

FACT SHEET

BLM ISSUES NEW GUIDANCE EASING RECOGNITION OF BOGUS HIGHWAY CLAIMS ON 240 MILLION ACRES OF PUBLIC LAND

On July 18, 2005, the Bureau of Land Management (BLM) issued new guidance inviting States, state agencies, and counties across the West to seek agreements with the Department of the Interior (DOI) that will ease the recognition of bogus highway rights-of-way across America's public lands – including National Monuments, Wild and Scenic Rivers, and National Conservation Areas – under an ancient, repealed loophole known as R.S. 2477. The deals will be modeled on a “Memorandum of Understanding” (MOU) secretly negotiated between Utah and DOI in 2003 and will make use of BLM's revised regulations providing for the federal government to disclaim its legal interest in lands.

In sum, BLM's new guidance sets out a step-by-step process for State, counties and other municipal agencies to enter into MOUs and submit relatively flimsy claims of ownership to routes on federal lands. BLM's actions encourage dozens of secret, back-room deals that fundamentally weaken the standards for determining what is a legitimate state or county road across federal public land, and puts 240 million acres of National Monuments, Wild and Scenic Rivers, wilderness study areas, and other public lands at risk.

BLM's guidance endorses secret, back-room deals devoid of public involvement to determine how public lands across the West will be given away.¹

- BLM's guidance encourages States and other local governmental entities to seek agreements to grab public lands, but provides for no citizen involvement in the creation of such deals. These kinds of secret, back-room deals have received bipartisan criticism, including from the Republican Governor of Colorado who said that he “strongly object[s]” to such a process.²
- BLM's guidance provides that the agreements themselves will establish a process that renders public input so limited as to be virtually meaningless in processing specific claimed “highways” under R.S. 2477. For example:
 - o While the public has 60 days to comment on an application after the agency posts formal notice, the state or 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.³

¹ Guidance attached to Instruction Memo 2005-185 (Guidance) at Attachment 1-1 – 1-2 (establishing process for negotiation of Department of Interior-State agreements; providing for no public involvement in establishing such agreements), available at <http://www.blm.gov/nhp/efoia/wo/fy05/im2005-185attach1.pdf>.

² See letter of Gov. Bill Owens (Aug. 12, 2003) (criticizing the Utah-DOI agreement as “accomplished in secret, closed door meetings with no public process whatsoever”) (available at http://www.rs2477.com/documents/8-12-2003_letter_from_Governor_Bill_Owens.pdf); see also statement of Sen. Joseph Lieberman criticizing the Utah-DOI deal at <http://lieberman.senate.gov/press/03/04/2003410616.html>.

³ Guidance at Attachment 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

- The guidance states that public has no right to appeal the decision to DOI.⁴
- BLM need not notify the public of its decision or formally reply to the public concerning public comments.⁵

BLM opens the door for every state, county and/or state agency to seek to take America’s public lands.

- BLM’s guidance will empower ANY state agency – a city, state liquor board, or barber and cosmetology licensing office – to seek an agreement to claim a trail is a “highway” over important public lands.⁶ The previous MOU with the State of Utah provided for county claims to be submitted under that agreement and did not explicitly provide for numerous MOUs and a corresponding number of disclaimer processes to go on at the same in one state.
- BLM’s guidance will allow agencies to ignore or bypass governors who want to protect Federal lands in their states.
- BLM’s guidance encourages radical anti-conservation local governments to seek agreements to grab public land. For example:
 - San Bernardino, California claims as “constructed highways” any “trails, horse trails, hiking trails and footpaths” under R.S. 2477, including more than 2,500 miles of trails in the Mojave National Preserve and hundreds of miles through the California Desert National Conservation Area.⁷
 - Moffat County, Colorado has claimed “pedestrian trails, horse paths, [and] livestock trails” as “constructed highways”, and is laying claim to 2,000 miles of routes, including over 230 miles of routes within the 77,000 acre roadless area and proposed wilderness in Vermillion Basin.⁸

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).

⁴ *Id.* at attachment 1-6 (“only the applicant of claimant has the right to appeal a decision on the application”).

