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

COUNTY OF INYO,	)	Case No: 1:06-cv-1502 AWI-DLB
	)	
Plaintiff,	)	<b>DEFENDANT-INTERVENORS</b>
	)	<b>SIERRA CLUB <u>ET AL.</u>'s</b>
	)	<b>MEMORANDUM OF LAW</b>
v.	)	<b>IN OPPOSITION TO</b>
	)	<b>PLAINTIFF'S MOTION</b>
	)	<b>FOR SUMMARY JUDGMENT</b>
UNITED STATES DEPARTMENT OF	)	
INTERIOR, <i>et al.</i>	)	
	)	Anthony W. Ishii
Defendants, and	)	United States District Judge
	)	
SIERRA CLUB, <i>et al.</i>	)	
	)	Hearing Date: November 22, 2010
Defendant-Intervenors.	)	Hearing Time: 1:30 PM
	)	Hearing Location: Courtroom 2, 8th Floor

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## INTRODUCTION

Under a repealed law known as R.S. 2477, Inyo County asserts a highway right-of-way for “Last Chance Road,” a half-mile route that is little more than a desert wash that dead-ends at a cliff at the edge of Last Chance Canyon. In its September 9 motion, the County seeks a declaration of title to the route, which presently lies inside designated wilderness in Death Valley National Park.

To win title to an R.S. 2477 right-of-way, claimants face a series of formidable burdens. Claimants must file their case under the Quiet Title Act. To ensure that claimants meet that law’s narrow waiver of sovereign immunity, they must plead their claim with specificity, identifying the precise nature, extent, and scope of the highway.

Claimants must also meet the three plain language requirements of R.S. 2477. First, they must show that the route was purposefully and physically “constructed” on the ground. Second, they must show that the route constructed was a “highway,” a route to an important destination with significant public use. Third, they must show that a highway was constructed before 1976 (the date of R.S. 2477’s repeal), and was constructed when the federal public land was not reserved or set aside for some other purpose.

Finally, because R.S. 2477 is a federal land grant, it must be narrowly construed. The Court, therefore, cannot find a claimant has established an R.S. 2477 right-of-way unless it finds the claimant has made all three of these showings after “any doubt” is resolved in the United States’ favor.

Inyo County fails to overcome any of these hurdles. The County fails to identify with particularity the location or length of its highway claim, relying on conflicting maps and incomplete and incorrect route descriptions. The County also has declined to identify the scope of its easement. Because Inyo County fails to meet the Quiet Title Act’s particularity requirement, this Court lacks jurisdiction over the County’s claim, and its claim must be dismissed.

If the Court nonetheless finds it has jurisdiction, the County fails to demonstrate, beyond any doubt, that Last Chance Road meets the plain-language tests for an R.S. 2477 right-of-way. The County admits it has little or no evidence of construction. Nor does the scant evidence show the route was a highway. Over the century of Last Chance Road’s alleged existence, the County has

1 found only one person who has hazy, contradictory memories of driving the route on only a few  
2 occasions. This is not the significant use required to meet the definition of a highway. The route  
3 also does not connect significant destinations; it dead-ends at a cliff. The maps the County provides  
4 do not agree on the route's location or endpoints. Finally, some of the minimal "evidence" the  
5 County offers relates to a 30+ year period during which the area was "reserved," and therefore  
6 unavailable for the establishment of an R.S. 2477 right.

7 Nor can Inyo County meet its considerable burden by alleging, as it does, that R.S. 2477  
8 incorporates state law, and thus that this Court may ignore R.S. 2477's plain-language requirements,  
9 including "construction." The County's evidence – two inscrutable resolutions, a few conflicting  
10 and questionable maps, and a single user – does not meet state law standards for a highway.

11 If the Court finds it has jurisdiction, it should therefore grant summary judgment to the  
12 United States because Inyo County cannot meet its burden of showing, beyond any doubt, that a  
13 single user and a few maps established Last Chance Road as an R.S. 2477 right-of-way. In the  
14 alternative, this Court should deny Inyo County's summary judgment motion because issues of  
15 material fact – the credibility of the County's witnesses and the veracity of its maps – are in dispute.

## 16 LEGAL STANDARDS

### 17 I. R.S. 2477

18 Under the 1866 law known as "R.S. 2477," Congress encouraged the development of  
19 transportation infrastructure by granting "the right of way for the construction of highways over  
20 public lands, not reserved for public uses." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253  
21 ("1866 Act") (codified at 43 U.S.C. § 932) (repealed). Congress repealed R.S. 2477 in 1976, but  
22 preserved pre-existing rights-of-way. See Federal Land Policy Management Act § 706(a)  
23 ("FLPMA"), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976).

## ARGUMENT

### **I. BECAUSE INYO COUNTY FAILS TO PLEAD ITS CLAIM TO LAST CHANCE ROAD WITH PARTICULARITY, THE COURT LACKS JURISDICTION OVER THE CLAIM.**

Under the Quiet Title Act's ("QTA's") narrow waiver of sovereign immunity, Inyo County must define with particularity the nature and extent of its claim against the United States. By presenting inconsistent and confusing evidence of the claimed road's location and by refusing to delineate the scope of its claimed right, Inyo County fails to identify the nature of its claim and meet this threshold QTA requirement. Accordingly, the County's claim must be dismissed because it does not fall within the limited scope of the QTA's waiver of sovereign immunity, depriving this Court of jurisdiction.<sup>1</sup>

#### **A. The Court's Jurisdiction Over Inyo County's Claim Is Limited By The Specific Conditions Of The Quiet Title Act's Narrow Waiver of Sovereign Immunity.**

In the absence of an unequivocal waiver of sovereign immunity, courts lack jurisdiction over claims against the United States. Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983); Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173 (9th Cir. 2007); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). Waivers of sovereign immunity must be strictly construed in favor of the United States. United States v. Nordic Vill. Inc., 503 U.S. 30, 34 (1992); Consejo de Desarrollo Economico, 482 F.3d at 1173. "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed . . . ." Block, 461 U.S. at 287; Fid. Exploration & Prod. Co. v. United States, 506 F.3d 1182, 1186 (9th Cir. 2007). Consequently, "the terms of [the United States'] waiver of sovereign immunity define the extent of the court's jurisdiction." United States v. Mottaz, 476 U.S. 834, 841 (1986); see also Block, 461 U.S. at 292 (running of statute of limitations, a condition of the QTA, deprives courts of jurisdiction to inquire into the merits of a QTA claim).

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<sup>1</sup> Pursuant to the Federal Rules, "[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

1 The QTA serves as a limited waiver of the United States' sovereign immunity with respect to  
 2 "civil action[s] . . . to adjudicate a disputed title to real property in which the United States claims an  
 3 interest." 28 U.S.C. § 2409a(a); see also Block, 461 U.S. at 280-86 (discussing the origin and effect  
 4 of the QTA). "Congress intended the QTA to provide the exclusive means by which adverse  
 5 claimants could challenge the United States' title to real property." Block, 461 U.S. at 286. The  
 6 scope of the QTA's waiver of sovereign immunity – and thereby a court's jurisdiction over a QTA  
 7 claim – is limited by the Act's specific provisions, which a claimant must "strictly observe[]." See  
 8 id. at 287; Fid. Exploration, 506 F.3d at 1186.

9 **B. The Quiet Title Act Requires Inyo County To Plead Its R.S. 2477 Claim With**  
 10 **Particularity.**

11 The QTA requires that "[t]he complaint shall set forth with particularity the nature of the  
 12 right, title, or interest which the plaintiff claims in the real property, the circumstances under which  
 13 it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d)  
 14 (emphasis added). Congress required that QTA claims be pleaded with particularity to ensure the  
 15 nature and extent of a claimed property right is defined; "otherwise district courts would be  
 16 empowered to quiet title to undefined lands." Denver ex rel. Bd. of Water Comm'rs. v. Bergland,  
 17 517 F. Supp. 155, 175 (D. Colo. 1981), aff'd in part and rev'd in part on other grounds, 695 F.2d  
 18 465, 484 (10th Cir. 1982).

19 The particularity requirement expressly limits the QTA's waiver of sovereign immunity and  
 20 must be strictly observed. Hazel Green Ranch, L.L.C. v. U. S. Dep't of Interior, 2010 WL 1342914,  
 21 at \*4 (E.D. Cal. Apr. 5, 2010) (attached as Exh. 1); see also Mottaz, 476 U.S. at 841. Accordingly, a  
 22 court must dismiss a QTA complaint that fails to identify specifically and consistently the location  
 23 and extent of the claimed property interest. For example, in Hazel Green Ranch, Judge Wanger of  
 24 this Court dismissed R.S. 2477 claims to two alleged highways because the complaint "describe[d]  
 25 the claimed interest in real property in a confusing and contradictory manner," using maps that  
 26 placed the roads at different locations and claiming different lengths of the routes. 2010 WL  
 27 1342914, at \*5-\*6; see also Washington County v. United States, 903 F. Supp. 40, 42 (D. Utah  
 28 1995) (dismissing R.S. 2477 claims because the "conclusory allegations" contained in the complaint

lacked “relevant details regarding the creation, use and extent of the right-of-way”).

**C. Because Inyo County Presents Inconsistent And Contradictory Evidence Of The Claimed Road’s Location, Endpoints, And Length, Its Claim Must Be Dismissed.**

Inyo County’s “evidence” supporting its claim is literally all over the map. Descriptions of the route are incomprehensible or wrong. The route appears in different locations on different maps. Maps contradict each other as to the route’s length and the points it allegedly connects. This confusing, contradictory evidence does not set forth with particularity the County’s claim, as required by the QTA. This Court must therefore dismiss Inyo County’s claim.

Inyo County’s complaint fails to describe a specific path of travel, location, or length for the claimed route. The Complaint states that Last Chance Road “is described in the . . . Road Register.” Complaint ¶ 78 (Oct. 25, 2006) Dkt. # 1-1. But the County now admits that the Road Register’s “description for the claimed Last Chance Road is incomplete and inaccurate.” Parties’ Stipulated List of Undisputed Facts ¶ 31 (Aug. 20, 2010) Dkt. # 91 (“Undisputed Facts”) (emphasis added). The County Road Register, prepared sometime after 1948, describes a route numbered 2046 and named “Last Chance” starting at R. 39-E, T. 21, Sec. 21, ¼ S 1, Point 2-southeast and ending at R. 39-E, T. 21, Sec. 36, ¼ S 4, Point 8, south boundary of District 2. Undisputed Facts ¶ 30; see also Complaint ¶ 78 (quoting Road Register description); Exh. J to Undisputed Facts (Road Register page). As Inyo County admits

[a]mong other deficiencies, the legal description places the road within Township 21, omitting any indication of either south or north . . . . Reference to USGS maps reveals that there is no Township 21 North, Range 39 East, in this area. 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 complaint [the 1957 USGS Magruder Map] in Township 7 South.

Undisputed Facts ¶ 31. In sum, the Road Register description places the route 84 miles south of its now-claimed location, or at non-existent map coordinates. This incomprehensible or highly inaccurate description fails to fix the path of Last Chance Road with specificity. Further, the Road Register describes the claimed route as four miles long, though “[t]he 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.” Undisputed Facts ¶ 33 (emphasis added). The length identified in the

1 Road Register also conflicts with the Complaint’s allegation that a “map of County maintained  
2 mileage” displays Last Chance Road as 0.6 of a mile long. Complaint ¶ 77.

3 Maps Inyo County cites in its complaint and summary judgment memorandum conflict with  
4 one another as to the route’s course, location, length, and endpoints. The Complaint references 1911  
5 data and a 1957 map to support its Last Chance Road claim. Complaint ¶ 74; see also Exh. 3 to Inyo  
6 Complaint (1957 Map). The Complaint’s reference to 1911 data appears to be a reference to the  
7 1913 USGS Lida Map, which was developed from surveys completed as late as 1911. Undisputed  
8 Facts ¶ 46. The route it shows begins in the north at the Willow Springs Road, heads southeast  
9 toward the northern rim of Last Chance Canyon, then continues south into Last Chance Canyon for a  
10 short distance before climbing up the Canyon’s western wall. See Exh. E to Undisputed Facts (1913  
11 map). The route’s southern end is at Last Chance Spring, a canyon to the west of Last Chance  
12 Canyon. Id.; Undisputed Facts ¶ 47. The route is about five miles long.

13 The 1957 USGS Magruder Mountain map, cited to and attached to the Complaint, shows a  
14 route at a different location.<sup>2</sup> The 1957 map depicts a route “heading southeast from the Willow  
15 Springs Road from roughly the same location as the ‘trail or path’ feature on the 1913 Lida map,”  
16 but then diverging from the route on the 1913 USGS map. See Exh. F to Undisputed Facts (1957  
17 map). Instead of going to Last Chance Spring, the route on the 1957 USGS map descends into Last  
18 Chance Canyon and stays there for several miles before connecting with a route at the northern end  
19 of Death Valley. Id.; Undisputed Facts ¶ 53. The 1957 route is about eight miles long and ends one  
20 mile east of Last Chance Spring and the 1913 route’s terminus, in the next canyon over. Undisputed  
21 Facts ¶ 54. In short, the alleged Last Chance Road goes two different places by two different routes  
22 on the two maps.

23 Further, the routes depicted on both the 1957 USGS map and the 1913 USGS map diverge  
24 significantly from the path the County now appears to claim in its memorandum. The County now  
25 appears to claim a route that largely matches the four-wheel drive “trail” depicted on yet another  
26

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27 <sup>2</sup> The Complaint also alleges that the route “is further and more particularly described by the federal  
28 government at Exhibit 3,” which attaches the 1957 USGS Magruder Mountain map. Complaint  
¶ 79; Exh. 3 to Complaint.

map – the 1987 USGS Last Chance Mountain map. See Undisputed Facts ¶ 62. This route runs 0.52 miles from Willow Springs Road in the north to the rim overlooking Last Chance Canyon to the south where it dead-ends at a steep cliff. See Undisputed Facts ¶¶ 44, 62. Both the 1913 and 1957 maps show a route that traverses down the steep cliff and continues for miles. See Exhs. E and F to Undisputed Facts.

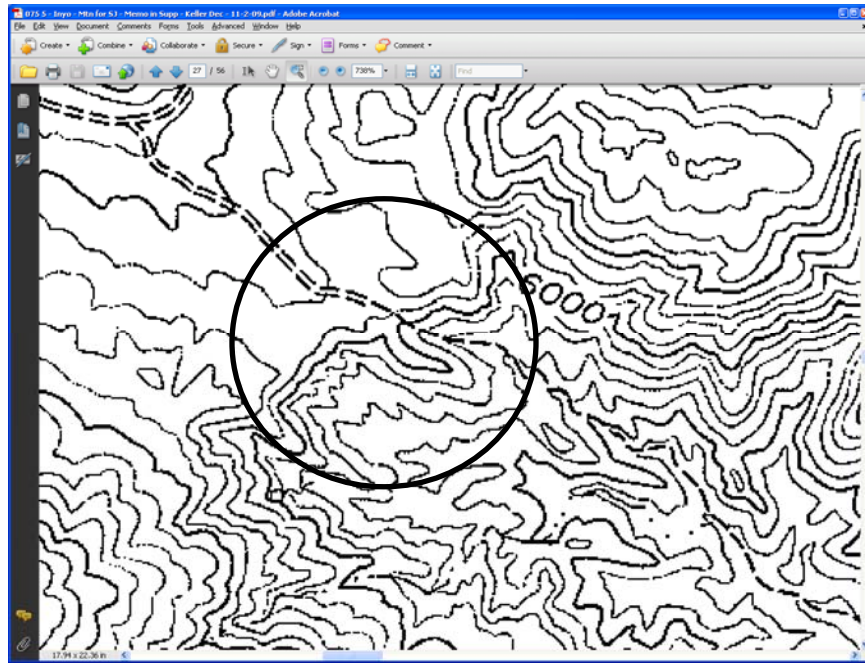
The 1957 map and the 1987 map also each show a route that reaches the rim overlooking Last Chance Canyon, but at different locations.<sup>3</sup> Inyo County agrees that

[t]he 1987 Last Chance Mountain map depicts a significant portion of the Last Chance Road in a different location than the 1957 Magruder Mountain map. On both the 1957 Magruder Mountain map and the 1987 Last Chance Mountain map, the depicted route initially follows a wash south from Willow Springs Road. On the 1957 Magruder Mountain map, the route is shown as continuing in a wash in a southeasterly direction to the rim of Last Chance Canyon. However, on the 1987 Last Chance Mountain map, approximately two-thirds of the way up that wash (south) toward the rim of Last Chance Canyon, the route climbs out of the wash and proceeds directly south to the rim of the canyon. The 1957 Magruder Mountain map and the 1987 Last Chance Mountain map show the route reaching the rim of Last Chance Canyon at locations approximately 900 feet apart from one another.

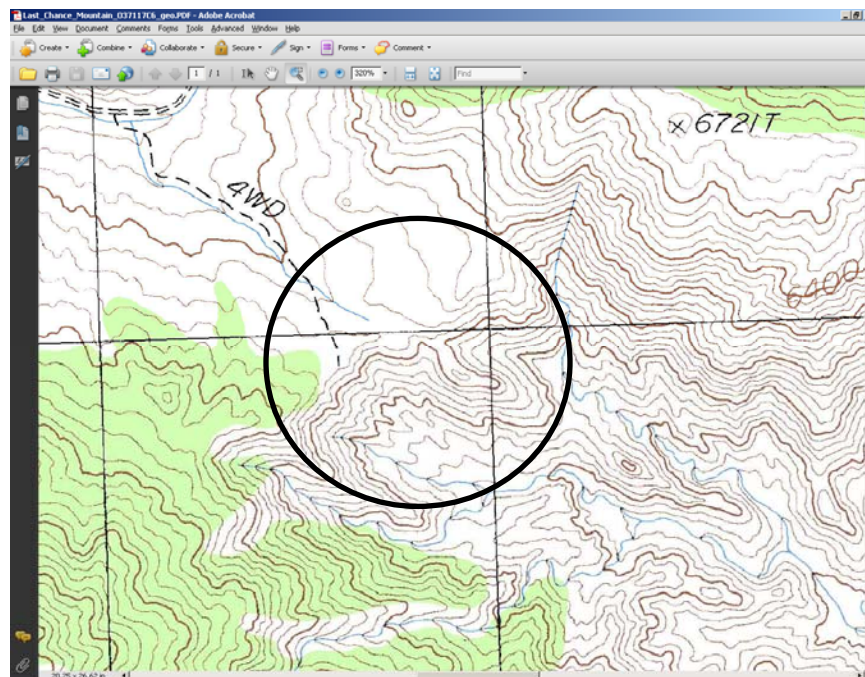
Undisputed Facts ¶ 58 (emphasis added) (citations omitted); see also Figures 1 and 2, infra (comparing relevant portions of 1957 and 1987 USGS maps); Declaration of Douglas Pflugh (comparing maps) (attached as Exh. 2).

