

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**



FROM: Supervisor Marion Ashley

SUBMITTAL DATE:
September 28, 2010

SUBJECT: A report on the findings relating to Mr. Robert Mabee

RECOMMENDED MOTION: That the Board of Supervisors Receive and File

BACKGROUND: In August of 2010, I recommended to the Board that my office be allowed to look into the claims and allegations by Mr. Robert Mabee pertaining to the construction of Bautista Road in the 3rd District.

Attached you will find my office's report on the matter.

Departmental Concurrence

Marion Ashley

Supervisor Marion Ashley

| | | | |
|-----------------------|-------------------------------|----|---|
| FINANCIAL DATA | Current F.Y. Total Cost: | \$ | In Current Year Budget: Budget Adjustment: For Fiscal Year: |
| | Current F.Y. Net County Cost: | \$ | |
| | Annual Net County Cost: | \$ | |

| | | |
|-------------------------|---|--------------------------|
| SOURCE OF FUNDS: | Positions To Be Deleted Per A-30 | <input type="checkbox"/> |
| | Requires 4/5 Vote | <input type="checkbox"/> |

C.E.O. RECOMMENDATION:

County Executive Office Signature

MINUTES OF THE FLOOD CONTROL AND WATER CONSERVATION DISTRICT

On motion of Supervisor Ashley, seconded by Supervisor Stone and duly carried,
IT WAS ORDERED that the above matter is received and filed as recommended.

Ayes: Buster, Stone, Benoit and Ashley
Nays: None
Absent: Tavaglione
Date: October 5, 2010
xc: Flood, Supvr. Ashley

Kecia Harper-Ihem
Clerk of the Board
By *[Signature]*
Deputy

Prev. Agn. Ref.:

District:

Agenda Number:

11.13

Dept's Recomm.: Policy Policy
 Consent Consent
Per Exec. Ofc.:

Supervisor,

As per your recommendation, I have compiled a report on my findings regarding Mr. Robert Mabee. Let me add a disclaimer that I am not an engineer, a surveyor or an attorney and that my report reflects only my readings, personal interviews with Mr. Mabee, and staff meetings as to what occurred and transpired. To add, a lot of the staff has changed in the offices of Riverside County Flood Control, Riverside County Transportation Department and County Counsel. As you can imagine, putting the facts together has been difficult and a true evaluation of what transpired could have been complicated with time.

Background

In 1962, the U.S. Army Corps of Engineers constructed the Bautista Creek Debris Dam and Channel to help control flooding in the Valle Vista area of Hemet. Upon completion of the construction, the Corps of Engineers turned over the operation and maintenance of the system to the Riverside County Flood Control and Water Conservation District. In the intervening 48 years, the system has functioned flawlessly, safeguarding the lives and property of the citizens in the eastern part of the Hemet Valley. The channel improvements also included maintenance access along the easterly side of the channel, extending from Fairview Avenue south-easterly about 2 miles to the dam. This maintenance access road also serves as access to a number of properties easterly of the channel. The Riverside County Flood Control District, nevertheless, had been subjected to trespassing, vandalism, and increasing liability from increased use of the private use easements along the channel. The only solution was to fence off the easement next to the channel and substitute a road outside the fence and adjacent to the private properties being served. The process of constructing such fence took about a decade.

The Mabees are the legitimate successors to the easement rights and the dispute arises from the interpretation of "Public Street" in the deed that states in part: "if at any time a public highway or street shall be extended to the described lands in section 22 lying easterly of Bautista Creek Channel, this easement shall cease and determine. If at any time this easement shall be intersected by a public highway or public street, the portion of this easement lying north and northwesterly of such intersection shall cease and determine."

Mr. Mabee's Allegation and Claim

Mr. Mabee generally states that he was wronged by the county. The root of his dilemma lies with Mr. Mabee not feeling as though the county fairly compensated him either monetarily or better than what was constructed for the loss of his 15' ingress and egress easement when the county dedicated for public use a strip of land 40' in width along the most easterly boarder of the Bautista Creek flood control channel. All of Mr. Mabee's allegations, theories and assertions are underpinned by the aforementioned dilemma.

Allegations and Findings

A. Lack of encroachment permit issued to Riverside County Flood Control by Road Department (Now Transportation Department)

Mr. Mabee appears to be correct in his assertion that Flood Control did not obtain permits from the Road Department based on correspondence that has been provided to him from the Transportation Department ("Trans"). The issue is whether or not permits should have been issued for the work.

It is difficult to know how the department functioned 23 years ago and what went into the decision of issuing or not issuing a permit at that time. A review of past procedures and practices was conducted by "Trans" and found that generally permits would have not been issued to Flood Control for Non- County Maintained Roads that have been accepted for public use such as Bautista Road. In essence, because Bautista Road was not built to county standards and not put into the county maintained road system obtaining permits was not the practice.

B. Removal of Encroachments

Mr. Mabee has asked Trans to order the removal of certain "encroachments" along the 40' easement. This includes the berms that were constructed by Flood to protect the road from washout by dispersing and slowing down erosive flows, and the facilities that Lake Hemet Water District has in place as part of their water system.

The County's long standing practice is to not order the removal of encroachments on Non- County Maintained Roads (even those with a easement for public use), which generally involve disputes between private property owners since it then uses County resources and public tax-payer dollars on essentially private disputes.

To add, Bautista Road is for the most part free and clear of any obstructions and is easily drivable from one end to the other.

C. Lake Hemet Water facilities and added berms restrict the width of Bautista Rd.

Mr. Mabee is correct that the Lake Hemet facilities restrict the width of Bautista Rd. to approximately 20ft. The Lake Hemet facilities pre-date the creation of the public road and therefore have prior rights, and do not restrict access to make it impassable. The berms also restrict access at several points, but also not to the point of being impassable. The berms were installed by Flood Control to minimize erosion on the dirt road. Removal of such berms would have a detrimental effect on Bautista Rd. as water flows would not be channeled.

D. The US Corps of Engineers issued a letter dated May 27, 2008 stating that the Bautista Channel would fail as a result of the berms added by Flood Control

Mr. Mabee is correct that the US Corp of Engineers issued a letter. The letter stated in part that, "the modifications...have compromised the project's original design performance."

In a subsequent Corps letter, nonetheless, dated October 14, 2008, the Corp references their May 27th letter and goes on to state:

Your response letter (referring to the Flood Control District's response letter dated July 3, 2008) was very helpful to our better understanding the issues. We concur with your findings that modification of the maintenance road for side drainage and removal of sparse vegetation from the small diversion dikes are not necessary. These issues do not pose an additional increase in flood risk to the surrounding community.

Further, the letter states:

This letter will serve to close-out our concerns on these issues.

E. FEMA's Regulatory Branch has said that because of modifications, the channel is no longer certified for a 100 year flood.

There is no evidence to support this claim. The FEMA Flood Insurance Rate Map for the area continues to show full containment of the 100 year floodplain within the channel. Any modification to FEMA's Flood Insurance Rate Maps is accomplished as a result of a petition from the local jurisdiction or at a minimum, in consultation with the local jurisdiction. Neither has occurred.

F. Loss of Ability to Entitle Land because of not having legal access

Mr. Mabee contends that the District, by fencing off portions of the 40ft easement and the connecting private easement, affected the legal access to this property and thus, his ability to entitle. The District contends that they have mitigated that by granting Mr. Mabee an encroachment permit through their property to access his parcels, which was done via letter in 1993. This matter can best be addressed by County Counsel as this issue has been addressed by the courts.

At its narrowest point the road travel way appears to be about 14ft wide for a stretch, not materially different from the 15ft Mabee easement. Overall, replacement of the 15ft easement by a 40ft easement was a betterment of the access since it provided a physical separation from the edge of the channel. Please note that Bautista Rd. has little traffic on it since it is essentially a long dead end and does not connect to another public road for use.

Also note that portions of Mr. Mabee 80acres have been sold over the years, and that generally a title company does not provide title insurance to properties without establishing that there is sufficient legal access.

Legal History

After a fatal car accident and vandalism, the District determined it needed to erect a fence along Bautista Creek Channel, which would interfere with Mr. Mabee's fifteen foot wide paved access easement. Mr. Mabee filed a lawsuit against the District seeking damages in the amount of \$1,000,000 for interference with his easement. The District initially began proceedings before the Board to condemn Mr. Mabee's property, but instead dedicated and constructed an unpaved public road to provide access to Mr. Mabee's property. The public road was accepted by the County, but not into the County maintained road system and therefore, did not meet the specifications for a County maintained road.

Based on the language in Mr. Mabee's easement, the Court determined that the public road terminated Mr. Mabee's easement and he was not entitled to damages. The Court also denied a motion for new trial which contained allegations by Mr. Mabee pertaining to the Lake Hemet Water District easement. Mr. Mabee appealed to both the Court of Appeal and then to the California Supreme Court without success.

Mr. Mabee thereafter filed a second lawsuit alleging fraud and misrepresentation in the prior lawsuit, based on representations by the District and by the Court that Mr. Mabee had received "unhindered" or "unobstructed access" to his property. The Court in this second lawsuit determined that: "[t]he evidence is clear that with the ramp constructed by the District across its own property to the easement gave plaintiffs unhindered access." The Court further found that Mr. Mabee's claim of interference with his "legal access" was time barred.

In lieu of his fifteen-foot wide paved easement, Mr. Mabee expected the County/District to provide a paved forty-foot wide road meeting all the specifications of a County maintained road. Instead he received an unpaved public road which did not meet these specifications and which extended onto a portion of District property for which Mr. Mabee received an encroachment permit from the District. The Courts, however, determined that the unpaved public road was adequate to terminate Mr. Mabee's easement and to provide access to Mr. Mabee's property. Mr. Mabee no longer owns the property and attributes his loss of the property to the County.

Opinion and Thoughts on the Matter

Overall I believe Mr. Mabee believed he was going to get a dedicated county road that would have been brought into the County maintained road system. Obviously Mr. Mabee was not pleased when he got a dedicated public road. I do not believe, however, that a county road in the maintained system would have ever been accomplished as physical barriers (Hemet Water Facilities) existed and would have been extremely expensive to remove and replace.

I do not believe, nevertheless, that Mr. Mabee was wronged or short changed by County Flood Control. A 40ft easement was built to replace the original 15ft easement. While Mr. Mabee was never granted easement rights to Bautista Rd., that never prevented him or any other private property owner from using Bautista Rd for either access to their property or for future entitlements. Simply put, it's a public road.

Recommendations

That the Board of Supervisors receive and file.

01932

AFTER RECORDING RETURN TO:
RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT
P. O. BOX 1033, RIVERSIDE, CALIFORNIA

Project 4030
Bautista Creek Channel

RECEIVED FOR RECORD

AUG 9 1965

15
Kiv O. Bautista
Raymond Deichsel

Recorded in Office Records
of Riverside County, California

W.W. Dealy

REC'D
[Signature]

[Handwritten mark]

AUG. 9, 1965

[]

E A S E M E N T D E E D

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT hereby grants to RAYMOND DEICHSEL, JR. and LOLA H. DEICHSEL a non-exclusive private easement for ingress and egress over the land in the County of Riverside, State of California, described as:

The northeasterly 15.00 feet of the southwesterly 155.00 feet of that certain 200-foot wide right of way as shown on Record of Survey filed April 14, 1960, in Record of Survey Book 31, pages 52-59, inclusive, records of Riverside County, California, between the easterly right of way line of Fairview Avenue and the south line of Section 22, Township 5 South, Range 1 East, S.B.B. & M; together with an easement 15.00 feet in width northerly of, adjacent to, and parallel with the south line of said Section 22, extending from the easterly line of the above-described easement to the easterly line of Parcel 4030-22 as shown on Record of Survey filed April 14, 1960, in Record of Survey Book 31, pages 52-59, records of Riverside County, California.

This easement is granted pursuant to the contract between the parties, dated April 16, 1961, which provides that District shall grant to Deichsels this easement for ingress and egress to Deichsels landlocked remainder described as the South half of the South half of Section 22, Township 5 South, Range 1 East, S.B.B. & M; Excepting therefrom the Southeast quarter of the Southeast quarter of the Southeast quarter of said Section

22

91932

AUG. 9. 1965

91932

This easement is subordinate to the rights of the District to construct, maintain and operate Bautista Creek Channel. If at any time a public highway or street shall be extended to the described lands in Section 22 lying easterly of Bautista Creek Channel, this easement shall cease and determine. If at any time this easement shall be intersected by a public highway or public street, the portion of this easement lying north and northwesterly of such intersection shall cease and determine.

Dated August 9, 1965

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

By [Signature]
Chairman

State of California)
 : ss.
County of Riverside)

On August 9, 1965, before me personally appeared William F. Jones known to me to be the Chairman of the Board of Supervisors of Riverside County Flood Control and Water Conservation District and the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that said District executed the same.

DONALD D. SULLIVAN, County Clerk

By [Signature]
Deputy

(EAL)

FREE RECORDING

This instrument is for the benefit of Riverside County Flood Control and Water Conservation District and is subject to be recorded.

CERTIFICATE of ACCEPTANCE
(Government Code Section 27201)

THIS IS TO CERTIFY that the interest in real property conveyed to the County of Riverside, State of California, by the within instrument, is hereby accepted for the purpose of vesting title in the County of Riverside by the undersigned on behalf of the Board of Supervisors pursuant to the authority conveyed by Resolution No. 06-194 of the Board of Supervisors adopted May 13, 1986 and the grantee consents to the recidation thereof by its duly authorized officer.

This certificate of acceptance does not constitute acceptance of any load into the county maintained system pursuant to Section 941 of the Streets & Highways Code.

Dated: 5-11-88

County of Riverside

By Leroy D. Smith
Leroy D. Smith
Road Commissioner and County Surveyor

THIS INSTRUMENT IS FOR THE BENEFIT OF THE COUNTY OF RIVERSIDE AND ENTITLED TO BE RECORDED WITHOUT FEE (GOV CODE 6103)

FOR RECORDER'S USE

RETURN TO RIVERSIDE FLOOD CONTROL AND WATER CONSERVATION DISTRICT

127298

RECEIVED FOR RECORD
AT 2:00 O'CLOCK P.M.

MAY 12 1988

Filed in Official Records of Riverside County, California

William J. Smith
Recorder
Fees

EASEMENT

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

grant(s) to the County of Riverside an easement for public road and drainage purposes, including public utility and public services purposes, over, upon, across, and within the real property in the County of Riverside, State of California, described as follows:

Parcel 4030-500 -

Being a portion of Sections 16, 21 and 22, Township 5 South, Range 1 East, San Bernardino Base and Meridian, lying within all or parts of Parcels 4030-16, 4030-17, 4030-17B, 4030-19A, 4030-20, 4030-21A and 4030-22 as shown on Record of Survey, Book 31, Pages 52-59, inclusive, Records of Riverside County, California, described as follows:

A strip of land 40 foot in width measured at right angles, lying Easterly of, parallel and concentric with a line which lies 60 feet Easterly of, parallel and concentric with the centerline of Bautista Creek as shown on said Record of Survey.

The side lines of said 40 foot wide strip of land shall be prolonged or shortened so as to terminate at the Northerly end with the Easterly right of way of Fairview Avenue and terminate at the Southerly end with the Southerly line of Section 22.

Grantor understands that the herein described road shall not become part of the county maintained road system until accepted by subsequent resolution of the Board of Supervisors pursuant to Section 941 of the Streets and Highways Code.

157298

DATED APR 12 1998

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

By: *Melba Dunlap*
Chairman

State of California)
) ss.
County of Riverside)

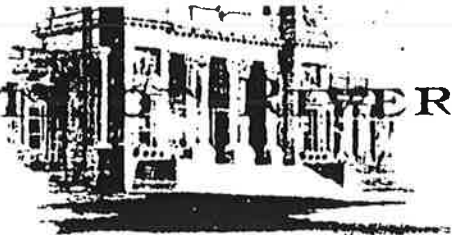
On April 12, 1998 before me personally appeared Melba Dunlap known to me to be the Chairman of the Board of Supervisors of Riverside County Flood Control and Water Conservation District and the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that said District executed the same.

GERALD A. MALONEY, County Clerk

By: *Gerald A. Maloney*
Deputy

(SEAL)

COUNTY OF RIVERSIDE



MELBA DUNLAP

275-1020

KAY CENICEROS

275-1030

PATRICIA (CORKY) LARSON

275-1040

NORTON YOUNGLOVE

275-1050

TO: CORKY LARSON, SUPERVISOR
KAY CENICEROS, SUPERVISOR
MELBA DUNLAP, SUPERVISOR
BOB BUSTER, SUPERVISOR
LARRY PARRISH, CAO
KEN EDWARDS, FLOOD CONTROL
BILL KATZENSTEIN, COUNTY COUNSEL

FROM: NORTON YOUNGLOVE, SUPERVISOR

DATE: DECEMBER 31, 1992

RE: ROBERT MAYBEE DISPUTES

ATTACHED PLEASE FIND THE MAYBEE REPORT I PROMISED MANY WEEKS AGO.

WHAT DO YOU WISH DONE WITH IT? I HAVE SENT A COPY TO MR. MAYBEE.
I SUGGEST WE FOLLOW KAY'S DIRECTION; ESPECIALLY SINCE SHE WILL BE
CHAIR OF THE FLOOD CONTROL AND WATER CONSERVATION DISTRICT IN 1993.

December 30, 1992

A REPORT

RELATING TO THE DISPUTES OF ROBERT MAYBEE WITH FLOOD CONTROL

Too many weeks ago, I assured the Board and Mr. Maybee that I would personally review the records, ask questions and provide a report on the dispute between Mr. Maybee and our Flood Control District. I apologize for my slowness in getting this done. It is a very complicated subject which doesn't lend itself to easy analysis.

