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February 11, 2009

*Via Email and U.S. Mail*

Lupe C. Valdez  
Director of Public Affairs  
Union Pacific Railroad  
13181 Crossroads Parkway North  
Suite 500  
City of Industry, CA 91746

*Re: Proposed Closure of Public Access at Union Pacific Right-of-Way in the Imperial Sand Dunes*

Dear Ms. Valdez:

This firm represents the American Sand Association ("ASA") and other recreational groups whose members routinely visit the Imperial Sand Dunes Recreation Area ("ISDRA") in Imperial County, California. As you may or may not know, one of the primary routes of travel within the ISDRA is Wash Road, which traverses the Union Pacific right-of-way ("ROW") and provides access to public use areas on both sides of Union Pacific's property. I have been informed that Union Pacific now intends to close public use of its ROW, effectively severing Wash Road in two and preventing access to areas long enjoyed by members of the public.

I am writing to request that Union Pacific postpone closure the ROW until the status of Wash Road, including that portion of it which crosses the ROW, can be examined and determined. Specifically, it is ASA's position that the public have used Wash Road and have crossed the ROW for more than 45 years, and that Union Pacific, until very recently, has remained silent on the issue. Assuming ASA's position is correct and can be substantiated with evidence, Wash Road, in its entirety, would qualify as a "public easement." As such, it would not be subject to unilateral closure by Union Pacific. The legal rules which govern this situation are fairly straight-forward, but are best understood in their historical context, which I provide below.

In 1970, the California Supreme Court decided a case known as *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, in which the plaintiff claimed that a public easement existed across private parcels to the shoreline in the City of Santa Cruz. The plaintiff provided evidence showing long-standing public use of the easement in question. Despite objections from the City

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of Santa Cruz and the private property owners, the court found that an easement, running in favor of the public, had been established under the theory of "implied dedication."

In response to *Gion*, the California Legislature, in 1971, enacted Civil Code section 1009. This statute was designed to (1) encourage private property owners to open their land to public recreational use, and (2) protect private property owners against implied dedication claims by recreational users. As a result of Civil Code section 1009, it is now quite difficult to establish a public easement across private land for recreational purposes. However, Section 1009 was *prospective* only; it did not apply to public easements established prior to March 4, 1972, the effective date of the statute. This point of law was settled in the case of *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, which provides as follows:

"It is accurate to say the enactment of section 1009 and the related amendment of section 813, in large part, abrogate the holding in *Gion-Dietz* – *prospectively*. However, there is no public policy manifest in this enactment which restricts the application of that holding to claims preceding March 4, 1972."

*Friends of the Trails v. Blasius, supra*, 78 Cal.App.4th at 823.  
(*Emphasis in the original*).

The court in *Friends of Trails* went on to explain that, with respect to recreational easements in existence prior to March 4, 1972, *Gion* still applied with full force of law.

Thus, any party hoping to claim a public recreation easement by implied dedication must establish that it falls within the ambit of *Gion*, which means there must be evidence that (1) public use of the easement in question took place for at least five years prior to March 4, 1972, and (2) the landowner neither granted formal permission for such use nor took action to stop such use.\* So long as such evidence exists, *Gion* applies and a public easement by implied dedication will be found.

With respect to Wash Road in the Imperial Sand Dunes, there is evidence that members of the public – without permission or objection from Union Pacific – have used that road and crossed the Union Pacific ROW since the early 1960s. Assuming such evidence is credible –

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\* Note that subsection (d) of Section 1009 provides an additional exception to the general prohibition against public recreation easements by implied dedication. However, in this letter we are not addressing whether Wash Road meets the subsection (d) criteria. That is an issue for another day.

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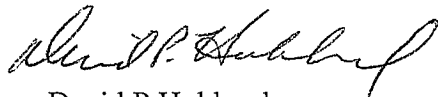
and we believe it is – the ASA will be able to establish that a public easement across the ROW meets the *Gion* criteria and was in existence prior to March 4, 1972. As such, the easement may not be closed or otherwise disturbed by Union Pacific.

The ASA recognizes that Union Pacific will want to conduct its own due diligence on the question of historical public use of Wash Road and the ROW. We do not expect you to take our word alone that such use took place. So we are in the process of compiling the relevant data, which we will present to you, the BLM, and a court of law, if necessary, in the new few weeks. To that end, we request that Union Pacific not close the ROW to public access for a period of six weeks, providing us time to gather and provide you with the evidence discussed above. By postponing closure of the ROW, Union Pacific will allow the dispute to be resolved without incurring the costs of defending a legal action.

However, if Union Pacific *does* close the ROW to public use, the ASA will have no choice but to file a complaint seeking declaratory and injunctive relief, as well as attorneys fees under the "Private Attorneys General" statute, Code of Civil Procedure section 1021.5. *See, Friends of the Trails, supra*, 78 Cal.App.4th at 832-839.

I am happy to talk with you or anyone else at Union Pacific about this issue and how best to resolve it. I look forward to hearing from you.

Sincerely,



David P Hubbard  
of  
Gatzke Dillon & Ballance LLP

cc: Bob Mason, the American Sand Association  
Jerry Grabow, EcoLogic Partners, Inc.  
Steven Borchart, Bureau of Land Management

DPH:rlf