

**Bureau of Land Management  
Process for Evaluation of an Activity  
Located within a Right-of-Way Granted  
under the  
General Railroad Right-of-Way Act of March 3, 1875**

**I. Information Gathering**

- A. Gather publicly available information on the proposed or existing activity or facility (e.g., State, county, or local records; proponent's website if available).
- B. Gather publicly available information about the railroad from the railroad's website, or from other public data sources.
- C. Request information from the parties involved with the activity under review (i.e., the railroad, the proponent of the activity) sufficient to conduct the evaluation below.
- D. Provide an opportunity for a meeting(s) (i.e., in-person, conference call, webinar) with the activity's proponent and the railroad, as appropriate, to discuss the activity in detail.
- E. Provide an opportunity for interested parties to provide information prior to undertaking an evaluation of the activity in question. With respect to such information gathering, firm dates should be set for the parties to submit information to be considered during the evaluation process.

**II. Evaluation**

- A. In cases where evaluation of an activity within an 1875 Act Right-of-Way (ROW) is expected to be complex, the Bureau of Land Management (BLM) authorized officer may find that there is a need to involve other BLM or Department personnel, or individuals from other Federal agencies, as applicable. These personnel could include representatives from the BLM state/field office(s), the Solicitor's Office, and BLM Washington Office to provide technical and legal expertise as appropriate.
- B. The BLM will consider, among other things, the following factors for conducting the evaluation:
  - 1. The specific purpose identified in the 1875 grant, namely the exclusive use and occupancy of the area within the ROW for railroad purposes.
  - 2. The purposes of the activity being evaluated, with specific consideration given to how it relates to railroad purposes, including how it promotes

them and any inconsistency the activity may have with railroad operations.

3. That doubts as to whether a particular activity is within the scope are “are resolved for the government.”
4. Information provided by the activity’s proponent or the railroad ROW holder, to the extent they are not the same party, demonstrating why the specific activity is within the scope of an 1875 railroad ROW grant.
  - a. An activity “derives from” a railroad purpose if it comes from, originates, or issues from a railroad purpose. It “furthers” a railroad purpose if it promotes or advances the purpose.
  - b. For example, telephone lines have been found to derive from or further a railroad purpose even though they are not literally required to run a train because they provide for communication for the railroad along a rail line. Similarly, commercial freight warehouses have been found to derive from or further a railroad purpose because they facilitate a railroad’s receipt and delivery of freight.
  - c. It should be noted that activities found to derive from or further a railroad purpose may also provide substantial non-railroad benefits. For example, a telephone line could, in addition to providing rail line communications, also provide for personal and business phone calls. Similarly, a freight warehouse could also provide local freight handling services unrelated to the railroad. The existence of such non-railroad benefits does not preclude the activity from being found to derive from or further a railroad purpose. However, the nature and extent of those non-railroad benefits may inform the BLM’s determination of whether an activity derives from or furthers a railroad purpose. The BLM’s evaluation will be circumstance specific, e.g., did the railroad purpose drive the design or development of the activity in question? Is the non-railroad benefit the driver of the activity or its design? Is the design of the activity independent of either, such as for systems that come in a narrow range of configurations?
  - d. Any other information submitted by the railroad ROW holder or the party undertaking the activity under evaluation.
5. Information practicably available to the BLM about the relationship between the proposed activity and railroad purposes, including:
  - a. The current *Manual for Railway Engineering* (MRE), an annual publication of the American Railway Engineering and Maintenance Association, which contains recommended practices for the railway industry.
  - b. Engineering design standards applicable to the activity in question relevant to the geographical area(s) where it is located.

6. Any articles of incorporation, corporate charter, legal filings or publicly noted information that explains the purpose of the railroad company's operations.
  7. Applicable BLM Resource Management Plans or activity plans for the public lands in question, information in the LR2000 system, Master Title Plats, Historical Indices, historic maps, and the like.
  8. Any relevant case law or other legal guidance provided by the Solicitor's Office.
- C. Upon the completion of the evaluation process, a written recommendation will be prepared by BLM staff for the BLM Authorized Officer on whether the new/existing activity is within the scope of the 1875 Act ROW. In order to document the evaluation process, the recommendation will follow the following format:
1. A synopsis of the information submitted/gathered relating to the activity and the need for the evaluation (Issue).
  2. Identification/description of pertinent laws, cases, regulations, policy, and other guidance (including the MRE, with specific citations) considered in the evaluation (Guidance).
  3. Discussion of how the relevant "Guidance" was considered and applied to the information relating to the new/existing activity (Analysis).
  4. Recommendation, based on the analysis completed (Conclusion).
  5. The recommendation should include attachments, as necessary, to document and support information identified in the "Issue" and "Analysis" sections, and any other information that is helpful to document the evaluation process and the recommendation.

### **III. Authorized Officer's Consideration of the Recommendation**

- A. The BLM authorized officer will consider the recommendation and may conduct additional evaluation as deemed necessary to reach an informed determination.
- B. The BLM authorized officer is not bound by the recommendation and retains full authority to reach a determination on whether the new/existing activity is within the scope of the railroad ROW.

### **IV. Notification of the BLM Authorized Officer's Determination**

- A. A business letter will be sent to the railroad and the proponent of the activity providing notification of the determination that the BLM authorized officer has reached.
- B. The notification letter will:
  1. Provide the rationale for the determination that was reached;

- a. If the proposed project is found to be within the scope of the railroad ROW, the notification should explain that the BLM has no jurisdiction over the activity in question; or
  - b. If the proposed project is found not to be within the scope of the railroad ROW, the notification should explain that the proposed/existing activity requires BLM authorization, and should identify the applicable laws and process for obtaining such authorization.
2. Explain that the determination was reached based on the information provided by the railroad ROW holder and/or party undertaking the activity and any other information reasonably available to the BLM, and that if additional information becomes available regarding the activity or if information relating to the activity changes, an evaluation based on new information could result in a different determination by the BLM authorized officer. The notification letter should further note that where the BLM has already completed the evaluation process, the authorized officer may undertake additional evaluations as s/he deems appropriate and in the public interest given available agency resources (see e.g., 43 CFR 2803.22);
3. Notify the party receiving the letter that they have a continuing obligation to notify the BLM of new activities they might undertake within an 1875 Act ROW, as any determination made with respect to any particular activity is limited to the facts before the BLM at that time of such determination;
4. Explain that the determination is not a final agency decision and therefore not subject to appeal under 43 CFR Part 4 (BLM Manual Sections 1841.1.D. and 1841.15) because it does not determine any final rights or obligations, does not constitute authorization or disapproval of any particular activity, nor do legal consequences for the activity in question flow from that determination; and
5. Explain that proceeding with new activities or continued activities found not to be within the scope of the 1875 Act ROW without authorization from the BLM could result in the BLM instituting trespass proceedings.