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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF INYO Plaintiff, v. DEPARTMENT OF THE INTERIOR, KENNETH L. SALAZAR, in his capacity as Secretary of the United States Department of the Interior, NATIONAL PARK SERVICE, JONATHAN B. JARVIS, in his capacity as Director, National Park Service, and SARAH CRAIGHEAD, in her 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 IN OPPOSITION TO INYO COUNTY'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT Dennis L. Beck U.S. Magistrate Judge Anthony W. Ishii U.S. District Court Judge Hearing Date: November 22, 2010 Hearing Time: 1:30 p.m. Hearing Location: Courtroom 2, 8th Fl.

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I. INTRODUCTION

Inyo County seeks to quiet title, pursuant to the federal Quiet Title Act, to a right-of-way claimed to have been perfected under a repealed 19th Century right-of-way law known as R.S. 2477. The County alleges that the "Last Chance Road," a claimed four-wheel drive track in the northern portion of Death Valley National Park, was established as an R.S. 2477 highway prior to repeal of that law in 1976. While the County's descriptions of the location of the claimed road are inconsistent and to some extent unintelligible, the County alleges that the claimed route commences off of the Willow Springs Road at a location near Willow Springs, and travels south up a small wash into designated wilderness for "approximately one-half to three-quarters mile" to a location somewhere along the northern rim of Last Chance Canyon in Death Valley National Park. See Inyo Memo at 2.

The County has been unable to identify the location of the right-of-way to which it seeks to quiet title in a consistent manner. The County has further been unable or unwilling to identify the scope of the right-of-way to which it seeks to quiet title. The County instead insists that: "The route of the Last Chance Road need not be delineated for the purposes of this action," and that "the scope of the right-of-way is not judiciable by the Court at this time." Inyo Memo at 19.

The County avers that it accepted a right-of-way for an R.S. 2477 highway in 1948 based on adoption of two County resolutions that make no reference to Last Chance Road. Those resolutions instead reference attached maps and road descriptions. The County has been unable to locate the maps attached to the 1948 resolutions. The County has been unable to locate the road descriptions attached to the resolutions. Consequently, the County bases its allegation that the resolutions accepted a highway right-of-way for Last Chance Road on an undated County Road Register that identifies Last Chance Road, No. 2046, as a road 4.0 miles in length, but with legal description that is unintelligible. To the extent that legal description can be divined, it puts the location of Last Chance Road No. 2046 approximately 84 miles to south of the location identified in the map attached as Exhibit 3 to the County's Complaint. Parties' Stipulated List of Undisputed Facts, August 20, 2010 (Doc. 91) ("Stipulated Facts") at ¶ 31.

The County argues that the claimed right-of-way was accepted by the 1948 resolutions alone but that, if public use is necessary to establish an R.S. 2477 right-of-way, the County has alleged sufficient public use. The County's assertion that the claimed road was accepted by public use is based on the deposition testimony of one County Road Department employee, Mr. Leonard Huarte, who suffered from inconsistent and conflicting recollections concerning whether he ever graded the wash through which most of claimed route traverses. Indeed, the only allegation of public use identified by the County is Mr. Huarte's recollection of "using the road on several occasions in the early 1970s as access for deer hunting and seeing vehicles parked along the road." Inyo Memo at 5. As for Mr. Huarte's inconsistent recollections concerning whether he ever graded the wash and why he would have graded the wash, the County offers that "he did not know why he graded the road, since in his view it basically went up to 'hardly nothing.'" See Id. (citing Stipulated Facts at ¶¶ 77, 97).

II. SUMMARY OF ARGUMENT

Inyo County fails to identify the right-of-way it requests the Court to adjudicate on summary judgment. The County also fails to establish the undisputed facts necessary to show acceptance of an R.S. 2477 highway right-of-way. The County's motion should therefore be denied. Based on the County's inability to identify the location and the scope of the right-of-way, and the County's acknowledged lack of facts concerning construction and public use of the claimed road, summary judgment should be entered against the County and in favor of Defendants and denying the County's claim.

A. The County fails to identify the location and the scope of the right-of-way it requests the Court to adjudicate on summary judgment.

Inyo County has been unable or unwilling to identify the route of the claimed Last Chance Road or the scope of the right-of-way to which it seeks to quiet title. The County argues that the United States "admitted the location of the road" at the point the National Park Service placed a sign in a small wash adjacent to the Willow Springs Road prohibiting off-road vehicle, motorcycle and bicycle use. Inyo Memo at 19. The County concludes that the Court therefore

need not "define the further extent of the road" beyond the sign in order to "determine there is a road right-of-way on Last Chance Road," and to require the United States "to remove the sign from the road." Id. at 19-20. The County further argues, as to its inability or refusal to identify the scope of the right-of-way to which it seeks to quiet title, that "[t]here is simply no ripe dispute as to the scope or location of the right-of-way" and that "it would be bad policy for the Court to attempt to define the scope of the right-of-way on this undeveloped record." Id. at 20. Indeed, it would be impossible for the Court to adjudicate Inyo County's claimed right-of-way – undefined as to location other than that it encompasses the point where the sign exists, and totally undefined as to scope, including width, allowable uses and other attributes – based on the facts alleged by the County.

The Quiet Title Act requires a plaintiff to identify with particularity "the nature of the right, title, or interest which the plaintiff claims in the real property" to which plaintiff seeks to quiet title. See 28 U.S.C. § 2409a(d). The County's request that the Court grant summary judgment, adjudicating a right-of-way into this wilderness area within Death Valley National Park, undefined in location and scope, must be denied for failure to meet the particularity requirements of the QTA.

B. The County fails to establish the undisputed facts necessary to show acceptance of an R.S. 2477 right-of-way under the requirements of federal law.

In addition to the failure to identify the location and the scope of the right-of-way to which the County seeks to quiet title on summary judgment, the County fails to set forth the undisputed facts necessary to show acceptance of an R.S. 2477 right-of-way. Under the plain language of R.S. 2477, in order to accept the grant of a right-of-way, a claimant must establish the "construction" of a "highway" over unreserved public lands. Inyo County fails to set forth facts establishing these requirements.

The County suggests that the Court should read the requirement for "construction" out of the statute, conceding that if mechanical construction is deemed necessary it may be impossible for the County to sustain its burden of proof. See Inyo Memo at 8. The plain language of the

statute dictates that actual physical construction is required and the County fails to meet its burden of presenting facts establishing this requirement. Even if the Court were to determine that an R.S. 2477 right-of-way can be accepted in the absence of actual physical construction, through other means that physically establish a defined travel way, such as by the repeated passage of vehicles, the County fails to meet this burden. The County does not set forth facts establishing that the Last Chance Road as now claimed existed prior to repeal of R.S. 2477 in 1976. The County asserts that United States Geological Survey ("USGS") maps establish the existence of the claimed road by 1976. However, the unnamed routes shown on the USGS maps vary in location and County representatives allege that the County now claims the route shown on the 1987 USGS map, rather than the 1957 USGS map attached to the County's Complaint. Stipulated Facts at ¶ 62; Pedersen Declaration (Doc. 75-3) at ¶ 7. A line on a 1987 map obviously does not establish the physical existence of a travel way in 1976. Even the route shown on the 1987 map varies from the route identified by County representatives during on-site depositions this past June. Stipulated Facts at ¶ 66. Finally, Mr. Huarte testified that he was not sure if the entire route he walked during the on-site portion of his June 9, 2010 deposition was the route he recalled grading in the 1970s. Stipulated Facts at ¶ 86.

The County also fails to establish that the claimed Last Chance Road was established as a "highway" within the meaning of R.S. 2477. The County presents no facts that establish that claimed road was ever a significant road. The County provides no evidence that the claimed road connected identifiable destinations. The County fails to establish that the various trails, paths and four-wheel drive routes shown on the USGS maps depict anything beyond rough four-wheel tracks through natural washes. Finally, the County fails to establish that the claimed road was used by the public with sufficient frequency and continuity to establish a highway within the meaning of R.S. 2477. The County acknowledges that it has no evidence of public use prior to repeal of R.S. 2477 in 1976 other than the testimony of Mr. Huarte. Stipulation of Facts at ¶ 92. The County's sole allegation of public use is Mr. Huarte's testimony that he used the road for hunting access several times in the early 1970s, but that he could not realistically estimate how

many times because he would "just be guessing." Id. at ¶93. Mr. Huarte further testified that he had seen "some hunters once in a while but not that many." Id. at ¶98. Mr. Huarte stated that he did not personally observe members of the public using the route for any purposes other than hunting. Id. Acceptance of an R.S. 2477 right-of-way requires proof of public use by many and different persons, for a variety of uses, over a sufficiently lengthy period of time. The County does not and cannot show these necessary facts.

C. The 1948 County resolutions do not establish acceptance of an R.S. 2477 right-of-way.

Inyo County asserts that two resolutions adopted by the County in 1948 constitute acceptance of an R.S. 2477 right-of-way for the claimed Last Chance Road. The County errs on several levels. First, the subject lands were not unreserved public lands open to entry under R.S. 2477 in 1948. Under Executive Order 6910, the lands were withdrawn and reserved pursuant to the Taylor Grazing Act of 1934, and the lands were not re-opened to entry under the public land laws, including R.S. 2477, until 1967. Stipulated Facts at ¶¶ 7-9.

Second, a county resolution alone is insufficient to establish an R.S. 2477 right-of-way. Congress did not intend to grant rights-of-way in advance of the need for roads and, as noted above, acceptance required claimant to establish construction of a highway and sufficient public use – necessary facts the County does not and cannot show. Moreover, even if California law could define the terms for acceptance of a federal grant of land in contravention of federal law, the mere adoption of a resolution, without a specific identification the claimed road and without evidence of its construction or physical existence, does not establish a right-of-way under California law.

In any event, the facts here do no demonstrate that the Count accepted a right-of-way for the claimed Last Chance Road by adoption of the 1948 resolutions. The resolutions do not identify Last Chance Road. Instead, the resolutions refer to attached maps and road descriptions. The County has been unable to locate either the attached maps or the road descriptions. The County bases its argument that the resolutions must have identified the Last Chance Road on an

undated County Road Register that includes a listing of Last Chance Road, No. 2046, as a 4.0 mile road, and sets forth an unintelligible legal description. County representatives acknowledge that the County has no information that any such four-mile road ever existed. Stipulated Facts at ¶ 33. County officials further concede that the legal description in the Road Register, to the extent it can be interpreted, places the road 84 miles south of the location now claimed for the road by the County. Stipulated Facts at ¶ 31.

