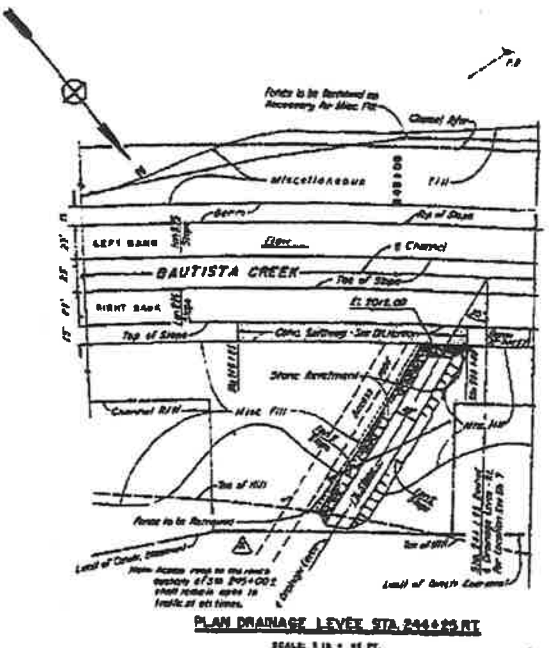
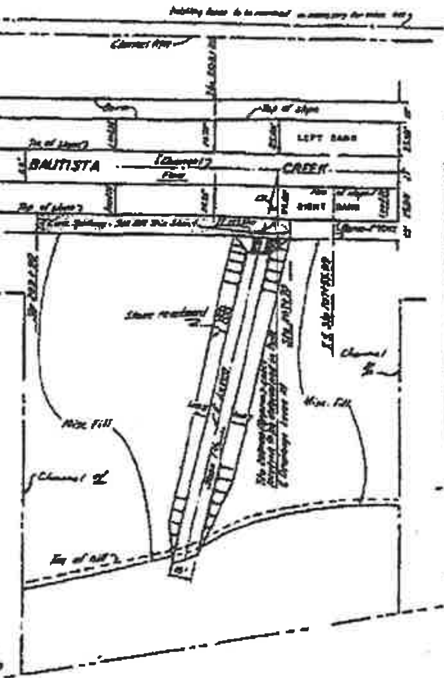
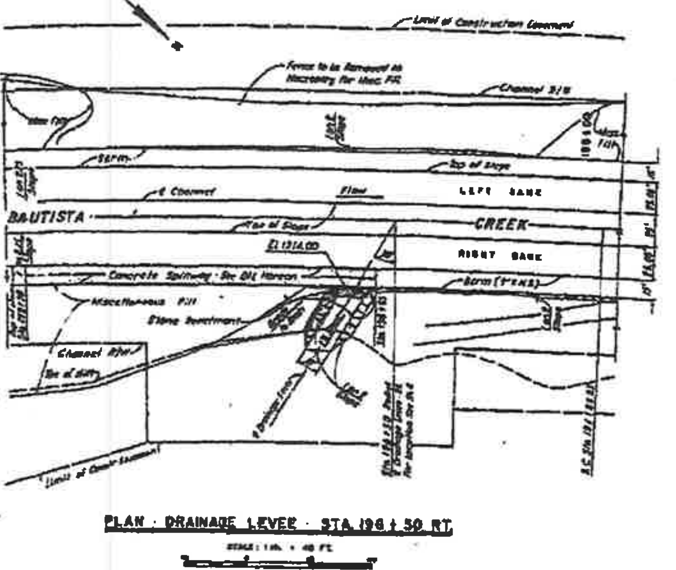


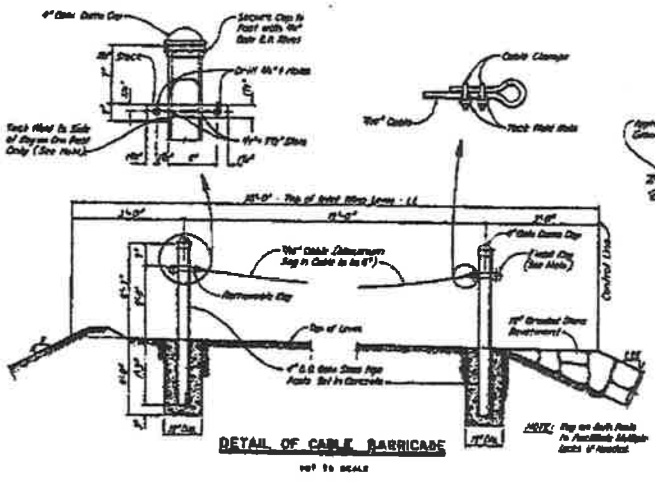
PLAN DRAINAGE LEVEE STA. 244+25 RT



PLAN DRAINAGE LEVEE STA. 208+00 RT

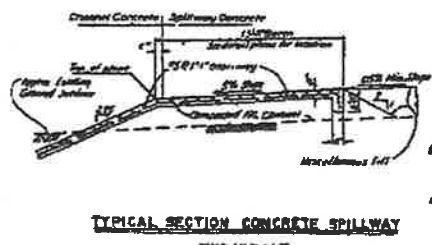


PLAN · DRAINAGE LEVEE · STA. 196+50 RT.

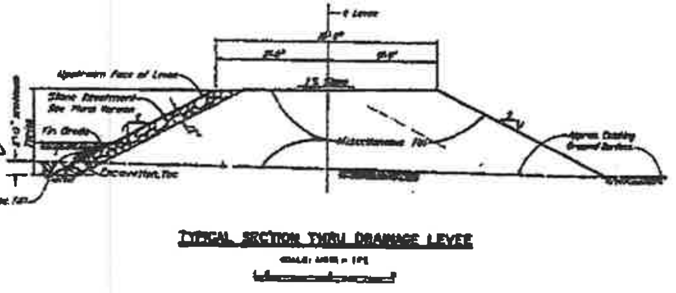


DETAIL OF CABLE BARRICADE

NOT TO SCALE



TYPICAL SECTION CONCRETE SPILLWAY



TYPICAL SECTION THRU DRAINAGE LEVEE

REFERENCE DRAWINGS

For General Notes and Reference Drawings .... See Sheet No. 6
For Channel Inlet Wing Levee General Plan .... See Sheet No. 6
For Detail Plans Nos. 1, 2 & 3 .... See Sheets Nos. 4, 7, 4

DATUM IS MEAN SEA LEVEL

CORPS OF ENGINEERS, U.S. ARMY
OFFICE OF THE DISTRICT ENGINEER
LOS ANGELES, CALIFORNIA

SAN JACINTO RIVER & BAUTISTA CREEK IMPROVEMENTS
BAUTISTA CREEK CHANNEL

MISCELLANEOUS DETAILS

JUNE, 1960

Attachment 1

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

WARREN D. WILLIAMS
General Manager-Chief Engineer

1995 MARKET STREET
RIVERSIDE, CA 92501
951.955.1200
FAX 951.788.9965
www.floodcontrol.co.riverside.ca.us

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

July 3, 2008

Mr. Robert Koplin, Chief
Engineering Division
U. S. Army Corps of Engineers
Post Office Box 532711
Los Angeles, CA 90053-2325

Dear Mr. Koplin: Re: Bautista Creek Channel

We are in receipt of your letter dated May 27, 2008 (copy attached) regarding the District's Bautista Creek Channel. Upon receipt of your letter, Steve Stump (the District's Chief of Operations), our Maintenance Supervisor, Senior Maintenance staff and I personally inspected the project.

As you know, the Corps constructed the channel in 1961. The District has operated and maintained the facility for the past 47 years. Three diversion dikes were constructed by the Corps to collect and direct side drainage as part of the original Bautista Creek Channel project. All three structures have performed well. Never in the project's 47-year history have the structures been overtopped, nor have their structural integrity ever been compromised in any way. Moreover, never has any side drainage ever impacted the Bautista Creek Channel concrete lining. That being said, I wish to offer the following insight based upon the District's first-hand experience and long history with the project.

