphasis added). Citizens' groups report that they were previously able to file administrative appeals against RS 2477 rights-of-way determinations under DOI's general appeal regulations.

(1) If, as it now appears, appeals will not be allowed by individuals other than claimants and applicants, please explain why DOI made this change.

The provisions of the recordable disclaimer of interest rules governing administrative appeals from adverse decisions were not changed during the BLM's most recent rulemaking process. As a result, the rules governing appeals, including who may appeal, have been the same since 1984 when the rules were first promulgated.

(2) How will individuals other than applicants or claimants, such as private landowners and interested members of the public who are affected, but not applicants or individuals making claims, be able to challenge DOI/BLM's determinations?

In accordance with 43 CFR 1864.4, an applicant or claimant adversely affected by a written decision of the authorized officer made pursuant to the provisions of this subpart shall have a right of appeal pursuant to 43 CFR part 4. In addition, any party with standing has the ability to challenge BLM's determination in Federal court.

(F) DOI determined that the changes in the disclaimer rule were not subject to an environmental impacts analysis under the National Environmental Policy Act, noting because the rule is "procedural in nature, therefore its environmental effect is too broad, speculative or conjectural to analyze." Please explain the rationale for reaching this conclusion.

The BLM has determined that the January 6, 2003, final rule, which made several technical amendments to the disclaimer of interest regulations, is categorically excluded from environmental review under section 102 (2) (C) of the National Environmental Policy Act, under 516 Department Manual (DM), Chapter 2, Appendix I, Item 1.10. In addition, the rule does not meet any of the ten exceptions to the categorical exclusions listed in 516 DM, Chapter 2, Appendix 2. In individual cases where a State or county wishes to substantially alter an R.S. 2477 right-of-way that the United States has disclaimed under these regulations, the State or

county may do so only after notifying the BLM of its intentions and giving the BLM an opportunity determine that no permit or other authorization is required. If a permit or other authorization is required, it would be subject to compliance with any applicable law, including the National Environmental Policy Act.

9. (A) Under the disclaimer of interest process, the Federal government apparently disclaims all interests in and ownership of the public lands. Why is the disclaimer process being used to resolve RS 2477 claims?

(B) Please explain the legal basis for concluding that an RS 2477 right-of-way interest can be "disclaimed" at all. Please submit a copy of all legal analyses of this issue, whether prepared by DOI or any other entity.

(C) When issuing RS 2477 disclaimers, how will BLM, which is responsible for using the disclaimers, word the interest being disclaimed?

Interior recently addressed the issues raised by questions 9(A)-(C) in a letter to the Associate General Counsel for the General Accounting Office (GAO). The analysis set out in part II of Interior's letter provides extensive analysis on these points. A copy of that letter is attached for your review. See Appendix D.

(D) The 1993 Report to Congress described the procedure previously followed for administratively processing and recognizing RS 2477 claims. This process included, among other things, a review of historical records to determine whether the land had been unreserved as well as a field examination of the claims. 1993 Report to Congress at 37. What will DOI/BLM do to verify the evidence that is submitted regarding each claim? Will it conduct field examinations?

The BLM will review all applications and will also determine the need for any on-the-ground inspections of the claimed right-of-way. Please refer to the attached June 25, 2003, Memorandum to the Utah State Director for additional details concerning process. See Appendix B.

10. (A) The April 9 MOU does not indicate what criteria will be used to determine the validity of RS 2477 rights-of-way, nor has DOI provided information to the public, the Congress, not apparently even its own staff regarding the specific standards to be applied in making RS 2477 determinations under the April 9 MOU, future MOU's or with respect to other claims. Please describe the standards that the Departmental/BLM officials will follow in making determinations for claims under the April 9 MOU, under any additional MOU's that may be negotiated, and for all other claims, whether processed under the disclaimer of interest rule or otherwise.

The Utah MOU is designed to address those roads for which there is no legitimate debate about their legal sufficiency under R.S. 2477. As a result, Interior has determined that no additional criteria are needed at this point to implement the MOU. Outside the areas covered by the Utah MOU, the 1997 interim policy guidance remains in place as the policy of the Department. See Appendix E.

(B) Specifically, what definitions of the terms "highway", "construction", and "unreserved" (terms which appear in the RS 2477 statute) will apply?

This question is addressed in the answer to the previous question.

