

## **PROCEDURE FOR MAKING A NON-BINDING VALIDITY DETERMINATION (NBD)**

The following steps should be taken in making a non-binding validity determination:

### **Step 1 –**

If the NBD is being performed in conjunction with a state or county road improvement proposal, the state or county bears the initial burden of providing appropriate evidence that the claimed right-of-way was properly accepted in accordance with governing state law principles prior to 1976.

Examples of the type of information that would assist BLM in its determination:

- 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; and/or
- Information about which Federal land managing agency or agencies administers the land underlying the claimed right-of-way

The State or Field Office should work directly with the regional and field solicitor to determine if the evidence provided supports the claim. If the claimant fails to provide substantial evidence to support the claim, the claim should be presumed invalid, the claimant should be so informed, and the State or Field Office should undertake no further review of the claim unless additional evidence is provided. The claimant should be sent a certified letter indicating that the evidence provided does not support the claim and therefore the claim is presumed invalid. The letter should also offer the claimant an opportunity to provide additional information.

If a claimant meets its initial burden, or if the State or Field Office is making an NBD for its own purposes, the office should review its public land records for any evidence supporting or contradicting the claim. Examples of BLM records that may contain relevant evidence are:

- Maps
- Aerial photos
- Land Use Plan Information and Maps (Resource Management Plans (RMP), Travel Plans, etc.)
- Range Management and Grazing Files
- Title and Survey Records
- Maintenance Records

## Attachment 2

If the proposed route would cross or abut private property or land managed by another government agency, the State or Field Office should ensure that the property owners or managers are informed and have an opportunity to comment.

### **Step 2 –**

The State or Field Office should determine whether the road, or any part of it, was abandoned, or crossed land that became private or was reserved for public purposes prior to the right-of-way's establishment. If it did, that portion of the road should not be considered a valid R.S. 2477 right-of-way claim by the BLM.

### **Step 3 –**

The State or Field Office personnel will make a site visit to the road and document by photographs or videotape the location, scope and condition of the road.

### **Step 4 –**

After reviewing the evidence, with the concurrence of the regional or field solicitor's office, the State or Field Office should make a written preliminary NBD. The State or Field Office should then publish notice of its preliminary determination and a brief statement of its reasoning in a newspaper of general circulation in the area of the claimed right-of-way and, at its discretion, on its website or in other appropriate locations.

To the extent practical, the evidence should be made available in electronic form on the BLM's website, as well as in hard copy form in the State or Field offices closest to the area in which the claimed right-of-way is located. The notice should identify the time and place at which any interested party may examine the evidence on which the preliminary NBD is based.

The notice should allow the public 30 calendar days to provide the BLM with information, comments, or additional evidence relevant to the determination.

### **Step 5 –**

At the conclusion of the comment period, the State or Field Office will review all of the evidence and, with the concurrence of the regional or field solicitor's office, make a final written NBD. It need not respond directly to any comments. The State or Field Office should provide notice of its final NBD to the claimant and the public.

### **Step 6 –**

If the NBD reaches a negative conclusion, a claimant may still seek a right-of-way under Title V or resolution of its ownership claim under the Quiet Title Act.

## Attachment 2

If a right-of-way claim is recognized under any of these processes, the BLM still retains its right and obligation to avoid undue degradation to the surrounding and underlying land it manages by enforcing reasonable regulations on the land and rights-of-way across it.