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

Attorney for PLAINTIFF COUNTY OF INYO

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

COUNTY OF INYO, Plaintiff, vs. DEPARTMENT OF THE INTERIOR, et al. Defendants, and SIERRA CLUB, et al. Defendant-Intervenors.	Case No.: 1:06-cv-1502 AWI-DLB MEMORANDUM IN SUPPORT OF INYO COUNTY'S MOTION FOR SUMMARY JUDGMENT Hearing Date: November 22, 2010 Time: Room: Anthony W. Ishii United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

INTERIOR BOARD OF LAND APPEALS

I.

INTRODUCTION.

This is an enforcement action by the County of Inyo to remove an encroachment from Last Chance Road[1], a county road. The encroachment was placed in the road by the federal defendants in 1995. The encroachment is a sign placed in the road where it enters Death Valley National Park. The sign prohibits any motor vehicle traffic on the road, essentially converting it to a hiking trail, and preventing utilization of the road right-of-way.

To remove this encroachment and allow use of Last Chance Road, Inyo County seeks to quiet title to the road, which is now located in Death Valley National Park and associated wilderness. The means to do so is the Quiet Title Act. 43 U.S.C. § 2409a. Substantial evidence contained in the record supports Inyo County's contentions, and supports an affirmative decision by summary judgment. This evidence demonstrates that Last Chance Road has existed for nearly one hundred years. It shows that Last Chance Road was accepted into the Inyo County Maintained Road System in 1948, long before that area was included in the park or studied for its wilderness potential. It shows that the road became a county highway with that action. It shows that the road itself exists to this day in the general location illustrated on County and federal maps. The court needs no more evidence than this to determine title to Last Chance Road.

In 1866, and continuing to 1976, the federal government offered a road right-of-way to any person who constructed a public highway across federal lands. Whether that offer was accepted was governed by state law. By California law, the federal offer of dedication was accepted by Inyo County in 1948, and a right-of-way in Inyo County was then created. The acceptance occurred when the Inyo County Board of Supervisors adopted resolutions taking Last Chance Road into the County highway system. Additionally, the federal offer of right-

[1] "Last Chance Road", as used in this motion, refers to the northern portion of Last Chance Road, the entirety of which is the subject of the Complaint. The northern portion is approximately one-half to three-quarters mile long. This northern portion is that reflected in the County Road System maps as Last Chance Road; the remaining portion is labeled "County Right Of Way Only – No Road". The northern portion is that which was excluded from the Last Chance Mountain Wilderness Area (CDCA #112), and which survived Plaintiff's Motion to Dismiss.

of-way was accepted by the public by creation and use of the road, even prior to the County's resolution. To this day, Last Chance Road remains a county highway pursuant to California law.

In 1995, the United States Park Service blocked access to Last Chance Road without formal explanation. Plaintiff Inyo County knows of no authority to close a County road on federal lands. In fact, all relevant federal statutes affirmatively protect property rights which existed at the time of their passage. These statutes include the Federal Land Policy and Management Act, which concerns the management of the subject lands prior to 1993; the California Desert Protection Act, which expanded Death Valley National Park and wilderness to enclose Last Chance Road; and the Wilderness Act, which governs management of the wilderness created in Death Valley. Even Executive Order 6910 (Withdrawal of Public Lands for Conservation) preserved existing rights in the lands. The encroachment upon Inyo County's right-of-way is inconsistent with the protection provided to existing property rights in these statutes.

Inyo County petitions this Court to quiet title to the Last Chance Road right-of-way and to order the federal defendant to remove its barrier from Last Chance Road. Inyo County further petitions your Court to order the Federal Defendant to cease and desist from interfering with the County's and the public's traditional use of Last Chance Road, thereby restoring the status quo ante regarding the road.

II.

FACTUAL BACKGOUND.

The northern terminus of Last Chance Road commences at Willow Spring Road, near Willow Springs in Cucomungo Canyon, and climbs south for about one-half to three-quarters mile to the head of Last Chance Canyon. The head of Last Chance Canyon is a steeply eroded ridge that has developed over millennia as the canyon erodes its way north. The rim provides a spectacular overlook of the badlands below as well as Last Chance Canyon itself and Death Valley beyond. Declaration of Bernard T. Pedersen, Page 3 (Document 75-3); Stipulated Facts, Paragraph 63 (Document 91).

The Last Chance Range comprises the northern limit of Death Valley. Last Chance Canyon cuts through Last Chance Range, southeast to northwest, from Death Valley to the vicinity of Willow Spring, located

in Cucomungo Canyon. The route north from Death Valley through Last Chance Canyon has an early heritage. The first documented use of the route occurred in 1853, when a group surveying routes for a railroad used it to escape the arid Eureka Valley/Death Valley region. RICHARD E. LINGENFELTER, DEATH VALLEY & THE ARMARGOSA, A LAND OF ILLUSION 81-82 (1986) (Excerpts at Exhibit A of Declaration of Ralph H. Keller, (Document 75-5).)

In the early 1900's, when Last Chance Road first appeared on government maps, the Willow Spring Road from which Last Chance Road branches connected Big Pine in the Owens Valley with Willow Spring and the mining towns and camps of Nevada to the north and east: Towns and camps such as Palmetto, Lida, Goldfield, Silver Peak, Gold Mountain; and the Las Vegas and Tonopah railroad. USGS Topographic Map, Lida, Edition of 1913 (Stipulated Facts, Exhibit E). The economic driver of this region, and Death Valley to the south, was mining; and towns and camps came and went as the population of miners shifted from area to area in search of ore. LINGENFELTER *supra* at 99-112. There are still the remains of a mill and miner's shack at Willow Spring. Pedersen Declaration, p. 3; USGS Topographic Map, Last Chance Mountain, Provisional Edition 1987 (Stipulated Facts, Exhibit G).