Despite the fact that the supposed Last Chance Road is depicted in different locations on the 1957 USGS map and the 1987 USGS map, and that the route on the 1987 USGS map dead-ends at the canyon rim while those on the 1957 and 1913 maps descend into Last Chance Canyon, the County asserts that both the 1913 and 1957 maps support its claim to public use of a highway at a

<sup>3</sup> The 1913 USGS map is of such large scale that it is impossible to tell whether the northern-most half-mile of the route on that map matches that part of the route on the 1957 Magruder Mountain map or that part of the route on the 1987 Last Chance Mountain map, or a different route altogether. Undisputed Facts ¶ 60.



**Figure 1. Excerpt of 1957 USGS Magruder Mountain map.** Area in the northwest part of the circle shows the route veering nearly due east as it approaches the rim of Last Chance Canyon; then passing east of a prominent ridge as it continues as a trail down the canyon (to the southeast). From Second Declaration of Douglas C. Pflugh (Aug. 20, 2010) ("Pflugh Decl."), attached as Exh. 2.



**Figure 2. Excerpt of 1987 USGS Last Chance Mountain map.** Area in the northwest part of the circle shows the route leaving a wash and turning nearly due south, ending as it hits the rim of Last Chance Canyon. The route on the 1987 map terminates at the canyon rim significantly west of the prominent ridge where the route, as depicted on the 1957 USGS map, continues as a trail down the canyon (to the southeast). From Pflugh Decl.(attached as Exh. 2).

single, different location. Inyo County's Mem. in Support of Mot. For Summ. J. 18-19 (Sept. 9, 2010) Dkt. # 92-1 ("Inyo Br.").<sup>4</sup>

Further, in its summary judgment memorandum, the County equivocates on the precise extent of the route. The County's memorandum alleges that it seeks a route of indeterminate length, "approximately one-half to three-quarters mile long." Inyo Br. 1 n.1; see also id. at 2 (the claimed road "climbs south for about one-half to three-quarters mile"). This indicates Inyo County still is not certain to which route, exactly, it seeks title.

In sum, four years after filing this case, the County cannot state with particularity the location, endpoints, and length of Last Chance Road. It continues to rely on conflicting evidence and maps rather than doing what it must: pick a route at one precise location, so that the Court and the parties can determine what property right the County seeks. Because it fails to choose a precise route, the County's claim must be dismissed. Hazel Green Ranch is directly on point. Just as Inyo County relies on an incomprehensible Road Register and conflicting maps to describe the claimed road, the complaint in Hazel Green Ranch identified the route with a number of conflicting maps and differing descriptions. See 2010 WL 1342914, at \*5-\*6. The Court found that the complaint's route descriptions were characterized by "[i]nconsistency and [a]mbiguity," just as Inyo County's complaint is. See id. at \*5. As in Hazel Green Ranch, Inyo County's claimed interest in real property violates the "plain language of the QTA requiring particularity in [its] description of the claimed real property interest" because it relies upon incorrect, inconsistent, and contradictory

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<sup>4</sup> Further, the County is not even clear whether it claims the precise route on the 1987 USGS map. The 1987 USGS map depicts the Last Chance route for 100-200 yards at its northern end turning off the Willow Springs Road at a 90-degree angle, then taking a 90-degree turn to the left (northeast) and paralleling the Willow Springs Wash for a hundred yards or so, and then taking a 90-degree turn to the right (southeast) as it intersects and travels up Last Chance Wash. See Exh. G to Undisputed Facts (1987 map); Undisputed Facts ¶ 66. Mr. Leonard Huarte, an Inyo County Roads Department equipment operator, 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 as depicted on the 1987 USGS map. Undisputed Facts ¶ 66. Mr. Huarte testified that the road instead turned off of Willow Springs Road at approximately a 90-degree angle (although, with graded "wings" allowing for a less acute turn off of or back onto Willow Springs Road) and then continued directly up the Last Chance wash toward the south. Id. Another Inyo County witness, Roads Department Supervisor Bernard Pederson testified similarly, stating that, while not certain, it appeared to him that Last Chance Road went off the Willow Springs Road, crossed the Willow Springs Wash at a 90-degree angle, and then directly entered the Last Chance Wash. Id. Both Mr. Huarte's and Mr. Pederson's descriptions conflict with the route as depicted on the 1987 USGS map.

evidence. See id. at \*6. Inyo County's claim must therefore be dismissed.

**D. Because Inyo County Refuses To Describe The Scope Of Its Claimed Right-Of-Way, Its Claim Must Be Dismissed.**

An R.S. 2477 right-of-way is an easement. Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993). As such, it is not a fee simple interest, but a right to use land in specific and identified ways. See Restatement (Third) of Property: Servitudes § 1.2(1) (defining an easement as creating "a nonpossessory right to enter and use land in the possession of another and obligat[ing] the possessor not to interfere with the uses authorized by the easement") (emphasis added); S. Utah Wilderness Alliance v. Bureau of Land Management ("SUWA v. BLM"), 425 F.3d 735, 747 (10th Cir. 2006) (an R.S. 2477 "right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way.") (emphasis added). As the Tenth Circuit put it in discussing R.S. 2477, "[t]he 'scope' of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as the uses to which it has been put." Sierra Club v. Hodel, 848 F.2d 1068, 1079 n.9 (10th Cir. 1988) (emphasis added), overruled on other grounds, Village of Los Arcos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992). Because the bundle of rights that make up an R.S. 2477 right-of-way – that is, its scope – is defined in part by the historical uses to which it has been put, those uses must be described with particularity.

Although Inyo County's complaint makes several unsubstantiated and incomplete allegations as to the scope of its claimed right-of-way, the County now declines to address the right-of-way's scope, and specifically asks the Court to avoid the question. Inyo Br. 19-20.<sup>5</sup> The County alleges

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<sup>5</sup> Inyo County's complaint alleges, for example, that Last Chance Road "was used primarily for recreation, sightseeing, law enforcement, land management, and traveling in the area." Complaint ¶ 74. However, the only evidence of any motor vehicle use of the area is the suspect testimony of Mr. Huarte, who alleges only that he drove on the route on several occasions in the 1970s for recreational hunting and that he had seen "some other hunters once in a while" on the route. Undisputed Facts ¶ 93. Inyo County has produced no evidence of any of the other uses alleged in the Complaint prior to October 1976. Further, the County alleges that the scope of the Last Chance right-of-way includes the right to widen the current dirt track "at least to the extent of a two-lane road to allow travelers to pass each other." Complaint ¶ 24 (citation & quotations omitted). The Complaint also asserts the right to improve the road "without [National Park Service] authorization." Id. ¶ 23. In his deposition, Inyo County Public Works Director and Roads Commissioner Bernard Pederson testified that the County claimed a right-of-way of up to 60 feet in width, though the current disturbed width of the route is no more than 12 feet. Undisputed Facts ¶ 95. Neither the

1 that any dispute as to scope is not ripe, “not judiciable,” and that adjudicating the right-of-way’s  
 2 scope would be “bad policy” based on the current “undeveloped record.” *Id.* Inyo County states  
 3 that imprecision about the route’s scope is unimportant because “[t]he route of Last Chance Road  
 4 need not be delimited for the purposes of this action.” *Id.* at 18 (emphasis added).

5 But Inyo County cannot avoid describing the right-of-way’s scope, nor can this Court, in a  
 6 ruling on the County’s claim, avoid “delimiting” the right-of-way’s scope. Title to a right-of-way is  
 7 meaningless apart from the right-of-way’s scope. Inyo County’s argument misperceives the nature  
 8 of the property interest at issue. Without defining in what “particular way” Inyo County claims it  
 9 has a right to use the road, there is no R.S. 2477 right-of-way. Because Inyo County has failed to  
 10 identify or describe the scope of its easement, it has failed to define with particularity the interest it  
 11 claims in using the land. The QTA therefore requires dismissal of Inyo County’s complaint.<sup>6</sup>

## 12 **II. INYO COUNTY’S SUMMARY JUDGMENT MOTION MUST BE DENIED, AND** 13 **SUMMARY JUDGMENT ENTERED FOR THE UNITED STATES.**

14 If this Court concludes it has jurisdiction to address Inyo County’s motion for summary  
 15 judgment, that motion must be denied. The County cannot establish beyond any doubt that  
 16 undisputed facts show an R.S. 2477 right-of-way was established for Last Chance Road. In fact,  
 17 even viewing facts in the light most favorable to Inyo County, the scant facts the County cites do not  
 18 demonstrate Last Chance Road as a right-of-way. Thus not only must Inyo County’s motion be  
 19 denied, but the Court should grant summary judgment for the United States. In the alternative,  
 20 issues of material fact require denial of Inyo County’s motion.

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24 Complaint nor the summary judgment memorandum describes the type of alleged vehicle use –  
 25 bicycle, off-road all-terrain vehicle, motorcycle, four-wheel-drive vehicle, standard passenger  
 26 vehicle, eighteen-wheeler, etc. – that occurred on the claimed “highway.”

27 <sup>6</sup> The relief Inyo County seeks only underscores the fact that a right-of-way cannot be determined  
 28 apart from its scope. The County requests this Court “order Federal Defendant to cease and desist  
 from interfering with County’s and the public’s traditional use of Last Chance Road.” Inyo Br. 22.  
 But the County refuses to identify what those traditional uses were.

**A. Burden And Standard Of Proof For Summary Judgment**

**1. Inyo County Must Prove The Existence Of An R.S. 2477 Right-Of-Way With Any Doubts Resolved In Favor Of The United States.**

The party claiming an R.S. 2477 right-of-way against the United States must demonstrate that the right-of-way was created by the relevant date, with any doubt as to whether the right-of-way exists resolved in favor of the United States.

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, as with R.S. 2477 rights-of-way, 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. 36, 59 (1983) (quoting United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957)); see also N. Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 534 (1903) (“[G]rants 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) (“[S]tatutes granting privileges or relinquishing rights . . . must be construed favorably to the government and [] nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government.”).

The Ninth Circuit and other courts have repeatedly applied this principle to evaluate the existence and scope of an R.S. 2477 right-of-way: “Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government.” Adams, 3 F.3d at 1258 (citation 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 [R.S. 2477] grant must be resolved in the government’s favor.”); Sw. Four Wheel Drive Ass’n v. Bureau of Land Management, 271 F. Supp. 2d 1308, 1313 (D.N.M. 2003) (“Doubts as to whether land was reserved for public use [as addressed in R.S. 2477] is resolved in favor of the government.”), aff’d on other grounds, 363 F.3d 1069 (10th Cir. 2004); Fitzgerald v. United States, 932 F. Supp. 1195, 1201 (D. Ariz. 1996) (“Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government”), vacated as moot, No. CIV-94-0518-PCT-PRG (D. Ariz. July 19, 1999).

**2. To Win Summary Judgment, The Movant Must Show There Is No Genuine Issue Of Material Fact And That It Is Entitled To Judgment As A Matter Of Law.**

The party moving for summary judgment “bears the burden of establishing the absence of a genuine issue of material fact.” See Cline v. Indus. Maint. Eng’r & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000). Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The evidence must be “so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). “[D]isputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id. at 248; Poore v. Simpson Paper Co., 566 F.3d 922, 927 (9th Cir. 2009). Summary judgment is not appropriate where the judge or jury must make credibility determinations, weigh evidence, or draw inferences from the facts. Anderson, 477 U.S. at 255; Earp v. Ornoski, 431 F.3d 1158, 1170 (9th Cir. 2005); Hoover v. Switlik Parachute Co., 663 F.2d 964, 968 (9th Cir. 1981); S.E.C. v. Koracorp Indus., Inc., 575 F.2d 692, 699 (9th Cir. 1978) (“[S]ummary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can [] credibility issues be appropriately resolved.”). In evaluating Inyo County’s motion, the evidence of the Federal

1 Defendants and Intervenor-Defendants, as non-movants, “is to be believed, and all justifiable  
2 inferences are to be drawn in [their] favor.” Anderson, 477 U.S. at 255.

3 The County’s burden of showing no genuine issue of material fact is separate from, and in  
4 addition to, its burden of showing beyond any doubt that the County has demonstrated the existence  
5 of a right-of-way. In other words, the County must show there is no factual dispute – and with any  
6 doubt resolved in favor of Defendants – that the County meets all of the standards for an R.S. 2477  
7 right-of-way. See Anderson, 477 U.S. at 252-53 (explaining interaction of burden to establish  
8 summary judgment with plaintiff’s underlying burden of clear and convincing evidence).

9 **B. Inyo County Cannot Demonstrate That Last Chance Road Is An R.S. 2477  
10 Right-Of-Way Under The Plain Meaning Of The Statute.**

11 R.S. 2477 granted “the right of way for the construction of highways over public lands, not  
12 reserved for public uses.” See supra at 2. Given the statute’s plain language, Inyo County has the  
13 burden of proving, beyond “any doubt,” that Last Chance Road:

- 14 - was constructed;
- 15 - was a highway; and
- 16 - that construction and use as a highway occurred when the public land underlying the route  
17 was not reserved, and prior to October 1976 (the date of R.S. 2477’s repeal).

18 Inyo County almost entirely ignores these three federal law preconditions for establishing an  
19 R.S. 2477 right. Instead, Inyo County asserts that the creation of an R.S. 2477 right-of-way is  
20 “governed by the law of the state in which the road was located.” Inyo Br. 6 (emphasis added); see  
21 also id. at 9 (asserting that “federal law incorporates state law to determine if a right-of-way offered  
22 by R.S. 2477 was accepted and perfected”). California law, the County says, permits a county to  
23 establish an R.S. 2477 right by either: (1) adopting a resolution declaring the existence of a County  
24 highway; or (2) public use. Using this approach, the County seeks to entirely avoid R.S. 2477’s  
25 “construction” mandate.

26 Inyo County cannot do so. The law’s plain language requires “construction,” and this Court  
27 may not adopt a reading of state law that directly conflicts with the plain meaning of superior federal  
28 law. Applying this plain meaning, neither a resolution nor the public use the County asserts amounts

1 to “construction.” Nor do the contradictory, confused testimony of one man’s alleged use and a few  
 2 conflicting maps prove beyond any doubt the existence of a “highway.” In addition, the lands at  
 3 issue were reserved, and therefore unavailable for the establishment of an R.S. 2477 grant, for more  
 4 than thirty years after 1935. During that period, an R.S. 2477 right could not be established across  
 5 the area. A plain reading of R.S. 2477 therefore requires summary judgment against Inyo County,  
 6 and in favor of the United States. In the alternative, there are serious questions concerning the  
 7 credibility of the County’s witnesses and documentary evidence, requiring denial of the County’s  
 8 motion.

### 9 **1. R.S. 2477 Requires Construction.**

10 The first rule of statutory construction is to adhere to the statute’s plain language. “Absent a  
 11 clearly expressed legislative intention to the contrary, the plain language of the statute is ordinarily  
 12 conclusive.” United States v. Hunter, 101 F.3d 82, 84 (9th Cir. 1996) (citing Am. Tobacco Co. v.  
 13 Patterson, 456 U.S. 63, 68 (1982)). Every word in a statute must be given operative effect, not  
 14 rendered redundant or meaningless. It is a “cardinal principle of statutory construction that a statute  
 15 ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word  
 16 shall be superfluous, void, or insignificant.” TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal  
 17 quotations and citation omitted); see also Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d  
 18 908, 928 (9th Cir. 2004) (same). This “cardinal principle of statutory construction” applies in “any  
 19 setting,” and is as fundamental today as it was in the 19th century when Congress adopted R.S.  
 20 2477. Duncan v. Walker, 533 U.S. 167, 174 (2001); accord Platt v. Union Pac. R.R. Co., 99 U.S. 48,  
 21 58 (1878) (refusing to interpret a federal land grant in a manner rendering words superfluous).

22 The plain language of R.S. 2477 requires “construction,” meaning intentional labor to build a  
 23 highway. Contrary to Inyo County’s assertion, neither sporadic public use nor a mere  
 24 pronouncement that a route is a highway meets this federal standard.

#### 25 **a. Contemporaneous Dictionary Definitions Of “Construction”** 26 **Support The Conclusion That Highways Must Be Built, Not** **Declared Or Created By Use.**

27 The Court’s analysis must “begin[] with the language of the statute . . . . When interpreting a  
 28 statute, [courts] must give words their ‘ordinary or natural’ meaning.” Leocal v. Ashcroft, 543 U.S.

1 1, 8-9 (2004) (citations omitted); see also United States v. TRW Rifle 7.62X51mm Caliber, 447 F.3d  
 2 686, 689 (9th Cir. 2006) (quoting same). Where Congress does not define a specific term, as with  
 3 the term “construction,” the courts must “‘follow the common practice of consulting dictionary  
 4 definitions to clarify their ordinary meaning’ and look to how the terms were defined ‘at the time the  
 5 statute was adopted.’” TRW Rifle 7.62X51mm Caliber, 447 F.3d at 689 (quoting United States v.  
 6 Carter, 421 F.3d 909, 911 (9th Cir. 2005)).

7 Mid-19th-century dictionary definitions of “construction” require active “building” and the  
 8 performance of intentional work, as opposed to a declaration that a road exists or by mere passage of  
 9 vehicles. For example, in 1865 Webster’s Dictionary defined “construction” as

- 10 1. The act of constructing; the act of building, or of devising and forming; fabrication;  
 composition.
- 11 2. The manner of putting together the parts of any thing so as to give to the whole its  
 peculiar form; structure; conformation.

12 Noah Webster, American Dictionary of the English Language 36 (1865) (excerpts attached as  
 13 Exh. 3). The same dictionary listed the following synonyms for “construct”: to “build; erect; form;  
 14 make; originate; invent; fabricate.” Id. Similarly, an 1863 dictionary defined “construction” as

15 [t]he act of constructing; fabrication; [m]ode of constructing or building; structure;  
 16 conformation.

17 Joseph Worcester, Dictionary of the English Language 301 (1863) (excerpts attached as Exh. 4).

18 **b. The Supreme Court Interpreted “Construction” In The 1866 Act**  
 19 **To Require Intentional Work With Equipment.**

20 A fundamental rule of statutory interpretation is that there should normally be a single  
 21 definition of a common term occurring in several places within a statute. “[T]he normal rule of  
 22 statutory construction [is] that identical words used in different parts of the same act are intended to  
 23 have the same meaning.” Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (quotations and citations  
 24 omitted).<sup>7</sup>

25  
 26  
 27 <sup>7</sup> The presumption yields only where the context in which the words are used “warrant[s] the  
 28 conclusion that they were employed in different parts of the act with different intent.” Atl. Cleaners  
& Dryers v. United States, 286 U.S. 427, 433 (1932).

