AN APPRAISAL OF

A roadway right of way along Old Trails Highway
and Main Street in Hackberry, Mohave County, Arizona

May 8, 2017

PREPARED BY

J. Douglas Estes, MAI, SR/WA
Landpro Valuation
444 South Greenfield Road
Mesa, Arizona 85206
www.landprovaluation.com

FILE NUMBER

17.0130

LANDPRO VALUATION

May 20, 2017

Mohave County
C/O Chris Kramer
Gust Rosenfeld P.L.C.
One East Washington Street, Suite 1600
Phoenix Arizona 85004

Re: An appraisal of a roadway right of way along Old Trails Highway and Main Street in Hackberry, Mohave County, Arizona
Landpro Valuation

Dear Mr. Kramer

At your request, objective of this appraisal is market value of various interests in the roadway. The intended users of this appraisal are and other parties associated with the . The intended use of this appraisal is in proceedings and should not be used for other purposes.

As a result of my market value of the various interest in the roadway

<u>With Townsite Segment</u>	
Fee Simple Interest:	**$49,000**
Phantom Servient Interest:	**$500**
<u>Without Townsite Segment*</u>	
Fee Simple Interest:	**$18,000**
Phantom Servient Interest:	**$500**

***Extraordinary Assumptions**: This appraisal is based on the following extraordinary assumptions:

1. In forming my opinion of value, I have disregarded any increase or decrease in the estimated market value of the real property to be acquired, prior to the

effective date of valuation, caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for such project, other than due to physical deterioration within the owner's reasonable control.

2. Based on my measurements, the width of the existing roadway varies through the length of the roadway Furthermore, a survey of the roadway showing the total land area as not available. For this appraisal, the area of the entire roadway is estimated based nd an assumed average width of 6 acres. The area of the segment is estimated based on an assumed length of 8,598 lineal feet and an assumed average width of 60 feet, for a total of 515,880 square feet, or 11.8430 . The area of townsite segment is based on an assumed length of 1,880 and an average width of 60 feet for a total of 112,800 square feet, traordinary assumption that these accurate and that the 60 foot width does not include any new right of way.

Use of these extraordinary assumption the assignment results.

This valuation is based upon the attached report and all of the assumptions and limiting conditions contained therein, including the understanding that have no control of the use to which the report may be put by a subsequent reader of this report. Disclosure of the contents of this appraisal report is governed by the Bylaws and Regulations of the Appraisal Institute. Neither all nor any part of the contents of this report (especially any conclusions as to value he is connected, nor any reference to the Appraisal Institute or the MAI designation) shall be disseminated to the public through advertising media, public relations media, news media, sales media, or any other public means of communication without prior written consent and approval of the undersigned.

This report may not be used for the sale of partial property interests (limited, general partnership, and syndication) unless specifically authorized by the appraiser.

I refer the reader to the Underlying Assumptions and Limiting Conditions. I am not qualified to determine the presence of hazardous substances as they affect the site. This would include, but not be limited to, toxic chemicals, asbestos, radon gas, methane, etc. Unless otherwise stated, the site is assumed to be unaffected by these substances.

I certify, to the best of my knowledge and belief, that:

1. The statements of fact contained in this report are true and correct.

2. The reported analyses, opinions and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions and conclusions.

3. I have no present or prospective interest in the property that is the subject of this report and no personal interest or bias with respect to the parties involved.

4. I have performed no services, as an appraiser or in any other capacity, regarding the property that is the subject of this report within the three year period immediately preceding acceptance of

5. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.

6. My engagement in this assignment was not contingent upon developing or reporting predetermined results.

7. My compensation for completing this assignment was not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.

8. My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Pr

9. I have made an on-site inspection of the property that is the subject of this report.

10. No one provided significant real property appraisal assistance to the person signing this certification.

11. The reported analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the Code of Professional Ethics and Standards of Professional Practice of the Appraisal Institute.

12. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.

13. As of the date of this report, I have completed the continuing education program for Designated Members of the Appraisal Institute.

I appreciate the opportunity to assist you.

Respectfully submitted,

Draft

J. Douglas Estes, MAI, SR/WA
Certified General Real Estate Appraiser
Certificate Number 30821, State of Arizona
Expires October 31, 2017

TABLE OF CONTENTS

SUMMARY OF APPRAISAL

Type of Property: The subject property is a roadway right of way.

Location: Along the existing Old Trails Highway and Main Street through Hackberry, Mohave County, Arizona

Assessor's Parcel not identified as parcel number, however, cross 001, 006, 007; 313-

Objective of the Appraisal: market value of various

Intended Use:

Intended Users: her parties associated with the

Client: and Gust Rosenfeld, P.L.C.

Owner Contact: on May 8,

Site Areas:

Desert Land Segment:	
Townsite Segment:	
Total:	628,680 Net square feet/14.4325 acres

Flood Zone: Mostly Flood Zone "X" with a small area in Flood Zone “A” along the wash along the southwest side of the Atchison Topeka and Santa Fe Railroad per FEMA FIRMs 04015C4100G and 04015C4375G dated November 18, 2009

Zoning: A (General) and AR (Agricultural-Residential), Mohave County

Highest and Best Use: For continued use as a roadway

Final Conclusion of Market Values:

With Townsite Segment	
Fee Simple Interest:	**$49,000**
Phantom Servient Interest:	**$500**
Without Townsite Segment	
Fee Simple Interest:	
Phantom Servient Interest:	

Effective Date of The Appraisal:

Date of Inspection

Date of Report:

ASSUMPTIONS AND LIMITING CONDITIONS

1. A complete legal description for the larger parcel was not available. I assume that the roadway is correctly identified in this report.

2. I was not provided with a title report urvey for the subject property. This appraisal assumes that any easements affecting the s
inspection.

3. Title to the property

4. The fee simple estate in the property contains the sum of all fractional interests that may exist.

5. The property is appraised as if owned in fee simple title without encumbrances, unless otherwise mentioned in

6. It is assumed that all applicable zoning and use regulations and restrictions have been complied with, unless nonconformity has been stated, defined and considered in this appraisal report.

7. It is assumed that all required licenses, certifica es of occupancy, or other legislative or administrative authority from any local, state, or national governmental or private entity or organization have been or can be obtained or renewed for any use on which the value estimates contained in this report a

8. Responsible ownership and competent management exist for the property, unless otherwise stated.

9. The appraiser is not ponsible for the accuracy of the opinions furnished by others and contained in this report, nor is he responsible for the reliability of government data used in the report.

10. Compensation for appraisal services is dependent only upon the production of this report and is not contingent upon the values estimated.

11. This report considers nothing of a legal character, is not considered to be a legal document and the appraiser assumes no responsibility for matters of a legal nature.

12. Testimony or attendance in court may be required by reason of this appraisal.

13. Hidden defects within the materials of the structures, property or subsoil or defects which are inaccessible to normal inspection, are not the responsibility of the appraiser.

14. Information furnished by the property owner, lender, agent, or management is correct as received.

15. Neither this report, nor any of its contents, may be used for the sale of shares or similar units of ownership in the nature of securities, without specific prior approval of the appraiser. No part of this appraisal may be reproduced without the permission of the appraiser

16. Neither all nor any part of the co ıtents of this report (especially any conclusions as to value, the identity of the appraiser e firm with which the appraiser is connected) shall be disseminated to the public through advertising, public relations, news sales, or other media without p t and approval of the appraiser.

17. Possession of this report, or a copy thereof, does not carry with it the right of publication. It may not be used for any purpose by any person other than the party to whom it is addressed without the wr

18. This report is the confidential and private property of the client and the appraiser. Any person other than the appraiser or the client who obtains and/or uses this report or its contents for any purpose not so or the client is hereby forewarned that all legal means to obtain redress may be employed against him.

19. Utility services are available, as detailed in this report, for the subject property and they will continue to be so in the foreseeable future, unless otherwise noted in this report.

20. Subsurface rights (mineral, oil, etc.) and their potential impact upon value were not considered in this appraisal, unless stated otherwise.

21. The appraiser cannot predict or evaluate the possible effects of wage price control actions of the government upon rental income or financing of the subject property; hence, it is assumed that no control will apply which would nullify contractual agreements, thereby changing property values.

22. The subject property is not, nor will it be, in violation of the National Environmental Policy Act, the State Environmental or Clean Air Act, or any and all similar government regulations or laws pertaining to the environment.

23. This appraisal assumes that the subject property, as vacant, has no historical or archaeological significance. The value estimate is predicated on the assumption that no such condition exists. Should the client have a concern over the subject's status, he or she is urged to retain the services of a qualified independent specialist to determine the extent of either significance, if any, and the cost to study the condition

or the benefit or detriment such a condition brings to the property. The cost of the inspection and study must be borne by the client or owner of the property. Should the development of the property be restricted or enhanced in any way, the appraiser reserves the right to modify the opinion of value indicated by the market.

24. Unless otherwise stated in this report, the appraiser did not observe the existence of hazardous materials, which may or may not be present on, or below, the property. The appraiser has no knowledge of the existence of such materials on or in, the property. The appraiser tances as asbestos, PCB transformers, urea formaldehyde foam insulation, or other toxic, hazardous, or contaminated substances and/or underground storage tanks (containing hazardous materials). The value estimate is predicated assumption that there the property that would cause a loss in value. No responsibility is assumed for such conditions, or for any expertise or engineering knowledge required to discover them. Thus, the value estimated herein is as if unaffected by any such cause and/or substance. Should the client have concern over the existence of such substances, he or she is urged to retain the services of a qualified independent environmental specialist to determine the extent of contamination, if any, and the cost of treatment or removal. The cost of detection, treatment or removal and permanent storage must be borne by the client or owner of the property. This cost can be deducted from the estimate of market value of the subject property if so indicated by t

Appraisal Problem

Old Trails Highway and Main Street have provided access to the area in and around Hackberry for more than 100 years. Both have historically been public roadways owned and maintained by Mohave County and provide access to a number of properties in the area. The roadways are located over property owned by Triple G Partnership. Triple G Partnership believes that Mohave County does not have the necessary property rights to use the area for roadway purposes and has closed the roads across their property. Mohave County believes that it does have the right to use the area for public roadways. Mohave County is utilizing eminent domain to reopen the road for public use in order to continue to provide access to properties in the area eminent domain proceedings, Mohave County needs to know the value of the roadway right of way This appraisal provides an opinion of the market value of various interests in the roadway right of way for use in

Identification of Property Appraised

Property Types

The larger parcel

The ATF properties are a combination of and large desert land tracts including land being used for sand and gravel extraction. For this analysis, the desert land segment has approximately 8,598 lineal feet and the townsite segment has approximately 1,880

Location

The roadway right of way is located along a portion of the existing Old Trails Highway and Main Street in Hackberry, Mohave County, Arizona. The right of way extends northwest from Route 66 to the Atchison Topeka and Santa Fe Railroad tracks, southwest across the tracks, southeast through Hackberry and beyond. I refer the reader to the maps in this report for additional information.

Property Rights Appraised

This appraisal provides a valuation of the fee simple interest and a phantom servient interest in both the larger parcel and the proposed acquisition. For valuation of the underlying fee interest, it is understood that Mohave County effectively owns an easement interest in the existing roadway, which leaves the underlying fee owner a phantom servient interest.

Larger Parcel

The larger parcel is the entire roadway right of way that is being acquired. The existing roadway is contiguous and has a unified use as a roadway. Although the roadway crosses parcels that have various underlying fee owners, it clearly functions as a single roadway. I recognize that although Main Street extends further east from Hackberry to Hackberry Road, it is not practical or necessary to include other portions of Hackberry Road or the roads with which it connects as part of the larger parcel. Therefore, for this appraisal the larger parcel is the as described in this report.

I also recognize that the acquisition may or may not include the roadway segment through the townsite parcels. If that is the case, the larger parcel does not include that area and may not be contiguous. Nonetheless, the n contiguous segments function as a single roadway.

Proposed Acquis

The proposed acquisition is along Old Trails Highway and Main Street in Hackberr , with or without the townsite segment. The right of way extends northwest from Route 66 to the Atchison Topeka and Santa Fe Railroad track tracks, southeast through Hackberry and beyond. I refer the reader t this report for additional information.

Legal Description

According to the legal description provided by the client, the subject property is legally described as a portion of Sections 12, 14 and 24 Township 23 North, Range 14 West of the Gila and Salt River Base and Meridian,

The legal description

Assessor's Parcel Number(s)

The larger parcel and acquisition are not identified as a single assessor's parcel number, however, cross over APN's 313-13-017; 313-14-001, 006, 007; 313-17-014, and 022.

The ATF properties include APN's 313-14-001, 002, 006 and 007; 313-13-001, 002, 003A, 003C, 004, 005, 006, 007, 008, 009, 010, 012, 017, 023, 024C, 024D and 024E; 313-17-004, 010, 014, 016, 017, 018, 021, 022, 023 and 025.

Owner and Ownership History

According to public records, as of the effective date of the appraisal, the owner of the underlying fee interest in the property is Triple G Partnership (aka Triple G), which has owned the property for more than five years prior to the effective date of the appraisal. The subject property is not currently listed or under contract for sale.

I refer the reader to the roadway history discussion in the property description section of this report for the history of the roadway.

Appraiser's Client

Mohave County

Intended Users of the Appraisal

Mohave County litigation negotiations and

Intended Use of the Appraisal

Eminent domain proceedings

Objective of the Appraisal

To provide an opinion of the recommended just compensation for the proposed acquisition

Effective Date of the Appraisal

May 8, 2017

Date of Inspection

May 8, 2017

Date of Report

May 20, 2017

Assignment Conditions

Assumptions and Limiting Conditions

I refer the reader to the assumptions and limiting conditions after the summary of salient facts in this report.

Extraordinary Assumptions and Hypothetical Conditions

I refer the reader to the extraordinary assumptions and hypothetical conditions in the letter of transmittal.

Jurisdictional Exceptions

This appraisal was not completed under any jurisdictional exceptions.

Definitions

Market Value

Market value is defined as "the most probable price estimated in terms of cash in United States dollars or comparable market financial arrangements that the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable."

Fair Market Value

"Fair market value is the most probable cash price a willing buyer would pay a willing seller on the open market where the seller has a reasonable time to find a buyer and the buyer knows everything about the property."

Fee Simple Estate

Fee simple estate is defined as "absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat

Easement

Easement is defined as "the right to use another's land for a stated purpose."[4]

Phantom Servient Interest

Based on information from the Town of Paradise Valley v. Laughlin, 174 Ariz. 484 (1992), a phantom servient interest can be defined as the remaining property rights after an effective fee simple taking for right of way purposes that leaves the property with little

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1 *Arizona Revised Statute 12-1122(C).*

2 *Revised Arizona Jury Instructions (Civil), 5th,* (July 2013), page 5.

3 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 90.

4 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 71.

or nothing of consequence or value due to the remote and speculative nature of potential uses of the area after the acquisition.

Scope of Work to Solve the Appraisal Problem

The scope of work to solve the appraisal problem included the following:

Inspection of the Subject Property

My inspection of the property was an on

Owner Contact

I inspected the property with the owner.

Regional and Market Area

I have researched and analyzed the four forces , economic, and governmental - that influence value for the market area. Where factual information is required, I have used several sources including:

- US Department of Labor: Bureau of Labor Statistics
- Economic and Business Research Center, Eller College of Management
- CoStar
- My inspection of the area

Property Description

I have researched an , as (if) vacant. Where factual information is required, I have used several sources including:

- Mohave County
- Mohave County zoning map and applicable ordinances
- Federal Emergency Management Agency Flood Insurance Rate Maps
- Mohave County Assessor's and Treasurer's Offices
- Monsoon
- Aerial photos of the property
- Inspection of the subject property

Highest and Best Use Analysis

When the objective of an appraisal is to estimate market value, the highest and best use analysis identifies the most profitable, competitive use to which the property can be put. Therefore, the highest and best use is a market-driven concept. In this appraisal, I have analyzed the highest and best use of the larger parcel and the ATF parcels, as (if) vacant.

The value of the ATF parcels, as improved, is not necessary for valuation of the larger parcel utilizing the across-the-fence method. Thus, for this analysis, I did not inspect the improvements on the ATF parcels. In this report, I do not describe the improvements on the ATF properties or analyze the highest and best use of the ATF properties, as improved.

Valuation Analysis

The larger parcel and proposed acquisition is , which is a long, narrow strip of land. . Thus, similar rights of way are commonly valued based on the value of the-fence (ATF) parcels. For this analysis, an opinion of value of the larger parcel and acquisition is developed based on the value of the

Furthermore, the ATF properties are grouped into two property types (site lots, with or without improvements and desert land). Thus, the right of way is segmented into those two property types and a valuation of the ATF parcels for each of those two segments is completed based on the different uses.

For valuation of the vacant, I have considered the cost, sales comparison and income approaches; however, only the sales comparison approach is used. The ATF p improvements; therefore, the cost approach is not similar properties are not typically bought and sold based on their income; therefore, the income approach is not applicable. Thus, only the sales comparison approach is used for valuation of the ATF parcels.

In the valuation, I made several independent investigations and analyses concerning both the subject property and the subject's market area. The data collected and utilized in the valuation section is referenced in the report and the sources of the data and confirmation are also re enced. The degree of reliance, as well as the significance of the data and each approach, is also presented. I have gathered information from one or more of the following sources:

- CoStar
- Wardex (Multiple Listing Service)
- Monsoon
- Direct contact with listing/sales brokers, leasing agents, and property managers and owners
- Landpro Valuation files
- Mohave County records
- Inspection of the comparable sales
- Other online sources

Reconciliation

In the reconciliation section of the report, the valuation approaches are evaluated as to their pertinence and reliability to the appraisal problem. This analysis results in a final value conclusion.

As part to the reconciliation section, a conclusion of value for the fee simple interest in the larger parcel with the townsite segment is developed by weighting the unit value of each segment and applyi

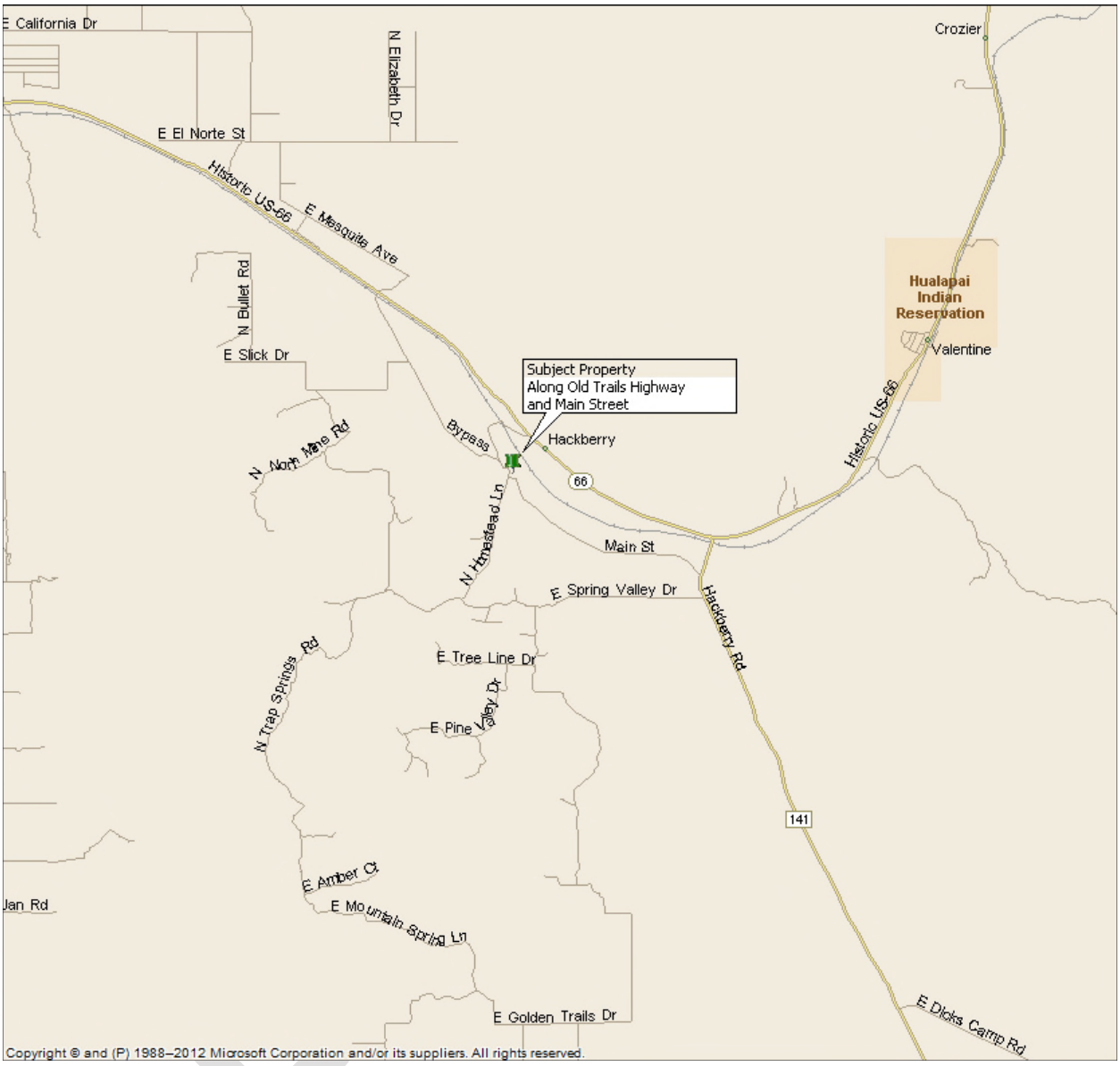
The value of the fee simple interest in the property is further adjusted by the property rights owned by Mohave C

Acquisition Valuation Analysis

The proposed acquisition is the entire larger parcel. Thus, the value of the larger parcel is the value of the acquisition.

Items Not Included in the Scope of Work

I am not qualified t
environmental contamination, soil defects, construction defects, other hidden defects or illegal conditions. The scope of this assignment did not include research, inspection or analysis of these ite ns. Furthermore, the scope of this assignment does not include analysis or valuation of personal property.



Market Area Delineation and Overview

The subject market area is a sparsely developed area located along Route 66, between Kingman and the east side of Mohave County. The market area includes the areas of Valle Vista, Hackberry, Valentine, Antares, Truxton, Peach Springs, a portion of the Hualapai Indian Reservation and other developments along Route 66.

Market Area Property Types/Land-Use Patterns

Property Types

The subject market area is sparsely developed. The developed properties that do exist are mostly low-density residential uses with some supporting commercial development. There is also a large amount of BLM, State Trust and undeveloped desert land in the market area. In geographic size Mohave County is the second largest county in Arizona and the fifth largest in the country.

Residential Development

Residential development in the market area ingle-family residential uses. The area has been slow to develop. Many of the residential areas are only partially built

Commercial Development

Commercial development within the market area is mostly located along te 66 and is concentrated in areas of residential development to provide some commercial services to residents in the area.

Employment and

The market areas has limited industrial development. That industrial development that does exist is located generally along Route 66 and includes a sand and gravel extraction, educational facilities and Hualapai Reservation facilities.

Quality and Condition

The quality and condition of the properties throughout the ma re generally average.

Surrounding Land Uses

To the north, south and east of the subject market area is mostly undeveloped desert. To the southwest of the market area is Kingman and desert land.

Basic Transportation/Linkage

Arterial Roadways

The primary transportation route within the market area is Route 66. Other roadways in the market area generally extend north and south of Route 66 and provide access to the developed uses in the area.

Freeway/Highway Access

Route 66 connects to Interstate 40 in Kingman to the southwest and in Seligman to the southeast. Interstate 40 provides linkage to other areas and roadways of Arizona to the east and Arizona, Nevada and California to the west.

Railroad Access

The main Atchison Topeka and ains daily through Kingman, passes through the area generally along

Airports

The market area does not have an airport, however, the served by the Kingman Airport to the southwest

Availability of Support

Schools

There are a number of elementary schools, junior high schools and high schools throughout the Mohave County. Moreover, Mohave Community College has four branches, Northern Arizona University has a Kingman office and The University of Arizona has a Mohave County Cooperative Extension Office.

Utilities

Utilities services are not available in some portions of the market area. Where available, utilities are provided at costs competitive with the other areas of the State. Mohave Electric Cooperative provides electricity. Southwest Gas Corporation provides natural gas. Water and sewer services are provided by a number of private or municipal water companies. Portions of the unincorporated areas and the undeveloped incorporated areas do not currently have

Police and Fire Protection

Police protection is provided the Mohave County Sheriff's Office. Fire protection is provided by volunteer fire departments.

Healthcare

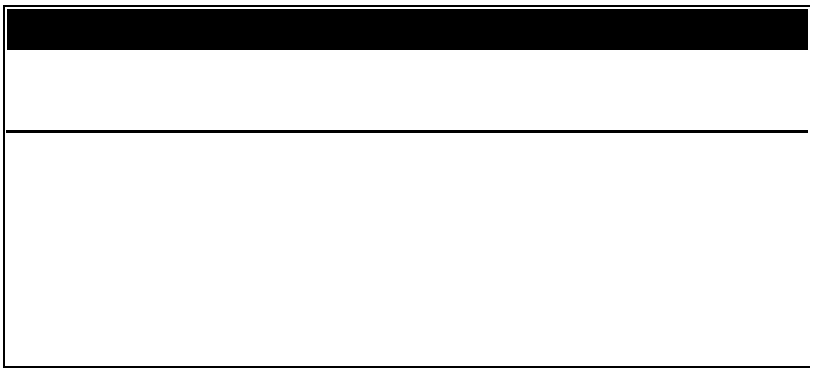
Most of the healthcare facilities serving local residents are located outside of the market area; nonetheless, adequate healthcare facilities are available in the surrounding market areas.

Retail Services

As a parsley populated area with very little commercial development, the market area has minimal retail services. Nonetheless, those not available within the market area, are available in Kingman to the southwest, Las Vegas to the northwest and Flagstaff to the east.

Population Trend

According to information obtained from conomy published by the Economic and Business Research Center in the University of Arizona's Eller College of Management, the historic population for Mohave County is as follows:



This data indicates that, although the population of Mohave County has increased over the last four years, the growth has been very slow.

Economy and Employment

Taxable Sales and Retail Sales

Gross taxable sales and retail sales for Mohave County over the last five years are summarized as follows:

Mohave County Gross Taxable Sales and Retail Sales

Year	Gross Taxable Sales	% Change	Retail Sales	% Change
2012	$1,270,131,235	-	$1,286,771,020	-
2013	$1,347,600,199	6%	$1,354,108,512	5%
2014	$1,395,995,500	4%	$1,461,586,944	8%
2015	-	-	$1,557,000,951	7%
2016	-	-	$1,602,730,972	3%

This table indicates that both gross taxable sales and retail sales have increased over the last five years.

Employers

The economy of Mohave County is heavily dependent upon tourism associated with the Colorado River and the lakes. Although dependent economically on tourism, the area generally has a moderately diversified economic base. There is a growing industrial market in some of the communities. Major employers in Mohave County include governmental employers, retail stores, hospitals and medical establishments, the school districts and some industrial uses. Industrial employers include American Woodmark Corp., Cyprus Climax Metals Co., Ford Proving Grounds, Goodyear Rubber Company, Guardian Fiberglass Products, IWX Motor Freight, Laidlaw Corp., McKee Foods, Praxair, Silver Ridge Village, Sterlite Corp.

As with most Sunbelt cities, population growth and employment growth are integral components of the economic base. areas of Arizona, California and Nevada, the economy and real estate market had a boom period between 2004 and 2007. During this time period property prices and the number of transactions increased dramatically. Since that time both sales and prices have d dramatically. The decline has been a result of the prior excessive speculation, the lack of available third party financing for both new real estate development projects and completed properties

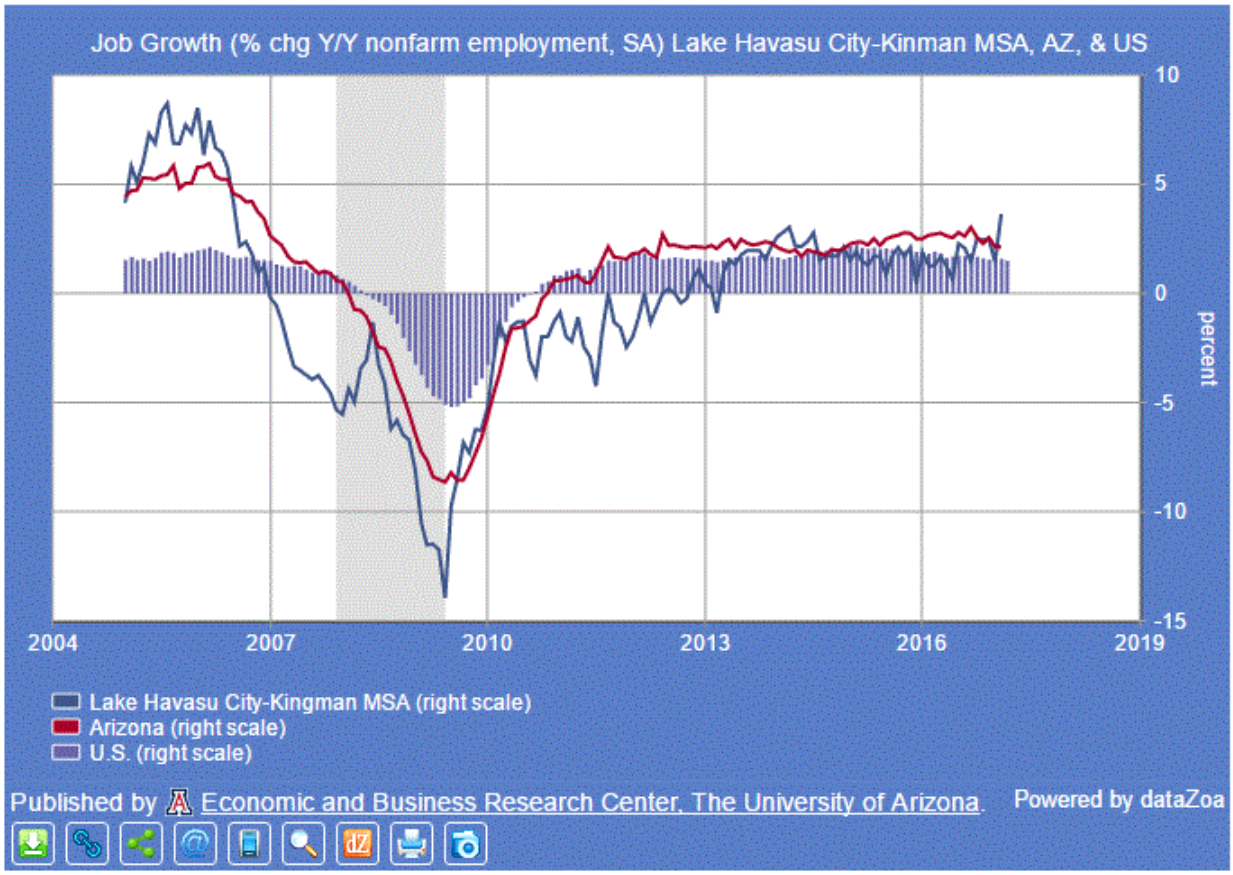
Employment Growth

Furthermore, according to Arizona Indicator Data published in Arizona's Economy by the University of Arizona's Eller college of Management, historic employment data for the Mohave County o

Employment by Industry - Lake Havasu City- Kingman MSA (Mohave Co)							5-Year Growth	
							Total	Percentage
Total Nonfarm Employment							3,723	8.33%
Total Private							4,042	11.01%
Goods Producing							603	12.46%
Mining and Construction							201	9.18%
Manufacturing							373	14.08%
Service-Providing							3,196	8.02%
Trade, Transportation, and Utilities	10,650	10,443	10,839	11,340	11,838	11,432	782	7.34%
Information	729	626	627	625	728	725	-4	-0.61%
Financial Activities	1,540	1,648	1,657	1,667	1,573	1,473	-67	-4.38%
Professional and Business Services	3,589	3,496	3,402	3,207	3,007	3,532	-58	-1.60%
Educational and Health Services	8,297	8,195	8,293	8,493	8,690	8,789	492	5.93%
Leisure and Hospitality	5,243	5,648	6,149	6,755	7,260	7,876	2,632	50.20%
Other Services	1,736	1,735	1,835	1,629	1,629	1,528	-208	-11.99%
Government	7,994	7,988	7,881	7,884	7,678	7,677	-317	-3.96%
Federal Government	527	528	423	425	426	426	-101	-19.13%
State and Local Government	7,464	7,456	7,448	7,444	7,232	7,229	-235	-3.14%

This data indicates that total nonfarm employment increased by 3,723, or 8.33% over the last five years. Employment in Leisure and Hospitality, Manufacturing and Goods Producing had the largest increases. Federal Government and Other Services had the largest declines.

Furthermore, job growth for the metropolitan area, Arizona and the U.S. are summarized in the following chart:



This chart indicates that employment growth for Mohave County has generally followed employment growth in Arizona and the U.S.

Real Estate Market

There is no consistently published data regarding real estate market conditions for the market area or Mohave County. Nonetheless, an article published in the Kingman Daily Miner on February 10, 2017 indicates that the housing market is “dicey”. Specifically the article states “the local housing market has been a little dicey following the Great Recession, but it’s making steady progress, said Jo Long…The area continues to lag behind increasing national trends.”

According to Realtor.com, the median listing price for residences in Kingman, which includes a portion of the market area, has trended upward from $140,000 in January 2014 to $166,000 in February of 2017 and the median listing price per square foot has increased from $80 to $100 over the same time period.

Furthermore, according to Zillow, the median home value in the Lake Havasu Metro area, which includes most of the populated areas of Mohave County, is $181,400. The

median value has increased 6.7% over the last year and is forecast to increase 2.6% over the next year.

New Residential Permits

According to Arizona Indicator Data published in Arizona's Economy by the University of Arizona's Eller college of Management, residential permits for the Mohave County over the last five years are as follows:

Mohave County Residential Permits

Year	Single-Family	% Change
2012		-
2013	455	35%
2014		12%
2015		21%
2016		%

This data indicates that single amily permits have increased every year over the last five years. Multi family permits have been erratic, however, have generally increased. Overall, the number of residential permits indicates demand for housing in the area.

Governmental Considerations

Local Governments

The lowest levels of government within Mohave County and County levels. The market area as identified in this report is an of Mohave County. Thus, land uses within the market area are controlled by Mohave County, which is generally supportive of growth

Other Governmental Influences

A large portion of the land within the market area (61%) is public land (State Trust, BLM, U.S. Forest Service, U.S. National Park Service and Indian Reservation); therefore, much of the land is controlled by the public entities that own them.

Conclusion and Relevance to the Subject Property

A typical development cycle of a small area or market area can be described as an "S - Curve", indicating that areas which are virtually undeveloped will grow at a fairly slow rate during the first period of growth. As the development in an area increases, the growth accelerates until development approaches saturation, at which point growth will again slow. Considered to be still in the growth stage of development, portions of the subject market area and surrounding area are developed with a mixture of residential,

light industrial and commercial uses. With remaining undeveloped land in the market area, it is anticipated that the market area will experience a continued growth in the coming years. Overall, in common with other portions of the state and nation, the long-term outlook for the subject market area appears good.

The larger parcel and proposed acquisition are the roadway right of way along Old Trails Highway and Main Street in Hackberry, Mohave County, Arizona. In the area of the subject property the right of way is an assumed width of 60 feet and an estimated length of 8,598 for the desert land segment and 1,880 for the townsite segment for a total length of 10,478. s are 11.8430 acres for the desert land segment, 2.5895 for the townsite segment and 14.4325 for the total length. The roadway right of way extends beyond the larger parcel as identified in this appraisal and connects to other roadways.

The across-the-fence parcels (ATF parcels) are a combination of lots ranging in size from 0.11 to 1.73 acres and desert land ranging from 2.44 to 300 acres, with a total of 649.21 acres. The ATF parcels are planned for Rural Development Area uses and zoned for a combination of General and Agricultural ial uses by Mohave County

Site Areas:

Larger Parcel
Desert Land Segment:
Townsite Segment:
Total:

Desert Land ATF

313-14-001:	
313-14-006:	
313-14-007:	
313-13-012:	
313-13-017:	
313-17-014:	300.00 Acres
313-17-022:	23.12 Acres
Total:	649.21 Acres

The desert land parcels surround the Hackberry townsite. They can be considered a single 649.21 acre ATF parcel. The length of the segment of desert land is estimated to be approximately 8,598 lineal feet.

Townsite ATF Lots:

313-14-002:	0.51 Acre
313-13-001:	0.22 Acre
313-13-002:	0.26 Acre
313-13-003A:	0.41 Acre
313-13-003C:	0.96 Acre
313-13-004:	0.22 Acre
313-13-005:	0.52 Acre
313-13-006:	
313-13-007:	
313-13-008:	
313-13-009:	
313-13-010:	
313-13-023:	
313-13-024C	
313-13-024D	
313-13-024E	
313-17-004:	
313-17-010:	
313-17-016:	
313-17-017:	
313-17-018:	
313-17-021:	
313-17-023:	
313-17-025:	

lots are
other
acent lots if developed. Thus, the effective size
townsite segment
The length of the
segment is estimated to be approximately
1,800 lineal feet.

Shape/Dimensions:

Larger Parcel:	Irregular
ATF Parcels:	A combination of rectangular and irregular

Topography: Gently rolling to near-level

Soil: Based on my inspection of the subject property and observation of adjacent properties, the soil appears adequate to support potential improvements.

Drainage: Apparently adequate

Frontage: The larger parcel is a roadway right of way that connects to other Mohave County roadways in the area. The ATF parcels have frontage along Old Trails Highway, Main Street and other roadways in the area.

Traffic Volume: Not counted

Street Improvements:

Traffic Lanes , where width allows)
Median
Surface el and some asphalt
Hackberry Townsite segment,

Curbs
Sidewalks
Gutters
Streetlights

Other roadways in the immediate area have similar
lane, asphalt-paved
urbs, gutters, sidewalks or street

Flood Zone: Mostly Flood Zone "X" with a small area in Flood Zone “A” along the wash along the southwest side of the Atchison Topeka and Santa Fe Railroad per FEMA FIRMs 04015C4100G and 04015C4375G

General Plan Designat n: According to the Mohave County General Plan, the subject property is located in an area identified as Rural Development Area. This is an area where residents presently enjoy a rural lifestyle, wide open spaces and few neighbors. Most of the land in Mohave County is included in this area type. Properties in these areas are generally at least five (5) acres in size, and many are much larger than this. A significant amount of land within this area type is owned by the Federal or State governments, or is included in an Indian reservation.

Zoning: The larger parcel and ATF parcels have either A (General) or AR (Agricultural Residential) zoning.

