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Congress of the United States
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February 1, 2006

The Honorable. Gale Norton
Secretary of the Interior
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Norton:

As you know, I think there is a need for resolution of uncertainties about potential claims for rights-of-way under the portion of the 1866 mining law later codified as section 2477 of the Revised Statutes (RS 2477) and repealed by the Federal Land Policy and Management Act (FLPMA) of 1976.

Your predecessor, Secretary Babbitt, sought to address this administratively, but was blocked by enactment of a prohibition on issuance of new final regulations on the subject unless and until authorized by Congress. To authorize such a resolution, I introduced bills on the subject in both the 108th Congress and, in revised form, again last year.

So, I was very interested to learn that your Department has been developing a proposed administrative process to deal with potential RS 2477 claims in light of the recent 10th Circuit Court of Appeals opinion in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.

My understanding is that the proposal, as outlined to a number of Colorado counties at a Colorado Counties Inc., meeting in Denver on January 27th by Ms. Kit Kimball and Mr. Dan Domenico of the Solicitor's Office, would involve authorizing issuance of "non-binding determinations" regarding the validity of RS 2477 claims.

Evidently issuance of such a determination would then trigger other actions, such as providing guidance for planning purposes, the development of road maintenance agreements with counties, and on-the-ground controls and restrictions such as signage.

I have a number of concerns and questions regarding this proposed process. I would like to know whether it will be established through rulemaking, and would also appreciate further elaboration on the following issues:

Who could seek a "non-binding determination"? If private parties, what role would be provided to relevant states and counties in the "non-binding determination" process? When can claimants begin to seek such "non-binding determinations"? What would they need to "file" to start the

process? How much time will the relevant public land agency allow for claimants to seek such determinations?

What would be the practical effect of a "non-binding determination" of validity? Of invalidity? If valid, who would "own" the use of the right-of-way and the rights to control access? How would the exact parameters of such use be established? Would the right-of-way be open to the public? Could a county — or anyone else — close it? Who would maintain it and be responsible for any liability? If invalid, what steps would the agency take to close or otherwise eliminate the right-of-way if it is being used? Would it have the legal authority to take these steps as the determination of invalidity is "non-binding"?

How will the public be involved in decisions regarding the issuance of a "non-binding determination"? How will the public be notified of claims for which such a determination may be under consideration? Who would have standing to object to issuance of such a determination? How long will the "non-binding determination" process be open to allow someone to object to a claim? What evidence will the relevant public land agency use in making a "non-binding determination"?

As I understand it, the proposed process also envisions the use of "road maintenance" agreements for rights-of-way with respect to which a "non-binding determination" of validity has been issued. Will these agreements be limited to counties or other local governments? What about private claimants? How will the public be involved in the creation, negotiation and execution of these agreements? What will they involve in terms of "scope" of the right-of-way, use levels, improvements, liability, etc.?

I am also concerned about the potential effects of such determinations on lands that were once in federal ownership but that have been transferred to other owners. Will the Department consider issuing a "non-binding determination" regarding a claim involving such lands? For a claim that crosses some portion of both federal lands and non-federal land, would a "non-binding determination" of validity of a right-of-way across the federal lands portion mean that the claimant has a presumptively valid claim across the lands in private or other non-federal ownership? What consideration would the Department provide to a private property owner who did not want such a right-of-way across the private portions?

I also would like to know whether a "non-binding determination" would be considered permanent and whether there would be a deadline for challenges, after which it would ripen into something "binding" not only on the Department but on other parties.

Because of the complications inherent in this issue and the importance of a complete resolution, I still strongly believe that it would be better for Congress to pass a legislative solution that would include a deadline for claims based on RS 2477, appropriate guidance to decision makers, notice and opportunities for public involvement, and a statute of limitations on any requests for judicial review. I will continue to seek action on such legislation.

In the meantime, however, I am very interested in knowing more about the proposals now being developed in your Department and I look forward to your response to my questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Udall". The signature is fluid and cursive, written over a white background.