July 2, 2003

The Honorable Gale Norton
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C.

Dear Secretary Norton:

I am writing to express my serious concern that the Department of the Interior ("DOI" or "The Department") is failing to fulfill its obligations as a steward of the nation's public lands in apparent violation of the law. My concern arises from recent and expected actions by the Department relating to the recognition of rights-of-way on federal land. These actions could suddenly make vulnerable millions of acres of land, including Federal lands protected as wilderness, national parks, national wildlife refuges, and national monuments. They will also threaten unreserved public lands which are ecologically valuable or have wilderness characteristics, are managed by other federal agencies such as the Departments of Defense and Energy, or are now in private ownership. Yet despite the potentially profound consequences of these changes, I am concerned that little information has been provided to the public about the Department's activities.

By way of background, the provision in question, Revised Statute 2477, was part of a law enacted in 1866 in response to settlers moving West and sometimes mining public land without authorization.[1] This provision granted a right-of-way "for the construction of highways over public lands, not reserved for public uses."[2] In ensuing years it became an important authority under which state and county highways were constructed and operated over federal lands throughout the western United States (along with other laws authorizing access or giving land grants for wagon roads).[3] It, along with many of the old land laws, was repealed in 1976 and replaced by a modern and comprehensive system for management of the public lands designed generally to retain the lands for

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[1] Mining Act of 1866.

[2] Act of July 26, 1866, ch. 262, 14 Stat. 251.

[3] Baldwin, CRS Report for Congress: *Highway Rights of Way: The Controversy Over Claims Under R.S. 2477*, January 15, 1993, updated April 28, 1993, 93-74A at CRS-3, 12-13 (hereinafter "CRS Report 93-74A").

public use.[4] (The Federal Land Policy and Management Act[5]) The RS 2477 rights-of-way were replaced with new provisions for granting rights-of-way which allow conditions to be imposed on the right-of-way, such as environmental protections and time limits.[6] As of 2001, 62,988 rights-of-way had been granted for various purposes under the new law.[7] But the old law remains in effect for rights-of-way which were established before 1976 and met the old law's requirements.

DOI's Bureau of Land Management (BLM) describes a right-of-way as a permit or an easement that authorizes the use of lands for certain specified purposes, such as the construction of a road.[8] Under the 1866 law, no formal application or approval from the government was necessary for the grant of the right-of-way to be completed. The history of the provision indicates that RS 2477 was intended to grant rights-of-way for "highways" in the sense of significant roads, and that they must have been constructed.[9] No one knows precisely how many rights-of-way were established under this law; indeed, claims are still being asserted to this day. However, the method of granting rights-of-way across public land changed dramatically with the passage of the 1976 law changing past practices and policies for managing the public's lands. Under the new law, state or local authorities, companies, and private individuals seeking to create a road across the public land must submit a formal application to the land manager, the Secretary of the Interior or Agriculture,[10] before being granted permission to do so. The new law also requires consideration of the environmental effects of granting the request.

I recognize the importance of fairly addressing valid claims which were established under the old law. However, what is at stake today is whether, by manipulating the standards for recognizing rights-of-way claims made under the 1866 law, the Bush Administration effectively gives broad permission for the development of federal land – even when the claims themselves may be flimsy and the damage to the environment caused by recognition of those claims may be profound. If the standards are systematically weakened as many in the Administration appear to prefer– by, as it were, loosening a series of legal screws that hold up the delicate framework protecting our public lands – the Administration would essentially open the public's lands to all comers, regardless of the validity of their claims to the land and regardless of the net environmental impact, and by doing so, distort the 1866 grant and undermine the purposes of the new law enacted in 1976. Roads and

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[4] *Id.* at CRS-3.

[5] 43 U.S.C. Sec. 1701 *et seq.*

[6] 43 U.S.C. Sec. 1761-1771.

[7] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics,* April 2002 at 71.

[8] *Id.* at 272.

[9] CRS Report 93-74A at 1.

[10] 43 U.S.C. Sec. 1761.

highways could be based on dubious claims, others seeking to develop federal land would be effectively invited to join in, and in some cases, the United States may give up entirely its legal interests in land, no matter how flimsy the claim. If, however, claims asserted under the old law are judged in a manner truly consistent with the letter and spirit of the law, only legitimate claims will be recognized with development of our federal lands proceeding in a more orderly, reasonable, and responsible fashion, as Congress expected when it enacted the 1976 law.

Existing highways constructed before October 21, 1976, under the old law's authority, continue to be recognized under the new law, and are referred to as "RS 2477 rights-of-way" (so-called "valid existing rights").[11] In a few instances, these RS 2477 highways are obvious– prominent roads with signs – but in others, they are not. In fact, there are few official records documenting the creation of these rights-of-way or indicating that a highway was constructed on federal land under the 1866 authority – as noted above, such highways were constructed without approval from the federal government and usually without documentation of the public land record. Thus, claims for such highways may surface decades later,[12] and at that point, a careful examination of the facts and sound judgement regarding the application of the appropriate legal standard is required to determine whether a piece of land is in fact subject to an RS 2477 right-of- way, a process which the Administration appears unwilling to undertake.