I. DISCLAIMERS

I am not an engineer nor am I surveyor, attorney etc. I also am not an arbitrator with any official duties or responsibilities. I have reviewed much but not all of the written records and have interviewed Mr. Maybee, Mr. Edwards and others. I have also viewed the property. The conclusions and recommendations are my own and do not necessarily reflect the view of any other person.

II. A BRIEF CHRONOLOGY

ATTACHMENT #1 November 5, 1909. Joseph Crawford grants to the Lake Hemet Water Company a 32 foot wide easement for a "main flume" right-of-way, crossing both the current and previous road or easement right-of-way of Mr. Maybee. This right remains fully intact.

ATTACHMENT #2 September 12, 1932. An easement is granted to Riverside County page 211 of official Records over the westerly 50' for roadway purposes affecting Parcel 1 as noted above.

ATTACHMENT #3 July 24, 1946. Rights of Way, reservations, conditions and restrictions as set out in Deed from Hemet Land Company in Book 766, page 162.

ATTACHMENT #4 May 12, 1960. Riverside County Flood Control District initiated action in Superior Court to condemn a portion of Parcel 1 (see above) for Bautista Creek Channel. Superior Court Case No. 72010 as recorded in Book 2694, Page 316.

ATTACHMENT #5 The Maybees purchased the property on October 7, 1964. Grant Deed was recorded on the same date with instrument No. 121565. It is worth noting that the Maybee property is almost one half mile removed from the road right of way and therefore needs additional right of way to reach his property. Neither the county nor county flood control are involved in that, in so far as I know.

ATTACHMENT #6 August 9, 1965. Riverside County Flood Control grants a non-exclusive private easement for ingress and egress over the 15' most immediately adjacent to the Bautista Creek Channel to Raymond and Lola Deichsel; instrument 91932. County Counsel later opines that the Maybees are legitimate successors to this easement right. Significantly, this easement deed states in part: "If at any time a public highway or street shall be extended to the described lands in Section 22 lying easterly of Bautista Creek Channel, this easement shall cease and determine. If at any time this easement shall be intersected by a public highway or public street, the portion of this easement lying north and northwesterly of such intersection shall cease and determine".

ATTACHMENT #7 April 27, 1987. Superior Court Case #187104 filed by the Maybees. Ultimately appealed to the 4th Circuit Court of Appeals with a finding in favor of the County.

ATTACHMENT #8 May 12, 1988. Riverside County Flood Control grants to Riverside County for "public road and drainage purpose, including public utility and public services purposes", a strip of land 40' in width along the most easterly border of district Bautista Creek land and affecting Parcels 4030-16, 17, 17B, 19A, 20, 21A and 22. Riverside County's Recorder Instrument #127298.

III. BRIEF ADDITIONAL FACTS

As the Board has witnessed, Mr. Maybee is extremely difficult to get facts from; his mind runs to charges of lying, conspiracy, lawsuits, etc. The root of the problem lies on the fact that our Flood Control District was being subjected to increasing liability from increased use of the private use easement granted in 1965. The only solution was to fence off the easement next to the flood control channel and substitute a road outside the fence and adjacent to the private properties being served. This process took about a decade and involved many negotiations, considerations, etc. Including more than a few misunderstandings and disagreements but also included all the appropriate public hearings, notifications etc. in so far as I can determine.

It is unfortunate that two 30" syphons were built for Lake Hemet Water District in 1960 as a part of the necessities for the concrete lining of the channel in a location that precludes the current 'road' right-of-way being of sufficient width its full length to satisfy Road Commissioner requirements for a road to be accepted into the County-maintained road system.

The Maybees have an understandable desire to do some division of their land and apparently are not able to do so without adequate road access as defined by law and required by our Road Commissioner and the Board of Supervisors. This he does not have nor apparently has he ever had.

IV. QUESTIONS AND CONCLUSIONS.

- A. Have you found any indications of lying, conspiracy, etc. on the part of Mr. Edwards, Supervisor Cenicerros or anyone else?

Conclusion: No. Misunderstandings, yes. Information which is confusing and easily misunderstood or not sufficiently understood by all parties, yes.

- B. Were the Maybees 'made-whole' by the transfer of their ingress/egress 15' easement next to the channel to a 40' easement with constrictions reducing to as little as 20' further removed from the channel but immediately adjacent to their property?

Conclusion: Yes, in so far as right-of-way width and a lack of change in the Lake Hemet "main flume" right of crossing either road right-of-way. However, there is a further important consideration which I make subject of the next question.

- C. Does the transfer from flood to roads for road and related purposes satisfy the phrase "public highway or street" as found in the August 1965 grant deed by Flood Control?

Is the condition of the road as constructed sufficient to satisfy that condition?

Conclusion: As to the first question, I don't know; legal counsel needs to answer it. As to the second question, a review of the property raises serious questions as to its ability to meet the condition. If the condition is not met then presumably Mr. Maybee still has rights to his initial 15' ingress and egress passage-way and Flood Control presumably should provide him access.

V. RECOMMENDATIONS

- A. The Board should direct Flood Control to prepare a base map with appropriate overlays showing each property rights change that relates in order that both the Board and Mr. Maybee can be assured as to which property is affected by what through the long and complicated series of transactions and also in order that we may all be assured that Flood Control

had adequately perfected its rights prior to transfer of rights. Mr. Maybee claims that we, Flood Control, vested rights without first adequately owning the property.

- B. County Counsel should be directed to provide answers to the legal questions posed in "C" above.
- C. Roads and Flood Control should either provide clear evidence that the new substitute 'road' was in useable condition at the time of ingress/egress transfer, including sufficient compaction, turning angles and overall utility, to provide normal ingress/egress to the Maybee property or in the alternative put the 'new' access into useable condition.
- D. Embankment effects upon the Maybee access rights should be reviewed.
- E. Roads should be directed to work with the Maybees and other affected property owners in an attempt to provide a road right of way sufficient to allow access to the properties dependent upon the current 'road' but capable of being accepted into the county-maintained road system upon sufficient improvements by the affected property owners.
- F. Supervisor Younglove should never again volunteer for another assignment such as this.

Sincerely,



Norton Younglove, Supervisor
Fifth District

Attachments: Documents listed chronologically

Photographs taken by Norton Younglove
on December 30, 1992.



COUNTY OF RIVERSIDE

TRANSPORTATION AND LAND MANAGEMENT AGENCY

Transportation Department



Juan C. Perez, P.E., T.E.
Director of Transportation

RECEIVED MAY 03 2010

April 29, 2010

Mr. Robert Mabee
3086 Miguel St.
Riverside, CA 92506

Dear Mr. Mabee,

We met on December 14, 2009 and February 3, 2010 to discuss your various concerns regarding Bautista Canyon Channel and Flood Control's involvement with the channel and levee and the public road right-of-way adjacent to it. As county maintained roads fall under the authority of the Transportation Department, I am limiting this letter to the issues you raised that are related to the road right-of-way, which is actually an easement for public use. I have reviewed copies of numerous letters and documents that you brought to our meeting. I have also reviewed a letter dated April 8, 2010 from Lake Hemet Municipal Water District (LHMWD), at your request, and a letter dated March 17, 2010 from Mr. Livingston of the County's Risk Management Division.

Firstly, you indicated that you want the Transportation Department to enforce the removal of all encroachments within the road right-of-way along the section from Fairview Avenue to the southerly limit of the easement under the authority of Section 1480.5 of the Streets and Highways code which states "*The road commissioner may immediately remove, or by notice may require the removal of, any of the following encroachments: (a) An encroachment which obstructs or prevents the use of a county highway by the public.*" By definition under Section 941 of the Streets and Highways code, of which a copy was provided to you at the meeting, a *county highway* is one that has been accepted into the county maintained road system. Since the road in question has not been accepted into the county maintained road system, and is therefore not a county highway, the Transportation Department has no authority to enforce the removal of encroachments within the right-of-way. This has been explained in more detail in the letter from Mr. Livingston. I should also note that Ordinance 499, our Encroachment Permit Ordinance, also only applies to county highways.

Secondly, you indicated that the 40' wide road easement that Flood Control granted to the County by instrument number 127298, recorded May 12, 1988, is inferior to the prior 15' wide private easements as it does not provide adequate access to the properties. The 40' easement is essentially adjacent to the 15' private easements and follows essentially the same alignment providing access to the properties.

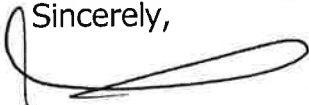
Mr. Robert Mabee
April 29, 2010
Page 2 of 2

Although as stated above the easement is not a county highway subject to the Department's jurisdiction, as a courtesy I conducted a field review of the easement on March 8, 2010. The dirt easement is quite drivable for a good distance southeast of Fairview. Although there is a LHMWD facility that creates a narrowing of the usable area for a few feet, there is sufficient room for a vehicle to go around it. It appears that there is hardly any traffic to speak of using this easement; in the hour or so that I was there I witnessed one other vehicle using a portion of it. As was stated in the letter from LHMWD and in previous documents that you have provided, LHMWD's use and rights to their facilities go back over 100 years and predate the creation of easements for public access. The Transportation Department has not received any complaints from any of the adjacent property owners concerning access to their properties that I am aware of.

Lastly, you indicated that the intersection of the road easement and Fairview Avenue does not comply with the requirements of Riverside County Ordinance 460. Ordinance 460 governs the subdivision of land and does not apply in this situation since the road easement was not created through the subdivision process.

In summary, the road easement in question is not part of the county maintained road system and therefore, the Transportation Department does not have the authority to have obstructions removed or expend gas tax dollars on the operation or maintenance of the road. This concludes our review of this issue.

Sincerely,



Juan C. Perez
Director of Transportation

Cc: Tom Wagoner, LHMWD
Steve Thomas, Riverside County Flood Control District
Ken Teich, County Surveyor
Kent Livingston, Risk Management



COUNTY OF RIVERSIDE
TRANSPORTATION AND
LAND MANAGEMENT AGENCY



Juan C. Perez, P.E., T.E.
Director of Transportation

Transportation Department

MEMORANDUM

TO: Steven Hernandez, 5th District Legislative Assistant
FROM: Juan C. Perez, Director of Transportation
DATE: September 16, 2010
SUBJECT: Mr. Robert Mabee and the Bautista Creek Channel

At your request, we are providing this memorandum concerning the Transportation Department's involvement in the issues raised by Mr. Mabee. I have met with Mr. Mabee about 3-4 times over the last few months and discussed his concerns and allegations, and conducted field reviews of the site. Following is a summary of the issue based on the research that we have done.

Mr. Mabee at one time owned property that he accessed from a 15-foot wide private easement next to Bautista Creek Channel (see grey area in Exhibit "A"), which he no longer owns. This easement ran from a public road intersection with Fairview Road to a point roughly 1.5 miles Southeasterly, and from there connected to his property via private easements.

In 1988 the Flood Control District issued a contract for modification of side drainage of the channel, fenced off the 15-foot private easement since it served as the maintenance road for the Bautista Creek Channel, and replaced it with a 40-foot public road easement. The County accepted the easement for public use, but not as a County-maintained Road since it was not improved to County Standards (it was and still is a dirt road).

Mr. Mabee has raised several concerns in our various discussions and in his Board testimony that we are addressing herein:

A. Lack of encroachment permit issued to Flood Control by the Road Department (now Transportation Department).

Mr. Mabee appears to be correct in his assertion that Flood Control did not obtain permits from the Road Department, based on correspondence that has been provided to him from our Department. The issue is whether or not permits should have been issued for the work.

It is difficult to ascertain how the Department functioned 23 years ago and what went into the decision of issuing or not issuing a permit at that time, so we have reviewed this in terms of past practices that we have records of and of how we would handle this situation today. The County's encroachment permit ordinance (Ord. 499) is intended to govern the use of County-Maintained Roads., ("County Highways" as defined by Section 941 of the Streets and Highway Codes). The Transportation Department generally issues permits to the District in County-maintained roads, so that we can inspect the Traffic Control, and quality of paving. The Transportation Department, however, generally would not issue permits to the District on Non-County Maintained Roads that have been accepted for public use, such as Bautista Road. In reviewing data from our encroachment permit system dating to the early to mid 90's, we find only one instance of a permit being issued to Flood Control for a Non-County Maintained Road, and that was as part of a larger project that mainly involved a County-Maintained Road. It is reasonable to assume then that a permit was not required at the time.

B. Removal of Encroachments

Mr. Mabee has asked the Transportation Department to order the removal of certain "encroachments" along the 40-foot easement. These include the "berms" that were placed by Flood Control to protect the dirt road from washout by dispersing and slowing down erosive flows, and the facilities that Lake Hemet Water District has in place as part of their water system (see Exhibit "B"). The County's long-standing general practice is to not order the removal of encroachments on Non-County Maintained Roads (even those with a easement for public use), which generally involve disputes between private property owners, since it then uses County resources and public tax-payer dollars on essentially private disputes.

Based on our review, the easement is for the most part free and clear of any obstructions, and a vehicle can travel it from one end to the other. Mr. Mabee is correct that the Lake Hemet facilities restrict the width at one point to approximately 20 feet. The Lake Hemet facilities pre-date the creation of the public road and therefore have prior rights, and do not restrict access to make it impassable. The "berms" also restrict access at several points, but also not to the point of being impassable. They were installed by Flood Control to minimize erosion on the dirt road, so it would stand to reason that their removal would have a detrimental, not beneficial, effect on accessibility.

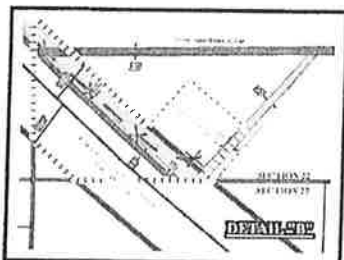
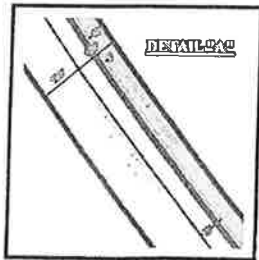
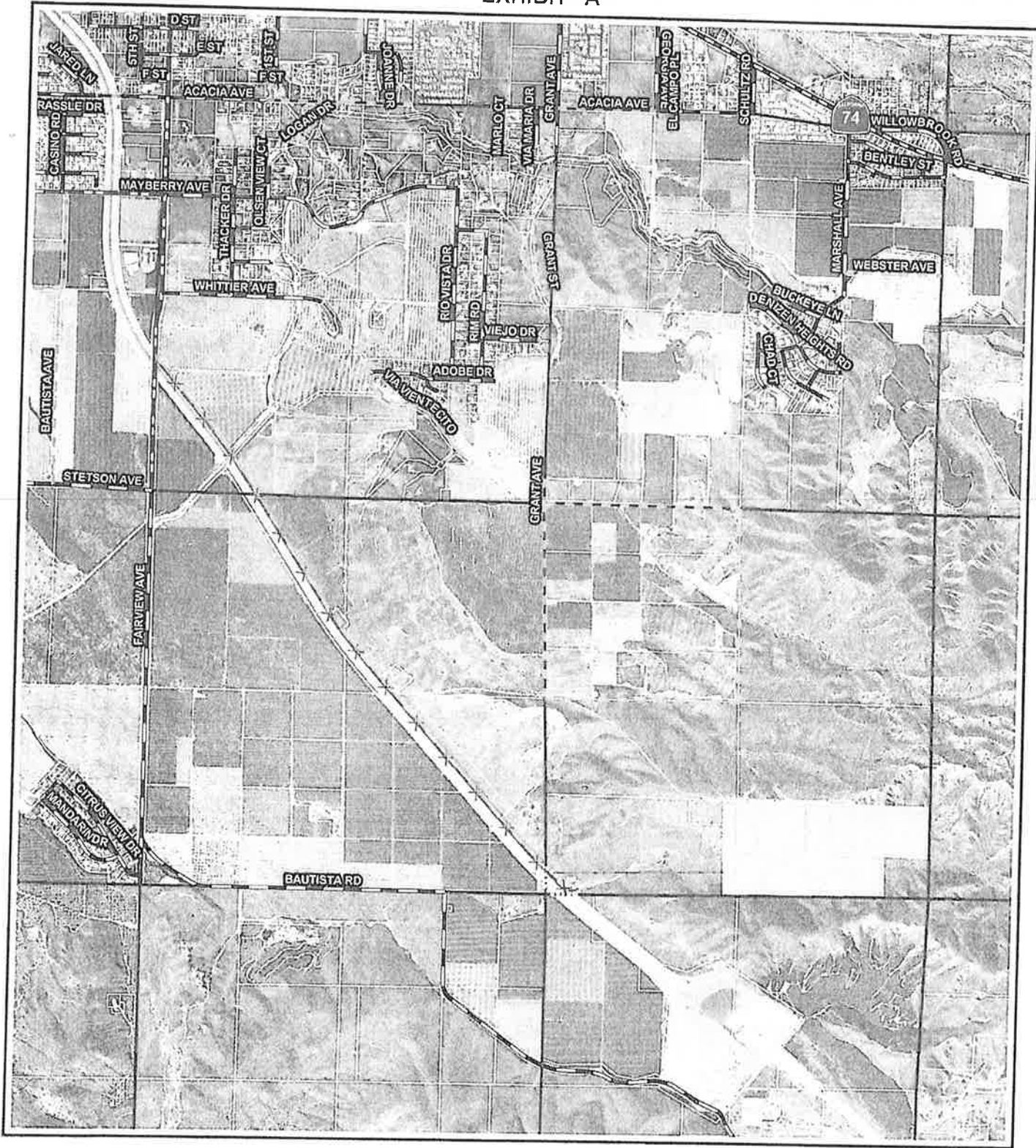
It appears that Mr. Mabee at one time owned roughly 80 acres. There are now 9 separate parcels that appear to have four different owners. We note that we are not aware of receiving any concerns regarding the usability of this access from any party other than Mr. Mabee, and the conditions have been in roughly their present state since Flood Control built the improvement about 22 years ago.

