

PETE V. DOMENICI, New Mexico, *Chairman*
DON NICKLES, Oklahoma
LARRY E. CRAIG, Idaho
BEN NIGHTHORSE CAMPBELL, Colorado
CRAIG THOMAS, Wyoming
LAMAR ALEXANDER, Tennessee
LISA MURKOWSKI, Alaska
JAMES M. TALENT, Missouri
CONRAD BURNS, Montana
GORDON SMITH, Oregon
JIM BUNNING, Kentucky
JON KYL, Arizona

JEFF BINGAMAN, New Mexico
DANIEL K. AKAKA, Hawaii
RYRON L. DORGAN, North Dakota
DOB GRAHAM, Florida
RON WYDEN, Oregon
TOM JOHNSON, South Dakota
MARY L. LANDRIEU, Louisiana
EVAN BAYH, Indiana
DIANNE FEINSTEIN, California
CHARLES E. SCHUMER, New York
MARIA CANTWELL, Washington

ALEX FLINT, STAFF DIRECTOR
JAMES P. BEINNE, CHIEF COUNSEL
ROBERT M. SIMON, DEMOCRATIC STAFF DIRECTOR
SAM E. FOWLER, DEMOCRATIC CHIEF COUNSEL

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

ENERGY.SENATE.GOV

April 21, 2003

The Honorable Gale Norton
Secretary of the Interior
Washington, D.C. 20240

Dear Madam Secretary:

The Secretary of the Interior holds the public domain in trust for the people of the United States. As Secretary, you are "charged with the duty and clothed with the power to protect" the public domain from "unlawful appropriation." United States v. Beebe, 127 U.S. 338, 342 (1888). "No appropriation of public land can be made for any purpose, but by the authority of Congress." United States v. Fitzgerald, 40 U.S. 407, 421 (1841).

Whether the many rights of way for highways across the public domain that the State of Utah now claims were lawfully appropriated by the authority of Congress has been a matter of dispute for many years. I am sympathetic with your desire to resolve these claims swiftly, but am deeply troubled by the way you are going about it.

The memorandum of understanding you entered into with the State of Utah last week purports to set up a process by which you will acknowledge rights of way pursuant to your authority to disclaim interests in land under section 315 of the Federal Land Policy and Management Act. To my mind, this process violates section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997, and it is not authorized by section 315 of the Federal Land Policy and Management Act.

Section 108 of the Department of the Interior and Related Appropriations Act, 1997, expressly prohibits any "final rule or regulation ... pertaining to the recognition, management, or validity of right-of-way pursuant to Revised Statute 2477" from taking effect "unless expressly authorized by [a subsequent] Act of Congress." Congress enacted this prohibition to prevent your predecessor from implementing an earlier proposal for resolving R. S. 2477 claims. As the legislative history of the prohibition clearly shows, Congress expected the Department to come up with a better approach that would "more completely resolve the many competing concerns raised" by R. S. 2477 claims. But it was emphatic that the Department could not implement any such process until it had been expressly approved by a new Act of Congress. Implementation of your new "Acknowledgment Process" without new legislative authority would plainly violate both the letter and the spirit of that prohibition.

Hon. Gale Norton
April 21, 2003
Page Two

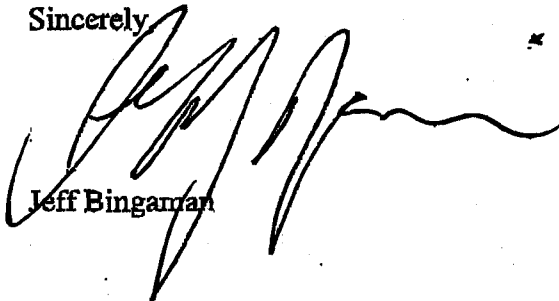
Section 315 of the Federal Land Policy and Management Act authorizes you to issue recordable disclaimers in certain cases where the United States has no legal interest in the land in question. It was never intended, and it has never before been used, as a mechanism to determine the validity of a state or county's claims under R. S. 2477. Neither the text of section 315 nor its legislative history provide any support for this new use.

Whatever else might be said for or against Secretary Babbitt's proposal, he at least proposed criteria that were consistent with existing case law and published his proposal for public comment. The same cannot be said for your new process. You have developed it in secret, announced it as a final policy, and have, without offering any reason or explanation, adopted new standards for recognizing R. S. 2477 claims that are at odds with judicial precedent and the Department's previous policies.

Recognition of an R. S. 2477 right of way permanently transfers an interest in the public lands out of federal control, giving the claimant control over how the public lands encumbered by the right of way are managed. If you think the new process outlined in the memorandum of understanding with Utah is appropriate for resolving R.S. 2477 claims, then you should lay it before the Congress and ask for the authority to implement it before proceeding.

In the meantime, in light of the significant impact your new policy will have on the management of the public lands, I have asked the Comptroller General for a legal opinion on the application of section 108 of the Appropriations Act and section 315 of the Federal Land Policy and Management Act to your new "Acknowledgment Process." I respectfully ask that you take no action to implement that process until we have received his opinion.

Sincerely,



Jeff Bingaman