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Filed June 17, 2025

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**CHINOOK LANDING, LLC, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
JOHN LUND,**  
*Plaintiff-Appellant*

v.

**UNITED STATES,**  
*Defendant-Appellee*

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2024-1884

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Appeal from the United States District Court for  
the District of Oregon in No. 3:19-cv-02015-AR, Judge  
Jeffrey Armistead.

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Decided: June 17, 2025

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JEFFREY WILSON MCCOY, Pacific Legal Foundation,  
Highlands Ranch, CO, argued for plaintiff-appellant.  
Also represented by DAMIEN M. SCHIFF, Sacramento,  
CA; KATHRYN DALY VALOIS, Palm Beach Gardens, FL.

SEAN MARTIN, United States Attorney's Office for  
the District of Oregon, Portland, OR, argued for  
defendant-appellee. Also represented by NATALIE K.  
WIGHT.

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Before MOORE, *Chief Judge*, PROST, *Circuit Judge*,  
and HALL, *District Judge*.<sup>1</sup>

PROST, *Circuit Judge*.

Chinook Landing, LLC (“Chinook”), as personal representative of the estate of John Lund, appeals from a decision of the U.S. District Court for the District of Oregon granting the United States’ summary judgment motion. *Lund v. United States*, No. 19-02015, 2023 WL 2572613, at \*1 (D. Or. Mar. 17, 2023) (adopting Findings and Recommendation, 2022 WL 19039088 (D. Or. Dec. 7, 2022) (“*Decision*”), as the final decision). The district court found Mr. Lund’s Quiet Title Act (“QTA”) and inverse condemnation claims against the government untimely under the applicable statutes of limitations. For the reasons set forth below, we affirm.

#### BACKGROUND

In December 1955, the United States recorded an easement titled “Transmission Line Easement and Access Road Easement” (“1955 easement”) granted by Mr. Lund’s predecessors-in-interest. ER 98–103.<sup>2</sup> The 1955 easement provides the government with the “right to enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power transmission lines.” ER 98. The 1955 easement also grants “a permanent easement and right-of-way . . . for the purpose of constructing an access road . . . to be used in connection with the aforementioned

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<sup>1</sup> Honorable Jennifer L. Hall, District Judge, United States District Court for the District of Delaware, sitting by designation.

<sup>2</sup> “ER” refers to the excerpts of record initially filed in the Ninth Circuit and transferred to this court.

transmission line easement and right-of-way.” ER 99. Starting in 1955, Bonneville Power Association (“BPA”), a federal agency that administers power generated by hydroelectric dams in the Pacific Northwest, exercised the easement rights to build the access road (“BPA Road”) and erect transmission lines and related facilities. *Decision*, 2022 WL 19039088, at \*3.

Since 1955, BPA used Reeher Road to reach the easement area from Oregon State Highway 6. *Id.* Reeher Road runs through the entire strip of land owned by Mr. Lund’s predecessors-in-interest in 1955. *Id.* at \*7. The land has since been subdivided into three lots, and Mr. Lund purchased one of those lots in 2004. In using Reeher Road, BPA crossed over what is now Mr. Lund’s property. *Id.* at \*3. BPA constructed its BPA Road directly off Reeher Road. *Id.* at \*7. To maintain the transmission lines, BPA used Reeher Road at least annually to transport machinery and personnel by vehicle to the transmission lines. *Id.* at \*3.

In 2013, BPA obtained easements specific to Reeher Road from Mr. Lund’s northern and southern neighbors in preparation for a project to improve the transmission lines. *Id.* at \*4. The easements granted rights including to reconstruct and repair Reeher Road not limited to culverts and bridges. *Id.* at \*4 n.3. Negotiations between BPA and Mr. Lund to obtain a similar easement failed. *Id.* at \*4. In 2014, Mr. Lund sent an email to BPA that he revokes “any formal or implied permission” to enter or cross his property. ER 54; *Decision*, 2022 WL 19039088, at \*4. BPA continued to use Reeher Road as an entry route to the transmission lines. *Decision*, 2022 WL 19039088, at \*4.

In December 2019, Mr. Lund commenced this action against the government in the U.S. District Court for the District of Oregon and amended his complaint in June 2021. ER 122, 125. He raised a QTA claim, 28 U.S.C. § 2409a, alleging that he has exclusive interest in Reeher Road where it crosses his property. *Decision*, 2022 WL 19039088, at \*1. He also raised an inverse condemnation claim under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), alleging that the government has taken his property without just compensation contrary to the Fifth Amendment to the U.S. Constitution. He requested “just compensation in an amount up to \$10,000.” *Id.* at \*4. The government moved for summary judgment arguing that both claims are barred by the applicable statutes of limitations and fail on their merits. *Id.* In December 2022, the magistrate judge issued a Findings and Recommendation granting the government’s summary judgment motion. *Id.* at \*12. The magistrate judge found that “BPA has a reasonable right to use [Reeher Road] to enter the easement area to accomplish the purposes set forth in the [1955] Easement.” *Id.* at \*10. The magistrate judge also found Mr. Lund’s claims time-barred under the applicable statutes of limitations. *Id.* at \*12. In March 2023, the district court adopted the magistrate judge’s decision in its entirety. *Lund*, 2023 WL 2572613, at \*1.

Chinook appealed to the Ninth Circuit.<sup>3</sup> In May 2024, the Ninth Circuit transferred the case to this court because the “Federal Circuit has exclusive

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<sup>3</sup> Mr. Lund passed away before the district court’s decision issued. During probate, title to the property at issue here transferred to Chinook, a single member LLC wholly owned by Mr. Lund’s widow. Appellant’s Br. 14-15.

jurisdiction over an appeal from a final decision of a district court in a non-tax case where jurisdiction rested in part upon [the Little Tucker Act, 28 U.S.C. § 1346(a)(2)].” *Chinook Landing, LLC v. United States*, No. 23-35344 (9th Cir. May 23, 2024), ECF. No. 44. We have jurisdiction under 28 U.S.C. § 1295(a)(2).

#### DISCUSSION

We review a district court’s grant of summary judgment de novo. *Schism v. United States*, 316 F.3d 1259, 1267 (Fed. Cir. 2019); *Brunozzi v. Cable Commc’ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017). Summary judgment is appropriate when, viewing the evidence in favor of the non-movant, there is no genuine dispute of material fact. *Schism*, 316 F.3d at 1267.

The QTA “provides a limited waiver of sovereign immunity for actions to quiet title against the United States.” *Martin v. United States*, 894 F.3d 1356, 1365 (Fed. Cir. 2018). Under the QTA, the government “may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.” 28 U.S.C. § 2409(a).

The Little Tucker Act provides district courts with concurrent jurisdiction with the U.S. Court of Federal Claims over certain claims against the government “not exceeding \$10,000 in amount, founded . . . upon the Constitution.” *Id.* § 1346(a)(2). The Fifth Amendment Takings Clause provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. Inverse condemnation is a takings claim “to recover the value of property taken by the government without formal



exercise of the power of eminent domain.” *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

On appeal, Chinook argues that Mr. Lund’s QTA and inverse condemnation claims are not time-barred under the applicable statutes of limitations. Appellant’s Br. 20, 53. We disagree.

We first address Mr. Lund’s QTA claim. We agree with the district court that Mr. Lund’s QTA claim is time-barred under the statute of limitations. *See Decision*, 2022 WL 19039088, at \*12. A QTA claim “except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued.” 28 U.S.C. § 2409a(g). Accrual occurs “on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” *Id.*; *Wilkins v. United States*, 598 U.S. 152, 156 (2023). “Constructive notice of recorded deeds may commence the running of the limitations period.” *California ex rel. State Land Comm’n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396 (9th Cir. 1985). The government’s use of the land may also trigger the limitations period. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984).

As the district court found, Mr. Lund or his predecessors-in-interest knew or should have known since 1955 of BPA’s interest in reaching the easement area via Reeher Road. *Decision*, 2022 WL 19039088, at \*11. First, the government properly recorded the 1955 easement and BPA started using Reeher Road in 1955 when it exercised the 1955 easement. The 1955 easement continues to burden Mr. Lund’s property. Second, BPA continued to use Reeher Road at least

annually since 1955 to transport machinery and personnel by vehicle to the transmission lines. BPA also built its BPA Road with its starting point on Reeher Road. Mr. Lund's QTA claim, therefore, accrued in 1955 and is time-barred because it expired in 1967, before he commenced this action in 2019.

We next address Mr. Lund's inverse condemnation claim brought under the Little Tucker Act. A claim under the Little Tucker Act shall be barred unless it "is filed within six years after such claim first accrues." 28 U.S.C. § 2501. "[A] takings claim accrues when 'all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'" *Etchegoinberry v. United States*, 132 F.4th 1374, 1379 (Fed. Cir. 2025) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). "[T]he general rule is that 'the owner at the time [of the taking] rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.'" *Argent v. United States*, 124 F.3d 1277, 1287 (Fed. Cir. 1997) (second alteration in original) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

We agree with the district court that Mr. Lund's inverse condemnation claim accrued in 1955. *Decision*, 2022 WL 19039088, at \*12. First, all the events that fix the government's alleged liability of using Reeher Road to cross over property currently owned by Mr. Lund started in 1955 when BPA exercised the 1955 easement. Second, the owners at the time of the alleged taking were or should have been aware of BPA's use of Reeher Road since 1955 because BPA built its BPA Road directly off Reeher Road and continued to use Reeher Road at least

annually. As a result, Mr. Lund's inverse condemnation claim is time-barred because it accrued in 1955 and expired six years later in 1961.

Chinook's arguments that Mr. Lund's QTA and inverse condemnation claims are not time-barred lack merit. Chinook argues that Mr. Lund's claims did not accrue until 2014. Appellant's Br. 27, 56. Chinook contends that "[i]t was only in 2014, when [Mr. Lund] revoked permission for BPA to use the road that BPA acted in a way that reflected a belief that it had the right to use the road under the [1955 easement]." *Id.* at 27. We disagree. BPA started using Reeher Road soon after recording the easement in 1955, BPA specifically built its BPA Road with a starting point on Reeher Road, and BPA continued to use Reeher Road to maintain the transmission lines. Mr. Lund or his predecessors-in-interest, therefore, knew or should have known since 1955 of BPA's interest in Reeher Road. Chinook further argues that Mr. Lund's takings claim did not accrue until 2014 because BPA used Reeher Road previously "only with the prior landowner's express and discretionary consent." Reply Br. 26. Yet, the prior owner from whom Mr. Lund acquired his property was not one of the owners of the property at the time of the government's alleged violation of using Reeher Road, as listed on the 1955 Easement. *See* ER 49 ¶ 2, 98. Mr. Lund's QTA and inverse condemnation claims expired long before he purchased his property in 2004.

Accordingly, we agree with the district court that Mr. Lund's QTA and inverse condemnation claims are time-barred under the applicable statutes of limitations.

CONCLUSION

We have considered Chinook's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm.

**AFFIRMED**

Filed March 17, 2023

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

KRISTY LUND, as

personal representative

of the ESTATE OF

JOHN LUND,

Plaintiff,

v.

UNITED STATES OF

AMERICA,

Defendant.

No. 3:19-cv-02015-AR

**ORDER**

HERNÁNDEZ, District Judge:

Magistrate Judge Armistead issued a Findings and Recommendation on December 7, 2022, in which he recommends that this Court grant Defendant's motion for summary judgment and deny as moot all other pending motions. F&R, ECF 52. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings and Recommendation. Pl. Obj., ECF No. 54. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered Plaintiff's objections and concludes that there is no basis to modify the Findings and Recommendation. The Court

has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings and Recommendation.

### CONCLUSION

The Court ADOPTS Magistrate Judge Armistead's Findings and Recommendation [52]. Therefore, the Court GRANTS Defendant's Motion for Summary Judgment [38]. Any other pending motions are DENIED as MOOT.

IT IS SO ORDERED.

DATED: March 17, 2023.

/s/ Marco A. Hernández  
MARCO A. HERNÁNDEZ  
United States District Judge

Filed December 7, 2022

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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|--|---|
| KRISTY LUND, as<br>personal representative<br>of the ESTATE OF<br>JOHN LUND,<br>Plaintiff, | Case No. 3:19-cv-02015-<br>AR<br><br><b>FINDINGS AND<br/>RECOMMENDATION</b> |
|--|---|

v.

UNITED STATES OF  
AMERICA,

Defendants.

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**ARMISTEAD, Magistrate Judge**

Plaintiff Kristy Lund, as the personal representative of the Estate of John Lund,<sup>1</sup> brings this quiet title and inverse condemnation action against the United States of America. Lund owns property through which runs a private road (the Subject Road) that the United States has, since 1955, used to reach a power transmission line and access road easement located along the property's northern border. Claiming an exclusive interest in the Subject Road where it crosses his property, Lund seeks a declaration quieting title under the Quiet Title Act (QTA), 28 U.S.C. § 2409a. Am. Compl. ¶¶ 16-18, ECF No. 34. Alternatively, Lund alleges that, by using this road to reach the transmission line and access road easement, the United States has taken his property

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<sup>1</sup> Because John Lund originally brought this action and submitted the declarations referenced in this F&R, the court uses he/him pronouns throughout for consistency.

without just compensation contrary to the Fifth Amendment to the U.S. Constitution. *Id.* ¶¶ 7-12.

The United States moves for summary judgment under Federal Rule of Civil Procedure 56, arguing that Lund's claims are barred by the applicable statutes of limitations and fail on their merits. Mot. for Summ. J. at 9, 15-17, ECF No. 38. Because the court concludes that the government's easement encompasses a right of entry using the Subject Road, and because Lund and his predecessors have had actual and constructive notice of that easement since 1955, the court recommends granting the United States' motion.

### **BACKGROUND**

In a prior Findings & Recommendation (F&R) resolving a motion to dismiss, U.S. Magistrate Judge John V. Acosta considered the parties' evidence and described the provenience of the Lund Property in detail. F&R at 2-6, ECF No. 26; Order, ECF No. 33 (adopting in relevant part F&R). The court incorporates those descriptions here and recounts the details most relevant to the current dispute.

#### ***A. Evidence***

For purposes of this summary judgment motion, the parties rely predominantly on declarations previously presented. Lund relies on his own declaration and a declaration from his attorney, Kenneth Dobson, which is accompanied by four exhibits with excerpts of internal communications from staff at the Bonneville Power Administration (BPA). First Decl. of John Lund, ECF No. 13; Decl. of Kenneth Dobson, ECF No. 13. Defendants rely on declarations from Daniel Ackerman, a BPA Land



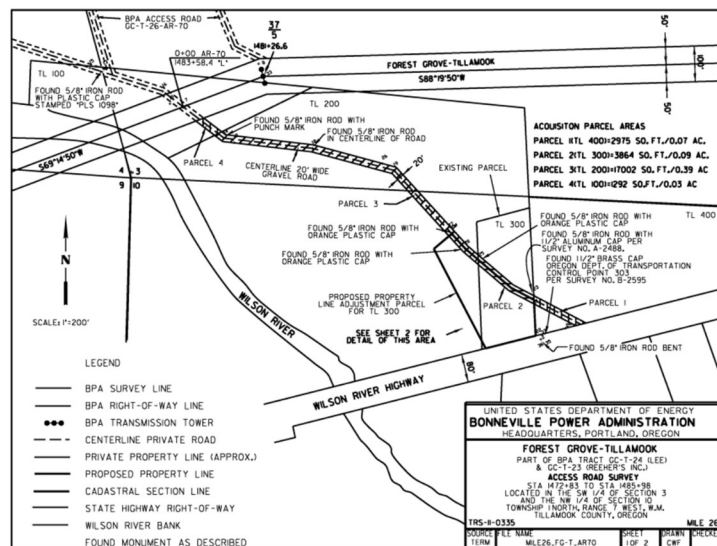
Surveyor, and James Clark, a BPA Realty Specialist—as well as twenty-six accompanying exhibits—which describe the chain-of-title of the Lund Property and provide context for the easements and roadways at issue in this dispute. First Decl. of Daniel Ackerman, ECF No. 8; Sec. Decl. of Daniel Ackerman, ECF No. 17; First Decl. of James Clark, ECF No. 9; Sec. Decl. of James Clark, ECF No. 18. The credentials of those witnesses and contents of those declarations are thoroughly recounted in Judge Acosta’s F&R and are not at issue here. F&R at 2-6.

For this summary judgment dispute, each party submitted an additional declaration, which bear introduction here. Lund submitted a three-page declaration, in which he recounts a discussion he had with William Stewart, the person from whom he acquired the Lund Property in 2004. Sec. Decl. of John Lund, ECF No. 43. Lund also describes his efforts to prevent BPA from entering his property and communications he had with BPA employees about potential alternative access routes. Lund’s declaration is accompanied by five exhibits, including an email in which Lund states that he “revokes” BPA’s permission to cross his property, a BPA email opening discussions about acquiring a revocable permit to use the Subject Road, a map proposing alternative routes to reach the transmission lines, and excerpts of emails with two BPA staff members, Christine Nickerson and Chad Maxwell. *Id.* ¶¶ 2-8, Exs. 1-5.