C. Legal Access

Mr. Mabee contends that the District, by fencing off portions of the 40-foot easement and the connecting private easement, affected the legal access to the property. The District contends that they mitigated that by granting Mr. Mabee an encroachment permit through their property to access his parcels, which was done via letter in 1993. This matter can be best addressed by County Counsel, and our understanding is that indeed it was reviewed and ruled on by the courts. At their narrowest point the road appears to be about 14 feet wide for a short stretch, not materially different from the 15 foot easement. Overall, the replacement of the 15-foot easement by a 40-foot easement was generally a betterment for access since it provided a physical separation from the edge of the channel. We also note that this road has very little traffic on it since it's essentially a long "dead-end" and doesn't connect to another road for public use.

Exhibit "C" shows the recorded easements and the location of the fence. Exhibit "D" shows the rough location of the actual physical access. There appears to be two separate easements recorded for road and utility use between the 40-foot road easement and the main access easement to the property. We note that portions of the property have been sold over the years, and that generally a title company does not provide a title report to properties without establishing that there is sufficient legal access.

EXHIBIT "A"



BAUTISTA CANYON CHANNEL
T. 5S. R. 1E.

LEGEND

- PARCEL, 4030-22 PER RS 31:52-39
- MABEE PROPERTY
- SECTIONS
- FENCE
- 15' Per Inst #91932 8/9/69
- 20' Per Inst #119544 10/19/65
- 20' Per Inst #121564 10/7/64
- 40' Per Inst #12798 5/12/68
- and Inst #137239 5/15/67
- Road Purposes and Water Lines
- Road Purposes and Water Lines

1 inch = 1,300 feet



EXHIBIT B
LAKE HENET

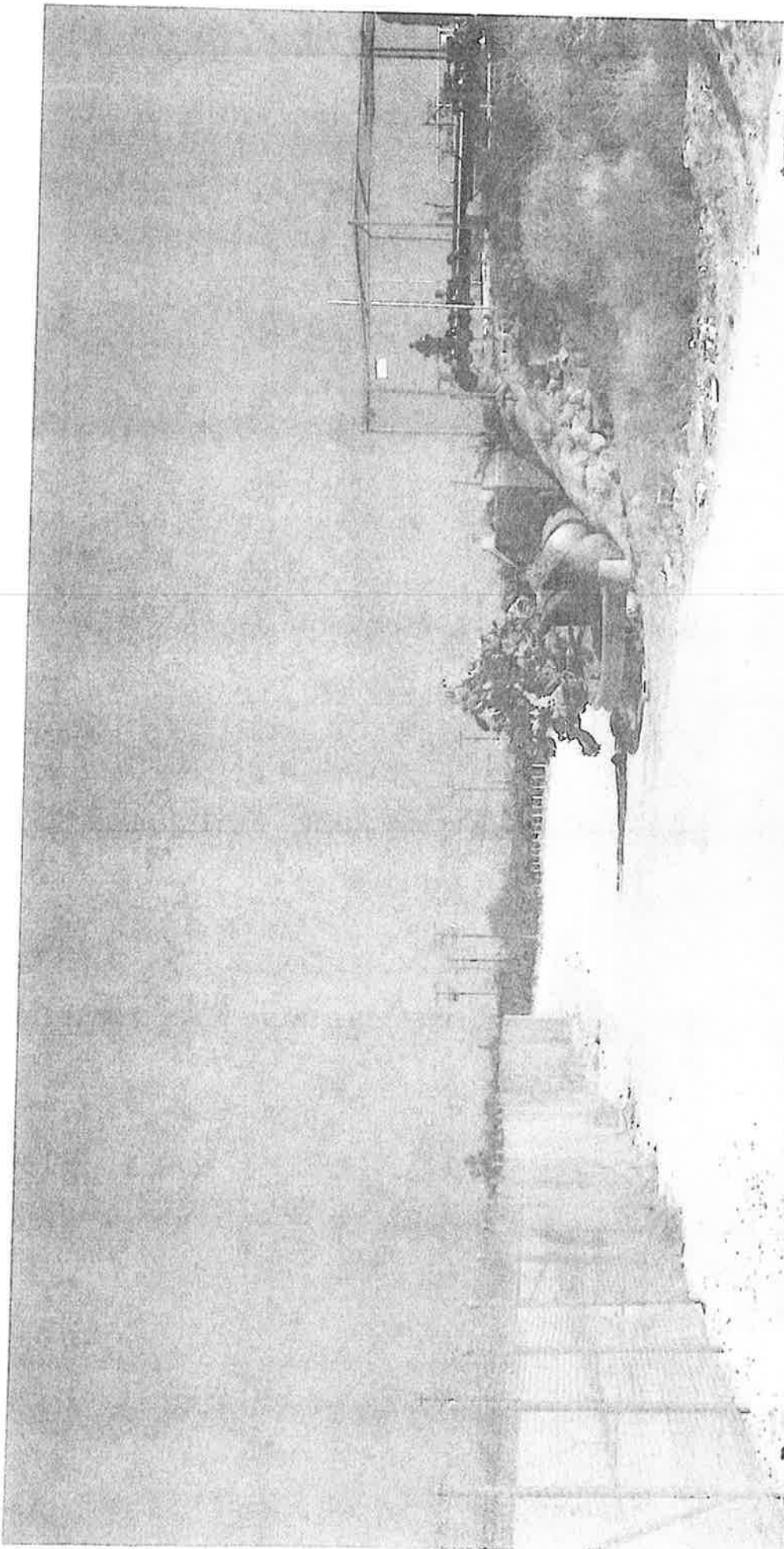
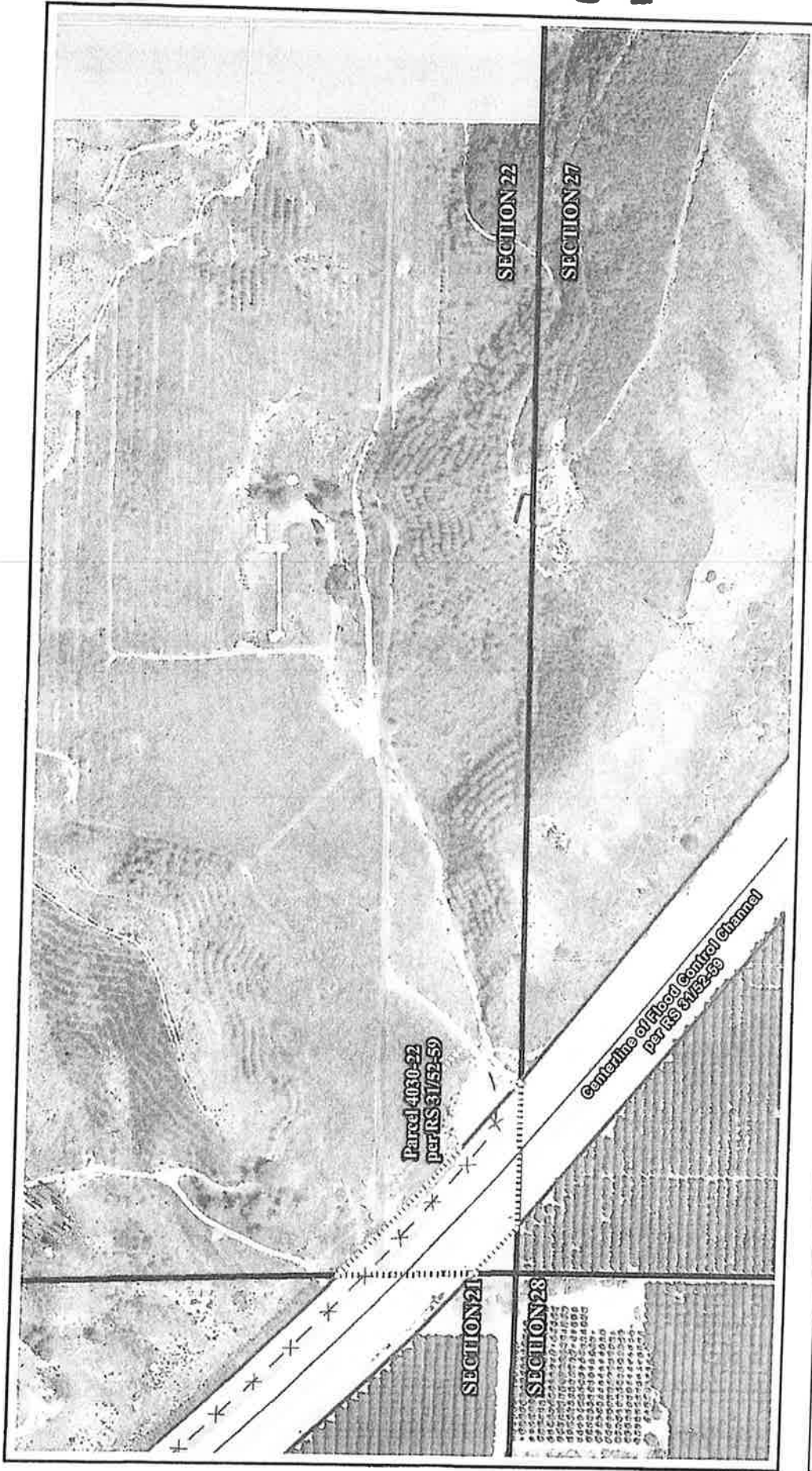


EXHIBIT B -
"BERTHS"





BAUTISTA CANYON CHANNEL

T. 5S. R.1E.

Legend

PARCEL 4030-22 PER RS 31/52-59

MABEE PROPERTY

SECTIONS

FENCE

CHANNEL ROW

15' Per Inst #91932 8/9/69 and Inst #137239 5/15/87

20' Per Inst #119644 10/19/65 - Road Purposes and Water Lines

20' Per Inst #121564 10/7/64 - Road Purposes and Water Lines

40' Per Inst # 12798 5/12/88

1 inch = 300 feet

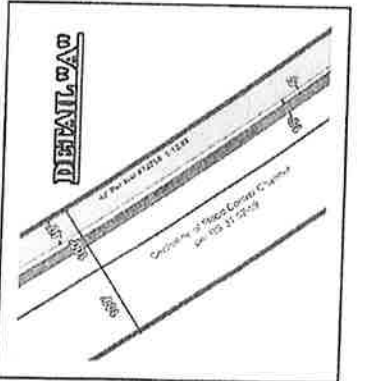
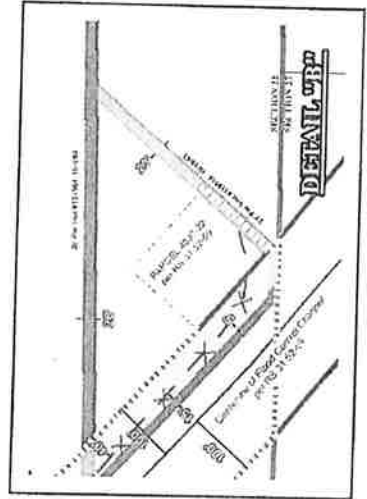
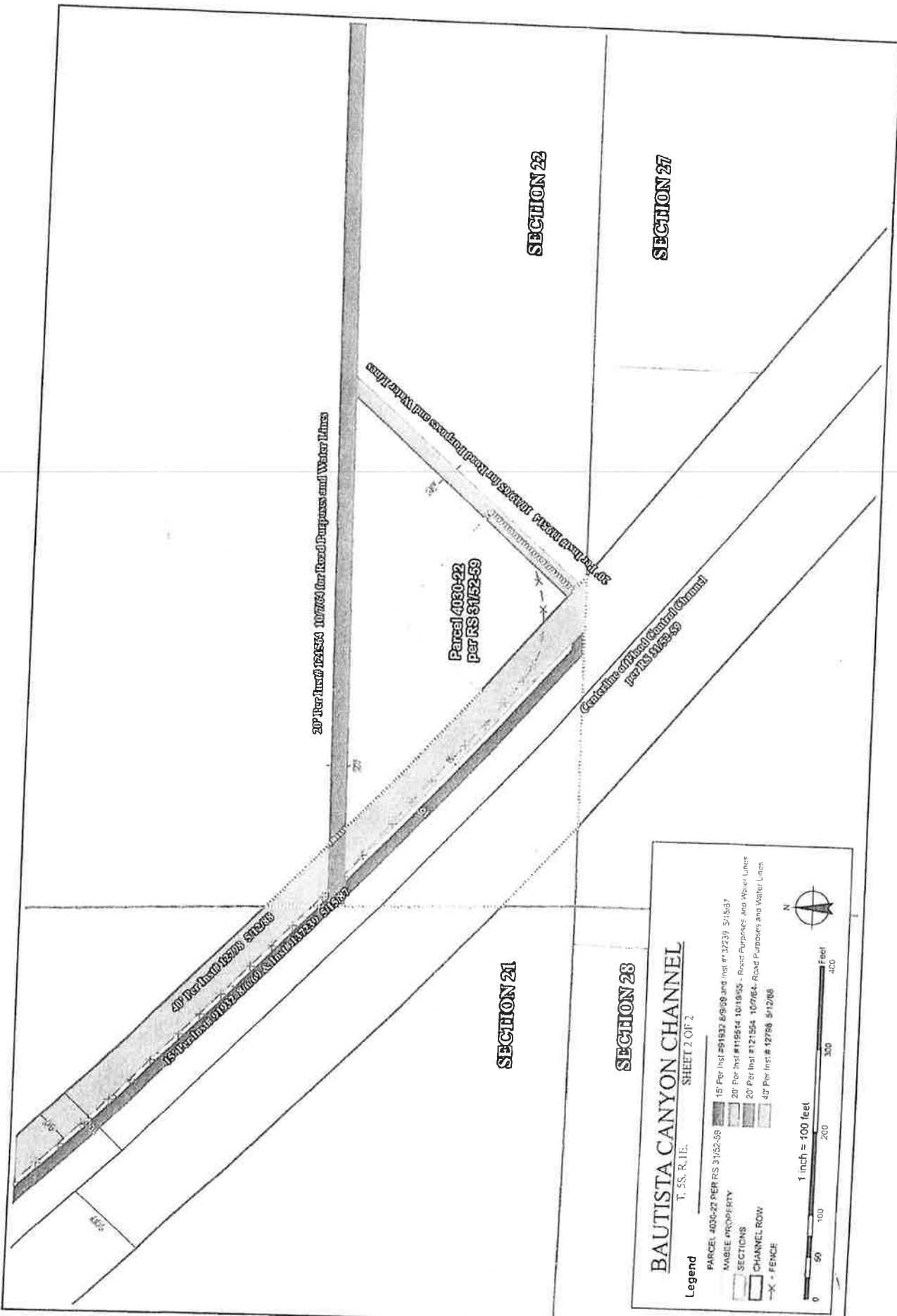


EXHIBIT C-2



BAUTISTA CANYON CHANNEL
 T. 5S, R. 1E, SHEET 2 OF 2

Legend

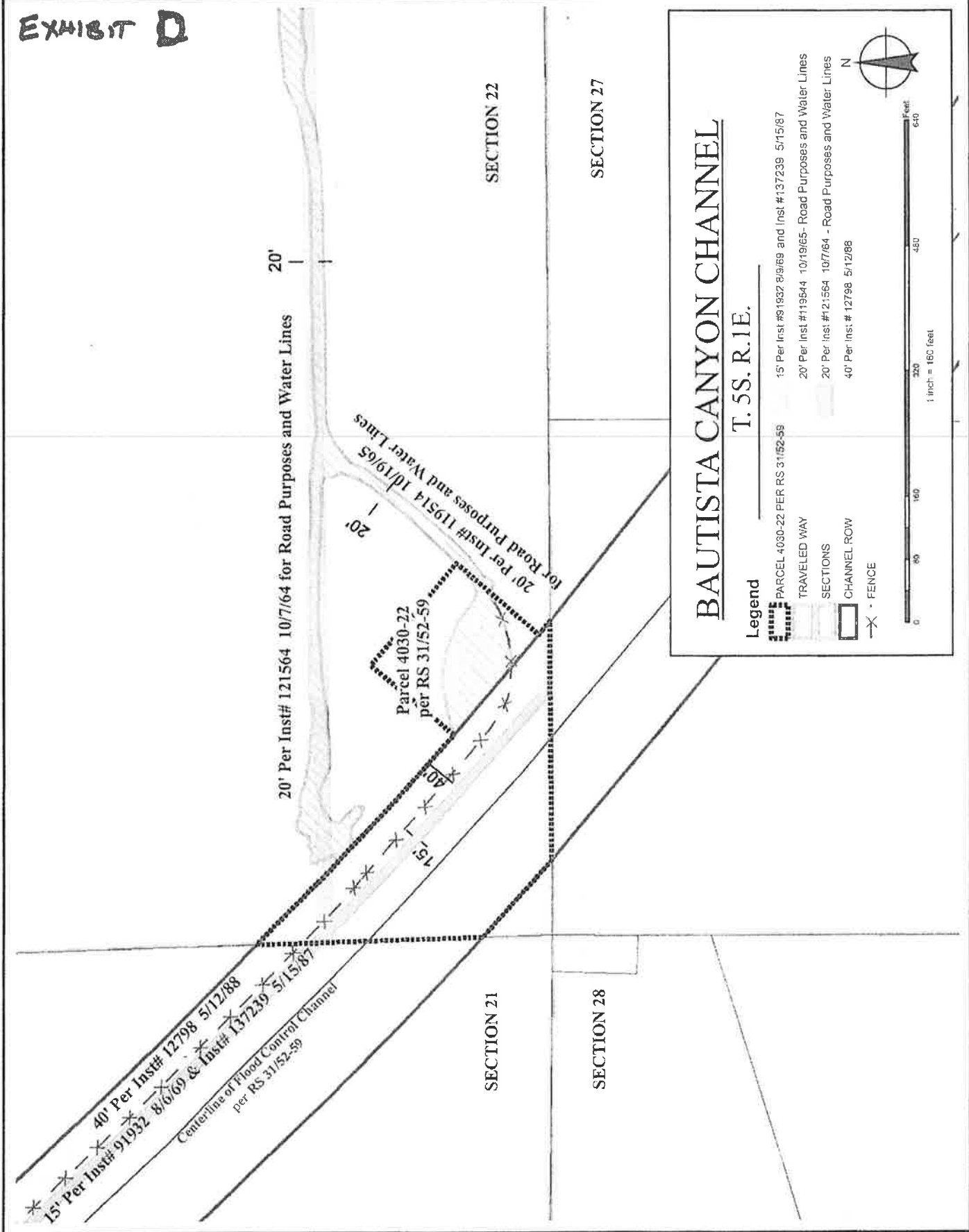
- PARCEL 4030-22 PER RS 3152-59
- MABLE PROPERTY
- SECTIONS
- CHANNEL ROW
- FENCE