1 The Supreme Court in 1896 interpreted the word “construction” in another section of the  
 2 same 1866 Act of which R.S. 2477 was a part. R.S. 2477 was section 8 of the 1866 Act. Section 9  
 3 of the 1866 Act provided that “the right of way for the construction of ditches and canals for the  
 4 purposes aforesaid is hereby acknowledged and confirmed.” 14 Stat. 253. In Bear Lake & River  
 5 Waterworks & Irrigation Co. v. Garland, the Supreme Court held that no rights vest against the  
 6 government under section 9’s “construction” requirement without “the performance of any labor.”  
 7 164 U.S. 1, 18 (1896). “Until the completion of this work, or, in other words, until the performance  
 8 of the condition upon which the right . . . is based, the person taking possession has no title, legal or  
 9 equitable, as against the government.” Id. at 19 (emphasis added).<sup>8</sup>

10 The Ninth Circuit has emphasized that “all parts of a grant statute are to be read together”  
 11 with specific reference to the 1866 statute of which R.S. 2477 was a part. Gates of the Mountains,  
 12 732 F.2d at 1413 n.4 (citing Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618, 625 (1885)). The  
 13 Ninth Circuit specifically concluded that section 9, where the term “construction” was analyzed in  
 14 Bear Lake, should be read together with section 8, R.S. 2477. Id. Thus, because the Supreme Court  
 15 concluded that “construction” meant work and the performance of labor to complete a structure in  
 16 section 9 of the Act, the Ninth Circuit’s holding in Gates of the Mountains requires that  
 17 “construction” have the same meaning in the context of section 8 of the Act, or R.S. 2477.

18 Some might argue that the two parts of the 1866 Act should be interpreted differently  
 19 because a canal must be “constructed,” whereas a highway could be established by mere travel over  
 20 the land. As discussed below, that observation is not accurate, but even if true would not help Inyo  
 21 County: if a highway could be created by mere use of a path, then Congress’s deliberate choice of  
 22 the word “construction” into R.S. 2477 would be superfluous. Instead, it is a clear expression of  
 23 Congress’s intent to impose an independent requirement of building and performing work – the plain  
 24 meaning of “construction” – to accept the grant. Congress could have granted a permanent right-of-  
 25

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26 <sup>8</sup> Similarly, the Supreme Court has held that acceptance of a grant through “construction” under a  
 27 railroad land-grant statute required “actual construction,” including grading, placing ties, and laying  
 28 rails. Barlow v. N. Pac. Ry. Co., 240 U.S. 484, 485, 487 (1916); accord Minneapolis, St. Paul &  
Sault Ste. Marie Ry. Co. v. Doughty, 208 U.S. 251, 255 (1908) (“right of way does not exist before  
 actual construction”).

way simply for travel or for the repeated use of trails, or upon a declaration without work that a route on a map was a highway. It did not do so.

Contrary to the County's implication, Central Pacific Railway Co. v. Alameda County, 284 U.S. 463, 465-67 (1932), does not hold that the mere passage of vehicles in accordance with state law was sufficient to establish an R.S. 2477 right-of-way. See Inyo Br. 9. The question presented in Alameda was whether R.S. 2477 applied to a highway constructed before the statute's passage in 1866. 284 U.S. at 473 ("The section of the act of 1866 granting rights of way for the construction of highways . . . was . . . a voluntary recognition and confirmation of pre-existing rights . . ."). That construction had taken place within the meaning of the federal statute was never contested in that case. The Court noted that the "public highway" was "laid out . . . by the county in 1859, and ever since has been maintained." Id. at 465. In fact, the Court noted that the route "has served as one of the main arteries of travel between the bay regions of southern Alameda county and the Livermore Valley," indicating it was one of the major routes in the area. Id. at 465-66.<sup>9</sup>

**c. The Ninth Circuit Has Repeatedly Reiterated R.S. 2477's Construction Requirement.**

The Ninth Circuit has consistently presumed that R.S. 2477 roads were constructed or built. R.S. 2477 "operates prospectively to grant rights of way for highways constructed after its enactment." Gates of the Mountains, 732 F.2d at 1413 n.3 (emphasis added). "To establish an easement, the [claimant] must show that the road in question was built before the surrounding land lost its public character in 1906." Adams, 3 F.3d at 1258 (emphasis added). "[W]e will assume that the roads were 'highways' and that the County had the requisite share in their construction to come within the statute." Humboldt County, 684 F.2d at 1281 n.5 (emphasis added).<sup>10</sup>

<sup>9</sup> The Tenth Circuit, in SUWA v. BLM, briefly states that "construction" could mean "form," and that public use of a path could "form" a highway. 425 F.3d at 779, 781-82. The court's reasoning fails to consider that "construction" at the time was not used by Congress, dictionaries, or others to mean mere use, but rather, was consistently used to mean something requiring activity and building. See supra at 15-17.

<sup>10</sup> Ninth Circuit district courts have done the same. "[T]he terms of [R.S. 2477] was a grant in praesenti, which became effective upon the construction of the road in 1921." United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963) (emphasis added). "To establish an R.S. 2477 easement, plaintiffs must show that the road in question was built before the surrounding land was reserved for a National Forest." Fitzgerald, 932 F. Supp. at 1201 (emphasis added). "An

**d. Contemporaneous Agency Decisions and Usage Support The Interpretation That “Construction” Means The Purposeful Expenditure Of Labor To Form A Highway.**

The Interior Department interpretation most contemporary with the adoption of R.S. 2477 concluded that no R.S. 2477 right-of-way could be established before construction was complete. In Douglas County, Wash., the Interior Department weighed whether a County resolution claiming every “section line” – lines on a map circumscribing each square mile – met the standard for constructing a highway under R.S. 2477. 26 Pub. Lands Dec. 446 (1898) (attached as Exh. 5). The Department concluded the resolution did not result in a grant under R.S. 2477 because “[t]here is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed, or that their construction and maintenance is practicable.” Id. (emphasis added). R.S. 2477 cannot be used to claim a right-of-way in an area where a highway is planned but does not exist, the Department concluded, even if it has been adopted as a road by the county. “Whatever may be the scope of the statute under consideration it certainly 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. The Interior Department made clear that declaring a route a highway, without construction, was not enough to create an R.S. 2477 right.

Further bolstering the conclusion that “construction” at the time of R.S. 2477’s enactment meant intentional mechanical construction is the fact that technical manuals, federal and state legislation, and practice throughout the country agreed with that definition. Construction need not necessarily require bulldozing or use of other modern machines. But construction as it was understood at the time of R.S. 2477’s adoption did require purposeful acts to lay a foundation, dig ditches, and create culverts and road surfaces – activities that required tools and could not be accomplished through haphazard use of a path. For example, an 1837 engineering treatise by a

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R.S. 2477 road is a public highway constructed over public lands . . . .” Alleman v. United States, 372 F. Supp. 2d 1212, 1225 (D. Or. 2005) (emphasis added). “R.S. § 2477 establishes rights-of-way for highways constructed before its passage in 1866, and also operates prospectively to grant rights of way for highways constructed after its enactment.” In re Schugg, 384 B.R. 263, 278 (D. Ariz. 2008) (emphasis added, internal quotations and citations omitted).

1 leading authority addressed the practice of highway construction, discussing such topics as drainage,  
 2 materials, grading, laying a foundation, and creating road surfaces. Frederick Simms, A Treatise on  
 3 the Principles and Practice of Levelling, Showing its Application to Purposes of Civil Engineering  
 4 Particularly in the Construction of Roads 102-07 (1837) (excerpts attached as Exh. 6).

5 Highway construction activities were well known at the time of R.S. 2477's adoption and  
 6 before. The federal government's role in financing transportation infrastructure – then called  
 7 “internal improvements” – was one of the most important issues in the 19th century. See generally  
 8 Carter Goodrich, Government Promotion of American Canals and Railroads 1800-1890 1, 5, 9, 12,  
 9 19-21, 24-25 (1960) (excerpts attached as Exh. 7); Thomas Donaldson, The Public Domain Its  
 10 History with Statistics 257, 260 (Johnson Reprint Corp. 1970) (1884) (excerpts attached as Exh. 8).

11 As early as 1806, Congress appropriated funds for laying out and then constructing the National  
 12 Road from Cumberland, Maryland to the Ohio River. Act of March 29, 1806, ch. 19, 2 Stat. 357  
 13 (attached as Exh. 9). Congress specified that construction of the National Road include raising the  
 14 middle of the carriage way “with stone, earth, or gravel and sand . . . leaving or making . . . a ditch or  
 15 water-course on each side . . . and in no instance shall there be an elevation in said road, when  
 16 finished, greater than an angle of five degrees with the horizon.” Id. § 4, 2 Stat. 359. Other wagon  
 17 road grants by Congress also required substantial mechanical construction, see, e.g., Act of June 25,  
 18 1864, ch. 153, § 4, 13 Stat. 183, 184 (attached as Exh. 10), and the roads were designated public  
 19 highways, id. § 2, 13 Stat. 183; see also Act of July 2, 1864, ch. 213, § 2, 13 Stat. 355 (attached as  
 20 Exh. 11).

21 Congress understood that “construction” of roads and highways required significant work.  
 22 The same month Congress adopted R.S. 2477, it enacted two laws to grant the State of Oregon  
 23 public land to aid in the “construction” of “wagon road[s].” Act of July 4, 1866, ch. 167, § 1, 14  
 24 Stat. 86 (attached as Exh. 12); Act of July 5, 1866, ch. 174, § 1, 14 Stat. 89 (attached as Exh. 13).  
 25 These roads, which Congress directed “shall be and remain [] public highway[s],” were to be  
 26 “constructed” with a particular “width, gradation, and bridges, as to permit . . . regular use.” Act of  
 27 July 4, 1866, §§ 2-3, 14 Stat. 86; Act of July 5, 1866, §§ 2-3, 14 Stat. 89. Valuable public lands  
 28 were to be granted to the State “only as the work progresses,” and only when a section of the road

1 was “completed.” Act of July 4, 1866, §§ 1, 4, 14 Stat. 86-87 (emphasis added); Act of July 5, 1866,  
 2 §§ 1, 4, 14 Stat 89 (emphasis added).<sup>11</sup> The same year R.S. 2477 was adopted, a bill was introduced  
 3 for the “construction of wagon roads in Arizona and Utah Territories,” which required the roads to  
 4 be “located, surveyed and constructed” and further detailed construction to include “chopp[ing] out  
 5 of a uniform width of at least six rods, the road-bed to be at least thirty-two feet in width, and  
 6 constructed with such ditches, bridges, culverts, and sluices as may be necessary.” Senate Bill 91,  
 7 39th Cong., 1st Sess. at 2-3 (Jan. 22, 1866) (attached as Exh. 15).

8 The California legislature similarly understood that “construction” of highways was labor-  
 9 intensive and involved more than the passage of a few travelers. Developing such an infrastructure  
 10 required “construction” work that was understood to be separate from identifying a route on the  
 11 ground by “surveying” or “locating” the route. See, e.g., An Act to grant certain parties herein  
 12 named the right to construct and maintain a Turnpike or Toll Road from the Town of Sonora, in  
 13 Tuolumne County, ch. 164, §§ 1, 3, 1863-4 Cal. Stat. 155 (Mar. 5, 1864) (“Tuolumne Turnpike  
 14 Act”) (granting the right to “enter upon and occupy any public or private lands necessary to the  
 15 location or construction of said road” and distinguishing “locat[ing] said road upon the line run by  
 16 the Engineers” from “commenc[ing] the construction of said road”) (emphasis added) (attached as  
 17 Exh. 16); id. at §§ 2-3 (using the terms “build” and “construction” interchangeably); An Act to  
 18 Authorize R.C. Kirby and others to construct and maintain a Turnpike Road from the Town of Santa  
 19 Cruz, ch. 178, §§ 2, 5, 1863-4 Cal. Stat. 173, 174 (Mar. 15, 1864) (requiring expenditure of funds  
 20 within a year for “the actual construction of said road, exclusive of the cost of survey”) (emphasis  
 21 added) (attached as Exh. 17).

22 Congress enacted R.S. 2477 against this long-established backdrop of public highway  
 23 construction. Many land grants conveyed rights-of-way for railroads, canals, roads, and highways,  
 24 for the purposes of encouraging settlement of the interior and increasing the demand and price for  
 25 public lands. Paul Gates & Robert Swenson, History of Public Land Law Development 341-46

26  
 27 <sup>11</sup> See also Pamela Baldwin, Congressional Research Service Report for Congress, Highway Rights  
 28 of Way on Public Lands: R.S. 2477 and Disclaimers of Interest CRS-30 (Nov. 7, 2003), available at  
<http://www.policyarchive.org/handle/10207/bitstreams/1880.pdf> (describing 19th-century statutes  
 requiring actual construction) (excerpts attached as Exh. 14).

(1968) (excerpts attached as Exh. 18). Like other land-grant statutes, R.S. 2477 provided an incentive and reward for the expenditure of effort required to construct a highway. To be sure, R.S. 2477, as a general statute not directed to any particular state or route, did not contain the detailed specifications concerning the mode of construction found in statutes funding specific roads. But while Congress did not specify particular methodologies, it unambiguously required “construction,” a term that in the mid-19th century clearly demanded expenditure of significant labor and effort for road-building.

The plain language requirement of R.S. 2477 – that a highway be actually constructed – also makes sense from the perspective of the policy goals of Congress when it enacted the statute in the 1860s. There was no need at the time to grant a right-of-way for mere use of paths over federal land because access was already free. See, e.g., Buford v. Houtz, 133 U.S. 320, 326 (1890) (recognizing implied license for free use of public lands); McKelvey v. United States, 273 F. 410, 413 (9th Cir. 1921) (“[A]t the time the [law at issue in the case] was passed [in 1885] the general policy of Congress was in recognition of an implied license that . . . the public lands . . . should be free for all persons to pass over and through.”). In fact, the Ninth Circuit and other courts have rejected claims that the homestead laws created implied easements, since no easement was necessary to traverse public lands to access lands to be homesteaded. “Given the custom of unfettered use of public lands in 1862 when Congress passed the Homestead Act and the Supreme Court’s refusal to characterize a settler’s use of public lands as a vested property right, we conclude that Congress did not imply an easement over public lands into the 1862 Homestead Act.” Fitzgerald Living Trust v. United States, 460 F.3d 1259, 1265 (9th Cir. 2006); see also United States v. Jenks, 22 F.3d 1513, 1515 (10th Cir. 1994) (“Homesteaders’ unimpeded access across federal lands remained largely unchallenged by the federal government until [1891] . . .”). Just as Congress had no need to create in the 1862 Homestead Act a vested property right in the form of an easement (because settlers already had free access to and across the public lands), Congress had no need four years later to enact a law granting rights-of-way across the public lands for any paths or routes of public travel other than the express grant for “constructed” highways found in R.S. 2477. See Fitzgerald Living Trust, 460 F.3d at 1265.

1 R.S. 2477 provided an incentive for the construction of highways across the public lands,  
2 improving the nation's transportation infrastructure to benefit both private and public interests. The  
3 grant eliminated the risk that the right-of-way might disappear because of the subsequent disposal of  
4 public lands. The public land that the constructed highway crossed might, for example, be granted  
5 to private claimants under the Homestead Act, and those private grantees might in turn seek to  
6 restrict or eliminate access along the segment of the highway that crossed the newly-granted land.  
7 The individual who had expended effort and/or funds to construct a highway would then see that  
8 money and effort go to waste. R.S. 2477 protected individuals who expended resources to construct  
9 highways against later land claims by private land grantees – grantees who might well have never  
10 settled in the area except for the constructed highway.

11 The limitation of grants to the public for constructed highways, as opposed to those merely  
12 traveling across public land, further fulfills the role of R.S. 2477 as an incentive for private parties to  
13 develop a benefit of lasting value to the nation. A private party who is simply traveling in a regular  
14 manner across a route does not need an additional incentive to continue his travels. Indeed, if rights-  
15 of-way could vest by mere passage of people or vehicles, thousands of rights-of-way could be  
16 granted unintentionally by virtue of the paths taken by travelers – travelers who had no intention of  
17 constructing anything of lasting benefit to the nation.

18 Thus, an assumption that most roads at the time were unimproved actually supports the plain-  
19 meaning interpretation of R.S. 2477; the legislation and treatises cited above show that there was a  
20 demonstrable need to improve travel conditions in the West through highway construction, as  
21 opposed to continuing the practice of repeated travel over inferior, unimproved tracks. At the same  
22 time, it was necessary that the roads be open to the public. Otherwise, Congress would only be  
23 subsidizing activities that would benefit private interests, rather than the public at large.  
24 Accordingly, Congress also carefully chose the term “highways” for R.S. 2477, with the long-settled  
25 meaning that “highways” were necessarily open to the public.

26 In sum, Congress could have granted, but did not grant, a right-of-way for “the use of paths,”  
27 or for “the repeated passage of vehicles,” or for “the proclamation of highways.” Instead, to spur  
28

investment in and development of internal improvements, Congress granted a permanent right-of-way in exchange for the “construction” of highways.

## 2. State Law Cannot Eliminate R.S. 2477’s Construction Requirement.

Recognizing that it is unlikely to prevail if the Court gives “construction” its plain meaning, Inyo County asserts that the creation of an R.S. 2477 right-of-way is “governed by the law of the state in which the road was located.” Inyo Br. 6. California law, the County asserts, permits a county to win an R.S. 2477 right by adopting a resolution, or by public use, neither of which amounts to “construction” as mandated by Congress. But the Constitution and a century of federal court decisions require that state law give way where it conflicts with the plain language of federal law. Further, the County’s reliance on the out-of-circuit SUWA v. BLM is unpersuasive, since that case ignored basic canons of statutory interpretation.

Where Congress has legislated on a subject within its powers – such as disposition of federal lands – that legislation displaces any conflicting state law. More than a century ago, the Supreme Court explained:

[C]ongress, under the power conferred upon it by the constitution, ‘to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,’ has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise.

