PAUL N. BRUCE, County Counsel (81619)
RALPH H. KELLER, Assistant County Counsel (205962)
COUNTY OF INYO
224 North Edwards Street, P.O. Box M
Independence, California 93526
(760) 878-0229 Voice
(760) 878-2241 Fax

Attorneys for PLAINTIFF COUNTY OF INYO

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

COUNTY OF INYO *Plaintiff,* vs. 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.*	CASE NO. 1:06-cv-1502 AWI-DLB MOTION FOR RECONSIDERATION Hearing Date: September 22, 2008 Time: 1:30 p.m. Room: Courtroom 3, 5th Floor Anthony W. Ishii United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

I.

INTRODUCTION

Plaintiff Inyo County respectfully petitions the Court to reconsider its Order On Motions By Defendants and Defendant-Intervenors To Dismiss For Lack of Subject Matter Jurisdiction (Order). Plaintiff so moves the Court because Plaintiff believes that, to the extent that the Court's opinion is based on law beyond that briefed by the parties, further analysis would be beneficial to the Court and would support a finding that the Court has jurisdiction over all of the rights-of-way that are subject to this action. Additionally, Plaintiff believes that, in any event, the Court has subject matter jurisdiction over the northern approximately ¾ mile of Last Chance Road, which was cherry stemmed from Wilderness Study Area (WSA) #112 in 1979. Finally, Plaintiff requests that the Court amend its factual conclusion that Padre Point Road has been closed to traffic since 1994, as that road remains open to traffic, which correction should not affect the Court's conclusions of law but could have consequences subsequent to this action.

II.

DISCUSSION

A. The northern portion of Last Chance Road, where it intersects with Cucomongo Road, was not included in a wilderness study area in 1979 and so the Quiet Title Act statute of limitations could not have begun at that time.

It appears it was an oversight to dismiss Plaintiff's cause of action as it relates to the portion of Last Chance Road that was cherry stemmed from WSA #112 in 1979. On page 4 of the Order, the Court found that "a short three-quarter mile segment of the subject Last Chance Canyon Road at the northern end where it intersects with Cucomongo Canyon Road" was cherry stemmed from the WSA, and Defendants admit that the most northerly portion of Last Chance

Road was not included in the WSA in 1979. Federal Defendants Memorandum of Points and Authorities in Support of Motion to Dismiss, n. 3; Intervenor-Defendant Sierra Club Et Al.'s Memorandum in Support of Their Motion to Dismiss for Lack of Subject Matter Jurisdiction, n. 5.

It was only by virtue of being included in a WSA that the obligation fell upon the United States to manage its lands so as not to diminish their wilderness characteristics, thus asserting a claim against Plaintiff's roads. Therefore, the statute of limitations could not have commenced for the most northern portion of Last Chance Road in 1979 since it was not included in a WSA, and the earliest the statute of limitations could have commenced was when that portion of the road was included in a wilderness area on October 31, 1994 with the passage of the California Desert Protection Act. (CDPA, 108 Stat. 4471.) Plaintiff's complaint was filed on October 25, 2006, within twelve years of the passage of the CDPA.

B. Padre Point Road has not been closed to traffic.

Although Padre Point Road traverses a wilderness area, it has not been closed to traffic. United States' Responses to County of Inyo's First Set of Requests For Admission, Interrogatories and Requests For Production of Documents, Response to Request For Admission No. 32. (Attachment 1). Accordingly, Plaintiff petitions the Court to amend its factual finding on page 6 to reflect that Padre Point Road has not been closed to vehicular traffic.

C. The United States' claim against Plaintiff's right to enhance or upgrade its rights-of-way was not a claim against the then established rights-of-way.

It has been and is Plaintiff's position that only Congress could authorize a claim against the County's rights-of-way in question. This position is based on the fact that the rights-of-way

were obtained in accordance with state and federal law and are fully protected by state law. It is, we contend, a bedrock constitutional principle that a state's law, particularly related to a well-established and traditional state function, is entitled to full respect under the United States Constitution unless Congress exercises it prerogative to limit it by enacting conflicting federal law. Accordingly, since Congress specifically preserved existing private property rights in federal lands when it enacted FLPMA (43 U.S.C. 1701 *et seq*.) and the Wilderness Act (16 U.S.C. § 1131 *et seq*.), Congress did not authorize actions by the executive branch that were inconsistent with state and federal laws, such as the taking of the County's rights-of-way across federal land.