15' Per Inst #91932 6/9/98 and Inst #13239 5/15/97
 20' Per Inst #119514 10/18/90 - Road Purposes and Water Lines
 20' Per Inst #121554 10/7/84 - Road Purposes and Water Lines
 40' Per Inst # 12758 5/12/88

1 inch = 100 feet

0 50 100 200 300 400 Feet

EXHIBIT D



BAUTISTA CANYON CHANNEL

T. 5S. R. 1E.

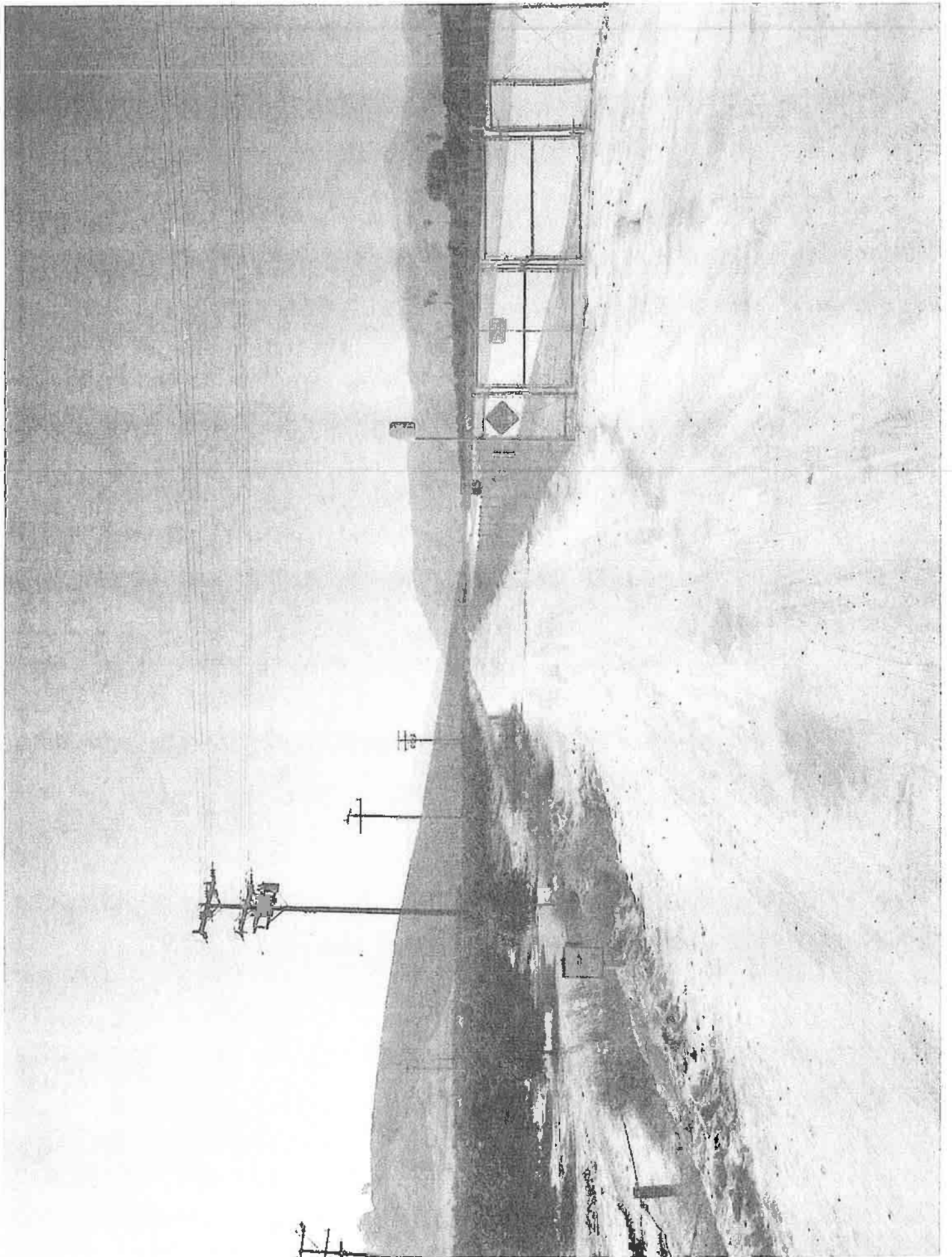
Legend

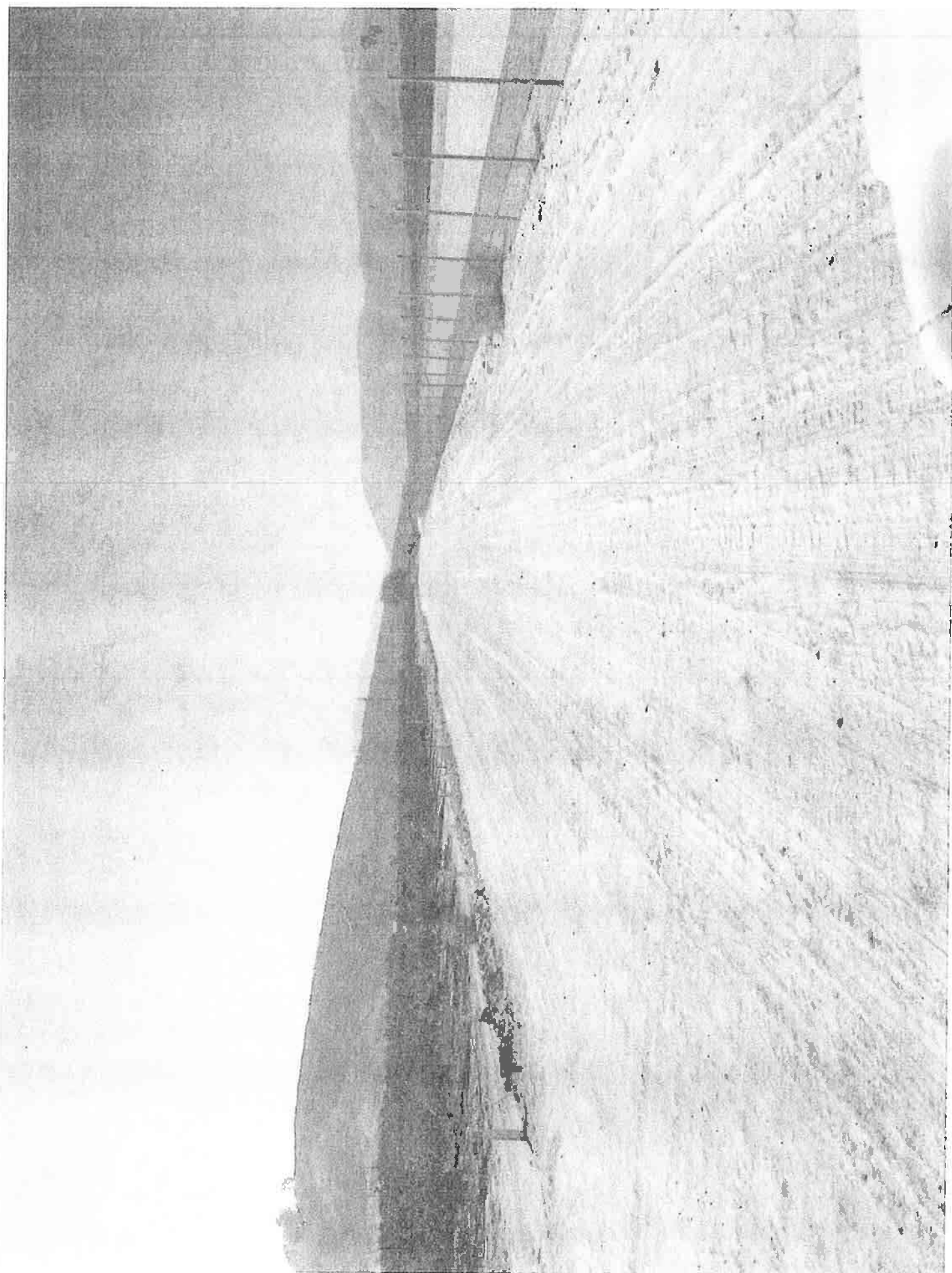
- PARCEL 4030-22 PER RS 31/52-59
- TRAVELED WAY
- SECTIONS
- CHANNEL ROW
- FENCE

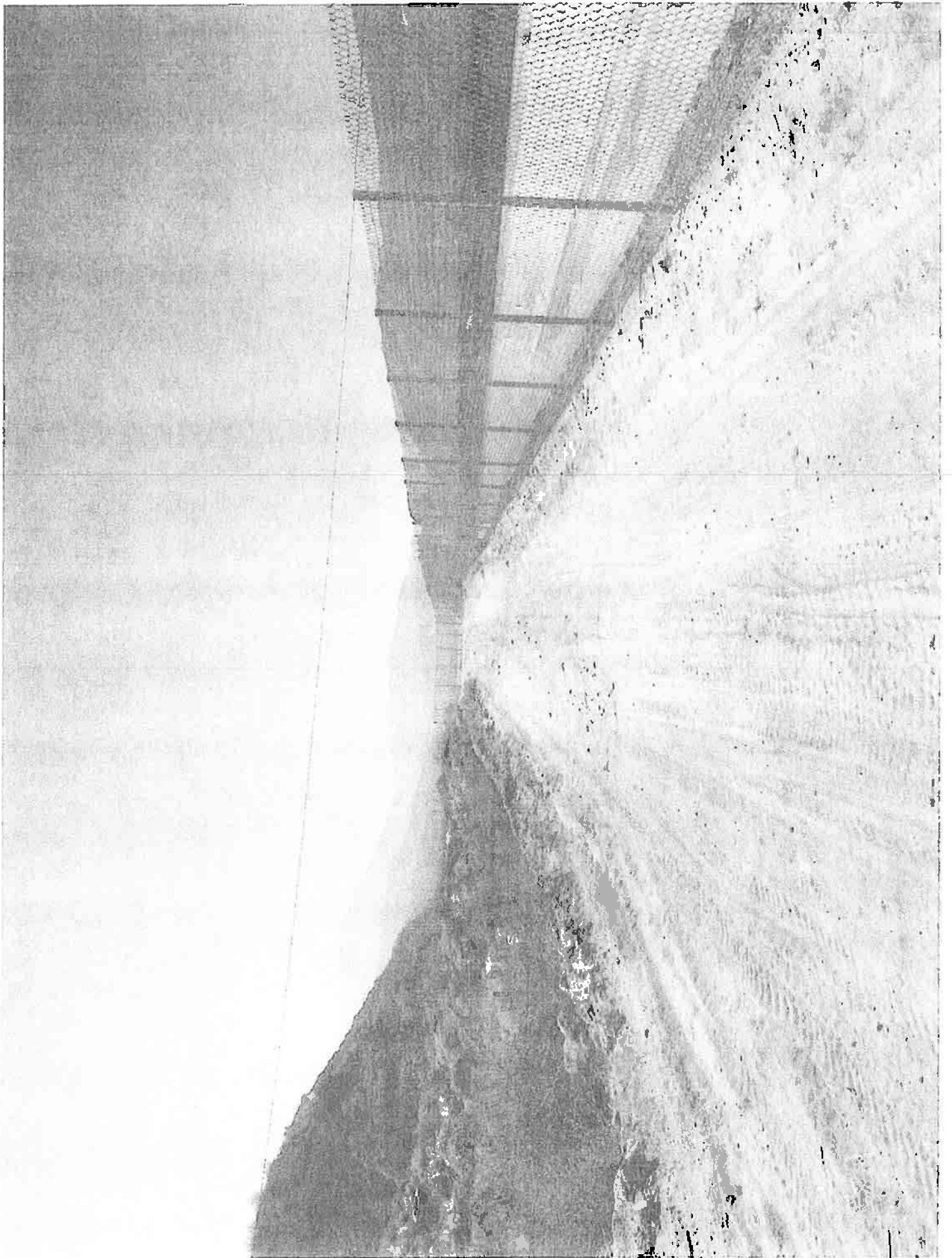
15' Per Inst #91932 8/6/69 and Inst #137239 5/15/87
 20' Per Inst #19564 10/19/65 - Road Purposes and Water Lines
 20' Per Inst #121564 10/7/64 - Road Purposes and Water Lines
 40' Per Inst # 12798 5/12/88

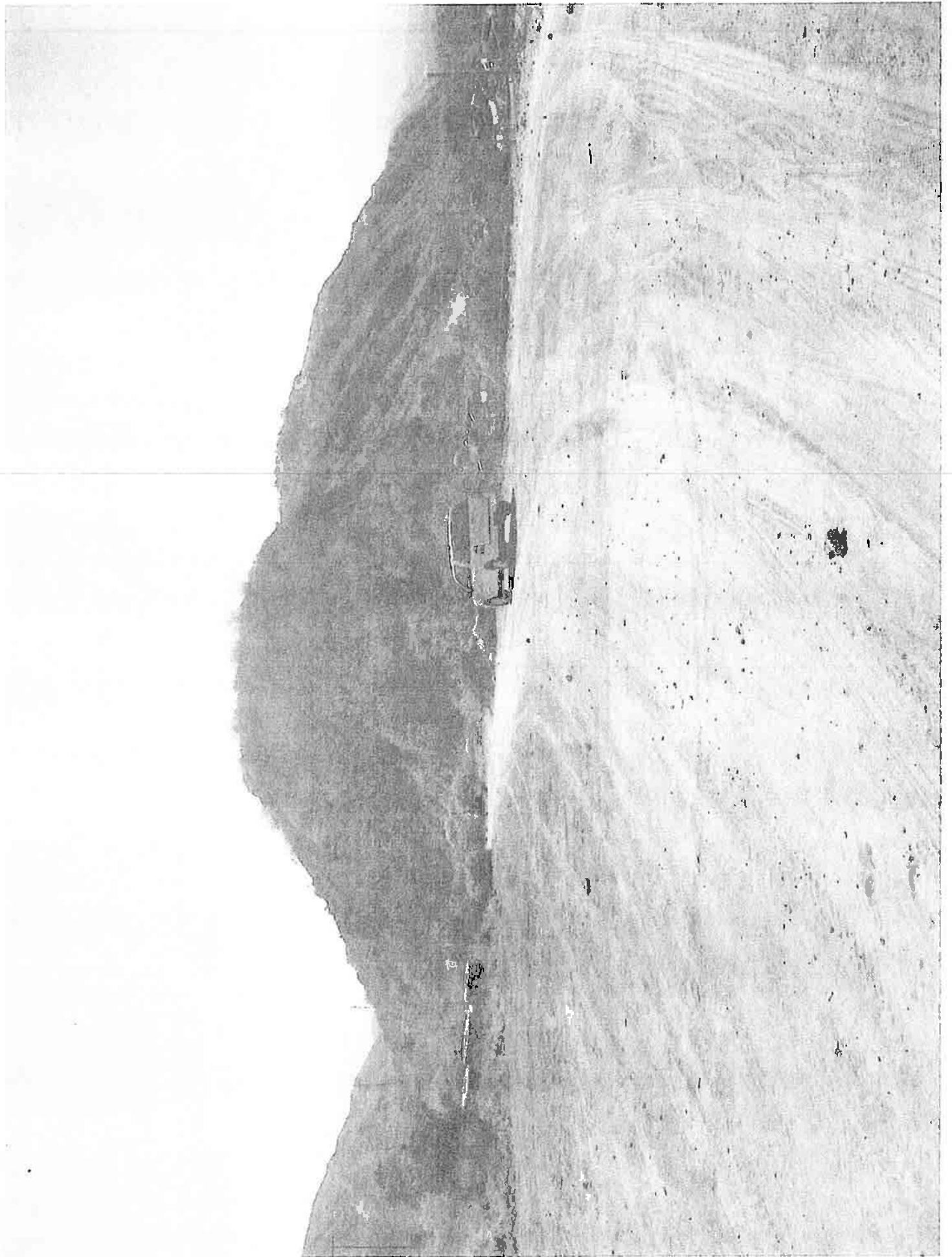
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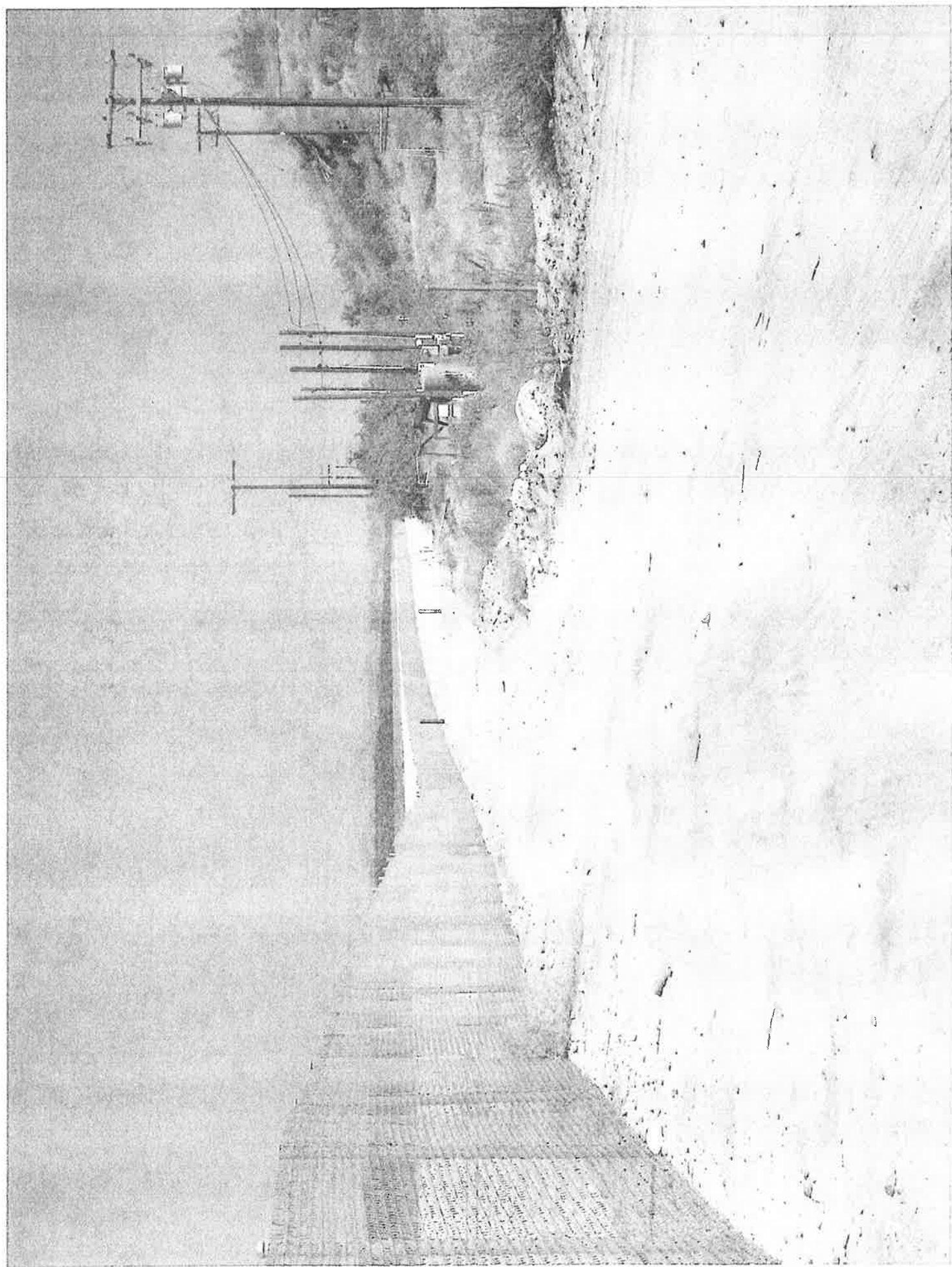
0 80 160 320 640 Feet
 1 inch = 160 feet