As of 1993, according to a Report to Congress regarding RS 2477 rights-of-way, 1,453 rights-of-way had been administratively recognized or judicially decreed to exist under the 1866 law across lands managed by DOI's BLM; two had been recognized in National Park units.[13] For many years after enactment of the 1976 land management law, few additional right of way claims were made under the repealed 1866 provisions.[14] Around 1988 there was an onslaught of additional assertions of claims, and claims at the BLM increased by thousands. Thus, in 1994, DOI proposed regulations to establish a more workable process for making binding determinations of the existence and validity of claims and for addressing inconsistent interpretations of the law's requirements.[15] However, this process was halted by Congressional action prohibiting the issuance of a final rule "pertaining to the

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[11] 43 U.S.C. Sec. 1701 note.

[12] U. S. Department of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands*, June 1993 at 35 (hereinafter "1993 Report to Congress").

[13] 1993 Report to Congress at 29.

[14] In fact, when the law was repealed in 1976, the Bureau of Land Management attempted to identify and recognize grants of rights-of-way that had been previously accepted. State and local governments that had constructed highways under the grant were encouraged to file maps with the BLM for notation on the public records, but most jurisdictions failed to reply. 1993 Report to Congress at 28.

[15] 59 *Fed. Reg*. 39216 (August 1, 1994).

recognition, management or validity of a right-of-way pursuant to Revised Statute 2477" unless authorized by Congress.[16]

I am very concerned that DOI's current approach fails to adequately protect our public lands. My first area of concern relates to changes, issued by the Department on January 6, 2003, to regulations which the agency has used for many years to resolve clear, uncontroversial title problems (the "disclaimer of interest" rule), and which will now be used to consider RS 2477 claims.[17] Under these procedures, in response to an application, the United States may declare that it has no legal interest in a piece of property. Previously, DOI issued only two or three disclaimers of this kind annually (and reportedly never for RS 2477 claims). But DOI has now broadened these regulations to expand the circumstances under which the "disclaimer" process will be used – thus making it a vehicle for processing RS 2477 rights-of-way claims,[18] and thereby circumventing the prohibition in law noted above.[19] My concern is that the disclaimer process may be used to unfairly concede Federal title to lands when proper title should be established by the Courts, or Congress.

There are several issues raised by these changes. First, they apparently do not provide for the thorough factual and legal determinations which occur when claims are filed under the Quiet Title Act (QTA), the only applicable law for resolving disputes over title with the United States.[20] Second, because the regulations limit who can appeal disclaimer decisions,[21] it seems that citizen groups cannot challenge a disclaimer issued for a RS 2477 claim, in contrast to their ability to appeal an administrative determination of a claim, under appropriate circumstances.[22] Third, under the revised regulations, which the Department says were changed to make them consistent with the Quiet Title Act, any entity

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[16] Pub. L. No. 104-208, Sec. 108, 110 Stat. 3009-200 (1996).

[17] 68 *Fed. Reg.* 494 (January 6, 2003).

[18] 68 *Fed. Reg.* 497- 498 (January 6, 2003) and U.S. Department of the Interior, *Memorandum of Understanding Between The State of Utah and the Department of the Interior On State and County Road Acknowledgment,* April 9, 2003, Item 4 of the stipulations and agreements (hereinafter "April 9 MOU").

[19] DOI explains in the notice accompanying the disclaimer rule that the prohibition does not apply. DOI states that the prohibition does not limit DOI's ability to acknowledge or deny the validity of RS 2477 claims and the revised regulations merely "define the administrative process by which an entity can apply for a recordable disclaimer of interest under section 315 of FLPMA." 68 *Fed. Reg.* 497 (January 6, 2002). At the request of Senator Bingaman, the Ranking Member of the Energy and Natural Resources Committee, the General Accounting Office is currently reviewing the Department's interpretation of the applicability of this provision.

[20] Baldwin, CRS Report for Congress, *Federal Lands,"Disclaimers of Interest," and RS2477,* Updated February 5, 2003, RS 21402 at CRS-4 (hereinafter "CRS Report RS 21402").

[21] The disclaimer regulations limit administrative appeals to "claimants" and "applicants." 43 *C.F.R.* Sec. 1864.4.

[22] *Southern Utah Wilderness Alliance (on reconsideration),* 132 IBLA 91 (February 21, 1995).

can file an application for an RS 2477 claim through the disclaimer process – including, for the first time, counties and other non-governmental entities regardless of whether the state agrees that the claim should be made– and counties and other state created entities can now make claims at any time, despite the limitation in the Quiet Title Act which provides that states are the only entities who can bring a lawsuit against the United States at anytime, free of the statute of limitation that applies to all claimants other than states under that act. Fourth, under the disclaimer regulations, a successful applicant may be obtaining a property interest in land that is greater than a right of way. Finally, there are questions regarding the legal basis for using the disclaimer of interest as a means of recognizing RS 2477 rights-of-way. Many of my questions relate to these changes and how the disclaimer process will actually be used to recognize rights-of-way under the old law.

My second area of concern centers on the Department's Memorandum of Understanding ("MOU") signed with the state of Utah on April 9, 2003, by which DOI agreed to utilize the procedures in the new disclaimer rule to acknowledge claims from Utah for RS 2477 rights-of-way. This agreement was reached without the benefit of public scrutiny. By its reliance on the use of the disclaimer of interest rule described above, it skirts the law prohibiting the Department from issuing rules pertaining to the recognition of existing claims without Congressional approval. At stake are priceless natural resources in the wilds of Utah, including the Grand Staircase Escalante National Monument. Further, there are many unanswered questions regarding the future for claims on lands currently excluded from the MOU and protected under a variety of Federal laws – including national parks and natural wildlife refuges – as well as your stated intention that this MOU will be used as a model for agreements with others.