This Court points out an area where Congress did seek to limit property rights on federal lands. Congress mandated that WSAs be managed "so as not to impair the suitability of such areas for preservation as wilderness." Thus, this Court concludes that "while designation of an area as a WSA does not necessarily impair its use to the extent the use was established prior to the designation, the designation does impair the ability of Plaintiff to carry out any actions that would diminish the area's wilderness values; for example, by paving, resurfacing, widening, redirecting, or otherwise improving an existing right of way."

To the extent Plaintiff had any right to *expand or improve* its rights-of-way in 1979, Plaintiff believes this reasoning supports the conclusion that a claim was made by the United States against that right. Where Plaintiff disagrees with the Court's Order is in the conclusion that a claim against this partial and inchoate property interest is a claim against the entirety of the Plaintiff's property interest, i.e. the existing roads.

As the Court held, until the United States asserted a definable claim against the existing roads, the statute of limitations under the Quiet Title Act (28 U.S.C. 2409a) did not begin to run. Plaintiff does not believe due process analysis under the United States Constitution demands a different result. As the Court notes, due process provides protection for property beyond that protected by state property law. Plaintiff agrees that due process would protect Plaintiff's right to improve its right-of-way in the future, if such right otherwise existed. California property law and federal R.S. 2477 decisions would do the same. However, Plaintiff finds no federal case law that holds that, even under a due process analysis, a claim against a portion of an entity's right-of-way expands by action of law to a claim against the entirety of an entity's right-of-way.

Certainly California law would not support this conclusion. Similar issues have arisen in California jurisprudence concerning easements by prescription. In California, acquiescence by an easement holder to interference with a portion of a right-of-way does not bar the easement holder from objecting to the complete obstruction of the right-of-way. *Ng v. Warren*, 79 Cal.App.2d 54, 62 (Cal. 1st Dist. 1947). It is appropriate to turn to state law to define the extent of property protected by the due process clause, and to determine the extent of a right-of-way under R.S. 2477. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-578 (1972), 92 S.Ct. 2701 (relating to 14th Amendment); *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988) (relating to R.S. 2477).

In short, Plaintiff believes the Court got it right when stating that the creation of the WSAs did not represent a claim against the existing roads, because the WSAs were created as vehicles to study these areas and there was no certainty that Congress would make any WSA a wilderness area. Plaintiff's roads clearly did not detract from the wilderness characteristics of

the WSAs – an assertion supported by the fact that Plaintiff's roads were actually included in the WSAs and by the fact that the roads were left open pending the Congressional wilderness decision. It follows that a claim against the County's theoretical right to expand those roads to the detriment of wilderness characteristics is not a claim against the County's separate right to the existing roads that were compatible with wilderness characteristics.

This conclusion seems consistent with due process analysis. If the claim as articulated was against the *expansion* of the roads, Plaintiff could not have been under notice that the claim was actually for a greater property right that included the existing roads. Without such notice, Plaintiff could not respond to the claim against its property - a violation of federal due process.

D. It is uncertain whether Plaintiff Inyo County had the right to expand its existing roads after the passage of FLPMA in 1976 and therefore it is uncertain whether the establishment of WSAs represent a claim against a property right of Plaintiff.

Should the Court accept the argument in section C above, it is irrelevant whether Plaintiff actually owned the right to expand its rights-of-way in 1979. On the other hand, if a claim against Plaintiff's right to expand its rights-of-way triggered its obligation to defend its roads as they existed on the ground, it would be relevant whether Plaintiff owned a right to expand or improve it rights-of-way.

Plaintiff acknowledges that its Complaint asserted a right to expand its rights-of-way beyond the area physically established as a road. At section 24 of our Complaint, Plaintiff asserted: "The scope of an R.S. 2477 right-of-way is 'not … restricted to the actual beaten path,' but includes the right to widen the road to meet exigencies of increased travel even after 1976, 'at least to the extent of a two-lane road' to allow travelers to pass each other. *Hodel*, 846 F.2d at 1083." In our Memorandum in Opposition to Sierra Club Et Al.'s Motion to Intervene, pages

3-4, Plaintiff did waive any cause of action to determine the extent of its rights-of-way beyond determining whether Plaintiff owns rights-of-way and ordering United States to remove its barriers. Nevertheless, Plaintiff acknowledges that it may be estopped from asserting a legal theory that conflicts with its Complaint.