The government submitted a five-page declaration from Matthew Kirkland, who has served as the Director of Realty Property Services for BPA since 2014. Decl. of Matthew Kirkland, ECF No. 46. Kirkland is BPA’s top Realty Officer. *Id.* ¶ 3. He oversees three departments and nine program areas,

with approximately ninety BPA employees, including geographers, surveyors, and realty specialists. Kirkland's declaration relies on collaboration and input from various realty specialists and is based on his first-hand review of the pleadings, the aforementioned declarations, and the accompanying four exhibits. *Id.* ¶¶ 10-14, Ex. 1-4 (proposed easement dated June 28, 2012; log summarizing communications between Clark and Lund; May 12, 2015 letter from BPA to Lund's counsel; Nickerson and Maxwell contracts). Kirkland describes, in his view, BPA's culture with respect to land rights when he began as Director in 2014 and his efforts to shift that culture "by aligning [] practices with BPA's legal rights." *Id.* ¶¶ 5-7. He also provides context, from BPA's perspective, regarding his staff's efforts to secure a permanent, express access road easement from Lund. *Id.* ¶¶ 8-16. Those efforts are described in greater detail below.

### B. *Lund Property and December Easement*



Lund owns property in Tillamook County, Oregon, located east of the Wilson River and north of Oregon Highway 6. First Ackerman Decl. ¶ 22, Ex. 17 (MicroStation Drawing, dated Feb. 11, 2019, depicting the Lund Property (TL 200), adjacent parcels, and relevant roadways, including Oregon Highway 6 (Wilson River Highway); First Lund Decl. ¶ 1 (admitting ownership of property). The property is accessible from Oregon Highway 6 by the Subject Road,<sup>2</sup> the use of which is central to this dispute. First Ackerman Decl. ¶ 22, Ex. 17; *Id.* ¶ 3, Ex. 3 (aerial photographs from 1952, 1955, and 1967 confirming existence of the Subject Road and its location on the Lund Property).

In 1955, the government acquired easements from multiple property owners to build and maintain power transmission lines near the Lund Property. As part of those transactions, the government obtained an easement (the December Easement) from Lund's predecessors-in-interest. First Ackerman Decl. ¶ 9, Ex. 5. The December Easement provides:

[The Grantors, Lund's predecessors-in-interest,] hereby grant, bargain, sell and convey to the UNITED STATES OF AMERICA and its assigns, *a perpetual easement and right to enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power transmission lines* and appurtenant signal lines, poles, towers, wires, cables, and appliances necessary in connection therewith, in, upon, over, under and across the

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<sup>2</sup> At various times, the Subject Road has been known as the old logging road, North Fork Road, Centerline Private Drive, and Reheer Road. First Clark Decl. ¶ 13.

following described parcel of land in the County of Tillamook, in the State of Oregon, to-wit:

That portion of that part of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 and SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, Township 1 North, Range 7 West of the Willamette Meridian, Tillamook County, Oregon, within a tract of land described as: Beginning at the point of intersection of the centerline of the Wilson River and the centerline of the Wilson River Highway in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10, Township 1 North, Range 7 West, W.M.; thence easterly along said highway a distance of 500 feet; thence north a distance of 700 feet; thence westerly a distance of 1386 feet, more or less, to a point which is 145 feet, more or less, north of the center of the Wilson River; thence south a distance of 145 feet to the center of the Wilson River; thence southerly along the center of said Wilson River to the point of beginning, which lies within a strip of land 100 feet in width, the boundaries of said strip lying 50 feet distant from, on each side of and parallel to the survey line of the Gales Creek-Tillamook section of the Forest Grove-Tillamook transmission line as now located and staked on the ground over, across, upon and/or adjacent to the above described property, said survey line being particularly described as follows:

Beginning at survey station 1433+89.5 a point on the east line of Section 3, Township 1 North, Range 7 West, W.M., said point being N. 14° 39' 10" W. a distance of 711.8 feet from the southeast corner of said Section 3; thence S. 88° 19' 50" W. a distance of 4737.1 feet to survey station 1481+26.6; thence S. 69° 14' 50" W. a distance of 1185.3 feet to survey station 1493+11.9; thence S. 84° 12' 20" W. a distance of 133.9 feet to survey station 1494+45.8 a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, Township 1 North, Range 7 West, W.M., said point being S. 80° 19' 30" W. a distance of 885.4 feet from the northeast corner of said Section 9;

*together with the right to clear said parcel of land and keep the same clear of all brush, tuber, structures, and fire hazards, provided however, the words "fire hazards" shall not be interpreted to include growing crops; and also the present and future right to top, limb, fell, and remove all growing trees, dead trees or snags (collectively called "danger trees") located on Grantors' land adjacent to said parcel of land, and within a strip of land 50 feet in width on the northerly side of and 75 feet in width on the southerly side of and beyond the outside limits of the right-of-way, which could fall upon or against said transmission and signal line facilities.*

Also, in addition to the above described easement and right-of-way, *the Grantors herein grant, bargain, sell, and convey unto the United*

*States of America a permanent easement and right-of-way over, upon, and across a part of the SW<sup>1</sup>/<sub>4</sub>SW<sup>1</sup>/<sub>4</sub> of Section 3, Township 1 North, Range 7 West, W.M., Tillamook County, Oregon, excepting the Gales Creek-Tillamook transmission line right-of-way, as is now surveyed and staked on the ground and as is shown colored in red on drawing, serial number 85326, attached hereto and, by reference, made a part of the description of this access read easement and right-of-way, for the purpose of constructing an access road approximately 14 feet in width, with such additional widths as are necessary to provide for cuts, fills, and turnouts, and for curves at angle points, to be used in connection with the aforementioned transmission line easement and right-of-way, together with such other rights and the right to construct such other appurtenant structures as are necessary to accomplish the purposes for which this access road easement and right-of-way is granted.*

The Grantors will be permitted the right of ingress and egress over and across said road, and the right to pass and repass along and on said road in so far as the same extends across the land of the Grantors, said right to be exercised in a manure that will not interfere with the use of the road by the United States of America, its agents and assigns.

First Ackerman Decl. ¶ 9, Ex. 5 (emphases added).

When Lund's predecessors-in-interest granted the United States the December Easement, their property began "at the point of intersection of the centerline of

the Wilson River and the centerline of [Oregon Highway 6],” stretched eastward along the highway and northward along the river, and was intersected by the Subject Road. Clark Decl. ¶ 7, Ex. 5. That property was later subdivided into three tax lots—one of which, tax lot 200, Lund acquired by statutory warranty deed on February 9, 2004. Sec. Ackerman Decl. ¶ 5, Ex. 17-2; First Ackerman Decl. ¶ 15, Ex. 11. It is undisputed that a portion of the easement area exists on the Lund Property today, although Lund contends that the Subject Road “is located well outside the boundaries of that easement.” Lund Decl. ¶ 2 (admitting that a portion of the easement area exists on the Lund Property); Sec. Ackerman Decl. ¶ 5, Ex. 2 (same); *Id.* ¶ 4, Ex. 18 (depicting burdened areas).

The United States recorded the December Easement on December 2, 1955. *Id.* Soon after, BPA, a federal agency that administers power generated by hydroelectric dams in the Pacific Northwest, exercised the easement rights by building the access road and erecting transmission lines, towers, and related facilities on the easement area. Clark Decl. ¶¶ 10-11; Lund Decl. ¶ 2. BPA used the Subject Road to reach the easement area from Oregon State Highway 6, thus crossing the Lund Property to compete these tasks. *Id.* To maintain the transmission lines, BPA has continued to access the easement area via the Subject Road at least annually. *Id.* ¶ 12, Ex. 3 (chart depicting BPA’s activities on the Lund Property since 1999); Sec. Clark Decl. ¶¶ 2, 4, 6-8.

In 2013, in preparation for a project to improve the transmission lines, BPA acquired from Lund’s northern and southern neighbors “perpetual non-exclusive easement[s] and right[s]-of-way for access purposes in, upon over, under, and across” the Subject

Road.<sup>3</sup> First Ackerman Decl. ¶¶ 17-18, Exs. 13-14. Despite attempted negotiations, BPA has not acquired a similar easement from Lund. Sec. Clark Decl. ¶ 8; Lund. Decl. ¶ 5-6. Instead, Lund states that, after acquiring the Lund Property in 2004, he “continued to give BPA permission to cross his property, until August 2, 2014, when [he] expressly revoked BPA’s permission” to enter the easement area using the Subject Road where it crosses his property. Lund Decl. ¶ 3. Despite that asserted revocation, BPA continued to use the Subject Road as an entry route, prompting Lund to file this action.

### LEGAL STANDARD

Summary judgment is appropriate if “there is no genuine dispute as to any material fact” and “the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324 (citing FED. R. CIV. P. 56(e)). A nonmoving party cannot defeat summary

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<sup>3</sup> Those easements granted BPA rights “to enter and to locate, construct, use, maintain, repair, and reconstruct the road or roads, and appurtenances thereto, including but not limited to culverts and bridges, together with cuts and fills, as needed” on parcels adjacent to the Lund Property. First Ackerman Decl. ¶¶ 17-18, Exs. 13-14.



judgment by relying on the allegations in the complaint, or with unsupported conjecture or conclusory statements. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should be entered against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322.

The court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). However, deference to the nonmoving party has limits. A party asserting that a fact cannot be true or is genuinely disputed must support the assertion with admissible evidence. FED. R. CIV. P. 56(c). Therefore, where “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotations omitted).

## DISCUSSION

Lund contends that the December Easement does not support BPA’s use of the Subject Road to enter the easement area, and he asserts two claims to prevent BPA’s continued use of that road. In Claim 1, brought under the QTA,<sup>4</sup> he seeks a declaration “quieting any

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<sup>4</sup> Under the QTA, the “United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property to which the United States claims an interest, other than a security interest or water rights.” 28 U.S.C. § 2409a(a). “[D]isputes over the right to an easement and suits seeking a

claimed right, title, or interest” by the United States in the Subject Road where it crosses his property. Am. Comp. ¶¶ 16-18. In Claim 2, he alternatively alleges that BPA’s continued use of the Subject Road to reach the easement area is a constitutional taking, for which he requests “[j]ust compensation in an amount up to \$10,000.” *Id.* ¶¶ 7-12, Prayer for Relief.

The United States argues that Lund cannot restrict BPA from accessing the easement area using the Subject Road where it crosses his property because the December Easement encompasses a right to enter the easement area using that route. Mot. for Summ. J. at 15-17. It further contends that summary judgment is appropriate because both of Lund’s claims are barred by the relevant statutes of limitations. *Id.* at 9-15. For his part, Lund maintains that his claims are timely because he was not reasonably aware that the government had an adverse claim to his property until 2014, when he revoked BPA’s permission to use the Subject Road. Resp. to Mot. for Summ. J. (Resp.) at 7, ECF No. 42.

#### **A. Scope of the December Easement**

The United States asserts that the statutes of limitation for Lund’s QTA and inverse condemnation claims began to run in 1955—when it acquired the December Easement from Lund’s predecessors-in-interest and properly recorded that easement. Mot. for Summ. J. at 9-10. Implicit in that assertion is an argument that Lund and his predecessors were on notice, since 1955, that the government claimed an interest in the Subject Road. However, the extent to

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declaration as to the scope of an easement fall within the purview of the QTA.” *Robinson v. United States*, 586 F.3d 683, 686 (9th Cir. 2009).

which the December Easement permits use of the Subject Road first requires interpretation of the easement.

“The interpretation of an express easement, like that of contracts and other written instruments, is a question of law for the court.” *Kell v. Oppenlander*, 154 Or. App. 422, 426 (1998) (citing *State Highway Comm’n v. Deal*, 191 Or. 661, 681-82 (1951); ORS § 42.230). “In construing an easement, [the court’s] fundamental task is to discern the nature and scope of the easement’s purpose and to give effect to that purpose in a practical manner.” *Watson v. Banducci*, 158 Or. App. 223, 230 (1999) (citing *Bernards v. Link*, 199 Or. 579, 593 (1952)). “To determine an easement’s purpose, [the court] ‘looks first to the words of the easement, viewing them in the context of the entire document.’” *Id.* (quoting *Kell*, 154 Or. App. at 426). The words of the easement are given their plain, ordinary meaning. *Cal-Neva Land & Timber Inc. v. United States*, 70 F. Supp. 2d 1151, 1157 (D. Or. 1999) (citing *Fendall v. Miller*, 99 Or. 610, 616-17 (1921)). If the easement’s terms clearly express the easement’s purpose, the analysis ends here. *Id.* (citing *Watson*, 158 Or. App. at 230).<sup>5</sup> However, if ambiguity remains, the court looks to relevant circumstances and uses for evidence of the original parties’ intent. *Id.*

To determine whether the December Easement granted BPA a right of entry via the Subject Road, the

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<sup>5</sup> To determine whether a contractual provision is plain or ambiguous, the court may also “properly consider the text of the provision in the context of the agreement as a whole and in light of the circumstances underlying the formation of the contract.” *Batzer Const., Inc. v. Boyer*, 204 Or. App. 309, 317 (2006); *Bloomfield v. Weakland*, 224 Or. App. 433, 447 (2008) (applying *Batzer* to easement interpretation).

court's analysis begins with any express purpose or use language in the document. *Cal-Neva Land & Timber*, 70 F. Supp. 2d at 1158. Under the December Easement, Lund's predecessors-in-interest granted the government rights: (1) "to enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power lines and appurtenant [structures]" on the easement area; and (2) to "keep the [area] clear of all brush, timber, structures and fire hazards," excluding growing crops, and to remove "danger trees" on a strip of land "75 feet in width on the southerly side of" the transmission lines. First Ackerman Decl. ¶ 9, Ex. 5. The document also provides for (3) "a permanent easement and right-of-way . . . for the purpose of constructing an access road approximately 14 feet in width . . . to be used in connection with the aforementioned transmission line easement and right-of-way." That grant was made (4) "together with such other rights and the right to construct such other appurtenant structures as are necessary to accomplish the purposes for which [the] access road easement and right-of-way were granted." *Id.* (emphasis added).

Examining this text, the court discerns that the express purposes of the December Easement include erection, operation, and maintenance of transmission lines; maintenance of vegetation near the transmission lines; and construction and use of an access road to reach the transmission lines on the easement area. The additional grant of "such other rights," while apparently expansive, is limited in scope by the requirement that these rights be "necessary to accomplish the purposes for which" the access road was granted.

Notably, the easement’s text lacks an *express* right to use the Subject Road to reach the easement area for these purposes. The United States maintains, however, that the “right to enter” and “such other rights” clauses grant an implied right to enter the easement area using the Subject Road. Mot. for Summ. J. at 15. Lund disputes that position. He counters that the lack of an express right to use the Subject Road shows that the easement, by its plain terms, did not contemplate entry via that route.<sup>6</sup> Resp. at 12. In support, Lund notes that most rights enumerated under the easement—the right to erect and operate transmission lines, to clear vegetation, and to build an access road—are expressly stated. He contends that, in contrast, the clauses cited by the government are too indefinite to support a right to use the Subject Road.

The court agrees with Lund, in part. Given the specificity of easement’s first three express rights—coupled with the absence of an express right to use the Subject Road—the court cannot conclude that the easement plainly supports a right of access via that route. Nor can the court conclude, however, that the

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<sup>6</sup> Lund also asserts that “no portion of the actual easement extends to [the Subject Road].” Resp. at 12 n.2. However, the government has presented evidence that portions of the Subject Road crossing the Lund Property still lie within the easement area. See Sec. Ackerman Decl. ¶ 3 (calculations reflecting that “1.03 acres out of the original total 1.54 acres” acquired for the danger tree zone and “0.03 acres out of the original total 0.95 acres” acquired for the transmission lines still burden the Lund Property); *Id.* ¶ 5, Ex. 19 (map depicting burdened areas indicating that the Subject Road crosses the danger tree zone on the Lund property). Lund has not presented evidence to dispute these calculations. Consequently, he has not raised a genuine dispute of material fact about that issue.

easement lacks such an *implied* right. Unlike the text enumerating specific rights, the “such other rights” clause cited by the government is limited only by the requirement that these uses be “necessary” in relation to the purpose of the access road. Because that right is written expansively, the court cannot determine from the text alone whether the original parties intended that clause to grant a right of entry via the Subject Road. Thus, the December Easement is ambiguous concerning that use. *Shogun’s Galley, Inc. v. Merrill*, 229 Or. App. 137, 145 (2009) (“When a provision can reasonably be interpreted in more than one way, it is ambiguous.”) (citing *Batzer Constr. Inc.*, 204 Or. App. at 313).

Given that ambiguity, the court turns to the “relevant surrounding circumstances for evidence of the original parties’ intent.” *Cal-Neva Land & Timber*, 70 F. Supp. 2d at 1157. “[R]elevant considerations may include the easement’s purpose, the circumstances existing at the time of the grant, and the manner in which the original parties used the easement.” *Watson*, 158 Or. App. at 230. “[E]xtrinsic evidence . . . is considered to assist the court in determining the intent of the original parties’ to the easements.” *Id.* at 1163.

