August 23, 2005

Mike Pool
Director, California State Office
Bureau of Land Management
U.S. Department of the Interior
2800 Cottage Way, Suite W-1834
Sacramento, California 95825

Re: Concerns, Questions, and Request for Meeting Regarding Instruction Memorandum No. 2005-185 and Disclaimers of Interest – Guidance for Processing Applications for Valid R.S. 2477 Highways

Dear Mr. Pool,

We are writing to express our deep concern regarding the recent documents "Instruction Memorandum No. 2005-185 and Disclaimers of Interest – Guidance for Processing Applications for Valid R.S. 2477 Highways" issued by the Department of Interior on July 14, 2005.

The Bureau of Land Management's new guidance sets out a step-by-step process for State, counties, and other municipal agencies to enter into Memoranda of Understanding (MOU) in order to obtain ownership of routes on federal lands. With little or no public input, the guidance permits a largely secretive process that fails to ensure the long-term protection of public land. It also excludes review under the National Environmental Policy Act and would appear to fundamentally weaken the standards for determining legitimate R.S. 2477 highways across federal public land. The guidance puts millions of acres of prized California landscapes at risk. In addition, the guidance is often unclear, vague or contradictory.

We request to meet with you in the near future to discuss our concerns and implore you to actively guard California's unique lands and waterways from this precedent-setting process. Prior to that meeting, though, we would like to present a number of questions and concerns regarding the substance and implementation of the guidance as it pertains to California's federal public lands.

1. The Instruction Memorandum and guidance frequently state: "For purposes of implementing the MOU, no application for disclaimers will be processed by BLM for roads within Congressionally designated Wilderness Areas or Wilderness Study Areas designated on or before October 21, 1993, under section 603 of FLPMA, or roads within the boundaries of any unit of the National Park System or any unit of the National Wildlife Refuge System."

We understand this to mean that all National Park units, National Wildlife Refuge units, and Congressionally designated Wilderness would be protected from disclaimers of interest negotiated through this MOU process. In addition, those Wilderness Study Areas (WSAs) created pursuant to

Section 603 of FLPMA prior to October 21, 1993 would also be so protected. As you know, certain Wilderness Areas and WSAs were designated by the California Desert Protection Act (CDPA) in October of 1994. The BLM manages extraordinary desert wild lands as Wilderness and WSAs under the CDPA. As you are well aware, San Bernardino County has been quite aggressive in its pursuit of R.S. 2477 claims in many of those lands. We assume that these Wilderness Areas and WSAs would be protected under any MOU in California. If BLM has a different interpretation of the guidance, we would appreciate hearing it as soon as possible.

Moreover, the California BLM manages other critical lands including: the millions of acres in California managed by BLM as wild and scenic rivers, National Monuments, National Conservation Areas, other units of the National Landscape Conservation System, and important habitat for endangered and threatened species.

In negotiating MOUs, how will the BLM address NLCS units and other critical resource lands?

2. The guidance is explicit and detailed in the general public's limited opportunities to participate in the MOU process. For example:

- The public is provided with no opportunity whatsoever to participate in or comment upon the process through which an MOU is negotiated. [1]
- While the public has 60 days to comment on an application for disclaimer after the agency posts formal notice, the county or other state entity can "pack the record" by working with the agency before the public is even advised and then continue to submit new information supporting its claim long after the public comment period has ended.[2]
- The guidance states that the public has no right to appeal the decision to DOI.[3]
- BLM need not notify the public of its decision or formally reply to the public concerning public comments.[4]

Considering the strong expression of public support for the CDPA, demonstrated throughout the desert during its 10th anniversary events last year, it is ironic that the BLM appears poised to enter into closed-door negotiations regarding public lands in the desert.

How will the California BLM office address this issue of restricted public participation? We note that while the guidance does not provide for any public involvement in the development of any

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[1] Guidance at Attachment at 1-1 – 1-2 (containing no provision for public involvement of any MOU) (available at http://www.blm.gov/nhp/efoia/wo/fy05/im2005-185attach1.pdf).

[2] Id. at 1-6 (providing for BLM to public notice in the Federal Register upon receipt and "at least 90 days before BLM issues a decision"); id at 1-5 ("application may be supplemented by the applicant at any time during BLM's processing of the application"); id. at 1-6 (providing public 60 days in which to comment on original application only).

[3] Id. at attachment 1-6 ("only the applicant of claimant has the right to appeal a decision on the application").

[4] Id. at 1-7 (requiring that any BLM decision be forwarded only to the applicant); id. at 1-6 (response to public comment will only be "placed in the case file").

