

# *Highway Robbery in California*

HOW THE REVIVAL OF AN 1866 LAW THREATENS  
CALIFORNIA'S NATIONAL PARKS AND WILDERNESS



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***Front cover: Granite Mountains, Mojave National Preserve, by Jeff Garton. Front inside cover: Redwood National Park, courtesy National Park Service; Sheephole Valley Wilderness, courtesy Pat Flanagan; Siskiyou Wilderness, by Joe Gillespie; Joshua Tree National Park, by John Kindsvater. Back inside cover: Cady Mountains, by Jim Rose; King Range, CWC file photo. Back cover: Map of RS 2477 "highways" claimed by San Bernardino County, by Laura Kindsvater.***

*“The mere existence of even bogus rights-of-way claims casts a cloud on a manager’s ability to make sound land-use decisions and protect America’s public lands, for who can predict when or whether the bogus claims will be granted. When foot trails that run through pristine streams, fragile tundra, and imperiled wildlife habitat are claimed as highways, the integrity of the land is threatened.”*

*—former BLM Idaho State Director Martha Hahn*



CWC's mission is to protect and restore California's wild places. CWC works toward a healthy future for California citizens and wild landscapes. That future is one where wilderness, wildlands, and biodiversity are core values for all Californians. These values generate a profound respect and appreciation for the state's mountains and rivers, coasts and deserts, allowing each person to develop deep relationships with wild nature. A commitment to conserve all roadless lands and native plants and animals in a functional network of protected areas becomes the basis of California law, policy, citizen ethics, and action. For people who believe that wilderness holds a special place in the human spirit and has intrinsic value, the California Wilderness Coalition is the only statewide organization that brings together individuals and organizations in the vigorous defense of California's remaining wildlands.

For more information about the California Wilderness Coalition, visit our web site at [www.calwild.org](http://www.calwild.org).



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# Executive Summary

From the redwood forests to the Mojave desert, Californians have set aside some of nature's most magnificent places as parks, monuments, and wilderness areas to be enjoyed in their natural state forever. But recently, a defunct 1866 mining law has emerged from its grave to plague California's parks and wilderness with the threat of road-building, off-road vehicle abuse, and development.

## **Administration Revives Dead Law to Give Away Public Lands**

Though long since repealed, "Revised Statute 2477" recently was revived by the Bush Administration's Department of the Interior, giving special interests a back door to exploit parks, wilderness, and other protected public lands. Although debate over RS 2477 has simmered for decades, the Bush Administration has taken unprecedented steps to resuscitate the Civil-War-era provision. Under new Department of the Interior regula-



JOE FONTAINE

*Mosquito Lake, Mineral King proposed wilderness, Sequoia National Park. The Blue Ribbon Coalition has proposed RS 2477 "highways" through Mineral King and Sequoia National Park.*

## **What is RS 2477? A Brief History**

The Lode Mining Act of 1866 is not exactly a household term. In the past ten years, however, this obscure statute – and particularly the part of it called Revised Statute 2477 (RS 2477) – has become a major threat to the American West's national parks, national monuments and wilderness areas. Revised Statute 2477 reads simply, "the right of way for the construction of highways over public lands, not reserved for other uses, is hereby granted."

Beginning in the mid-1980s, a number of different anti-wilderness groups seized on the RS 2477 statute. These groups included hard-line off road vehicle groups, advocates for extractive industries, some local governments, and elements of a few state governments. Using creative arguments and century-old legal precedents, these groups argued that RS 2477 allows them to claim virtually any route that a prospector, rancher, hunter or vagabond may have used, even if long abandoned, impassable and obscure as a public highway. More dangerous still, they claim that the statute allows them to upgrade any obscure track through the desert into an improved two-lane road, with no regard whatsoever for environmental, habitat or other values. Since wilderness is by definition roadless and does not permit motor vehicles, in some states the recognition of all claimed RS 2477 rights-of-way would effectively eliminate millions of acres of federal wilderness.

The task of those wishing to use RS 2477 to challenge the federal government's jurisdiction over public lands was made easier in 1988 by the first Bush Administration's Interior Secretary Donald Hodel. Hodel issued a rule that made routes not normally considered as highways the subjects of legitimate claims under RS 2477. Such routes were not necessarily open to vehicular use, but included foot and horse trails and pack-animal trails. Routes were deemed to have been "constructed" simply by removing vegetation or large rocks, or by the mere passage of vehicles. This ruling opened Pandora's box to claims ranging from cow paths to intermittent stream channels.

In an effort to return some sensible meaning to the 1866 law, the Clinton Administration in 1994 proposed a rule that might have eliminated much of the controversy by providing definitions of key terms such as "construction." The proposal was torpedoed by the Republican-led 104th Congress. In 1997, both the Department of Agriculture and Department of the Interior stopped further RS 2477 actions, and Interior Secretary Bruce Babbitt rescinded Hodel's rule.

Dwarfing all of these actions, pushed by counties that wish to prevent wilderness designation, in July 2000 the State of Utah threatened to sue the Department of the Interior (DOI) to establish legal rights to these routes. The State failed to carry out its threat, and instead entered into closed-door negotiations with Department of the Interior Secretary Gale Norton, seeking ways to validate its bogus claims. Tests of the legality of Interior's new rules will define the future of wilderness and national parks.

*Excerpted from Tender Land: A Sourcebook for Salvaging America's West, by Howard Wilshire, Jane Nielson, and Richard Hazlett, to be published by Oxford University Press.*

tions, areas as sensitive and breathtaking as California's Mojave National Preserve, Redwood National Park, Joshua Tree National Park, and Death Valley National Park may be forever transformed by proposed "highways."

Intended to aid the settlement of the West in the 1800s, Revised Statute 2477 reads simply, "the right of way for the construction of highways over public lands, not reserved for other uses, is hereby granted." In 1976, Congress repealed RS 2477 with the passage of the Federal Land Policy and Management Act (FLPMA), while recognizing valid existing rights-of-way. However, because no records were kept of valid RS2477 highways, in the 1990s the oil, mining, and off-road vehicle industries seized upon RS2477 claims – legitimate or phony – as a way to gain access to protected areas for development or off-road vehicles, to prevent wilderness designation on federal lands, even to pave roads through existing national parks.

In 2003 the Bush Administration implemented a new rule for the application of RS 2477, paving the way for thousands of miles of spurious new "highways" across the West. Using the new rule, the Department of the Interior will give away public lands claimed under RS2477, by using a "disclaimer of interest" to simply abandon title to these federal lands, allowing states or counties to take ownership.

Today, off-road vehicle groups and a handful of Western counties are claiming that abandoned roads, jeep tracks, hiking trails, even cow-paths and streambeds are actually "highways" across our national parks, forests, monuments, refuges, and wilderness. They propose to take ownership of federal lands wherever these trails exist. The Bush Administration's disclaimer rule violates a standing Congressional moratorium that forbids Interior from publishing new rules concerning RS 2477. Nevertheless, the Department of the Interior is now moving forward to negotiate the giveaway of public lands in the West using the disclaimer rule.

### **The Modern Alternative**

A far more efficient, modern, and common-sense process exists for state and county governments to obtain road rights-of-way across federal lands. The Bureau of Land Management (BLM) has permitted tens of thousands of miles of roads, highways, and rights-of-way across public lands throughout the West to meet legitimate transportation needs, pursuant to Title V of the Federal Land Policy and Management Act (FLPMA). Title V of FLPMA, unlike the disclaimer rule and RS 2477, provides for full environmental reviews and opportunities for public comment before rights-of-way are granted. Unfortunately, that is precisely what most RS 2477 proponents are angling to avoid.

