



# Land Use News

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Dedicated to conservation and multiple use of public lands  
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**Edited by:** [John Stewart](#)

## **Revised Statues 2477 Rights-of-Way (RS 2477)**

**Ron Schiller,  
High Desert Multiple Use Coalition**

The regular meeting of the Ridgecrest BLM Steering Committee was held Thursday evening, March 23, 2000 at the Ridgecrest BLM Field Office, 300 South Richmond Road. Two major topics on the agenda were Revised Statue Rights-of-way and Filming on public land. Revised Statues 2477 Rights-of-Way (RS 2477) is a major hot topic right now.

Dr. Carl Austin's Guest Editorial in the local News Review newspaper discusses Revised Statues 2477 Rights-of-Way (RS 2477). The New Review Publisher, Patricia Farris, has generously provided the text of Dr. Austin's article. (Thank you very much Pat).

### **Beware of trail closures**

To the Editor:

The battle that has developed over what some people are calling "trails" in the western Mojave Desert was written up in the Feb. 23 issue of the News Review. Since I have some mining interests in the local area and am involved in scraps over the same general issues in Idaho, this article caught my eye at once. It would appear useful to encourage the citizenry to take a very long hard look at one every special aspect of roads (or trails). In the western United States such issues are governed by a very specific law that the land-management agencies wish we would all forget about, and they try grandly to ignore until periodically tripped up in court.

The fundamental question is whether or not the federal land-managing agencies have the right to close existing routes of travel, and that brings us to what are called RS 2477 roads. These roads are despised by the BLM and the USFS in particular, although quite frankly no land

controlling agency likes them for the simple reason that the presence of such routes of travel means the agency cannot easily jam its planning down the public's throat.

What then is an RS 2477 road? Back in 1866, Congress enacted RS 2477, now codified as Title 43 U.S. Code 932. This law applies to all public lands. The law states: "The right-of-way for the construction of highways over lands not reserved for public uses, is hereby granted." RS 2477 was in effect for 110 years, until repealed by the passage of FLPMA in 1976. However, and this is a very important however, the passage of FLPMA in 1976 specified that all existing roads and rights-of-way at that time be continued. These roads and rights of way were not terminated. If you look up FLPMA it says: "Nothing in the Act ... shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted." Now isn't that interesting. All of these old routes are still valid, today, and only Congress has the authority to close any of them, not the BLM, not the USFS or any other agency. Interesting! Indeed, if a Federal agency or its employees close such a road, they would appear to have violated Federal law

As a matter of fact, closure of all the roads up into the east edge of the Sierra, closure of roads out in the desert, plus closure of numerous roads up in the tungsten- and gold-mining areas around Long Valley and Domeland, would all appear to be illegal closures and I am amazed no one has challenged these actions to date. (A point few people are aware of though, is that USFS lands are generally not public lands and to be a valid RS 2477 road on the forest, the road had to exist before the date the USFS took the land over.)

These matters have been fought in various courts. No doubt they will be fought out again, for you will find the various agencies have all sorts of in-house policies and legal opinions written by in-house lawyers to serve their own agenda. But remember, a policy is simply an administrative wish list - it is not the law. What the agencies generally do is challenge the citizens and hope to wear them down.

Let us use a recent case in Utah where the BLM tried to get some counties to give up their RS 2477 rights. The BLM lost. They are expected to try again, and I sincerely hope, and expect, they will lose again. In this case the judge stated that RS 2477 roads are: 1. "self-executing and became effective when they were established;" 2. not required to have "ratification from the Federal Government;" and 3. "preserved as they existed in 1976." Point 2 is crucial. The BLM, the USFS and other agencies do not have to ratify any of these roads. The agencies will claim you have to prove all sorts of things, but trying to force you to do so would appear to violate the decisions of the court.

So then - let us take a local example. You have an old mining route, dating from the late 1800s, that starts out south of Inyokern, wanders across the desert to a spring near Laurel Mountain, then cuts up and west to the skyline, drops down a canyon and on out a series of dry washes to the south.

This is an RS 2477 road and only Congress can close it. You may have several closely parallel routes, each is an RS 2477 road. According to various legal opinions and decisions I have seen, the BLM may want to close these to pursue some in-house agenda, but they do not have the authority to do so.

