Disclaimer Rule: Q & A

What Is The Final Rule On Conveyances, Disclaimers and Corrections?

On January 6, 2003 the U.S. Department of the Interior (DOI) through the Bureau of Land Management (BLM) published a final rule that amends the agency's regulations regarding "recordable disclaimers" of interests in lands. The recordable disclaimer process enables the federal government to renounce any interest in a particular piece of land when it determines that it has no interest or valid claim to such land.

The recently issued final rule contains three significant deviations from the agency's 1984 disclaimer regulations:

- The new regulation drops the requirement that the claimant be a "present owner of record" and instead opens the door to "any entity claiming title to lands" to bring a claim for a disclaimer. This opens the door for anyone – whether or not they have or ever have had title to the land in question – to bring a claim for a disclaimer document.
- The new rule also waives the statute of limitations as applied to the states. The statute bars all other claimants from bringing a claim if more than twelve years have elapsed from the date such claimant knew or should have known of the government's adverse interest.
- Finally, the new rule expands dramatically the definition of the term state (and thereby the scope of entities not subject to the twelve-year statute of limitations) to include "the state and any of its creations including any governmental instrumentality within a state, including cities, counties, or other official local governmental entities."

Why Is This Rule So Significant?

The disclaimer rule is not a minor administrative change, as the BLM has suggested. It is a major policy change. As a result of the final rule, it will be significantly easier for the BLM to grant local governments and other entities permanent ownership and use of claimed rights-of-way. The new rule has its most devastating effect when combined with an antiquated law called Revised Statute 2477 (RS 2477) – a law that was actually repealed over 25 years ago. RS 2477, which was originally passed in 1866 as part of a larger measure aimed at encouraging the settlement of the West, granted rights-of-way for the construction of highways across unreserved public lands. Many of the claims stemming from RS 2477 crisscross public lands and are patently spurious – including such things as cattle paths, horse trails, river-beds, and dirt bike and off-road vehicle routes.

Many of the areas most affected by this new rule are in the West and in Alaska. Areas subject to the disclaimer rule include: National Parks, designated Wilderness Areas, Wilderness Study Areas, and National Wildlife Refuges, National Forests, as well as military reservations.

The effect of granting these rights-of-way through a rule change is that many of our remaining pristine public lands in the West and in Alaska may no longer qualify for permanent protection as wilderness, and could be damaged by significant road-related

development. Road and highway development on these "roads to nowhere" will destroy and fragment wildlife habitat, cause erosion, degrade water quality, spread weeds, and harm archeological sites.

Reports by the National Park Service and the Department of the Interior have concluded that the impacts of RS 2477 on National Parks "could be devastating," and found that granting such claims "would undoubtedly degradate [sic] most [Park] values and seriously impact the ability of the [National Park System] to manage the [Parks] for the purposes for which they were established." Some examples of places at risk include: Denali National Park (AK); Grand Staircase-Escalante National Monument (UT); Mojave National Preserve (CA); Dinosaur National Monument (CO); and Canyonlands National Park (UT).

Has DOI Previously Applied The Disclaimer Process To RS 2477?

NO. Since 1976, the BLM has only issued 62 recordable disclaimers, and none of them has been for claims brought under RS 2477. However, it is likely, and, in fact, BLM explicitly anticipates that the revised rule will facilitate the processing of a large number of claims for disclaimers that are based on RS 2477 rights-of-way.

What Lands Are Affected By The Rule Change?
DOI asserts that the rule applies to ALL federal lands – including lands managed as National Parks, National Forests, National Wildlife Refuges, wilderness areas, National Recreation Areas, and even military bases and training areas. These lands total hundreds of million acres.

Does the Bureau of Land Management Analyze The Impacts Of Surrendering Sensitive Lands To Local Governments For Highway Development Before Issuing a Disclaimer?

NO. BLM makes clear in the rule that it will NOT analyze the environmental effects of either: (a) this rule change; or (b) ANY decision to issue a disclaimer of interest regardless of the potential environmental, social, safety, or economic impacts of doing so.

Will The Final Rule Reduce Litigation Related to Public Lands Issues?

NO. On the contrary, the rule is likely to *increase* litigation. While the public may comment on a decision to disclaim interest in lands, the process of determining whether a valid right-of-way exists is not open to the public. The DOI states that the public will not have an opportunity in the administrative process to appeal right-of-way and disclaimer decisions, so court action may be the only way to challenge decisions degrading sensitive public lands.

Can The States And Counties Obtain Rights-Of-Way Across Federal Lands For Legitimate Purposes Without Resorting To Lawsuits?

YES. Even without the revisions to the disclaimer rule, states and counties may apply for and obtain new rights-of-way under provisions of Title V of the Federal Land Policy and Management Act (FLPMA), the 1976 law that repealed RS 2477. These provisions require, among other things, an analysis of environmental impacts of granting the right-

of-way. In Alaska, Title XI of the Alaska National Interest Lands Conservation Act (ANILCA) provides an additional way for the state and private parties to obtain rights-of-way across National Parks, Refuges, and Wilderness Areas. Issuance of a Title XI right-of-way also requires a careful environmental analysis and public participation.

Is It An Exaggeration To Say That There Would Be An Avalanche Of Road Projects Unleashed By the Disclaimer Rule?

NO. Some counties and states are poised to bring thousands and thousands of these claims. Counties within the State of Utah have identified several thousand individual routes across public lands. The State of Alaska has already identified more than 650 right-of-way claims. The new rule will allow states and local jurisdictions to request "disclaimers" on all of these rights-of-way.

Additionally, in its comments on the proposed rule change, San Bernardino County (CA) expressed concern about bearing the cost of processing multiple RS 2477 claims through the disclaimer rule "because the number of claims the county might potentially file could create a financial burden" on them. Gilpin County (CO) and Valley County (ID) also expressed concerns about how DOI would address cost issues when counties submitted multiple claims. After the rule change was announced, Moffat County (CO) moved to finalize dozens of claims that could result in development of scores of new roads on cow paths and other trails through Dinosaur National Monument, a wildlife refuge, and half a dozen wilderness study areas.

Why Is This Proposal Different Than The RS 2477 Resolution Proposed By Secretary Babbitt in 1994?

Secretary Babbitt's 1994 proposed rule would have set clear, concise standards for determining when a state or local government has obtained a right to use a specific route under the repealed RS 2477 statute. The disclaimer rule sets no such standards and the current DOI has not established standards for determining the validity of RS 2477 claims. Also, the 1994 proposed rule would have permitted any affected person to appeal to the Bureau of Land Management any decision on a particular route. DOI says the recent disclaimer rule permits only "applicants or claimants" with an interest in the land to appeal, *not* the concerned public.

Is this rule change legal?

NO. In 1997, Congress prohibited DOI from issuing final rules related to RS 2477; the General Accounting Office (as well as DOI previously) concluded that this was a permanent prohibition. In addition, Congress did not intend for DOI to use the disclaimer rule to be used to address RS 2477 rights-of-way when it passed the Federal Land Policy and Management Act in 1976. The rule goes beyond the scope of the statute by permitting counties and local governments to avoid the 12-year statute of limitations on filing claims to rights-of-way and by opening the process to "any entity claiming title" rather than "present owners of record".

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