There is no need for the BLM to give away public lands under an obsolete statute, when states, counties and local governments have a long track record of satisfying their legitimate transportation needs under the existing modern statutes. The real goal

of most RS 2477 claimants is to undermine the conservation of public lands.

### **"Highways" Through California's Parks and Wilderness**

In California, more than 5,500 miles of proposed RS 2477 "highways" would cut through our national parks, forests, monuments, wilderness areas, and even a state park. RS 2477 claims also threaten critical habitat for threatened species. Six southern California counties have passed resolutions asserting RS2477 rights in general, but only one – San Bernardino County – has actually petitioned the Department of the



PAT FLANAGAN

*A hiking trail in the Mojave National Preserve Wilderness, claimed as a "highway" by San Bernardino County. The county proposes more than 2,500 miles of RS 2477 "highway" rights-of-way through Mojave National Preserve.*

Interior to give it ownership of specific rights-of-way, including thousands of miles of trails in national parks and in wilderness areas managed by the Bureau of Land Management (BLM). By contrast, Los Angeles County and San Diego County thus far have taken a more measured approach, working cooperatively with federal land agencies to ensure access to trails under modern environmental law, without resorting to the dangerous and obsolete 1866 statute.

San Bernardino County's proposed highways crisscross the Mojave National Preserve like a spider web, and also cross Death Valley National Park, the Mesquite Wilderness, Cady Mountains Wilderness Study Area, Soda Mountains Wilderness Study Area and more than a dozen other federally protected areas in the BLM's California Desert Conservation Area (*see map on back cover*). When field-checked, these proposed "highways" typically prove to be abandoned ranch roads and prospector trails, dry streambeds, and other trails fading away in open desert – not highways of any kind.

Even more disturbing, jeep clubs and other off-road interest groups have formally proposed RS 2477 highways through the King Range National Conservation Area, Siskiyou Wilderness, Giant Sequoia National Monument, and Sequoia National Park. The Bush Administration's new disclaimer rule clears a path for such special interest groups to claim rights-of-way over the public's conservation lands – whereas the previous regulation allowed only the actual “owner of interest” to apply, the new rule allows any entity to apply – public, private, or special interest.

RS 2477 and the disclaimer rule are a boon to those who oppose the protection of wilderness areas, because the presence of a road generally disqualifies an area for wilderness designation. If the Department of the Interior officially recognizes and gives away “highways” on faint backcountry trails that show no sign of construction and have not been maintained or regularly traveled for decades, then California's remaining wilderness study areas (WSAs) and other wilderness-quality lands could lose their eligibility for protection.

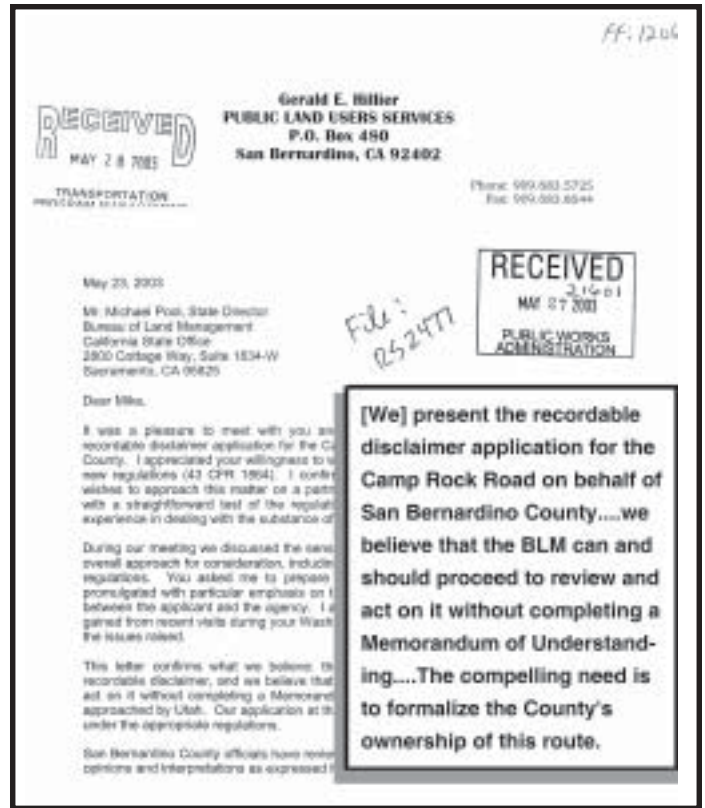
Volunteers around the state, in cooperation with the California Wilderness Coalition, have begun field-checking and documenting RS 2477 “highway” claims on public land. To date, this inventory has spanned 12 California counties and more than 30 national parks, wilderness areas, wilderness study areas, roadless areas proposed for wilderness designation in the California Wild Heritage Act, and other designated conservation lands. In case after case, field investigators have encountered overgrown jeep trails or hiking trails where claimants had asserted highways. Most of the routes do not connect one significant place with another, nor are they regularly traveled. In fact, many of them lie within designated wilderness areas where federal law already prohibits motor vehicles.

### ***Private, Military and Tribal Lands Also at Risk***

RS 2477 also threatens private property, and tribal and military lands, because many of these lands were unreserved public lands at some time in the past. In the California desert, for example, a number of proposed RS 2477 highways cross through private property and U.S. Army training lands.

### ***A Gathering Storm***

Many of California's political leaders have registered strong disapproval of the RS 2477 revival. U.S. Senators Dianne Feinstein and Barbara Boxer wrote to Secretary of Interior Gale Norton in March 2003, noting that the disclaimer rule is illegal and asking Norton not to process any disclaimers involving RS 2477 claims. The State of California Resources Agency in May 2003 asked the Department of Interior specifically not to grant highways in California using the RS 2477 loophole. And the majority of California's U.S. Congress members voted in July 2003 to curtail Interior from implementing the disclaimer rule.



In January 2003 the Department of Interior announced its new policy for granting RS 2477 disclaimers. A state or county may negotiate a Memorandum of Understanding (MOU) with Interior regarding which sorts of routes Interior will recognize as highways. Interior has stated that its MOUs will not address routes in national parks, wildlife refuges, wilderness, or WSAs — leaving national monuments and national forests, and many other federal conservation lands, open to highway claims in MOUs. In addition, Interior outlined a second way to obtain an RS 2477 right-of-way, which could be used outside MOUs, in parks and wilderness: Interior need only find a “compelling need” to give the right-of-way.

Interior already has negotiated an MOU with the State of Utah and has discussed potential agreements with other Western states and counties, including San Bernardino County. Although the State of California has firmly opposed the RS 2477 disclaimer process, San Bernardino County has approached Interior for its own MOU, potentially circumventing the state's authority to block RS 2477 highway claims over California's conservation lands. San Bernardino County also has told Interior that it has “compelling need” for a federal disclaimer of an ordinary county road that happens to run through BLM lands designated as critical habitat for the desert tortoise, a federally listed threatened species (see letter above).

Despite opposition from the highest levels of leadership in California, RS 2477 looms ominously over the state's most spectacular wild places like a thunderstorm on the horizon.

# What's at Stake in California

BOGUS HIGHWAYS THREATEN PARKS, WILDERNESS, PRIVATE LANDS, AND MORE

## National Parks

Spurious highway claims threaten the sanctity of the most popular areas in our national network of public lands: our National Parks. A 1993 memo from the National Park Service's Utah State Coordinator warned of the RS 2477 loophole's destructive potential: "Validation of possible RS 2477 rights-of-way assertions would undoubtedly derogate most unit values and seriously impair the ability of the NPS [National Park Service] to manage the units for the purposes for which they were established."



In California, five national parks are targets of RS 2477 highway claims totaling thousands of miles, and traversing pristine wilderness areas within park boundaries (see maps on pages 13, 14, and back cover). Congress preserved these parks on behalf of the American public in order to sustain the wild ecosystems, plant and animal species, habitat, and water resources they harbor. All of these values could suffer substantial degradation if the Department of Interior proceeds to validate RS 2477 highway assertions through the parks.

