



AGENDA REQUEST FORM  
BOARD OF SUPERVISORS  
COUNTY OF INYO

For Clerk's Use Only: <b>AGENDA NUMBER</b>
---

- Consent       Departmental WORKSHOP       Correspondence Action       Public Hearing  
 Scheduled Time for 9:05 a.m.       Closed Session       Informational

FROM: Planning Department, Public Works Department and County Counsel

FOR THE BOARD MEETING OF: February 8, 2005

SUBJECT: Federally-owned public access road access

**DEPARTMENTAL RECOMMENDATION:**

The objective of this workshop is to establish County policy on the closure of public roads on federal land, and to direct staff as to how to respond to proposed road closures.

Staff recommends that the Board:

- Conduct a workshop to discuss access issues on federally owned land within the County of Inyo. Review County rights under RS2477 (see discussion below and attachments).
- At conclusion of workshop, direct staff to develop specific policies and responses regarding proposed public road closures on federal land.

Death Valley National Park Superintendent J.T. Reynolds, BLM District Managers Roxie Trost, Bill Dunkleberger and Hector Villalobos, and USFS District Ranger Gary Oye will be in attendance to present information about public road access and road closures, and to answer questions.

**SUMMARY DISCUSSION:**

The Board of Supervisors has discussed the issue of public road closures by federal agencies on several occasions and has requested a workshop to discuss the option of applying RS 2477 claims to preserve public access. Staff is seeking direction on County policy regarding these road closures.

**Inyo County's Connection with RS2477 Issues**

On May 14, 2002, the Inyo County Board of Supervisors adopted Resolution 2002-36 (attached as Exhibit A). In the resolution, the Board of Supervisors affirmed the following:

- The County of Inyo and the public may have acquired right of way pursuant to RS 2477 in those ways provided by law.
- The County has the right to maintain any valid RS 2477 right of way - the absence of County maintenance shall not affect the status of that right of way, nor shall the assertion of an RS 2477 right of way obligate the County to maintain that right of way.
- The County shall not be deemed to consent to exchange or abandonment of any RS 2477 right of way unless the Board of Supervisors has passed a formal written resolution stating that consent.
- The County may pursue RS 2477 right of way to a particular road only when it finds that:
  1. The road constitutes a highway, constructed upon public lands prior to those lands being reserved for public uses or prior to October 21, 1976.
  2. The road or use of the road is threatened with closure, elimination, or significant restriction.
  3. There is a compelling reason to preserve the road or the use of the road.

From a Road Department perspective, Inyo County RS2477 implications can be divided into two areas:

- 1 Public roads that are maintained by the County (part of the County Maintained Road System).
2. Public roads that are not maintained by the County.

**County Maintained Roads:** The County has maintained the 1,124 miles of roads in the County Maintained Road System for over 100 years - records referencing the County Maintained Road System date back to the 1800's. The State gives counties funding to maintain these roads.

Historically, public road right of way was not formally documented - many County Roads predating modern subdivision requirements do not have right-of-way descriptions and written documentation of public ownership. While we know from practice that these roads are in the County system, the record of how these roads became County right of way is not clear. In these instances, the County has recognized implied dedication or asserted prescriptive rights for the road right of way.

The National Park Service has identified several roads for closure within Death Valley National Park that are in the County Maintained Road System because they are located within wilderness designations. These roads include:

1. Last Chance Road,
2. Lost Section Road,
3. Petro Road,
4. Surprise Canyon Road,
5. Padre Point, and
6. Old Toll Road.

Two of these roads have been closed by the National Park Service - Petro Road and

Lost Section Road. Lost Section Road is the road that the IC Road Department graded last year and subsequently caused considerable public attention. Some Park Service employees and representatives of environmental interest groups claimed that the County was illegally grading in a wilderness area. County staff conducting the grading was conducting routine maintenance grading as they had many times in the past, had no knowledge that the road had been included in a wilderness area, and the road was not marked to indicate that its status had changed from its historic use as a County Road.

Subsequent to the grading of this road, County staff met with Death Valley National Park staff to discuss road closure and status issues, and information has been exchanged as to which County roads may or may not have been included within official or proposed Wilderness boundaries.

