MCGREGOR W. SCOTT
United States Attorney
BRIAN ENOS (CSBN #201316)
Assistant U.S. Attorney
2500 Tulare St., Suite 4401
Fresno, CA 93721
Telephone: (559) 497-4000
Facsimile: (559) 497-4099

RONALD J. TENPAS
Assistant Attorney General
BRUCE D. BERNARD
Trial Attorney
General Litigation Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Telephone: (303) 844-1361
Facsimile: (303) 844-1350
e-mail: bruce.bernard@usdoj.gov

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF INYO Plaintiff, v. DEPARTMENT OF THE INTERIOR, DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of the Interior, NATIONAL PARK SERVICE, MARY A. BOMAR, in her capacity as Director, National Park Service, JAMES T. REYNOLDS, in his capacity as Superintendent, Death Valley National Park, Defendants, and SIERRA CLUB, *et al.*, Defendant-Intervenors.	No. 1:06-CV-01502-AWI-DLB FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS [Filed concurrently with Motion to Dismiss] Dennis L. Beck U.S. Magistrate Judge Anthony W. Ishii U.S. District Court Judge Hearing Date: June 23, 2008 Hearing Time: 1:30 p.m. Hearing Location: Courtroom 3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

I. INTRODUCTION

On October 25, 2006, the County of Inyo filed this action under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"), seeking to quiet title against the United States to rights-of-ways for four alleged County highways within Death Valley National Park. Complaint to Quiet Title ("Complaint") at ¶¶ 1, 4, 48, 55, 57-64, 66-72, 74-80, 82-87. Prior to their inclusion in Death Valley National Park in 1994, the lands on which the four claimed County highways are located were administered by the Bureau of Land Management ("BLM"). In 1979, BLM designated these lands as Wilderness Study Areas ("WSAs") pursuant to the Federal Land Policy and Management Act ("FLPMA"). In 1994, the California Desert Protection Act ("CDPA") elevated Death Valley National Monument to a National Park, substantially enlarged the unit by adding public domain lands previously administered by BLM to the Park, and transferred the jurisdiction of those lands from the BLM to NPS. The CDPA also designated the lands encompassed by these four WSAs as wilderness to be managed pursuant to the Wilderness Act of 1964 ("Wilderness Act"), 16 U.S.C. § 1131, *et seq*., as part of the Death Valley National Park Wilderness.

The County asserts that these four claimed roads have existed as maintained public highways since before 1976 and therefore qualify as highways under R.S. 2477. R.S. 2477 is a short enactment which granted the "right-of-way for the construction of highways over public lands, not reserved for public uses." When FLPMA repealed R.S. 2477 in 1976, it expressly preserved preexisting valid rights-of-way.

Federal Defendants assert that the QTA's twelve-year statute of limitations began to run in 1979, when BLM designated WSAs encompassing the four claimed highways, thereby providing notice to the County and other members of the public that the United States had determined these areas to be roadless and eligible for wilderness designation. The time to file a QTA action seeking to adjudicate rights adverse to the United States therefore expired in 1991. The County did not file this suit until 2006 and the Court should accordingly dismiss the County's complaint as time-barred.

II. STATUTORY AND REGULATORY BACKGROUND

A. Highway Rights-of-Way Under R.S. 2477.

In 1866, in the midst of an era of federal land grant statutes aimed at facilitating the settlement of the American West, Congress passed R.S. 2477 as a means of providing public access across unreserved public domain lands. See generally, Pamela Baldwin, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477, Cong. Research Serv. (1993), at 10-18; see also Central Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 472-73 (1932). From its 1866 enactment until its repeal by FLPMA in 1976, the statute provided, in its entirety, that "[t]he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. 2477; 43 U.S.C. § 932 (repealed 1976).[1/] This land grant was self-executing in some states – in other words, an R.S. 2477 right-of-way could come into existence automatically, without need for formal action by public authorities, whenever the public sufficiently indicated its intent to accept the land grant by establishing a public highway across public lands in accordance with state law. See Standage Ventures, Inc. v. Ariz., 499 F.2d 248, 250 (9th Cir. 1974); Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 770 (10th Cir. 2005) ("In most of the western states, where R.S. 2477 was most significant, acceptance required no governmental act . . . .").