In the **Mojave National Preserve**, San Bernardino County has proposed 2,567 miles of RS 2477 "highways," although in reality there are just 244 miles of county-maintained roads in the Preserve (see map on page 13). The county's specious claims include trails in the dramatic Granite Mountains and Provi-



*In the Mojave National Preserve, San Bernardino County has claimed over 2,500 miles of "highway" right-of-ways, although in reality there are just 244 miles of county-maintained roads in the preserve.*

dence Mountains, even hiking trails and a two-track jeep trail traversing Cima Dome, one of the largest Joshua tree forests in the world. More than 700 miles of these proposed "highways" run through designated wilderness areas inside the Preserve.

San Bernardino County claims a dozen more miles in **Death Valley National Park's** designated wilderness, mainly abandoned mining routes in some of the desert's most remote mountain ranges. The National Park Service has acquired all the old mining claims in this area of the wilderness, but the county persists in demanding ownership of the abandoned trails.

**Joshua Tree National Park** is the subject of RS2477 highway claims filed by a private individual for an old mining road to a long-abandoned townsite. Local conservationists have expressed concern that the route might be used to haul garbage to a new proposed regional landfill on the park's boundary.

Both **Redwood National Park** on California's north coast and **Sequoia National Park** in the southern Sierra Nevada are threatened by RS2477 highways proposed by a special interest group: the Blue Ribbon Coalition (BRC), a national off-road vehicle (ORV) advocacy group funded in part by the oil and mining industries and ORV manufacturers. BRC claims a few miles in Redwood National Park along the Bald Hill Trail, and more than two dozen miles in Sequoia National Park.

## Wilderness

California's wilderness areas represent our state's last remaining roadless areas, preserved for future generations to be untrodden by vehicles and untainted by exhaust fumes. As set out in the 1964 Wilderness Act, "A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." Any RS 2477 highway through a congressionally designated wilderness would degrade the essential value of wilderness.

Currently 23 existing wilderness areas are targeted by RS 2477 claims. So are seven proposed wilderness areas being considered for wilderness designation in the California Wild Heritage Act (see maps on pages 13, 14, and back cover).

Aside from its extensive highway claims in **Death Valley National Park Wilderness** and **Mojave National Preserve Wilderness (11 areas)**, San Bernardino County also has proposed highways in several national wilderness areas managed by the BLM in the California Desert Conservation Area: the **Dead Mountains Wilderness, Kingston Range Wilderness, and Mesquite Wilderness**.

In addition, private individuals have proposed highways in **Chemehuevi Mountains Wilderness, Cleghorn Lakes Wilderness, and Sheephole Valley Wilderness** in San Bernardino County; in the **Orocopia Wilderness and Palen-McCoy Wilderness** in Riverside County; and in the **Palo Verde Wilderness** in Imperial County. All these areas were designated wilderness by Congress in the California Desert Protection Act of 1994.

In northern California, the Blue Ribbon Coalition has proposed 48 miles of highways through the **Siskiyou Wilderness**, on long-abandoned mule logging trails that are now hiking trails. In the Sierra Nevada, the Blue Ribbon Coalition similarly has claimed highways on trails in the **Sequoia National Park Wilderness** and nearby **Jennie Lakes Wilderness**.

All designated wilderness areas are protected from road-building and motor vehicles under the 1964 Wilderness Act. If the Department of the Interior disclaims all federal interest in the abovementioned "highways" asserted under the new RS 2477 rule, these wilderness areas could be effectively opened to motorized vehicle traffic.

## Proposed Wilderness

Several proposed wilderness areas face the same threat. San Bernardino County claims it owns highways in all five congressionally designated wilderness study areas (WSAs) that are currently proposed for wilderness designation in the California Wild Heritage Act: the **Avawatz Mountains WSA, Cady Mountains WSA, Kingston Range WSA, Death Valley (DV-**

**17) WSA, and Soda Mountains WSA**. WSAs are areas recognized by the BLM as having wilderness character – meaning the agency itself found no highways there – and then set aside by law for Congress to consider as new wilderness areas.

One typical highway claim inside the Avawatz Mountains proposed wilderness becomes eroded and heavily vegetated after just a few feet, and exhibits no evidence of construction or maintenance. The Avawatz Mountains proposed wilderness stretches over miles of habitat for bighorn sheep, coyotes, bobcats, and roadrunners. It is a place of spiritual and cultural importance for Native Americans of the Shoshone Nation, and a popular destination for desert hikers, rock climbers, and equestrians. CWC staff and volunteers have documented similar bogus highways bisecting both the Soda Mountains proposed wilderness and the Cady Mountains proposed wilderness. If the Department of the Interior grants RS 2477 highways in areas such as these, they could be permanently eliminated from consideration for congressional wilderness designation.



LAURA KINDSVATER

*This typical RS 2477 "highway" claim in the Avawatz Mountains proposed wilderness becomes eroded and vegetated after just a few feet.*

Similarly, the Blue Ribbon Coalition has claimed highways in the renowned **Mineral King** area of the **Sequoia National Park proposed wilderness additions**, and in the **King Range proposed wilderness** (see King Range National Conservation Area on facing page). Both these areas are currently proposed for congressional wilderness designation in the California Wild Heritage Act.

The Blue Ribbon Coalition's claims exemplify the dubious nature of many RS 2477 assertions. The South Kelsey Trail in the **Siskiyou Wilderness** was originally constructed as a mule trail, not a highway, by Chinese workers in the 1850s – before the RS 2477 law even existed. For several miles this trail follows the South Fork Smith River, a designated national wild and scenic river where motor vehicles are already prohibited by act of Congress. At the other end of the scale, the Gasquet-Orleans Road was constructed for logging in the Six Rivers National Forest, long after these National Forest lands were "reserved for public uses" – making them ineligible for RS 2477 claims.





KIM FLOYD

An RS 2477 “highway” through a very narrow slot canyon in the Cady Mountains Wilderness Study Area.

### **National Monuments and National Forests**

No California counties are currently asserting RS2477 highways in national forests or monuments – but one well-funded off-road group is. The Blue Ribbon Coalition is proposing RS2477 highways in **Giant Sequoia National Monument** and the nearby **Sequoia National Forest**, and also in the **Klamath National Forest** and the **Six Rivers National Forest** outside the Siskiyou Wilderness (see maps on page 14).

In the Giant Sequoia National Monument, the Blue Ribbon Coalition has claimed 51 miles of trails, including portions of the Hockett Trail, which traverses giant sequoia groves and lush mountain meadows. The Hockett Trail originated as a mule trail used by miners and is a popular trail among equestrians today.

### **Other National and State Conservation Lands**

Known as California’s “Lost Coast,” the **King Range National Conservation Area** managed by the BLM in Humboldt and Mendocino counties is the wildest portion of the California coast. In fact it’s the longest undeveloped coastline in the contiguous United States – a unique haven for rare coastal old-growth forests and wildlife, including black bear, mountain lion, and rare or endangered species such as Roosevelt elk, California brown pelican, steelhead trout, coho salmon, bald eagle, peregrine falcon, and northern spotted owl. Much of this rugged and scenic coast currently is proposed for wilderness designation.

Unfortunately, the Blue Ribbon Coalition and a number of local residents continue to propose 100 miles of RS 2477 highways throughout the King Range, including a “highway” down scenic Black Sands Beach (see map on page 14). Their lawsuit attempting to force BLM to open the beach to vehicles was dismissed this fall in the 9th Circuit District Court. In November 2003 the

Blue Ribbon Coalition formally re-asserted these routes with BLM, and demanded a swift acknowledgment of their proposed highways so they could hold a motorized “dual sport ride” event on the beach.

