United States Senate

WASHINGTON, DC 20510

November 18, 2019

The Honorable David Bernhardt
Secretary
Department of Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Bernhardt:

We write to express our opposition to a Recordable Disclaimer of Interest application filed on May 19, 2019, by the State of Utah and Washington County, Utah, over their asserted R.S. 2477 right-of-way to the "Manganese Road" in Southern Utah. We are aware that on November 8, 2019, the Department of Interior (DOI) issued a Federal Register notice regarding this pending application. We oppose any effort by DOI to relinquish title to the property interests of the United States, particularly at a time when the Department is mired in litigation over the very legal and evidentiary standards that will determine the future validity of these kinds of claims.

As you know, Congress's prohibition over the Bureau of Land Management's (BLM) determination of the validity of R.S. 2477 claims is longstanding. In response to the Administration's attempts to expedite the validation of these very kinds of claims in the early 1990s, Congress enacted first a temporary and then a permanent prohibition, directing in 1996 that "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress."[1] Contrary to this clear moratorium, the Department nonetheless issued a final Disclaimer Rule in 2003, a matter that is of central import here given Congress's prohibition. Any attempt by the DOI to recognize the validity of the State of Utah and Washington County's R.S. 2477 claim under the guise of this specific Recordable Disclaimer of Interest is fatally flawed, tied as it is to a "final rule or regulation" that pertains to R.S. 2477 claims and is therefore contrary to law, namely the Section 108 prohibition that Congress enacted in 1996.

Furthermore, even if DOI were to consider acting without authorization and issuing a Recordable Disclaimer of Interest, it is unclear how it would do so given uncertainty about the appropriate standards. From 2010 to 2012, approximately 35 years after Congress repealed R.S. 2477, the State of Utah and many of its counties sued the United States over tens of thousands of miles of disputed R.S. 2477 rights-of-way, creating a tangle of legal questions. To begin to tackle these cases, the federal district court for the District of Utah ordered a trial in two of the cases, beginning with *Kane County and Utah v. United States,*[2] which will be heard in February 2020. The goal of this test case is to establish the jurisdictional and evidentiary standards that will be used for determining other disputed right-of-way claims moving forward. Given the uncertainty that exists around these standards, it is essential to the interests of the American people that the trial and any appeal be resolved before DOI even considers issuing a Recordable Disclaimer of Interest on the "Manganese Road" or any other R.S. 2477 claim.

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[1] Pub. L. No. 104-208, § 108 (1996).
[2] Case No. *2:10-cv-1073-CW.*

Deferring to the Court process not only makes sense as a practical matter but would also be consistent with your Department's own past positions. As you know, the Tenth Circuit Court of Appeals' 2005 decision in *SUWA v. BLM* not only held that BLM does not have primary jurisdiction to determine title—but noted with some amusement that it was BLM's own position that the validity of R.S. 2477 claims were matters to be resolved by the courts.[3] It is unclear that the circumstances have changed in a manner that suggests deviation from this position is reasonable now. To the contrary, the ongoing litigation would seem to weigh even further in favor of abstaining from any administrative action until this matter is resolved in the appropriate forum: the courts.

Given that DOI lacks proper legal authority and any workable standard to determine the validity of R.S. 2477 claims—indeed, it is in the midst of litigating that very authority—we urge you not to move forward with the State of Utah's "Manganese Road" or any other applications.

Sincerely,

Richard J. Durbin
United States Senator

Tom Udall
United States Senator

Martin Heinrich
United States Senator

Dianne Feinstein
United States Senator

Tammy Baldwin
United States Senator

[3] *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 752–53 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006) ("Perhaps more to the point, for over a century, in every Land Department or BLM decision in which parties sought a ruling on the validity of an R.S. 2477 claim, the agency maintained that this was a matter to be resolved by the courts . . . And in prior cases in this Circuit, the BLM has appeared as a litigant, without ever suggesting that its administrative determinations are entitled to legally enforceable status as a matter of primary jurisdiction. This case is the first occasion the government has ever purported to exercise the authority to resolve the validity of R.S. 2477 claims in an informal adjudication before the agency.").