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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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SAN JUAN COUNTY, UTAH,	:	Case No. 2:04 CV 00552 BSJ
Plaintiff,	:	
STATE OF UTAH,	:	<b>FEDERAL DEFENDANTS' TRIAL</b>
Plaintiff-Intervenor,	:	<b>MEMORANDUM</b>
vs.	:	
UNITED STATES OF AMERICA;	:	
DEPARTMENT OF THE INTERIOR;	:	Honorable Bruce S. Jenkins
NATIONAL PARK SERVICE,	:	
Defendants.	:	

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**I. INTRODUCTION.**

San Juan County (the “County”) filed this action against the Federal Defendants pursuant to the Quiet Title Act, 28 U.S.C. § 2409a (“QTA”). The County seeks to quiet title to a right-of-way for a claimed highway in Salt Creek Canyon in the Needles District of Canyonlands National Park, under Section 8 of the Mining Act of 1866, 14 Stat. 251, 253, later codified as Revised Statute 2477 and as 43 U.S.C. § 932 (repealed October 21, 1976) (“R.S. 2477”). The State of Utah intervened as plaintiff, alleging that the state is the joint owner of R.S. 2477 rights-of-way in Utah pursuant to Utah Code Ann. §§ 72-5-302(2) and 72-5-103(2)(b). Specifically, Plaintiffs seek to quiet title to approximately twelve miles of a claimed right-of-way in Salt Creek Canyon which commences at the Cave Spring Road, proceeds through Salt Creek Canyon, and ends in a tributary canyon near a geological formation known as Angel Arch.

**II. FACTUAL BACKGROUND.**

**A. Establishment of Canyonlands National Park.**

On April 9, 1962, the Department of the Interior filed an application of withdrawal, in aid of legislation to create Canyonlands National Park, for 330,272 acres of land including the lands at issue in this case. This application withdrew these lands from all forms of appropriation except location and entry of metalliferous minerals under the mining laws, and grazing. See 43 C.F.R. § 295.11(a) (1962).

On September 12, 1964, Congress added Canyonlands National Park to the national park system, providing:

That, in order to preserve an area in the State of Utah possessing superlative scenic, scientific, and archeologic features for the inspiration, benefit, and use of the public, there is hereby established the Canyonlands National Park which,

subject to valid existing rights, shall comprise the following generally described lands [including the lands at issue].

Pub. L. 88-590, 78 Stat. 934 (1964). In creating Canyonlands, Congress directed that the “administration, protection, and development” of Canyonlands be exercised by the Secretary of the Interior “in accordance with the provisions of [the Organic Act].” 16 U.S.C. § 271d.

Congress amended this Act on November 12, 1971, by Pub. L. No. 92-154, 85 Stat. 421 (1971), codified at 16 U.S.C. § 271. This amendment provides, in part:

That, in order to preserve an area in the State of Utah possessing superlative scenic, scientific, and archeologic features for the inspiration, benefit, and use of the public, there is hereby established the Canyonlands National Park which, subject to valid existing rights, shall comprise the area generally depicted on the drawing entitled “Boundary Map, Canyonlands National Park, Utah,” numbered 164-91004 and dated June 1970, which shows the boundaries of the park having a total of approximately three hundred and thirty-seven thousand two hundred and fifty-eight acres. The map is on file and available for public inspection in the offices of the National Park Service, Department of the Interior.

Canyonlands National Park is divided into three distinct geographical districts separated by the Green and Colorado Rivers. These districts are the Island in the Sky, a roughly triangular area extending south into the heart of the Park between the Colorado and Green Rivers to their point of confluence; the Maze District, to the West of the Green River and the Colorado River after it is joined by the Green; and, most relevant here, the Needles District, to the east and southeast of the Colorado River.

The uniqueness of this area, “within the scenic heart of the Colorado Plateau,” was a major factor underlying its recognition as a national park:

Although some of the individual features (arches, cliffs, canyons, colorful rock layers, semi-desert flora and fauna) are also found in other units of the National Park System, many are not duplicated elsewhere, and the total assemblage of features and their visual aspect is unique. Nowhere else is there a comparable

opportunity to view a colorful, exciting, geologically significant wilderness from above, and then get down into its midst--and still not lose the atmosphere of remote wilderness.

S. Rep. No. 88-381, at 6 (1963); H. R. Rep. No. 88-1823, at 5 (1964). This “scenery of erosion,” includes canyons, mesa, buttes, spires and natural arches exposing the geologic history of the area. Canyonlands’ backcountry is significant as one of the last, large, relatively undisturbed areas of the Colorado Plateau.

Another major theme of Canyonlands is its archeological history of the prehistoric Anasazi culture, many examples of which are found in the Park, especially in the Needles District. In addition, the Park’s desert, grassland and riparian ecosystems are both scenic and environmental resources. See S. Rep. No. 88-381, at 4-7 (1963) and H. R. Rep. No. 88-1823, at 9-10 (1964) (containing vivid descriptions of the scenic beauty of the proposed park and its plant and animal life, and noting its archeologic importance).

**B. Salt Creek Canyon.**

Salt Creek Canyon is the largest drainage in the Needles District of Canyonlands National Park and is located in a remote part of southeastern Utah, approximately 50 miles from the nearest town. Canyon elevations range from a low of approximately 3,600 feet at the Colorado River to a high of almost 8,000 feet at Cathedral Butte, the southern most end of the Canyon. The creek, itself, begins on the north side of the Abajo Mountains in the Manti-LaSal National Forest about five miles from the southern boundary of Canyonlands National Park. From this boundary, the creek runs northerly about 32 miles to the Colorado River. Sections of the creek have year-round surface water supported by several springs. In other sections, surface flow is intermittent, resulting from spring snowmelt and storm runoff. Surface and ground water

associated with the creek support the most extensive riparian ecosystems in the park, other than the Green and Colorado Rivers. Id. Surface water and riparian habitat are among the rarest habitat types in the arid Canyonlands environment, and are particularly important to wildlife. Salt Creek Canyon supports the Park's richest assemblage of birds and other vertebrate wildlife outside the river corridors.

Salt Creek Canyon is also the heart of the Salt Creek National Register Archeological District, the area with the highest recorded density of archeological sites in the Park. The Salt Creek Archeological District was listed on the National Register of Historic Places in 1974. The area contains the greatest concentration of archeological sites and structures within the Park (National Register Nomination 1974: 2). A tributary canyon contains Angel Arch, a now well-recognized geological formation. In 2001, the Park Service conducted a survey along the portion of the Salt Creek road between Peekaboo Campsite and Angel Arch within the Salt Creek Archeological District to identify cultural properties directly within the four-wheel drive road extending up the canyon. Six archeological sites were recorded in the Salt Creek four-wheel drive route between Peekaboo and the junction with Angel Arch Canyon. All six sites are within the Salt Creek Archeological District and eligible for nomination to the National Register of Historic Places.

Historic records of this area indicate that in approximately 1890, Lee Kirk, a homesteader, built a cabin above upper Salt Creek Canyon. The cabin was intended to be the center of Kirk's farming operation. Kirk, however, was unable to maintain the farm and abandoned the site circa 1900. Early survey notes indicate that the cabin was subsequently

occupied by an individual identified as L. Peachman. No further information, however, is available regarding his occupancy of the cabin.

From the turn of the century until the mid 1970s, Salt Creek Canyon was used for livestock grazing by the Scorup and Somerville Cattle Company and its predecessors. A cowboy camp was located near Cave Spring and in the vicinity of the junction between the east and west forks of Salt Creek Canyon.

Until the late 1940s and early 1950s, however, knowledge of the Needles and Salt Creek Canyon was limited to those ranchers and cowboys. At that time, a handful of people began to explore the Needles area by horseback and foot. In 1953 and 1954, the first motor vehicle trips through Salt Creek Canyon from Cave Spring to Angel Arch Canyon took place. Although the interest in vehicle travel increased during subsequent years, it was not until the late 1950s and early 1960s, that the number and frequency of vehicle trips increased with commercial guides.

**C. Salt Creek Route.**

The Salt Creek four-wheel drive route is an unimproved primitive track that previously ran from an all-weather gravel road in the vicinity of Cave Spring, for approximately eleven miles up Salt Creek Canyon to a side canyon sometimes known as Angel Arch Canyon. See map at Attachment 1. The route then continued another mile up this side canyon to its terminus in the vicinity of Angel Arch. Approximately two and one-half miles south of Cave Spring, is the junction between Horse and Salt Creek Canyons. Over the approximate eight and one-half miles between Horse Canyon and Angel Arch Canyon, the four-wheel drive route generally follows the course of Salt Creek, remaining within the stream channel and the flood plain for considerable distances, and weaving in and out of the streambed and crossing the channel about 60 times.

There are no man-made structures (drainage works, culverts, bridges, improvements, etc.) along the route.

The Park Service has exercised exclusive control over Salt Creek Canyon and the Salt Creek jeep route since establishment of the Park in 1964. The Park Service has determined which sections of the route should be closed to public use; which sections should be closed to vehicles and restored to natural conditions and, in some cases, recommended for wilderness designation; when and under what conditions the remaining portions should be open to vehicles; and where and in what manner the route should be maintained, repaired, and kept open to vehicles. The Park Service historically maintained the route to keep it passable to four-wheel drive, high clearance vehicles. This required the Park Service to carry out periodic grading and filling of sections of the route that had been washed-out or obstructed due to flooding, erosion and deposition of flood debris from periodic precipitation events. Even between such events, vehicle passage was often challenging due to soft sand and quicksand along the route that periodically trapped vehicles. Neither San Juan County nor the State of Utah expended any funds for the repair or maintenance of the Salt Creek route or conducted any repair or maintenance work on the route during the time that it was open to vehicle use.

The northern most portion of the original Salt Creek route, which led to Cave Spring, was closed by the Park Service to public use in the late 1960s (“historic Salt Creek access route”). The portion of the route is now used exclusively by the Park Service for administrative purposes.

The next section of the route, proceeding south from Cave Spring, is an approximate three mile stretch which leads to Peekaboo Spring and remains open to limited motor vehicle use. The Park Service controls motor vehicle use along this portion of the route by a permit system

and limits the number of vehicles to ten per day in that portion of Salt Creek Canyon and in Horse Canyon, a tributary to Salt Creek. The Park Service controls vehicle access by a locked gate located about one-half mile south of the Cave Spring road (“Permit Gate”) through which Park visitors may travel by vehicle up Horse Canyon or to Peekaboo Spring after obtaining a permit. The Park Service also maintains a small, primitive campground at Peekaboo Spring.

Proceeding south from Peekaboo Spring, the route leads approximately seven and one-half miles to the junction with Angel Arch Canyon and then one mile further up the tributary canyon to Angel Arch. The Park Service proposed this section for closure in 1993 and ultimately closed it to motor vehicles in 1998. This section remains open as a foot and pack trail.

South of Angel Arch Junction was a campsite known as the Bates Wilson Campsite named after the first superintendent of Canyonlands. Approximately four and one-half miles south of the Bates Wilson Campsite is the Upper Jump, a geographical feature where the streambed abruptly changes (“jumps”) in gradient. In 1973, the Park Service closed to vehicle use that portion of the jeep trail from a short distance above the Bates Wilson Campsite to the Upper Jump. A foot and pack trail continues past the Upper Jump another twelve miles to the southern park boundary.

Salt Creek is an arroyo system in which the channel and flood plain are unstable. Because the claimed road “is largely the bed of the intermittent Salt Creek” (see Trial Brief of San Juan County and the State of Utah (“Pltfs.’ Brief”) at 13), any vehicle tracks left in the streambed are erased during the next rain event. The stream channel and flood plain are dynamic, frequently changing after storms and periodic flash-floods in the Canyon. The presence of the route on the flood plain captures the flow of the stream channel in some locations,

channelizing flows and eroding the four-wheel drive route to the point that it becomes impassable. Essentially, the presence of a vehicle route in the channel and flood plain guarantees its own destruction.