The unnamed Last Chance Road appears on the United States Geological Service (USGS) topographic map of 1913 (Lida, Edition of Oct. 1913) Stipulated Facts, Exhibit E. The map indicates it was developed from surveying conducted in 1897-98, 1905, and 1911. Stipulated Facts, Paragraph 46. Last Chance Road is recorded as a trail, which proceeds from Willow Spring southeast to the head of Last Chance Canyon, and then trends southwest from the head of Last Chance Canyon to Last Chance Springs, which are located to the west of Last Chance Canyon. Stipulated Facts, Paragraph 47. Last Chance Road is again illustrated on the USGS topographic map of 1957 (Magruder Mtn., Nev.-Calif.). Stipulated Facts, Paragraph 52. The 1957 Magruder Mountain Map was developed from aerial photography taken in 1952 and field work conducted in 1957. Stipulated Facts, Paragraph 51. On this map, the road is depicted as a four-wheel-drive road that proceeds from Willow Spring Road to the head of Last Chance Canyon, then descending as a trail south into the canyon, and

continuing south as a "jeep trail" following the floor of Last Chance Canyon into Death Valley. Stipulated Facts, Paragraph 53.

In 1948, Inyo County by resolution took the northern portion of Last Chance Road into the County road system. *See* County of Inyo Board of Supervisors Resolutions No. 48-8, 48-9 (Exhibit A, Pedersen Declaration). These resolutions identified the roads they incorporated into the County road system by reference to maps and descriptions contained in an amended County Road Register. The County has been unable to locate maps that are contemporaneous with the 1948 resolutions. However, it has located in its archives the California Division of Highways map of the County Road system from 1955. That map shows Last Chance Road, Number 2046, as a County road following the general route of Last Chance Road. Stipulated Facts, Paragraph 36; Map of County Road System, 1955 (Stipulated Facts, Exhibit A). Last Chance Road has been included in the County Maintained Road system to this day. Pedersen Declaration, Paragraph 4. Additionally, the County of Inyo Department of Public Works holds the Road Register, which contains a somewhat inaccurate description of Last Chance Road, Number 2046. Exhibit B, Pedersen Declaration; Stipulated Facts, Paragraphs 24, 31. Since the Road Register is undated, it is difficult to prove it is the same Road Register referred to in Resolution 48-9, which was adopted over sixty years ago. However, the Road Register description for Last Chance Road contains a telling entry, typed at the bottom of the page containing the typed road description: "As Revised and Amended by Resolution of the Board of Supervisors of Inyo County, Dated March 1, 1948, Page 110-111, Supervisors Proceedings Volume N. Minutes of the Board of Supervisors on file with the County Clerk of Inyo County California." Stipulated Facts, Paragraph 25. Together, the resolutions, the 1955 road system map and the Road Register prove that Inyo County adopted Last Chance Road into the County Road System. One could not expect better evidence from so long ago.

Following the passage of the Federal Land Policy and Management Act (FLPMA) in 1976, the United States Bureau of Land Management (BLM) commenced efforts to survey its lands for wilderness potential. Pub.L. 94-579, Oct. 21, 1976, 90 Stat. 2744. The BLM identified portions of public lands as Wilderness Study Areas (WSA), which were "roadless" areas warranting further study. Generally speaking, roads were

considered incompatible with wilderness. The BLM identified a WSA that surrounded Last Chance Road, called Last Chance Mountain Wilderness Area, CDCA # 112. *See* Inyo County's Opposition to Federal Defendant's Motion to Dismiss at 2. In 1988, the BLM published a map of CDCA 112. Exhibit D of Keller Declaration. The BLM generally used Cucomungo Road as the northern border of the WSA. Doing so entirely would have included Last Chance Road in the WSA. However, Last Chance Road was cherry-stemmed from the WSA, meaning that the border of the WSA was drawn to exclude the road from the WSA. Stipulated Facts, Paragraph 11. This was typically viewed as an acknowledgement that roads should be excluded from wilderness designation. Despite the exclusion of Last Chance Road from CDCA # 112, Last Chance Road was included within the boundaries of the Death Valley Wilderness when it was created in 1994. Last Chance Road is now contained in Death Valley National Park. Stipulated Facts, Paragraph 12.

An employee of the Inyo County Road Department, Mr. Huarte, recalls using the road on several occasions in the early 1970's as access for deer hunting and seeing vehicles parked along the road. Stipulated Facts, Paragraphs 74, 93. The road remains evident today, although no use of it has been allowed for over 13 years. Stipulated Facts, Paragraph 94. Mr. Huarte recalls grading the road on various occasions in the early 1970's. Stipulated Facts, Paragraphs 75 - 78, 86. He did not know why he graded the road, since in his view it basically went up to "hardly nothing". Stipulated Facts, Paragraphs 77, 97. In 1995, the National Park Service placed signs on Last Chance Road prohibiting motorized travel on the route. Stipulated Facts, Paragraph 13.

III.

STANDARD OF REVIEW.

A. INYO COUNTY IS ENTITLED TO SUE IN ITS OWN RIGHT.

Plaintiff County of Inyo is a public entity of the State of California, and may sue and be sued. CAL. GOVERNMENT CODE § 811.2. Inyo County is responsible for providing local government services, including but not limited to road construction, reconstruction and maintenance, search and rescue, emergency medical services and law enforcement, all of which depend on access along County highways. The Inyo County Board

of Supervisors has general supervision, management, and control of the county highways. CAL. STREETS & HIGHWAYS CODE § 940; *Haggerty v. Kings County*, 117 Cal.App.2d 470 (Cal. App. 4th Dist. 1953).

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

Summary judgment may be granted only when, drawing all reasonable inference and resolving all doubts in favor of the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c); *see generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-255 (1986). A fact is material if it may affect the outcome of the proceedings, and an issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The moving party bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a genuine issue for trial. FED R. CIV. P. 56(e); *see Anderson,* 477 U.S. at 250. The court may not make credibility determinations, and inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *Id.* at 255. The burden of proof is upon the claimant to establish a right-of-way pursuant to R.S. 2477 and the Quiet Title Act. *Adams v. United States,* 3 F.3d 1254, 1258 (9th Cir. 1993).

IV.