MOU, it does not specifically prohibit such involvement. We therefore specifically request that California BLM commit that the public will have an opportunity to review and present comment to California BLM on any draft MOU before California BLM approves any such agreement and that the agency will respond to all public comments. Will California BLM commit to providing such public involvement?

Similarly, the public notice and comment requirements concerning individual disclaimer applications appear to set a floor, and not a ceiling.[5] We urge California BLM to commit to publishing a draft determination on each disclaimer application after it has received initial public comment, and permitting the public to comment on that draft determination. Such a process is consistent with the process approved by Utah BLM in evaluating alleged rights-of-way in the late 1990s, and would ensure that the public understands how BLM intends to weigh the evidence before it prior to the agency making a decision.[6] Will California BLM commit to providing such public involvement?

3. BLM's national guidance appears to empower any state governmental entity to seek an agreement to claim a trail is a "highway" over important public lands.[7] Will the new national guidance allow agencies to ignore or bypass governors? Is this the intent of the guidance?

R.S. 2477 rights-of-way are a concern to the state of California. Private entities have asserted rights-of-way in Jedediah Smith Redwoods State Park and Anza-Borrego Desert State Park. In 2003, the California State Resources Agency informed the Department of Interior of its objections to the disclaimer rule. Will the California BLM office involve the State Resources Agency and California's Congressional delegation in the MOU negotiation process?

4. Even with the exclusion of the protected lands of Wilderness Areas, Wilderness Study Areas, National Parks, and National Wildlife Refuges, many of California's cherished lands will be up for grabs with this guidance including National Conservation Areas and National Monuments. Under the guidance, even places like the Lost Coast could be considered for disclaimers in an MOU process. The Blue Ribbon Coalition has claimed 100 miles of supposed "highways" in the King Range National Conservation Area. The BLM has been very supportive of designating over 40,000 acres of the King Range's Lost Coast as Wilderness by HR 233, the Northern California Coastal Wild Heritage Wilderness Act. At a July House of Representatives Forests and Forest Health Subcommittee of the Resources Committee Chad Calvert, Deputy Assistant Secretary of the Interior, said "this area would truly be a crown jewel of the wilderness system."[8]

In negotiating MOUs, how will the BLM address potential wilderness areas before Congress? And how will BLM address claims in National Monuments, wild and scenic rivers, National Conservation Areas and historic trails? Will California BLM attempt to protect these areas by omitting them from lands where claims can be made in California?

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[5] Id. at Attachment 1-6.

[6] See Instruction Memorandum No. UT 98-56.

[7] Id. at Attachment 1-1 (encouraging states or "appropriate political subdivision (e.g., County)" to submit applications); id. ("other political subdivisions of the State may also file for disclaimers").

[8] Bureau of Land Management, Statement of Deputy Assistant Secretary Land and Minerals Management, available at http://www.blm.gov/nhp/news/legislative/pages/2005/te050714.htm.

5. The guidance does not say that the process is limited to claims that everyone would agree are highways, such as major routes which are constructed and maintained to a certain safety standard. In fact, the guidance appears to expand, rather than limit, what can be given away as a "highway" in several ways:

- BLM's guidance uses the term "road" and "highway" interchangeably, although R.S. 2477 itself grants only rights-of-way where "highways" – a higher standard than "road" – have been constructed.[9]
- BLM's guidance requires that the route "was and continues to be public and capable of accommodating automobiles or trucks with four wheels," where current law requires actual construction of the highway.[10] Conversely, the Bush Justice Department has previously supported current law, arguing in the federal court that the "mere passage of vehicles" cannot by itself constitute construction of a highway.[11]
- BLM's guidance could be interpreted to require the Department of the Interior to repudiate its current interpretation of key terms of R.S. 2477 and re-adopt the "Hodel Policy" from 1988. The guidance effectively revokes a policy directive from prior Secretary of Interior Bruce Babbitt that revoked the Hodel Policy.[12] The Hodel Policy defines "construction" of a "highway" to include the "[r]emoving high vegetation [or] moving large rocks out the way."[13] Such an interpretation could permit cow paths and pedestrian trails to qualify as "constructed highways" for give-away to state entities under R.S. 2477.

This is a crucial issue. The California Wilderness Coalition, Desert Survivors, National Parks Conservation Association, Sierra Club, and numerous other concerned San Bernardino County residents have ground-truthed almost the entire 5,000 miles of R.S. 2477 asserted by the County. This inventory includes detailed maps and photographs of each of these claims, documenting the thousands of miles of mythical "highways," many of which are little more than faded tracks to nowhere.

What is the definition of "road" or "highway" that BLM will ultimately use in this MOU process? What is the definition of "construction" that BLM will ultimately use in this MOU process?