The “A” zone was originally established to be used in areas where it was unclear whether the pattern of development would be residential or commercial, with eventual rezoning of the properties as development progressed. No subdividing shall be conducted, or approved, in any area zoned "A" without prior rezoning of the land so parceled, unless all parcels created meet the required minimum parcel size.
family dwellings, duplexes, multiple dwellings, general commercial uses, offices, agricultural uses, landing strips, home
omes, adult foster

communications facilities, schools, churches, public buildings, automobile wrecking yards, junkyards,

R zone is primarily intended to allow single-family residential uses on suburban and rural parcels, and also allow domestic livestock, and other personal agricultural endeavors. Permitted uses include
family

on facilities, schools, churches, public buildings, childcare, adult foster care, playgrounds, RV and manufactured home parks, riding and boarding facilities, retail plant nurseries, kennels and

Likelihood of Zoning Change:

Mohave
Furthermore, the existing zoning allows for a wide variety of uses. Therefore, it is my opinion that a zoning change for the subject property is not likely.

Easements, Encroachments And Restrictions:

I was not provided a title report or site survey for the larger parcel, acquisition or ATF parcels. Some of the ATF parcels are bisected by power and water transmission lines. Based on my inspection of the property, the larger parcel and ATF Parcels do not appear to be affected by any other atypical easements, encroachments or restrictions.

Based on the historic use of the property as a roadway, the underlying fee interest in the roadway is a phantom servient interest. Based on information from the Town of Paradise Valley v. Laughlin, 174 Ariz. 484 (1992), a phantom servient interest can be defined as the remaining property rights after an effective fee simple taking for right of way purposes that leaves the property with little or nothing of consequence or value due to the remote and speculative nature of potential uses of the area after

Utilities:

Public Water: ny has a water line that ties are the developed have wells. The water line has sufficient capacity to serve development of additional properties

Public Sewer: area)
Electricity:
Telephone:
Gas:

Surrounding Uses: Surrounding uses are mostly undeveloped desert and limited

Compatibility: erty is generally compatible with the

Apparent Adverse

Site Utility and Accessibility: Although the larger parcel and ATF parcels have adequate utility and accessibility for potential uses, they are located away from employment centers and more densely populated areas of Mohave County.

Both Old Trails Highway and Main Street provide access to the ATF properties.

Non-apparent Adverse Factors: I again refer the reader to the Underlying Assumptions and Limiting Conditions. I repeat that I am not qualified to determine the presence of

hazardous substances as they affect the site. This would include, but not be limited to, toxic chemicals, radon gas, methane, etc. Unless otherwise stated, the site is assumed to be unaffected by these substances.

Improvements:

Larger Parcel: The larger parcel is improved with a bladed dirt or
The property also has some asphalt-

ATF Parcels:

Desert Land Segment: The land parcels along the desert land segment have some perimeter fencing. They also have equipment for the sand and gravel extraction operation on the

the improvements on the ATF parcels is
ining the value of the larger parcel
and acquisition. Thus, the improvements are not

Townsite Segment
are vacant
family residences,
structures and supporting site improvements.

the improvements on the ATF parcels is irrelevant in determining the value of the larger parcel and acquisition. Thus, the improvements are not

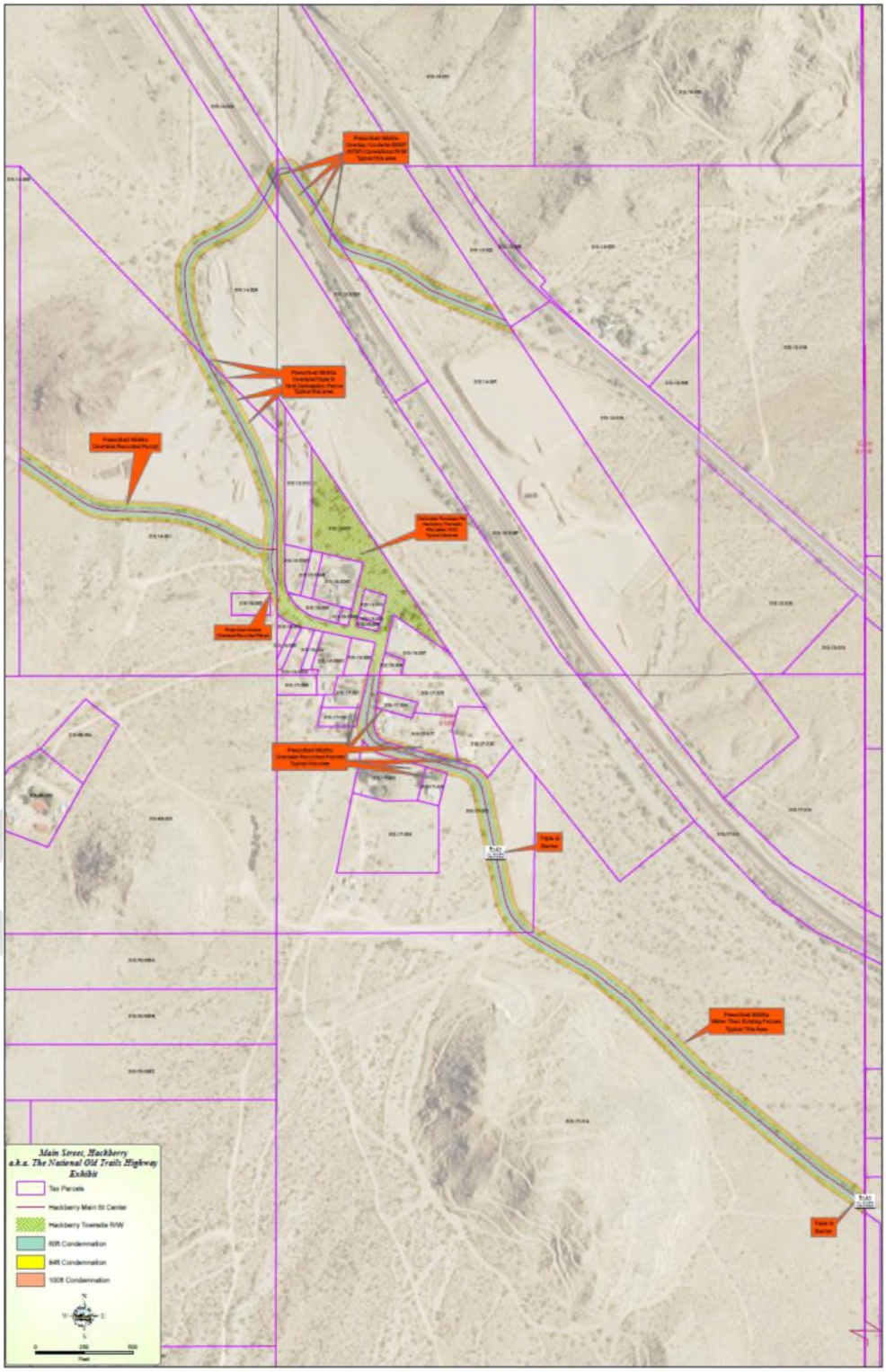
History of Roadway: Based on public record information, the larger parcel has been used as a roadway right of way for more than 100 years. A map filed in 1912 shows roadways in the area. A map of Hackberry Townsite recorded in 1918 effectively dedicates a portion of Old Trails Highway and Main Street.

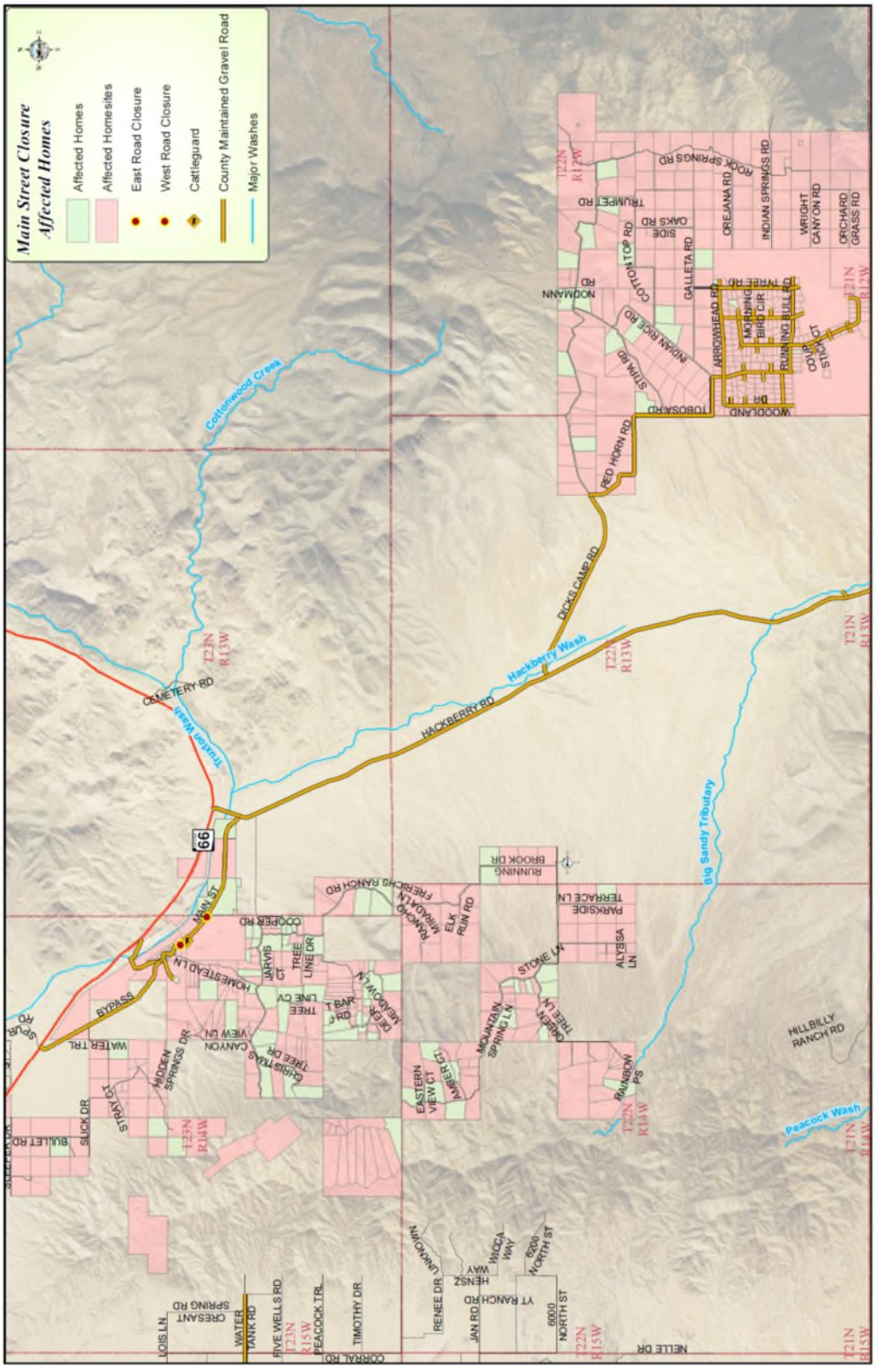
In 1995 the roadway is identified as part of a Mohave County Primitive Road. Primitive roads are described as roads opened before June 13, 1975 and not built in accordance with county standards. They are local and collector roads (not highways) generally for local access and constructed of native material, gravel or

substandard paving. The roadway is on Primitive Road, Blade Route 4, which includes the Hackberry, Truxton and Pinion Pines areas. The roadway is identified as Old Trails Road from Highway 66 at the General Store to Hackberry Road with a total of 3.7 miles.

In 2009, the roadway was established as a county ounty's regular road maintenance system via Resolution No. 167. The resolution states that records indicated that the right of way was established through various plats, records, deeds and other instruments. In Exhibit B (unsurfaced roads not in subdivisions) of the d 4233 Old 6 to Hackberry Road.

ounty has a for maintenance and repair of the roadway. This included blading the road, cleaning up, oadway,


Main Street, Hackberry
a.k.a. The National Old Trails Highway
Exhibit
Tax Parcels
Hackberry Main St Center
Hackberry Townsite R/W
60ft Condemnation
84ft Condemnation
100ft Condemnation


Main Street Closure
Affected Homes
Affected Homes
Affected Homesites
East Road Closure
West Road Closure
Cattleguard
County Maintained Gravel Road
Major Washes
Cottonwood Creek
Hackberry Wash
Truxton Wash
Big Sandy Tributary
Peacock Wash
HACKBERRY RD
CEMETERY RD
DICKS CAMP RD
RED HORN RD
TOBOSA RD
WOODLAND DR
STUPA RD
INDIAN RICE RD
NODMANN RD
CONTOUR TOP RD
SIDE OAKS RD
GALLETA RD
TRUMPET RD
ROCK SPRINGS RD
OREJANA RD
INDIAN SPRINGS RD
WRIGHT CANYON RD
ORCHARD GRASS RD
ARROWHEAD RD
MORNING BIRD CIR
RUNNING BULL RD
STACY CT
COYOTE CT
MAIN ST
COOPER RD
HOMESTEAD LN
BYPASS
SPUR RD
WATER TRL
SLICK DR
STRAY CT
BULLET RD
HIDDEN SPRINGS DR
CANYON VIEW LN
CHRIS TAS TREE DR
TREE LINE DR
JARVIS CT
TREE LINE CV
T BAR RD
CREEK HEAD VW LN
RANCHO MIRAGE LN
ELK RUN RD
FREEDOM'S RANCH RD
RUNNING BROOK DR
PARKSIDE TERRACE LN
ALYSSA LN
STONE LN
GREEN TREE LN
MOUNTAIN SPRING LN
EASTERN VIEW CT
AMBER CT
RAINBOW PS
HILLBILLY RANCH RD
LINNOMAN
WICCA WAY
HENSZ WAY
RENEE DR
JAN RD
YT RANCH RD
6000 NORTH ST
NELLE DR
CORRAL RD
TIMOTHY DR
PEACOCK TRL
FIVE WELLS RD
WATER TANK RD
LOIS LN
CRESANT SPRING RD
T22N R12W
T21N R12W
T22N R13W
T21N R13W
T23N R14W
T22N R14W
T21N R14W
T23N R15W
T22N R15W
T21N R15W
66


PANEL
04015C4100G
eff. 11/18/2009
AREA OF MINIMAL FLOOD HAZARD
PANEL
04015C4375G
eff. 11/18/2009

Highest and best use is defined as “the reasonably probable use of property that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity”.[5]

This definition applies specifically to the highest and best use of land. It is to be recognized that in cases where a site has existing improvements, the highest and best use may very well be determined to be different from the existing use. The existing use will continue, however, unless the land value in its highest and best use exceeds the total value of the property in its existing use. Implied within this definition is recognition of the contribution of that specific use to community environment or to community development goals in addition to the wealth maximization of individual property owners. Also implied is that the determination of highest and best use results from the appraiser's judgment and analytical skill, and that the use determined from analysis represents an op

On the basis of the preceding sections, a general discussion will follow analyzing the highest and best use of both the larger parcel and the across fence parcels (ATF parcels), as (if) vacant.

Legally Permissible

General Plan Designation: According to the Mohave County General Plan, the larger parcel and ATF parcels are located in an area identified as Rural Development Area. This is an area where residents presently enjoy a rural lifestyle, wide open spaces and few neighbors. Most of the land in Mohave County is included in this area type. Properties in these areas are generally at least five (5) acres in size, and many are much larger than this. A significant amount of land within this area type is owned by the Federal or State governments, or is included in an Indian reservation.

Zoning: The larger parcel and ATF parcels have either A (General) or AR (Agricultural Residential) zoning.

The “A” zone was originally established to be used in areas where it was unclear whether the pattern of development would be residential or commercial, with eventual rezoning of the properties as development progressed. No subdividing shall be conducted, or approved, in any area zoned "A" without prior rezoning of the land so parceled, unless all parcels created meet the required minimum parcel size. Permitted uses include single-family dwellings, duplexes, multiple dwellings, general commercial uses, offices, agricultural uses, landing strips, home occupations, childcare, group homes, adult foster care, assisted living homes, signs, wireless communications

[5] Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 109.

facilities, schools, churches, public buildings, automobile wrecking yards, junkyards, borrow pits, RV and mobile home parks.

The AR zone is primarily intended to allow single-family residential uses on suburban and rural parcels, and also allow domestic livestock, and other personal agricultural endeavors. Permitted uses include agricultural, home occupations, single-family residential uses, guest ranches, wireless communication facilities, schools, churches, public buildings, childcare, adult foster care, playgrounds, RV and manufactured home parks, riding and boarding facilities, retail plant nurseries, kennels and veterinary clinic and cottage industries.

Likelihood of Zonin current zoning is consistent with the Mohave County General . Furthermore, the existing zoning allows for a wide variety of uses. Therefore, it is my not likely.

Easements, Encroac I was not provided a title report or site survey for the property. bisected by power and water transmission lines ased on my inspection of the property and review of the title report, the larger parcel atypical easements, encroachments or restrictions.

Based on the historic use of the property as a roadway, the underlying fee interest in the roadway is a phantom servient interest.

Based on these legal restrictions, the most likely legally permissible use of the larger parcel is for a variety of low density uses consistent with the existing zoning, including continued use as a roadway right of way.

Furthermore, based on these legal restrictions it is my opinion that the most likely legally permissible use of the parcels for development of a variety of uses, consistent with the ex ng zoning.

Physically Possible

The larger parcel is a long, narrow strip of land with slightly rolling to near-level topography. Although the roadway crosses a wash, where it is in Flood Zone A, most of the roadway is not in a flood zone. Land uses in the immediate area of the subject property are undeveloped desert land and low-density uses. Electricity, water and telephone services are available in the area. Public sewer is not available. Wells and septic systems are in use in the area. The roadway connects to Route 66 on the north, Hackberry Road on the east, Bypass Road on the west and Homestead Lane on the south. Due to the long-narrow shape, the potential physically possible uses of the property are for continued use as a roadway right of way or for assemblage with adjacent properties. Recognizing the fact that the developed properties in the area rely on the roadway for access, it is my opinion that the most likely legally permissible and physically possible use of the larger parcel is for use as a roadway.

The desert land parcels range in size from 2.44 to 300 acres with a total of 649.21 acres. The parcels generally have a usable shape and slightly rolling to near-level topography. The properties are mostly located outside a flood hazard zone, however, the area along the Truxton Wash along the southwest side of the railroad tracks and another smaller area is located in Flood Zone A. Land uses in the immediate area of the subject property are undeveloped desert land and low-density uses. Electricity, water and telephone services are available in the area. Wells and septic systems are also in use in the area. The properties have access via Old West Highway, Main Street and other county roadways in the area. The roadways are mostly bladed dirt roads. Route 66 is located to the north of the properties and north of the Atchison, Topeka and Santa Fe Railroad right of way. Portions of the desert land parcels are being mined for sand and gravel. Mohave County trucks were being loaded with sand and gravel materials and weighed during my inspection. Recognizing these physical characteristics, the mostly likely legally permissible and physically possible use of the desert land parcels is for a variety of low density uses, consistent with the current zoning, including sand and gravel extraction on a portion of the property.

The lots along the townsite segment h 0 to 1.73 acres. The parcels generally have a usable shape and slightly rolling to near level topography. The properties are locat and uses in the immediate area of the subject property uses. Electricity, water and telephone services are available in the area. Wells and septic systems are also properties have access via Old West Highway, Main Street and other county roadways in he area. The roadways are mostly bladed dirt roads. Route 66 is located to the north of the properties and north of the Atchison, Topeka and Santa Fe Railroad right of way. Recognizing these physical characteristics, the mostly likely legally permissible a residential lots is for a variety of low

Financially Feasible

The most likely legally permissible and physically possible use of the larger parcel is for use as a roadway. Based on the current and historic use of the larger parcel as part of a roadway right of way, it is my opinion that continued use of the area as a right of way is financially feasible. Thus, the most likely financially feasible use of the larger parcel is for use as a roadway.

Although the economy in the area has grown in the last five years, the population growth rate has been slow. The growth does not support rapid development of properties in the area. Furthermore, there is a large amount of undeveloped land in the area suitable for development of low-density uses. Thus, it is my opinion that development in the area is not financially feasible at this time. Nonetheless, development of specific properties for specific users may be financially feasible. Thus, it is my opinion that the most likely financially feasible use of the ATF properties is to hold

for investment. Nonetheless, with some demand for materials, continued sand and gravel extraction on a portion of the property is also financially feasible.

Maximally Productive and Highest and Best Use

The most likely financially feasible use of the larger parcel is for use as a roadway. It is my opinion that no other use would provide a greater return to the property. Therefore, it is my opinion that the maximally productive and highest and best use of the property is for use as a roadway right of way providing access to properties in the area.

The most likely financially feasible use of the to hold for investment with sand and gravel extraction on a portion of the property. It is my opinion that no other use would provide a greater return to the site. Therefore, it is my opinion that the maximally productive and highest and best use of the desert land, as if vacant, is to hold for investment with sand and gravel extraction on a portion of the property.

The most likely financially feasible use of the to hold for investment. It is my opinion that no other use would provi . Therefore, it is my opinion that the maximally productive and highest and best u townsite lots, as if vacant,

The larger parcel is a roadway right of way, which is a long, narrow strip of land. Although similar rights of way sell, such sales are not common. Thus, similar rights of way are commonly valued based on the value of the across-the-fence (ATF) parcels. For this analysis, an opinion of value of the larger parcel and acquisition is developed based on the value of the ATF properties, as if vacant.

Furthermore, the ATF properties are grouped into two property types (desert land and townsite lots, with or without improvements). Thus, the right of way is segmented into those two property types and a valuation of the ATF parcels for each of those two segments is completed based on the different uses.

Typically, real estate can be valued by applying three approaches, i.e., the Cost Approach, the Sales Comparison Approach, and the Income Capitalization Approach. Each of these approaches are defined and discussed as follows:

Cost Approach

The Cost Approach is defined as set of procedures through which a value indication is derived for the fee simple estate by estimating the current cost to construct a reproduction of (or replacement for) the existing structure, including an entrepreneurial incentive or profit; deducting depreciation from the total cost; and adding the estimated land value. Adjustments may then be made to the indicated value of the fee simple estate in the subject property to reflect the value of the property interest being appraised".[6]

This approach in appraisal analysis is based on the proposition that the informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property. It is particularly applicable when the property being appraised involves relatively new improvements that represent the highest and best use of the land or when relatively unique or specialized improvements are located on the site and for which there exist no comparable properties on the market. This is sometimes referred to as Value in Use or the value of a particular property for a specific use, i.e., Special Purpose Value.

Sales Comparison Approach

The sales comparison approach is defined as "the process of deriving a value indication for the subject property by comparing sales of similar properties to the property being appraised, identifying appropriate units of comparison, and making adjustments to the sale prices (or unit prices, as appropriate) of the comparable properties based on

6 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 54.

relevant, market-derived elements of comparison. The sales comparison approach may be used to value improved properties, vacant land, or land being considered as though vacant when an adequate supply of comparable sales is available".[7]

Traditionally, this is an appraisal procedure in which the market value estimate is predicated upon prices paid in actual market transactions and prices asked in current listings. It is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon (a) the availability of comparable sales data; (b) the verification of the sales data; (c) the degree of comparability or extent of adjustment necessary for time differences; and (d) the absence of atypical conditions affecting the sales price. It is sometimes referred to as Value in Exchange or the value, in terms of money, of real estate in a typical market.

The Income Capitalization Approach

The Income Capita pecific appraisal techniques applied to develop a value indication for a property based on its earning c apability and calculated by the capitalization of property income."

The Discounted Cash Flow Analysis is defined as he procedure in which a discount rate is applied to a set of projected income streams a and a reversion. The analyst specifies the quantity, variability, timing, and duration of the income streams and the quantity and timing of the reversion, and discounts each to its present value at a specified yield rate

Final Reconciliation

Final Reconciliation is defined as "the last phase in the development of a value opinion in which two or more value indications derived from market data are resolved into a final value opinion, which may be either a range of value, in relation to a benchmark, or a single point estimate section of the report, the valuation approaches are evaluated as to their pertinence and reliability to the appraisal problem. This analysis results in a final value estimate.

For valuation of the subject site as vacant land, only the sales comparison approach was used. Because the property, as if vacant, does not have any significant improvements, the cost approach was not used. Furthermore, properties similar to the subject are typically not leased or exchanged based on their rental income; therefore, the income approach was not used. Nonetheless, the cost approach is used to estimate the contributory value of the site improvements being acquired, if any.

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7 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 207.
8 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 115.
9 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 66.
10 Appraisal Institute, *The Dictionary of Real Estate Appraisal, Sixth Edition* (Chicago, Illinois, 2015), page 91.

As part to the reconciliation section, a conclusion of value for the fee simple interest in the larger parcel with the townsite segment is developed by weighting the unit value of each segment and applying that unit value to the larger parcel area.

The value of the fee simple interest in the property is further adjusted by the property rights owned by Mohave County and the underlying fee owner.

The sales comparison approach is an approach through which an appraiser derives a value indication by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison and making adjustments, based on the elements of comparison, to the sale prices of the comparables.

Traditionally, this is an appraisal procedure in which the market value estimate is predicated upon prices paid in actual market transactions and prices asked in current listings. It is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon (a) the availability of comparable sales data; (b) the verification of the data; (c) the degree of comparability or extent of adjustment necessary for time differences; and (d) the a typical conditions affecting the sales price. It is sometimes referred to as Value in Exchange or the value, in terms of money, of real estate in a typical market.

The appraisal of land focuses on valuing the property rights attached to the land. In addition, the physical characteristics of land, the availability of utilities, and site improvements affect land use and value. The physical characteristics of a parcel of land that an appraiser may consider are size, topography, view amenity, access and utilities. Topographical characteristics include the land's contour, grade, and drainage. Land value must always be considered in terms of highest and best use.

Overview of the Search for Comparable Sales Information

Emphasis was placed upon sel
comparables which were considered to be similar to the subject properties in terms of property rights conveyed, zoning classifications, and development time horizons. Although my search for comparable propert es was initially concentrated within the subject's immediate vicinity, it was necessary to expand the scope of research to encompass areas somewhat outside of the subject's immediate area.

Nonetheless, although differing somewhat in terms of location, it should also be noted that the comparables are still considered to be generally similar in terms of their development time horizons. Similarly, I also sought to ensure the homogeneity of the comparables and the subject property through a careful consideration of certain other factors. Accordingly, although differing in certain respects, it will be observed that the comparables used within my analysis are generally comparable with the subject property in terms of many physical attributes. I believe that the comparables included within this analysis are consistent with the subject's highest and best use, and are representative of the range of indications of value within which the subject properties could be placed.

Selection Of Appropriate Units Of Comparison

Although alternative units might be employed, when utilizing the sales comparison approach for parcels of land of this size, the predominant unit of comparison is the sales price per acre of land area. During the research process, market participants clearly indicated that this unit of comparison is the primary unit used in the negotiation process. Accordingly, for the purpose of this report, the sale price per acre of land is used.

Analysis and Comparison of Comparable Sales

Typically, comparable sales are analyzed using a combination of quantitative and/or qualitative comparative techniques. In applying quantitative adjustment techniques, mathematical processes are used to identify those items of comparison that require adjustment and to measure the amount, if any, of the indicated adjustment(s). Analytical techniques commonly utilized to measure quantitative adjustments include paired data set analysis, statistical analysis, graphic analysis, trend analysis, cost related analysis and secondary data analysis. However, although these techniques are theoretically sound, their use is somewhat limited because of the imperfect nature of the real estate market and the lack of sufficient market data to quantify adjustments.

Therefore, in this analysis, in tho
reasonably be quantified, a qualitative technique was used instead; or more specifically, a relative comparison analysis. In relative comparison analysis, the applicable elements of comparison for each comparable sale are analyzed to determine if a comparable sale is inferior, superior or equal to the subject property based on the individual element of comparison. After all of the applicable elements of comparison are analyzed, a net relative value indication of each comparable sale is concluded. Based on this relative value indication, the comparable sales are then reconciled into a value indication by arraying them relative to the subject property.

In this valuation analysis, the adjustment categories for which quantifiable adjustments could reasonably be made will be analyzed first. Following this analysis will be a summary of the quantifiable adjustments and the adjusted value indications of each of the comparable sales. The analysis and summary of quantifiable adjustments will then be followed by a relative comparison analysis of the remaining elements of comparison.

Quantitative Adjustments

Those adjustment categories for which market derived information is considered to be able to support quantifiable adjustments include such factors as:

- Real Property Rights Conveyed
- Financing Terms
- Conditions of Sale
- Expenditures Immediately After the Sale
- Market Conditions (Date of Sale)

Qualitative Adjustments

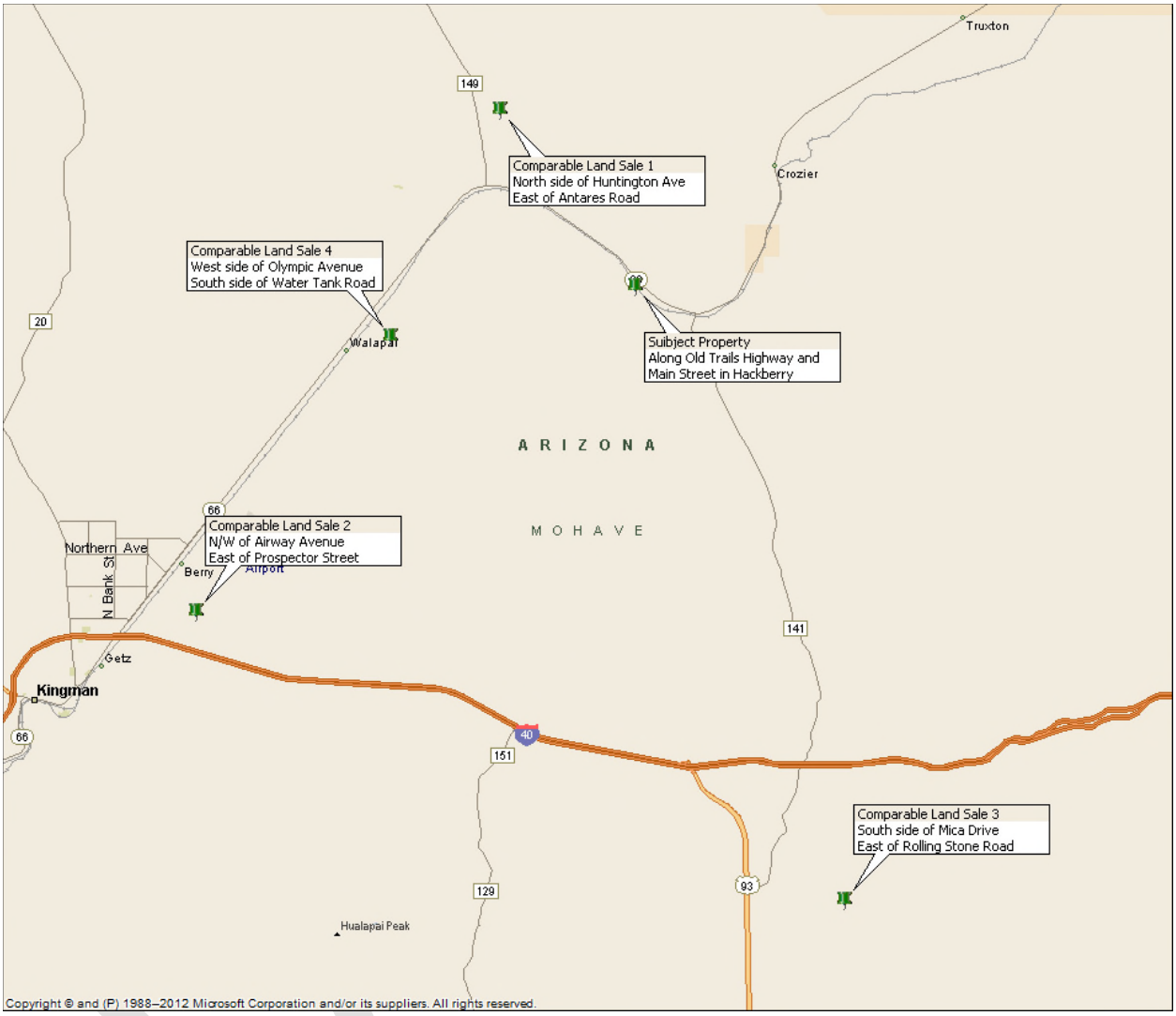
Those adjustment categories for which available market information is more appropriately considered to support a relative comparison analysis include the following:

- Location
- Physical Characteristics (size, topography, off-site improvements, etc…)
- Intended Use
- Economic Characteristics
- Non-Realty Components of Value

Description Of Desert Land Comparables

Presented on the following pages are data sheets for each of the comparables examined, as well as a map showing the location of each comparable with respect to the subject property. Following the comparable data sheets is a detailed discussion of the application of the sales comparison approach and the value indications derived.

Comparable Land Sales Map-Desert Land Comparables



Comparable Land Sale One

Identification

Type:	
Location:	north side of Huntington Avenue, east of
Tax Parcel Number	

Sale Data

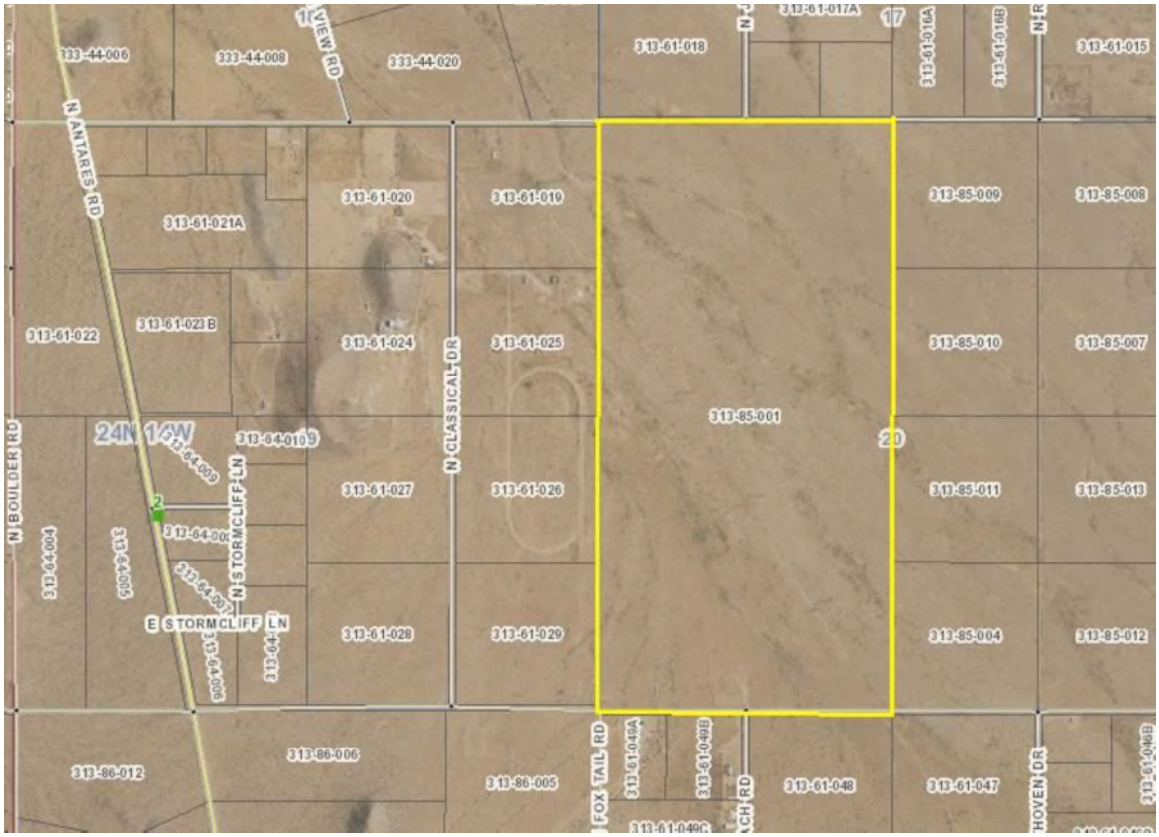
Sale Price:	$230,000
Terms:	$46,000 Cash down with the balance of $184,000 carried by the seller with undisclosed terms. The broker stated that the terms impacted the sale price by as much as, or more than 20%.
Unit Price:	$719 Per acre
Date of Recordation:	November 8, 2013 (1.5 month escrow)
Grantor/Seller:	BLM Investments, Inc.
Grantee/Buyer:	Now Consultants, LLC
Instrument:	Warranty Deed
Instrument Number:	2013-057385
Conditions of Sale:	Typical

Marketing Period: Less than one year
Confirmation: Public records, Wardex, selling broker and inspection

Site Data

Shape/Dimensions: Rectangular
Area: 320 Acres
Topography: Near level to slightly irregular
Zoning/Restrictions:
Off-Sites:
Lot Type:
Utilities:
Roadway Frontage:
Flood Zone:
Improvements:
Comments: density uses.