**D. Closure of the Salt Creek Route to Motor Vehicles.**

**1. Closure of historic Salt Creek access route in 1960s.**

Prior to the mid to late 1960s, the Salt Creek jeep route commenced at the old Park entrance road about a half mile east of Salt Creek and proceeded southwest for about a mile, crossing Salt Creek and proceeding directly to Cave Spring where the route headed southerly back into Salt Creek. In the Park's 1965 Master Plan, the Park Service proposed obliteration of this historic Salt Creek access route. However, with the construction and opening of the Needles entrance road in the late 1960s, the Park Service elected to keep the route open for administrative purposes, but close it to public use. This closure required that the Salt Creek jeep trail be accessed by proceeding another mile and three-quarters west, then south about a half mile to the Cave Spring road, and then back east on the Cave Spring road another mile – adding over three miles to access to the portion of the Salt Creek jeep route that remained open at that point.

**2. Closure of the upper Salt Creek route in 1970s.**

The Salt Creek jeep trail previously continued south of the Salt Creek Canyon's junction with the Angel Arch Canyon approximately four and one-half miles to the Upper Jump ("upper Salt Creek route"). However, in 1973 the Park Service closed this portion of the Salt Creek jeep trail to vehicle use a short distance above the Bates Wilson Campsite, located south of the junction of the Canyons.

The Park Service kept other stretches of the Salt Canyon four-wheel drive route open to vehicles while it continued to monitor impacts from vehicle use to determine whether closure to vehicles would be necessary to protect Park resources. The Park's 1973 Master Plan provided:

Current off-the-road vehicle use will continue in the stream beds in Salt Creek and Horse Canyon. Since these canyons are renewed by seasonal flash flooding, evidences of man's impact are erased if use is confined to the creek beds. Restricted use will be allowed in Lavender and Davis Canyon. Because of limited past use in these areas, resource use capacities cannot be determined at this time and must be based on park management observations. Should use capabilities be reached, individual private vehicle use in these canyons will be terminated. Controlled visitor access will then be via tours conducted by rangers or concessioners, or possibly both.

As well as being fragile ecologically, these canyons are scattered with Indian ruins, petroglyphs, and pictographs that need protection. The most effective protection is a ranger at the site; however, this method can only be justified at special sites in the park, such as Horseshoe Canyon. Second best is a ranger- or concessioner-conducted tour and a limiting of access to the area by making access more difficult. Some roads in these canyons may need to be shortened or closed for this reason. More visitor impact information will needed before these decisions can be made.

In 1974, the Park Service cherry-stemmed the Salt Creek four-wheel drive route out of the area recommended for wilderness designation, but recommended the upper Salt Creek route as a Potential Wilderness Addition. Lands designated as a Potential Wilderness Addition are areas for which the Department of the Interior requests authority to designate as wilderness after non-conforming uses are phased out and the lands restored to a natural condition. In the 1978 and 1982 Wilderness Recommendations, the Park Service and the Department of the Interior recommended the upper Salt Creek route for wilderness designation, signaling that the area had been restored to its natural state.

In 1977, as part of its planning process, the Park Service proposed closing the Salt Creek route at the junction of Angel Arch Canyon, below (north of) the Bates Wilson Campsite. At that time, park planners met with representatives of San Juan County and provided copies of their proposal to the County.

In October 1978, the Park Service adopted a General Management Plan (“GMP”) for Canyonlands National Park. The GMP was prepared with two goals for the Park in mind -- (1) that the Park would serve as “a major scenic attraction” and (2) that the Park would be a “model for the preservation of a unique natural environment.” In that portion of the GMP addressing the “Salt Creek Canyons” subunit, the Park Service kept open the four-wheel drive access to the Bates Wilson Campsite.

In August, 1985, the Park Service adopted a Backcountry Management Plan (“BMP”) for the Park that retained access to, but provided for vehicle and visitor limits at, the Bates Wilson Campsite (as well as the Angel Arch camp). A subsequent BMP, adopted in 1989, further reduced the vehicle and visitor limits at the campsite.

**3. Closure of Peekaboo to Angel Arch section in 1992-2005.**

**a. 1995 Backcountry Management Plan.**

The appeal of remote and the primitive areas continued to place pressure on the Park’s resources. Between 1984 and 1992, annual visitation to Canyonlands quadrupled, thereby decreasing a visitor’s ability to find solitude, and generating the need for a new management plan for the backcountry. As to Salt Creek Canyon, the Park Service was increasingly concerned about the adverse impacts inherent in the existence of a four-wheel drive route and vehicle traffic in the Canyon’s narrow riparian corridor.

Consequently, in 1992, the Park Service began developing a new BMP for Canyonlands National Park and the Orange Cliffs Unit of Glen Canyon National Recreation Area. Southern Utah Wilderness Alliance v. Dabney, (“Dabney II”) 222 F.3d 819, 822 (10<sup>th</sup> Cir. 2000). The goal of the BMP was “to prevent significant damage to resources, provide for public use, and protect scenic values and a sense of solitude in backcountry areas.” The BMP was expected “to provide management direction for the backcountry for the next five years,” subject to review and updating “as necessary.” The process for developing the new BMP was announced in a 1992 Federal Register notice stating that the Park Service was initiating a new environmental assessment for the updated BMP. The planning process identified area closures as one of the issues to be addressed.

In December, 1993, the Park Service released a draft BMP and environmental assessment (“EA”) that addressed, among other things, four-wheel drive use of various “rough jeep tracks or trails,” including the four-wheel drive trail in Salt Creek Canyon. See Dabney II, 222 F.3d at 823. As to Salt Creek Canyon, the Park Service assessed various alternatives. Alternative A proposed closing to vehicle use the Salt Creek Road at the Horse Canyon junction north of Peekaboo Spring. Alternatives B and C proposed closing the four-wheel drive routes in Salt Creek and Horse Canyons at the Permit Gate or at Cave Springs, north of Peekaboo. Guided vehicles tours, however, would be allowed in Horse Canyon under Alternative B and would not be allowed under Alternative C. A no-action alternative allowing continued unrestricted use of the road was also considered. The Park Service identified the preferred alternative as closing the road to vehicles just south of the Peekaboo campsite and leaving the trail up Salt Creek Canyon to Angel Arch to be traversed by foot.

On January 6, 1995, the Park Service released the final BMP which adopted an alternative that did not close the road to vehicle use. Instead, the BMP closed a one-half mile segment of the road between the junction with Angel Arch Canyon and the Bates Wilson Campsite, but left the remainder open to vehicles on a limited permit system. See Dabney II, 222 F.3d at 823. Specifically, the BMP provided that day use permits for Salt Creek Canyon would be limited to ten permits for private motor vehicles and two permits for commercial motor vehicle tours. Id. The Park installed the Permit Gate at this time to regulate access to the Salt Creek road.

**b. 1995-1998 District Court proceedings.**

On June 22, 1995, the Southern Utah Wilderness Alliance (“SUWA”) filed suit against the Park Service challenging, among other things, those portions of the BMP that authorized the use of four-wheel drive vehicles in Salt Creek Canyon from Peekaboo Campsite to Angel Arch. See Complaint for Declaratory and Injunctive Relief, Southern Utah Wilderness Alliance v. Dabney, (“Dabney I”) 7 F. Supp. 2d 1205 (J. Kimball) (D. Utah 1998) (No. 95-CV-559), Dkt. No. 275.

The Utah Trail Machine Association, in conjunction with other similarly interested organizations, intervened as defendants (collectively referred to as “USAA” (for Utah Shared Access Alliance)) and defended the Park Service’s decision to allow continued, but limited, vehicle access in Salt Creek Canyon. Neither San Juan County nor the State sought to intervene in the lawsuit at that time.

The parties subsequently filed cross-motions for summary judgment and, as to Salt Creek Canyon, the district court ruled that the Organic Act and Canyonlands’ enabling legislation

precluded the Park Service from authorizing activities that permanently impaired unique park resources. Dabney I, 7 F. Supp.2d at 1209-14. The district court then determined that permanent impairment would occur from the continued use by motorized vehicles within Salt Creek Canyon. Id.

The district court reasoned that “[g]iven the uniqueness of its riparian areas and the availability of less-invasive forms of access, permanent impairment of Salt Creek Canyon in order to permit the continued use of four-wheel drive vehicles beyond Peekaboo Spring cannot be reconciled with the Organic Act’s overarching goal of resource protection.” Id. at 1212. The Court then vacated the BMP’s decision to allow motorized vehicle use in Salt Creek Canyon and remanded to the Park Service for action in accordance with the judgment. Id. at 1214. In addition, the Court enjoined the Park Service from permitting or otherwise allowing motorized vehicles to travel in Salt Creek Canyon above Peekaboo campsite. Id.

**c. 1998-2000 Court of Appeals proceedings.**

The defendant-intervenor, USAA appealed the Court’s decision, and on August 15, 2000, the Court of Appeals reversed the district court. See Dabney II, 222 F.3d at 823. The district court’s finding that vehicle use in Salt Creek Canyon would result in significant, permanent impairment in violation of the Organic Act, was rejected by the Court of Appeals because of conflicting information in the administrative record regarding the level of impairment caused by vehicles in Salt Creek Canyon. Id. at 829. Accordingly, the Court of Appeals remanded the case to the district court to re-examine the evidence regarding impairment. The Court further instructed that the district court’s analysis should not be limited to whether the evidence demonstrates significant, permanent impairment. Id. Rather, the district court was directed to

assess whether the evidence demonstrated the level of impairment prohibited by the Act, which may be broader than significant, permanent impairment. Id. Neither San Juan County nor the State sought to intervene in the appeal.

**d. 2002 Middle Salt Creek Access Plan and Environmental Assessment.**

On remand, the Salt Creek route above Peekaboo remained closed to motorized vehicles while the Park Service prepared an EA on an access plan for the middle portion of Salt Creek Canyon, from Peekaboo to the junction of Angel Arch Canyon, and for Angel Arch Canyon. The Park Service decided that, in view of continued questions concerning the level of impact caused by vehicle access to Middle Salt Creek Canyon, changes in the road, new information gathered during the period of road closure, ongoing litigation, and new Management Policies, the Park Service should conduct a new EA addressing a full range of alternatives for the management of the area. In particular, the prior EA for the BMP had not examined a number of alternatives that might have mitigated vehicular impacts, such as seasonal closures and realignment of some sections of road from the creek bottom.

The EA analyzed in detail three alternatives permitting vehicle access to Middle Salt Creek Canyon. Each of these alternatives allowed vehicle travel in Salt Creek Canyon under the permit system and daily vehicle limits consistent with the 1995 BMP. The EA also analyzed in detail an alternative which prohibited motor vehicle access in Middle Salt Creek Canyon.

At that same time, San Juan County notified the Park Service that it claimed an R.S. 2477 right-of-way for the Salt Creek Road. As a result, the Park Service undertook an examination of San Juan County's claim through a review of public land records, historic maps, aerial

photographs, park records, and other public documents. The Park Service also conducted site visits to look for features on the ground that might evidence road construction or improvement. The Park Service interviewed several people who had been in Salt Creek Canyon prior to the establishment of Canyonlands. Finally, the Park Service solicited information from San Juan County concerning the basis for its claimed R.S. 2477 right-of-way.

In September, 2002, the Park Service completed its EA and review of San Juan County's R.S. 2477 claim. The Park Service concluded that the EA's management alternatives allowing vehicle traffic in Salt Creek Canyon above Peekaboo Spring would cause unacceptable adverse impacts to Salt Creek's ecosystem, thereby impairing key park resources and values. The Park Service also concluded that based upon available evidence, an R.S. 2477 right-of-way for the Salt Creek route was not established. Therefore, the Park Service selected the management alternative in the EA which prohibited motor vehicle access in Salt Creek Canyon above Peekaboo Spring to avoid impairment of key park resources and values.

Specifically, the EA determined that the alternatives allowing motor vehicle access would cause impairment to park resources and values because of unacceptable adverse impacts to Salt Creek's riparian and wetland ecosystem. Salt Creek supports the most extensive surface water and riparian vegetation in Canyonlands other than the Green and Colorado Rivers. This habitat is among the rarest in the arid Canyonlands environment and particularly important to wildlife. In addition, Salt Creek supports the park's richest assemblage of birds and other vertebrate wildlife outside the Green and Colorado river corridors. For these reasons, the Park Service concluded that the Salt Creek riparian/wetland ecosystem was a resource whose conservation was key to the natural integrity of the park, and that the potential major indirect adverse impacts on

this resource from vehicle use would constitute an impairment of the Park's resources and values.