On October 21, 1976, Congress enacted FLPMA, which repealed R.S. 2477 but preserved "any valid" right-of-way "existing on the date of approval of this Act." 43 U.S.C. §§ 1701 et seq. Accordingly, rights-of-way under R.S. 2477 that were perfected before the statute's repeal in 1976 and which have not been abandoned remain valid today. Local governments may file suits to quiet title against the United States if they can demonstrate that the grant of a right-of-way was accepted prior to the statute's repeal in 1976 and, where applicable, prior to the

---

[1/] The statute was first enacted as Section 8 of the Act of July 26, 1866 entitled "An Act Granting Right of Way to Ditch and Canal Owners Over The Public Lands and For Other Purposes," ch. 262, 14 Stat. 251, 253 (commonly referred to as the Mining Act of 1866). The statute was codified in 1873 in the Revised Statutes as section 2477 upon publication of the Revised Statutes, and subsequently recodified in 1938 as 43 U.S.C. 932.

reservation or appropriation of the public land underlying the alleged right-of-way to some other use.

B. The Wilderness Act

The Wilderness Act, 16 U.S.C. § 1131 et seq., was signed into law on September 3, 1964, to secure "for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a). The Act established a "National Wilderness Preservation System" ("Wilderness System") to be composed of Congressionally designated wilderness areas. Id. These areas are to be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas [and] the preservation of their wilderness character . . . ." Id.

The Act defines "wilderness" in a manner that emphasizes the intent to preserve the primeval character of each wilderness area:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (emphasis added).

Federal lands are included within the Wilderness System only by Act of Congress. 16 U.S.C. § 1131(a). Upon inclusion, the administering agency becomes "responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." 16 U.S.C. § 1133(b).

Section 4(b) states that "[e]xcept as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical uses." 16 U.S.C. § 1133(b). The use of wilderness areas for these listed uses is, however, strictly regulated by the next subsection of the Act. Section 4(c) defines the activities and facilities that are prohibited in wilderness areas and strictly prohibits roads, as well as the use of motor vehicles and other forms of mechanical transport:

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purposes of this Act (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 U.S.C. § 1133(c) (emphasis added).

Under the Wilderness Act, the evaluation of federal lands for designation as new wilderness areas was limited to "primitive" areas in the National Forests and to areas in the National Park System, Wildlife Refuges, and Game Ranges. 16 U.S.C. §§ 1132(b), (c). Therefore, prior to the enactment of FLPMA in 1976, there was no mechanism for designation of public domain lands administered by BLM as new wilderness areas.

C. The Federal Land Policy and Management Act

Prior to their addition to Death Valley National Park in 1994, the lands adjacent to Death Valley National Monument,[2]/ including the areas in which the four alleged County highways are located, were under the jurisdiction of the Bureau of Land Management ("BLM"). BLM is responsible for managing approximately 262 million acres of federal public lands located predominantly in 12 Western States. BLM manages these public lands pursuant to statutes enacted by Congress under its constitutional authority to "make all needful Rules and

---

[2]/ Death Valley National Monument was established in 1933 by Presidential Proclamation and then expanded in 1937. See 16 U.S.C. § 410aaa. In 1994, the California Desert Protection Act substantially enlarged Death Valley and proclaimed the entire area to be a National Park. Pub. L. 103-433, § 301-302, 108 Stat. 4471-4509, 4485-86 (Oct. 31, 1994) (16 U.S.C. 410aaa-7).

Regulations respecting the Territory and other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Principal among these statutes is FLPMA, enacted in 1976, which establishes a comprehensive regime for managing the public lands and requires the Secretary of the Interior to protect "the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" of these lands while simultaneously managing the lands for a variety of multiple uses including recreation, mining, timber, and grazing. See 43 U.S.C. § 1701(a)(8).

Beyond establishing standards for protecting the public lands, FLPMA required the Secretary to study, within fifteen years of the Act's passage, certain "roadless areas of five thousand acres or more" and to inform the President as to whether these areas are "suitab[le] or nonsuitab[le]" for preservation as wilderness by Congress under the Wilderness Act. See 43 U.S.C. § 1782(a). The President, in turn, reported his recommendations to Congress with respect to each of these areas, which are administratively designated as WSAs. FLPMA mandated that, during the period of wilderness review and until Congress had determined otherwise, BLM was required to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." Id. at 1782(c).

FLPMA also included specific provisions concerning California desert BLM lands – identified as the "California Desert Conservation Area" ("CDCA"). Section 601 mandated the "immediate and future protection and administration" of the CDCA and required BLM to complete a comprehensive, long-range plan for the management of the CDCA by September 30, 1980. 43 U.S.C. §§ 1781(b), (d). This mandate for completing a comprehensive plan for protection of the CDCA by 1980 had the effect of accelerating the wilderness review process for the CDCA. The CDCA included BLM lands adjacent to Death Valley National Monument, including those in which Inyo's four claimed County highways are located.