The County fails to allege the facts necessary to show acceptance of an R.S. 2477 right-of-way for the claimed Last Chance Road under any theory and its motion must be denied.

D. The County's summary judgment motion should be denied and summary judgment entered in favor of Defendants.

The County is unable to identify the location and the scope of the right-of-way it requests the Court to adjudicate. The County acknowledges that its proof of construction and public use of the claimed road is limited to maps and the testimony of Mr. Huarte. The County has stipulated that it has identified no persons other than Mr. Huarte who claim to have knowledge as to any public use of the claimed route prior to 1977. Stipulated Facts at ¶ 92. The County has produced no documentary evidence of any public use. Summary judgment should therefore be entered against the County and in favor of Defendants and denying the County's claim.

III. STATUTORY BACKGROUND AND STANDARDS

A. Summary Judgment.

Summary judgment is appropriate when the movant demonstrates that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law, as shown by the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying the evidence that it believes forms the basis for its motion and demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Cline v. Indus. Maintenance Eng'g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000). A party opposing a summary judgment motion may not rest upon the

allegations or denials in its pleadings, Fed. R. Civ. P. 56(e), but must demonstrate the existence of facts that could support a finder of fact ruling in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Summary judgment should be entered against a party that fails to produce evidence on an element on which it will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The reviewing court must make all justifiable inferences and resolve all ambiguities in favor of the party opposing summary judgment. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Summary judgment is not appropriate where evidence establishes facts that give rise to contradictory inferences concerning material issues of fact. United States v. Lange, 466 F.2d 1021, 1026 (9th Cir. 1972).

B. The Quiet Title Act and sovereign immunity.

Under the doctrine of federal sovereign immunity, the United States is immune from suit unless it has waived its immunity. Dep't. of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); Lehman v. Nakshian, 453 U.S. 156, 160 (1981); United States v. Mitchell, 445 U.S. 535, 538 (1980). The Quiet Title Act ("QTA") constitutes a limited waiver of the United States' sovereign immunity in civil actions brought "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The Act is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." Block v. North Dakota, 461 U.S. 273, 286 (1983). Where QTA jurisdiction lies, the court can adjudicate the disputes between the plaintiff and the United States and render judgment between them.

The QTA's waiver of sovereign immunity, however, is expressly limited by a number of conditions. Of relevance here, a plaintiff seeking to quiet title as against the United States must clearly identify the property claimed. Specifically, the QTA provides:

> The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

28 U.S.C. § 2409a(d) (emphasis added).

Because it is a waiver of sovereign immunity, the QTA must be strictly construed. See United States v. Mottaz, 476 U.S. 834, 841 (1986); United States v. Testan, 424 U.S. 392, 399 (1976); Kingman Reef Atoll Inv., L.L.C. v. United States, 541 F.3d 1189, 1195-96 (9th Cir. 2008); Fidelity Exploration and Prod. Co. v. United States, 506 F.3d 1182, 1185-86 (9th Cir. 2007). The specific requirements of the QTA are therefore subject to the rule that "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." Fidelity Exploration, 506 F.3d 1186 (quoting Block, 461 U.S. at 287). See also Skranak v. Castenada, 425 F.3d 1213, 1216 (9th Cir. 2005).

The federal courts have generally held that satisfaction of the QTA's pleading requirements, 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. See Block, 461 U.S. at 293-94; Kingman Reef, 541 F.3d at 1195-96; Fidelity Exploration, 506 F.3d at 1185 (quoting Mottaz, 476 U.S. at 843). But see Wisconsin Valley Improvement Co. v. United States, 569 F.3d 331, 334 (7th Cir. 2009) (concluding that QTA's limitation period was a mandatory element of a QTA claim, rather than a prerequisite to jurisdiction). "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). "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, 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). 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).

C. Revised Statute 2477.

1. 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 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 The Wilderness Society v. Kane County, 581 F.3d 1198, 1206 (10th Cir. 2009) ("Wilderness Society"); Standage Ventures, Inc. v. Ariz., 499 F.2d 248, 250 (9th Cir. 1974); Southern Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 770 (10th Cir. 2005) ("SUWA v. BLM").

On October 21, 1976, Congress enacted the Federal Land Policy and Management Act ("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.

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[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.

2. Burden and standard of proof under R.S. 2477.

a. Burden of proof.

The party claiming an R.S. 2477 right-of-way against the federal government bears the burden of proving its alleged right-of-way. Wilderness Society, 581 F.3d at 1220 (citing SUWA v. BLM, 425 F.3d at 768-69). The Tenth Circuit has specifically found that in R.S. 2477 cases, "the burden of proof lies on those parties seeking to enforce rights-of-way against the federal government." Wilderness Society, 581 F.3d at 1220 (quoting SUWA v. BLM, 425 F.3d at 768 (quotation omitted)). "This allocation of the burden of proof to the R.S. 2477 claimant," the Court observed "is consonant with federal law and federal interests." Id. (quoting SUWA v. BLM, 425 F.3d at 769). The Court further noted that "it has long been the law that land 'grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language–inferences being resolved not against but for the government.'" Id. (quoting Caldwell v. United States, 250 U.S. 14, 20 (1919)). See also Watt v. W. Nuclear, Inc. 462 U.S. 36, 59 (1983). The Ninth Circuit has applied this rule to R.S. 2477 cases. Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993).

b. Standard of proof.

The claimant of an R.S. 2477 right-of-way must meet its burden by clear and convincing evidence, establishing that the right-of-way was created by the relevant date. This is so because land grants from the government are construed favorably to the government, and any doubt as to whether an R.S. 2477 right-of-way exists is resolved in favor of the United States. Wilderness Society, 581 F.3d at 1220. See also McFarland v. Kempthorne, 545 F.3d 1106, 1112 (9th Cir. 2008), cert. denied, 129 S.Ct. 1582 (2009).

R.S. 2477 governs the disposition of rights to federal property, a power constitutionally vested in Congress. U.S. Const. Art. IV § 3, cl. 2; see Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917) (observing that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them"); Kleppe v. New Mexico,

426 U.S. 529, 539 (1976). "The laws of the United States alone control the disposition of title to its lands." United States v. Oregon, 295 U.S. 1, 27-28 (1935).

Where Congress exercises its constitutional authority to dispose of rights to public lands, such grants are strictly construed. "'[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.'" Watt v. W. Nuclear, Inc., 462 U.S. at 59 (quoting United States v. Union Pacific R.R. Co., 353 U.S. 112, 116 (1957)); see also Northern Pacific Ry. v. Soderberg, 188 U.S. 526, 534 (1903) ("grants from the sovereign should receive a strict construction–a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee."); Caldwell v. United States, 250 U.S. 14, 20 (1919) ("statutes granting privileges or relinquishing rights are to be strictly construed; or to express the rule more directly, that such grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government").

The Ninth Circuit has consistently applied this principle in reviewing rulings concerning the existence and scope of R.S. 2477 rights-of-way. See Adams v. United States, 3 F.3d at 1258 ("Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government") (citations omitted); United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411, 1413 (9th Cir. 1984) (same); Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982) ("Any doubt as to the extent of the grant must be resolved in the government's favor"); See also Fitzgerald v. United States, 932 F.Supp. 1195, 1201 (D. Ariz. 1996) (same).[2]/

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[2]/ Many State courts have applied the "clear and convincing" standard in cases involving title disputes over real property. See, e.g., Wasatch County v. Okelberry, 179 P.3d 768, 773 (Utah 2008) (requiring clear and convincing evidence to establish prescriptive easement); Draper City v. Estate

This standard of proof follows logically from the broad protection afforded sovereign lands which are held for and managed in the interest of the public, Congress's exclusive control over the conditions under which others may obtain rights in those lands, and the long standing judicial precedent construing grants of sovereign lands in favor of the United States. Application of the appropriate burden of proof in R.S. 2477 cases is not an academic exercise. The Tenth Circuit has observed that "[b]ecause evidence in these [R.S. 2477] cases is over a quarter of a century old, the burden of proof could be decisive in some cases." SUWA v. BLM, 425 F.3d at 769.

Accordingly, given the broad protection afforded sovereign lands held for the benefit of the public, and the well established judicial precedent construing public land grants in favor of the United States, this Court should require that the County demonstrate the existence of the claimed right-of-way by clear and convincing evidence.

IV. ARGUMENT

A. The County fails to identify the location and scope of the right-of-way it requests the Court to adjudicate on summary judgment.

1. The Quiet Title Act requires plaintiff to identify with particularity the property to which plaintiff seeks to quiet title.

As a limited waiver of sovereign immunity, the QTA is the sole avenue by which a plaintiff can seek to prove the existence of a claimed R.S. 2477 right-of-way in court. Wilderness Society, 581 F.3d at 1206. As noted above, the QTA requires plaintiffs to 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) (emphasis added). In keeping with the rule that the QTA's requirements must be strictly construed, the court in Washington County v. United States, 903 F.

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of Bernardo, 888 P.2d 1097, 1099 (Utah 1995) (same); Watson v. Dundas, 136 P.3d 973, 981 (Mont. 2006) ("clear and convincing evidence constitutes the applicable burden of proof for prescriptive easements, including public rights of way"); Roberts v. Swim, 784 P.2d 339, 342 (Idaho 1989) (using the clear and convincing evidence standard to show use for adverse possession); Grant v. Ratliff, 164 Cal. App. 4th 1304, 1310 (Cal. App. 2d Dist. 2008); Brewer v. Murphy, 161 Cal. App. 4th 928, 938, (Cal. App. 5th Dist. 2008); Field-Escandon v. DeMann, 204 Cal. App. 3d 228, 235 (Cal. App. 2d Dist. 1988); Applegate v. Ota, 146 Cal. App. 3d 702, 708, (Cal. App. 2d Dist. 1983).

Supp. 40, 42 (D. Utah 1995), dismissed several claims to R.S. 2477 rights-of-way, in part, on the grounds that the complaint did not allege "with particularity" the real property interest claimed or the circumstances under which the interests were acquired. As stated by the court:

> Plaintiff alleges that it is "the owner of the highway rights-of-way shown" on the map attached to its complaint and that it "acquired its rights-of-way through public use, by County construction and maintenance of the rights-of-way or both." The court agrees with the United States that these conclusory allegations do not identify "with particularity" any interest in real property; nor, do they describe "the circumstances under which" any property interest was acquired. Accordingly, as an additional basis for dismissing plaintiff's complaint, the court concludes that plaintiff has failed to comply with the conditions and requirements of 28 U.S.C. § 2409a by which the United States consents to suit in quiet title actions.