Mr. Jeff Jewett, former IC Public Works Director, has identified several issues regarding the closure of the roads in Death Valley National Park:

- There was no notification by the Park Service that the roads were proposed to be included into a wilderness designation.
- The County has maintained and graded these roads on previous occasions with no public or Park Service comment.
- In other areas, the boundaries of the wilderness designations were intentionally “cherry stemmed”<sup>1</sup> around roads (including county roads); yet, the above referenced roads were not “cherry stemmed” and it is unclear as to why these roads were not excluded from the Wilderness boundary.

If the County cannot maintain these roads, we should either abandon the roads or request that the wilderness boundary be relocated. Currently, the County is receiving funds to maintain these roads and also assuming the liability for these roads, yet, we are prevented from maintaining them.

**Non-County Roads:** There are many public roads that are not in the County Maintained Road System. Some of these roads are also being closed to public use. Furthermore, some of these roads may qualify as RS 2477 right of way. The County can pursue and accept right of way on behalf of the public, without having to accept these right of ways into the County Road System. However, such action may create liability for the County. For example, if the County asserts RS 2477 rights for a public road and, as a result, there are environmental impacts from the continued use of the road, the County may be liable for the mitigation of those impacts.

### **Legislative History RS2477**

- **The 1866 Mining Act:** Revised Statute 2477 (RS 2477), a section of an 1866 mining law, was intended to encourage settlement of territories in the West. The law granted rights-of-ways for the construction of “highways” on public lands that were not reserved for other purposes. That language read: “The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

---

<sup>1</sup> “Cherry stemmed” means the wilderness boundary line was drawn around the roads to clearly exclude them from the official Wilderness Area.

- **Repeal of RS 2477 in 1976:** RS 2477 was repealed with enactment of Section 5 of the Federal Land Policy and Management Act (FLPMA) in 1976, existing rights-of-ways were not affected. FLPMA established a process for determining public land access rights.
- **Hodel Policy of 1988:** In 1988, the U.S. Department of the Interior issued the "Hodel Policy," which eased restrictions on the types of access that could be qualified as RS2477 claims.
- **Babbitt Policy of 1994:** The U.S. Department of the Interior placed a moratorium on the consideration of RS 2477 claims under the Hodel Policy. The agency initiated rulemaking to establish procedures and standards for claiming and determining the validity of pre-existing RS 2477 rights-of-way.
- **Babbitt Policy of 1997:** The Hodel Policy was rescinded in January of 1997.
- **The 105th Congress:** In 1996, language was included in the FY 1997 Omnibus Appropriations measure, which placed a moratorium on any final regulation involving RS 2477 validity standards, unless specifically authorized by an Act of Congress.
- **Current Status:** On February 22, 2002, the Bureau of Land Management published a proposed rule pertaining to Conveyances, Disclaimers and Correction Documents (RIN 1004-AD, 67 Fed. Reg. 8216). The rule was finalized on January 6, 2003.

Under the Conveyances, Disclaimers and Corrections rule [Federal Register, Vol 68, No. 3, RIN 1004-AD 50], the BLM has the authority to issue "disclaimers of interest" to states, counties, and individuals for areas within public lands. When the United States "disclaims" an interest in land, it relinquishes all ownership interests in the property, investing them in the claimant. This authority was given to the Secretary of the Interior in the Act that created the BLM and was intended to clear "cloud[s] on the title" of lands owned by individuals when the Secretary determines that the national interest in the lands had "terminated by operation of law or (is) otherwise invalid."

This rule applies to any property claim on federal land, not just to RS 2477 claims. There is some question as to whether it can be applied to RS 2477 since in 1996 Congress issued a moratorium on rulemaking regarding RS 2477. BLM has not been clear as to whether this rule can be used to clear up 2477 claims, and it is our understanding that there is currently a moratorium on resolving 2477 issues unless a compelling and immediate need exists. This rule may be present an option to Inyo County to make a direct request to BLM to administratively recognize RS 2477 claims. Staff from the BLM will be present at the workshop and will be able to update our information and answer questions on this issue.

The 12-year statute of limitation is still in effect for court claims for quiet title, which is the action we would need to take to assert an RS 2477 claim.