D. The Federal Quiet Title Act

Under the doctrine of federal sovereign immunity, the United States is immune from suit except to the extent Congress expressly waives that immunity. See Lane v. Pena, 518 U.S. 187,

192 (1996); Lehman v. Nakshian, 453 U.S. 156, 160 (1981); United States v. Sherwood, 312 U.S. 584, 586 (1941). Before the Quiet Title Act's ("QTA") enactment in 1972, the United States had not waived its immunity with respect to suits involving title to land. See Block v. North Dakota, 461 U.S. 273, 280 (1983). As a result, prior to the QTA, those asserting title to land claimed by the United States had limited means of obtaining a resolution of the title dispute. Id. Those asserting title adverse to the United States could try to induce the United States to file a quiet title action against them or they could petition Congress or the Executive Branch for discretionary relief. Id. Those willing to settle for monetary compensation (instead of title to the disputed property) could sue and attempt to establish a constitutional claim for just compensation. Id. at 280-81. Others tried to institute so-called "officer's suit[s]," thereby proceeding against the federal official charged with supervision of the relevant land instead of the United States. Id. at 281. Such suits proved unsuccessful in circumventing federal sovereign immunity. Id. at 281-82.

Against that backdrop of limited remedies, Congress considered and enacted the QTA in order to provide recourse to citizens asserting title to lands also claimed by the United States. Id. at 282. The QTA provides that "[t]he United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The Act, therefore, operates as a limited waiver of the United States' sovereign immunity, and is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." Block, 461 U.S. at 286-87. Where QTA jurisdiction lies, the court can adjudicate the disputes between the plaintiff and the United States and render judgment between them.

However, the QTA's waiver of sovereign immunity is expressly limited by a number of conditions. Of relevance here, the QTA directs that any complaint alleging a quiet title claim must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). In addition, the Act limits its waiver of sovereign immunity to actions commenced within twelve years of the accrual of the action:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. 2409a(g). A QTA plaintiff is required to plead with particularity facts sufficient to show its ability to satisfy the statute of limitations. See, e.g., Buchler v. United States, 384 F. Supp. 709, 713 (E.D. Cal. 1974).

Because it is a waiver of sovereign immunity, the QTA must be strictly construed, and the limitations set forth in the statute, including those concerning particularity and the time for commencing QTA actions, must be strictly enforced. See United States v. Mottaz, 476 U.S. 834, 841 (1986); United States v. Testan, 424 U.S. 392, 399 (1976). "'When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.'" Consejo de Desarollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173 (9th Cir. 2007) (quoting Mottaz, 476 U.S. at 841).

III. FACTUAL BACKGROUND

A. Inyo's Claimed County Highways.

Inyo County claims to be the owner of rights-of-way for four highways within Death Valley National Park. The County claims rights-of-way for the Petro Road, the Lost Section Road – South, the Last Chance Road, and the Padre Point Road. Complaint at ¶¶ 4, 48, 55, 57-64, 66-72, 74-80, 82-87. The County asserts that these roads are County highways of historical and cultural significance. Complaint at ¶¶ 3, 4, 34, 47, 50, 51, 52, 54, 55, 61, 69, 77, 85. The County further asserts that these four County highways were all constructed prior to 1976, and have all been maintained by Inyo County and regularly and continuously used since prior to 1976, and therefore qualify as highways under R.S. 2477. Complaint at ¶¶ 35, 39, 48, 50, 54, 55, 57, 58, 59, 60, 61, 66, 67, 68, 69, 74, 75, 76, 77, 82, 83, 84, 85.

B. Designation of Wilderness Study Areas Encompassing Claimed County Highways.

As part of the CDCA planning and wilderness review process mandated by FLPMA, BLM inventoried the CDCA lands in the late 1970s to determine whether areas were roadless

and had wilderness character, and so should be designated as WSAs. See Declaration of Gerald J. Magee, attached as Attachment A hereto ("Magee Declaration"), at ¶ 9; National Outdoor Coalition, 59 I.B.L.A. 291 (Oct. 30, 1981) (describing BLM's implementation of FLPMA's wilderness review provision within the CDCA); 43 U.S.C. § 1782 (FLPMA's wilderness review provisions). As described in National Outdoor Coalition, BLM divided the wilderness review program ordered by Section 603(a) of FLPMA into three phases: (1) the inventory phase consisting of BLM's identification of those roadless areas possessing wilderness characteristics; (2) the study phase involving BLM's studies of the uses, values and resources to determine which areas will be recommended as suitable for wilderness designation and which are to be recommended as nonsuitable; and (3) the reporting phase involving the actual forwarding of recommendations as to the suitability or nonsuitability of subject areas for preservation as wilderness through the Secretary of the Interior to the President. Id. The inventory phase is a two step process consisting of the initial inventory phase in which the State Director of the BLM identifies lands that clearly do not possess wilderness characteristics and those lands that may possess such characteristics. Id. The lands determined in the initial inventory as potentially possessing wilderness characteristics will then be subject to an intensive inventory. Id.