Upon close inspection we found the diversion dike at Station 208+00 to be in very good condition. The original rock-facing is clearly visible and undisturbed. Based on our experience with similar structures, we determined that this drainage facility is functioning as designed and is being adequately maintained. The clearing of the sparse amount of vegetation present would serve no purpose.

The diversion dike located at Station 196+50 although more vegetated, likewise is clearly performing up to design standards. As with the diversion dike at Station 208+00, upon close inspection the rock-facing is visible and undisturbed. The removal of the vegetation present on and in the vicinity of the structure would not greatly benefit inspection efforts, nor would it in anyway improve the efficiency of delivering side flows to the channel itself. On the downside, clearing may increase the potential for erosion, and in turn increase maintenance costs. Moreover, the District attempts to avoid the clearing of native vegetation wherever possible out of respect for the environment. In this case, periodic monitoring of the facility should suffice.

A small watershed is captured by the diversion dike at Station 244+25. Flows emanating from the small wash appear to be confined to the existing concrete spillway constructed by the Corps in 1961. Further, there is no evidence that flows have ever exceeded the capacity of the spillway and flowed across the asphalt roadway upstream of the spillway. If it had, one might expect to see erosion or abrasion damage from debris being carried across the asphalt surface. However, the condition of the asphalt pavement at this specific location shows no such signs of damage, and in fact is of similar character and integrity as the asphalt roadway found elsewhere along the entire length of the channel.

Please bear in mind that the Corps' Design memorandum for this project states that side flows would be "discharged over 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 sideslope paving". In the rare instance that flows would exceed the capacity of the existing concrete spillway, they would flow harmlessly across the paved asphalt surface and into the concrete lined channel. The replacement of a good portion of the asphalt roadway with a reinforced concrete surface as suggested by Corps staff is unwarranted at this time.

As with other Corps constructed/District maintained facilities, Bautista Creek Channel will be closely monitored, and problems identified through frequent inspections brought to the Corps' attention. Those problems will then be addressed immediately by District staff. Those inspections include but are not limited to the quarterly inspections done as part of our semi-annual reporting we provide the Corps Operations Branch.

We appreciate and respect the opinions and suggestions offered by your staff and understand the importance of maintenance to ensuring a properly functioning system. Further, we realize that the Corps is always appreciative of the Local Sponsor's perspective on issues. We are thankful for the terrific working relationship our agencies share. Please feel free to contact me at 951.955.1250 should you have any questions regarding this matter.

Very truly yours,

STEPHEN C. THOMAS
Assistant Chief Engineer

Attachment

c: Dusty Williams

SCT:bjp
P8\119895

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 PS|11 9895

FLOOD INSURANCE STUDY - FEMA - AUGUST 28 2008

approximately the same amount of damage will occur with storms of the same magnitude even though the route of floods will vary substantially as the water emanating from the canyon mouths is directed from one point to another on the debris cones.

In order to provide a general indication of the relative severity of historical floods, peak discharge data have been compiled from gaging stations spread throughout the county. The locations, periods of record, and peak discharges at these gages are shown in Table 3, "Historical Flooding."

TABLE 3 – HISTORICAL FLOODING

Location	Drainage Area (Square Miles)	Period of Record	Date	Peak Discharge (cfs)
San Jacinto River Near San Jacinto	141	1920-Present	February 16, 1927	45,000
			February 21, 1980	17,300
			March 2, 1938	14,300
			February 6, 1937	14,000
			January 25, 1969	7,410
			November 22, 1965	6,300
Bautista Creek Near Hemet	39.4	1947-1959	April 3, 1958	1,440
			July 19, 1955	1,170
			February 25, 1969	650
Bautista Creek At Valle Vista	47.2	1969 to present	February 21, 1980	11,400 ✓
			March 28, 1980	1,390
			August 17, 1977	1,050

Peak elevation data have also been kept on Lake Elsinore as a further record of the flood history of Riverside County. The highest lake levels for the period 1916 to 1983 are as follows:

Date	Elevation of Lake Elsinore (feet)-NGVD29
April 1980	1,265.7
April 1916	1,265.6
April 1917	1,260.7
May 1922	1,259.7
May 1927	1,259.0
May 1938	1,258.9
April 1918	1,258.7

DIRECTORS
Walter Bothner
President
C.H. Nordal
Vice President
Robert Lindquist, Jr.
Secretary
Watson Gilmore, Jr.
Treasurer
Charles Ludke

LAKE HEMET MUNICIPAL WATER DISTRICT

40988 FLORIDA AVENUE — P.O. BOX 5038 — HEMET, CALIFORNIA 92344-0809
PHONE (714) 658-3241 FAX (714) 766-7031

Leonard C. Hale
General Manager
Mary E. White
Asst. Sec.-Treas.
Leroy Hamilton
Operations Supervis

December 13, 1990

To Whom It May Concern:

Lake Hemet Municipal Water District owns and operates an irrigation distribution channel, part of which crosses a portion of Section 16, Township 5 South, Range 1 East, San Bernardino Base & Meridian. This system crosses the Bautista Flood Control Channel in this area.

Attached, find a description of the Easement given to Lake Hemet Water Company by Joseph Crawford in 1909 for a "main flume" right-of-way 32 feet wide. The redwood trestle across the Bautista Wash was replaced at the expense of Riverside County Flood Control District with two 30" syphons in 1960 when the Flood Control District constructed the concrete flood control channel through this area. The flume is still in use including the 30" syphons across the Flood Control Channel. The attached drawing, "Detail A", shows the approximate location of Lake Hemet Municipal Water District's flume facilities as it enters the syphon tubes. Also located on the right-of-way near the syphon tubes are pump and pipe facilities enclosed within a chain link cage.

GENERAL ACKNOWLEDGMENT

NO. 1

State of California
County of Riverside } SS.

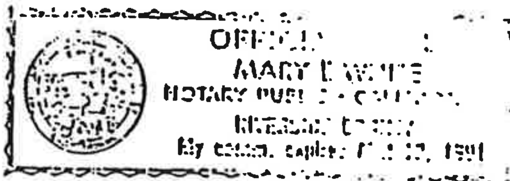
On this the 20th day of December 1990, before me,

