

GUIDANCE FOR PROCESSING APPLICATIONS FOR EITHER DISCLAIMERS OF INTEREST OR RIGHTS-OF-WAY FOR VALID R.S. 2477 HIGHWAYS

Introduction

The following guidance is provided for processing applications for disclaimers of interest (applications) filed either by a State or an appropriate political subdivision (e.g., County) of a State (hereinafter collectively referred to as the applicant(s)) for either recordable disclaimers of interest (disclaimers) or rights-of-way pertaining to Revised Statute (R.S.) 2477 rights-of-way over public land administered by the Bureau of Land Management (BLM) and lands administered by other Federal agencies.

Before BLM can accept applications to authorize valid R.S. 2477 roads, a Memorandum of Understanding (MOU) is required between the Secretary of the Interior (Secretary) and the potential applicant that describes the sideboards as to what will constitute a valid filing. The MOU must follow the general format that was used in the agreement between the State of Utah (Utah) and the Secretary that was signed in April 2003, as further described in the “Discussion of the MOU” below. Some specific items that must be included are: a roadway must have been constructed on unreserved lands, prior to October 21, 1976, must be traversable by a 4-wheeled vehicle, must show evidence of periodic maintenance, and must not be within a congressionally designated Wilderness Area or Wilderness Study Area designated on or before October 21, 1993, under section 603 of the Federal Land Policy and Management Act (FLPMA), or part of the National Park or Wildlife Refuge Systems, or roads that are administered by a Federal agency other than the Department of the Interior (DOI), unless that Federal agency consents to the inclusion of the road in the Acknowledgement Process.

SUMMARY OF THE PROCESS

I. DISCLAIMERS OF INTEREST

The following is a summary of the steps to be taken in developing proposals by States for processing disclaimers:

1. A potential applicant indicates to BLM that it wishes to have valid R.S. 2477 roads located on public or other Federal lands acknowledged by having a disclaimer issued.
2. The potential applicant and BLM State Office have preliminary discussions on the scope of the proposal, including the potential number of roads, capability to pay cost recovery if the disclaimer process is followed, potential issues that could arise, and a discussion of the process involved for filing disclaimers. Discussions should clearly indicate that BLM is required to stay within the “sideboards” identified above. Although other political subdivisions of a State may also file for disclaimers, the State should be encouraged to file applications on their behalf. Participation by either the Regional or Field Solicitor in these preliminary meetings is encouraged.

3. If the applicant wants to pursue the disclaimer option, the BLM State Director will prepare a written summary of the preliminary discussions that were held with the applicant and submit the summary for review by the BLM Washington Office and the DOI. The summary report will be routed to the Lands, Realty and Cadastral Survey Group (WO-350) who in turn will forward the report to the BLM Director, Assistant Secretary - Land and Minerals Management, Office of the Solicitor, and ultimately the Secretary.
4. If the Secretary, after review of the summary report, approves proceeding ahead with development of a proposal, the applicant and the BLM State Director will develop a draft MOU that provides criteria and guidelines for processing and approving disclaimers for authorizing R.S. 2477 roads.
5. The State Director will send the draft MOU to the BLM Director.
6. The draft MOU is forwarded by the Director to the following offices for review:
 - a. Assistant Secretary – Land and Minerals Management;
 - b. Solicitor; and
 - c. The Secretary
7. The draft MOU, with comments, will be returned to the BLM State Director. The BLM State Director and the applicant will revise and finalize the MOU for resubmission to the BLM Washington Office. The BLM Director will then forward the final MOU to the Secretary for approval.
8. Once approved by the Secretary, the MOU is sent to the Governor or other appropriate official of the involved State for signature (this event may be part of a joint signing ceremony).
9. Implementation of the MOU may require additional agreements between BLM and the applicant, or perhaps development of implementing instructions (e.g., cost recovery master agreements, maintenance agreements, etc.).
10. Applications can then be filed with the BLM State Director by the applicant. Applications will not be accepted in any field office.
11. Applications are processed in accordance with the MOU and are either authorized or denied by the BLM State Director. Denials are subject to appeal in accordance with the regulations in 43 CFR Part 4.

II. RIGHTS-OF-WAY

The BLM will also present to potential applicants the option of authorizing existing roads under FLPMA Title V rights-of-way rather than by use of disclaimers. The advantage of authorizing an existing road(s) by a FLPMA right-of-way is that (1) it can be processed at the local level, (2) the R.S. 2477 criteria does not have to be met, (3) unlike a disclaimer, the existing road may be

modified for width, location, and other factors as a part of the right-of-way grant, (4) approval of the proposal by the Secretary is not required, and (5) there would be no cost to the applicant for processing the application.

If a State or subdivision of a State files a right of way application to authorize an existing road under FLPMA Title V, the regulations in 43 CFR 2800 and corresponding manual/handbook series shall be followed. Although cost reimbursement for processing applications by applicants is not required, if an applicant wishes to donate funds for processing right-of-way applications they may be accepted, if it is determined to be in the public interest.