INYO COUNTY OBTAINED A RIGHT-OF-WAY IN LAST CHANCE ROAD NO LATER THAN 1948 WHEN IT ACCEPTED THE ROAD INTO THE COUNTY MAINTAINED ROAD SYSTEM

A. INTRODUCTION.

Plaintiff's argument is simple and straightforward. By Revised Statute 2477 (also R.S. 2477), the United States offered the public a road right-of-way for any road constructed over the public lands. By long history of federal practice, the acceptance of the offer was governed by the law of the state in which the road was located. California law is unambiguous regarding the acceptance of offers of public roads, also known as

dedications. When a county board of supervisors accepts a road of any nature into the county highway system, by resolution, that road becomes a county and public highway. Therefore, when the County of Inyo Board of Supervisors accepted Last Chance Road into the county road system, it made Last Chance Road a county highway and accepted the federal offer of a right-of-way. That right-of-way exists to this date.

B. A RIGHT-OF-WAY OVER FEDERAL LAND WAS OFFERED BY REVISED STATUTE 2477.

Revised Statute 2477, as it has come to be referred to, was adopted by Congress in 1866 in the Mining Act of July 26 1866. Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976, Pub.L. No. 94-579 § 706(a), 90 Stat. 2743). R.S. 2477 states in its entirety: "And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Revised Statute 2477 was repealed in 1976 by the passage of FLPMA. But even as Congress repealed R.S. 2477, it specified that any valid R.S. 2477 right-of-way "existing on the date of approval of this Act" (October 21, 1976) would continue in effect. Pub.L. No. 94-579 § 701(a), 90 Stat. 2743, 2786 (1976).

Therefore, if Inyo County held a valid right-of-way to Last Chance Road on October 21, 1976, that right-of-way continued, unless terminated by some other action.

By R.S. 2477, Congress made an *actual* offer of dedication of a public road. *Western Aggregates, Inc. v. County of Yuba*, 101 Cal.App.4th 278, 298 (Cal. App. 3d Dist. 2002). The clear offer of a right-of-way, however, raises a host of issues, most vexing of which, perhaps, is the action necessary to constitute an acceptance of the offer. R.S. 2477 provides no assistance in this respect in that it required no formal action of acceptance. *Southern Utah Wilderness Alliance v. Bureau of Land Management,* 425 F.3d 735, 741 (10th Cir. 2006) (*Southern Utah Wilderness Alliance*). R.S. 2477 also provides no assistance to determine whether federal law or state law should be consulted to determine whether such an offer has been accepted.

///

///

///

C. THE CHOICE OF FEDERAL OR STATE LAW TO DETERMINE ACCEPTANCE OF THE R.S. 2477 OFFER MAY OF ITSELF BE DETERMINATIVE DUE TO LACK OF HISTORICAL EVIDENCE.

The question of whether to consult federal law or state law for guidance on the issue is of great import. Depending on the state and its laws, an offer of dedication might be accepted by mechanically constructing a road over a parcel; or it might be accepted by mere use of an offered right-of-way; or it might be accepted by action of the local governing body with jurisdiction over the road. A state might allow acceptance by only one or all of these methods. Where states require construction of a road as acceptance of an offer of dedication, depending on the state, both mechanical construction and construction by use may suffice. There is no federal history or federal common law available to determine what actions properly constitute acceptance of the dedication. (*See* discussion *infra*.)

Given that all evidence of the acceptance of the right-of-way must pre-date October 21, 1976, when the R.S. 2477 offer was withdrawn, and that many rural county roads, such as Last Chance Road, were established much earlier than 1976, evidence of mechanical construction, or even maintenance, of the road may be impossible to come by. Where, as in California, construction of a road by use is an accepted method to establish a road, and adoption of a road by resolution is determinative as well, the ancient history of the road is less important than the fact that the road existed prior to 1976 or had been adopted as a county road prior to 1976 – facts that are currently ascertainable. However, if federal agencies are allowed to develop a federal common law on the matter, and should they determine to mandate mechanical construction as the only means of acceptance of an R.S. 2477 offer of dedication, the burden of proof upon local government to establish such acceptance might well be too high to meet, threatening long established rights to county roads crossing federal lands. If a new twenty-first century federal common law were to be developed around roads, it might not recognize a dirt four-wheel-drive county highway as a highway at all, despite a hundred years of history, and state and local law. In that case, the type of acceptance would be entirely irrelevant. This would be unsettling to a local jurisdiction such as Inyo County that has many county highways, dirt and paved, that traverse federal land. Accordingly, the choice of law in these matters might well eliminate a local jurisdiction's right to many county roads.

Plaintiff believes the overwhelming weight of the cases, and past practice, affirm that state law is

consulted to determine if an R.S. 2477 offer of right-of-way was accepted. We rely, in large part, on the definitive federal case on the matter and the materials cited therein: *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2006). This case presents a comprehensive and persuasive analysis of R.S. 2477 and its applicability to county roads, as well as a reasoned analysis of the laws applicable to the offer and acceptance of these federal grants of right-of-way.

D. FEDERAL LAW INCORPORATES STATE LAW TO DETERMINE WHETHER THE OFFER OF A RIGHT-OF-WAY WAS PERFECTED.

Both the United States Supreme Court and the Ninth Circuit have held that state law determines whether a right-of-way was perfected under R.S. 2477. In 1932, the Supreme Court upheld a right-of-way that it found to have been established according to California law. *Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 473 (1932). The road in that case was "formed by the passage of wagons, etc., over the natural soil" and was declared by the county to be a county highway in 1859. *Id*. at 465-467. The Court found:

> It follows that the laying out by authority of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented. Within the principle of the decisions of this court heretofore cited, they were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. The reasons for so holding are too cogent to be denied.
>
> *Id.* at 473.