My third area of concern relates to the Department's current interpretation of key terms contained in the repealed 1866 provisions, such as "highway" and "construction," in making determinations as to whether or not right-of-way claims are valid. How these terms are interpreted in implementing the April 9 MOU with Utah and any additional MOUs which may be negotiated, as well as in processing RS 2477 claims not subject to the MOU's, will impact significantly the determinations that are made. Draft guidance suggests that the Department may seek to establish interpretations of these words that will greatly expand the universe of claims which may be recognized by DOI as RS 2477 rights-of-way.

As noted, only limited information has been made available to the public regarding these actions and their impact on the public lands, therefore, I am requesting that you provide answers to the questions which are set forth below.

Extent of RS 2477 claims

A logical first question is, how many RS 2477 claims are there (both currently pending and expected to be submitted) and how are they affected by the Department's actions? It is not easy to get an answer to this question. In a January 14, 2003, briefing on the disclaimer rule, DOI officials

advised Senate staff that they could not provide information regarding the number of RS 2477 claims subject to the new disclaimer rule, suggesting that the number was not significant. Furthermore, DOI has not been forthcoming in responding to requests for information which it has in its possession. For example, it took a lawsuit and a court order under the Freedom of Information Act before DOI provided members of the public with maps of roads and trails on public land that Utah asserts are RS 2477 highway rights-of-way belonging to the state of Utah.[23] Furthermore, DOI has not provided information in response to specific Senate requests, including information requested at staff briefings in January and May of this year.

The facts suggest that the claims may be more numerous than DOI officials have acknowledged. In 1993 there were approximately 5,600 pending claims on file with the Bureau of Land Management nationwide, and 6 pending with the National Park Service.[24] The 1993 Report to Congress noted the difficulty of assessing the extent of claims, observing that claims may surface at any time. Since issuance of the 1993 Report to Congress, some states and counties have worked to identify and document what they believe are valid RS 2477 claims. For example, the State of Alaska has a project to research and adjudicate its claims, having to date identified more than 600 claims which it believes are RS 2477 rights-of-way.[25] According to an analysis prepared by the Department of the Interior in 1995, Alaska also asserted claims for the right to use land along section lines[26] ("section line easements") throughout the state, meaning that if all of these claims are determined to be valid, every square mile of public land would have a permanent easement for a road along its borders.

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[23] Davidson, "Interior is called less than truthful," *Deseret News*, January 23, 2003 at B10; Stempeck, "Interior Releases Details of Utah's Rights-of-Way Claims," *Land Letter*, April 3, 2003.

[24] 1993 Report to Congress at 29.

[25] Alaska Department of Natural Resources, Division of Mining, Land and Water, RS 2477 Project. http://www.dnr.state.ak.us/mlw/trails/f2477.htm. (visited March 20, 2003) (hereinafter "Alaska RS 2477 Project.") This is an increase over the specific estimates made in a 1995 Departmental analysis, which reported that the State of Alaska had identified 99 claims for public highways on 14 National Wildlife Refuges, most of which were listed as foot and dogsled trails, and identified 111 routes in which it believed constituted valid RS 2477 rights-of-way claims, with 52 more being analyzed. U.S. Department of the Interior, National Park Service, Alaska Regional Office, Memorandum from Field Director to Special Assistant to the Secretary, Re: RS 2477, October 27, 1995 at 1; U. S. Department of the Interior, Fish and Wildlife Service, Region 7, Memorandum from Regional Director to Special Assistant to the Secretary for Alaska, Re: Transmittal of Material on Impact of RS 2477 on Alaska Refuges, October 27, 1995, Attachment.

[26] Section lines are the result of the surveying system which was used to divide and dispose of public lands. As explained by the Congressional Research Service: "The federal government applied the same system of surveying since the Continental Congress passed the Land Ordinance of 1785. . . Under this system, a principal meridian, base, standard and guides were first measured and marked, and "townships" squares six miles on a side were surveyed. The township tracts were then divided into "sections" one mile on a side, each of which contained 640 acres (the amount of land allowed under the Stock-Raising Homestead Act of 1916)." These sections were then further divided into smaller allotments, either halves, quarters, or smaller divisions. CRS Report 98-74A at CRS-8.

This amounts to 300,000 miles of section line easements blanketing wildlife refuges,[27] and within national parks, north/south and east/west at approximately one-mile intervals, amounting to 170,995 miles.[28]

Utah has undertaken a similar project, on which DOI officials say the State has spent $8 million. With regard to the claims in Utah, a recent news report quoted one of the litigants in the Freedom of Information Act suit mentioned above as stating that the claims encompassed an estimated 100,000 miles.[29] The 1993 Report to Congress attributed 5,000 of the 5,600 claims pending at BLM to public lands in Utah. However, at a May 12, 2003 briefing of Senate staff, DOI officials stated that DOI had not received claims from Utah.

