



**AGENDA REQUEST FORM**  
BOARD OF SUPERVISORS  
COUNTY OF INYO

For Clerk's Use Only:  
**AGENDA NUMBER**

Consent     Departmental     Correspondence Action     Public Hearing  
 Scheduled Time for 1:00 p.m.     Closed Session     Informational

**FROM:** COUNTY COUNSEL/ROAD DEPARTMENT

**FOR THE BOARD MEETING OF:** October 17, 2006

**SUBJECT:** CONSIDERATION OF WHETHER TO MAKE FINDINGS UNDER INYO COUNTY RESOLUTION NO. 2002-36

**DEPARTMENTAL RECOMMENDATION:**

Staff recommends your Board consider documentary evidence and public comments and make findings, if appropriate, under County of Inyo Resolution No. 2002-36 supporting assertion of Revised Statute 2477 claims for the following roads in the County maintained mileage system: Last Chance Road; Lost Section Road – South; Old Toll Road; Padre Point Road; Petro Road; and Santa Rosa Road.

**CAO RECOMMENDATION:**

**SUMMARY DISCUSSION:**

Certain County maintained roads located in wilderness areas established by the California Desert Protection Act of 1994 may have been closed by Congress in passing that Act. The County may have property rights in these roads pursuant to Revised Statute (R.S.) 2477, which established road easements in certain highways that were constructed across federal land. These roads were apparently closed without consideration of the County's property interest in the road rights-of-way and without the consent of the County. Access to two of these roads, Petro Road and Lost Section Road, has been physically blocked by Death Valley National Park..

On May 14, 2002, your Board passed resolution 2002-36 to reaffirm and establish standards for the recognition of rights-of-way in accordance with R.S. 2477. This resolution establishes certain findings to be made by your Board, upon substantial and reliable evidence, prior to pursuing R.S. 2477 rights-of-way with respect to particular roads. There are three findings that must be made. They are:

Finding 1. The road under consideration constitutes a highway, construction of which occurred upon public lands not reserved for public uses and was completed before the earlier of the date when those public lands were reserved for public uses, or October 21, 1976.

Finding 2. The road, or the use thereof, is threatened with closure, elimination, or significant restriction by the United States, or any other person or entity, public or private.

Finding 3. There is a compelling reason to preserve the road, or the use thereof.

**Criteria for Finding 1**

The first finding essentially determines whether the road in question is a right-of-way secured by R.S. 2477. The road must have been constructed after 1866 and prior to October 21, 1976. Evidence of construction in the relevant time period may come from many sources. Inclusion of the road in the County Road Register during that period would be evidence that the road had been constructed and that the County

had exercised ownership and control of the road. The County itself need not have constructed the road and any other evidence that the road was established or constructed might be persuasive.

Resolution 2002-36 states that the County shall, in applying the terms “construction,” “highway,” and “public lands not reserved for public uses”, use the definition or interpretations given them by the federal agency that administers the land on which the road is located. Subsequent to the adoption of Resolution 2002-36, a federal district court has interpreted R.S. 2477 and determined that the law of the state in which the road is located should be used to determine if a public highway was created in a particular instance. *Southern Utah Wilderness Alliance v. Bureau of Land Management* (10<sup>th</sup> Cir. 2005) 425 F.3d 735. Therefore, California law would govern whether the subject roads were created in the appropriate time frame in order to create a public right-of-way pursuant to RS 2477.

The court in *Southern Utah Wilderness Alliance* did find that the continuous use over a specified period of time would establish an R.S. 2477 right-of-way in most western states, that mechanical construction generally is not required, and that whether a route connected identifiable destinations is relevant, but not determinative, to whether it is a valid R.S. 2477 right of way. The Secretary of the Interior, in a March 22, 2006 memorandum, interpreted the court’s holding as follows:

“R.S. 2477 rights of way must be ‘public highways.’ What constitutes a ‘public highway’ will again generally be determined by looking to State law regarding public easements, but in general, a public highway is a definitive route or way that is freely open for all to use. See *SUWA v. BLM*, 425 F.3d at 765, 782-83. It need not necessarily be open to vehicular traffic. *Id.* Multiple ways through a general area may not qualify as a definitive route, though evidence may show that one or more of the ways qualifies as a highway depending on climate, topography, historic use, and other factors. See *id.* at 767. The route need not lead to an identifiable destination, although that may be one factor to consider in assessing whether the route is in fact a public highway. See *id.* at 783.”