The United States argues that the circumstances and uses when the December Easement was granted demonstrate that “the original parties to the easement understood in fact that [BPA] would use the established route of entry to reach the easement area from Oregon Highway 6.” Mot. for Summ. J. at 15; Reply in support of Mot. for Summ. J. (Reply) at 3, ECF No. 45. Lund counters that, even assuming that BPA’s use of the Subject Road was understood, the

Grantors intended that use to be with permission only. As explained below, the government is correct.

When the December Easement was granted in 1955, the Grantors owned the entire strip of land over which the Subject Road runs. Sec. Ackerman Decl. ¶ 5, Ex. 19 (Lund admission that predecessor-in-interest owned all three tax lots). The Subject Road—then an established logging road—connected Oregon Highway 6 to the southern border of the Grantor’s property. First Ackerman Dec. ¶ 3, 6, Ex. 3; First Clark Decl. ¶ 13, Ex. 5. From there, it continued north through the Grantor’s property, serving also as an access route from Oregon Highway 6 for the Grantor’s northern neighbors. First Ackerman Decl. ¶ 6, Ex. 2.<sup>7</sup> Because of terrain limitations imposed by the Wilson River to the east and a steep ravine to the west, the Subject Road is considered the only viable route for access to these properties from Oregon Highway 6. Sec. Clark Decl. ¶ 7, Ex. 7 (depicting river, ravine, and elevation change and stating that “[t]o date, BPA has not identified a viable way to access the [easement area] other than [the Subject Road]”).

After the United States acquired the December Easement from the Grantors, the Subject Road played a pivotal role in the exercise of BPA’s easement rights. As addressed previously, the easement granted BPA rights to erect and operate transmission lines, to clear vegetation, and to build an access road beginning on a northern portion of the Grantor’s property. BPA exercised those rights immediately, using the Subject Road to do so. First Clark Decl. ¶ 10 (The Subject

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<sup>7</sup> Lund’s northern neighbor holds an appurtenant easement to use the Subject Road for ingress and egress. First Ackerman Decl. ¶ 6, Ex. 2. Those rights are uncontested in this action.

Road “has been used by BPA, as the most reasonable route of access to the transmission line, since easement rights were secured in 1955.”). First, BPA constructed the access road—known today as BPA Road. First Clark Decl. ¶¶ 9-10. Use of the Subject Road was fundamental to the completion of that task, serving as both the access point from Oregon Highway 6 and the beginning point for BPA Road. First Clark Decl., ¶ 10 (citing First Ackerman Decl. ¶ 10, Ex. 6 (BPA Maps Serial No. 85326) (“The point of beginning for this access road, stationing 0+00, is shown on drawing 85326 at the intersection of [the Subject Road] and the transmission line right-of-way.)). Likewise, the Subject Road was the only identified route to reach the transmission line right-of-way. First Clark Decl. ¶ 11; Sec. Clark Decl. ¶ 7. As such, BPA has, since 1955, used the Subject Road to move the equipment and personnel necessary for the erection, operation, and maintenance of those structures. *Id.*

In light of those circumstances and uses, the record evinces the original parties’ intention that the December Easement include a right of entry using the Subject Road. In particular, the location of BPA Road—specifically its origin at the Subject Road—is strong evidence that the original parties understood that entry via the Subject Road was included in the grant of “such other rights . . . as are necessary to accomplish the purposes for which” the access road was granted. Similarly, BPA’s immediate, continued, and sole use of the Subject Road to enter the transmission line right-of-way suggests that the parties intended the “right to enter” to encompass entry across the Subject Road.



Lund's arguments do not persuade the court otherwise. Lund does not dispute the evidence of these original circumstances and uses. Instead, he argues that BPA's actions and statements in recent years demonstrate that the "subjective intent of the parties in entering the [December Easement] did not include use" of the Subject Road. Resp. at 15. For instance, Lund notes that, in preparation for a project to rebuild the transmission lines, BPA approached him in 2012 to negotiate an "a permanent, defined access road easement that would include the right to grade and gravel and add cuts and fills as needed" on the Subject Road.<sup>8</sup> First Lund Decl. ¶ 6; Kirkland Decl. ¶ 9, Ex. 1. He also references internal communications from BPA employees as evidence that BPA acknowledged "inadequate land rights" to the Subject Road.<sup>9</sup> Dobson Decl. ¶¶ 2-4, Ex. 1-3 (survey report recommending acquiring express rights to the Subject Road; internal staff emails discussing accessibility problems on Lund Property; 2019 team meeting note about acquiring non-exclusive access road easement for Subject Road).

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<sup>8</sup> In 2013, BPA successfully acquired express rights to use the Subject Road from parcels adjacent to the Lund property. First Ackerman Decl. ¶¶ 17-18, Exs. 13-14 (easements to use Subject Road on neighboring properties).

<sup>9</sup> Lund also points to his own declaration, in which he describes that, when he purchased the Lund Property from William Stewart in 2004, Mr. Stewart "explained how he had given [BPA] permission to cross the property using the Subject Road." First Lund Decl. ¶ 2. Setting aside the admissibility issues inherent in that statement, Mr. Stewart was not the original Grantor of the December Easement, and as such, his explanation does not bear on the intent of the original parties to the easement. *Cal-Neva Land & Timber*, 70 F. Supp. 2d at 1163.

Because Lund's evidence concerns events occurring at least fifty years after the December Easement was granted, "it is not helpful to understanding the [original] parties' intent." *Cal-Neva Land & Timber*, 70 F. Supp. 2d at 1163 (evidence of events beginning twenty-four years after grant of easement was not persuasive of original grantor's intent). Moreover, to the extent Lund argues that BPA's negotiation attempts and employee communications constitute admissions that it lacks a right to enter the easement area using the Subject Road, his argument is undermined by BPA's evidence of the context behind those decisions.

For instance, BPA's Director of Real Property Services, Matthew Kirkland, provides perspective that, when he began his tenure as Director in 2014, BPA's practice was "to minimize conflicts [with landowners] and to avoid exercising the power of eminent domain." Kirkland Decl. ¶ 2. Kirkland states that, because of this practice, "staff would sometimes request PEPS from landowners (Permission to Enter Property rights) even when easements expressly provided the right to enter property to maintain and rebuild the transmission lines." *Id.* ¶ 6. As for the internal communications reference by Lund, Kirkland acknowledges that BPA staff "noted there was no permanent defined access road from Highway 6 to the transmission line easement." *Id.* ¶ 8. He maintains, however, that it was always BPA's position that the December Easement "provides [it] sufficient rights to enter the [Lund Property] using a reasonable route." *Id.* ¶ 11, Ex. 3 (letter, dated May 3, 2015, from BPA's counsel to Lund's counsel, supporting that position). Nevertheless, to minimize conflict with Mr. Lund—and because BPA "[understood] that its reasonable

rights of entry do not necessarily allow [it] to make changes to Mr. Lund’s property or the related proposed access route”—BPA staff “approached Mr. Lund as early as 2012 in an effort to secure a permanent, defined access road easement that would include the right to grade and gravel and add cuts and fills as needed.” *Id.* ¶¶ 9, 11 Ex. 1 (proposed easement dated Jun 28, 2018).

Given that context, the court cannot conclude—as Lund asserts—that BPA’s attempts to negotiate an express easement to use the Subject Road and its staff communications regarding those efforts constitute admissions that the December Easement lacks a reasonable right of entry using the Subject Road. Thus, Lund’s counterarguments do not overcome evidence of the circumstances existing when the December Easement was granted in 1955, nor of the BPA’s early use of the Subject Road to exercise those easement rights. Accordingly, the court concludes that, when the December Easement was granted in 1955, the original parties understood and intended that BPA would use the Subject Road as a reasonable route of entry to accomplish the purposes of the easement.

That conclusion is consistent with precedent from the Oregon Supreme Court, which has recognized, albeit without lengthy examination, that the “owner of the dominant estate may enter on the servient estate for the purpose of doing anything *reasonably necessary* to the proper exercise of [its] easement.” See *Jewell v. Kroo*, 268 Or. 103, 106 (1973) (citing 3 Tiffany, Real Property 346-51, § 810 (3d ed. 1939) (emphasis added)); *Baumbach v. Pool*, 266 Or. 154, 157 (1973). Applying that rationale to a dispute between a plaintiff-landowner and a defendant-utility

company, the Oregon Court of Appeals held that the utility company's prescriptive easement for power lines granted it an incidental right to enter the landowner's property for maintenance of the lines and surrounding vegetation. *Motes v. PacifiCorp*, 230 Or. App. 701, 707 (2009).

In the underlying dispute, the utility company asserted that it had a prescriptive easement for the "inspection, maintenance, repair, upgrade, and replacement" of transmission lines crossing the landowner's property, as well as "for the maintenance of vegetation, as necessary to prevent interference with the lines." *Id.* at 705. The trial court agreed that a prescriptive easement existed; however, it limited the scope of the easement by prohibiting the utility company from "using a driveway on the subject property to operate vehicles in its maintenance of the easement." *Id.* at 705-06. On appeal, the court affirmed the existence of the prescriptive easement. *Id.* The court concluded, however, that the trial court erred by prohibiting use of the landowner's existing driveway. *Id.* Because evidence presented at trial demonstrated that the driveway extended onto the easement area and was the safest, most direct access route to the transmission lines, the court held that prohibiting use of that driveway "unduly restrict[ed]" the scope of the easement and reversed for modification to the judgment on that ground. *Id.* at 714.

As in *Motes*, here the court is presented with evidence that the Subject Road is the safest, most direct route to enter the easement area and that a portion of the Subject Road extends onto that area. Moreover, the *Motes* court explicitly recognized that the utility company's "prescriptive easement

functions like an express easement,” thus undercutting Lund’s argument that *Motes* is inapposite. *Id.* at 713; *see also* Resp. at 15 (arguing that *Motes* is inapplicable because it involves a common law easement by prescription).

Relying on that precedent, the government argues that BPA’s use of the Subject Road to enter the easement area—and its concurrent entry on the Lund Property—is “reasonably necessary” to exercise its rights under the December Easement. Mot. for Summ. J. at 17. The court agrees. As already established, BPA has used the Subject Road to access the easement for maintenance of the transmission lines and vegetation since 1955. *See* Sec. Clark Decl. ¶¶ 4-6 (stating that “the only way to [access BPA Road] by vehicle is [the Subject Road]”). Those patrols occur on at least an annual basis and require “vehicular access to exercise all of the rights called out in the [e]asement, including patrol and maintenance, and to abate fire hazards and other threats to system operations.” *Id.* ¶ 7.

The government also has presented significant evidence that, although it investigated alternative routes, there is no other direct way to access the easement area from Oregon Highway 6. Sec. Clark Decl. ¶¶ 2-5. For instance, the record reflects that the Lund Property and easement area are bordered on the east by the Wilson River and on the west by stark elevation changes, including a steep ravine. *Id.* ¶ 7, Ex. 7. Likewise, maps reflect the Subject Road as the only direct route from Oregon Highway 6 to the Lund Property and the easement area. First Clark Decl. ¶ 13, Ex. 5; First Ackerman Dec. ¶ 22, Ex. 17; Sec. Ackerman Decl. ¶ 3, Ex. 8.

Lund counters that use of the Subject Road is “convenient, but not necessary” to accomplish the purposes of the December Easement because “he is aware of overgrown logging roads which, if reopened, could provide alternative access” to the transmission lines from the east. Resp. at 13; Sec. Lund Decl. ¶ 7, Ex. 4 (depiction of suggested alternative routes). By Lund’s own admission, however, these alternative routes are overgrown and abandoned. As such, it would be unreasonable to require BPA to modify its historic use of the Subject Road in favor of one of these asserted alternatives. See *Motes*, 230 Or. App. at 714 (“The need for access to the lines will rarely arise, but if it does, the time and expense associate with coming in from the country road would impose a significantly greater burden on [the utility company] than if it had access by way of plaintiff’s driveway.”).

Lund also asserts that, in 2015, he had conversations with two BPA contractors—a road engineer named Chad Maxwell and a right-of-way agent named Christine Nickerson—confirming the existence of alternative routes. Sec. Lund Decl. ¶ 8, Ex. 5. Lund neither offers further details about those alleged routes nor an argument about the admissibility of those out-of-court statements. See *United States v. Pappas*, 814 F.2d 1342, 1346 n.9 (9th Cir. 1987) (rejecting plaintiff-landowners argument that the government is estopped from complaining about the location of a fence because Bureau of Reclamation employees told plaintiff where to locate the fence). In contrast, the United States presents evidence that Maxwell and Nickerson were “hired for specific, project-related tasks, and neither were authorized to speak on BPA’s behalf regarding legal rights, and doing so was outside the scope of their

contracts.” Kirkland Decl. ¶ 14. Consequently, Lund has not raised a genuine dispute of fact about the existence of alternative routes to reach the transmission lines and access road.

In summary, although the text of the December Easement is ambiguous concerning BPA’s rights to enter the easement area using the Subject Road, evidence of the circumstances when the easement was granted and of BPA’s original, continued, and sole use of the Subject Road for maintenance of the transmission lines and vegetation support a conclusion that the original parties intended the easement to grant a right of entry via that route. That conclusion is reinforced by precedent from Oregon courts. Accordingly, the court finds that BPA has a reasonable right to use the Subject Road to enter the easement area to accomplish the purposes set forth in the December Easement.

### ***B. Claim 1: Statute of Limitations***

The QTA has a twelve-year statute of limitations, which is a strictly construed jurisdictional prerequisite. 28 U.S.C. § 2409a(g); *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005) (“The [QTA] is a waiver of sovereign immunity. If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction.”). The limitations period begins to run “on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g).

The phrase “‘should have known’ imparts a test of reasonableness,” and this standard has been interpreted expansively. *Schulz v. Dep’t of Army*, 886 F.2d 1157, 1160 (9th Cir. 1989) (quoting 28 U.S.C.

§ 2409a(g)). Although recorded documents trigger the limitations period, “the scope of the QTA’s notice standard is not limited to recorded documents of valid claims.” *LNG Dev., LLC v. U.S. Army Corps of Engineers*, Case No. 3:14-cv-01239-AC, 2015 WL 5155079, at \*7 (citing *State of California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396 (9th Cir. 1985)). Notice of a government claim that creates even a cloud on the title—that is, an “interest that raises questions that may *affect* the claim of title and pose problems in the future”—is sufficient to trigger the limitations period. *Id.* (quoting *Kingman Reef Atoll Invs. LLC v. United States*, 545 F. Supp. 2d 1103, 1111 (D. Haw. 2007), *aff’d*, 541 F.3d 1189 (9th Cir. 2008) (emphasis in original)); *Robinson*, 586 F.3d at 687. The period also may be triggered by the “government’s use of land,” even if not openly and obviously hostile. *Id.*

The United States contends that there is no genuine dispute of material fact that Lund and his predecessors-in-interest “knew or should have known” of the government’s interest in accessing the easement via the Subject Road since 1955, when the December Easement was procured and properly recorded. The court agrees, for three reasons.

First, it is undisputed that, after acquiring the easement from the original Grantors, the United States properly recorded the December Easement. Moreover, as explained above, the court finds that the original Grantors understood and intended the easement to grant a right of access via the Subject Road. Therefore, Lund’s predecessors-in-interest had constructive notice, since 1955, of a cloud on the title of the property with respect to BPA’s use of the Subject Road. *See Yuba Goldfields*, 752 F.2d at 396 (“Constructive notice of recorded deed may commence



the running of the limitations period.”). Second, the record demonstrates that the easement continues to burden the Lund Property today. First Lund Decl. ¶ 2; Sec. Ackerman Decl. ¶ 4, Ex. 18. Consequently, when Lund acquired the property in 2004, he had constructive notice of a cloud on the title of the property as to the Subject Road. And third, the record reflects that BPA exercised its easement rights immediately and, in exercising those rights, used the Subject Road to access and maintain the transmission lines and surrounding area on at least an annual basis. First Clark Decl. ¶¶ 11-12, Ex. 3. Given that historic use, Lund and his predecessors also had actual notice of the government’s interest in entry via the Subject Road.

Lund does not contest that he had constructive and actual notice of the easement; instead, he attempts to circumvent the QTA’s statute of limitation through several unavailing legal arguments.<sup>10</sup> For instance, Lund argues that a reasonable landowner would not have had notice that the easement included use of the Subject Road because several BPA employees and contractors represented in emails and internal communications that the easement did not expressly extend to the road. The court acknowledges that those communications may have generated confusion. Nevertheless, Lund’s argument must fail because, as a matter of law, Lund’s predecessors-in-interest had

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<sup>10</sup> Lund also asserts that his QTA claim is timely because, in his F&R dated February 15, 2021, Judge Acosta concluded that the limitations period had not lapsed. F&R at 32, ECF No. 26. That recommendation was not adopted by District Judge Hernández, however, and thus does not bind this court. *See* Order, ECF No. 33 (declining to adopt finding that Lund’s QTA claim is not time-barred).

constructive notice of the December Easement since 1955. *See State of Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984) (“The existence of one uncontroverted instance of notice suffices to trigger the limitations period.”). Because the QTA’s statute of limitations is strictly construed, that notice was sufficient to trigger the limitations in 1955, well before Lund acquired the property.