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[9] See Instruction Memo 2005-185 (available at http://www.blm.gov/nhp/efoia/wo/fy05/im2005-185.htm) and Guidance.

[10] Guidance at Attachment 1-4.

[11] See Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 01-4173 (June 2002) at49-54; Brief of Federal Appellees, Southwest Four Wheel rive Ass'n v. BLM, Tenth Cir. No. 03-2138 (Oct. 15, 2003) at 37-41; and Brief of Federal Appellees, SUWA v. BLM, Tenth Cir. No. 04-4071 (August 2004), at 47-52.

[12] See Guidance at Attachment 1-3 ("the requirements for [R.S. 2477] determinations under the [Babbitt Policy] will not apply".

[13] See Hodel Policy, available at http://www.rs2477.com/documents/12-7-88_memo_from_Assist._Sec._of_Fish_and_Wildlife_to_Secretary_of_Interior.pdf.

6. BLM's guidance states explicitly: "BLM's processing of the [disclaimer] application … is not subject to … the National Environmental Policy Act, section 106 of the National Historic Preservation Act, or section 7 of the Endangered Species Act."[14] The Instruction Memorandum states that: "an agency will not recommend that a claim be approved if it is not in conformance with State law."[15]

Will the BLM reject any claim that does not have documented compliance with the California Coastal Act, California Endangered Species Act, California Environmental Quality Act, Porter-Cologne Water Quality Control Act, California Public Resources Code 5024 and 5097.9, and other pertinent state laws? In addition, will the BLM reject any claim that does not comply with the Brown Act, California Public Records Act, and other applicable good government laws? And what process will BLM use to ensure that issuing recordable disclaimers of interest will not result in violations of all of these State laws?

7. The guidance says nothing about what happens to routes once they are given away to a state or state entity. The guidance does state that any new agreement "must follow the general format that was used" in the Utah-DOI 2003 agreement.[16] That agreement says that "[i]n cases where the State or county wishes to substantially alter a road that is subject to the Acknowledgment Process that is outside the scope of ordinary maintenance, it will do so only after notifying BLM of its intentions and giving BLM the opportunity to determine that no permit or other authorization is required under federal law. . . ."[17] The Utah agreement does not prohibit the development, realignment or improvement of these routes, and it does not lay out a process by which the public would have any opportunity to participate in determining whether a permit or other authorization is required to change the character, alignment or use of these routes. It also fails to require any review of environmental impacts before such road upgrading could occur. BLM could simply send a letter to the county with a simple "go ahead."

Will the BLM require that route alterations comply with applicable federal and state environmental laws? If so, how will it do so? Will it issue additional guidance? If so, when?

As we have stated many times before, we believe the disclaimer rule issued in 2003 is illegal. Thus, the guidance would use an illegal process to adopt agreements similar to the illegal Utah-DOI MOU. The General Accounting Office, Congress's non-partisan investigative arm, has already determined that the Utah-DOI MOU – which BLM's guidance encourages other states and state entities to clone – is illegal.[18] The recordable disclaimer of interest process created by Congress in the Federal Land Policy and Management Act (FLPMA) was not intended to be used to give away rights-of-way across public land. Congress intended the disclaimer process as a way of clearing private title to land in which the Federal Government had no legal interest. See 43 U.S.C. § 1745.

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[14] Guidance at Attachment 1-7.

[15] Instruction Memorandum at 2.

[16] Guidance at Attachment 1-1.

[17] State of Utah-DOI MOU (April 9, 2003) at 3-4 (available at www.rs2477.com/documents/MOU_Utah_DOI.pdf).

[18] See GAO Report B-300912 (Feb. 6, 2004) available at http://www.rs2477.com/documents/GAO_Opinion_2_6_04.pdf.

Use of the provision – as recently revised through controversial regulations issued by the Interior Department – for R.S. 2477 claims is inappropriate and illegal. The 2003 disclaimer regulations – squarely aimed at relaxing the standards by which states, counties, and other parties could be granted rights-of-way – also violates a 1997 Congressional mandate that prohibited the Interior Department from issuing final regulations concerning R.S.2477.

We hope that this letter begins a constructive dialogue with your office on the potential use of the disclaimer rule in the state. We understand that discussions have already occurred over the last two years between the California BLM office and San Bernardino County with regard to an MOU for that County. What is the current status of those negotiations? And would you please share with us any correspondence between California BLM and San Bernardino County related to R.S. 2477 claims in the County generated, modified, or acquired by the California State BLM office since January 1, 2004?

Again, we would like to meet with you soon to discuss our concerns. Please let us know if you need more information. Prior to our meeting with you, we anticipate that you will answer these questions in this letter.

Sincerely,

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