(C) In processing RS 2477 claims, will the Department utilize the standards which were set forth in the brief submitted by the Justice Department on its behalf to the Tenth Circuit Court of Appeals in June 2001? (This criteria included evidence of actual construction, defined as the "act of building, or of devising and forming, fabrication." It characterized a "highway" as "a public road; a way open to all passengers; so called either because it was a great or public road, or because the earth raised to form a dry path. Highways open a communication from one City or town to another.") If this criteria will not be used, why not? What is being changed?

This question is addressed in the answer to question 10(A).

(D) Departmental officials were asked during the May 12, 2003, Senate staff briefing about a draft DOI document revoking a series of departmental documents relating to RS 2477 claims. (These include a 1980 DOI legal opinion addressing the applicable standards for determining whether highways were established and an 1898 Land Decision of Secretary Bliss.) The draft document also contains new criteria of making RS 2477 determinations. The officials who conducted the briefing did not answer questions regarding the document, asserting their unfamiliarity with it, but promised to provide information subsequent to the briefing. No such information has been forthcoming. Accordingly, please explain the status of this document and the substantive guidance contained therein.

This question is addressed in the answer to question 10(A).

(E) Roads and highways clearly had different definitions at the time of the RS 2477 statute was enacted. What is the reason for using the term "road" in the April 9 MOU rather than the statutory term "highway"?

As your question acknowledges, it is crucial to interpret R.S. 2477 to be consistent with its historical context. What may have been considered a highway in 1866 may be very different from what is considered a highway in 2003. The MOU specifically uses the word "road" in an attempt to avoid a counter-productive debate about the statutory definition of "highway." Even more important, as the answers to the four previous questions point out, the Utah MOU will only address roads that will pass muster under any interpretation of R.S. 2477.

11. With regard to the State of Utah, the April 9 MOU revoked the policy issued by former Interior Secretary Babbitt regarding the treatment of RS 2477 claims. (The "Babbitt" policy provided that until final rules for the determination of RS 2477 claims were effective, the BLM would not process RS 2477 assertions except in cases where there was a demonstrated, compelling and immediate need to do so. It also revoked a 1988 policy issued by the Department under Secretary Hodel.)

(A) Does the "Hodel" policy - which contained minimal requirements for the creation of a highway (for example, that the removal of rocks and vegetation by hand or the passage of vehicles is adequate to determine that construction of a highway has occurred or that a qualifying highway could be a trail or foot-path) - now apply to the claims which will be processed under the April 9 MOU?

The 1997 Interim Department Policy, the "Babbitt" policy, applies to all other requests for right-of-way acknowledgments that are not submitted in accordance with the Utah MOU.

(B) Why did you repeal the "Babbitt" policy as to just some claims in one state? What is the rationale for having different standards in different states or even as to some claims within one state?

The "Babbitt Policy" does nothing to ensure that National Parks, Fish and Wildlife Refuges, Wilderness Areas and Wilderness Study Areas are protected and, as stated above, provided no public participation opportunities on R.S. 2477 claims. The Utah MOU provides explicit protection for these conservation units. Interior will also impose this condition on any MOU negotiated outside the State of Utah.

(C) Does the Department intend to reinstate the "Hodel" policy with regard to all RS 2477 rights-of-way claims? What will be the impact of the reinstatement of this policy?

The 1997 Interim Department Policy, the "Babbitt" policy, applies to all other requests for right-of-way acknowledgments that are not submitted in accordance with the Utah MOU.

12. (A) What is the Department's view about the role of state law in the determination of RS 2477 rights-of-way?

For nearly one hundred years, the federal courts and the Department of the Interior have consistently concluded that state law is a crucial tool in both interpreting and applying R.S. 2477.

(B) Do you agree with recent court cases and the position taken by the Justice Department in the Tenth Circuit that state law cannot controvert the Congressionally established criteria for RS 2477 rights-of-way?

The appeal that this question references was recently vacated by the Tenth Circuit Court of Appeals. Therefore, it did not provide any substantive guidance that might be relevant on the topic of R.S. 2477.

13. As noted above, as of 1995, the State of Alaska had asserted claims for section line easements throughout the state, with the effect that about 300,000 claims would blanket National Wildlife Refuges and 170,995 miles of claims blanket National Parks. What is the position of the Department with respect to section line rights-of-way that were not constructed as of 1976?

The Department is aware that the territorial legislatures of many future states asserted a variety of rights to section lines during the nineteenth century. Many of those section lines went on to form the basis of state and local transportation infrastructure. For many others, there has been no modification to the physical landscape since the territorial legislatures originally acted. If Utah submits any claims for section line rights-of-way pursuant to the MOU, those claims would still have to satisfy the criteria established in the MOU.

