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

COUNTY OF INYO,

Plaintiff,

vs.

DEPARTMENT OF THE INTERIOR,
et al.

Defendants, and

SIERRA CLUB, et al.

Defendant-Intervenors.

Case No.: 1:06-cv-1502 AWI-DLB

PLAINTIFF'S REPLY TO DEFENDANTS'
OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND PLAINTIFF'S
OPPOSITION TO FEDERAL DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT

Hearing Date: January 10, 2011

Time: 1:30 p.m.

Room: 2

Anthony W. Ishii
United States District Judge

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ATTACHMENTS

Attachment 1: Declaration of Bernard T. Pedersen

Attachment 2: Declaration of Leonard Huarte

Attachment 3: Declaration of Ralph H. Keller

I.

INTRODUCTION.

Federal Defendants and Defendant Intervenors (collectively Defendants) ask this court to ignore one hundred years of state law, federal law, federal BLM policy, Interior Board of Land Appeal rulings, and federal case law to create new law pertaining to the acceptance of the federal offer of rights-of-way pursuant to Revised Statute 2477. To accept this invitation would be to disturb long-standing rights that govern countless roads in the West. The Court need not and should not do so. There is a long history of well established federal law and practice that looks to and adopts state law to answer the relevant questions in this case, thus creating the relevant federal law in each state, without the necessity of this court now creating or filling in the gaps of a non-existent federal statutory law of the road.

The Defendants' reimagining of the law is adverse to Inyo County's long-time reliance on federal and state law and the County's current rights in and understanding of its road system. The Defendants' interpretation threatens many roads in that system; those which historically were constructed over federal lands without written grants from the United States. If the County lacks the ability to prove its claim to Last Chance Road, it similarly lacks the ability to prove its claim to many of those other roads. Those roads would continue to exist only as long as the United States in its discretion elected not to place barriers across them. The County has undertaken the responsibility for the maintenance (and the risk of the failure to do so) of Last Chance Road since at least 1948, when the Board of Supervisors deemed the road important and worthy enough to be formally included in the documented County road system. The County has been responsible for the maintenance of Last Chance Road and has accepted funds from the State for such maintenance annually from 1948 to the present. It has relied for decades on the existence of and an understanding of federal law that Defendants now seek to change.

There can be little question that Last Chance Road existed and exists. It is not only reflected on several federal maps covering different eras during the last century, but it and its path are visible to this day. Representatives of all parties to this dispute, including public works experts from the County and Death Valley National Park, located and walked the route without difficulty. All parties agreed that evidence of the passage of vehicles remains evident on portions of the route. Stipulated Facts at ¶ 94.

Further, there is no dispute regarding the course of the vast majority of the road. For analysis, the road may be divided into three segments. A very short segment is its intersection with Willow Creek Road – the Intersection Segment. The longest section is the Wash Segment, which is the route up Last Chance wash heading south and southeast from the intersection with Willow Creek Road. There is no dispute that the road has always followed the wash. The third section is the Terminus Segment, which runs from the end of the Wash Segment to the rim of Last Chance Canyon. Early in its existence, the final section of the road ran toward the east and southeast from the end of the Wash Segment, following a shallow wash to Last Chance Canyon. Currently, and since at least 1970, the Terminus Segment ascends more directly south to the head of Last Chance Canyon, where a turn-around was graded by the County. It climbs a small hill at the end of the Wash Segment. It is on this more southerly iteration of the Terminus Segment of the road that the signs of motor vehicle use are most evident.

The Defendants claim that the Plaintiff's claim is not pled with particularity, and lacks supporting evidence. Plaintiff disagrees. The remainder of the brief should remove any ambiguity about the claim to Last Chance Road that may yet exist.

II.

STANDARD OF REVIEW

A. BURDEN ON PLAINTIFF AND DEFENDANT TO DEMONSTRATE NO GENUINE ISSUE OF MATERIAL FACT AND THAT PLAINTIFF ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Plaintiff has moved for summary judgment in this matter and the Federal Defendant has cross moved for summary judgment as well. Summary judgment may be granted for either party only when, drawing all reasonable inference and resolving all doubts in favor of the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-255 (1986).

B. BURDEN AND STANDARD OF PROOF UNDER R.S. 2477.

Defendants propose that your court impose a heightened standard of proof to determine the Plaintiff's rights under R.S. 2477. This heightened standard is theoretically based on federal case law to the effect that grants from the sovereign should be construed narrowly and that doubts as to the scope of a grant should be construed in favor of the (federal) government. The Federal Defendants would impose a "clear and convincing"

1 burden of proof upon Plaintiff to demonstrate acceptance of the offered easement. The Defendant Interveners
2 propose a “beyond any doubt” standard. Neither is appropriate.

3 The federal cases to which Defendants turn for support of the heightened standard of proof do not
4 themselves create such a standard, whether “clear and convincing” or “beyond any doubt”. Rather, these cases
5 stand for the proposition that doubts as to the scope of a grant should be resolved in favor of the government.
6 *See Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993) (“Any doubt as to the scope of the grant under
7 R.S. 2477 must be resolved in favor of the government”) (citations omitted); *United States v. Gates of the*
8 *Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1412-13 (9th Cir. 1984) (“This case turns on the scope of the
9 right-of-way in the American Bar Road, which was constructed across unreserved public land. (footnote
10 omitted) When Lewis and Clark County declared the American Bar Road a public road on March 21, 1901, the
11 United States granted a right-of-way pursuant to § 2477 of the Revised Statutes. (footnote omitted) Any doubt
12 as to the scope of the grant under R.S. 2477 must be resolved in favor of the government.”); *Humboldt County v.*
13 *United States*, 684 F.2d 1276, 1280 (9th Cir. 1982) (“Any doubt as to the extent of the grant must be resolved in
14 the government’s favor”). If there were questions as to whether the County’s claimed right-of-way exceeded
15 that offered by the United States, the burden would lie on the County to establish that its acceptance fell within
16 the federal offer. However, these cases would not logically create an enhanced burden applicable to the Court’s
17 determination of factual matters, only to legal questions as to the scope of the offered grant. So while doubts as
18 to scope of grant may be construed in the federal government’s favor, Defendants’ briefs expand this rule into
19 an increased burden of proof which has not been applied by federal courts.

20 Neither do the California cases cited in footnote two of the Federal Defendant’s brief support an
21 increased burden of proof. These cases concerned determinations of property rights resulting from adverse
22 possession, in which a party sought to establish rights due to open and notorious use adverse to the property
23 owner’s rights. It is understandable in the interest of protecting the underlying property rights and to discourage
24 trespass that courts would require a heightened burden of proof to demonstrate that the trespass was open and
25 notorious and that the trespasser therefore acquired rights to which it would not otherwise be entitled. *See Grant*
26 *v. Ratliff*, 164 Cal.App.4th 1304, 79 Cal.Rptr.3d 902 (Cal. 2 Dist., 2008) (Burden of proof for *prescriptive*
27 *easement* is clear and convincing, but holding that continuous use of an easement over a long period of time
28 without the landowner’s interference is presumptive evidence of its existence and in the absence of evidence of

1 mere permissive use it will be sufficient to sustain a judgment.); *Brewer v. Murphy*, 161 Cal.App.4th 928, 74
2 Cal.Rptr.3d 436 (Cal. 5th Dist., 2008) (Prescriptive easement case).