Potential Use



Comparable Land Sale Two

North from Airway Avenue

South from Airway Avenue

Identification

Type:
Location: uth sides of Airway Avenue, east

Tax Parcel Number

Sale Data

Sale Price: $1,625,000, plus

Terms:
Unit Price:
Date of Recordation:
Grantor/Seller: Valley Oaks Financial Corporation
Grantee/Buyer: SDIP VB, LLC
Instrument: Special Warranty Deed
Instrument Number: 2014-053846
Conditions of Sale: REO
Marketing Period: Less than one year at sale price
Confirmation: Public records, CoStar, broker and inspection

Site Data

Shape/Dimensions: Irregular and non-contiguous
Area: 676.54 Acres
Topography: Near-level to slightly irregular
Zoning/Restrictions: R-2, R1-8, O, C-1, C-2 and I-1

Off-Sites:	Bladed dirt roads
Lot Type:	Corner
Utilities:	Electricity and water to site and sewer nearby
Roadway Frontage:	Airway Road and Wagon Wheel Drive
Flood Zone:	Flood Zone X
Improvements:	None of value
Comments:	The property is located in an area of mixed uses on the east side of Kingman. Beyond the special district broker

Potential Use community

Comparable Land Sale Three

Identification

Type:	
Location:	On the south side of Mica Drive, east of Rolling Stone
Tax Parcel Number	

Sale Data

Sale Price:	$150,000
Terms:	All cash to the seller
Unit Price:	$1,154 Per acre
Date of Recordation:	September 9, 2016
Grantor/Seller:	John S. Sieker and Maureen R. Sieker Family Trust
Grantee/Buyer:	Mark Merritt
Instrument:	Warranty Deed
Instrument Number:	2016-040941
Conditions of Sale:	Typical
Marketing Period:	Less than one year at sale price
Confirmation:	Public records, Wardex, seller and inspection

Site Data

Shape/Dimensions:	Rectangular
Area:	130 Acres
Topography:	Near-level to irregular
Zoning/Restrictions:	AR
Off-Sites:	Bladed dirt roads (The property is accessible via freight trucks.)
Lot Type:	
Utilities:	
Roadway Frontage:	
Flood Zone:	
Improvements:	
Comments:	property is located in a sparsely developed area . The property was being used for extraction of boulders, which generated the seller approximately $3,000 per month. The seller stated that no utilities are extended to the site, but well water is available at approximately 100 feet below the

Potential Use

Comparable Land Sale Four

Northwest from Olympic Avenue

Southwest from Olympic Avenue

Identification

Type:	
Location:	On the west side of Olympic Avenue and the south side of Water Tank Road, in Mohave County, Arizona
Tax Parcel Number	017, 018, 019A, 020, 022, 026, 027, 028, 029B, 030, 033, 034, 035A, 036A, 037, 038 And 039

Sale Data

Sale Price:	
Terms:	
Unit Price:	
Date of Recordation:	
Grantor/Seller:	
Grantee/Buyer:	Oasis Organics, LLC
Instrument:	Warranty Deed
Instrument Number:	2016-050171
Conditions of Sale:	Typical
Marketing Period:	Less than one year at sale price
Confirmation:	Public records, Wardex, broker and inspection

Site Data

Shape/Dimensions:	Irregular
Area:	650 Acres
Topography:	Gently sloping from east to west
Zoning/Restrictions:	AR
Off-Sites:	Bladed dirt roads

Lot Type:	Interior and corner
Utilities:	Electricity, no water, no sewer
Roadway Frontage:	The property has frontage along Olympic Avenue, Water Tank Road, Suggar Drive, Medford Drive, Jobe Drive, West Road, Ader Drive and Billie Drive
Flood Zone:	Flood Zone X
Improvements:	None of value
Comments:	The property is located in a mostly undeveloped area The property is access from Route 66 under the railroad

Potential Use

Land Sales Summary and Adjustment Grid					
		Land Comparables			
	Subject	1	2	3	4
Sale Price	-	$230,000	$2,825,000	$150,000	$487,500
Size in Acres	649.2100	320.000	676.540	130.000	650.000
Price Per Acre	-	$719	$4,176	$1,154	$750
Property Rights Conveyed	Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple
Total Adjustment					$0
Price Adj. For Rights Conveyed					$487,500
Financing					All Cash
Total Adjustment					$0
Price Adj. For Financing					$487,500
Conditions of Sale					Typical
Total Adjustment					$0
Price Adj. For Financing					$487,500
Market Conditions					Nov-16
Adjustment Factor					3.00%
Total Adjustment					$14,625
Price Adj. For Market Conditions					$502,125
Adjusted Price Per Acre					$773
Location/Access					Similar
Adjustment Factor					None
Configuration					Typical
Adjustment Factor					None
Size (Acres)					650.000
Adjustment Factor					None
Utilities					E
Adjustment Factor					**Upward**
Off-Site Improvements					Bladed
Adjustment Factor					None
Site Improvements					None
Adjustment Factor					None
Flood Zone					X
Adjustment Factor					None
Use	Hold/S&G	Hold/Ag	Mixed Use	Hold	Hold
Adjustment Factor	-	**Upward**	**Downward**	**Upward**	**Upward**
Net Qualitative Adjustment	-	**Upward**	**Downward**	**Upward**	**Upward**

Utilities: E = Electricity; T = Telephone; S = Septic

Quantifiable Adjustments

Property Rights Conveyed: This is an appraisal of the fee simple interest in the larger parcel. The fee-simple interest was conveyed in each of the comparable sales; therefore, no adjustments are indicated for property rights conveyed.

Financing Terms: All of the comparables, except Comparable 1, sold for all cash to the seller or with cash equivalent financing, indicating no adjustment for financing terms. Comparable 1 sold with $46,000 (20%) cash down and the balance of $184,000 carried by the seller. The broker stated that the property would have sold for as much as 20% or more less than the sale price for an all cash transaction. Furthermore, he stated that the seller subsequently foreclosed on the property. Recognizing these terms the sale is adjusted downward for financing.

Conditions of Sale: appear to have sold under typical conditions of sale, indicating no adjustment.

Market Conditions: The effective date of the appraisal is May 8, 2017. The comparable sales sold between November 2013 and

There is no consistently published data regarding real estate market conditions for the market area or Mohave County. eless, an article published in the Kingman Daily Miner on February 10, 2017 indicates that the housing market is "dicey". Specifically the article states "the local housing market has been a little dicey following the Great Recession, but it's making steady progress, said Jo Long…The area continues to lag behind increasing national trends."

According to Realtor.com, the median listing price for residences in Kingman, which includes a portion of the market $140,000 in January 2014 to $166,000 in and the median listing price per square foot has increased from $80 to $10 This equates to 18.57, or 0.5% per month over the 37 month period for the median listing price for residences and 25%, or 0.68% per months over the 37 month period for the median listing price per square foot.

Furthermore, according to Zillow, the median home value in the Lake Havasu Metro area, which includes most of the populated areas of Mohave County, is $181,400. The median value has increased 6.7% over the last year and is forecast to increase 2.6% over the next year.

Recognizing these conditions, each of the comparables is adjusted upward 0.5% per month to reflect the increasing market conditions.

Qualitative Adjustments

Comparable Land Sale 1 is the November 8, 2013 sale of a 320 acre parcel of land located on the north side of Huntington Avenue, east of Antares Road in Mohave County for $230,000, or $719 per acre. After a downward adjustment for financing and an upward adjustment for market conditions, this comparable has an adjusted sale price of $693 per acre. This comparable is sufficiently similar to the subject based on location, configuration, size, off-site improvements, site improvements and flood zone to not require adjustments. This comparable has inferior utilities, requiring an upward

adjustment. The intended use of this property is inferior to the ATF property which is partially being used for sand and gravel extraction, indicating an upward adjustment. Overall, it is my opinion that this comparable is inferior to the subject and requires a net upward qualitative adjustment, indicating a unit value for the subject property above $693 per acre.

Comparable Land Sale 2 is the December 15, 2014 sale of a 676.54 acre parcel of land located on the north and south sides of Airway Avenue, east of Prospector Street in Kingman for $2,825,000, or $4,176 market conditions, this comparable has per acre. This comparable is sufficiently similar to the subject based on configuration, size, off-site improvements, site improvements and flood zone to not require adjustments. This comparable has a superior location in Kingman, superior utilities (near public sewer) and a superior potential use (master planned for a mix of uses), indicated upward adjustments. Overall, it is my opinion that this comparable is superior to the subject and requires a net downward qualitative adjustment, indicating a the subject property below $4,781

Comparable Land Sale __ is the September 9, 2016 sale of a 130 acre parcel of land located on the south side of Mica Drive, east of Rolling Stone Road in Mohave County for $150,000, or $1,154 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $1,200 per acre. This comparable is sufficiently similar to the subject based on location, configuration, off site improvements, site improvements and floo This comparable is smaller than the subject, requiring a downward adjustment. This comparable has inferior utilities, requiring an upward adjustment. The intended use of this property is inferior to the ATF property which is partially being used for sand and gravel extraction, indicating an upward adjustment. Overall, it is my opinion that this comparable is inferior to the subject and requires a net upward qualitative adjustment, indicating a unit value for the subject pr

Comparable Land Sale __ s the November 3, 2016 sale of a 650 acre parcel of land located on the west side of Olympic Avenue and the south side of Water Tank Road in Mohave County for $487,500, or $750 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $773 per acre. This comparable is sufficiently similar to the subject based on location, configuration, size, off-site improvements, site improvements and flood zone to not require adjustments. This comparable has inferior utilities, requiring an upward adjustment. The intended use of this property is inferior to the ATF property which is partially being used for sand and gravel extraction, indicating an upward adjustment. Overall, it is my opinion that this comparable is inferior to the subject and requires a net upward qualitative adjustment, indicating a unit value for the subject property above $773 per acre.

Reconciliation of Value Indications

To conclude a value for the subject site, the subject and comparables are arrayed in the following table from the highest price per acre to the lowest price per acre:

Array by Net Relative Rating		
Comparable Sale	Net Adjustment	Adjusted Unit Price
2	Downward	$4,781
Subject		

Based on this array, the comparable sales indicate a value for the subject property below the adjusted sale pri per acre) and above the adjusted sale prices of Comparables 1, 3 and 4 (above and $1,200 per acre).

I have considered the comments of two active brokers in the area regarding the subject property. The broker for Comparable Sale 1 indicated that with Truxton Canyon Water Company Water and the on going sand and gravel operation with mineral rights, the value of the subject property would likely be in the range of $2,000 to $2,500 per acre.

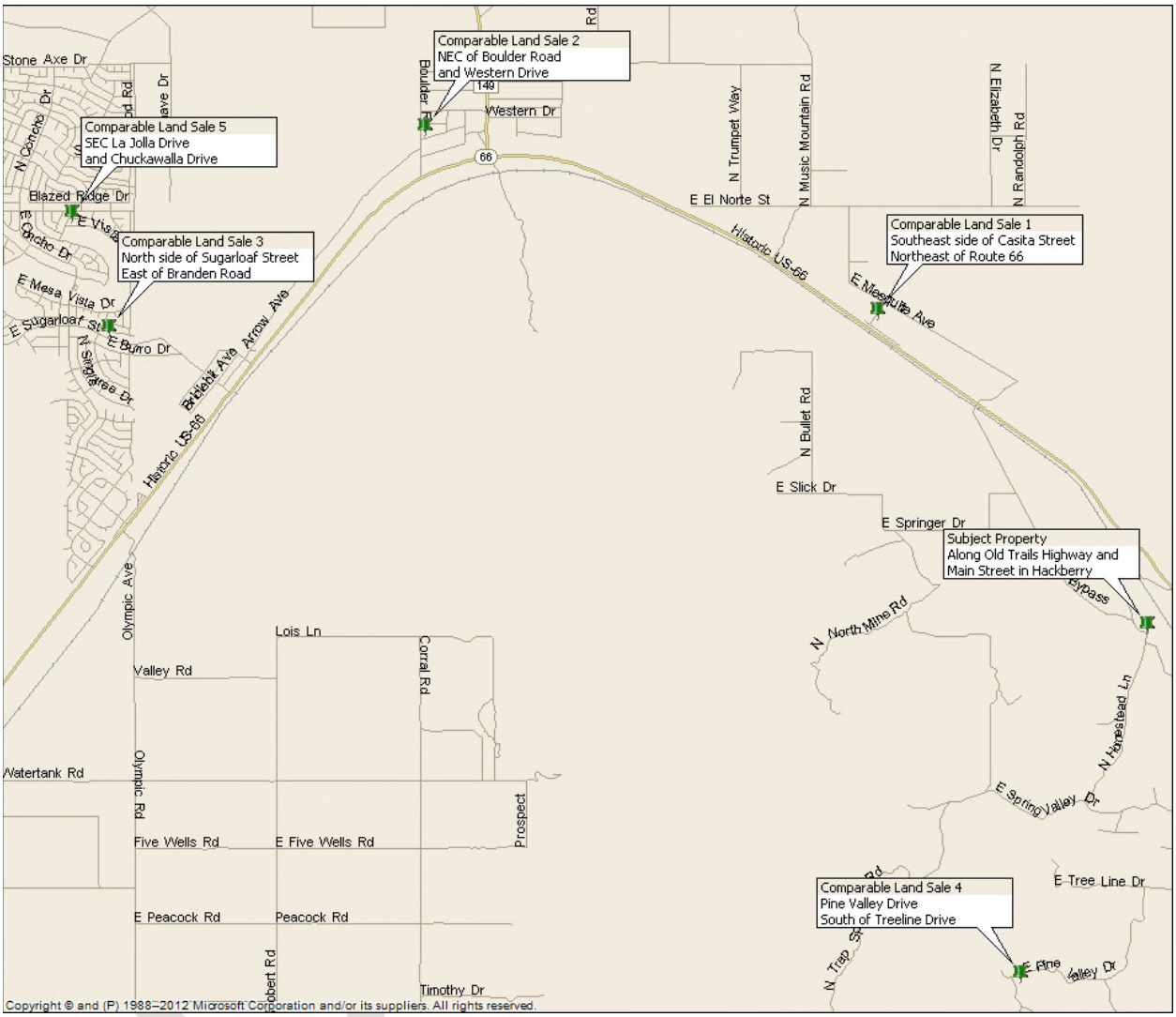
The broker for Comparable Sale 2 indicated that the Truxton Canyon Water Company Water adds some value to the property, however, wells can be installed in the area for approximately $28,000; therefore, the water company water does not add a lot of value. He indicated that with water and the on going sand and gravel operation, the value of the property is likely in the range of $1,200 to $1,500 per acre.

As a property that was previously used for extraction of boulders, Comparable 3 is most similar to the subject pr erty currently used for sand and gravel extraction, however, is inferior due to the lack of utilities and the fact that it was not acquired for that use. Thus, based on these indications, it is my opinion that subject property has a value of **$1,500 per acre**.

Description Of Vacant Townsite Lot Comparables

Presented on the following pages are data sheets for each of the comparables examined, as well as a map showing the location of each comparable with respect to the subject property. Following the comparable data sheets is a detailed discussion of the application of the sales comparison approach and the value indications derived.

Comparable Land Sales Map-Townsite Lot Comparables



Comparable Land Sale One

Identification

Type:
Location: southeast side of La Casita Street, northeast

Tax Parcel Number

Sale Data

Sale Price:
Terms: All cash to the seller
Unit Price: $5,900 Per acre
Date of Recordation: April 10, 2015
Grantor/Seller: Phillip A. Backus
Grantee/Buyer: Daniel E. Ott
Instrument: Warranty Deed
Instrument Number: 2015-015596
Conditions of Sale: Typical
Marketing Period: Less than one year
Confirmation: Public records and Zillow

Site Data

Shape/Dimensions: Rectangular

Area:	1 Acre
Topography:	Near-level-to-slightly irregular
Zoning/Restrictions:	Not available
Off-Sites:	Bladed dirt road
Lot Type:	Interior
Utilities:	Electricity, telephone and septic system (no water)
Roadway Frontage:	La Casita Street
Flood Zone:	Flood Zone X
Improvements:	This property had a 576 square foot mobile home r miscellaneous structures that were in poor condition and contributed
Comments:	density

Potential Use

Comparable Land Sale Two

Identification

Type:
Location: At the northeast corner of Boulder Road and Western

Tax Parcel Number

Sale Data

Sale Price:	$20,000
Terms:	All cash to the seller
Unit Price:	$19,048 Per acre
Date of Recordation:	June 12, 2015
Grantor/Seller:	Ron Kouf
Grantee/Buyer:	Frank L. Corin
Instrument:	Warranty Deed
Instrument Number:	2015-026368
Conditions of Sale:	Typical
Marketing Period:	Less than one year
Confirmation:	Public records, Zillow, listing agent for current listing and Realtor.com

Site Data

Shape/Dimensions:	Irregular
Area:	1.05 Acre
Topography:	Near-level to slightly irregular
Zoning/Restrictions:	Not available
Off-Sites:	Bladed dirt road
Lot Type:	Corner
Utilities:	Electricity, telephone, water and septic system
Roadway Frontage:	
Flood Zone:	
Improvements:	a mobile home and site improvements that subsequently
Comments:	density The property is currently Although the current agent was not involved in the 2015 sale of the property, she indicated that it likely reflected the value at the time. She also indicated that the current asking price of $30,000 for the site is most

Potential Use

Comparable Land Sale Three

Identification

Type:	
Location:	On the north side of Sugarloaf Street, east of Branden
Tax Parcel Number	

Sale Data

Sale Price:	$3,000
Terms:	All cash to the seller
Unit Price:	$14,286 Per acre
Date of Recordation:	December 28, 2016
Grantor/Seller:	Dave R. De Young and Mary Anne De Young
Grantee/Buyer:	Meagan Mayer
Instrument:	Warranty Deed
Instrument Number:	2016-058833
Conditions of Sale:	Typical
Marketing Period:	Less than one year
Confirmation:	Public records, seller and Wardex

Site Data

Shape/Dimensions:	Irregular
Area:	0.21 Acre
Topography:	Near level to slightly irregular
Zoning/Restrictions:	R1-10
Off-Sites:	Asphalt paved
Lot Type:	
Utilities:	, no sewer or septic
Roadway Frontage:	
Flood Zone:	
Improvements:	
Comments:	Valle Vista, which is a master panned area with a golf course, playground

Potential Use Investment with potential for development of a single-

Comparable Land Sale Four

Identification

Type:	
Location:	Pine Valley Drive, south of Treeline Drive, Hackberry,
Tax Parcel Number	

Sale Data

Sale Price:	$19,900
Terms:	$5,000 (26.3%) Cash down, with the balance of $14,000 carried by the seller for approximately 20 years. The agent stated that the terms did not impact the sale price. The seller received other cash offers at or near the asking and selling price.
Unit Price:	$2,872 Per acre
Date of Recordation:	February 1, 2017
Grantor/Seller:	John H. Shuffler
Grantee/Buyer:	Dawn Duncan-Hubbs
Instrument:	Warranty Deed

Instrument Number:	2017-005121
Conditions of Sale:	Typical
Marketing Period:	Less than one year
Confirmation:	Public records, agent and Wardex

Site Data

Shape/Dimensions:	Irregular
Area:	
Topography:	
Zoning/Restrictions:	
Off-Sites:	
Lot Type:	
Utilities:	
Roadway Frontage:	Pine Valley Drive (along north and west sides)
Flood Zone:	
Improvements:	
Comments:	The property is located within the Spring Valley property has good views of the surrounding areas and good vegetation. In addition to the 6.93 acres, the sale included a small s shared with the adjacent property. The property was acquired by the owner of the adjacent

Potential Use

Comparable Land Sale Five

Identification

Type:
Location: heast corner of La Jolla Drive and

Tax Parcel Number

Sale Data

Sale Price:	$12,500
Terms:	All cash to the seller
Unit Price:	$29,070 Per acre
Date of Recordation:	April 13, 2017
Grantor/Seller:	Dorla M. Nelson, Robert K. Nelson and Laurie D. Nelson
Grantee/Buyer:	Craig Asuchak
Instrument:	Warranty Deed
Instrument Number:	2017-019463
Conditions of Sale:	Typical
Marketing Period:	Approximately 28 months
Confirmation:	Public records, listing and selling agent, and Wardex

Site Data

Shape/Dimensions:	Irregular
Area:	0.43 Acre
Topography:	Irregular
Zoning/Restrictions:	RO
Off-Sites:	Asphalt-paved
Lot Type:	Corner
Utilities:	
Roadway Frontage:	
Flood Zone:	
Improvements:	
Comments:	The property is located in Valle Vista, which is a master panned area with a golf course, playground The agent indicated that the sale price

Potential Use

Land Sales Summary and Adjustment Grid						
		Land Comparables				
	Subject	1	2	3	4	5
Sale Price	-	$5,900	$20,000	$3,000	$19,900	$12,500
Size in Acres	0.4 to 1.73	1.000	1.050	0.210	6.930	0.430
Price Per Acre	-	$5,900	$19,048	$14,286	$2,872	$29,070
Property Rights Conveyed	Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple	Fee Simple
Total Adjustment	-	$0	$0	$0	$0	$0
Price Adj. For Rights Conveyed		$5,900	$20,000	$3,000	$19,900	$12,500
Financing						All Cash
Total Adjustment						$0
Price Adj. For Financing						$12,500
Conditions of Sale						Typical
Total Adjustment						$0
Price Adj. For Financing						$12,500
Market Conditions						Apr-17
Adjustment Factor						5.00%
Total Adjustment						$625
Price Adj. For Market Conditions						$13,125
Adjusted Price Per Acre						$30,523
Location/Access						Similar
Adjustment Factor						None
Configuration						Typical
Adjustment Factor						None
Size (Acres)						0.430
Adjustment Factor						None
Utilities						E, T, W
Adjustment Factor						None
Off-Site Improvements						Paved
Adjustment Factor						**Downward**
Site Improvements						None
Adjustment Factor						None
Flood Zone						X
Adjustment Factor						None
Potential Use						L.D. Res
Adjustment Factor						None
Net Qualitative Adjustment						**Downward**
Utilities: E = Electricity; T = Telephone; S = Septic						

Quantifiable Adjustments

Property Rights Conveyed: This is an appraisal of the fee simple interest in the larger parcel. The fee-simple interest was conveyed in each of the comparable sales; therefore, no adjustments are indicated for property rights conveyed.

Financing Terms: All of the comparables sold for all cash to the seller or with cash equivalent financing, indicating no adjustment for financing terms.

Conditions of Sale: All of the comparables appear to have sold under typical conditions of sale, indicating no adjustment.

Market Conditions: The effective date of the appraisal is May 8, 2017. The comparable sales sold between April 2015 and April 2017.

There is no consistently published data regarding real estate market conditions for the market area or Mohave County. Nonetheless, an article published in the Kingman Daily Miner on February 10, 2017 indicates that the housing market is "dicey". Specifically the article states "the local housing market has been a little dicey following the Great Recession, but it's making steady progress, said Jo Long…The area continues to lag behind increasing national trends."

According to Realtor.com, the median list Kingman, which includes a portion of the market $140,000 in January 2014 to $166,000 in and the median listing price per square foot has increased from $80 to $10 8.57, or 0.5% per month over the 37 month period for the median listing price for residences and 25%, or 0.68% per months over the 37 month period for the median listing price per square foot.

Furthermore, according to Zillow, the median home value in the Lake Havasu Metro area, which includes most of the populated areas of Mohave County, is $181,400. The median value has increased 6.7% over the last year and is forecast to increase 2.6% over the next year.

Recognizing these conditions, each of the comparables is adjusted upward 0.5% per month to reflect the increasing market conditions.

Qualitative Adjustments

Comparable Land Sale arcel of land located on the southeast side of La Casita Street, northeast of Route 66 in Mohave County for $5,900, or $5,900 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $6,608 per acre. This comparable is sufficiently similar to the subject based on location, configuration, size, off site improvements, site improvements, flood zone and potential use to not require an adjustment. This comparable has inferior utilities, requiring an upward adjustment. Overall, it is my opinion that this comparable is inferior to the subject and requires a net upward qualitative adjustment, indicating a unit value for the subject property above $6,608 per acre.

Comparable Land Sale 2 is the June 12, 2015 sale of a 1.05 acre parcel of land located at the northeast corner of Boulder road and Wester Drive in Mohave County for $20,000, or $19,048 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $21,143 per acre. This comparable is sufficiently similar to the subject based on location, configuration, size, off-site improvements, site improvements, flood zone and potential use to not require an adjustment. This comparable has superior utilities, requiring a downward adjustment.

Overall, it is my opinion that this comparable is superior to the subject and requires a net downward qualitative adjustment, indicating a unit value for the subject property below $21,143 per acre.

Comparable Land Sale 3 is the December 28, 2016 sale of a 0.21 acre parcel of land located at on the north side of Sugarloaf Street, east of Branden Road in Valle Vista for $3,000, or $14,286 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $14,643 per acre. This comparable is sufficiently similar to the subject based on location, configuration, utilities, site improvements, flood zone and potential use to not require an adjustment. This comparable is smaller than the subject and has superior off site improvements, requiring downward adjustments. Overall, it is my opinion that this comparable is superior to the subject and requires a net downward qualitative adjustment, indicating a unit value for the subject property below $14,643 per acre.

Comparable Land Sale __ is the February 1, 2017 sale of a 6.93 acre parcel of land located along Pine Valley Drive, south of Treeline Drive in Hackberry for $19,900, or $2,872 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $2,915 per acre. This comparable is sufficiently similar to the subject based on location, configuration, off site improvements, site improvements, flood zone and potential use to not require an adjustment. larger than the subject, indicating an upward adjustment. This comparable has superior utilities, indicating a downward adjustment. n that the upward adjustment for size outweighs the downward adjustment for utilities, indicating a net upward qualitative adjustment, indicating a unit value for the subject property above $2,915 per acre.

Comparable Land Sale __ is the April 13, 2017 sale of a 0.43 acre parcel of land located at the southeast corner of La Jolla Drive and Chuckawalla Drive in Valle Vista for $12,500, or $29,070 per acre. After an upward adjustment for market conditions, this comparable has an adjusted sale price of $30,523 per acre. This comparable is sufficiently similar to the subject based on location, configuration, size, utilities, site improvements, flood zone and potential use to not require an adjustment. This comparable has superior off-site improvements, indicating a downward adjustment. Overall, it is my opinion that this comparable is superior to the subject and requires a net downward qualitative adjustment, indicating a unit value for the subject property below $30,523 per acre.

Reconciliation of Value Indications

To conclude a value for the subject site, the subject and comparables are arrayed in the following table from the highest price per acre to the lowest price per acre:

Array by Net Relative Rating		
Comparable Sale	Net Adjustment	Adjusted Unit Price
5	Downward	$30,523
2	Downward	$21,143
3	Downward	$14,643
Subject	-	-
1	Upward	$6,808

Based on this array, the comparable sales indicate a value for the subject property below the adjusted sale price s 2, 3 and 5 (below $30,523, $21,143 and $14,643 per acre) and nd 4 (above $2,915 and $6,608

I recognize that the sale price range indicated by the comparables is relatively large; nonetheless, the slightly narrower range of $6,608 to $14,643 per acre indicated by Comparables 1 and 3 is indicative of the
Recognizing that water, electricity and telephone services are available to the properties in the area, it is my opinion that the townsite segment have a value in the upper middle of the na

RECONCILIATION AND FINAL VALUATION ESTIMATE

Reconciliation is the process whereby the appraiser evaluates and selects from among alternative conclusions or indications, a single conclusion of value. An orderly connection of interdependent elements is a prerequisite of proper reconciliation. This requires a re-examination of specific data, procedures, and techniques within the framework of the approaches used to derive preliminary estimates. Each approach is reviewed separately by comparing it to the other approaches to value in terms of adequacy, accuracy, completeness of reasoning, and overall reliability.

Within the scope of this report, all three approaches to value have been considered; however, as the subject property is being appraised as vacant land only, the cost approach to value was not considered to be applicable in this case. Similarly, as the subject property is not considered to be capable of being leased at a rental rate which would reflect a fair return to the land (and is not expected to be able to do so in the foreseeable future), the income capitalization approach to value was also not considered to be applicable to this report. Therefore, only the sales comparison approach to value was used.

In the valuation of the ATF properties along the desert land segment, I analyzed sales of four comparable used a combination of quantitative and qualitative comparative techniques to compare the sales with the subject property. After analysis, the comparable sales provided a reliable the ATF properties. Therefore, with exclusive emphasis on the sales comparison approach, it is my opinion that the market value, as i ATF parcels along the segment of desert land is

In the valuation of the ATF properties along the analyzed sales of five comparable
comparative techniques to compare the sales with the subject property. After analysis, the comparable sales provided a reliable ATF properties. Therefore, with exclusive emphasis on the sales comparison approach, it is my opinion that the market value, as if vacant, of the fee simple interest in the ATF parcels along the segment of residential lots is **$12,000 per acre.**

Exposure Period

Exposure period is defined as “the estimated length of time the property interest being appraised would have been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal; a retrospective estimate based upon an analysis of past events assuming a competitive and open market. Exposure time is always presumed to occur prior to the effective date of the appraisal. The overall concept of reasonable exposure encompasses not only adequate, sufficient and reasonable time but also adequate, sufficient and reasonable effort. Exposure time is different for various types of real estate and value ranges and

under various market conditions."[11] Based on other sales in the area, it is my opinion that the ATF parcels could have been sold in twelve months or less.

Larger Parcel Value Conclusion

To conclude an overall value for the larger parcel, an overall unit value for the roadway is concluded by weighting each segment based on the lineal feet of frontage along the roadway. The final weighted value for the fee simple interest is then multiplied by the total area of the roadway to pro ide an indication of value for the fee simple interest in the roadway. Based on the lineal feet of frontage and segment unit values, the weighted unit value conclusion is calculated as follows:

Weighted Unit Value Conclusion With Townsite Segment	
Segment	Weighted Unit Value
Desert Land Segment	$1,231
Townsite Segment	$2,153
Total	$3,384

Therefore, based on analysis, it is my opinion that the fee simple interest in the roadway area has a unit value

With a weighted average unit value of $3,384 re and a roadway area of 14.4325 acres, the value of the

Therefore, based on this analysis, it is my opinion that the market value of the fee simple interest in the roadway, including

If the townsite segment is not included, the unit value of the fee simple interest in the roadway area is the same as the desert land segment, or $1,500 per acre. With a land area of 11.8430 acres for the desert segment, the value of fee simple interest in the roadway is calculated as follows:

$1,500 Per Acre X 11.8430 Acres = $17,765
Rounded to $18,000

Therefore, based on this analysis, it is my opinion that the market value of the fee simple interest in the roadway, without the townsite segment is $18,000.

[11] *Appraisal Standards Board of The Appraisal Foundation, Statement on Appraisals Standards No. 6, "Reasonable Exposure Time in Real Property and Personal Property Market Value Opinions"*

Valuation of Phantom Servient Interest

As discussed previously, based on the historic use of the property as a roadway, Mohave County effectively owns an easement interest in the property and the underlying fee owner owns a phantom servient interest in the property. Based on information from the Town of Paradise Valley v. Laughlin, 174 Ariz. 484 (1992), a phantom servient interest can be defined as the remaining property rights after an effective fee simple taking for right of way purposes that leaves the property with little or nothing of consequence or value due to the remote and speculative nature of potential uses of the area after the acquisition.

With the understanding that Mohave County effectively owns an easement interest in the roadway, based on the concept of phantom servient interest as discussed in Town of Paradise Valley v. Laughlin, Mohave County owns virtually all of the property rights in the roadway and the underlying fee owner owns virtually no property rights in the roadway. Nonetheless, I do recognize a nominal value for the remote and speculative phantom servient interest of the underlying fee owner. For this analysis, it is my opinion that the market value of the phantom servient interest in the roadway is $500, with or without the townsite segment.

Final Value Conclusion

Therefore, based on this a market value of the various interests in the roadway,

<u>With Townsite Segment</u>
Fee Simple Interest:
Phantom Servient Interest:

<u>Without Townsite Segment</u>
Fee Simple Interest:
Phantom Servient Interest:

ADDENDA

- Subject Photographs
- Partial Legal Description
- Appraiser’s Qualifications

Subject Photographs

Northwest along Old Trails Highway from Route 66

Southeast along Old Trails Highway from near railroad crossing

Northeast along Old Trails Highway toward railroad crossing

Old Trails Highway

Southeast along Main Street

South along Main Street

Northwest along Main Street

Desert land ATF parcel looking from Main Street

Desert land ATF parcel used for sand and gravel operation

Desert land ATF parcel used for sand and gravel operation

Typical townsite ATF parcel

Typical townsite ATF parcel

Legal Description and Roadway Exhibit

D

Legal Description
Main Street, Hackberry, Arizona
a.k.a. The National Old Trails Highway

An existing roadway surface generally twenty-five feet wide situated in and running across Sections Thirteen, Fourteen, and Twenty-Four, all in Township Twenty-Three North, Range Fourteen West, Gila and Salt River Baseline and Meridian, County of Mohave, State of Arizona, and being more particularly described as follows:

Beginning at a point of intersection on the east line of said Section Twenty-Four the same being the west line of the Southwest One-Quarter of Section Nineteen, Township Twenty-Three North, Range Thirteen West, of said Gila and Salt River Baseline and Meridian, and the center of Main Street, from which the B.L.M. Brass Cap dated 1958 at the Southwest Corner of said Section Nineteen bears S 0°01'58" W a distance of 1,923.65 feet and the B.L.M Brass Cap dated 1958 at the West One-Quarter Corner of Said Section Nineteen bears N 0°01'58" E, a distance of 713.95 feet;
Thence northwesterly on the center of Main Street the following courses;

1. Thence N 54°55'25" W, a distance of 270.82 feet to a Point of Intersection (P.I.);
2. Thence N 50°23'06" W, a distance of 817.77 feet to a P.I.;
3. Thence N 44°56'32" W, a distance of 284.02 feet to a P.I.;
4. Thence N 44°25'06" W, a distance of 241.10 feet to a P.I.;
5. Thence N 52°34'24" W, a distance of 241.14 feet to a P.I.;
6. Thence N 59°50'23" W, a distance of 345.10 feet to a point of curvature;
7. Thence on the arc of a curve to the right having a central angle of 48°14'12", a radius of 312.70 feet, an arc distance of 263.26 feet to a point of tangency;
8. Thence N 11°36'11" W, a distance of 550.40 feet to a point of curvature;
9. Thence on the arc of a curve to the left having a central angle of 23°16'01", a radius of 173.15 feet, an arc distance of 70.31 feet to a point of compound curvature bounded on the right a distance of 30.00 feet by the boundary shown on Parcel Plat by Christopher Registered Land Surveyor No. 24514, recorded May 15, 2002, in Parcel Plat Book 18 page 38 of the Mohave County Recorder's Office;
10. Thence continuing on a compound curve to the left bounded 30.00 feet to the right by the said boundary shown on Parcel Plat Book 18 page 38, having a central angle of 39°22'34", a radius of 130.31 feet, an arc distance of 89.56 feet to a point of tangency;
11. Thence continuing on the center of Main Street the following three courses bounded on the right a distance of 30.00 feet by the boundary shown on said Parcel Plat Book 18 page 38 and on the left by the following parcels known as the Hackberry School Parcel recorded July 25, 2006, in Book 6377 page 819 Official Records Mohave County Recorder's Office, and the Ted & Sheli Grigg Family Trust Parcel recorded August 13, 2013, with Fee Number 2013042783 Official Records Mohave County Recorder's Office, and the Charles Grigg Trustee Parcel recorded March 3,1978, in Book 447 Page 297 Mohave County Recorder's Office, and Subject Parcel "B" including that parcel described in Book 1612 page 933, as shown on the Record of Survey by Yarbrough Registered Land Surveyor No. 23391, dated September 10, 2010, recorded September 10, 2010, in Record of Survey Book 40 page 18, with reception number 2010-054731, Mohave County Recorder's Office.
12. Thence N 74°14'46" W, a distance of 421.60 feet to a point of curvature;
13. Thence on the arc of a curve to the right having a central angle of 84°02'37", a radius of 124.96 feet, an arc distance of 183.30 feet to a point of tangency;

A.) Thence N 9°47'51" E, a distance of 239.19 feet to the southerly line of the Map of a Portion of Hackberry Townsite dated December 20, 1918, as Recorded in Book 12

Miscellaneous, Page 252, Mohave County Recorder's Office, indexed with County Assessor's Subdivision map number 1139.

And

All roadways as shown and dedicated on the aforementioned Map of a Portion of Hackberry Townsite dated December 20, 1918, as Recorded in Book 12 Miscellaneous, Page 252, Mohave County Recorder's Office, indexed with County Assessor's Subdivision map number 1139.

And

Beginning at a point of intersection on the east line of said Section Fourteen, Township Twenty-Three North, Range 14 West, the same being the west line of the aforementioned Hackberry Townsite, and the center of Main Street, from which the B.L.M. Brass Cap dated 1911 at the Southeast Corner of said Section Fourteen bears S 0°06'25" W, a distance of 459.18 feet, and a rebar with a yellow plastic cap numbered RLS 23391 set per Record of Survey dated August 11, 2010, recorded August 12, 2010, in Book 40 page 13, with reception number 2010-048597, Mohave County Recorder's Office, bears N 0°06'25"E, a distance of 209.08 Feet;

Thence Northerly on the center of Main Street the following courses:

1. Thence on the arc of a non-tangential curve to the right having a central angle of 25°45'08", a radius of 381.84 feet, a tangent bearing "In" of N 20°40'30" W, an arc distance of 171.62 feet to a point of tangency and bounded on the right 18.5 feet by the aforementioned Hackberry Townsite fence and on the left by a 0.51 acre rectangular parcel of land identified as being 112.00 feet latitudinal by 200.00 feet longitudinal as shown on the aforementioned Record of Survey reception number 2010-048597;
2. Thence N 5°04'38" E a distance of 112.08 feet to a point of curvature;
3. Thence on the arc of a curve to the left having a central angle of 24°37'46", a radius of 476.40 feet, an arc distance of 204.79 feet to a point of tangency and bounded on the right 10 feet by the gravel yard fence;
4. Thence N 19°33'08" W, a distance of 240.90 feet to a P.I. and bounded on the right 15 feet by the gravel yard fence;
5. Thence N 27°51'10" W, a distance of 520.24 feet to a point of curvature and bounded on the right 10 feet by the gravel yard fence running 290 lineal feet with the road;
6. Thence on the arc of a curve to the right having a central angle of 27°25'04", a radius of 935.50 feet, an arc distance of 447.66 feet to a point of compound curvature;
7. Thence continuing on a compound curve to the right having a central angle of 64°16'30", a radius of 193.91 feet, an arc distance of 217.53 feet to a point of tangency;
8. Thence N 63°50'24" E, a distance of 148.05 feet to a point of curvature;
9. Thence on the arc of a curve to the left having a central angle of 37°24'16", a radius of 384.02 feet, an arc distance of 250.70 feet to a point of tangency;
10. Thence N 26°26'08" E entering the Railroad right-of-way, a distance of 124.40 feet to a point of curvature;
11. Thence on the arc of a curve to the right having a central angle of 118°35'14", a radius of 47.51 feet, an arc distance of 98.34 feet to a point of tangency;
12. Thence S 34°58'38" E, a distance of 181.02 feet to a P.I. bounded on the left 13 feet by the corral fence and the right 35 feet by the projected railroad roadbed prism;
13. Thence S 28°48'22" E, a distance of 187.04 feet to a point of curvature bounded 25 feet on the left by the corral fence and on the right 23 feet by the toe of the railroad track slope;
14. Thence on the arc of a curve to the left having a central angle of 44°28'18", a radius of 220.14 feet, leaving the Railroad right-of-way, an arc distance of 170.87 feet, to a point of tangency;
15. Thence S 73°16'40" E, a distance of 121.43 feet to a point of curvature;

16. Thence along the arc of a curve to the right having a central angle of 17°47'59", a radius of 498.10 feet, an arc distance of 154.74 feet to a point of tangency;

17. Thence S 55°28'41" E, a distance of 157.12 feet to a P.I.;

1.) Thence S68°03'35" E to the intersection of the center of the subject roadway and the northeasterly line conveyed and described in the quit claim deed recorded June 15, 2000, in Official Records Book 3532 page 620 of Mohave County Recorder's Office the same line being now or formerly the common line between Triple G, an Arizona partnership, to the southwest and Atchison, Topeka & Santa Fe to the Northeast.