Lund next argues that the limitations period did not begin to run until 2014, when he “revoked BPA’s permission” to access the transmission lines via the Subject Road. That argument fails because, as the owner of the servient estate, Lund could not orally “revoke” BPA’s right to reasonably exercise its easement rights. *See Sander, Trustees of Barry J. Sander and Goldye Wolf Revocable Living Trust v. Nicholson*, 306 Or. App. 167, 173 (2020) (express easement “may only be extinguished by consent, prescription, abandonment, or merger”).

Finally, Lund contends that the government effectively “abandoned” the right to use the Subject Road to reach the transmission lines because BPA employees acknowledged in internal communications that a “rights gap” existed as to the Subject Road. However, Lund has offered no facts showing “clear and unequivocal” abandonment.<sup>11</sup> *See Waibel*

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<sup>11</sup> Lund’s response to the government’s motion for summary judgment relies heavily on statements allegedly made by BPA employees and contractors. Lund Resp. to Mot. for Summ. J. at 3, 8-9, ECF No. 42. The United States moves to strike those statements as hearsay. Reply to Mot. for Summ. J. at 7, ECF No. 45. However, because there is no genuine dispute that Lund’s predecessors-in-interest had constructive and actual notice of the easement since 1955, the court need not consider those statements in detail, nor address the motion to strike.

*Ranches, LLC v. United States*, Case No. 2:15-cv-02071-HL, 2022 WL 2612214, at \*6 (“[T]he BLM’s public statements regarding the closure of Teaters Road to the public did not ‘clearly and unequivocally’ abandon [the] United States’s interest in the easement.” (quoting *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1200-01 (9th Cir. 2008))). Instead, the record reflects that BPA uses the Subject Road to enter the easement area at least annually. First Clark Decl. ¶ 13, Ex. 3. Thus, Lund has not raised a genuine dispute of fact that BPA abandoned its easement rights.

In conclusion, the QTA’s statute of limitations began to run when the December Easement was recorded on December 2, 1955, and it lapsed twelve years later in 1967. Lund’s QTA claim is time-barred.

### ***C. Claim 2: Statute of Limitations***

Lund’s inverse condemnation claim is brought under 28 U.S.C. § 1346(a)(2), a statute known as the “Little Tucker Act,” that confers on this court jurisdiction, concurrent with the U.S. Court of Federal Claims, over a “civil action or claim against the United States, not exceeding \$10,000 in amount, founded [ ] upon the Constitution.” 28 U.S.C. § 1346(a)(2). To be timely under the Little Tucker Act, the plaintiff must assert a claim against the United States “within six years after such claim first accrues.” 28 U.S.C. § 2501. “In general, a takings claim accrues when ‘all events which fix the government’s alleged liability have occurred and the plaintiff was or should have been aware of their existence.’” *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). “Thus, the key date for accrual

purposes is the date on which the plaintiff's land has been clearly and permanently taken.” *Id.* (citing *Seldovia Native Assoc., Inc. v. United States*, 144 F.3d 769, 774 (1998)).

Lund alleges that the United States took his property without just compensation by “repeatedly entering and using the Lund Property for public purposes without permission.” Am. Compl. ¶ 11. Therefore, the alleged “taking” began in 1955, when the government began to exercise its easement rights by using the Subject Road to construct BPA Road and erect, operate, and maintain the transmission lines. Thus, the statute of limitations expired in 1961, and Lund’s inverse condemnation claim is time-barred.<sup>12</sup>

### CONCLUSION

For the above reasons, the United States motion for summary judgment (ECF No. 38) should be GRANTED. Any other pending motions should be DENIED as MOOT.

### SCHEDULING ORDER

The Findings and Recommendation will be referred to Judge Marco A. Hernández. Objections, if any, are due within fourteen days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen days. When the response is due or filed, whichever date is earlier, the

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<sup>12</sup> The courts notes also that even if Lund’s inverse condemnation claim were not time-barred, it would fail on the merits because—as previously addressed—the BPA’s use of the Subject Road to reach the transmission lines and BPA Road is within the scope of the easement.

Findings and Recommendation will go under advisement.

December 7, 2022.

/s/ Jeffrey Armistead  
JEFFREY ARMISTEAD  
United States Magistrate Judge

Filed June 9, 2021

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JOHN LUND,

Plaintiff,

No. 3:19-cv-02015-AC

v.

**ORDER**UNITED STATES OF  
AMERICA and JOHN  
DOES 1-15,

Defendants.

HERNÁNDEZ, District Judge:

Magistrate Judge Acosta issued a Findings and Recommendation on February 15, 2021, in which he recommends that this Court grant Defendants' Motion to Dismiss and give Plaintiff leave to amend his complaint under the Quiet Title Act. F&R, ECF 26. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff and Defendants filed timely objections to the Magistrate Judge's Findings & Recommendation. Pl. Obj., ECF 29; Defs. Obj., ECF 30. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court adopts in part Judge Acosta's Findings & Recommendation. The Court agrees with Judge Acosta that Plaintiff's *Bivens* and FTCA claims are

preempted by the Quiet Title Act, and Plaintiff should be granted leave to amend to state a claim under the Quiet Title Act.

However, the Court declines to adopt the findings that: (1) Plaintiff's claim is not time-barred and (2) the Court does not have jurisdiction over Plaintiff's Little Tucker Act claim. As to the first finding, the Court cannot determine at this stage in the proceedings whether or not Plaintiff's Quiet Title Act claim is time-barred. When Plaintiff "or his predecessor in interest knew or should have known of the claim of the United States" may hinge on the merits of the case. *See* 28 U.S.C. § 2409a(g); *Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995) ("If a claimant asserts fee title to disputed property, notice of a government claim that creates even a cloud on that title may be sufficient to trigger the limitations period.").<sup>1</sup>

As to the second finding, Plaintiff's claim under the Little Tucker Act may be reasonably construed as an alternative theory of relief. *See Schema v. United States Dep't of Agric.*, No. 2:14-CV-0630 MCE CKD, 2014 WL 4377918, at \*2 (E.D. Cal. Sept. 4, 2014) ("Defendants have not cited any authority for the

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<sup>1</sup> Defendants also argue in their objections that Plaintiff's Quiet Title Act claim fails on the merits. As this issue was not squarely presented to the magistrate judge, the Court declines to address it now. *See Brown v. Roe*, 279 F.3d 742, 745-46 (9th Cir. 2002) (rejecting the Fourth Circuit's holding that a district court must consider new arguments raised for the first time in an objection to a magistrate judge's F&R); *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000) ("[I]t would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge." (citation omitted)).

proposition that a Plaintiff may not simultaneously pursue both Tucker Act and Quiet Title Act claims in this instance at this stage in the proceeding. Therefore, the Court finds that, although inartfully pled, Plaintiff's Complaint contains causes of action under the Tucker Act and under the [Quiet Title Act]."). While Plaintiff's Quiet Title Act claim is premised on Plaintiff's claim of exclusive ownership, Plaintiff alleges in his inverse condemnation claim that Defendants "unilaterally created an easement" in his property. Compl. ¶ 17. Accordingly, the Court declines to dismiss Plaintiff's Little Tucker Act claim at this stage in the proceedings.

### CONCLUSION

The Court ADOPTS IN PART Magistrate Judge Acosta's Findings & Recommendation [26]. Therefore, Defendants' Motion to Dismiss [7] is GRANTED in part and DENIED in part, and Plaintiff's *Bivens* and FTCA claims are dismissed. Plaintiff may file an amended complaint within 14 days of this Order.

IT IS SO ORDERED.

DATED: June 9, 2021.

/s/ Marco A. Hernández  
MARCO A. HERNÁNDEZ  
United States District Judge



Filed February 15, 2021

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

|                  |                         |
|------------------|-------------------------|
| JOHN LUND,       | Case No. 3:19-cv-02015- |
| Plaintiff,       | AC                      |
| v.               | FINDINGS AND            |
| UNITED STATES OF | RECOMMENDATION          |
| AMERICA and JOHN |                         |
| DOES 1-15,       |                         |
| Defendants.      |                         |

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ACOSTA, Magistrate Judge:

Lund filed this lawsuit against the United States of America alleging the Bonneville Power Administration (“BPA”), though fifteen unnamed BPA employees (“Agents”) (collectively, “Defendants”), have repeatedly and without permission, authority, or just compensation, trespassed onto his real property, thus depriving him of valuable property rights and causing him personal harm. He asserts claims for trespass under the Federal Torts Claims Act (28 U.S.C. §§ 2671-2680 (2000)) (“the FTCA”), an inverse condemnation claim under the Little Tucker Act (28 U.S.C. § 1346(a)(2)), and a *Bivens* claim<sup>1</sup> against Defendants.

Defendants move to dismiss Lund’s complaint for lack of subject matter jurisdiction. (Defendants’ Motion [ECF No. 7] to Dismiss for Lack of Subject Matter Jurisdiction (the “Motion”).) Specifically,

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<sup>1</sup> *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Defendants contend that because Lund's claims all pertain to land in which the United States claims an interest, the Quiet Title Act (28 U.S.C. § 2409a (1986)) ("QTA") governs Lund's case to the exclusion of all other theories and remedies. Thus, Defendants conclude, Lund's FTCA and *Bivens* claims must be dismissed. The court then must determine, according to Defendants, the parties' respective rights under the easement and whether, depending on that determination, Lund is entitled to a remedy under the QTA.

The court finds the QTA governs here because a dispute over title to the subject parcel underlies the parties' dispute. Because the QTA provides the exclusive means by which Lund may seek a remedy, it pre-empts his claims to the extent those claims assert more general remedies under other theories. Consequently, Defendants' motion should be granted and Lund's complaint dismissed, with leave to amend his complaint to state a claim under the Quiet Title Act.

### *Background*

#### I. The History of the Lund Property.

##### *A. The chains of title.*

Lund owns real property located along Oregon Highway 6 at Lees Camp in Tillamook County, Oregon (the "Lund Property"). (Complaint [ECF No. 1], ¶ 2.) The Lund Property's provenience is important to resolving the issues raised in Lund's complaint.

In January 1944, Gerald and Nellie Reheer granted to Rex and Bernadine Lee ("the Lees") the tract of land that eventually became the Lund Property.

(Declaration of Daniel Ackerman [ECF No. 8] (“First Ackerman Decl.”), p. 3, ¶ 5 and Exh. 1, pp 1-2.)<sup>2</sup> The grant recited that “the above-described [Lund Property] is subject to an easement for road purposes along the Wilson River, which road is to be of a sufficient width to make said road a good passable highway, not less than twenty-four feet in width.” (First Ackerman Decl., Exh. 1, p. 2.)<sup>3</sup> In October 1945, the Lees granted to B.H. and Anne Reheer (“the Reehers”), who owned an adjacent parcel, a road easement across the Lees’ property:

[The Lees] hereby grant[] unto [the Reehers], heirs and assigns the free and uninterrupted use, liberty and privilege of and passage over and along a certain established logging road across [the Lund Property] above described, not to exceed 40 feet in width; together with free ingress, egress and regress to and for [the Reehers], their heirs and assigns, at all times forever hereafter into, along upon and out of the said roadway.

TO HAVE AND TO HOLD all and singular, the privileges aforesaid to them [the Reehers], their heirs and assigns to their use and behoof.

(First Ackerman Decl., p. 3, and Exh. 2, p. 2.) (hereinafter, the logging road is referred to as “the

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<sup>2</sup> Throughout his first declaration, Ackerman refers to the Lund Property as “the Subject Property.” To promote clarity, the court hereinafter refers to it as “the Lund Property.”

<sup>3</sup> After its construction, the highway was called the Wilson River Highway, and subsequently designated Oregon Highway 6. Second Declaration of Daniel Ackerman [ECF No. 17] (“Second Ackerman Decl.”), Exh. 18; Second Declaration of James Clark [ECF No. 18] (“Second Clark Decl.”), p. 2. ¶ 2.

Subject Road”).<sup>4</sup> Subsequent aerial photographs taken in 1952, 1955, and 1967 confirmed both the existence of the Subject Road and its location on the Lund Property. (First Ackerman Decl., p. 3 and Exh. 3. *Compare* Declaration of James Clark [ECF No. 9] (“First Clark Decl.”), Exhibit 5 (Google Maps depiction of same area).)

In 1955, the United States acquired easements from multiple property owners to build and maintain power lines, including the two transmission line and access road easements relevant here, one obtained on August 18, 1955 (the “August Easement”), and the other obtained on December 2, 1955 (the “December Easement”). (First Ackerman Decl., pp. 4-5 and Exhs. 4, 5.) The August Easement was obtained from Reehers Incorporated and granted to the United States a transmission line easement, which grant included an access road to be built from the Subject Road to the transmission towers on the easement. (First Ackerman Decl., p. 4 and Exh. 4.) The December Easement was obtained from Elmer and Alma Beeler, Russell and Beulah Thornbury, and Thomas and Betty Bowman, and granted the United States rights identical to those granted in the August Easement. (First Ackerman Decl., pp. 4-5 and Exh. 5.) The December Easement provides:

**TRANSMISSION LINE EASEMENT  
AND ACCESS ROAD EASEMENT**

The Grantors, ELMER S. BEELER AND  
ALMA D. BEELER, husband and Wife, owners;  
RUSSELL W. THORNBURG AND BEULAH

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<sup>4</sup> The logging road, which the court refers to as “the Subject Road,” later became Reheer Road.

M. THORNBURG, husband and wife, contract purchasers; and THOMAS K. BOWMAN AND BETTY L. BOWMAN, husband and wife, subcontract purchasers, for and in consideration of the sum of ONE HUNDRED DOLLARS (\$100,00), in hand paid by the UNITED STATES OF AMERICA, receipt of which is hereby acknowledged, hereby grant, bargain, sell and convey to the UNITED STATES OF AMERICA and its assigns, a perpetual easement and right to enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power transmission lines and appurtenant signal lines, poles, towers, wires, cables, and appliances necessary in connection therewith, in, upon, over, under and across the following described parcel of land in the County of Tillamook, in the State of Oregon, to-wit:

That portion of that part of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 and SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, Township 1 North, Range 7 West of the Willamette Meridian, Tillamook County, Oregon, within a tract of land described as: Beginning at the point of intersection of the centerline of the Wilson River and the centerline of the Wilson River Highway in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10, Township 1 North, Range 7 West, W.M.; thence easterly along said highway a distance of 500 feet; thence north a distance of 700 feet; thence westerly a distance of 1386 feet, more or less, to a point which is 145 feet, more or less, north of the center of the Wilson River; thence southerly a distance of 145 feet to the

center of the Wilson River; thence southerly along the center of said Wilson River to the point of beginning, which lies within a strip of land 100 feet in width, the boundaries of said strip lying 50 feet distant from, on each side of and parallel to the survey line of the Gales Creek-Tillamook section of the Forest Grove-Tillamook transmission line as now located and staked on the ground over, across, upon and/or adjacent to the above described property, said survey line being particularly described as follows:

Beginning at survey station 1433+89.5 a point on the east line of Section 3, Township 1 North, Range 7 West, W.M., said point being N. 14° 39' 10" W. a distance of 711.8 feet from the southeast corner of said Section 3; thence S. 88° 19' 50" W. a distance of 4737.1 feet to survey station 1481+26.6; thence S. 69° 14' 50" W. a distance of 1185.3 feet to survey station 1493+11.9; thence S. 84° 12' 20" W. a distance of 133.9 feet to survey station 1494+45.8 a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, Township 1 North, Range 7 West, W.M., said point being S. 80° 19' 30" W. a distance of 885.4 feet from the northeast corner of said Section 9;

together with the right to clear said parcel of land and keep the same clear of all brush, tuber, structures, and fire hazards, provided however, the words "fire hazards" shall not be interpreted to include growing crops; and also the present and future right to top, limb, fell, and remove all growing trees, dead trees or snags (collectively called "danger trees") located

on Grantors' land adjacent to said parcel of land, and within a strip of land 50 feet in width on the northerly side of and 75 feet in width on the southerly side of and beyond the outside limits of the right-of-way, which could fall upon or against said transmission and signal line facilities.

Also, in addition to the above described easement and right-of-way, the Granters herein grant, bargain, sell, and convey unto the United States of America a permanent easement and right-of-way over, upon, and across a part of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 1 North, Range 7 West, W.M., Tillamook County, Oregon, excepting the Gales Creek-Tillamook transmission line right-of-way, as is now surveyed and staked on the ground and as is shown colored in red on drawing, serial number 85326, attached hereto and, by reference, made a part of the description of this access road easement and right-of-way, for the purpose of constructing an access road approximately 14 feet in width, with such additional widths as are necessary to provide for cuts, fills, and turnouts, and for curves at angle points, to be used in connection with the aforementioned transmission line easement and right-of-way, together with such other rights and the right to construct such other appurtenant structures as are necessary to accomplish the purposes for which this access road easement and right-of-way is granted.

The Grantors will be permitted the right of ingress and egress over and across said road,

and the right to pass and repass along and on said road in so far as the same extends across the land of the Grantors, said right to be exercised in a manure that will not interfere with the use of the road by the United States of America, its agents and assigns.