Mary E. White

the undersigned Notary Public, personally appeared

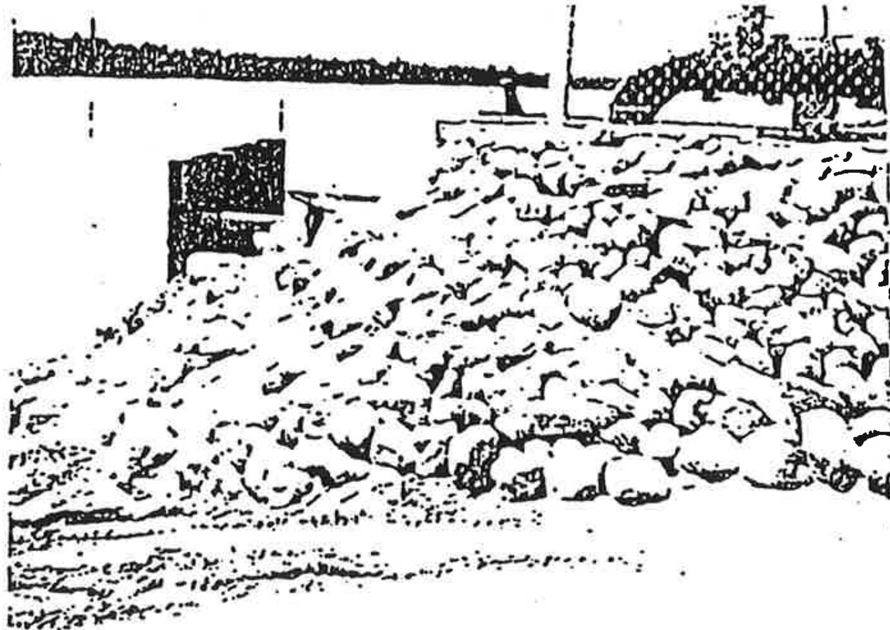
Leonard G. Hale

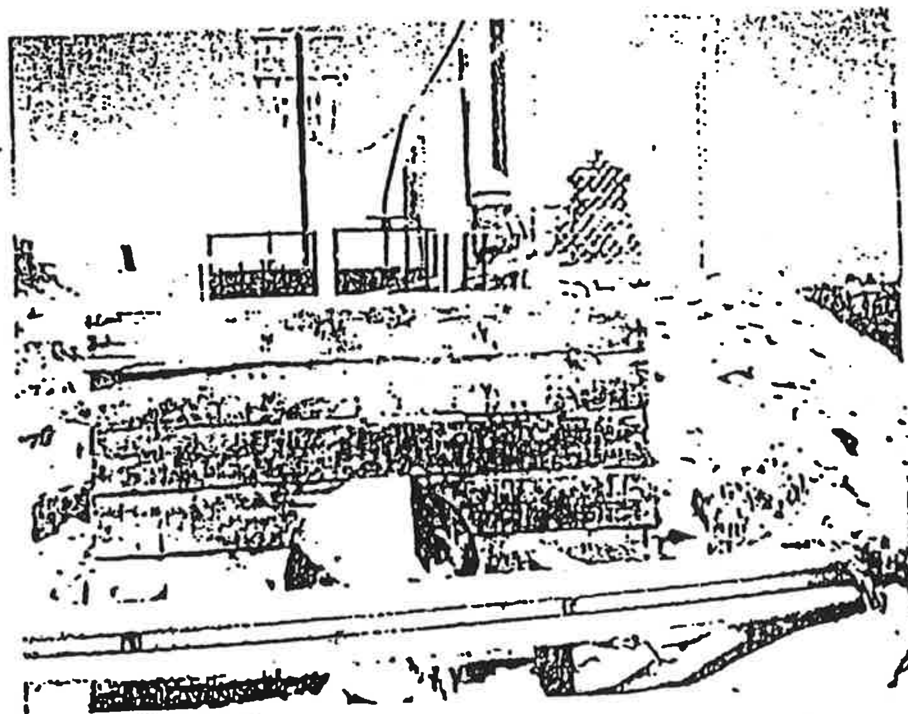
x personally known to me
[ ] proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that he executed it.
WITNESS my hand and official seal.



Mary E. White
Notary's Signature

7110 122
NATIONAL NOTARY ASSOCIATION • 23012 Ventura Blvd. • P.O. Box 4625 • Woodland Hills, CA 91365-





DetAiL -A

DIRECTORS
Walter Bothner
President
C.H. Nordal
Vice President
Robert Lindquist, Jr.
Secretary
Watson Gilmore, Jr.
Treasurer
Charles Ludke

LAKE HEMET MUNICIPAL WATER DISTRICT
40988 FLORIDA AVENUE — P.O. BOX 5038 — HEMET, CALIFORNIA 92344-0809
PHONE (714) 658-3241 FAX (714) 766-7031

STAFF
Leonard C. Hale
General Manager
Mary E. White
Asst. Sec.-Treas.
Leroy Hamilton
Operations Supervisor

December 13, 1990

To Whom It May Concern:

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Lake Hemet Municipal Water District still retains the ownership of the easement and has never relinquished any of its rights in any way.

LAKE HEMET MUNICIPAL WATER DISTRICT

Leonard C. Hale, General Manager

LCH:bw

RECEIVED
MAR 29 1996
Riverside County
Transportation Dept.

RIVERSIDE, CALIFORNIA 92501

(714) 686-4180 (800) 442-4970

December 7, 1990

To: Robert Mabee
Attn: Robert Mabee
27750 Grant
Hemet, CA 92344

Your Reference: Riverside County Flood Control and Water Conservation District
Our No. : C523610

In response to the above referenced application for a Policy of Title Insurance, TICOR TITLE INSURANCE COMPANY OF CALIFORNIA hereby reports that it is prepared to issue, or cause to be issued, as of the date hereof, a Policy or Policies of Title Insurance describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an exception below or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations of said Policy forms.

The printed Exceptions and Exclusions from the coverage of said Policy or Policies are set forth on the attached cover. Copies of the Policy forms should be read. They are available from the office which issued this report.

This Report (and any supplements or amendments thereto) is issued solely for the purpose of facilitating the issuance of a Policy of Title Insurance and no liability is assumed hereby. If it is desired that liability be assumed prior to the issuance of a Policy of Title Insurance, a Binder or Commitment should be requested.

Dated as of December 4, 1990, at 7:30 a.m.

Steve Gallagher/ck, Title Officer

The form of Policy of Title I...

T. NO. NN00627
1944 CA (9-84)

(Individual)

STATE OF CALIFORNIA
COUNTY OF Riverside } ss.

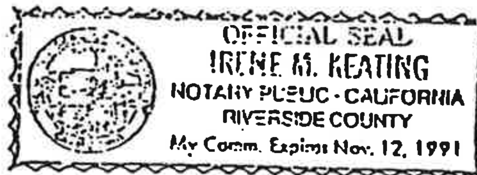
On December 20, 1990 before me, the undersigned, a Notary Public in and for said State, personally appeared Steven J. Gallagher

________, personally known to me or proved to me on the basis of satisfactory evidence to be the person__ whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Signature

ered by



(This area for official notarial seal)

Title to said estate or interest at the date hereof is vested in:

Riverside County Flood Control and Water Conservation District

At the date hereof exceptions to coverage in addition to the printed Exceptions and Exclusions contained in said Policy form would be as follows:

1. A right of way in favor of Joseph Crawford, 32.00 feet wide, lying on the Southeasterly side of a line described as follows:

Beginning on the South line of said Section 16, distant 577.90 feet Easterly from the Southwest corner of said section; thence North 40°43'00" East 1,145.70 feet, to the corner No. 8 of herein parcel, said line, herein described, being parallel with and 31.00 feet Northwest of the Southeast face of Lake Hemet Water Company's Flume, as reserved in Deed to H.L. Thompson, recorded November 16, 1909 in Book 291, Page 393 of Deeds and in Deed to Hemet Land Company recorded May 4, 1912 in Book 350, Page 97 of Deeds.

2. An easement over said land for pole lines, and incidental purposes, as granted to Southern Sierras Power Company, by Deed recorded July 9, 1924 in Book 607, Page 574 of Deeds,

Said deed provides that the poles of said line shall be erected within a strip of land 10.00 feet wide the centerline thereof being described as follows:

Beginning at a point on the West line of said Southwest quarter 1,416.60 feet more or less North of the Southwest corner thereof; thence East 92.00 feet; thence North 228.00 feet; thence South 89°17'00" East 1,496.20 feet.

Said Matter Affects : Parcel 1

3. An easement over the Westerly 50.00 feet of said land for roadway, as granted to Riverside County by Deed recorded September 12, 1932 in Book 89, Page 211 of Official Records.

Said Matter Affects : Parcel 1

4. Rights of way, reservations, conditions and restrictions as set out in Deed from Hemet Land Company, recorded July 24, 1946 in Book 766, Page 162 of Official Records.

5. An action commenced May 12, 1960 entitled Riverside County Flood Control and Water Conservation District vs. Lake Hemet Municipal Water District, et al, to condemn a portion of said land therein designated as Parcel No. 4030-18 for Bautista Creek Channel Case No. 72010 Superior Court Riverside County. Notice of the pendency of said action was recorded May 12, 1960 in Book 2694, Page 316 of Official Records.