3 With R.S. 2477, on the other hand, the United States offered the grant of a road easement to encourage
4 persons to settle the west and build roads on federal lands. The question here is not whether the County
5 adversely possessed the federal land, but whether it accepted an offered easement to advance federal policy.
6 The fact that the state cases create a heightened burden of proof for adverse possession is not persuasive that a
7 heightened burden of proof should be applied to the acceptance of a federal invitation to create a road. While it
8 may be that the federal offer of a grant must be narrowly construed, it does not follow that the question of
9 whether the County accepted the federal offer to build a road warrants a clear and convincing standard of
10 persuasion. Such a conclusion would tend to deprive parties of bargained for benefits without a rationale in law
11 or equity, and in cases such as this, where the relevant evidence is minimally thirty-four years stale, would
12 needlessly disrupt long established property rights.

13 This conclusion is particularly true where one governmental entity claims an easement from another.
14 Inyo County holds its easement for the benefit of the public, not for private purposes. The Court here is
15 weighing a claimed public easement held for the benefit of the public against federal ownership of public lands,
16 also managed for the benefit of the public. There is no public policy rationale to favor one public use over
17 another, particularly when both uses are recognized by federal law as public benefits.

18 Plaintiff therefore asserts that the appropriate burden of proof to establish its claims is by the
19 preponderance of the evidence.

20 **C. DIRECT VERSUS CIRCUMSTANTIAL EVIDENCE.**

21 The Defendants' briefs do not directly address the type of proof necessary to establish the County's
22 claim. But, their arguments seem to imply that, particularly on the issues of public use and construction,
23 circumstantial evidence of public use or construction of Last Chance Road cannot meet the County's burden of
24 persuasion. In normal circumstances, a person might assume, circumstantially, that the fact that a road had
25 existed for a long number of years on public lands was persuasive of the fact that the road was used by the
26 public and maintained as necessary. The Defendants apparently would ignore such circumstantial evidence and
27 insist on direct documentary or other evidence of the use or maintenance. Plaintiff finds no authority that the
28 Court is required to set aside common sense or normal inferences made from circumstantial evidence in deciding

1 this matter. “As a general rule, the law makes no distinction between the weight or value to be given to either
2 direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You
3 are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both
4 direct and circumstantial.” 3 FED. JURY PRAC. & INSTR. § 104.05.

5 **III.**

6 **THE EVIDENCE AND ITS APPLICABILITY TO PLAINTIFF’S CLAIM**

7 Last Chance Road, as relevant to this brief, is only a small portion of an extended route which once
8 descended into Last Chance Canyon and continued south. It is a route whose purpose, and to some extent
9 whose path, has changed with the passage of time. Last Chance Road has always begun at its intersection with
10 Willow Creek Road in the vicinity of Willow Springs in Cucomongo Canyon and travelled to the head of Last
11 Chance Canyon. How and where it descended into Last Chance Canyon, or made its way south from the head
12 of Last Chance Canyon, is not relevant to the County’s claim in this case. This following is the evidence
13 believed by Plaintiff to establish the existence of Last Chance Road and the acceptance of the easement offered
14 by the United States.

15 **A. THE ESCAPE OF THE SURVEYORS IN 1853.**

16 In 1853 a party searching for a route for a railway found itself in the arid Eureka Valley, which is the
17 valley directly east of Death Valley. Eureka Valley is the valley to which Willow Creek Road runs if one is
18 travelling from the mining towns to the east. In fact, Last Chance Road is the last direct foot or mule route to
19 Death Valley if travelling along Willow Creek Road from the east. That party found itself out of water and in
20 trouble, until it crossed the Last Chance Range and found Last Chance Spring, which is just to the south of the
21 beginning of Last Chance Canyon. After watering themselves and their mules, the party exited Death Valley by
22 travelling north through Last Chance Canyon, which would have taken them to Cucomongo Canyon in the
23 vicinity of Willow Spring. The significance of this evidence is twofold. One, it demonstrates the critical
24 importance of water to travelers in the desert. Second, it demonstrates a route from Last Chance Spring in the
25 south to the vicinity of Willow Spring in the north. (History does not tell us if the survey group visited Willow
26 Spring.)
27
28

B. THE USGS MAP OF 1913.

The 1913 Lida USGS map shows the early route of Last Chance Road and confirms that the road served to connect Willow Spring with Last Chance Spring, and to connect Cucomongo Canyon with Death Valley. Stipulated Facts, Ex. B (Document 91-1). USGS maps are official records of the United States and the 1913 Lida Map is direct evidence of the existence of Last Chance Road, which at that time was a trail. This USGS map is also eyewitness testimony of the individuals who surveyed the route in the period of 1897-1898, 1905 and 1911, and rendered their observations in official government map form. The 1913 Lida map is an official record and is also circumstantial evidence of public use of Last Chance Road, in that it was a route across public lands from Willow Springs in Cucomongo Canyon to Last Chance Spring in Death Valley. Its evident purpose was to serve travelers either entering Death Valley from the north or leaving Death Valley to the north. The entire route from Willow Spring to Last Chance Spring is not the subject of this action. Last Chance Road served to provide access to the overlook at the head of Last Chance Canyon, at that time, most likely so the traveler could then cut across the canyon and travel south.

C. THE COUNTY RESOLUTION OF 1948.

On March 1, 1948, the Board of Supervisors of Inyo County adopted a resolution that documented the then existing modern Inyo County road system. That resolution adopted roads that were illustrated by a map that was attached to the resolution and by road descriptions that existed at the time of the resolution. The map no longer exists in County records, but the description of Last Chance Road, number 2046, does. Stipulated Facts, ¶ 15-18. The resolution is the first and most persuasive evidence that the government of Inyo County considered Last Chance Road to be a county road and had theretofore accepted it as such. It has remained a county road from at least that time to the present. As stated in Plaintiff's Memorandum in Support of Inyo County's Motion for Summary Judgment, this action by the County Board of Supervisors is determinative under California law of the road's status as a county highway.

D. THE COUNTY ROAD REGISTER – LAST CHANCE ROAD, 2046.

The County Road Register contains the written description of Last Chance Road that was adopted by the Inyo County Board of Supervisors by resolution in 1948. The Road Register page that contains the description of Last Chance Road states that said description is "[a]s revised and amended by Resolution of the Board of Supervisors of Inyo County, Dated March 1, 1948." Stipulated Facts at ¶ 25. The Road Register is an

1 official record of the County of Inyo and accordingly is of high trustworthiness. It was created long before the
2 ownership of Last Chance Road became an issue, and most likely prior to 1955. Since 1955, county road
3 systems have been described by use of maps issued by the State of California and approved by the Federal
4 government. Declaration of Bernard T. Pedersen at ¶ 3, 4, & Ex. B (All references herein to the Pedersen
5 Declaration are to the November 19, 2010 declaration of Mr. Pedersen attached to this document as Attachment
6 1.)