(First Ackerman Decl., Ex. 5, pp. 1-2.)<sup>5</sup>

The December Easement is most relevant to the Lund Property and to the parties' dispute, because Lund acquired the Lund Property in 2004 subject to it. (First Ackerman Decl., p. 7, ¶¶ 14, 15 and Exh. 11; Declaration of Daniel Ackerman [ECF No. 17] ("Second Ackerman Declaration"), p. 1, ¶ 1.) Lund confirms this in his declaration: "I acquired my property from a former wife of Bill Stewart[.]" Declaration of John Lund ("Lund Decl."), p. 1; First Ackerman Decl., Exh. 11 (Statutory Warrant Deed, Stewart to Lund). Stewart's title came from Rex and Bernadine Lee in 1972, the couple who, as mentioned above, obtained their title from Gerald and Nellie Reeher in 1944. (First Ackerman Decl., pp. 3, ¶ 5, 5-6 ¶ 11, and Exhs. 1, pp. 1-2; 7.)

Lund acknowledges that his grantor, Stewart, during the mid-1950s had given the BPA "permission to cross the property to access powerlines located on an easement it had acquired" on land north of the Lund Property. (Lund Decl. [ECF No. 13] ("Lund Decl."), ¶ 2.) Lund states that he "continued to give BPA permission to cross the property, but never spent any time or money maintaining the roadway." (*Id.* at

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<sup>5</sup> Although separate documents, the two easements contain nearly identical language of the rights granted, with exceptions made only for the names of the granting parties and descriptions of the grantors' specific parcels.



¶ 3.) Lund claims that in August 2014, he “expressly revoked BPA’s permission to continue using my property” (*Id.* at ¶ 4), but that even after doing so, BPA employees would come upon the Lund Property, sometimes with his “limited permission” and other times without his “consent.” (*Id.* at ¶ 5.) Lund observes that both before and after he revoked permission for BPA to use the Lund Property, BPA approached him “at various times with various offers to purchase an easement to use the roadway on the property,” but that no agreement has yet been reached. (*Id.* at ¶ 6.)

*B. Evidence.*

1. Daniel Ackerman.

Daniel Ackerman (“Ackerman”), is an Acquisition Land Surveyor assigned to BPA’s Mapping Group, and has worked for BPA under contract or as an employee since September of 2012. (First Ackerman Decl., pp. 1, 2, ¶¶ 1, 3.) Since 2003, he has been a licensed Professional Land Surveyor in Washington State, and in 2006 he became a Certified Federal Surveyor. (First Ackerman Decl., pp. 1-2, ¶ 2.) He provides BPA with “professional opinions and guidance regarding boundaries, legal descriptions, and title issues, for the acquisition of land rights on federal, public, private, and tribal lands covering the seven states in BPA’s service territory including: Washington, Oregon, Idaho, Montana, California, Nevada, and Wyoming.” (First Ackerman Decl., p. 2, ¶ 2.) His job duties include “researching, reviewing and evaluating deeds, surveys, maps, title reports and other evidence for the purpose of making title and ownership determinations and to prepare accurate land descriptions for BPA’s Realty Group to acquire

the land rights needed for BPA to construct, access, maintain the regional electric transmission network.” (First Ackerman Decl., p. 2, ¶ 3.) Ackerman is assigned to coordinate those survey services with BPA’s Fish and Wildlife and Mobile REDI telecommunications projects. (*Id.*)

Ackerman researched and analyzed the rights, burdens, and obligations accompanying and associated with the Lund Property. (First Ackerman Decl., p. 2, ¶ 4.) In performing this task, he worked with two BPA surveyors and one survey technician to gather, assess, and present the facts stated in his declaration and to gather or create the exhibits that accompany it. (First Ackerman Decl., p. 2, ¶ 3.) Ackerman’s first declaration [ECF No. 8] is ten pages long and precisely details the chain-of-title of the Lund Property and the neighboring properties. Accompanying his declaration are 17 exhibits [ECF Nos. 8-1 through 8-17] comprising 223 pages that support and illustrate his team’s findings.

Based on his team’s research and analysis and citing the right-of-way easements, Ackerman concludes that BPA has an easement over the Subject Road:

“In my professional opinion the right to access the transmission line via the Subject Road is included with ‘such other rights . . . as are necessary to accomplish the purpose’ of the transmission line easement, because the Subject Road is the most reasonable and obvious way to reach the right-of-way from Oregon Highway 6.

(First Ackerman Decl., pp. 3-4, ¶ 9.) After chronicling a series of transfers, surveys, lot-line adjustments,

and boundary-line adjustments about and around the Lund property, occurring both before and after Lund's acquisition of the Lund Property on February 9, 2004 (First Ackerman Decl., pp. 5-9, ¶¶ 11-22), Ackerman explains in detail the basis of his conclusion:

In my professional opinion, the provisions in Transmission Line and Access Road Easement, Book 150, Page 521, in 1955, and referenced above in Paragraph 9, have run with the land in the same location since it was first granted to BPA by the Lund's predecessor in title. A significant portion of that easement was transferred to Reeher's Homestead Inc., in that lot line adjustment referenced above in Paragraph 14, but based on the survey field evidence collected in January 2019 as referenced on Paragraph 22, a portion of the easement still exists directly on the Lund Property. The said Transmission Line Easement grants BPA "... a perpetual easement and right to enter . . ." to maintain its transmission line that has been in existence in 1955. Plus, the easement grants rights to clear "danger trees" on the area "75 feet in width on the southerly side of and beyond the outside limits of the right-of-way," which encumbers an even greater portion of the Lund Property.

In my professional opinion, the route of entry to the easement area is that same "existing logging road" which was granted to the Reeher's in 1944, in the Easement in Book 92, Page 550, referenced above in Paragraph 6 and delineated on Survey A-2488 in 1973, referenced above in Paragraph 12. The historical aerial photography referenced above

in Paragraph 7, dating back to 1952, shows the road to be in the same location as it exists today. That road is represented by a double dashed line depicted on BPA Plan Maps referenced above in Paragraph 10. The road connects the new road that BPA built pursuant to Easement 138536 to Oregon Highway 6.

(First Ackerman Decl., pp. 9-10, ¶¶ 23-24.)

In his second declaration [ECF No. 17], comprising three pages and accompanied by two exhibits [ECF Nos. 17-1 and 17-2], Ackerman first notes that his first declaration traces the chain of title for the Lund Property “back to Beeler, and the neighbor Reeher before that,” that it identifies the 1955 transmission line and access road easements the United States procured from Beeler, and consequently that “according to my professional surveyor’s assessment, the Beeler Easement directly burdens the Lund property.” (Second Ackerman Decl. p. 1, ¶ 1.) Ackerman then explains why BPA’s easement burdens the Lund Property:

The Beeler Easement also grants the United States express rights of action to remove danger trees on the 75-foot portion lying to the south of the 100-foot wide right of way. Using a MicroStation cadd drawing created using field survey data observed by BPA surveyors in February of 2019, I have calculated that 1.03 acres out of the original total of 1.54 acres acquired still burden the Lund property. The acreage calculations reported here are based on the property boundaries established and monumented on the ground, as reported by survey A-2488, referenced in paragraph 12 and

attached as Exhibit 8, in my Declaration dated March 5, 2020.

\* \* \* \*

In 1955, when the Easement was executed by Beeler, he owned the entire strip of land (Tax Lots 100, 200, and 300) over which Reeher Road runs[.]

(Second Ackerman Decl. pp. 2-3, ¶¶ 3, 5.) Ackerman observes that Lund, in answer to BPA's First Set of Requests for Admission, admitted the Beeler provenience. (Second Ackerman Decl. p. 3, ¶ 5.c. & Ex. 19.)

## 2. James Clark.

James Clark is a Realty Specialist who has worked for BPA since 2012. (First Clark Decl., p. 1, ¶ 1.) As a Realty Specialist, Clark's duties include land acquisition, land management, and land disposal, and serving as BPA's land liaison for capital projects and for his assigned district. (*Id.*, p. 2, ¶ 3.) Before his employment with BPA, Clark worked for nine years as a Real Estate Broker in Yamhill County, Oregon. (First Clark Decl., p. 1, ¶ 2.) His analysis of the land areas in dispute relies on collaboration and input from various BPA realty specialists, land surveyors, attorneys, transmission line maintenance staff, and vegetation management staff. (*Id.* at p. 2, ¶ 4.)

Clark identifies the land tracts over which BPA acquired the right to construct the Gales Creek-Tillamook Section of its transmission line in 1955. (*Id.*, p. 2, ¶ 5.) Clark refers to the August Easement and the December Easement and to the burdened tracts of land, traces the Subject Road through those properties, notes that BPA's use of the Subject Road began when it acquired these easements, and

confirms that BPA since then has used the Subject Road to access, maintain, inspect, and patrol the transmission line on the easements that burden, among other tracts, the Lund Property. (*Id.*, pp. 2-5, ¶¶ 5-12.) Clark also cites a 1973 Reeher Incorporated survey of the Subject Road, then known as “The North Fork Road,” to confirm that it later renamed “Reeher Road.” (*Id.*, pp. 5-6, ¶ 13.)<sup>6</sup>

In his second declaration, Clark reaffirms that “BPA has used what is presently known as Reeher Road since 1955 to reach the Easement area from Oregon Highway 6 (also called the Wilson River Highway).” (Second Clark Decl., at p. 2, ¶ 2.7) Clark points out that the Subject Road is the only road by which BPA can transport equipment and personnel from Oregon Highway 6 to the section of the transmission line easement that contains Structure 26/5, which is the section that burdens the Lund Property. (*Id.* at p. 3, ¶ 4.)

In his second declaration, Clark also explains why the alternative access routes that Lund proposes in his declaration [ECF No. 13] are not feasible. All of the proposed alternative access routes Lund identifies are on his neighbor’s property and “would require BPA to acquire approximately 3000 linear feet of additional access road rights to construct and improve the routes [Lund] highlighted in Appendix A [of Plaintiff’s Response to Defendant’s First Set of

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<sup>6</sup> In his second declaration, Clark reaffirms that “BPA has used what is presently known as Reeher Road since 1955 to reach the Easement area from Oregon Highway 6 (also called the Wilson River Highway).” (Second Clark Decl., at p. 2, ¶ 2.)

<sup>7</sup> Clark also notes that “though it has meandered, been rebuilt and renamed, BPA has used this road throughout the years.” (*Id.*, p. 2 n.1.)

Interrogatories].” (Second Clark Decl., p. 3, ¶ 5). Clark also observes that in identifying proposed alternative routes, Lund failed to account for the problems inherent in those routes that make them “unreasonable and impractical:” none of them are safe, each alternative route presents virtually impassable terrain features, and all would have greater environmental impact if BPA attempted to develop and use them. (*Id.* at pp. 3-4; ¶¶ 5-7.) Clark concludes: “While BPA preferred to have an express easement to include the right to use and rebuild the road, BPA concluded it could make do with its existing ‘right to enter’ under the Beeler Easement, using Reeher Road, which is the most obvious and reasonable way to reach the Easement area, as BPA has done since 1955.” (*Id.* at p. 5, ¶ 8.)

### 3. Lund.

Lund’s only evidence to refute the QTA’s applicability to his claims is his two-and-one-half-page declaration [ECF No. 13] in which he describes a discussion with Bill Stewart, from whom he acquired the Lund Property, and recounts various conversations with BPA agents and employees. Lund offers no exhibits to support his declaration or his opposition. He did not submit declarations or evidence from surveyors, civil or environmental engineers, title searchers, or realty specialists; provided no chain-of-title analysis; and offered no other evidence to contest Defendants’ evidentiary submissions or to create an alternative accounting of his asserted ownership interests in the Lund Property or in the contested easement. Furthermore, many of the statements contained in his declaration’s nine paragraphs are conclusory, not based on personal knowledge, or lack sufficient foundation. Fairly read,

his narrative mirrors the allegations contained in his complaint and the arguments contained in his opposition to the Motion.

## II. The Parties' Contentions.

In his First Claim for Relief, Lund seeks damages for trespass under the FTCA based on the United States' repeated entry over the Disputed Parcel after Lund revoked his permission. (Complaint ¶¶ 8-15.) He also alleges BPA and its contractors used the Subject Road to access BPA's power transmission lines in the past with his permission, but that they continued to do so even after he revoked his permission. (Complaint ¶¶ 10, 11.)

In his Second Claim for Relief, Lund asserts he is entitled to just compensation for inverse condemnation under 28 U.S.C. § 1346. (Complaint ¶¶ 1-7, 16(1)<sup>8</sup>-18.) He alleges that to the extent BPA's repeated entry and use of the Lund Property has created a unilateral easement for BPA, then a taking has occurred without just compensation to Lund. Thus, he is entitled to a money award under the Fifth Amendment of the United States Constitution. (Complaint ¶¶ 17(1), 18(1)<sup>9</sup>.)

In his Third Claim for Relief, Lund asserts the Agents have repeatedly violated his constitutionally protected right against deprivation of property without due process under the Fourteenth Amendment, right against warrantless entry under the Fourth Amendment, and right against the taking

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<sup>8</sup> Lund begins both the Second and Third Claim for Relief with claim number "16" in his complaint. Here, "16(1)" refers to the first use of "16" in the second claim.

<sup>9</sup> For the reasons explained in footnote 1, "17(1)" and "18(1)" refer to the first use of "17" and "18" in the second claim.



of private property without just compensation under the Fifth Amendment. (Complaint ¶¶ 1-7, 16(2)<sup>10</sup>-21.) He asserts that BPA has federal authority over the Agents, unnamed employees of BPA whom Lund alleges were personally involved in the tortious conduct and the deprivation of his constitutional rights. (Complaint ¶ 4.) Lund alleges he is entitled to an injunction barring Agents, or any other agent of the United States, from entering the Lund Property pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as to money damages for losses incurred by deprivations of his constitutional rights. (Complaint ¶ 20.)

Defendants observe that the Easement is for the purpose of building, operating, and maintaining electric power transmission lines and related equipment on a 100-foot right-of-way, and that it also grants three relevant express rights: (1) a right to access a right-of-way; (2) a right to build a new access road on the right-of-way; and (3) a right to keep a seventy-five foot wide area south of the right-of-way clear of “danger trees” which could harm the operation of the transmission lines. (Motion, at 2.)

Defendants have moved to dismiss Lund’s complaint for lack of subject-matter jurisdiction. (Motion at 4.) Defendants assert BPA claims an interest in the Disputed Parcel to access the Easement’s right-of-way (*id.*) and that the Subject Road, which connects to Oregon Highway 6, is the only reasonable means of ingress or egress to the Easement, thus giving them a right to continue crossing over the Disputed Parcel. (Motion at 7.) On

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<sup>10</sup> Again, as explained above, “16(2)” refers to the second use of “16” in the third claim.

these facts, Defendants conclude Lund's suit is governed exclusively by the QTA, because it involves real property in which the government claims an interest; therefore Lund's other claims are preempted. (Motion at 3.) Defendants also argue the QTA's statute of limitations would time-bar any QTA claim Lund could bring, and accordingly, this action should be dismissed.

Lund counters that his FTCA and *Bivens* claims are proper because they do not challenge Defendants' use of the Easement, and argues that the claim he brings, trespass on the Disputed Parcel, is outside the Easement's scope. (Resp. to Defs.' Mot. [ECF No. 12] ("Resp.") at 4.) Lund alternatively argues that should the court find his claims more properly brought under the QTA, then the claims should not be time-barred and he should be granted leave to amend, because he was not aware BPA was asserting a right to property until after he revoked his permission to allow BPA to access the Disputed Parcel. (Resp. at 10.) Accordingly, Lund contends the statute of limitations for a QTA claim could not have begun to accrue prior to August 2014.

### *Legal Standard*

The United States District Courts are courts of limited subject-matter jurisdiction, having original jurisdiction over all civil actions arising under the Constitution, law, or treaties of the United States. 28 U.S.C. § 1331. A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject-matter jurisdiction, and the party asserting jurisdiction bears the burden of proving the court has jurisdiction over their claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377

(1994). A Rule 12(b)(1) motion may attack the substance of the complaint's jurisdictional allegations even though the allegations are formally sufficient. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 9744, 979-80 (9th Cir. 2007) (the court treats motion attacking the substance of complaint's jurisdictional allegations as a Rule 12(b)(1) motion). In deciding a Rule 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

#### *Discussion*

Defendants argue the QTA is the sole source of the court's authority to decide the real property rights underlying Lund's claims. Defendants support their position with two arguments. First, the QTA governs this case to the exclusion of other claims and remedies, thus preempting Lund's FTCA and *Bivens* claims. Second, Defendants contend that Lund's inverse condemnation claim under the Little Tucker Act must be dismissed, because such a claim concedes the government's possession of real property and Lund, in his complaint, adamantly asserts an ownership interest here. Finally, Defendants oppose Lund's alternative request to amend his complaint to add a QTA claim because the applicable statute of limitations bars a QTA claim here. Because the parties couple subject-matter jurisdiction for the FTCA and *Bivens* claims in their respective discussions, the court addresses those claims first, along with the QTA statute of limitations issue. The court then addresses Lund's inverse condemnation claim.

I. Lund's First and Third Claims for Relief: FTCA and Bivens.

*A. The QTA applies.*

Federal sovereign immunity insulates the United States from lawsuits in the absence of an express waiver of immunity by Congress. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). In a suit against the federal government, discerning whether the United States has waived sovereign immunity is itself a question of subject-matter jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The United States has waived its sovereign immunity for claims under the FTCA, including any civil action or claim not exceeding \$10,000 in amount, and founded either upon the Constitution or any "Act of Congress." 28 U.S.C. § 1346(a)(2) (2013); *see Tobar v. U.S.*, 639 F.3d 1191, 1196 (9th Cir. 2011).