Van Brocklin v. Anderson, 117 U.S. 151, 168 (1886) (emphasis added) (citations omitted). “The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control.” Oregon, 295 U.S. at 27-28. If state law, including state common law, is to be used, it is considered “only in so far as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.” Id. at 28 (emphasis added). Federal courts “must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.” Jerome v. United States, 318 U.S. 101, 104 (1943) (emphasis added) (rejecting the use of state law to define a term in a federal statute); see also United States v. Patz, 584 F.2d 927, 930 (9th Cir. 1978) (also rejecting the use of state law to define a term in a federal statute); Brown v. McMahon, 722 F. Supp. 1573, 1577

n.3 (E.D. Cal. 1989) (“[I]n the absence of plain indications to the contrary, when Congress enacts a statute, it does not intend to make its application dependent upon state law.”). Based on these principles, the Ninth Circuit has held that courts interpreting federal land grant statutes should “limit[] their analysis to ascertaining what Congress originally intended in the grant,” and place state common law in a secondary role. See Idaho v. Hodel, 814 F.2d 1288, 1295 (9th Cir. 1987).

The Supreme Court has also specifically held that state common law must play a secondary role, if any, in cases involving federal land grant statutes – cases where “nothing passes except what is conveyed in clear language, and [] if there are doubts they are resolved for the Government.” W. Nuclear, Inc., 462 U.S. at 59. The Court has emphasized that “in construing a congressional grant, . . . the intent of Congress . . . should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties.” Mo., Kan. & Tex. R.R. Co. v. Kan. Pac. R.R. Co., 97 U.S. 491, 497 (1878) (emphasis added). The number or duration of state law cases does not alter the requirement that only state law consistent with the federal statute’s plain meaning may be relied upon; nor does it affect whether or not the state law is consistent with the statute’s plain meaning in the first place. “If we do our job of reading the statute whole, we have to give effect to this plain command, even if doing that will reverse the longstanding practice under the statute . . . .” Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (citation omitted).

Following Supreme Court precedent, the Ninth Circuit in right-of-way cases has rejected reliance on state common law when it has conflicted with federal statutes. The Ninth Circuit has applied this logic specifically in interpreting law regarding easements on federal land. In Adams, the Ninth Circuit rejected reliance on common law for determining the scope of an easement crossing National Forest land because, “[w]here the United States owns the servient estate for the benefit of the public, there are additional concerns focused on preservation of the land. Common law rules are applicable only when not preempted by statute.” 3 F.3d at 1259 (emphasis added). Similarly, in Gates of the Mountains, the Ninth Circuit rejected the application of Montana utilities law to its determination of the scope of an R.S. 2477 right-of-way because state law was inconsistent with federal law. 732 F.2d at 1413; see also Humboldt County, 684 F.2d at 1281-82 (exclusively

1 applying federal law to determine that the County’s recreational use of the road was inadequate to  
 2 establish a right-of-way under R.S. 2477, and to determine the meaning of the term “public lands” in  
 3 the statute).

4 Courts may fill gaps in federal statutes by, inter alia, incorporating state law. Kamen v.  
 5 Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991). But here there is no statutory gap to fill. Congress  
 6 declared unambiguously that “construction” is required to establish an R.S. 2477 right-of-way. State  
 7 law cannot contradict an explicit federal statutory provision under the guise of filling a gap. Indeed,  
 8 in a leading case concerning the applicability of state law in a federal statutory scheme, the Supreme  
 9 Court emphasized that “[i]n answering the central question of displacement of [state] law, we of  
 10 course would not contradict an explicit federal statutory provision.” O’Melveny & Myers v. Fed.  
 11 Deposit Ins. Corp., 512 U.S. 79, 85 (1994) (emphasis added); accord West v. Conrail, 481 U.S. 35,  
 12 40 n.6 (1987) (“The governing principle is that we borrow [from state law] only what is necessary to  
 13 fill the gap left by Congress.”).

14 Inyo County ignores Ninth Circuit precedent and canons of statutory interpretation in favor  
 15 of the Tenth Circuit’s interpretation in SUWA v. BLM, dropping into its brief a block quote nearly  
 16 five pages long. Inyo Br. 10-15 (citing SUWA v. BLM, 425 F.3d at 762-68). But SUWA v. BLM is  
 17 neither binding nor persuasive.

18 SUWA v. BLM begins its analysis properly, acknowledging that federal law governs  
 19 R.S. 2477 rights-of-way, and that state law can be used only to the extent that it is consistent with  
 20 federal law. 425 F.3d at 762. But then it takes a wrong turn. Rather than grounding its analysis in  
 21 the statute’s plain language at the time the law was passed – looking at what the term “construction”  
 22 meant in reference to highways in 1866 – the Tenth Circuit bases its analysis upon the subsequent  
 23 treatment of R.S. 2477 by state courts. Those state courts ignored the word “construction,” and  
 24 determined instead whether a highway was “established” pursuant to state law, an entirely different  
 25 question. See id. at 763-64. In other words, state courts looked at the question of what was a  
 26 “highway” only, completely ignoring the meaning of the word “construction.” SUWA v. BLM then  
 27 rejects requiring actual construction – intentional work meant to build a highway – because “[i]n no  
 28 state was mechanical construction deemed necessary for acceptance.” Id. at 776. In other words,

1 because no state required “construction” to define a highway under state law, the fact that R.S. 2477  
2 required “construction” could be ignored.

3 This turns the process of statutory interpretation on its head. As SUWA v. BLM  
4 acknowledges, federal courts may rely on state common law only to the extent state common law is  
5 consistent with the federal statute. Id. at 762. Therefore the federal courts must first determine the  
6 federal law’s plain language to understand with what state law may conflict. This the Tenth Circuit  
7 failed to do.

8 The County also cites Standage Ventures for the proposition that an R.S. 2477 highway is  
9 granted when a highway is established “in accordance with state law.” Inyo Br. 9 (citing Standage  
10 Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974)). But that case does not stand for the  
11 proposition that state law can read the term “construction” out of R.S. 2477. In that case, the Ninth  
12 Circuit addressed whether a dispute over the scope of a right-of-way presented a federal question  
13 when both parties simply assumed that “a right-of-way came into existence automatically when a  
14 public highway was established across public lands in accordance with the law of the state.”  
15 Standage Ventures, 499 F.2d at 250 (emphasis added). The Ninth Circuit only reported what two  
16 parties incorrectly assumed. The Standage Ventures court nowhere addressed whether the plain  
17 language of R.S. 2477 requires “construction” or whether a state law eliminating the construction  
18 requirement could be consistent with Congress’s intent, as Inyo County presumes here.<sup>12</sup>

19 Further, R.S. 2477’s plain language cannot be altered because, as Inyo County argues, “the  
20 burden of proof upon local government to establish such acceptance might well be too high to meet.”  
21 Inyo Br. 8. Inyo County does not explain how or why its desire to easily obtain rights-of-way should  
22 outweigh well-settled canons of statutory construction. Contrary state law cannot supplant clear  
23

24  
25 <sup>12</sup> Inyo County also refers to a withdrawn Ninth Circuit opinion, which relied on Standage Ventures,  
26 and, without analysis of R.S. 2477’s plain language, assumed R.S. 2477 rights could be established  
27 in any way approved by state law. See Inyo Br. 14; Shultz v. Dep’t of Army, 10 F.3d 649, 655 (9th  
28 Cir. 1993), opinion withdrawn and superseded on reh’g, 96 F.3d 1222 (9th Cir. 1996). As a  
withdrawn opinion, Shultz is obviously not controlling, and the Ninth Circuit itself has cautioned  
against relying on it. See Hoefler v. Babbitt, 139 F.3d 726, 728 n.2 (9th Cir. 1998) (declining to  
look to the Shultz withdrawn opinion); see also In re Alsberg, 68 F.3d 312, 315 (9th Cir. 1995)  
(withdrawn opinions are not controlling precedent).

1 federal law simply because of supposed administrative difficulties that would inhere in following the  
 2 federal approach. See U.S. Const., art. VI, cl. 2 (Supremacy Clause).<sup>13</sup>

3 In sum, the most elemental canons of statutory construction require that courts give effect to  
 4 the plain meaning of a federal statute's words, while the Supremacy Clause and long-established  
 5 precedent mandate that state law cannot conflict with and render meaningless federal law. These  
 6 well-settled principles require that courts give meaning to the term "construction" in R.S. 2477 and  
 7 reject state law interpretations that would effectively eliminate the law's construction requirement.

8 **3. Inyo County Does Not Demonstrate Beyond Any Doubt That Last  
 9 Chance Road Was "Constructed."**

10 Inyo County asserts that state law permits the County to accept an R.S. 2477 right-of-way as  
 11 follows:

12 First, a public road is created if it is laid out or erected by the county. Second, if a  
 13 road is laid out or constructed by others, it may be dedicated to and accepted by the  
 14 public, either by public use or by acceptance by a county. A county indicates its  
 15 acceptance of a road dedication by resolution. Id.; CAL. STREET & HIGHWAYS  
 CODE § 25. Last Chance Road entails the second of these scenarios, in that there is  
no evidence that it was laid out or erected by Inyo County. Last Chance Road was  
established by others, dedicated to the public by the United States, and accepted both  
by resolution of Inyo County and by public use.

16 Inyo Br. 16 (emphasis added).

17 Inyo County thus argues that under a state law standard, Last Chance Road became an  
 18 R.S. 2477 right-of-way under one or both of the following two methods. First, it argues Last Chance  
 19 Road "was accepted [as a right-of-way] as a matter of law when the Inyo County Board of  
 20 Supervisors accepted it into the County Road System" via two resolutions in 1948. Inyo Br. 16; see  
 21 also id. at 1 ("acceptance occurred when the Inyo County Board of Supervisors adopted resolutions  
 22 taking Last Chance Road into the County highway system" in 1948). Second, the County argues  
 23

24 <sup>13</sup> Inyo County quotes SUWA v. BLM to the effect that repealed federal regulations show the  
 25 United States acquiesced in incorporating state law into R.S. 2477 to override the law's  
 26 "construction" requirement. Inyo Br. 13-14 (quoting SUWA v. BLM, 425 F.3d at 766). But  
 27 agencies are without power to issue regulations or adopt policies that contradict an express statutory  
 28 provision. In reviewing agency action, the first question is always "whether Congress has directly  
 spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the  
 matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent  
 of Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).  
 Here, Congress has directly spoken to the precise question by requiring "construction."

1 that the right-of-way was accepted by “public use.” *Id.* at 17-19.

2 Both of Inyo County’s arguments fail to demonstrate “construction,” even viewing the facts  
3 in the light most favorable to the County. A mere County declaration constructs nothing on the  
4 ground. The County has admitted it has no evidence of construction. And even ignoring the  
5 County’s admission, the totality of the County’s evidence does not show Last Chance Road was  
6 constructed when any doubts are, as they must be, resolved in favor of the United States.

7 **a. Neither County Resolutions Nor Desultory Public Use Amount To**  
8 **“Construction.”**

9 The County’s 1948 resolutions plainly did not construct a highway. Written words cannot  
10 construct anything on the ground. The resolutions merely proclaim a County “primary road system”  
11 and allude to maps and route descriptions that Inyo County has failed to locate. Undisputed Facts  
12 ¶¶ 15-20. The 1948 resolutions do not even mention or identify Last Chance Road. *See infra* at 40;  
13 Undisputed Facts ¶ 16. The County admits that “the adoption of a resolution purporting to adopt a  
14 road into the County’s [road] system does not necessarily indicate that the road is in existence.”  
15 Undisputed Facts ¶ 22 (emphasis added).

16 Inyo County’s argument that a network of R.S. 2477 highways can be established by a mere  
17 statement that the County had a road system – without identifying the routes, and with the admission  
18 that parts of that road system might not exist – would lead to preposterous results. It could lead to  
19 the County winning rights-of-way to any imagined route anywhere across federal public lands. Such  
20 an interpretation ignores the plain language of R.S. 2477 and the Supreme Court’s admonition that  
21 all doubts as to the existence of such rights be resolved in favor of the United States. The Interior  
22 Department in 1898 specifically rejected a similar county attempt to vest R.S. 2477 rights-of-way  
23 without proof of construction, finding it contrary to the statute’s requirements. Douglas County,  
24 Wash., 26 Pub. Lands Dec. 446; *see supra* at 19.

25 Nor does the “public use” the County alleges amount to “construction.” Traveling over the  
26 land is not the same as using labor to intentionally build a roadbed, which “construction” requires.  
27 Further, while the County alleges that the road was “established by others,” or “creat[ed]” by the  
28 public, it does not allege that such “establishment” or “creation” involved physically constructing the

1 Last Chance route. Inyo Br. 16 (“established by others”); *id.* at 2 (“creat[ed]” by the public).  
 2 Because Inyo County does not in its memorandum allege or attempt to demonstrate that Last Chance  
 3 Road was “constructed,” this Court must deny the County’s summary judgment motion.<sup>14</sup>

4 **b. Inyo County Admits It Has No Evidence Of Construction.**

5 Even if Inyo County chose to argue that Last Chance Road was constructed, it admits it has  
 6 no facts to support such an argument. “The County does not have any records, documentation or  
 7 other information indicating that the claimed Last Chance Road was mechanically constructed.”  
 8 Undisputed Facts ¶ 67. This admission is consistent with the County’s statement in its earlier  
 9 summary judgment motion (later withdrawn) that “[t]here is little evidence that Last Chance Road  
 10 was mechanically constructed prior to 1976.” Mem. In Support Of Inyo County’s Mot. For Summ.  
 11 J. 6 (Nov. 2, 2009) Dkt. # 75-2 (withdrawn by Dkt. # 83 (Dec. 31, 2009)). Based on these  
 12 admissions alone, Inyo County’s R.S. 2477 claim must be denied as a matter of law.

13 **c. None Of The Evidence Inyo County Cites Demonstrates Beyond**  
 14 **Any Doubt That Last Chance Road Was Constructed.**

15 Even if this Court ignores Inyo County’s admission, and examines the evidence the County  
 16 cites to support public use of the route, none of that evidence comes close to demonstrating, beyond  
 17 any doubt, that Last Chance Road was constructed prior to October 1976. To generally support its  
 18 case, Inyo County supplies evidence that is vague and riddled with doubt and contradiction. The  
 19 totality of Inyo County’s documentary and testimonial evidence is as follows:

- 20 -- a book discussing the use and settlement of the Death Valley area in the 19th and 20th  
 21 centuries (Richard Lingenfelter’s Death Valley and the Armargosa, A Land of Illusion)  
 22 as evidence that Last Chance Road was used in 1853 (*see* Inyo Br. 3) although the book  
 23 does not mention the road or describe precisely what route the travelers might have used  
 24 over an area of hundreds of square miles;
- 25 -- the 1913 USGS Lida map (*see* Inyo Br. 3, 18-19; Undisputed Facts ¶¶ 45-50; Exh. E to  
 26 Undisputed Facts), which portrays a five-mile “trail or path” from the Willow Springs  
 27 Road to Last Chance Springs, a route no other map shows, and whose existence is  
 28 contradicted by testimony;

<sup>14</sup> The County’s complaint alleges Last Chance Road was constructed, although it does not allege when, how, or by whom, or what evidence supports such an allegation. Complaint ¶ 75.

- 1 -- the two 1948 resolutions adopted by the Inyo County Board of Supervisors which  
2 proclaim a County “primary road system” and allude to maps and route descriptions but  
3 do not identify any routes by name, let alone specifically identify Last Chance Road (see  
4 Inyo Br. 4, 16-17; Undisputed Facts ¶¶ 15-23);
- 5 -- an undated Inyo County “Road Register” (see Inyo Br. 4, 16-17; Undisputed Facts ¶¶ 24-  
6 34; Exh. J to Undisputed Facts), which the County admits contains an “incomplete and  
7 inaccurate” description of Last Chance Road’s currently-claimed location (Undisputed  
8 Facts ¶ 31);
- 9 -- a 1955 CalTrans map of part of Inyo County (see Inyo Br. 4, 17-18; Undisputed Facts  
10 ¶¶ 35-38; Exh. A to Undisputed Facts), which “provides no topographic information and  
11 little other detail,” making it difficult to tell whether the Last Chance Road depicted on  
12 that map coincides with the County’s claim (Undisputed Facts ¶ 37);
- 13 -- the 1957 USGS Magruder Mountain map (see Inyo Br. 3, 18-19; Undisputed Facts ¶¶ 51-  
14 54; 63-65; Exh. F to Undisputed Facts), which portrays an unimproved dirt road running  
15 southwest from the Willow Springs Road, through Last Chance Canyon, displaying a  
16 route at a location contradicted by testimony and not found on earlier and later maps;
- 17 -- Inyo County’s 1975 Road Inventory, which “identifies a section of the County Road  
18 System map on which the route appears, and the length of the route . . . but provides no  
19 other location information” (Undisputed Facts ¶ 43; Exh. H to Undisputed Facts), making  
20 it impossible to tell the route’s location;
- 21 -- the 1987 USGS Last Chance Mountain map (see Inyo Br. 3, 19; Undisputed Facts ¶¶ 55-  
22 62; 66; Exh. G to Undisputed Facts), prepared after R.S. 2477 expired, which portrays a  
23 four-wheel drive “trail” running southwest from the Willow Springs Road, reaching the  
24 rim overlooking Last Chance Canyon at a significantly different location than the 1957  
25 USGS Magruder Mountain map;
- 26 -- a 1988 BLM map and other materials concerning the boundaries of Last Chance  
27 Mountain Wilderness Study Area (“WSA”) (see Inyo Br. 4-5), prepared after R.S. 2477  
28 expired, which depict that the WSA “excluded a narrow corridor around a feature on a  
map that appears to be a road heading southeast from Willow Springs Road towards Last  
Chance Canyon” (Undisputed Facts ¶ 11); and
- the testimony of Inyo County employees including equipment operator Leonard Huarte,  
the only person whom Inyo County could find to say he or she had used the route, and  
whose muddled, vague testimony about that use is disputed by others (see Inyo Br. 5, 18;  
Undisputed Facts ¶¶ 70-87, 92-98).

This sparse, contradicted information does not prove, beyond any doubt, that Last Chance Road was  
ever “constructed.”<sup>15</sup>

<sup>15</sup> Further, as discussed below, the land underlying Last Chance Road was not unreserved public  
land from November 1934 to December 1967. See infra at 48-51. As a result, no action between  
1934 and 1967 – including the adoption of the 1948 resolutions or any alleged public use during that  
period – could result in the grant of an R.S. 2477 right-of-way. See id.

**(1) The County's Documentary Evidence Does Not Demonstrate Beyond Doubt That Last Chance Road Was Constructed.**

None of the documentary evidence relied upon by Inyo County demonstrates beyond any doubt that Last Chance Road was ever constructed. First, Mr. Lingenfelter's book mentions two trips by explorers in 1853 in the general area of the Last Chance Mountains. See infra at 39-40. However, the book does not describe the route taken, nor does it aver that the travelers built a road as they passed through. Lingenfelter at 82, Exhibit A to Declaration of Ralph H. Keller, Dkt. # 75-5. The book does not show highway "construction," nor even travel on the path that the County now claims. It would be absurd for this Court to infer construction of a specific route from two trips somewhere in a hundreds-of-square-miles area.