Because of the obligation imposed by Section 601(d) of FLPMA that the Secretary complete a comprehensive, long range plan for the management of the CDCA by September 30, 1980, the wilderness inventory and study process was accelerated for lands within the CDCA. Magee Declaration at ¶ 7. Pursuant to the FLPMA's mandate that BLM identify roadless areas and assess their suitability for preservation as wilderness, BLM issued a Wilderness Inventory Handbook on September 27, 1978 to provide uniform guidance for wilderness review on public lands under BLM jurisdiction. Id. The Wilderness Inventory Handbook and defined the term "roadless" as follows: "The word roadless refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." Id. This definition is identical to that in the legislative history of FLPMA. H. R. Rep. No. 94-1163 at 17

(1976).

In carrying out the CDCA wilderness inventory, BLM sought and obtained extensive public participation and input, including through a series of public briefings, workshops and formal public meetings. See CDCA Wilderness Inventory – Final Descriptive Narratives, published March 31, 1979, 44 Fed. Reg. 19,044-45 (March 30, 1979). This consultation and coordination effort sought public input on the Preliminary Wilderness Inventory Map and on the Interim Inventory Map and Descriptive Narratives. In total, BLM held 57 widely advertised and well-attended meetings and workshops.

On March 30, 1979, the BLM State Director for California published a list of designated WSAs totaling 5.5 million acres of CDCA lands. CDCA Wilderness Inventory – Final Descriptive Narratives, 44 Fed. Reg. 19,044-45; Magee Declaration at ¶ 11. This Federal Register Notice stated that in determining roadless areas for inclusion in WSAs, "area boundaries were limited by rights-of-way . . . and existing roads." Id. at 19,045. Included among the WSAs designated by BLM were four WSAs encompassing the County highways claimed by Inyo County: (1) the Greenwater Range WSA (CDCA 147), encompassing the claimed Petro Road; (2) the Greenwater Valley WSA (CDCA 148), encompassing the claimed Lost Section - South Road; (3) the Last Chance Mountain WSA (CDCA 112), encompassing almost all of the claimed Last Chance Road;[3]/ and (4) the Panamint Dunes WSA (CDCA 127), encompassing the claimed Padre Point Road. Magee Declaration at ¶ 12. Designation of the WSAs completed the inventory phase and initiated the study phase.

The wilderness study phase, which was integrated with the CDCA planning process, culminated with BLM's publication of the Draft Environmental Impact Statement for the proposed CDCA plan in February 1980, and the Final Environmental Impact Statement for the proposed CDCA plan in September 1980, and issuance of the CDCA final plan Record of

---

[3]/ As noted in the Magee Declaration at ¶ 12.c., all of the claimed Last Chance Road, with the exception of a "cherry stem" that corresponds to the northern one-half mile of the claimed road, was included in the Last Chance Mountain WSA (CDCA 112). Federal Defendants' Motion to Dismiss does not therefore apply to this small portion of the claimed Last Chance Road.

Decision in December 1980. Magee Declaration at ¶ 14.

After several unsuccessful attempts in the late 1980s and early 1990s to enact legislation protecting and preserving CDCA lands, in 1994, Congress enacted the California Desert Protection Act. Pub. L. No. 103-433, 108 Stat. 4471 (Oct. 31, 1994) (codified at 16 U.S.C. §§ 410aaa et seq.). The CDPA afforded Death Valley National Monument full recognition and statutory protection as a National Park, substantially enlarged the unit by adding public domain lands previously administered by BLM to the Park, and transferred the jurisdiction of those lands from the jurisdiction of BLM to NPS. 16 U.S.C. §§ 410aaa-410aaa-3). The CDPA also designated all of the lands encompassed by the Greenwater Range, Greenwater Valley, Last Chance Mountain, and Panamint Dunes WSAs as part of the Death Valley National Park Wilderness Area to be managed pursuant to the Wilderness Act. 16 U.S.C. § 1132.

IV. STANDARD OF REVIEW

"The question whether the United States has waived its sovereign immunity . . . is, in the first instance, a question of subject matter jurisdiction." McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). When defending on the basis of sovereign immunity, therefore, a federal defendant may move to dismiss a claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Faced with a 12(b)(1) motion, a plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. See Thomas v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." General Atomic Co. v. United Nuclear Corp., 655 F.2d 968, 968-69 (9th Cir. 1981). In determining whether it has jurisdiction, a court is not restricted to the face of the pleadings, but may instead review evidence and resolve factual disputes concerning the existence of jurisdiction without converting the motion into one for summary judgment. See McCarthy, 850 F.2d at 560; Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983). If a federal court finds that it lacks subject matter jurisdiction, then it must dismiss the action. See Fed. R. Civ. P. 12(h)(3).