California law is generally in accord with these determinations. California law generally does not require formal construction by a governmental entity to create a highway. Early California law stated: “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 a road by a private party that was later used by the public could amount to formation of public highway. *Ball v. Stephens*, 158 P.2d 207 (2d Dist. 1945) (This road started out as a 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.). Use of a right-of-way by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient without any specific action by state, county or city authority. RS 2477 would indicate the intent of the owner of the land in question here, the United States, to dedicate land to use for a road when the conditions of that act are met.

There is no evidence that any of the public land in question was reserved for public use prior to October 21, 1976. The Southern Utah Wilderness Alliance court addressed this criteria, again as summarized by the Secretary of the Interior:

“R.S. 2477 limited its reach to ‘public lands, not reserved for public uses.’ For purposes of R.S. 2477, public lands are those lands that are open to the operation of the various public land laws enacted by Congress. Lands were ‘reserved for public use’ only when they were both ‘withdraw[n] from the operation of the public land laws, [and] also dedicate[d] to a

particular public use.’ *SUWA v. BLM*, 425 F.3d at 784. Therefore, public land that was ‘withdrawn’ but not reserved for any particular use remained subject to R.S. 2477. Land that was temporarily withdrawn from only certain kinds of private appropriation for study or later classification cannot be said to have been ‘reserved for public use.’ Nor was any land that remained open to settlement, sale, or entry under certain public land laws exempt from operation or R.S. 2477.”

It does not appear any of the subject roads were in the original Death Valley National Monument. The Federal land on which they are located would not have been withdrawn from the operation of public land laws until 1994.

### Criteria for Finding 2

The roads under question here may have been included in wilderness areas established by the California Desert Protection Act of 1994 or may have been excluded from wilderness areas. Staff expects to provide more definitive evidence whether they were excluded prior to your Board’s meeting on this issue. Federal wilderness areas are not compatible with public roads. The Wilderness Act states, in part:

“(c) Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.” (16 USCA § 1131)

The California Desert Protection Act of 1994, which created the wilderness areas in question here, stated that the provision of the Wilderness Act (passed in 1964 and quoted above) are applicable to the wilderness created by it. Therefore, your Board may conclude that the creation of the wilderness prohibited, or at a minimum threatened, the continued use of roads that were included in that wilderness.

### Criteria for Finding 3

The third finding calls for your Board’s public policy determination that action should be taken to preserve the road in question. Such action should only be taken if there is a compelling reason to do so.

### Discussion of Particular Roads

As this Agenda Request Form is being prepared, County staff is doing historical research on each road listed below. Additional information on each road will be provided to your Board at the meeting on October 17.

### Last Chance Road Easement

Last Chance Road Easement is a generally impassable easement that is not maintained by the County. It is in Death Valley National Park and is shown as a right-of-way only (no road) in County maintained mileage maps. It is not listed on the 1948 County of Inyo Road Register.

Finding 1: In order to obtain rights under RS 2477, a highway must have been constructed prior to October 21, 1976. At the time of this writing, there is no evidence that a road was ever constructed on the Last Chance Road Easement. If no road was actually constructed, even through use, it would be difficult to make a positive finding for finding one, under federal or California law.

Finding 2: Inclusion in the wilderness area may be considered as a threat of closure of the road (or easement).

Finding 3: Your Board would need to find there is a compelling reason to preserve this road or the use of it.

### Lost Section Road – South (Road No. 5010A)

Lost Section Road (South) is a 3.1 mile section of Lost Section Road in Death Valley that connects in a north/south direction with Furnace Creek Wash Road. Another portion of Lost Section Road connects with Furnace Creek Wash Road approximately four miles south of the northerly intersection and is not included in the wilderness area. Lost Section Road – South was physically closed and rehabilitated by the Park Service. It was a dirt road. It is listed and described in the County of Inyo Road Register, dated March 1, 1948, page 178.

Finding 1: Inclusion in the Road Register in 1948 may be considered as persuasive evidence that the road was constructed and jurisdiction of it was assumed by the County by that date. Other evidence may establish that the road was constructed prior to October 21, 1976 and used by the public.

Finding 2: Inclusion in the wilderness area may be considered as a threat of closure of the road.

Finding 3: This is a short section of road that is essentially a cut-off between Lost Section Road and Furnace Creek Wash Road. Your Board could consider the convenience of this section to travelers on either of these roads in determining if there is a compelling reason to preserve the road.

