

## 2801 – RIGHTS-OF-WAY – GENERAL

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## 2801 - RIGHTS-OF-WAY – GENERAL

.1 Purpose. The Bureau of Land Management (BLM) 2800 Manual/Handbook/IM Series provides policy and program direction for issuing, administering, assigning, amending, renewing and terminating ROW Grants under the Federal Land Policy and Management Act (FLPMA) and other related authorities in an environmentally, socially, and economically sound manner. The Manual/Handbook/IM series provides instructions to the program managers for ROW policy and program management.

.2 Objectives. The objectives of the ROW program are to:

A. Principal Use. Recognize that ROWs are a principal or major use of the public lands. As such, the ROW program must receive the level of management interest, priority, and attention commensurate to the other principal or major uses of the public lands and to the magnitude of the impacts associated with various ROW proposals.

B. Guidance. Provide policy, procedures, and guidance for managing ROWs on public land so as to:

1. Coordinate the actions of individuals, governments, and businesses in using public lands for ROW purposes.
2. Minimize the proliferation of separate ROWs.
3. Promote the sharing of ROWs with respect to engineering and technological compatibility, national security, and land use planning.
4. Provide a system of designated ROW corridors on public land to help meet future ROW needs as appropriate.
5. Promote efficiency in granting ROWs.
6. Promote uniform ROW application processing and granting requirements and procedures.
7. Promote to the greatest extent practicable the use of applicant/holder-generated plans of development (PODs).
8. Protect the quality of natural resources and prevent unnecessary environmental damage to lands and resources.
9. Protect the ROW holder's investments in improvements on the ROW.

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### .3 Authorities. Authorities include:

A. The Federal Land Policy and Management Act of October 21, 1976, as amended, 43 U.S.C. 1701 et. seq.

B. The Federal-Aid Highway Act of August 27, 1958, 23 U.S.C. 107(d), 317.

C. Titles XI and XIII of the Alaska National Interest Lands Conservation Act of December 2, 1980 16 U.S.C. 3161 et. seq. (ANILCA).

D. National Trails Act, ‘Railbanking,’ 16 U.S.C. 1247.

E. National Trails Act, ‘Rails to Trails,’ 16 U.S.C. 1248(c)-(e).2801.3.

F. Act of March 3, 1891 (43 U.S.C. 946-951) as to other than Public and National Forest Land.

G. Act of January 21, 1895 (43 U.S.C. 956) as to other than Public and National Forest Land.

H. Act of February 15, 1901 (43 U.S.C. 959) as to other than Public and National Forest Land.

I. 43 CFR Group 2800, Rights-of-Way.

### .4 Responsibility.

A. Director and Deputy Director are responsible for overall compliance with statutory authorities, Department policies, and ROW development and management programs affecting the public lands.

B. Assistant Director, Minerals, Realty and Resource Protection, through the Chief, Division of Lands, Realty and Cadastral Survey, is responsible for providing regulation, direction, policy, and procedural guidance for efficiently evaluating and processing ROW applications, issuing ROW authorizations, monitoring and terminating ROW grants, managing the Bureau's ROW program, and providing for future needs through designation of ROW corridors.

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C. State Directors, District Managers and Field Managers, within their delegated areas of responsibility, are responsible for uniformly implementing and carrying out the guidance and instruction contained in this 2800 Manual/Handbook/IM series; implementing and managing the ROW program in their States, Districts or Areas; programming and budgeting ROW funds; issuing local instructions; maintaining program quality control; maintaining a cadre of personnel proficient in developing, evaluating and processing ROW applications; providing timely compliance and monitoring during construction, operation, maintenance, and termination; designating and managing corridors as necessary to meet future ROW needs.

.5 Acronyms and Terms. See Glossary of Terms.

.6 Scope.

A. Manual/Handbooks/IM.

1. Manual sections within the 2800 series provide the basic source of permanent internal written policy and program direction.

2. Handbook sections provide detailed procedures or instructions needed to carry out the policy and program direction.

B. This Manual/Handbook/IM series provides guidance needed to issue, administer, amend, assign, renew and terminate grants for necessary transportation or other systems and facilities which are in the public interest and which require the use of public lands for the purposes identified in 43 U.S.C. 1761, regardless of the authority used to issue the grant.