On June 14, 2004, the Park Service published a Final Rule amending its regulations to prohibit motor vehicles in Salt Creek Canyon above Peekaboo Spring ("the Final Rule"). 69 Fed. Reg. 32,871 (June 14, 2004) (codified at 36 C.F.R. § 7.44). On that same day, San Juan County filed this action claiming that it owned an R.S. 2477 right-of-way in Salt Creek Canyon.

**e. 2004-2005 District Court proceedings on remand.**

On August 13, 2004, the defendant-intervenors, USAA filed a second amended cross-claim against the Park Service, in the original suit, seeking judicial review of the Park Service's Final Rule prohibiting motor vehicles in Middle Salt Creek Canyon. See Defendant-Intervenor's Second Amended Cross-Claim, Dabney I, (No. 2:95 CV 559), Dkt. No. 275. On September 12, 2005, the district court issued a Memorandum Decision and Order finding that the Final Rule was based upon a permissible construction of the National Park Service Organic Act and the Canyonlands Enabling Act and was supported by the Administrative Record.

**E. County and State Claims to R.S. 2477 Right-of-Way for Salt Creek Road.**

In this action, San Juan County's initial Complaint alleged that after 1866 and prior to the reservation of the subject lands, it acquired a perfected R.S. 2477 right-of-way for the claimed Salt Creek road from Peekaboo Spring to the Upper Jump, and from the junction of Salt Creek Canyon and Angel Arch Canyon to the vicinity of Angel Arch. The County filed an Amended Complaint on June 30, 2004 (Dkt. 2), alleging that the County's right-of-way started at a point near Cave Spring, where the road heads south from the Cave Spring Road, rather than at Peekaboo Spring – three miles to the south. Finally, on March 17, 2008, the County filed a

Second Amended Complaint (Dkt. 92), again changing its claim to describe the claimed right-of-way as starting at the Cave Spring Road and ending in the vicinity of Angel Arch – having dropped from its complaint a claimed right-of-way for that portion of the route running to the Upper Jump. The County did not claim any portion of the Cave Spring Road in any of its complaints.

The State of Utah's initial Complaint, filed on April 22, 2005 (Dkt. 63), alleged that the Salt Creek road included an approximately one mile segment of the Cave Spring Road, then continued south into the Salt Creek Canyon to the junction of Salt Creek Canyon and Angel Arch Canyon, and up Angel Arch Canyon to a point near Angel Arch. The State did not claim the road beyond the junction of Angel Arch Canyon and Salt Creek Canyon to the Upper Jump as claimed in the County's first two complaints. The State filed an Amended Complaint on March 20, 2008 (Dkt. 93), claiming that the State's right-of-way commenced at the Cave Spring Road and proceeded to the vicinity of Angel Arch.

The County's Second Amended Complaint alleges that its requested right-of-way for the Salt Creek road is for a public highway "sufficient in scope for vehicle travel and including that which is reasonable and necessary to maintain the road to sound engineering principles and established practices that will protect the public, the road and prevent impairment of the adjacent land." County's 2<sup>nd</sup> A. Cmplt. at ¶ 37. Plaintiffs' Trial Brief asserts that the claimed right-of-way for the Salt Creek road includes the right to extend the claimed road outside the "beaten path" and to widen the road to a width "sufficient for the passage of two motor vehicles." Trial Brief of San Juan County and the State of Utah (Dkt. 118) ("Pltfs.' Trial Brief") at 11.

Since the claimed creation of the road through the present, the County has never carried out any construction or maintenance activities on the route.

The State's Amended Complaint alleges that its requested right-of-way for the Salt Creek road includes: "Such areas along the roadway beyond the beaten path as are reasonable and necessary to accommodate 'sound engineering practices' and provide safe travel on the road, including lands on which attendant accouterments such as drainage ditches and culverts existed as of the date of the reservation of the subject lands adjacent to the road, or reasonably and necessarily are added after that date to accommodate increased travel for pre-existing uses." State's A. Cmplt. at ¶ 15. The State's Amended Complaint further requests that its right-of-way include the right to carry out what it characterizes as reasonable and necessary activities to maintain the road, "including, but not limited to" the following activities:

- a. Making minor deviations in the road for safety purposes;
- b. Grooming the road surface;
- c. Establishing and maintaining the crown with materials gathered along the road;
- d. Filling ruts;
- e. Spot filling with the same or improved materials;
- f. Leveling or smoothing washboards;
- g. Clearing the road way of obstructing debris;
- h. Cleaning culverts, if any, including head basins and outlets;
- i. Resurfacing with the same or improved materials of the same general type;
- j. Maintaining and repairing washes and gullies;
- k. Maintaining drainage;
- l. Maintaining and repairing washes and gullies;
- m. Maintaining, repairing, replacing and installing culverts as necessary to protect the existing surface from erosion; and,
- n. Repairing washouts.

Id. at ¶ 27.

Since the claimed creation of the road through the present, the State has never carried out any of the listed activities – or for that matter, any construction or maintenance activities of any kind whatsoever on the claimed road. Moreover, the public has never carried out any of the construction or maintenance activities listed in the State’s Amended Complaint.

### **III. SUMMARY OF FEDERAL DEFENDANTS’ EVIDENCE AND ARGUMENT.**

The claims of the County and the State are barred by the QTA’s statute of limitations and, because of Plaintiffs’ failure to satisfy this jurisdictional prerequisite, the court lacks subject matter jurisdiction over this matter. The Park Service has exercised exclusive jurisdiction and control over the claimed lands, including the claimed Salt Creek road, since establishment of Canyonlands in 1964. The exercise of the Park Service’s exclusive jurisdiction and control is evidenced by the Park Service’s comprehensive regulation and management of visitor and vehicle use and access to Salt Creek Canyon. The Park Service’s management and control over access to the Canyon included closure of a portion of the road to the public, closure of the route in the upper portion of the Canyon to motor vehicles, as well as wilderness recommendations and management actions directed at allowing the stream to fully reclaim that portion of the old four-wheel route to ensure that the upper Canyon retains its wilderness characteristics. In addition, the Park Service has carried out substantial investments in the construction, repair and maintenance of the portions of the Salt Creek four-wheel drive route that the Park has allowed to remain open to vehicular use. Conversely, Plaintiffs have had no presence in Salt Creek Canyon since establishment of Canyonlands National Park in 1964—or at any date prior to that. Neither the County, nor the State, have ever carried out any construction, improvement, repair or maintenance of the route. Until the filing this action, neither Plaintiff, nor any member of the

public, ever challenged the Federal Defendants' exclusive ownership, jurisdiction and control of the Canyon, including the claimed road. The Park Service's open and notorious actions controlling access to the Canyon extend into the 1960s, starting immediately after establishment of the Park, and Plaintiffs' claims are therefore barred by the QTA's twelve-year statute of limitation.

Even if the Court determines that it has jurisdiction over these claims, Plaintiffs cannot meet their burden of establishing the existence of an R.S. 2477 right-of-way for the claimed Salt Creek road. The Tenth Circuit has made clear that the burden lies with the claimant seeking to establish a right-of-way over federal lands and that any doubts are resolved in favor of the United States. Here, Plaintiffs cannot meet their burden of proving that the claimed Salt Creek road was established for the claimed uses by at least ten years of continuous use before reservation of the subject lands. Neither the County nor the State have ever manifested any intent to accept an R.S. 2477 right-of-way for the claimed Salt Creek road. Neither the County nor the State can show that they took any action to accept the claimed Salt Creek into their respective road systems. Instead, the claims of the County and the State were filed in a last-ditch effort to prevent the Park Service from closing Middle Salt Creek Canyon to motor vehicle use. Plaintiffs cannot show any act accepting or acknowledging an R.S. 2477 right-of-way beyond their actions in filing this suit. The County and the State acknowledge that they have never carried out any construction or maintenance of the claimed route or expended any funds for any such construction or maintenance. The State acknowledges that it is not authorized to make any expenditures on the route.

Nor can Plaintiffs establish the acceptance of an R.S. 2477 right-of-way for the claimed road by public use. Critically, Plaintiffs cannot establish the physical existence of a road by 1964. Early travel by horseback and on foot on undefined and unknown routes up Salt Creek Canyon did not create a road or highway within the meaning of R.S. 2477. While it is presumably the case that travel up the Canyon generally followed the course of Salt Creek, Plaintiffs cannot establish the course followed by early travelers on foot and horseback driving cattle or prospecting in the Canyon. There is no documentation of any defined route or track prior to 1964. Plaintiffs cannot establish that travel by jeeps that commenced in the 1950s followed the same routes through the Canyon that may have been utilized by travelers on foot or horseback. Nor can Plaintiffs present evidence that jeeps accessing the Canyon followed each other's tracks – which were quickly erased by the stream. The evidence will show that jeeps traveling up the Canyon in the 1950s were required to find their own route up the Canyon after each storm and season-to-season – generally following the streambed – but picking their way through the Canyon around debris and quicksand, leaving the streambed at different locations depending on conditions existing during each trip.

Finally, Plaintiffs cannot establish that vehicular travel within or alongside the sandy or rocky bed of Salt Creek established a defined or persistent track at any time before 1964. Any public use of the claimed Salt Creek road prior to 1964, including vehicular travel, construction and maintenance, did not create a defined route or track up the Canyon and therefore did not create a road or highway within the meaning of R.S. 2477. The existence of a streambed in the bottom of the Canyon and evidence of occasional travel up the general course of the Canyon does not establish the creation or formation of a road within the meaning of R.S. 2477.

Even setting aside the question of whether there was sufficient travel within the Canyon prior to 1964 to establish a defined and persistent route, Plaintiffs cannot establish ten years of continuous public use of the claimed Salt Creek road from Cave Spring to Angel Arch. There is no evidence of any travel to Angel Arch by jeep until 1953 and after that date, travel in Salt Creek Canyon remained isolated and infrequent. In 1953 and again in 1954, a group of explorer scouts from the Moab area traveled to Angel Arch Canyon by jeep. These two trips are the first and may be the only two motor vehicle trips through Salt Creek Canyon from Cave Spring to Angel Arch Canyon in those early years. There is no evidence of any motor vehicles traveling through Salt Creek in 1955. From 1956 to 1958, the evidence will show just four to five recreational motor vehicle trips in Salt Creek Canyon each year. For many of these trips, motor vehicle use did not continue all the way to the Arch itself, but ended short of the Arch at Horse Canyon, Peekaboo Campsite, or the junction of Salt Creek and Angel Arch Canyon. It was not until 1959 and 1960, that the number of vehicle trips for recreational purposes increased with the availability of commercial trips. Even with this increase in the number of trips during the late 1950s and early 1960s, the frequency of these trips was insufficient to establish continuous use, and the time period within which these trips were taken falls short of the required ten years of use necessary to establish an R.S. 2477 right-of-way in Utah over these federal lands.

#### **IV. FEDERAL DEFENDANTS' EVIDENCE AND ARGUMENT.**

##### **A. Plaintiffs' Claims Are Barred By The Quiet Title Act.**

##### **1. The Quiet Title Act.**

Under the doctrine of federal sovereign immunity, the United States is immune from suit except to the extent Congress expressly waives that immunity. See Lane v. Pena, 518 U.S. 187,

192 (1996); Lehman v. Nakshian, 453 U.S. 156, 160 (1981); United States v. Sherwood, 312 U.S. 584, 586 (1941). The Quiet Title Act (“QTA”) constitutes a limited waiver of the United States’ sovereign immunity in civil actions brought “to adjudicate a disputed title to real property in which the United States claims an interest.” 28 U.S.C. § 2409a(a). The Act is the “exclusive means by which adverse claimants [may] challenge the United States’ title to real property.” Block v. North Dakota, 461 U.S. 273, 286 (1983). Where QTA jurisdiction lies, the court can adjudicate the disputes between the plaintiff and the United States and render judgment between them.