DETAILED INFORMATION

I. DISCUSSION OF THE MOU

An MOU dated April 9, 2003 between the State of Utah and the DOI is currently the only agreement in effect on processing disclaimers for acknowledging State and County Roads. Applicants who wish to pursue the recognition of R.S. 2477 roads should discuss the execution of a similar MOU with the appropriate BLM State Director. An MOU should contain many of the criteria identified below. (See MOU between the State of Utah and the Secretary of the Interior for further guidance.)

The MOU should recognize and establish criteria for R.S. 2477 rights-of-way asserted by an applicant were actually part of the applicant's inventoried and were maintained transportation infrastructure prior to the enactment of FLPMA in 1976 and that these may be valid R.S. 2477 rights-of-way. An applicant should agree to submit only those claims for roads that existed prior to October 21, 1976, were and will continue to be public roads capable of accommodating automobiles or trucks with four wheels and have been the subject of some type of periodic maintenance. Through the MOU, the Secretary and the applicant should agree to focus their limited resources on acknowledging these R.S. 2477 rights-of-way that satisfy the statutory requirements of "construction" and "highway" under almost any interpretation of those statutory terms. Applicants should be cognizant of the need for full and open communication with the Counties and other local governmental entities pertaining to the development and implementation of any approved MOU.

For purposes of implementing an MOU, no application will be processed by BLM for roads within congressionally designated Wilderness Areas or Wilderness Study Areas designated on or before October 21, 1993, under section 603 of FLPMA, or roads within the boundaries of any unit of the National Park System or any unit of the National Wildlife Refuge System.

For purposes of implementing the MOU, the requirements for determinations under the "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy," dated January 22, 1997, will not apply.

II. APPLICATIONS

An applicant for a disclaimer is required to meet with the BLM State Office prior to filing an application, so that the applicant has a clear understanding of the process and any required

information or fees. Only applications submitted by or through the applicant pursuant to an approved MOU will be processed.

Applications for any claimed R.S. 2477 rights-of-way over lands administered by a Federal agency other than BLM will not be processed by BLM unless the Federal agency consents to the inclusion of the claimed right-of-way in the MOU process. The BLM will coordinate with other Federal agencies as required.

All applications must be filed in the appropriate BLM State Office. Applications may not be filed in any other BLM Office, including BLM Field Offices. Each claimed right-of-way requires a separate application and must be accompanied by a nonrefundable \$100 fee. In addition, the applicant will be required to reimburse BLM for the administrative costs involved in processing the application. The BLM will not begin work on an application (except for preapplication meetings) until the applicant pays the nonrefundable fee and the estimated administrative costs identified by BLM, as discussed in Section III below.

Any information the applicant wants BLM to consider while processing the application must be contained in the application. The application should contain the applicant's name, mailing address, telephone number, and point of contact or agent. Each application should identify the name of the claimed right-of-way and include a brief description of its location, length, and other characteristics that describes the route, which the BLM will use to publish a Notice in the Federal Register informing the public of the application. Each application should contain information demonstrating that the claimed right-of-way existed prior to October 21, 1976; a legal description of the claimed right-of-way by aliquot parts (e.g., a ¼ ¼ section), as well as a centerline or GPS description; and information demonstrating that the claimed right-of-way meets the legal requirements of R.S. 2477; was and continues to be public and capable of accommodating automobiles or trucks with four wheels; and has been the subject of some type of periodic maintenance. The application should also contain a description of the road's character (surface type, beginning and ending points, and identifying name or number if applicable), usage or purposes, width, and improvements such as bridges or culverts and other ancillary features existing as of the October 21, 1976. The application should also identify others known or believed to have a claim or interest in the claimed right-of-way.

Examples of the type of information that would assist BLM in processing an application are:

- Narrative as to when and by whom the claimed right-of-way was constructed and supporting evidence
- Maintenance records or other evidence of periodic maintenance
- Affidavits and/or other legally cognizable documents evidencing how the claimed right-of-way was established, its history, and usage
- Historic maps and photographs of the claimed right-of-way (pre October 21,1976)
- Current maps and photographs of the claimed right-of-way

- Information about which Federal land managing agency or agencies administers the land underlying the claimed right-of-way
- Documentation showing that the claimed right-of-way is capable of accommodating automobiles or trucks with four wheels

The application may be supplemented by the applicant at any time during BLM's processing of the application, or it may be withdrawn by the applicant for any reason, without prejudice, at any time prior to the actual recording of a disclaimer issued by the BLM. Any information submitted by the applicant will be subject to public review, in accordance with applicable law, and the provisions of the MOU regarding review and release of information. Submission of both hard copy and electronic copy of all application materials is required.