### **How R.S. 2477 can be applied to County issues:**

- R.S. 2477 recognized traditional use of public land for roads.
- R.S. 2477 is a grant of right of way that is accepted by constructing a highway.
- Federal Land Policy and Management Act (FLPMA) was passed on October 21, 1976, and repealed R.S. 2477.
  - FLPMA is the modern public lands management law for BLM lands.
  - Rights of way existing in 1976 were not extinguished.
- Wilderness designations generally protect existing private property rights.
  - The Death Valley National Park legislation preserves existing rights in the property.
- Wilderness study areas are areas agencies identify as qualifying for wilderness. It is likely most future wilderness designation will be derived from identified study areas.
  - One criterion for land to be dedicated for wilderness is that the study area be roadless.
  - If there are 2477 rights of way in the area, the area may not qualify as roadless for the purpose of being a wilderness study area.

### **Establishing R.S. 2477 Rights of Way - The Process:**

- R.S. 2477 rights are established without application or the requirement to give notice or record the rights. If the rights were established, they continue to exist.
  - Proving that the right was established can be problematic.
  - Federal law governs scope of the right of way. (9<sup>th</sup> Circuit)
- The entity asserting the rights may achieve recognition of that right by administrative procedures or by federal quiet title action.
- BLM land is subject to administrative procedures to quiet title in federal lands.
  - Recordable Disclaimer of Interest process.
    - This is a procedure to obtain a disclaimer from the federal government regarding disputed interest in land to remove cloud from title.
  - The disclaimer does not specifically apply to R.S. 2477 claims, but can be used to determine title to them.
  - The disclaimer process requires: (43 CFR 1864.1-2.)
    1. \$100.00 fee.
    2. Legal description of the road.
    3. Statement of reasons why claimant believes it has title to land.
    4. Any available evidence supporting the claim.
- A Federal quiet title action will most likely occur in federal court.
  - There is a twelve-year statute of limitation to bring the action.
  - The statute of limitation period would run from the time when the public should have known access to the road was removed.
  - Burden of proof for establishing the right is on the person claiming the right.
  - Reasonable rules established by federal agencies to demonstrate rights of way have been upheld.

- Necessary Elements to Establish Right of Way
  1. The route must be a “highway.”
  2. There is much debate over what constitutes a highway.
  3. Should be a definite route that was open to the public to freely come and go at will.
  4. It is debatable whether the highway must be passable by modern vehicles.
  5. Inclusion in County road system is persuasive of highway status.
- Highway must have been “constructed.” There are many cases on construction, but federal guidelines and consensus of courts seems to be that some actual construction of a road is necessary. Mere establishment by use is not enough. This is the latest BLM interpretation (which may have changed in a recent MOU with Utah). However, there is conflicting guidance from land agencies and courts on what entails construction.
- Laws of the state regarding establishment of roads may be persuasive or perhaps determinative of whether construction has occurred. Prior to 1976, the law of the state generally controlled. This is a controversial topic. Some entities claim that extended use of the right of way may equal construction, so that old wagon trails, pathways and other passages qualify.
  - Early California Law: 'In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property.' (Political Code § 2618.)
    - Laying out of road by private party that was later used by public could amount to formation of public highway. (Ball v. Stephens, 158 P.2d 207 (2d Dist. 1945).) This road started out as trail but was slowly improved as a road, which was used by the public. It was improved as a road by use as a road.
- Highway must have been constructed before 1976, when R.S. 2477 was repealed.
- The land must have been available for entry when the highway was constructed.
  - Entry generally means the land was available for settlement by the public under federal law.
  - National Parks and Forests are withdrawn from entry.
  - The federal government withdrew federal land from entry for various reasons.
  - An example is the withdrawal of most lands in the Owens Valley by the Reclamation Agency at the turn of the century, prior to and during the acquisition of land by Los Angeles for the aqueduct.

**Liability Issues:**

- Assertion of R.S. 2477 right of way in itself should not lead to liability.
- The County is not liable for roads not accepted into the County Road system. (Streets & Highways Code § 941)
- Maintaining a road that is not in the County road system may lead to liability. (Gov. Code § 831.3.)

**Ways to Challenge Federal Land Use Decisions:**

- R.S. 2477 right either administratively or through quiet title action

- Administrative Procedures Act to challenge whether a federal agency followed its own rules.
- National Environmental Protection Act to ensure public input and that environmental issues are considered.

### **The Dilemma for Staff**

We have had numerous discussions with the Board regarding public road closure and RS2477 issues. Staff has a clear understanding concerning the history of public road access legislation and current status of RS2477 and related issues.