903 F. Supp. at 42.

Similarly, the court dismissed the QTA counterclaims raised by several defendant counties in Southern Utah Wilderness Alliance v. Bureau of Land Mgmt., No. 2:96CV836C (D. Utah July 20, 2000) (order dismissing counterclaims) (Attachment 1), on the grounds that the counties failed to plead "with particularity" the circumstances under which they acquired the claimed rights-of-way. As stated by the court:

> The Counties have failed to plead "with particularity" the circumstances under which they acquired R.S. 2477 right-of-way in the road segments. Instead, the Counties have merely pled that the road segments at issue have been maintained by the Counties and used by the public continuously and without interruption since prior to October 21, 1976, and that the lands traversed by the road segments had not been reserved for public uses prior to October 21, 1976. (citations omitted). These conclusory assertions do not provide relevant details regarding the creation of the rights-of-way claimed – such as to when, how and under what circumstances the road segments were created or maintained.

Southern Utah Wilderness Alliance v. Bureau of Land Mgmt., slip op. at 8-9, citing Washington County, 903 F. Supp. at 42 . (Attachment 1). See also Buchler v. United States, 384 F. Supp. 709, 711 (E.D. Cal. 1974) (dismissing quiet title claim for failure to plead with particularity the circumstances under which claimed interest was acquired and interest claimed by the United States); City and County of Denver v. Bergland, 517 F. Supp. 155, 175 (D. Colo. 1981), aff'd in part, rev'd in part, 695 F.2d 465 (10th Cir. 1982) (dismissing QTA claim for failure to describe with particularity the interest claimed).

Following suit, Judge Wanger recently dismissed Mariposa County's R.S. 2477 claims

for two roads the County alleged were well-documented historical access roads into Yosemite National Park – on the grounds that the county had not adequately identified the location of the rights-of-way to which it was seeking to quiet title. Hazel Green Ranch, LLC v. United States Dep't of the Interior, Slip Copy, No. 1:07-CV-00414, 2010 WL 1342914, at *6, *12 (E.D. Cal. Apr. 5, 2010). The Court noted that "the plain language of the QTA requiring particularity in description of the claimed real property interest" supports the principle that a description of a claimed road "in a confusing and contradictory manner is insufficient." Id. at *6. Judge Wanger also concluded that, while the level of specificity required by the QTA is not clearly defined, at the very least Federal Defendants are entitled to a "clear and consistent" explanation of how the roads were alleged to have been realigned since they were claimed to have been originally perfected under R.S. 2477. Id. at *12.

Thus, the language of the QTA and judicial interpretations of the Act make it clear that the United States has not waived its sovereign immunity to allow itself to be sued to quiet title based on general, conclusory allegations concerning the basis for plaintiff's alleged interest in real property claimed by the United States. Where a complaint suffers from such defects, the waiver of sovereign immunity under the QTA does not apply, and the court is accordingly without jurisdiction.

2. The County is unable or unwilling to identify the location and the scope of the claimed right-of-way to which it seeks to quiet title.

Inyo County has been unable or unwilling to identify the route of the claimed Last Chance Road or of the scope of the right-of-way to which it seeks to quiet title.

The claimed Last Chance Road is identified by the County in the third claim of the County's Complaint by reference to Road No. 2046 in the County Road Register as follows:

> Beginning at a point of junction with County Road 2047, described as: R. 39-E, T. 21, Sec. 21, 1/4S 1, Point 2-southeast, thence describing a long southwesterly and a long southeasterly curve to R. 39-E, T. 21, Sec, 36, 1/4S 4, Point 8, south boundary of District 2, at a junction with continuing County Road 5046, being point of termination.
>
> Width of Road:
> Length of Road: 4.0 miles.

Complaint at ¶ 78.

Mr. Bernard T. Pedersen, Director of the Inyo County Public Works Department and Inyo County Road Commissioner, testified that the legal description in the County Road Register for Road No. 2046 is incomplete and inaccurate. Stipulated Facts at ¶ 31. Among other deficiencies, the legal description places the road within Township 21, omitting any indication of either south or north. Id. Reference to USGS maps reveals that there is no Township 21 North, Range 39 East, in this area. Id. Township 21 South, Range 39 East, is approximately 84 miles south of the location of the claimed road as depicted on Exhibit 3 to the County's Complaint in Township 7 South. Id.

The County's Complaint further alleges that the Last Chance Road is described in the map attached as Exhibit 3 to its Complaint. Complaint at ¶ 79. Exhibit 3 to the Complaint is a reduced sized copy of the 1957 Magruder Mountain map prepared by the USGS. Complaint at Ex. 3; Stipulated Facts at ¶ 3. This 1957 USGS map depicts a double dashed line, indicating a feature classified as an "unimproved dirt" road heading southeast from the Willow Spring Road. Stipulated Facts at ¶ 52.

However, County officials now represent that the County's claim is not for the route depicted on the 1957 USGS map – but rather the route the County asserts currently exists on the ground and which the County believes is shown on the 1987 Last Chance Mountain map prepared by the USGS. Stipulated Facts at ¶ 62; Pedersen Declaration (Doc. 75-3) at ¶ 7. The route claimed by the County to be the Last Chance Road on the 1987 USGS map is depicted as a single dashed line labeled "4WD," indicating a four-wheel drive "trail" heading southeast from the Willow Springs Road. Stipulated Facts at ¶ 56. The 1987 USGS map depicts a significant portion of the trail in a different location than the 1957 USGS map. Id. at ¶ 58. While both maps show the trail initially following a wash south from Willow Springs Road, the routes are shown as reaching the rim of Last Chance Canyon at locations approximately 900 feet apart from one another. Id.

Moreover, County representatives are unsure of whether the location of the claimed Last

Chance Road, to the extent they can identify the alignment on the ground, corresponds to the route shown on the 1987 USGS map. County officials, while uncertain of the location the claimed Last Chance Road departed the Willow Spring Road, believed that it departed the Road at a location east of that shown on the 1987 USGS map. Stipulated Facts at ¶ 66, 85, 90. The 1987 USGS map shows the Last Chance route turnoff from Willow Springs Road crossing and then paralleling the Willow Springs Wash, then turning southeast before intersecting and traveling up the Last Chance wash. Stipulated Facts at ¶ 66. During his June 10, 2010 on-site deposition, Mr. Huarte testified that, while he was not certain, he recollected that the turn-off from Willow Springs Road to the Last Chance route did not parallel the Willow Springs Wash. Stipulated Facts at ¶¶ 66, 85. Mr. Huarte testified that the road instead turned off of Willow Spring Road at approximately a 90-degree angle and then continued directly up the Last Chance Wash toward the south. Stipulated Facts at ¶ 66. Mr. Pedersen also testified that, while not certain, it appeared to him that the claimed route went off the Willow Springs Road, crossed the Willow Springs Wash at a 90-degree angle, and then directly entered the Last Chance wash. Stipulated Facts at ¶ 66.

To complete the confusion, Mr. Huarte testified that he was not sure if the entire route he walked during the on-site portion of his deposition on June 10, 2010 was the route he recalled grading in the 1970s. Stipulated Facts at ¶ 86.

Unable to provide a consistent and accurate description of the location of the road right-of-way to which it seeks to quiet title, the County asserts that: "The route of Last Chance road need not be delimited for the purposes of this action." Inyo Memo at 19. The County argues that, because the National Park Service placed a sign in the Last Chance wash prohibiting off-road vehicle, motorcycle and bicycle use, "[t]he Court therefore need not define the further extent of the road to order Defendant to remove the sign from the road and the Court need not define the extent of the road to determine there is a road right-of-way on Last Chance Road." Id. at 19-20.

The County further offers that it is "of the opinion that the scope of the right-of-way is

not judiciable by the Court at this time," beyond a claim for a route proceeding generally "from Willow Spring Road to the head of Last Chance Canyon." Id. at 19. The County avers that, because Federal Defendants have the authority to participate in the management of the road, the interaction between the County and Federal Defendants "would likely be complex and continuously evolving." Inyo Memo at 19 (citing United States v. Vogler, 859 F.2d 638 (9th Cir. 1988); Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994)). The County states that "there has never been a dispute as to the route of the road or the scope of its use," and, therefore, "there is simply no ripe dispute as to the scope or location of the right-of-way" for the Court to adjudicate. Inyo Memo at 19-20. The County further offers its belief that "it would be bad policy for the Court to attempt to define the scope of the right-of-way on this undeveloped record." Id. at 20. The County concludes that the scope of the right-of-way it seeks the Court to adjudicate on summary judgment should be left undefined and that any future disputes concerning the scope of the right-of-way should be resolved administratively or in subsequent litigation. Id. ("the appropriate course of action is to allow the Plaintiff and Defendant to engage in normal inter-agency coordination in managing the road," and in the event of a dispute, "it should be resolved administratively, and if it could not be so resolved, then the defined dispute would be ripe for adjudication"). Finally, the County states that it limits its request for relief to the request that the Court quiet title in and to the Last Chance Road, order Federal Defendants to remove all obstructions placed in the Last Chance Road, and order Federal Defendants to cease and desist from interfering with the County's and the public's traditional use of Last Chance Road. Id. at 22.

3. The County's claim for a right-of-way undefined as to location and scope must be denied and summary judgment entered against the County.

Inyo County has been unable or unwilling to identify the route of the claimed Last Chance Road or of the scope of the right-of-way to which it seeks to quiet title. The County's request that the Court adjudicate the general existence of a right-of-way for the Last Chance Road – undefined as to location and scope – fails to meet the QTA's requirement that plaintiffs

set forth "with particularity the nature of the right, title, or interest" claimed. See 28 U.S.C. § 2409a(d). The nature and extent of a road right-of-way includes, at a minimum, the beginning and ending points, the alignment, the width, and the uses that can be made of the right-of-way. The Court is without subject matter jurisdiction to adjudicate the general existence of a right-of-way as requested by the County and the Court should enter summary judgment denying the claim.[3]/

B. The County fails to establish the undisputed facts necessary to show acceptance of an R.S. 2477 right-of-way under the requirements of federal law.

In addition to the failure to identify the location and the scope of the right-of-way to which the County seeks to quiet title on summary judgment, the County fails to set forth the undisputed facts necessary to establish acceptance of an R.S. 2477 right-of-way.