In January of this year, Moffat County, Colorado approved action to assert claims for more than an estimated 2,000 miles of roads, including claims in the Dinosaur National Monument, the Browns Park National Wildlife Refuge, and on Bureau of Land Management and National Forest land.[30] San Bernardino County, California, which is still identifying potential claims, has reportedly identified 4,986 miles of claims, more than 2,500 of which are in the Mojave National Preserve.[31]

Obviously, this information is an incomplete and patchwork description of pending or potential claims for RS 2477 rights-of-way. Accordingly, please provide the information requested below:

1. (A) Maps of all pending RS 2477 claims submitted to the Department of the Interior and its constituent agencies. If available, you may submit the information in electronic format.

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[27] U.S. Department of the Interior, Memorandum from Deborah L. Williams, Special Assistant to the Secretary for Alaska to John Leshy, Solicitor, Subject: Alaska RS 2477 Information, October 26, 1995.

[28] The total of 163 possible rights-of-way identified at the time included routes in Wrangell-St. Elias National Park and Preserve, Denali National Park and Preserve, Bering Land Bridge National Preserve, Yukon-Charley Rivers National Preserve, Gates of the Arctic National Park and Preserve, Glacier Bay National Park and Preserve, Katmai National Park and Preserve, Lake Clark National Park and Preserve, Klondike Gold Rush National Historic Park, Aniakcha National Monument, Cape Krusenstern National Monument, Kobuk Valley National Park, and Noatak National Preserve. U.S. Department of the Interior, National Park Service, Memorandum from Field Director, Alaska, to Special Assistant to the Secretary, Alaska, Subject: RS 2477, October 27, 1995 at 1-2.

[29] Stempeck, "Interior Releases Details of Utah's Rights-of-Way Claims," *Land Letter*, April 3, 2003.

[30] Moffat County, Colorado Resolution No. 2003-05, A Resolution Recognizing Rights-of Way Established Over Public Lands Under R.S. 2477, January 10, 2003; Moffat County's RS2477 Right of Way Claims, http://www.cowildernessnetwork.org/moffat.htm, (visited March 20, 2003).

[31] http://www.calwild.org/campaigns/rs2477.php Recently, the State of California submitted a letter to Secretary Norton expressing concerns that the use of the disclaimer of interest rule to allow RS 2477 highway claims "will have significant and unacceptable impacts on federally protection lands in California." Villamana, "Alaska, Col., look to stake rights-of-way claims under RS 2477," June 12, 2003.

(B) Based on formal and informal communications with potential claimants by DOI officials and officials of its constituency agencies – including any other relevant information submitted to DOI, its agencies, or seen by its officials – what is your expectation regarding the total number and extent of RS 2477 rights-of-way claims that will be made during the next three years? Please identify by state and county the number of and nature of claims that you have reason to believe may be submitted.

(C) How many of the claims that: (1) are pending, or (2) are likely to be submitted, are located in the areas which have been managed to protect wilderness values but which are no longer being so managed, due to the Department's April 11, 2003, settlement agreement in State of Utah v. Norton? [32] (In that case, DOI agreed with the State of Utah not to establish or manage certain lands throughout the western United States to protect wilderness values.)

(D) In view of the decentralized nature of DOI's operations, how can you be confident that the information provided in response to the foregoing three questions is complete?

(E) Please clarify the status of the 5,000 pending Utah claims which were reported to Congress in 1993.

Claims under the new disclaimer regulations

The preamble to the January 6, 2003, disclaimer rule states that after "adjudicating the claim, BLM may issue a recordable disclaimer of interest to disclaim the United States' interest in a highway right-of-way under RS 2477."[33] In the new rule, by greatly expanding the definition of "state," DOI authorized counties and non-governmental entities to make RS 2247 claims, regardless of whether the state agrees that the claim should be made. By so doing, it circumvented a 12-year statute of limitations for disclaimer of interest applications made by entities other than states. Departmental officials have stated that the changes were made to be consistent with the time periods under the Quiet Title Act. (That Act has a general 12 year statute of limitation with an exception for states.) However, as noted by a Congressional Research Service report, recent court cases have held that the exception in the 12 year statute of limitations for states is "to be interpreted narrowly, such that counties and other subdivisions of a state may not avail themselves of the exception."[34]

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[32] Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint, *State of Utah v. Norton*, (D. Utah, Central Div. 2003) (2:96CV0870 B).

[33] 68 *Fed. Reg.* 496 (January 6, 2003).

[34] CRS Report RS 21402 at CRS-4.

2. How many additional claims were made viable by the broadening of the language in the disclaimer rule allowing counties and others to make such claims?

3. The disclaimer regulation was also changed to provide that "*any entity claiming title* to lands" (emphasis added) may make an application for a disclaimer.[35] (Previously, the use of the disclaimer process was limited to the "present owner of record.")[36]

(A) This change would appear to have a significant impact, in particular in the case of RS 2477 claims. What is the effect of this change?

(B) What is the impact of allowing non-governmental entities to make a claim through the disclaimer process? Will they now be able to accept RS 2477 rights-of-way under the disclaimer provisions? If so, is there any limit to that entity's control over the use of the right-of-way? What is that limit? What is DOI's position regarding who would be the title holder of the RS 2477 right-of-way?

