MEMORANDUM

TO: Interested Person

FROM: Ted Zukoski, Earthjustice (303-996-9622, tzukoski@earthjustice.org)

DATE: October 7, 2003

RE: **Interior Department Sep. 22 Response to Lieberman on R.S. 2477 Policy Letter Has Interesting Discussion, Omissions.**

On September 22, the Interior Department responded to Senator Joe Liebreman's September 23, letter concerning R.S. 2477 policy. On the whole, the Department of the Interior's (DOI's) letter fails to respond, responds evasively, or responds to questions not asked on many occasions. However, even some of these non-responsive answers are a window onto DOI's thinking.

Below find a brief summary of my thoughts on the document. The DOI's letter can be viewed at http://www.highway-robbery.org/documents/9-22-03_letter_to_Lieberman.pdf

Other governments are expressing an interest in a DOI agreement on processing R.S. 2477 claims under the disclaimer rule. Aside from Colorado and Alaska, Idaho, Oregon and San Bernardino County have "expressed interest in working with the Department." See letter of R. Watson, DOI to Sen. J. Lieberman, Sep. 22, 2003 at 1, 13.

DOI refuses to speculate on avalanche of claims to follow, or future actions. DOI simply refuses to estimate the number and impact of potential R.S. 2477 – or any other activity that may happen in the future. Id. at 2, 5.

DOI answers questions about R.S. 2477 and the Disclaimer Rule by talking about the Utah Memorandum of Understanding. In many cases where DOI was posed a difficult question about how it would treat certain R.S. 2477 issues, it refers not the law, or the Disclaimer Rule, but to the Utah-DOI Memorandum of Understanding (MOU). See, e.g., response to questions 6(a) and 6(b), id. at 6.

Claims by those seeking to obtain title on behalf of others. Sen. Lieberman asked several questions involved how non-governmental entities – those not alleging an interest in rights-of-way in themselves – would be treated under the Disclaimer Rule. On the whole, DOI simply refused to provide responsive answers to these questions. See id. at 3-4.

Disclaimer Rule previously used for rights of way? DOI states that "Interior has never issued any recordable disclaimers of interest for R.S. 2477 rights-of-way. However, a number of recordable disclaimers of interest have been granted for rights-of-way created by other Federal laws." Id. at 5. DOI failed to provide any information about what these cases involved.

Impacts of Disclaimer Rule on private landowners, DOD, DOE and tribal lands. DOI essentially refuses to answer questions about the potential impacts of the Disclaimer Rule on private

landowners, on DOD or DOE facilities, or on tribal lands, again discussing the MOU as opposed to the Rule. Id. at 5-7. DOI does say that the only notification landowners may receive of claims adverse to their property interests will be through notice in the Federal Register. This may be of interest to some of our private landowner friends.

Public comment limited to 60 days, applicant will get to review them. In response to a question on public comment on disclaimer applications, DOI states that the public has 60 days to comment. This tracks the Utah MOU, but apparently contravenes practice in Alaska (which allows 90 days). DOI also states that "BLM, in consultation with the applicant, will review all timely comments." This seems an unprecedented way for an agency to address comments. DOI will not respond directly to comments, but will "address" comments in the casefile (which means DOI's responses won't be made public unless someone specifically requests them). Id. at 7.

The public must go to federal court to challenge agency decisions. While the letter repeatedly touts the Disclaimer Rule's provision for public comment, the agency admits that the only way for the public to challenge a decision is to go to court (where DOI implies that it may challenge standing). Id. at 8.

What triggers NEPA review? DOI states that where an applicant wants to "substantially alter" a right-of-way (ROW), that it must notify BLM, but that BLM could permit the "substantial alteration" to go forward without permits or further public or environmental review. Id.

DOI will not commit to verifying the evidence submitted in support of disclaimers. DOI will review applications and "determine the need" for on–the-ground inspections, but other than that fails to commit to verifying the evidence submitted. Id. at 9.

DOI refuses to take any position on standards for addressing rights-of-way. DOI essentially refuses to provide a substantive response to any question concerning what standards will govern the approval of R.S. 2477 ROWs under the Disclaimer Rule. DOI argues that no standards are needed in Utah, because the MOU "is designed to address those roads for which there is no legitimate debate about their legal sufficiency." Id. at 10. This is the agency's response with respect to virtually every questions about standards. DOI also states that the MOU uses the word "road" instead of the legal term "highway" "in an attempt to avoid a counter-productive debate." Id. at 11. DOI does state that it is not using the Hodel Policy, but refused to answer whether it would reinstate that policy. Id. at 11. DOI also refused to agree with the proposition that state law cannot contravene Federal criteria for the establishment of R.S. 2477 ROWs. Id. at 12.

Future MOUs will protect Parks, Refuges, wilderness and WSAs. "The Utah MOU provides explicit protection for these conservation units. Interior will also impose this condition on any MOU negotiated outside the State of Utah." Id. at 11.

Role of state law is "crucial" but undefined. DOI states that state law is a "crucial tool in both interpreting and applying R.S. 2477," but fails to say how. Id. at 12.

DOI refuses to rule out section lines as a basis for rights-of-way. Id.

DOI is not negotiating claims with Utah outside the MOU, and not negotiating any other MOUs. Id. at 12, 14 (not negotiating MOU with "any particular party" including Alaska).

No guidance on MOU's use of term "ordinary maintenance." The Utah-DOI MOU permits ROW holders to undertake "ordinary maintenance" without public notice, review, environmental disclosure or permitting. DOI refused to clarify what "ordinary maintenance" might mean, stating that the issue would be addressed "on a case-by-case basis." Id. at 14.

Conservation groups should be happy. DOI states that the Utah MOU does not show that DOI has abandoned the 4Cs because DOI met with conservation groups, the agreement excluded National Parks and other areas, and the MOU provides a process for participation short of litigation. Id. at 15.

Cost issues. DOI states that it cannot wave cost reimbursement provision of the Disclaimer Rule, and, thought it could wave the application fee, "it is Department policy not to waive application fees." Id. at 15-16. DOI, however, fails to explain whether an applicant could reduce its financial exposure given the requirement that a request for disclaimer be accompanied by a $100 application fee by bundling many R.S. 2477 ROW claims in one "application." Id. at 16.

Where in Utah has BLM denied a state right-of-way request? DOI completely dodges this question. Id. at 17.