The federal courts have made it clear that satisfaction of the QTA's statute of limitations, and therefore whether an action qualifies as one for which the United States has waived its sovereign immunity, is a jurisdictional prerequisite to a quiet title action against the United States. As this Circuit noted in Fidelity Exploration and Production Co. v. United States, 506 F.3d 1182, 1186 (9th Cir. 2007), the Supreme Court has held that the QTA's limitation period is "a central condition of the consent given by the Act." Fidelity Exploration and Production Co. v. United States, 506 F.3d 1182, 1186 (9th Cir. 2007), quoting Mottaz, 476 U.S. at 843. As such, this condition on Congress' waiver of the United States' sovereign immunity "must be strictly observed." Fidelity Exploration, 506 F.3d 1186, quoting Block v. North Dakota, 461 U.S. 273, 287 (1983). See also Skranak v. Castenada, 425 F.3d 1213, 1216 (9th Cir. 2005) ("Such bar is jurisdictional. The Quiet Title Act is a waiver of sovereign immunity. If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction."). Moreover, the courts have required that a claimant plead with particularity in its complaint facts sufficient to show its ability to satisfy the statute of limitations. See Buchler, 384 F. Supp. at 713.

V. SUMMARY OF ARGUMENT

Inyo County's Complaint should be dismissed for failure to plead facts that would show that the County can satisfy the QTA's statute of limitations. The County's Complaint does not identify the date the County first had reason to know of the United States' adverse interest in the claimed roads. The County's Complaint therefore fails to satisfy the QTA's requirement that the County identify with particularity the bases for its claims, including allegations that show its ability to satisfy the QTA's statute of limitations, and should be dismissed on this basis.

If the Court declines to dismiss Inyo County's Complaint on the basis that the County failed to plead compliance with of the QTA's statute of limitation, the Court should dismiss the Complaint as time-barred in any event. The County's claims were required to have been brought prior to April 1, 1991, because the statute of limitations was triggered by the March 31, 1979 designation of the four WSAs encompassing the claimed roads–and characterizing the areas as

roadless areas by definition. At that point the County was reasonably aware that the United States considered these areas to be roadless. BLM's conclusion that there were no roads in the WSAs put the County on notice that the United States did not recognize that there were any maintained roads in these areas–in direct contravention to the County's claimed title to rights-of-way for maintained County highways within the WSAs. Therefore, as of 1979, the County knew or should have known that the United States asserted an interest adverse to the Inyo's claimed ownership of maintained highways within these WSAs. The time for filing a QTA action seeking to adjudicate rights-of-way for claimed highways within the areas encompassed by these WSAs expired on April 1, 1991. Inyo County's suit, filed October 25, 2006, is therefore time-barred and must be dismissed.[4]/

VI. ARGUMENT

A. Inyo County's Complaint Should be Dismissed Due to the County's Failure to Plead with Particularity Facts Sufficient to Show That the County's Action Was Filed Within the QTA's Twelve-Year Statute of Limitations.

As noted above, courts require plaintiffs in QTA actions to plead facts sufficient to meet the QTA's requirements for particularity, including facts that allege that the complaint was filed within the QTA's twelve-year statute of limitations. As noted by the court in dismissing plaintiff's claims in Buchler, 384 F.Supp. at 713, "it is incumbent upon plaintiffs in their complaint to allege the date on which they or their predecessors in interest knew or should have known of the claims of the United States. Again, as plaintiffs have failed to make this allegation, this defect in pleading is subject to a motion to dismiss."

Here, although the Complaint includes various allegations regarding NPS's actions and assertions concerning road closures pursuant to the CDPA, see Complaint at ¶¶ 4, 38, 39, 51, 64, 72, 80, 87, the Complaint fails to identify a date when the County first had reason to know of the United States' claimed adverse interest in the alleged highways. Because this pleading requirement is a jurisdictional prerequisite to the County's claims under the QTA, the Complaint

---

[4]/ Other than as it pertains to the northern one-half mile of the claimed Last Chance Road. See note 3, supra.

should be dismissed for failure to plead facts sufficient to support the jurisdiction of the court.

B. The County's Complaint Should Be Dismissed Because It Was Filed Seventeen Years After the County First Had Notice of the United States' Claim of Interest Adverse to the County's Claimed Ownership and Is Therefore Barred by the QTA's Twelve-Year Statute of Limitations.