The QTA’s waiver of sovereign immunity, however, is expressly limited by a number of conditions. Of relevance here, the Act limits its waiver of sovereign immunity to actions commenced within twelve years of the accrual of the action:

Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. 2409a(g). See also 28 U.S.C. 2409a(i) & (k) (distinct twelve year limitations period applicable to States). A QTA plaintiff is required to plead with particularity facts sufficient to show its ability to satisfy the statute of limitations. See, e.g., Buchler v. United States, 384 F. Supp. 709, 713 (E.D. Cal. 1974) (“it is incumbent upon plaintiffs in their complaint to allege the date on which they or their predecessors in interest knew or should have known of the claims of the United States. Again, as plaintiffs have failed to make this allegation, this defect in pleading is subject to a motion to dismiss.”).

Because it is a waiver of sovereign immunity, the QTA must be strictly construed, and the limitations set forth in the statute, including those concerning particularity and the time for commencing QTA actions, must be strictly enforced. See United States v. Mottaz, 476 U.S. 834, 841 (1986); United States v. Testan, 424 U.S. 392, 399 (1976). “When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.” Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173 (9th Cir. 2007) (quoting Mottaz, 476 U.S. at 841).

**2. Sovereign immunity, subject matter jurisdiction and the QTA’s statute of limitations.**

“The question whether the United States has waived its sovereign immunity . . . is, in the first instance, a question of subject matter jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). When defending on the basis of sovereign immunity, a plaintiff bears the burden of proving the existence of the court’s subject matter jurisdiction. See Thomas v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). “A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.” General Atomic Co. v. United Nuclear Corp., 655 F.2d 968, 968-69 (9th Cir. 1981). If a federal court finds that it lacks subject matter jurisdiction, then it must dismiss the action. See Fed. R. Civ. P. 12(h)(3).

The federal courts have generally held that satisfaction of the QTA’s statute of limitations, and therefore whether an action qualifies as one for which the United States has waived its sovereign immunity, is a jurisdictional prerequisite to a quiet title action against the United States. See Block, 461 U.S. at 292. In Block, the Court reversed the district and appellate courts’ ruling that QTA’s statute of limitations did not apply to suits by states and

remanded for findings on whether the State's claim had accrued more than twelve years prior to suit, stating: "If North Dakota's suit is barred by § 2409a(f), the courts below had no jurisdiction to inquire into the merits."<sup>1</sup>/ 461 U.S. at 292.

The QTA's limitation period is "a central condition of the consent given by the Act." Fidelity Exploration and Production Co. v. United States, 506 F.3d 1182, 1185 (9th Cir. 2007) (quoting Mottaz, 476 U.S. at 843). See also Kingman Reef Atoll Investments, L.L.C. v. United States, 541 F.3d 1189, 1195-96 (9th Cir. 2008) (QTA's statute of limitations is jurisdictional). But see Wisconsin Valley Improvement Co. v. United States, 569 F.3d 331, 334 (7th Cir. 2009) (concluding that QTA's limitation period was a mandatory element of a QTA claim, rather than a prerequisite to jurisdiction). The limitation period is therefore subject to the rule that "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." Fidelity Exploration, 506 F.3d 1186 (quoting Block, 461 U.S. at 287). See also Skranak v. Castenada, 425 F.3d 1213, 1216 (9th Cir. 2005) ("Such bar is jurisdictional. The Quiet Title Act is a waiver of sovereign immunity. If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction.").

### **3. This action is time-barred.**

#### **a. Standard concerning triggering of QTA's statute of limitations.**

The QTA explicitly requires that actions brought under it must be commenced within twelve years of the date upon which the cause of action accrued, which the Act specifies as "the

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<sup>1</sup> Former Section 2409a(f) was re-codified as Section 2409a(g) in 1986. See Pub. L. No. 99-598, 100 Stat. 3351 (1986).

date that the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). Since the QTA provides a statutory waiver of sovereign immunity, the courts have construed the QTA and its statute of limitations narrowly and in favor of the sovereign. See Block, 461 U.S. at 275-76; Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 450-51 (10th Cir. 1985); Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982).

In applying the QTA’s statute of limitations, the courts utilize a reasonableness test. For purposes of determining when a claim has accrued, “[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff’s.” Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980); see also California ex. rel., State Land Comm’n v. Yuba Goldfields, Inc., 752 F.2d 393, 397 (9th Cir. 1985); Amoco Prod. Co. v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980); Vincent Murphy Chevrolet Co., Inc., 766 F.2d at 452; Park County, Mont. v. United States, 626 F.2d 718, 721 n.6 (9th Cir. 1980). Knowledge of the claim’s full contours is not necessary, if there is a reasonable awareness that the United States claims “some” interest adverse to the plaintiff. North Dakota ex rel. Bd. of Univ. v. Block, 789 F.2d 1308, 1313 (8th Cir. 1986); Knapp, 636 F.2d at 283.<sup>2/</sup> “The existence of one uncontroverted instance of notice suffices to trigger the limitations period.” Nevada v. United States, 731 F.2d 633, 635 (9th Cir. 1984).

This reasonable awareness standard is met when the plaintiff has any reason to understand that the government claims an interest adverse to plaintiff’s claimed interest in the

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<sup>2/</sup> Moreover, in QTA claims against the federal government, the statute of limitations cannot be tolled. United States v. Beggerly, 524 U.S. 38, 48 (1998).

property in question. Constructive notice of a claim of the United States may be sufficient to commence the running of the statute of limitations. Yuba Goldfields, 752 F.2d at 396; Hawaii v. United States, 676 F. Supp. 1024, 1032 (D. Hawaii 1988), aff'd, 866 F.2d 313 (9th Cir. 1989). Accrual of a cause of action under the QTA does not require a showing of adversity, nor does it require that the United States' claim be communicated in clear and unambiguous language. Yuba Goldfields, 752 F.2d at 397.

The activities that will trigger the QTA's statute of limitations concerning non-possessory interests such as easements and rights-of-way are somewhat distinct from those that will trigger the statute as to claimed fee title. Knowledge that the government claims to own land, i.e., the servient estate, will not trigger the statute as against a claimed easement interest. See McFarland v. Norton, 425 F.3d 724, 727 (9th Cir. 2005) cert. denied, 129 S.Ct. 1582 (2009) ("The government's claim to ownership and control of the servient tenement can be entirely consistent with private ownership of an easement.") (citing Michel v. United States, 65 F.3d 130, 132 (9th Cir. 1995)). A plaintiff's cause of action for an easement across government land accrues when the government "denie[s] or limit[s] the use of the roadway," Michel, 65 F.3d at 132 (quoting Werner v. United States, 9 F.3d 1514, 1516 (11th Cir. 1993)), or plaintiff otherwise has reason to understand that the government claims "the exclusive right to deny . . . access." McFarland, 425 F.3d at 727.

In Park County, the Ninth Circuit affirmed the district court's decision dismissing two counties' claim for an R.S. 2477 right-of-way based on the QTA's statute of limitations where the Forest Service's maintenance of the road, a portion of which followed two Forest Service

trails, had been exclusive and included placement of a sign prohibiting motor vehicles from a portion of the road. Park County, 626 F.2d at 720-21.

In Southwest Four Wheel Drive Ass'n v. Bureau of Land Management, 271 F. Supp. 2d 1308, 1312 (D.N.M. 2003), aff'd on other grounds, 363 F. 3d 1069 (10th Cir. 2004), the court ruled that the designation of a WSA encompassing claimed R.S. 2477 rights-of-way put plaintiffs and the public on notice, as of the date of publication of the WSA designation, "that BLM claimed all the area and did not recognize any alleged rights-of-way," thus triggering the QTA's twelve year statute of limitations.

Likewise, in the unreported case of County of Inyo v. Dep't of the Interior, No. CV F 06-1502, 2008 WL 4468747, at \*9 (E.D. Cal. Sept. 29, 2008) (Attachment 2), the court ruled that the designation of a WSA encompassing claimed R.S. 2477 rights-of-way put plaintiff county on notice of the United States' claim. The court concluded that the temporary limitation on the county's ability to enhance or upgrade its claimed rights-of-way for four graded dirt roads imposed by the WSA designation triggered the QTA's statute of limitations, compelling the conclusion that the county's claims were time-barred. Id.

Finally, in Wisconsin Valley Improvement Co., 569 F.3d at 335-36, the Court held that plaintiff was put on notice by actions that raised questions concerning whether plaintiff's claimed flowage easements had been acknowledged and were subject to potential dispute by the Forest Service. In so holding, the Court rejected plaintiff's contention that its claim did not accrue until the United States used the land in a way incompatible with plaintiff's claimed easements, stating "it is the private party's knowledge (actual or constructive), rather than the United States' bulldozers or other physical activity, that causes a claim to accrue. Someone who wants a legal

right to use land owned by the United States must act to vindicate the claim; the United States need not evict the interloper by force.”

**b. The claims of both the County and the State are barred by the QTA’s statute of limitations.**

Canyonlands National Park was established nearly a half century ago (1964) and 40 years prior to the filing of this action. Since that time, the Park Service has exercised complete, absolute and exclusive jurisdiction and control over Salt Creek Canyon, including the claimed Salt Creek road. These actions of the Park Service put the County and the State on notice that the United States claimed the exclusive right to the lands traversed by the route, and of the United States’ claim adverse to any claim to a right-of-way for the trail.

The Park Service’s actions establishing its exclusive control over the area commenced as early as 1965 with the Park’s first Master Plan. The Plan included proposals concerning which four-wheel drive routes in the Park should be left open, and which routes should be closed and in some cases obliterated. The Park Service’s control was further demonstrated by its closure of the historic Salt Creek access route to public use by 1969.

The Park Service further demonstrated its exclusive control over this area by closing the upper Salt Creek route in 1973, recommending the upper portion of the Canyon for Potential Wilderness Addition in 1974, and recommending that area for Wilderness Area designation in 1978 and 1984. In 1977, the Park Service proposed closure of the Salt Creek route at the junction of Angel Arch Canyon and met with County representatives concerning that management alternative. Although that last portion of the route above the junction of the Canyons was not closed until 1995 by adoption of the 1995 Backcountry Management Plan, the

Park Service's 1977 notification to the County of that proposal further put the County and the State on notice of the United States' assertion of exclusive ownership and control over the Canyon. Finally, when the planning process that resulted in the 1995 BMP and closure of the last one-half mile segment of the upper Salt Creek route (and ultimately the closure of the route at Peekaboo) was initiated in 1992, the Park Service published notice in the Federal Register that it was initiating a new environmental assessment for an updated BMP. The planning process identified area closures as one of the issues to be addressed.

In addition, since 1964, the Park Service alone has determined when the Canyon should be closed to vehicular use on a seasonal basis due to ice and other dangerous conditions. The Park Service has likewise determined when the Canyon needed to be temporarily closed due to flooding, obstructions, quicksand, or other conditions rendering vehicle use dangerous or making the route impassable. This complete control over access to the Canyon has extended to the possibility of adverse weather and road conditions – again as determined exclusively by the Park Service. While these seasonal and temporary closures alone do not trigger the QTA's limitation period, given the Park Service's authority to regulate and manage use of rights-of-way, see United States v. Garfield County, 122 F. Supp.2d 1201 (D. Utah 2000), they are part of the complete, absolute and exclusive jurisdiction and control the Park Service has exercised openly and without challenge over Salt Creek Canyon and the claimed Salt Creek road.

The Park Service has been the only governmental entity to exert any presence and control in the Canyon since establishment of the Park in 1964. The Park's exclusive regulation of access and use of the Canyon has extended, not just to determining what portion of the route should be left open and when it should be open to vehicular use, but also to providing emergency

assistance. The Park Service's exclusive presence and control of the four-wheel drive route in Salt Creek Canyon has been open and notorious, and included posting signs in the area. Again, while these actions in providing for visitor safety and assistance, and signing and regulating use do not alone trigger the QTA's limitation period, given the Park Service's authority to regulate and manage use of rights-of-way, they are yet another indication of the Park Service's exclusive and absolute control over the Canyon and the claimed Salt Creek road. See id.