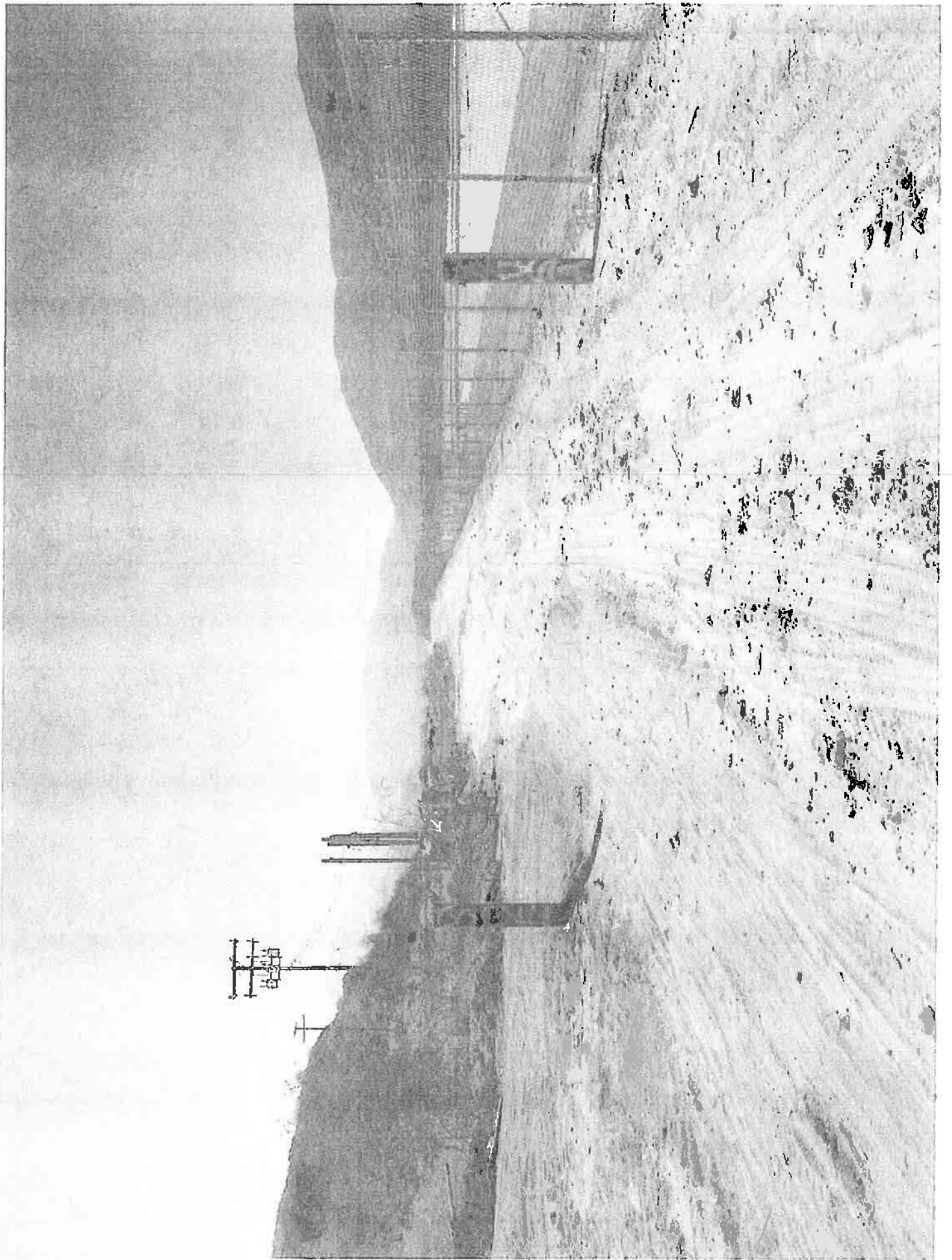












| ROUTING SLIP | | ORIGINATING DATE: 6/1/08 | BY: [Signature] | RESPOND | REPORT | INFO | FILE |
|--------------|--------------------------|--------------------------|-----------------|---------|--------|------|------|
| TO: | CHIEF | | | | | | |
| | ASSISTANT CHIEF | | | | | X | |
| | DESIGN & CONSTRUCTION | | | | | | |
| | FEDERAL PROJECTS | | | | | | |
| | FINANCE | | | | | | |
| | INFORMATION TECHNOLOGY | | | | | | |
| | OPERATIONS & MAINTENANCE | | | | | X | |
| | PLANNING | | | | | | |
| | REGULATORY | | | | | | |
| | SURVEY & MAPPING | | | | | | |
| | EXECUTIVE ASSISTANT | | | | | | |

COMMENTS: STEVE/STEVE - LET'S DISCUSS. L.W.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

LOS ANGELES DISTRICT CORPS OF ENGINEERS
P. O. BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

May 27, 2008

RECEIVED

JUN 16 2008

RIVERSIDE COUNTY FLOOD CONTROL DISTRICT

Mr. Steve Stump
Operations and Maintenance
Riverside County Flood Control and
Water Conservation District
1995 Market Street
Riverside, CA 92501

Dear Mr. Stump:

On May 13, 2008, in response to a citizen concern, two engineers from the U.S. Army Corps of Engineers, Los Angeles District, Hydrology and Hydraulics Branch, conducted a field investigation of Bautista Creek Channel in Hemet, Riverside County, California. The purpose for the field investigation was to evaluate whether "drainage levee" modifications within the Riverside County Flood Control and Water Conservation District (RCFCWCD) right-of-way in the Bautista Creek Channel have compromised the project's original design performance. The Field Investigation Report is enclosed.

Based on the field investigation, we concluded that one of the modifications within the RCFCWCD right-of-way may compromise the project's original design performance. In addition, two of the modified "drainage levees" need maintenance.

We therefore recommend: 1) For the "drainage levee" at channel station 244+25, either a) the excess fill be removed and the original "drainage levee" be exposed; or b) the existing concrete spillway be extended upstream 50 ft and the low spots in the fill be raised to prevent sheet flow from undermining the sideslope paving and cause channel failure and, 2) For the "drainage levees" at channel stations 196+50 and 208+00, the vegetation on the levees be removed and the stone revetment be inspected to ensure that the size and thickness match the as-built construction plans.

If you have any questions or concerns about this matter please contact either Mr. Van Crisostomo or Mr. Rick Andre of my staff at (213) 452-3558 or (213) 452-3564 respectively.

Sincerely,

Robert E. Koplin, PE
Chief, Engineering Division

Enclosure

MEMORANDUM FOR RECORD

SUBJECT: Field Investigation, Bautista Creek Channel, Right Bank, From the Fairview Avenue Bridge to Station 246+25, Hemet, California

1. References:

- a. Email from LTC Anthony G. Reed, Subject: Mr. Mabee's Two Concerns, dated 19 April 2008
- b. *General Design for Bautista Creek Channel, Design Memorandum No. 2, San Jacinto River and Bautista Creek Improvements*, U.S. Army Corps of Engineers, Los Angeles District, dated September 1959
- c. *Bautista Creek Channel, As-built Construction Plans, File No. 172*, U.S. Army Corps of Engineers, Los Angeles District, dated October 1961
- d. Letter from the Corps to Riverside County Flood Control District, Subject: Approval of Bautista Creek Channel Levee Modification (EE88-23), dated 14 December 1987.

2. On 13 May 2008, Messrs. Van Crisostomo and Rick Andre of the Hydrology and Hydraulics Section inspected the subject site pursuant to a request by LTC Anthony G. Reed, Deputy District Commander, Los Angeles District, U.S. Army Corps of Engineers (Ref. 1a). The purpose for the field investigation was to evaluate whether "drainage levee" modifications within the Riverside County Flood Control and Water Conservation District (RCFCWCD) right-of-way in the Bautista Creek Channel have compromised the project's original design performance.

3. Mr. Crisostomo and Mr. Andre were met at the project site by Mr. Robert Mabee, a local resident, who acted as their escort for the site visit. The inspection focused on a 1.7 mile reach of the right bank of the channel from the Fairview Avenue Bridge to approximately station 244+25. Mr. Mabee claimed that RCFCWCD altered several "drainage levees" and changed the drainage pattern of the sheet flow entering the channel.

4. This reach of the Bautista Creek Channel is an incised, trapezoidal concrete-lined channel. The basewidth is 25 ft and the sideslopes are 2:25 to 1. The channel depth is between 11.5 to 12 ft. The design flow rate for this reach is 16,500 cfs. The flow is supercritical with a velocity of 45 ft/s. The concrete channel itself is well-maintained. Along the right bank (looking downstream) of the channel are three "drainage levees" that direct sheet flow towards the channel.

Enclosure

CESPL-ED-HH

SUBJECT: Field Investigation, Bautista Creek Channel, Right Bank, From the Fairview Avenue Bridge to Station 246+25, Hemet, California

5. The Design Memorandum (Ref. 1b) and as-built construction plans (Ref. 1c) were checked to determine if the "drainage levees" are original project features and to confirm their intended function. According to the Design Memorandum, "Side-drainage investigations indicated that large side flows would reach the channel along the right (northeast) bank. Because the top of the channel would be at or near ground level, these flows would be discharged over the top of the channel banks for nearly the entire length of the channel. Therefore, the maintenance roadway along the right bank would be paved to prevent undermining of the side-slope paving. Low cross dikes may be required at intervals to divert the flow into the channel; the specific locations of these dikes would be determined before contract plans and specifications are complete." Furthermore, the as-built construction plans confirm that the "drainage levees" were constructed as part of the Bautista Creek Channel project. In addition, concrete spillways were constructed at the end of these "drainage levees" to prevent the undermining of the concrete sideslope when sheet flow from the surrounding drainage areas flows into the channel (Attachment 1).

6. Per Reference 1d, the Corps approved a permit for the RCFCWCD to modify these "drainage levees". Except for the "drainage levee" at station 244+25, the proposed modifications were followed, i.e. the "drainage levees" were truncated approximately 20 ft to widen the maintenance road and then the existing concrete spillway extended to the end of the truncated "drainage levee" (Attachment 2). At station 244+25 the "drainage levee" was not truncated as indicated in the approved permit plans. Instead, it was buried with miscellaneous fill (it is unknown who placed the fill). This fill alters the sheet flow drainage pattern and causes the flow to enter the channel over parts of the right bank not protected by a concrete spillway. This could potentially undermine the sideslope paving and cause channel failure. Originally, the side inflow from the surrounding drainage area was wide and shallow, confined at the downstream end by the "drainage levee" and the upstream end by high ground (Attachment 3). Now, because of the fill, the sheet flow is now concentrated, and the fill may not be high enough to direct all the sheet flow towards the channel. There are low spots along the fill that would likely be overtopped during high flow events and may cause sheet flow to go over parts of the right bank not protected by a concrete spillway

7. In addition to concerns about the construction of the "drainage levee" at station 244+25, Messrs. Andre and Crisostomo observed that the "drainage levees" at station 196+50 and 208+00 are overgrown with vegetation. Also, the stone revetment for these "drainage levees" is thin at some locations.

8. Based on the field investigations, we concluded that one of the modifications within the RCFCWCD right-of-way may compromise the project's original design performance. In addition, two of the modified "drainage levees" need maintenance.

CESPL-ED-HH

SUBJECT: Field Investigation, Bautista Creek Channel, Right Bank, From the Fairview Avenue Bridge to Station 246+25, Hemet, California

9. For the "drainage levees" at station 196+50 and 208+00, we recommend that the vegetation on the "drainage levees" be removed. We also recommend that Geotech Branch inspect the stone revetment to determine if the size and thickness match the as-built construction plans.

10. For the "drainage levee" at station 244+25, we recommend that either 1) the excess fill be removed and the original "drainage levee" be exposed; or 2) that the existing concrete spillway be extended upstream 50 ft and the low spots in the fill be raised to prevent sheet flow from undermining the sideslope paving and cause channel failure.