1. Standard for acceptance of R.S. 2477 right-of-way.

By the terms of the statute, acceptance of an R.S. 2477 right-of-way requires the actual physical "construction" of a "highway." The term "highway" as used in R.S. 2477 connotes a road used by the general public to travel between identifiable destinations with sufficient

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[3]/ Nor does the Court have subject matter to enter the injunctive relieve requested by the County. The waiver of sovereign immunity provided by the QTA is limited to the adjudication of title to real property in which the United States claims an interest and the Court is without jurisdiction to enter the requested order requiring the United States to remove the sign and to "cease and desist from interfering with the County's and the public's traditional use" of the claimed road. The remedial clause of the QTA prohibits such a result. Instead, that clause states that "if the final determination [in a quiet title claim] shall be adverse to the United States, the Unites States nevertheless may retain such possession or control of the real property or or any part thereof as it may elect" upon payment of just compensation. 28 U.S.C. § 2409a(b). This provision was designed to avoid the disruption of ongoing Federal programs involving disputed lands by allowing the United States to pay money damages instead of surrendering the subject property upon loss of quiet title claim. See Block, 461 U.S. at 283. A unanimous Supreme Court in United States v. Mottaz interpreted this provision as giving the choice of remedy in a QTA action to the government, not the plaintiff. 476 U.S. at 847-48. Thus, even if the United States' cross-motion does not dispose of this action, the limited terms of the QTA's waiver of sovereign immunity prohibit this Court from entertaining the County's request that the United States be ordered to remove the sign prohibiting off-road vehicle use and to "cease and desist" from interfering with the County's and the public's alleged traditional use of the claimed road.

frequency and duration necessary to make it a significant road in the area in which it is located. Inyo County, however argues that the Court should ignore the plain meaning of the relevant statutory terms and conclude that R.S. 2477 highways can be accepted by the mere passage of vehicles over the land by a very few persons for occasional access for deer hunting. See Inyo Memo at 8. The County errs.

R.S. 2477 succinctly provided that "the right of way for the construction of highways over public land, not reserved for public uses, is hereby granted." It is a fundamental principle of statutory construction that the relevant analysis begins "with the plain language of the law." United States v. Morgan, 922 F.2d 1495, 1496 (10th Cir. 1991). In construing the plain meaning of a statute, absent instruction by Congress to the contrary, the relevant terms are "to be interpreted in their ordinary definitions and in the meanings commonly attributed to them." Yankee Atomic Elec. Co. v. New Mexico & Ariz. Land Co., 632 F.2d 855, 857 (10th Cir. 1980). Moreover, as noted above, where a federal statute grants an interest in land, the statute should be construed narrowly and in accordance with law. United States v. Oregon, 295 U.S. at 28. "Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government." Gates of the Mountains Lakeshore Homes, 732 F.2d at 1413; see also Watt v. W. Nuclear, Inc., 462 U.S. at 59 (holding that federal grants must be construed in favor of the government).

a. Actual physical "construction."

Neither the language of the statute nor the plain meaning of the statutory terms support Inyo's effort to diminish R.S. 2477's "construction of highways" requirement. R.S. 2477 offered a right-of-way across the public lands, an offer that could be accepted only by meeting the requirements contained in the statute: (1) "construction" of (2) "highways" over (3) "public lands, not reserved for public uses." Contrary to the County's suggestion, the statutory language selected by Congress did not provide for the establishment of a right-of-way based on "mere use" of a route, or by adoption of a route by resolution, in the absence of actual construction. See Inyo Memo at 8. Rather, Congress selected the phrase "construction of highways" as the predicate for establishment of a right-of-way.

Consistent with the commonly understood meaning of these terms at the time R.S. 2477 was enacted, Congress thereby required a purposeful, physical act to establish a defined route across the public lands. Webster's Dictionary from 1860 defines "construction" as "[t]he act of building, or of devising and forming, fabrication." Webster's Dictionary of the English Language 256 (1860).

Contrary to the County's contention that "construction" of highways necessarily includes mere passage over the land or adoption of a resolution, "construction" requires actual construction insofar as some form of mechanical construction must have occurred to construct or improve the highway. The mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.

Beyond the plain and ordinary meaning of statutory language contained in R.S. 2477, this interpretation of the term "construction" is consistent with federal case law. In 1896, the Supreme Court construed the meaning of the term "construction" as used in another section of the Mining Act of 1866 to require actual mechanical construction. In Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. 1 (1896), the Supreme Court addressed the meaning of the term "construction" in R.S. 2339, which was enacted as section 9 of the Mining Act of 1866 – the same Act that contained R.S. 2477 (enacted as section 8). Section 9 addresses rights-of-way for "the construction of ditches," just as R.S. 2477 deals with rights-of-way for "the construction of highways." See R.S. 2339, codified as amended at 43 U.S.C. § 661. The Supreme Court held that the expenditure of physical labor or "construction" of the improvement for which the right-of-way was granted was a necessary condition for perfection of the grant. As the Court explained:

> Under this statute no right or title to the land, or to a right-of-way over or through it . . . vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon . . .
>
> . . . Until the completion of the work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the

> person taking possession has no title, legal or equitable, as against the government.

Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. at 18-19.

The Supreme Court's decision construing the term "construction" as used in section 9 of the Mining Act of 1866 to require a physical act supports the conclusion that actual, physical construction is a prerequisite to establishing an R.S. 2477 right-of-way under section 8 of the same Act. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning"). Indeed, the Ninth Circuit has stated that, because sections 8 and 9 were both enacted by the Mining Act of 1866, federal case law construing section 9 of the Act is "especially strong authority" on the scope and meaning of section 8 – R.S. 2477. Gates of the Mountains Lakeshore Homes, 732 F.2d at 1413 n.4 (citing Winona & St. Peter Railroad Co. v. Barney, 113 U.S. 618, 625 (1885).

This interpretation is likewise consistent with federal case law interpreting R.S. 2477. See Adams v. United States, 3 F.3d at 1258 (to establish an R.S. 2477 right-of-way, plaintiffs "must show that the road in question was built before the surrounding land lost its public character in 1906") (emphasis added); Gates of the Mountains Lakeshore Homes, 732 F.2d at 1413 (R.S. 2477 "grant[s] rights of way for highways constructed after its enactment") (emphasis added). But see SUWA v. BLM, 425 F.3d at 779 (concluding that an R.S. 2477 highway need not have been created by mechanical construction if there is evidence that there was sufficient public use to have established or formed a public highway by the relevant date).

b. Creation of "highway."

Similarly, the ordinary meaning of the term "highway" in the 1860s was not merely any route or road across the landscape, but rather "a public road; a way open to all passengers; so called, either because it was a great or public road, or because the earth was raised to form a dry path. Highways open a communication from one City or town to another." Webster's Dictionary of the English Language at 552 (emphasis added). In fact, as the Congressional

Research Service noted in its 1993 Report, Congress' use of the term "highways" rather than "roads" indicates an intent to limit R.S. 2477 rights-of-way to "significant" or "principal" public roads rather than to apply broadly to any class of road. CRS Report at 7-8.

A "highway" is commonly understood to constitute a thoroughfare used by the public for the passage of vehicles carrying people and goods from place to place. A highway must be public in nature. A highway connects the public with identifiable destinations or places. While a highway need not connect cities or towns, the route must lead vehicles to some identifiable destination such as a trail head, a business, or other place used by and open to the public. See Dillingham Commercial Co., Inc. v. City of Dillingham, 705 P.2d 410, 414 (Alaska 1985) ("a right of way created by public user pursuant to 43 U.S.C. § 932 connotes definite termini"); Dunn v. County of Santa Cruz, 154 P.2d 440, 401 (Cal. App. 1st Dist. 1944) (use of country roadway that for many years "had been open and had been used by anyone who cared to use it," but that "was not a through road" determined not to have been dedicated and accepted as public road); Lindsay Land & Live Stock Co. v. Churns, 285 P. 646, 648 (Utah 1929) ("road connected two points between which there was occasion for considerable travel"); Moulton v. Irish, 218 P. 1053, 1055 (Mont. 1923) (fact that road "did not lead to any town, settlement, post office, or home" one reason for rejecting an R.S. 2477 claim).

In sum, the conclusion that the "construction" of "highways" requires the actual physical construction of public thoroughfares across the public lands is consistent with the plain meaning of those terms as they were understood in 1866. There is no basis for concluding that Congress would have intended that the terms "construction" and "highways" be read in the broad manner that the County suggests, or that Congress would have permitted the definition of rights acquired in the public lands to vary based upon the particular state in which the relevant lands are located.

c. Public use.

As noted above, a road must satisfy the public use requirement to meet the definition of a "highway" under R.S. 2477. Courts have consistently required proof of public use by many and different persons for a variety of uses to show acceptance of an R.S. 2477 right-of-way. See,

e.g., Humboldt County v. United States, 684 F.2d 1276, 1282 (9th Cir. 1982) (road used solely for recreational access did not qualify as a "highway" within the meaning of R.S. 2477); SUWA v. BLM, 425 F.3d at 772 (quoting the standard described in Lindsay Land & Live Stock Co. v. Churnos, 285 P. 646, 648 (Utah 1929): "While it is difficult to fix a standard by which to measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority."); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) (R.S. 2477 dedication not accepted by infrequent and sporadic use by sightseers, hunters, and trappers of dead-end road running into wild, unenclosed, or uncultivated land).

Indeed, the Tenth Circuit has determined that the "traditional legal standard of continuous public use" trumps the need to prove mechanical construction. See e.g., SUWA v. BLM, 425 F.3d at 781-82.[4]/ The court observed that the substantial public use requirement was the more encompassing and rigorous standard, noting that there could well be cases, such as one of the routes at issue in that case, where there was ample proof of mechanical construction, including bulldozing by mining companies, but insufficient proof of more than "sporadic and infrequent" use by the public. Id. (approvingly quoting BLM administrative decision). The court noted that: "Large parts of southern Utah are crisscrossed by old mining and logging roads constructed for a particular purpose and used for a limited period of time, but not by the general public." Id. at 781-82. The court concluded that the key requirement for establishing acceptance of a claimed R.S. 2477 highway right-of-way was that the claimed route must have "sustained

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[4]/ In SUWA, the court diminished the need for requiring mechanical construction as a separate, mandatary element of proof of an R.S. 2477 claim, stating its skepticism that there was much difference between a construction standard and the requirement for establishing substantial public use. SUWA v. BLM, 425 F.3d at 781. The Court stated its view that, if a particular route had "sustained substantial use by the general public over the necessary period of time," either no mechanical construction was necessary, or the necessary construction had taken place. Id.

substantial use by the general public" so that it was clear that claimed right-of-way had been "genuinely accepted through continual public use over a lengthy period of time." Id.