Even if the Court does not dismiss Inyo County's Complaint due to the County's failure to plead with particularity facts that would show that the County's claim was brought within the QTA's twelve-year statute of limitations, the County's Complaint is time-barred and should be dismissed.[5]/ The QTA's statute of limitations was triggered by the California Desert Conservation Area, Wilderness Inventory – Final Descriptive Narratives, published March 31, 1979, which designated the Greenwater Range, Greenwater Valley, Last Chance Mountain, and Panamint Dunes Wilderness Study Areas. See 44 Fed. Reg. 19,044-45 (March 30, 1979). The County's Complaint was filed October 25, 2006. The Court should therefore dismiss the Complaint because it was filed more than twelve years after the County knew or should have known that the United States claimed an interest adverse to the County's claimed ownership of the alleged County highways.

1. The QTA's statute of limitations runs from when the County first had notice that the United States claimed an interest adverse to the Inyo's claimed interest in the alleged County highways.

The QTA explicitly requires that actions brought under the QTA must be commenced within twelve years of the date upon which the cause of action accrued, which the Act specifies as "the date that the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). Since the QTA provides a statutory waiver of sovereign immunity, the courts have construed the QTA and its statute of limitations narrowly and in favor of the sovereign. See Block v. North Dakota, 461 U.S. 273, 275-76 (1983); Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 450-51 (10th Cir. 1985); Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982).

---

[5]/ Other than as it pertains to the northern one-half mile of the claimed Last Chance Road. See note 3, supra.

In applying the QTA's statute of limitations, the courts have applied a reasonableness test. For purposes of determining when a claim has accrued, "[a]ll that is necessary is a reasonable awareness that the government claims some interest adverse to the plaintiffs'." Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980); see also California ex. rel., State Land Comm'n v. Yuba Goldfields, Inc., 752 F.2d 393 (9th Cir. 1985); Amoco Prod. Co. v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980); Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 499, 452 (10th Cir. 1985); Park County Mont. v. United States, 626 F.2d 718, 721 n. 6 (9th Cir. 1980).

Federal courts have determined that this reasonable awareness standard is met when the plaintiff has any reason to understand that the government claims an interest adverse to plaintiff's claimed interest in the property in question. In Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, the court ruled that the designation of a WSA encompassing claimed R.S. 2477 rights-of-way put plaintiffs and the public on notice, as of the date of publication of the WSA designation, "that BLM claimed all the area and did not recognize any alleged rights-of-way," thus triggering the QTA's twelve year statute of limitations. Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 271 F. Supp. 2d 1308, 1312 (D.N.M. 2003), aff'd on other grounds, 363 F. 3d 1069 (10th Cir. 2004). In holding that Federal Register publication of the designation of the WSA provided notice that triggered the QTA's, the court quoted Shiny Rock Mining Corp. v. U.S., 906 F.2d 1362, 1364 (9th Cir. 1990): "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." See also Gov't of Guam v. United States, 744 F.2d 699, 701 (9th Cir. 1984) (executive order published in Federal Register constituted formal notice for QTA limitations period).

Here, Inyo County not only was given notice through publication of the WSA designations in the Federal Register, but also had actual knowledge of the WSA designations and that the United States' claimed interests adverse to the County's claimed ownership of the four alleged County highways.

2. Inclusion of the claimed roads in Wilderness Study Areas put the County on notice that the United States claimed an interest adverse to the County.

The United States gave notice in 1979 that it had determined the relevant areas to be roadless and therefore eligible for wilderness designation. As noted above, that notice stated that in identifying roadless areas for inclusion in WSAs, "area boundaries were limited by rights-of-way . . . and existing roads." 44 Fed. Reg. at 19,045. By definition, a WSA designation means the United States is asserting the area is roadless. 43 U.S.C. § 1782(a). The determination that these areas were eligible for wilderness designation constituted notice that the United States did not recognize the presence of any rights-of-way or roads within these WSAs,[6]/ and asserted the right to prohibit all roads–both permanent and temporary–and to prohibit the use of motorized vehicles in these areas. See Wilderness Act, Section 4(c), 16 U.S.C. § 1133(c). Moreover, upon designation of the WSAs, BLM was required to manage the WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." See 43 U.S.C. § 1782(c). This FLPMA mandate that WSAs be managed in a manner that maintained their wilderness character is reflected in BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review ("Interim Management Policy"), adopted December 1979, and applicable to all WSAs. See Magee Declaration at ¶ 13; 44 Fed. Reg. 72,014 (Dec. 12, 1979). The Interim Management Policy describes BLM's standard for interim management (i.e., during the period of wilderness review and until the Congress acts on the President's recommendations) as requiring "that lands under wilderness review must be managed so as not to impair their suitability for preservation as wilderness." See Magee Declaration at ¶ 13; 44 Fed. Reg. 72,014, 72,015 (Dec. 12, 1979).

The County therefore knew or should have known in 1979, when the WSAs were designated, that the United States claimed there were no roads within the Greenwater Range,

---

[6]/ Other than the northern one-half mile of the claimed Last Chance Road. See note 3, supra.