However, and despite our previous statements, we are compelled to state that, on more informed examination, it is far from certain under either state or federal law that Plaintiff's rights-of-way could exceed those put to actual use at the passage of FLPMA in 1976, which withdrew the offer of highway rights-of-way over federal land. Under California law, where an offer of dedication and its acceptance are ambiguous, the extent of a right-of-way is generally determined by use. *Orena v. City of Santa Barbara*, 91 Cal. 621 (Cal. 1891); *Payne v. English*, 101 Cal. 10 (Cal. 1894); *Youngtown Steel Products Co. v. City of Los Angeles*, 38 Cal.2d 407 (Cal. 1952); *Mulch v. Nagle*, 51 Cal.App. 559 (Cal. 1st Dist. 1921). State law should be applied to determine the extent of an R.S. 2477 right-of-way. *Southern Utah Wilderness Alliance v. Bureau of Land Management,* 425 F.3d 735, 476 (10th Cir. 2006); *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988).

The point Plaintiff would make, if allowed, is that whether Plaintiff held any rights-of-way that were adversely affected by the creation of the WSAs is a matter that deserves further briefing and a determination by the Court. If Plaintiff did not hold the right to expand or improve its rights-of-way, the United States did not assert a claim adverse to Plaintiff when it created the WSAs, and Plaintiff could not have been on notice of a claim against its interests.

III.

CONCLUSION

In order to trigger the statute of limitations of the Quiet Title Act in this case, a claim must have been made that was adverse to the County's property interests in its roads. At most, the establishment of WSAs asserted a claim adverse to the County's right to expand its roads. Because that claim was not adverse to the County's roads as they existed in 1979, it could not trigger the statute of limitations for that portion of the County's rights-of-way. Additionally, since the northernmost portion of Last Chance Road was not included in a WSA in 1979, the statute of limitations could not have begun until much later and the cause of action as to that portion of Last Chance Road is not outside the Court's jurisdiction. The County of Inyo therefore respectfully requests that the Court reconsider its Order and find that it has subject matter jurisdiction to hear all causes of action in this case.

Dated: August 25, 2008

Respectfully Submitted,
PAUL N. BRUCE, COUNTY COUNSEL

By: /s/ Ralph H. Keller
RALPH H. KELLER, ASSISTANT COUNTY COUNSEL
County of Inyo
Post Office Box M, 224 N. Edwards Street
Independence, CA 93526
Telephone: 760-878-0229

Attorneys for Plaintiff

ATTACHMENT 1

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

UNITED STATES' RESPONSES TO COUNTY OF INYO'S FIRST SET OF REQUESTS FOR ADMISSION, INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Dennis L. Beck
U.S. Magistrate Judge

Anthony W. Ishii
U.S. District Court Judge

REQUEST FOR ADMISSION NO. 32:

Please admit that you have not blocked motorized vehicle access to Padre Point Road.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 33:

Please admit that you have not created final maps and legal descriptions of the boundaries of the wilderness areas created in Death Valley National Park by the CDPA, have not filed those maps and legal descriptions with the Committee on Energy and Natural Resources of the United States Senate and the Committee on Natural Resources of the United States House of Representatives, and do not have such maps on file and available for public inspection, all as required by Section 602 of the CDPA.

RESPONSE:

Defendants admit that the NPS has not created final maps and legal descriptions of the boundaries of the wilderness areas in Death Valley National Park designated by the CDPA.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Please explain by what statute, regulation, policy or other authority you barricaded Last Chance Road, Petro Road and Lost Section Road - South and the purpose of such barricades.

RESPONSE:

The NPS derives its authority to prohibit mechanized vehicle use on the claimed Last Chance Road, Petro Road and Lost Section Road- South from the following authorities: the California Desert Protection Act, the Park's enabling legislation (16 U.S.C. Section 410aaa et seq.), the Wilderness Act, NPS regulations (*e.g.*, 36 CFR Section 4.10 and 36 C.F.R. Section 1.5) and NPS policies (*e.g.*, NPS Management Policies, Chapter 6, Section 6.4.3.3.).

INTERROGATORY NO. 2:

Please explain by what statute, regulation, policy or other authority you allow the continued motorized use of Padre Point Road and whether statute, regulation, policy or other