And

An existing roadway surface generally 35 feet wide adjacent to and lying south of the following described line as shown on the Record of Survey dated August 11, 2010, recorded August 12, 2010, in Book 40 page 13, with reception number 2010-048597, Mohave County Recorder's Office:

Beginning at a point on the east line of said Section Fourteen, Township Twenty-Three North, Range 14 West, marked with a rebar with a yellow plastic cap numbered RLS 23391 set per the aforementioned Record of Survey reception number 2010-048597, from which the B.L.M. Brass Cap dated 1911 at the Southeast Corner of Said Section Fourteen bears S 00°02'42" W, a distance of 668.16 feet as shown on said Record of Survey and measured in reference to the previously described roads as bearing S 0°06'25" W, a distance of 668.16 feet; Thence along the platted line the following six courses per said Record of Survey;

1.) Thence N 89°57'17"W, a distance of 52.93 feet;

2.) Thence on a curve to the right having a central angle of 29°11'33", a radius of 175.00 feet, an arc distance of 89.16 feet;

3.) Thence N 60°45'44" W, a distance of 128.17 feet;

4.) Thence on the arc of a curve to the left having a central angle of 26°58'24", a radius of 825.00 feet, an arc distance of 388.39 feet;

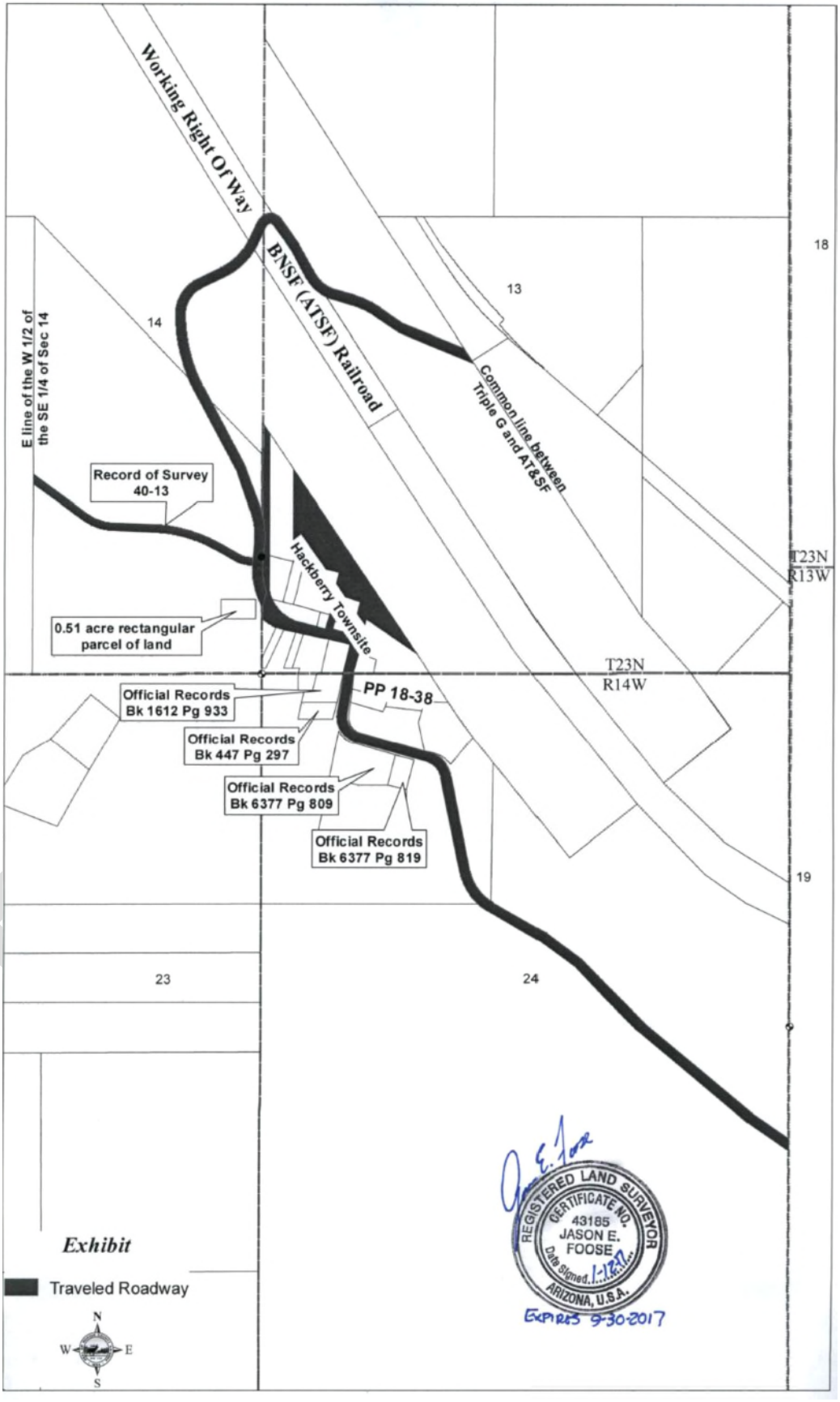
5.) Thence N 87°44'08" W, a distance of 235.02 feet;

6.) Thence on an arc of a curve to the right having a central angle of 33°01'17", a radius of 275.00 feet, an arc length of 158.49 feet;

Thence on a tangent line N 54°42'51"W to the east line of the west one-half of the Southeast Quarter of said Section 14, Township 23 North, Range 14 West.

This Description was created by Jason E. Foose, R.L.S. 43185, from record information and field measurements, for an on behalf of Mohave County Public Works and for the exclusive use by the Mohave County Superior Court or it's assigns in the matter of Case No. CV2016-07195.

EXPIRES 9-30-17


Working Right Of Way
BNSF (ATSF) Railroad
Common line between Triple G and AT&SF
E line of the W 1/2 of the SE 1/4 of Sec 14
Record of Survey 40-13
Hackberry Townsite
0.51 acre rectangular parcel of land
PP 18-38
Official Records Bk 1612 Pg 933
Official Records Bk 447 Pg 297
Official Records Bk 6377 Pg 809
Official Records Bk 6377 Pg 819
13
14
18
19
23
24
T23N R13W
T23N R14W
Exhibit
Traveled Roadway
N
W
E
S
REGISTERED LAND SURVEYOR
CERTIFICATE NO.
43185
JASON E.
FOOSE
Date Signed 1-17-17
ARIZONA, U.S.A.
EXPIRES 9-30-2017

Professional Qualifications of J. Douglas Estes, MAI, SR/WA

Professional Certification, Designations and Associations

- Arizona Certified General Real Estate Appraiser Number 30821
- MAI, Appraisal Institute, Certificate Number 11429
- SR/WA, International Right of Way Association, Designation Number 5641

Experience

Firms

- 2014—Present, Real Estate Appraiser and Owner, Landpro Valuation, Mesa,
- 1998—2014, Real Estate Appraiser for Sell & Associates, Tempe, AZ
- 1994—1998, Real Estate Appraiser for Sell, Huish & Associates, Tempe, AZ
- 1993—1994, Appraisal Researcher for R.H. Whitlatch & Associates, Yuma, Arizona
- 1989—1993, Construction Estimator

Property Types/Assignments

- Expert Witness Testimony
- Industrial Buildings
- Retail Buildings
- Gas Stations and Convenience Stores
- Environmentally Contami
- Rights-of-Way and Easements
- Multi-Family Residential Properties
- Residential Subdivisions
- Medical Office Buildings
- Billboard Leases
- Transportation and Utility Corridors
- Leased Fee Analysis/Valuations
- Mini-Storage Facilities
- Historic Properties
- Professional Office Buildings
- Section 8 Rent Comparability Studies
- RV and Boat Storage Facilities
- Transit Warehouses
- Commercial Subdivisions

Geographical Areas

- Arizona
- California
- Utah
- New Mexico
- Nevada
- Mexico
- Gila River Indian Community
- Navajo Nation
- Salt River Pima Maricopa Indian Community

Litigation Assignments

- Eminent Domain
- Bankruptcy
- Divorce
- Income, Gift and Estate Taxes
- Foreclosure
- Real Estate Taxes
- Insurance Claims
- Fraud

Education

- Bachelor of Science, Business Management nce, Cum Laude, Marriott School of Management, Brigham Young University, 1989

Professional Courses and Seminars

- IRWA Course 103, Ethics and the Right of Way Profession, 2012
- Condemnation Summit IX, Phoenix, 2011
- AI Seminar, Introduction to Valuation for
- Condemnation Summit VII, Phoenix, 2010
- State Bar of Arizona Annual Convention, Bankruptcy, Glendale, 2010
- State Bar of Arizona Annual Convention, Negotiating & Restructuring RE, Glendale, 2010
- IRWA Course 502, Business Re
- LAI, Real Estate Bankruptcies for the Non Lawyer RE Professional, Scottsdale, 2010
- International Right of Way Association Facilitator Clinic, Las Vegas, 2010
- AI Seminar, Uniform Appraisal Standards for Federal Land Acquisitions, Phoenix, 2009
- IRWA Course 803, Eminent Domain Law for the Right of Way Professional, Phoenix, 2009
- AI Seminar, Appraising Distressed Commercial RE: Here We Go Again, Mesa, 2009
- IRWA Course 410, Reviewing Appraisals in Eminent Domain, Tempe, 2008
- IRWA Course 401
- IRWA Course 900, Principles of Real Estate Engineering, Tempe, 2007
- IRWA Course 213, Conflict Management, Tempe, 2006
- IRWA Course 205, Bargaining Negotiations, Tempe, 2006
- IRWA Course 800, Principles o
- IRWA Course 212, Creatively Solving Problems in Groups, Tempe, 2005
- IRWA Course 104, Standards of Practice for the Right of Way Professional, 2005
- IRWA Course 200, Principles of Real Estate Negotiation, Phoenix, 2004
- IRWA Course 403, Easement Valuation, Phoenix, 2004
- IRWA Course 214, Skills of Expert Testimony, Phoenix, 2004
- AI Seminar, Online Valuation of Detrimental Conditions, Online, 2003
- AI Course 420N, Business Practices and Ethics, Tempe, 2003
- IRWA Course 802, Legal Aspects of Easements, Phoenix 2003
- AI Course 410, Standards of Professional Practice, Part A, Tempe 2003
- AI Course 705, Litigation Appraising: Specialized Topics and Applications, Tempe 2002
- AI Course 700, Appraiser as Expert Witness: Preparation and Testimony, Tempe 2002
- AI Course 720, Condemnation Appraising: Advanced Principles, Tempe 2000
- AI Course 710, Condemnation Appraising: Basic Principles, Tempe 2000
- Comprehensive Appraisal Workshop, Dallas, Texas, 1996
- AI Course 550, Advanced Applications, San Diego, California, 1996
- AI Course 540, Report Writing & Valuation Analysis, San Diego, California, 1995

- AI Course 530, Sales Comparison & Cost Approaches, Boulder, Colorado, 1995
- AI Course 420, Code of Professional Ethics, Las Vegas, Nevada, 1995
- AI Course 410, USPAP, Las Vegas, Nevada, 1995
- AI Course 520, Highest and Best Use and Market Analysis, Tempe, AZ, 1995
- AI Course 510—Advanced Income Capitalization, San Jose, California, 1994
- AI Course 310—Basic Income Capitalization, San Diego, California, 1993
- AI Course 110—Appraisal Principles, Salt Lake City, Utah, 1993

Other Readings/Studies

- Principles of Right of Way (International Right of Way Associations)
- Numerous Eminent Domain Cases
- Real Estate Valuation in Litigation, 2nd Edition (Chicago: Appraisal Institute, 1995)
- The Appraisal of Real Estate (Chicago: Appraisal Institute)

Other Professional & Civic Activities

- IRWA Course Facilitator
- IRWA Kachina Chapter 28 Professional of the Year, 2008
- IRWA Kachina Chapter Executive Board, 2006
- IRWA Kachina Chapter
- IRWA Kachina Chapter
- Arizona Management Group
- Boy Scouts of America
- Instructor for Lorman Education Services
- Spanish Speaking

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Attorneys for Defendant/Counterclaimant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, political subdivision, Defendant/Counterclaimant.	No. CV2016-017837 **MOHAVE COUNTY'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes) (Oral Argument Requested)

SUMMARY OF ARGUMENTS

The Roadway Property at issue in this case consists of portions of the roads commonly known as "Main Street," "Old Trails Road," or "Old Trails Highway," which run across Mohave County Assessor Parcel Numbers 313-17-014, 313-17-022, 313-13-017, 313-14-001, 313-14-006, and 313-14-007. [See Separate Statement of Facts ("SSF"), filed herewith, at ¶ 1] These parcels are owned by Plaintiffs Triple G Partnership, Fred C. Grigg, and Ted J. Grigg (collectively, "Triple G"). [SSF ¶ 2] In 2015, Triple G installed barricades on the Roadway Property, preventing public ingress and egress along the Roadway and preventing Mohave County (the "County") from

performing necessary maintenance and routine upkeep on the Roadway. [SSF ¶¶ 3, 4] Triple G contends it owns and has the right to restrict travel along the Roadway, while the County maintains that it holds legal or equitable title to the Roadway Property, having accepted the Roadway as part of the County roads system in 1917 with no objection from any property owner until the current dispute. Alternatively, a public right of way has been established upon the Roadway Property pursuant to the doctrine of common law dedication. Under either scenario, Triple G cannot lawfully prevent free public travel upon the Roadway.

The County's motion for summary judgment should be granted for two independent reasons:

1. *De facto* taking. The government may validly exercise its sovereign right of eminent domain by physically appropriating property to a public use without following *de jure* procedures. This is known generally as "inverse condemnation." Under state and federal constitutional law, if the government physically invades or appropriates private property for a proper public purpose, the property owner's sole remedy is to sue in inverse condemnation seeking just compensation. The action to quiet title against the County must fail, and the County's claim to title must prevail, because courts have no power to limit, much less negate, the County's sovereign right to take property for a public use other than to impose the Constitutional limitation of payment of just compensation.

Here, the Roadway Property at issue has been used as a public thoroughfare for over a century, and has been improved and maintained by the County as a public road. Because previous property owners did not bring a timely inverse condemnation action, a claim for just compensation is time-barred. This court has no power to order any other remedy.

2. Common law dedication. Alternatively, under Arizona common law, a

property owner can dedicate his land to a public use. In this case, the federal government enacted R.S. 2477 as an express dedication of public of rights of way over federal lands. Because the County and public accepted that dedication by treating the Roadway Property as a public thoroughfare before it was transferred to private ownership, a right of way for the public has been established upon the Roadway Property by common law dedication.

This Motion is supported by the attached Memorandum of Points and Authorities, and the County's Separate Statement of Facts in Support of its Motion for Summary Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. MAIN STREET HAS BEEN A PUBLIC ROAD FOR OVER A CENTURY

There can be no real dispute that the Roadway has been in existence as a public road since the 1800s. As early as 1883, the path of the Roadway is depicted on the Atlantic and Pacific Rail Road completion map, as the sole road running through and providing public access to the town site of Hackberry. [SSF ¶ 5] The Roadway is depicted on the relevant 1898 and 1912 General Land Office Plat Maps, approved and accepted by the United States Land Office. [SSF ¶ 6-7] The Roadway is also shown on the 1916 certified maps of Mohave County roads. [SSF ¶ 8] These 1916 maps were approved and adopted as the official road maps by the County Board of Supervisors at a public meeting on January 2, 1917, and recorded with the Maricopa County Recorder on January 27, 2017. [SSF ¶ 9, 10] On all of these historical maps, the Roadway is the *only* way for members of the public to travel through or access Hackberry town site. Offshoots of the Roadway provided access to the Hackberry Mine (discovered in 1879), the Hackberry Cemetery (established 1884) and the Hackberry School (built in 1917 and in use as a public school until 1994). [SSF ¶ 11-15] Other historical maps similarly show the existence of the Roadway. [SSF ¶ 16-17]

The Roadway itself is part of the historic National Old Trails Highway. [SSF ¶ 18-21] In 1916, the Automobile Club of Southern California published a brochure and map entitled "The National Old Trails Road to Southern California," showing "the all year route from Los Angeles to New York." [SSF ¶ 23] This map shows the Roadway as part of the Old Trails Highway, and indicates that a highway sign post was even located in Hackberry proper, to direct public travelers from across the nation. [SSF ¶ 24-25] The Arizona Republican newspaper regularly reported on the condition of the Old Trails Highway from Crozier to Hackberry, warning drivers to be careful in crossing washes, and the progressive increase in tourist traffic along the highway is documented in local newspapers from this time. [SSF ¶ 19-22] A map of a portion of the Hackberry town site, dated December 20, 1918, depicts the Old Trails National Highway running through the center of the town, and expressly dedicates to the public for public uses other roads branching off from the National Highway. [SSF ¶ 26]

The Roadway was in existence and was used by the public long before any of the Roadway Property was transferred from the federal government to private ownership. [SSF ¶ 27-30] Historic reports of County road expenditures, County Resolutions 95-382 and 2009-167, as well as County maintenance records from the year 2003-2015 demonstrate that the County continued to repair and maintain the Roadway for public use up until Triple G installed concrete barricades blocking access along the Roadway. [SSF ¶ 31-32]

II. MAIN STREET BECAME A PUBLIC ROAD THROUGH EMINENT DOMAIN OR COMMON LAW DEDICATION

A. Standard for Summary Judgment

Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the non-movant, there are no genuine issues of material fact and/or the movant is entitled to judgment as a matter of law. Rule 56(c), Ariz. R. Civ. P.; *see*

Johnson v. Earnhardt's Gilbert Dodge, Inc., 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006); *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). A genuine issue of material fact exists only if, based upon the evidence available, a reasonable fact-finder could decide in favor of the non-movant – "a scintilla of evidence or a slight doubt" is insufficient to create a genuine issue of material fact and render summary judgment inappropriate. *Orme School*, 166 Ariz. at 311, 802 P.2d at 1010. Summary judgment should be granted when the evidence presented by the party opposing the motion has so little probative value, taking into account the required burden of proof, that reasonable jurors could not accept the opposing party's position. *Id*. at 309, 802 P.2d at 1008; *Nelson v. Rice*, 198 Ariz. 563, 565, 12 P.3d 238, 240 (App. 2000). Upon a movant's showing that no genuine issue of material fact exists, the burden shifts to the non-movant to rebut that showing with controverting evidence. *Orme School*, 166 Ariz. at 310, 802 P.2d at 1009. If the non-movant does not meet its burden, summary judgment should be granted. *Id*.

B. The County has acquired title to the Roadway Property by *de facto* taking.

1. The only remedy for a *de facto* governmental taking is a timely inverse eminent domain action.

Eminent domain is an inherent and inalienable right of the sovereign that is neither created nor granted by the Constitutions of either the United States or any State. *City of Scottsdale v. Mun. Court of City of Tempe*, 90 Ariz. 393, 396, 368 P.2d 637, 639 (1962). It is so necessary for the proper performance of government that it is deemed essential to the life of the nation. *Tucson Elec. Power Co. v. Adams*, 134 Ariz. 396, 398, 656 P.2d 1257, 1259 (App. 1982). It is limited only by the constitutional requirement of the payment of just compensation. *Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993).

In Arizona, when the government takes or damages private property it must pay the property owner just compensation. Ariz. Const. art. 2, § 17 ("No private property shall be taken or damaged for public or private use without just compensation[.]"). Typically, such a taking is accomplished via a statutory scheme. *See, e.g.*, A.R.S. § 12-1111, et seq. If, however, the government appropriates private property for a public use without filing a formal condemnation action, "the property owner's remedy is to sue for inverse eminent domain to recover the fair market value of the property interest taken or damaged." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 222 Ariz. 515, 525, 217 P.3d 1220, 1230 (App. 2009). An inverse condemnation claim is not an action by which a property owner may eject the government from the affected property, or somehow "undo" the taking – rather, it is a means to receive constitutional compensation for the property that has been taken. *See State v. Hollis*, 93 Ariz. 200, 203, 379 P.2d 750, 751 (1963); *Pima County v. Bilby*, 87 Ariz. 366, 370, 351 P.2d 647, 649 (1960); *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 183, 52 P.3d 213, 215 (App. 2002) ("If there has been a taking and the pertinent governmental authority has failed to pursue a proper condemnation action, the landowner may initiate an inverse condemnation action to secure compensation").

To prevail in an inverse condemnation suit, a plaintiff must prove a governmental entity constructed, developed, or maintained a public improvement that substantially interfered with the plaintiff's property rights. *A Tumbling-T Ranches*, 222 Ariz. at 525, 217 P.3d at 1230; *see Maricopa County Mun. Water Conservation Dist. No. 1 v. Warford*, 69 Ariz. 1, 11, 206 P.2d 1168, 1175 (1949). Arizona law "has only recognized a 'taking' of property where the government either assumes actual possession of the property or places a legal restraint upon the property that substantially diminishes or destroys the owner's right to, and use and enjoyment of, the property." *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 242, 165 P.3d 211, 220 (App. 2007)

(citations omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve");

If a property owner does not act promptly following a governmental taking, they will be barred from seeking compensation. In *Flood Control District of Maricopa County v. Gaines*, 202 Ariz. 248, 251, 43 P.3d 196, 199 (App. 2002) a property owner sought to bring an inverse eminent domain claim against the District, alleging the failure of a dam flooded and damaged its private property. *Id.*, 202 Ariz. at 251. The District successfully argued that the claim was time barred under A.R.S. § 12-821, which provides: "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." The Court of Appeals concluded that § 12–821 was the operative statute of limitations for inverse condemnation actions, stating that Arizona law does not "preclud[e] the legislature from establishing the period within which constitutionally-based causes of action must be brought." *Id.*, 202 Ariz. at 254. Accordingly, a claim for inverse condemnation must be brought within one year of its accrual.

2. Neither Triple G nor any previous owners of the Roadway Property brought a timely action for inverse eminent domain.

In this case, because more than one hundred years have elapsed since the County's taking of the Roadway Property and the accrual of any potential inverse condemnation claim, Triple G is barred from seeking any relief against the County.

As detailed above, the Roadway is depicted as the only road through Hackberry in the official Mohave County maps, approved by the Board of Supervisors and recorded in 1917. [SSF ¶ 8] It provided the only access to the town cemetery and public school. [SSF ¶ 12-15] When the underlying property was platted to private landowners between 1916 and 1999, the Roadway remained open to use by the public,

and was maintained and repaired by the County. [SSF ¶ 32] The County's taking of the Roadway Property occurred decades ago, and no prior property owner has made a timely claim for compensation.

The passage of A.R.S. § 28–1861 in 1974 (current version, at A.R.S. § 28–7041) provided additional notice to prior owners of the Roadway Property's existence as a County roadway.[1] A.R.S. § 28–7041(C) provides:

> All highways, roads or streets that have been constructed, laid out, opened, established or maintained for ten years or more by the state or an agency or political subdivision of the state before January 1, 1960 and that have been used continuously by the public as thoroughfares for free travel and passage for ten years or more are declared public highways, regardless of an error, defect or omission in the proceeding or failure to act to establish those highways, roads or streets or in recording the proceedings.

The Arizona Supreme Court has held that under A.R.S. § 28–7041, use by the public alone does not provide an independent basis for curing defects in a road's creation and transferring ownership of historical roads to the government.[2] *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 858 P.2d 1213 (1993). In this case, consistent with the holding in *Dawson*, prior owners of the Roadway Property did not "lose" title to their property by failing to preserve it from public use, or by virtue of the curative statute alone. Rather, title passed to the County as a result of the County's taking,

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[1] The original iteration of A.R.S. § 28-7041, first effective in 1927, provided that such highways only need have been used "by the public as thoroughfares for free travel and passage for two (2) years, or more."

[2] In reaching this conclusion, the *Dawson* court incorrectly interpreted and applied the holding in *City of Tucson v. Morgan*, 13 Ariz.App. 193, 195, 475 P.2d 285, 287 (1970), and ignored the previous supreme court ruling in *State ex rel. Herman v. Elec. Dist. No. 2 of Pinal Cty.*, 106 Ariz. 242, 243, 474 P.2d 833, 834 (1970) (which found that "the county legally acquired the road <u>*by the curative act*</u> in 1927" (emphasis added)).

commenced in the early twentieth century. Prior owners gave up any claim for damages by failing to seek compensation for such taking.[3] Particularly after the passage of the curative statute, use of such roadways by the public and maintenance by the government plainly constituted a taking for a public purpose. The County Board of Supervisors officially accepted the Roadway as part of the County roads system at a public meeting in 1917, "regardless of an error, defect or omission in the proceeding." And unlike the plaintiffs in *Dawson*, the individuals who owned the underlying Roadway Property in 1917, 1927, or 1974 *never* objected to the Roadway or brought a claim for inverse condemnation – indeed, they were likely happy to enjoy the benefits of access via a County-maintained thoroughfare. In sum, the operation of A.R.S. § 28-7041 (and its 1974 and 1927 predecessors), provided ample additional notice of the County's taking long before Triple G even purchased the underlying Roadway Property.

Applying the rule in *Gaines*, Triple G's cause of action accrued and the limitations period began running when it or its predecessor in interest discovered or reasonably should have discovered that the County had interfered with their alleged property rights. *Gaines*, 202 Ariz. at 254. In this case, the statute of limitations for bringing an inverse eminent domain action had run before Triple G came into possession of the property. Not only had the government been physically occupying and maintaining the Roadway Property for decades, but with its continued occupation after the passage of the curative statute, it further "declared" its intent that such roadways be public highways. These facts together constituted a *de facto* taking of the Roadway Property. No previous property owner took any action against the County, but instead allowed the County to continue to maintain the Roadway and let the public

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[3] Notably, the *Dawson* case was decided before the *Gaines* decision, and did not raise the statute of limitations issue.

travel freely on the Roadway, until Triple G erected barricades in 2015.

Public use alone did not pass title of the Roadway Property to the County. But operation of the curative statute in conjunction with the County's maintenance of the public Roadway, County resolutions passed regarding the status of the roadway, *and* the public's continued use of the Roadway, all demonstrate that the County took this Roadway Property for a public purpose. The County is not claiming it fulfilled all the formal statutory procedures to create a highway in this case. Rather, it contends that County Board actions, continuous historical public use, and government maintenance of the Roadway constituted a taking of the Triple G property transferring title to the County.[4] The only avenue available to a landowner for a government taking by physical invasion or appropriation is an action for inverse condemnation and the only available remedy is just compensation. Because neither Triple G's predecessors in interest nor Triple G itself have timely brought a claim for inverse condemnation, it can no longer claim compensation for the County's taking, and title of the Roadway Property belongs to the County.

C. In the alternative, a public right of way has been acquired by common law dedication.

1. General elements of common law dedication.

Even if this court determines that the County has not already taken the Roadway Property for a public highway purpose, that does not mean that Triple G can now barricade the Roadway and prevent public ingress and egress. If Triple G holds title to

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[4] Indeed, the holding of *Dawson* cannot possibly be interpreted to mean there can never be a *de facto* government taking of a roadway, as the ability of the government to take property through eminent domain is itself an extraconstitutional power. *See Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 193, 859 P.2d 1323, 1326 (1993) ("Eminent domain is the sovereign right of the state to appropriate private land for the public good, subject to the constitutional limitation that the property owner is justly compensated").

the Roadway Property, such Property is still encumbered by a public right of way that has been created by common law dedication, both by dedication of the federal government and by dedication of previous property owners.

Since territorial days, Arizona has recognized the doctrine of common law dedication. *See, e.g., Evans v. Blankenship*, 4 Ariz. 307, 39 P. 812 (1895) (upholding common law dedication of a public park). Under Arizona common law, a property owner can dedicate his land for public roads. *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421, 87 P.3d 831, 834 (2004). "It was settled long ago in this state that the doctrine of common law dedication applies to the dedication of roadway easements for public use." *Id*.

Unlike statutory dedication, in which fee title to the land constituting the road passes to the relevant governmental entity, common law dedication creates an easement for public use. It allows the public to use the dedicated land for specified purposes, while fee title remains with the dedicator. *Pleak*, 207 Ariz. at 421, 87 P.3d at 834 (2004) (citing *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 290, 179 P.2d 437, 441 (1947); *Moeur v. City of Tempe*, 3 Ariz.App. 196, 199, 412 P.2d 878, 881 (1966)).

To be effective, such dedication must include (1) an offer by the property owner to dedicate, and (2) acceptance by the general public. *Hunt v. Richardson*, 216 Ariz. 114, 119, 163 P.3d 1064, 1069 (App. 2007), as corrected on denial of reconsideration (Aug. 23, 2007) (citations omitted). "No magic words are required to dedicate land to public use; any full demonstration of the donor's intent to make the dedication is sufficient." *Id. See also, Pleak*, 207 Ariz. at 424, 87 P.3d at 837 ("No particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice.").

An offer to dedicate may be accepted by continuous public use for a period of time, demonstrating the public's acceptance of the offer. *See Pleak*, 207 Ariz. at 424,

87 P.3d at 837 (public use is one form of acceptance); *Hunt v. Richardson*, 216 Ariz. at 119, 163 P.3d at 1069 (acceptance occurs when members of the public use the road). Public repair, maintenance, and depiction of a road on official maps also are traditional signs of acceptance of a dedication. *E.g.*, *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006); Restatement (Third) of Property: Servitudes § 2.18 cmt. e (2000). After acceptance of an express grant of a public right of way, the underlying property is irrevocably dedicated to this public purpose, while title to the property remains with the owner.

2. RS 2477 constituted a grant of right of way by the federal government, which can be accepted through any means authorized by state law.

To promote the settlement and development of unreserved public lands in the West, in 1866 Congress passed an open-ended, self-executing grant of "[t]he right-of-way for the construction of highways over public lands, not reserved for public uses." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932). This statute, commonly referred to as R.S. 2477, was the federal government's "standing offer of a free right of way over the public domain." *Lindsay Land & Live Stock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929); *see also S. Utah Wilderness Alliance*, 425 F.3d at 770–71. Congress repealed R.S. 2477 in 1976, 110 years after its enactment, in favor of a policy of land conservation and preservation. Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701 et seq. However, Congress specified that rights of way created under R.S. 2477 before October 21, 1976 (the effective date of the repealing statute), remain valid. Pub. L. No. 94-579 § 701(a), 90 Stat. 2743, 2786.

In the years after its enactment, R.S. 2477 was uniformly interpreted by the courts as an express dedication of the right of way by the landowner, the United States, to the public. *See State v. Crawford*, 7 Ariz. App. 551, 555, 441 P.2d 586, 590 (1968);

S. Utah Wilderness Alliance, 425 F.3d at 769. This offer could be accepted in any manner recognized by state law. In Arizona, therefore, the federal offer could be "accepted" in any manner that satisfies the doctrine of common law dedication.

County action before the Roadway Property was transferred to private ownership demonstrates acceptance of the federal government's right of way grant, pursuant to common law dedication. The Roadway is shown as the only County road through Hackberry in 1916 County maps. [SSF ¶ 8] These maps were approved and accepted by the County Board of Supervisors in 1917, and recorded with the County Recorder. [SSF ¶ 9-10] The County expended resources improving and maintaining the Roadway. [SFF ¶ 31-32] These actions demonstrated acceptance of the federal government's offer, and perfected the common law dedication of a public right of way along the Roadway.

Actions by the general public before the Roadway Property was transferred to public ownership also show acceptance pursuant to common law dedication. The county and federal maps show the Roadway as the only route for travel between Peach Springs and Kingman, Arizona. [SSF ¶ 6-10] The Roadway was part of the Old Trails Highway, and newspapers document the travel of tourists along its northern Arizona route, as well as locals using the Roadway to access Hackberry proper. [SSF ¶ 19-25] This use of the Roadway by the general public constituted acceptance of the federal government's offer, and perfected the common law dedication of the public right of way, regardless of the state of title.

3. <u>Alternatively, offers made by Triple G indicate that a public right of way has been acquired by common law dedication.</u>

In additional to the R.S. 2477 federal grant, individual property owners have made past offers of dedication sufficient to constitute common law dedication of the Roadway for public use. These offers were accepted by the County and the public in

the same manner described above.

In 2002, Ted J. Grigg applied for a zoning change from the County, allowing him to divide a single five-plus acre parcel into three one-plus acre parcels (current parcels # 313-17-016, 017, and 018). [SSF ¶ 33] The parcel plat for this land division, prepared for and submitted by Mr. Grigg, shows "Old Trails Highway, aka Main Street" running along the west and south borders of the original parcel. [SSF ¶ 34] Mr. Grigg even dedicated a public utility easement running along that portion of "Old Trails Highway aka Main Street" that borders his property. [SSF ¶ 35] Yet this is a segment of the Roadway that Triple G now claims is not a public right of way.

This same segment of the Roadway is also described as a "public street" in a 1978 Joint Tenancy Deed conveying several parcels of property from Dorothy I. Grigg to Charles S. Grigg and Blanche Grigg. [SSF ¶ 36] This indicates that previous property owners considered the Roadway a "public street" since at least the 1970s.

It is also telling that Triple G has not attempted to quiet title to Parcel #313-13-017. This parcel sits right in the middle of the other parcels in dispute, and contains a segment of the Roadway that Triple G implicitly admits has been dedicated to the public as a right of way. This dedication is depicted on the 1918 Hackberry Townsite plat. [SSF ¶ 26] The Roadway is referenced as "Old Trails National Highway" and a "dedicated roadway area" in correspondence between Griggs and their neighbors in a property dispute. [SSF ¶ 37] By barricading other Roadway segments on their properties, Triple G has impermissibly cut off public access to this admittedly public right of way. There would be no point in dedicating a "road to nowhere" in the middle of two unconnected segments of allegedly private roads which could be closed off at any time. The only reasonable inference is that the entire Roadway was admitted to be a public right of way.

By virtue of the federal government's grant, or the grant of previous property

owners, acceptance by the County and the general public, and Defendants' implicit and express admissions, a public right of way has been established over the Roadway Property. Accordingly, Triple G may not close off the Roadway Property and prevent the free travel of the public along the Roadway.

CONCLUSION

As set forth above, the County has acquired title to the Roadway Property by exercise of its right of eminent domain through a *de facto* taking. The Roadway Property has been used by the public as a thoroughfare for free travel and passage since before Arizona statehood. During the course of such use, no previous property owner has ever objected to the public's use of the Roadway Property, nor the County's ongoing actions to repair and maintain it as a public road. Neither Triple G nor any previous property owner has brought a timely action for inverse condemnation, and any right to compensation is now barred. Alternatively, a public right of way has been established upon the Roadway Property pursuant to common law dedication.

The County respectfully requests this court enter summary judgment finding either (1) that the County has acquired title to the Roadway Property, or (2) there is a public right of way upon the Roadway Property; and (3) that Triple G is not entitled to quiet title or close the Roadway.

RESPECTFULLY SUBMITTED this 28th day of July, 2017.

GUST ROSENFELD P.L.C.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, a political subdivision, Defendant/Counterclaimant.	Case No. CV2016-017837 **MOTION FOR PARTIAL SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes)

Pursuant to Rule 56, *Arizona Rules of Civil Procedure*, Plaintiffs/Counterdefendants Triple G Partnership, Fred C. Grigg, and Ted J. Grigg (collectively "Triple G") hereby request judgment in their favor as to their Quiet Title claim (Claim I of their Complaint against Defendant/Counterclaimant Mohave County ("Mohave County")) and all claims asserted by Mohave County in its Counterclaim. This motion is supported by the following Memorandum of Points and Authorities, separate Statement of Facts in Support of Triple G's Motion for Summary Judgment (the "SSOF"), and Exhibits submitted concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves the ownership of dirt roads near Hackberry, Arizona, an unincorporated town on the south side of historic Route 66 in Mohave County. These dirt roads (defined as the "Roadway" herein and in both parties' prior pleadings) have been present in the area for more than 100 years. [SSOF at ¶ 5].

Summary judgment[1] is appropriate because the law is settled and the facts are undisputed. As explained herein, a century of consistent case law makes clear that private roads cannot be taken by adverse possession and county governments had to strictly comply with the applicable statutory regime to accept the federal government's offer under R.S. 2477. The undisputed and undisputable facts show:

1. Triple G owns the properties crossed by the dirt roads that comprise the Roadway. [SSOF at ¶ 1].
2. These deeds and patents show no easements for the Roadway. [SSOF at ¶¶ 9, 13, 18, 22].
3. Mohave County did not build the Roadway. [SSOF at ¶ 5].
4. Mohave County has never taken the steps necessary under Arizona law to establish the Roadway as a public road. [SSOF at ¶ 3].

Moreover, with respect to Mohave County's condemnation claim, since filing its Counterclaim on September 29, 2016, Mohave County has neither provided an appraisal for the roads at issue nor made an offer to Triple G, as required by A.R.S. § 12-1116(A).

The law favors the diligent. Mohave County has nearly a year to comply with

[1] Triple G is not seeking Summary Judgment on Count II of its Complaint – Trespass – because there are material facts that remain in dispute. Once proper title has been successfully established by this Court, Triple G anticipates the parties will reach a mutually desirable resolution on the remaining issue.

condemnation pre-filing requirements. The County has had over a century to establish the Roadway as a public road in accordance with Arizona law. It never has.

Triple G has had to wait nearly two years and spend significant sums and time to clear title to its lands. As evident by the County's simultaneous motion for summary judgment, both parties agree on one point. No further factual development is needed. The time has come to render judgment.

II. FACTUAL BACKGROUND

A. Triple G Seeks to Quiet Title for the Properties that it Currently Owns and Possesses.

APNs ## 313-14-006 and 007 (the "Railroad Parcels")

Pursuant to the July 27, 1866 Act of Congress, 14 Stat. 292, the lands now identified by APN #s 313-14-006 and 313-14-007 were granted to the Atlantic and Pacific Railroad (the "Railroad"). [SSOF at ¶ 4]. In 1883, the Railroad filed a completion map showing the railroad right-of-way and the Hackberry Siding, which encompassed the lands now identified by APN #s 313-14-006 and 313-14-007. [SSOF at ¶ 6]. On June 26, 1998, the Railroad's successor-in-interest, the Burlington Northern and Santa Fe Railway Company, transferred its right, title, and interest in APN #s 313-14-006 and 313-14-007 to ANT, LLC. [SSOF at ¶ 7]. On May 19, 2000, ANT, LLC transferred its right, title, and interest in APNs #s 313-14-006 and 313-14-007 to Triple G Partnership. [SSOF at ¶ 8]. The deed includes no easement for the Roadway. [SSOF at ¶ 9].

APN # 313-17-014 (the "State Trust Land Parcel")

On May 21, 1969, the federal government conveyed APN # 313-17-014 to the State of Arizona, as indemnity for losses of other Arizona State Trust Lands (the "Federal Conveyance"). [SSOF at ¶ 10]. The Federal Conveyance stated that the selected lands, which included APN 313-17-014, "are shown to be subject to such selection, being surveyed public lands within the meaning of 43 U.S.C. §§ 851 and 852 and within the limits of the State and free

from adverse claims of record." [SSOF at ¶ 11]. The Federal Conveyance reserved to the United States: a right-of-way for ditches and canals; a right-of-way for an electrical transmission line; a railroad right-of-way to the Atchison, Topeka, and Stan Fe Railroad Company; and rights-of-way to the Mohave Electric Cooperative, Inc., for electric transmission lines. [SSOF at ¶ 12]. The Federal Conveyance did not reserve any rights-of-way for roads. [SSOF at ¶ 13]. Triple G acquired fee title to APN # 313-17-014 from the State of Arizona via patent dated August 9, 1999. [SSOF at ¶ 14].