Greenwater Valley, Last Chance Mountain,[7]/ and Panamint Dunes WSAs and that this claim was adverse to the County's interest in the subject roads. See California Desert Conservation Area, Wilderness Inventory – Final Descriptive Narratives, published March 31, 1979, 44 Fed. Reg. 19,044-45 (March 30, 1979). The United States' conclusion that no rights-of-way or roads existed in the WSAs necessarily put the public on notice that the United States believed that no public highways existed within these areas. Moreover, designation of these WSAs constituted notice that the United States had determined these areas to be eligible for wilderness designation, thereby prohibiting the presence of all roads and use of motorized vehicles.

3. Inyo County had actual notice of the 1979 designation of WSAs and was fully aware that BLM's roadless determination was inconsistent with the County's claimed ownership of maintained County highways in these areas.

Inyo County was well aware of the 1979 designation of these areas as roadless WSAs. The issue of potential wilderness designation and other restrictions on use, especially, vehicle access, was a controversial and very public issue in Inyo County. The CDCA planning process provided ample notice and opportunity for public input and the County was closely involved with the CDCA planning and wilderness review process from its inception in 1977 through its completion in 1994. See Magee Declaration at ¶¶ 8, 9 (attached Wilderness Inventory and Study Program and Wilderness Inventory Handbook), 14, 17, 18; Declaration of Bruce D. Bernard, attached as Attachment 2 hereto ("Bernard Declaration"), at Ex. B, Document Nos. 1-119 (documents produced from County files concerning its participation in CDCA planning process). Indeed, the Board of Supervisors actively followed the CDCA planning process, nominated representatives to the CDCA Advisory Committee, met with BLM representatives and personnel, directed the County Planning Department and the County Planning Commission to work with BLM, adopted numerous resolutions presenting the County's concerns with the CDCA planning and wilderness inventory process to California's Congressional delegation and to the Department

---

[7]/ See note 3, supra.

of the Interior, and prosecuted lawsuits challenging various aspects of the process. Id.[8]/

The focus of much of Inyo County's expressed concerns with the CDCA planning process was the potential for inconsistency and interference between the CDCA plan and wilderness inventory with the Inyo County General Plan's designation of areas open to multiple uses and served by the maintained county road system or otherwise accessible by motorized vehicles. Id. Indeed, the County expressed keen concern that roadless determinations or other protection alternatives presented in the CDCA plan could result in the closure of portions of the County maintained road system. Id.

In 1978, for example, the Board of Supervisors adopted Resolution No. 78-111 which noted the County's concern that BLM's roadless determinations under the Wilderness Act and FLPMA failed to take into account the County's position that a maintained County road system served much of the CDCA. Bernard Declaration, Ex. B, Document No. 24 (Resolution 78-111, Sept. 5, 1978). This 1978 resolution directed the County Planning Department and Planning Commission to work with BLM on the CDCA Inventory and Study Program to ensure "that the Inyo County General Plan is not violated by restricting Multiple use concepts in the area and that the County road system as well as the Public roads in the area are clearly recognized and

---

[8]/ Inyo County was plaintiff in American Motorcyclist Ass'n v. Watt, 534 F. Supp 923 (D.C. Cal. 1981), aff'd, 714 F.2d 962 (9th Cir. 1983), in which the County and other plaintiffs sought to enjoin implementation of the CDCA plan. Among the alleged procedural violations of FLPMA and the BLM planning regulations were Inyo County's assertions that BLM failed to coordinate development of the CDCA plan with state and local plans and resolve inconsistencies. Id. at 935-36.

Inyo County was also plaintiff in an Interior Board of Land Appeals ("IBLA") administrative appeal challenging the designation of WSAs in Inyo County (although outside the CDCA), including on the bases that several of the WSAs comprised less than 5,000 acres, and that one of the WSAs had an irregular shape. See Inyo County Board of Supervisors, 63 I.B.L.A. 321 (April 27, 1982). The IBLA determined that while, under BLM's general management authority, it may inventory and identify areas of less than 5,000 acres as constituting roadless areas possessing wilderness characteristics, and that BLM may manage and recommend such areas as wilderness, the agency could not properly designate such areas as WSAs under Section 603(a) of FLPMA because that section only mandates review of roadless areas of 5,000 acres or more. The IBLA also determined that BLM had the authority to designate WSAs of irregular shapes, including long, narrow configurations.

preserved for use of the General Public as well as mining and recreation activities." Id.