Staff is unclear what direction the Board of Supervisors would like us to take regarding these issues.

For instance, we have these questions:

- 1 Should we request that public agencies go through a local process with Inyo County prior to making a road closure decision? (a resolution was prepared to do this at a past workshop, but not adopted)
2. How should we respond when we get a notice of a pending road closure?
3. How should we respond when we are told a County road has been closed, such as in Death Valley, where we did not agree to its closure and were not informed that it was to be closed until after the action took effect?

We look forward to clarifying these issues so that we may better serve the Board and the constituents of Inyo County on this issue.

### **ALTERNATIVES**

- Take no action.
2. Direct staff to develop other policy recommendations regarding proposed closures of non-County public access roads.

### **OTHER AGENCY INVOLVEMENT:**

Inyo County Public Works, County Counsel.

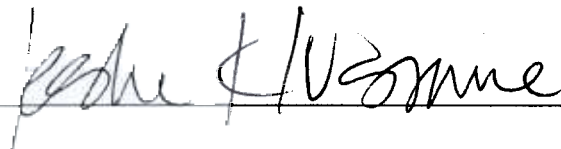
### **FINANCING:**

A decision to process appeals or protests may include fees and litigation costs. Funds for such actions are not included in the FY2004/05 Inyo County Budget.

<b>APPROVALS</b>	
<b>COUNTY COUNSEL:</b>	<b>AGREEMENTS, CONTRACTS AND ORDINANCES AND CLOSED SESSION AND RELATED ITEMS (Must be reviewed and approved by county counsel prior to submission to the board clerk.)</b>
<b>AUDITOR/CONTROLLER:</b>	<b>ACCOUNTING/FINANCE AND RELATED ITEMS (Must be reviewed and approved by the auditor-controller prior to submission to the board clerk.)</b>
<b>PERSONNEL DIRECTOR:</b>	<b>PERSONNEL AND RELATED ITEMS (Must be reviewed and approved by the director of personnel services prior to submission to the board clerk.)</b>

**DEPARTMENT HEAD SIGNATURE:**

(Not to be signed until all approvals are received)

 \_\_\_\_\_ Date: 2/2/05

**Attachments**

- Exhibit A: Inyo County Resolution 2002-36
- Exhibit B: Inyo County Resolution 2002-34
- Exhibit C: Inyo County Resolution 95-04
- Exhibit D: Inyo County Resolution 78-111
- Exhibit E: December 14, 2004 Agenda Request – Public Access Road –Process for Closure
- Exhibit F: April 15, 2004, BLM Correspondence to Linda Arcularius
- Exhibit G: BLM “Background April 2004” information regarding RS 2477
- Exhibit H: Quadstate County Government Coalition, September 29, 2003, w/attachment
- Exhibit I: IC Correspondence to Forest Supervisor Jeff Bailey, INF, September 24, 2003
- Exhibit J: Supervisor Michael A. Dorame, Testimony to Subcommittee, August 18, 2003
- Exhibit K: IC Correspondence to BLM, October 1, 2002, w/attachment
- Exhibit L: BLM Correspondence to IC, September 4, 2002
- Exhibit M: June 5, 2002, BLM Correspondence to Linda Arcularius
- Exhibit N: IC Correspondence to USFS CAET, May 2, 2000
- Exhibit O: California Off Road Vehicle Association, Inc., March 21, 2002
- Exhibit P: Blue Ribbon Coalition Correspondence to IC, March 20, 2002
- Exhibit Q: “Our Not so Public Lands”, undated correspondence from Richard Cervantes
- Exhibit R: Richard Cervantes Correspondence to USFS, July 18, 2003
- Exhibit S: Internet article submitted by Richard Cervantes, “Public Rights of Way over Federally Managed Lands”
- Exhibit T: “Highway Robbery in California”, November 2003, California Wilderness Coalition



Exhibit U: "Interior Dept. Eases Curbs on Federal Rights of Way", Washington Post,  
January 7, 2003

Exhibit V: "How have federal agencies implemented RS2477 road access rights",  
Heritage Research Center, Ltd. February 27, 2002

Exhibit W: BLM RS 2477 "Routes Inside and Outside Wilderness", October 1999

Exhibit X: "Source Book on RS 2477 Rights of Way Issues After Babbit January 22,  
1997, Memorandum", Western Counties' Resources Policy Institute,  
February, 1998