In 1974, the Ninth Circuit determined that an R.S. 2477 right-of-way was established when the public highway was established in accordance with state law. *Standage Ventures, Inc. v. State of Ariz.*, 499 F.2d 248, 250 (9th Cir. 1974). Finally, in 2006, in the *Southern Utah Wilderness Alliance* case the Tenth Circuit squarely and thoroughly addressed the issue and held that federal law incorporates state law to determine if a right-of-way offered by R.S. 2477 was accepted and perfected. Several factors convinced the Court of that conclusion. One involves the traditional position taken by the BLM on the issue. The BLM has been at the point of the spear on R.S. 2477 issues for over a century. Its position has traditionally and exclusively been that state law governs whether a right-of-way under R.S. 2477 has been established and that state courts are the forum in

which the existence of the right-of-way is properly determined. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 755, fn 7[2] (Footnote included below). The Court found:

> The BLM also has been reluctant, until very recently, to issue regulations governing R.S. 2477 rights-of-way. In fact, its earliest regulation on the subject disclaimed any role for the federal government in implementing R.S. 2477. That regulation states, in its entirety:
>
> > The grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under said R.S. 2477 as no action on the part of the Federal Government is necessary.
> >
> > 43 C.F.R. § 244.55 (1939) (footnote omitted).
>
> This regulation reflects the position that R.S. 2477 gives the BLM no executive role, and indicates that the BLM interpreted the grant to take effect without any action on its part. Subsequent editions of the Code of Federal Regulations carried forward the same language, (Footnote omitted.) which was not repealed until the code underwent extensive post-FLPMA (and, thus, post-R.S. 2477) revisions in 1980.
>
> *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 755-756.

The *Southern Utah Wilderness Alliance* case was essentially over the *scope* of a county's right-of-way. However, in that case the issue of whether a right-of-way had been established remained an issue, to be decided on remand. To provide guidance to the lower court on remand, the Court addressed the choice of law issue. The Court's reasoning is persuasive, and Plaintiff, which cannot better the Court's language or reasoning, quotes it at length:

> The real question, we think, is not whether state law applies or federal law applies, but whether

---

[2] FN7. *Kirk Brown*, 151 IBLA 221, 227 n. 6 (1999) ("Normally, the existence of an R.S. 2477 road is a question of state law for adjudication by state courts."); *Sierra Club*, 104 IBLA 17, 18 (1988) ("[T]he Department has taken the position that the proper forum for adjudicating R.S. 2477 rights-of-way is the state courts in the state in which the road is located."); *James S. Mitchell, William Dawson*, 104 IBLA 377, 381 (1988) ("[T]he Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to [R.S. 2744], a road is properly deemed to be a 'public highway.'"); *Leo Titus, Sr.*, 89 IBLA 323, 337 (1985) ("[T]his Department has considered State courts to be the proper forum for determining whether there is a public highway under [R.S. 2744] and the respective rights of interested parties."); *Nick DiRe*, 55 IBLA 151, 154 (1981) ("[T]he question of the existence of a 'public highway' [under R.S. 2477] is ultimately a matter for state courts….") *Homer D. Meeds*, 26 IBLA 281, 298 (1976) ("[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under [R.S. 2477] has been created under State law and to adjudicate the respective rights of interested parties."); *Herb Penrose*, A-29507 at 1-2 (July 26, 1963) ("State courts are the proper forums for determining the protestant's rights and the rights of the public to use the existing… [R.S. 2477] road."); Solicitor's M-Opinion, *Limitation of Access to Through-Highways Crossing Public Lands*, M-36274, 62 I.D. 158, 161 (1955) ("Whatever may be construed as a highway under State law is a highway under [R.S. 2744], and the rights thereunder are interpreted by the courts in accordance with the State law.").

federal law looks to state law to flesh out details of interpretation. R.S. 2477 is a federal statute and it 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, 37 S.Ct. 387, 61 L.Ed. 791 (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, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976). As the Supreme Court has stated, "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." *United States v. Oregon*, 295 U.S. 1, 27-28, 55 S.Ct. 610, 79 L.Ed. 1267 (1935). "The construction of grants by the United States is a federal not a state question." *Id.* at 28, 55 S.Ct. 610.

Even where an issue is ultimately governed by federal law, however, it is not uncommon for courts to "borrow" state law to aid in interpretation of the federal statute. The Supreme Court has explained that "[c]ontroversies ... governed by federal law, do not inevitably require resort to uniform federal rules.... Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law'." *United States v. Kimball Foods, Inc.* 440 U.S. 715, 727-28, 99 S.Ct. 1448, 59 L. Ed.2d 711 (1979) (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947)); (Citations omitted.).

In the specific context of federal land grant statutes, the Court has explained that courts may incorporate state law "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." *Oregon*, 295 U.S. at 28, 55 S.Ct. 610; *see United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir.1984) ("The scope of a grant of federal land is, of course, a question of federal law. But in some instances "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.' ") (quoting *Oregon*, 295 U.S. at 28, 55 S.Ct. 610) (internal citation omitted in original).

In determining when to borrow state law in the interpretation of a federal statute, the Supreme Court has instructed courts to consider: whether there is a "need for a nationally uniform body of law," whether state law would "frustrate federal policy or functions," and what "impact a federal rule might have on existing relationships under state law." *Wilson*, 442 U.S. at 672, 99 S.Ct. 2529. Those were the considerations the *Hodel* court consulted in determining that state law should govern the "scope" of R.S. 2477 grants. *Hodel*, 848 F.2d at 1082-83. It follows that to the extent state law is "borrowed" in the course of interpreting R.S. 2477, it must be in service of "federal policy or functions," and cannot derogate from the evident purposes of the federal statute. State law is "borrowed" not for its own sake, and not on account of any inherent state authority over the subject matter, but solely to the extent it provides "an appropriate and convenient measure of the content" of the federal law. *Bator*, et al., *supra*, at 768. (Footnote omitted.)

To modern eyes, R.S. 2477 may seem to stand on its own terms, without need for reference to any outside body of law. At the time of its enactment, however, the creation and legal incidence of "highways" was an important field within the common law, with well-developed legal principles reflected in numerous legal treatises and decisions. (Citations omitted.) When Congress legislates against a backdrop of common law, without any indication of intention to depart from

or change common law rules, the statutory terms must be read as embodying their common law meaning. *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992); *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739-40, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). It is reasonable to assume that when Congress granted rights of way for the construction of highways across the unreserved lands of the West in 1866, it was aware of and incorporated the common law pertaining to the nature of public highways and how they are established.