Encl



Rick Andre
Hydraulic Engineer



Van Crisostomo, PE
Hydraulic Engineer

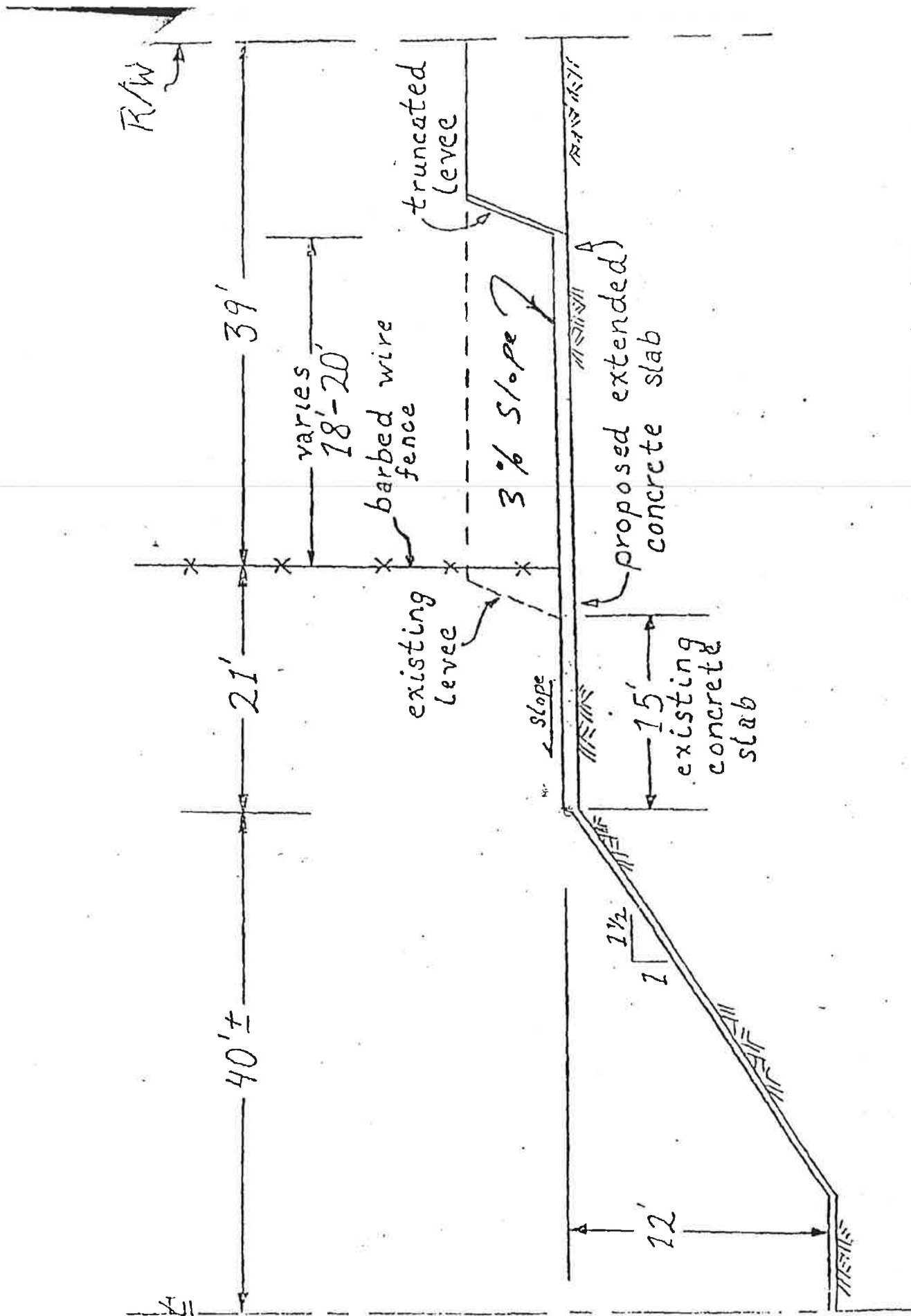


EXHIBIT A
(NOT TO SCALE)



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT CORPS OF ENGINEERS
P.O. BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

OCTOBER 14, 2008

RECEIVED

OCT 27 2008

RIVERSIDE COUNTY FLOOD CONTROL
WATER CONSERVATION DISTRICT

Mr. Stephen C. Thomas
Assistant Chief Engineer
Riverside County Flood Control
and Water Conservation District
1995 Market Street
Riverside, California 92501

Dear Mr. Thomas,

This letter is a follow-up to your letter dated July 3, 2008, and reference to our letter to Mr. Steve Stump dated May 27, 2008, regarding the Bautista Creek Channel. In our May 27 letter, we noted an overland flow side drainage issue and vegetation clearing (operations and maintenance) concern to be addressed by your agency. Your response letter was very helpful to our better understanding the issues. We concur with your findings that modification of the maintenance road for side drainage and removal of sparse vegetation from the small diversion dikes are not necessary. These issues do not pose an additional increase in flood risk to the surrounding community.

We appreciate your input, especially since you have had responsibility for its operation for over 47 years, which brings a lot of credibility as to how the system has functioned without significant problems. It is rewarding to know that the system has performed flawlessly and provided flood control benefits to your community.

Your commitment to closely monitor Bautista Creek Channel by routine inspections satisfies the terms of the Operation & Maintenance manual. We are confident that your agency will quickly address problems related to the flood conveyance capacity of the system to ensure that the project will function as designed.

This letter will serve to close-out our concerns on these issues. I would also like to commend you in your timely attention to these matters and look forward to the continuing working relationship between our agencies.

If you have any questions or concerns about this matter, please contact Mr. Van Crisostomo or Mr. Rick Andre of my staff at (213) 452-3558 or (213) 452-3564, respectively.

Sincerely,

Robert E. Koplin, PE
Chief, Engineering Division

response to #8/129895

| ROUTING SLIP | | ORIGINATING DATE: 10/28/08 | BY: [Signature] | RESPOND | REPORT | INFO | FILE |
|--------------|--------------------------|----------------------------|-----------------|---------|--------|------|------|
| TO: | CHIEF | | | | | | |
| | ASSISTANT CHIEF | | | | | X | |
| | DESIGN & CONSTRUCTION | | | | | | |
| | FEDERAL PROJECTS | | | | | | |
| | FINANCE | | | | | | |
| | INFORMATION TECHNOLOGY | | | | | | |
| | OPERATIONS & MAINTENANCE | | | | | X | |
| | PLANNING | | | | | | |
| | REGULATORY | | | | | | |
| | SURVEY & MAPPING | | | | | | |
| | EXECUTIVE ASSISTANT | | | | | | |


COMMENTS: I will email a copy to THE BOS & JOE FOR INFO BUT REC THEY NOT GIVE TO MABEE UNTIL ASKED.



MEMORANDUM

RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

DATE: September 14, 2010

TO: Steven Hernandez, Legislative Assistant to Supervisor Marion Ashley
FROM: Dusty Williams, General Manager-Chief Engineer 
RE: Robert Mabee and Bautista Creek

You have asked for a brief report concerning Mr. Robert Mabee's complaint regarding the Bautista Creek Channel. Below is a synopsis of the pertinent facts.

Background -

In 1962, the U.S. Army Corps of Engineers constructed the Bautista Creek Debris Dam and Channel to help control flooding in the Valle Vista area of Hemet. Upon completion of the construction, the Corps of Engineers turned over the operation and maintenance of the system to the Riverside County Flood Control and Water Conservation District. In the intervening 48 years, the system has functioned flawlessly, safeguarding the lives and property of the citizens in the eastern part of the Hemet Valley.

The channel improvements also included maintenance access along the easterly side of the channel, extending from Fairview Avenue south-easterly about 2 miles to the dam. This maintenance access road also serves as access to a number of properties easterly of the channel. It is this roadway that is the subject of most of Mr. Mabee's comments.

Evidently, Mr. Mabee believes that as a result of Flood's ongoing operation and maintenance activities of the Bautista Creek system, the public's safety has been compromised.

Three facts are of particular interest and should be noted:

- 1) Mr. Mabee no longer resides in the Bautista Canyon area and, therefore, no longer accesses his property by way of this roadway.
- 2) In 1987 Mr. Mabee brought an unsuccessful lawsuit against the District (Superior Court Case Nos. 187104, 254996, 291475) over these same issues. In 1992 the Fourth District Court of Appeals also ruled against Mr. Mabee, labeling some of Mr. Mabee's arguments as "without merit, if not specious". Later that same year, the California Supreme Court denied Mr. Mabee's petition for review.

MEMO

Page 2

September 14, 2010

RE: Robert Mabee and Bautista Creek

- 3) On March 17th of this year, the County's Risk Management Division of the Human Resources Department issued a letter to Mr. Mabee. In that letter, Senior Liability Claims Adjuster, Kent Livingston states:

As for your request that the County of Riverside and/or Riverside County Flood Control and Water Conservation District vacate or set aside the judgment in favor of the County of Riverside and/or Riverside County Flood Control and Water Conservation District (case number RIC 187104) is respectfully denied. If the County of Riverside and/or Riverside County Flood Control and Water Conservation District were to vacate or set aside this judgment, this act would be considered a gift of public funds that were expended to defend this matter. Furthermore, I question the legality of vacating a judgment or setting aside a judgment. The court has made a legal determination and the County of Riverside and/or Riverside County Flood Control and Water Conservation District will abide by this ruling.

Following are the pertinent claims made by Mr. Mabee and the District's responses:

Mr. Mabee's claim – The Flood Control District covered over a levee with thousands of cubic yards of dirt that also encroaches into a public road resulting in blocking access to the south end of the public road. This work was done without any permits of any kind in violation of county, state and federal statutes.

Response – Over the years the Flood Control District, in its endeavor to keep the road passable for maintenance personnel and the public who use the road for access, has made certain improvements to the side drainage conveyance from several minor watersheds to the east of the channel. One of these improvements was the construction of a deflector berm, consisting of approximately 20 cubic yards of earth, which direct minor side flows to cross the access road in a specific location, thereby minimizing erosion and rutting of the road. Where the deflector impeded vehicular traffic, an encroachment permit was issued by the District allowing for comparable legal access. Mr. Mabee is correct in that this work was accomplished without obtaining any permits; the reason being that no permits were required.

Further, Mr. Mabee often refers to a letter issued by the Transportation Department saying that they have no record of any permit being issued to the Flood Control District. That is indeed a fact. What Mr. Mabee fails to point out is that the referenced Transportation letter, dated February 10, 2010, goes on to state:

The right-of-way has not been accepted into the county maintained road system and therefore, the Transportation Department would not have issued [sic] encroachment permit. The Transportation [sic] does not issue encroachment permits for work within rights-of-way that are not in the county maintained road system.

MEMO

Page 3

September 14, 2010

RE: Robert Mabee and Bautista Creek

Mr. Mabee's claim – The U.S. Army Corps of Engineers issued a letter dated May 27, 2008, stating that the Bautista Creek system could fail as a result of modifications made by the Flood Control District.

Response – The Corps of Engineers did issue a letter in May of 2008 which stated:

...the modifications...may compromise the project's original design performance.

However, Mr. Mabee again fails to point out that in a subsequent Corps letter, dated October 14, 2008, they reference their May 27th letter and go on to state:

Your response letter (referring to the Flood Control District's response letter dated July 3, 2008) was very helpful to our better understanding the issues. We concur with your findings that modification of the maintenance road for side drainage and removal of sparse vegetation from the small diversion dikes are not necessary. These issues do not pose an additional increase in flood risk to the surrounding community.

Further, the letter said:

This letter will serve to close-out our concerns on these issues.

Mr. Mabee's claim – FEMA's Regulatory Branch has said that because of modifications, the channel is no longer certified for a 100 year flood.

Response – This claim is simply not true. The FEMA Flood Insurance Rate Map for the area continues to show full containment of the 100 year floodplain within the channel. Any modification to FEMA's Flood Insurance Rate Maps is accomplished as a result of a petition from the local jurisdiction or at a minimum, in consultation with the local jurisdiction. Neither has occurred.

Summary -

In his zeal to reverse the Court's finding against him and prove his claim, Mr. Mabee often misstates, misinterprets or otherwise, mischaracterizes the facts. That notwithstanding, this matter has been reviewed and litigated ad infinitum, and Mr. Mabee's constant re-hashing of the facts does not change them. Mr. Mabee has pursued all of his options, including the courts, and in the end has been denied.

DW:seb

P8\133260



COUNTY OF
Riverside
HUMAN RESOURCES
Winner IPMA Award for Excellence

Risk Management Division
Post Office Box 1210, Riverside, CA 92502-1210 (951) 955-3540 Fax (951) 955-5855

RONALD W. KOMERS, IPMA-CP
Asst. County Executive Officer/
Human Resources Director

BARBARA A. OLIVIER, SPHR
Asst. Human Resources Director

March 17, 2010

Robert Mabee
3086 Miguel St.
Riverside, CA 92506

Dear Mr. Mabee:

This letter will serve to confirm and memorialize our meeting and our recent telephone conversations. I will attempt to respond to your concerns later in this letter.

You requested from Riverside County Flood Control and Water Conservation District a copy of the FEMA Flood Insurance Study published on August 28, 2008. This information is available through FEMA, however, as a courtesy, I am attaching a copy of this document along with a CD ROM of the entire document for your review.

The following are your concerns pursuant to our meeting:

- You contend that the Lake Hemet Water District still has title of a portion of the area you are concerned about. I have not seen a title report for this area, thus, I do not know if this is a correct assumption. If this is the case, this would be an issue between the Lake Hemet Water District and the County of Riverside. To my knowledge, this issue has not been raised.
- You contend that the access road was part of the County maintained road system. California Streets and Highway Code Section 941 addresses when a road becomes a road that is either Dedicated for Public Use, Not Part of the County Maintained Road System or Dedicated for Public Use and Part of the County Maintained Road System.

941. (a) Boards of supervisors shall, by proper order, cause those highways which are necessary to public convenience to be established, recorded, constructed, and maintained in the manner provided in this division.

(b) No public or private road shall become a county highway until and unless the board of supervisors, or its designee, by appropriate action, has caused the road to be accepted into the county road system. No county shall be held liable for failure to maintain any road unless and until it has been accepted into the county road system by action of the board of supervisors or its designee.

(c) The acceptance of any road or the acceptance of any road subject to improvements pursuant to Section 66477.1 of the Government Code does not constitute the acceptance of the road into the county road system in the absence of the adoption of a resolution by the board of supervisors accepting the road into the county road system.

(d) In lieu of the procedures set forth in subdivisions (b) or (c), boards of supervisors may, by ordinance, designate a county officer to accept, on behalf of the board, roads or portions thereof, into the county road system and to record conveyances to the county of real property interests for road uses and purposes. The designee shall, prior to recording any conveyance under this section, affix a certificate to the instrument stating the acceptance into the county road system and designating the name or number, or both, of the county road. The designee shall report all acceptances and recordings to the board at the end of the fiscal year, or at more frequent intervals as determined by the board.

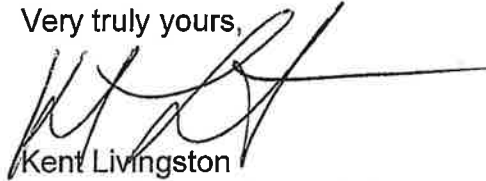
According to my research, this road has been dedicated and accepted for public use but not as part of the maintained road system.

- You have told me that you have registered a Complaint with FEMA and the Inspector Generals Office concerning the various issues involving the subject levees. The County of Riverside will not interject my comments into a Federal investigation and we have no comment as to this issue.
- As for your request that the County of Riverside and/or Riverside County Flood Control and Water Conservation District vacate or set aside the judgment in favor of the County of Riverside and/or Riverside County Flood Control and Water Conservation District (case number RIC 187104) is respectfully denied. If the County of Riverside and/or Riverside County Flood Control and Water Conservation District were to vacate or set aside this judgment, this act would be considered a gift of public funds that were expended to defend this matter. Furthermore, I question the legality of vacating a judgment or setting aside a judgment. The court has made a legal determination and the County of Riverside and Riverside County Flood Control and Water Conservation District will abide by this ruling.

I know that you disagree with the above; however, this is the position of the County of Riverside and/or Riverside County Flood Control and Water Conservation District. Furthermore, it is our position that you are time barred from proceeding further on this matter. This matter has been adjudicated and our files are closed.

Our contact and further contact with you will not toll or extend any statute of limitation or claim filing requirement under State or Federal law. Should you have any questions, please give me a call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Livingston', with a long horizontal line extending to the right.

Kent Livingston

Senior Liability Claims Adjuster

Direct Line: (951) 955-5863

Fax Line: (951) 955-5855

Email: klivings@rc-hr.com

Enclosures: FEMA Flood Insurance Study and CD ROM.

CC: Riverside County Counsel
Riverside County Transportation Department
Riverside County Flood Control and Water Conservation District

RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

April 29, 1993

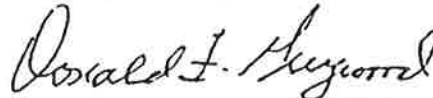
Mr. Robert Mabee
27750 Grant Avenue
Hemet, CA 92544-6730

Dear Mr. Mabee:

Re: Bautista Creek Channel/Access
Project No. 4-0-0030

As a successor to the Deischel property you may lack access to your property per a described easement that intersects a 40-foot road dedicated to and accepted by the Riverside County Transportation Department. The road is located adjacent to the Bautista Creek Channel and runs from Fairview Avenue to said easement. In order to secure the Bautista Creek Channel, the District installed chain line fence; and for your safety has modified drainage deflection dikes. Although practical and physical access was never impaired the construction may have impeded your "legal" access to the dedicated road. To remedy this situation the District is issuing you an encroachment permit (attached) for access across District property that approximates the traveled way being used to reach the access easement on and across the Deischel property.

Very truly yours,


DONALD F. GREYWOOD
Chief of Operations

Attachment

DFG:mcv
dg10429d

COUNTY COUNSEL



Memorandum

October 22, 1992

OCT 26 1992

TO: Patricia Larson, Supervisor, Fourth District
Chairman of the Board of Supervisors
Walt Abraham, Supervisor, First District
Melba Dunlap, Supervisor, Second District
Kay Cenicerros, Supervisor, Third District
Norton Younglove, Supervisor, Fifth District
Gerald A. Maloney, Clerk of the Board of Supervisors
Kenneth L. Edwards, Chief Engineer, RCFC&WCD

FROM: Jay G. Vickers, Deputy County Counsel *JGV*

RE: Robert Mabee
Oral Communication October 13, 1992
Bautista Creek

The sometimes acrimonious relationship between Robert Mabee, the County of Riverside and Riverside County Flood Control and Water Conservation District has a long history extending back into the 1960's. The problem begins in 1961 when the Flood Control District acquired some real property from Raymond and Lola Deichsel for the Bautista Creek Channel. As a part of this transaction, the Flood Control District, in 1965, conveyed a non-exclusive private easement for ingress and egress over particularly described property to Mr. and Mrs. Deichsel. The easement also provided for extinguishment of the easement if a public street or highway were extended to the Deichsel property in the future.

Sometime in the mid to late 1960's, the Deichsel's conveyed a portion of their property to Mr. Mabee and the Flood Control District granted an encroachment permit to use the access road to Mr. Mabee; however, Mr. Mabee's request for a separate non-exclusive easement was denied.

October 22, 1992
Page 2

In the early to mid 1980's, the Flood Control District began experiencing much trespassing and vandalism along the private easement granted in 1965. The Flood Control District was also concerned about its liability exposure because the easement was immediately adjacent to the Bautista Creek Channel. The matter was subject to numerous public hearings before the Board from July, 1987 through April, 1988. These hearings were attended by Mr. Mabee. On April 12, 1988, the Board adopted the following Motion which contained the stated Justification (see agenda item 7.7 for April 12, 1988):

RECOMMENDED MOTION:

The Board of Supervisors of the Riverside County Flood Control and Water Conservation District approve and authorize the granting of an easement herein described on the attached easement for acceptance into the County Non-Maintained Road System and authorize the Riverside County Road Commissioner to sign the Certificate of Acceptance for said easements.