APN # 313-14-001 and APN # 313-17-022 (the "Homestead Parcels")

On November 15, 1916, the United States issued a patent to Jesse T. Wallace for land which included property now identified by APN # 313-14-001. [SSOF at ¶ 15]. The patent was issued pursuant to the May 20, 1862 Act of Congress "To Secure Homesteads to Actual Settlers on the Public Domain" (the "Homestead Act"), ch. 75, § 2, 12 Stat. 392. [SSOF at ¶ 16]. Triple G acquired fee title to APN #313-14-001 on October 7, 1987. [SSOF at ¶ 17]. The deed includes no easement for the Roadway. [SSOF at ¶ 18].

On March 30, 1923, the United States issued a patent to Floyd W. Donovan for the land which included property now identified by APN # 313-17-022. [SSOF at ¶ 19]. The patent was issued pursuant to the Homestead Act. [SSOF at ¶ 20]. Triple G acquired fee title to APN #313-17-022 on June 2, 1989. [SSOF at ¶21]. The deed includes no easement for the Roadway. [SSOF at ¶ 22].

B. <u>The County's Assertion of Title</u>

Notwithstanding the absence of any recorded deed or easement for the Roadway, by letter dated September 14, 2015, Mohave County asserted that the Roadway crossing the State Trust Land Parcel was a public road based on "RS 2477 rights." [SSOF at ¶ 23]. In a subsequent letter dated May 26, 2016, the County claimed a common law dedication across the Railroad Parcels. [SSOF at ¶ 24]. The County has never recorded an easement or a deed evidencing an interest in the Roadway. [SSOF at ¶ 25].

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ariz.R.Civ.P. 56(c). Summary judgment is intended to dispose of factually unsupported claims and is appropriately entered where a party cannot make a showing sufficient to establish an essential element upon which such party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Orme School v. Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990) (federal decisions applying Rule 56 of the Federal Rules of Civil Procedure are instructive and persuasive with respect to Arizona's Rule 56).

III. LEGAL ARGUMENT

A. The County Admits it Did Not Establish the Roads as Public Highways in Accordance with Arizona Law.

Currently set forth in A.R.S. § 28-6701, *et seq*, the statutory procedure to establish a public highway has changed little since 1901. *Compare* A.R.S. § 28-6701, *et seq*, A.R.S. § 18-201, *et seq* (1961), Code § 59-601 (1939), Rev. Stat. § 5057 (1913); and Rev. Stat. § 3617 (1901). The County must (1) receive a petition from 10 taxpayers[2]; (2) obtain a map and survey; (3) give notice of a hearing; (4) hold the hearing; and (5) until 1961, the County was also required to record a plat and its official judgment with the county recorder. A.R.S. § 28-6701, *et seq*; Rev. Stat. § 5057(f) (1913); Code § 59-601 (1939); Ariz. Laws 1961, Ch. 105 § 6.

If the County ever desired to establish a public highway, it must have met each one of these elements at the relevant point in time. *See, e.g., Champie,* 27 Ariz. at 466–67, 233 P. at

[2] Beginning in 1961, a petition could also be brought "by the governing body of a legal subdivision." Ariz. Laws 1961, Ch. 105, § 2. In 2012 proceedings could also begin "by the county engineer's recommendation" without the need for a map and survey. Ariz. Laws 2012, Ch. 285, § 1.

1108 (road was "certainly" not public due to failure to follow the statute, even though the public had used it for years and the county maintained it); *Tucson Consol. Copper,* 12 Ariz. at 228, 100 P. at 778 (failure to record the plat meant the highway was not public); *Graham County v. Dowell*, 50 Ariz. 221, 226, 71 P.2d 1019, 1021 (1937) ("[F]rom 1901 to 1925 there was but one legal way for establishing a public road within the state of Arizona, which was carefully set forth . . . the highway had to be established by a very formal and definite procedure under the general law, and not by user, prescription, or special act.").

The County admits that it did not receive or obtain a petition signed by ten or more taxpayers of Mohave County, requesting that Mohave County establish the Roadway as a public highway. [SSOF at ¶ 3]. The County admits that it did not receive or obtain a petition signed by a governing body of a legal subdivision, requesting that Mohave County establish the Roadway as a public highway. [SSOF at ¶ 3]. Since 2012, the County could have established a road after receiving or obtaining a recommendation from the county engineer, but the county engineer has not done so. [SSOF at ¶ 3]. Moreover, the County does not dispute that it recorded no map, no plat or judgment regarding the private roads that are at issue in this matter. [SSOF at ¶ 25][3]

B. Because the County Failed to Establish the Roadway in Strict Accordance with Statutory Requirements, it Did Not Accept the Federal Government's Offer Under RS 2477.[4]

The County's failure to strictly follow the statutory procedures to establish a public highway is fatal to Count I of its Counterclaim, its claim that it has "fee title to the Roadway

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[3] The County notes that a Hackberry Townsite plat shows a portion of the Roadway. [SSOF at ¶ 25] That portion of the Roadway was not part of Triple G's Complaint or the County's Counterclaim and so is not at issue in this matter.

[4] "R.S. 2477" means the act of Congress of 1866, section 2477, Rev. St., codified as 43 U.S.C.A. § 932, Repealed. Pub. L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793.

pursuant to R.S. 2477, which grants rights of way for the construction of highways across public lands not otherwise reserved for public purposes." Answer/Counterclaim, ¶1. Contrary to the County's assertion, R.S. 2477 was not a grant, but an offer; an offer that could only be accepted by strictly following the statutory procedures to establish a public highway. As explained in *State v. Crawford*, 7 Ariz. App. 551, 441 P.2d 586 (1968):

> Cases decided under 43 U.S.C.A. § 932 [R.S. 2477] hold that it constitutes an offer on the part of the federal government to dedicate unreserved lands for highway purposes, which offer must be accepted by the public in order to become effective. [] Whether the offer to dedicate which is made under the federal act is accepted by the establishment of a public highway is an issue to be determined under the law of the state where the highway is located. [] The federal statute does not of itself operate to grant right-of-ways and establish highways contrary to the local laws. *Tucson Consolidated Copper Co. v. Reese*, 12 Ariz. 226, 100 P. 777 (1909). The latter case makes it clear that, **in order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of the Arizona law**.

7 Ariz. App. at 555, 441 P.2d at 590 (some citations omitted, emphasis added); *see* also *Cochise County v. Pioneer Nat. Title Ins. Co*., 115 Ariz. 381, 384, 565 P.2d 887, 890 (App. 1977) ("the highway must be established in strict compliance with the provisions of the Arizona law"); *Lyon v. Gila River Indian Cmty*., 626 F.3d 1059, 1077 (9th Cir. 2010) ("Federal Revised Statute 2477 did not itself *create* R.S. 2477 roads; rather, it *authorized* the states to construct highways over public lands...Arizona must have taken some affirmative act to accept the grant represented by R.S. 2477.") (emphasis in original); *State ex rel. Herman v. Cardon*, 112 Ariz. 548, 550, 544 P.2d 657, 659 (1976); *Territory v. Richardson*, 8 Ariz. 336, 339, 76 P. 456, 457 (1904).[5]

[5] Triple G acknowledges the curious case of a footnote in a recent Attorney General Opinion, No. 117-005. In a footnote that begins: "[t]his Opinion does not address what constitutes a 'valid' R.S. 2477 right of way", the footnote nevertheless suggests that *Tucson Consol. Copper* is "specious precedent," "largely bereft of progeny," and "implicitly overruled" by *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421 (2004). *Id*. at fn 1. The extent to

The case of *Cochise County v. Pioneer Nat. Title Ins. Co*, 115 Ariz. 381 (1977), presents a remarkably similar fact pattern to the case at issue. Cochise County asserted that it accepted the federal government's offer under R.S. 2477 because a map submitted to the board of supervisors by the county surveyor showed the road at issue. *Id*. at 382, 888. Here, Mohave County asserts that the county engineer certified a map showing the Roadway, and that subsequently the map was approved by the Mohave County Board of Supervisors. [SSOF at ¶ 26] In *Cochise County*, the court concluded that "Cochise County failed to properly establish a roadway in 1911" and therefore the County has no claim under R.S. 2477. *Cochise County*, 115 Ariz. at 384, 800. As was the case in *Cochise County*, Mohave County failed to comply with the statutory requirements to establish a public road and that failure torpedoes its assertion of title under R.S 2477.

The County is just another in a long line of governmental entities to argue that federal R.S. 2477 created a public highway even though the government did not comply with the Arizona law regulating the creation of public roads. But every attempt to make that argument has failed. So too must the County's argument here.

C. The County Did Not Take an Interest in the Roadway by Adverse Possession.

In Count II of its Counterclaim, Mohave County asserts it took fee title to the Roadway through adverse possession. Counterclaim ¶32. However, it has been the law in Arizona since territorial times that the government cannot take a private road by adverse possession. *See, e.g.,*

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which the AG Opinion footnote is wrong is really quite remarkable. For starters, the case cited for support in the AG Opinion is from another jurisdiction and R.S. 2477 claims are governed by state law. In addition, as explained herein, the Arizona cases that align with *Tucson Consol. Copper* are plentiful and consistent. In fact, there are *none* to the contrary. Moreover, *Pleak* could not be clearer that it only dealt with the ability of a "private landowner" to dedicate an easement under the common law, not the federal government. 207 Ariz. at 423.

- *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611, 858 P.2d 1213, 1214 (1993) ("[S]ince territorial days, Arizona cases have consistently held that no public highway can be created by prescription.");
- *Old Pueblo Transit Co. v. Arizona Corp. Comm'n*, 84 Ariz. 389, 393, 329 P.2d 1108, 1111 (1958) ("[I]n Arizona, public highways can only be established in a manner provided by statute and cannot be established by prescriptive use.") (*citing Mead v. Hummel*, 58 Ariz. 462, 467, 121 P.2d 423, 425 (1942));
- *Champie v. Castle Hot Springs Co*., 27 Ariz. 463, 467, 233 P. 1107, 1108 (1925) ("there has been but one legal method of establishing public roads or private ways, which is carefully set forth in both codes").
- *Tucson Consol. Copper Co. v. Reese*, 12 Ariz. 226, 229, 100 P. 777, 779 (1909) ("We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription");

These cases conclusively establish that public use and maintenance do not constitute a taking of private roads. Triple G is entitled to summary judgment with respect to Count II of the County's Counterclaim.

D. A.R.S. § 28-7041 Does Not Provide a Statutory Right of Adverse Possession.

The County relies on A.R.S. § 28-7041 for its third claim of ownership (Count V of the Counterclaim). However, this statute does not change the long-standing common law that absolutely prohibits the creation of public roads by adverse possession. In *Dawson,* the State tried the exact ploy that the County has attempted here, arguing "that the roadway property was no longer owned by petitioners but had, instead, been acquired by the state either through

prescription or through the operation of A.R.S. § 28–1861(B).[6]" *Id.*, 175 Ariz. at 611, 858 P.2d at 1214. The Supreme Court unequivocally rejected the argument. The Supreme Court first disposed of the State's adverse possession claim, holding that "[i]t is clear that Arizona law does not permit the creation of public highways by prescription." *Id.* at 612, 858 P.2d at 1215. Then the Court dismantled the State's statutory argument for three distinct reasons:

> First, the statutory language does not manifest any clear intent to change the common law. [] Second, the change in the common law sought by the state would render § 28–1861(B) unconstitutional. [] Third, and perhaps most important, the legislature passed § 28–1861(B) shortly after a very similar statute had been ruled to be curative only.

Dawson at 613, 858 P.2d at 1216 (citations omitted).

With respect to the third reason, the *Dawson* Court incorporated the ruling in *City of Tucson v. Morgan*, 13 Ariz. App. 193, 195, 475 P.2d 285, 287 (1970), which interpreted a "virtually identical" statute to the one at bar and held: "[t]o interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property." *Dawson* at 613, 858 P.2d at 1216.

Dawson's companion case presents a nearly-identical fact pattern to the one presented here. In *Gotland*[7], the town sought "an injunction to prevent the Gotlands from erecting a barricade blocking access to an unpaved section of Grapevine Road which traverses their property. Cave Creek had declared the road to be a public highway pursuant to Ariz.Rev.Stat. (A.R.S.) § 28–1861(B)." The road had been built in "the late 1800's" and used by the county "for at least 10 years" prior to 1960 and the Gotlands had purchased the property in 1984. *Id* at 498, 400, 837 P.2d at 1133, 1135; *compare with* County's Counterclaims ¶¶ 5- 8. The Court of

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[6] This statute was renumbered and further subdivided in 1995, but the operative language from former § 28-1861(B) is effectively identical to current § 28-7041(C). Ariz. Sess. Laws 1995, Ch. 132 § 3.

[7] *Gotland v. Town of Cave Creek*, 172 Ariz. 397, 398, 837 P.2d 1132, 1133 (App. 1991).

Appeals held, as the County now urges here, that § 28-1861 vacated the prohibition against the creation of a highway by adverse possession and allowed public use to effect a taking. *Gotland* at 401, 837 P.2d at 1136.

But the Supreme Court rejected the Court of Appeals' (and now the County's identical) interpretation of A.R.S. § 28-1861: "Because [§28-1861(B)] provides for no compensation and provides no grace period within which to act to protect property rights, we fail to see how it could pass constitutional muster if, in fact, its intent was to pass title." *Dawson* at 612, 858 P.2d at 1215. Instead, the curative statute, inter alia, "cures any ultra vires problem previously existing where the state had been expending public monies on what were technically not public roads **… we necessarily disagree with the court of appeals' opinion in *Gotland*."** *Id.* at 613, 858 P.2d at 1216 (emphasis added).

The County would have this Court reach the same conclusion vacated by the Supreme Court. But *Dawson*'s interpretation of § 28-1861 remains the controlling law in Arizona. The curative language does not provide an independent basis for transferring title. *See also Morgan*, *supra*, at 193-95, 475 P.2d at 286-87:

> [T]he law is now and was in 1926 that title does not vest in the county until a final order of condemnation is made and a copy thereof filed with the county recorder …
>
> Appellant also contends that the curative act of 1927, now A.R.S. s 18-152, establishes its title to the land in question…the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property… .

Nothing in the curative statute suggests that the government acquires an interest in a private roadway simply by using or maintaining it.

As *Dawson* and many other cases have held, the curative statute certainly cannot "cure" the County's failure to follow the statutory process to create a public highway. *See, e.g.,*

Dawson at 611, 858 P.2d at 1214 (the state only adopted a resolution and took no other action and so could not be cured). In *Morgan*, *supra,* the Court of Appeals held that even though the City had filed a resolution and recorded of a map, the curative statute could not create title—the City had to comply with the requirements of the law before title could vest. *Morgan* at 194, 475 P.2d at 286. Even though the City had taken some of the statutory steps, the curative statute could not fix a failure to complete them all.

Here, Mohave County did not receive a petition or record the plat and its ruling with the County recorder. [SSOF at ¶¶ 3, 25] If the adoption of a resolution was insufficient in *Dawson* and the filing and recording of a map was insufficient in *Morgan*, the County's failure to do either was insufficient here. Here, the curative statute has nothing to "cure" and the County has no right or title to Triple G's road.

Dawson, Gotland, and *Morgan* are directly on point with this suit. They establish that if the County wants to create a public road, the County must buy it or condemn it, following the strict statutory requirements. Here, the County did not follow statutory requirements and thus it has nothing. As the undisputed facts and consistent case law make clear, Triple G is entitled to summary judgment with respect to Count V of the County's Counterclaim.

E. The County Could Not have Taken an Interest By Adverse Possession in That Portion of the Roadway That Crosses the State Trust Land Parcel Because Federal and State Lands Cannot Be Taken By Adverse Possession.

Federal lands cannot be taken by adverse possession. *See* U.S. Const. Art. IV, § 3, cl.2 (no right in federal land may be obtained without Congress' authorization). The State Trust Land Parcel was owned by the federal government until 1969, at which time it became State Trust Land. [SSOF at ¶ 10]

Assuming for the sake of argument that *Dawson, Morgan,* and *Gotland* (and all others) were wrongly decided and A.R.S. § 28-7041 provides a statutory right of adverse possession, it still would not help the County with respect to the portion of the Roadway crossing the State Trust Land Parcel. Under A.R.S. § 28-7041, the road had to be "constructed, laid out, opened,

established or maintained for ten years or more by the state or an agency or political subdivision of the state before January 1, 1960." As of January 1, 1960, the Roadway crossing the State Trust Land was still held by the federal government, and therefore not subject to adverse possession, even assuming state law authorized it.

F. The County's Derivative Claims (Counts III and IV) Fail Because the County Does Not Have Title the Relevant Property.

Counterclaims III (recovery of real property and damages) and IV (trespass) are derivative damage claims that are contingent upon title to the relevant property. The County cannot obtain a recovery of property it does not own and Triple G cannot "trespass" on property that it owns. Because Triple G is entitled to judgment on Counterclaim Counts I, II, and V fail, it is entitled to judgment on Counts III and IV as well.

G. The County Has Still Failed to Comply with Condemnation Pre-Filing Requirements.

The County has not followed the statutory requirements to condemn the Roadway. It must appraise the Roadway and deliver a written offer to purchase at least twenty days before filing an action under A.R.S. § 12-1116(A)(1-2). Given the Court's prior denial of the County's request to waive pre-filing requirements, the County cannot pursue its condemnation action unless and until the County complies with these requirements. Yet months have passed and still the County has done nothing. The statutory prerequisites to filing a condemnation action exist for good reasons. If the County were to start over and actually follow the laws governing a condemnation action, the resulting appraisal might avoid the need for litigation with respect to condemnation altogether—if the County makes a fair offer to pay just compensation and compensable damages for its taking and Triple G accepts that offer, no condemnation proceedings would be necessary. The Court should grant judgment with respect to Counterclaim VI.

IV. CONCLUSION

Governing law is consistent and the facts are clear. For the past year, the County has not followed the statutory requirements to pursue a condemnation action and for the past century it has not follow the statutory requirements to establish the Roadway as a public road. Triple G owns the properties underlying the Roadway, and there are no recorded easements for the Roadway on Triple G's deeds. Because the County has no valid claim to title, Triple G respectfully requests that the Court grant judgment in favor of Triple G with respect to Triple G's Quiet Title claim and all of the County's counterclaims.

RESPECTFULLY SUBMITTED this 28th day of July 2017.

RYLEY CARLOCK & APPLEWHITE

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, a political subdivision, Defendant/Counterclaimant.	Case No. CV2016-017837 **RESPONSE TO DEFENDANT/ COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes)

Plaintiffs/Counterdefendants Triple G Partnership, Fred C. Grigg, and Ted J. Grigg (collectively "Triple G") respond to Defendant/Counterclaimant Mohave County's (the "County") Motion for Summary Judgment and request that the Motion be denied because the County's claims rely on theories that have no support under Arizona law. In order to grant its Motion, the County needs the Court to hold that several seminal Arizona Supreme Court cases were wrongly decided and no longer govern, despite the fact that none have been overturned and all remain binding.[1]

[1]The County clearly sees it is facing an uphill battle as it is forced to argue that a unanimous Arizona Supreme Court decision is incorrect. *See* Motion, fn 2 at 8.

The County's evidence regarding the Roadway's history is interesting (Motion at 3:11-4:20), but irrelevant. It does not matter what the private Roadway has been called or whether the public has used it, the only issue is whether the County has any legally recognized interest in it. *See State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611, 858 P.2d 1213, 1214 (1993) (state did not have title in "State Route 288").

With respect to its argument that the County's maintenance, public use, and the operation of A.R.S. § 28-7041 constitute a taking, the only court that has accepted this theory was subsequently overturned by the Arizona Supreme Court. *See Gotland v. Town of Cave Creek*, 175 Ariz. 614, 615, 858 P.2d 1217, 1218 (1993). As explained herein, every other Arizona decision has held that A.R.S. § 28-7041, government maintenance, and public use of a road are not, and can never be, a taking.

With respect to its claim that the federal government dedicated the road, no Arizona court has ever held that the doctrine of common law dedication applies to R.S. 2477 offers. To the explicit contrary, Arizona courts have consistently held that acceptance of the federal government's offer under R.S. 2477 requires an affirmative act by the state or local government.[2]

In the best light, the County's arguments to overturn a century of consistent Supreme Court precedent are creative attempts to reverse existing law. However, these efforts must be futile in this forum. Given the County has chosen to press for changes to Arizona law rather than comply with the existing ones and pay its citizens for the private property it seeks to take, it must pursue those changes as the Appellant in subsequent appellate proceedings. A private landowner should not have to bear the costs of the County's refusal to comply with Arizona law.

[2] The County has now concocted a third claim (private landowner common law dedication) that was not pled in its counterclaim, and as explained herein, is also meritless.

This Response is supported by the accompanying Memorandum of Points and Authorities. No separate statement of facts is necessary to defeat the County's Motion, which can only be granted if the Court accepts the County's arguments to change existing law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The County Failed To Include All Claims In Either Its Motion Or Complaint.

Although styled as a full Motion for Summary Judgment, the Motion does not address all of the claims raised in the County's Counterclaim. For example, the Counterclaim requests damages for recovery of the Roadway and also asserts a claim for trespass (Counts III and IV), but the Motion is silent as to the asserted damages the County believes it has incurred. In contrast, Triple G specifically did not include its trespass claim in its partial summary judgment for the very simple reason that until its ownership is confirmed, it did not make sense to spend the parties' or judicial resources on the question of damages. In addition, the Counterclaim included a claim for condemnation, but the Motion is silent on this claim. The County's failure to identify any factual and legal bases in support of these claims in its Motion precludes judgment with respect to its alleged damages and its condemnation claim.

Conversely, in its Counterclaim, the County asserted title under a theory of adverse possession (Count II) and requested declaratory relief that the road was a public road under A.R.S. § 28-7041 (Count V). After needlessly fighting and barely surviving dismissal[3], it appears the County now finally admits that Count II has no validity. *See* Motion at 10:2 ("Public use alone did not pass title of the Roadway Property to the County"). The County also apparently accepts, belatedly, that Count V of its Counterclaim is unsupportable in light of the holding in *Dawson* that "under A.R.S. § 28-7041, use by the public alone does not provide an

[3] At oral argument on Triple G's Motion to Dismiss, Judge Gerlach indicated initially that he was inclined to grant Triple G's motion with respect to Counts II and V, but ultimately he decided against it based on his concern that "[t]he court is not convinced that the motion to dismiss can be granted here without, in effect, resolving one or more disputed issues of fact." Minute Entry filed March, 10, 2017.

independent basis for curing defects in a road's creation and transferring ownership of historical roads to the government." Motion at 8:12-15. Instead of these two unsupportable claims, the County now combines them to assert a *de facto* taking, which is addressed further in Section II, infra. The County's other new claim is a claim that private landowners dedicated the Roadway to the County under a common law dedication theory. This too was not pled in the Counterclaim, and is therefore inappropriate to include in summary judgment motion. *See* Ariz. R. Civ. P. 56(a). To the extent the Court decides to address the merits of this new assertion of title, the futility of the County's new argument is addressed further in Section IV, infra.[4]

Finally, the County now asserts that it is seeking to quiet title to its interest in the portion of the Roadway that crosses APN #313-13-017. *See* Motion at 14:14-25. This portion of the Roadway was not part of Triple G's Complaint or the County's Answer and Counterclaim. Triple G agrees with the County that it is "telling" that Triple G did not attempted to quiet title to this parcel. *See* Motion at 14:14. That is because Triple G was thoughtful and targeted when it filed its Complaint (and in its own recently filed Motion for Summary Judgment), seeking only to quiet title for those parcels it was entitled to do so. Triple G's approach stands in stark contrast to the County's approach, which has been to raise numerous meritless claims that shift and evolve as one after another is exposed as unsupported and unsupportable.

II. The Operation Of A.R.S. § 28-7041, The County's Maintenance, And Public Use Of The Roadway Were Not, And Could Not Be, A Taking.

Simply put, the County's *de facto* taking argument is: "we took Plaintiffs' private road without following statutory procedures and without paying for it decades ago, and now it is too late for Plaintiff to do anything about it." In support of this argument, the County provides an

[4] Even the County's R.S. 2477 claim has changed. Its Counterclaim to quiet title asserted that it held fee title. Para. 20 and 21. In contrast, the Motion only asserts rights under a theory of common law dedication, which even assuming, *arguendo*, it were to apply, would only provide an easement and not transfer title.

interesting recitation of the law governing inverse condemnation. Motion at 5:15-7:16. The problem for the County is that this argument has no application to private roads and the undisputed facts presented in this case.[5] Fundamentally, the County's argument regarding inverse condemnation *presumes* that which the County cannot *show* - that a taking ever occurred.

A taking requires dispossession.[6] "A taking occurs when an entity with the power of eminent domain substantially deprives an owner of the use and enjoyment of its property or physically invades it." *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 487, ¶ 45, 217 P.3d 424, 437 (App. 2009) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)); *see also Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 81, ¶¶ 18-19, 270 P.3d 902, 908 (App. 2012) ("a permanent physical invasion of its property []or a complete deprivation of all economically beneficial use"); *City of Phoenix v. Garretson*, 234 Ariz. 332, 337, ¶ 19, 322 P.3d 149, 154 (2014) ("destroys or substantially impairs a preexisting right of access"); *Dos Picos Land Ltd. P'ship v. Pima County*, 225 Ariz. 458, 461, ¶¶ 7-8, 240 P.3d 853, 856 (App. 2010).

For the first time, the County acknowledges that its public use of the road was not sufficient to constitute a taking. Motion at 10:2; *compare* Counterclaim II: Adverse Possession. Instead, it now argues that a taking occurred as a result of the combination of: its maintenance of the road, public use of the road, county resolutions regarding the road, and the curative statute,

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[5] As it did in earlier proceedings, the County relies heavily on *Flood Control Dist. v. Gaines*, 202 Ariz. 248 (2002), 43 P.3d 196 (App. 2002). In its Response to Triple G's Motion to Dismiss, the County argued that *Gaines* "implicitly rejected" *Dawson*. Response to Motion to Dismiss, 6:4-7. The County has abandoned that argument, but still fails to acknowledge that *Gaines* is irrelevant here because it dealt with the timing of a claim of inverse condemnation resulting from floodwaters, not the use of a private road, and there was no dispute that a taking had occurred. *Id.* at 250-51.

[6] Even if, *arguendo*, the County could take a road by adverse possession—and it cannot—use and maintenance are not adverse to Triple G's ownership. *See Conwell v. Allen*, 21 Ariz. App. 383, 384–85, 519 P.2d 872, 873–74 (1974) (holding that maintaining grass was not sufficiently hostile to give notice of an intent to take the land); *Gardiner v. Henderson*, 103 Ariz. 420, 424, 443 P.2d 416, 420 (1968) (a taking "denies the owner of its usage, its rental value, and its enjoyment.").

A.R.S. § 28-7041. Motion at 10:2-10. The County's argument apparently is: even though none of its actions were sufficient individually to take private property, collectively, these insufficient actions were good enough to do so. However, not one of those actions constitutes a taking under Arizona law, and the aggregation of multiple actions that are *not* takings does not somehow tip the scales in the County's favor. Two wrongs do not make a right and four non-takings do not create a taking.

It has been the law in Arizona since territorial times that the government cannot take a private road by adverse possession. *See, e.g.,* T*ucson Consol. Copper Co. v. Reese,* 12 Ariz. 226, 229, 100 P. 777, 779 (1909) ("We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription"); *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611, 858 P.2d 1213, 1214 (1993) ("[S]ince territorial days, Arizona cases have consistently held that no public highway can be created by prescription."); *Old Pueblo Transit Co. v. Arizona Corp. Comm'n*, 84 Ariz. 389, 393, 329 P.2d 1108, 1111 (1958) ("[I]n Arizona, public highways can only be established in a manner provided by statute and cannot be established by prescriptive use.") (citing *Mead v. Hummel*, 58 Ariz. 462, 467, 121 P.2d 423, 425 (1942)); *see also Curtis v. Southern Pac. Co.,* 39 Ariz. 570, 573, 8 P.2d 1078, 1079 (1932); *Champie v. Castle Hot Springs Co.*, 27 Ariz. 463, 467, 233 P. 1107, 1108 (1925); *Territory v. Richardson*, 8 Ariz. 336, 339, 76 P. 456, 457 (1904).

In *Champie*, a road had been used "by the general public for years, and … the county reimbursed plaintiff for the maintenance of the general highway." 27 Ariz. at 466, 233 P. at 1108. The Court held that such government maintenance and public use **did not** constitute a taking:

> there has been but one legal method of establishing public roads or private ways, which is carefully set forth in both codes…The fact, if it be one, that the county illegally paid plaintiff some money to reimburse it for work on private premises, while it might give rise to some form of action for the recovery of such money, in no manner affects the status of the road. The trial court properly found the roads and passageways involved herein were private roads and passageways.

Champie at 467, 233 P. at 1108.

The County now acknowledges that public use and government maintenance are insufficient, so it argues that the curative statute changes the analysis. Motion at 9: 2-4. As *Dawson* explained, it does not:

> First, the statutory language does not manifest any clear intent to change the common law. [] Second, the change in the common law sought by the state would render § 28–1861(B) unconstitutional. [] Third, and perhaps most important, the legislature passed § 28–1861(B) shortly after a very similar statute had been ruled to be curative only.

Dawson at 613, 858 P.2d at 1216 (citations omitted). Moreover, *Dawson*'s companion case presents a nearly-identical fact pattern to the one presented here. In *Gotland*[7], the town sought "an injunction to prevent the Gotlands from erecting a barricade blocking access to an unpaved section of Grapevine Road which traverses their property. Cave Creek had declared the road to be a public highway pursuant to Ariz.Rev.Stat. (A.R.S.) § 28–1861(B).[8]" The road had been built in "the late 1800's" and used by the county "for at least 10 years" prior to 1960 and the Gotlands had purchased the property in 1984. *Id.* at 498, 400, 837 P.2d at 1133, 1135; *compare with* Motion 10:8-15. The Court of Appeals held, as the County now urges here, that § 28-1861 vacated the prohibition against the creation of a highway by prescription and allowed public use to effect a taking, noting further (as the County finds compelling here) that "the private ownership rights in the road may have been lost even before the Gotlands acquired the land." *Gotland*, 172 Ariz. at 401, 837 P.2d at 1136.

But the Supreme Court rejected the Court of Appeals' (and now the County's identical) interpretation of A.R.S. § 28-1861: "Because [§28-1861(B)] provides for no compensation and provides no grace period within which to act to protect property rights, we fail to see how it

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[7] *Gotland v. Town of Cave Creek*, 172 Ariz. 397, 398, 837 P.2d 1132, 1133 (App. 1991).

[8] This statute was re-numbered and further subdivided in 1995, but the operative language from former §28-1861(B) is effectively identical to current § 28-7041(C). Ariz. Sess. Laws 1995, Ch. 132 § 3.

could pass constitutional muster if, in fact, its intent was to pass title." *Dawson* at 612, 858 P.2d at 1215. Instead, the curative statute, inter alia, "cures any ultra vires problem previously existing where the state had been expending public monies on what were technically not public roads**… we necessarily disagree with the court of appeals' opinion in *Gotland*."** *Id.* at 613, 858 P.2d at 1216 (emphasis added).

The County asks this Court to reach the same conclusion vacated by the Supreme Court.[9] But *Dawson*'s interpretation of § 28-1861 remains the controlling law in Arizona. *See, e.g.,* 39A C.J.S. Highways § 5 (citing *Dawson*). The statute does not transfer title. *See Morgan*, 13 Ariz. App at 193-95, 475 P.2d at 286-87:

> [T]he law is now and was in 1926 that title does not vest in the county until a final order of condemnation is made and a copy thereof filed with the county recorder…
> Appellant also contends that the curative act of 1927, now A.R.S. § 18-152, establishes its title to the land in question…the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property….

Finally, it is black letter law that the County's resolutions were **not** takings. *See City of Tucson v. Morgan*, 13 Ariz. App. 193, 193-95, 475 P.2d 285, 286-87 (1970) ("the mere passing of a resolution in the filing of a map does not constitute a taking and does not cause any interference with or invasion of the land or curtailment of its use."); *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 186, ¶ 22, 52 P.3d 213, 218 (App. 2002) (measuring a taking "not by what [the] state says or intends, but by what it does") (citation omitted). Instead, a formal resolution to take private land only clouds the title to that land. *Cook v. Town of Pinetop-*

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[9] The County also complains that *Dawson* cannot be read to prohibit the government from taking a private roadway without complying with the law. Motion at 10, fn 4. Difficult as it may be for the County to accept, *Dawson* stands for the proposition that if the government wants to take a private road, it needs to follow the law and establish it in accordance with statutory requirements. The law remains in Arizona as it has always been, that the government cannot take private roads simply by using them, maintaining them, or passing resolutions that do not comply with statutory requirements.

Lakeside, 232 Ariz. 173, 177, ¶ 17, 303 P.3d 67, 71 (App. 2013) ("The Town's October 2007 resolution purporting to reclaim the disputed property created a cloud on Cook's title to the property.").

Applied to this case, *Cardon, Champie, Morgan, Dawson, Gotland* and their progeny establish that public use, maintenance, A.R.S. § 28-7041, and county resolutions do not constitute takings. Because the County never took the Roadway, neither Triple G nor prior landowners needed to bring an inverse condemnation action (and moreover, in light of *Dawson*, could not have brought an inverse condemnation action without violating Rule 11). The County's claims to the contrary are meritless.

III. The Doctrine Of Common Law Dedication Does Not Apply To Federal Offers Under R.S. 2477.

The County asserts, "[s]ince territorial days, Arizona has recognized the doctrine of common law dedication." Motion at 11: 4-5. But the County inexcusably fails to acknowledge that this doctrine does not apply to the federal government's offer under R.S. 2477. Instead, all have concluded that acceptance of the offer requires an affirmative act by the state. In *Tucson Consol. Copper Co, et al., v. Reese*, the defendants asserted that a public right of way had been established across federal lands before the plaintiff homesteader had taken title due to: public use of the road, county acceptance and recording of a map showing the road, and a later county resolution declaring the road to be a public road under R.S. 2477. 12 Ariz. 226, 227, 100 P. 777, 779 (1909). In other words, the defendants' arguments in Reese were identical to the County's argument here.[10] The Court upheld the trial court's ruling for the plaintiff landowner, holding:

[10] It is inexplicable that the County's Motion did not address this legal authority which is directly adverse to the County's position. The Motion even cited a Tenth Circuit case, which itself cites *Tucson Consol. Copper* for the black letter proposition that Arizona requires "official action" before an R.S. 2477 offer could be accepted. *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 770 (10th Cir. 2005).

> The matter of the establishment of public highways… is wholly statutory… We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription.

Id. at 229. The combination of: an offer by the federal government, public use of the roadway, and a county resolution, were insufficient to establish a R.S. 2477 right-of-way in 1909, and remain so today.

In *County of Cochise v. Pioneer National Title Insurance Company*, Cochise County sought an injunction requiring the removal of a barricade on a road that the county claimed was an established county road. 115 Ariz. 381, 382, 565 P.2d 887, 888 (App. 1977). In support of its claims, the County relied on the public use of the road and a 1911 map prepared by the county supervisor and approved by the board of supervisors. *Id.* In other words, Cochise County made the same argument in 1977 that Mohave County makes today. The Court noted:

> In order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of Arizona law…. Cochise County concedes that the board of supervisors failed to take those steps necessary to comply fully with Arizona law regarding the establishment of highways in 1911…..

Id. 115 Ariz., at 384, 565 P.2d at 890 (internal citations omitted). The court concluded that no public roadway was established under R.S. 2477 before the property was transferred to private ownership in 1915. *Id.*

More recently, both the Ninth Circuit and Tenth Circuit have reviewed Arizona law governing the establishment of public roads under R.S. 2477 and reached the same conclusion. In *Lyon*, the plaintiff asserted that an R.S. 2477 right-of-way had been created across lands that are now part of the Gila River Indian Community Reservation. 626 F.3d 1059, 1067 (9th Cir. 2010). The Ninth Circuit rejected the argument that the "mere existence" of the roads made them public under Arizona law; "[r]ather, Arizona must have taken some affirmative act to accept the grant represented by R.S. 2477. *Id.* at 1077. *See also*, *S. Utah Wilderness Alliance v. BLM*, 425 F. 3d. at 770 (10th Cir. 2005) (noting that Arizona law requires "official action" (*citing Tucson Consol. Copper,* 12 Ariz. at 229, 100 P. at 779).

What contrary authority does the County possess? Its Motion relies heavily on *Pleak v. Entrada Prop. Owners' Ass'n,* 207 Ariz. 418, 421, 87 P.3d 831, 834 (2004). Did *Pleak* hold that the federal government's offer under R.S. 2477 could be accepted through a common law dedication? No. It frequently and explicitly limited its discussion of common law dedication to the ability of a private landowner to dedicate a roadway easement. For example, the Court noted: "nothing in [the territorial code] suggests that landowners are somehow thereby prevented from dedicating their *privately owned* land to public use." *Id.* at 422, 87 P.3d at 835 (emphasis in original).

The County is the latest in a long line of governmental entities to try to argue that federal R.S. 2477 created a public highway even though the government did not comply with Arizona law regulating the creation of public highways. But every attempt to make that argument has failed. The County's assertion of a common law dedication under R.S. 2477 is not so common after all – it has never been recognized in Arizona and is contrary to a century of consistent decisions.

IV. The Private Landowner Common Law Dedication Claim Was Not Pled And Has No Merit.

For the first time in this litigation, the County asserts that the Roadway was dedicated to the public by individual private land owners, including plaintiff Ted Grigg. *See* Motion at 13:22-15-4. Like the rest of the County's actions with respect to the Roadway, this argument is far too little, far too late. Mohave County did not raise this claim in its counterclaim (and cannot raise it here under Ariz. R. Civ. P. 56(a)) and, more fundamentally, the argument is completely meritless.

The County does not even argue that a private landowner ever dedicated those portions of the Roadway that cross four of the five parcels for which Triple G has sought to quiet title: APN Nos. 313-14-001, 313-14-006, 313-14-007, 313-17-014. Instead, the County makes the remarkable argument that a single private landowner's decision to dedicate one portion of a

private road somehow makes the rest of the road public, regardless of who owns those other segments.[11] *See* Motion at 14:24-25 ("The only reasonable inference is that the entire Roadway was admitted to be a public right of way.")

Imagine a private road that crosses six properties: A, B, C, D, E, and F. The owner of Property C (APN 313-13-017 in this narrative), which lies along the middle of the private road, chooses to dedicate the roadway crossing its property to the government, as is that owner's legal right to do. Under the County's newest theory, the actions of the owner of Property C serve to also impair the title held by the owners of properties A, B, D, E, and F. After all, "[t]here would be no point in dedicating a 'road to nowhere' in the middle of two unconnected segments of allegedly private roads which could be closed off at any time." Motion at 22-24. This argument has no support in law. The owner of Property C can do what it likes with its property, pointless or not, but it does not affect the title to the property held by others. Here, the properties on either side of Parcel APN 313-13-017 were held by the federal government and another private landowner at the time of the express dedication. County's Statement of Facts 26-30. The owner of APN 313-13-017 did not, and could not, also dedicate a public road across the adjacent federal lands and a third party's private lands that he did not own.