(C) According to a January 21, 2003 news article, a private organization had made three right-of-way claims, seeking motorized access across hundreds of miles of wilderness in California in Sequoia National Forest, through the King Range National Conservation Area on the north coast and in non-wilderness tracts in the Six Rivers National Forest.[37]

(1) What claims, or notices of intent to file claims, have been submitted by private organizations for these three areas?
(2) Have any additional claims or notices of intent been filed by non-governmental entities elsewhere on Federal lands since January 2002? If so, identify the location of the claim, the party, and the date on which the claim or notice was submitted.
(3) How will these claims be processed?

(D) Please describe the nature and extent of claims that will be processed under the disclaimer of interest rule. For example, according to news reports, Alaska recently became the first state to claim a riverbed using the rule, making a claim for 500 miles of the Black River.[38]

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[35] 68 *Fed. Reg.* 502 (January 6, 2003).

[36] 43 *C.F.R.* Sec. 1864.1-1(a) (Revised as of October 1, 2002).

[37] Cart, "Bush Opens Way for Counties and States to Claim Wilderness Roads," *Los Angeles Times*, January 21, 2003 at 1.

[38] The Associated Press, "Alaska stakes its claim to 500 miles of the Black River," *Anchorage Daily News, adn.com*, May 29, 2003.

(1) Will DOI be processing such claims under the disclaimer rule?
(2) If so, how many such claims are projected?

4. It is my understanding that prior to publication of the January 6, 2003 changes in the disclaimer of interest rule, of the 62 disclaimers issued under the disclaimer authority, none were in recognition of RS 2477 claims. If that is not correct, please identify specifically the claims that were recognized as RS 2477 rights-of-way and the date the disclaimer was issued.

Potential impact of claims on other lands

The West is characterized by a patchwork of land ownership, with land owned by private parties, the state, and the Federal governments often intermingled. A claim for a RS 2477 right-of-way highway over public land could also extend across land which was previously unreserved public land but which is now privately owned.

Private lands

An example of the potential problems on private lands is occurring in the State of Alaska. As part of its project to identify, document, and record its RS 2477 claims, the Alaska Department of Natural Resources identified claims crossing large parcels of land and it "notified over 8000 owners of smaller parcels. . . that it was planning to record rights of way crossing over their parcels."[39] However, "[p]ublic outcry from concerned land owners has curbed those plans. . . ."[40] While the state had not proceeded to record those rights, it did note that whether or not the RS 2477 route is recorded, a valid right-of-way exists and encumbers the property it crosses.

The Department's explanatory notice accompanying the changes made in the disclaimer of interest rule stated that the rulemaking did not apply to private or state lands and that it did not "anticipate that title to private land would be clouded by implementation of the final rule."[41] However, this explanation did not address the issues relating to private landowners who might be affected, as are the Alaska landowners, by a determination that a right-of-way traversed public land. Further, it did not discuss the interest of the U.S. Forest Service, which supported the changes in the disclaimer rule making it available for the RS 2477 process.[42] As noted in the 1993 Report to Congress, the Forest

[39] Alaska RS 2477 project.

[40] *Id.*

[41] 68 *Fed. Reg.* 498-499 (January 6, 2003).

[42] The Forest Service recommended a change in the proposed regulation. Letter to The Honorable J. Steven Griles, Deputy Secretary, Department of the Interior, Washington, D.C., from Dale Bosworth, Chief, U.S. Department of Agriculture,

Service considers the assertions of RS 2477 rights-of-way across private land as an important means for the Federal government to regain historic public access to federal land in some instances.[43] Thus, it appears that notwithstanding DOI's assertions, to the extent that the disclaimer of interest rule is used for processing RS 2477 claims, there are likely to be implications of the rule changes for private landowners.

5. (A) Private landowners and title companies did not submit comments on the proposed changes to the disclaimer of interest rule. On what did DOI base its assertion that it will have no affect on private landowners? What communications did DOI and its constituent agencies have with private landowners regarding these issues? When did these communications occur?

(B) In which states, besides Alaska, could this be an issue for private landowners?

(C) How and when will private landowners be notified regarding specific RS 2477 claims which could affect them and that are pending before DOI/BLM?

Lands managed by the military and the Department of Energy

6. (A) Both the military and the Department of Energy have facilities which are located on public land withdrawn from the public domain. In general, what are the implications of RS 2477 rights-of-way assertions for military installations and the Department of Energy?

(B) Identify those facilities which may be subject to RS 2477 claims, identifying the dates on which the currently effective withdrawals occurred and the dates of any previous reservations of the land.

Indian lands

7. (A) The January 6, 2003 disclaimer rule provides that BLM will not approve an application that "pertains to trust or restricted Indian Lands."[44] Reportedly, one of the maps of claims prepared by the State of Utah contains claims for RS 2477 rights-of-way across the Navajo Nation. Would the Department process such claims under any procedure other than the disclaimer of interest rule?

(B) In general, what are the implications for tribal sovereignty of RS 2477 claims?

Forest Service, Washington, D.C., April 2, 2002.

[43] 1993 Report to Congress at 15.

[44] 68 *Fed. Reg.* 502 (January 6, 2003).

Notification to the public and opportunities for public participation

The preamble to the revised rule notes that the existing disclaimer rule requires that BLM must file a notice of the application and the grounds supporting it in the Federal Register and publish an announcement in local newspapers at least 90 days before a decision is made.[45] Departmental officials have provided oral assurances to Senate staff that the public will have the opportunity to submit information regarding RS 2477 claims. However, the existing regulations are silent on the question of how, if at all, public comment will be taken into account in "adjudicating the claim." Further, the details regarding the nature of the information to be provided to the public are not clear, particularly with regard to how the adjudication will proceed, the nature of the information that will be available, and the role of public comment in adjudicating the claim.