The Blue Ribbon Coalition’s highway claims also threaten nearby **Jedediah Smith Redwoods State Park**, where a proposed highway on the Little Bald Hill Trail crosses into state park lands.

In addition to wilderness, San Bernardino County also proposes RS 2477 highways through other protected lands in BLM’s **California Desert Conservation Area**, particularly lands designated as critical habitat for federally listed threatened species, and areas of critical environmental concern (ACECs), which BLM establishes to monitor or protect unique ecological and cultural resources on public lands. In both cases, RS 2477 highways granted by the federal government could degrade or destroy the values for which these lands are managed.

In the **Rainbow Basin Natural Area ACEC**, the BLM strictly limits motorized vehicle access in order to protect habitat for a fragile desert tortoise population. San Bernardino County asserts an RS 2477 highway directly through the area. Other ACECs at risk from highways proposed by unknown individuals are the **Chuckwalla Bench ACEC** which protects desert tortoise habitat, and the **Denning Springs ACEC** which protects prehistoric cultural sites.



CWC FILE PHOTO

Giant sequoia are found only in 70 remnant groves scattered across the Sierra Nevada. Many of these groves are protected by the Giant Sequoia National Monument, which was designated in 2000. Today the Blue Ribbon Coalition is trying to open the monument to off-road vehicle use by claiming 51 miles of RS 2477 rights-of-way.

## Private Property

RS 2477 highway claims are a serious threat to Western landowners. Because many private lands in the West were originally unreserved public lands, RS2477 claims have been made across homesteads, ranches, patented lands, and other private property. It is important for private landowners to know that if the government recognizes abandoned or non-existent roads as RS 2477 rights-of-way, these can be asserted against their private property. This means landowners might not be able to stop ATV riders or government vehicles from crossing their property. Even if landowners have conducted a title search on their property, they still could be faced with RS 2477 claims brought by any individual.

This has already happened to private landowners in Utah, who were forced to hire lawyers to successfully defend their private property from county road graders. In Colorado and other states, off-road vehicle users and county officials have forcibly opened vehicle routes across private lands by removing barriers, opening gates, and cutting locks over the objection of the private landowners. According to the Department of Interior, the only notification landowners may receive of claims adverse to their property interests will be through notice in the Federal Register.

In California, RS 2477 claims made across private lands have significant potential for conflict. CWC has identified several areas where RS 2477 routes have been asserted through private lands, or right up to private property lines. For example, in the Lanfair Valley region of the Mojave National Preserve, many of San Bernardino County's highway claims run through private lands owned by inholders within the park. While a few of these routes are county-maintained roads, the majority are not. Some local landowners have objected to the county's extensive demands for rights-of-way in this area.

## Tribal and Military Lands

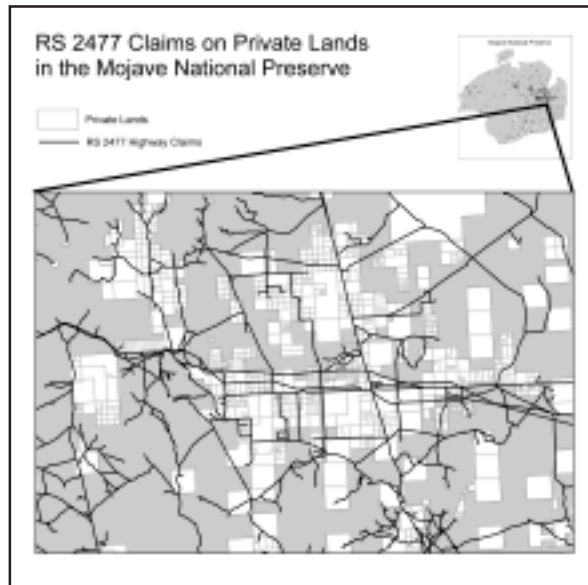
Native American tribal lands and lands owned by the United States Armed Forces are also threatened by RS 2477, because the 1866 statute pre-dates the reservation of many Indian and military lands.

San Bernardino County has asserted ownership of roads and trails crossing Army, Navy, and Air Force lands in the Mojave desert. The county's digital map of its proposed RS 2477 highways includes a number of jeep trails and dirt roads crossing into the U.S. Army Training Center at Fort Irwin and the recently allocated Fort Irwin expansion lands. The majority of these are not maintained by the county. While these routes may be the result of poor or overzealous mapping by the

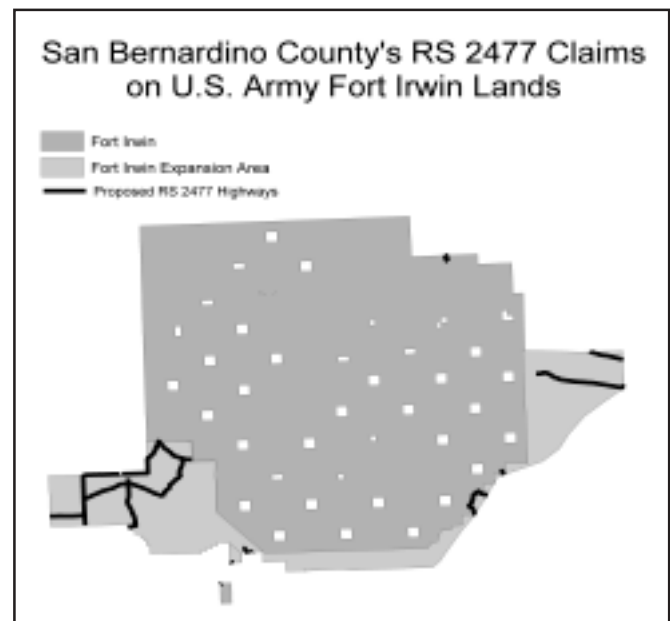
county, they represent a real problem – because Fort Irwin was “reserved” for the Army's use later than 1866, the county or other entities could abuse the Bush Administration's disclaimer rule to gain title to routes on what is now Army land. Other “highways” claimed by the county run across Navy lands at the China Lake Naval Weapons Center, and across Air Force lands at the Cuddeback Gunnery Range.

At least one California tribe has expressed concerns about RS 2477. After Imperial County passed a general resolution asserting RS 2477 rights in 2002, the Quechan Indian Nation responded that the action had been taken without consulting the tribe. The tribe requested notice and

consultation prior to any changes to the legal status or physical condition of Indian Pass Road, which travels through an area sacred to the Quechan and designated by BLM as an Area of Traditional Cultural Concern.



MAP BY LAURA KINDSWATER



MAP BY LAURA KINDSWATER

## Ecological Harm

Even the smallest road can have an enormous impact on wildlife. Roads transform wildlife habitat with pernicious impacts extending far beyond the threat of “road kill.” In fact, the presence of roads represents one of the primary reasons that California species have been listed as federally threatened or endangered, according to a 2001 study by the National Wildlife Federation.

Roads fragment habitat, disrupt wildlife movement and behavior, spread exotic invasive plants, degrade and pollute streams, and provide access to previously intact ecosystems. These disturbances impact wildlife habitat beyond paved (or unpaved) road surfaces. Scientists have identified a “road-effect zone” estimated to be 15 to 20 times as large as the actual right of way.