C. As to grants issued on or before October 21, 1976, under then existing statutory authority, this manual/handbook/IM series applies to the extent that it does not diminish or reduce any rights conferred by the grant or the statute under which they were issued. Where there is a reduction, the grant or enabling statute will apply instead of the manual guidance.

D. Other: See BLM Manual 2809 for:

1. Federal Aid highways, for which Title 23 FHwA procedures apply.

2. Roads constructed or used according to reciprocal and cost share road use agreements.

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3. Public highways constructed under the authority of R.S. 2477 (Act of July 26, 1866, 43 U.S.C. 932, repealed October 21, 1976).

4. Reservoirs, canals and ditches constructed on public land under the authority of R.S. 2339 and R.S. 2340 (Act of July 26, 1866, 43 U.S.C. 661, repealed October 21, 1976).

5. Facilities excepted under the provisions of the Instructions, 44 L.D. 359; Circular 442, August 21, 1915, and Instructions 44 L.D. 513, Circular 442, January 13, 1916.

6. Railroad grants other than those issued pursuant to FLPMA.

E. Manuals 2802 thru 2809 do not apply to:

1. Applications pursuant to the Mineral Leasing Act (MLA).

2. New applications for lands within wilderness areas - see 43 CFR 2920 or 6305. By law Title V of FLPMA does not apply to land designated as wilderness (43 USC 1761(a)).

3. ROWs (easements) reserved in patents under the Small Tract Act of June 1, 1938, as amended (repealed Oct. 21, 1976).

.7 [Reserved]

.8 Policy. It is general policy of the BLM to:

A. Major or Principal Use. Give proper consideration to the major or principal ROW use on the public lands.

B. Land Use Plans. Before declining to grant a ROW on the basis of conflict with another major or principal use(s), the AO shall assure that the potential conflict between ROW use and the other major or principal use were considered in the land use plan.

C. Efficiency. Authorize all ROW uses on public lands in the most efficient and economical manner possible by a ROW grant.

D. Designated Corridors. Provide for ROW use of the public land through a system of designated ROW corridors. The use of ROW corridors will be actively encouraged by Bureau managers.

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E. Categorical Exclusions. Whenever applicable, apply categorical exclusion provisions for ROW applications.

F. Access. Allow owners of non-Federal lands surrounded by public land managed under FLPMA, a degree of access which will provide for the reasonable use and enjoyment of the non-Federal land. Such access must conform to rules and regulations governing the administration of the public land.

G. Prior Authorizations/Existing Uses. Such uses should be serialized and noted to the public land records for informational purposes.

1. Pre-FLPMA. Recognize as an authorized use, any ROW facility constructed on public land on or before October 21, 1976, under the authority of any act repealed as to future authorization by FLPMA. No further authorization is required by the holder for the following:

a. Ditches and canals constructed on public land under the authority of the Act of July 26, 1866 (43 U.S.C. 661, repealed 1976).

b. A ROW for a public highway constructed on public land under R.S. 2477 (43 U.S.C. 932, repealed 1976).

2. Existing Uses. Recognize as an authorized use:

a. Facilities usual to a highway located within the limits of a ROW granted pursuant to Title 23 of the Federal Aid Highway Act, unless the Letter of Consent does not allow such uses.

b. Facilities usual to a highway for which the highway ROW holder approved such use during the period that the Secretary had waived regulatory jurisdiction (waiver period ended November 7, 1974).

c. On acquired lands, facilities which were authorized by the previous landowner(s) and not specifically acquired by the United States.

d. On acquired lands, facilities for which the use was established by adverse possession or prescription prior to acquisition of the land by the United States.

H. Public Service. Provide all applicants, holders, and interested parties timely and equitable consideration and the highest degree of public service.

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I. Plans of Development. Maximize the use of PODs while allowing management discretion for the development of non-guide stipulations for special situations.

J. Impacts. Assure to the greatest extent possible that all identified impacts are mitigated and that there is compliance with the terms and conditions of the grant.

K. Survey Monuments. Require protection of land survey markers. This entails the rehabilitation of disturbed corner monuments and their accessories, and replacement of destroyed corner monuments and their accessories, in conformance to the Bureau of Land Management Manual of Instructions for the Survey of the Public Lands of the United States (Survey Manual).