7 Defendants find the description of Last Chance Road in the Road Register to be ambiguous, placing the
8 road 84 miles to the south of its actual location. The description that Defendants find suspicious states:
9 “Beginning at a point of junction with County Road 2047, described as: 39-E, **T. 21**, Sec. 21, 1/4S 1, Point 2-
10 southeast, thence describing a long southwesterly and a long southeasterly curve to R. 39-E, T. 21, Sec. 36, 1/4S
11 4, Point 8, south boundary of District 2, at a junction with continuing County Road 5046, being point of
12 termination.” (Emphasis added.) Stipulated Facts at ¶ 30. The part of the description that Defendants find
13 confusing is “T. 21”. Defendants assume that “T. 21” means Township 21, a township that is located south of
14 the road’s actual location. Plaintiff has no knowledge of what the drafters of that language meant when they
15 used “T. 21” in 1948. However, the meaning of the term “Beginning at a point of junction with County Road
16 2047” is clear even today. County Road 2047 is Willow Creek Road (see below) and Federal Defendants admit
17 that Willow Creek Road is an acceptable “R.S. 2477” road located in Cucomongo Canyon. Therefore, it
18 appears evident from the Road Register description that Last Chance Road began in Cucomongo Canyon and
19 then ran southwest and southeast, as it does today. Further, the road as described ran well beyond the terminus
20 of the current Last Chance Road to the border of Road District 2, a distance of four miles, where it continued as
21 County Road 5046, which is described on another page of the Road Register. This is persuasive evidence that
22 Inyo County once claimed the entirety of the Last Chance Road route through Last Chance Canyon, before
23 removing all but the northern .6 mile from the county road system in 1956.

24 While Plaintiff agrees that a road description that describes a road as taking “a long southwesterly and a
25 long southeasterly curve” is less than precise in today’s age of satellite mapping to a precision of inches, it was
26 abundantly precise enough in 1948 to lay claim to the only road in the vicinity. The County is now able to
27 provide the precision that was not thought necessary in 1948 or before. In any event, the Road Register
28

description described above leaves little doubt that the Board of Supervisors intended to and did take the existing Last Chance Road into the county road system in 1948.

E. THE COUNTY ROAD REGISTER – WILLOW CREEK ROAD, 2047.

The County Road Register also contained a description of Willow Creek Road, number 2047, from which Last Chance Road commences. Pedersen Declaration at ¶ 9, Ex. G. The Road Register entry describes Willow Creek Road, in part, as: “Beginning at a point of junction with County Road 2048, described as: R. 38-E, T. 20, Sec. 13, ¼ S 3, Point 2-southwest, thence northeast to Sec. 13, ¼ S 2, Point 6, thence easterly to R. 39-E, T. 21, Sec. 17 ...”. (Emphasis added.) Willow Creek Road generally runs west to east. The significance of this Road Register entry is that the drafters located a large portion of Willow Creek Road in T. 21, the location that Defendants found ambiguous in the Last Chance Road description, placing the road 84 miles to the south of its actual location. All parties to this dispute acknowledge that Willow Creek Road is in Cucomongo Canyon, and not 84 miles to the south of it, and the Road Register description of Last Chance Road describes it intersecting with Willow Creek Road in T. 21. It therefore may safely be assumed that Inyo County did not intend to describe Last Chance Road as a road 84 miles to the south of Cucomongo Canyon, but referred to the road that existed in the location where it is found today.

F. THE DEPARTMENT OF TRANSPORTATION MAP OF THE COUNTY ROAD SYSTEM OF 1955.

Starting in August, 1954, and pursuant to agreement with Inyo County, the California Department of Public Works, Division of Highways, in cooperation with the U.S. Bureau of Public Roads, conducted an inventory of rural roads in the County. Pedersen Declaration at Ex. A. The inventory was completed and approved in October, 1955. This inventory resulted in the 1955 CalTrans map. Pedersen Declaration at ¶ 3; Stipulated Facts, Ex. A. (Doc # 91-1). 1955 CalTrans map is printed on semi-transparent Mylar material. From 1955 to 1986, county road system maps were based on this map. Annually, the maps were revised by the State, by direction of the County Board of Supervisors, as roads were added to or deleted from the county road system. After the Board of Supervisors would direct a change to the road system, a Mylar map with the revisions would then be issued by the State. Each Mylar road system map that was issued reflected the dates of revision. Pedersen Declaration at ¶ 3, 4. Last Chance Road was consistently depicted on the Mylar maps of the county road system from 1955 to 1986, with no change. (Compare the 1974 and 1986 road system maps referenced below.) The location of Last Chance Road on the Mylar maps is in the same general location as on the USGS

1 maps of the era, and in the same location (but with less precision) as is depicted on maps today. The
2 significance of the 1955 map is that it confirms the intention of the Board of Supervisors in 1948 to add Last
3 Chance Road, number 2046, to the county road system. The 1948 Resolution, along with the inventory of the
4 road system and the creation of the county road system maps five years later, reflect the beginning of modern
5 documentation of the county and state road systems. The Mylar road system maps also reflect that the County,
6 State and Federal governments considered Last Chance Road to be part of the County road system.

7 **G. THE USGS MAP OF 1957.**

8 In 1952 aerial photography was taken of the area surrounding Last Chance Road and in 1957 mapping
9 field work of the area was conducted. This resulted in the 1957 USGS Magruder Mountain map. Stipulated
10 Facts ¶ 51. This map is an official record of the United States and is a depiction of observations by United
11 States personnel. The 1957 Magruder Mountain map depicts Last Chance Road following the wash southeast
12 from Willow Creek road, in the same location as the Wash Section walked by the parties in 2010 and depicted
13 on the 1913 USGS Lida map and subsequent USGS maps. The 1957 map shows Last Chance Road as a dirt
14 road that runs to the rim of Last Chance Canyon. The route then turns to a trail and descends into Last Chance
15 Canyon. After descending into the canyon it again becomes a dirt road that travels south through Last Chance
16 Canyon into Death Valley. The only portion of road that is relevant to this action is the dirt road that ran from
17 Willow Creek Road to the head of Last Chance Canyon.

18 The final section of Last Chance Road depicted on the 1957 map varies from the location of the
19 Terminus Section depicted on the 1987 USGS Last Chance Mountain map and that existed in the 1970's – the
20 section that is visible in 2010. Stipulated Facts ¶ 58, 59. In 1952 and 1957, the final section of the road ran
21 from the southern end of the Wash Section toward the southeast, along a shallow wash that feeds into the Wash
22 Section. The parties walked the 1957 route southeast from the Wash Section and observed no current signs of a
23 road. Stipulated Facts ¶ 64, 65.

24 The 1957 map reflects a road in transition. A trail that had developed at the turn of the century before
25 automobiles were widely available, had become, to a large extent, a road traversable by motor vehicles. The
26 1957 map shows the road intersecting the rim of Last Chance Canyon at a point to the east of the current road's
27 terminus. At the 1957 terminus, it is possible to enter the Last Chance Canyon badlands on foot. However, as
28 the map suggests and observation dictates, it is very unlikely that motor vehicles purposefully drove over the

1 rim of the canyon. Entering the canyon was accomplished on foot, where in a matter of miles, the traveler
2 would intercept the southern motor vehicle road portion of Last Chance Road (which was removed from the
3 county road system by resolution in 1956 (Stipulated Facts ¶ 39)). Motor vehicle traffic within the canyon
4 would have had to originate from the south, in Death Valley.