8. (A) Please describe specifically the nature of the information which will be made available to the public for comment. Will this include all information in the possession of DOI and its constituent agencies that is relevant to the determination of the RS 2477 claims, as well as all information on which the claimant justifies its claim? How and where will this information be made available?

(B) Where in the decision making process will public notification and disclosure occur?

(C) How will public comment be taken into account?

(D) What is the procedure that the Department will follow in adjudicating these claims? Please describe in detail, with reference to applicable regulations or policies.

(E) Under the January 2003 disclaimer rule, only "*applicants* or *claimants* adversely affected by a written decision" may appeal a decision (emphasis added).[46] Citizens' groups report that they were previously able to file administrative appeals against RS 2477 rights-of-way determinations under DOI's general appeals regulations.

(1) If, as it now appears, appeals will not be allowed by individuals other than claimants and applicants, please explain why DOI made this change.
(2) How will individuals other than applicants or claimants, such as private landowners and interested members of the public who are affected, but not applicants or individuals making claims, be able to challenge DOI/BLM's determinations?

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[45] 43 *C.F.R.* Sec. 1864.2.

[46] 43 *C.F.R.* Sec. 1864.4.

(F) DOI determined that the changes in the disclaimer rule were not subject to an environmental impacts analysis under the National Environmental Policy Act, noting because the rule is "procedural in nature, therefore its environmental effect is too broad, speculative or conjectural to analyze."[47] Please explain the rationale for reaching this conclusion.

The disclaimer process and applicable standards

9. (A) Under the disclaimer of interest process, the Federal government apparently disclaims all interests in and ownership of the public lands. Why is the disclaimer process being used to resolve RS 2477 claims?

(B) Please explain the legal basis for concluding that an RS 2477 right-of-way interest can be "disclaimed" at all. Please submit a copy of all legal analyses of this issue, whether prepared by DOI or any other entity.

(C) When issuing RS 2477 disclaimers, how will BLM, which is responsible for issuing the disclaimers, word the interest being disclaimed?

(D) The 1993 Report to Congress described the procedure previously followed for administratively processing and recognizing RS 2477 claims. This process included, among other things, a review of historical records to determine whether the land had been unreserved as well as a field examination of the claims.[48] What will DOI/BLM do to verify the evidence that is submitted regarding each claim? Will it conduct field examinations?

10. (A) The April 9 MOU does not indicate what criteria will be used to determine the validity of RS 2477 rights-of-way, nor has DOI provided information to the public, the Congress, nor apparently even its own staff regarding the specific standards to be applied in making RS 2477 determinations under the April 9 MOU, future MOU's, or with respect to other claims. Please describe the standards that the Departmental/BLM officials will follow in making determinations for claims under the April 9 MOU, under any additional MOU's that may be negotiated, and for all other claims, whether processed under the disclaimer of interest rule or otherwise.

(B) Specifically, what definitions of the terms "highway", "construction", and "unreserved" (terms which appear in the RS 2477 statute) will apply?

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[47] 68 *Fed. Reg.* 502 (January 6, 2003).

[48] 1993 Report to Congress at 37.

(C) In processing RS 2477 claims, will the Department utilize the standards which were set forth in the brief submitted by the Justice Department on its behalf to the Tenth Circuit Court of Appeals in June 2001? (This criteria included evidence of actual construction, defined as the "act of building, or of devising and forming, fabrication."[49] It characterized a "highway" as "a public road; a way open to all passengers; so called, either because it was a great or public road, or because the earth was raised to form a dry path. Highways open a communication from one City or town to another."[50]) If this criteria will not be used, why not? What is being changed?

(D) Departmental officials were asked during the May 12, 2003, Senate staff briefing about a draft DOI document revoking a series of departmental documents relating to RS 2477 claims. (These include a 1980 DOI legal opinion addressing the applicable standards for determining whether highways were established and an 1898 Land Decision of Secretary Bliss.)[51] The draft document also contains new criteria for making RS 2477 determinations.[52] The officials who conducted the briefing did not answer questions regarding the document, asserting their unfamiliarity with it, but promised to provide information subsequent to the briefing. No such information has been forthcoming. Accordingly, please explain the status of this document and the substantive guidance contained therein.

(E) Roads and highways clearly had different definitions at the time the RS 2477 statute was enacted.[53] What is the reason for using the term "road" in the April 9 MOU rather than the statutory term "highway"?

11. With regard to the State of Utah,[54] the April 9 MOU revoked the policy issued by former Interior Secretary Babbitt regarding the treatment of RS 2477 claims. (The "Babbitt" policy provided that until final rules for the determination of RS 2477 claims were effective, the BLM

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[49] Brief of Federal Appellee, *Southern Utah Wilderness Alliance v. Bureau of Land Management*, (10th Cir. 2002) (No. 01-41173) at 51.

[50] *Id.* at 52.

[51] Draft Memorandum to Assistant Secretary, Fish, Wildlife and Parks, Assistant Secretary, Land and Minerals Management, Assistant Secretary, Indian Affairs, Assistant Secretary, Water and Science from Secretary Re: Departmental Policy for Revised Statute 2477, undated at 6.