### Old Toll Road (Road No. 5016)

Old Toll Road is a dirt road with a terminus on highway 190, near Panamint Springs, that provides access to Zinc Hill Road, Darwin Falls and the town of Darwin. It is listed and described in the County of Inyo Road Register, dated March 1, 1948, page 184.

Finding 1: Inclusion in the Road Register in 1948 may be considered as persuasive evidence that the road was constructed and jurisdiction of it was assumed by the County by that date. Other evidence may establish that the road was constructed prior to October 21, 1976 and used by the public. Evidence will be provided to your Board that, prior to the construction of Highway 190, this road was a primary route between Darwin and Panamint Springs.

Finding 2: Inclusion in the wilderness area may be considered as a threat of closure of the road.

Finding 3: Your Board would need to find there is a compelling reason to preserve this road or the use of it.

#### Padre Point Road (Road No. 5030)

Padre Point Road is depicted on the maps of County maintained mileage to be a .6 mile road that spurs off of Highway 190. It is not listed on the 1948 County of Inyo Road Register. The road depicted in County maintained mileage may not exist. It appears that the road that is currently used to access the Father Crowley overlook is not the same road as depicted in the Road Register. However, the fact that the County has maintained the actual Father Crowley overlook road would indicate County control over the road, at least currently.

Finding 1: It may be that the road identified on the road register was never constructed and would therefore not be protected by R.S. 2477. However, if the actual Father Crowley overlook road was constructed prior to October 21, 1976 and used by the public, it may qualify as a R.S. 2477 right-of-way. Such a finding would be bolstered if the road was maintained by the County prior to that date.

Finding 2: Inclusion in the wilderness area may be considered as a threat of closure of the road. If the actual road was excluded from the wilderness, the threat of road closure would not be imminent. Staff should be able to confirm whether the road is included in wilderness by your Board's meeting.

Finding 3: The fact that the actual overlook road is a popular overlook for the traveling public could present a compelling reason to preserve the road and the use of it.

#### Petro Road (Road No. 5003)

Petro Road is a 16.8 mile dirt road that connects Furnace Wash Road to Highway 127, passing through the Greenwater Range. The 6 mile portion of the road that passes through Death Valley wilderness has been closed by the National Park and partially restored. It is listed and described in the County of Inyo Road Register, dated March 1, 1948, page 170.

Finding 1: Inclusion in the Road Register in 1948 may be considered as persuasive evidence that the road was constructed and jurisdiction of it was assumed by the County by that date.

Finding 2: Inclusion in the wilderness area may be considered as a threat of closure of the road.

Finding 3: Your Board would need to find there is a compelling reason to preserve this road or the use of it.

#### Santa Rosa Road (Road No. 4029)

Santa Rosa Road is a 5.1 mile graded dirt road that provides access to mining and recreation in the Malpais Mesa wilderness area. It is listed and described in the County of Inyo Road Register, dated March 1, 1948, page 165.

Finding 1: Inclusion in the Road Register in 1948 may be considered as persuasive evidence that the road was constructed and jurisdiction of it was assumed by the County by that date.

Finding 2: There is some evidence that this road was excluded from the Malpais Mesa wilderness area. If the road was excluded from the wilderness, the threat of road closure would not be imminent. Staff should be able to confirm whether the road is included in wilderness by your Board's meeting.

Finding 3: Your Board would need to find there is a compelling reason to preserve this road or the use of it.

ALTERNATIVES:

Your Board is under no obligation to make findings for any of these roads. However, by the terms of Resolution 2002-36, Staff would take no action to preserve any of these roads absent such findings, unless your Board specifically directed otherwise.

OTHER AGENCY INVOLVEMENT:

United States Department of the Interior; U.S. Bureau of Land Management; U.S. Park Service.

FINANCING:

Making the findings in this item will not, in itself, have financial implications for the County.

**APPROVALS**

COUNTY COUNSEL:	AGREEMENTS, CONTRACTS AND ORDINANCES AND CLOSED SESSION AND RELATED ITEMS <i>(Must be reviewed and approved by county counsel prior to submission to the board clerk.)</i>  Approved: _____ Date _____
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***DEPARTMENT HEAD SIGNATURE:***

(Not to be signed until all approvals are received) \_\_\_\_\_ Date: \_\_\_\_\_

**ATTACHMENTS:**

- Resolution No. 2002-36
- Memorandum, Secretary of the Interior, March 22, 2006
- Last Chance Road materials
- Lost Section – South Road materials
- Old Toll Road materials
- Padre Point Road materials
- Petro Road materials
- Santa Rosa Road materials