5 **H. THE GRADING AND HUNTING ACTIVITIES OF LEONARD HUARTE FROM 1970 TO 1975.**

6 Mr. Leonard Huarte is unfairly maligned by both Defendants in their memoranda. Mr. Huarte is a long-
7 time public servant who began working for the County as young man in 1968. He was an equipment operator at
8 that time and for forty years has maintained county roads. He recalls grading Last Chance Road in the early
9 seventies on three separate occasions and recalls using it to access the area for hunting. Declaration of Leonard
10 Huarte (Attachment 2) (All references to the Huarte Declaration in this document are to the declaration attached
11 to this document and signed on November 20, 2010.). He recalls grading the Wash Segment of Last Chance
12 Road, following the bottom of the wash, in accordance with his training and experience and custom. Huarte
13 Declaration at ¶18. Mr. Huarte was directed to grade Last Chance Road by experienced road workers, who
14 inspected his work. Huarte Declaration at ¶15. He does not remember having to grade around trees in the Wash
15 Segment, and he does not even remember that there was indeed any tree even present in the Wash Segment.
16 Huarte Declaration at ¶ 19. If the Defendants now wish to assert that there was a tree present in the early 1970's
17 (35-40 years ago) that Mr. Huarte would have to had graded around – and that he doesn't remember which way
18 he went (to the right or left), it is up to them to provide the requisite proof that such a tree existed at that time;
19 and even then, they would have to establish that whether Mr. Huarte graded to the right of left of the wash
20 shown, and the road shown, on the official record government maps is material. Mr. Huarte also quite clearly
21 remembered, while standing at a most spectacular drop into Last Chance Canyon, that he used to grade Last
22 Chance Road to the edge of the canyon and that he had constructed a turn-around just short of the edge of the
23 canyon. That point is where the road is shown arriving at the rim of the canyon on the 1987 USGS Last Chance
24 Mountain Map and at the point to which the parties walked in 2010. Huarte Declaration at ¶ 20. Mr. Huarte
25 provides, in his Declaration at paragraph 22, just how far he graded the road in the Terminus Segment (71 feet
26 from the Canyon rim), and he then provides the dimensions and location of the turn-around he graded at the end
27 of the Terminus Segment (52 feet by 42 feet). Huarte Declaration, paragraph 22; and Exhibit 7 to the Huarte
28 Declaration

1 The first deposition of Mr. Huarte occurred in 2008. It took place in Independence, California, far from
2 Last Chance Road, and Mr. Huarte was questioned by reference to a USGS map, which was marked and
3 included as an exhibit in this action. Stipulated Facts, Exhibit I (Document 91-3). He had not traveled to Last
4 Chance road in preparation for that deposition. He had not been prepared for the deposition. Huarte
5 Declaration at ¶ 4. It became clear during the deposition that Mr. Huarte did not know the true location of the
6 road called Last Chance Road. He identified a road a few miles to the east and close to the Nevada border as
7 what he thought was Last Chance Road (because it was in the area of the old Last Chance Mine, Huarte
8 Declaration, paragraph 5), and testified that he had not graded that road. In fact, there is no evidence that
9 County crews ever graded that road, which is not a county road. It became clear a year later in 2009 that Mr.
10 Huarte was not alone among the County road crew in misunderstanding where the road called Last Chance Road
11 was located on the ground. Stipulated Facts ¶ 75. In 2008, Mr. Huarte was oriented on the USGS map to the
12 proper Last Chance Road (without identifying it as such) by its location immediately adjacent to Willow
13 Springs, which was a feature he was well aware of. He recalled driving up that road in his hunting expeditions
14 in the past and recalled that the road he travelled upon had been maintained and ended at the large drop-off into
15 Last Chance Canyon.

16 In preparation for Mr. Huarte's deposition in 2010 he travelled to what he erroneously had believed was
17 Last Chance Road with other employees of the County. He and his foreman were in one vehicle. Both were
18 under the impression that Last Chance Road was the road Mr. Huarte had previously misidentified, and which
19 was a few miles to the east of the actual Last Chance Road. That eastern road was their destination. When Mr.
20 Huarte and his foreman passed the actual Last Chance Road, he mentioned to his foreman that he recalled
21 grading that "little road" to the edge of the canyon, and continued on to the road both believed to be Last
22 Chance Road (leading to the Last Chance Mine). Upon being oriented to the correct Last Chance Road, Mr.
23 Huarte and the other county personnel returned to Last Chance Road and walked the road to the edge of the
24 canyon. Huarte Declaration at ¶ 6. A week later Mr. Huarte sat for his second deposition, consisting of one day
25 in Independence and one day walking the road while being deposed.

26 The Defendants attempt to discredit Mr. Huarte because his recollection of grading Last Chance Road is
27 less than precise. Plaintiff does not find Mr. Huarte's memory to be suspicious. Mr. Huarte is a man who has
28 spent his life grading desert roads for the county. By his own testimony, he did not grade Last Chance Road

1 after the seventies, and of course, since the mid-1990's the road has been closed. Additionally, the experience
 2 of grading the road would have been less than remarkable for the young Mr. Huarte, not so important that he
 3 should be expected to remember the details of the adventure thirty-five years later. Neither is it surprising that
 4 thirty-five years later, there is little sign of his grading activities (other than the roadway sections themselves,
 5 see Exhibits 3 and 4 to the Huarte Declaration), after many snow falls and rain storms. Even the Federal
 6 Defendant's expert declared it would be unlikely for signs of grading (such as clearly delineated berms, etc.) to
 7 remain after the passage of thirty years. Deposition of Ainsley Holeso, 22:14-25; 23:1-6. It would be far more
 8 surprising, even suspicious, if Mr. Huarte retained the detailed memory he was so clearly expected to recall
 9 during his deposition. Mr. Huarte is well familiar with the Willow Springs area, an area in which he has worked
 10 for forty years and hunted during his youth. Even in 2008, when he was unaware of the identity of Last Chance
 11 Road, he recalled it with some detail as a place he drove and hunted. And in 2010, upon looking at the road
 12 again, and after walking the road, he clearly remembered grading it, and so testified.

13 The significance of Mr. Huarte's testimony and his Declaration is threefold. First, it establishes that
 14 Inyo County actually constructed and maintained Last Chance Road prior to 1976. Second, it establishes that
 15 the road followed the bottom of the wash as depicted on the 1957 and 1987 USGS maps (drawn from data and
 16 photos compiled and made in 1952 and 1980-82, respectively – see Map Legends). Third, it establishes that the
 17 Terminus Segment of Last Chance Road as depicted on the 1987 USGS map, as drawn from data dating to 1980,
 18 existing prior to 1976.

19 **I. THE DIVISION OF HIGHWAYS MAP OF ROAD SYSTEM, INYO COUNTY, CALIFORNIA, 1974.**

20 In 1974, the State of California, in cooperation with Inyo County and the U.S. Department of
 21 Transportation, Federal Highway Administration, Bureau of Public Roads, issued a revised Mylar map of the
 22 county road system, which shows Last Chance Road as a county road. Pedersen Declaration at ¶ 5, Ex. C.¹
 23 This map is based on the original 1955 road system map of the County. In the lower left margin of the map are
 24 the dates on which the county road system maps were revised and reissued to reflect annual changes in the
 25

26
 27 ¹ The attached map is the only copy of the 1974 map in the County's files. It was used for a County survey project. The black dots on
 28 the Mylar map, the grid with section numbers, and the squares on section corners in two townships were added by the County as part of
 the survey project. The underlying labeled roads (including Last Chance Road) are contained on the Mylar map. Compare to 1955
 Mylar map and the 1986 Mylar map.