6. An easement affecting the portion of said land and for the purposes stated herein, and incidental purposes,

In Favor of : Robert A. Barnes and Leslie Barnes
For : Ingress and egress
Recorded : May 15, 1987 as Instrument No. 137239
Affects : As follows:

The unpaved road lying Northeasterly of and adjacent to the Northeasterly 15.00 feet of the Southwesterly 155.00 feet of that certain 200.00 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, San Bernardino Meridian.

✓7. An easement affecting the portion of said land and for the purposes stated herein, and incidental purposes,

In Favor of	: County of Riverside
For	: Public road and drainage purposes, including public utility and public services purposes
Recorded	: May 12, 1988 as Instrument No. 127298
Affects	: Being a portion of Sections 16, 21 and 22, Township 5 South, Range 1 East, San Bernardino 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 40.00 foot in width measured at right angles, lying Easterly of, parallel and concentric with a line which lies 60.00 feet Easterly of, parallel and concentric with the centerline of Bautista Creek as shown on said Record of Survey.

The side lines of said 40.00 foot wide strip of land shall be prolongated 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.

in and for the County of Riverside, State of California, personally appeared John T. Kuhns and Frances E. Kuhns, his wife, known to me to be the persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and private seal, at my office in the said County, the day and year in this certificate first above written.

George E. Bennett. Justice of the Peace in and for Riverside County, State of California, in Elsinore Judicial Township.

Received for record Nov. 16, 1909, at 16 min. past 9 o'clock A. M. at request of The Riverside Abstract Co. Copied in book No. 291 of Deeds, page 392 et seq., records of Riverside County, California.

Fees, $1.10

I. S. Logan, Recorder.

By J. Ramsbottom, Deputy Recorder.

+++++++++++++++++++++++++++++++++

11-5, 1909

JOSEPH CRAWFORD.

TO

H. L. THOMPSON.

THIS INDENTURE, made the fifth day of November, in the year of our Lord one thousand nine hundred and nine, between JOSEPH CRAWFORD, an unmarried man, of San Jacinto, Riverside County, California, party of the first part and H. L. THOMPSON, of Hemet, Riverside County, California, party of the second part.

WITNESSETH: That for and in consideration of the sum of ten dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged the said party of the first part does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land situate in the Fr. Section 16, T. 5 S., R. 1 East, S. B. B. & M., County of Riverside, State of California, and bounded and particularly described as follows, to-wit:

Commencing at the S.W. corner of Section 16, T. 5 S., R. 1 E., thence N. 0- 16- W., 1648.60 feet by the west line of Section 16 to corner No. 2; thence S. 89- 17- E., 1568.00 feet by land now or formerly of [illegible] to corner No. 3; thence S. 18- 21- W., [illegible] feet along the Lake Hemet Water Co's right of way to corner No. 4;

thence S. 2- 50- E. 117-60 feet by said right of way to corner No. 5; thence S. 14- 21- E., 111-0 feet by said right of way to corner No. 6; thence S. 13- 54- W., 98-66 feet by said right of way to corner No. 7; thence S. 40- 43- W., 350-60 feet by said right of way to corner No. 8; thence S. 0- x 13-. W. 876 feet to corner No. 9; thence N. 89- 15-. W. 1321 feet by the south line of said Section 16 to corner No. 1 the point of beginning, containing 68-43 acres.

Reserving however for the Lake Hemet Water Co's main flume line a right of way 32 feet wide lying on the southeasterly side of a line described as follows:

Beginning on the south line of said Section 16, distant 577-90 feet easterly from the S.W. corner of said Section, thence N. 40- 43- E., 1148-70 feet to corner No. 8 of above parcel. Said line above described being parallel with and 31 feet N.W. of the S.E. face of the Lake Hemet Water Co's flume.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

Joseph Crawford. (Seal)

State of California. }
County of Riverside. } ss.

On this fifth day of November, in the year one thousand nine hundred and nine, before me, J. W. Ryan, a Notary Public in and for said County of Riverside, State of California, residing therein, duly commissioned and sworn, personally appeared Joseph Crawford, an unmarried man, personally known to me to be the person described in, and whose name is subscribed to and who executed the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, at my office in San Jacinto, in the said County, the day and year in this certificate first above written.

J. W. Ryan; Notary Public
in and for Riverside County,
State of California.

(NOTARIAL SEAL)

Received for record Nov. 16, 1909, at 45 min. past 11 o'clock A. M. at request of Hemet Land Co. Copied in book No. 191 of Deeds, page 393 et seq., records of Riverside County, California.

Fees, $1.20

I. B. Logan, Recorder.
By J. Remsbottom, Deputy Recorder.

DESCRIPTION

The land referred to in this report is situated in the County of Riverside, State of California, and is described as follows:

PARCEL 1:

Parcel 4030-18 in the County of Riverside, State of California, as shown on map filed April 14, 1960 in Record of Survey Book 31, Pages 52 through 59 inclusive, in the Office of the County Recorder of said County.

PARCEL 2:

Parcel 4030-19A in the County of Riverside, State of California, as shown on map filed April 14, 1960 in Record of Survey Book 31, Pages 52 through 59 inclusive, in the Office of the County Recorder of said County.

MATCH LINE

STA 180+00

R/W

BAUTISTA CREEK

SEE DETAIL "A" BELOW

STA 170+10

℄ BAUTISTA CK. CHAN.

100' 100' 40' 100'

50'

EX CONC. SPILLWAY

MEET EX.

EX. A.C.

15.5' TYP

15'

22'

25' O.C. TYP.

LAKE HEMET MUNICIPAL WATER DISTRICT FLUME

17'

DETAIL "A"

BENCH MARK

552
16

FAIRVIEW AVE

Pcl 4030-17B

Pcl 4030-18

Pcl 4030-19B

Pcl 4130-18

Pcl 4030-19A

49
18.89 Ac ±

5

6
38.04 ± Ac.

3

39

25
2.02 Ac

RS 56/89

56 Ac

50

9

13

14

26

17
20
21

Data R/S 10/15
R/S 14/37
R/S 28/21

BK.

AN ORDINANCE OF THE COUNTY OF RIVERSIDE, AMENDING ORDINANCE NO. 499 RELATING TO ENCROACHMENTS IN COUNTY HIGHWAYS.

The Board of Supervisors of the County of Riverside, State of California, do ordain as follows:

Section 1. GENERAL. Subject to the control of the Board of Supervisors, there is hereby delegated to the County Road Commissioner the administration of the use of County highways for excavations and encroachments, the maintenance, planting and removal of trees, and the issuance, modification and revocation of permits for such uses.

Section 2. ENCROACHMENTS AND EXCAVATIONS. No person, including firm, corporation, public district, public agency or political subdivision, shall make any excavation in, or construct, install or maintain any improvement, structure or encroachment in, on, over or under, any County highway or the right of way thereof without first obtaining from the County Road Commissioner a permit therefor, or maintain the same without such permit or in violation of the terms or conditions thereof. Such a permit shall be issued by the County Road Commissioner only upon written application therefor, and payment of the required fee or fees. Such permit shall be issued only if the applicant is a public utility holding a current franchise from the County of Riverside, or a public district or public utility or publ service agency having lawful authority to use the right of way or highway for the purpose specified, or the owner of an easement for such purpose within the highway right or way, or if the Road Commissioner is satisfied that the use proposed is in the public interest and that there will be no substantial injury to the highwa or impairment of its use as the result thereof, and that the use is reasonably necessary for the performance of the functions of the applicant. Every such permit shall be revocable and the uses and installations thereunder shall be subordinate to any prior right of the County to use the right of way for public road purposes. Every such permit shall be conditional upon the right of the County to require the permittee to relocate or remove the structure or encroachment at the permittee's expense for the benefit of the Coun or to relocate the structure or encroachment at the permittee's expense, where in the opinion of the County Road Commissioner such action is reasonable necessary to avoid a crossing conflict, for the benefit of any public district, public agency or political subdivision, or of any other person or agency having a right to use the County highway for the purpose proposed; but the acceptance of a permit shall not be deemed a waiver by the permittee of any contractual or statutory right against any party for reimbursement of the expense of such removal or relocation. Every such permit shall be subject to such conditions as the County Road Commissioner determines are necessary to assure the safety of the traveling public and the restoration of the surface of the highway and the foundations thereof, and of the portions outside the traveled roadway. The County Road Commissioner may require such surety bond or deposit of money as in his judgement may be necessary to secure performance of the conditions of the permit and the replacement or restoration of the surface and the subsurface of the highway and the right of way, and any survey