In 1979, the Supervisors adopted two more resolutions expressing concern that the CDCA planning and wilderness review process could result in roadless determinations that would not allow for multiple use of the area. Id., Document No. 43 (Resolution 79-40, May 15, 1979), Document No. 45 (Resolution 79-120, Oct. 23, 1979). In 1980, the Supervisors adopted two additional resolutions expressing concern that roadless determinations or other protective aspects of the CDCA plan could result in closure of portions of the "maintained county road system" and expressing opposition to the protection alternative of the CDCA plan. Id., Document No. 50 (Resolution 80-51, May 6, 1980), Document No. 55 (Resolution 80-124, Nov. 18, 1980).

The County's awareness of the designation of WSAs encompassing these claimed County highways is confirmed by other documents from the County's files, including correspondence from the State Director of BLM to the Chairman of the Inyo County Board of Supervisors transmitting advance copies of the WSA maps and explaining that publication of the Federal Register notice announcing the WSA designations was scheduled for March 30, 1979 (Document No. 40), as well as a copy of that March 30, 1979 Federal Register notice of publication of the CDCA Wilderness Inventory – Final Descriptive Narratives (Document No. 37). See Bernard Declaration, Ex. B, Document No. 40 (Letter from State Director, BLM, to Chairman, Inyo County Board of Supervisors), Document No. 37 (copy of 44 Fed. Reg. 19,044-45, March 30, 1979). Indeed, the County has acknowledged that it was aware that the claimed Petro Road, Lost Section Road – South, Padre Point Road, and much of the Last Chance Road were included in WSAs designated in 1979. See Bernard Declaration, Ex. A (Responses to Requests for Admission Nos. 1-4, Response to Interrogatory No. 3, Plaintiff County of Inyo's Response to Federal Defendants' First Set of Requests for Admission, Interrogatories and Requests for Production of Documents).

It could not, therefore, be more clear that Inyo County was fully aware of the designation of these areas as WSAs and that BLM's determination of these areas to be roadless areas

possessing wilderness character was inconsistent with the County's claimed ownership of maintained County highways in these areas. By 1979, the County was on notice that the United States considered the area to be roadless and claimed an adverse interest in these areas–an interest wholly inconsistent with Inyo's claimed ownership of County highways.

4. Under the "reasonable awareness" standard, Inyo County knew or should have known, as of 1979, that the United States claimed interests adverse to the County's claimed ownership of maintained County highways within these WSAs, and the County's claims are thus barred.

The documents produced from Inyo County's own files concerning the CDCA plan make it perfectly clear that the County had "a reasonable awareness that the government claim[ed] some interest adverse" to the County. See Knapp, 636 F.2d at 283. Upon designation of the Greenwater Range, Greenwater Valley, Last Chance Mountain, and Panamint Dunes WSAs in 1979, the County "knew or should have known" that the United States considered these areas to be roadless and did not recognize the existence of maintained County highways in these areas.

Although the United States did not construct physical impediments to vehicular access into these areas until after enactment of the CDPA, the United States' claim to interests adverse to the County was known or should have been known through publication in the Federal Register in 1979. "The existence of one uncontroverted instance of notice suffices to trigger the limitations period." Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984); see also Park County Mont. v. United States, 626 F.2d 718, 721 (9th Cir. 1980) (single sign adequate notice); see also California. v. Yuba Goldfields, 752 F.2d at 397. Knowledge of the claim's full contours is not necessary, if there is a reasonable awareness that the United States claims "some" interest adverse to the plaintiff. North Dakota ex rel. Bd. of Univ. v. Block, 789 F.2d 1308, 1313 (8th Cir. 1986); Knapp, 636 F.2d at 283.[9/] Here, Inyo County's actions make it clear that the County had a keen awareness that designation of the WSAs threatened the claimed existence and use of Inyo's alleged County highways. Under the reasonable awareness standard, the County knew or

---

[9/] Moreover, in QTA claims against the federal government, the statute of limitations cannot be tolled. United States v. Beggerly, 524 U.S. 38, 48 (1998).

should have known, by 1979, that the United States claimed an interest adverse to the County concerning its claimed highways and any QTA action must have been brought within twelve years of that date.

VII. CONCLUSION

The County knew or should have known by March 31, 1979 that the United States claimed an interest adverse to the County's asserted rights-of-way for these four claimed County highways. The QTA's twelve year statute of limitations was triggered on that date and ran by April 1, 1991. The County's claims, filed October 25, 2006, are therefore time-barred and the County's Complaint must be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 9th day of May, 2008.

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

/s/ Bruce D. Bernard
BRUCE D. BERNARD
Trial Attorney
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294
Telephone: (303) 844-1361
Facsimile: (303) 844-1350
Email: bruce.bernard@usdoj.gov

ATTORNEYS FOR FEDERAL DEFENDANTS

OF COUNSEL:

Barbara Goodyear
U.S. Department of the Interior
Office of the Solicitor
Pacific Southwest Region
San Francisco Field Office
1111 Jackson Street, Suite 735
Oakland, California 94607