14. (A) Has Utah waived any rights to any claims within the areas described above? If so, please provide the documentation. If not, what effort has the Department made to obtain such waivers?

The Department is not aware of any Utah R.S. 2477 claim specifically based on the mere existence of a section line.

(B) Does the Department of the Interior intend to contest claims which may be brought under the Quiet Title Act? If not, why not?

As is the case with a number of previous questions, it is impossible for the Department to answer this question with specificity because the question requires the Department to speculate about the details of future litigation.

(C) Is the Department or the BLM continuing to negotiate with or discuss with the State of Utah and its counties claims that are not subject to the MOU? If so, please identify specifically the claims which are the subject of these discussions/negotiations.

No.

(D) The standards for and the determination of a RS 2477 right-of-way are controversial, subject to litigation in the courts. DOI itself has not agreed on the appropriate standards. By what criteria will BLM/DOI decide which claims are not controversial and suitable for processing through the MOU's acknowledgment process (using the disclaimer process) and which should be decided by a court under the Quiet Title Act?

By signing the Utah MOU, the State of Utah has voluntarily agreed to a number of criteria that will govern the roads that it submits for acknowledgment. The criteria that Utah has agreed to are set out in the MOU itself and are self-explanatory.

(E) What is the total number of Utah claims that you expect will be processed in accordance with the April 9 MOU? How many are currently being processed?

The Department is not currently processing any Utah road claims under the Utah MOU. The Department does not have a particular expectation regarding the precise number of road claims that it might be asked to acknowledge.

(F) Since Utah did not give up any of its claims in the areas such as that were excluded from the MOU, how will Utah's claims for RS 2477 highways in these lands be processed?

Utah may apply for R.S. 2477 claims under the terms of the MOU or under the "Babbitt" policy.

(G) How are the 5,000 Utah claims that were pending at the BLM in 1993 being processed?

It is not clear which claims this question refers to; but as is explained in the answer to question 14(E), above, the Department is not currently processing any Utah road claims. Utah has not submitted a single R.S. 2477 claim under the MOU.

15. DOI had encouraged others to negotiate MOU's.

(A) Please identify all states and counties that are currently discussing a MOU with DOI, or who have expressed an interest in negotiating an MOU on RS 2477 claims.

A number of states and counties have expressed interest in negotiating MOU's with the Department, including Alaska, Colorado, Idaho, Oregon, and San Bernardino County, CA. The Department is not negotiating an MOU with any particular party at the present time.

(B) How many claims are potentially subject to each of these MOU's?

As the answer to the previous question explains, the Department is not negotiating an MOU with any particular party at the present time.

(C) A January 2003 new report stated that the Deputy Secretary "recently told a group of Alaska mining and energy executives that the administration would soon approve rights-of-way claims from that state."

(1) What is the status of the Department's negotiations with Alaska for the approval of these claims?

As the answer to a previous question explains, the BLM is processing a recordable disclaimer of interest application for Alaska's Black River. No other claims are currently being processed.

(2) According to a recent news report, the state of Alaska plans to present a memorandum of understanding to DOI. Will these claims be processed in accordance with the MOU being prepared by Alaska? If not, how will the claims to which the Deputy Secretary referred be processed?

As the answers to the three previous questions explain, the Department is not negotiating an MOU with any particular party at the present time.

(3) Identify all Alaska claims which have been administratively recognized or for which a disclaimer or interest has been issued since January 2003.

As the answer to a previous question explains, the BLM is processing a recordable disclaimer of interest application for Alaska's Black River. No other claims are currently being processed.

16. The April 9 MOU states: "In cases where the State or county wishes to substantially alter a road that is subject to the Acknowledgment Process in a way that is outside the scope of ordinary maintenance, it will do so only after notifying BLM of its intentions and giving BLM an opportunity to determine that no permit or other authorization is required under federal law; .... Under what circumstances can BLM allow activities "outside the scope of ordinary maintenance" without permits or public involvement? Please identify the relevant legal authorities.

The purpose of this provision in the Utah MOU is to create a means for the BLM to receive notice of proposed road maintenance activity that could arguably require additional environmental compliance. BLM plans to address issues like this on a case-by-case basis.

17. (A) Critics assert that the language quoted above is little more than a continuation of the Department's pattern of refusal to provide information to the public regarding claims made against public's lands. What are the plans for the classifications, review of, and release of information?