The United States' sovereign immunity also is waived when federal agents act under color of law. In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the plaintiff brought a civil action against the United States and recovered damages for injuries sustained following federal agents' violation of his constitutional rights. *Id.* at 397. *Bivens* recognized that agents of the federal government acting under federal authority have a higher propensity to harm the rights of private citizens. *Id.* at 391-92. The Court found the Fourth Amendment operates as a limitation on the exercise of federal power, and found where federally protected rights have been invaded, the courts may adjust their remedies to grant the necessary relief. *Id.* at 392. Because the plaintiff stated a cause of action arising

under the Constitution, the claim could be heard in court. *Id.* at 397.

The United States also has waived its sovereign immunity under the QTA, allowing it to be named as a defendant in a civil action to adjudicate a disputed title to real property in which it claims an interest. 28 U.S.C. § 2409a(a) (1986). This section contains a caveat that the section does not apply to “actions which may be or could be brought under sections 1346 . . . of this title.” *Id.* The QTA thus provides an exception for claims brought under the FTCA (*id.*), but the QTA may also provide exclusive jurisdiction when claimants explicitly challenge the United States’ title to real property. *Robinson*, 586 F.3d at 686. If a suit falls within the substantive scope of the QTA by challenging the title of the United States, the QTA serves as an exclusive authority with a preemptive effect on other claims. *Id.* (quoting *Block*, 461 U.S. at 280).

Lund argues this court has subject-matter jurisdiction over his FTCA and *Bivens* claims as claims under federal law and the Constitution, and thus the QTA does not exclude these claims. (Resp. at 1.) Defendants reply that a plaintiff may not, as Lund attempts here, litigate a claim that in fact is a QTA claim under a different statute imposing different requirements and providing different remedies. (Motion at 8.) Defendants observe that the QTA therefore should govern this case exclusively, because the allegations regarding the Disputed Parcel challenge the scope of the Easement, which in turn is central to the question of which law applies in determining jurisdiction. (Motion at 6.) While Lund insists he is the sole owner of the Disputed Parcel, Defendants contend the nature of the complaint

necessarily implicates the Easement and, thus, constitutes a dispute involving the scope Easement.

The court first addresses whether the QTA preempts Lund's FTCA and *Bivens* claims. Supreme Court case law determines whether or not Lund's claims are governed by the QTA. In *Block v. North Dakota*, the Supreme Court of the United States interpreted Congress's intent in the Quiet Title Act:

The legislative history establishes that Congress intended the QTA to provide the exclusive means by which adverse claimants can challenge the United States' title to real property . . . . The rule that a precisely drawn, detailed statute pre-empts more general remedies is applicable here. *Cf. Brown v. GSA*, 425 U.S. 820, 96 S. Ct. 1961, 48 L.Ed.2d 402. Pp. 1816-1819.

*Block*, 461 U.S. at 273.

In *United States v. Mottaz*, the court held a party's claim was brought within the scope of the QTA based on the description of her claim. 476 U.S. 834, 841-42 (1986). There, the plaintiff maintained she possessed sole title to the property, the ownership of which was disputed by the United States. *Mottaz*, 476 U.S. at 842. The Court found the plaintiff's claim to title central to her suit and, therefore, held her claim within the scope of the QTA. *Mottaz*, 476 U.S. at 842. In *Match-E-Be-Nash-She-Wish Band of Pottawatomí Band of Indians v. Patchak*, 57 U.S. 209 (2012), the Court interpreted the plain language of the QTA and found it gives the district court jurisdiction over "civil actions . . . to quiet title" to property in which the United States claims an interest. *Id.* at 217 (quoting 28 U.S.C. 1346(f)).

Two elements to a QTA claim are important to the Lund's claims here: whether there is a dispute over title to real property; in which 2) the United States claims an interest. *Robinson*, 586 F.3d at 686 (quoting 28 U.S.C. § 2409(a)). In *Robinson*, the Ninth Circuit set out a pragmatic approach to determining whether a claim is excluded by the QTA. There, the court concluded that a suit which actually challenges the federal government's title, however denominated, falls within the scope of the QTA regardless of the remedy sought. *Robinson*, 586 F.3d at 688. "Where, on the other hand, there was no real dispute as to an ownership interest, courts have held that the QTA does not apply to a related tort claim." *Id.* (citing *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 759 (4th Cir.1990) (permitting an action for trespass where the plaintiff did not assert an ownership interest in his complaint)).

In tandem, *Robinson* and *Block* define the QTA's reach when disputes over title to real property involve an easement. *Haury Living Trust by and through Haury v. United States*, No. 3:19-cv-00853-HZ, 2019 WL 5699598, at 2 (D. Or. Nov. 4, 2019). Applying those cases, Chief Judge Hernández of this court explained that a challenge to the scope of an easement also is properly brought under the QTA, whereas challenges over use of an easement are not. *Id.* A challenge to property "use" must involve existing easement rights, but a challenge to the scope of an easement is concerned with dispute over rights that may have been granted in an easement, or the "bundle of sticks" which give way to permissive rights conveyed to the United States. *Id.*

These authorities inform the court's understanding of the essence of Lund's claims: his assertion of title

is central to those claims. Lund alleges “BPA and its agents and contractors have repeatedly and without lawful authority or just compensation used and trespassed *upon Plaintiff’s property*, thereby depriving him of valuable property rights and causing him personal harm.” Complaint, ¶1 (italics added). Lund asserts that “[t]he Lund Property *contains a private road* that links Oregon State Highway 6 to an area used by a company *owned by Plaintiff’s family* for the operation of private vacation cabins. That area is near an easement owned and maintained by BPA for power transmission lines.” Complaint, ¶ 9 (italics added). And he contends that “[i]n times past, BPA and its contractors *used the private road* to access its power transmission lines *with Plaintiff’s permission*. In August 2014, Plaintiff formally *revoked permission* for BPA and its contractors to continue using the private road to access its power lines.” Complaint, ¶ 10 (italics added).

Each of Lund’s three claims for relief is premised on his ownership of the Lund Property and on the United States’ alleged violation, through BPA and its agents, of that ownership interest. Lund’s assertion that in the past he gave and later revoked “permission” for BPA to come upon and cross his property further manifests that ownership is the issue raised in his complaint. He alleges that even though he has “revoked [his] permission,” BAP and its agents “continue using his road and property” (Complaint, ¶ 11), which use violates his right of exclusive possession.” Complaint, ¶ 12.

Counter to these allegations is Defendants’ equally unequivocal assertion that BPA has, and has had continually since 1955, an easement to use the Subject Road on and over the Lund Property. Defendants



support their assertion with extensive and detailed analysis backed by evidence to show their use of the Subject Road and the Disputed Parcel during that time. Thus, there is no doubt here that Lund's claims involve a dispute over ownership or, at least, over the scope of the Easement. Under either premise, Lund's claims fall squarely under the QTA.

Accordingly, the court finds Lund's FTCA and *Bivens* claims arise from disputed rights to access the Easement, which brings his claims under the QTA's purview. Therefore, the court finds it does not have subject-matter jurisdiction over Lund's First and Third Claims for Relief. Because the QTA is intended as the exclusive source of jurisdiction over claims encompassing the scope of an easement, it preempts Lund's FTCA and *Bivens* claims and is the sole source of jurisdiction here.

*B. Lund should be granted leave to amend his complaint.*

Lund asserts that if the court finds the QTA preempts his FTCA and *Bivens* claims, the court should allow him leave to amend his complaint. Defendants argue the QTA's statute of limitations renders any QTA claim time-barred. Defendants assert they have used the Disputed Parcel for decades prior to Lund's revocation of permission and, thus any claim under the QTA would be futile in light of a lapsed statute of limitations. (Motion at 15-16.)

As Defendants observe in their Motion, claims under the QTA are subject to a twelve-year statute of limitations that begins to accrue on the date the plaintiff, or their predecessor in interest, "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g)(1986). Accordingly, Defendants

frame the “accrual question” as “whether the United States’ actions would have alerted a reasonable landowner that the government claimed an interest in the land.” (Mot. at 15 (citation omitted).)

The Ninth Circuit explained that simple knowledge of an adverse claim is insufficient to trigger the statute of limitations under the QTA. *Michel v. U.S.*, 65 F.3d 130, 131 (9th Cir. 1995). The facts regarding land ownership and the easement in *Michel* are effectively the inverse of the present case, but the principles explained by the Ninth Circuit remain relevant here. In *Michel*, the government argued that a plaintiff who filed a lawsuit in 1992 should have known long before that he had a claim of a right to use roads across a government refuge, having been aware of the government’s title since the 1940s. *Id.* There, the court concluded that when a plaintiff claims a non-possessory interest such as an easement across the government land, the claim accrues only once the government acts “adversely to the interests of plaintiffs, denies or limits the use of the roadway for access to the plaintiff’s property.” *Id.* at 132 (quoting *Werner v. United States*, 9 F.3d 1514, 1516 (11th Cir. 1993)<sup>11</sup>). The court elaborated, explaining a contrary holding would force a claimant to bring a claim within twelve years even if the government gave no clear indication it contested the claimant’s right. *Michel*, 65 F.3d at 132. Thus, the court held the plaintiff’s claim did not accrue until they knew or should have known the government claimed exclusive rights over access to the property in dispute. *Id.*

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<sup>11</sup> The *Werner* court found limitations on a plaintiff’s claim of an easement over government land even though plaintiffs knew of the government’s title for more than twelve years.

Here, BPA used a portion of the Lund Property, via the Disputed Parcel, to access the Easement “for decades,” and Defendants assert BPA accessed the Easement for vegetation management at least annually, using the Subject Road over the Disputed Parcel. (Motion at 2-3, 15.) Initially, this use was pursuant to permission granted by Lund’s predecessors-in-interest at the time of the Easement’s creation. (Motion at 5-6.) Defendants’ evidence demonstrates a continued entry over the Disputed Parcel to access the Easement, and Defendants argue that on this evidence of continued entry, Lund’s predecessors-in-interest should have been alerted to BPA’s ingress and egress at least annually since 1955. (Mot. at 15-16.) But *Michel* instructs here that the statute of limitations began to accrue only once Defendants affirmatively claimed their interest in the Disputed Parcel, thus making plaintiff aware of a disputed interest. The Tenth Circuit, in a separate case, arrived at the same conclusion regarding the accrual of a statute of limitations for QTA claims, holding the “[k]nowledge of a claim’s full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff’s.” *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980).

The court finds Lund was not reasonably aware that BPA had an adverse claim to the Disputed Parcel until after he revoked his permission, because previously he reasonably believed himself to be the sole and exclusive owner of the Disputed Parcel who merely allowed BPA to access the Easement with his permission, just as he reasonably believed his predecessor-in-interest had done before him. (Complaint ¶¶ 10-14; Lund Decl. ¶¶ 2-7.) Lund

testified BPA approached him to purchase rights to the Disputed Parcel both before and after he revoked BPA's permission to use the Road on the Lund Property, but – critical to the analysis here – it never claimed an adverse interest to the Disputed Parcel. (Lund Decl. ¶¶ 6-7.) Even if BPA's use of the Disputed Parcel to access the Easement was permissive under Lund's predecessors-in-interest, Lund was not necessarily aware of any dispute of title until August 2014. It was at this point when Lund asserted what he believed to be his sole ownership of the Disputed Parcel, and Defendants continued to access the Easement over the Disputed Parcel, having never previously asserted a property interest over the Disputed Parcel to Lund. (Lund Decl. ¶ 7.) Defendants' arguments to the contrary are unpersuasive under the standard articulated in *Michel* and *Knapp*. Viewing the facts alleged in the light most favorable to Lund, the court does not find Lund knew the Disputed Parcel actually was in dispute. The court thus finds Lund could not reasonably have known of Defendants' adverse interest until he revoked BPA's permission to access the Easement via the Disputed Parcel in August 2014.

The court concludes that the statute of limitations for a QTA claim here has not lapsed. Accordingly, the court finds Lund's claim to resolve ownership of the Disputed Parcel is not time-barred. Because the QTA preempts Lund's FTCA and *Bivens* claims, those claims should be dismissed without prejudice and Lund should be allowed leave to amend his complaint to assert a timely claim under the QTA.

II. Lund's Second Claim for Relief: Inverse Condemnation.

The Supreme Court has explained the distinction between claims under the Little Tucker Act and claims under the QTA. Under the Little Tucker Act, a plaintiff concedes the government possesses title through a taking and seeks compensation for the taken property, but a claim brought under the QTA disputes the government's possession and seeks to vest title in the plaintiff. *Mottaz*, 476 U.S. at 849-50.

Here, Lund contends that the court has subject-matter jurisdiction over the inverse condemnation claim because his is a Fifth Amendment claim that "arises" under the Constitution, within the parameters of 28 U.S.C. § 1331. (Resp. at 4.) Lund contends that when a plaintiff expressly invokes the Little Tucker Act, the court can exercise subject-matter jurisdiction over the claim as it was pleaded. He argues his inverse condemnation claim brought as a Fifth Amendment takings claim should fall squarely under the Little Tucker Act, and so his claim is properly pleaded under 28 U.S.C. § 1346(a)(2) and not preempted by the QTA.

In their motion, Defendants analogize Lund's third claim for relief to his *Bivens* claim, noting both claims turn on whether BPA lacked the right to enter under the Easement. Because the QTA preempts Lund's *Bivens* claim, "[t]he same holds for the inverse condemnation claim, which alleges that BPA 'repeatedly' entered and used the Lund Property 'without permission.'" (Motion at 14.) In their reply, Defendants acknowledge that no authority has concluded the QTA preempts claims brought under the Little Tucker Act, but *Mottaz* articulated the

difference between the two claims and it is that difference that distinguishes Lund's claim here. A QTA claim involves a disputed interest but a Little Tucker Act claim concedes the Government's interest. (Defs.' Reply at 6.) Thus, where landowners claim they still own their property interest exclusively, the claim would not fit within the Little Tucker Act because the essence of the claim is a disputed interest.

As discussed above, Lund's complaint is firmly premised on his exclusive ownership interest in the Lund Property and on his contention that BPA has no right to enter it. Indeed, he explicitly characterizes his ownership interest as "exclusive" in his complaint. Complaint, ¶ 12. Lund cannot assert an inverse condemnation claim over real property which he claims to own exclusively. Thus, the court finds it does not have subject-matter jurisdiction over Lund's inverse condemnation claim under the 28 U.S.C. 1346(a)(2), because the QTA preempts that claim.

#### *Conclusion*

Defendants' motion should be granted and the court should dismiss Lund's first, second, and third claims. Lund should be granted leave to amend his complaint under the QTA.

#### *Scheduling Order*

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due within seventeen (17) days. If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the

Findings and Recommendation will go under advisement at that time.

DATED this 15th day of February, 2021.

/s/ John V. Acosta  
JOHN V. ACOSTA  
United States Magistrate Judge

Filed May 23, 2024

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

|   |   |
|---|---|
| <p>CHINOOK LANDING, LLC,<br/>As Personal Representative<br/>of the Estate of John Lund,<br/>Plaintiff-Appellant,<br/>v.<br/>UNITED STATES; JOHN<br/>DOES, 1-15,<br/>Defendants-Appellees.</p> | <p>No. 23-35344<br/><br/>D.C. No. 3:19-cv-<br/>02015-AR<br/>District of Oregon,<br/>Portland<br/><br/>ORDER</p> |
|---|---|

Before: BYBEE, FRIEDLAND, and MILLER, Circuit Judges.

This court lacks jurisdiction of this appeal because jurisdiction in the district court was based in part on the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The Federal Circuit has exclusive jurisdiction over an appeal from a final decision of a district court in a non-tax case where jurisdiction rested in part upon that statute. *See* 28 U.S.C. § 1295(a)(2); *United States v. Hohri*, 482 U.S. 64 (1987); *Brant v. Cleveland Nat'l Forest Serv.*, 843 F.2d 1222 (9th Cir. 1988).

The appeal is hereby transferred to the Federal Circuit pursuant to 28 U.S.C. § 1631.



Filed March 28, 2023

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

KRISTY LUND, as                      No. 3:19-cv-02015-AR  
personal representative  
of the ESTATE OF  
JOHN LUND,                      JUDGMENT  
Plaintiff,

v.

UNITED STATES OF  
AMERICA,  
Defendant.

HERNÁNDEZ, District Judge:

Based on the record, IT IS ORDERED AND  
ADJUDGED that judgment is entered in favor of  
Defendant. Pending motions, if any, are denied as  
moot.

DATED: March 28, 2023.