L. Wind Energy. See *Record of Decision, Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments*, December 2005.

M. Solar Energy. [Reserved]

.9 When to Issue a ROW Grant.

A. Issuance. The BLM will use a ROW grant to authorize the use of public lands for systems or facilities that include but are not limited to:

1. Reservoirs, canals, ditches, flumes, pipelines, tunnels, and other facilities and systems which impound, store, transport, or distribute water;
2. Pipelines and conveyor belts for transporting and distributing solid materials;
3. Systems for generating, transmitting, or distributing electricity;
4. Systems for transmitting or receiving voice or electronic signals used for communication;
5. Transportation systems such as roads, trails, highways, railroads, canals, tunnels, tramways, airways, and livestock driveways, and
6. Any other system or facility for transportation, communication or other similar purpose over, upon, under or through public lands.

B. Authority. All grants shall be issued under the authority of FLPMA except:

1. Title 23 of the U.S. Code will be used for Federal-aid highways and related facilities, including material sites (see Manual 2809).



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2. The Mineral Leasing Act will be used for non Federally owned and operated pipelines or other systems for the transportation, storage, or distribution of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom. Related facilities that are applied for as part of, or as an amendment to, the primary application are included regardless that, standing alone, the facility would be authorized under FLPMA. (See Manual 2880.)

3. Other Federal Land. Those pre-FLPMA authorities where the BLM has delegated authority from the Secretary of the Interior (see Manual 2809).

C. Regulatory Agencies. Some uses require filings with Regulatory agencies. The BLM will cooperate fully with these agencies. Principal among these are:

1. Generating, transmitting and distributing electricity (especially hydropower projects) may be subject to applicable requirements of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1935, 16 U.S.C. 741.

2. Most railroads are subject to regulations by the Surface Transportation Board, 49 U.S.C. Subtitle IV.

D. ROW Uses not requiring a ROW Grant. Some ROW uses are authorized by other statutes (e.g. mining laws), or have grandfather rights from law that predates FLPMA (e.g. Revised Statute 2477), or are existing rights in the land when the BLM acquires it, or are minor in nature.

1. Casual Use. The AO shall make every effort to allow uses of the public lands without a ROW grant, under the provisions for casual use. If a proposed use is expected to cause appreciable disturbance or damage to public lands or resources and needs to be controlled, it is not casual use.

a. Criteria for Identifying Casual Use.

(1) Access. If access needs to be controlled or regulated through the use of stipulations, casual use is not applicable.

(2) Disturbance or Damage. The possibility of appreciable disturbance or damage is a judgment call that needs to be made in advance. Review similar activities that have previously occurred in other locations. Did they cause appreciable damage? Will there be any significant evidence of the activity in the near future? Will observers be aware of or concerned by the activity?

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b. Examples. Casual use may include the following activities and practices:

(1) Recreational activities such as use of roads for hunting and sightseeing. This does not include driving where vehicle use is prohibited.

(2) Domestic uses or activities associated with managing ranches, farms, and rural residences.

(3) Ingress and egress on existing roads and trails.

(4) Activities necessary to collect data for filing a ROW application such as sampling, marking of routes or sites, including surveying or other activities that do not unduly disturb the surface or require the extensive removal of vegetation.

(5) Minor activities that have existed over a period of time without a grant and without causing appreciable disturbance to the public land resources or improvements.

2. Revised Statute 2477 (RS2477). Highway ROW granted by Congress under the Act of July 26, 1866. See Manual 2809.21 for more detail.

3. Revised Statutes 2339 and 2340 (RS2339/2340). Ditch, canal, reservoir ROW granted by Congress for the conveyance of appropriated water under the Act of July 26, 1866. See Manual 2809.22 for more detail.

4. Access to Mining Claims. For access over lands open to the mining laws see 43 CFR 3809; otherwise a ROW grant is required.

5. Access to Salable Minerals. Access may be included in the sale; otherwise a ROW grant is required.

6. Access to leasable Minerals. [Reserved]

7. Fact Finders Act. Subsection 4P of the Act of December 5, 1924, (43 USC 417) authorizes the reservation of a ROW or easement to the United States over public land withdrawn for Bureau of Reclamation project purposes by the Bureau of Reclamation. Procedures are contained in the Interagency Agreement of March 25, 1983. These ROW or easement reservations may be transferred or assigned by the Bureau of Reclamation to an irrigation district or to water user groups.