EACH DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS CERTIFIED TO BE A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE
Dated: 9-9-96
GERALD A. MALONEY
Clerk of the Board of Supervisors
County of Riverside, California
By:

monuments or other improvements that may have been disturbed. The County Road Commissioner may, where convenient to road work he has programmed, or for other reasons of County convenience, arrange to do the work of replacement to pavement or restoration of the roadway at the expense of the permittee. If any permittee shall fail to refill any excavation or to restore the County highway or right of way to its condition prior to the excavation, the County Road Commissioner shall have the right to perform said work and collect in the name of the County the cost thereof.

Section 3. EXCEPTIONS. An excavation or encroachment may be made without first obtaining a permit for repair or replacement of a facility previously installed only when necessary for the immediate protection or preservation of life or property, and provided that such a permit be obtained on the first business day thereafter, and further provided that said excavation is made in such manner as to give full protection to the users of such highway and the County of Riverside.

No permit shall be required for the loading or unloading of agricultural produce or produce containers. All such operations shall where possible be conducted off of the paved or traveled part of any county highway. If any part of the loading or unloading occurs on the paved or traveled portion of such highway, appropriate visible warnings shall be posted for the protection of traffic approaching from each direction, and if such operation leaves less than one traffic lane available for travel in either direction, a flagman shall be used at the sole risk of the operator. Use of warnings and flagmen shall be in accordance with published standards of the State Department of Transportation. Overnight storage of containers, agricultural products or unlicensed vehicles on the shoulder of any county highway or within eight feet of the traveled portion of such highway is prohibited. Bulk manure not in containers may be temporarily stored or stockpiled within the right of way of a county highway only when intended to be used on the abutting agricultural lands as follows:

1. On any portion of the right of way obviously not graded, improved or used for vehicle travel, sidewalk or drainage purposes.
2. On any unpaved graded shoulder of a paved highway, not closer than 4 feet from the pavement nor in such location as will impede or impair highway drainage.
3. On the graded shoulder of a highway less than 4 feet from the pavement only if there is no other location available and only if warning lights and signs to protect the traveling public are placed and maintained during any overnight storage at such place.

Section 4. TREE REMOVAL. No person, firm, corporation, public district, public agency or political subdivision shall remove or severely trim any tree planted in the right of way of any County highway without first obtaining a permit from the County Road Commissioner to do so. Such permit shall be issued without fee, if the County Road Commissioner is satisfied that such removal or trimming is in the public interest or is necessary for the improvement of the right of way or the construction of improvements on adjacent land. He may impose such conditions as he deems reasonable or necessary, including requirements for the work to be done only by a qualified tree surgeon or tree trimmer actually engaged in that business, and for bond, insurance or other security to protect person and property from injury or damage. The provisions limiting trimming of trees shall not apply to any public utility maintaining overhead

power of communication lines pursuant to franchise, where necessary to prevent interference of a tree with such installation. A permit for removal of a tree may be conditioned upon its relocation or replacement by one or more other trees of a kind or type to be specified in the permit.

Section 5. APPLICATION. Each application for a permit under this ordinance shall be in writing in the name of the person or agency owning the encroachment and controlling the excavation and shall be signed by such person or agency or by his or its agent authorized in writing. The application shall be submitted on a form supplied by the County Road Commissioner and shall contain or be accompanied by such information as he may require. Each permit shall be in writing, signed by the County Road Commissioner or his representative, on a form to be furnished by him.

Section 6. FEES. The permit fees and inspection fees required by this ordinance shall be paid at or after the time application is filed, but in any event before the permit is issued. Said fees for permits, which shall not be refundable, and for inspections shall be as follows:

a. For tree planting, trimming, or removal, a permit fee of $20.00 and an inspection fee of $15.00.

b. For installation of an encroachment in a County highway or right-of-way with or without excavation, a permit fee of $20.00 and an inspection fee of $80.00 plus $.10 per linear foot.

c. For residential driveways, a permit fee of $20.00 and an inspection fee of $35.00 per driveway.

d. For commercial driveways a permit fee of $20.00 and an inspection fee of $45.00 per driveway.

e. For voluntary clubs and gutters for residential use, a permit fee of $20.00 and an inspection fee as specified in subsection b of this section for inspections. Any driveways or sidewalks require separate permits and payment of fees as required by subsections c and g of this section.

f. For concrete curbs and gutters for a single commercial development, a permit fee of $20.00 and inspection fees at the same rate as specified in subsection b of this section for inspections. Any driveways or sidewalks require separate permits and payment of fees as required by subsections d and g of this section.

g. For concrete sidewalks, a permit fee of $20.00 and an inspection fee as specified in subsection b of this section for inspections.

h. For a miscellaneous permit or, a permit involving a temporary encroachment not involving an excavation, a permit involving photographing or filming, a permit fee of $20.00 and an inspection fee of $40.00 per day.

any applicant a blanket permit for a series of excavations or encroachment of the same type or types. This provision shall be broadly applied, to reduce administrative costs of both County and applicant.

Section 9. PENALTIES. Any person who does any act for which a permit is required by this ordinance, without first obtaining such permit, or who, having obtained such a permit, violates any term or condition thereof and thereby jeopardizes or injures person or property, is guilty of a misdemeanor and shall be punishable by a fine of not more than $500.00, or by imprisonment in the County jail for not more than 6 months, or by both such fine and imprisonment. Nothing herein shall be deemed to deprive any person of any civil right or remedy he may have against a violator of this ordinance, nor to deprive the County of Riverside of any cause of action which it may have against such violator, regardless of any prosecution or conviction under this section.

Any person who violates the provisions of the second paragraph of Section 3 of this ordinance is guilty of a misdemeanor and shall be punishable as provided in this section.

ADOPTED: 11-9-64 (Eff.: 12-9-64)
AMENDED: 499.1 - 499.5
499.6 (Eff.: 3-31-83)
499.7 (Eff.: 3-25-88)
499.8 (Eff.: 9-12-91)

ENCROACHMENT PERMITS

What is an encroachment permit?

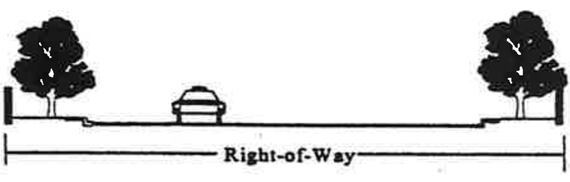
An encroachment permit is written permission, to excavate or otherwise encroach within Riverside County's public road right-of-way. A permit may be granted to a public utility, contractor or an individual. Permits are issued by the Transportation Department.

When are they needed?

In addition to excavations, permits must be obtained for tree planting and removal, driveway installations, placement of any structures, construction of street improvements and drainage facilities, or generally for any type of work conducted within the road right-of-way.

What is the road right-of-way?

The road right-of-way is the full width of the land owned or controlled by the County upon which the traveled way is constructed and usually extends considerably beyond the edge of pavement, or traveled way, to the boundaries of the adjacent private properties.



What is the purpose?

Permits provide necessary regulation of the encroachment process so as to safeguard the public interest in the roadway facility and to ensure continuing safety and convenience for the traveling public.