/s/ Marco A. Hernández  
MARCO A. HERNÁNDEZ  
United States District Judge

Filed September 7, 2021

Dobson Decl. Ex. 1

**U.S. DEPARTMENT OF ENERGY**  
**BONNEVILLE POWER ADMINISTRATION**  
 Survey Section – TRSS  
**SURVEY REPORT**

**DATE: 11/07/11** ORIGINAL TRACT ID: GC-T-26-AR-70  
 REQUESTED BY: PARCEL NO.:  
 MONICA STAFFLUND WORK ORDER NO.: 00219978  
 CASE NUMBER:  
 TICKLER NUMBER: TASK NUMBER: 04  
 TRS-11-0335

|  |                                    |                                      |     |
|--|------------------------------------|--------------------------------------|-----|
| OWNER<br>NAME:   | ADDRESS:                           | CITY:                                | ZIP |
| STATE:<br>Oregon   | COUNTY:<br>Tillamook               | SECTION:<br>3 & 10                   |     |
| TOWNSHIP:<br>IN  | RANGE:<br>7W                       | MERIDIAN:<br>WM                      |     |
| DESIGN NAME OF LINE OR<br>FACILITY:<br>Forest Grove-Tillamook Line |                                    | DESIGN MILE<br>26                    |     |
| OPERATING NAME OF LINE:<br>Keeler-Tillamook No. 1 Line             |                                    | OPERATING<br>MILE<br>37              |     |
| FROM<br>SURVEY<br>STATION:<br>1483+58.4                            | TO SURVEY<br>STATION:<br>1493+11.9 | RIGHT-OF-WAY<br>WIDTH:<br>20 Ft. ??? |     |

**NARRATIVE:**

We arrived at the subject property September 08, 2011. We met with Mr. Lund, who proceeded to inform us of all the particulars of this job, from his

point of view. In 1955 BPA was using a road called North Fork Rd. which was mapped as if it went on a course through the Lee's Camp settlement, which is in a different location than the existing road shown on the included exhibit. We surveyed the existing road and located the road centerline monuments from County Surveys A-2488, and B-2896. I can not find any documents giving BPA the right to use the existing gravel road (40' wide per logging road easement BK. 92, Pg. 550, Tillamook County records), nor the other one through Lee's Camp. If we plan on acquiring this existing gravel road for access (seems like the best route), we will need title coverage for several parcels of land, and probably should acquire rights from all parties involved with this road. Mr. Lund also informed us that he is in the process of doing a property line adjustment with the Haugen's, which will affect the road acreage per owner. Anyway, this exhibit and report are probably just the beginning of processing this situation. We will keep the file open and wait to hear from you on how to continue. Please contact myself or Craig Forbes to further discuss or provide additional information.

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CHECKED BY:

MANAGER: JD Conant

BPA PROJECT SURVEYOR: RJ Teiper

DATE: 11/07/11

\* \* \* \* \*

Filed September 7, 2021

Dobson Decl. Ex. 2

Thanks—

Kelly

Kelly L. Miller, RLS, EIT

Supervisory Land Surveyor TERM – TPP4

BONNEVILLE POWER ADMINISTRATION

\* \* \* \* \*

**From:** Hensley, Stacie R (BPA) – TERR-3

**Sent:** Tuesday, May 08, 2018 2:24 PM

**To:** Jackson, Kerri J (BPA) – TERP-TPP-4

**Cc:** Miller, Kelly L (BPA) – TERM-TPP-4; Lynch,  
William C (BPA) – TERM-TPP-4

**Subject:** Land work order (tract GC-T-26-AR-1P2)

**Importance:** High

I need an urgent land work order to complete an acquisition for an access road on Forest Grove-Tillamook. We originally cancelled due to failed negotiations and ROE. All we need is to update title and negotiate.

The land payment is for \$2,000. This one will more than likely go to condemnation so we will need more time for labor.

Can we use a typical for this?

**Note:** We are currently unable to access the property due to inadequate land rights. The landowner does not like BPA and completed a lot line adjustment to exclude our TL easement from his property recently.

Stacie R. Hensley | Bonneville Power Administration  
| Regional Realty Officer–South, TERR-HQ-3

\* \* \* \* \*

Filed September 7, 2021

Dobson Decl. Ex. 3

Summary of TER ID 19-0059 Forest Grove-Tillamook  
No 1 Project Team Meeting

Date: January 3, 2019

**Access Road Acquisition**

Tract GC-T-26-AR-1P2

**Attendees:**

Jared Leavitt (TERM)

Darin Smith (TERR)

Mike Gilroy (TERM)

Danya Ward (TERR)

Jim Clark (TERR)

**Scope**

Acquire non-exclusive access road easement to fill in  
rights gap along Reehers Road.

**TERM**

- Mike ordered title reports for two landowners, Lund and Haugen
- Jared estimates the 1st two weeks in February for doing survey work. Jim will provide assistance with survey and landowner communication

**TERR**

- Danya will create project schedules
- Darin and Jim are drafting Waiver Evaluation estimates for approval

**Considerations**

- **Time** Acquisitions need to be to a point where line maintenance and patrols can be completed (May 2019)

**Next Steps**

- TERM Ground Surveys
- TERM Review Title Reports
- TERR Project Schedule
- TERR Create Waiver Evaluation for Approval

Filed September 7, 2021

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

JOHN LUND,  
Plaintiff,

v.

UNITED STATES OF  
AMERICA and JOHN  
DOES 1-15,  
Defendants.

Case No. 3:19-cv-02015-  
AC

**DECLARATION OF  
JOHN LUND IN  
OPPOSITION TO  
DEFENDANT'S  
MOTION FOR  
SUMMARY  
JUDGMENT**

STATE OF OREGON       )  
  )ss.  
County of Tillamook    )

I, John Lund, swear and affirm as follows:

1. I am the Plaintiff and the owner of the real property in Tillamook County at issue in the above referenced action. I am over the age of 18 and competent to testify to the matters herein. I write this declaration in support of opposition to the Defendant's Motion for Summary Judgment.
2. I acquired my property from, Bjerte Williams, a former wife of Bill Stewart both of whom I knew since childhood. Prior to his death, Mr. Stewart explained to me how he had given the Bonneville Power Administration ("BPA") permission to cross the property to access powerlines located on an easement it had acquired on land north of my property during

the mid-1950s. The easement touches a small part of my property, but the roadway Mr. Stewart allowed BPA to use to reach the easement is located well outside the boundaries of that easement.

3. After I acquired the property, I continued to give BPA permission to cross the property, until August 2, 2014, when I expressly revoked BPA's permission to continue using my property because it would not contribute to the cost of maintaining the road or entertain a reasonable proposal for the purchase of a road easement that addressed ownership rights of felled hazard trees, protecting the potable water system, liability, and maintenance of the road. A true and accurate copy of the email in which I revoked permission for BPA to use the road is attached hereto as Exhibit 1.
4. After I revoked BPA's permission to enter my property, it's employees and contractors would from time to time still come on my property and use the roadway. Occasionally, I would grant them limited permission to come onto the property for specific projects like removing hazard trees and surveying a potential road easement, but other times the BPA's employees would come onto the property without my consent.
5. Both before and after I revoked BPA's permission to continue using my property, BPA approached me at various times with various offers to purchase an easement to use the roadway on the property. However, we still have not been able to agree to a price or on



the terms of an easement. During the negotiations in 2014, BPA also requested that I grant it a revocable permit to use the road until a more permanent easement could be negotiated. A true and accurate copy of BPA's request for a revokable permit is attached hereto as Exhibit 2.

6. At no point in my many discussions with BPA's representatives prior to my revoking of the permission to use the road in 2014 did the agency assert that the 1955 easement document gave the agency the right to use any portion of my private road to access its power line easement. In fact, in an email to me dated March 25, 2011, a BPA representative admitted that the agency did not have an easement to use the road. A true and accurate copy of that email is attached hereto as Exhibit 3.
7. My family and I have owned property in the immediate area for decades and I am very familiar with the layout and topography of the area around my property. There are other ways to access the BPA easement without crossing my property. The other roads are located off Highway 6 at about mile post 15.4 and again at 15.5, also at about mile post 6.8. A map with a legend showing the alternative routes that BPA could use to access its power line easement is set forth as Exhibit 4.
8. A BPA road engineer, who I recall was Chad Maxwell, told me during a meeting on July 23, 2014 that he used another road to access the easement area. Another BPA representative

Christine Nickerson stated in an email to me on July 8, 2014 that “there is another way to access the poles, but it would be a more difficult route.” I understand the other road used by BPA to access the easement area is more challenging, but it is no worse than some of the other roads BPA uses to access their power lines in other parts of the Tillamook Forest. A true and accurate copy of the relevant portions of Ms. Nickerson’s July 8, 2014 email is attached hereto as Exhibit 5. In that same email, Ms. Nickerson acknowledged that BPA’s attempt to secure legal access to use the roadway “is something that should have been handled many years ago.”

9. From my experience owning property in the area, hiking old logging roads, and reviewing county surveys and GIS data, I also am aware of other overgrown logging roads which, if reopened, could provide alternative access to the structure in question from their easement one structure to the East.
10. In early 2020, after I filed this lawsuit, BPA and its contractors again came onto my property without my permission. When I confronted them, a BPA representative explained that they had asked and received permission from Reehers Homestead, Inc., a corporation for which I was a board member at the time. Unlike the BPA, this company does have an easement to use the roadway. However, the then 89-year-old individual the BPA employee said she spoke with to receive permission no longer holds a position with the company.

I HEREBY DECLARE THAT THE ABOVE  
STATEMENT IS TRUE TO THE BEST OF MY  
KNOWLEDGE AND BELIEF AND THAT I  
UNDERSTAND IT IS MADE FOR USE AS  
EVIDENCE IN COURT AND IS SUBJECT TO  
PENALTY FOR PERJURY.

Dated:

August 31, 2021

/s/ John R. Lund  
John Lund

\* \* \* \* \*

Filed September 7, 2021

Lund Decl. Ex 1

**From:** John Lund  
**Sent:** Saturday, August 2, 2014 1:54 PM  
**To:** Nickerson, Christine  
**Cc:** Nystrom,Jill K (BPA) – TERR-3  
**Subject:** Re: BPA Access Road Easement/Lund

ALL,

Please consider this written notice that I revoke any formal or implied permission for your agency, agents, or contractors to enter or cross my property. This revocation is immediate upon receipt.

Also, since your engineer acknowledged an alternative usable route, my property is not “needed” for your purposes. Please seek permission to use that other route.

Thank You,  
John Lund

**From:** Nickerson, Christine  
**Sent:** Friday, July 25, 2014 11:21 AM  
**To:** John Lund  
**Cc:** Nystrom,Jill K (BPA) – TERR-3  
**Subject:** RE: BPA Access Road Easement/Lund

Hello John,

Thank you for meeting with Jill and I on Wednesday. I hope that we can get a Revocable Permit executed soon.

I have attached a draft Letter of Understanding which addresses:

- BPA to maintain the road as needed to BPA’s standards.

- Well head on west side of access road (I would have you mark the approximate location of the well head on a map).

Please let me know if this will suffice.

I have clipped and pasted below a paragraph about the Federal Tort Claims Act. This would apply if there were injury or damage to you or your property due to the project and/or BPA accessing your property.

Filed September 7, 2021

Lund Decl. Ex. 2

**Clark, James L (BPA) – TERR-CHEMAWA**

---

**From:** John Lund <johnatntc@hotmail.com>  
**Sent:** Saturday, May 21, 2016 2:20 PM  
**To:** Clark, James L (BPA) – TERR-3  
**Subject:** FW: K-T 37-5

Below is the text from an email in 2011. Pretty much to the point of what I've been saying all along and it's your people saying it.

**From:** Stafflund, Monica A – TERR-CHEMAWA  
[mailto:mastafflund@bpa.gov]  
**Sent:** Friday, March 25, 2011 11:00 AM  
**To:** 'johnatntc@hotmail.com' <johnatntc@hotmail.com>  
**Cc:** Sundberg, Aaron D – TFL-CHEMAWA  
<adsundberg@bpa.gov>; Sever, Paul H – TFLF-CHEMAWA <phsever@bpa.gov>; Mora Flores, Carlos – TFBV-ALVEY <jcmoralflores@bpa.gov>  
**Subject:** RE: K-T 37/5

we have the transmission line easement but no easement for an access road. the road is a historical way to travel, not an easement

Monica Stafflund  
Field Realty Specialist  
503-393-8181

---

**From:** johnatntc@hotmail.com  
[mailto:johnatntc@hotmail.com]  
**Sent:** Friday, March 25, 2011 10:45 AM  
**To:** Stafflund, Monica A – TERR-CHEMAWA  
**Cc:** Sundberg, Aaron D – TFL-CHEMAWA;  
Sever, Paul H – TFLF-CHEMAWA; Mora  
Flores, Carlos – TFBV-ALVEY  
**Subject:** Re: K-T 37/5

Hi Monica,

I just left the county court house after failing to find any easement or document between BPA and any prior owner of the tax lots 100, 200, and 300. NONE for WIRES or ROAD access.

What documents do you have?

John Lund

Sent from my Verizon Wireless BlackBerry

---

**From:** "Stafflund, Monica A – TERR-CHEMAWA"  
<mastafflund@bpa.gov>  
**Date:** Tue, 22 Mar 2011 16:07:00 -0700  
**To:** 'johnatntc@hotmail.com' <johatntc@hotmail.com>  
**Cc:** Sundberg, Aaron D – TFL-CHEMAWA  
<adsundberg@bpa.gov>; Sever, Paul H – TFLF-  
CHEMAWA <phsever@bpa.gov>; Mora Flores,  
Carlos – TFBV-ALVEY <jcmoraflores@bpa.gov>  
**Subject:** K-T 37/5

Requested info

Filed September 7, 2021

Lund Decl. Ex. 3

**Department of Energy**  
Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621  
**TRANSMISSION SERVICES**

April 1, 2014

In reply refer to: TERR-3

Project: Keeler-Tillamook Rebuild

Tract No. GC-T-26-AR-1P2

**CERTIFIED-RETURN RECEIPT REQUESTED**

John R. Lund  
8781 E. Pomegranate  
Tucson, AZ 85730

RE: Revocable Permit

Dear Property Owner:

As you are aware, Bonneville Power Administration (BPA) has an upcoming project, Keeler-Tillamook Rebuild and Access Roads, which will consist of replacing wood pole structures and appurtenances.

In connection with this project, BPA offered to purchase an access road easement from you which have provided BPA a specific and defined access route to BPA's structures for the Rebuild and for operations and maintenance after the Rebuild. That offer was made on December 28, 2012 and included an offer of just compensation in the amount of \$1,900.00 for an access easement.



In order to complete this project, and for operations and maintenance purposes, it is necessary for BPA to have access to its facilities.

At this time, there has not been settlement between you and BPA on the access road easement on your property, so BPA has developed a REVOCABLE PERMIT FOR ACCESS ROAD. This permit will give BPA the right to cross your property in the location described on Exhibit A and as shown on Exhibit B. The permit will not be recorded. Further, you have the right to revoke the permit if you provide BPA with 180 calendar day notice. BPA will compensate you with a one-time payment of \$500.00 in exchange for this permit. This is an attempt to reach an agreement with you that I believe will minimize confusion both during the project and in the future as crews perform routine operations and maintenance of BPA's facilities.

BPA has contracted with HDR, Inc. to assist with this project. If you would like to accept the offer or have questions or comments please contact HDR representative, Christine Nickerson, at 503-727-3950, or by email at [Christine.nickerson@hdrinc.com](mailto:Christine.nickerson@hdrinc.com).

Sincerely,

/s/ Jill K. Nystrom  
BPA Realty Specialist

Enclosure:  
Revocable Permit with Exhibits  
Voucher Certificate  
Request for Tax Payer ID

BPA Tract No: GC-T-26-AR-1P2  
(revocable)

**REVOCABLE PERMIT FOR ACCESS ROAD**

John R. Lund, the Permittor, whether one or more, hereby grants to the UNITED STATES OF AMERICA, Department of Energy, Bonneville Power Administration ("BPA"), its officers, employees and contractors, permission to use the route of travel described on Exhibit A and as shown on Exhibit B, attached. This route of travel is to be used as access for ingress and egress to BPA's electric power transmission facilities.

BPA may not assign or transfer this permit without the written consent of the Permittor.

The rights granted under this permit are for the use of the Permittor's property and shall not be construed as a conveyance of any interest in the Permittor's property.

The Permittor may revoke this permit upon 180 calendar days' written notice to BPA. Said notice shall be considered sufficient when sent by mail deposited in a United States Post Office and addressed to Bonneville Power Administration, TERS-3, P.O. BOX 3621, PORTLAND, OR 97208-3621. Attn. Real Property Field Services

As consideration for the rights granted herein, BPA shall compensate the Permittor a one-time payment of \$500.00.

**IN WITNESS WHEREOF**, the Permittor has signed this permit below.

|   |                                 |
|---|---------------------------------|
| Accepted for the<br>UNITED STATES OF<br>AMERICA,<br>Department of Energy,<br>Bonneville Power<br>Administration<br><br>By: _____<br>Title: _____<br>Date: _____ | _____.Date:____<br>John R. Lund |
|---|---------------------------------|

Tract No. GC-T-26-AR-1P2  
(revocable)

BPA FEBRUARY 2008

[EXHIBIT A]

GC-T-26-AR-1 Parcel 2

A right-of-way 20 feet wide, over and along an existing road, over and across part of the SW1/4SW1/4 of Section 3 and part of the NW1/4NW1/4 of Section 10, all in Township 1 North, Range 7 West, Willamette Meridian, Tillamook County, Oregon, as shown on Bonneville Power Administration (BPA) Access Road Acquisition Exhibit for GC-T-26-AR-1 Parcel 2, dated January 12, 2012, attached hereto and made a part hereof.