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*“[The Bush RS 2477 policy] has the potential to have a very broad negative impact on the nation’s federal lands. The January 2003 Bureau of Land Management [Disclaimer] Rule is particularly worrisome because new RS 2477 rights-of-way would not be required to meet any particular standard or criteria for environmental protection to be approved... RS 2477 has the potential to facilitate new road-building on a wide range of public lands, including National Parks, National Wildlife Refuges, National Forests, designated Wilderness and Wilderness Study Areas. Direct effects of roads on ecosystems are well documented.”*

*—Ecological Society of America, the nation’s professional organization of 7,600 ecological scientists, July 2003 letter to Congress*

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Unpaved off-road vehicle (ORV) routes pose the same threats to wildlife as official highways and byways. However, because ORV trails often traverse undeveloped areas, they may affect a larger number of sensitive species than paved highways in urban areas. ORV trails kill plants and animals, cause erosion and landslides, decrease the biological value of the soil, and degrade water quality in streams and rivers. Noise and disturbance from ORVs can cause animals to abandon valuable habitat and alter their movements, affecting reproduction and genetic diversity.

Wide-ranging animals, such as mountain lions, bears, and the Pacific fisher are more likely to be affected by roads and routes because they require large expanses of continuous habitat. Amphibians, like the California tiger salamander, are also sensitive to roads because they must migrate between wetland and upland habitats, which can be bisected by road construction. For highly endangered species such as the San Joaquin kit fox or Channel Island fox, roads pose a major impediment to survival.



*Desert tortoise crushed by a motorized vehicle.*

DR. KRISTIN BERRY

### **Case Study: RS 2477 and the Threatened Desert Tortoise**

The Mojave desert tortoise is listed as a threatened species by both the U.S. Fish and Wildlife Service and the California Department of Fish and Game. Because the tortoise is acutely vulnerable to habitat degradation, it acts as a health indicator for the overall desert ecosystem. Currently the desert tortoise is besieged by a multitude of threats – including habitat destruction and degradation, disease, and predation – most of which are abetted by the presence of roads. Non-native invasive plants, which out-compete the tortoise’s native food sources, spread along roadsides. Roads also attract common ravens, which kill and eat juvenile tortoises. Road construction often brings new development and increased off-road vehicle use, both of which pose significant setbacks for the embattled tortoise. Scientists have identified a “tortoise depression zone” estimated to extend from 400 meters up to 2 miles from highway edges.

To date, San Bernardino County has proposed 2,231 miles of RS 2477 highways through designated critical habitat for the desert tortoise, mostly on trails that are not county-maintained roads. Taking into account the fragmentation and “depression zone” effects of roads, it is clear the county’s claims would impact an enormous amount of critical habitat for the tortoise.

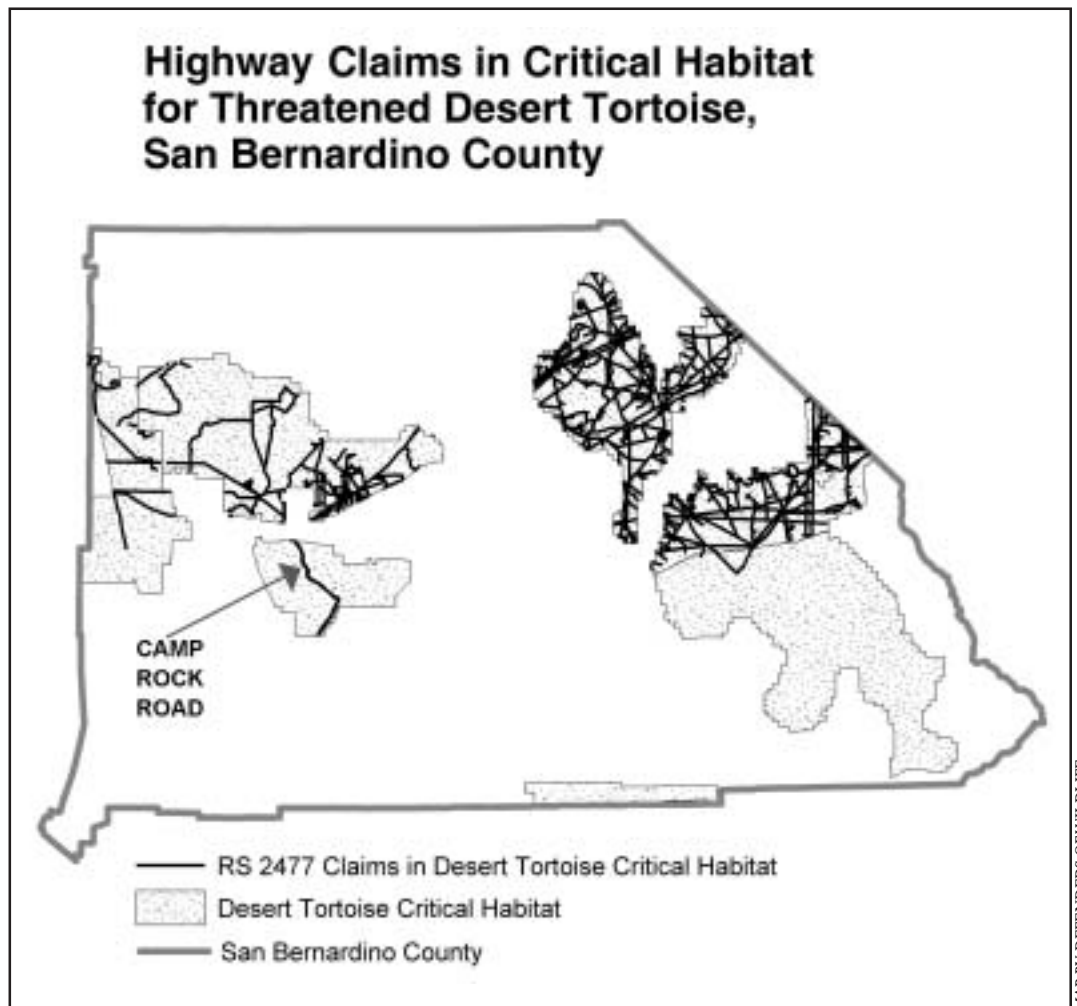
The case of Camp Rock Road is illustrative. This county-maintained road runs directly through desert tortoise critical habitat for 25 miles. In places, the roadside berms pushed up by the county’s road grading equipment are so high that desert tortoises become trapped in the roadbed. Here they lack shelter from natural enemies or access to food and water, and they can be killed by vehicle traffic. In addition, water drainages cut into the roadside can destroy tortoise burrows, and motorcyclists and other off-road vehicle users often transform these drainage cuts into new ORV trails, which create still more impacts in tortoise habitat. Of 21 tortoise observations recorded by the BLM along Camp Rock Road between 1989 and 2003, one-third were dead.

BLM has notified San Bernardino County that the county’s maintenance activities on Camp Rock Road may “pose a threat to the continued survival of desert tortoise” in the area and “impede the safe movement of tortoises, cause the collapse of tortoise burrows or cause other disruptive events that may

harm or injure the desert tortoise.” Yet the county has refused BLM’s instruction to alter its maintenance procedures to protect the tortoise.

In fact the county has gone quite the opposite direction. In April 2003, San Bernardino County moved to take complete ownership of Camp Rock Road, filing the nation’s first application for an RS 2477 “disclaimer of interest” from the Department of the Interior. County transportation officials have said that if the federal government were to disclaim its interest in the road, BLM could no longer instruct the county to mitigate damage to the desert tortoise.

Federal, state, and local governments have spent tens of millions of dollars on desert tortoise recovery, and the public has participated in a detailed planning process for the California desert. San Bernardino County’s recent disclaimer application for Camp Rock Road – and its thousands of miles of highway claims in critical habitat – could seriously undermine ongoing efforts to protect and recover the threatened desert tortoise.



# The Modern Alternative

## OBTAINING RIGHTS-OF-WAY UNDER TITLE V OF FLPMA

### **Ancient Law Replaced by Modern Permits**

Congress repealed Revised Statute 2477 in 1976 and replaced it with a modern permit process, in Title V of the Federal Lands Policy Management Act (FLPMA). Today, local governments seeking rights-of-way across federal lands find the modern law far easier, less controversial, and less expensive than the obsolete, complicated, and highly contested RS 2477.

