

## Appendix M2

Interim Guidance Relating to the  
Scope of a Railroad's Authority to  
Approve Uses within Railroad  
Rights-of-Way Granted under the  
Act of March 3, 1875

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**  
National

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D.C. 20240  
<http://www.blm.gov/>  
December 2, 2011

In Reply Refer To:  
2800/2880 (350) P

EMS TRANSMISSION 12/20/2011  
Instruction Memorandum No. 2012-038  
Expires: 09/30/2013

To: All Field Office Officials

From: Assistant Director, Minerals and Realty Management

Subject: Interim Guidance Relating to the Scope of a Railroad's Authority to Approve Uses within Railroad Rights-of-Way Granted under the Act of March 3, 1875

**Purpose:** The purpose of this Instruction Memorandum (IM) is to provide interim guidance in light of the release of Solicitor's Opinion M-37025 on November 4, 2011, which withdraws those portions of Solicitor's Opinion M-36964 relating to the scope of a railroad's authority to undertake or authorize uses within railroad rights of way (ROW) under the Act of March 3, 1875 (1875 Act). Additional guidance that will address proposed and existing uses on public lands within 1875 Act ROWs will be developed and issued shortly.

**Policy/Action:** Based on a review of Opinion M-36964, *Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way* of January 5, 1989 (the 1989 Opinion), the Solicitor recently issued a new Opinion, M-37025, that withdraws that part of the 1989 Opinion addressing a railroad's authority to undertake or authorize activities within railroad ROWs granted pursuant to the 1875 Act.[1] A copy of Opinion M-37025 is attached.

Opinion M-37025 concludes that the findings in the 1989 Opinion regarding the 1875 Act are erroneous because a railroad's authority to undertake or authorize activities within an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. Determining whether a particular activity derives from or furthers a railroad purpose requires a case-by-case evaluation. The guidance below broadly describes how such evaluations for uses proposed within 1875 Act railroad ROWs should be conducted.

#### Uses Proposed Within 1875 Act Railroad ROWs

The Bureau of Land Management (BLM) retains authority over proposed uses within 1875 Act ROWs across BLM-managed public lands which do not derive from or further a railroad purpose. Therefore, proponents of uses within an 1875 Act ROW that are not derived from or in furtherance of a railroad purpose will need authorization from the BLM.[2] Most, if not all, of such authorizations would fall under Title V of the Federal Land Policy and Management Act or Section 28 of the Mineral Leasing Act.

Thus, in those situations where a use is proposed within an 1875 Act ROW located on public lands, the BLM must first evaluate whether a railroad purpose will be served by the proposed use. To assist in that evaluation, the BLM will, among other things, solicit the input of the railroad holding the subject 1875 Act ROW. The BLM will additionally consider the following: 1) courts have interpreted "railroad purpose" to include activities incidental to train operations that also have a separate commercial purpose as being within the railroad's authority to undertake or authorize;[3] and 2) a railroad has the exclusive right to utilize the entirety of its ROW for the purposes of operating a railroad. Therefore, any activity undertaken or authorized by a railroad cannot otherwise interfere with railroad operations.

- If the BLM concludes that a railroad purpose would be served by the proposed use, then no further action would be required by the agency.

- If, however, the BLM concludes that the proposed activity does not derive from or further a railroad purpose, the proponent of the proposed use would have to submit an application to the BLM that would be processed in accordance with applicable laws, regulations and agency policies. Applications processed for uses within 1875 Act ROWs will be subject to the same fees and requirements that would be normally required for such use of public lands under applicable laws, regulations and policies, including but not limited to, cost recovery fees (processing and monitoring), rental fees and bonding requirements. As noted above, approval of any such use by the BLM within an 1875 Act ROW across BLM-managed public lands will require coordination with the railroad ROW holder to ensure such uses do not interfere with railroad operations.

State Offices should contact the Washington Office, Branch of Rights-of-Way (WO-350), for assistance with evaluating whether activities proposed within an 1875 Act ROW located on BLM-managed public lands derive from or further a railroad purpose, and therefore do not require authorization from the BLM.

#### Subsequent Guidance

Additional guidance will be issued addressing the evaluation of both proposed and existing uses within 1875 Act ROWs located on BLM-managed public lands.

To assist in developing this guidance, all State and Field Offices should conduct an in-office assessment of the BLM records by ensuring ROWs authorized under the 1875 Act are accurately recorded in LR2000 to facilitate WO-350 retrieval of records and identify the following, if known:

- 1) The types of existing facilities (water pipeline, fiber optic lines, power lines, etc.), names of the facility owners, and related BLM serial numbers (both for facility and railroad), within 1875 Act ROWs located on public lands;
- 2) Any proposed facilities and proponent names, within 1875 Act ROWs located on public lands; and
- 3) Any other relevant information that could inform the future policy.

For the identification of proposed facilities and proponent names, State and Field offices should rely on recent inquiries or other publicly available information, such as phone calls received, public meeting notices, or newspaper articles.

The results of the in-office assessments should be compiled by each State Office and a single response for each state transmitted to Lucas Lucero, Branch Chief, Rights-of-Way, in the Washington Office of the BLM no later than 90 days after the issuance of this IM.

**Timeframe:** This information and interim guidance is effective immediately.

**Budget Impact:** There is expected to be a minor budget impact, depending on the number of proposals that need to be evaluated for railroad use and the amount of work involved with information gathering related to existing uses of 1875 Act ROWs.

**Background:** On January 5, 1989, the Solicitor issued Opinion M-36964 which, among other things, concluded that railroads possessed "what is tantamount to a fee interest in [their] 1875 Act rights of way" allowing them to undertake or authorize any activities within these ROWs regardless of purpose. As a result of further review of the 1875 Act and applicable judicial decisions, the Solicitor issued Opinion M-37025 on November 4, 2011 withdrawing that part of Opinion M-36964 concerning ROW issued under the 1875 Act. As Opinion M-37025 explains, railroad companies have the authority to undertake or authorize activities within an 1875 Act ROW if those activities derive from or further a railroad purpose, while the BLM is responsible for authorizing activities that do not serve any railroad purpose.

**Manual/Handbook Sections Affected:** This IM transmits interim policy that amends and will be incorporated into the BLM Right-of-Way Manual Series 2800/2880 during the next revision.

**Coordination:** This IM was developed in consultation with WO-100 and coordinated with the Solicitor's Office and affected State Offices.

**Contacts:** If you have questions or need additional information, please contact me at 202-208-4201, or your staff may contact Kim Berns, Division Chief, Lands, Realty and Cadastral Survey (WO-350) at 202-912-7350; Lucas Lucero, Branch Chief, Rights-of-Way at 202-912-7324; or Beth Ransel, Linear ROW &

Master Agreements Lead at 202-912-7213.

Signed by:  
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Acting, Assistant Director  
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Authenticated by:  
Robert M. Williams  
Division of IRM Governance, WO-560

2 Attachments

- 1 - Solicitor's Opinion M-37025 (13 pp)
- 2 - Q&As Pertaining to M-37025 (3 pp)

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- [1] Opinion M-37025 does not modify the findings of the 1989 Opinion relating to railroad ROWs issued under other railroad ROW statutes.
  - [2] Uses proposed within an 1875 Act ROW cannot interfere with a railroad's use of its ROW.
  - [3] An example might include a telephone line that is located within an 1875 Act ROW that provides both station communication and general commercial use.