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Will Surprise Canyon remain off limits to off-road drivers?

Four-wheel-drive enthusiasts want to reopen the wild road, but environmentalists say no. The fight over the state road is in federal court.

By Lee Romney
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Five years after it was temporarily closed to off-road enthusiasts who winched their vehicles up its limestone waterfalls, a coveted canyon on Death Valley National Park's western edge has been reclaimed by nature's hand.

Thick willow groves have erased nearly all traces of the washed-out road that once pointed extreme sportsmen to the ruins of a onetime silver boom town. Bighorn sheep appear with greater frequency, conservationists note, and the endangered Inyo California towhee has returned.

But the battle for Surprise Canyon, home of the longest year-round stream in the Panamint Range, has revved up a notch: More than 100 four-wheel-drive aficionados determined to see their prized run reopened have filed a lawsuit in federal court that is being closely watched throughout the West.

The claim relies on a Civil War-era mining law that allowed counties and states to lay routes over federal land. Although the statute, known as RS 2477, was repealed three decades ago, routes established before then were allowed under a grandfather clause. A gravel toll road in Surprise Canyon that fell into public hands before succumbing to flooding is such a route, the lawsuit contends.

Battles over what routes qualify have intensified in recent years across Utah and other Western states, as emboldened counties, off-road enthusiasts and private landholders seek to wrest from federal hands thousands of old rights-of-way, rutted vehicle trails and even cattle paths.

But the Surprise Canyon claim — which demands that the Bureau of Land Management and National Park Service immediately reopen the canyon to vehicles — appears to be the first federal court fight over a California route.

Since the Surprise Canyon suit was filed in late August, Inyo and San Bernardino counties have filed separate RS 2477 federal court claims that assert local control over 18 other routes.

Six environmental groups are seeking to intervene in the Surprise Canyon case, hoping to see the canyon permanently closed and to weigh in on the antiquated statute.

"This is a law that was passed a year after Lincoln was assassinated and repealed 30 years ago, and

its dead hand is still haunting the protection of our national parks," said Ted Zukoski, a Denver staff attorney with Earthjustice, which is representing the environmental groups. "What they are attempting to do is to undermine protection for these beautiful wild areas."

Although Utah "has really been the epicenter of this debate," Zukoski added, "it certainly seems like the California desert is becoming another area where there's a tremendous amount of pressure on this issue."

Brian Hawthorne of the Idaho-based Blue Ribbon Coalition, which represents off-road enthusiasts, said the disputes are real and must be resolved to clarify where vehicles are permitted.

Hawthorne said he'd prefer to see the conflicts settled outside court: A New Mexico congressman last month proposed legislation that would allow states or counties to gain title by producing any official map or survey made before 1976. But Hawthorne conceded that passage was unlikely.

"We are looking at a monumental battle over each and every one of these roads," said Hawthorne, whose group has not taken a stance on Surprise Canyon.

Built in 1874, Surprise Canyon Road carried miners to Panamint City. Constant washouts prompted regular rebuilding. But a 1984 flash flood wreaked havoc that no one chose to counter.

Then, in 1989, hard-core off-road enthusiasts stacked boulders and pruned back willows to clear a path for their tricked-out machines, forging a route that at times took them directly through the stream bed and — with the help of steel winch cables — up its seven slick waterfalls. (The road had previously covered the stream, pushing it underground in places, before flooding stripped the canyon to bedrock.)

The California Desert Protection Act in 1994 placed the upper portion of Surprise in Death Valley National Park and designated the Bureau of Land Management portion below as wilderness. But Congress excluded a narrow strip of land around the washed-out road. That made it legally open to off-roaders, and the canyon's cachet grew.

Critics of the riders say they destroyed sensitive riparian habitat of the Panamint daisy and Panamint alligator lizard and spilled oil, gas and antifreeze in the water. The riders counter that they maintained the ghost town buildings and regularly hauled out trash. They also point out that the road had been host to a steady stream of cars for decades.

Off-road use came to a halt in 2001 when, as the result of a settlement in a broader lawsuit filed by the Center for Biological Diversity, the canyon was temporarily closed pending a detailed joint environmental review by both federal agencies. (The current lawsuit demands that the canyon be reopened regardless of the review.)

The 2001 settlement noted that the smattering of property owners up the canyon would be exempted and could request a key to the gate barring access to the road. To the off-road winchers, that smelled like an opportunity.

"What would you do if you wanted to get up there?" asked Joe Stocker, 70, a retired millwright who made dozens of canyon winch runs and is a plaintiff in the new case. "You'd buy land up there."

One property owner sold — to off-road enthusiasts who formed two land partnerships at the heart

of the current case. But the Ridgecrest field manager of the Bureau of Land Management denied keys to the new property owners, saying that their access "would result in appreciable disturbance or damage to federal lands and resources." Each was invited instead to apply for a permit. One owner did, to no avail.

The suit demands that the agencies process that application if the RS 2477 claim is not upheld.

With the gate still locked, the new owners turned to RS 2477. The lawsuit was filed in the District of Columbia on Aug. 31. Environmental groups filed a motion to intervene earlier this month.

"The canyon's dramatic recovery," they wrote, "could be short-lived if it is again opened to motorized use."

Consequences could be broader: Counties across California and elsewhere have for years passed resolutions claiming control of roadways under RS 2477. They have also filed claims with federal agencies that control the underlying land. But an appellate court ruled last year in a Utah case that only courts could determine the validity of such claims.

The ruling also said courts should look to state law to determine what qualifies as a road under the statute. Utah requires continuous use for a decade. Colorado and other states have much weaker definitions. The Surprise lawsuit may shed some light on the law here.

"It may answer a question in California: What is a road?" said Karen Budd-Falen, a Wyoming lawyer retained by the off-roaders.

Zukoski, of Earthjustice, said he believes only states and counties have the right to bring RS 2477 claims. But Budd-Falen argues that under California law, public use alone can create a road, without a formal county designation. That means, she says, that the public can also file the claim. A court determination that her clients are entitled to sue could set a precedent, she said.

A Bureau of Land Management spokeswoman in Sacramento said the agency could not comment on the lawsuit but confirmed it is the first RS 2477 court action against the bureau in California.

Alan Stein, deputy district manager for resources at the bureau's California Desert district office, said the designation of a right-of-way would leave open many questions about its scope, how it should be maintained and who gets to decide. "None of it is simple," Stein said.

The National Park Service, meanwhile, finds itself facing three such federal court challenges, two filed by counties last month in California. San Bernardino County's suit asserts a claim to 14 roads in the Mojave National Preserve, placed under federal control 12 years ago by the California Desert Protection Act.

The county maintained the roads, some of which are paved, and relies on them to provide services to residents, said San Bernardino deputy county counsel Charles Scolastico.

Inyo County's suit claims four longtime "county highways" that are now un-maintained dirt roads in Death Valley National Park. Two have been closed — illegally, Inyo County claims.

All roads are in wilderness protected under the 12-year-old desert act.

What the county wants to do with the roads is beside the point, said Ralph "Randy" Keller, Inyo

County assistant counsel.

"State law says only the supervisors can close a county highway," he said. "They are county roads under county control and, without even consulting the county, they've been taken. It comes down to an issue of local control."

National Park Service West Coast spokeswoman Holly Bundock said she could not comment on specific litigation, but she added: "We don't invite vehicle access in wilderness areas because that's fundamentally in conflict with the Wilderness Act and our policies on managing the Wilderness Act."

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