Moreover, as discussed below, the Park Service has been the only entity to expend resources toward keeping the travel route open, including ongoing and significant expenditures for construction, repair and maintenance of the route. Neither the County nor the State have ever carried out any work on the claimed road. See Park County, 626 F.2d at 720 (“[U]nquestionably the trails are United States Forest Service Trails. The forest service has maintained the trails since the early part of the 20<sup>th</sup> century. Neither of the counties has maintained the purported road or authorized expenditures of any county money to maintain any of the routes in the Absaroka National Forest.”).

Under the reasonableness standard established in Knapp, the claim of the County and the State accrued when Plaintiffs should have been “reasonabl[y] aware[] that the Government claim[s] some interest adverse to [that of] plaintiff[.]” Knapp, 636 F.2d at 283. Knowledge of the full contours of the United States' claim is not necessary if there is a reasonable awareness that the United States claims “some” interest adverse to plaintiffs. Id. Here, the Park Service's actions were comprehensive, open, notorious and continuous such that Plaintiffs should have been reasonably aware of the United States' adverse claim. While the United States' claim was open and adverse, the United States was not required to make a showing of adversity or to

communicate its claim in clear and unambiguous language. See North Dakota v. Block, 789 F.2d at 1313; Yuba Goldfields, 752 F.2d at 397.

Although the United States closed portions of the Salt Creek jeep trail to vehicular access in 1969 and 1973, it was not necessary for the United States to close portions of the trail or to construct physical impediments to vehicular access to put Plaintiffs on notice of the United States' claim to interests adverse to Plaintiffs' claimed right-of-way. The Park Service's proposal to obliterate the historic Salt Creek access road in its 1965 Master Plan, as well as its 1977 Assessment of Alternatives for the General Management Plan that included an alternative for closing a portion of the route above the junction of Salt Creek and Angel Arch Canyons, put Plaintiffs on notice that the United States asserted the exclusive right to the route and did not recognize a right-of-way in any third party. As noted above, a plaintiff is charged with knowledge of the United States' claim to an easement interest, not only where the United States "denie[s] or limit[s] the use of the roadway," Michel, 65 F.3d at 132 (citation omitted), but also where plaintiff otherwise has reason to understand that the government claims "the exclusive right to deny . . . access." McFarland, 425 F.3d at 727. As the Seventh Circuit recently stated in Wisconsin Valley Improvement Co., it is not the United States' use of the land in a way incompatible with plaintiff's claimed easement that triggers the limitations period.. "[I]t is the private party's knowledge (actual or constructive)," that the United States does not or may not recognize the claimed easement that triggers the statute. Wisconsin Valley Improvement Co., 569 F.3d at 336. The Circuit held that plaintiff was put on inquiry notice by the Forest Service's request that the Federal Energy Regulatory Commission (FERC) condition plaintiff's requested renewals of dam licenses on curtailing the flooding of National Forest System lands, the Forest

Service's submissions to FERC that the company's claimed flowage easements were open to question, and the Forest Service's assertion that FERC had the authority to impose such conditions regardless of whether plaintiff had the claimed flowage easements. Id. at 332-33, 335.

In this case, the recommendation of the Park Service and the Department of the Interior that the upper Canyon be designated as Wilderness further reinforced Plaintiffs' notice that the United States considered the area to be roadless, and that the Park Service intended to continue to manage it in a manner that kept it in its natural state, including in a roadless condition, at least by 1978. This designation of the suitability of the area for wilderness designation constituted further notice of the United States' claim. See Southwest Four Wheel Drive Ass'n, 271 F. Supp. 2d at 1312; County of Inyo, 2008 WL 4468747 at \*9.

Finally, it is not necessary for the Park Service to have denied vehicle access or to have denied the existence of a right-of-way for the entire length of the claimed route for the statute to have been triggered as to Plaintiffs' claim. The historic Salt Creek access road and the upper Salt Creek route constituted portions of the claimed Salt Creek road to the extent any such road existed by 1964. The fact that the Park Service had constructed another access into the Cave Spring area by 1969 when it closed the historic Salt Creek access road does not vitiate the notice provided by that closure. The Park Service's unilateral act of closing that portion of the road, thereby requiring today's more circuitous route into the Cave Springs area, to the point Plaintiffs now assert their claimed Salt Creek road commences, put Plaintiffs on notice of the Park Service's adverse claim that it had the exclusive right to deny public access over the road as it saw fit. The Park Service's closure of the upper Salt Creek route in the mid-1970s likewise reinforced the notice to the Plaintiffs and the public that the Park Service claimed the right to

deny access to the route. Plaintiffs cannot reasonably assert that the closure of that portion of the Salt Creek four-wheel drive route did not trigger the statute as to the portion of the route that remained open to vehicles until 1998. The closure clearly put Plaintiffs on further notice of the Park Service's claim of right to close any portion of the route as it believed appropriate to protect Park resources. The County's first two complaints in this action alleged that the Salt Creek road extended to the Upper Jump and claimed an R.S. 2477 right-of-way for the route all the way to the Jump. Similarly, Plaintiffs allege that "[b]y the 1950s, the Salt Creek road had been improved with a bulldozer through Salt Creek Canyon (but not Angel Arch) to a point called the Upper Jump." Pltfs.' Trial Brief at 7. Plaintiffs' strategic election to amend their claim by dropping the upper Salt Creek route does not alter the fact that they were on notice in the 1960s and 1970s of the Park Service's assertion of its exclusive right to close the route to motor vehicles.

Case law confirms that notice of a claim or right to a segment of a claimed right-of-way or easement puts claimant on notice as to the entire claim. In Park County, the Ninth Circuit affirmed the district court's decision dismissing the county's claim for an R.S. 2477 right-of-way based on the QTA's statute of limitations where the Forest Service maintained portions of the road that corresponded to two Forest Service trails and placed a sign and rock barrier prohibiting motor vehicles from a segment of one of the trails that entered a primitive area. Park County, 626 F.2d at 720-21. In affirming, the Circuit rejected the county's "contention that the placing of the sign approximately 41 air miles from the county seat of Park County, and approximately 48 miles from the county seat of Sweet Grass County, constituted notice . . . only to the portion of

the right-of-way behind the sign.” Id. The Court found that the sign closing a portion of one of the trails put the counties on notice with respect to the entire purported right-of-way. Id.

Similarly, in Millard County v. United States, this Court barred the county’s claim for an R.S. 2477 right-of-way based on the statute of limitations grounds, relying on the Bureau of Land Management’s (“BLM’s”) grading of only a portion of the claimed road. Millard County v. United States, (“Millard County”) No. 93-C-591 (J. Jenkins) Memorandum Decision (D. Utah December 4, 1995) (Attachment 3). The Court found that BLM’s grading of a portion of the road provided notice to the county of the United States’ claim to the entire road. Id., citing Knapp, 636 F.2d at 283 (the Quiet Title Act’s statute of limitations does not require that the plaintiff have knowledge of the full contours of the United States’ claim; “[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to plaintiff’s.”).

In sum, while “one uncontroverted instance of notice” would have been sufficient to trigger the QTA’s statute of limitation, see Nevada v. United States, 731 F.2d at 635, here there were a myriad of actions by the Park Service that put Plaintiffs on notice of the United States’ claim. The Park Service’s closure of portions of the Salt Creek route in 1969 and 1973 and its regular assertion of exclusive control over access and use of the route constituted such uncontroverted notice. Accordingly, the Plaintiffs’ claims are barred by the QTA’s statute of limitations and the Court is without jurisdiction over this action.

- c. **The 1986 amendments to the QTA and subsequent Utah statutory enactments did not prevent the State's claim from being time-barred.**
- (1) **The State's claim was barred by 1986 and the 1986 amendments of the QTA did not retroactively revive the State's claim.**

The Park Service's actions in establishing its exclusive jurisdiction and control over Salt Creek Canyon since 1964, including but not limited to the 1965 Master Plan proposing obliteration of the historic access road, the 1969 closure of that road to the public, the 1973 closure of the upper Salt Creek route to vehicular access, and the October 1974 wilderness recommendation, put both the County and the State on notice of the United States' adverse claim to the Canyon. The QTA's twelve year statute of limitations set forth at section 2409a(f), prior to the 1986 amendment to the statute substituting a separate set of provisions applicable to the State, had therefore run prior to 1986. See Pub. L. No. 99-598, 100 Stat. 3351 (1986).<sup>3/</sup> Given that the State knew or should have known of the United States' claimed interest for twelve years prior to 1986, the 1986 amendment adding new subsections (i) and (k) has no application to this case. The 1986 amendment could not operate to retroactively revive the State's claim which is made clear by the amendment's legislative history showing that the amendment was intended to have only prospective application. H.R. Rep. No. 99-924 at \*4 (1986) ("the statute of limitations will commence on the date the State received notice of the Federal claims to the land").

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<sup>3</sup> Former Section 2409a(f) was re-codified as Section 2409a(g) in 1986. See Pub. L. No. 99-598, 100 Stat. 3351 (1986). New subsections 2409a(i) and (k) were added as part of the 1986 amendments to the QTA enacted as a legislative response to Block v. North Dakota in which the Supreme Court held that the QTA's twelve-year statute of limitations, formerly set forth at 28 U.S.C. § 2409a(f) and now re-codified at section 2409a(g), was applicable to states. Block v. North Dakota, 461 U.S. at 292. See Pub. L. No. 99-598, 100 Stat. 3351 (1986).

**(2) Even if the State's claim was not barred by 1986, the State's claim is barred by sections 2409a(i) and (k) of the QTA.**

Even if the State's claim was not barred prior to the 1986 amendments to the QTA, the State's claim is barred under sections 2409a(i) and (k). Section 2409a(i) provides in relevant part that:

(i) Any civil action brought by a State under this section with respect to lands . . . on which the United States . . . has made substantial improvements or substantial investments or on which the United States conducted substantial activities pursuant to a management plan . . . shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

28 U.S.C. § 2409a(i). This section limits the lands concerning which the QTA's limitation period can be triggered as against states to those in which the United States has carried out any of the described improvements, investments or activities. Section 2409a(k) then defines the notice that will trigger the limitation period with respect to such lands, providing that:

(k) Notice for purposes of accrual of an action brought by a State under this section shall be--

(1) by public communication with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put to the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvements of the claimed lands which, in the circumstances, is open and notorious.

28 U.S.C. § 2409a(k).

**(A) The Park Service made improvements and investments and carried out sufficient activities under section 2409a(i) to bring these lands within the scope of lands for which the statute of limitations can run against the State.**

The Park Service has made substantial improvements and investments in Salt Creek Canyon and on the Salt Creek four-wheel drive route to bring these lands within the scope of lands for which the QTA's statute of limitations in 2409a(i) can run against the State. The Park Service has carried out repairs and maintenance at substantial expense in order to keep the portion of the Salt Creek four-wheel drive route that the Park has allowed to remain open passable to vehicular use. These repairs have been carried out by the Park Service on a continuing and periodic basis since establishment of the Park. Substantial work has been required approximately every five years to repair wash-outs and clear debris after significant flood events. In addition to the Park Service's substantial activities directed at management and regulation of travel and vehicular use within Salt Creek Canyon and the Salt Creek four-wheel drive route pursuant to its general management plans, its backcountry management plans and transportation plans, the Park Service has conducted substantial natural resource studies directed towards management and protection of the riparian resources of the Canyon. Finally, the Park Service has carried out substantial archeological studies, inventories and management activities directed at protecting the extraordinary archeological sites within the Canyon.

These activities conform to and exceed the actions that courts have determined bring federal lands within the scope of sections 2409a(i) and (k). In Calhoun County, Texas v. United States, 132 F.3d 1100, 1103 (5th Cir. 1998), the Fifth Circuit found that, even if the county were treated as a state, the lands were subject to the QTA's limitations period as it applies to states

because the United States had conducted activities to improve the wildlife habitat on the Matagorda Island, on which the county claimed public roads.

In Millard County, this Court found that, even if the county was treated as a state for purposes of the QTA, the BLM's grading of a portion of the road for which the county claimed an R.S. 2477 right-of-way brought the road and the claimed right-of-way within the scope of lands for which the limitations period can be triggered as against states. Millard County at 8-10. The Court determined that the BLM's grading over a two and one-half month period was a substantial improvement of the road triggering sections 2409a(i) and (k) of the QTA. Id.