Second, none of the records generated by Inyo County itself indicate the route was constructed. The 1948 resolutions through which the County allegedly adopted Last Chance Road into the County road system neither mention or identify Last Chance Road by name, nor make any statement at all about whether the routes included in the County road system were constructed. See Undisputed Facts ¶¶ 16, 23 ("The County may adopt roads by resolution that are neither constructed nor maintained."). Even if the resolution had mentioned Last Chance Road by name, the County admits that would not be evidence of construction. "[T]he adoption of a resolution purporting to adopt a road into the County's maintained mileage system does not necessarily indicate that the road is in existence," let alone that it was constructed. Undisputed Facts ¶ 22 (emphasis added). This County admission is dispositive; this Court cannot imagine the route's existence and fill in gaps in the County's evidence to find a highway was constructed when one may not have existed.

Further, while the County "Road Register" identifies Last Chance Road, it merely provides (incorrect) location information for the route. See supra at 5-6. As with the 1948 resolutions, the County admits that "the listing of roads in the Road Register does not necessarily indicate that the roads physically existed." Undisputed Facts ¶ 27. Inyo County's 1975 Road Inventory is simply a spreadsheet identifying a route and its length; it contains no statement concerning the route's origin or character. Undisputed Facts ¶ 43; Exh. H to Undisputed Facts.

1 Third, maps cited by the County likewise do not indicate the route was constructed. The  
 2 maps also disagree about the route's location, endpoints, and length, rendering a picture so clouded  
 3 by confusion and uncertainty that they cannot demonstrate "beyond any doubt" that use, let alone  
 4 construction, occurred on any one route. The 1913 USGS Lida map identifies a route in the general  
 5 area as a "trail or path," not a constructed highway. Undisputed Facts ¶ 47. No other map identifies  
 6 a route with the same southern endpoint. See supra at 6-7. The 1957 USGS Magruder Mountain  
 7 map identifies Last Chance Road as "unimproved dirt," indicating a lack of construction at that time.  
 8 Undisputed Facts ¶ 52. The USGS 1987 Last Chance Mountain map – irrelevant given that it was  
 9 derived from information and field surveys obtained after 1976, the latest date when R.S. 2477 rights  
 10 could be created – describes Last Chance Road as nothing more than a four-wheel-drive "trail" and  
 11 does not indicate that the route was constructed. Undisputed Facts ¶ 56. It shows a route at a  
 12 location that differs markedly from that on the 1957 map, and dead-ending at a cliff, something none  
 13 of the other maps show. See supra at 7. Similarly, the 1955 CalTrans map only indicates those  
 14 routes that are part of the County's maintained mileage system, meaning those routes taken into the  
 15 County road system. Undisputed Facts ¶ 35. As such, routes on the 1955 map may not even exist.  
 16 See Undisputed Facts ¶ 22.

17 Finally, Inyo County argues that the designation of the Last Chance Mountain WSA is  
 18 evidence of the route's construction, because the WSA boundary excluded a narrow area  
 19 surrounding a portion of the claimed route. Inyo Br. 5. However, BLM's exclusion does not mean  
 20 that the route was constructed at all, let alone that it was constructed before 1976. First, BLM  
 21 designated the WSA after FLPMA's 1976 repeal of R.S. 2477, so it has little value in determining  
 22 whether a route was constructed before that date. Second, pursuant to 43 U.S.C. § 1782(a), WSAs  
 23 are evaluated for the multiple characteristics of wilderness, and areas could have been excluded from  
 24 WSA boundaries for multiple reasons, not just the existence of a "constructed" highway. See 16  
 25 U.S.C. § 1131(c) (defining "wilderness" as, inter alia, an area: (1) "untrammelled by man"; (2)  
 26 lacking "permanent improvements or human habitation"; (3) "which [] generally appears to have  
 27 been affected primarily by the forces of nature, with the imprint of man's work substantially  
 28 unnoticeable"; (4) with "outstanding opportunities for solitude"; or (5) "which may also contain

ecological, geological, or other features of scientific, educational, scenic, or historical value”); see also BLM, First Progress Report to the Congress, California Desert Conservation Area 39-40 (1978) (describing BLM’s then-ongoing wilderness inventory process) (excerpts attached as Exh. 19); 43 U.S.C. § 1782(a) (WSA Inventory procedures).

Given these criteria, BLM may have excluded the area at issue for any number of reasons other than the presence of a constructed highway. See, e.g., Tri-County Cattlemen's Ass’n, 60 IBLA 305, 307 (1981) (describing the multiple criteria for including or excluding lands within WSAs); The Wilderness Soc’y, 81 IBLA 181, 186-87 (1984) (upholding BLM’s exclusion from WSAs of lands that did not meet the BLM’s definition of roads, but where there were noticeable impacts). BLM documentation does not explain the exclusion of the area from the WSA. Further, unlike other areas excluded from the Last Chance Mountain WSA, BLM’s inventory does not assert the Last Chance route area was cherry-stemmed because of the presence of a road. Compare BLM, CDCA Wilderness Inventory, Final Descriptive Narrative 7 (Mar. 31, 1979) Dkt. # 49-3 (discussing its exclusion of an area on the southern end of the WSA because there was a “maintained access road” to Last Chance Spring there).<sup>16</sup>

In sum, none of Inyo County’s documentary evidence even hints, let alone demonstrates beyond doubt, that Last Chance Road was constructed before October 1976.

**(2) The Vague, Contradictory Testimony Of One Man Concerning Route “Maintenance” Does Not Demonstrate Beyond Doubt That Last Chance Road Was Constructed.**

The only evidence of any kind that could even remotely be construed as pertaining to “construction” is the testimony of an Inyo County Roads Department equipment operator, Mr. Leonard Huarte. Inyo Br. 18. However, because his testimony is vague, inconsistent, self-contradictory, and contradicted by other witnesses, it cannot be relied on to show, beyond any doubt, that construction occurred on Last Chance Road.

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<sup>16</sup> The 1988 WSA map appears to be based on the 1957 USGS Magruder Mountain Map. Compare Exh. F to Undisputed Facts (1957 map) with Exh. D to Keller Declaration, Dkt. # 75-5 (WSA map). Because the route excluded from the WSA corresponds to that on the 1957 USGS map, it does not correspond to the route Inyo County apparently now claims. See supra at 6-7.

1 Initially, Mr. Huarte could not even identify Last Chance Road. When asked to locate Last  
2 Chance Road on a map in his initial March 2008 deposition, he could not do so. See Undisputed  
3 Facts ¶ 72. Instead, he marked a different route several miles to the east. Id. When he was  
4 redirected and asked about Last Chance Road at its actual location, he did not remember maintaining  
5 it. Undisputed Facts ¶ 73. Nor could he state definitively if Last Chance Road looked as if it had  
6 been maintained, or if other County employees had maintained it. Undisputed Facts ¶ 74 (Last  
7 Chance Road “‘kind of’ looked like it had been graded, but . . . [Mr. Huarte] didn’t know ‘if the old  
8 timers had graded it’ or not”). Mr. Huarte only alleged that he had driven the route in the 1970s for  
9 hunting. Id.

10 Two years later, however, after a trip to the area with his supervisor, Mr. Huarte changed his  
11 story, asserting that he had in the 1970s graded a wash which the County now claims as Last Chance  
12 Road. Undisputed Facts ¶¶ 75, 76. Such a radical change alone calls Mr. Huarte’s testimony into  
13 question. Further undermining his credibility, Mr. Huarte could provide no explanation for his  
14 shifting memories. He offered no reason why he did not remember grading Last Chance Road when  
15 asked about it in March 2008, except that he “totally forgot.” Undisputed Facts ¶¶ 76, 78. He never  
16 explained why he could have recalled driving on Last Chance Road on hunting trips and described  
17 that road in some detail in March 2008, but “totally forgot” that he actually maintained it on several  
18 occasions in the mid-1970s. Undisputed Facts ¶¶ 73-74, 79; Deposition of Leonard Huarte 24:9-16  
19 (June 9-10, 2010) (excerpts attached as Exh. 20) (“Second Huarte Deposition”), cited in Undisputed  
20 Facts ¶ 76. His 2008 testimony is even more incredible given his 2010 testimony that, at least once,  
21 he spent two to three weeks doing nothing but driving his road grader on Last Chance Road. See  
22 Undisputed Facts ¶ 78.

23 Further, Mr. Huarte could not explain why he would have graded Last Chance Road. He  
24 could not remember if he had been told to grade Last Chance Road; he later stated that his boss  
25 “probably didn’t say grade that road.” Undisputed Facts ¶ 77. He stated: “I don’t know why we  
26 really graded that road; it went up to hardly nothing.” Id. He also could not remember when or why  
27 he would have stopped grading it sometime in the late 1970s. Undisputed Facts ¶ 80.

Despite his testimony that he graded the road several times in the 1970s and at least once spent two to three weeks doing so, throughout his on-site deposition Mr. Huarte could not recall landmarks on the route, and, in the end, was uncertain whether he had in fact graded the route at all. For example, on June 9, 2010, the day before his on-site deposition, Mr. Huarte discussed at length driving a road grader around a large tree that is currently adjacent to the Last Chance route. Undisputed Facts ¶ 81. “There’s one big piñon tree right there now but we went up this wash around that, I remember that,” he said, and “[t]hat tree, that big pinion tree up there, we were probably on the, as you’re going up, it would be on the left side of the tree. But we did go around that.” Second Huarte Deposition 32:9-33:25, cited in Undisputed Facts ¶ 81. However, in response to the question “do you remember that tree being there 40 years ago at all?,” Mr. Huarte said “[n]ot really . . . I sure don’t really remember it.” *Id.* 34:1-5, cited in Undisputed Facts ¶ 81; see also Undisputed Facts ¶ 81 (“During the on-site portion of his deposition the next day, Mr. Huarte again conceded that he could not remember the tree.”). In addition, despite testifying that he had graded the route, he hedged when asked whether he had been the one to create berms he said could be found on the side of the route, stating in a non-committal way, “[w]ell, I could have been the one, all right.” Undisputed Facts ¶ 79. And although he was apparently unsure if he had done the work on the route that created berms, he never saw anyone else working on the route. Undisputed Facts ¶¶ 79, 82.

After spending hours walking up and down the claimed route during an on-site deposition on June 10, 2010, Mr. Huarte was asked the ultimate question: whether the entire route is the one he recalled grading in the 1970s. His response: “I’m not sure on that. It kind of looked that way but I’m really not sure.” Undisputed Facts ¶ 86. Given Mr. Huarte’s faulty memory and his own self-doubt, this Court cannot rely on such testimony to find, resolving all doubts in the United States’ favor, that Mr. Huarte “constructed” Last Chance Road.<sup>17</sup>

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<sup>17</sup> Inyo County never asserts that Mr. Huarte’s alleged use of a road grader in a desert wash “constructed” a highway. *See* Inyo Br. 5, 18-19. The County discusses the alleged grading to show the route’s “existence,” not its construction. *Id.* at 18-19. The County also appears to agree that Mr. Huarte’s use of the grader constituted “maintenance” and not “construction.” *See* Undisputed Facts ¶ 69 (County has no records the route “was mechanically maintained, other than the recent recollections of Mr. Leonard Huarte”).

Further, given the serious questions regarding Mr. Huarte's credibility, due to his reversals and foggy memory, his statements cannot support summary judgment in Inyo County's favor. See S.E.C. v. Koracorp Indus., 575 F.2d at 699 ("The courts have long recognized that summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved."); Ornoski, 431 F.3d at 1170 (summary judgment not appropriate where credibility is a factor).

Finally, even if this Court somehow finds Mr. Huarte's representations that he did grade the road entirely credible – which it cannot, given the burden of proof the County must meet and the muddled nature of the testimony – this Court cannot use Mr. Huarte's testimony as grounds to award Inyo County summary judgment. Mr. Huarte's testimony is contradicted by that of others. For example, Mr. Ainsley Holeso, the Roads Foreman for Death Valley National Park for ten years, examined Last Chance Road twice in June 2010. He testified that he observed no sign of mechanical construction or maintenance at any location along the claimed route of Last Chance Road. Undisputed Facts ¶ 91. Given this conflicting testimony, summary judgment is inappropriate.

Inyo County supplies no evidence at all showing, beyond any doubt, that Last Chance Road was constructed before October 1976. Summary judgment in favor of the United States is therefore appropriate.

#### **4. R.S. 2477 Requires That The Route Constructed Be A "Highway."**

In addition to mandating "construction," R.S. 2477 requires that a right-of-way be granted only if the route constructed is a "highway." A highway at the time of R.S. 2477's adoption was a significant public road having significant levels of public use and accessing an important destination. Inyo County can prevail in this suit only if it shows Last Chance Road meets this definition.

##### **a. An R.S. 2477 "Highway" Is A Significant Public Road, Not A Dirt Track To Nowhere.**

As with "construction," understanding the meaning of the term "highway" requires a resort to dictionaries at the time of R.S. 2477's adoption. Those dictionaries defined a "highway" as a "great road; a public road; a road over which the public at large have a right of passage"; Worcester at 684; see also The Oxford English Dictionary 233 (2d ed. 1989) ("OED") ("A public road open to all

1 passengers, a high road”) (citing historical usage) (excerpts attached as Exh. 21).

2 In the mid-19th century, as today, “highway” meant an artery connecting identifiable places,  
3 one the public at large would use. Worcester at 684 (a “public road”); OED, at 233 (“esp. a main or  
4 principal road forming the direct or ordinary route between one town or city and another, as  
5 distinguished from a local, branch or cross road”).

6 At the time of R.S. 2477’s enactment, the term “highway” had a meaning more strict than a  
7 road to nowhere. Americans at the time described transportation infrastructure that linked the nation  
8 together for commercial purposes as “highways.” For this reason, “highway” encompassed railroads  
9 and navigable waters, as well as roads, insofar as they formed commercial links between different  
10 communities. E.g., The Montello, 87 U.S. (20 Wall.) 430, 439 (1874); The Mohler, 88 U.S. (21  
11 Wall.) 230, 235 (1874). Similarly, in 1872, the Supreme Court used “highway” as a synonym for  
12 “an avenue to the markets of the country.” Chicago, Burlington & Quincy R.R. Co. v. Otoe County,  
13 83 U.S. (16 Wall.) 667, 675 (1872). Moreover, “highway” in the mid-19th-century meant not just  
14 any way useful for commerce, but a way of some importance. Worcester at 684 (“great road”);  
15 OED, at 233 (“a high road”). Consequently, roads relatively insignificant to a transportation system  
16 would not qualify.

17 The Congressional Research Service’s 2003 report concurs. The definition of “highways,”  
18 the CRS report states, meaning

19 principal public roads, was evidently the common American meaning at the time of  
20 [R.S. 2477’s] enactment: highway was not defined in the generic sense as a travel  
21 corridor of any kind. Rather, the contemporaneous common usage dictionaries use  
“road” as the more generic term, and “highway” (at least in the context of ground  
transportation) to mean a more significant road.

22 Baldwin (Exh. 14) at 24. “In other words, while all highways are roads, not all roads are highways,  
23 since, arguably, highways are public, and are more significant, built up roads.” Id. at 25. The report  
24 concludes,

25 it appears likely that Congress in the 1866 Act used the term highway in the sense of  
26 a significant or principal road; namely, one that was open for public passage, received  
a significant amount of public use, was constructed or improved, and that connected  
cities, towns, or other places of interest to the public.

27 Id. at 26; see also id. at 26-33 (examining legislative history, contemporaneous bills, and the history  
28

of access to Western lands to reach this conclusion). In sum, the common understanding in the mid-19th century – and likely that of Congress at the time – was that a “highway” meant a well-used link between places of some significance. “Highway” did not mean a beaten path, seldom used, that has no discernable purpose, and goes to no identifiable destination.

**5. Inyo County’s Allegations Do Not Demonstrate Last Chance Road Was A “Highway.”**

Inyo County presents no evidence that Last Chance Road either linked significant destinations or received significant public use. Because the County cannot present evidence showing, beyond any doubt, that Last Chance Road meets the definition of a “highway,” the Court must deny the County’s motion, and grant summary judgment to the United States.

**a. There Is No Evidence Of More Than Desultory Public Use Of Any Of The Routes In The Area Of Last Chance Road.**

Neither the individual pieces of evidence the County cites, nor all of its evidence viewed collectively, shows anything but occasional, desultory use of the claimed route. In fact, Inyo County was able to find only one person who testified that he used the route prior to October 21, 1976. Inyo County therefore cannot establish evidence showing, beyond any doubt, that Last Chance Road was ever a “highway.”

**(1) Evidence Of Public Travel Somewhere In The Last Chance Mountains In The 1850s Does Not Demonstrate Use Of Last Chance Road.**

Mr. Lingenfelter’s book, Death Valley and the Armargosa, A Land of Illusion, describes two trips in the general area surrounding Last Chance Canyon in 1853. It fails to provide a precise location for the route(s) the travelers took, providing no evidence of travel along Last Chance Road. The book states that in 1853, John Ebbetts and Tredwell Moore “crossed eastward in desperation over the Last Chance Range and into Death Valley. As they entered the valley, Moore saw the verdant signs of water and salvation at Last Chance Spring.” Exhibit A of Declaration of Ralph H. Keller at 8 (Dkt. # 75-5). The Last Chance Range is hundreds of square miles in size, and is incised by numerous canyons. The book provides no evidence that these men followed the route the County now claims, or indeed any of the varying routes depicted on County-supplied maps.

1 The book's only other mention of travel in the area is that the two men mentioned above "left  
2 Death Valley by way of Last Chance Canyon the next morning." Lingenfelter at 82. The route the  
3 County claims – depicted as a four-wheel drive trail on the 1987 USGS Last Chance Mountain map  
4 – does not descend into Last Chance Canyon.<sup>18</sup>

5 In addition, even if the 1853 trips did occur exactly on Last Chance Road, these trips  
6 represent the only specific accounts of any public use allegedly related to the claimed route until Mr.  
7 Huarte's poorly-remembered trips in the mid-1970s. Undisputed Facts ¶ 92. A few visits in the area  
8 of the route over more than a century hardly constitute the significant use necessary to establish a  
9 "highway." Because "any doubt" must be resolved in favor of the United States, the Court cannot  
10 conclude that Mr. Lingenfelter's book supports Inyo County's claim.