California courts have also applied this federal law standard and required a showing of substantial public use to establish acceptance of claimed R.S. 2477 rights-of-way. In Ball v. Stevens, the court observed that the public use must be "substantial and sufficient to prove acceptance of the offer of the government of the right of way." Ball v. Stevens 68 Cal. App. 2d 843, 849 (Ca. App. 2d Dist. 1945). The court found sufficient public use based on proof of use by "many people," over extended periods of time, for a variety of purposes. Id. (substantial use continuously for many years by miners, operators, oil company employees and vacationers, including almost daily travel by automobile during period that oil field was active). See also Western Aggregates, Inc. v. County of Yuba, 122 Cal. Rptr. 2d 648, 655 (Cal. Ct. App. 3d Dist. 2002) (noting passage of 100 to 500 cars per day and presence of substantial mining interests in the area in late 1900s in finding R.S. 2477 right-of-way accepted).[5]/ By contrast, the California Supreme Court declined to find that a claimed R.S. 2477 right-of-way had been accepted for a road constructed and used "for hauling wood, lumber, and some other freights, for driving live stock, and for passing over it on foot and in vehicles" because only the claimant and a "few other persons occasionally used" the road. Sutton v. Nicolaisen, 44 P. 805, 806 (Cal. 1896).

d. Scope of R.S. 2477 right-of-way.

Federal case law makes clear that an R.S. 2477 right-of-way is "limited to the original use for which it was acquired." Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988) (citing Nielson v. Sandberg, 141 P.2d 696, 701 (Utah 1943). As the Tenth Circuit stated, "In other words, the scope of an R.S. 2477 right-of-way is limited by the established usage of the

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[5]/ California courts have applied a similarly high threshold for public use in cases involving perfection of non-federal highway rights-of-ways. See e.g., Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 238, 241 (Cal. 1954) (claimed road had been used by "various members" of the public on a weekly or more frequent basis for twelve years); Grey v. Magee, 133 Cal. App. 653, 656-57 (Cal. Ct. App. 4th Dist. 1933) (court found "overwhelming evidence" of un obstructed and substantial public use over an eighty year period, established through the testimony of over 100 witnesses).

route as of the date of repeal of the statute." SUWA v. BLM, 425 F.3d at 746. The Court noted that because, "[a] right of way is not tantamount to fee simple ownership of a defined parcel of territory," and is instead "an entitlement to use certain land in a particular way," it is important to understand the scope of the right-of-way so that use does not exceed the encumbrance on the servient estate. Id. at 747. The Court pointed out that proposed widening of a road, modification of the horizontal or vertical alignment of a road, installation of bridges or other drainage structures, or significant changes in road surface, could all exceed the scope of a right-of-way. Id. at 748-49.

A claimant of an R.S. 2477 right-of-way is therefore required to identify the scope of the claimed right-of-way, as it existed at the time of the alleged perfection of the right-of-way, in order to meet the requirement that plaintiff identify with particularity the "nature of the right, title, or interest" plaintiff claims in the real property. The scope includes the specific uses for which the right-of-way is alleged to have been utilized at the time of its establishment, as well as its physical parameters, including its width, alignment, and composition.

2. The County fails to establish that the claimed Last Chance Road was constructed or otherwise physically established prior to October 21, 1976.

a. The County fails to present any credible facts that the road was constructed at the claimed location prior to 1977.

The County initially acknowledges that the plain language of R.S. 2477 requires construction in stating that "the United States offered the public a road right-of-way for any road constructed over the public lands." See Inyo Memo at 6 (emphasis added). However, the County immediately proceeds to argue that a county resolution purporting to accept a road into the county's maintained mileage system establishes an R.S. 2477 highway. See id. at 7-17. The County finds it necessary to read the word "construction" out of R.S. 2477 given its acknowledgment that "evidence of mechanical construction, or even maintenance, of the road may be impossible to come by." See id. at 8. The County further concedes that if federal law applies and mechanical construction is deemed necessary to accept an R.S. 2477 right-of-way,

"the burden of proof upon local government to establish such acceptance might well be too high to meet." Id. The County concludes that this requirement of federal law threatens the ability of counties to establish acceptance of R.S. 2477 highway rights-of-way for four-wheel tracts established by passage of such vehicles. Id. As noted above, under the plain language of R.S. 2477, claimant must establish the "construction" of a highway over unreserved public lands during the relevant time period in order to accept the grant of a right-of-way. The County has not and cannot allege facts showing construction of the claimed Last Chance Road prior to repeal of R.S. 2477 in 1976.

The County acknowledges that it does not have any records, documentation or other information indicating that the claimed Last Chance Road was mechanically constructed. Stipulated Facts at ¶ 67. The County does not have any records, documentation or other information indicating who constructed or otherwise established the claimed Last Chance Road. Stipulated Facts at ¶ 68. The County does not have any records, documentation or other information indicating when the claimed Last Chance Road was mechanically maintained, other than inconsistent recollections of Mr. Huarte. Stipulated Facts at ¶ 69.

The route of the alleged road that County representatives currently assert the County is claiming is largely the Last Chance Wash. Stipulated Facts at ¶ 70. During Mr. Huarte's first deposition on March 5, 2008, when asked about the area where the County alleges the Last Chance Road is located, Mr. Huarte testified that "[a]s far as I remember I cannot remember grading it." Stipulated Facts at ¶ 73; First Huarte Deposition (Attachment 2) at 33:20-22, 45:25-46:15. Mr. Huarte further stated that he did not remember anyone else grading that route. Stipulated Facts at ¶ 73; First Huarte Deposition at 33:23-24. He added that the first time he saw the area in the early 1970s it "kind of" looked like it had been graded, but that he didn't know "if the old timers had graded it" or not. Stipulated Facts at ¶ 74; First Huarte Deposition at 34:10-35:1.

During Mr. Huarte's second deposition on June 9-10, 2010, Mr. Huarte testified that, after visiting the area in December of 2009 with his supervisor and other personnel from Inyo

County, he determined that his earlier testimony that he had not graded the area was incorrect and that he had in fact graded the route several times around 1973 to 1977. Stipulated Facts at ¶75-76; Second Huarte Deposition (Attachment 3) at 24:9-16. During his June 9-10 deposition, Mr. Huarte could not remember if he had been told to grade the Last Chance Road. Stipulated Facts at ¶ 77; Second Huarte Deposition at 24:9-16; 25:11-14. Mr. Huarte testified that "I don't know why we really graded that road; it went up to hardly nothing." Stipulated Facts at ¶ 77; Second Huarte Deposition at 26:13-14. He noted that his boss "probably didn't say grade that road." Stipulated Facts at ¶ 77; Second Huarte Deposition at 35:18-21. Mr. Huarte confirmed that he never say anyone else grade the Last Chance route. Stipulated Facts at ¶ 82; Second Huarte Deposition at 35:22-36:4.

When Mr. Huarte was asked on June 9, 2010 about the detailed description he gave on March 5, 2008 of the route at the location claimed by the County for the Last Chance Road, including his description of berms, and whether he was testifying that he was the one who created those berms, he stated that "[w]ell, I could have been the one, all right." Stipulated Facts at ¶ 79; Second Huarte Deposition at 27:10-16. Mr. Huarte testified on June 9, 2010 that observers were likely to see berms or "wind rows" on the route, or evidence of where they had been. Stipulated Facts at ¶ 83; Second Huarte Deposition at 41:22-42:6. During the on-site portion of his deposition on June 10, 2010, Mr. Huarte testified that he did not observe signs of berms or wind rows at any location along the route. Stipulated Facts at ¶ 84; Second Huarte Deposition at 73:11-14; 83:5-7.

During that on-site deposition, Mr. Huarte was not sure of the location at which the claimed Last Chance Road began off of the Willow Springs Road. Stipulated Facts at ¶ 85; Second Huarte Deposition at 51:15-53:24, 57:2-58-13, 61:20-62:7. Mr. Huarte believed that the claimed Last Chance Road could have commenced at the location where Last Chance Wash intersects Willow Springs Wash, or that the road may have commenced at a point west of that location. Id. When on-site on June 10, 2010, Mr. Huarte testified that he was not sure if the entire route the County alleges is the Last Chance Road was the one he recalled grading in the

1970s, stating, "I'm not sure on that. It kind of looked that way but I'm really not sure." Stipulated Facts at ¶ 86; Second Huarte Deposition at 70:19-22.

Mr. Ainsley Holeso, Roads Foreman for Death Valley National Park, who has worked as an equipment operator, maintained roads and supervised road maintenance for the National Park Service for 20 years, testified that he observed no signs of mechanical construction or maintenance at any location along the claimed route of Last Chance Road. Stipulated Facts at ¶ 91.

In sum, Mr. Huarte's testimony concerning whether he ever graded the claimed Last Chance Road is inconsistent and equivocal. Indeed, he acknowledged that he was "not sure' whether the entire route the County now alleges is the Last Chance Road was the one he believes he recalls having graded in the 1970s. Mr. Huarte's inconsistent recollections are the only facts presented by the County to establish that the claimed Last Chance Road was a constructed road. These facts far fall short of the clear and convincing proof of construction of a highway at a defined location necessary to establish acceptance of an R.S. 2477 right-of-way and the County's claim should be denied.

b. The County fails to establish that the claimed road was physically established by the passage of vehicles prior to 1977.

Even if the Court were to determine that an R.S. 2477 right-of-way can be accepted in the absence of actual physical construction, through other means that physically establish a defined travel way, such as by the repeated passage of vehicles, the County fails to meet this burden. Although the Tenth Circuit has ruled that an R.S. 2477 highway need not be created by mechanical construction, it did not eliminate the requirement that public use must have been sufficient to have established or formed a public highway by the relevant date.[6]/ See SUWA v.

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[6]/ In SUWA, the Court observed that creation of a road by repeated use, i.e., formation of the so-called "beaten path," could conceivably serve to form or make an R.S. 2477 highway without the need for mechanical construction – if there was proof that the claimed right-of-way had been "genuinely accepted through continual public use over a lengthy period of time" so that it "formed part of the public transportation system." SUWA v. BLM. 425 F.3d at 779-82.

BLM, 425 F.3d at 778. The Ninth Circuit has not adopted this relaxed standard concerning "construction" of claimed R.S. 2477 highways. The Ninth Circuit has also determined that a claimant is required to show that the road being claimed is in the "same location as [the] historical road" that the R.S. 2477 claim is based upon. See Adams v. United States, 3 F.3d at 1258. Here, even under the looser Tenth Circuit standard, the County fails to show the existence, prior to 1977, of any defined track up the Last Chance Wash to the point along the northern rim of Last Chance Canyon to which the County asserts the route runs.

The only evidence presented by the County of the physical existence of a defined track in this area prior to 1977 are various trails, paths and four-wheel drive routes depicted in this general area on USGS maps and Mr. Huarte's conflicting recollections of the claimed Last Chance Road. The locations of the routes from the Willow Springs area into Last Chance Canyon as shown on these maps vary from one another. Stipulated Facts at ¶¶ 54, 58, 63, 66.

