EXHIBIT 27

Letter of P.L. Scarlett, Acting Sec'y of the Interior to U.S. Sen. J. Bingaman (May 3, 2006)

THE SECRETARY OF THE INTERIOR

WASHINGTON

MAY 0 3 2006

The Honorable Jeff Bingaman
United States Senate
Washington, D.C. 20510

Dear Senator Bingaman:

This is in response to your April 17, 2006, letter, also signed by five of your colleagues, expressing your concern regarding Secretary Norton's March 22, 2006, memorandum and guidance which interpret and implement Revised Statute 2477, commonly known as "R.S. 2477." I appreciate your interest in this issue, and I have enclosed a copy of the memorandum and guidance for your reference.

Administering R.S. 2477 implicates the sometimes-conflicting interests of citizen advocacy groups, private property owners, wildlife, tribal, state, and local governments, and the federal government. But as the court said in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F. 3d 735 (10th Cir. 2005), 2005 U.S. App. Lexis 19381 (*SUWA v. BLM*), "[b]oth levels of government have responsibility for, and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action."[1] The Department is committed to ensuring that the administration of R.S. 2477 encourages conservation through consultation, communication, and cooperation with tribes, states, counties, private landowners, and interested citizens while honoring valid rights-of-way.

The *SUWA v. BLM* decision necessitated that the Department revisit existing policies interpreting and implementing R.S. 2477. Let me assure you that the policy issued by the Department on March 22 is designed to ensure protection of sensitive areas under the Department's jurisdiction. The recently issued memorandum that accompanies our guidance directed all Interior bureaus to ensure that their administration of claimed and recognized rights-of-way upholds the Department's right and duty to protect the underlying and surrounding federal lands it manages, paying particular attention to the effects of right-of-way use in sensitive areas such as units of the National Park System, the National Wildlife Refuge System, and congressionally-designated wilderness areas or wilderness study areas.[2] We are strongly committed to protecting these sensitive areas.

The policy was neither designed nor intended to have the effect stated in your letter and will not have such effect. The policy makes clear that no road development will take

[1] *SUWA v. BLM*, 2005 U.S. App. Lexis 19381at *27.
[2] Memorandum at 4.

place on public lands of any kind by the holder of a valid R.S 2477 right-of-way unless and until it has consulted with the federal land manager about the proposed development, and the manager has been afforded a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the right-of-way as of October 21, 1976; to study potential effects; and if appropriate, to formulate alternatives that serve to protect the public lands.[3] As the policy states, federal land managers "may [and will] take reasonable steps to ensure that the use of roads within Federal land does not violate the Federal landowners' duty to protect the surrounding and underlying lands, even if the roads are valid rights-of-way."[4]

With these principles in place, the Department's policy makes clear that any unilateral attempts by R.S. 2477 rights-of-way holders to develop or improve those rights-of-way without first consulting with the federal land manager will be considered unlawful, and we will seek to enjoin that action.

We have also concluded that the *SUWA v. BLM* decision provides sound legal guidance on the resolution of R.S. 2477 road disputes between the federal government and counties. Although it is a Tenth Circuit decision, its analysis and holdings are comprehensive and persuasive, and do not appear to conflict with any other circuit's decisions. For this reason, the Department is applying its principles nationwide, bearing in mind, of course, that the Tenth Circuit has ruled that state law, in general, must be followed to assess the validity and scope of R.S. 2477 claims, and that the exact rules that will be applied will therefore vary from state to state.

Although R.S. 2477 was repealed nearly 30 years ago, controversies continue to arise about the existence and scope of the rights-of-way it granted and which were grandfathered into existing law upon repeal of R.S. 2477. Rather than set out a new policy for sensitive lands, this policy is an attempt to clarify how the Department will carry out its obligations following the *SUWA v. BLM* decision.

The Utah Memorandum of Understanding (MOU) was, in effect, a pilot project designed to break the longstanding logjam over certain R.S. 2477 ownership claims through the exercise of the Department's recordable disclaimer authority. Our discretionary use of this statutory authority was intended to resolve undisputed claims; and the Department agreed not to use this authority in parks, refuges and wilderness and wilderness study areas as a way to reduce controversy and avoid unnecessary litigation. Our commitment to that effect, however, was not a determination that valid claims could not exist in those areas. Given the fresh and binding legal guidance in the *SUWA v. BLM* decision, which clarified the legal standards to be applied to ownership claims, both the Department and the State of Utah view the MOU as obsolete and inoperative. For these reasons, the recently issued guidelines do not contradict assurances made to Congress in 2003.

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[3] Guidance at 7.
[4] Guidance at 5.

The *SUWA v. BLM* decision clarifies that the Department lacks authority to make binding determinations of the validity of R.S. 2477 ownership claims. The Tenth Circuit confirmed, however, that the Department may make nonbinding ownership determinations for its own land management purposes. As made clear throughout this response, if and when such administrative determinations are made, they will be done in accordance with the law and only after the public is given an opportunity to comment on the evidence on which the determinations are based.

Finally, proposed road maintenance agreements will not make it easier for States or counties to perform landscape-changing highway maintenance and construction on public lands without adequate environmental analysis or protections. The guidelines make clear that road maintenance agreements, which will be entered into only after public comment, are designed only to preserve the *status quo* on certain roads, and to insure that public safety issues that do not require other than routine maintenance work are timely and appropriately addressed.[5] As noted above, both the *SUWA v. BLM* decision and the Departmental policy make clear that such activities may take place, if at all, only after full consultation with the federal land manager, during which consultation the federal land manager will have full authority to propose and require whatever steps are necessary to fulfill its underlying obligation to protect public lands, as required and provided for by law.

I appreciate the opportunity to explain these guidelines and answer your questions. I hope that this letter addresses and satisfies your concerns. Identical letters are being sent to your colleagues.

Sincerely,

Acting Secretary of the Interior

Enclosure

[5] Guidelines at 6-7.