11 **(2) Inyo County's Resolutions and Road Register Do Not Provide**  
12 **Evidence of Use.**

13 The County's 1948 resolutions are insufficient to show any public use of Last Chance Road.  
14 The resolutions do not mention Last Chance Road (or any road) by name, nor do they identify the  
15 location of Last Chance Road (or any road). The resolutions refer to maps and descriptions, but the  
16 County failed to locate either. Undisputed Facts ¶¶ 16-20. Further, the County admits that "the  
17 adoption of a resolution purporting to adopt a road into the County's maintained mileage system  
18 does not necessarily indicate that the road is in existence." Undisputed Facts ¶ 22 (emphasis added).  
19 The resolutions cannot show, beyond "any doubt," that any public use of the road was occurring.

20 Nor is the Road Register entry evidence of use. As with the resolutions, "the listing of roads  
21 in the Road Register does not necessarily indicate that the roads physically existed." Undisputed  
22 Facts ¶ 27.

23 Further, the Road Register cannot be evidence of public use at the location the County now  
24 claims because the Road Register description of the route is "incomplete and inaccurate."  
25 Undisputed Facts ¶ 31. The description omits key information, but may indicate the road is 84 miles  
26 south of its now-claimed location. Id.; see also supra at 5. Because Inyo County admits the Road

27 <sup>18</sup> Recent observers cast doubt on the existence of any road connecting the area from the northern  
28 extent of Last Chance Road (where it leaves the Willow Springs Road) to Death Valley or Last  
Chance Spring to the south. See infra at 41-42.

Register does not identify Last Chance Road anywhere near its current location, this Court cannot rely on the Register to show public use of the route, given all doubts must be resolved in favor of Defendants.

**(3) Maps Cited By Inyo County Do Not Demonstrate Significant Public Use.**

Inyo County alleges that a number of maps show “that the public used Last Chance Road.” Inyo Br. 18. Its theory is that since a number of maps show several different routes in several different locations, there must have been some public use of the route it ultimately claims. Far from showing use, the maps show routes where the County’s own witnesses state routes never existed, and display what the County claims as Last Chance Road crossing different areas of land, accessing different destinations, and having varying lengths. Given their contradictory nature, the maps do not show, beyond any doubt, public use for Last Chance Road at the location the County now claims.

**(a) The 1913 USGS Lida Map**

The earliest map relied upon by Inyo County, the 1913 USGS Lida Map, does not show a road at all. Rather, it shows a dashed line, indicating a feature classified as a “trail or path.” Undisputed Facts ¶ 47; Exh. E to Undisputed Facts (map). The route it shows begins in the north at the Willow Springs Road, heads southeast in toward the northern rim of Last Chance Canyon, then continues south into Last Chance Canyon for a short distance before climbing up the Canyon’s western wall. The route’s southern end is at Last Chance Spring, a canyon to the west of Last Chance Canyon. Undisputed Facts ¶ 47.

Other evidence undermines any conclusion, based on the 1913 map, that a route between Willow Springs Road and Last Chance Spring ever existed, even as just a “path.” Inyo County witness Mr. George Milovich, who frequently visited the area of Last Chance Spring in the 1960s, testified that there was no trail going from Willow Springs Road to Last Chance Spring. Undisputed Facts ¶ 48. While standing on the northern rim of Last Chance Canyon during his on-site deposition on June 10, 2010, Mr. Huarte stated that he did not see any possible way that a travel route, even a foot trail, could descend the steep, rocky cliff into Last Chance Canyon from the northern rim of the canyon. Undisputed Facts ¶¶ 49, 63. Mr. Joe Tilman, an engineering technician for the National

1 Park Service, also testified that on his June 3 and June 10, 2010 visits to the site, he did not observe  
 2 any signs of a road or an abandoned road heading from the northern rim of Last Chance Canyon into  
 3 the canyon. Undisputed Facts ¶¶ 50, 63. No other map in evidence shows a road or trail extending  
 4 directly from Willow Springs Road to Last Chance Spring, as the 1913 USGS Lida map does.

5 In sum, the 1913 USGS Lida map shows a footpath at a location and with a southern  
 6 terminus not corroborated by any other map, and contradicted by observation from the 1960s and  
 7 today. It cannot be used as evidence that the Last Chance route now claimed by the County was  
 8 used as a “highway” in the early 20th century, particularly when all doubts are to be resolved in  
 9 favor of the United States.

### 10 (b) The 1957 USGS Magruder Mountain Map

11 The 1957 map “depicts a double dashed line, indicating a feature classified as an  
 12 ‘unimproved dirt’ road heading southeast from the Willow Springs Road from roughly the same  
 13 location as the ‘trail or path’ feature on the 1913 Lida map.” Undisputed Facts ¶ 52. “This  
 14 unimproved dirt road feature transitions to a single dashed line, classified as a ‘trail,’ just north of  
 15 the rim of the canyon, that descends into the Canyon and then continues as a ‘jeep trail’ going  
 16 roughly south, following the floor of Last Chance Canyon into Death Valley.” Undisputed Facts  
 17 ¶ 53.

18 The 1957 map is inconsistent with the 1913 USGS Lida map. The 1957 map shows a  
 19 southeastern route from the Willow Springs Road then into Last Chance Canyon, with a southern  
 20 terminus approximately one mile east of Last Chance Spring and in the next canyon to the east of the  
 21 route on the 1913 map. Undisputed Facts ¶ 54; Exh. F to Undisputed Facts (1957 map). The 1957  
 22 map also conflicts with observations this year that no route goes over the canyon rim and descends  
 23 into Last Chance Canyon. See Undisputed Facts ¶ 63. Mr. Huarte (for Inyo County) and Mr.  
 24 Tilman (for Defendants) “testified that they did not see any possible way a travel route, even a foot  
 25 trail, could proceed into Last Chance Canyon from the northern rim,” undermining any claim to  
 26 public use of the route depicted on the 1957 USGS Magruder Mountain map. Id.<sup>19</sup>

27  
 28 <sup>19</sup> Other evidence calls into question any assertion of significant public use on the route shown on  
 the 1957 USGS Magruder Mountain map. Douglas Pflugh, who has expertise in aerial photo

1 The 1957 map also diverges significantly from the path the County now claims as its right-  
 2 of-way. See Undisputed Facts ¶¶ 44, 62; supra at 6-7. The 1957 map and the 1987 map show a  
 3 route that reaches the rim overlooking Last Chance Canyon at two different locations. See supra at  
 4 7-8; Undisputed Facts ¶ 58.

5 There is no evidence in the record that the portion of the route depicted on the 1957 USGS  
 6 Magruder Mountain map that diverges from the 1987 USGS Last Chance Mountain map – that is,  
 7 the southern portion of the route on the 1957 map reaching the Last Chance Canyon rim from the  
 8 north – ever existed on the ground. In his June 10, 2010 on-site testimony, Mr. Huarte testified he  
 9 could find no evidence of a road, nor did he remember grading a road, where the 1957 map diverges  
 10 from the 1987 map. Undisputed Facts ¶ 65. Mr. Tilman, the National Park Service road engineer,

11 testified that the southern third of the unimproved dirt road between Willow Springs  
 12 Road and the northern rim of Last Chance Canyon as shown on the 1957 Magruder  
 13 Mountain map was just a wash and not a travel route of any kind. Mr. Tilman  
 14 testified that he did not observe any signs of travel in the wash and does not believe  
 15 there was ever a road at that location. Mr. Tilman testified that the wash was only  
 16 wide enough to accommodate a foot trail or a mule trail.

17 Undisputed Facts ¶ 64 (emphasis added) (citations omitted). This testimony and evidence on the  
 18 ground undermines the credibility of the 1957 USGS Magruder Mountain map, and undermines any  
 19 implication that public use occurred on the route depicted on that map.

20 Despite the fact that Last Chance Road is depicted in different locations on the 1957 and  
 21 1987 maps, and that the route on one dead ends at a cliff and on the other accesses a trail into Last  
 22 Chance Canyon, the County asserts that both maps support its claim to public use of a highway at a

23 interpretation, reviewed the 1952 aerial photos relied on by the USGS to create the 1957 map, and,  
 24 except for a short section and the route's northern end, saw nothing that looked like a road. Pflugh  
 25 Decl. at ¶ 23 (attached as Exh. 2). He testified that while he could "see something" in the same  
 26 general location as the route indicated on the map "for a short distance – approximately 100 yards –  
 27 heading south from the Willow Creek Road[,] I could not, at this scale, positively identify it as a  
 28 road or other feature, such as a wash." Id. Mr. Pflugh also testified that "that after the first short  
 section[,] no feature was visible" on the aerial photos where a route was indicated on the map. Id.  
 "That is, I did not identify any feature . . . comparable to the unimproved dirt road indicated on the  
 Magruder Mountain 1957 map after approximately 100 yards south of the Willow Creek Road." Id.  
 He further testified that in reviewing the 1982 aerial photos used by USGS to create the 1987 USGS  
 Last Chance Mountain map, "I did not note a feature corresponding to the Magruder Mountain 1957  
 map's road feature." Id. ¶ 25. In sum, Mr. Pflugh's review of aerial photos from 1952 and 1982  
 found almost no trace of the route identified on the 1957 map, which one would expect to see if  
 significant public use had been occurring during those years.

single location. Inyo Br. 18-19. This argument ignores the facts and the County's heavy burden to show significant public use of the route at one location, all doubts being resolved in favor of the United States. See Adams, 3 F.3d at 1258 (affirming district court's rejection of an R.S. 2477 claim because "the Clark Canyon Road is no longer in the same location as that historical road").

Further, if the 1957 USGS map was correct at the time it was produced, two things are true. First, the route the County claims as depicted on the 1987 USGS map, which reaches the canyon rim nearly a thousand feet to the west of where the route meets the rim on the 1957 USGS map, did not exist in 1957, undermining any claim that any public use had occurred of the southern third of Last Chance Road by 1957. Second, public use from the 1950s on was so inconsequential that no trace at all of the route's use to the rim of Last Chance Canyon could be found 50 years later.

Whether the 1957 map is accurate or not, it does not provide credible evidence to support Inyo County's current claim to Last Chance Road when all doubts are resolved in the United States' favor.

#### (c) The 1987 USGS Last Chance Mountain Map

The 1987 USGS Last Chance Mountain map shows a four-wheel drive trail starting at the Willow Springs Road in the north and heading roughly south for one-half mile to the rim overlooking Last Chance Canyon, and then terminating at a steep cliff overlooking that Canyon. See Exh. G to Undisputed Facts. The map relies on survey work and aerial photography performed between 1980 and 1984, after R.S. 2477 was repealed. Undisputed Facts ¶ 55.<sup>20</sup> The 1987 USGS map thus does not provide evidence establishing, beyond doubt, the existence of a highway receiving significant public use prior to October 1976, when R.S. 2477 was repealed.<sup>21</sup>

<sup>20</sup> Mr. Pflugh's review of 1982 aerial photos identified a "minor feature" on the ground corresponding to the four-wheel drive trail marked on the 1987 map. Pflugh Decl. ¶ 24 (attached as Exh. 2). He was unable to identify such a feature on the 1952 photography, however. Id. ¶ 25. His observations undermine any claim that any use of the route depicted on the 1987 map had occurred by the early 1950s.

<sup>21</sup> In addition, Inyo County witnesses testified that the precise route Mr. Huarte may or may not remember grading differs from that depicted on the 1987 map, further raising questions about whether the map – or the witnesses' recollections – are accurate. See supra at 9 n.4.

**(d) The 1955 CalTrans Map And The 1988 BLM WSA Map**

Neither the 1955 CalTrans Map nor the 1988 BLM WSA map depicting a cherry-stem in the general vicinity of Last Chance Road show public use of the route. As noted above, routes on the 1955 CalTrans map may not even have existed. See supra at 33. The lack of detail on the 1955 map makes it “impossible to tell” whether the route shown corresponds to any route on the USGS maps. Undisputed Facts ¶ 37. Similarly, that BLM excluded an area from the Last Chance Mountain WSA does not necessarily indicate the presence of a road, let alone one experiencing public use. See supra at 33-34. BLM’s exclusion of the area around a route after R.S. 2477 was repealed is not evidence of public use before that repeal. Finally, the 1988 WSA map appears to be based on the 1957 USFS Magruder Mountain map, one that is of dubious credibility. See supra at 34 n.16. Neither the 1955 CalTrans Map nor the 1988 BLM WSA map therefore show beyond doubt that significant – or any – public use occurred during the time when R.S. 2477 was in force.

**(e) Conclusion**

Contrary to Inyo County’s allegation, maps from 1913, 1957, and 1987, among other evidence, do not show that the route it now claims “experienced continuous use for decades.” Inyo Br. 19. The County conveniently ignores that each of the maps shows a different route, accessing a different southern destination. Inyo County ignores testimony that no route could, or ever did, traverse the route depicted on either the 1913 or 1957 maps.<sup>22</sup> Inyo County ignores the fact the no map shows the route ending at the precise point on the cliff at Last Chance Canyon that the 1987 map shows. Inyo County ignores that the 1987 was based on field work performed after R.S. 2477 was repealed. The conflicts among the maps, and the conflicts between the maps and current and historic observation, cast serious doubts on their credibility, and on the likelihood that significant public use occurred on Last Chance Road at the location now claimed. Because all doubts are resolved in favor of the United States, summary judgment in favor of the United States is warranted. In the alternative, conflicts among the maps, and between the map and testimony create an issue of

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<sup>22</sup> While Inyo County relies on the 1913 and 1957 maps to demonstrate use, it identified not one person who used the different iterations of Last Chance Road on the maps from one end to the other.

1 material fact requiring denial of Inyo County's motion.

2 **(4) Mr. Huarte's Hunting Trips Show, At Best, Occasional And**  
 3 **Desultory Use Of The Route.**

4 Beyond documentary evidence, Inyo County has been able to identify only one person (Mr.  
 5 Huarte) in the four years since it brought suit who claims to have knowledge of any public use of the  
 6 route prior to 1977. Undisputed Facts ¶ 92. Even if Mr. Huarte's inconsistent testimony is to be  
 7 believed, it does not establish significant public use for a variety of purposes, and so fails to  
 8 establish, beyond any doubt, that Last Chance Road was ever a "highway."

9 Mr. Huarte has testified inconsistently that he may remember using an Inyo County road  
 10 grader on Last Chance Road in his official capacity as an equipment operator on a few occasions in  
 11 the mid-1970s. Undisputed Facts ¶¶ 70-86; see supra at 34-36. Given the changing, self-  
 12 contradictory, vague, and unreliable nature of that testimony, these official, rather than public, acts  
 13 by Mr. Huarte do not establish public use any more than they establish construction. See supra at  
 14 37. His testimony of personal use of Last Chance Road, like his testimony concerning grading, is  
 15 also inconsistent, and even if true, reflects only occasional, desultory use.

16 In his March 2008 deposition, Mr. Huarte testified that he used Last Chance Road for  
 17 hunting access approximately ten times in the early 1970s. Undisputed Facts ¶ 93; see also Inyo  
 18 Br. 5 (alleging Mr. Huarte used the road "on several occasions" for hunting). When asked how  
 19 many times he had gone hunting there in his June 10, 2010 deposition, Mr. Huarte backpedaled,  
 20 stating that he didn't know and would "just be guessing." Undisputed Facts ¶ 93 Mr. Huarte further  
 21 testified in March 2008 that he had seen "some other hunters once in a while" on these trips "but not  
 22 that many," as well as parked vehicles on the road's southern end. Id. ¶¶ 93, 98. This is the entirety  
 23 of Inyo County's allegations concerning actual public use prior to the October 1976 repeal of  
 24 R.S. 2477. The hazy recollection of infrequent, occasional use of the route for recreation by one  
 25 person, and a few others he allegedly observed, does not a highway make. A desert wash used a few  
 26 times by hunters is not a "highway." Inyo County fails to show, beyond "any doubt," that Last  
 27 Chance Road was a well-used route connecting significant destinations.<sup>23</sup>

28 <sup>23</sup> This Court should decline Inyo County's invitation to set such a low bar to define a "highway."

**b. Last Chance Road Does Not Connect The Public To An Important Destination.**

Last Chance Road allegedly starts at the north from a remote dirt road (the Willow Springs Road) and travels less than 2,500 feet up a wash and over a small rise to dead-end at a steep drop. There does not appear to be any purpose for the route, which simply ends at the top of a cliff, where further travel is impossible. The County does not allege the route was used for commerce, and the fact that the route dead-ends at a cliff in the desert demonstrates it was not important for connecting commercial destinations. Inyo County's witness Mr. Huarte admits the route "went up to hardly nothing." Undisputed Facts ¶ 77.<sup>24</sup> This evidence does not show, when all doubts are resolved in the United States' favor, that such a route is a "highway." Inyo County's motion therefore should be denied, and summary judgment entered for the United States.

**6. R.S. 2477 Requires That Rights-of-Way Be Established Only Over Unreserved Public Lands.**

To win an R.S. 2477 grant, Inyo County must prove, beyond doubt, not only that "construction" of a "highway" took place, but also that the highway was constructed across "public lands, not reserved for public uses." In other words, "[t]o establish an [R.S. 2477] easement, [the claimant] must show that the road in question was built before the surrounding land lost its public character." Adams, 3 F.3d at 1257; see also Fitzgerald, 932 F. Supp. at 1201 (plaintiff required to show "that the road in question was built before the surrounding land was reserved . . ."). Unreserved public lands are those owned by the federal government and "subject to sale or other disposal under general laws, excluding those to which any claims or rights of others have attached." Humboldt County, 684 F.2d at 1281. The placement of lands in the National Forest system is a reservation of those lands which precludes the establishment of an R.S. 2477 right-of-way across

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If irregular, ill-remembered use by one person can establish a "highway," then every acre of the West could be claimed as an R.S. 2477 highway.

<sup>24</sup> The County may believe that the 1913 and 1957 maps showing a route leaving Willow Springs Road in the north and accessing Death Valley to the south demonstrate that Last Chance Road once did serve to connect significant destinations. While the maps show such a connection, testimony undermines the accuracy of those maps, and fails to show that the maps depicted correspond to the route the County now claims. See supra at 6-7, 41-42. Further, Inyo County found not one person who traveled the length of either route on either map.

1 them. See, e.g., Fitzgerald, 932 F. Supp. at 1201. Lands also are reserved for public uses where they  
 2 are withdrawn for national parks or monuments, Indian reservations, and public rangeland  
 3 management. See United States v. Garfield County, 122 F. Supp. 2d 1201, 1215 (D. Utah 2000)  
 4 (describing national parks and monuments as “reserved for public uses” under R.S. 2477); In re  
 5 Schugg, 384 B.R. at 279 (creation of an Indian reservation divests those lands of their public  
 6 character for purposes of R.S. 2477); Humboldt County, 684 F.2d at 1281 (reservations under the  
 7 Taylor Grazing Act rendered lands non-public). Even an order by the Secretary of the Interior  
 8 temporarily withdrawing from disposition all unreserved lands in the State of Alaska “reserved  
 9 [those lands] for public use” for purposes of R.S. 2477. See Wilderness Soc’y v. Morton, 479 F.2d  
 10 842, 883 n. 90 (D.C. Cir. 1973) (en banc), cert. denied, 411 U.S. 917 (1973).