The recordable disclaimer of interest process is the only available tool for resolving these types of disputes that provides an opportunity for public notice and participation. Pursuant to Federal law, a notice of every Utah claim will be published in the *Federal Register* and in a local newspaper. In addition, see the responses to Questions 8A and 8B.

(B) Critics also assert that the failure of the Department to respond to requests from the public for information regarding the claims being made by the state as well as the secret negotiation of the April 9 MOU is inconsistent with your stated commitment to "consultation, cooperation, and communication" with the stakeholders or public lands. How do you respond to this criticism?

This criticism is overstated and does not have merit. Representatives from the Department have met with representatives of several organizations including the Wilderness Society, Trustees for Alaska, the National Parks Conservation Association, and the Southern Utah Wilderness Alliance on a number of occasions. Indeed, the exclusions of national parks, wildlife refuges, wilderness areas, and wilderness study areas in the Utah MOU were, in part, a response to the views expressed during those meetings.

It is also important to note other points that were addressed during those meetings. First, representatives of the groups referenced above have consistently recognized that there are valid R.S. 2477 rights-of-way in Utah, and elsewhere, the ownership of which can be resolved without any significant controversy. These non-controversial roads are the subject of the Utah MOU. Second, the groups have also pointed out that they do not have the resources to participate in litigation all over the country involving R.S. 2477 rights-of-way. The recordable disclaimer of interest process is the only available alternative to the expensive and time consuming litigation that the groups raised as one of their concerns.

18. The disclaimer rule provides that the applicant must submit a deposit in the amount BLM determines is necessary to cover the administrative costs of processing the application.

(A) What is current estimate of the cost to the government of making administrative determinations regarding claims?

The administrative cost for each claim will vary depending on the estimated workload involved.

(B) How will BLM determine costs for each application? Please submit copies of the applicable guidance regarding the determination and collection of this deposit.

After receipt of an application, the BLM will inform the applicant of the anticipated work and the estimated administrative costs for the work. The entire process for determining administrative cost reimbursement is outlined in the attached June 25, 2003, Memorandum to the Utah State Director. See Appendix B.

19. The disclaimer of interest rule also requires a claimant to submit a $100 application fee. Potential claimants objected to the $100 application fee because, they said, they planned to submit hundreds of claims. In response, in issuing the final rule, BLM noted that it may waive the application fees.

(A) What constitutes an application? Must a separate application be filed for each claimed RS 2477 rights-of-way?

The application should contain all the information the applicant wants the BLM to consider in processing the application. All of the information required for a complete application is outlined in the attached June 25, 2003, Memorandum to the Utah State Director. See Appendix B. The application fee may be waived but administrative cost reimbursements may not be waived.

(B) Under what circumstances would BLM waive the fees? What is the basis for waiving application fees?

It was noted in the preamble to the final rule that the rulemaking did not change BLM's application procedures or fee structures. Although there may be authority to waive application fees, to our knowledge this has not been done in the past; and it is Department policy not to waive application fees.

20. (A) Please identify, by state, the number of rights-of-way granted for roads and highways under the authorities contained in FLPMA since 1976.

Please refer to the attached Table 1.

(B) How many rights-of-way on public domain, on a state by state basis, have been granted across the public domain under authorities contained in FHA and the MLA? If these statistics have not been compiled, please describe what is required to collect this information.

Please refer to the attached Table 2. Please note that the BLM does not distinguish Federal Highway Administration rights-of-way from FLPMA rights-of-way for statistical purposes.

(C) The New York Times recently reported that the Governor of Utah had stated that the roads agreement (the April 9 MOU) was "vital for the state to maintain a transportation system that would serve, among others, outbackers eager to get closer to wilderness areas they cherish." Please identify specifically the requests for the rights-of-way by the state of Utah for construction of roads across the public domain which have been denied by BLM, indicating the location, the purpose of the road, and the reason for the denial.

It is unclear whether this question refers to rights-of-way pursuant to R.S. 2477, Title V of FLPMA, section 315 of FLPMA, or some other authority. The State of Utah has not yet submitted any requests for R.S. 2477 rights-of-ways since the MOU was signed.

I hope that this letter has provided you with the information you requested. If you have any further questions, please contact Jim Hughes, Deputy Director, Bureau of Land Management.

Sincerely,

Rebecca W. Watson
Assistant Secretary,
Land and Minerals Management

Enclosures: As listed