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8. Railroad ROWs. The BLM follows the Solicitor's Opinion (96 ID 439-445, M-36964) that holders of railroad ROWs under the land grant statutes (Limited Fee grants) or the General Railroad Act of 1875 or similar Acts (Exclusive Easement grant) may allow others to use the ROW for any purpose without the involvement of the BLM.

E. Utility Service to BLM Facilities. The BLM has numerous facilities located outside of urban or developed areas; some extremely remote. Obtaining electricity, water or other utility service may require the utility to cross public lands to reach the BLM facility.

1. Service Agreements are used by most utility companies for such services. Agreements are an administrative function related to the management of the BLM facility. As such, they should be limited to the facility area.

2. Rights-of-Way should be used where it is necessary for the utility to cross public lands to reach the BLM facility.

a. Cost recovery may be waived pursuant to 43 CFR 2804.21(a)(7).

b. Rent is waived so long as the service line is only used to supply the BLM facility.

### .10 Review of Decisions.

A. Interlocutory Decisions. Interlocutory decisions are interim decisions and usually ask for additional information, offer an action, request a report, etc. By themselves there is no immediate penalty for lack of response. Parties to the interlocutory decision may seek relief by protest, discussion, etc.

1. Protests to interlocutory decisions are reviewed by the issuing officer or higher official. If an appeal is filed during the protest period, the BLM will treat it as a formal appeal and refer the case to the IBLA. Depending on the issues, the BLM may want to request a remand to consider the appeal as a protest.

B. Final Decisions carry a penalty for lack of action or response. Failure to respond within the allowable time renders the decision final and no longer reviewable.

1. Reviewed by the IBLA. BLM Form 1842-1 (Illustration 2) shall be enclosed with every decision document. Since ROW decisions are in full force and effect, information on petitions for stay must also be included. See Illustration 1 for standard appeal language to be included in all decisions.

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C. Full Force and Effect of ROW Decision. A BLM decision affecting a ROW application carries the “full force and effect” of the decision. Full force and effect means that the decision can be implemented immediately even if the decision is appealed to the IBLA. An affected party has the opportunity to file a petition for a stay with an appeal to the IBLA. Immediate implementation is an option, not a requirement, of the decision.

1. Stay. The appellant has the opportunity to file a petition for a “stay” with the IBLA within 30 days. A stay is a request to prevent implementation of the decision until the appeal can be reviewed by the IBLA.

2. 45 Day Period. By regulation, the IBLA has 45 days to rule on a request for stay.

a. No Action. If the IBLA fails to act on a petition for stay within 45 days, the petition for stay is considered to be denied, and the BLM ROW decision is in full force and effect.

D. BLM Reconsideration and Request for Remand. The BLM can reconsider a ROW decision before an appeal is filed. If the BLM wants to reconsider a ROW decision after an appeal is filed, the BLM must first request the IBLA to remand the case to the agency.

E. Request for IBLA Reconsideration. A decision by the IBLA constitutes the final agency action, but the IBLA may reconsider a decision in extraordinary circumstances for sufficient reason. An appellant or the BLM can request reconsideration from IBLA.

F. Secretarial Jurisdiction. In a very unique situation the BLM could request the Secretary of the Interior to issue a decision on a ROW which would be reviewable only in Federal District Court.

G. Judicial Review. IBLA and Secretarial decisions are appealable to the Federal District Court where the land or property is situated, or to the Federal District Court for the District of Columbia.

H. Action on Applications. If the applicant appeals a decision establishing a cost recovery category 6, further action on the application by the BLM will be suspended pending the outcome of the appeal.

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### Standard Appeal Language [used in the body of the decision]

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition (request) pursuant to regulation 43 CFR 2801.10 or 2881.10 for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.