With respect to that portion of the road crossing APN 313-17-022, the County asserts that the Plaintiff's prior reference to this portion of the Roadway as "Old Trails Highway aka Main Street", the express dedication of a public utility easement, and the reference to a "public street" in a prior deed, apparently constitute a common law dedication. *See* Motion at 14:2-15:2. The County cites no authority that these actions amount to an offer to dedicate. Simply referring to a

[11] APS #313-13-017 was not included in either Triple G's Complaint or the County's Answer and Counterclaim. The only reason the County identifies APN #313-13-017 now is in a transparent attempt to confuse the Court and wrongly claim Plaintiff previously referred to the Roadway at issue in this matter as a dedicated roadway area. Motion at 14:18-20.

private road by its commonly used name does not make it public. *See, e.g., Dawson*, 175 Ariz. at 611, 613, 858 P.2d at 1214, 1216 (State had no title to "State Route 288").

As the County itself notes, a common law dedication requires a clear demonstration of *intent to dedicate*. Motion at 11:21-22. As recently stated by the Arizona Supreme Court, a common law dedication requires:

> "full[] demonstrat[ion] [of] the intent of the donor to dedicate." *Id.* (citing Allied Am. Inv. Co., 65 Ariz. at 287, 179 P.2d at 439); *see also City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 149, 444 P.2d 437, 440 (1968) (evidence of public dedication must be "clear, satisfactory and unequivocal") (citation omitted). "Dedication is not presumed nor does a presumption of an intent to dedicate arise unless it is clearly shown by the owner's acts and declarations." *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 386, 227 P.2d 1011, 1013 (1951). Rather, "[t]he burden of proof to establish a dedication is on the party asserting it." *Id.*

Kadlec v. Dorsey, 224 Ariz. 551, 552, 233 P.3d 1130, 1131 (2010) (holding that creation of roadway easement did not constitute a common law dedication). In *Pleak*, the common law dedication was clear from a survey, which contained a statement that "'the owner of record of the property included in the easements shown hereon[,] hereby dedicate[s] these easements to the public for use as such.'" 207 Ariz. at 420 (alteration in original). In *Hunt v. Richardson*, the owner dedicated the easement by recording a document "granting an '[e]asement for Ingress, Egress, Public and Private Utilities.'" 216 Ariz. 114, 117, 163 P.3d 1064, 1067 (alteration in original). The express dedication across APS 313-13-017 was as follows: "We hereby dedicate all streets shown within red border lines to the public and public uses forever." Ex 23 to County's Statement of Facts.

Here, the County provides no "clear, satisfactory and unequivocal" statements of intent to dedicate the portion of the Roadway crossing APN 313-017-022, and the County does not even argue that such statements exist with respect to APN Nos. 313-14-001, 313-14-006, 313-14-007, 313-17-014. There has never been a common law dedication across the five parcels identified in Triple G's Complaint. The County's decision to raise this futile, unsupported argument for the first time now serves to highlight further the weaknesses of its entire claim to title. If the

County really had a valid claim, it would not be making up new, unsupported theories at this late juncture.

V. Conclusion

The County now acknowledges its claims for ownership as set forth in Counts II (adverse possession) and V (declaratory judgment under A.R.S. § 28-7041) of its Counterclaim are unsupportable. Motion at 8:12-15; 10:2. Fatal to Count I of its Counterclaim, the County also admits it failed to comply with the statutory requirements to establish a highway, which is necessary to establish a right of way under R.S. 2477. Motion at 10:6-7 ("[t]he County is not claiming it fulfilled all the formal statutory procedures to create a highway in this case.").

What more can be said?

The County is free to spend taxpayers' dollars in an effort to overturn existing law and take private lands, without compensation, from another one of its taxpayers. However, it should do so honestly and explicitly. The only way the County can succeed on its Motion is if the Court agrees that a century of case law was wrongly decided. Triple G respectfully requests that the Court uphold the continuing validity of T*ucson Consol. Copper, Dawson, Kadlec, et al.*, and deny the County's Motion.

RESPECTFULLY SUBMITTED this 21st day of August 2017.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, a political subdivision, Defendant/Counterclaimant.	Case No. CV2016-017837 **RESPONSE TO DEFENDANT/ COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes)

Plaintiffs/Counterdefendants Triple G Partnership, Fred C. Grigg, and Ted J. Grigg (collectively "Triple G") respond to Defendant/Counterclaimant Mohave County's (the "County") Motion for Summary Judgment and request that the Motion be denied because the County's claims rely on theories that have no support under Arizona law. In order to grant its Motion, the County needs the Court to hold that several seminal Arizona Supreme Court cases were wrongly decided and no longer govern, despite the fact that none have been overturned and all remain binding.[1]

[1]The County clearly sees it is facing an uphill battle as it is forced to argue that a unanimous Arizona Supreme Court decision is incorrect. *See* Motion, fn 2 at 8.

The County's evidence regarding the Roadway's history is interesting (Motion at 3:11-4:20), but irrelevant. It does not matter what the private Roadway has been called or whether the public has used it, the only issue is whether the County has any legally recognized interest in it. *See State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611, 858 P.2d 1213, 1214 (1993) (state did not have title in "State Route 288").

With respect to its argument that the County's maintenance, public use, and the operation of A.R.S. § 28-7041 constitute a taking, the only court that has accepted this theory was subsequently overturned by the Arizona Supreme Court. *See Gotland v. Town of Cave Creek*, 175 Ariz. 614, 615, 858 P.2d 1217, 1218 (1993). As explained herein, every other Arizona decision has held that A.R.S. § 28-7041, government maintenance, and public use of a road are not, and can never be, a taking.

With respect to its claim that the federal government dedicated the road, no Arizona court has ever held that the doctrine of common law dedication applies to R.S. 2477 offers. To the explicit contrary, Arizona courts have consistently held that acceptance of the federal government's offer under R.S. 2477 requires an affirmative act by the state or local government.[2]

In the best light, the County's arguments to overturn a century of consistent Supreme Court precedent are creative attempts to reverse existing law. However, these efforts must be futile in this forum. Given the County has chosen to press for changes to Arizona law rather than comply with the existing ones and pay its citizens for the private property it seeks to take, it must pursue those changes as the Appellant in subsequent appellate proceedings. A private landowner should not have to bear the costs of the County's refusal to comply with Arizona law.

[2] The County has now concocted a third claim (private landowner common law dedication) that was not pled in its counterclaim, and as explained herein, is also meritless.

This Response is supported by the accompanying Memorandum of Points and Authorities. No separate statement of facts is necessary to defeat the County's Motion, which can only be granted if the Court accepts the County's arguments to change existing law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The County Failed To Include All Claims In Either Its Motion Or Complaint.

Although styled as a full Motion for Summary Judgment, the Motion does not address all of the claims raised in the County's Counterclaim. For example, the Counterclaim requests damages for recovery of the Roadway and also asserts a claim for trespass (Counts III and IV), but the Motion is silent as to the asserted damages the County believes it has incurred. In contrast, Triple G specifically did not include its trespass claim in its partial summary judgment for the very simple reason that until its ownership is confirmed, it did not make sense to spend the parties' or judicial resources on the question of damages. In addition, the Counterclaim included a claim for condemnation, but the Motion is silent on this claim. The County's failure to identify any factual and legal bases in support of these claims in its Motion precludes judgment with respect to its alleged damages and its condemnation claim.

Conversely, in its Counterclaim, the County asserted title under a theory of adverse possession (Count II) and requested declaratory relief that the road was a public road under A.R.S. § 28-7041 (Count V). After needlessly fighting and barely surviving dismissal[3], it appears the County now finally admits that Count II has no validity. *See* Motion at 10:2 ("Public use alone did not pass title of the Roadway Property to the County"). The County also apparently accepts, belatedly, that Count V of its Counterclaim is unsupportable in light of the holding in *Dawson* that "under A.R.S. § 28-7041, use by the public alone does not provide an

[3] At oral argument on Triple G's Motion to Dismiss, Judge Gerlach indicated initially that he was inclined to grant Triple G's motion with respect to Counts II and V, but ultimately he decided against it based on his concern that "[t]he court is not convinced that the motion to dismiss can be granted here without, in effect, resolving one or more disputed issues of fact." Minute Entry filed March, 10, 2017.

independent basis for curing defects in a road's creation and transferring ownership of historical roads to the government." Motion at 8:12-15. Instead of these two unsupportable claims, the County now combines them to assert a *de facto* taking, which is addressed further in Section II, infra. The County's other new claim is a claim that private landowners dedicated the Roadway to the County under a common law dedication theory. This too was not pled in the Counterclaim, and is therefore inappropriate to include in summary judgment motion. *See* Ariz. R. Civ. P. 56(a). To the extent the Court decides to address the merits of this new assertion of title, the futility of the County's new argument is addressed further in Section IV, infra.[4]

Finally, the County now asserts that it is seeking to quiet title to its interest in the portion of the Roadway that crosses APN #313-13-017. *See* Motion at 14:14-25. This portion of the Roadway was not part of Triple G's Complaint or the County's Answer and Counterclaim. Triple G agrees with the County that it is "telling" that Triple G did not attempted to quiet title to this parcel. *See* Motion at 14:14. That is because Triple G was thoughtful and targeted when it filed its Complaint (and in its own recently filed Motion for Summary Judgment), seeking only to quiet title for those parcels it was entitled to do so. Triple G's approach stands in stark contrast to the County's approach, which has been to raise numerous meritless claims that shift and evolve as one after another is exposed as unsupported and unsupportable.

II. The Operation Of A.R.S. § 28-7041, The County's Maintenance, And Public Use Of The Roadway Were Not, And Could Not Be, A Taking.

Simply put, the County's *de facto* taking argument is: "we took Plaintiffs' private road without following statutory procedures and without paying for it decades ago, and now it is too late for Plaintiff to do anything about it." In support of this argument, the County provides an

[4] Even the County's R.S. 2477 claim has changed. Its Counterclaim to quiet title asserted that it held fee title. Para. 20 and 21. In contrast, the Motion only asserts rights under a theory of common law dedication, which even assuming, *arguendo*, it were to apply, would only provide an easement and not transfer title.

interesting recitation of the law governing inverse condemnation. Motion at 5:15-7:16. The problem for the County is that this argument has no application to private roads and the undisputed facts presented in this case.[5] Fundamentally, the County's argument regarding inverse condemnation *presumes* that which the County cannot *show* - that a taking ever occurred.

A taking requires dispossession.[6] "A taking occurs when an entity with the power of eminent domain substantially deprives an owner of the use and enjoyment of its property or physically invades it." *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 487, ¶ 45, 217 P.3d 424, 437 (App. 2009) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)); *see also Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 81, ¶¶ 18-19, 270 P.3d 902, 908 (App. 2012) ("a permanent physical invasion of its property []or a complete deprivation of all economically beneficial use"); *City of Phoenix v. Garretson*, 234 Ariz. 332, 337, ¶ 19, 322 P.3d 149, 154 (2014) ("destroys or substantially impairs a preexisting right of access"); *Dos Picos Land Ltd. P'ship v. Pima County*, 225 Ariz. 458, 461, ¶¶ 7-8, 240 P.3d 853, 856 (App. 2010).

For the first time, the County acknowledges that its public use of the road was not sufficient to constitute a taking. Motion at 10:2; *compare* Counterclaim II: Adverse Possession. Instead, it now argues that a taking occurred as a result of the combination of: its maintenance of the road, public use of the road, county resolutions regarding the road, and the curative statute,

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[5] As it did in earlier proceedings, the County relies heavily on *Flood Control Dist. v. Gaines*, 202 Ariz. 248 (2002), 43 P.3d 196 (App. 2002). In its Response to Triple G's Motion to Dismiss, the County argued that *Gaines* "implicitly rejected" *Dawson*. Response to Motion to Dismiss, 6:4-7. The County has abandoned that argument, but still fails to acknowledge that *Gaines* is irrelevant here because it dealt with the timing of a claim of inverse condemnation resulting from floodwaters, not the use of a private road, and there was no dispute that a taking had occurred. *Id.* at 250-51.

[6] Even if, *arguendo*, the County could take a road by adverse possession—and it cannot—use and maintenance are not adverse to Triple G's ownership. *See Conwell v. Allen*, 21 Ariz. App. 383, 384–85, 519 P.2d 872, 873–74 (1974) (holding that maintaining grass was not sufficiently hostile to give notice of an intent to take the land); *Gardiner v. Henderson*, 103 Ariz. 420, 424, 443 P.2d 416, 420 (1968) (a taking "denies the owner of its usage, its rental value, and its enjoyment.").

A.R.S. § 28-7041. Motion at 10:2-10. The County's argument apparently is: even though none of its actions were sufficient individually to take private property, collectively, these insufficient actions were good enough to do so. However, not one of those actions constitutes a taking under Arizona law, and the aggregation of multiple actions that are *not* takings does not somehow tip the scales in the County's favor. Two wrongs do not make a right and four non-takings do not create a taking.

It has been the law in Arizona since territorial times that the government cannot take a private road by adverse possession. *See, e.g.,* T*ucson Consol. Copper Co. v. Reese,* 12 Ariz. 226, 229, 100 P. 777, 779 (1909) ("We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription"); *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611, 858 P.2d 1213, 1214 (1993) ("[S]ince territorial days, Arizona cases have consistently held that no public highway can be created by prescription."); *Old Pueblo Transit Co. v. Arizona Corp. Comm'n*, 84 Ariz. 389, 393, 329 P.2d 1108, 1111 (1958) ("[I]n Arizona, public highways can only be established in a manner provided by statute and cannot be established by prescriptive use.") (citing *Mead v. Hummel*, 58 Ariz. 462, 467, 121 P.2d 423, 425 (1942)); *see also Curtis v. Southern Pac. Co.,* 39 Ariz. 570, 573, 8 P.2d 1078, 1079 (1932); *Champie v. Castle Hot Springs Co.*, 27 Ariz. 463, 467, 233 P. 1107, 1108 (1925); *Territory v. Richardson*, 8 Ariz. 336, 339, 76 P. 456, 457 (1904).

In *Champie*, a road had been used "by the general public for years, and … the county reimbursed plaintiff for the maintenance of the general highway." 27 Ariz. at 466, 233 P. at 1108. The Court held that such government maintenance and public use **did not** constitute a taking:

> there has been but one legal method of establishing public roads or private ways, which is carefully set forth in both codes…The fact, if it be one, that the county illegally paid plaintiff some money to reimburse it for work on private premises, while it might give rise to some form of action for the recovery of such money, in no manner affects the status of the road. The trial court properly found the roads and passageways involved herein were private roads and passageways.

Champie at 467, 233 P. at 1108.

The County now acknowledges that public use and government maintenance are insufficient, so it argues that the curative statute changes the analysis. Motion at 9: 2-4. As *Dawson* explained, it does not:

> First, the statutory language does not manifest any clear intent to change the common law. [] Second, the change in the common law sought by the state would render § 28–1861(B) unconstitutional. [] Third, and perhaps most important, the legislature passed § 28–1861(B) shortly after a very similar statute had been ruled to be curative only.

Dawson at 613, 858 P.2d at 1216 (citations omitted). Moreover, *Dawson*'s companion case presents a nearly-identical fact pattern to the one presented here. In *Gotland*[7], the town sought "an injunction to prevent the Gotlands from erecting a barricade blocking access to an unpaved section of Grapevine Road which traverses their property. Cave Creek had declared the road to be a public highway pursuant to Ariz.Rev.Stat. (A.R.S.) § 28–1861(B).[8]" The road had been built in "the late 1800's" and used by the county "for at least 10 years" prior to 1960 and the Gotlands had purchased the property in 1984. *Id.* at 498, 400, 837 P.2d at 1133, 1135; *compare with* Motion 10:8-15. The Court of Appeals held, as the County now urges here, that § 28-1861 vacated the prohibition against the creation of a highway by prescription and allowed public use to effect a taking, noting further (as the County finds compelling here) that "the private ownership rights in the road may have been lost even before the Gotlands acquired the land." *Gotland*, 172 Ariz. at 401, 837 P.2d at 1136.

But the Supreme Court rejected the Court of Appeals' (and now the County's identical) interpretation of A.R.S. § 28-1861: "Because [§28-1861(B)] provides for no compensation and provides no grace period within which to act to protect property rights, we fail to see how it

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[7] *Gotland v. Town of Cave Creek*, 172 Ariz. 397, 398, 837 P.2d 1132, 1133 (App. 1991).

[8] This statute was re-numbered and further subdivided in 1995, but the operative language from former §28-1861(B) is effectively identical to current § 28-7041(C). Ariz. Sess. Laws 1995, Ch. 132 § 3.

could pass constitutional muster if, in fact, its intent was to pass title." *Dawson* at 612, 858 P.2d at 1215. Instead, the curative statute, inter alia, "cures any ultra vires problem previously existing where the state had been expending public monies on what were technically not public roads**… we necessarily disagree with the court of appeals' opinion in *Gotland*."** *Id.* at 613, 858 P.2d at 1216 (emphasis added).

The County asks this Court to reach the same conclusion vacated by the Supreme Court.[9] But *Dawson*'s interpretation of § 28-1861 remains the controlling law in Arizona. *See, e.g.,* 39A C.J.S. Highways § 5 (citing *Dawson*). The statute does not transfer title. *See Morgan*, 13 Ariz. App at 193-95, 475 P.2d at 286-87:

> [T]he law is now and was in 1926 that title does not vest in the county until a final order of condemnation is made and a copy thereof filed with the county recorder…
> Appellant also contends that the curative act of 1927, now A.R.S. § 18-152, establishes its title to the land in question…the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property….

Finally, it is black letter law that the County's resolutions were **not** takings. *See City of Tucson v. Morgan*, 13 Ariz. App. 193, 193-95, 475 P.2d 285, 286-87 (1970) ("the mere passing of a resolution in the filing of a map does not constitute a taking and does not cause any interference with or invasion of the land or curtailment of its use."); *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 186, ¶ 22, 52 P.3d 213, 218 (App. 2002) (measuring a taking "not by what [the] state says or intends, but by what it does") (citation omitted). Instead, a formal resolution to take private land only clouds the title to that land. *Cook v. Town of Pinetop-*

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[9] The County also complains that *Dawson* cannot be read to prohibit the government from taking a private roadway without complying with the law. Motion at 10, fn 4. Difficult as it may be for the County to accept, *Dawson* stands for the proposition that if the government wants to take a private road, it needs to follow the law and establish it in accordance with statutory requirements. The law remains in Arizona as it has always been, that the government cannot take private roads simply by using them, maintaining them, or passing resolutions that do not comply with statutory requirements.

Lakeside, 232 Ariz. 173, 177, ¶ 17, 303 P.3d 67, 71 (App. 2013) ("The Town's October 2007 resolution purporting to reclaim the disputed property created a cloud on Cook's title to the property.").

Applied to this case, *Cardon, Champie, Morgan, Dawson, Gotland* and their progeny establish that public use, maintenance, A.R.S. § 28-7041, and county resolutions do not constitute takings. Because the County never took the Roadway, neither Triple G nor prior landowners needed to bring an inverse condemnation action (and moreover, in light of *Dawson*, could not have brought an inverse condemnation action without violating Rule 11). The County's claims to the contrary are meritless.

III. The Doctrine Of Common Law Dedication Does Not Apply To Federal Offers Under R.S. 2477.

The County asserts, "[s]ince territorial days, Arizona has recognized the doctrine of common law dedication." Motion at 11: 4-5. But the County inexcusably fails to acknowledge that this doctrine does not apply to the federal government's offer under R.S. 2477. Instead, all have concluded that acceptance of the offer requires an affirmative act by the state. In *Tucson Consol. Copper Co, et al., v. Reese*, the defendants asserted that a public right of way had been established across federal lands before the plaintiff homesteader had taken title due to: public use of the road, county acceptance and recording of a map showing the road, and a later county resolution declaring the road to be a public road under R.S. 2477. 12 Ariz. 226, 227, 100 P. 777, 779 (1909). In other words, the defendants' arguments in Reese were identical to the County's argument here.[10] The Court upheld the trial court's ruling for the plaintiff landowner, holding:

[10] It is inexplicable that the County's Motion did not address this legal authority which is directly adverse to the County's position. The Motion even cited a Tenth Circuit case, which itself cites *Tucson Consol. Copper* for the black letter proposition that Arizona requires "official action" before an R.S. 2477 offer could be accepted. *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 770 (10th Cir. 2005).

> The matter of the establishment of public highways… is wholly statutory… We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription.

Id. at 229. The combination of: an offer by the federal government, public use of the roadway, and a county resolution, were insufficient to establish a R.S. 2477 right-of-way in 1909, and remain so today.

In *County of Cochise v. Pioneer National Title Insurance Company*, Cochise County sought an injunction requiring the removal of a barricade on a road that the county claimed was an established county road. 115 Ariz. 381, 382, 565 P.2d 887, 888 (App. 1977). In support of its claims, the County relied on the public use of the road and a 1911 map prepared by the county supervisor and approved by the board of supervisors. *Id.* In other words, Cochise County made the same argument in 1977 that Mohave County makes today. The Court noted:

> In order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of Arizona law…. Cochise County concedes that the board of supervisors failed to take those steps necessary to comply fully with Arizona law regarding the establishment of highways in 1911…..

Id. 115 Ariz., at 384, 565 P.2d at 890 (internal citations omitted). The court concluded that no public roadway was established under R.S. 2477 before the property was transferred to private ownership in 1915. *Id.*

More recently, both the Ninth Circuit and Tenth Circuit have reviewed Arizona law governing the establishment of public roads under R.S. 2477 and reached the same conclusion. In *Lyon*, the plaintiff asserted that an R.S. 2477 right-of-way had been created across lands that are now part of the Gila River Indian Community Reservation. 626 F.3d 1059, 1067 (9th Cir. 2010). The Ninth Circuit rejected the argument that the "mere existence" of the roads made them public under Arizona law; "[r]ather, Arizona must have taken some affirmative act to accept the grant represented by R.S. 2477. *Id.* at 1077. *See also*, *S. Utah Wilderness Alliance v. BLM*, 425 F. 3d. at 770 (10th Cir. 2005) (noting that Arizona law requires "official action" (*citing Tucson Consol. Copper,* 12 Ariz. at 229, 100 P. at 779).

What contrary authority does the County possess? Its Motion relies heavily on *Pleak v. Entrada Prop. Owners' Ass'n,* 207 Ariz. 418, 421, 87 P.3d 831, 834 (2004). Did *Pleak* hold that the federal government's offer under R.S. 2477 could be accepted through a common law dedication? No. It frequently and explicitly limited its discussion of common law dedication to the ability of a private landowner to dedicate a roadway easement. For example, the Court noted: "nothing in [the territorial code] suggests that landowners are somehow thereby prevented from dedicating their *privately owned* land to public use." *Id.* at 422, 87 P.3d at 835 (emphasis in original).

The County is the latest in a long line of governmental entities to try to argue that federal R.S. 2477 created a public highway even though the government did not comply with Arizona law regulating the creation of public highways. But every attempt to make that argument has failed. The County's assertion of a common law dedication under R.S. 2477 is not so common after all – it has never been recognized in Arizona and is contrary to a century of consistent decisions.

IV. The Private Landowner Common Law Dedication Claim Was Not Pled And Has No Merit.

For the first time in this litigation, the County asserts that the Roadway was dedicated to the public by individual private land owners, including plaintiff Ted Grigg. *See* Motion at 13:22-15-4. Like the rest of the County's actions with respect to the Roadway, this argument is far too little, far too late. Mohave County did not raise this claim in its counterclaim (and cannot raise it here under Ariz. R. Civ. P. 56(a)) and, more fundamentally, the argument is completely meritless.

The County does not even argue that a private landowner ever dedicated those portions of the Roadway that cross four of the five parcels for which Triple G has sought to quiet title: APN Nos. 313-14-001, 313-14-006, 313-14-007, 313-17-014. Instead, the County makes the remarkable argument that a single private landowner's decision to dedicate one portion of a

private road somehow makes the rest of the road public, regardless of who owns those other segments.[11] *See* Motion at 14:24-25 ("The only reasonable inference is that the entire Roadway was admitted to be a public right of way.")

Imagine a private road that crosses six properties: A, B, C, D, E, and F. The owner of Property C (APN 313-13-017 in this narrative), which lies along the middle of the private road, chooses to dedicate the roadway crossing its property to the government, as is that owner's legal right to do. Under the County's newest theory, the actions of the owner of Property C serve to also impair the title held by the owners of properties A, B, D, E, and F. After all, "[t]here would be no point in dedicating a 'road to nowhere' in the middle of two unconnected segments of allegedly private roads which could be closed off at any time." Motion at 22-24. This argument has no support in law. The owner of Property C can do what it likes with its property, pointless or not, but it does not affect the title to the property held by others. Here, the properties on either side of Parcel APN 313-13-017 were held by the federal government and another private landowner at the time of the express dedication. County's Statement of Facts 26-30. The owner of APN 313-13-017 did not, and could not, also dedicate a public road across the adjacent federal lands and a third party's private lands that he did not own.

With respect to that portion of the road crossing APN 313-17-022, the County asserts that the Plaintiff's prior reference to this portion of the Roadway as "Old Trails Highway aka Main Street", the express dedication of a public utility easement, and the reference to a "public street" in a prior deed, apparently constitute a common law dedication. *See* Motion at 14:2-15:2. The County cites no authority that these actions amount to an offer to dedicate. Simply referring to a

[11] APS #313-13-017 was not included in either Triple G's Complaint or the County's Answer and Counterclaim. The only reason the County identifies APN #313-13-017 now is in a transparent attempt to confuse the Court and wrongly claim Plaintiff previously referred to the Roadway at issue in this matter as a dedicated roadway area. Motion at 14:18-20.

private road by its commonly used name does not make it public. *See, e.g., Dawson*, 175 Ariz. at 611, 613, 858 P.2d at 1214, 1216 (State had no title to "State Route 288").

As the County itself notes, a common law dedication requires a clear demonstration of *intent to dedicate*. Motion at 11:21-22. As recently stated by the Arizona Supreme Court, a common law dedication requires:

> "full[] demonstrat[ion] [of] the intent of the donor to dedicate." *Id.* (citing Allied Am. Inv. Co., 65 Ariz. at 287, 179 P.2d at 439); *see also City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 149, 444 P.2d 437, 440 (1968) (evidence of public dedication must be "clear, satisfactory and unequivocal") (citation omitted). "Dedication is not presumed nor does a presumption of an intent to dedicate arise unless it is clearly shown by the owner's acts and declarations." *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 386, 227 P.2d 1011, 1013 (1951). Rather, "[t]he burden of proof to establish a dedication is on the party asserting it." *Id.*

Kadlec v. Dorsey, 224 Ariz. 551, 552, 233 P.3d 1130, 1131 (2010) (holding that creation of roadway easement did not constitute a common law dedication). In *Pleak*, the common law dedication was clear from a survey, which contained a statement that "'the owner of record of the property included in the easements shown hereon[,] hereby dedicate[s] these easements to the public for use as such.'" 207 Ariz. at 420 (alteration in original). In *Hunt v. Richardson*, the owner dedicated the easement by recording a document "granting an '[e]asement for Ingress, Egress, Public and Private Utilities.'" 216 Ariz. 114, 117, 163 P.3d 1064, 1067 (alteration in original). The express dedication across APS 313-13-017 was as follows: "We hereby dedicate all streets shown within red border lines to the public and public uses forever." Ex 23 to County's Statement of Facts.

Here, the County provides no "clear, satisfactory and unequivocal" statements of intent to dedicate the portion of the Roadway crossing APN 313-017-022, and the County does not even argue that such statements exist with respect to APN Nos. 313-14-001, 313-14-006, 313-14-007, 313-17-014. There has never been a common law dedication across the five parcels identified in Triple G's Complaint. The County's decision to raise this futile, unsupported argument for the first time now serves to highlight further the weaknesses of its entire claim to title. If the

County really had a valid claim, it would not be making up new, unsupported theories at this late juncture.

V. Conclusion

The County now acknowledges its claims for ownership as set forth in Counts II (adverse possession) and V (declaratory judgment under A.R.S. § 28-7041) of its Counterclaim are unsupportable. Motion at 8:12-15; 10:2. Fatal to Count I of its Counterclaim, the County also admits it failed to comply with the statutory requirements to establish a highway, which is necessary to establish a right of way under R.S. 2477. Motion at 10:6-7 ("[t]he County is not claiming it fulfilled all the formal statutory procedures to create a highway in this case.").

What more can be said?

The County is free to spend taxpayers' dollars in an effort to overturn existing law and take private lands, without compensation, from another one of its taxpayers. However, it should do so honestly and explicitly. The only way the County can succeed on its Motion is if the Court agrees that a century of case law was wrongly decided. Triple G respectfully requests that the Court uphold the continuing validity of T*ucson Consol. Copper, Dawson, Kadlec, et al.*, and deny the County's Motion.

RESPECTFULLY SUBMITTED this 21st day of August 2017.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, political subdivision, Defendant/Counterclaimant.	No. CV2016-017837 **MOHAVE COUNTY'S RESPONSE OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes) (Oral Argument Requested)

INTRODUCTION

Triple's G's sole argument in this matter can be stated simply: Because the County failed to strictly comply with the elements of A.R.S. § 28-6701, *et seq.* in establishing the Roadway Property as a public road over 100 years ago, Triple G may now barricade sections of the Roadway adjacent to its property. Triple G is wrong.

By physically occupying, laying out and maintaining the Roadway for public use for over a century, the County appropriated or took the Roadway property through its inherent right of eminent domain. The County's occupation and use of the property constitutes a *de facto* governmental taking (inverse condemnation), depriving Triple G's predecessors in interest of any ownership in the Roadway decades before Triple G even

acquired the surrounding land. The County's right to take Property, either through legal process or through physical appropriation, is subject only to a single Constitutional limitation: the requirement of payment of just compensation. There is not, and, under both the Arizona and United States Constitutions, there cannot be, any other limit on the inherent right of the sovereign to appropriate property for public use.

Alternatively, the County maintains that a public right of way was established on the Roadway property through common law dedication. Under either theory, the outcome is the same: the Roadway remains a public road.

Triple G does not deny that the Roadway itself predates Arizona statehood, and that it has been used as a thoroughfare for public travel for over 100 years. Triple G does not deny that the Roadway is depicted on the relevant 1898 and 1912 General Land Office Plat Maps, approved and accepted by the United States Land Office.[1] Triple G does not deny that in 1917 the County accepted the Roadway into the County highway system and recorded maps showing the Roadway as the sole means of accessing the town of Hackberry. Triple G does not deny that the County has continued to repair and maintain the Roadway for public use up until the time Triple G initiated this current dispute and subsequent legal action. These undisputed facts alone entitle

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[1] To the extent Triple G argues that the original federal patents and deeds for the respective parcels do not include reservations of easements or rights of way for the Roadway, the County notes that the 1898 and 1912 GLO Plat Maps and the survey notes upon which they are based are incorporated by reference into those patents and deeds, and these GLO documents clearly show the existence of the Roadway. See "Manual of Surveying Instruction for the Survey of the Public Lands of the United States" (2009), Chapter 9-43 [SOF at ¶ 2]. *See also, Cragin v. Powell*, 128 U.S. 691, 696 (1888) ("It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself."); A.R.S. § 11-482, "Incorporation by reference; legal descriptions".

the County to summary judgment as a matter of law affirming its ownership of the Roadway property.[2]

To rule in favor of Triple G in this matter would require this Court to apply nonexistent extraconstitutional limits on the inherent sovereign right of eminent domain and overturn decades of Arizona legal precedent regarding common law dedication. The Court should decline to do so by denying Plaintiff's Motion.

This Response is supported by the attached Controverting Separate Statement of Facts. The County also incorporates by reference all arguments and facts set forth in its Motion for Summary Judgment and Separate Statement of Facts in Support of Motion, filed July 28, 2017.

MEMORANDUM OF POINTS AND AUTHORITIES

I. A *de facto* taking does not require compliance with any statute.

In its motion, Triple G argues that the actions taken by the County have had no effect at all on the ownership of the Roadway property, for the sole reason that the County did not meet all the elements and complete all the steps set forth in A.R.S. § 28-6701. This argument ignores the fundamental nature of the right of eminent domain, which is neither created nor granted by the Constitution or by statute. "The right [of eminent domain] is an inherent one that pertains to sovereignty as a necessary, constant and inextinguishable attribute. Constitutional provisions do not create or grant the

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[2] The County notes that in its Motion for Summary Judgment, it intentionally did not address the "Count VI: Condemnation" or its damage claims set forth in its Counterclaims. The County understood that the simultaneous motions to be filed by the parties were to deal with the factual and legal issues concerning title, ownership, and encumbrances of the Roadway property only, and that Count VI and the other derivative damage claims would be addressed if necessary after a ruling on the motions. To the extent Triple G has argued that judgment should be entered in its favor on Count VI, the County asserts that on August 4, 2017, it made an offer to Triple G based upon an appraisal report, in full compliance with Arizona law. [SOF at ¶ 3]

power." Kerrick, et al., *Eminent Domain in Arizona*, 3d (State Bar of Arizona, 2013) §1.1 (and cases cited therein). The County's inherent right of eminent domain to acquire property for a public purpose is limited only by the constitutional limitation of just compensation, and nothing else. *Id.*, *Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 193 (1993) (inverse condemnation of property for highway). It is not dependent on the existence of any statute, let alone statutory compliance.[3] See, *Eminent Domain in Arizona*, 3d at §1.2 ("The Constitutional provisions are self-executing. The Legislature's failure to enact a statute addressing procedures and standards relevant to an inverse condemnation action does not abrogate an owner's right to bring such an action" for just compensation). A party suffering an "unconstitutional" taking is limited to the remedy provided by the Takings Clause – just compensation – and is *not* entitled to undo the taking. *Madison v. Graham*, 316 F. 3d 867 (9th Cir. 2002) (remedy for alleged "unconstitutional" taking is just compensation, relief not available under Due Process clause). See also, *Esplanade Properties, LLC v. City of Seattle*, 307 F. 3d 978 (9th Cir. 2002); *Armendez v. Penman*, 75 F. 3d 1311 (9th Cir. 1996).

For over 100 years, this Roadway property has been used only as a public road, physically occupied and maintained by the County. It has been travelled upon by the public, identified as a public road in the County records, and consistently maintained using County funds. It has been the sole public road providing access to the Hackberry Mine, the basis for the town's existence. It has been the sole public road for funeral processions to the Hackberry Cemetery. It has been the sole public road allowing

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[3] There are three constitutionally valid ways the government may appropriate property for public use: legal process (direct condemnation), physical appropriation (inverse condemnation or *de facto* taking), and through adoption of regulations that deprive a property owner of all economically viable use of the property.

school children access to Hackberry Public School. Indeed, prior owners in the Griggs' own family have themselves admitted that Old Trails Highway is a public road. Because of these facts, for over 100 years the Roadway property could not be used by anyone for any purpose but as a public right of way – no houses could be built on the property, no structures could be erected in the right of way. The sole and exclusive use of the Roadway property was as a public road.

The actions of the County in establishing and maintaining the Roadway constituted a taking under its power of eminent domain, subject only to a timely claim for compensation from the property owner. Under Arizona law, a "taking" occurs when "the government either assumes actual possession of the property or places a legal restraint upon the property that substantially diminishes or destroys the owner's right to, and use and enjoyment of, the property." *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 242 (App. 2007) (citations omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Notably, a taking does not have to completely deprive a property owner of all uses of the property – if government action places restrictions on how property can be used, diminishing a property owner's use and enjoyment of his property, then a taking has occurred. *See, e.g., DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 184 (App. 2002) (a "taking" of property occurs "where the government either assumes actual possession of the property or places a legal restraint upon the property that substantially diminishes or destroys the owner's right to, and use and enjoyment of, the property.") (emphasis added). In this case, previous property owners and Triple G were free to use the Roadway Property in the same manner as any other member of the public. However, they were and remain legally restrained from using the Roadway property for any use

but as a public road. Because the property owners were deprived of any and all use of their property but as a public right of way, a governmental taking occurred.

If a property owner does not act promptly following a governmental taking, they will be barred from seeking compensation. *Flood Control District of Maricopa County v. Gaines*, 202 Ariz. 248, 251 (App. 2002) (a claim for inverse condemnation must be brought within one year of its accrual). Triple G does not deny the fact that no previous property owner has sought compensation for the County's taking of the Roadway Property for a public road, or challenged such taking in any way. In this case, because more than 100 years have elapsed since the County's taking of the Roadway Property and the accrual of any potential inverse condemnation claim, Triple G is barred from seeking any relief against the County.

Triple G's motion relies entirely on the false premise that a road in Arizona cannot be taken by adverse possession or by a *de facto* taking by the government. This predicate is contrary to both Arizona case law and the Arizona Constitution. *See* Ariz. Const. art. 2, § 17 ("No private property shall be taken or damaged for public or private use without just compensation[.]"). The cases cited by Triple G in support of this proposition deal with claims of prescription, focusing on use by the public. *See, e.g.*, *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611 (1993) ("[S]ince territorial days, Arizona cases have consistently held that no public highway can be created by prescription."); *Old Pueblo Transit Co. v. Arizona Corp. Comm'n*, 84 Ariz. 389, 393 (1958) ("[I]n Arizona, public highways can only be established in a manner provided by statute and cannot be established by prescriptive use"); *Mead v. Hummel*, 58 Ariz. 462 (1942); *Champie v. Castle Hot Springs Co.*, 27 Ariz. 463, 467 (1925) ("there has been but one legal method of establishing public roads or private ways, which is carefully set forth in both codes"); *Tucson Consol. Copper Co. v. Reese*, 12 Ariz. 226, 229 (1909) ("We have no statute in this territory which recognizes that a public road or highway

may be established by adverse user or by prescription").

By contrast, our instant case is concerned with appropriation or taking of property by the government for roadway purposes. None of the cases cited by Triple G actually stand for its claimed proposition that the government cannot take property for a roadway by adverse possession (none even involve a claim for adverse possession). Furthermore, adverse possession is different and distinct from a *de facto* taking. The former does not implicate constitutional just compensation, the latter does. The former is passage of title upon the expiration of a statute of limitation, the latter is passing of title by taking of property for public use without regard to any limitation period. Where the property is taken for a public use, such as a road, the only remedy is a timely claim for just compensation under the Takings Clause. There is no authority for Triple G's remarkable and wholly unsupported proposition that the government's inherent right of eminent domain is otherwise limited when it takes property for roadway purposes.