Although the County's Complaint is unclear, it apparently alleges that the County was claiming a right-of-way for a route depicted as an "unimproved dirt" road on the 1957 USGS map attached as Exhibit 3 to its Complaint. See Inyo County Complaint ("Complaint") at ¶¶ 78, 79, Ex. 3; Stipulated Facts at ¶ 3. However, the County has more recently alleged that it seeks a right-of-way for a route shown as a four-wheel road on the 1987 USGS map. Stipulated Facts at ¶ 62; Pedersen Declaration (Doc. 75-3) at ¶ 7; Pedersen Deposition (Attachment 4) at 68:2-18. Critically, the 1957 USGS map shows the "unimproved dirt" road heading southeast from the Willow Springs Road and reaching the rim of Last Chance Canyon at a location approximately 900 feet west of the point at which the 1987 USGS map depicts a four-wheel drive road terminating. Stipulated Facts, ¶ 58. This discrepancy of 900 feet is significant and, in fact, constitutes about one-third of the total length of the claimed road. See Stipulated Facts at ¶ 44 (route County identified on ground measured to be 2,728 feet in length).

The County now apparently claims a route based on the 1987 USGS map – although the route County representatives identified on the ground this past June does not fully conform to that map. Stipulated Facts at ¶¶ 62, 66; Pedersen Declaration (Doc. 75-3) at ¶ 7; Pedersen

Deposition at 68:2-18. Mr. Huarte and Mr. Bernard Pedersen, Inyo County Director of Public Works and Road Commissioner, testified that, while they were not certain, they believed that the claimed Last Chance Road commenced at the location where the Last Chance Wash intersects the Willow Springs Wash. Stipulated Facts, ¶ 66. The 1987 USGS map, however, shows the four-wheel drive road crossing and then paralleling the Willow Springs Wash, and then turning southeast before intersecting and traveling south up the last Chance Wash. Id.

In any event, the 1987 map clearly does not establish the existence of a defined track in 1976. Nor do Mr. Huarte's recollections establish the existence of a defined travel way at the location the County now apparently claims for the Last Chance Road. During his first deposition on March 8, 2008, Mr. Huarte identified the Last Chance Road on the 1987 USGS map several miles to the east of the location where the County alleges the road existed. Stipulated Facts at ¶ 72. During his second deposition, on June 9-10, 2010, Mr. Huarte again testified that when he visited the area with his supervisor and other County personnel in December of 2009, he believed that Last Chance Road was further to the east than the location of the route other County representatives identified as the claimed location of the road. Stipulated Facts at ¶ 75. Mr. Huarte and Mr. Pedersen were both unsure of the location at which the claimed Last Chance Road commenced off of Willow Springs Road, but believed that it began at a point east of the location the four-wheel drive road shown on the 1987 USGS map is shown departing the Willow Springs Road. Stipulated Facts at ¶¶ 66, 85. Finally, Mr. Huarte testified that he was not sure if the entire route he walked during the on-site portion of his June 9, 2010 deposition was the route he recalled grading in the 1970s. Stipulated Facts at ¶ 86. In sum, the County sets forth no facts that establish that any defined track existed prior to 1977 in the location of the Last Chance Road as now claimed.

These discrepancies likely explain the County's request that the Court adjudicate a right-of-way without identifying its location beyond the point at which the Park Service's sign is located. In any event, the County fails to show the physical existence, by 1976, of a defined track conforming to the route of the right-of-way claimed by the County – whether the County

seeks a right-of-way based on the dirt road depicted on the 1957 USGS map, or the four-wheel drive road shown on the 1987 USGS map.

The County has failed to present facts establishing that the claimed road was constructed or otherwise physically established at the currently-claimed location prior to repeal of R.S. 2477 in 1976 and its claim should be denied.

3. The County fails to establish that the claimed Last Chance Road was established as a "highway" within the meaning of R.S. 2477 prior to 1977.

As noted above, the term "highway" as used in R.S. 2477 connotes a significant public thoroughfare used by the public for the passage of vehicles carrying people and goods from one identifiable destination to another. Taking all the County's factual allegations as true, the claimed Last Chance Road never constituted a "highway" within the meaning of R.S. 2477. The claimed Last Chance Road constituted, at most, an ill-defined four-wheel drive track through a natural wash that was used by a few deer hunters as a minor access off of the Willow Springs Road.

The County suggests that the "route north from Death Valley through Last Chance Canyon" has an early heritage as a travel route in and out of Death Valley. See Inyo Memo at 3. The County cites a book entitled DEATH VALLEY AND THE ARMARGOSA, A LAND OF ILLUSION, authored by Richard Lingenfelter ("LAND OF ILLUSION"), as proof of this heritage. Id. (citing Doc. 75-5 at 81-82). However, the County's allegation concerning use of the "route north from Death Valley through Last Chance Canyon" in 1853 (prior to the 1866 enactment of R.S. 2477)[7]/ by a lost survey party does not pertain to the claimed Last Chance Road. See id. Lingenfelter's book describes the survey party, desperate for water, crossing over the Last Chance Range to the Last Chance Spring in Death Valley, and leaving the valley "by way of Last Chance Canyon" a few days later. LAND OF ILLUSION at 81-82. This text provides no facts indicating that the

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[7]/ The only evidence of possible use of the County's claimed route after the passage of R.S. 2477 in 1866 and prior to its repeal on October 21, 1976 is the conflicting and limited testimony of Mr. Huarte discussed in the next subsection.

survey party followed a route anywhere near the wash through which the County believes the claimed Last Chance Road traversed. See id. The book certainly does not suggest the lost survey party built or followed a road into or out of Last Chance Canyon. See id.

Nor does the County's averment concerning the Willow Spring Road connecting Big Pine with Willow Spring and mining towns and camps in Nevada relate to the claimed Last Chance Road. See id. The County's allegation concerning the use of Willow Spring Road, and its reference to Last Chance Road in that same sentence, should not serve to conflate the facts relating to the Willow Spring Road, a real road, used for travel between identifiable destinations, with facts pertaining the claimed Last Chance Road. A careful reading of the County's brief makes it clear that the described use relates to "the Willow Spring Road from which the Last Chance Road branches." See id. (emphasis added). The County does not, and cannot, allege any facts concerning use of the claimed Last Chance Road – at best a dead-end four-wheel track up a small wash – as a road used to connect destinations.

4. The County fails to establish that the claimed Last Chance Road was used by the public with sufficient frequency and continuity to establish an R.S. 2477 highway prior to 1977.

As noted above, establishment of an R.S. 2477 "highway" requires a showing that the claimed road was used by the public in a significant way. That public use must have been by a significant number of different persons for a variety of uses. See e.g., Ball v. Stephens, 68 Cal. App. at 849. The County presents no facts showing that the Last Chance Road satisfies these requirements.

The County's suggestion that depiction of a road on official maps constitutes evidence of public use is unsupportable under these facts. See Inyo Memo at 18. In addition to the fact that the USGS maps show varying routes and that the route now claimed by the County does not correspond to any of those depicted routes, a line on a map provides no inference of public use. See e.g., Hays v. Vanek, 217 Cal. App. 3d 271, 280 (Cal. App. 4th Dist. 1989) (court unwilling to infer "public" use and dedication to the general public based on depiction of dirt road during period that county's population was sparse with the roads probably being used by homesteaders

and mining claim owners); Galli v. Idaho County, 191 P.3d 233, 238 (Idaho 2008) (survey maps and notes not adequate to infer regular public use for required period).

The County concedes that it has identified no persons other than Mr. Huarte who claim to have any knowledge as to any public use of the route prior to 1977. Stipulated Facts at ¶ 92. During his first deposition on March 5, 2008, Mr. Huarte estimated that he had used the route approximately ten times for hunting access in the early 1970s. Stipulated Facts at ¶ 93; First Huarte Deposition at 35:18-24; 36:25-37:9. When asked how many times he had gone hunting there during his second deposition on June 10, 2008, Mr. Huarte responded that he didn't know and would "just be guessing." Stipulated Facts at ¶ 93; Second Huarte Deposition at 37:2-4. Mr. Huarte testified that the route was used in the 1970s by "some hunters once in a while but not that many." Stipulated Facts at ¶ 98; First Huarte Deposition at 38:5-6. He further offered in his second deposition that "there was vehicles up there but I can't really say how many, you know." Stipulated Facts at ¶ 98; Second Huarte Deposition at 38:6-9. Mr. Huarte did not recall seeing members of the public using the route for any purpose besides hunting. Stipulated Facts at ¶ 98; Second Huarte Deposition at 42:14-20.

Occasional use by a few persons for hunting access falls far short of the public use necessary to accept an R.S. 2477 highway right-of-way and the County's claim should be denied.

C. The 1948 County resolutions do not establish acceptance of an R.S. 2477 right-of-way.

Inyo County asserts that two resolutions adopted by the County in 1948 constitute acceptance of an R.S. 2477 right-of-way for the claimed Last Chance Road. Inyo Memo at 1, 4, 7, 16-17; Stipulated Facts at ¶ 15. These two resolutions, Resolution 48-8 and Resolution 48-9, were adopted on March 1, 1948 and address the County's primary and secondary road systems. See Resolution 48-8 and Resolution 48-9 attached as Exhibit A to Pedersen Declaration (Doc. 75-3). The resolutions do not establish acceptance of an R.S. 2477 right-of-way for the claimed Last Chance Road. First, the subject lands were not unreserved public lands in 1948. Second, a county resolution is not sufficient to establish acceptance of an R.S. 2477 right-of-way in the absence of proof of the physical existence of a claimed road and of the requisite public use of the

road. Lastly, the facts concerning the 1948 resolutions establish that the County did not accept a right-of-way for the claimed road by adoption of these two resolutions.

1. In 1948, the subject lands were closed to entry under R.S. 2477.

R.S. 2477 grants the right-of-way for the construction of highways "over public lands, not reserved for public uses." R.S. 2477; 43 U.S.C. § 932. See Adams v. United States, 3 F.3d at 1257; Fitzgerald v. United States, 932 F. Supp. at 1201. The lands underlying the claimed Last Chance Road were closed for appropriation under R.S. 2477 from November 26, 1934 until December 14, 1967 due to the withdrawal of the subject lands from entry under the public land laws and the reservation of the lands for classification of their most useful purpose pursuant to the Taylor Grazing Act of June 38, 1934. The County's 1948 resolutions could not, therefore, constitute an acceptance of a right-of-way pursuant to R.S. 2477.