Understanding why some still cling to RS 2477 requires a look back at Western history. Before 1976, the Bureau of Land Management (BLM) functioned mainly as a land disposal agency, whose purpose was give federal land away to private citizens and industries. This function dated back before the BLM existed, to the 1800s when the Western frontier seemed boundless and wild, harboring infinite natural resources. By the dawn of the 20th century the goals of the federal land agencies began to shift; National Parks, Forests, and Wildlife Refuges were created for the first time. Congress withdrew these lands from private settlement as it began to recognize their unique and increasingly scarce resource values to the American public. Wholesale land giveaways became obsolete.

In 1976, Congress finally gave BLM a modern mandate, set out in FLPMA. This included the repeal of an ancient statute granting rights of way over public lands, originally intended to expedite homesteading and economic expansion throughout the West. Revised Statute 2477 was part of the Lode Mining Act of 1866 and read, in its entirety, “The right of way for the construction of highways over public lands, not reserved for public uses is hereby granted.” FLPMA grandfathered valid existing RS 2477 rights-of-way, including those that have yet to be asserted. But more importantly, it replaced RS 2477 with an modern procedure for obtaining rights of way, intended to prevent further abuse of our remaining public wildlands. This new process is found in Title V of FLPMA (43 USC 1761-1771), and it involves two key modern components that RS 2477 lacked: public comment opportunities and environmental review.

Today, Title V rights-of-way are granted for electrical power generation and transmission systems, telecommunications systems, highways, railroads, and pipelines. Title V requires the claimant (or federal agency) to analyze environmental impacts, and FLPMA generally requires public participation in management goals and decision-making for public lands. Many claimants find Title V to be a familiar, speedy process for resolving claims. However, there are those, primarily off-

road recreational groups, extractive industries, and county governments, who seek to exploit RS 2477 and its lack of standards or environmental review, often with the aim of rendering public wildlands ineligible for permanent protection. Secretary of the Interior Gale Norton’s new disclaimer rule (see pages 3 and 4) is intended to aid in this exploitation.

### **Disadvantages of RS 2477 and “Disclaimers”**

Not only does Norton’s new RS 2477 disclaimer rule sanction an outdated, illegal procedure for gaining potentially damaging rights-of-way over public land, it also is hindered by numerous disadvantages as compared to the legitimate, contemporary process of obtaining rights-of-way outlined in Title V.

**Fiscal Impact** – Obtaining an RS 2477 right-of-way through Norton’s disclaimer rule is expensive. In addition to a \$100 fee for each right-of-way sought, an applicant is required to reimburse BLM for all staff time and administrative costs for processing the application. Also required is a metes and bounds survey certified under state law by a licensed civil engineer; this can cost from \$3,000 to \$5,000 per mile. The applicant must prove the U.S. does not have a title interest in the property being sought; this requires maps and other historical documentation of the route’s existence on unreserved public land prior to 1976. In addition, the disputed nature of many RS 2477 claims, and the Department of the Interior’s lack of a clear standard for valid RS 2477 highways, invite costly litigation.

Costs are lower and more predictable for a Title V permit. The applicant must submit a plan of construction, operation, and rehabilitation for the right-of-way, and must pay fair market value for the right of way in advance. Processing fees range from \$100 to \$1,300 depending on the category of the right-of-way. Permits are effective for 30 years and are easily renewable as long as applicants adhere to the permit’s terms and conditions. Monitoring and rental fees also may be attached. However, for state or local government agencies, no fees are required for application, monitoring, or rental, if the land resources are intended for governmental purposes and continue to serve the public interest. This provides a significant incentive for municipal and county governments to use Title V.

**Expediency** – A Title V permit is generally processed and granted in 3 to 4 months if it involves little environmental impact. If potential impact is more significant, the process may extend up to 12 months depending on the extent of environmental disturbance, required environmental review, and public comment periods.

RS 2477 rights-of-way are more time-consuming. Currently, the California BLM is prohibited by moratorium from processing any disclaimer applications for RS 2477 rights-of-way, unless the applicant demonstrates a “compelling need” or negotiates a Memorandum of Understanding directly with the Department of the Interior. Interior is not currently negotiating MOUs with any state or county, until after it completes its MOU process with the State of Utah, which is expected to take years. Once processing commences on a disclaimer application, the right-of-way still will not be granted until the applicant has satisfied all survey, historical documentation, and fee requirements, and until the BLM has determined to its own satisfaction that the right-of-way is valid. This also could take years, during which time title to the land in question will remain with the United States.

**Environmental Review** – In granting a right-of-way under Title V, Interior must consider its impacts on the environment and determine that it will do no unnecessary damage. This may require a full environmental analysis under the National Environmental Policy Act (NEPA). The applicant must minimize damage to scenery and fish and wildlife habitat, and comply with state and federal air and water quality standards.

Under Norton’s new disclaimer rule, Interior will not analyze environmental impacts of any decision to hand over RS 2477 rights-of-way. The disclaimer process is considered “Categorically Excluded” from normal environmental review under NEPA – regardless of the affected lands’ environmental sensitivity, resource values, or potential impacts caused by development. This exclusion is usually reserved only for federal actions that clearly will have no environmental impacts. In addition, RS 2477 rights-of-way, by definition, must have existed prior to the reservation of land for some other public purpose – e.g., a National Park or Wildlife Refuge – and are therefore exempt from the protections offered by these designations.

**Liability** – When a Title V permit is issued, the U.S. still retains some liability for damages caused by the use and occupancy of the right-of-way. The permit holder is liable only for damage that occurs in connection with the holder’s own use. The holder generally indemnifies or insures the U.S. government harmless for third party liability or damages. The recipient of an RS 2477 right-of-way, however, is entirely responsible as the owner of that right-of-way for maintenance and conditions of the road or trail and is thus liable for all damages incurred on that route.

**Private Land** – The BLM warns that its disclaimer of an RS 2477 right-of-way on federal lands could be construed as federal recognition of a road which also runs through adjacent private lands. In this way, private property, Native American reservations, military lands, homesteads, ranches, and even municipalities are jeopardized by RS 2477. Private landowners, tribal nations, and federal agencies other than BLM are not exempt from RS 2477 highways cutting across their land.

Under FLPMA, however, the Department of the Interior has no authority to convey a right-of-way across private lands on which the federal government does not hold an interest. If there is no existing federal right-of-way across private lands, Title V does not permit the BLM to grant one.

**Public Participation** – RS 2477 disclaimer applications must be published in the Federal Register 90 days before a final disclaimer is issued, giving the public notice and opportunity to comment or protest. In California, anyone with standing can appeal the final decision, including those who filed protests and others who have a vested interest in the affected area. Unfortunately, the policies the Department of the Interior will use to determine valid rights-of-way are being sent out to BLM offices around the nation with no opportunity for public involvement. Norton’s new disclaimer rule was adopted before Interior even published the standards that it will use to judge the validity of these claims. Interior has refused the American public the opportunity to comment on those standards before they were finalized.

In contrast, when a FLPMA Title V permit is granted for a new right-of-way, the public has the normal right to review the proposed action under NEPA. Public participation in environmental review is welcomed, and announcements are posted in the Federal Register and local newspapers.