What is the authority?

Permits are required pursuant to County Ordinance No. 499 which delegates authority to the Director of Transportation to administer the use of highways for such encroachments. The Ordinance also establishes penalties for working without a permit and for violation of any terms of the permit.

What is the process?

An application describing the proposed work must be completed. In many cases, four sets of construction plans must be submitted along with the application. Financial security is usually required to assure compliance with the terms of the permit. Application forms are available from the referenced offices. Most permits are issued withing fourteen working days.

What are the fees?

Currently there is a permit fee of $20.00. In addition to the permit fee, there is an inspection fee based upon the following schedule:

Item	Fee
Tree planting, trimming or removal	$15.00
Encroachment with / without excavation	$80.00 + .10 lin. ft.
Residential driveway approach	$35.00
Commercial driveway approach	$45.00
Voluntary curb & gutter	$80.00 + .10 lin. ft.
Curb & gutter - commercial development	$80.00 + .10 lin. ft.
Sidewalk	$80.00 + .10 lin. ft.
Misc. Or temporary encroachment - no excavation	$40.00 per day
Pavement reconstruction excluding overlays	$ .07 sq. ft.
Bridges and drainage structures	4% est. construction cost
Pedestrian benches	$15.00 per bench per year
Utility service connections involving cuts	$80.00 + .10 lin. ft
Blanket Permit	$210.00

- *The fee for an Extension of time is $10.00.*
- *Permit and inspection fees are increased by 100% whenever encroachments occur without first obtaining a permit.*

SPECIFICATIONS and CONTRACT DOCUMENTS

for the CONSTRUCTION of

BAUTISTA CREEK CHANNEL

MODIFICATION OF SIDE DRAINAGE

PROJECT NO. 4-0-030

in

RIVERSIDE COUNTY, CALIFORNIA

Riverside County Flood Control and Water Conservation District

The above agencies shall also be advised of any major change in the construction schedule that could restrict pedestrian or vehicular traffic.

6.4 Public Convenience and Access - The Contractor shall provide continuous access to all private property. Additional provisions shall be made as necessary to protect the public and accommodate traffic with a minimum of inconvenience.

Several residents and grove operators currently use the project right of way as access to Fairview Avenue. The Contractor shall notify each resident in writing 3 days in advance of construction across affected private roadway entrances. Such notice shall contain the expected day and period of time (not to exceed 24 hours) that the roadway entrance is to be out of service. A copy of each letter shall be submitted to the Engineer.

A minimum 12-foot wide travel lane shall remain open to traffic at all times throughout the length of the project.

Partial closures of the traveled way implemented by the Contractor shall be related to actual work being performed at the time. Partial closures shall not be maintained if work is not being performed. If the existing partial closure is not essential to the type of work being performed at the time, the traveled way shall immediately be restored to a safe condition for public use.

6.5 Riverside County Road Department Encroachment Permit - The Contractor shall comply with all of the requirements of the encroachment permit issued to the District by the County Road Department. The permit is on file in the District office, 1995 Market Street, and is available for review upon request.

6.6 Optional Disposal Site - The Contractor shall note that an optional disposal site is available adjacent to the training levee at Station 208+00, as shown on the drawings. Rock, concrete and other inorganic material only may be disposed of at this location as directed by the Engineer. Organic materials, asphalt, and rubbish shall not be disposed of at this location. Materials in excess of 2 feet in any dimension shall not be disposed of at this optional site. All rock and concrete materials shall be buried a minimum 2 feet below finished grade. Compaction of material placed in the disposal site will not be required other than by wheel rolling with loaders or other heavy equipment. The finished area shall be left neatly graded, shall be free of sumps and shall have sufficient slope for proper drainage.

6.7 Construction of Oiled Roadway Surface - The Contractor's attention is directed to "Instructions to Bidders", Page IV of these Specifications and note that the District expressly reserves the right to eliminate certain items from the work.

PAGE - 40 - PLANS AND SPECIFICATIONS PROJECT 4-0-030

FLOOD CONTROL AND WATER CONSERVATION DISTRICT BOARD SUBMITTAL
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

FROM: Chief Engineer SUBMITTAL DATE: September 20, 1988

SUBJECT: Bautista Creek Channel
Modification of Side Drainage
Project No. 4-0-030

RECOMMENDED MOTION:

The Board approve the low bid submitted by the firm of McLaughlin Construction, Inc., for $157,458.38, for the construction of the above referenced project, and authorize the Chairman to execute the contract on behalf of the District.

JUSTIFICATION:

The bid documents have been reviewed and approved for award by County Counsel.

FINANCIAL:

This project is funded in the District's Zone 4 budget.

KENNETH L. EDWARDS
Chief Engineer

ROAD EASEMENT RECORDED MAY-12-1988 - PERMIT REQUIRED FROM ROAD DEPT - NO EXCEPTIONS - ORDINANCE-499.8

EACH DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS CERTIFIED TO BE A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

Dated: June 19, 1996

GERALD A. MALONEY
Clerk of the Board of Supervisors
County of Riverside, California

By: Brenda L. Hutchison, Deputy

MINUTES OF THE FLOOD CONTROL & WATER CONSERVATION DISTRICT BOARD

On motion of Supervisor Dunlap, seconded by Supervisor Ceniceros and duly carried by unanimous vote, IT WAS ORDERED that the above matter is approved as recommended.

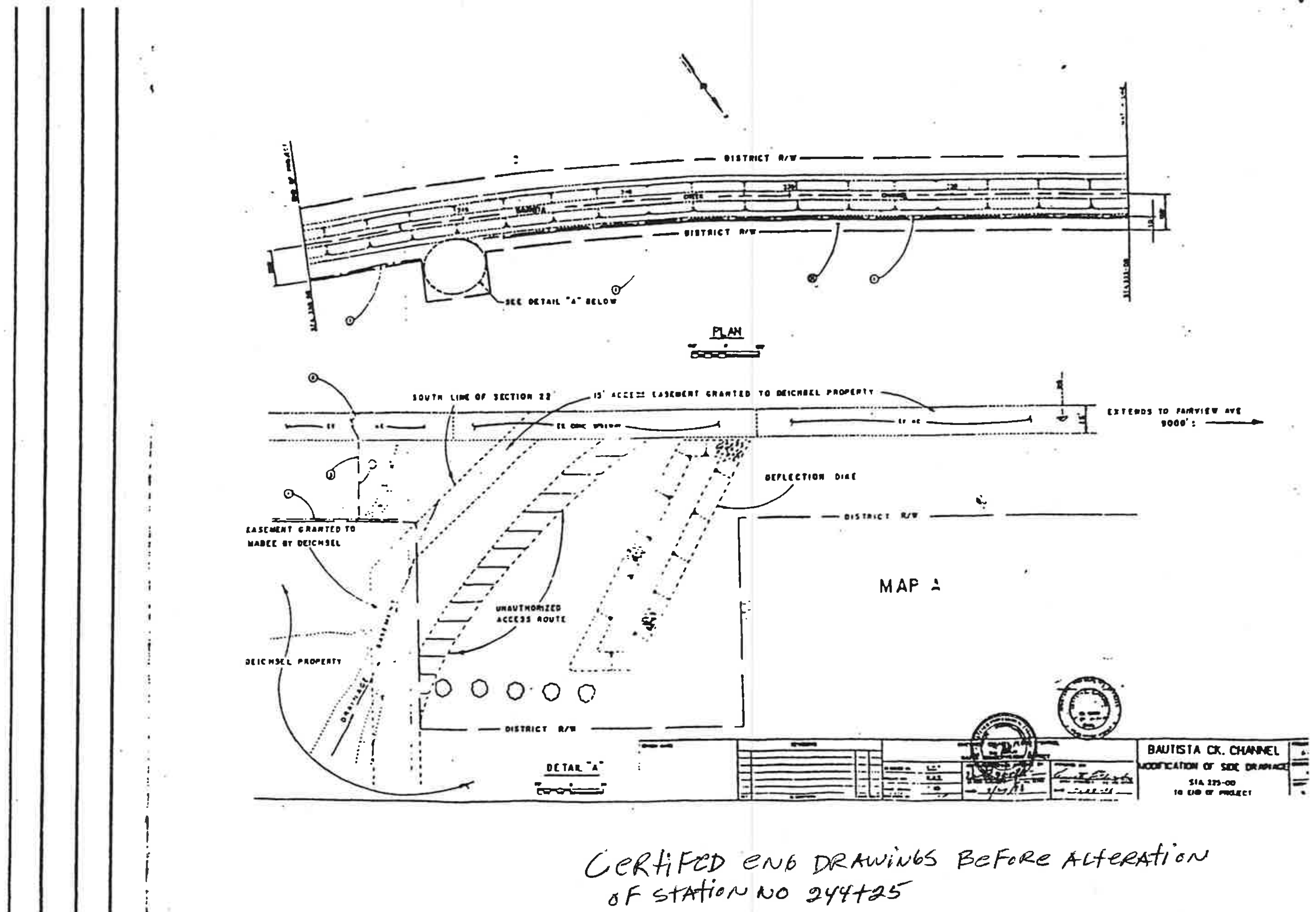
Ayes: Abraham, Ceniceros, Larson, Younglove, and Dunlap
Noes: None
Absent: None
Date: September 20, 1988
xc: Flood, Aud., Co.Co