In the decades following enactment of R.S. 2477, when disputes arose, courts uniformly interpreted the statute in light of this well-developed body of legal principles, most of which were embodied in state court decisions. In one early case, a landowner acquired title to a parcel of land from the United States and constructed a fence across what had been used, in previous years, as a public pathway between the town and its school. The Supreme Court of California held that under state law, five years of public use was sufficient for the public to acquire the right to use the path as a public way. *McRose v. Bottyer,* 81 Cal. 122, 125, 22 P. 393 (1889). "The fact that the land was public land of the United States at the time the right to use it as a public way was acquired… makes no difference. The Act of Congress of 1866 (sec. 2477, R.S. U.S.) granted the right of way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made, the public acquired an easement subject to the laws of this state." *Id.* at 126, 22 P. 393. The *Hodel* court cited some fifteen decisions in which state law definitions of "acceptance" of a public highway were employed to resolve R.S. 2477 disputes, 848 F.2d at 1082 n. 13, and we have located many more. (Footnote omitted.)

One prominent example is the Supreme Court's decision in *Central Pacific Railway Co. v. Alameda County,* 284 U.S. 463, 52 S.Ct. 225, 76 L.Ed. 402 (1932), which involved a conflict between two rights of way in the bottom of a California canyon, one a public highway laid out in 1859 and "formed by the passage of wagons, etc., over the natural soil," and the other a right of way granted to the Central Pacific Railway Company under Acts of Congress in 1862 and 1864. *Id.* at 467, 52 S.Ct. 225. The ultimate question was whether R.S. 2477 applied retroactively to validate rights of way established prior to the enactment of the statute in 1866. The Court held that it did, and in the course of so holding, the Court acknowledged that state law governed the acceptance of the relevant R.S. 2477 right of way: "[T]he laying out *by authority of the state law* of the road here in question created rights of continuing user to which the government must be deemed to have assented [when it passed R.S. 2477](Brackets in original.)." *Id.* at 473, 52 S.Ct. 225 (emphasis added in original). … In contrast to this and the many other decisions employing state law standards to resolve R.S. 2477 disputes, the parties have not cited, and we have not found, any cases before its repeal in which R.S. 2477 controversies were resolved by anything other than state law. This unanimity of interpretation over a great many years is entitled to weight. *See Sierra Club v. Hodel,* 848 F.2d 1068, 1080 (10th Cir.1988) (practice under a statute is relevant evidence of how that statute should be interpreted) (quoting *United States v. Midwest Oil Co.,* 236 U.S. 459, 473, 35 S.Ct. 309, 59 L.Ed. 673 (1915)).

It was the consistent policy of the BLM, as well as the courts, to look to common law and state law as setting the terms of acceptance of R.S. 2477 grants. In 1902, in *The Pasadena and Mount Wilson Toll Road Co. v. Schneider,* 31 Pub. Lands Dec. 405 (1902), the Department of the Interior considered whether toll roads could be R.S. 2477 highways. Its answer to that question drew directly from the common law of "highways," as reflected in state court decisions, common law treatises, and legal dictionaries:

> Section 2477 of the Revised Statutes grants "the right of way for the construction of highways over the public lands not reserved for public uses." A highway is "a road over which the public at large have a right of passage" (Dic.Loc.V.) and includes "every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the King's subjects'" (3 Kent. Com., 432). Toll roads are highways, and differ from ordinary highways merely in the fact that they are also subjects of property and the cost of their construction and maintenance is raised by a toll from those using them, instead of by general taxation, *Commonwealth v. Wilkinson* (16 Pick., Mass., 175, 26 Am. Decl., 654 [1834]); *Buncombe Turnpike Co. v. Baxter* (10 Ired., N. Car., 222 [1849]). The obstruction of a turnpike toll road is indictable, under a statute against obstruction of highways. (*Nor Cent. R. Co. v. Commonwealth*, 90 Pa. St., 300 [1879].) A highway may be a mere footway. (*Tyler v. Sturdy*, 108 Mass., 196 [1871].) Neither the breadth, form, degree of facility, manner of construction, private, corporate, or public ownership, or source or manner of raising the fund for construction and maintenance, distinguishes a highway, but the fact of general public right of user for passage, without individual discrimination, is the essential feature. The necessities and volume of traffic, difficulties of route, and fund available for construction and maintenance, will vary the unessential features, *but the fact of general public right of user for passage upon equal terms under like circumstances is the one constant characteristic of a highway.*(Emphasis added.)
>
> *Id.* at 407-408.

In its first regulation addressing R.S. 2477 claims, issued in 1939, the BLM stated that "[t]he grant [under R.S. 2477] becomes effective upon the construction or establishing of highways, *in accordance with the State laws*, over public lands not reserved for public uses." 43 C.F.R. § 244.55 (1939) (emphasis added in original). BLM regulations continued to incorporate state law as the standard for recognizing R.S. 2477 rights-of- way until the repeal of R.S. 2477 in 1976. *See* 43 C.F.R. § 244.58 (1963) ("Grants of rights-of-way [under R.S. 2477] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses."); 43 C.F.R. § 2822.2-1 (1974) ("Grants of rights-of-way [under R.S. 2477] become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses."); *see also* Solicitor's M-Opinion, *Limitation of Access to Through-Highways Crossing Public Lands*, M-36274, 62 I.D. 158, 161 (1955) ("Whatever may be construed as a highway under State law is a highway under [R.S. 2477], and the rights thereunder are interpreted by the courts in accordance with the State law."). Both before and after repeal, and until very recently, BLM administrative decisions took the same position. *See, e.g., Kirk Brown*, 151 IBLA 221, 227 n. 6 (1999) ("Normally, the existence of an R.S. 2477 road is a question of state law."); *Homer D. Meeds*, 26 IBLA 281, 298 (1976) ("[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under [R.S. 2477] has been created under State law and to adjudicate the respective rights of interested parties.").

This did not mean, and never meant, that state law could override federal requirements or undermine federal land policy. For example, in an early decision, the BLM determined that a state law purporting to accept rights of way along all section lines within the county was beyond the intentions of Congress in enacting R.S. 2477. *Douglas County, Washington*, 26 Pub. Lands Dec. 446 (1898). The Department described this state law as "the manifestation of a marked and

novel liberality on the part of the county authorities in dealing with the public land," and stated that R.S. 2477 "was not intended to grant a right of way over public lands in advance of an apparent necessity therefore, or on the mere suggestion that at some future time such roads may be needed." *Id.* at 447. (Footnote omitted.) Similarly, in 1974, the BLM issued regulations clarifying that R.S. 2477 rights of way are limited to highway purposes, and do not encompass ancillary uses such as utility lines, notwithstanding state law to the contrary. *See* 43 C.F.R. § 2822.2-2 (1974). In none of the cases applying state law was there any suggestion of a conflict between the state law and any federal principles or interests. Rather, state law was employed as a convenient and well-developed set of rules for resolving such issues as the length of time of public use necessary to establish a right of way, abandonment of a right of way, and priorities between competing private claims.