County road system. The significance of this map is that in 1974, the County, the State and the U.S. Department of Transportation took action confirming Last Chance Road to be a road in the county maintained mileage system. This is outside the 1934 to 1967 time period during which President Roosevelt had withdrawn large portions of federal land from entry for grazing and homesteading – which Defendants’ also claim somehow also applied to R.S. 2477 offers for roadways, all the while leaving in the public’s right to travel the West and explore for and establish mining claims!

J. COUNTY OF INYO RESOLUTION NO. 76-51.

Prior to 1986, the County would adopt changes to its road system by resolution of the Board of Supervisors, which changes would be reported to the State. On May 4, 1976, the Board of Supervisors issued Resolution 76-51 by which it added four roads to the county road system, deleted five roads and modified five others. Changes to the road system were indicated by color corrections on a map that was attached to the resolution. Pedersen Declaration at ¶ 4, Ex. B. That map is not in County’s records. Also attached to and incorporated into the resolution was a tabulation of roads which were included in the mileage of maintained roads of 1121.035 miles. That tabulation is maintained in County records. *Id.* The portion of that tabulation relating to Last Chance Road is attached. The significance of this resolution is that in May of 1976 Inyo County continued to consider Last Chance Road, a road of .59 miles, to be an accepted county road in the county maintained mileage system, and asserted so by resolution. If Last Chance Road had not been included in the County road system prior to 1976, it would have been included by this resolution. At the time of the resolution, the R.S. 2477 offer of road easements was effective and would have been accepted.

K. THE DIVISION OF HIGHWAYS MAP OF ROAD SYSTEM, INYO COUNTY, CALIFORNIA, 1986.

In 1986 the State of California Department of Transportation in cooperation with the U.S. Department of Transportation, Federal Highway Administration and the County issued a revised Mylar map of the county road system, which shows Last Chance Road as a county road. Pedersen Declaration at ¶ 6, Ex. D. This map is based on the original 1955 road system map of the county. In the lower left margin of the map is a table showing the dates on which the county road system maps were revised and reissued. Reference to this table shows that the maps were revised annually from 1967 to 1975. The significance of this map is that in 1986, the County, the State and the U.S. Department of Transportation considered Last Chance Road to be a road in the county maintained mileage system in the same location as on the original road system map of 1955. This map

1 shows that the 1955 map had been continually revised and updated from 1967 to 1975 and that Last Chance
2 Road was not deleted. At the time of those revisions, the R.S. 2477 offer of road easements was effective and
3 would have been accepted by the annually re-issuance of the map.

4 **L. THE 1987 USGS LAST CHANCE MOUNTAIN MAP.**

5 The 1987 USGS Last Chance Mountain Map is the most recent federal map of the area around Last
6 Chance Road. It is based on aerial photography taken in 1980 and 1982, and field work conducted in 1984.
7 Stipulation of Facts, ¶ 55, Ex. G. It shows a four-wheel-drive road running southeast from the area of Willow
8 Springs to the rim of Last Chance Canyon. As with the 1913 and 1957 USGS maps, the 1987 map shows Last
9 Chance Road following the wash southeast toward Last Chance Canyon. It varies from those maps on the final
10 section of the road. Rather than proceeding southeast from the end of the Wash Section as on the earlier maps,
11 the Terminus Section of the road on the 1987 map climbs south from Last Chance Wash up a small hill toward
12 the canyon. Stipulated Facts, ¶ 58.

13 The 1987 USGS map is direct evidence that the route of Last Chance Road had changed from 1957 to
14 1984. There no longer was a trail that proceeded into Last Chance Canyon from the end of the motor route into
15 the canyon. Last Chance Road had become a distinct road, connecting Willow Creek Road to the overlook of
16 Last Chance Canyon, and the terrain thereabouts. Its terminal point had shifted to the west, overlooking a more
17 rugged area of the headlands, an area that would be virtually impossible to descend, even on foot. It appears a
18 primary purpose of the road was to serve as a unique overlook and access point. The 1987 map renders the
19 modern Last Chance Road, and corroborates Mr. Huarte's testimony that, after grading the road through the
20 wash, he continued directly south to the edge of Last Chance Canyon, where he constructed a turnaround. This
21 demonstrates that the road that is depicted on the 1987 USGS map existed as substantially the same route prior
22 to 1976.

23 **M. MAP OF COUNTY ROAD SYSTEM, MONO-INYO COUNTIES, 2007.**

24 Attached as Exhibit E to the Pedersen Declaration is the current map of the county maintained mileage
25 system. It shows Last Chance Road as part of the California Road System. It was approved on March 21, 2007
26 by Gene Fong, Division Administrator, Federal Highway Administration. Currently, maps of county road
27 systems are updated electronically by the State in coordination with the Federal Highway Administration and
28 published electronically on a State web site. The maps are updated in accordance with certifications by the

1 County and after approval by the State. Pedersen Declaration at ¶ 7. The significance of this map is that this is
2 the route of Last Chance Road that is currently claimed by Inyo County and approved by the State of California
3 and the Federal Highway Administration. It closely aligns with the route of Last Chance Road that is illustrated
4 on the 1987 Last Chance Canyon USGS map.

5 **N. EXHIBIT MAP OF LAST CHANCE ROAD, 2009.**

6 Attached as Exhibit H to the Pedersen Declaration is an exhibit map of Last Chance Road prepared by
7 Inyo County in December 2009, based on survey points collected in the Fall of 2009. It shows Last Chance
8 Road superimposed on a satellite photo of the area, including the area at the head of Last Chance Canyon. The
9 significance of this document is to show the discrete geological feature at which Last Chance Road ends. As
10 illustrated by this satellite photo, the head of Last Chance Canyon is the northern extremity of the canyon where
11 it has nearly eroded into Cucomongo Canyon, through which Willow Creek Road runs. The satellite photo
12 illustrates the badlands that are the predominate feature at the Last Chance Canyon overlook at the terminus of
13 Last Chance Road.

14 **O. SUMMARY OF EVIDENCE.**

15 Taken together, the evidence set forth in herein clearly establishes the following not only by the
16 preponderance of the evidence, but to an even higher than necessary standard, as well: Last Chance Road was
17 established as a through route for mule and foot travelers as early as 1895, and clearly by 1911. It continued as
18 a route from then until the present, evolving from a foot and mule path, to a motor vehicle, foot and mule path,
19 to a motor vehicle road. Its early function was to provide access from and to Death Valley via Last Chance
20 Canyon and the springs at either terminus of the canyon. It always provided access to magnificent overlooks at
21 the head of Last Chance Canyon, and not later than the early seventies providing such access was its primary
22 purpose. Hunting access was another public purpose. In 1948, by resolution, the Inyo County Board of
23 Supervisors took Last Chance Road into the county maintained road system and took responsibility for
24 maintaining the road. Since that time, the County has received road maintenance funds based on maintained
25 mileage of which Last Chance Road is a part, with the cooperation and approval of the State and Federal
26 governments. In 1954 the State of California inventoried Last Chance Road and since that time included it in
27 maps of the County road system. In 1974 and 1976 the County caused new maps of the County road system to
28 be produced that included Last Chance Road as a part of that system. In 1976 the County Board of Supervisors

1 adopted a resolution to that effect. From 1970 to 1975, on at least three occasions, the County reconstructed and
 2 maintained Last Chance Road on its current route by the use of a grader. The current route of Last Chance Road
 3 is reflected on the 1987 USGS Last Chance Mountain map. It is also set forth in detail, including the turn-
 4 around at the top of the road and at the overlook, on Exhibit 7, Declaration of Leonard Huarte. The precise
 5 location of the top of the County graded Last Chance Road (71 feet from the Canyon rim), and the dimensions
 6 of the County graded turnaround (52 feet by 42 feet) are set forth in the Huarte Declaration at paragraph 22.