III. ADMINISTRATIVE COST REIMBURSEMENT

The obligation for cost reimbursement begins when BLM receives an application. Payment of the estimated administrative costs may be made in periodic installments in advance of individual work steps as identified by BLM. As soon as possible after receipt of the application, BLM will inform the applicant of the anticipated work steps and the estimated administrative costs for each step. The BLM will discuss the costs with the applicant. If the applicant and BLM cannot agree on the costs, BLM will issue a decision on the costs, which the applicant may appeal to the Interior Board of Land Appeals (IBLA). The applicant must pay the administrative costs for each work step before BLM will begin work on that step.

All cost reimbursement installments are credited toward the applicant's total cost reimbursement obligation. If excess funds remain after completion of the processing of the application, these funds are to be refunded to the applicant by BLM. However, BLM may re-estimate the direct and indirect costs of processing the application and adjust the applicant's cost reimbursement obligation whenever a significant change in the work involved in processing the application occurs. When a re-estimation of the administrative costs is made, BLM will discuss the costs with the applicant. If the applicant and BLM cannot agree on the revised costs, BLM will issue a decision on the new cost estimates, which may be appealed by the applicant. Where multiple applications are filed, a master agreement between the applicant and BLM is encouraged.

Administrative costs include both estimated direct and indirect costs to BLM for processing an application. The cost recovery categories and schedules that are established for FLPMA rights-of-way under 43 CFR 2800 do not apply to the determination of administrative costs for processing applications under the MOU. Direct costs are those costs that can be accurately and readily determined for processing the application. Any case work time for a specific application is a direct cost. These costs include, but are not limited to, procurement, travel, and personnel time for reviewing the application and attached documentation, site visits, equipment, supplies, publication costs, contracted services, and preparing decisions and disclaimer of interest documents. Personnel costs are generally determined from the recorded labor cost of BLM staff.

Indirect costs are costs expressed as a percent of overall BLM costs, which are of such a nature that the amounts applicable to a specific application cannot be accurately or readily determined. Indirect costs are generally referred to as “overhead” costs and include such costs as BLM General Administration and Data activities. The current Fiscal Year 2005 fixed BLM “overhead” rate is 18.4 percent. The overhead cost rate is determined annually.

IV. PUBLIC NOTICE AND COMMENT

Upon receipt of an application, and at least 90 days before BLM issues a decision on the application, BLM shall publish a Notice in the Federal Register informing the public of the application and summarizing the applicant’s grounds for supporting the application. The Notice will explain how the public may review the application and any supporting information. In addition, the applicant, at their own expense, will be required to publish the same Notice in a newspaper of general circulation near the lands covered by 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. Information contained in the BLM case file for the application will be made available for public review in the appropriate BLM State Office in electronic or digital form at the time of Federal Register publication. Public comment will be accepted, if received by 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, BLM will address all relevant, substantive issues raised by the commentors.

Because only an applicant or claimant has the right to appeal a decision on the application to the IBLA, the submission of comments by any other entities on the application shall not grant them a right of appeal to the IBLA. Further, there are no other administrative appeal procedures, such as filing a protest with the State Director, in the disclaimer process.

V. PROCESSING APPLICATIONS

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. The BLM State Office will inform affected field offices when applications are received. The BLM will determine if there is a need for on-the-ground inspections of the claimed right-of-way. The BLM will coordinate with the applicant and other Federal agencies affected by the claimed right-of-way, as appropriate.

The BLM will review its public land records to determine if the public lands underlying the claimed right-of-way were unreserved some time prior to October 21, 1976. The public land records can be referenced; therefore, copies do not need to be included in the case file unless the records indicate that the public lands were not subject to operation of R.S. 2477. The BLM will consult with the Solicitor's Office, on a case-by-case basis, as necessary to process the application.

The BLM's processing of the application or issuance of a disclaimer is not subject to section 102(C) of the National Environmental Policy Act, section 106 of the National Historic Preservation Act, or section 7 of the Endangered Species Act.

Following its review of the application, 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 MOU and, if appropriate, BLM will prepare a draft disclaimer. The width of the road asserted and the width of the road disclaimed shall not exceed the width of ground disturbance that existed for the road as of the date of the MOU, or a representative width if the MOU so specifies. Each draft decision and disclaimer will be reviewed by the Solicitor's Office for legal sufficiency.

VI. DECISIONS AND APPEALS

Following review by the Solicitor's Office, the BLM State Director will make a final decision on the application. If BLM decides to issue a recordable disclaimer, the decision and the disclaimer will be forwarded to the applicant. Among other things, the disclaimer will describe the right-of-way width, surface type, and character. If BLM decides not to issue a disclaimer, the BLM State Director will issue a decision to the applicant or adverse claimant explaining the rationale for BLM's decision. The BLM will provide written notice of its decision on an application to any adverse claimant. Either the applicant or a claimant adversely affected by the decision may appeal the decision to the IBLA as provided by 43 CFR 1864.4.

If the applicant records the disclaimer, it should send a copy of the recorded disclaimer with the appropriate certifications of the County office in which the disclaimer was recorded to BLM. Once a disclaimer has been recorded by the applicant and a copy of the recorded document has been received by BLM, BLM will note its public land records to show the acknowledged right-of-way.