### **Case Study: Los Angeles County**

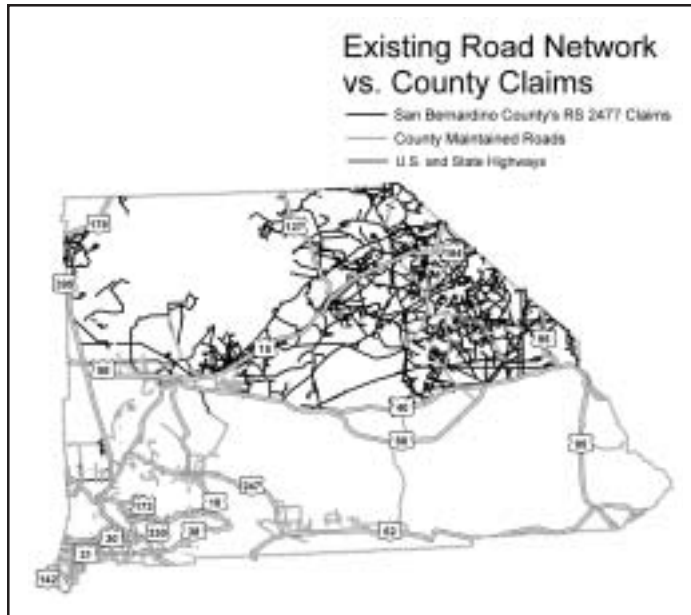
Los Angeles County is a good example of a potential RS 2477 claimant that examined RS 2477 and chose instead to do cooperative planning with the BLM using contemporary legislative tools. In June 2002, the Los Angeles County Board of Supervisors asked the Department of Parks and Recreation to prepare a report on RS 2477 and its application to historical trails and routes on federal lands. The Parks department worked with local interest groups, including hiking and equestrian groups, to address the need for access to public land in the county and evaluate potential assertions of RS 2477 rights for specific historic routes.

On completing this process, the L.A. County Parks Department concluded that the county did not need to assert RS 2477 rights to carry out its plans for access to public lands. Instead, they initiated a collaborative process with the BLM to acquire rights for county use on trail segments within their jurisdiction. During discussions with BLM, it was determined that the county could apply for a permanent use permit that would allow the county to build access trails on federal property. In this way the Parks department is able to carry out its policy of developing trails in an environmentally sensitive manner that protects property rights. The process pioneered by L.A. County shows that permanent access to federal lands for multiple use can be obtained without resorting to the archaic, costly, time-consuming process that RS 2477 claims would require.

# RS 2477 Status by County

## San Bernardino

In California, only San Bernardino County has launched an aggressive effort to map and assert dubious RS 2477 claims on federal public land. To date, this county has proposed more than 5,000 miles of RS 2477 “highways” in the desert – more than twice the mileage of its entire county road system.



In August 1997, San Bernardino County sent 62 maps to BLM’s California Desert district office in Riverside. These maps and accompanying documents proposed 2,341 miles of RS 2477 “public highways” within the Mojave National Preserve, many in wilderness and other closed areas which county employees illegally drove in a vehicle equipped with a GPS unit. In July 1998 the County Board of Supervisors passed a resolution formally asserting RS 2477 rights-of-way including “wagon roads, trails, horse and foot paths,” reaffirming the routes in the Mojave National Preserve, and asserting routes in Death Valley National Park as well. The County passed a second resolution in September 2001 reaffirming the County’s intent to claim these “highways” pursuant to RS 2477. Since then, the county has mapped additional claims for a total of more than 5,000 miles of RS 2477 highways. Of the 2,567 miles of highway claims that are within the Mojave National Preserve, more than 700 miles are within the Preserve’s designated wilderness areas. Another 2,461 miles are elsewhere in the California desert, including Death Valley National Park, nine wilderness areas managed by the BLM, five congressionally designated wilderness study areas (WSAs) currently proposed for wilderness designation, BLM areas of critical environmental concern (ACECs), and designated critical habitat for the threatened desert tortoise.

San Bernardino County has protested the Department of Interior’s fees for processing highway claims, arguing that with more than 5,000 miles in the queue, the financial burden on the county could prove debilitating. Nevertheless, in April 2003 the county board of supervisors submitted to Interior an application for the nation’s first RS 2477 disclaimer of interest, demanding ownership of the 42-mile Camp Rock Road, a county-maintained, high-speed dirt road connecting Daggett and Lucerne Valley. While Camp Rock Road does not cross a national park or wilderness, it traverses 25 miles of BLM land designated as critical habitat for the desert tortoise, a federally listed threatened species generally thought to be in decline throughout the California desert. The county asserts that if granted, this disclaimer would prevent the BLM from requiring the county to adjust its road maintenance work to protect the tortoise.

Remarkably, the county has indicated that they are not yet finished asserting claims, and that their route identification process is only 80 percent complete.

## Kern

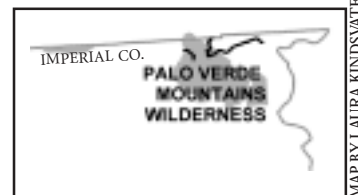
Kern County has not formally asserted any specific RS 2477 rights-of-way. In February 2002 the county passed a resolution affirming its RS 2477 rights in general, but it has not asserted specific highway claims, nor has it embarked on a process to map or identify RS 2477 routes on public lands in the county.

## San Diego

San Diego County has not formally asserted any specific RS 2477 rights-of-way. In July 2002 the county passed a resolution affirming its RS 2477 rights in general, and San Diego planning officials have described RS 2477 as a potential “tool in our toolbox,” making clear that they may assert rights-of-way under RS 2477 if it becomes necessary. However, after drafting and receiving public comment on a county-wide trails plan, county officials have not identified any need to assert RS 2477 rights-of-way to complete the plan.

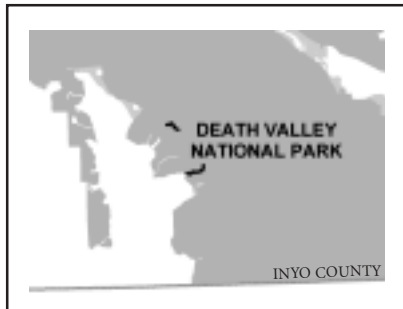
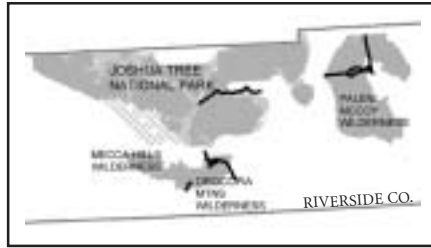
## Imperial

Imperial County has not asserted any specific RS 2477 rights-of-way. In March 2002 the county adopted a resolution asserting its RS 2477 rights in general. Individuals have claimed some RS 2477 highways in the Palo Verde Mountains Wilderness and the Algodones Dunes, but little is known about these claims because the BLM has not disclosed the identity of individual claimants.



## Riverside

Riverside County has not asserted any specific RS 2477 rights-of-way. In April 2002 the county adopted a resolution asserting its RS 2477 rights in general. Individuals have claimed some RS 2477 highways in the Orocopia Mountains Wilderness, Palen-McCoy Wilderness, and Joshua Tree National Park, but little is known about these claims because the BLM's policy has not disclosed the identity of individual claimants.



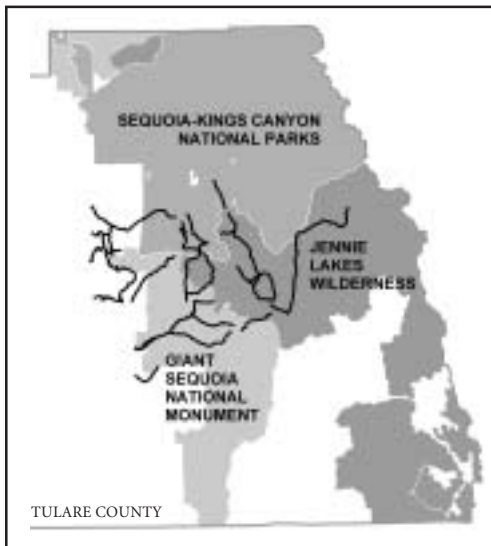
## Inyo

Inyo County has not asserted any specific RS 2477 rights-of-way. In May 2002 the county adopted a resolution asserting its RS 2477 rights in general. County officials have indicated they will consider routes on a

case by case basis if RS 2477 issues arise. A private individual has claimed a highway along Happy Canyon, but little is known about this claim because the BLM has not disclosed the identity of individual claimants.