On November 26, 1934, pursuant to the Taylor Grazing Act of June 28, 1934, President Roosevelt issued Executive Order 6910 which temporarily withdrew all of the vacant, unreserved and unappropriated public land in the State of California:

> from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said Act of June 28, 1934, and for conservation and development of natural resources. . . .

Stipulated Facts at ¶ 7; Exec. Order No. 6910 (1934) on Withdrawal of Public Lands for Conservation.

On the 1934 date of Executive Order 6910, the lands underlying the claimed Last Chance Road were vacant, unreserved and unappropriated public land. Executive Order 6910 therefore rendered the affected lands, such as the land underlying the claimed Last Chance Road, unavailable for appropriation under R.S. 2477 as of November 26, 1934. See Humboldt County v. United States, 684 F.2d 1276, 1281 (9th Cir. 1982). See also Andrus v. Utah, 446 U.S. 500, 519 (1980) (characterizing Taylor Grazing Act and executive withdrawals thereunder as having "locked up" federal lands in the Western States pending further action by Congress or the President); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 876 (1990) (noting that Public Land Law Review Commission determined that virtually all of the public domain lands had been

"withdrawn and classified for retention").

In 1936, Congress amended the Taylor Grazing Act and authorized the Secretary of the Interior to examine and classify any lands withdrawn and reserved by Executive Order 6910 and to open the lands to entry, selection, or location for disposal in accordance with the classification under applicable public land laws. Stipulated Facts at ¶ 8; 43 U.S.C. § 315f. As the Ninth Circuit observed in Humboldt County, this amendment provided that the subject lands "shall not be subject to disposition, settlement, or occupation until the same have been classified and open to entry." Humboldt County, 684 F.2d at 1281; see also Lujan, 497 U.S. at 876.

The Secretary of the Interior, acting through the Bureau of Land Management ("BLM"), did not exercise this authority with respect to the lands underlying the claimed Last Chance Road until 1967. Stipulated Facts at ¶ 9. On December 14, 1967, the BLM classified the lands underlying the claimed Last Chance Road as open for multiple uses. Id. This classification re-opened the subject lands for potential disposition under applicable public land laws, including for construction of highways pursuant to R.S. 2477.

The Ninth Circuit has determined that lands withdrawn and reserved for classification under the Taylor Grazing Act and Executive Order 6910, and not re-opened to entry in accordance with applicable public land laws under the Taylor Grazing Act amendments (43 U.S.C. § 315f), do not constitute unreserved "public lands," and are instead "reserved" lands closed to disposition, settlement, and occupation under the public land laws pertaining to unreserved public lands. Humboldt County, 684 F.2d at 1281. Indeed, in addressing two claims for R.S. 2477 rights-of-way made by Humboldt County, the Ninth Circuit determined that Executive Order 6910 had reserved the subject lands for classification, thereby closing the lands to entry under R.S. 2477. Id. at 1278, 1281. The Court noted that the Secretary could have re-opened the lands to "disposition, settlement, or occupation" under applicable public land laws pursuant to the Taylor Grazing Act amendments (43 U.S.C. § 315f), but had not done so. Id. The Ninth Circuit therefore concluded that, because the subject lands had not been re-opened to disposition under the public lands laws by the Secretary, they did not constitute "public lands"

and instead constituted reserved lands unavailable for entry under R.S. 2477. Id.

The Ninth Circuit's holding in Humboldt County dictates that the lands underlying the claimed Last Chance Road were unavailable for entry under R.S. 2477 from November 26, 1934 until December 14, 1967.[8]/ The County's assertion that the 1948 resolutions constituted acceptance of an R.S. 2477 right-of-way is therefore wholly unsupportable.

2. A county resolution, standing alone, is insufficient as a matter of law to establish a highway right-of-way pursuant to R.S. 2477.

Even if the subject lands were not closed to entry under R.S. 2477 in 1948, these two resolutions are insufficient as a matter of law to establish a highway right-of-way pursuant to R.S. 2477. Rather, an R.S. 2477 right-of-way can only be established with the requisite evidence demonstrating, among other things, the physical existence and public use of the claimed road.

a. R.S. 2477 did not grant rights-of-way in advance of the need for roads.

By its express terms, R.S. 2477 granted rights-of-way for the construction of highways. It did not grant rights-of-way in the absence of a road. The express requirements of this federal law cannot be modified or vitiated by state law. As the Tenth Circuit noted in SUWA v. BLM, while courts have looked to state law for guidance in evaluating the terms of acceptance of R.S. 2477 rights-of-way, "This did not mean, and never meant, that state law could override federal requirements or undermine federal land policy." SUWA v. BLM, 425 F.3d at 766.

Indeed, the SUWA Court approvingly cited the Department of the Interior opinion in Douglas County, Washington, in which the Department rejected application of a state law purporting to accept rights-of-way along section lines within the county as contrary to the intent of Congress in enacting R.S. 2477. Id. (citing Douglas County, Washington, 26 Pub. Lands Dec. 446 (1898). As the Circuit noted, the Department described this state law as "the manifestation of a marked and novel liberality on the part of the county authorities in dealing with the public

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[8]/ In SUWA v. BLM, the Tenth Circuit criticized the Humboldt County decision on this point. See SUWA v. BLM, 425 F.3d at 787-88. This Court is of course bound by the Ninth Circuit's decision in Humboldt County.

land," and stated that R.S. 2477 "was not intended to grant a right-of-way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed." Id. (citing Douglas County, 26 Pub. Lands Dec. at 447). The SUWA Court cited this state law, purporting to accept R.S. 2477 rights-of-way in advance of the existence or need for roads, as an example of the principle that, while courts may look to state law to flesh out details in interpretation of the federal statute, state law may not "override federal requirements or undermine federal land policy," as encompassed by R.S. 2477. Id.

It is therefore crystal clear that neither state law, nor a county resolution purporting to accept roads into the county's maintained mileage system, can vitiate federal law by providing for acceptance of an R.S. 2477 highway right-of-way in the absence of proof of the physical existence and public use of the claimed road.

b. Even if California could define the grant under R.S. 2477 in contravention to federal law, the mere adoption of a resolution, without more, does not establish a right-of-way under California law.

Even if state law could define the terms of acceptance of rights-of-way under R.S. 2477 in contravention to federal law, the adoption of a county resolution, in the absence of a specific description of a claimed road or evidence of its construction or physical existence, does not establish a right-of-way under California law.

Under California law a highway is not accepted and dedicated as a County highway by a County resolution until and unless it is "[l]aid out or constructed." CAL. STREETS & HIGHWAY CODE § 25(b). See also CAL. STREETS & HIGHWAY CODE § 23 (defining "highway" as including bridges, drainage works incidental to highway "construction"). The County has not shown that the claimed Last Chance Road was ever laid out or constructed. As discussed in Watson v. Greely, a highway is deemed "laid out" when it "has been set apart according to a definite description and appropriated to road purposes." Watson v. Greely, 69 Cal. App. 643, 650 (Cal. App. 3d Dist. 1924). The County has presented no facts showing that the claimed Last Chance Road was dedicated based on a "definite description." Indeed, the County has stipulated that it has no maps or route descriptions identifying the roads purported to be accepted into the

County's maintained mileage system by the 1948 resolutions. Nor has the County presented facts establishing that the claimed Last Chance Road was "constructed" at the location it asserts the road can be located on the ground today. The testimony of Mr. Huarte concerning possible grading of the road is inconsistent and confused and insufficient to establish that a road was constructed at claimed location prior to repeal of R.S. 2477 in 1976. In fact, Mr. Huarte testified that he was not sure if the entire route the County now alleges is the Last Chance Road was the one he recalled grading in the 1970s. Stipulated Facts at ¶ 86; Second Huarte Deposition at 70:19-22 ("I'm not sure on that. It kind of looked that way but I'm really not sure.").

Therefore, even under the County's theory that mere adoption of a resolution could serve to accept an R.S. 2477 right-of-way, the County's claim fails.

c. Aside from the legal deficiencies in the County's position, the facts do not demonstrate that the County accepted a right-of-way for the claimed road by adoption of the 1948 resolutions.

Even if state law could override federal law requirements, and even if California law provided authority for the proposition that a county resolution could operate to accept an R.S. 2477 right-of-way without proof of the physical existence or public use of claimed roads, the facts here do not demonstrate that the County accepted an R.S. 2477 right-of-way for the Last Chance Road by adoption of the 1948 resolutions. Indeed, the limited evidence proffered by the County does not even support the factual assertions for which it is proffered.

(1) The 1948 resolutions do not identify the Last Chance Road.

Resolutions Nos. 48-8 and 48-9 do not refer to any road by name or road number and do not identify the Last Chance Road or Road No. 2046. Stipulated Facts at ¶ 15. Instead, the resolutions refer to attached maps of the County system of primary and secondary roads, amendments and revisions to the County Road Register, an official map of the primary road system of the County, and a set of official route descriptions of the roads in the County's primary road system. Stipulated Facts at ¶ 17. The County has not been able to locate any of these attachments. Id.

Specifically, Resolution 48-8 states that the County "has adopted maps of the county

primary road system which also shows the secondary roads of the county road system," that "in connection with the said maps, a number of revisions and amendments were made to the County Road Register," and that "the road register amendments and revisions shall constitute the County Road Register and shall be the official road register in lieu of the former road register." Stipulated Facts at ¶ 18; Pedersen Declaration (Doc. 75-3) at Ex. A-1-2. The County has not been able to locate copies of the attached maps of the County's primary and secondary road system or the road register amendments and revisions referenced by Resolution 48-8. Stipulated Facts at ¶ 18.

Resolution 48-9 states that a map attached as Exhibit "A" to the resolution is adopted "as the official map of the primary road system" of the County, and that the set of route descriptions attached as Exhibit "B" to the resolution is adopted "as the official route descriptions for the roads" included in the County's primary county road system. Stipulated Facts at ¶ 19; Pedersen Declaration at Ex. A. The County has not been able to locate a map marked as Exhibit "A" to Resolution 48-9 or the route descriptions marked as Exhibit "B" to Resolution 48-9. Stipulated Facts at ¶ 19, Chegwidden Deposition (Attachment 5) at 16, 25, 28, 31, 66; Pedersen Declaration at 37, 41-41. There is no way of determining the roads that were included in Exhibits "A" and "B" to Resolution 48-9. Stipulated Facts at ¶ 19; Chegwidden Deposition at 25:14-24.