11 Inyo County thus must show, beyond any doubt, that the County constructed a highway when  
 12 the lands underlying the highway were not reserved.

13 **7. Because The Lands Underlying Last Chance Road Were Reserved From**  
 14 **1934 To 1967, No R.S. 2477 Right-Of-Way Could Be Established During**  
 15 **That Period.**

16 **a. The Lands Underlying Last Chance Road Were Reserved From**  
 17 **1934 To 1967.**

18 Inyo County’s memorandum does not address whether the land underlying Last Chance Road  
 19 was reserved prior to the law’s repeal in October 1976. In its complaint, the County alleges that,  
 20 “[a]t the time Last Chance Road was constructed and until 1994 it was located on public lands, not  
 21 reserved for public uses.” Complaint ¶ 75. This statement is incorrect. The land underlying the  
 22 route was reserved from 1934 to 1967.

23 On November 26, 1934, President Franklin D. Roosevelt issued Executive Order 6910,  
 24 which “ordered that all of the vacant, unreserved, and unappropriated public land” in California and  
 25 eleven other western states be “temporarily withdrawn from settlement, location, sale or entry, and  
 26 reserved for classification, and pending determination of the most useful purpose to which such land  
 27 may be put in consideration of the provisions of” the Taylor Grazing Act of 1934. Executive Order  
 28 6910 (Nov. 26, 1934) (emphasis added) (attached as Exh. 22); see also Humboldt County, 684 F.2d

1 at 1281.<sup>25</sup> This Order was to remain in effect until revoked by the President or Congress. Executive  
 2 Order 6910. Congress acted shortly thereafter, as the Ninth Circuit has explained:

3 In 1936 Congress responded to this Executive Order by amending the Taylor Grazing  
 4 Act to permit the Secretary, in his discretion, to classify both lands within grazing  
 5 districts and lands withdrawn by the Executive Order as proper for homesteading.  
 43 U.S.C. § 315f. That section provided that the affected lands “shall not be subject  
 6 to disposition, settlement, or occupation until after the same have been classified and  
 7 opened to entry.”

8 Humboldt County, 684 F.2d at 1281; see also Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 876  
 9 (1990) (describing E.O. 6910 and Taylor Grazing Act in same terms).

10 The effect of the Executive Order and subsequent Congressional action was dramatic. The  
 11 Supreme Court concluded: “the Taylor Grazing Act, coupled with the withdrawals by Executive  
 12 Order [6910], ‘locked up’ all of the federal lands in the Western States pending further action by  
 13 Congress or the President, except as otherwise permitted in the discretion of the Secretary of the  
 14 Interior.” Andrus v. Utah, 446 U.S. 500, 519 (1980) (emphasis added); see also Lujan, 497 U.S. at  
 15 871 (“The Public Land Law Review Commission, established by Congress in 1964 to study the  
 16 matter, determined in 1970 that ‘virtually all’ of the country’s public domain – about one-third of the  
 17 land within the United States – had been withdrawn or classified for retention,” largely as a result of  
 18 the Executive Order and the 1936 amendments to the Taylor Grazing Act) (citations omitted)).

19 The Ninth Circuit has definitively concluded that land “locked up” by the Executive Order  
 20 and the Taylor Grazing Act Amendments are not “public lands” but rather are “reserved,” and as a  
 21 result unavailable for the establishment of R.S. 2477 claims, unless and until the Interior Secretary  
 22 classified the lands as “open.” Humboldt County, 684 F.2d at 1281. In Humboldt County, a Nevada  
 23 county sought title to two highway rights-of-way under 43 U.S.C. § 932, also known as R.S. 2477.  
 24 Id. at 1278. The Ninth Circuit stated that the lands at issue had been reserved pursuant to Executive  
 25 Order 6910. Id. at 1281. Because the Secretary had not subsequently classified the lands at issue as  
 26 open, the lands were not “public lands” and remained reserved and unavailable for the construction

27 <sup>25</sup> Executive Order 6910 preserved valid rights existing at that time. See Executive Order 6910 at  
 28 un-numbered paragraph 7.

1 of rights of way pursuant to R.S. 2477. Id.<sup>26</sup>

2 The situation here is identical to that in Humboldt. The lands over which Inyo County claims  
 3 Last Chance Road were vacant and unappropriated in 1934, and consequently “reserved” by  
 4 Executive Order 6910 as of November 26, 1934. On December 14, 1967, BLM classified the lands  
 5 underlying Last Chance Road as open for multiple use. Undisputed Facts ¶ 9. This classification  
 6 made the lands underlying Last Chance Road available again for disposition under R.S. 2477.  
 7 However, from November 26, 1934 until December 14, 1967, Humboldt requires that the lands at  
 8 issue in this case could not be acquired for R.S. 2477 rights of way.<sup>27</sup>

9 **b. Inyo County Cannot Show An R.S. 2477 Right-Of-Way Was**  
 10 **Granted During The Time The Lands Were Unreserved.**

11 Because the lands underlying Last Chance Road were unavailable for the establishment of an  
 12 R.S. 2477 grant from 1934 to 1967, the grant could not have been accepted by any action during that  
 13 period. Alternatively, if evidence shows highway construction occurred prior to November 1934,  
 14 that right would be grandfathered by Executive Order 6910. Inyo County can make neither showing.

15 First, Inyo County fails to present evidence that Last Chance Road was a constructed  
 16 highway prior to November 1934, and so grandfathered by the Executive Order. While Inyo County  
 17 alleges that Last Chance Road “was accepted by the public by creation and use of the road, even  
 18 prior to the County’s [1948] resolution[s],” Inyo Br. 2, the County does not say what evidence  
 19 supports such acceptance, nor by what specific date the right vested before 1948. The only two  
 20 pieces of evidence cited by Inyo County prior to November 1934 are: (1) Mr. Lingenfelter’s book  
 21 alleging a few people traveled somewhere in the area in the 19th century, see supra at 38-39; and  
 22 (2) the 1913 USGS Lida map showing a “trail or path” in the general vicinity, a map that shows the  
 23 route going to a different destination than the claimed route. See supra at 6-7. These two scraps of

24 <sup>26</sup> As the Ninth Circuit explained, “the County would not be precluded from acquiring a right of  
 25 way under section 932 [R.S. 2477] if the requirements of section 315f were met. However, the  
 26 County has not claimed that the Secretary has classified the Blue Lake area under section 315f.  
 27 Thus, because of the Executive Order, the Blue Lake area was not subject to sale or disposition and  
 28 was therefore not ‘public lands.’ The County did not acquire any right of way under section 932.”  
Humboldt County, 684 F.2d at 1281.

<sup>27</sup> The Ninth Circuit’s Humboldt holding is binding, notwithstanding the Tenth Circuit’s criticism of  
 it in SUWA v. BLM, 425 F.3d at 787-88.

evidence cannot possibly prove, beyond any doubt, the existence of a constructed R.S. 2477 right-of-way prior to November 1934. As a result, the County can only prevail if evidence prior to 1934, together with evidence after December 1967, shows beyond any doubt that Last Chance Road was a constructed highway.

Because land underlying Last Chance Road was reserved between 1934 and 1967, no actions reflected in the following evidence can be used to prove establishment of a constructed highway:

(1) Inyo County's 1948 resolutions, allegedly incorporating Last Chance Road into the County maintained mileage system; (2) the Road Register, prepared sometime after the 1948 resolutions; (3) the 1955 CalTrans Map; or (4) the USGS 1957 Magruder Mountain map.

Consequently, the only documents or testimony that Inyo County can rely on to demonstrate highway construction before October 1976 are:

- Mr. Lingenfelter's book, which does not mention Last Chance Road or describe precisely what route a few travelers in the area used on two trips in 1853;
- the 1913 USGS Lida map, which portrays only a "trail or path" in the general area of the claimed route, and whose accuracy has been challenged (see supra at 6-7, 41-42);
- Inyo County's 1975 Road Inventory, which "identifies a section of the County Road System map on which the route appears, and the length of the route . . . but provides no other location information" (Undisputed Facts ¶ 43); and
- the vague, tentative, contradictory, and contradicted testimony of Mr. Huarte concerning his memories of road use and grading in the mid-1970s (see supra at 34-36).<sup>28</sup>

As discussed above, this "evidence" cannot and does not show beyond any doubt that Inyo County constructed a highway at Last Chance Road before November 1934 or between December 1967 and October 1976. Inyo County's motion must be denied, and summary judgment be awarded to the United States.

**C. Inyo County Cannot Demonstrate That Last Chance Road Is An R.S. 2477 Right-Of-Way, Even Assuming That R.S. 2477 Incorporates State Law.**

Even if this Court rejects a plain reading of R.S. 2477, and agrees with Inyo County that R.S. 2477 incorporates state law to determine the establishment of a right-of-way, the Court must

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<sup>28</sup> Evidence relating to alleged construction of a highway after October 1976 – including the WSA cherry-stem and the 1987 USGS Last Chance Mountain map – cannot show highway construction prior to October 1976 and are thus irrelevant.

1 deny Inyo County's summary judgment motion, and award summary judgment to the United States.  
 2 Inyo County's argument that the 1948 Board of Supervisors resolutions created a right-of-way under  
 3 California highway law ignores the limits of federal law and lacks factual support. Further, the  
 4 County fails to supply evidence demonstrating beyond any doubt that sufficient public use occurred  
 5 on Last Chance Road to meet the California standard for establishment of a highway.

6 **1. Inyo County's Resolutions Do Not Establish Last Chance Road As A**  
 7 **County Highway.**

8 Inyo County alleges that Last Chance Road became a county highway when it met one of the  
 9 definitions of such a highway under state law: the route allegedly was "[l]aid out or constructed by  
 10 others and dedicated or abandoned to or acquired by the county." Cal. Streets & Highways Code  
 11 § 25(b); Inyo Br. 16 (paraphrasing and citing § 25).<sup>29</sup> Specifically, Inyo County alleges that the  
 12 1948 resolutions constituted acceptance of an "offer of . . . land for a highway," thereby creating a  
 13 public highway and R.S. 2477 right-of-way. Inyo Br. 16.

14 Inyo County's argument fails. First, the 1948 resolutions could not establish an R.S. 2477  
 15 right-of-way because they were adopted when the area was reserved for public use, and thus  
 16 R.S. 2477 did not apply. Second, even if R.S. 2477 incorporates state law, it cannot do so in a way  
 17 that essentially renders the federal law meaningless. That is, however, what Inyo County's  
 18 interpretation of California law would do. Because incorporating a state law that permits counties to  
 19 win rights-of-way by simply declaring they exist would undermine Federal purposes, such a state  
 20 law may not be incorporated into R.S. 2477. Third, under California law, a route becomes a  
 21 highway if it is both (1) laid out or constructed by others and (2) dedicated to the county. A "laid  
 22 out" route is one over public land that "has been set apart according to a definite description and  
 23 appropriated to road purposes." Watson v. Greely, 69 Cal. App. 643, 650 (Cal. Ct. App. 1924).  
 24 Inyo County fails to demonstrate either prong of the test for a county highway because the 1948

25 \_\_\_\_\_  
 26 <sup>29</sup> The other definitions of "county highway" are any highway "[l]aid out or constructed as such by  
 27 the county"; "[m]ade a county highway in any action for the partition of real property"; or "[m]ade a  
 28 county highway pursuant to law." Cal. Streets & Highways Code § 25. Inyo County admits that  
 "there is no evidence that [Last Chance Road] was laid out or erected by Inyo County," Inyo Br. 16,  
 and the County does not allege that Last Chance Road is a county highway pursuant to either of the  
 other two definitions.

1 resolutions fail to establish both: (1) the location of Last Chance Road (much less “definitive[ly]  
 2 descri[be]” it); and (2) that the County adopted Last Chance Road into its road system at that time,  
 3 thereby accepting the highway’s dedication. Accordingly, the resolutions do not show that the route  
 4 became a county highway pursuant to state law. Finally, Inyo County fails to address evidence that  
 5 the County apparently withdrew the entire road from its system in a 1956 County resolution.

6 **a. Because The Last Chance Road Area Was Reserved For Public**  
 7 **Use In 1948, The County Resolutions Could Not Establish A**  
 8 **Highway Right-Of-Way.**

9 The 1948 resolutions could not vest the County with a right-of-way for Last Chance Road  
 10 because the area underlying the road was “reserved” for public uses in 1948 (and for many years  
 11 both before and after 1948). See supra at 48-50. Only actions taken when federal land is unreserved  
 12 can result in the establishment of an R.S. 2477 highway. As a matter of federal law, Inyo County’s  
 13 argument that the 1948 resolutions established Last Chance Road as an R.S. 2477 right-of-way must  
 14 fail.

15 **b. Even If R.S. 2477 Incorporates State Law, The Mere Adoption Of**  
 16 **A Resolution, Without More, Cannot Demonstrate The Existence**  
 17 **Of An R.S. 2477 Right-Of-Way.**

18 Inyo County relies almost exclusively on the Tenth Circuit’s SUWA v. BLM decision for the  
 19 proposition that an R.S. 2477 highway vests in the County when the public highway is established in  
 20 accordance with state law. Inyo Br. 9-15. But even that decision recognizes that federal law may  
 21 not incorporate state law in a way that completely undermines that federal law. As the Court  
 22 observed, incorporation of state law “did not mean, and never meant, that state law could override  
 23 federal requirements or undermine federal land policy.” SUWA v. BLM, 425 F.3d at 766.<sup>30</sup> The  
 24 Tenth Circuit cites with approval Douglas County, Washington, in which the Interior Department  
 25 rejected a county’s resolution adopting R.S. 2477 right-of-ways because the routes apparently did  
 26 not exist on the ground. Id.; see supra at 19. Such a county resolution, the court reasoned, went too  
 27 far, and the Interior Department properly rejected it. By comparison, the Tenth Circuit concluded  
 28 that the State of Utah’s standard for establishment of highways – which requires ten years of

<sup>30</sup> See also SUWA v. BLM, 425 F.3d at 767-68 (“To the extent adoption of a state law definition  
 would frustrate federal policy under R.S. 2477, it will not be adopted.”)

1 continuous public use – did not go too far because it was based on common law requirements and  
 2 because the court found “there is [not] much difference, in practice, between a ‘construction’  
 3 standard . . . and the traditional legal standard of continuous public use.” SUWA v. BLM, 425 F.3d  
 4 at 781.

5 Inyo County’s contention – that state law permits a route to become a highway based on a  
 6 county declaration without any evidence the route existed or was in use – goes too far by overriding  
 7 federal requirements and undermining federal policy in the same manner as the county resolution in  
 8 Douglas County. Inyo County’s 1948 resolutions, by themselves, cannot establish an R.S. 2477  
 9 right-of-way for Last Chance Road. This is especially so given the County’s admission that such  
 10 resolutions could take into the County road system routes that did not even exist. Undisputed Facts  
 11 ¶ 22.

12 **c. The Facts Do Not Demonstrate That Inyo County Adopted Last**  
 13 **Chance Road As A County Highway By Resolution in 1948.**

14 A county highway under California law must be both “[l]aid out or constructed by others”  
 15 and “dedicated” to the county. Cal. Streets & Highways Code § 25(b). Inyo County has provided  
 16 little or no evidence that Last Chance Road has been constructed. See supra at 28-37. Neither has it  
 17 shown that Last Chance was “laid out” or identified by the County or others. And, because the  
 18 resolutions do not definitively adopt Last Chance Road into the county road system, the County  
 19 never accepted dedication of the land for a highway.

20 The County asserts that the 1948 resolutions adopted Last Chance Road into the County road  
 21 system, thus establishing it as an R.S. 2477 right-of-way. Inyo Br. 16. The 1948 resolutions  
 22 adopted a map as “the official map of the primary road system of said County” and road descriptions  
 23 that were to serve as “the official route descriptions for the roads included in the said system of  
 24 primary county roads of said County.” Undisputed Facts ¶ 19. However, the resolutions themselves  
 25 do not reference Last Chance Road, and the County has lost both the map and the road descriptions  
 26 to which the resolutions refer. Id. ¶¶ 16; 20. Without the lost map and road description, there is no  
 27 evidence that the map and road descriptions included Last Chance Road. Id. ¶¶ 16-17; see also  
 28 Exh. A-2 to Inyo County Pederson Dec. (1948 resolutions) Dkt. # 75-3. Accordingly, there is no

1 evidence that the County accepted dedication of Last Chance Road, much less definitely described it,  
2 for purposes of establishing a county highway.

3 In its summary judgment memorandum, Inyo County argues that the County “Road Register”  
4 contains the official route descriptions for the roads attached to the 1948 resolutions, and that the  
5 1955 CalTrans Map is consistent with the map attached to those resolutions. Inyo Br. 16-17. But  
6 the “Undisputed Facts” tell a different story. The County admits that “[t]here is no way of  
7 determining the roads that were” identified on attachments to the 1948 resolutions. Undisputed  
8 Facts ¶ 20. Inyo County’s Director of Public Works and Road Commissioner testified that he “did  
9 not know if the roads listed in the Road Register conform to those that may have been included” in  
10 the attachments to the 1948 resolutions. Undisputed Facts ¶ 29. The County also “acknowledges  
11 that there is no way of knowing whether the 1955 CalTrans Map corresponds to maps that may have  
12 been attached to” the 1948 resolutions. Undisputed Facts ¶ 38. In sum, Inyo County is simply  
13 guessing that the Road Register and 1955 CalTrans map reflect the 1948 resolution, and asking the  
14 Court to accept that guess. Because there is clearly room for doubt whether the missing attachments  
15 to the 1948 resolutions “definitely described” Last Chance Road, this Court cannot conclude the  
16 resolutions established a county highway

17 **d. The Road Register Does Not Show That Inyo County’s**  
18 **Resolutions Adopted Last Chance Road In The Location It Now**  
**Claims.**

19 Even if the Road Register contains the description of Last Chance Road from the 1948  
20 resolutions, that would not be enough to establish a County right-of-way. The Road Register’s  
21 “legal description for the claimed Last Chance Road is incomplete and inaccurate,” and places the  
22 route either 84 miles south of its claimed location, or at coordinates that do not exist. Undisputed  
23 Facts ¶ 31; supra at 5.

