PUBLIC LANDS: Control over roads in parks, wilderness increasingly a court issue
Arthur O'Donnell, *Land Letter* editor

While Utah and Alaska have been in the forefront of local attempts to assert broad rights-of-way on roads that lie within the boundaries of federal lands, two cases in California appear to be the next front in the ongoing skirmish over the effects of a Civil War-era law.

In the latest action, a federal judge ruled last week that a group of environmental advocates must be allowed to intervene in a case brought against the National Park Service by California's Inyo County. The county's suit is seeking "quiet title" to four roads within federal lands near Death Valley National Park.

In another case, San Bernardino County officials are similarly seeking access and control over 14 roads and spurs, covering about 240 miles in the Mojave National Preserve. These cases join more publicized actions by Utah officials to claim control over roads and highways in various federal lands (*Land Letter*, June 7).

The Greenwater range in the Death Valley National Park and wilderness area. Local officials are seeking rights-of-way on roads that the Park Service had closed, and environmental groups have joined the legal fray. Photo courtesy of USGS.

Enacted as part of the Mining Act of 1866, now known as Revised Statute 2477, this was a relatively simple measure that afforded public rights-of-way through public lands that were not specifically reserved for public uses. Its purpose was to encourage the local construction of roads and highways as the nation was undergoing tremendous growth and westward expansion. Though R.S. 2477 was repealed by Congress in 1976, there was left behind a grandfathered provision covering rights-of-way on roads that counties or other jurisdictions could prove were built or maintained as part of the local highway system.

There were differing standards. BLM had a stricter requirement for proof, for instance, while under Utah law the state and counties claim road ownership by showing 10 years of continuous use prior to 1976.

The issue became even more complicated following a 2005 ruling from the 10th U.S. Circuit Court of Appeals, which upheld Utah's interpretation of what constitutes local control over a road in question. As one of her last acts before leaving office, former Interior Secretary Gale Norton issued a guidance memo to agencies that spelled out a broader policy approach that would essentially accept states' and local governments' claims over roads (*Land Letter*, March 23, 2006).

Prospectors, settlers and ORVs

Environmentalists fear the order makes it easier for localities to perform widespread, landscape-changing highway maintenance and construction on public lands, possibly leading to rights-of-way claims in national parks, wildlife refuges, national monuments and wilderness areas. More recently, Colo. Rep. Mark Udall (D) has proposed an amendment to the 2008 Interior appropriations bill that would prevent local or state governments from claiming federal lands under R.S. 2477 (*E&E Daily*, June 14).

In fact, the standards being proposed by California counties in their suits appear even broader than those asserted by Utah in its successful challenge. Under California law, stated the San Bernardino suit, "the acceptance of R.S. 2477 right-of-way could be established by public use without formal action by any public agency." Almost any local action, including use, public repair, depiction of the road on public maps, or inclusion in the county highway maintained road system, would suffice, San Bernardino argued in its complaint filed in U.S. District Court against Interior last Oct. 26 [*County of San Bernardino v. USA*; CV 06-1179 VAP].

Up until the creation of the Mojave National Preserve in 1994, the county claims, the Bureau of Land Management did not require any notice of highway maintenance or construction, but once the preserve was formalized and turned over to the National Park Service, "NPS has restricted access to materials required for maintenance and ... assumed regulatory responsibility on the roads without county input or approval."

The county's claim covers 14 roads or sections totaling about 241 miles. "These are roads that the county has been maintaining, some before the turn of the century," said Mitchell Norton, deputy county counsel. "These are not trails like is Death Valley. Almost all are paved. Nobody is blazing new trails here."

Norton and colleague Charles Scolastico told *Land Letter* that they expect to enter mediation with the federal agencies to try to reach an agreement before the case comes to trial.

In contrast, the Inyo County case looks to be setting up a court fight that will involve the various agencies as well as a group of non-government organizations.

The Inyo complaint describes four relatively short and remote sections of road -- the longest being 18 miles -- that is historically connected to long-abandoned mining sites at Greenwater. In three instances, the county claims, NPS siad the roads were part of the Death Valley Wilderness and it closed the roads and put up signs to that effect.

"These roads were part of a network of roads that enabled prospectors and settlers to explore and establish communities in the eastern section of the county at the beginning of the twentieth century," wrote the county. "These roads have existed for generations as a cultural and recreational heritage for citizens of Inyo County and of the region. The county has a unique and independent responsibility to preserve this heritage into the future," it further explained to the court.

Charlie Callagan, a park ranger at the Death Valley National Park, explained that at least one of the contested roads, called Padre Point, a half-mile gravel spur to a view point, was at one time mistakenly mapped within the boundaries of the wilderness area. However, the dead-end strip "is not closed and we have no intention of closing it," he said.

There were three other roads: about half of the 17-mile-long Petro Road, which accesses Native American petroglyph sites; 3 miles of Lost Section, south of Greenwater area; and the Last Chance Road and trail, have been closed because they are part of designated wilderness, he said. The 8 miles of Last Chance right-of-way being claimed by the county never had a road, he said, but includes a hiking and cattle path.

This issue of local governments taking title to dusty trails as if they were developed highways has become a core issue for conservationists and environmental groups. In some areas of the West, local officials have declared R.S. 2477 rights of way over undeveloped trails in wilderness areas and through private lands, leading to numerous court cases, such as the high-profile fight over off-road vehicle use at the Grand Staircase/Escalante National Monument in Utah.

Trails to highways?

That same fear is at play in the Death Valley case, and this month a coalition of six groups, including the Sierra Club, Wilderness Society, the Center for Biological Diversity, and the National Parks Conservation Association, successfully petitioned the court to intervene in the case.

In a June 14 ruling, District Court Judge Anthony Ishii ruled that the groups have a substantial interest in the case, even though they do not assert any ownership rights over the properties in question [*Inyo County v. Interior*; U.S. District Court; No. CV F 06-1502 AWI].

What is at stake is not merely title to the contested land, Ishii wrote. "The action also seeks to settle rights to particular uses of the land, substantially influencing the character of surrounding land vis-a-vis the land's wilderness designation," he wrote. The action could involve giving the county the right "to convert what is currently a pedestrian trailway devoid of motorized traffic into a two-lane rural highway."

Because the groups have actively advocated establishing the wilderness areas in the first place, including the blockage of rights-of-way in order to enhance wilderness values, and the suit seeks to "undue precisely what the proposed intervenors worked to accomplish," Ishii held that the groups have shown their "substantial protectable interest" in the litigation.

The ruling was hailed by the groups. "Inyo County's land grab could undermine the very reasons Death Valley is such an iconic landscape," said Ted Zukoski, an attorney with Earthjustice representing the groups. "The court understood that and understood that those with the strongest interest in protecting Death Valley should have a seat at the table."

"The county is making claims within the wilderness area, and in this instance, it's a direct threat to the wilderness designation," said Kristen Brengle of the Wilderness Society. "If a claim is going to hurt protected land or land that should be under protection, we're going to get involved," she said.

Deborah DeMeo, program manager for NPCA, said her group is committed to balancing interests for recreation in parkland, including allowing off-road vehicles where appropriate. However, in this case, "It's not appropriate for them in wilderness lands with a quality of quiet. Our concerns have more to do with the upsetting of the ecosystem," she said.

Inyo County attorneys were unavailable for comment this week. A status conference in the matter is expected later this summer.