Here, the Park Service's repairs, improvements and investments in keeping the Salt Creek four-wheel drive route open to vehicles and its activities pursuant to its planning processes brings the Salt Creek Canyon and claimed road and right-of-way within the scope of 2409a(i), and subjects the State to the QTA's twelve year limitations period applicable to states so long as the notice requirements of 2409a(k) can be shown to have been met.

**(B) The Park Service provided sufficient public communications of its claims under section 2409a(k)(1), and made sufficient use, occupancy and improvements of the claimed lands under section 2409a(k)(1), to put the State on notice more than twelve years before this action was filed.**

The Park Service's comprehensive assertion of exclusive jurisdiction and control over Salt Creek Canyon and the Salt Creek four-wheel drive route since 1964 has been both publically communicated and open and notorious. The Park Service's 1965 Master Plan proposing obliteration of the historic access road was a public document and the closure of that road to the public in 1969 was open and well-known to any visitor entering the Needles District and

proceeding towards Salt Creek Canyon. The Park Service's closure of the upper Salt Creek route to four-wheel drive vehicles was likewise a physical closure apparent to all the world. The Park's 1973 Master Plan noting the potential need to close Salt Creek Canyon to motorized use in the future was a public document. The Park Service's recommendations in the 1970s that this area be designated as wilderness, free from roads and motorized access, were likewise public and open. The 1977 Assessment of Alternatives for the General Management Plan proposing further vehicle closures of the route above the junction of the Canyons was communicated publicly and openly. The June 5, 1992 Federal Register notice of the preparation of an updated BMP and environmental assessment and reference to planning materials identifying area closures was published and publicly communicated. 57 Fed. Reg. 27,268 (June 18, 1992). Finally, the Park Service's maintenance, repairs, and improvements to the portions of the four-wheel drive route it allowed to remain open took place in public and were well publicized and reported on in the media.

These activities fall squarely within and indeed far surpass the actions that courts have found to meet the notice standard set forth in 2409a(k). In Hawaii v. United States, 676 F. Supp. at 1037, the district court held that under section 2409a(k), "the continuous use, possession, and control of the Lualualei lands by the Navy since the 1930's [was] sufficient to put Hawaii on notice that Defendants claimed some interest in the lands." The Court reasoned that "one uncontroverted instance of notice that Defendants had any interest in the Lualualei lands is sufficient to trigger the statute of limitations." Id. at 1036-1037.

Likewise, the Seventh Circuit in Wisconsin Valley Improvement Co., 569 F.3d at 336, held that requiring land use be incompatible with claimed easements conflicts with the rule,

“stated in § 2409(g) and (k) . . . that it is the private party’s knowledge, (actual or constructive), rather than the United States’ bulldozers or other physical activity, that causes a claim to accrue.”

The Court continued, stating that: “Someone who wants a legal right to use land owned by the United States must act to vindicate the claim; the United States need not evict the interloper by force.” Id.

Finally, in Millard County, this Court held that the county was barred even if the county were treated as a state for purposes of the QTA because one of the events that put the county on notice of the United States’ claim was road grading, which the Court determined constituted a substantial improvement of the road within the meaning of section 2409a(i) and (k). Millard County at 8-10. The Court held that this grading over a two and one-half month period triggered these sections of the QTA because the work was open and notorious under the circumstances – which involved a relatively remote area in which the grading work was visible from aerial photographs. Id. at 10. The Court found that, had the county inquired, it would have learned that the United States claimed title to the road. Id. The Court also pointed two other events that put the county on notice, even if treated as a state under sections 2409a(i) and (k) of the QTA. Id. at 11. The Court pointed to a memorandum of understanding between the county and the BLM concerning responsibilities for road construction and maintenance and listing the road as a BLM road—although the memorandum was less than clear as to whether that description was intended to show ownership was in the United States. Id. The Court also noted that an oil company has requested a right-of-way permit from the BLM for access to a proposed oil and gas exploration well of which the county was aware. Id. The Court determined the permit request put the county on notice that the United States claimed an interest in the road and the right to regulate access to

and use of the road. Id., quoting Nevada, 731 F.2d at 635 (“merely asserting some federal authority over a backroad [is] sufficient for § 2409a(f) [now 2409a(g)] notice purposes”).

The Court concluded that the QTA’s statute of limitations is jurisdictional and that the Court was therefore without jurisdiction to consider the county’s claim that continuous public use of the road for more than ten years before 1976 created an R.S. 2477 right-of-way. Millard at 11-12, citing Block, 461 U.S. at 292; Bradford v. United States ex rel. Dep’t of Interior, 651 F.2d 700, 703 (10th Cir. 1981); Mottaz, 476 U.S. at 841 (when the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction, and federal statutes of limitations are a condition on the United States’ waiver of sovereign immunity).

Here, the Park Service’s comprehensive actions and open and notorious use, occupancy, and improvements of Salt Creek route provided notice to the State of Utah of the United States’ exclusive claim to the Canyon, unencumbered by any right-of-way, and, as a result, the State’s action is barred by sections 2409a(i) & (k) of the QTA.

**(3) Utah Code Ann. §§ 72-5-302(2) and 72-5-103(2)(b), enacted in 1993 and 2000, and purporting to create State ownership in R.S. 2477 rights-of-way for county roads, did not save the State’s claim from being time-barred.**

The State of Utah has intervened as plaintiff, alleging that it is the joint owner of R.S. 2477 rights-of-way in Utah pursuant to Utah Code Ann. §§ 72-5-302(2) and 72-5-103(2)(b). Section 72-5-302(2) provides that the state and its political subdivisions have title to R.S. 2477 rights-of-way in accordance with referenced statutes addressing each road classification. Salt Creek road is claimed to be a class D road and the statutory section referenced by section 72-5-

302(2) pertaining to class D roads, Utah Code Ann. § 72-3-105, states that the state and county have joint undivided interest in the title to all rights-of-way for class D roads. See Utah Code Ann. § 72-3-105(3). Section 72-5-103(2)(b) provides that if a highway is a county road, or included in a R.S. 2477 right-of-way, title is held jointly by the state and the county.

Section 72-5-302(2) was originally enacted in 1993 as an amendment to § 27-16-103. See 1993 Utah Laws 2<sup>nd</sup> Sess. Ch. 6 (H.B. 6) at § 3. That original statutory enactment provided that: “The state and its political subdivisions have title to the R.S. 2477 rights-of-ways.” That enactment did not purport to give the state title to R.S. 2477 rights-of-way for county roads or vice versa. That is to say, the statute can most reasonably be read as providing that the state owns rights-of-way for state roads, and its political subdivisions, i.e., the counties, own rights-of-way for county roads. This is particularly the case, given that another portion of that set of statutes enacted in 1993, § 27-16-106(2)(a) & (b), provided that the State only became the owner of R.S. 2477 rights-of-way in the event they were abandoned by the counties. See 1993 Utah Laws 2<sup>nd</sup> Sess. Ch. 6 (H.B. 6) at § 6. Subsection § 27-16-106(2)(a), stated that: “Abandonment of any R.S. 2477 right-of-way shall only take place in accordance with the procedures in Title 27, Chapter 12, Article 6, Acquisition of Property for Highway Purposes.” Id. Subsection § 27-16-106(2)(a), provided that: “If any R.S. 2477 right-of-way is abandoned by a political subdivision of the state, the right-of-way shall revert to the state.” Id. Neither the State nor the County assert that the claimed right-of-way for the Salt Creek road, claimed by the County as a Class D County road, was abandoned by the County and, therefore, even under these 1993 statutory enactments, the State cannot show that it had any ownership interest in the claimed right-of-way for the Salt Creek road. Even if the statute is read as purporting to give the state title to R.S. 2477 rights-of-

way for county roads, this 1993 statutory enactment cannot create state ownership in 2477 rights-of-way for a claimed county road over federal lands required to have been established, if at all, by 1964. Nor does this statute create a cause of action by the State where an action by the county was time-barred by the QTA's statute of limitation applicable to counties (28 USC § 2409a(g)) by the 1993 amendment..

The first statutory enactments clearly purporting to give the state an ownership interest in rights-of-way for county roads were Sections 72-3-105(3) and 72-5-103(2)(b) which were originally enacted in 2000. See 2000 Utah Laws Ch. 324 (S.B. 249) at §§ 4, 6. However, again, this 2000 statutory enactment cannot create state ownership in 2477 rights-of-way for county roads over federal lands claimed to have been established by 1964 when the statute of limitations has already run. Nor does this statute create a cause of action by the State where an action by the county was time-barred by the QTA's statute of limitation applicable to counties (28 USC § 2409a(g)) by 2000.

Plaintiffs' citation to the provision of the Utah Constitution providing that lands granted to the State by Congress constitute public lands of the State that are to be held in trust for the people, provides no support for their argument that these 1993 and 2000 statutory enactments created State ownership of R.S. 2477 rights-of-way for county roads. See Pltfs.' Trial Brief at 27. Nor does the case law holding that members of the public lack standing to adjudicate R.S. 2477 rights-of-way under the QTA's limited waiver of sovereign immunity provide support for Plaintiffs' arguments that the State legislature could create ownership in rights-of-way for county roads that would have to have been established by 1964. See id. at 28, citing Kinscherff v. United States, 586 F.2d 159, 160-61 (10th Cir. 1978); Southwest Four Wheel Drive Ass'n, 363

F.3d at 1071. These holdings that the interest of members of the public in the use of claimed public roads is not an interest in real property justiciable under the QTA provide no support for Plaintiffs' assertion that the State legislature could effectively create ownership in the State in 1993/2000 in rights-of-way for county roads that would have to have been established over federal land by 1964.

In any event, as explained above, the QTA's statute of limitations had run as against both the County and the State by 1986, when the QTA was amended to provide a separate set of limitations provisions applicable to states. Moreover, even if the State's claim was not barred by 1986, and the 1993 or 2000 statutory enactments had created an ownership interest in the State, the QTA's statute of limitations had run based on the Park Service's additional actions between 1986 and 1993/2000, *i.e.*, completion of the wilderness recommendation process and issuance of the 1977 Assessment of Alternatives concerning the General Management Plan.

**d. The State's claim is barred by Utah Code Ann. § 78B-2-201.**

Utah Code Ann. § 78B-2-201 provides that: "The state may not bring an action against any person for or with respect to any real property, its issues or profits, based upon the state's right or title to the real property, unless: (1) the right or title to the property accrued within seven years before any action or other proceeding is commenced; or (2) the state or those from whom it claims it received all or a portion of the rents and profits from the real property within the immediately preceding seven years." While this state statute does not supercede the QTA's statute of limitations applicable to states, 28 U.S.C. 2409a(k) & (i), it constitutes a separate state law limitation on the authority of the State of Utah to file actions for title to real property. See Trail Mountain Coal Co. v. Utah Div. of State Lands and Forestry, 921 P.2d 1365, 1372 (Utah

1996) (“A plain reading of the statute reveals that it applies to actions brought by the state as a consequence of the state’s claim of right to real property or issues or profits derived from real property”).

Under Utah law, in most cases, a cause of action accrues and the statute of limitations begins to run “upon the happening of the last event necessary to complete the cause of action.” Russell Packard Development, Inc. v. Carson, 78 P.3d 616, 620 (Utah Ct. App. 2003) (quoting Spears v. Warr, 44 P.3d 742, 75 (Utah 2002)). “Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations.” Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992); see also Christiansen v. Utah-Idaho Sugar Co., 590 P.2d 1251, 1252-53 (Utah 1979) (holding that in a suit for damages for the alleged breach of covenants under a special warranty deed “[t]he time the cause of action accrues . . . is the time at which the grantee first receives notice, either actual or constructive, of an encumbrance against his property”).

In this case, in addition to the closures discussed above, in December, 1993, the Park Service released a draft BMP and EA notifying the state and the public generally that the Park Service was evaluating three alternatives for the management of Salt Creek Canyon all of which included closure to motor vehicles of the Salt Creek road at various points between Cave Spring and Peekaboo. Therefore, even if the Court does not find that the state knew or should have known of the United States’ claim due to the road closures made in the 1960s and 1970s, the state was aware of the United States’ claim no later than December, 1993 when the State received notice of the potential encumbrance against its claimed property. See Christiansen, 590 P.2d at 1252-1253. Because the state received notice of the potential encumbrance against its

claimed property eleven and one-half years before this suit was filed, the state has no authority to prosecute this action and the state's claim should be dismissed as time-barred under § 78B-2-201.