In arguing that the County cannot take property for roadway purposes, Triple G relies heavily on the holding in *Tucson Consol. Copper Co. v. Reese*, that "We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription." 12 Ariz. 226, 227 (1909). Triple G interprets this to mean that the government can never accomplish a *de facto* taking of property if the property is to be used for a roadway purpose. First, it is fundamentally wrong that the absence of an Arizona statute can have the effect of limiting the government's right of eminent domain. Second, the case did not involve a takings analysis. Finally, as acknowledged by Triple G, the holding in *Tucson Consol. Copper* has been strongly disfavored and significantly limited since it came down in 1909, and to the extent it might be somehow relevant, it should carry no weight here.

Triple G's strict interpretation of *Tucson Consol. Copper*'s holding was overruled by *Maricopa Cty. v. Anderson*, which recognized that property can be

acquired for roadway purposes through the government's exercise of eminent domain without going through the statutory procedures of A.R.S. § 28-6701. 81 Ariz. 339, 344 (1957) ("we expressly overrule the pronouncement of this court in *County of Apache v. Udall*, 38 Ariz. 488, 1 P.2d 340, wherein it was held, in effect, that section 1701, R.C.1928, section 59-601, A.C.A.1939, now s 18-201 et seq. A.R.S.1956 [the predecessors to A.R.S. 28-6701], was the exclusive method by which boards of supervisors may establish county highways and condemn property therefor"). The court in *Rodgers v. Ray* similarly stated, "While there is some doubt in this state as to whether a public road can be established by mere use, it is our view that there is sufficient evidence of a common-law dedication and acceptance here for these roads to pass muster as public roads." 10 Ariz. App. 119, 121, n.2 (1969) ("While *Tucson Consolidated* has never been expressly overruled, *County of Apache v. Udall*, 38 Ariz. 488, 1 P.2d 340 (1931), which relied upon *Tucson Consolidated* in making a similar pronouncement to that quoted above (38 Ariz. at 492, 1 P.2d 340), was overruled on its pronouncement by *County of Maricopa v. Anderson*, 81 Ariz. 339, 344, 306 P.2d 268, 271 (1957).").

In *Hughes v. City of Phoenix*, the Court affirmed the public character of a roadway that had been in use by the public for decades, regardless of the procedures undertaken by the City. 64 Ariz. 331, 335 (1946) ("There is no occasion for us here to be concerned with the genealogy of title or seizin of the City of Phoenix in and to its streets. Suffice it to say that the street in question, where the appellant's car was parked, has been a public thoroughfare for some seventy-two years, by grant, dedication or common usage, and subject at all times to reasonable regulatory control."). And in *Calmat of Arizona v. State ex rel. Miller*, the Arizona Supreme Court yet again confirmed that the government can accomplish a *de facto* taking of property for roadway purposes. 176 Ariz. 190, 191 (1993) (inverse condemnation action for

widening of highway bridge.). Finally, a recent Arizona Attorney General Opinion further demonstrates the meager support for Triple G's interpretation of *Tucson Consol. Copper*, referring to the case as "specious precedent from the Arizona Territorial Court." AZ Att'y Gen. Op. No: I17-005 (R15-014) (2017).

Contrary to Triple G's inverted contention, it is not the County asking the Court to overturn long standing Arizona precedent in this matter – it is Triple G. The County is asking this Court to apply the same unfavorable and limited reading of T*ucson Consol. Copper* that has already been applied by the Arizona Court of Appeals, Arizona Supreme Court, and the Arizona Attorney General's office, and to affirm decades of precedent holding that the only remedy for a governmental taking is payment of just compensation. The cases relied upon by Triple G in its motion simply do not support its argument that by opening the Roadway Property to the public, accepting it into the County highway system, and performing all necessary maintenance and repairs on the Roadway for over 100 years, the County has not effected a taking of the Roadway Property. In light of the County's taking, the only remedy available to Triple G is a claim for just compensation. In sum, the road must remain a road.

II. The plain language of A.R.S. § 28-7041 and previous curative statutes further supports the County's claim of title to the Roadway Property.

Triple G also incorrectly asserts that the current curative statute – A.R.S. § 28-7041 – and its previous incarnations have no bearing on the County's claim of ownership. While the County maintains that the curative statute was erroneously interpreted by the court in *Dawson*, the County does not believe that *Dawson* needs be overturned in order for the County to prevail. Even under Triple G's interpretation of the curative statute's applicability, the Roadway Property has still passed to the County by virtue of the County's *de facto* taking. The language of *Dawson* and the curative statute itself merely provide additional support and bases for continued public use as a

roadway.

A.R.S. § 28–7041(C) provides:

> All highways, roads or streets that have been constructed, laid out, opened, established or maintained for ten years or more by the state or an agency or political subdivision of the state before January 1, 1960 and that have been used continuously by the public as thoroughfares for free travel and passage for ten years or more are declared public highways, regardless of an error, defect or omission in the proceeding or failure to act to establish those highways, roads or streets or in recording the proceedings.

Arizona courts have previously interpreted the curative statute and its earlier iterations (A.R.S. §§ 28-7041, 28-1861, and 18-152) as a means by which title to roadway property ownership is formally transferred to the government if the elements of the statute have been met. See S*tate ex rel. Herman v. Elec. Dist. No. 2 of Pinal Cty.*, 106 Ariz. 242, 243 (1970) (held that the original 1927 curative statute did operate to effectively pass title of the roadway in question to the County).[4] In *City of Tucson v. Morgan*, 13 Ariz. App. 193, 194–95 (1970), the curative statute was held to be not applicable, but only because the property that the City claimed to have taken was never physically occupied by a road. In this case, there is no dispute that the property in question has been used as a roadway and physically occupied by a road –actual graded and maintained right of way used by the public as a right of way for over a century.

In *Dawson*, the court essentially misapplied the *Morgan* holding, quoting *Morgan* for the blanket conclusion that "the effect of [the curative] status is not greater

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[4] Indeed, the legislative history of the curative statute demonstrates that during the bill's passage, the drafters specifically discussed the designated time period of use and whether it should be ten rather than seven years to comport with the time period necessary to create an easement by prescription. In fact, the committee then amended the statute to require that public use occur for a period of ten years. [See Separate Statement of Facts in Support of Response, at ¶ 1].

than the filing of a resolution and recording of a map or plat," and the curative statute, therefore, does not pass title. 175 Ariz. at 613. The court in *Dawson* was also concerned with the fact that the curative statute did not explicitly provide a "grace period" for property owners to bring a claim "to protect property rights" being taken by the government through operation of the statute. However, after *Dawson* was decided, the Arizona Court of Appeals in *Flood Control District of Maricopa County v. Gaines*, held that such a grace period did, in fact, exist in the context of governmental takings. Upon discovery of the taking, property owners can bring a claim for just compensation within the statutory one year period. *Gaines*, 202 Ariz. at 251 ("All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward."). The holding in *Gaines* effectively eliminated the very basis for the Court's ruling in *Dawson*. Accordingly, operation of the curative statute should pass title of the Roadway Property to the County.[5]

Though the County maintains the curative statute has been misinterpreted and misapplied in *Dawson*, even if this Court determines that the curative statute did not transfer title to the County by operation of statute alone, it certainly demonstrates that any roadway property meeting the elements of the curative statute has been taken by the government for use as a road.

The holdings in *Dawson* and *Gotland v. Town of Cave Creek*, 175 Ariz. 614, 615 (1993), actually confirm the government's power to effect a *de facto* taking of property for roadway purposes. The underlying issue in *Dawson* was whether the property

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[5] At minimum, the curative statute surely applies to cure defects to the Roadway property crossing APN # 313-17-014, i.e., the property that did not transfer to private ownership until 1999. Even under *Dawson*, there can be no argument that private property rights are impacted by title passing to the County, as APN # 313-17-014 was not privately owned during the operative time period.

owner was entitled to claim just compensation in the context of an inverse condemnation of a roadway in light of the State's argument that such claims were barred by the statute. The Court held that a *de facto* taking of the roadway property had occurred, and that the statute itself did not relieve the State of its duty to pay just compensation for said taking. In light of the Court's finding, the road remained an open public road. The case was remanded to the trial court "to proceed on damages only, expressly leaving open all questions relating to any applicable limits that would apply to plaintiff's damages, including any limitations on the period of time for which damages could be claimed." *Dawson*, 175 Ariz. at 611. The property owner did not get to close the road, and his only recourse was a claim for compensation.

In *Gotland*, the Supreme Court similarly reversed and remanded to the trial court to resolve only issues regarding compensation for the taking that had occurred. *See Gotland v. Town of Cave Creek*, 172 Ariz. 397, 399 (App. 1991), vacated, 175 Ariz. 614 (1993) ("the only genuine issue of material fact was the amount of damages to which the Gotlands were entitled" for the taking). Accordingly, the holdings in *Dawson* and *Gotland* do not render the curative statute irrelevant, but rather support the County's *de facto* takings claim.

For these reasons, the language of the curative statute supports the County's claim of taking–under the plain language of statute, property meeting these standards has been taken by the County for use as a road. Here, as in *Dawson* and *Gotland*, the only recourse for such a taking is an action for compensation. Triple G cannot eject the government from the Roadway property.

III. The County accepted the federal government's offer under RS 2477 in accordance with Arizona law, and properly established a common law right of way over the Roadway Property.

In its Motion, Triple G dismisses the relevance of RS 2477, stating that the federal government's open offer of rights of way under RS 2477 "could only be

accepted by strictly following the statutory procedures to establish a public highway." [Triple G Motion, p. 7] This limited reading, however, ignores the actual language of the cases Triple G cites, as well as the doctrine of common law dedication under Arizona law.

In 1866, Congress passed an open-ended, self-executing grant of "[t]he right-of-way for the construction of highways over public lands, not reserved for public uses." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (codified at 43 U.S.C. § 932). In the years after its enactment, R.S. 2477 was uniformly interpreted by the courts as an express dedication of the right of way by the landowner, the United States, to the public. *See State v. Crawford*, 7 Ariz. App. 551, 555 (1968); *S. Utah Wilderness Alliance*, 425 F.3d at 769. In Arizona, this offer could be accepted in any manner which complies with state law. *Crawford*, 7 Ariz. App. at 555.

One legal way of accepting an offer of right of way by the federal government (or an offer by any other property owner, for that matter) is by "strictly complying" with the elements necessary to establish a public right of way though common law dedication. Since before statehood, Arizona has recognized that a property owner can dedicate land for use as public roads. *See, e.g., Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421 (2004); *Evans v. Blankenship*, 4 Ariz. 307 (1895). "It was settled long ago in this state that the doctrine of common law dedication applies to the dedication of roadway easements for public use." *Id.* Common law dedication creates an easement for public use over the subject property, allowing the public to use the dedicated land for specified purposes, while fee title remains with the dedicator. *Pleak*, 207 Ariz. at 421 (2004) (citing *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 290 (1947); *Moeur v. City of Tempe*, 3 Ariz.App. 196, 199 (1966)).

An offer to dedicate may be accepted by continuous public use for a period of time, demonstrating the public's acceptance of the offer. *See Pleak*, 207 Ariz. at 424;

Hunt v. Richardson, 216 Ariz. 114, 119 (App. 2007). Governmental repair, maintenance, and depiction of a road on official maps also are traditional signs of governmental acceptance of a dedication. *See, e.g.*, S. *Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006); Restatement (Third) of Property: Servitudes § 2.18 cmt. e (2000). After an offer of a public right of way has been accepted – by public use or government action – underlying fee title to the property remains with the owner. But the property is irrevocably dedicated and subject to an easement, in favor of the general public and/or the governmental entity accepting that easement.

In this case, the County accepted the federal government's grant of right of way by identifying the Roadway property as a public road in the County records, and by consistently maintaining the roadway using County funds. Use of the Roadway as a thoroughfare for travel by the general public for many years prior to the County's actions also constituted acceptance of the federal government's offer. These actions by both the County and the public perfected the common law dedication of the public right of way, regardless of the state of title. Old Trails Highway remains a public road, whether the County owns it in fee title through a taking or title to a permanent easement pursuant to common law dedication..

Precedent is clear that an offer under RS 2477 can be accepted by <u>any means</u> permitted under state law. Precedent is also clear that the doctrine of common law dedication <u>is</u> a permissible way to accept a dedication of right of way under Arizona state law. In spite of these facts, Triple G still inexplicably argues that failure to strictly comply with the elements of A.R.S. § 28-6701 is somehow fatal to the County's claim of RS 2477 right of way. Triple G cites *Tucson Consol. Copper* in this context, again failing to acknowledge the full extent of its disfavored status.

To the extent Triple G argues that *Tucson Consol. Copper* precludes RS 2477

rights of way established by common law dedication, any such a holding was certainly overruled in 2004 by *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. at 421. In *Pleak*, the Arizona Supreme Court rejected Triple G's notion that "there are only two categories of roads—public and private—and the former can only be created pursuant to statute." *Id.* Instead, the court affirmed the continued viability of the doctrine of common law dedication, i.e., "the dedication of roadway easements for public use," noting that the doctrine had never been abrogated by statute. *Id.* at 421-423 (specifically referencing the public highways statute), citing *Thorpe v. Clanton*, 10 Ariz. 94, 99-100 (1906).

The facts in this case demonstrate that both the County and the general public long ago accepted the federal government's offer under RS 2477 to dedicate federal lands as public rights of way. Triple G does not dispute the long history of public traffic upon the Roadway, the documentation by the County of the Roadway as part of its system of highways, or the expenditure of County funds to maintain and repair the Roadway over the last century. Accordingly, there can be no other conclusion than a public right of way was established by common law dedication, and Triple G has no right or power to restrict the travel of the general public along the Roadway.

IV. Conclusion.

The law and facts are clear. The County effected a *de facto* taking of the Roadway property years ago, by physically occupying, laying out and maintaining the Roadway for public use for over a century. No authority – whether cited by Triple G in its Motion or otherwise – can negate the County's inherent extraconstitutional right of eminent domain. The only recourse for such a taking is a timely claim for just compensation. Alternatively, a public right of way has been established upon the Roadway property pursuant to common law dedication. On either one of these independent bases, this Court should deny Triple G's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 5th day of September, 2017.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, political subdivision, Defendant/Counterclaimant.	No. CV2016-017837 **MOHAVE COUNTY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Connie Contes) (Oral Argument Requested)

INTRODUCTION

The County's position in this matter is consistent and clear. By physically occupying, repairing, and maintaining the Roadway for public use for over a century, the County has acquired the Roadway property through its inherent right of eminent domain. The County's occupation and use of the property constitutes a *de facto* governmental taking, which deprived Triple G's predecessors in interest of any ownership in the Roadway many years before Triple G even purchased the surrounding land. In the alternative, a public right of way was established on the Roadway property through common law dedication. Under either theory, the Roadway remains a public road.

In its Response to the County's Motion, Triple G does not deny any of the facts set forth by the County: that the Roadway itself predates Arizona statehood; that it has been used as a thoroughfare for public travel for over 100 years; that in 1917 the County accepted the Roadway into the County highway system and recorded maps showing the Roadway as the sole means of accessing the town of Hackberry; and that the County has continued to repair and maintain the Roadway for public use up until the time Triple G initiated this current dispute and subsequent legal action.

Instead, Triple G resorts to mischaracterizing and misrepresenting the County's legal arguments in an effort to obscure the unavoidable conclusion in this matter – that Triple G cannot unilaterally close a public right of way. Triple G's Response misstates the law on eminent domain and *de facto* takings, and attempts to impose nonexistent restriction on common law dedication. As set forth below, and as discussed in the County's previous briefs, the only way for Triple G to prevail on its quiet title claim is if decades of Arizona legal precedent regarding eminent domain and common law dedication are overturned. The Court should decline to do so, and instead enter summary judgment finding either (1) that the County has acquired title to the Roadway Property, or (2) there is a public right of way upon the Roadway Property; and that Triple G is therefore not entitled to quiet title or close the Roadway.

The County incorporates by reference all arguments and facts set forth in its Response to Triple G's Motion for Summary Judgment, filed September 5, 2017.[1]

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[1] In its Motion for Summary Judgment, the County intentionally did not address its condemnation count or the damage claims set forth in its Counterclaims. The County understood that the simultaneous motions to be filed by the parties were to deal with the factual and legal issues concerning title, ownership, and encumbrances of the Roadway property only, and that the other derivative damage claims would be addressed if necessary after a ruling on the motions. The County's failure to include these damage claims in its Motion explicitly seeking judgment in its favor only on the issues of quiet title and ownership should not preclude the Court from ruling in its favor.

I. Triple G cites no authority to support its claim that the government cannot take property for a roadway purpose.

In its Response, Triple G argues simply that it is legally impossible for the County take the Roadway property – or any other property – for a roadway purpose. This contention is contrary to both Arizona case law and the Arizona Constitution, and ignores the fundamental nature of the right of eminent domain. *See* Ariz. Const. art. 2, § 17 ("No private property shall be taken or damaged for public or private use without just compensation[.]"). "The right [of eminent domain] is an inherent one that pertains to sovereignty as a necessary, constant and inextinguishable attribute. Constitutional provisions do not create or grant the power." Kerrick, et al., *Eminent Domain in Arizona*, 3d (State Bar of Arizona, 2013) §1.1 (and cases cited therein). The County's inherent right of eminent domain to acquire property for a public purpose is limited only by the constitutional limitation of just compensation, and nothing else. *Id*., *Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 193 (1993) (inverse condemnation of property for highway). A party suffering a *de facto* taking is limited to the remedy provided by the Takings Clause – just compensation – and is *not* entitled to undo the taking. *Madison v. Graham*, 316 F. 3d 867 (9th Cir. 2002) (remedy for alleged "unconstitutional" taking is just compensation, relief not available under Due Process clause). See also, *Esplanade Properties, LLC v. City of Seattle*, 307 F. 3d 978 (9th Cir. 2002); *Armendez v. Penman*, 75 F. 3d 1311 (9th Cir. 1996).

Indeed, the Arizona cases cited by Triple G in support of this proposition deal with claims of prescription, focusing on use by the public. None of these cases even include claims regarding adverse possession, or claims by the government that it has effected a *de facto* taking. *See, e.g., Tucson Consol. Copper Co. v. Reese*, 12 Ariz. 226, 229 (1909); *Old Pueblo Transit Co. v. Arizona Corp. Comm'n*, 84 Ariz. 389, 393 (1958); *Curtis v. Southern Pac. Co.*, 39 Ariz. 570, 573 (1923); *Champie v. Castle Hot*

Springs Co., 27 Ariz. 463, 467 (1925).[2] By contrast, this case is concerned with appropriation or taking of property by the government for roadway purposes. Where the property is taken for a public use, such as a road, the only remedy is a timely claim for just compensation under the Takings Clause. *Flood Control District of Maricopa County v. Gaines*, 202 Ariz. 248, 251 (App. 2002) (a claim for inverse condemnation must be brought within one year of its accrual).

Triple G also argues that "a taking requires dispossession." [Triple G Response at p. 5] This assertion is belied by the very case Triple G cites in support of its argument: "A taking occurs when an entity with the power of eminent domain substantially deprives an owner of the use and enjoyment of its property *or* physically invades it." *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 478 (App. 2009) (emphasis added). In reality, it is black letter Arizona law that a taking does not have to "dispossess" a property owner, or even completely deprive a property owner of all uses of the property – if government action places restrictions on how property can be used, diminishing a property owner's use and enjoyment of his property, then a taking has occurred. *See State v. Mabery Ranch, Co.*, 216 Ariz. 233, 242 (App. 2007); *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 184 (App. 2002); *State ex rel Herman v. Hague*, 10 Ariz.App. 404, 406 (1969) (impairing direct access to property constitutes taking; actual physical taking of property not required). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (cable TV wires strung across apartment building exterior, held: physical invasion, no matter how minimal, is a taking).

There is simply no authority for Triple G's remarkable and wholly unsupported

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[2] Triple G inexplicably cites *Champie* for the proposition that government maintenance and public use of a roadway does not constitute a government taking, ignoring the fact that the issue of *de facto* taking was never even raised in that case. Indeed, both plaintiff and defendant were private parties without the power of eminent domain – neither party could even have made a takings claim.

proposition that the government's inherent right of eminent domain is somehow limited beyond the sole Constitutional limitation of just compensation when it takes property for roadway purposes. No such limitation appears in the Constitution, which is the only limiting authority on the sovereign right to acquire property for public purposes.

II. The authority cited by Triple G in its Response supports the County's *de facto* taking claim.

Not only do the cases cited by Triple G fail to support its arguments, but their holdings actually offer support for the County's *de facto* taking claim. Specifically, the holdings in *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611 (1993) and *Gotland v. Town of Cave Creek*, 175 Ariz. 614, 615 (1993), confirm the government's power to effect a *de facto* taking of property for roadway purposes.

The underlying issue in *Dawson* was whether the property owner was entitled to claim just compensation in the context of an inverse condemnation of a roadway in light of the State's argument that such claims were barred by the statute.[3] The Court held that a *de facto* taking of the roadway property had occurred, and that the statute itself did not relieve the State of its duty to pay just compensation for said taking. In light of the Court's finding, the road remained an open public road. The case was remanded to the trial court "to proceed on damages only, expressly leaving open all questions relating to any applicable limits that would apply to plaintiff's damages, including any limitations on the period of time for which damages could be claimed." *Dawson*, 175 Ariz. at 611. The property owner did not get to dispossess the sovereign and close the

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[3] While the County maintains that the curative statute was erroneously interpreted by the court in *Dawson*, (as set forth fully in the County's Response to Triple G's motion, filed September 5, 2017), the County does not believe that *Dawson* mandates a different result insofar as the only issue before that court was whether the curative statute relieved the government of the duty to pay just compensation upon a *de facto* taking.

road, and his only recourse was a claim for compensation. That is the same result that the County seeks in this case.

In *Gotland*, the Supreme Court similarly reversed and remanded to the trial court to resolve only issues regarding compensation for the taking that had occurred. *See Gotland v. Town of Cave Creek*, 172 Ariz. 397, 399 (App. 1991), vacated, 175 Ariz. 614 (1993) ("the only genuine issue of material fact was the amount of damages to which the Gotlands were entitled" for the taking). Accordingly, the holdings in *Dawson* and *Gotland* provide further support for the County's *de facto* takings claim.

For these reasons, the language of the curative statute supports the County's claim of taking–under the plain language of statute, property meeting these standards has been taken by the County for use as a road. Here, as in *Dawson* and *Gotland*, the only recourse for such a taking is an action for compensation. Triple G cannot eject the government from the Roadway property.[4]

III. The doctrine of common law dedication applies to any offers to dedicate property, including necessarily federal offers under R.S. 2477.

In its Response, Triple G does not deny that the doctrine of common law dedication is a proper way under Arizona law to create public rights of way. Instead, Triple G attempts to impose limits the doctrine itself, by making the bold claim that it does not apply when it comes to offers to dedicate made by the federal government. None of the cases cited by Triple G support such an argument, and ruling to create such

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[4] Triple G itself highlights the fact that the County has cited multiple elements of factual support for its claim that the Roadway property has been appropriated for a public road; Triple G argues that this is somehow a concession that any one element is "not enough." This is wrong. The fact that the Roadway has not only been used by the public for over a century, but it has also been maintained and repaired by the County, depicted on County road maps, and held out in County resolutions as a public road, serves to provide overwhelming evidence of the public character of the Roadway.

a limitation would require overturning recent Arizona Supreme Court precedent.

R.S. 2477 has been uniformly interpreted by the courts as an express dedication of the right of way by the landowner, the United States, to the public. *See State v. Crawford*, 7 Ariz. App. 551, 555 (1968); *S. Utah Wilderness Alliance*, 425 F.3d at 769. In Arizona, this offer could be accepted in any manner which complies with state law. *Crawford*, 7 Ariz. App. at 555. One legal way of accepting an offer of right of way by the federal government (or an offer by any other property owner, for that matter) is by "strictly complying" with the elements necessary to establish a public right of way though common law dedication. *See, e.g.*, *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 421 (2004); *Evans v. Blankenship*, 4 Ariz. 307 (1895). Common law dedication creates an easement for public use over the subject property, allowing the public to use the dedicated land for specified purposes, while fee title remains with the dedicator. *Pleak*, 207 Ariz. at 421 (2004) (citing *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283, 290 (1947); *Moeur v. City of Tempe*, 3 Ariz.App. 196, 199 (1966)).

An offer to dedicate may be accepted by continuous public use for a period of time, demonstrating the public's acceptance of the offer. *See Pleak*, 207 Ariz. at 424; *Hunt v. Richardson*, 216 Ariz. 114, 119 (App. 2007). Governmental repair, maintenance, and depiction of a road on official maps also are traditional signs of governmental acceptance of a dedication. *See, e.g.*, S. *Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005), as amended on denial of reh'g (Jan. 6, 2006); Restatement (Third) of Property: Servitudes § 2.18 cmt. e (2000). After an offer of a public right of way has been accepted – by public use or government action – underlying fee title to the property remains with the owner. But the property is irrevocably dedicated and subject to an easement, in favor of the general public and/or the governmental entity accepting that easement.

In arguing that the doctrine of common law dedication does not apply in the

context of RS 2477, Triple G relies heavily on the language in *Tucson Consol. Copper Co. v. Reese*, that

> The matter of the establishment of public highways, as declared by us in Territory v. Richardson, is wholly statutory. The act of Congress of 1866, being section 2477... in granting rights of way for public highways over the public domain, is not to be construed as granting such rights of way and establishing highways contrary to the laws of the state or territory in which the lands affected are located.

12 Ariz. 226, 229, (1909). Triple G interprets this language to mean that the doctrine of common law dedication has no application when it comes to RS 2477 grants. However, Triple G ignores the fact that the doctrine of common law dedication was not even raised in that case, let alone limited in its application by that holding. More importantly, as detailed above, public rights of way established by common law dedication are not "contrary to the laws of the state" of Arizona. Numerous Arizona cases have upheld common law dedication as a lawful means of establishing public rights of way. Precedent is clear that an offer under RS 2477 can be accepted by <u>any means</u> permitted under state law. Precedent is also clear that the doctrine of common law dedication <u>is</u> a permissible way to accept a dedication of right of way under Arizona state law.

Furthermore, to the extent Triple G argues that *Tucson Consol. Copper* precludes RS 2477 rights of way established by common law dedication, any such a holding was certainly overruled in 2004 by *Pleak*. In *Pleak*, the Arizona Supreme Court explicitly rejected Triple G's notion that "there are only two categories of roads—public and private—and the former can only be created pursuant to statute." *Id.* Instead, the court affirmed the continued viability of the doctrine of common law dedication, i.e., "the dedication of roadway easements for public use," noting that the doctrine had never been abrogated by statute. *Id.* at 421-423 (specifically referencing the public highways statute), citing *Thorpe v. Clanton*, 10 Ariz. 94, 99-100 (1906).

Triple G also argues that because *Pleak* only discusses common law dedication in the context private landowners, this means the government is precluded from ever dedicating property via common law dedication. This argument has no merit. *Pleak* mentions private land owners because the land at issue in *Pleak* was privately owned. There is no authority that even suggests an offer of dedication by the federal government should be treated any differently than an offer of dedication by an individual. Nor is there any authority that an offer of dedication by the federal government cannot be accepted under Arizona law by meeting the requirements of common law dedication.

The facts in this case demonstrate that both the County and the general public long ago accepted the federal government's offer under RS 2477 to dedicate federal lands as public rights of way. Triple G does not dispute the long history of public traffic upon the Roadway, the documentation by the County of the Roadway as part of its system of highways, or the expenditure of County funds to maintain and repair the Roadway over the last century. Accordingly, there can be no other conclusion than a public right of way was established by common law dedication, and Triple G has no right or power to restrict the travel of the general public along the Roadway.[5]

Triple G finally claims that there is no merit to the County's argument that

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[5] Triple G argues that the County has not properly pled its argument regarding common law dedication. The County notes that common law dedication has been properly raised as a defense to Triple G's original claim of unrestricted ownership of the Roadway property. Not only was it disclosed in the County's 26.1 disclosure statement, but Triple G itself admits that the County claimed a public right of way by common law dedication of the Roadway before the instant suit was even filed, in a letter the County sent to Triple G. It is baffling that Triple G now acts as though this valid defense was not previously raised. To the extent Triple G demands this defense be raised as a Counterclaim, the County will gladly amend their claims accordingly if the Court determines it is necessary. Ariz. R. Civ. P. 15(a)(2) ("Leave to amend must be freely given when justice requires.")

actions by previous property owners provide additional evidence of common law dedication by those individual owners. Tellingly, Triple G offers no explanation why previous Grigg owners of the property identified the Roadway as a public road in deeds and other documents. In fact, the only reasonable explanation is that these property owners agreed with the County's current arguments as to the public character of the Roadway. This evidence chips away at Triple G's claim to private ownership of the total Roadway property. The County has never argued that dedication of the Roadway across any single parcel somehow accomplishes a dedication of the entire Roadway. But these individual dedications are additional pieces of evidence demonstrating the connecting segments of the Roadway were, indeed, public rights of way, having been taken by the County through its power of eminent domain, or having been established through common law dedication. Triple G's mischaracterizations do not make the evidence in the County's favor any less overwhelming.

IV. Conclusion.

Despite Triple G's attempts to confuse the issues, the law in this case is clear. The County effected a *de facto* taking of the Roadway property years ago, by physically occupying, laying out and maintaining the Roadway for public use for over a century. There is no Arizona authority negating the County's inherent extraconstitutional right of eminent domain, nor can there be. Triple G's only recourse for this a taking is a timely claim for just compensation. Alternatively, a public right of way has been established upon the Roadway property pursuant to common law dedication. On either one of these independent bases, this Court should grant the County's Motion for Summary Judgment, finding either (1) that the County has acquired title to the Roadway Property, or (2) there is a public right of way upon the Roadway Property; and that Triple G is therefore not entitled to quiet title or close the Roadway.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

TRIPLE G PARTNERSHIP, FRED C. GRIGG, and TED J. GRIGG, Plaintiffs/Counterdefendants, v. MOHAVE COUNTY, a political subdivision, Defendant/Counterclaimant.	Case No. CV2016-017837 **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** **(Oral Argument Requested)** (Assigned to the Honorable Connie Contes)

The County's Response presents a classic strawman argument to hide the reality that it is asking the Court to go where no court has gone before (without later being overturned) and create avoidable conflicts between Arizona Supreme Court precedent. Wrapping itself in the righteousness of the sovereign's ability to take private property without paying for it, the County accuses Triple G of arguing that the government can never take "property if the property is to be used for a roadway purpose." Mohave County's Response Opposing Plaintiff's Motion for Summary Judgment ("Response") at 7:19. Of course, that is not Triple G's assertion.

The undisputed, material facts make this case much easier than the County would have the Court believe. The issue is not whether the County can acquire private roads or take private property to build roads (despite the County's efforts to portray the dispute as such), but whether it can take title to an existing private road in the *specific manner* asserted by the County in this case. The County argues that its use, maintenance, and its various assertions of interest in a pre-existing private dirt road constituted a *de facto* taking of title. Response at 4:16-19. However,

the authorities are unanimously against the County. In Arizona, government use, maintenance, and pronouncements do not, cannot, constitute a taking of title to existing private roads. *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 611-613, 858 P.2d 1213, 1214-1216 (1993). The government cannot take title to an existing private road simply by calling dibs, using it, or maintaining it.

With respect to its common law dedication argument, the County seeks to create a conflict between *Tucson Consol. Copper*[1] and *Pleak*[2], but the two cases are easily harmonized. On its face, *Pleak* applies to common law dedications of **private land** for roads, **other than public highways**. *Id.* at 422, 87 P.3d at 835. It does not mention, let alone discuss, the process by which R.S. 2477 offers could have been accepted. *Tucson Consol. Copper* addresses the manner in which state and local governments could have accepted the federal government's offer under R.S. 2477 for rights of way for **highways**. *Id.* at 227-29, 100 P.2d at 778-79.

The County attempts to fit itself with the white hat in this dispute by asserting it is pursuing the greater good of keeping each and every dirt road to Hackberry open by taking private roads without paying for them, but there are many problems with its narrative. First, Hackberry remains accessible to anyone. [SSOF at ¶27]. Only one redundant access point has been closed, and that was done for safety reasons. [SSOF at ¶¶28 & 29].[3] Second, Hackberry is the Griggs and the Griggs are Hackberry. They own seven of the nine houses in Hackberry and twenty-three members of their family are buried in the Hackberry Cemetery. [SSOF at ¶31]. Fred and Ted Grigg have lived in Hackberry their entire lives, on the land that has been in their family since the late 1800s. [SSOF at ¶¶32 & 33]. What the County seeks is the Court's stamp of approval for the government's brute force power grab to take a private road without paying

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[1] *Tucson Consol. Copper Co. v. Reese,* 12 Ariz. 226, 100 P. 777 (1909).
[2] *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 87 P.3d 831 (2004).
[3] This is why the County failed to even allege a harm that would justify immediate possession in its condemnation action, and why the Court denied its request. *See* March 10, 2017 Minute Entry and Order ("Minute Entry").

for it, declaring that mere use, maintenance, and assertions of right served to take the road from prior owners without compensation.

Material facts are undisputed. Despite the County's efforts to muddy the waters, the legal questions before the Court are also clear. The choice before the Court is whether to accept the County's legal arguments, which would require the Court to conclude that multiple Supreme Court cases (and their progeny) were wrongly decided, or accept Triple G's legal arguments, which are in harmony with and fully honor a century of consistent case law. No Arizona court has held that a highway can be created through a common law dedication. All Arizona courts have held that acceptance of an R.S. 2477 offer required strict compliance with the statutory procedures to establish a highway. With the exception of one case later overturned, no court has held that the government could take title to a private road through use, maintenance, and public pronouncements. All but the one, later overturned, have reached the contrary result.

It is time to quiet title for Triple G, who respectfully requests the Court grant its Motion for Summary Judgment.

1. Triple G is entitled to Summary Judgment on Count V of the County's Counterclaim.

In Count V of its Counterclaim, the County asserted that A.R.S. §28-7041 transferred title to the private roadways at issue. Belatedly and begrudgingly, the County no longer seriously disputes that this particular claim is foreclosed by the Court's holding in *Dawson*. *See* Response at 10:19-11:18.[4] Accordingly, the Court should grant Triple G summary judgment on Count V of the County's Counterclaim.

[4] The County does assert that the statute transferred title to the parcel that was federal land until 1969 and then State Trust land until 1999. Response at 11, fn 5. Interpreting the statute to authorize a transfer title of federal or State Trust lands would violate both the Arizona and federal constitutions, as the County cannot take federal lands by fiat or take State Trust Land without compensating the beneficiaries. *See, e.g., Lassen v. Ariz*, 385 U.S. 458, 469 ("Arizona must actually compensate the trust" for rights of way over trust lands).

2. The doctrine of common law dedication of easements for private land for roads, other than highways, still does not apply to the federal government's offer of right of way for public highways under RS 2477.

The County asserts that *Pleak* overruled *Tucson Consol. Copper Co*. Response at 14:26-15:2.[5] Besides the obvious problem of creating a conflict between binding precedent that does not exist, the errors of the County's argument are at least three-fold. First, even when a common law dedication occurs, it only provides an easement, not fee title as the County asserts it holds here. *See Pleak* at 421, 87 P.3d at 834; County Counterclaim ¶ 21. Second, the issue presented in *Pleak* was whether a private landowner could dedicate a roadway, and so the Court explicitly limited its holding accordingly. *Id.* at 422, 87 P.3d at 835 ("nothing in [the territorial code] suggests that landowners are somehow thereby prevented from dedicating their *privately owned* land to public use.") (emphasis in original). Third, the Court in *Pleak* acknowledged and explained the determinative distinction between "public highways," which can only be created by statute, and the right of a private landowner to dedicate an easement for a public road that is not a highway. *Id.* at 423, 87 P.3d at 836. *Pleak* allowed a private landowner to dedicate an easement that created a public road, but not a highway. But by its express terms, R.S. 2477 was an offer for rights of way for "highways." Under Arizona law, it could only be accepted by the state or local government's strict compliance with the statutory process to establish a public *highway*. *See, e.g., County of Cochise v. Pioneer Nat'l Title Ins. Co.*, 115 Ariz. 381, 382, 565 P.2d 887, 888 (App. 1977).

The County's tortured interpretation runs directly counter to *Cochise County,* which has the same fact pattern as our case, and for which the County has no answer. There, Cochise County sought an injunction to remove a barricade on a road that the county claimed was an

[5] The County also cites *State v. Crawford* for support, but *Crawford* itself cites *Tucson Consol. Copper* for the black letter proposition that an R.S. 2477 "highway must be established in strict compliance with the provisions of the Arizona law." 7 Ariz. App. 551, 555, 441 P.2d 586, 590 (1968).

established county road. *Id.* at 382, 565 P.2d at 888. The County relied on public use of the road and a 1911 map prepared by the county surveyor and approved by the board of supervisors. *Id.* In other words, the same argument that Mohave County makes today. The Court stated:

> In order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of Arizona law….

Id. at 384, 565 P.2d at 890 (internal citations omitted). The court concluded that no public highway was established under R.S. 2477 before the property was transferred to private ownership in 1915. *Id.* Faced with the same facts and law, this Court should hold likewise.

In the years since *Pleak*, both the Ninth and Tenth Circuits have reviewed Arizona law governing the establishment of public highways under R.S. 2477. Neither mentioned *Pleak*, yet each reached the same conclusion that the County scrambles to deny. *See Lyon v Gila River Indian Cmty.,* 626 F.3d 1059, 1067 (9th Cir. 2010) (rejecting the argument that the "mere existence" of the roads made them public under Arizona law; "[r]ather, Arizona must have taken some affirmative act to accept the grant represented by R.S. 2477"); *S. Utah Wilderness Alliance v. BLM*, 425 F.3d. 735, 770 (10th Cir. 2005) (noting that Arizona law requires "official action" and *citing Tucson Consol. Copper,* 12 Ariz. at 229, 100 P. at 779).

The County wants this Court to believe that a common law dedication is a viable workaround to the century of Arizona caselaw regarding R.S. 2477, yet cannot even provide a single case citation to where such a thing was discussed. For good reason, the County's assertion of a common law dedication for a public highway under R.S. 2477 has never been recognized in Arizona and is contrary to a century of consistent decisions.

3. The County's use, maintenance, and assertions of interest do not constitute adverse possession or a *de facto* taking under Arizona law.

Judge Gerlach initially indicated that he was inclined to grant Triple G's motion to dismiss the County's adverse possession claim, but decided against based on the concern that the County might be able to develop a set of facts to justify its claim. Minute Entry at p. 2. For

example, had the County taken private property to build a road where none had existed before[6], that would constitute a taking of private property.[7] Had the County paved the existing dirt private road, maybe that would constitute a taking.[8] Had the County reopened a previously closed road, perhaps that would constitute a taking.[9] But none of those theories provide the basis for the County's argument that it took title to the private roads.

Instead, the County asserts that public's use, the County maintenance, and the County's statements constitute a *de facto* taking of Triple G's title. *See, e.g.*, Response at 4:17-18. However, none of those actions constitute a taking of title under Arizona law.