Gerald A. Maloney
Clerk of the Board
By: Deputy

bjp
f110920a
FORM 118 (12/82)

Prev. Agn. ref. Depts. Comments 3rd Dist. AGENDA NO.

7.1



CERTIFED ENG DRAWINGS BEFORE ALTERATION OF STATION NO 244+25

Work in public road by flood control and contractor after July-29-1988 - Road recorded - May-12-1988 permits required

PLAN

BAUTISTA CREEK CHANNEL

R/W

STA 225+00

STA 220+00

SEE DETAIL "A" BELOW

EX CONC. SPILLWAY

EX AC

DETAIL "A"

NOTES:

1. INSTALL 6' CHAIN LINK FENCE PER STD. DWG. M801
2. INSTALL CABLE BARRIER PER DETAIL ON SHT. 7.
3. REMOVE EX. CABLE BARRIER.
4. REMOVE & SALVAGE EX BARBED WIRE FENCE & ALL POSTS
5. REMOVE & SALVAGE EX PIPE SWING GATE
6. INSTALL 14' DOUBLE DRIVE GATE PER STD. M801
7. INSTALL TYPE "L" OBJECT MARKER PER CALTRANS STD A74-A
8. SET FENCE POSTS AT 2' OFFSET FROM TOP OF SLOPE.
9. PROTECT EX GUIDE MARKERS IN PLACE
10. PROTECT EX WE & APPURTENANCES IN PLACE
11. CONST OILED ROADWAY SURFACE FROM STA 155+40 TO STA 242+50 PER DETAIL ON SHT 6.

RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

DESIGNED BY	S.C.T.
DRAWN BY	R.A.S.
DATE DRAWN	7-88

BAUTISTA CK. CHANNEL
MODIFICATION OF SIDE DRAINAGE
STA 225+00 TO END OF PROJECT

PROJECT NO. 4-0-030
DRAWING NO. 4-507
SHEET NO. 5 of 15

Certified eng drawings after alteration of station no 244+25

July-29-1988

15987

To be recorded with County Recorder within 10 days after completion. No recording fee.

When recorded, return to:

Notice of Completion
(Civil Code § 3093 - Public Works)

RECEIVED FOR RECORD
Min. Past ___ o'clock ___

JAN 18 1989
Recorded in Official Records of Riverside County, California
William E. Conerly
RECORDER
Fees $ ___

(For Recorder's use)

Notice is hereby given by the undersigned owner, a public entity of the State of California, that a public work of improvement has been completed, as follows:

Project title or description of work: Bautista Creek Channel, Modification of Side Drainage, #4-0-030

Date of completion: Date as set forth below

Nature of owner: District, Public

Interest or estate of owner: Fee Title

Address of owner: County Administrative Center, Riverside, California

Name of contractor: McLaughlin Construction, Inc.

Street address or legal description of site: Parcels 4030-16, -17, -17B, -19A, -20 and -22 of R/S 31/52-59 recorded April 1960.

Dated: January 17, 1989

Owner: Riverside County Flood Control and Water Conservation District
(Name of public entity)

By [signature]

Title Chairman, Board of Supervisors

STATE OF CALIFORNIA) ss
COUNTY OF RIVERSIDE)

I am the Chairman of the governing board of the Riverside County Flood Control and Water Conservation District the public entity which executed the foregoing notice and on whose behalf I make this verification; I have read said notice, know its contents, and the same is true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Riverside, California on January 17, 1989 (Date)

[signature]

EACH DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS CERTIFIED TO BE A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

Dated: 1/30/97

GERALD A. MALONEY
Clerk of the Board of Supervisors
County of Riverside, California

By: [signature], Deputy

County Counsel Form 1 (Rev. 5-71)

xc: Flood + Aud.

2.21 1-17-89

1998

Mr Robert Maybee 20 March

I have not been able to compose a letter that might be of use to you. Instead I will be in Department 08 at 8:30 AM in case I may of any use to you.

Two thoughts do occur.

l) Coun ty decisions might have been different if we had known that Flood Control did not have the necessary approval from the Army Corps of Engineers.

2) The fact that you were offered an encroachment permit rather than a new non-exclulsive easment I find important. This I believe relates to your reduced ability to sell or borrow against the property.

Sincerely,

Norton Younglove

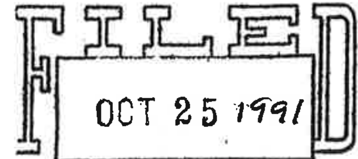
4th Civil No. E009108
187104

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



ROBERT D. MABEE and
MARTHA A. MABEE,

Plaintiffs and Appellants,

vs.

COUNTY OF RIVERSIDE AND RIVERSIDE
COUNTY FLOOD CONTROL AND WATER
CONSERVATION DISTRICT,

Defendant and Respondent.

Appeal from the Riverside County Superior Court
Honorable Ronald T. Deissler, Judge

RESPONDENTS' BRIEF

KINKLE, RODIGER & SPRIGGS
PAUL REYNOLDS
3801 University Avenue, Suite 700
Riverside, California 92501
(714) 683-7759

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN
CYNTHIA N. SARNO
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210

Attorneys for Respondent County of Riverside
and Riverside County Flood Control and Water
Conservation District

4th Civil No. E009108

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT D. MABEE and
MARTHA A. MABEE,

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Beverly Hills, California 90210

Attorneys for Respondent County of Riverside
and Riverside County Flood Control and Water
Conservation District

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4th Civil No. E009108

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CONSERVATION DISTRICT,

Defendant and Respondent.

Appeal from the Riverside County Superior Court
Honorable Ronald T. Deissler, Judge

INTRODUCTION

Plaintiffs Robert D. Mabee and Martha A. Mabee allege to be at all relevant times owners of a certain easement for ingress and egress. The easement was created pursuant to deed and expressly made subordinate to the rights of the grantor, defendant Riverside County Flood Control and Water Conservation District (the

"District"), to "construct, maintain and operate Bautista Creek Channel." The deed further expressly provides that when a "public highway or street" is extended to the property, the easement "shall cease and determine."

In 1986, pursuant to its right and obligation to maintain and operate Bautista Creek Channel (the "Channel"), the District developed a plan to secure the Channel against mounting incidences of unauthorized trespass and vandalism. The plan focused on the construction of a new road that would provide plaintiffs with an alternate, unobstructed access to their land and allow the Channel to be fenced off. Construction of the new road necessitated the use of machinery, the grading of soil, the installation of culverts and the erection of a fence. The District completed the new road and in May 1988, dedicated it to defendant County of Riverside (the "County") for "public road" purposes.