**B. Plaintiffs Cannot Meet Their Burden of Establishing the Existence of an R.S. 2477 Right-of-Way for the Claimed Uses.**

**1. Highway rights-of-way under R.S. 2477.**

In 1866, in the midst of an era of federal land grant statutes aimed at facilitating the settlement of the American West, Congress passed R.S. 2477 as a means of providing public access across unreserved public domain lands. See generally, Pamela Baldwin, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477, Cong. Research Serv. (1993), at 10-18; see also Central Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 472-73 (1932). From its 1866 enactment until its repeal in 1976, the statute provided, in its entirety, that “[the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” R.S. 2477; 43 U.S.C. § 932 (repealed 1976).<sup>4/</sup> This land grant was self-executing in some states, including Utah – in other words, an R.S. 2477 right-of-way could come into existence automatically, without need for formal action by public authorities, whenever the public sufficiently indicated its intent to accept the land grant by establishing a public highway across public lands in accordance with state law. See Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 770 (10th Cir. 2005) (“SUWA v. BLM”).

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<sup>4/</sup> The statute was first enacted as Section 8 of the Act of July 26, 1866 entitled “An Act Granting Right of Way to Ditch and Canal Owners Over The Public Lands and For Other Purposes,” ch. 262, 14 Stat. 251, 253 (commonly referred to as the Mining Act of 1866). The statute was codified in 1873 in the Revised Statutes as section 2477 upon publication of the Revised Statutes, and subsequently recodified in 1938 as 43 U.S.C. § 932.

On October 21, 1976, Congress enacted the Federal Land Policy and Management Act (“FLPMA”), which repealed R.S. 2477 but preserved “any valid” right-of-way “existing on the date of approval of this Act.” 43 U.S.C. §§ 1701 et seq. Accordingly, rights-of-way under R.S. 2477 that were perfected before the statute’s repeal in 1976 and which have not been abandoned remain valid today.

**2. Burden and standard of proof.**

**a. Burden of proof.**

The party claiming an R.S. 2477 right-of-way against the federal government bears the burden of proving its alleged right-of-way. Wilderness Society v. Kane County, No. 08-4090 2009 WL 2777712 at \*15 (10th Cir. 2009) citing SUWA v. BLM, 425 F.3d at 768-69. In determining when a highway is deemed to be dedicated to the use of the public, “[t]he presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it.” Id. at 768 (quoting Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F.Supp.2d 1130, 1136 (D. Utah 2001); see also Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995). The 10<sup>th</sup> Circuit has found that this allocation of the burden of proof to the claimant of an alleged R.S. 2477 right-of-way is consonant with federal law and federal interests. Id.

**b. Standard of proof.**

The claimant of an R.S. 2477 right-of-way must meet its burden by clear and convincing evidence, establishing that the right-of-way was created by the relevant date. This is so because land grants from the government are construed favorably to the government, and any doubt as to whether an R.S. 2477 right-of-way exists is resolved in favor of the United States. SUWA v.

BLM, 425 F.3d at 769; see also Albrecht v. United States, 831 F.2d 196, 198 (10th Cir. 1987); McFarland v. Kempthorne, 545 F.3d 1106, 1112 (9th Cir. 2008), cert. denied, 129 S.Ct. 1582 (2009).

R.S. 2477 governs the disposition of rights to federal property, a power constitutionally vested in Congress. U.S. Const. Art. IV § 3, cl. 2; see Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917) (observing that the Property Clause gives Congress the power over the public lands “to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them”); Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). “The laws of the United States alone control the disposition of title to its lands.” United States v. Oregon, 295 U.S. 1, 27-28 (1935).

Where Congress exercises its constitutional authority to dispose of rights to public lands, such grants are strictly construed. “[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.” Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983) (quoting United States v. Union Pacific R.R. Co., 353 U.S. 112, 116 (1957)); see also Northern Pacific Ry. v. Soderberg, 188 U.S. 526, 534 (1903) (“grants from the sovereign should receive a strict construction,—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.”); Caldwell v. United States, 250 U.S. 14, 20 (1919) (“statutes granting privileges or relinquishing rights are to be strictly construed; or to express the rule more directly, that such grants must be construed

favorably to the government and that nothing passes but what is conveyed in clear and explicit language – inferences being resolved not against but for the government”).

This general principle also applies to the determination and scope of an R.S. 2477 right-of-way. See Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993) (citations omitted) (“Any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the government”); United States v. Balliet, 133 F. Supp. 2d 1120, 1129 (D. Ark. 2001); Fitzgerald v. United States, 932 F.Supp. 1195, 1201 (D. Az. 1996) (same).

While “the construction of grants by the United States is a federal not a state question” SUWA v. BLM, 425 F.3d at 762 (quoting United States v. Oregon, 295 U.S. 1, 28 (1935)), it is not uncommon for courts to “borrow” state law to aid in interpretation of the federal statute. SUWA v. BLM, 425 F.3d at 763. Thus, even if federal law governs a given question, it may be determined as a matter of choice, that state law furnishes “an appropriate and convenient measure” of the content of the federal law. Id.<sup>5/</sup>

The Utah Supreme Court has adopted a “clear and convincing” standard in determining whether a highway was dedicated and abandoned to public use. See Wasatch County v. Okelberry, 179 P.3d 768, 773 (Utah 2008); Draper, 888 P.2d at 1099. In these decisions, the Court expressly required that the claimant establish the dedication and abandonment by “clear and convincing” evidence. The Court adopted this higher standard of proof because of “the constitutional protection accorded private property,” Wasatch County, 179 P.3d at 773, and “the

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<sup>5</sup> “Even assuming in general terms the appropriateness of ‘borrowing’ state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law.” United States v. Little Lake Misere Land Co., 412 U.S. 580, 595-96 (1973). Accordingly, “a rule of law that is plainly hostile to the interests of the United States” will not be borrowed. Id. at 597.

high degree of sanctity and respect” that should be granted ownership of property. Draper City, 888 P.2d at 1099. For similar reasons, a “clear and convincing” standard of proof is appropriate here.

This standard of proof follows logically from the broad protection afforded sovereign lands which are held for and managed in interest of the public, Congress’s exclusive control over the conditions under which others may obtain rights in those lands, and the long standing judicial precedent construing grants of sovereign lands in favor of the United States.

Plaintiffs, however, citing to decisions from the Ninth and Tenth Circuit Courts of Appeal, claim that the public’s acceptance of an R.S. 2477 right-of-way need not be proven by a higher standard, but by a preponderance of the evidence. See Pltfs.’ Brief at 15-17. Plaintiffs’ reliance on these cases is mistaken because neither of these cases purport to address the burden of proof required by an R.S. 2477 claimant. In SUWA v. BLM, 425 F.3d at 750, the court suggested that the United States’ claims of trespass and for declaratory relief should be decided by a “preponderance of the evidence” standard. The court did not address the burden by which an R.S. 2477 claimant must establish a right-of-way across public land. In Adams, 3 F.3d 1260, the court applied a “preponderance of the evidence” standard to a claimed easement for the transport of water under 43 U.S.C. § 661, not R.S. 2477.

Plaintiffs also cite to language from the Preliminary Assessment prepared by the Park Service at the time the EA was prepared for the Middle Salt Creek Canyon. See Pltfs.’ Brf. at 16-17. The application of a “preponderance of the evidence” standard by “passing N.P.S. officials,” id. at 1, in a non-binding administrative determination, however, is not dispositive of the issue here.

Application of the appropriate burden of proof is not an academic exercise here.

The Tenth Circuit has observed that “[b]ecause evidence in these [R.S. 2477] cases is over a quarter of a century old, the burden of proof could be decisive in some cases.” SUWA v. BLM, 425 F.3d at 769. In this case, where the evidence is more than 40 years old, the burden of proof may well be determinative.

Accordingly, given the importance of applying the appropriate burden of proof in this case, the broad protection afforded sovereign lands held for the benefit of the public, and the well established judicial precedent construing public land grants in favor of the United States, this Court should apply a higher standard of proof and require that the Plaintiffs demonstrate the existence of the claimed right-of-way by clear and convincing evidence.

**3. Standard for acceptance of R.S. 2477 right-of-way.**

The Tenth Circuit’s decision in SUWA v. BLM provided guidance concerning three legal questions pertinent to the standard for establishing an R.S. 2477 right-of-way in Utah: (1) the public use requirement (SUWA v. BLM, 425 F.3d at 769-76); (2) the formation of a highway through construction or other means (id. at 776-82); and (3) the definition of a “highway” (id. at 782-84).

**a. Public use.**

“Acceptance of an R.S. 2477 right of way in Utah [] requires continuous public use for a period of ten years.” Id. at 771. “[H]ow continuous and intensive the public use must be” is a fact-specific determination based on the broad guidance provided in the case law concerning situations in which a 2477 highway was determined to have been established, and those in which the claim to a 2477 highway was rejected:

The requirements for establishing acceptance of a right of way by a user cannot, we think, be captured by verbal formulas alone. It is necessary to set forth the factual circumstances of the decided cases, both those recognizing and those not recognizing the validity of R.S. 2477 claims.

Id. at 772.

**b. Formation of highway by mechanical construction or other means.**

An R.S. 2477 highway in Utah need not have been created by mechanical construction if there is evidence that there was sufficient public use to have established or formed a public highway by the relevant date. SUWA v. BLM, 425 F.3d at 779. So, while mechanical construction is relevant to the question of public use, it is not determinative. Id. In SUWA, the Court observed that creation of a road by repeated use, i.e., formation of the so-called “beaten path,” could conceivably serve to form or make an R.S. 2477 highway without the need for mechanical construction. Id. at 779-81. The Court observed that if a particular route sustained substantial use by the general public over the necessary period of time, either no mechanical construction was necessary, or any necessary construction must have taken place. Id. The Court concluded that the public use standard, which takes into account evidence of construction along with other evidence, is a more appropriate standard “to distinguish between rights of way genuinely accepted through continual public use over a lengthy period of time, and routes which, though mechanically constructed (at least in part), served limited purposes for limited periods of time, and never formed part of the public transportation system.” Id. at 782.

**c. Definition of “highway.”**

In Utah, a route must satisfy the “continuous public use” standard to meet the definition of a “highway” under R.S. 2477. Id. at 782. An R.S. 2477 highway must be public in nature. Id.

Evidence regarding the presence or lack of identifiable destinations is also relevant to the overall determination of whether a route satisfies the continuous public use standard. *Id.* at 783-84, citing Lindsay Land & Live Stock Co. v. Churns, 285 P. 646, 648 (Utah 1929) (“road connected two points between which there was occasion for considerable travel”); Moulton v. Irish, 218 P. 1053, 1055 (Mont. 1923) (fact that road “did not lead to any town, settlement, post office, or home” one reason for rejecting an R.S. 2477 claim); Dillingham Commercial Co., Inc. v. City of Dillingham, 705 P.2d 410, 414 (Alaska 1985) (“a right of way created by public user pursuant to 43 U.S.C. § 932 connotes definite termini”).

\_\_\_\_\_ Finally, in SUWA, the Court concluded that it did not need to resolve the question of whether R.S. 2477 highways are limited to roads for the passage of “vehicles carrying people and goods from place to place” because the case involved exclusively claims for roads appropriate to vehicular use. 425 F.3d at 782-83.

#### **4. Scope of R.S. 2477 right-of-way.**

Regardless of whether an R.S. 2477 highway can be established for modes of travel other than by vehicle, the scope of an R.S. 2477 right-of-way is limited to the uses for which the right-of-way was established as of the date the subject lands were reserved for public uses. SUWA v. BLM, 425 F.3d at 746, citing Sierra Club v. Hotel, 848 F.2d 1068, 1083 (10th Cir. 1988) (“an easement is limited to the original use for which it was acquired”). Therefore, to establish an R.S. 2477 right-of-way for a highway that includes vehicle use, the claimant must establish continuous public vehicle use over the claimed route for the required period. SUWA v. BLM, 425 F.3d at 746, 771. In Utah, that period is ten years. *Id.* at 771.