7 IV.

8 PLAINTIFF'S CLAIM, STATED WITH PARTICULARITY

9 Plaintiff claims a road easement pursuant to its acceptance of the federal offer of road rights-of-way in
 10 Revised Statute 2477. Plaintiff claims the route Last Chance Road followed in 1975, shortly before the
 11 revocation of the R.S. 2477 grant offer. That route proceeded from the intersection with Willow Creek Road,
 12 through the wash visible today and shown on the 1957 and 1987 USGS maps, and then directly south to the rim
 13 of Last Chance Canyon, as shown on the 1987 USGS Last Chance Mountain map. This is the route graded by
 14 the County from 1970 to 1975 and visible on the ground at this time. The 1987 USGS Last Chance Mountain
 15 topographical map is an accurate rendition of the Plaintiff's claimed right-of-way. By statute, a California
 16 highway easement is forty feet wide. CALIFORNIA POLITICAL CODE § 2620 (1883) (repealed); CALIFORNIA
 17 STREETS & HIGHWAYS CODE § 906. However, Plaintiff recognizes that federal cases have limited the scope of
 18 R.S. 2477 easements to that utilized when R.S. 2477 was withdrawn in 1976. *Sierra Club v. Hodel*, 848 F.2d
 19 1068, 1083 (10th Cir. 1988) (citing *Nielson v. Sandberg*, 141 P.2d 696, 701 (Utah 1943); *SUWA v. BLM*, 425
 20 F.3d 735, 746 (10th Cir. 2006). By 1976, Plaintiff had utilized the easement as a single land dirt road travelling
 21 up the Last Chance Wash and then south to the rim of Last Chance Canyon. Plaintiff had established a
 22 turnaround at the end of the route, of the dimensions of 52 feet by 42 feet, as shown on Exhibit Seven to the
 23 Huarte Declaration, attached hereto as Attachment 2. Huarte Declaration at ¶ 22.

24 The evidence indicates that Plaintiff may have perfected an easement to two routes, one shown on the
 25 1957 USGS map and one shown on the 1987 USGS map. The routes vary at the terminal section of the road.
 26 Plaintiff does not claim the route shown on the 1957 USGS map. The evidence indicates that in Last Chance
 27 Road's 100-year history, it has always followed the wash from Willow Creek Road until branching off at the
 28 point where the wash ends. Over time, washes change course in subtle and dramatic ways, and could threaten

1 the course of the road. Also, Last Chance Road has always run to the rim of Last Chance Canyon, which is a
 2 geologic feature formed as Last Chance Canyon erodes its way north to Cucomongo Canyon. Enough change to
 3 the headlands would threaten the course of the terminal section of Last Chance Road. Therefore, Plaintiff
 4 requests the Court to declare the 1987 USGS rendering of Last Chance Road as the easement, with the
 5 additional provision that the right-of-way may vary as necessitated by geological conditions so as to maintain a
 6 continuous road from Willow Creek Road to the head of Last Chance Canyon.

7 **V.**

8 **ARGUMENT**

9 Defendants argue that the Court should apply the plain language of R.S. 2477 in this matter and
 10 propose definitions of “construction”, “public use”, and “highway” to assist the Court with that task. It is
 11 striking that Defendants cite few cases to support their proposed standards even though there is a hundred years
 12 of precedent concerning the establishment of highway easements pursuant to R.S. 2477. That precedent is
 13 found in BLM policy, IBLA rulings, and Federal and state case law. The precedent does not support
 14 Defendants’ argument that state law should be set aside in search of a federal common law of R.S. 2477
 15 easements.

16 The reason Plaintiff’s summary judgment motion relied so heavily on the Tenth Circuit case, *Southern*
 17 *Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 735 (10th Cir. 2006), is because that case
 18 meticulously addressed the governing precedent and rationally incorporated it into its decision. The bottom line
 19 of that case is that the law of the state in which the road is located governs the establishment of road easements
 20 pursuant to R.S. 2477. State law is incorporated into federal law for this purpose. States and counties have
 21 relied on this interpretation from 1866 to the present, and the roads that were created in that time form a large
 22 part of the highway system in Inyo County and many other Western jurisdictions today.

23 California law is unambiguous on the matter. Where a road has formed, and that road is taken into a
 24 county road system by resolution of the board of supervisors, that road is a county road and part of the county
 25 highway system. See Memorandum in Support of Inyo County’s Motion for Summary Judgment (Document
 26 75-2), § IV. The Court will find no California law that disturbs the discretion of a county board of supervisors
 27 in this situation. Here the facts show, by any standard, that Last Chance Road came into being and that the
 28 County of Inyo Board of Supervisors, on various occasions between 1948 and 1976, by resolution, took that

1 road into the county road system. It is Plaintiff's contention that given these facts, the Court should grant
2 summary judgment to Plaintiff. Further, at the least, the Federal Defendants have not demonstrated that no
3 genuine issue of material fact exists to show that Last Chance Road was not constructed, was not used by the
4 public, and is not a highway.

5 Despite the preceding argument, there is a great deal of direct and circumstantial evidence that the road
6 has been constructed, has been used by the public, and is a highway.

7 **A. COUNTY'S CLAIM IS STATED WITH PARTICULARITY AND THE COURT HAS JURISDICTION.**

8 Under the Quiet Title Act, Plaintiff is required to plead with particularity the nature of the right, title, or
9 interest Plaintiff claims in the real property. Plaintiff has done so. Plaintiff's complaint, summary judgment
10 memorandum and this memorandum claim a road right-of-way for a county road, running from Willow Creek
11 Road south through Last Chance Wash to the rim of Last Chance Canyon. The course of the road is delineated
12 by description and by the use of topographic maps. The complaint and subsequent memoranda inform the
13 Federal Defendant of the manner in which Plaintiff accepted the offer of the R.S. 2477 easement – by resolution
14 of the Board of Supervisors and by public use, in accordance with California law. Additionally, the complaint
15 defined the scope of the easement sought. There is only one road heading south from the immediate vicinity of
16 Willow Spring, and that road is Last Chance Road. All maps used to define Last Chance Road accurately
17 located it in its present location, with varying levels of specificity. There could be no confusion regarding the
18 location of the road claimed by the County. Federal Defendants were accurately informed of Plaintiff's claim,
19 and have the ability to defend against it.

20 The Federal Defendants cite *Washington County v. U.S.*, 903 F.Supp. 40 (D.Utah 1995) to the effect that
21 the County has not pled its claim with particularity. In the *Washington* case, the county claimed some 800 road
22 segments by reference to a map and asserted that it owned such segments. The *Washington* case is not similar to
23 the claim of Inyo County. In the first instance, this case concerns one road segment, in a location known and
24 observed by all parties. While the County utilized federal government maps as evidence that the road existed
25 and as to its location, the County's claim to ownership is not predicated on the map and a bare assertion of
26 ownership. The County has introduced proof that its Board of Supervisors accepted the easement to Last
27 Chance Road in accordance with California law by taking discrete, clear and public action. The USGS maps
28 used in this case are direct evidence of the existence of and official records of the road, and were used to support

1 that fact. But they are not the only proof of the road's existence. It is visible even now on the ground and all
 2 parties have examined it. Further, County personnel drove on the road and maintained it prior to 1976. This
 3 claim is not a bald assertion of ownership. By law, Inyo County took responsibility for this road, took liability
 4 for its maintenance, and accepted the duty to keep the road open for the public, and did so from at 1948 until the
 5 Federal Defendants closed it in 1995.