24 The Road Register description of Last Chance Road conflicts with the County’s claim in at  
25 least one other way. The Road Register describes that part of the route claimed in the County’s  
26 motion as route 2046, and identifies it as 4.0 miles long. Undisputed Facts ¶ 32. But Inyo County  
27 “acknowledges that it has no information that a road ever existed over the entire 4.0 mile Last  
28 Chance Road No. 2046 listed on the Road Register and claimed to have been adopted into the

County's maintained mileage road system pursuant to the 1948 resolutions." Undisputed Facts ¶ 33.

A resolution claiming a road of a different length and at a non-existent location – or 84 miles away from every map of the route – is not the "definite description" required by California law, see Watson, 69 Cal. App. at 650, nor does it amount to a "clear and explicit" grant required for property rights to vest against the federal government. See Undisputed Facts ¶ 30-31; N. Pac. Ry. Co., 188 U.S. at 534 ("clear and explicit"); MacDonald v. United States, 119 F.2d 821, 826-27 (9th Cir. 1941) (same).

**e. Evidence Shows Inyo County Withdrew Last Chance Road From Its County Road System In 1956.**

Inyo County's withdrawal of apparently all of Last Chance Road from the County road system in 1956 further undermines any claim that the 1948 resolutions established a highway pursuant to R.S. 2477 for the route. In 1956, Inyo County adopted a resolution that excluded 26 miles from its inventory of maintained county roads on Last Chance Road and Arrow Road. See Undisputed Facts ¶ 39. The Road Register has two entries for Last Chance Road: the 4.0 mile entry which encompasses the route claimed in this motion (numbered 2046), and another entry describing an 18.0 mile route (numbered 5046) connected to route 2046 and continuing to the southeast from 2046's southern terminus. See Undisputed Facts ¶ 39; Exhs. C and J to Undisputed Facts. Arrow Road is listed as 4.0 miles long. Undisputed Facts ¶ 39. The entirety of Last Chance and Arrow Roads add up to the total 26 miles withdrawn by Inyo County. Id. It therefore appears that the County withdrew the entirety of Last Chance Road from the County's maintained mileage system.<sup>31</sup>

County officials have "agreed that by passing and adopting the 1956 Resolution, the County abandoned nearly all of the Last Chance Road." Undisputed Facts ¶ 42; see also Cal. Streets & Highways Code § 901 (discussing abandonment of county highway by order of the board of supervisors of the county in which the highway is situated). Inyo County cannot claim a R.S. 2477

<sup>31</sup> Inyo County may argue that the Court should ignore the 1956 resolution apparently excluding the entirety of Last Chance Road from the County's maintained mileage system because a later document – the 1975 Road Inventory – identifies route 2046, Last Chance Road, as still within the County maintained mileage system. Undisputed Facts ¶ 43. However, that Inventory does not identify Last Chance Road's location. Id. In addition, the length of the route claimed in the Inventory – 0.59 miles – differs from the 0.52 miles measured on the ground for the route apparently now claimed by Inyo County. Undisputed Facts ¶ 44.

1 right-of-way for a road it has abandoned. See Hazel Green Ranch, 2010 WL 1342914, at \*5  
 2 (“rights-of-way under R.S. 2477 that were perfected before the statute’s repeal in 1976 and which  
 3 have not been abandoned, remain valid today”).

4 **f. Conclusion.**

5 Inyo County’s resolutions cannot, by themselves, establish Last Chance Road as an  
 6 R.S. 2477 right-of-way. The County adopted the resolutions when the lands were reserved, and so  
 7 R.S. 2477 did not apply. Further, R.S. 2477 cannot incorporate state law to the extent it would  
 8 undermine R.S. 2477’s purposes. Because the resolutions themselves fail to even identify Last  
 9 Chance Road, there is ample doubt that the resolutions could meet California law standards for  
 10 adoption of a county highway. Inyo County’s summary judgment motion must be denied, and  
 11 summary judgment to the United States should be granted.

12 **2. Because The Undisputed Facts Do Not Demonstrate “Substantial Use” Of**  
 13 **Last Chance Road, No R.S. 2477 Highway Right-of-Way Was**  
**Established.**

14 Inyo County alleges that Last Chance Road was accepted as an R.S. 2477 right-of-way under  
 15 California law not only by resolution, but also “by public use.” Inyo Br. 16, 17. But not just any use  
 16 will do. California law requires “substantial use” by the public. Because the County’s evidence  
 17 suggests, at best, occasional, desultory use, Inyo County cannot demonstrate public use sufficient to  
 18 establish an R.S. 2477 right-of-way. Because the facts do not support “substantial use” beyond any  
 19 doubt, this Court should enter summary judgment in favor of the United States. In the alternative,  
 20 the question of whether Inyo County has proven substantial use beyond any doubt is a disputed issue  
 21 of fact requiring denial of Inyo County’s summary judgment motion.

22 **a. California Law Requires “Substantial Use” By The Public To**  
 23 **Establish A Highway.**

24 In order to find an R.S. 2477 right-of-way has been granted, California courts have required  
 25 that public use of the route be “substantial and sufficient to prove acceptance of the offer of the  
 26 government of the right of way.” Ball v. Stephens, 68 Cal. App. 2d 843, 849 (Cal. Ct. App. 1945).

27 California courts find public use sufficient where it was “substantial,” was by “many  
 28 people,” occurred over extended time periods, and was for varied purposes. Id. It cannot be use that

1 is “merely occasional.” Id. In Ball v. Stephens, the road in question had been continuously used for  
 2 thirty years and transformed by that use from a trail to a road suitable for automobiles. Id. at 848-51.  
 3 Travel and use was recorded for miners, operators and employees of oil wells, and vacationers. Id.  
 4 at 848-49. The court noted “almost daily” travel by automobile while surrounding oil wells were  
 5 active and found that, for five years prior to the issue of defendant’s patent, “miners traveled over  
 6 the road by automobile to and from their mining claims.” Id. at 849. In these circumstances, the  
 7 court found travel over the route “substantial.” Id. In Western Aggregates, Inc. v. County of Yuba,  
 8 another California case determining R.S. 2477 acceptance by public use, the court underscored the  
 9 substantiality of public use by pointing to a 1934 traffic survey recording the passage of “100 to  
 10 500” cars a day and describing it as “an important county road.” 101 Cal. App. 4th 278, 288 (Cal.  
 11 Ct. App. 2002).

12 California courts have established similarly high standards for acceptance of highways by  
 13 public use outside the R.S. 2477 context. In Smith v. City of San Luis Obispo, the road in question  
 14 was located in the city and was “traveled by a large number of persons.” 95 Cal. 463, 467 (1892).  
 15 In People v. County of Marin, evidence of public use was even stronger, the road being used by “all  
 16 persons traveling from the town of San Rafael to the village of San Quentin” over a thirty-five year  
 17 period. 103 Cal. 223, 225 (1894). In Gray v. Magee, the court found there was “overwhelming  
 18 evidence” of unobstructed and substantial public use over eighty years, established through the  
 19 testimony of more than 100 witnesses. 133 Cal. App. 653, 656-57 (Cal. Ct. App. 1933). Witnesses  
 20 described “see[ing] literally hundreds of other people use the road over a period of many years.” Id.  
 21 at 657. In City of Venice v. Short Line Beach Land Co., the disputed road was continually used as a  
 22 “public way” for 14 years, was the only means of vehicle access to several buildings, and parts of the  
 23 road even had sidewalks alongside. 180 Cal. 447, 450, 451-52 (1919). In McRose v. Bottyer, the  
 24 road had been “use[d] as a street until 1858, and thereafter as a way to and from the school-house  
 25 until 1884.” 81 Cal. 122, 124 (1889). In Union Transportation Co. v. Sacramento County, the road  
 26 had been used by “various members” of the public on a weekly or more frequent basis for twelve  
 27 years and there had been regular maintenance by parties other than the property owner. 42 Cal. 2d  
 28 235, 238, 241 (1954). And in People v. Laugenour, the court found that “the avenue in question

1 was, at all times and continuously after the sale of lots in the subdivision through which it passes,  
2 used by the purchases of said lots and their successors in interest and such other persons as had  
3 business or other relations with those residing in said subdivision.” 25 Cal. App. 44, 49 (Cal. Ct.  
4 App. 1914). In short, California courts require use that is both more than occasional and for varied,  
5 not limited, purposes to accept dedication of or creation of a public highway.

6 Those federal cases that conclude R.S. 2477 incorporates state law similarly require  
7 substantial use, and cite with favor numerous state cases finding sporadic public use insufficient to  
8 establish a highway. In SUWA v. BLM, the Tenth Circuit expressed skepticism that a highway  
9 could be established by “haphazard, unintentional, or incomplete actions,” and concluded that mere  
10 passage of vehicles “over the land at some point in the past . . . is a caricature of the common law  
11 standard.” 425 F.3d at 781. The Tenth Circuit expressed no disagreement with BLM’s position that  
12 “[i]t is unlikely that a route used by a single entity or used only a few times would qualify has a  
13 highway.” Id. at 783; see also id. at 772, 775-76, 783 (citing Lindsay Land & Live Stock Co. v.  
14 Churnos, 285 P. 646, 648 (Utah 1929) (“While it is difficult to fix a standard by which to measure  
15 what is a public use or a public thoroughfare, it can be said here that the road was used by many and  
16 different persons for a variety of purposes; that it was open to all who desired to use it; that the use  
17 made of it was as general and extensive as the situation and surroundings would permit, had the road  
18 been formally laid out as a public highway by public authority.”); Hamerly v. Denton, 359 P.2d 121,  
19 125 (Alaska 1961) (R.S. 2477 dedication not established by infrequent and sporadic use by  
20 sightseers, hunters, and trappers of dead-end road running into wild, unenclosed, or uncultivated  
21 land); and Luchetti v. Bandler, 777 P.2d 1326, 1328 (New Mexico 1989) (“use to reach a single  
22 private residence, hike, picnic, or gather wood, or to reach a watering hole” not enough to require a  
23 finding of a R.S. 2477 right-of-way)).

24 In order to establish creation of a highway by public use, Inyo County must provide evidence  
25 showing, beyond any doubt, the substantial public use required by California law.  
26  
27  
28

**b. The Undisputed Facts Do Not Support A Determination That “Substantial Use” of Last Chance Road Ever Occurred.**

Inyo County’s evidence, shows, at best, very occasional, desultory use of Last Chance Road. See supra at 39-46. The rare, little-substantiated use alleged by Inyo County, rather than meeting the standards set out in Ball v. Stephens, is more analogous to the use found insufficient by a number of state courts. For example, given that Inyo County has identified only a single person with unclear recollections of using the route a few times and observing, perhaps, a few others on some of his trips, the County’s evidence of limited use similarly parallels the use by one cattleman for moving cattle rejected in Utah by Cassity v. Castagno, and the road used “perhaps once a year, twice a year, three times; not over that; maybe some years not at all” rejected by the Montana Supreme Court in Moulton v. Irish. Cassity v. Castagno, 347 P.2d 834, 835 (Utah. 1959); Moulton v. Irish, 218 P. 1053, 1054 (Mont. 1923) (internal quotations omitted); see also SUWA v. BLM, 425 F.3d at 773-74, 775-76 (citing both cases with approval); Kirk v. Schultz, 119 P.2d 266, 268 (Idaho 1941) (when route is “casually and desultorily and not regularly used,” there is no R.S. 2477 right-of-way). Mr. Huarte’s hunting also does not demonstrate that, as in Ball v. Stephens, “many people used the road for different purposes,” including living alongside the route, or using the route to move livestock or access a mining claim. 68 Cal. App. 2d at 849; see also Hamerly, 359 P.2d at 125. Inyo County’s alleged use does not rise to the level of substantial public use necessary to establish an R.S. 2477 right-of-way, even if R.S. 2477 incorporates state law.

Inyo County’s other arguments concerning California law do not change this conclusion. The County argues, for example, that the inclusion of a road on an official map “can provide evidence that a public road existed.” Inyo Br. 18 (citing Western Aggregates, 101 Cal. App. 4th at 299). That is not the same, however, as providing evidence of public use of the route. Indeed, the California Appeals Court rejected an R.S. 2477 claim, despite the road’s appearance on an 1891 USGS map (called the “Plane Table Survey”) as a “first class or primary road,” because there was no evidence of general public use. Hays v. Vanek, 217 Cal. App. 3d 271, 277, 280 (Cal. Ct. App. 1989). “We are unable to conclude that ‘public’ use must be inferred from the designation of this dirt road as ‘first class’ [by the USGS map] during a period of time when the county’s population

1 was sparse with the roads probably being primarily used by homesteaders and mining claim owners  
 2 . . . . Lacking facts, the bare legal history of the subject property is insufficient to establish a  
 3 dedication to the general public.” *Id.* at 281. *Hays* is particularly instructive because the route Inyo  
 4 County points to on the 1913 USGS map is not even a “first class” road (as in *Hays*), but merely a  
 5 “trail or path.” Undisputed Facts ¶ 47. Other cases in California and elsewhere have found maps not  
 6 persuasive as evidence of use. *See Whelan v. Boyd*, 93 Cal. 500, 501 (1892); *Galli v. Idaho County*,  
 7 191 P.3d 233, 238 (Idaho 2008) (“The only documentation was the survey map and notes, which is  
 8 not adequate to show regular public use for five years . . . . It cannot be said that existence of the  
 9 roads in a 1902 [USGS] survey supports a finding by substantial and competent evidence to infer  
 10 regular use by the public from 1899 to 1904.”). The evidentiary value of the USGS and other maps  
 11 Inyo County relies on is further undermined by the fact that they conflict with one another and with  
 12 observations dating back to the 1960s.

13 Even viewing the facts in the light most favorable to Inyo County, the County fails to show,  
 14 beyond any doubt, substantial public use. Summary judgment for Defendants is therefore required.  
 15 In the alternative, determining that the meager public use Inyo County alleges meets California  
 16 “public use” standard would implicate disputed issues of material fact concerning maps and the  
 17 credibility of Inyo County’s lone witness. Inyo County’s motion must therefore be denied.  
 18 *Anderson*, 477 U.S. at 247; *see also United States v. Lange*, 466 F.2d 1021, 1026 (9th Cir. 1972)  
 19 (“[s]ummary judgment is not appropriate” where material evidence in the case “establishes facts  
 20 which give rise to contradictory inferences”).

### 21 **III. THE QUIET TITLE ACT FORBIDS THIS COURT FROM GRANTING RELIEF** 22 **THE COUNTY SEEKS.**

23 This Court cannot, in ruling on Inyo County’s motion, order relief the County explicitly  
 24 seeks: the removal of obstructions, and an order that the United States desist from interfering with  
 25 traditional uses of the route. *See* Inyo Br. 22; Complaint, Request for Relief ¶¶ 2-3. Such relief is  
 26 prohibited by law. The QTA states: “The United States shall not be disturbed in possession or  
 27 control of any real property involved in any action under this section pending a final judgment . . . ,  
 28 the conclusion of any appeal therefrom, and sixty days.” 28 U.S.C. § 2409a(b). Further, in the event

1 of an adverse judgment, the United States may retain control of the property at issue upon payment  
2 of just compensation “of an amount which . . . the district court in the same action shall determine.”  
3 Id. Thus, even if this Court finds title lies with Inyo County, the County’s other requests for relief  
4 must be denied.

5 **CONCLUSION**

6 This Court should dismiss Inyo County’s claim to Last Chance Road for lack of jurisdiction  
7 because the County has failed to plead its claim with particularity, as the Quiet Title Act requires. If  
8 the Court finds it has jurisdiction, it should grant summary judgment to the United States because  
9 Inyo County cannot meet its burden of showing, beyond any doubt, that a single user and a few maps  
10 established Last Chance Road as an R.S. 2477 right-of-way. In the alternative, this Court should  
11 deny Inyo County’s summary judgment motion because issues of material fact are in dispute.

12 Respectfully submitted on this 18th day of October, 2010,

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**TABLE OF EXHIBITS**

Exhibit 1	<u>Hazel Green Ranch v. United States Department of the Interior</u> , 2010 WL 1342914 (E.D. Cal. Apr. 5, 2010)
Exhibit 2	Second Declaration of Douglas Pflugh (Aug. 20, 2010)
Exhibit 3	Noah Webster, <u>American Dictionary of the English Language</u> (1865) (excerpts)
Exhibit 4	Joseph Worcester, <u>Dictionary of the English Language</u> (1863) (excerpts)
Exhibit 5	<u>Douglas County, Washington</u> , 26 Pub. Lands Dec. 446 (1898)
Exhibit 6	Frederick Simms, <u>A Treatise on the Principles and Practice of Levelling, Showing its Application to Purposes of Civil Engineering Particularly in the Construction of Roads</u> (1837) (excerpts)
Exhibit 7	Carter Goodrich, <u>Government Promotion of American Canals and Railroads 1800-1890</u> (1960) (excerpts)
Exhibit 8	Thomas Donaldson, <u>The Public Domain Its History with Statistics</u> (Johnson Reprint Corp. 1970) (1884) (excerpts)
Exhibit 9	Act of March 29, 1806, ch. 19, 2 Stat. 357
Exhibit 10	Act of June 25, 1864, ch. 153, 13 Stat. 183
Exhibit 11	Act of July 2, 1864, ch. 213, 13 Stat. 355
Exhibit 12	Act of July 4, 1866, ch. 167, 14 Stat. 86
Exhibit 13	Act of July 5, 1866, ch. 174, 14 Stat. 89
Exhibit 14	Pamela Baldwin, Congressional Research Service Report for Congress, <u>Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest</u> (Nov. 7, 2003) (excerpts)
Exhibit 15	Senate Bill 91, 39th Cong., 1st Sess. (Jan. 22, 1866)
Exhibit 16	An Act to grant certain parties herein named the right to construct and maintain a Turnpike or Toll Road from the Town of Sonora, in Tuolumne County, ch. 164, 1863-4 Cal. Stat. 155 (Mar. 5, 1864)

- 1  
2 Exhibit 17 An Act to Authorize R.C. Kirby and others to construct and maintain a  
3 Turnpike Road from the Town of Santa Cruz, ch. 178, 1863-4 Cal. Stat.  
4 173 (Mar. 15, 1864)  
5  
6 Exhibit 18 Paul Gates & Robert Swenson, History of Public Land Law  
7 Development (1968) (excerpts)  
8  
9 Exhibit 19 BLM, First Progress Report to the Congress, California Desert  
10 Conservation Area (1978) (excerpts)  
11  
12 Exhibit 20 Deposition of Leonard Huarte (June 9-10, 2010) (excerpts)  
13  
14 Exhibit 21 The Oxford English Dictionary (2d ed. 1989) (excerpts)  
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16 Exhibit 22 Executive Order 6910  
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