This does not mean they won't blow smoke at you, try to baffle you with important sounding opinions from their in-house lawyers. But the law is explicit.

If you elect to pursue the RS 2477 road matter, where do you start? You gather all the court precedents and decisions, and there are many in the western states, and you build an atlas of these roads. You use old mining publications, old maps that show roads and routes, old advertising brochures, diaries, maps in published books, old topo maps (which is one reason I

never throw away an old topo, or an old mine report.) As a matter of fact, a lot of four-wheelers were using these old roads and making new ones by the late '60s and early '70s.

As you pursue this matter you will also find the passage of FLPMA was accompanied by a Legislative Intent letter that clearly spells out the passage of FLPMA was to include the preservation of all existing RS 2477 roads.

Rep. Santini of Nevada wrote the letter and some 25 representatives signed it, including those who were responsible for reviewing FLPMA. To drive these points home even harder, in 1988 the U.S. 10th Circuit Court of Appeals ruled that RS 2477 rights-of-way were still as valid, as they were in 1976 when FLPMA was passed. This verifies once again that these access routes are just as valid in the year 2000 as when established by some miner, mule-packer or four-wheel club as long as it was prior to 1976.

It is up to the citizenry. You can let the agencies bluff you. You can sit idly by with local officialdom and watch your rights fade away, or you can become active and challenge these closures based on existing law and court cases. You will find, of course, a vast debate over what constitutes a road.

Stop and think what a road was when the law was passed. As defined recently here in Idaho, a road includes even pack trails. In any event, if it was traveled by wheeled vehicles of any type, even

just being two tracks in the sand, it is a road and is protected by law. I know it because it takes 12 miles of 2477 road to reach my ranch and several miles of another two-track RS 2477 road to reach the west side of my place. These roads are real and you should not let them go without a fight.

As a final comment, do not get in the habit of calling these routes trails. This is a perjorative term the agencies like because it sounds demeaning:

"Oh, it's just a trail - no one will miss it." Granted, in mining country what are shown at times on maps as trails are actually access routes that were built to take 18-wheelers, but stick with terms like access routes, roads and rights-of-way. You may find room for cooperation with the agencies, trading off truly redundant roads for some post-FLPMA route you would like, but my advice is give away nothing, absolutely nothing.

Carl F. Austin  
Oakley, Idaho

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#### **(FINAL NOTE)**

In 1997, as part of the Interior Appropriations Bill, Congress passed legislation that specifically forbids any Federal agency to develop a final rule or regulation regarding RS 2477 Rights-of-Way.

Title 1, Sec. 108. states, "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act".

A subsequent letter to James F. Hinchman, Acting Comptroller General of the United States General Accounting Office, to request a GAO interpretation of the permanence of the provision was signed by 30 Senators and Congressmen. In response, the GAO indicated that although the appropriations bill would expire, the RS 2477 provision language was written in such a way that

it became permanent law. After the GAO interpretation, the US House of Representatives Committee on Resources issued a press release on September 4, 1997 with the headline, "Comptroller General Rules That Congressional Approval Is Required For RS 2477 Changes; Action Bans Secretary Babbitt From Voiding Right-of-Ways".

**To date, this is where the RS 2477 issue stands.**

The actual documents are available on line at the US House of Representatives Resources Committee web site as follows:

- 1) Congressional Letter to James F. Hinchman, Acting Comptroller General of the United States General Accounting Office, 7/29/97  
<http://www.house.gov/resources/105cong/fullcomm/rs2477.htm>
- 2) United States General Accounting Office response to Congressional Letter 8/20/97  
<http://www.house.gov/resources/105cong/fullcomm/rs2477b.htm>
- 3) US House Committee on Resources Press Release, 9/4/97, "Comptroller General Rules That Congressional Approval Is Required For RS 2477 Changes; Action Bans Secretary Babbitt From Voiding Right-of-Ways"  
<http://www.house.gov/resources/press/1997/090497pr.htm>

This information is provided by Ron Schiller, Chairman, High Desert Multiple Use Coalition. As usual, please feel free to pass this information on to any other interested parties. Anyone wishing to receive future information regarding issues related to the management of public lands should send an e-mail to [schiller@ridgecrest.ca.us](mailto:schiller@ridgecrest.ca.us) and request to be placed on the distribution list.

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