⁵ *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”).

⁶ *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”).

⁷ See San Bernardino County Resolution 2001-241 (at www.rs2477.com/documents/9-18-01_San_Bernardino_County_Resolution.pdf) and California Wilderness Coalition, Highway Robbery in California (Nov. 2003) (available at <http://www.calwild.org/resources/pubs/rs2477.pdf>).

⁸ Moffat County Resolution 2003-05 (available at www.co.moffat.co.us/NaturalResources/2003_RS2477_RESOLUTION_2.pdf); see also <http://www.rs2477.com/lands/colorado1.htm> (links to analysis of Moffat County claims)..

BLM puts up for give-away nearly 240 million acres of public lands – an area greater than the states of California, Oregon, and Washington combined – including National Monuments and Wild and Scenic Rivers⁹.

- BLM’s guidance excludes from submission any claims for routes within a Wilderness Area or Wilderness Study Area (WSA - if designated on or before October 21, 1993 under FLPMA Section 603) or part of the National Park or National Wildlife Refuge Systems, or roads that are administered by a Federal agency other than the Department of the Interior (unless that agency consents). This guidance leaves at risk National Monuments, National Conservation Areas (NCAs), Wild & Scenic Rivers, Historic Trails and WSAs designated after October 21, 1993 or designated through land management plans under Section 202 of FLPMA.
- Areas where BLM’s guidance will ease the turn-over of potentially bogus rights-of-way includes:
 - o Up to 14 million acres of NCAs, including two key riparian NCAs – the Gila Box and San Pedro River NCAs – in Arizona; the 9.5 million acre California Desert NCA and King Range NCA in CA; the Gunnison Gorge NCA and part of the McInnis Canyons NCA in Colorado; and the Snake River Birds of Prey NCA in ID, set aside to protect bald eagles and what may be the worlds largest concentration of raptors;¹⁰
 - o Up to 3 million acres of national monuments outside of Utah (including the Grand Canyon-Parashant NM and Vermillion Cliffs NM in AZ, Canyons of the Ancients NM in CO; Craters of the Moon NM in ID; Missouri Breaks NM in MT; Cascade-Siskiyou NM in OR)¹¹
 - o Up to 1 million acres of Wild and Scenic Rivers (including the Rio Grande and Rio Chama in NM; the Eel, Merced and Toulomne Rivers in CA; the upper Missouri River in MT; and the Deschutes, Klamath and Rogue Rivers in OR.)¹²
 - o Up to 1 million acres of National Recreation Areas (in the White Mountains NCA in Alaska)¹³
 - o Nearly 300,000 acres of Wilderness Study Areas (including the Organ Needles in NM; Headwaters Reserve in CA, Sutton Mountain in OR)¹⁴
 - o Millions of acres of areas proposed for wilderness protection across the West including Vermillion Basin and Roan Plateau in Colorado, the proposed King Range Wilderness in California, and the Sand Tank Mountains in Arizona, where BLM has acknowledged the area’s wild character.
 - o Thousands if not millions of acres of lands across the West that provide important habitat for wildlife and that protect watersheds for communities.

⁹ All BLM lands total 261 million acres. See www.blm.gov/nhp/index.htm. The only areas not opened to disposal under BLM’s new policy are the 7 million acres of designated wilderness and 15 million acres of Sec. 603 Wilderness Study Areas (WSAs). See Guidance at Attachment 1-3 (no applications accepted for wilderness and Sec. 603 WSAs); www.blm.gov/nlcs/summary_tables.htm (BLM acres of wilderness and Sec. 603 WSAs). The states of California, Oregon and Washington combined are approximately 207 million acres in size.

¹⁰ See www.blm.gov/nlcs/summary_tables.htm.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ BLM spreadsheet (April 3, 2003), obtained through the Freedom of Information Act website.