We do not believe application of state law in this fashion offends the criteria set forth in *Wilson* for appropriate borrowing of state law in the interpretation of federal statutes. The first question is whether there is a "need for a uniform national rule" regarding what steps are required to perfect an R.S. 2477 right of way. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). We think not. Although the substantive content of state law could in some cases conflict with the purposes of federal law (the second *Wilson* criterion), we do not think uniformity for uniformity's sake is necessary in this area of the law. Indeed, there is some force to the view that interpretation of R.S. 2477 should be sensitive to the differences in geographic, climatic, demographic, and economic circumstances among the various states, differences which can have an effect on the establishment and use of routes of travel. A panel of the Ninth Circuit, for example, held that its decision in an R.S. 2477 case involving an Alaska claim "Must take into account the fact that conditions in Alaska present unique questions, not easily answered." *Shultz v. Dep't of Army*, 10 F.3D 649, 655 (9th Cir. 1993). (Footnote included in footnote below.[3]) Judge Fletcher, writing for the court, explained:

> Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails and they have moved with the season and the purpose for the transit--what travelled [sic] best in winter could be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and as the uses shifted. What might be considered sporadic use in another context would be consistent or constant use in Alaska.
>
> *Id.* (Footnote omitted in original).

Analogous considerations might pertain in the southern Utah canyon country in which this case arises. The sparse population, rugged terrain, scarcity of passable routes, seasonal differences in snow, mud, and stream flow, fragile and environmentally sensitive land, and paucity of towns or other centers of economic activity, could have an effect on the location of roads.

Moreover, for over 130 years disputes over R.S. 2477 claims were litigated by reference to non-uniform state standards, a fact that casts serious doubt on any claims of a need for uniformity

[3] "FN18. On panel rehearing, the opinion in Schultz was withdrawn, 90 F.3D 1222 (9th Cir. 1996). We therefore cite the opinion not as authority but for its persuasive value."

> today. *See 1993 D.O.I. Report to Congress*, at 2 ("There have been few problems regarding R.S. 2477 rights-of-way in most public land states although states have handled the issue differently. This may be because of the differences among state laws ..."). When the BLM proposed nationwide standards for the first time in 1994, Congress responded by passing a permanent appropriations rider forbidding the implementation of those standards absent express authorization from Congress. U.S. Department of the Interior and Related Agencies' Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104-208, 110 Stat. 3009 (1996). At the time it took this action, Congress was aware that there were no uniform federal standards. *See 1993 D.O.I. Report to Congress*, at 21 (noting the existence of "numerous and conflicting state and federal court rulings on R.S. 2477"). Congress's decision to perpetuate non-uniform standards provides support for the view that there is no "need for a uniform national rule." *Wilson*, 442 U.S. at 673, 99 S.Ct. 2529.
>
> The second *Wilson* criterion is whether "application of state law would frustrate federal policy or functions." *Id.* As we discuss specific state law standards, we will advert to congressional intention and other indications of federal policy. To the extent adoption of a state law definition would frustrate federal policy under R.S. 2477, it will not be adopted.
>
> The third *Wilson* criterion, the "impact a federal rule might have on existing relationships under state law," *id.*, points in favor of continued application of state law. Both right-of-way holders and public and private landowners faced with potential R.S. 2477 claims have an interest in preservation of the status quo ante. That is best accomplished by not changing legal standards. In *Hodel*, this Court observed that "R.S. 2477 rightholders, on the one hand, and private landowners and BLM as custodian of the public lands, on the other, have developed property relationships around each particular state's definition of the scope of an R.S. 2477 road." 848 F.2d at 1082-83. The same can be said of the existence of an R.S. 2477 road."
>
> We therefore conclude that federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right of way under the statute, federal law "borrows" from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent. The applicable state law in this case is that of the State of Utah, supplemented where appropriate by precedent from other states with similar principles of law.
>
> *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d at 762-768."

California courts also have consistently applied state law to determine if a R.S. 2477 right-of-way was perfected. *See McRose v. Bottyer*, 81 Cal. 122, 126 (Cal. 1889); *Schwerdtle v. County of Placer*, 108 Cal. 589, 591-592 (Cal. 1895); *Ball v. Stephens*, 68 Cal.App.2d 843, 846 (Cal. App. 2d Dist. 1945); *Western Aggregates, Inc. v. County of Yuba*, 101 Cal.App.4th 278, 296 (Cal. App. 3d Dist. 2002) (*Review Denied* Oct. 16, 2002.) "Congress did not specify or limit the methods to be followed in the establishment of such highways. It was necessary therefore, in order that a road should become a public highway, that it be established in accordance with the laws of the state in which it was located." (Citations omitted.) *Ball v. Stephens*, 68 Cal.App.2d at 846.

E. THE LAST CHANCE ROAD RIGHT-OF-WAY WAS ACCEPTED IN ACCORDANCE WITH CALIFORNIA, AND THEREFORE FEDERAL, LAW.

Assuming, therefore, that California law determines the method by which the Last Chance Road offer of right-of-way would be accepted, Plaintiff moves to an analysis of California law. Under California law, there are two important ways by which a county can obtain a county highway. First, a public road is created if it is laid out or erected by the county. Second, if a road is laid out or constructed by others, it may be dedicated to and accepted by the public, either by public use or by acceptance by a county. A county indicates its 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.

1. The Last Chance Road Right-of-Way was accepted as a matter of law when the Inyo County Board of Supervisors accepted it into the County Road System.