6 **B. LAST CHANCE ROAD WAS CONSTRUCTED BY THE PUBLIC AND THE COUNTY.**

7 There are many ways by which a road may be constructed and there is no inherent reason to require that
 8 specialized equipment and personnel be used. The type of construction needed would logically follow from the
 9 type of road to be constructed and its function. It is not illogical to consider the application of force and effort
 10 in the form of automobiles traveling a single route as "construction" in the appropriate circumstance. Federal
 11 Defendant's road expert, Ainsley Holeso was correct when he said "I mean you can see by the wear -- I mean
 12 there's evidence [of a road] where there's wear. Where people utilize a road will create a road, that you can see
 13 evidence of wear." Deposition of Ainsley Holeso, 12:15-25 (Attachment C to this document).

14 In other words, the passage of vehicles, over a period of time, can create a road. This is a reality that is
 15 accepted by both California courts and, in the recent past, the U.S. Department of Interior. The standard in
 16 California is set forth in *Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207 (Cal. 2nd Dist. 1945): "The
 17 strongest evidence as to the extent of the travel was the fact that the road did come into existence through public
 18 use. In other words, it came to be a road by means of being used as a road and in the same fashion that many
 19 other mountain roads have come into existence." *Id.* at 848.

20 Last Chance Road did not carry the traffic that the road in *Ball* did. Yet, the evidence from Mr. Holeso
 21 is that there is a distinct roadway visible from Willow Creek Road looking at Last Chance Road. In his
 22 experience such a roadway may be created by the passage of vehicles. In other words, in the desert it may often
 23 not be necessary to use heavy equipment to create a road. Defendants currently propose a different standard for
 24 "construction", but it is interesting to look at the recent policy of the Department of the Interior pertaining to
 25 R.S. 2477 roads. This policy was approved by the Secretary Hodel and was in place from 1988 to 1991:
 26 Construction is a physical act of readying the highway for use by the public according to the
 27 available or intended mode of transportation - foot, horse, vehicle, etc. Removing high
 28 vegetation, moving large rocks out the way, or filling low spots, etc., may be sufficient as
 construction for a particular case. ... Road maintenance over several years may equal actual
 construction. The passage of vehicles by users over time may equal actual construction.

Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS-2477), Adopted December 1, 1988. (Repealed)

Under this recent federal policy, Last Chance Road was constructed. It was constructed to the level of a dirt one-lane road with a large turnaround at the terminus, the intended mode of transportation, by the passage of vehicles and by maintenance activities.

Defendants conclude that the County lacks evidence of either construction or public use of Last Chance Road. What this conclusion ignores, among the other evidence described, presented and discussed herein, is what, to the Plaintiff, is the most obvious point: Last Chance Road has been in existence for a hundred years. Defendants offer no evidence or explanation of how a road, lacking construction or public use, springs into being and maintains itself over such a lengthy period of time. The fact of the matter is that the existence of the road over the ages is clear evidence of both construction and public use, and both federal and state law recognize this fact. Put another way, it is evidence minimally, the public use constructed the road.

Defendants cite *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1 (1896) for the proposition that “construction” means construction of the improvement for which the easement was granted. This case concerned the acceptance of an easement for a ditch. There is no small difference between the construction of a road and the construction of a ditch. From the perspective of common sense, a ditch must be dug to be useful at all. A ditch is unlikely to arise due to use as a ditch. This mandates mechanical construction. When, in that case, the court held that the ditch must be constructed to show acceptance of the offered grant, it simply held that the ditch must be created to accept the right-of-way. In fact, the ditch itself would be evidence of construction. A court would be unlikely to require further proof of construction of an existing ditch; the construction would be assumed from the fact the ditch existed. The holding in the *Bear Lake* case was that until the ditch was created, the easement was not accepted.

Last Chance Road has been created. Plaintiff does not seek an easement derived from holding unimproved land. On Last Chance Road, even today, there are signs of construction. There are branches removed from a tree along the road. Deposition of Holeso, 18:16-19. The worn path of the road is observable from Willow Creek Road. Deposition of Holeso, 12:15-25. There is the obvious sign of a two wheel track as the road leaves the Wash Section. Deposition of Holeso, 20:2-18. Like the ditch, the fact that the road exists may be taken as the fact that the road was constructed.

1 Further evidence of construction and maintenance of Last Chance Road is the fact that in 1948 Inyo
2 County undertook the duty to maintain the road, accepted funds from the state for maintenance, and accepted the
3 liability for not doing so. Under previous DOI policy, this legal obligation of itself is evidence of a highway.
4 And finally, of course, is the evidence provided by Mr. Huarte of Inyo County. Mr. Huarte graded Last Chance
5 Road on three separate occasions between 1970 and 1975. For a dirt road, grading with heavy road equipment
6 would be maintenance, but it would also be construction. If the road had not already existed, running the grader
7 over it would have constructed it.

8 **C. LAST CHANCE ROAD WAS USED BY THE PUBLIC.**

9 Federal Defendants invoke *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425
10 F.3d 735, 772, for the proposition that public use of a road is necessary to accept a right-of-way. The case does
11 not stand for that proposition. It stands for the proposition that state law determines how an offer of a road
12 easement must be accepted. Utah, in which the road was located, required continuous public use of the road for
13 ten years to accept a road dedication. It was this state law requirement that encouraged the court to ponder what
14 type of public use could constitute acceptance of the offered easement.

15 In California, acceptance of an offer of right-of-way by a county board of supervisors is determinative
16 of the matter. Under *Southern Utah Wilderness Alliance v. Bureau of Land Management*, that acceptance would
17 be determinative as well. California also allows acceptance of easements by public use, and gives particular
18 deference to public use accompanied by an imperfect acceptance by a board of supervisors. The Last Chance
19 Road right-of-way was accepted by that criteria as well.

20 It is simply implausible that a road that existed for over a hundred years was used by only a few persons
21 for private purposes. There is no indication that the road served a private enterprise, or was built by a private
22 individual for personal access or business purposes. Last Chance Road served as a route into and out of Death
23 Valley at a time when the area teemed with miners. It was a route that ran from spring to spring and from
24 Willow Springs Road to Death Valley Road. It was always part of a larger system of communication. When
25 Inyo County began maintaining the road it took on a greater public purpose. In the seventies, Mr. Huarte used
26 the road as a member of the public and observed others do so as well. The road now serves as access to one of
27 the most spectacular overlooks in the Last Chance Mountains in a national park that is used by the public for the
28 purpose of observing spectacular sights. It provides access to a trail that descends into the badlands of Last

1 Chance Canyon. Holeso Deposition: 24:17-21. There is no apparent reason for Last Chance Road to exist other
 2 than for use by the public, and it is evident from its existence that the public used it.