- BLM's guidance appears to be part of a broader attempt to undermine protection for important wildlife habitat and roadless wildlands across the West. The Bush Administration has unleashed oil and gas drilling on thousands of acres critical habitat and roadless BLM lands, and through an April 2003 back-door settlement renounced BLM's authority to create new WSAs to protect wilderness-quality lands through management plans.
- BLM's guidance provides no real protection for National Parks, National Wildlife Refuges or Wilderness. While BLM's guidance doesn't permit states or state entities to use this process to seek rights-of-way through National Parks, National Wildlife Refuges, designated wilderness or some wilderness study areas, nothing prevents states, counties or other entities from using other means (such as Quiet Title Act lawsuits) to degrade those areas. In fact, the State of Utah and a county have sued in the last year claiming a streambed in Canyonlands National Park that is critically important for the Park's wildlife is a "constructed highway" where the State can bulldoze as it pleases.¹⁵ Utah and another County have filed suit seeking to turn abandoned jeep trails in the Mexican Mountain WSA in the San Rafael Swell into constructed highways.¹⁶

BLM's guidance encourages the agency to give away dirt tracks on special public lands claimed as "constructed highways."

- Nowhere does BLM's guidance 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 actually expands, rather than limits, what can be given away as a "highway" in several ways:**
 - o 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.¹⁷
 - o 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.¹⁸ 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.
 - o 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.¹⁹ The Hodel Policy defines "construction" of a "highway" to include the

¹⁵ See <http://www.rs2477.com/lands/utah9.htm>.

¹⁶ See <http://www.rs2477.com/lands/utah8.htm>.

¹⁷ See Instruction Memo 2005-185 (available at <http://www.blm.gov/nhp/efoia/wo/fy05/im2005-185.htm>) and Guidance.

¹⁸ Guidance at Attachment 1-4.

¹⁹ See Guidance at Attachment 1-3 ("the requirements for [R.S. 2477] determinations under the [Babbitt Policy] will not apply").

“[r]emoving high vegetation [or] moving large rocks out the way.”²⁰ 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.

BLM’s guidance instructs that the agency will ignore impacts of land give-aways to the environment, endangered wildlife, and sensitive cultural resources.

- 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.”²¹

BLM’s guidance does nothing to limit the widening or alteration of the routes once they are given away.

- BLM’s guidance says nothing about what happens to routes once they are given away to a state or state entity. But the guidance does state that any new agreement must “must follow the general format that was used” in the Utah-DOI 2003 agreement.²² 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. . . .”²³ The 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.”

- more -

²⁰ 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.

²¹ Guidance at Attachment 1-7.

²² Guidance at Attachment 1-1.

²³ State of Utah-DOI MOU (April 9, 2003) at 3-4 (available at www.rs2477.com/documents/MOU_Utah_DOI.pdf).

BLM's guidance would use an illegal process – the disclaimer rule – to adopt agreements similar to the illegal Utah-DOI MOU.

- The General Accounting Office, Congress's non-partisan investigative, has already determined that the Utah-DOI MOU – which BLM's guidance encourages other states and state entities to clone – is illegal.²⁴
- BLM's guidance would permit the recognition of R.S. 2477 rights-of-way under controversial amendments to a rule regarding “recordable disclaimers of interest” which are illegal.
 - o 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. Use of the provision – as recently revised through controversial regulations issued by the Interior Department – for R.S. 2477 claims is inappropriate and illegal.
 - o 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. Congress wanted to reserve to itself the authority to resolve the R.S.2477 issue.
- The 2003 Utah-DOI agreement has largely been a failure, in part because Utah has sought to establish such a low bar for taking rights-of-way away from the American people that the state has failed to do the most basic research necessary to show that a route meets R.S. 2477's standards. For example, much of the first route for which the State of Utah sought a right-of-way was sold by the county to the BLM for \$1 in the 1930s, something a basic title search (performed by a member of the public, not BLM or Utah) turned up.²⁵ In the more than 2 years since the Utah-DOI agreement was signed, not a single disclaimer application has been approved.

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²⁴ See GAO Report B-300912 (Feb. 6, 2004) available at http://www.rs2477.com/documents/GAO_Opinion_2_6_04.pdf.

²⁵ See Earthjustice letter (May 6, 2004), available at www.rs2477.com/documents/Weiss_Highway_May_6_2004.pdf.