Where an offer of a piece of land for a highway has been made to a county, the act of acceptance by the County creates a county highway. *Watson v. Greely*, 69 Cal.App. 643, 649 (Cal. App. 3rd Dist. 1924). A public road becomes a county road when it is accepted by resolution of the board of supervisors. *Wine v. Boyer*, 220 Cal.App.2d 375, 385 (Cal. App. 2d Dist. 1963); CAL. STREET & HIGHWAYS CODE § 941. The action of a board of supervisors creating a road will be presumed to be effective, unless evidence is produced to the contrary. *Humboldt County v. Dinsmore*, 75 Cal. 604, 607-608 (Cal. 1888). It is within a board of supervisors jurisdiction to determine if the matters necessary are extant and to establish a county highway. *Id*. at 608-609.

The facts here are reasonably straightforward. In 1948, by Resolution No. 48-8 and 48-9, Inyo County accepted Last Chance Road into the Inyo County road system by specific reference to the County Road Register. The resolutions themselves do not name Last Chance Road, but accept existing County roads by reference to the Road Register. Resolutions No. 48-8, 48-9 (Exhibit A of Pedersen Declaration); Stipulated Facts, Paragraph 18. A separate document, the County Road Register, maintained by the Inyo County Road Commissioner, contains the typewritten description of Last Chance Road, road number 2046. The Road

Register entry for Last Chance Road states specifically that it was adopted by the above resolutions. Stipulated Facts, Paragraphs 24, 25. Additionally, maps of the County Road System, maintained by the Road Commissioner, and released on October 19, 1955, graphically illustrate road number 2046, and label it Last Chance Road. Stipulated Facts, Exhibit A. Further, the road exists at the general location illustrated on that map and on USGS maps. Stipulated Facts, Paragraphs 11, 36, 47, 52-54, 56-61, 94.

When Inyo County accepted Last Chance Road into the road system by resolution, the County became responsible and liable for the road, and the road became a County highway. The action of the Board of Supervisors is determinative. CAL. STREET & HIGHWAYS CODE § 941. For the purposes of R.S. 2477, the acceptance by Inyo County occurred while the offer was outstanding, prior to its withdrawal in 1976. Under California law, there is little doubt regarding the County's ownership of Last Chance Road. Additionally, as a public highway, the public has a right to travel upon the road, a right which may not be abrogated except by action of the Board of Supervisors. *Escobedo v. State of California*, 35 Cal.2d 870, 875-876 (Cal. 1950); *Findley v. Justice Court*, 62 Cal.App.3d 566, 572 (Cal. App. 5th Dist 1976).

2. The Last Chance Road Right-of-Way was accepted by public use.

The acceptance of a right-of-way dedication by board resolution creates a public highway in and of itself. However, acceptance by a board of supervisors is not required. The dedication of a right-of-way may be accepted by public use. *Ball v. Stephens*, 68 Cal.App.2d at 846 (recognizing R.S. 2477 right-of-way even though "it was never improved or maintained by the county"); *see also Smith v. City of San Luis Obispo*, 95 Cal. 463 (Cal. 1892); *Western Aggregates v. Yuba*, 101 Cal.App.4th 278, 297 (Cal. App. 3d Dist. 2002). In *Ball v. Stephens* the road was neither laid out nor constructed by the county:

> The route was used first as a trail, later by horsedrawn vehicles, and went through a gradual process of occasional improvement and use until it became a road suitable for automobiles and trucks. … The strongest evidence as to the extent of the travel was the fact that the road did come into existence through public use. In other words, it came to be a road by means of being used as a road and in the same fashion that many other mountain roads have come into existence.
>
> *Ball v. Stephens*, 68 Cal.App.2d at 848.

The offer of a landowner to dedicate a highway and its acceptance by the public may be manifested in

any number of ways indicating an intent by the landowner to dedicate, and by the public to accept. Use by the public for a sufficient period of time to demonstrate the recognition, use and acceptance of a public highway consummates the dedication. *People v. Laugenour*, 25 Cal.App. 44, 52, (Cal. App. 3rd Dist. 1914). Where the offer to dedicate by the owner is clear, the length of time that the public uses the road is not relevant to determine if the offer is accepted. The offer to dedicate and the acceptance by use, both being shown, the rights of the public have immediately vested. *Schwerdtle v. County of Placer*, 108 Cal. 589, 593 (Cal. 1895). The acceptance of a dedication by a board of supervisors, even if not strictly in accordance with procedure, combined with the use of the road by the public, is ample to show an acceptance of the dedicated right-of-way. *People v. Marin County*, 103 Cal. 223, 229-230 (Cal. 1894). Further evidence of the public use of a road is its inclusion on official maps. *Western Aggregates, Inc. v. County of Yuba*, 101 Cal.App.4th at 298. Markings on official maps can provide evidence that a public road existed. *Id*.; CAL. EVID. CODE § 1341; *Gray v. Magee*, 133 Cal.App. 653, 658, 661 (Cal. App. 4th Dist. 1933).

The evidence inescapably establishes that the public used Last Chance Road following the offer of the right-of-way by the United States. As mentioned previously, the offer of the right-of-way occurred by virtue of the passage of R.S. 2477 in 1866. The offer was open until the passage of FLPMA in 1976. The fact that the road existed during the relevant time period is first evidenced by United States topographic maps from 1913 and 1957, both of which show the relevant portion of Last Chance Road. These are surveyed maps issued by the United States government and should be presumed to be accurate. Stipulated Facts, Paragraphs 46, 51. The road is evidenced as well by the Inyo County road system map dated 1955. Further, even if the Board of Supervisors' acceptance of the road into the County Road System by resolution in 1948 was not sufficient in itself to create the road, it is substantial evidence that the road existed and that the public intended to extend control over it.

In his depositions, Mr. Huarte stated that he drove on the road and graded it in the early 1970's. Stipulated Facts, Paragraphs 74-79, 86, 93. Not surprisingly, portions of the road physically exist even to this day. Stipulated Facts, Paragraph 86, 94. The Court therefore has substantial and convincing evidence of the

existence of Last Chance Road in 1913, 1948, 1957, the 1970's, 1987, 1995 and 2010. There can be little argument that the road did not come into being and experience continuous use for decades. As a result, there can be even less argument under California law that Last Chance Road did not become a public highway. "The strongest evidence as to the extent of the travel was the fact that the road did come into existence through public use. In other words, it came to be a road by means of being used as a road and in the same fashion that many other mountain roads have come into existence." *Ball v. Stephens*, 68 Cal.App.2d at 848.

