

**Congress of the United States**  
**Washington, DC 20515**

March 22, 2016

Chairman Ken Calvert  
Subcommittee on Interior, Environment, and  
Related Agencies  
B-308 Rayburn House Office Building  
Washington, D.C. 20515

Ranking Member Betty McCollum  
Subcommittee on Interior, Environment, and  
Related Agencies  
2256 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Calvert and Ranking Member McCollum:

We write regarding the Bureau of Land Management's interpretation of the General Railroad Right-of-Way Act of 1875 ("1875 Act"), which granted railroads rights-of-way over public lands for railroad purposes.

For over a century, the 1875 Act has been interpreted to allow railroads to authorize other entities to use railroad rights-of-way for infrastructure over BLM land, without further authorization from the BLM, as long as the activity does not interfere with railroad operations. In November 2011, the Solicitor of the Department of the Interior issued a Memorandum Opinion, which rejected this interpretation and instead determined that for a third party to use a railroad right-of-way, the activity must further, at least in part, a railroad purpose.

In October 2015, BLM's California state office departed even further from statute and the 2011 M-Opinion when it determined that a water pipeline was not within the scope of an 1875 Act right-of-way, because the project did not "originate from a railroad purpose," despite providing inarguable benefits to the railroad.

This new legal test seems to have been formulated by BLM inappropriately and has major ramifications for every existing and new activity within an 1875 Act right-of-way. For example, railroads may no longer be legally able to authorize the use of their respective rights-of-way to third parties for critical infrastructure, such as water pipelines, power lines, telecommunication lines, and fiber-optic cables – even when those activities further a railroad purpose.

To make matters worse, BLM has warned in a 2014 Instruction Memorandum that it plans to publish a Federal Register notice formally requesting information about all activities located in 1875 Act rights-of-way. Once it receives the requested information, BLM plans to retroactively make a determination whether each activity is in the scope of the right-of-way, presumably restricting projects not originating from a railroad purpose.

We understand that there are currently over 3,500 individual instances of third-party uses of 1875 Act rights-of-way over federal lands. In addition, BLM insists it be notified of all proposed

new activities located within 1875 Act rights-of-way across BLM land in order to determine whether such activities meet its novel test of arising from a railroad purpose. Projects failing this test are expected to go through the burdensome full BLM permitting process.

Not only is this an unprecedented interpretation of the 1875 Act, but also at best a questionable use of congressionally-appropriated funds, given the enormous volume of new administrative determinations BLM would have to take on.

The implications of BLM's rewrite of the 1875 Act will have far-reaching consequences throughout the West, where railroad rights-of-way are widely utilized for all kinds of critical infrastructure. Moreover, the BLM determination runs afoul of federal and state policy, which encourages the co-location of utilities within already disturbed rights-of-way.

To address BLM's overreach, avoid wasteful use of federal resources, and restore the interpretation of 1875 Act rights-of-way that railroads and others have relied on for close to 150 years, we ask that the subcommittee include the following language in the FY2017 Interior and Environment Appropriations bill:

*SEC. \_\_. RAILROAD PURPOSE.*

*Section 24202 of title 49, United States Code, is amended by adding at the end the following:*

*“(c) Scope.—*

*“(1) IN GENERAL.—Notwithstanding any other provision of law, any activity, including a commercial activity, undertaken or conducted by a railroad company, or undertaken or conducted by another entity and authorized by a railroad company, using a railroad right-of-way shall be expressly deemed to derive from or further a railroad purpose within the scope of the right-of-way grant, regardless of whether such activity is necessary, primarily intended, or originated for the operation, maintenance, or construction of a railroad, if such activity—*

*“(A) contributes to any aspect of a railroad company's business, subject to paragraph (2); and*

*“(B) does not interfere with the operation of the railroad.*

*“(2) NON-APPLICABILITY.—Paragraph (1) shall not apply to an activity using a railroad right-of-way if such activity does not have any benefit to the railroad company other than payment for the use of the railroad right-of-way.*

*“(3) AUTHORIZATION REQUIRED.—No activity using a railroad right-of-way by an entity other than the railroad company granted the railroad right-of-way shall be permitted without authorization from such railroad company if the railroad right-of-way has not been abandoned.*

*“(4) SAVINGS CLAUSE.—Nothing in this subsection may be construed to affect the rights to—*

*“(A) the mineral estate underlying a railroad right-of-way;*

*“(B) a railroad right-of-way that has been abandoned; or*

“(C) airspace of a railroad right-of-way.

“(5) DEFINED TERM.—In this subsection, the term ‘railroad right-of-way’ means the subsurface and surface of a right-of-way granted under the Act of March 3, 1875 (18 Stat. 482; chapter 152; 43 U.S.C. 934 et seq.).”.

Thank you for your consideration.

Sincerely,


  
Tom McClintock


  
Rob Bishop

  
Tony Cardenas

  
Paul Gosar

  
Cynthia Lummis

  
Jim Costa

  
Paul Cook

  
Duncan Hunter

  
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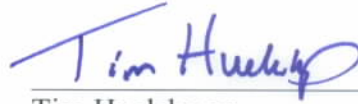
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