3 **D. LAST CHANCE ROAD IS A HIGHWAY.**

4 Defendants, without citation, create a definition of “highway”: “a road used by the general public to
 5 travel between identifiable destinations with sufficient frequency and duration necessary to make it a significant
 6 road in the areas in which it is located.” Defendants also rely on Webster for a more restrictive definition of
 7 “highway”: “a road connecting one town or city to another.” Defendants are mistaken in their belief that Last
 8 Chance Road lacks the gravitas to be a highway, either historically or currently. Historically it served as a route
 9 of survival, running from spring to spring in an arid and dangerous part of the desert. Most recently, it served as
 10 access to an interesting trailhead and to a stunning viewpoint; an overlook of the magnificent badlands at the
 11 head of Last Chance Canyon. Perhaps in the world of federal road-making, the terminus of Last Chance Road
 12 has nothing to offer. But to Inyo County, it offers a spectacular overlook in a spectacular area. The public
 13 comes to Death Valley to view the geology, and Inyo County directly benefits from those visits. Last Chance
 14 Road is reason for a hardy few to drive the dirt roads to north Death Valley and rewards those who do.

15 While Inyo County would argue that Last Chance Road meets the Defendant’s desired
 16 definition of highway, that definition has no grounding in law. The following is the definition of “highway”
 17 found in the California Political Code from 1899, in the time period when Last Chance Road was first laid out:
 18 “In all counties of this State public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges,
 19 laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public,
 20 or made such in actions for the partition of real property.” CALIFORNIA POLITICAL CODE § 2618 (1899)
 21 (repealed).

22 Further, the Political Code of that era gave boards of supervisors the authority to “[c]ause to be recorded
 23 as highways all highways which have become such by usage, dedication or abandonment to the public, or by
 24 any other means provided by law, and to prepare and record proper deeds and titles thereto.” CALIFORNIA
 25 POLITICAL CODE § 2643(2) (repealed). Under current law, the board of supervisors has plenary authority to
 26 establish a county highway.

1 A better federal definition of “highway” is found in the same Department of the Interior policy
2 from 1988 that defined “construction” for the purposes of R.S. 2477. It dealt with the issue of what
3 constitutes a highway as follows:

4 A public highway is a definitive route or way that is freely open for all to use. It need not
5 necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify. A toll
6 road or trail is still a public highway if the only limitation is the payment of the toll by all users.
7 Multiple ways through a general area may not qualify as a definite route, however, evidence may
8 show that one or another of the ways may qualify.

9 The inclusion of a highway in a State, county, or municipal road system constitutes being a public
10 highway.

11 Expenditure of construction or maintenance money by an appropriate public body is evidence of
12 the highway being a public highway.

13 Absent evidence to the contrary, a statement by an appropriate public body that the highway was
14 and still is considered a public highway will be accepted.

15 Many years ago, the California Supreme Court discussed highways as follows:

16 There is no merit in the appellant's contention that section 325 of the Code of Civil
17 Procedure, prescribing the conditions necessary to an adverse possession of the land, is applicable
18 to this question. Land used for a highway could not be enclosed or cultivated, and no
19 improvement thereof by the public authorities is necessary to constitute it a highway. The law
20 relating to highways is indicated by section 2618 of the Political Code, declaring that such
21 highways are roads, streets, alleys, etc., ‘laid out or erected as such by the public, or if laid out or
22 erected by others, dedicated or abandoned to the public.’ To accomplish such dedication or
23 abandonment and acceptance by the public, neither improvement of the way by public authority
24 nor payment of taxes by the public is necessary. All that is required is a dedication or
25 abandonment by the owner and an acceptance thereof by the public.

26 *Venice v. Short Line Beach Land Co.*, 181 P. 658, 659-660 (Cal. 1919).

27 Last Chance Road’s significance arises not only from the directness of its route to Death Valley,
28 or from its trailhead, or by its magnificent overlook, but by the fact that it came into being and existed for over
one hundred years – from the days of mule travel and the earliest automobiles to the era of jeeps and four-wheel-
drive vehicles. Its significance lies in its existence. Its use by the public is evidenced by its existence. It is not
a route that served a limited purpose and then was abandoned; it is a route that lasted through a century, until it
was closed by the Federal Defendants. By any definition, it qualifies as a highway.

VI.

REMEDIES UNDER THE QUIET TITLE ACT

A. COURT CAN ORDER REMOVAL OF BARRIERS.

In footnote 3 of Federal Defendants memorandum, Defendants state that the Court may not enter the injunctive relief sought by Plaintiff to remove the barrier from Last Chance Road and cease and desist from interfering with the County's and the public's traditional use of Last Chance Road. The relevant paragraph of the Quiet Title Act states:

The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

28 U.S.C. § 2409a(b).

The first clause of this paragraph implies that the United States may be disturbed in its possession or control of the Last Chance Road easement. It simply requires that before a court order doing so may take effect, the appeal of the decision must conclude and sixty days must pass.

B. COURT MAY NOT ORDER REMEDY OF PAYMENT.

Federal Defendants also assert in footnote 3 of their brief that the if Plaintiff's right-of-way is confirmed, the United States may retain the property and compensate the County for the taking. Plaintiff could not disagree more. A predicate to the proposition that the United States may retain possession of the property must be that the federal agency took the property in the first instance under the power of some authority. In this instance, the executive branch completely lacks the authority to occupy Inyo County's easement. Congress has expressed a continuing resolve to protect existing property rights when managing federal land. Congress specifically protected existing property rights when it passed the Federal Land Policy and Management Act, the Wilderness Act, and the California Desert Protection Act of 1994. *See* § V of Memorandum in Support of Inyo County's Motion for Summary Judgment (Document 75-2). Therefore, Congress specifically withheld authority from the executive branch to take Inyo County's property in Death Valley.

It would be a violation of state and federal law, and Article X of the Constitution of the United States, for the National Park Service to take Last Chance Road, assuming the County holds a valid easement. It is a

violation of California law to place a barrier in a public road. CAL. STREETS & HIGHWAYS CODE, Division 2, Chapter 6 (Obstructions and Injuries to County Highways). The County Road Commissioner is required by statute to remove the barrier. While the laws of the United States are supreme over the laws of the state, there is no federal statute that would trump State law in this case, quite the opposite. Federal statutes protect the County's property interest in the road. The creation and protection of local highways is a traditional power of the state, which has not been forfeited. That power is delegated to Inyo County. If the Park Service seizes a County road, in violation of California law and without the authorization of federal law, it assumes a power that is reserved to the State and delegated by the State to Inyo County. This is a violation of the United States Constitution. Less importantly, it is a violation of the federal Administrative Procedures Act, which generally prohibits a federal agency from acting beyond its authority.

Given these circumstances, if Plaintiff has a property right in its road, the Court may not allow the United States to retain possession of the road and simply pay compensation. To do so would allow a violation of California law, the Administrative Procedure Act and the United States Constitution. If the Court should find in favor of Plaintiff, and should the United States seek to retain possession of Last Chance Road, Plaintiff reserves the right to fully brief this issue.

VII. CONCLUSION

The Plaintiff respectfully moves the Court to deny the Federal Defendants' cross motion for summary judgment and moves the court to: Quiet title in and to Last Chance Road; order the Federal Defendant to remove all obstructions placed by it in Last Chance Road; order Federal Defendant to cease and desist from interfering with the County's and public's traditional use of Last Chance Road; and award the Plaintiff attorney fees and cost to the extent permitted by law.

DATED: November 22, 2010

Respectfully submitted,

/s/ Ralph H. Keller
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dg/Litigation/RS2477/Reply.112210