Substitute IRS form W9e  
(07-2003)

**REQUEST FOR TAXPAYER IDENTIFICATION  
NUMBER AND CERTIFICATION**

**REQUIRED**

**Name**

Phone Number(s)

Business Name (If different from above)

**Check appropriate:** ☐ Individual/Sole Proprietor  
☐ Corporation ☐ Partnership ☐ Other:

**Address**

**City, State, ZIP Code**

**Mailing Address**

**City, State ZIP Code**

**CERTIFICATION & Federal Tax Identification  
Number**

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), **and**
2. I am not subject to backup withholding because:  
**(a)** I am exempt from backup withholding, or **(b)** I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or **(c)** the IRS has notified me that I am no longer subject to backup withholding, **and**
3. I am a U.S. person (including a U.S. resident alien).

**CERTIFICATION INSTRUCTIONS:** You must cross out item **2** above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return.

Signature of U.S. person \_\_\_\_\_ Date \_\_\_\_\_  
Social Security Number Or Employer Identification  
Number

\_\_\_\_\_

Signature of U.S. person\_\_\_\_\_ Date\_\_\_\_\_  
Social Security Number **Or** Employer Identification  
Number

\_\_\_\_\_

Do you require IRS form 1099? ☐ YES ☐ NO

## OPTIONAL     Vendor Express Enrollment

This form is used for Automated Clearing House (ACH) payments with an addendum record that contains payment related information processed through the Vendor Express Program.

Contact Person

Telephone Number\_\_\_\_\_

Internet E-Mail Address\_\_\_\_\_

## Financial Institution Information

Bank Name

Telephone Number

Nine Digit Transit Number

Depositor Account Number

**PRIVACY ACT STATEMENT:** the above information is provided to comply with the Privacy Act of 1974 (P.L. 93-579). All information collected on this form is required under the provision of U.S.C. 3322

and 31 CFR 210. This information will be used by the Treasury Department to transmit payment data, by electronic means to vendor's financial institution.

**RETURN THIS FORM TO:**  
**Bonneville Power Administration**  
**TERS-3**  
**P O BOX 3621**  
**PORTLAND, OR 97206-3621**

Lead Tract No. GC-T-26-AR-1P2

**U.S. DEPARTMENT OF ENERGY-  
 BONNEVILLE POWER ADMINISTRATION  
 VOUCHER CERTIFICATE**

FOR: Revocable Permit for Access Road

**CERTIFICATE:**

As grantor(s) in the instrument described above, (I) (we) hereby authorize the disbursements shown below:

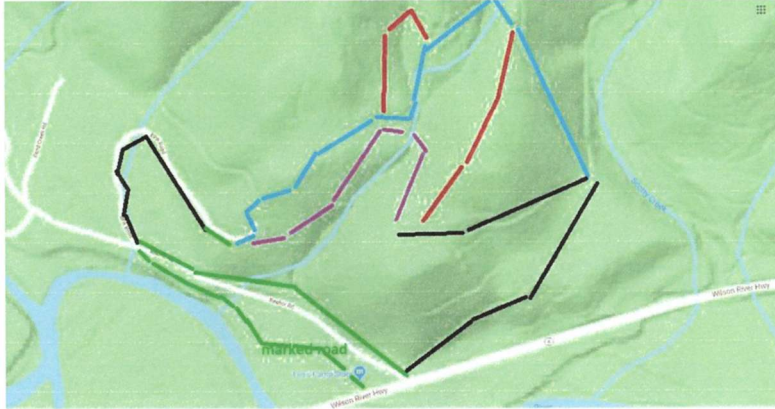
| NAME OF PAYEE         | DATE | MAILING ADDRESS | AMOUNT |
|-----------------------|------|-----------------|--------|
| John R. Lund<br>Sign: |      |                 | \$     |
|                       |      |                 | \$     |
|                       |      |                 | \$     |
|                       |      |                 | \$     |
|                       |      |                 | \$     |

**TOTAL DISBURSEMENTS ON  
 THIS VOUCHER:**

\$500.00

BPA May 2012

Filed September 7, 2021

**Exhibit 4**

- The black roads are legal BPA easements
- The green line is an existing road that Plaintiff's family uses. It is steep in places, but drivable.
- The blue line is the existing road that Ms. Nickerson discussed as alternative access in her July 8, 2014 email.
- The north south red road (east) is drivable, but would need some improvement. The other (west) red road link goes into a creek bed and back out. It would need work to reestablish it but it also is almost level and would avoid at least one steep grade.
- The purple line indicates where roads were at one time and could be restored making for fairly easy access.



Filed September 7, 2021

Lund Decl. Ex. 5

**From:** Nickerson, Christine

**Sent:** Tuesday, July 8, 2014 12:53 PM

**To:** John Lund

**Subject:** RE: BPA Access Road Easement/Land

Hi John,

When I first contacted you, Jill really just wanted to secure the property rights as this is something that should have been handled many years ago. As the pole replacement project progressed, it came to the attention of the contractor that your road really is needed to access the poles. There is another way to access the poles, but it would be a difficult route.

I think we can conduct our meeting outside (this is what we are all used to doing). If it would be more comfortable we can always drive to the nearest café or coffee shop for a sit down meeting. Will noon work? I am also going to invite the land liaison for the contractor, Eric Richter. He is on the ground now working with property owners as the project is underway.

The meeting will have to do with both getting to an agreement and working on the document language, and observing the site. It may be determined that BPA will need to use an alternate access, but this would be a last resort. The main issues we will be discussing are the items from your email dated 5/28/14 (below). See my comments in blue.

*Hi Christine,*

*I think that the revocable permit has merit and fewer hurdles to overcome.*

*However the document needs to be adjusted. For clarification, the road in question is truly unique. I rarely use that road for myself. To get a vehicle on it, I have to leave my property to enter through adjoining parcels. There is no access to or from that road anywhere on my property. I did not design the road. I do not maintain the road. Thus I have no use for it, but since it crosses my property it causes me problems. Fact is that there is only one legal user and that is the owner of the parcel North of me, Reeher's Homestead Incorporated. Even when I personally go further North I use another road through my property and do not use the road in question.*

*Thus I need the following issues addressed in your next draft.*

*1. The roadway description shall be 40' wide and per the 1973 survey attached. 40' is required due to the fact that this is not sole use and is not your typical BPA road going only to a pole structure with no other traffic. Vehicles will meet and have to pass. That requires one to pull to the side and every time one or both of those vehicles will go outside of the 10' side distance in your proposed easement. This is something that the road engineer can discuss with you. BPA can try to make any improvements beneficial to you and to BPA.*

*2. The BPA must accept the road as is and be responsible for its design, maintenance, and suitability. Again, I did not design nor do I maintain it and I do not recommend it's use. Therefore the BPA must say that it meets all their needs and that they will ensure it is adequate for their use. I am particularly concerned in two areas. First is those passing vehicles that pull to the side could slip over the edge or the soft shoulder could give way and the vehicle could roll*

*down the hill. Second, that there is a soft area, especially when the forest is wet, on the curve with the creek and culverts. Your heavy trucks could cause the road bed to slide downslope and it could be perilous. These are important items to discuss to make sure that the road is suitable for BPA's use. We will want your input on the best access to the poles.*

I did forward your requests to BPA. First and foremost BPA will verify that you and BPA are talking about the same road. The access road engineer is going to drive by and confirm. Once this is established BPA will address your other requests regarding the revocable permit.

I will be in touch as soon as I have more information. Thank you very much for reaching out to me, and for providing the information in your previous emails.

Regards,

**Christine Nickerson**

*Right of Way Agent*

**HDR**

660 Hawthorne Ave. SE, Suite 220

Salem, OR 97301

D 503-727-3950 M 503-310-5815

christina.nickerson@hdrinc.com

hdrinc.com/follow-us

---

**From:** John Lund [mailto:johnatntc@hotmail.com]

**Sent:** Tuesday, April 15, 2014 9:21 AM

**To:** Nickerson, Christine

**Subject:** Re: BPA Access Road Easement/Lund

Hi again,

Sorry, I forgot to attach the 1973 road survey that I mentioned in the other email. Both surveys are on file and public record in the Tillamook County Surveyors office.

John Lund

---

**From:** Nickerson, Christine  
**Sent:** Tuesday, April 8, 2014 4:06 PM  
**To:** johnatntc@hotmail.com  
**Subject:** BPA Access Road Easement/Lund

Hello John,

Per our phone conversation a couple of weeks ago, I am sending you the paperwork for a BPA Access Road Easement, and the paperwork for a BPA Revocable Permit.

As you know, BPA needs permission to access a road on your property to access their transmission line. During the month of August, 2014 (8/4/2014-9/8/2014) BPA will be working in your area on the pole replacement project. The attached Revocable Permit would provide BPA immediate yet temporary access to your property so that they can complete the project.

BPA is also interested in acquiring permanent rights for access on your property in the form of an Access Road Easement. The Access Road Easement paperwork that I have attached is an updated version of the paperwork that was presented to you in 2012. I hope that you and I can continue the discussions that you have had with Jill Nystrom regarding the easement. I would like to hear from you what your needs are, and what it will take for you to sign the easement.

Ideally, you would sign the Revocable Permit as soon as possible, and then we can continue to work on the Access Road Easement.

Please review the attached paperwork, and call me at your convenience. I look forward to hearing from you.

Kind regards,

**CHRISTINE  
NICKERSON**

**HDR Engineering, Inc.**

Right of Way Agent

660 Hawthorne Ave. SE,

Ste. 220 | Salem, OR 97301

503-310-5815 |

fax: 503-316-5550

christine.nickerson@hdrinc.com

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Filed March 6, 2020  
BOOK 150 PAGE 521

Tracts No. GC-T-24;  
GC-T-AR-70, Par. 1

138536

TRANSMISSION LINE EASEMENT  
AND ACCESS ROAD EASEMENT

The Grantors, ELMER S. BEELER AND ALMA D. BEELER, husband and wife, owners; RUSSELL W. THORNBURG AND BEULAH M. THORNBURG, husband and wife, contract purchasers; and THOMAS K. BOWMAN AND BETTY L. BOWMAN, husband and wife, subcontract purchasers, for and in consideration of the sum of ONE HUNDRED DOLLARS (\$100.00), is hand paid by the UNITED STATES OF AMERICA, receipt of which is hereby acknowledged, hereby grant, bargain, sell and convey to the UNITED STATES OF AMERICA and its assigns, a perpetual easement and right to enter and erect, operate, maintain, repair, rebuild, and patrol one or more electric power transmission lines and appurtenant signal lines, poles, towers, wires, cables, and appliances necessary in connection therewith, in, upon, over, under and across the following described parcel of land in the County of Tillamook, in the State of Oregon, to-wit:

That portion of that part of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3 and SE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, Township 1 North, Range 7 West of the Willamette Meridian, Tillamook County, Oregon, within a tract of land described as: Beginning at the point of intersection of the centerline of the Wilson river and the centerline of the Wilson River Highway in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10,

Township 1 North, Range 7 West, W.M.; thence easterly along said highway a distance of 500 feet; thence north a distance of 700 feet; thence westerly a distance of 1386 feet, more or less, to a point which is 145 feet, more or less, north of the center of the Wilson River; thence south a distance of 145 feet to the center of the Wilson River; thence southerly along the center of said Wilson River to the point of beginning, which lies within a strip of land 100 feet in width, the boundaries of said strip lying 50 feet distant from, on each side of and parallel to the survey line of the Gales Creek-Tillamook section of the Forest Grove-Tillamook transmission line as now located and staked on the ground over, across, upon and/or adjacent to the above described property, said survey line being particularly described as follows:

Beginning at survey station 1433+89.5 a point on the east line of Section 3, Township 1 North, Range 7 West, W.M., said point being N.  $14^{\circ}39'10''$  W. a distance of 711.8 feet from the southeast corner of said Section 3; thence S.  $88^{\circ}19'50''$  W. a distance of 4737.1 feet to survey station 1481+26.6; thence S.  $69^{\circ}14'50''$  W. a distance of 1185.3 feet to survey station 1493+11.9; thence S.  $84^{\circ}12'20''$  W. a distance of 133.9 feet to survey station 1494+45.8 a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, Township 1 North, Range 7 West, W.M., said point being S.  $80^{\circ}19'30''$  W. a distance of 885.4 feet from the northeast corner of said Section 9;

together with the right to clear said parcel of land and keep the same clear of all brush, timber, structures, and fire hazards, provided however, the words "fire hazards" shall not be interpreted to include growing crops; and also the present and future right to top, limb, fell, and remove all growing trees, dead trees or snags (collectively called "danger trees") located on Grantors' land adjacent to said parcel of land, and within a strip of land 50 feet in width on the northerly side of and 75 feet in width on the southerly side of and beyond the outside limits of the right-of-way, which could fall upon or against said transmission and signal line facilities.

Also, in addition to the above described easement and right-of-way, the Grantors herein grant, bargain, sell, and convey unto the United States of America a permanent easement and right-of-way over, upon, and across a part of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 3, Township 1 North, Range 7 West, W.M., Tillamook County, Oregon, excepting the Gales Creek-Tillamook transmission line right-of-way, as is now surveyed and staked on the ground and as is shown colored in red on drawing, serial number 85326, attached hereto and, by reference, made a part of the description of this access road easement and right-of-way, for the purpose of constructing an access road approximately 14 feet in width, with such additional widths as are necessary to provide for cuts, fills, and turnouts, and for curves at angle points, to be used in connection with the aforementioned transmission line easement and right-of-way, together with such other rights and the right to construct such other appurtenant structures as are necessary to accomplish the purposes for which this access road easement and right-of-way is granted.



The Grantors will be permitted the right of ingress and egress over and across said road, and the right to pass and repass along and on said road in so far as the same extends across the land of the Grantors, said right to be exercised in a manner that will not interfere with the use of the road by the United States of America, its agents and assigns.

TO HAVE AND TO HOLD said easements and rights unto the UNITED STATES OF AMERICA and its assigns, forever.

The Grantors covenant to and with the UNITED STATES OF AMERICA and its assigns that the title to all brush and timber cut and removed from said parcels of land and also all growing trees, dead trees or snags (collectively called "danger trees") cut and removed from Grantors' land adjacent to said parcels of land is and shall be vested in the UNITED STATES OF AMERICA and its assigns and that the consideration paid for conveying said easements and rights herein described is accepted as full compensation for all damages incidental to the exercise of any of said rights.

The Grantors also covenant to and with the UNITED STATES OF AMERICA that Grantors are lawfully seized and possessed of the lands aforesaid; have a good and lawful right and power to sell and convey same; that same are free and clear of encumbrances, except as above indicated; and that Grantors will forever warrant and defend the title to said easements and the quiet possession thereof

against the lawful claims and demands of all persons whomsoever.

Dated this 8 day of November, 1955.

/s/ Elmer S. Beeler

Elmer S. Beeler

/s/ Alma D. Beeler

Alma D. Beeler

/s/ Russell W. Thornburg

Russell W. Thornburg

/s/ Beulah M. Thornburg

Beulah M. Thornburg

/s/ Thomas K. Bowman

Thomas K. Bowman

/s/ Betty L. Bowman

Betty L. Bowman

STATE OF Oregon

)

) ss:

COUNTY OF Washington)

On the 1 day of November, 1955, personally came before me, a notary public in and for said County and State, the within-named ELMER S. BEELER AND ALMA D. BEELER, husband and wife, to me personally known to be the identical persons described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year last above written.

(SEAL)

/s/ W. E. Helman

Notary Public in and for the  
State of Oregon

Residing at Portland, Oregon

My commission expires: 9/20/57

STATE OF Oregon                    )  
   ) ss:  
 COUNTY OF Benton                    )

On the 8 day of November, 1955, personally came before me, a notary public in and for said County and State, the within-named RUSSELL W. THORNBURG AND BEULAH M. THORNBURG, husband and wife, to me personally known to be the identical persons described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year last above written.

(SEAL)                                    /s/ W. E. Helman  
   Notary Public in and for the  
   State of Oregon  
   Residing at Portland, Oregon  
   My commission expires: 9/20/57

*(Standard form of acknowledgment approved for use with all conveyances in Washington and Oregon)*

STATE OF Oregon                    )  
   ) ss:  
 COUNTY OF Tillamook                    )

On the 28 day of October, 1955, personally came before me, a notary public in and for said County and State, the within-named THOMAS K. BOWMAN AND BETTY L. BOWMAN, husband and wife,

to me personally known to be the identical persons described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act

and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year last above written.

(SEAL) /s/ W. E. Helman  
 Notary Public in and for the  
 State of Oregon  
 Residing at Portland, Oregon  
 My commission expires: 9/20/57

STATE OF Oregon )  
 ) ss:  
 COUNTY OF Tillamook )

I CERTIFY that the within instrument was received for the record on the 2nd day of December, 1955, at 11:23 AM., and recorded in book 150 on page 521, records of Deeds of said County.

Witness my hand and seal of County affixed.

(SEAL) [illegible] L. Hoover  
/s/ [illegible] Brunson  
*Deputy.*