[52] *Id.* at 7-10.

[53] CRS Report 93-74A at CRS-5-CRS-10.

[54] It stated: "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways: Revocation of December 7, 1988 Policy, dated January 22, 1997, shall be inapplicable to acknowledgment requests submitted in accordance with this MOU." April 9 MOU, Item 7, stipulations and agreements.

would not process RS 2477 assertions except in cases where there was a demonstrated, compelling, and immediate need to do so. It also revoked a 1988 policy issued by the Department under Secretary Hodel.)

(A) Does the "Hodel" policy – which contained minimal requirements for the creation of a highway (for example, that the removal of rocks and vegetation by hand or the passage of vehicles is adequate to determine that construction of a highway has occurred or that a qualifying highway could be a trail or a foot-path) – now apply to the claims which will be processed under the April 9 MOU? [55]

(B) Why did you repeal the "Babbitt" policy as to just some claims in one state? What is the rationale for having different standards in different states or even as to some claims within one state?

(C) Does the Department intend to reinstate the "Hodel" policy with regard to all RS 2477 rights-of-way claims?[56] What will be the impact of the reinstatement of this policy?

12. (A) What is the Department's view about the role of state law in the determination of RS 2477 rights-of way?

(B) Do you agree with recent court cases and the position taken by the Justice Department in the Tenth Circuit that state law cannot controvert the Congressionally established criteria for RS 2477 rights-of-way?[57]

13. As noted above, as of 1995, the State of Alaska had asserted claims for section line easements throughout the state, with the effect that about 300,000 miles of claims would blanket National Wildlife Refuges and 170,995 miles of claims blanket National Parks. What is the position of the Department with respect to section line rights-of-way that were not constructed as of 1976?

Implementation of April 9 MOU; negotiation of additional MOU's

Departmental officials advised during the May 12 briefing of Senate staff that the April 9 MOU was agreed to as a means of settling "potential litigation" in response to a notice of *intent* to sue. The

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[55] "Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477(Repealed), Grant of Right-of-Way for Public Highways (RS 2477)," December 7, 1988.

[56] *Id.*

[57] Brief of Federal Appellee, *Southern Utah Wilderness Alliance v. Bureau of Land Management*, (10th Cir. 2002) (No. 01-41173) at 56-59.

MOU states that "[f]or purposes of the Acknowledgment Process only," (referring to the process set up in the MOU) "neither the State nor any Utah county shall assert a right-of-way" for any roads in designated Wilderness Areas or Wilderness Study areas, within the boundaries of any unit of the National Park System, the National Wildlife Refuge System, or roads administered by any other Federal agency (unless the other Federal agency agrees).[58] However, on the face of this "settlement" MOU, Utah did not waive *any* of its claims, including the many claims that it has identified for rights-of-way in the areas which were excluded in the MOU. The MOU further provides that the State or a county may withdraw a claim from consideration under the disclaimer process at any time before it is actually disclaimed, without prejudice to the claim.[59] So that we may better understand how this MOU protects the public's interest in its lands, please answer the following questions:

14. (A) Has Utah waived any rights to any claims within the areas described above? If so, please provide the documentation. If not, what effort has the Department made to obtain such waivers?

(B) Does the Department of the Interior intend to contest claims which may be brought under the Quiet Title Act? If not, why not?

(C) Is the Department or the BLM continuing to negotiate with or discuss with the State of Utah and its counties claims that are not subject to the MOU? If so, please identify specifically the claims which are the subject of these discussions/negotiations.

(D) The standards for and the determination of a RS 2477 right-of-way are controversial, subject to litigation in the courts. DOI itself has not agreed on the appropriate standards. By what criteria will DOI/BLM decide which claims are not controversial and suitable for processing through the MOU's acknowledgment process (using the disclaimer process) and which should be decided by a court under the Quiet Title Act?[60]

(E) What is the total number of Utah claims that you expect will be processed in accordance with the April 9 MOU? How many are currently being processed?

(F) Since Utah did not give up any of its claims in the areas such as that were excluded from the MOU, how will Utah's claims for RS 2477 highways in these lands be processed?

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[58] April 9 MOU, Item 2, stipulations and agreements.

[59] April 9 MOU, Item 10, stipulations and agreements.

[60] The Department has stated that the MOU will be used for "acknowledging those R.S. 2477 rights-of-way that are unquestionably part of the State's transportation infrastructure." Department of the Interior, Fact Sheet, "Memorandum of Understanding: Department of the Interior and State of Utah, Resolution of R.S. 2477 Right-of-Way Claims," undated.

(G) How are the 5,000 Utah claims that were pending at the BLM in 1993 being processed?

15. DOI has encouraged others to negotiate MOU's.

(A) Please identify all states and counties that are currently discussing a MOU with DOI, or who have expressed an interest in negotiating an MOU on RS 2477 claims.

(B) How many claims are potentially subject to each of these MOU's?

(C) A January 2003 news report stated that the Deputy Secretary "recently told a group of Alaska mining and energy executives that the administration would soon approve rights-of-way claims from that state."[61]

(1) What is the status of the Department's negotiations with Alaska for the approval of these claims?
(2) According to a recent news report, the state of Alaska plans to present a memorandum of understanding to DOI.[62] Will these claims be processed in accordance with the MOU being prepared by Alaska? If not, how will the claims to which the Deputy Secretary referred be processed?
(3) Identify all Alaska claims which have been administratively recognized or for which a disclaimer of interest has been issued since January 2003.