JUSTIFICATION:

The District's Bautista Creek Channel from Fairview Avenue upstream is experiencing increased vandalism and trespassing. To help prevent this and limit potential liabilities, the District needs to fence the channel and maintenance road to control access. Certain individuals, by virtue of being successors in interest to an access easement per Instrument No. 91932 recorded April 7, 1965, enjoy the use of a certain 15-foot wide strip of land adjacent to said channel. Other individuals whose property lies adjacent to the channel have also been using the maintenance road along said channel.

The District's R/W for the Bautista Creek Channel is of sufficient width to allow for its operation and maintenance and to provide for this roadway use outside of the fenced channel maintenance road. The granting of the easement for road purposes (40 feet wide) to the County will allow those certain parties to have continued legal access to their properties and will allow the District to secure the channel from the public. The District will still have use of the 40 foot strip for emergency purposes and maintenance and control of the side drainage into the channel.

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Page 3

The Deeds authorized by this action were recorded in May, 1988.

It was the Flood Control District's intent that this action would meet the condition contained in the Deichsel easement of 1965 and would extinguish the easement granted to the Deichsels. This action was taken only after Mr. Mabee refused to accept a private ingress and egress easement in the same location as the easement approved in the April 12, 1988 Board action. In addition the District had previously offered to maintain the easement and pay \$1,000.00 to Mr. Mabee in return for any claim he may have had to use the Deichsel easement.

In 1987, Mr. and Mrs. Robert Mabee sued the County and Mr. Kenneth L. Edwards, individually, for nuisance and trespass. This suit was based on the Deichsel easement of 1965. It is our understanding that this lawsuit was eventually amended to allege inverse condemnation against the County and Riverside County Flood Control and Water Conservation District and to challenge the Board's April 12, 1988 action. In addition the Mabee's raised the issue of the utility easements which had previously been granted by the Flood Control District. Paul Reynolds of Kinkle, Rodiger and Spriggs represented the County, Flood Control District and Mr. Edwards in this litigation.

This litigation was first referred to arbitration. In October, 1989, the arbitrator ruled for the County and Flood Control District. The Mabee's then requested a trial de novo before the Superior Court. This trial occurred in October, 1990, and the trial court found that the Mabee's suffered no damages and that the conveyances from the Flood Control District to the County in 1988 extinguished the Deichsel easement.

While this matter was pending before the trial judge, the Mabee's brought the issue of the easement previously granted to Lake Hemet Municipal Water District by the Riverside County Flood Control and Water Conservation District to the trial judges attention and made it an issue in the litigation.

Not being satisfied with either the arbitrator's or the trial court's decision, the Mabee's appealed the matter to the Court of Appeal, Fourth District, Division 2. On June 2, 1992, the Court of Appeal affirmed the Judgment for Defendants County of Riverside and Riverside County Flood Control and Water Conservation District and labeled some of the Mabee's arguments as "without merit, if not specious".

On August 19, 1992, the California Supreme Court denied Mr. Mabee's petition for review.

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For the Board's information, we have attached a copy of (1) the trial court's Statement of Decision and (2) the opinion of the Court of Appeal.

CONCLUSION: The Mabee's have had their day before the Court and this Board. The matter has now been resolved by the Court. The Board should take no further action on this matter.

The report should be received and filed.

JJB:mc-6z

cc: Robert Mabee

NOV 27 1990

ARTHUR A. SIMS, Clerk
By *Y.A. Burns* Y.A. Burns
Deputy

1 KINKLE, RODIGER AND SPRIGGS
2 PROFESSIONAL CORPORATION
3 3801 University Avenue, Suite 700
4 Riverside, California 92501

5 (714) 683-2410

6 Attorneys for Defendants,
7 COUNTY OF RIVERSIDE; RIVERSIDE COUNTY FLOOD CONTROL
8 AND WATER CONSERVATION DISTRICT

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF RIVERSIDE

11 ROBERT D. MABEE, and)
12 MARTHA A. MABEE)
13 Plaintiffs,)
14 v.)
15 COUNTY OF RIVERSIDE; and)
16 RIVERSIDE COUNTY FLOOD)
CONTROL AND WATER)
CONSERVATION DISTRICT)
Defendants.)

CASE NO: 187-104
PROPOSED
STATEMENT OF DECISION AND JUDGMENT
(California Rules of Court,
Rule 232 (c))

17
18 The above-entitled cause came on regularly for trial on
19 October 11, 1990, in Department 12 of the above-entitled court,
20 the Honorable Ronald T. Deissler, presiding without a jury (the
21 liability phase of the case having been bifurcated from damages)
22 and was tried on that date and on October 12, and October 15,
23 1990. Mark E. Roseman appeared as counsel for plaintiffs, ROBERT
24 D. MABEE and MARTHA, A. MABEE, and Paul B. Reynolds appeared as
25 counsel for Defendant, COUNTY OF RIVERSIDE and RIVERSIDE COUNTY
26 FLOOD CONTROL AND WATER CONSERVATION DISTRICT.

27 Oral and documentary evidence was introduced on behalf of
28

1 the respective parties and the cause was argued and submitted for
2 decision. The court, having considered the evidence and having
3 heard the arguments of counsel and being fully advised, issues the
4 following statement of decision:

5 1. That plaintiffs, by virtue of being successors in
6 interest to the Deischel property, had a non-exclusive
7 private easement for ingress and egress as evidenced by
8 the easement deed (Exhibit 1).

9 2. That plaintiff's easement was extinguished on May 11,
10 1988 when the Riverside County Flood Control and Water
11 Conservation District granted to the County of Riverside
12 an easement for public road and drainage purposes which
13 was accepted by the County of Riverside, as evidenced by
14 Exhibit 10. The easement deed (Exhibit 1) by its terms,
15 provided that the easement would cease and determine if a
16 public highway or street was extended to Section 22.

17 3. That defendants did not take plaintiff's property
18 rights without just compensation as the evidence does not
19 support the finding that plaintiffs suffered substantial
20 impairment to their access/easement prior to its
21 extinguishment on May 11, 1988.

22 (a) The court further finds that Defendant's construction
23 of the dirt roadway evidenced by Exhibit 10 was within
24 their rights to construct, maintain and operate Bautista
25 Creek Channel and plaintiffs rights of ingress and egress,
26 by the express terms of the easement (Exhibit 1) were
27 subordinate to the rights of the Flood Control District to
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construct, maintain and operate Bautista Creek Channel.
4. The court finds that since there was no taking of plaintiff's property/easement by the Defendants, there is no damage issue to be determined by a jury.

Judgment is hereby ordered to be entered for the Defendants. Further, defendants are to receive their statutory costs of suit.

Dated: Nov 09 1990 Ronald T. Deissler

JUDGE RONALD DEISSLER
JUDGE OF THE SUPERIOR COURT

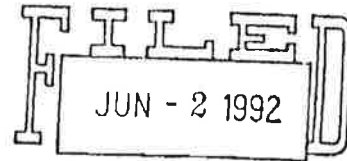
Entered on file
Judgment Book 538 Page 374

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA



COURT OF APPEAL FOURTH DISTRICT

ROBERT D. MABEE, et al.)
)
 Plaintiffs and Appellants,)
)
 v.)
)
 THE COUNTY OF RIVERSIDE, et al.)
)
 Defendants and Respondents.)
 _____)

E009108
 (Super.Ct.No.
 187104

OPINION

Appeal from a judgment of the Superior Court of Riverside County. Ronald T. Deissler, Judge. Affirmed.

Robert D. Mabee and Martha A. Mabee, in propria persona, Appellants.

Kinkle, Rodiger & Spriggs, by Paul Reynolds, and Greines, Martin, Stein & Richland, by Martin Stein and Cynthia N. Sarno, for Defendant and Respondent.

In an inverse condemnation action for the alleged taking of their easement, plaintiffs have appealed from the judgment entered in favor of defendants. Plaintiffs make four assignments of error. Because no error was demonstrated by plaintiffs, we shall affirm the judgment.

FACTUAL AND PROCEDURAL SYNOPSIS

In 1965, the Riverside County Flood Control and Water Conservation District (hereinafter the District or defendant) granted a "non-exclusive private easement for ingress and egress" to the owners of landlocked property in Hemet, California. The easement was located on a District-owned maintenance road that ran along and immediately adjacent to the east bank of the Bautista Creek Channel (the channel).

In pertinent part, the grant of the easement provided for its own termination: the easement by its express terms was "subordinate to the rights of the District to construct, maintain and operate Bautista Creek Channel. If at any time a public highway or street shall be extended to the described lands in Section 22 lying easterly of Bautista Creek Channel, this easement shall cease and determine."

In 1985, in response to increased vandalism to and trespassing in the channel, the District decided upon a plan to fence off and secure the channel from unauthorized access and to provide an alternate route for easement holders on a different track than that followed by the maintenance road. As a result of such plan, in 1986, defendants began constructing a dirt road (hereinafter the dirt road), "to provide access for the various property owners along the channel."

The dirt road was placed 21 feet from the edge of the channel. Three five-foot dikes were built to direct storm runoff into the flood control channel and culverts were installed under the road to prevent fill from blocking runoff drainage. The

District graded the dirt road in such a way that it would traverse the dikes. During construction, the easement road was partially obstructed by a locked gate. The District offered to give plaintiffs and other easement holders a key to the gate, but the residents refused it. As a result, the easement was not completely blocked until 1988 when, after the dirt road was built, the District fully fenced off the old easement with a locked gate and barbed wire.

On May 11, 1988, the District granted to the County an easement along the dirt road "for public road and drainage purposes." The grant and the County's "Certificate of Acceptance" were recorded the next day.

In July, 1988, Mr. and Mrs. Mabee (plaintiffs) earlier purchasers of property from an easement holder, and successors to the sellers' interest in the easement, filed a first amended complaint against the District and the County of Riverside (the County or defendant) for damages for the inverse condemnation of their easement. Defendants took the position that the easement had been extinguished, according to its own terms, by the dedication of the dirt road in May 1988, and thus that plaintiffs had no property interest to be taken.

The trial court ruled for defendants, for the reason that defendant's construction of the dirt road fell within their express right to "construct, maintain and operate" the channel and plaintiffs access was subordinate thereto. The court further ruled, according to the statement of decision and judgment, "2. That plaintiff's easement was extinguished on May 11, 1988 when the . . . District granted to the County . . . an easement for

public road and drainage purposes which was accepted by the County. . . . The easement deed . . . by its terms, provided that the easement would cease and determine if a public highway or street was extended to Section 22. [¶] 3. That defendants did not take plaintiff's property rights without just compensation as the evidence does not support the finding that plaintiffs suffered substantial impairment to their access/easement prior to its extinguishment on May 11, 1988."

Plaintiffs' later motion for a new trial was denied; this appeal followed.

DISCUSSION

Plaintiffs contend principally that the trial court erred in allowing defendants to offer evidence of the dirt road because it was a new matter which defendants had not affirmatively raised as a defense in their answers to plaintiffs' first amended complaint. Defendants take the position on appeal, as they did at trial, that the dirt road was not a new matter, because the District deeded the dirt road as a "public road" to the County in May 1988, which had the effect of terminating plaintiffs' easement, with the result that plaintiffs possessed no property right which could be taken.

"New matter" is an affirmative defense which the defendant must raise in its answer to the complaint. (Code Civ. Proc., §

431.30, subd. (b)(2).)^{1/} "New matter" is an issue relied on by a defendant which is not raised by the plaintiff. (State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal.App.3d 721, 725.) Specifically, "If the answer, either directly or by necessary implication, admits the truth of all the essential allegations of the complaint . . . but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter."

(Goddard v. Fulton (1863) 21 Cal. 430, 436.) Thus, a matter unresponsive to the essential elements of the complaint, constitutes a "new matter" and must be raised in the answer as an affirmative defense. (State Farm Mut. Auto. Ins. Co., supra, at p. 725, citing Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 543.)

In contrast, where the answer negates some essential allegation of the complaint, facts in support of the answer do not constitute new matter, "but only a traverse." (State Farm Mut. Auto. Ins. Co. v. Superior Court, supra, 228 Cal.App.3d at p. 725, citing Goddard v. Fulton, supra, 21 Cal. 430, 436.) Here, the dirt road's existence served to negate an essential allegation in plaintiffs' complaint.

The essential elements of an action for inverse condemnation are: "an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or

^{1/} Code of Civil Procedure section 431.30 states in relevant part, "(b) The answer to a complaint shall contain: [1] (2) A statement of any new matter constituting a defense."

appropriation must directly and specially affect the landowner to his injury.'" (Gilbert v. State of California (1990) 218 Cal.App.3d 234, 249, quoting from Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119-120.) The plaintiff has the burden of alleging and proving as its case in chief, a) ownership of a property right and b) its infringement. (Id. at pp.249-250.)

Plaintiffs alleged ownership of the easement in paragraph 6 of their first amended complaint: "Defendants, . . . entered the easement . . . of which Plaintiffs are the owners and possessors, and substantially destroyed the easement, making portions of it unpassable, [sic] . . . and . . . prevent[ed] access to and from the easement. . . . [¶] 7. As a proximate result . . . Plaintiff's [sic] easement was damaged to such an extent that it is unusable. . . ." In their answers, defendants denied paragraphs 6 and 7 and generally and specifically denied each and every allegation of the complaint, thus putting in issue the existence of an ownership interest in the easement.

By its own terms the easement would cease and determine "If at any time a public highway or street shall be extended to the described lands . . . lying easterly of Bautista Creek Channel." Therefore, the dirt road's existence is central to defendants' position that plaintiffs had no interest in an easement after May 1988, because the easement had been extinguished by operation of law triggered by the fact of the new public road. Thus, such evidence served to negate an essential element of plaintiffs' inverse condemnation action and as such did not constitute "new matter." In other words, defendants were properly allowed to

offer evidence of the dirt road at trial to negate plaintiffs's allegation that they owned the easement.

Lest there be any further discussion on this question, the record discloses that, at the commencement of trial, plaintiffs' attorney agreed with defendants and with the court that the question to be resolved at trial was the existence of a property interest in the easement: In response to the parties' attempts to clarify the issues to be resolved, the court stated: "It's your case. . . . But the obvious issues you see is [sic] whether the plaintiff has an interest in the real property, that he does have some. And to me, from the statements that were made this morning, there seems to be a factual dispute regarding that. . . . [¶] [Plaintiffs' attorney]: I agree with the Court. That really -- that's the crux of this case. . . . [Y]ou've left open as an issue whether or not . . . there was something to be taken in this action." (Emphasis added.)

"When a case is tried on the 'assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, . . . neither party can change this theory for purposes of review on appeal.'" (Nelson v. Dept. Alcoholic Bev. Control (1959) 166 Cal.App.2d 783, 788.) Having agreed that the question of whether plaintiffs had a property interest was the "crux" of the case, plaintiffs cannot now argue on appeal that defendants should have been prevented from offering evidence of the dirt road where the road's existence was directly relevant to the determination of whether plaintiffs' had a property interest which had been lost by inverse condemnation.

In their second assignment of error, plaintiffs argue the court incorrectly ruled that the dirt road extinguished the easement because the dirt road did not fit the definition of a street or highway pursuant to Riverside County Ordinances 460 and 461. This argument is without merit, if not specious.

"The word 'road' is a generic term which includes highways, streets, public ways and thoroughfares." (Fischer v. County of Shasta (1956) 46 Cal.2d 771, 774.) It is also apparent that a road which does not meet county construction standards may yet be a "public road." In Hays v. Vanek (1989) 217 Cal.App.3d 271, a dirt road was offered for dedication as a public way but the County of San Diego rejected the offer of dedication because it did not meet the county's standards. The reviewing court held that it was nevertheless a public road. (Id. at pp. 283-284.) "All roads over which the public has a right to travel, whether express or prescriptive, are "public" roads. . . . [Citations.]" The "fact that the County refused to accept [the dedicated road] . . . is not inconsistent with its status as a 'public' road." (Id. at p. 284, fn. omitted.) Here, there is also evidence that the dirt road was and remains open to the public.

Further, "When streets have been offered for dedication and there has been an acceptance of the offer they are public streets subject to public control as to their opening, continued use or closure. Such streets are no longer private but are public property." (47 Ops.Cal.Atty.Gen. 191, 194 (1966), citing Brick v. Cazaux (1937) 9 Cal.2d 549.) The deed for the dirt road from the District to the County grants "an easement for public road. . . ." That the District intended to grant an easement for a public

road is apparent from the language of the dedication.² The County accepted the dedication on May 11, 1988. The dirt road is a public road, and thus extinguished plaintiffs' easement.³

As their third assignment of error, plaintiffs contend that the court mistakenly found as a fact that defendants had not interfered with plaintiffs' easement. The court found that the "evidence does not support the finding that plaintiffs suffered substantial impairment to their access/easement prior to its extinguishment on May 11, 1988." "Whether a particular use of the land by the servient owner is an unreasonable interference with the rights of the dominant owner is a question of fact for the trier of fact, and its findings based on conflicting evidence

² Plaintiffs nevertheless argue that the fee to the dirt road remains in the District. Nevertheless the identity of the fee owner is not relevant to the road's public character. "At most, acceptance by public use can result in an easement in favor of the public for road purposes. Under such circumstances, fee title must continue to be held by some private person or persons." (Cf. Hays v. Vanek, supra, 217 Cal.App.3d at p. 284, fn 5.) This fact, however, does not alter the outcome, which is that the dedication of the public road by the District and the acceptance of the dedication of the road, and the road's availability to the public, extinguishes plaintiffs' easement by the terms of that easement.