3. The route of Last Chance Road need not be delimited for the purposes of this action.

In its Complaint, Inyo County sought to have the scope of its right-of-way defined by this court. As stated in Plaintiff's Memorandum in Opposition to Sierra Club et. al's Motion to Intervene, Plaintiff is now of the opinion that the scope of the right-of-way is not judiciable by this Court at this time, beyond a claim for a route from Willow Spring Road to the head of Last Chance Canyon. Plaintiff maintained Last Chance Road for decades in cooperation with the federal land owner, and there has never been a dispute as to the route of the road or scope of its use. It was not until the road was blocked in 1995 that any objection to the road was raised, and then it was not raised as to the scope of the right-of-way, or the route, but as to whether the right-of-way existed at all. There is little doubt that, as the fee title holder, the Federal Defendant has the authority to participate in the management of the road. See *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988); *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994). If the County, as claimed, holds a right-of-way for this road, state law would continue to define the County's authority to maintain and manage the road subject to the federal interest in its lands. Management of the road would necessarily be a cooperative venture. This interaction between the County and the Federal Defendants would likely be complex and continuously evolving, but nothing out of the ordinarily in Death Valley National Park or other federal lands in Inyo County.

There has been one obstruction, a sign, placed in Last Chance Road by the Federal Defendant. The United States admitted placing the sign in the road, and thereby admitted the location of the road at that point. Discovery Response of United States, Exhibit F of Keller Declaration. The Court therefore need not define the further extent of the road to order Defendant to remove the sign from the road, and the Court need not define the

extent of the road to determine there is a road right-of-way on Last Chance Road. There is simply no ripe dispute as to the scope or location of the right-of-way. Further, Plaintiff believes it would be bad policy for the Court to attempt to define the scope of the right-of-way on this undeveloped record. Assuming Plaintiff's motion is granted, the appropriate course of action is to allow Plaintiff and Defendant to engage in normal inter-agency coordination in managing the road. In the unlikely event of a dispute, it should be resolved administratively, and if it could not be so resolved, the then defined dispute would be ripe for adjudication. Therefore, Plaintiff limits its request for relief to that stated below, and waives the more extensive relief for which it petitioned in its Complaint.

V.

THE UNITED STATES LACKS THE AUTHORITY TO TERMINATE THE RIGHT-OF-WAY OR TO PROHIBIT ITS USE.

It may be premature in this motion to defend against a claim by the United States that it has the authority to close the road, assuming Inyo County established a right-of-way. The United States has raised no such claim. However, it seems prudent to make that point. It would be understandable if persons were to assume that Congress, by making the area surrounding Last Chance Road a wilderness area, intended to eliminate the road. However, such an assumption runs counter to the clear intention of Congress.

All of the land management statutes relevant to Last Chance Road share one thing in common – they all demonstrate an intention *not* to eliminate property rights within their spheres. This protection of property rights is understandable considering the expansive coverage of these acts, as well as the contentious nature of taking thousands of acres of formerly accessible public lands into wilderness. It is not a surprising trade-off that Congress would act to protect existing mining claims and in-holdings at the same time it eliminated an opportunity for the general public to create new roads or claims on this land.

The FLPMA, which generally governs the activities of the BLM, and which led to the creation of CDCA # 112, provides: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, *right-of-way*, or other land use right or authorization existing on the date of approval of this act." (Emphasis added.) FLPMA § 701(a), codified at 43 U.S.C. § 1701 savings

provision (a). It further provides that "[a]ll actions by the secretary concerned under this Act shall be subject to valid existing rights", and "[n]othing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted." FLPMA §§ 701(h), 509(a), codified respectively at 43 U.S.C. §§ 1701 savings provision (h) and 1769(a).

The California Desert Protection Act of 1994 (CDPA) created the expanded Death Valley wilderness area, which surrounds Last Chance Road. California Desert Protection Act of 1994, PL 103-433, October 31, 1994, 108 Stat. 4471. Section 708 of the CDPA provides: "The Secretary shall provide adequate access to nonfederal owned land *or interests in land* within the boundaries of the conservation units and wilderness areas designated by this Act which will provide the owner of such land *or interest* the reasonable use and enjoyment thereof." (Emphasis added.)

Section 603 of the CDPA states that the wilderness created by the CDPA shall be administered by the applicable provisions of the Wilderness Act. The Wilderness Act is codified at 16 U.S.C. § 1131 *et seq.* and at section 1133 (prohibition provisions), provides: "Except as specifically provided for in this chapter, and *subject to existing private rights,* there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter…" (Emphasis added.) The Wilderness Act further specifically protects patented mining claims and provides for roads to access those claims. 16 U.S.C. §§ 1133(d)(3) (mining ingress), (4) (water resources, grazing); 1134(b) (access to mining claims). A local jurisdiction's interest in a public road right-of-way is considered private property under the United States Constitution, Amendment V. *Jefferson County, Tenn. v. Tennessee Val. Authority,* 146 F.2d 564, 565-66 (C.C.A. Tenn. 1945), *cert. denied* 65 S.Ct. 1016, *rehearing denied* 65 S.Ct. 1024.

Plaintiff believes the Federal Defendant will find no lawful authority to close Last Chance Road. In fact, it is prohibited by Congress from doing so.

VI.

CONCLUSION.

Plaintiff Inyo County believes the evidence and law are conclusive that the United States offered a road

right-of-way over public lands, which was accepted by Inyo County. Upon that acceptance, Last Chance Road became a county highway. Further, the evidence is clear that the right-of-way exists to this day, and has been obstructed by the Federal Defendants. Therefore, there are no disputed issues of material fact and Plaintiff is entitled to judgment as a matter of law. Accordingly, Inyo County respectfully prays this court to: Quiet title in and to Last Chance Road; order Federal Defendant to remove all obstructions placed by it in Last Chance Road; order Federal Defendant to cease and desist from interfering with County's and the public's traditional use of Last Chance Road; and award the Plaintiff attorneys fees and costs to the extent permitted by law.

DATED: September 9, 2010

Respectfully submitted,

/s/ Ralph H. Keller
RALPH H. KELLER
County Counsel
Attorney for Plaintiff

dg/Litigation/RS2477/Memorandum in Suppt.09082010