5. **Plaintiffs cannot meet their burden of establishing the existence of an R.S. 2477 right-of-way for the claimed uses.**
  - a. **Plaintiffs cannot establish acceptance of an R.S. 2477 right-of-way for the claimed Salt Creek road by public use.**
    - (1) **Plaintiffs cannot establish that the claimed road existed by 1964.**

Plaintiffs claim that travel up Salt Creek Canyon and within the streambed of Salt Creek established a highway within the meaning of R.S. 2477 prior to 1964. While SUWA v. BLM determined that an R.S. 2477 highway need not be created by mechanical construction, it did not eliminate the requirement that public use must be sufficient to establish or form a public highway by the relevant date. See SUWA, 425 F.3d at 778. Plaintiffs will not be able to document the existence of any defined track up Salt Creek Canyon prior to 1964.

Aerial photographs of the Canyon taken prior to 1964 do not show any track in Salt Creek Canyon above (south of) Horse Canyon. United States Geological Service (“USGS”) maps similarly show just a one-half mile trail segment at the far north end of the claimed route. United States Cadastral Survey Notes and Plats do not indicate a trail of any kind on the course of the claimed road, other than one reference to a “jeep trail” on the far north end of the claimed route.

Aerial photographs taken after 1964 show a track on the oxbows adjacent to the creek, but do not indicate a continuous track up the Canyon. While travel within the streambed and modern flood plain of Salt Creek may leave tracks for others to follow until the next precipitation event, the next such event erases all tracks within the streambed. Moreover, precipitation events that recur on a two to five year basis flow over the flood plain and obliterate tracks other than

those on the higher terraces. The 1995 BMP notes that these larger precipitation events erode portions of the route to the degree that the Park Service has been required to carry out maintenance and repair of the route on average every five years in order to keep it open to four-wheel use .

Early travelers describe having to pick their route up the Canyon each year and season to season depending on storm events. Several of these travelers will describe how the streambed changes dramatically from year-to-year and even from storm-to-storm. The descriptions of these early travelers are consistent with the analyses of the geomorphology of the Canyon. This system is a dynamic system, prone to flash-flooding that causes the course of the creek to change with major precipitation events. Under these conditions, repeated use was not sufficient to create, as it must, a beaten path. Substantial mechanical construction, or establishment of a continuous route by vehicle passage on the terraces above the streambed and flood plain would have been required to create a defined track and highway within the meaning of R.S. 2477.

The County's legal description of the claimed right-of-way is based on a set of GPS surveys taken by the County between June 1999 and May 2001. The County required four trips to complete its GPSing of the route because it was repeatedly unable to complete driving the route without encountering impassable conditions. The County crews surveyed the centerline of the route as they found the route to exist on the dates they traveled to the Canyon. The County made no effort to determine if the route it GPS's conformed to any route that may have existed up the Canyon prior to 1964.

**(2) Neither the County, nor the State, ever carried out any construction or maintenance on the claimed Salt Creek road.**

Neither the County, nor the State, ever carried out any construction or maintenance activities on the claimed Salt Creek road. The road has only remained open where the Park Service has elected to construct, repair and improve the road after the frequent storm events that erase the road where it exists in the streambed and the somewhat less frequent storms that eliminate the road on the flood plain. After the 1998 order of this Court requiring closure to vehicles at the Peekaboo gate, the Park Service ceased its efforts to reconstruct and maintain the road after flood events and the road is now impassible to vehicles in many of the reaches where it previously existed in the streambed or the flood plain.

**(3) Neither the County, nor the State, ever expended funds for any construction or maintenance on the claimed Salt Creek road.**

Neither the County, nor the State, have ever expended funds for any construction or maintenance activities on the claimed road. Since creation of the Park in 1964, the substantial expenditures necessary for construction, repair and maintenance of the road in order to keep it passable to motor vehicles have all come from the Park Service. As noted above, significant expenditures have been required on average every five years in order to repair the road and keep it open to four-wheel use. The County apparently claims that the Salt Creek road is a Class D county road – at least since the filing of this suit – but has never requested or appropriated funds for construction or repairs on the road. While the County, at least theoretically, has authority to seek and request funds for the periodic construction and repairs necessary to permit motor

vehicle use of the road (even though it never did), the State lacks such authority as to Class D county roads.

**(4) Plaintiffs cannot establish construction or maintenance of the Salt Creek road by the public.**

Plaintiffs cannot show that members of the public carried out construction or maintenance activities on the claimed Salt Creek road. While Plaintiffs will present anecdotal testimony regarding persons in four-wheel drive vehicles using shovels to knock down the banks of the streambed where they found it necessary to leave the stream channel in order to avoid quicksand or debris washed down by floods, any such work was quickly erased by the next rain event. Plaintiffs will also assert that early users saw indications of heavy equipment having been used on the route. However, any such construction did not survive – all evidence having been washed away by the stream and equipment operators apparently not having bothered to cut a path on the upland terraces now crossed by the route. Early travelers will testify that Harlan Beeman moved a trailer to the Upper Jump around 1958 and Plaintiffs will speculate that the presence of the trailer for a couple of years near the Jump indicated that heavy equipment must have been utilized on the route. While it is certainly likely that a vehicle larger than a small jeep was used to pull the trailer to the Jump, there is no evidence of equipment use along the route. Again, any use of such equipment would mysteriously have had to be confined to the stream channel and the flood plain where it was quickly erased, as there is no evidence of any such work on the terraces above the flood plain.

- b. Neither the County nor the State ever manifested any intent to accept an R.S. 2477 right-of-way for the claimed Salt Creek road through acceptance of the road into the County or State road systems.**

Neither the County, nor the State, can present any evidence showing any intent by those Plaintiffs to accept an R.S. 2477 right-of-way for the claimed Salt Creek road prior to the filing of this action. Nor can Plaintiffs show any determination by the County or the State that an R.S. 2477 right-of-way was deemed to have been created – outside the determination of its attorneys in this litigation. While in Utah no formal act of acceptance is required to show the establishment of an R.S. 2477 right-of-way, see SUWA v. BLM, 425 F.3d at 770, the lack of recognition or awareness – by the County, the State or the public – of the claimed right-of-way within Canyonlands National Park for decades after the establishment of the Park in 1964 is certainly relevant to the determination of whether an R.S. 2477 right-of-way had been established. Neither the County nor the State ever carried out any evaluation of whether the public had accepted an R.S. 2477 right-of-way for the road outside the context of this litigation. Even after this action was filed, the County and the State had a difficult time determining the location of the road – or at least the location of their claimed right-of-way. The County’s first complaint claimed the right-of-way started at Peekaboo and proceeded up Salt Creek to the Upper Jump. The County’s next complaint asserted that the right-of-way commenced at Cave Spring and traveled to the Upper Jump.

The State’s first complaint asserted that the right-of-way included a mile section of the Cave Spring Road. The State’s next complaint dropped that claim from its assertions concerning the length of the claimed right-of-way. The unfamiliarity of the County and the State with Salt

Creek Canyon is perhaps understandable given their total lack of presence in the Canyon over decades. The State's 2000 notice of intent to file suit identifying the R.S. 2477 claims the State intended to make state-wide identified every road that showed up on the United States Geological Survey database, *i.e.*, the USGS 1:100,000 scale digital line graph data. The State made no effort to determine if the criteria of R.S. 2477 were met with respect to any of these roads – outside the determination of the attorneys involved in the Park Service closure of the Salt Creek road and now this R.S. 2477 litigation. Finally, when the County and the State sent their survey crews out to GPS the claimed route – which required four separate trips between June of 1999 to May of 2001 because of the impassibility of the route – those crews simply GPS'd the route they found on the ground, making no effort to confirm what may or may not have been physically present in 1964. No effort was made to determine whether any defined route existed in 1964, or whether a different route may have been present in 1964.

**c. Plaintiffs cannot establish ten years of continuous public use of the claimed Salt Creek road from Cave Spring to Angel Arch.**

Plaintiffs cannot present evidence of the required ten years of continuous use of the entire claimed road from Cave Spring to Angel Arch. Plaintiffs must show the establishment of a continuous route from Cave Spring to Angel Arch to sustain their burden of proving the claimed right-of-way. See *Shultz v. Department of Army*, 96 F.3d 1222, 1223 (9th Cir. 1996) (plaintiff failed to sustain his “burden to factually establish a continuous R.S. 2477 route” across the claimed federal lands). Although the evidence will demonstrate that an increase in the number of early explorers traveling through Salt Creek Canyon by foot, horseback and motor vehicle over the years, there is no evidence that such users followed any particular route, much less the same

route from trip to trip. Nor is there evidence that any such early use extended to Angel Arch. Early travel by horseback and on foot over undefined, haphazard, and unknown routes up Salt Creek Canyon did not create a road or highway within the meaning of R.S. 2477. While travel up the Canyon presumably followed the course of Salt Creek, Plaintiffs cannot establish which route was followed by early travelers on foot and horseback driving cattle or prospecting in the Canyon. There is no documentation of any defined route or track from Cave Spring to Angel Arch prior to 1964. Plaintiffs cannot establish that occasional travel by jeeps commencing in the 1950s followed the same routes through the Canyon utilized by travelers on foot or horseback. Nor can Plaintiffs present evidence that jeeps accessing the Canyon followed each other's tracks. Rather, the evidence will show that jeeps traveling up the Canyon in the 1950s were required to find their own route up the Canyon after each storm and season-to-season—generally following the streambed—but picking their way through the Canyon around debris and quicksand, leaving the streambed at different locations depending on existing conditions.

Finally, Plaintiffs cannot establish that vehicular travel within or alongside the sandy or rocky bed of Salt Creek established a defined or persistent track from Cave Spring to Angel Arch at any time before 1964. Any public use of the claimed Salt Creek road prior to 1964, including vehicular travel, did not create a defined route or track up Salt Creek Canyon and into Angel Arch Canyon to the vicinity of the Arch, and therefore did not create a road or highway within the meaning of R.S. 2477.

**d. Plaintiffs cannot establish ten years of continuous public use of the claimed Salt Creek road from Cave Spring to Angel Arch by motor vehicles.**

Likewise, Plaintiffs cannot demonstrate the required ten years of continuous use by motor vehicles for the entire length of the claimed road from Cave Spring to Angel Arch. There is no evidence of any travel to Angel Arch by jeep until 1953 and even after that date, travel in Salt Creek Canyon remained isolated and infrequent. In 1953 and again in 1954, a group of explorer scouts from the Moab area traveled to Angel Arch Canyon by jeep. These two trips are the first and may be the only two motor vehicle trips through Salt Creek Canyon from Cave Spring to Angel Arch Canyon in those early years. There is no evidence of any motor vehicles traveling through Salt Creek in 1955 and from 1956-58, there were just four to five motor vehicle trips to Angel Arch each year. For many of these trips, motor vehicle use did not continue all the way to the Arch itself, but ended short of the Arch at Horse Canyon, Peekaboo Campsite, or the junction of Salt Creek and Angel Arch Canyon. It was not until 1959 and 1960, that the number of vehicle trips increased with commercial trips. Even with this increase in the number of trips during the late 1950s and early 1960s, the frequency of these trips was insufficient to establish continuous public use, and the time period within which these trips were taken falls short of the required ten years of use necessary to establish an R.S. 2477 right-of-way in Utah over these federal lands.

**V. CONCLUSION.**

For the reasons explained above, plaintiffs' claims are barred by the QTA's statute of limitations. Even if plaintiffs' claims are not time-barred, plaintiffs will not be able to sustain their burden of establishing the existence of the claimed road from Cave Spring to Angel Arch

prior to 1964. Nor can plaintiffs meet their burden of showing ten years of continuous public use by motor vehicles from Cave Spring to Angel Arch prior to 1964. Accordingly, this Court should dismiss plaintiffs' claim for lack of subject matter jurisdiction or, alternatively, grant judgment in favor of Federal Defendants.

DATED this 4th day of September, 2009.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office for the District of Utah, and that copies of the foregoing Federal Defendant' Trial Memorandum were e-mailed to all parties named below on the 4th day of September, 2009.

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