³ Perhaps plaintiffs' confusion stems from the legend at the bottom of the dedication, which states, "Grantor understands that the herein described road shall not become part of the county maintained road system until accepted by subsequent resolution of the Board of Supervisors pursuant to Section 941 of the Street and Highways Code." Section 941 refers to the acceptance of the road as a county road, attendant with all the responsibilities for maintenance and liability, as distinguished from a plain public road. Yet as the decision in Hays so aptly analyzes, a public road may exist independent of whether the County has accepted it into the system of County-maintained roads. (Hays v. Vanek, supra, 217 Cal.App.3d at p. 284.) "[T]here are public roads which are not 'county roads'. . . ." (47 Ops.Cal.Atty.Gen. 191, 193 (1966).)

are binding on appeal." (City of Los Angeles v. Howard (1966) 244 Cal.App.2d 538, 543-544.)

The easement deed specifically retained in the servient tenement holder the right "to construct, maintain and operate" the channel and makes plaintiffs' rights subordinate thereto. Thus, "the servient owner may use his property in any manner not inconsistent with the easement so long as it does not unreasonably impede the dominant tenant in his rights." (City of Los Angeles, supra, at p. 543, emphasis added.) The evidence shows that the District constructed the dirt road as a direct response to increased vandalism giving rise to a need to secure and maintain the channel. Further, at all times, plaintiffs always had access to their land; the record shows that their access over the extinguished easement was only sealed off after the dirt road was finally finished and dedicated to the County.

Plaintiffs nevertheless insist that construction of the dirt road caused them inconvenience and injury. Plaintiffs further cite as evidence of interference with the easement, that "Riverside County Sheriff's Report dated August 18, 1987 stated that the culverts and dirt extended 5 to 7 feet out into the fenced easement in three places . . . show[ing] substantial impairment of the easement occurred nine months prior to May 11, 1988." In fact, Deputy Sheriff Dean Wright testified that he did not recall having to drive around the culvert pipes.

Plaintiffs further assert that the easement's south 350 feet were completely blocked by the construction, forcing them to

drive off the easement at that point. However, there is nothing in the record to support this contention. The trial court was correct in concluding that the evidence did not support plaintiffs' argument that their access had been substantially impaired between 1986 and May 12, 1988.

Plaintiffs finally contend that the court erred in denying their motion for new trial, because they claim that the notice of their intention to move for a new trial was filed within the statutory time frame. This contention is also specious. Regardless of whether plaintiffs' notice of intention to move for a new trial was filed on time, the record contains no memorandum of points and authorities or supporting affidavits. Indeed, the court dismissed plaintiffs' motion for a new trial "for failure to timely file and serve a memorandum of points and authorities and affidavits in support of the motion. . . ." pursuant to Code of Civil Procedure 659a and Rule 203.1 of the California Rules of Court.

Code of Civil Procedure section 659a states, "within 10 days of filing the notice, the moving party shall . . . file any affidavits intended to be used upon such motion. . . . The time herein specified may, for good cause shown by affidavit . . . be extended by any judge for an additional period of not exceeding 20 days." Rule 203 further provides a much more stringent stricture: "Within 10 days after filing notice of intention to move for a new trial . . . the moving party shall serve and file a memorandum of points and authorities relied upon, . . . If the

moving party fails to serve and file the prescribed memorandum, the court may deny the motion without a hearing on the merits." (Cal. Rules of Court, rule 203, emphasis added.) There being no record of any requests by plaintiffs for extensions of time, nor explanation for the lack of supporting documents, the trial court acted well within statutory and regulatory guidelines when it denied plaintiffs' motion for new trial.

DISPOSITION

The judgment appealed from is affirmed.

NOT FOR PUBLICATION

/s/ McDANIEL J.*

We concur:

/s/ DABNEY
Acting P. J.

/s/ TIMLIN
J.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Oct 5th, 2010

Riverside County Board of Supervisors:

On Sept 30th I received a copy of Supervisor Ashley's report for today's agenda, report 11.13. I hand carried the report to the Grand Jury the same day. The report is to be added to the complaint that I made to the Grand Jury.

The report was written by Steve Hernandez and signed by Ashley. I met with Steve three times. The first meeting was in Ashley's office. We went over documents that I had given the County. Steve was impressed with the fact that everything that I told the Board was exactly the same as Supervisor Younglove's report that is included in your report today. Steven asked me what did I want from the County. As I have said to this Board and County Counsel I want the encroachment to be removed. Remove the fill over the levee as the U.S. Corp. Eng. has recommended in their report to avoid failure of the channel, and for the County to file a motion to the court to set aside case 187104 based upon fraud upon the court. He said, "No, no you don't understand. How much money would it take for you to go away?" County Counsel told me this meeting violated the Brown Act.

In the second meeting Steve and I spent the morning at the site. When we left the site Steve was convinced that my easements were blocked and that I never had access to my property. The third meeting lasted aprox 2/12 hours in the County Boardroom with *Steve Thomas*, County Counsel, Juan Perez, Steve and myself. I did all the talking and showed them documents that proved the fraud. I met Warren Williams two times. Once at his office and about two hours at the site. Williams said, "How are we going to fix this? It will cost a lot of money. I don't know if I can get it from the Board." I would be willing to take a polygraph test for the above statements.

Page 2A of the report states that Robert Mabee appears to be right that Flood Control did not obtain permits from the Road Dept. Hernandez then goes on to say that permits would not have been issued for non maintained public roads.

Exhibit No. 1: Certificate of Acceptance. Government Code section 27281 states that by the Certificate of Acceptance on the face of the easement and signed by the Road Commissioner at that point it became a public road regardless of whether it was accepted into the County maintained system of roads.

Exhibit No. 2: California Civil Code concerning Encroachments Points and Authorities. Page 3D Hernandez states, "Robert Mabee is correct that the corps issued a report May 27th, 2008 stating that the modifications have compromised the project."

Exhibit 3: Complete report of the Corps report states that the channel could fail as a result of the modifications. The County's response is so what, it hasn't failed in 47 years.

Submitted By:
Robert Mabee

11.13

The project was modified Sept 30th, 1988. The Corps report states the design flow is 16500 cubic ft. a second.

Exhibit 4: FEMA's historical flood of 1980 was 11,400 cubic ft. per second. Since the modification in 1988 hundreds of homes have been built in the flood plain. Normal flow is about 1,220 cubic ft. per second. Flood Control lied in their response. The test will be in the next heavy flooding. The Corps of Eng. Inspector Frank Ellis has asked the Corps to reply in writing why the Eng. report should be ignored. The civilian employee who wrote the County that everything is o.k. is no longer with the Corps. A review of flood reports will show that the reports were falsified. They did not report the modifications as required by FEMA. Page 3D Hernandez states, "that encroachments have narrowed the road to 14 ft."

FRANK
ELLIS IS
THE INSPECTOR
GENERAL OF
CORPS -
R.M

Exhibit 5: Notarized title report and letter from Lake Hemet shows at the time of recording the public road Flood Control did not have 100% ownership. Both Juan Perez and Warren Williams' director's report states no permits were ever issued, but that they were not needed. The following exhibits will show that Perez and Williams are incompetent liars.

Exhibit 6: County Ordinance 499 page 1, section 1, states no public district or agency is exempt from a permit, no exceptions. - VIOLATION IS A MISDEMEANOR.

Exhibit 7: Construction permits - PURPOSE OF PERMITS

Exhibit 8: Contract project No. 4-0-030 dated 9-20-1988, page 40.6-5 states in plain English Flood Control must have a Road Dept. permit. Perez and Williams should be fired. Not for incompetence, but for lying to this Board.

PROJECT NO
4-0-030
I HAVE A
COMPLETE COPY
OF CONTRACT
CERTIFIED BY
CLERK OF BOARD
R.M

Exhibit 9: A letter from Supervisor Younglove stating that Flood Control had deceived him and the Board, and his offer to appear in Court to ask the Court to set aside the judgment in case 187104.

Exhibit 10: A complete copy of the County brief filed in the Appellate Court in case 187104. The brief tells in detail why the road was built, how it was built, and on page 5 tells the Court that they had provided a unobstructed road to take the place of the easement. The Board has been lied to by Juan Perez, Warren Williams, and County Counsel.

Robert Mabee
3086 Miguel St.
Riverside, Ca 92506
(951) 788-4858

By the Certificate of Acceptance printed on the face of the Easement grant and signed by the Riverside County Road Commissioner, the easement was accepted for the purpose of vesting title in the County of Riverside on behalf of the public for public road and utility purposes. At that point, it became a public road regardless of whether it was accepted into the county-maintained system of roads.

"A dedication may be defined as devotion of land to public use (e.g. public streets . . .) by an unequivocal act of the fee owner

The "Certificate of Acceptance" on the Easement instrument reads as follows:

**"CERTIFICATE OF ACCEPTANCE
(Government Code Section 27281)**

THIS IS TO CERTIFY that the interest in real property conveyed to the County of Riverside, State of California, by the within instrument, is hereby accepted for the purpose of vesting title in the County of Riverside by the undersigned on behalf of the Board of Supervisors pursuant to the authority conveyed by Resolution No. 86-194 of the Board of Supervisors adopted May 13, 1986 and the grantee consents to the recordation thereof by its duly authorized officer.

This certificate of acceptance does not constitute acceptance of any road into the county maintained system pursuant to Section 941 of the Street & Highways Code."

manifesting an intent that the land shall be accepted and used for the public purpose. [Citation.]" (1 Ogden's Revised California Real Property Law (1974) § 4.10, p. 125.)

"When streets have been offered for dedication and there has been an acceptance of the offer[,] they are public streets subject to public control as to their opening, continued use or closure . . . Brick v. Cazaux, 9 Cal.2d 549 (1937)." (47 Ops.Cal.Atty Gen. 191, 194 (1966).)

Calif Civil Code- streets and highways-Obstructions and injuries to county highways

Chapter 6

Section 1480- Definitions- Page 516

A- The term highway includes all or part of the entire width of right of way of a county highway, whether or not such entire area is actually used for highway purpose.

B- The term "encroachment" includes any structure or object of any kind or character placed, without the authority of law, either in, under or over any county highway.

Notes of Decision- Page 517

4- Rights of public- the primary purpose of a highway is the passing and repassing of the public, which is entitled to the full unobstructed and uninterrupted enjoyment of entire width of layout for that purpose. Ex Parte Bodkin (1948) 194 P.2d- 588, 86.C.A.2d-208

Section 1480.5- Authority to Remove encroachments- Page 517

The Road Commissioner may immediately remove, or by notice may require the removal of, any of the following encroachments.

A- an encroachment which obstructs or prevents the use of a county highway by the public.

Actions in General- Page 521

In action to abate structure on public roadway as nuisance, fact that structure is off traveled part of highway or that sufficient areas remain to allow public use of right of way in accustomed manner is no defense. People V. Henderson (1948) 194 P.2d 91, 85 C. A. 2d 653

The District Attorney may prosecute an action to abate the construction and maintenance of an earth embankment on a public highway. People v. Power (1918) 175 P. 803, 38 C.A. 181

Section 3490- Effect of Lapse of Time- Page 622

No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.



DEPARTMENT OF THE ARMY

LOS ANGELES DISTRICT CORPS OF ENGINEERS

P.O. BOX 532711

LOS ANGELES, CALIFORNIA 90053-2325

May 27, 2008

REPLY TO
ATTENTION OF

Mr. Steve Stump
Operations and Maintenance
Riverside County Flood Control and
Water Conservation District
1995 Market Street
Riverside, CA 92501

Dear Mr. Stump:

On May 13, 2008, in response to a citizen concern, two engineers from the U.S. Army Corps of Engineers, Los Angeles District, Hydrology and Hydraulics Branch, conducted a field investigation of Bautista Creek Channel in Hemet, Riverside County, California. The purpose for the field investigation was to evaluate whether "drainage levee" modifications within the Riverside County Flood Control and Water Conservation District (RCFCWCD) right-of-way in the Bautista Creek Channel have compromised the project's original design performance. The Field Investigation Report is enclosed.

Based on the field investigation, we concluded that one of the modifications within the RCFCWCD right-of-way may compromise the project's original design performance. In addition, two of the modified "drainage levees" need maintenance.

We therefore recommend: 1) For the "drainage levee" at channel station 244+25, either a) the excess fill be removed and the original "drainage levee" be exposed; or b) the existing concrete spillway be extended upstream 50 ft and the low spots in the fill be raised to prevent sheet flow from undermining the sideslope paving and cause channel failure and, 2) For the "drainage levees" at channel stations 196+50 and 208+00, the vegetation on the levees be removed and the stone revetment be inspected to ensure that the size and thickness match the as-built construction plans.

If you have any questions or concerns about this matter please contact either Mr. Van Crisostomo or Mr. Rick Andre of my staff at (213) 452-3558 or (213) 452-3564 respectively.

Sincerely,

Robert E. Koplin, PE
Chief, Engineering Division

Enclosure

MEMORANDUM FOR RECORD

SUBJECT: Field Investigation, Bautista Creek Channel, Right Bank, From the Fairview Avenue Bridge to Station 246+25, Hemet, California

1. References:

- a. Email from LTC Anthony G. Reed, Subject: Mr. Mabee's Two Concerns, dated 19 April 2008
- b. *General Design for Bautista Creek Channel, Design Memorandum No. 2, San Jacinto River and Bautista Creek Improvements*, U.S. Army Corps of Engineers, Los Angeles District, dated September 1959
- c. *Bautista Creek Channel, As-built Construction Plans*, File No. 172, U.S. Army Corps of Engineers, Los Angeles District, dated October 1961
- d. Letter from the Corps to Riverside County Flood Control District, Subject: Approval of Bautista Creek Channel Levee Modification (EB88-23), dated 14 December 1987.

2. On 13 May 2008, Messrs. Van Crisostomo and Rick Andre of the Hydrology and Hydraulics Section inspected the subject site pursuant to a request by LTC Anthony G. Reed, Deputy District Commander, Los Angeles District, U.S. Army Corps of Engineers (Ref. 1a). The purpose for the field investigation was to evaluate whether "drainage levee" modifications within the Riverside County Flood Control and Water Conservation District (RCFCWCD) right-of-way in the Bautista Creek Channel have compromised the project's original design performance.

3. Mr. Crisostomo and Mr. Andre were met at the project site by Mr. Robert Mabee, a local resident, who acted as their escort for the site visit. The inspection focused on a 1.7 mile reach of the right bank of the channel from the Fairview Avenue Bridge to approximately station 244+25. Mr. Mabee claimed that RCFCWCD altered several "drainage levees" and changed the drainage pattern of the sheet flow entering the channel.

4. This reach of the Bautista Creek Channel is an incised, trapezoidal concrete-lined channel. The basewidth is 25 ft and the sideslopes are 2:25 to 1. The channel depth is between 11.5 to 12 ft. The design flow rate for this reach is 16,500 cfs. The flow is supercritical with a velocity of 45 ft/s. The concrete channel itself is well-maintained. Along the right bank (looking downstream) of the channel are three "drainage levees" that direct sheet flow towards the channel.

Enclosure

CESPL-ED-HH

SUBJECT: Field Investigation, Bautista Creek Channel, Right Bank, From the Fairview Avenue Bridge to Station 246+25, Hemet, California

5. The Design Memorandum (Ref. 1b) and as-built construction plans (Ref. 1c) were checked to determine if the "drainage levees" are original project features and to confirm their intended function. According to the Design Memorandum, "Side-drainage investigations indicated that large side flows would reach the channel along the right (northeast) bank. Because the top of the channel would be at or near ground level, these flows would be discharged over the top of the channel banks for nearly the entire length of the channel. Therefore, the maintenance roadway along the right bank would be paved to prevent undermining of the side-slope paving. Low cross dikes may be required at intervals to divert the flow into the channel; the specific locations of these dikes would be determined before contract plans and specifications are complete." Furthermore, the as-built construction plans confirm that the "drainage levees" were constructed as part of the Bautista Creek Channel project. In addition, concrete spillways were constructed at the end of these "drainage levees" to prevent the undermining of the concrete sideslope when sheet flow from the surrounding drainage areas flows into the channel (Attachment 1).

6. Per Reference 1d, the Corps approved a ^{project no} permit for the RCFCWCD to modify these "drainage levees". Except for the "drainage levee" at station 244+25, the proposed modifications were followed, i.e. the "drainage levees" were truncated approximately 20 ft to widen the maintenance road and then the existing concrete spillway extended to the end of the truncated "drainage levee" (Attachment 2). At station 244+25 the "drainage levee" was not truncated as indicated in the approved permit plans. Instead, it was buried with miscellaneous fill (it is unknown who placed the fill). This fill alters the sheet flow drainage pattern and causes the flow to enter the channel over parts of the right bank not protected by a concrete spillway. This could potentially undermine the sideslope paving and cause channel failure. Originally, the side inflow from the surrounding drainage area was wide and shallow, confined at the downstream end by the "drainage levee" and the upstream end by high ground (Attachment 3). Now, because of the fill, the sheet flow is now concentrated, and the fill may not be high enough to direct all the sheet flow towards the channel. There are low spots along the fill that would likely be overtopped during high flow events and may cause sheet flow to go over parts of the right bank not protected by a concrete spillway

7. In addition to concerns about the construction of the "drainage levee" at station 244+25, Messrs. Andre and Crisostomo observed that the "drainage levees" at station 196+50 and 208+00 are overgrown with vegetation. Also, the stone revetment for these "drainage levees" is thin at some locations.

8. Based on the field investigations, we concluded that one of the modifications within the RCFCWCD right-of-way may compromise the project's original design performance. In addition, two of the modified "drainage levees" need maintenance.