If the government wants to take a road, it can condemn it, buy an easement, or accept a grant, but it cannot adversely possess. It could not do so in 1909 and it cannot do so today. *Compare Tucson Consol. Copper* at 229, 100 P. at 779 ("We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription") with *Dawson*, 175 Ariz. at 611, 858 P.2d at 1214 ("[S]ince territorial days, Arizona cases have consistently held that no public highway can be created by prescription.").

The government's maintenance of the road cannot take title because it is not adverse to Triple G's ownership. *See, e.g., Conwell v. Allen*, 21 Ariz. App. 383, 384–85, 519 P.2d 872, 873–74 (1974) (holding that maintaining grass was not sufficiently hostile to give notice of an intent to take the land); *Gardiner v. Henderson*, 103 Ariz. 420, 424, 443 P.2d 416, 420 (1968) (a

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[6] The County relies repeatedly on *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 441 (1982), which holds that "a ***permanent physical*** occupation of property is a taking." (emphasis added). Here, the County built nothing physical or permanent. If anything, *Loretto* establishes that the County has failed to make a taking of Triple G's property because it asserts only temporary acts of use and maintenance.

[7] In support of its strawman argument, the County spends much of its Response asserting the unremarkable and irrelevant proposition that private property can be taken to build a new road or expand an existing one. Response at 3:13-9:11 (*citing,* among others*, Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 195, 859 P.2d 1323, 1328 (1993) (land next to existing road can be taken for road expansion)).

[8] However, building a curb along private road was not a taking in *State ex rel. Herman v. Cardon*, 112 Ariz. 548, 551, 544 P2d. 657, 660 (1976) (County's failure to comply with the statute meant it had no right to build curb and landowner was "justified in summarily removing … the curb… without resort to legal proceedings."

[9] *See* discussion of *Gotland v. Town of Cave Creek*, 175 Ariz. 614, 858 P2d. 1217, infra.

taking "denies the owner of its usage, its rental value, and its enjoyment.") Finally, it is black letter law that the County's resolutions were **not** takings. *See City of Tucson v. Morgan*, 13 Ariz. App. 193, 193-95, 475 P.2d 285, 286-87 (1970) ("the mere passing of a resolution in the filing of a map does not constitute a taking and does not cause any interference with or invasion of the land or curtailment of its use."); *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 186, ¶22, 52 P.3d 213, 218 (App. 2002) (measuring a taking "not by what [the] state says or intends, but by what it does") (citation omitted).[10]

The County argues that the numerous cases cited by Triple G deal with claims of prescription and are therefore irrelevant to the County's adverse possession claim. Response at 6: 16-17 and 7: 3-5. The County cites no legal basis for distinguishing these claims. Is the County really arguing that use of a private road is insufficient to take an easement, but more than adequate to take full title? Such an argument is contrary to common sense and the law. Restrictions on the lesser must also restrain the greater. If you cannot take a prescriptive easement, you necessarily cannot take full title through adverse possession. *See, e.g., La Rue v. Kosich*, 66 Ariz. 299, 303, 187 P2d. 642, 645 (1947) (holding that a prescriptive easement is established by proving the elements essential to acquiring title).[11]

In an effort to undercut *Tucson Consol's* clear statement that an interest in a road cannot be taken by "adverse user," the County cites *County of Maricopa v. Anderson*, 81 Ariz. 339, 306 P.2d 268 (1957). Response at 7:25-8:16. Contrary to the County's implication, this case did not overrule *Tucson Consol's* holding that roads cannot be acquired through adverse possession.

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[10] The County now cites *DUWA* for the proposition that a taking can occur either by a physical occupation or a legal restraint. Response at 5:16-17. However, the Court held in *DUWA* that the government's statement of interest in future condemnation was not a taking. Id. at 186, 52 P.3d at 217. What is the legal restraint that the County has imposed? Is there a zoning ordinance or regulation that prohibited Triple G from closing this private road? No. If there had been one, the County would have cited the legal restraint in its demand that Triple G open the road. DUWA instead stands for the proposition that a taking requires an "official act." *Id.*

[11] Even if it were reasonable to argue that the law of prescriptive use does not apply to adverse possession claims, the County presented no facts that it holds exclusive possession, a necessary element for adverse possession.

Rather, the Court in *Anderson* found a second *statutory* right to establish a road that was not previously recognized in *Apache v Udall*, the case it overturned. *Id.* at 344, 306 P. 2d at 271.[12]

Anderson also rebuts the County's breathtaking claim that its powers were not created by the Constitution or statute. Response at 3:16-4:15.

> The power of eminent domain is a prerogative of sovereignty and sovereignty is an attribute of the state where it must always reside. It represents the composite power of all of the people in the state except as limited by the State constitution.
> A county is a creature of the state and while **no part of sovereignty is vested in the county**, it may be given the right to exercise that power as was done by the provisions of section 27-901, supra, but in doing so it is acting as the agent of the sovereign state. … **the county possesses none of the powers of sovereignty itself** and in the execution of its right to exercise such power, it necessarily acts as the agent of the sovereign, the State of Arizona.

Anderson, at 343-44, 306 P.2d at 270-71 (emphasis added). *See also City of Phx. v. Harnish*, 214 Ariz. 158, 161-62, 150 P.3d 245, 248-49 (App. 2006) ("Political subdivisions of the State, including municipalities, do not have inherent powers of eminent domain and may only exercise those powers that are statutorily delegated to them. We narrowly construe these powers and will not expand them beyond what is expressly granted by the legislature or otherwise clearly and necessarily implied from the powers expressly granted.") (internal citations omitted).

Additionally, even though the County seems to acknowledge that A.R.S. §28-7041 does not transfer title, it argues that meeting the elements of this statute instead proves a *de facto* taking. Response at 11:15-18. A spade is a spade. The statute does not transfer title, and compliance with it cannot demonstrate a *de facto* taking that transfers title.

The County's efforts to distinguish *Morgan* are simply unsupported. The County argues,

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[12] The County has casually asserted, without supporting facts, that it "laid out" the road. However, the Court also explained that the phrase "lay out" includes all the steps necessary … preliminary to construction. *Id.* at 342, 306 P.2d at 270. It would have been impossible for the County to undertake all of the steps necessary prior to construction given that the County asserts the road was built before the County existed and admits that it did not follow the statutory requirements to accept an R.S. 2477 offer. Response at 2:9; County's MSJ at 10:6-7.

without citation, that the *Morgan* Court held the statute was not applicable "only because the property…was never physically occupied by a road." Response at 10:15-16 (emphasis in Response). That is wrong, as there was an existing road at issue, Alvernon Way. 13 Ariz. App. at 193, 475 P.2d at 285. What the Court actually said was: "[w]e believe that the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property…" *Id.* at 195, 475 P2d. at 287.

Finally, there is the issue of what the Supreme Court really said in *Gotland* and *Dawson*. Attempting to spin these cases as helpful to its cause, the County ignores or misstates the procedural posture and relief sought and granted in each case. In *Gotland*, the alleged taking was not the town's historical use and maintenance of the road, but rather the town's recent declaration that the road was a public highway and contemporaneous reopening of the road after the landowner had closed it. *Gotland v. Town of Cave Creek*, 1991 Ariz. App. LEXIS 324, 837 P 2d. 1132, 1136 (1991) (*overruled by Gotland*, 175 Ariz. 614, 858 P.2d 1217). The County cites the overturned Court of Appeals decision for the proposition that "the Supreme Court similarly reversed and remanded to the trial court to resolve only issues regarding compensation for the taking that had occurred." Response at 12. Citing the overturned Court of Appeals decision for the Supreme Court's holding is a bait and switch that fundamentally misrepresents what the Supreme Court actually did, "remanding the matter for further proceedings in accordance with this opinion and the opinion in *State ex rel. Miller v. Dawson*." 175 Ariz. at 616, 858 P2d. at 1218.

This brings us to *Dawson*. Without citation, the County asserts "[t]he underlying issue in *Dawson* was whether the property owner was entitled to claim just compensation in the context of an inverse condemnation of a roadway in light of the State's argument that such claims were

barred by the statute. The Court held that a *de facto* taking of the roadway property occurred…" Response at 11:21-12:3.[13]

The County's argument is…deceptive. The *Dawson* Court most certainly did not hold that a *de facto* taking *of titl*e occurred. Explicitly and directly contrary to the County's narrative, the Court found, "[t]he state has not acquired title to the land…." 175 Ariz. at 613, 858 P2d. at 1216. The property owner had not sought damages for a taking of title, but for damages "as a result of runoff water discharged onto [his] property." *Id*. at 611, 858 P2d. at 1214. The Court sent the case back to the trial court to address the question of damages resulting from the taking associated with the floodwaters discharged on State Route 288, *for which the property owner continued to hold title*. *Id*. at 613-614, 858 P2d. at 1216-1217. Triple G seeks only to quiet title, and has not requested takings damages for floodwaters on the private roads.

In *Dawson*, the state's use, maintenance, and resolution regarding an existing state highway, State Route 288, did not transfer title to the state via a *de facto* taking. *Id.* How can the County, in good conscience, continue to argue that the County's use, maintenance and pronouncements concerning the primitive dirt roads in Hackberry constitute a *de facto* taking of title? There was no taking of title to the private roads. Triple G, not the County, holds title.

Conclusion

The County's counsel presumably missed *Dawson* when it filed its counterclaim and started down its dead-end path claiming title. This mistake was perhaps understandable, if the County only searched for cases discussing A.R.S. §28-7041, not the prior statutory reference. However, the County has stubbornly refused to acknowledge its error, first arguing that the

[13] The County also argues that the "property owner did not get to close the road…" Response at 12:9-10. This ignores the fact the landowner was not requesting court authorization to close the road. Moreover, in the event the landowner would have attempted to close State Route 288, presumably the state could have, and would have, instituted condemnation proceedings and requested immediate possession. Unlike the County's efforts to do so here, which failed because it alleged no harm from the closure of one of the private roads at issue, it is likely the state would have been successful in obtaining immediate possession of the state highway.

unanimous Supreme Court decision in *Dawson* was overruled by a Court of Appeals decision [County's Response to Motion to Dismiss at 6:7], then arguing that *Dawson* was wrongly decided, and now arguing that *Dawson* says something completely different than what it actually does. However, *Dawson* compels one outcome.

The undisputed, material facts make this a straightforward case about ownership of real property. The deeds do not reflect any interest held by the County, only Triple G.[14] And the County admits that. [County's MSJ at 1:23-24]. Next, there are Arizona statutes that might have allowed the County to accept the federal R.S. 2477 offer, but no evidence that the County ever complied with the strict statutory requirements. And the County admits that too. [County's MSJ at 10:6-7] So what is left to impede summary judgment in favor of Triple G?

The County asserts that it can take land as it wishes because it is the all-powerful sovereign.[15] [Response at 3-4] The County wants the land, so it says that it has taken it. This *ipse dixit* argument may have been barely enough to avoid a motion to dismiss, but it cannot stop a motion for summary judgment based on actual undisputed facts and law.

The County knows that it has no true basis for claiming ownership of Triple G's land, so it instead muddies the water with red herrings. These deserve little discussion. Call it "government" or "the public," neither can adversely possess a road. Response at 6. The County can beat its chest all it wants about its ability to effect a *de facto* taking, Response at 3-9, but it cannot point to any actual action that took anything from Triple G. Use and maintenance does not do it, and the County cites no case to the contrary. Instead the County argues that *Pleak*, a case about private party common law dedication, overruled *Tucson Consol. Copper* and *Cochise*

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[14] The County halfheartedly asserts that the roads are incorporated by reference into the patents [Response at 2, footnote 1], but fails to note: 1) only two of the five patents at issue reference GLO surveys; 2) these patents do not specify which GLO survey was incorporated; 3) a map showing an existing road would not vest any rights for the County; and 4) these two patents specifically reserved rights of way for various purposes, but not roads.

[15] It is not. *County of Maricopa v. Anderson*, 81 Ariz. 339, 343-44, 306 P.2d 268, 270-71 (1957) ("the county possesses none of the powers of sovereignty itself.");

County, which address the actual facets of this case and dictate strict statutory compliance before the state can accept a federal R.S. 2477 offer to create a public highway. Triple G respectfully requests that the Court not be distracted by these attempts to manufacture a dispute.

Skies are blue. Grass is green. The government cannot take title to existing private roads through use, maintenance, or assertions of title. The law of private common law dedication for roads other than highways does not apply, cannot apply, and has never been applied, to the federal government's offer of rights of way for public highways. The County is just the latest in a long line of government bodies that claims title to something without actually following the law or paying for it. Like the rest, the County's effort must fail. Triple G holds title.

Triple G respectfully requests the Court grant Triple G's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 20th day of September, 2017.

RYLEY CARLOCK & APPLEWHITE

By: */s/ Albert H. Acken*
Albert H. Acken
Nicholas P. Edgson
Attorneys for Plaintiffs/Counterdefendants

COPY of the foregoing hand-delivered
this 20th day of September, 2017 to:

Honorable Connie Contes
East Court Building, #913

COPY of the foregoing mailed
this 20th day of September, 2017, to:

Christopher W. Kramer
Laura R. Curry
Mina C. O'Boyle
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/s/ Brandi R. Kline

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/02/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017837 12/21/2017

HONORABLE CONNIE CONTES

CLERK OF THE COURT
C. Fisher/D Arrieta
Deputy

TRIPLE G PARTNERSHIP, et al.

ALBERT H ACKEN

v.

MOHAVE COUNTY

MINA C. O'BOYLE

JASON L CASSIDY

UNDER ADVISEMENT RULING

On October 23, 2017, the Court took under advisement the ruling on the following filings:

- Plaintiffs/Counterdefendants Triple G Partnership, Fred C. Grigg and Ted J. Grigg's Motion for Partial Summary Judgment, filed July 28, 2017, addressing count 1 (Quiet Title) of their complaint, filed July 28 2017; and

- Defendant/Counterclaimant Mohave County's Motion for Summary Judgment, filed July 28 2017, addressing counts I and II of its counterclaim.

The Court has considered all of the filings submitted by the parties on both pending motions for partial summary judgment, the arguments of counsel, matters of record, and the applicable law.

Based thereon,

The Court finds that the parties agree that the material facts are undisputed, no further factual development is needed, and summary adjudication is appropriate for ruling on the rights of the parties to the subject Roadway property identified in the parties' filings.

The Court finds further that the law applicable to the undisputed facts more persuasively supports the arguments advanced by Mohave County rather than plaintiffs' arguments, at least as to the establishment of a public right of way through common law dedication of the Roadway property, if not also County ownership of the Roadway property by a *de facto* governmental taking for over a century, which defeats plaintiffs' claim to quiet title and deny public access to the Roadway property.

IT IS THEREFORE ORDERED granting defendant/counterclaimant Mohave County's Motion for Summary Judgment on at least count I, as well as count II, of its counterclaim.

IT IS FURTHER ORDERED denying plaintiffs' motion for partial summary judgment on count 1 of their complaint.

Unless requested by the parties otherwise,

IT IS ORDERED affirming at this time the telephonic Trial Scheduling Conference on **January 3, 2018 at 10:30 a.m. (30 minutes allotted)** before this division.

Chris DeRose, Clerk of Court
*** Electronically Filed ***
06/12/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-017837 05/24/2018

HONORABLE CONNIE CONTES

CLERK OF THE COURT
D Arrieta
Deputy

TRIPLE G PARTNERSHIP, et al.

ALBERT H ACKEN

v.

MOHAVE COUNTY

CHRISTOPHER W KRAMER

JASON L CASSIDY

MINUTE ENTRY

East Court Building – Courtroom 913

9:12 a.m. This is the time set for Oral Argument on plaintiffs' Motion for Reconsideration or, in the Alternative, Clarification, filed January 4, 2018; response and reply thereto. Plaintiffs/Counterdefendants Triple G Partnership, Fred C. Grigg (who is present) and Ted J. Grigg (who is present) are represented by counsel, Albert H. Acken. Defendant/Counterclaimant Mohave County is represented by counsel, Laury R. Curry on behalf of Christopher W. Kramer.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding the status of the case, filings in this matter, and the court's previous rulings.

Argument is heard and considered on the Motion for Reconsideration.

Based upon the matters presented and for the reasons stated on the record, the court clarifies her minute entry ruling dated December 21, 2017, by granting partial relief to each party, such that plaintiffs/counterdefendants retain title to the Roadway Property, subject to a right of way easement to the Roadway Property acquired by the County by common law dedication.

IT IS THEREFORE ORDERED:

1. Granting each party partial relief. Specifically, the court confirms her prior ruling by minute entry dated December 21, 2017, by granting defendant/counterclaimant Mohave County's Motion for Summary Judgment on Count 1 of its counterclaim to the extent that the County has acquired a right of way easement to the Roadway Property by common law dedication.

2. Denying at this time defendant/counterclaimant Mohave County's Motion for Summary Judgment on Count II of its counterclaim to quiet title by its exercise of its right of eminent domain through a *de facto* taking.

3. Confirming the denial of plaintiffs/counterdefendants' Motion for Partial Summary Judgment on Count 1 of their complaint to the extent that the County has acquired a right of way easement to the Roadway Property by common law dedication.

4. The parties shall confer in an effort to reach agreement upon the proposed form of judgment that conforms with the court's ruling.

5. No later than **thirty (30) days** from the filing date of this minute entry order, counsel for Mohave County shall submit a proposed form of judgment. The form of judgment shall conform with the rulings made on the record today. If no further matters remain pending, Rule 54(c) language shall be included. Otherwise, the parties shall include detailed explanation as to why Rule 54(c) language is not applicable.

6. In the event that the parties agree that Rule 54(c) does not apply, the court will proceed with the Pretrial Status/Trial Scheduling Conference set for September 14, 2018.

10:05 a.m. Matter concludes.

Dale S. Zeitlin (#006615)
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Attorneys for Defendants DJL 2007 LLC;DJL Enterprises, LLC; East Coast Investor Group 535, LLC; Mark G. and Carol A. Knorr; Silver Creek Land Co., LLC; and Michael Suda and Donald Suda

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

ARIZONA ELECTRIC POWER COOPERATIVE, INC., Plaintiff, v. DJL 2007 LLC, an Arizona limited liability company; GARRY OWEN, LLC, an Arizona limited liability company; DJL Enterprises, LLC, an Arizona limited liability company; and MOHAVE COUNTY, ARIZONA; *et al* Defendants.	Case No.: CV2014-04008 (Consolidated) CV2014-04009 CV2014-04010 CV2014-04011 CV2014-04012 CV2014-04013 **REVISED PARTIAL FINAL JUDGMENT AND STAY ORDER** (Assigned to the Honorable Charles W. Gurtler, Jr., Division I)
MOHAVE ELECTRIC COOPERATIVE, INCORPORATED, an Arizona Electric Cooperative Non-Profit Membership Corporation, Intervenor.	

Pursuant to Stipulation, the Court enters the following Partial Final Judgment and Stay Order:

This matter having come on regularly before the Court on two motions, both of which the Court has decided as a matter of law:

1. The parties' cross-motions for summary judgment regarding the ownership of the improvements; and

2. The parties' cross-motions regarding the date of value

The Court, having considered the parties' briefs and having heard oral arguments, hereby adopts and incorporates the findings, analyses, and decisions set forth in the Court's orders dated November 3, 2014, and January 8, 2016 as though fully set forth herein. The November 3, 2014 order is attached as Exhibit 1 and the January 8, 2016 order is attached as Exhibit 2 and are incorporated herein made a part of this final judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that pursuant to Rule 54(b), Arizona Rules of Civil Procedure, there is no reason for delay in the entry of this partial final judgment and the entry of this partial final judgment is hereby directed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, staying all further proceedings in this Court until the parties have exhausted their appeals of this partial final judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, pursuant to A.R.S. §12-2101(A)(6), this judgment is a final determination of the rights of the parties, and the only issue remaining before the Court is the amount of recovery. The Court, therefore, certifies this matter for immediate appeal.

Done in Open Court this 22nd day of Aug., 2018.

JUDGE OF THE SUPERIOR COURT

ORIGINAL of the foregoing e-lodged
this 22nd day of August 2018

COPY of the foregoing served via
Turbo Court and U.S. Mail this same day to:

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/s/ Luis E. Gomez

EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE CHARLES W. GURTLER, JR., JUDGE
DIVISION I – BULLHEAD CITY *ks
DATE: NOVEMBER 3, 2014

COURT ORDER

SOUTHWEST TRANSMISSION COOPERATIVE, INC., Plaintiff, v. DJL 2007 LLC, an Arizona limited liability company; GARRY OWEN, LLC, an Arizona limited liability company; DJL ENTERPRISES, LLC, an Arizona limited liability company; MOHAVE COUNTY, ARIZONA, Defendants.	NO. CV-2014-4008
MOHAVE ELECTRIC COOPERATIVE, INCORPORATED, an Arizona electric cooperative non-profit member corporation, Intervenor.	

Pending is Defendants' Motion to Determine Date of Valuation. The Court has reviewed the briefing and has had the benefit of oral argument. The Court issues its Court Order specifying its Findings of Fact, Conclusions of Law and Orders.

The parties agree on a number of basic legal principals. These include that: the Plaintiff has a right to initiate condemnation proceedings; that the Plaintiff is an agent of the state in order to acquire an interest in property; and that the date of valuation must be the date of the taking. The parties vehemently disagree as to what the date of the taking is. The Court must interpret all of the statutory provisions and case law cited by the parties in light of the present factual circumstances in these consolidated cases.

The most pertinent factual circumstance is that the Plaintiff and Intervenor have transmission lines that traverse across Plaintiff's property necessitating the subject easement. The transmission lines exist as a result of having been constructed under a thirty (30) year right-of-way that was granted by the United States Department of the Interior, Bureau of Land Management, to Plaintiff's predecessor-in-interest. This right-of-way was renewable; however, Plaintiff did not exercise the option to renew the Right-of-Way Agreement. Defendants are the successors-in-interest to the United States Department of the Interior, Bureau of Land Management.

Plaintiff has argued that this is essentially an inverse condemnation case scenario and that the date of taking should be established as of the date of entry onto the subject property. Defendant argues there is no right

of entry and that the date of valuation must be established as close in time to the date of trial as Plaintiff does not have a statutory right to immediate possession. The Court must disagree with both parties analysis.

The Court starts with the proposition that the date of taking is presumptively the date of the issuance of the Summons as statutorily set forth in A.R.S. § 12-1123.

> For the purpose of assessing compensation and damages, the right to compensation and damages shall be deemed to accrue at the date of the summons, and its actual value at that date shall be the measure of compensation and damages.
>
> A.R.S. § 12-1123(A).

Plaintiff has argued that the date of entry onto the property by the Plaintiff under a claim of right should be the date of valuation citing Calmat of Arizona v. State ex rel. Miller, 176 Ariz. 190, 195, 859 P.2d 1323 (1993). However, in Calmat, the date of entry was based upon an Order of Possession issued in a case that was subsequently dismissed for lack of prosecution. When there is immediate possession before a final Judgment, compensation is deemed as of the date the Order of immediate possession is entered by the Court. A.R.S. § 12-1123(B). The Court cannot equate the Plaintiff's date of entry as being under a claim of right as was determined in Calmat. The Court must agree with Plaintiff's assertion that the Plaintiff is deemed the agent of the State for the purposes of this condemnation action.

> The person seeking to acquire property for any of the public uses authorized by this title is an agent of the state.
>
> A.R.S. § 12-1115(C).

The effect of A.R.S. §12-1115(C) is that as of the date of issuance of the Summons, the Plaintiff became the agent of the state for the purposes of this condemnation action. Prior to the initiation of this condemnation action, the Plaintiff was not an agent of the State of Arizona. As an example, in an inverse condemnation case, the taking of property occurs when the government assumes "actual possession of the property." State v. Mabery Ranch Co., LLC, 216 Ariz. 233, 242, 165 P.3d 211 (App. 2007). Plaintiff became an agent of the state as of the filing of the Complaint in this matter. As of that date of filing, the "government" had actual physical possession and entered the subject property. This further corresponds to the statutory provision that the date of the taking is presumptively the date of the issuance of the Summons under A.R.S. § 12-1123(A).

Such a finding also comports with the City of Scottsdale v. CGP-Aberdeen, 217 Ariz. 626, 177 P.3d 1198 (App. 2008), review denied (2008). In CGP-Aberdeen, it was determined the date of valuation as of the date of the Summons did not control, it was rather when the government took legal possession of the subject property. In this instance, the government took possession of the subject property through its agent on the date the Complaint was filed and Summons issued.

There are also important policy considerations here. One such policy consideration is by establishing a specific valuation date there is certainty. There is not certainty with respect to attempting to appraise the property in the present time based upon a future date of valuation which is set as of a trial date in the future.

Determining the date of valuation based upon the date of the Summons, and thus the lawful taking of the property, is also consistent with fundamental property rights. As of the date of the filing of the Complaint and Summons, the Defendants' respective property rights, are now clearly affected by an adverse interest. The physical invasion of the property coupled with a right to condemn an interest in land affects the Defendants'

ability to exercise the cornucopia of rights within that bundle of property rights. Defendants' property rights are now subservient to the easement to be established in favor of the Plaintiff. Prior to the filing of the Complaint in this matter, Defendants could have demanded the removal of the lines and sought ejectment of the same. That right is extinguished through the filing of the Complaint with the Plaintiff being statutorily deemed an agent of the state.

However, this does not end the analysis. Defendants are entitled to fair compensation for the taking of the property. However, that does not resolve damages to the Defendants for the time frame that the Plaintiff and Intervenor were hold-over tenants. The Defendants have argued that they are entitled to rental damages through the date of valuation, which should be the date of the beginning of the trial. The Court can only partially agree with that analysis. The Defendants are entitled to rental damages through the date of valuation. However, that date of valuation is as of the date of the issuance of the Summons in the matter.

IT IS, THEREFORE, ORDERED determining the date of valuation as of the date of the issuance of the Summons in this matter.

Counsel have advised the Court that they should be able to work out a discovery schedule and provide the Court with Joint Report and Scheduling Order once the Court determines the date of valuation. The Court commends all counsel for being able to work well with one another. Obviously, any such appraisals as to the taking damages as of the date of valuation as referenced herein, must also address rental damages from the date of the expiration of the thirty (30) year right-of-way to the date of the filing of the Complaint in this matter.

IT IS, THEREFORE, ORDERED directing the Clerk to bring the file to the attention of the Court on November 17, 2014, for the Court's internal review with respect to the Joint Report and proposed Scheduling Order in this matter.

cc:

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Honorable Charles W. Gurtler, Jr.
Division I

EXHIBIT 2

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE CHARLES W. GURTLER, JR., JUDGE
DIVISION I – BULLHEAD CITY *ks
DATE: JANUARY 8, 2016

COURT ORDER

SOUTHWEST TRANSMISSION COOPERATIVE, INC., Plaintiff, v. DJL 2007 LLC, an Arizona limited liability company; GARRY OWEN, LLC, an Arizona limited liability company; DJL ENTERPRISES, LLC, an Arizona limited liability company; MOHAVE COUNTY, ARIZONA, Defendants.	NO. CV-2014-4008
MOHAVE ELECTRIC COOPERATIVE, INCORPORATED, an Arizona electric cooperative non-profit member corporation, Intervenor.	

The Court took under advisement the parties' Cross-Motions for Summary Judgment. For the reasons hereinafter specified,

IT IS ORDERED granting Plaintiff SOUTHWEST TRANSMISSION COOPERATIVE, INC. and Intervenor MOHAVE ELECTRIC COOPERATIVE, INC.'s Motion for Partial Summary Judgment Re: Evaluation.

The Court finds that there are no genuine issues of material fact in accord with Rule 56(A), A.R.C.P. The following facts are undisputed. The United States Department of Interior through the Bureau of Land Management granted a Right-of-Way to Arizona Electric Power Cooperative, Inc. (hereinafter "AEPCO"). This grant was recorded at Fee No. 83-38721 Official Records of Mohave County. The Right-of-Way granted to AEPCO an easement for an electrical transmission line.

AEPCO proceeded to construct the electrical transmission lines. Plaintiff is the successor-in-interest to AEPCO. Defendants are now the record title holders of the subject real property succeeding to the interest of the United States. For the purposes of the Motion, the Court finds that the electrical transmission lines or structures are permanent and that there was no intent to remove them. The Court must view the evidence in the light most favorable to the opposing party. Law v. Verde Valley Med. Ctr., 217 Ariz. 92, 94 ¶ 7, 170 P.3d 701, 703 (App. 2007). Ainsa v. Salt River Valley Water Users Ass'n., 6 Ariz.App. 290, 432 P.2d 149 (1967).

The easement expired on May 14, 2011, without being renewed. Plaintiff and Intervenor's lines remained on Defendant's property without the benefit of any interest in the subject real property by way of easement, grant, right-of-way, license or the like. Additionally, Plaintiff and Intervenor use the lines traversing Defendants' property for the transmission of electricity.

Defendants initially filed a Motion for Partial Summary Judgment arguing that the transmission improvements should be valued and just compensation paid for the same. Neither the parties nor this Court has been able to find any Arizona case law concerning the factual scenario present before the Court. However, numerous other jurisdictions have dealt with similar factual situations. Indeed, as far back as 1900 the Supreme Court of Washington wrote about this issue as follows:

> The law upon the subject is well settled, and the question does not justify extended discussion. [Cites omitted.]
>
> Seattle & M.R. Co. v. Corbett, 22 Wash. 189, 190, 60 P. 127 (1900).

In Seattle & M.R. Co., a railway company took possession of the defendant's property in June, 1891 and proceeded to construct its railroad. In February, 1899, condemnation proceedings were initiated by the railroad company for the land it had appropriated consisting of 8.5 acres. The trial court granted to defendant landowner damages for the value of the land taken, as well as the value of all of the improvements placed upon the land consisting of rails, ties, bolts, fishplates, etc. Seattle & M.R. Co., 22 Wash. at 190, 60 P. at 127-128.

In this case, the Defendants have argued that the Plaintiff and Intervenor are trespassers. Under the common law, the improvements were intended to be permanent, and upon expiration of the right-of-way, the transmission lines are fixtures and became that of the landowner. The Defendants further point out that at no time has rent been paid by the Plaintiff or Intervenor. However, the common law doctrine of fixtures is inapplicable to the question at hand.

> The question is not controlled by the rule of common law, under which structures erected by tort feasors become part of the real estate. Unlike tort feasors, at common law the railroad possessed the power to condemn and acquire title, the condition upon which it might do so being that it should make just compensation; and it would be monstrously unjust to hold that it should be required to pay the value of the improvements which it had placed upon the land prior to its acquisition.
>
> Seattle & M.R. Co., 22 Wash. at 190-191, 60 P. at 128.

Numerous other courts have reached the same conclusion:

> This court and the courts of Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, Alabama, Florida, Texas and other states have held that the general rule as to things affixed to the freehold by a trespasser or a person entering tortuously is not applicable against a body having the power of eminent domain, and entering without leave, and making improvements for the public purpose for which it was created and given such power.
>
> Illinois Cent. R. Co. v. Le Blanc, 74 Miss. 650, 21 So. 760, 762 (Miss. 1897).

The Mississippi Supreme Court quoted extensively from the Michigan case of Railway Co. v. Dunlap, 47 Mich. 456, 11 NW 271 as follows:

> "The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property."
>
> Illinois Cent. R. Co., 21 So. at 762.

This Court is mindful of the stated policy to look to the common law if there is no statutory provision or case law applicable. However, even assuming arguendo that the aforementioned authority does not apply (common law rule inapplicable in condemnation proceedings), the Court does not find Defendants prevail under the common law. This Court notes that many of the cases cited in the briefing do not distinguish between a party who innocently entered the land of another and constructed improvements, as compared to one who purposefully entered the land of another to construct improvements.

Defendants have argued that the Plaintiff and Intervenor are trespassers and, as such, the Plaintiff and Intervenor must pay for the improvements built on the property to be condemned:

> But if the entry upon the land is a naked trespass, buildings permanently attached to the soil become the property of the owner of the latter. The trespasser can acquire no rights by his tortious acts.
>
> Searl Business School Dist. No. 2, 133 U.S. 553, 561-562, 10 S.Ct. 374, 33 L.Ed. 740 (1890).

In Searl the school district built and constructed a schoolhouse on property it had purchased from individuals named Watson and Schlessinger. Said individuals were in actual possession and occupancy of the property under a deed of conveyance. However, the actual title holder was the appellant Searl. The school district had actual knowledge of Searl's interest in the land but felt the people it bought from had better title. The Supreme Court found that there was no willful trespass and, therefore, Searl was not entitled to damages in condemnation for the constructed improvements as the school district had acted in good faith. Searl, 133 U.S. at 562-563.

It is undisputed that the Plaintiff and Intervenor did not construct the improvements on property that it held no interest to in bad faith. The undisputed facts clearly establish that their predecessor-in-interest constructed the electrical transmission lines under the grant of right-of-way from the U.S. Department of Interior.

Defendants argue under 43 C.F.R. § 2808.10(c)(1)(2) that Plaintiff and Intervenor became a willful trespasser after the expiration of the right-of-way grant as they continued the operation of the electrical transmission lines without paying rent. However, this Court has already issued rulings that the Defendants are entitled rental damages from the expiration of the right-of-way grant through the date of valuation. The Court agreed with the Defendants that they were entitled to rental damages as the Plaintiff and Intervenor are holdover tenants. The Court's previous rulings benefitted the Defendants and the Defendants are now judicially estopped from taking a contrary position within the context of this matter. Standage Ventures, Inc. v. State of Arizona, 114 Ariz. 480, 483, 562 P.2d 360 (1977). The Court's ruling is the law of the case. More importantly, this Court's decision is consistent with the United States Court of Appeals for the 9th Circuit's Decision in Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (1987). In the Etalook case, a pipeline company had entered into various agreements regarding the construction of a portion of the Alaskan pipeline on property owned by Etalook. Etalook subsequently backed out of those agreements after the pipeline company took possession and began to construct improvements over the property. The 9th Circuit affirmed the District Court's ruling that Etalook was entitled to rental damages during the period of occupancy by the condemnors as well as condemnation compensation for fair market value.

> In a case like this, where the trespasser did not act in bad faith, but had paid for an easement, the proper measure of damages is the reasonable rental value of the property for the duration of the trespass. . . . Nor did the court err in awarding title of improvements to Alyeska.
>
> Etalook, 831 F.2d 1440 (1987).

In this particular instance, Plaintiff and Intervenor will have to pay just compensation for the easement sought in condemnation. Additionally, the Court takes judicial notice that the Plaintiff has posted a bond in the amount of $269,500.00 with the Clerk of the Superior Court (see Notice of Deposit of Bond filed February 13, 2015). Inclusive within the overall damages the Defendants will be entitled to is the condemnation damages for the easement and the rental value from the time of occupancy through date of valuation. Therefore, while Defendants have argued that the Plaintiff and Intervenor have not paid rent, they are liable for rental damages in this matter.

The Etalook case further addressed the argument that Etalook was not entitled to the value of the permanent improvements upon the right-of-way as Alyeska (the agent for Exxon Pipeline Co.) was a common trespasser. The 9th Circuit Court of Appeals reiterated the case law decisions that the condemnor is not required to condemn improvements that it had built on the land to be condemned prior to the initiation of the condemnation proceedings.

> Eatlook relies upon the common law rule that a trespasser who builds on another's land dedicates his structure to the land's owner. However, this rule is inapplicable here because Alyeska exercised the power of eminent domain. . . .
>
> First, some courts have recognized an exception to the forfeiture rule where a body has the power to exercise eminent domain. "[T]he general rule as to things affixed to the freehold by a trespasser . . . is not applicable as against a body having the power of eminent domain, and entering without leave, and making improvements for the public for which it was created and given such power." Anderson-Tully Co. v. United States, 189 F.2d 192, 197 (5th Cir.), cert. denied, 342 U.S. 826, 72 S.Ct. 47, 96 L.Ed. 624 (1951). See Searl v. School-District, 133 U.S. 533, 564, 10 S.Ct. 374, 877, 33 L.Ed. 740 (1890).
>
> Etalook, 831 F.2d at 1444.

The Court further does not find that AEPCO's intent that the transmission lines were meant to be permanent controls. Obviously, AEPCO, and then Plaintiff, had the opportunity to renew the grant right-of-way. Defendants have asked the Court to take judicial notice that such right-of-ways are always extended and that the Plaintiff merely failed to seek an extension of the grant of right-of-way. The Court does not take judicial notice of that as the Court does not find it a proper means by which to take judicial notice. However, unequivocally, the Plaintiff and Intervenor have the right to condemn the subject property. Section 17, Article 2, Arizona Constitution; Clausen v. Salt River Valley Water User's Ass'n., 59 Ariz. 71, 123 P.2d 172 (1942); A.R.S. § 12-1115(C). Therefore, even if the grant of right-of-way was not extended or renewed, Plaintiff maintained the right to condemn the subject property. Finally, even if the intent was for the lines to be permanent, Plaintiff and Intervenor still had a right to remove the transmission lines.

> After your grant terminates, you must remove any facilities within a right-of-way within a reasonable time, as determined by BLM.
>
> 43 C.F.R. § 2807.19(A).

The cases cited by the Defendants are in accord with these specific rulings. As was stated in the United States v. Five Parcels of Land, 180 F.2d 75 (1950):

> We know of no departure, in the decisions, from the rule thus asserted, in all cases where there were stipulations in the leases conferring upon the condemnor the right of removal of such improvements or where the condemnor had in good faith gone upon the lands and erected improvements in the bona fide belief that it has the right so to do, or the

circumstances were such that equity ought to hold that the condemnor, who owned the improvements, had the right to remove the same.

Id., 180 F.2d at 76, 77.

Similarly, in The State of Alaska v. Teller Native Corp., Ala. 904 P.2d 847 (1995), the Alaska Supreme Court reiterated the proposition that a condemnor who built improvements prior to initiating the condemnation proceedings would not have to pay for the value of such improvements. Teller, 904 P.2d at 850. However, as Alaska had specifically entered into a contract, and as consideration for that contract, was to build improvements and thus confer title of the improvements to the landowner, then in that event, the State of Alaska was required to pay the landowner as part of the condemnation damages the value of those improvements. Id., 904 P.2d at 851-852. The rationale was that it was the expectation of the landlord to receive the improvements at the end of the lease. Here, there is no indication that title to the transmission lines was consideration for the right-of-way grant from the United States Department of the Interior. There is no indication that the United States would take title to the transmission lines unless the owners of the transmission lines did not remove the same in a timely manner. That condition cannot occur as the condemnation proceedings foreclosed that eventuality.

The Court further notes the Defendants did not take action or initiate a lawsuit for the ejectment of the Plaintiff and Intervenor from the subject lands. There is no indication in the record that the Defendants, as successors-in-interest to the United States, either requested the BLM to demand removal of the lines within a reasonable period of time, or that Defendants demanded removal of the lines in a reasonable amount of time. There simply is no indication within the record that somehow title to the transmission lines had passed to the Defendants.

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