## Tulare

Tulare County has not asserted any RS 2477 rights-of-way. Nevertheless, an off-road vehicle interest group, the Blue Ribbon Coalition, has asserted 180 miles of RS 2477 "highways" within the county, in important conservation lands including Sequoia National Park, Giant Sequoia National Monument, Sequoia National Forest, Jennie Lakes Wilderness, and the Mineral King proposed wilderness in Sequoia National Park, currently proposed for wilderness designation in the California Wild Heritage Act.



## Del Norte, Siskiyou, and Humboldt

The Blue Ribbon Coalition has also asserted 180 miles of "highway" claims that crisscross Redwood National Park, Jedediah Smith Redwoods State Park, Siskiyou Wilderness, extremely remote and rugged portions of the Siskiyou Wilderness, and 100 miles of "highways" in the King Range National Conservation Area.

## Los Angeles

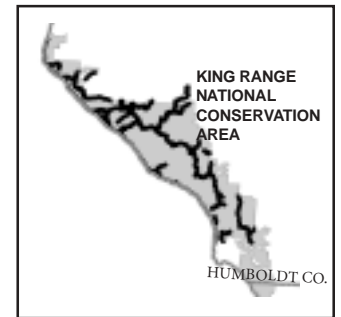
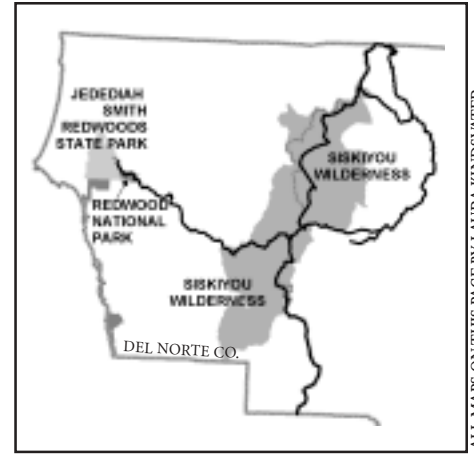
Los Angeles County has no known RS 2477 rights-of-way assertions, by the county or by other parties.

In fact, Los Angeles recently took a close look at RS 2477 and opted to use a more modern approach. At the behest of an Antelope Valley equestrian group concerned about trail access, the Los Angeles County Board of Supervisors asked the Department of Parks and Recreation in June 2002 to prepare an official report on RS 2477 and its application to historical trails and routes on federal lands.

After consulting recreation and conservation groups and weighing potential RS 2477 assertions, the department concluded that the county did not need to assert RS 2477 rights-of-way to secure trail access on public lands. Instead, the county has initiated a collaborative process with the BLM to obtain any necessary permits for access or trail construction under modern law — the Federal Lands Policy and Management Act (FLPMA). The county has received positive reviews of its trails plan from a variety of recreation enthusiasts, from hikers to horseback riders to mountain bikers. The path taken by L.A. County demonstrates how access to federal lands for multiple use can be obtained easily, quickly, and at low cost in a way that satisfies a variety of interests and avoids the legal pitfalls and brick walls inherent in the obsolete RS 2477 process.

## All Other Counties

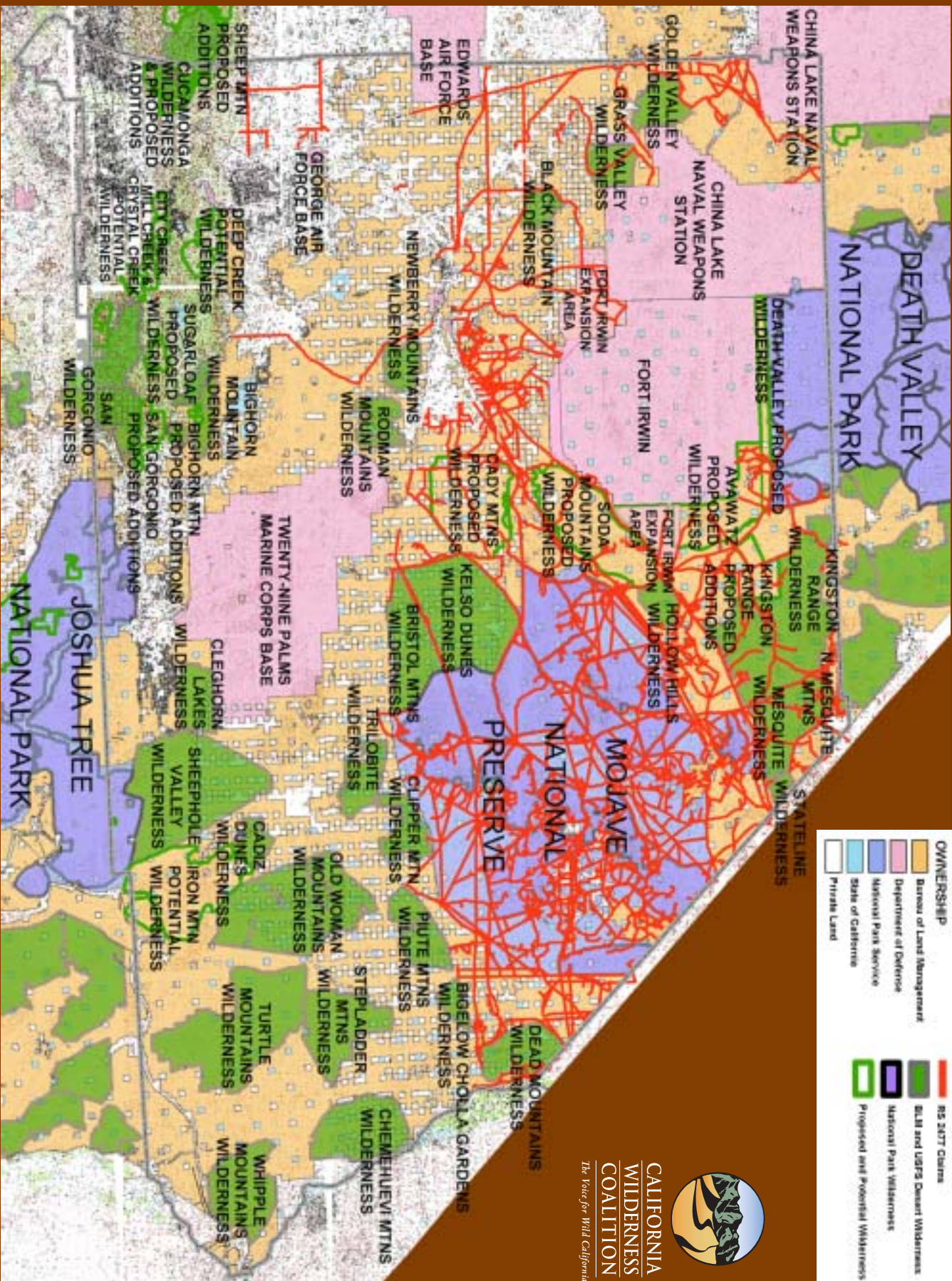
No known RS 2477 highway claims.



ALL MAPS ON THIS PAGE BY LAURA KINDSWATER



# RS 2477 "HIGHWAYS" CLAIMED BY SAN BERNARDINO COUNTY



**CALIFORNIA  
WILDERNESS  
COALITION**

*The Voice for Wild California*