
ON NOVEMBER 4, 2011, THE SOLICITOR OF THE UNITED STATES DEPARTMENT OF THE INTERIOR ISSUED OPINION M-37025 WHICH PARTIALLY WITHDREW THE SOLICITOR'S 1989 OPINION M-36964 AND CLARIFIED THE SCOPE OF A RIGHT OF WAY ESTABLISHED UNDER THE GENERAL RAILROAD RIGHT OF WAY ACT OF MARCH 3, 1875 (1875 ACT). HERE ARE SOME QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

1. What is the General Railroad Right of Way Act of March 3, 1875?

The General Railroad Right of Way Act of March 3, 1875 (1875 Act) granted railroad companies a 100 foot right-of-way (ROW) on public land on either side of a railroad line subject to certain terms and conditions. Thousands of miles of 1875 Act ROWs are estimated to exist on public land in the western United States.

2. Were there other statutes that authorize the granting of ROWs on public land to railroad companies?

Yes. There were a number of acts pre-1871 that granted railroad companies ROWs. These pre-1871 acts were generally for specific companies or routes, and provided fee title to the lands over which the railroad was constructed, including to certain public land on either side of a railroad line subject to certain terms and conditions.

3. Are the pre-1871 acts and the 1875 Act still in effect?

No. In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). Title VII of FLPMA repealed the various railroad ROW statutes but recognized existing ROWs established under those statutes as valid existing rights.

4. What is an "M Opinion"?

An "M Opinion," which is short for "Memorandum Opinion," is a formal written opinion by the Solicitor that presents the official legal interpretation of the Department of the Interior on matters within the Department's jurisdiction. M Opinions are binding on all Department offices and officials and may be withdrawn, overruled, or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

5. What did Opinion M-36964 do?

Opinion M-36964 was issued by the Solicitor in 1989 and arose in the context of MCI Communication's request to install a fiber optic line within three different railroad ROWs across BLM land held by the Southern Pacific Railroad Company pursuant to (i) the Act of July 27, 1866; (ii) the Act of March 3, 1871; and (iii) the 1875 Act. With respect to the pre-1871 ROWs, Opinion M-36964 concluded that a Southern Pacific held a fee interest and therefore could authorize any activity within those ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations. With respect to the 1875 Act ROW, Opinion M-36964 concluded that Southern Pacific held an interest that was "tantamount" to a fee and thus could similarly undertake or authorize any activity within these ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations.

6. What does Opinion M-37025 do relative to the 1875 Act?

Opinion M-37025 was issued by the Solicitor on November 4, 2011. It withdraws those portions of Opinion M-36964 regarding the 1875 Act based on the fact that those portions are

inconsistent with a longstanding Supreme Court precedent – *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) – and two recent federal court decisions – *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005) (the latter questioned the legal basis for Opinion M-36964’s conclusion). Specifically, Opinion M-37025 rejects Opinion M-36964’s conclusion that the 1875 Act is “tantamount” to a fee. Rather, Opinion M-37025 states that the scope of an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. As result, Opinion M-37025 activities that are not related to railroad purposes are outside the scope of the ROW grant and that such activities require BLM authorization pursuant to applicable law. Approval of any such uses by the BLM will require coordination with the railroad to ensure such uses do not interfere with railroad operations within the ROW.

7. What does Opinion M-37025 do relative to the pre-1871 Acts?

Nothing. Opinion M-37025 specifically states that it does not alter the conclusions of Opinion M-36964 with respect to the pre-1871 Acts. Therefore, the conclusion of Opinion M-36964 that railroad companies possess a fee interest in these pre-1871 ROWs is unchanged.

8. What are examples of activities within a railroad ROW that derive from or further a railroad purpose?

Although each situation must be evaluated on a case by case basis, examples of activities within an 1875 Act ROW that may serve a railroad purpose include: telegraph, telephone and fiber optic lines that provide for both railroad and commercial communications; warehouses that provide for receipt of freight by the railroad while also providing other retail services; transmission lines that provide power to the rail line and commercially; and station grounds, maintenance yards, and related improvements.

9. What should the proponents of a new use within an 1875 Act ROW on BLM land do?

Proponents of new uses within an 1875 Act ROW should contact BLM for a determination of whether the proposed use serves a railroad purpose. As explained above, if BLM determines that a proposed use does serve a railroad purpose, BLM authorization is not required and the railroad company may undertake or authorize the use at its discretion, subject to any other applicable legal requirements. If, however, BLM determines that the proposed use does not serve a railroad purpose, BLM authorization is required and the proponent must submit an application to the agency for processing in accordance with applicable law, regulation and policy.

10. What actions, if any, will BLM undertake regarding uses that already exist within 1875 Act ROWs based on Opinion M-37025?

The BLM is currently developing guidance that addresses the relationship of Opinion M-37025 to existing uses within 1875 Act ROWs on BLM land and the actions, if any, that the agency should take to ensure compliance with the new Opinion.

11. Who should I contact for further information?

You may contact the BLM's Washington Office, Branch of Rights of Way at 202-912-7342 if you have further questions concerning the applicability of Opinion M-37025 to 1875 Act ROWs on BLM land.