16. The April 9 MOU states: "In cases where the State or a county wishes to substantially alter a road that is subject to the Acknowledgement Process in a way that is outside the scope of ordinary maintenance, it will do so only after notifying BLM of its intentions and giving BLM an opportunity to determine that no permit or other authorization is required under federal law; . . . ."[63] Under what circumstances can BLM allow activities "outside the scope of ordinary maintenance" without permits or public involvement? Please identify the relevant legal authorities.

MOU and public disclosure of information

As noted above, it was only after a Federal court issued an order that the DOI released information to the public regarding the claims made by the state of Utah for rights-of-way on the public

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[61] Cart, "Bush Opens Way for Counties and State to Claim Wilderness Roads; Policy could allow vehicles into vast areas of wilderness, some in national parks. Critics fear harm by miners, off-roaders and others." *Los Angeles Times*, January 21, 2003 at 1.

[62] "Alaska, Colo., look to stake rights-of-way claims under RS 2477," *Land Letter*, June 12, 2003.

[63] April 9 MOU, Item 6, stipulations and agreements.

domain. The April 9 MOU contains a provision regarding information to be disclosed to the public under the MOU: "Activities under this MOU and any implementing agreements shall be conducted in accordance with mutually-agreed upon plans for the classification of information by the State, for the review and release of information, and for cooperation in the preparation of any and all reports to Congress."[64] (It further states that the release of information will be in accordance with applicable law.)

17. (A) Critics assert that the language quoted above is little more than a continuation of the Department's pattern of refusal to provide information to the public regarding claims made against the public's lands. What are the plans for the classification, review of, and release of information?

(B) Critics also assert that the failure of the Department to respond to requests from the public for information regarding the claims being made by the state as well as the secret negotiation of the April 9 MOU is inconsistent with your stated commitment to "consultation, cooperation, and communication" with the stakeholders of public lands. How do you respond to this criticism?

Recovery of administrative costs of processing claims

At the time of its 1993 Report to Congress, DOI estimated the costs of making administrative determinations regarding claims to be between $1,000 to $5,000 per claim.[65] These costs included processing claims, reviewing historical records to determine whether the land had been unreserved, and field examinations of the claims of rights-of-way.[66]

18. The disclaimer rule provides that the applicant must submit a deposit in the amount BLM determines is necessary to cover the administrative costs of processing the application.[67]

(A) What is the current estimate of the cost to the government of making administrative determinations regarding claims?

(B) How will BLM determine costs for each application? Please submit copies of the applicable guidance regarding the determination and collection of this deposit.

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[64] April 9 MOU, Item 12, stipulations and agreements.

[65] 1993 Report to Congress at 37.

[66] These costs exclude costs associated with litigation and management of the right-of-way once it is recognized.

[67] 43 *C.F.R.* Sec. 1864.1-3(d).

19. The disclaimer of interest rule also requires a claimant to submit a $100 application fee. Potential claimants objected to the $100 application fee because, they said, they planned to submit hundreds of claims. In response, in issuing the final rule, BLM noted that it may waive the application fees.[68]

(A) What constitutes an application? Must a separate application be filed for each claimed RS 2477 rights-of-way?

(B) Under what circumstances would BLM waive the fees? What is the basis for waiving application fees?

Rights-of-ways granted under existing statutory authorities

Title V of the Federal Land Policy and Management Act contains procedures for the grant of rights-of-way, a process designed to replace RS 2477 as the legal authority for acquiring rights-of-way across public lands. 62,988 rights-of-way have been granted for highways and other activities such as electric transmission, pipelines, and fiber optic cables.[69] In addition, road and highway rights-of-way are granted across federal lands under other authorities contained in the Federal Highway Administration Act (FHA) and the Mineral Leasing Act (MLA).

19. (A) Please identify, by state, the number of rights-of-way granted for roads and highways under the authorities contained in FLPMA since 1976.

(B) How many rights-of-way on public domain, on a state by state basis, have been granted across the public domain under authorities contained in FHA and the MLA? If these statistics have not been compiled, please describe what is required to collect this information.

(C) *The New York Times* recently reported that the Governor of Utah had stated that the roads agreement (the April 9 MOU) was "vital for the state to maintain a transportation system that would serve, among others, outbackers eager to get closer to wilderness areas they cherish."[70] Please identify specifically the requests for rights-of-way by the state of Utah for construction of roads across the public domain which have been denied by BLM, indicating the location, the purpose of the road, and the reasons for the denial.

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[68] 68 *Fed. Reg.* 499-500 (January 9, 2003).

[69] *Supra*, note *7*.

[70] The quotation appears in a story regarding both the April 9 MOU and the settlement of a lawsuit regarding the designation of wilderness areas and appears to refer to the April 9 MOU. Michael Janofsky, "U.S.-Utah Land Accord Incites Unlikely Critics," *The New York Times*, May 23, 2003, A-18.

I look forward to receiving the answers to these questions. Your responses will shed light on the effectiveness and efficiency of the DOI in the administration of its responsibilities under the Federal Land Policy and Management Act.

Sincerely yours,

Joseph I. Lieberman
Ranking Member

JIL:kjs
cc: Director, Bureau of Land Management