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Information on Taking Appeals to the Interior Board of Land Appeals

Form 1842-1  
(September 2006)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

**INFORMATION ON TAKING APPEALS TO THE INTERIOR BOARD OF LAND APPEALS**

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**DO NOT APPEAL UNLESS**

1. This decision is adverse to you,  
AND
2. You believe it is incorrect

**IF YOU APPEAL, THE FOLLOWING PROCEDURES MUST BE FOLLOWED**

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1. **NOTICE OF APPEAL.....** A person who wishes to appeal to the Interior Board of Land Appeals must file in the office of the officer who made the decision (not the Interior Board of Land Appeals) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the *Notice of Appeal* in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the FEDERAL REGISTER, a person not served with the decision must transmit a *Notice of Appeal* in time for it to be filed within 30 days after the date of publication (43 CFR 4.411 and 4.413)

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  2. **WHERE TO FILE**  
  
NOTICE OF APPEAL..... [BLM Field/State Office will type in their address]  
  
WITH COPY TO SOLICITOR..... [BLM Field/State Office will type in Solicitor address]

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  3. **STATEMENT OF REASONS** Within 30 days after filing the *Notice of Appeal*, file a complete statement of the reasons why you are appealing. This must be filed with the United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, 801 N. Quincy Street, MS 300-QC, Arlington, Virginia 22203. If you fully stated your reasons for appealing when filing the *Notice of Appeal*, no additional statement is necessary. (43 CFR 4.412 and 4.413)  
  
WITH COPY TO SOLICITOR..... [BLM Field/State Office will type in Solicitor address]

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  4. **ADVERSE PARTIES.....** Within 15 days after each document is filed, each adverse party named in the decision and the Regional Solicitor or Field Solicitor having jurisdiction over the State in which the appeal arose must be served with a copy of: (a) the *Notice of Appeal*, (b) the Statement of Reasons, and (c) any other documents filed (43 CFR 4.413).

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  5. **PROOF OF SERVICE.....** Within 15 days after any document is served on an adverse party, file proof of that service with the United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, 801 N. Quincy Street, MS 300-QC, Arlington, Virginia 22203. This may consist of a certified or registered mail "Return Receipt Card" signed by the adverse party (43 CFR 4.401(c)).
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6. **REQUEST FOR STAY . . . .**

Except where program-specific regulations place this decision in full force and effect or provide for an automatic stay, the decision becomes effective upon the expiration of the time allowed for filing an appeal unless a petition for a stay is timely filed together with a *Notice of Appeal* (43 CFR 4.21). If you wish to file a petition for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Interior Board of Land Appeals, the petition for a stay must accompany your *Notice of Appeal* (43 CFR 4.21 or 43 CFR 2801.10 or 43 CFR 2881.10). A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the *Notice of Appeal* and Petition for a Stay **must** also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

**Standards for Obtaining a Stay.** Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards: (1) the relative harm to the parties if the stay is granted or denied, (2) the likelihood of the appellant's success on the merits, (3) the likelihood of immediate and irreparable harm if the stay is not granted, and (4) whether the public interest favors granting the stay.

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Unless these procedures are followed, your appeal will be subject to dismissal (43 CFR 4.402). Be certain that **all** communications are identified by serial number of the case being appealed.

NOTE: A document is not filed until it is actually received in the proper office (43 CFR 4.401(a)). See 43 CFR Part 4, Subpart B for General Rules Relating to Procedures and Practice Involving Appeals.

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**43 CFR SUBPART 1821—GENERAL INFORMATION**

Sec. 1821.10 *Where are BLM offices located?* (a) In addition to the Headquarters Office in Washington, D.C. and seven national level support and service centers, BLM operates 12 State Offices each having several subsidiary offices called Field Offices. The addresses of the State Offices can be found in the most recent edition of 43 CFR 1821.10. The State Office geographical areas of jurisdiction are as follows:

STATE OFFICES AND AREAS OF JURISDICTION:

- Alaska State Office—Alaska
- Arizona State Office—Arizona
- California State Office—California
- Colorado State Office—Colorado
- Eastern States Office—Arkansas, Iowa, Louisiana, Minnesota, Missouri and, all States east of the Mississippi River
- Idaho State Office—Idaho
- Montana State Office—Montana, North Dakota and South Dakota
- Nevada State Office—Nevada
- New Mexico State Office—New Mexico, Kansas, Oklahoma and Texas
- Oregon State Office—Oregon and Washington
- Utah State Office—Utah
- Wyoming State Office—Wyoming and Nebraska

(b) A list of the names, addresses, and geographical areas of jurisdiction of all Field Offices of the Bureau of Land Management can be obtained at the above addresses or any office of the Bureau of Land Management, including the Washington Office, Bureau of Land Management, 1849 C Street, NW, Washington, DC 20240.