The County's representatives also cannot explain the distinction between the County's primary road system and its secondary road system. Stipulated Facts at ¶ 21; Chegwidden Deposition at 25:7-13; Pedersen Deposition at 23:22-24:22. The County acknowledges that the adoption of a resolution purporting to adopt at road into the County's maintained mileage system does not necessarily indicate that the road is in existence. Stipulated Facts at ¶ 22; Chegwidden Deposition at 26:9-27:2. The County further concedes that the County may adopt roads into its maintained mileage system that are neither constructed nor maintained. Stipulated Facts at ¶ 23; Pedersen Deposition at 27:7-28:8.

(2) The undated County Road Register does not describe the Last Chance Road at a location anywhere near the location now claimed by the County.

The County asserts that its County Road Register lists roads adopted into the County's maintained mileage system by the 1948 resolutions. Inyo Memo at 16-17. The County acknowledges, however, that it does not know the date on which the Road Register was prepared or the dates on which it may have been revised and updated. Stipulated Facts at ¶ 26; Pedersen Deposition at 41:7-22. Mr. Pedersen acknowledged that the listing of roads in the Road Register does not necessarily indicate that the roads physically existed. Stipulated Facts at ¶ 27; Pedersen Deposition at 106:12-107:25. Mr. Ron Chegwidden, the former Inyo County Director of Public Works and Road Commissioner, conceded that he did not know if the roads listed in the Road Register conform to those that may have been included in Exhibits A and B to Resolution 48-9. Stipulated Facts at ¶ 29; Chegwidden Deposition at 31:1-5.

The County acknowledges that the description of Last Chance Road, No. 2046, in the Road Register, as quoted above, is incomplete and inaccurate. Stipulated Facts at ¶ 31. The County concedes that, among other deficiencies, the legal description places the road within Township 21, omitting any indication of either south or north, that there is no Township 21 North, Range 39 East, in this area, and that Township 21 South, Range 39 East, is approximately 84 miles south of the claimed location of the Last Chance Road. Stipulated Facts at ¶ 31.

The County Road Register describes Last Chance Road, No. 2046, as 4.0 miles long. Stipulated Facts at ¶ 32, Ex. J; Pedersen Declaration at Ex. B. The County acknowledges that it has no information that a road ever existed over the entire 4.0 mile Last Chance Road No. 2046 listed on the Road Register and claimed to have been adopted into the County's maintained mileage road system by the 1948 resolutions. Stipulated Facts at ¶ 33.

(3) The 1955 CalTrans map does not establish that the Last Chance Road was adopted by the 1948 resolutions.

The County asserts that inventories of County maintained roads are depicted on California Department of Transportation ("CalTrans") supplied maps of the County Road System. Stipulated Facts at ¶ 36. A 1955 CalTrans map shows a road labeled "Last Chance Rd." and numbered "2046" extending for approximately one-half mile from Willow Springs Road and heading generally southeast. Stipulated Facts at ¶ 34; Pedersen Declaration, Ex. C.

The 1955 CalTrans map shows a double-dashed line labeled "County Right of Way Only – No Road" continuing southeast from the labeled "Last Chance Rd." Id. Because the 1955 CalTrans map provides no topographical information and little other detail, it is impossible to tell whether the route on the 1955 CalTrans map corresponds to any of the routes depicted on the various USGS maps. Stipulated Facts at ¶ 37. The County acknowledges that there is no way of knowing whether the 1955 CalTrans map corresponds to maps that may have been attached to Resolution 48-8 and Resolution 48-9. Stipulated Facts at ¶ 38.

(4) The County's 1956 resolution appears to have abandoned the Last Chance Road.

By Resolution passed and adopted on May 7, 1956, and maintained mileage report dated May 3, 1956, Inyo County excluded various roads from the County's maintained mileages system. Stipulated Facts at ¶ 39, Ex. B. The maintained mileage report states that 26 miles of the excluded mileage is accounted for by the exclusion of the Last Chance Road and the Arrow Roads. Stipulated Facts at ¶ 39. The entirety of the Last Chance Road, including the 4.0 mile Last Chance Road No. 2046, and the Arrow Road, as described in the County Road Register, total 26 miles. Stipulated Facts at ¶ 39. The 1956 Resolution references attached maps marked as Exhibit A, and attached route descriptions including lengths marked as Exhibit B. Stipulated Facts at ¶ 40. The County has not been able to locate either Exhibit A or B to the 1956 Resolution. Stipulated Facts at ¶ 40. The 1956 maintained mileage report references an attached sample resolution showing corrected mileage of maintained roads, and attached Exhibit "A" set of corrected County road maps with mileage, and an attached Exhibit "B" IBM corrected tabulation of County roads. Stipulated Facts at ¶ 41. The County has not been able to locate the sample resolutions, or documents labeled as Exhibits "A" or "B" to the report. Stipulated Facts at ¶ 41. County officials acknowledged that by passing and adopting the 1956 Resolution, the County abandoned nearly all of the Last Chance Road. Stipulated Facts at ¶ 42. The County, however, asserts that an approximately one-half mile portion of Last Chance Road continues to be part of the County's maintained mileage system. Id.

(5) The County's 1975 Road Inventory provides no evidence that the Last Chance Road was adopted by the 1948 resolutions.

Inyo County's 1975 Road Inventory contains an entry for Last Chance Road, No. 2046. Stipulated Facts at ¶ 43, Ex. H (Road Inventory). The Road Inventory identifies a section of the County Road System map on which the road appears, and the length of the route (0.59 miles), but provides no information concerning the location of the road. Stipulated Facts at ¶ 43, Ex. H (Road Inventory). Inyo County officials stated that they believed the route the parties followed on June 10, 2010 during the on-site portion of the depositions was the route as claimed in the County's quiet title suit. Stipulated Facts at ¶ 44; Pedersen Deposition at 68:6-24. That route was measured to be 2,728 feet (0.52 miles) in length, 12% shorter than the route identified in Inyo County's Road Inventory. Stipulated Facts at ¶ 44.

(6) Taking all the County's allegations as true, the County has failed to allege facts that establish that the County accepted the claimed road by adoption of the 1948 resolutions.

Taking all the County's allegations as true, the County has failed to allege facts that would establish that the 1948 resolutions adopted the claimed Last Chance Road into the County's maintained mileage system. The 1948 resolutions do not name or list the Last Chance Road No. 2046, and the County does not have the maps and route descriptions that were attached to those resolutions. The County does not know the date on which the undated Road Register listing Last Chance Road No. 2046 was prepared, or the dates on which it may have been revised and updated. The County acknowledges that the description of Last Chance Road No. 2046 in the Road Register is incomplete and inaccurate and places the road 84 miles to the south of the claimed road. The County acknowledges that it has no information that a road ever existed over the 4.0 mile Last Chance Road No. 2046 listed on the Road Register and claimed to have been adopted into the County's maintained mileage road system by the 1948 resolutions. The County concedes that it is impossible to tell whether the approximately one-half mile route shown on the 1955 CalTrans map for the Last Chance Road corresponds to maps and route descriptions that may have been attached to the 1948 resolutions, or to any of the routes depicted on the various

USGS maps. The County's 1956 resolution may have abandoned the entirety of the Last Chance Road No. 2046, although it is impossible to be certain because the County does not have any of the attachments to the resolution. The County's 1975 Road Inventory lists the Last Chance Road No. 2046 as 0.59 miles in length, but provides no information as to its location. The route County officials now believe to be the Last Chance Road as identified on-site in the recent depositions was measured to be 0.52 miles in length, 12% shorter than the route identified in Inyo County's Road Inventory.

Thus, even if a county resolution could constitute acceptance of an R.S. 2477 highway right-of-way without proof of the physical existence and public use of the claimed road, the County's 1948 resolutions and subsequently prepared County documents fail to establish acceptance of a right-of-way for the claimed Last Chance Road.

D. The County's summary motion should be denied and summary judgment entered in favor of Defendants.

The County claims an R.S. 2477 right-of-way for the Last Chance Road undefined as to location and scope. The County acknowledges that its proof of construction and public use of the claimed road is limited to maps and the testimony of Mr. Huarte as described above. The County has stipulated that it has no proof of any public use of the claimed route prior to 1977 beyond the facts testified to by Mr. Huarte. Stipulated Facts at ¶ 92. The County's motion for summary judgment should therefore be denied, and summary judgment should be entered against the County and in favor of Defendants ordering that the County's claim is denied due to its failure to adequately identify the location and the scope of the claimed right-of-way, and its acknowledged lack of facts that would establish the required public use of the claimed road.

In the alternative, the Court should find that determining whether the claimed right-of-way was accepted by the County requires resolution of disputed issues of material fact concerning whether the claimed road was constructed and used by the general public, prior to 1977, in a manner, and with sufficient frequency and continuity, to constitute a highway within the meaning of R.S. 2477. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 247; United States v. Lange, 466 F.2d at 1026.

V. CONCLUSION

For the reasons stated above, Federal Defendants request the Court to enter judgment ordering that:

(1) Inyo County's motion for summary judgment is denied;

(2) Federal Defendants' cross-motion for summary judgment is granted and the Third Claim of Inyo County's Complaint to Quiet Title requesting the Court to quiet title to an R.S. 2477 right-of-way for the northern segment of the claimed Last Chance Road and all requested relief associated with that Third Claim is denied;[9]/

(3) All claims set forth in Inyo County's Complaint to Quiet Title having been dismissed by the Court's September 29, 2008 Amended Order of Dismissal (Doc. 68), or denied by this order granting summary judgment in favor of Federal Defendants, final judgment is accordingly entered in favor of Defendants and against Plaintiff.

In the alternative, Federal Defendants request the Court to enter an order denying Inyo County's motion for summary judgment on the basis that determination of whether the County accepted a highway right-of-way pursuant to R.S. 2477 for the claimed Last Chance Road requires the Court to resolve disputed issues of material fact and to hear further evidence concerning whether the claimed road was constructed and used by the general public, prior to repeal of R.S. 2477 in 1976, in a manner, and with sufficient frequency and continuity, to constitute a highway within the meaning of R.S. 2477.

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[9]/ This denial on summary judgment pertains to Inyo County's claim for an R.S. 2477 right-of-way for the northern segment of the claimed Last Chance Road that the County alleges runs southeast from the Willow Springs (a/k/a Cucomongo Road) for approximately one-half to three-quarters of a mile. As clarified by the parties' Joint Stipulation Identifying Issues Remaining for Decision (Doc. 70), this portion of the County's Third Claim of its Complaint, seeking to quiet title to a right-of-way for the claimed Last Chance Road, was not dismissed by the Court's Amended Order on Motions by Defendants and Defendant-Intervenors to Dismiss For Lack of Subject Matter Jurisdiction, dated September 29, 2008, (Doc. 68) ("Amended Order of Dismissal") at 17.

Respectfully submitted this 18th day of October, 2010.

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