Plaintiffs brought the instant action for inverse condemnation, alleging that by such construction, defendants "substantially destroyed" their easement, "making portions of it unpassable" and preventing access. Following a full trial on the merits, the trial court entered judgment in favor of defendants. The court denied plaintiffs' motion for new trial. For the following reasons, the judgment and ruling must be affirmed.

1. The trial court found that plaintiffs' easement was extinguished in May 1988 when the District deeded the new road it had constructed to the County of Riverside for "public road" purposes. Plaintiffs refer to the basis of this finding as the "public highway or road" defense. The thrust of plaintiffs' appeal is that this defense constitutes "new matter" that was not raised by defendants in the pleadings and that the trial court erred by allowing defendants to rely upon this defense. These

contentions are patently without merit. In order to state a cause of action for inverse condemnation, plaintiffs must plead and prove ownership of an allegedly infringed property right. Because ownership is an essential element of plaintiffs' cause of action, the absence of this element is not "new matter" and need not be pleaded specifically as an affirmative defense. Moreover, even if lack of ownership were "new matter," it would be adequately raised by pleading the affirmative defense of failure to state a cause of action. Because defendants specifically denied plaintiffs' alleged ownership of the easement at all times alleged and pled the affirmative defense of failure to state a cause of action, the trial court did not err in allowing defendants to rely on the "public highway or road" defense.

2. The trial court's interpretation of the new road constructed by the District and dedicated to the County for "public road" purposes as a "public highway or street" that extinguished plaintiffs' easement pursuant to the express terms of the easement deed was entirely reasonable and proper. It was reasonable for the court to give the words "highway" and "street" their ordinary meaning--that of a public thoroughfare. It was also reasonable for the court to find that acceptance by the County pursuant to Government Code section 27281 of the dedication of the new road for "public road" purposes was sufficient to create a "public" road as contemplated by the easement deed.

3. Plaintiffs' easement rights were expressly subordinate to the District's right to maintain and operate the Channel. Pursuant to this right, the District constructed a new road that would enable it to secure the Channel. Any alleged interference with plaintiffs' easement was reasonable, unsubstantial and necessitated by the actual construction of the new road. Moreover, plaintiffs were able to access

their property throughout the construction process. Thus, the trial court correctly found that plaintiffs' easement was not substantially impaired prior to its extinguishment in May 1988.

4. The trial court properly denied plaintiffs' motion for new trial on the grounds of newly discovered evidence because (a) plaintiffs' notice of intention to move for new trial was untimely, (b) plaintiffs failed to timely file a memorandum of points and authorities and supporting affidavits, and (c) plaintiffs wholly failed to show that the purported "newly discovered" evidence could not have been, with reasonable diligence, discovered and produced at trial and that such "evidence" was in any way material or likely to alter the result.

For these reasons, which we now discuss in detail, the judgment in favor of defendants and the trial court's order denying plaintiffs' motion for new trial should be affirmed.

STATEMENT OF FACTS

Plaintiffs allege, as a result of acquiring certain real property, to be successors in interest to an access easement, originally granted by the Riverside County Flood Control and Water Conservation District (the "District") to Raymond Deichsel, Jr. and Lola H. Deichsel (the "Deichsel Easement") pursuant to deed dated August 9, 1965 (the "Deed"). (CT 6-7; RT 4-7.)

The Deed expressly provides, in pertinent part:

"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." (CT 7.)

The Deichsel Easement came into being because the District, in order to construct the Bautista Creek Channel, acquired a right-of-way which affected adjoining parcels. (RT 105.) The Deichsel property was one such affected parcel. (Ibid.) Rather than pay severance damages, the District agreed to grant the Deischels a private, non-exclusive access easement along 15 feet immediately adjacent to the Channel up to Deischels' property line. (Ibid.) The access easement went partially over a paved maintenance road. (Ibid.) It is this easement to which plaintiffs claim to be successors in interest. (RT 4-7.)

It was the District's responsibility to operate and maintain Bautista Creek Channel. (RT 102.) In 1985 and 1986, problems the District had been experiencing with vandalism and trespassing in the Channel began to multiply. (RT 106.) In response to these problems, the District developed a plan to provide to the Deischels and/or their successors in interest alternative, unobstructed access away from the maintenance road so that the Channel could be fenced out to secure it from unauthorized access and trespass. (RT 107.) The plan was to construct a new road 21 feet from the edge of the Channel. A fence would then be placed between the new road and the maintenance road to secure the Channel from unauthorized access. (RT 108.)

Pursuant to its plan, the District began construction of the new road in 1986. (RT 70.) As part of the construction process, the District put culverts[1/] under the new road so that fill would not block the drainage. (RT 109.) Construction equipment was used to place fill to build the grades over the dikes in the culverts. (RT 73.) The culverts faced toward the Channel and directed flow into it. (RT 71, 96.) The culverts were covered with soil and did not extend onto the paved maintenance road. (RT 72, 111, 200.)

The District built a ramp outside the existing easement to enable the Deichsel successors to easily traverse onto their property. (RT 114.) A grade change was made at the south end. All the work the district did on the south end was on the District's right-of-way. (RT 116.) No part of it was on the original Deischel easement. (Ibid.) A barbed wire fence was placed 21 feet out from the edge of the Channel. (RT 109-110.) The District left openings approximately 20-25 feet wide in the fence where property owners were located so they could drive through. (RT 78, 120, 198, 207.)

Between September 1987 and the end of 1988, the District did additional construction on the new road. (RT 84.) During the first phase, the District took out the culverts and the fill material that had been placed. (RT 84-85.) During the second phase, the District cut back part of the dikes, constructed concrete aprons, removed the barbed wire fence and put in a chain link fence. (RT 85.) The new road extends from Fairview avenue to plaintiffs' property. (RT 56-60.)

In May 1988, the District dedicated the new road to the County of Riverside for "public road" purposes. (RT 69, 95, 234; CT 116-117). From the beginning of

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1/ A "culvert" is a big round pipe for drainage. (RT 22.)

construction in 1986 to May 1988, the 15 foot paved maintenance road was open at all times from Fairview Avenue to the point where the Deischel easement turned away from the paved maintenance road to go into the Deischel property. (RT 113, 117, 121.)

STATEMENT OF THE CASE

On July 11, 1988, plaintiffs filed the operative First Amended Complaint, Riverside Superior Court Case No. 187104, for inverse condemnation. (CT 1-13.) Defendants County of Riverside and Riverside County Flood Control and Water Conservation District filed their answers, respectively, on July 27, 1988 and October 9, 1990. (See Plaintiffs' Application to Augment Record on Appeal, dated July 5, 1991, certified copies of defendants' answers attached thereto, and Order dated July 26, 1991, granting application.)

The liability phase of the case was bifurcated from the damages phase and came on regularly for trial before the Honorable Ronald T. Deissler on October 11, 1990. Following a full trial on the merits, on October 15, 1990, the trial court made the following findings:

1. Plaintiffs had a nonexclusive easement, as successors in interest by virtue of their acquisition of the land the easement runs through;

2. Plaintiffs' easement was extinguished by deeding of the public right of way as evidenced by the deed to the County and by virtue of the terms of the Easement Deed;

3. Defendants' construction on the new road that was dedicated was within their right to construct, maintain and operate Bautista Creek Channel; and, plaintiffs' rights of ingress and egress were expressly subject to the District's right to construct, maintain and operate the Channel; and

4. The evidence does not support the finding that plaintiffs suffered substantial impairment of the easement before its extinguishment. (RT 274.)

Accordingly, the court ordered judgment to be entered in favor of defendants. (RT 274.) Judgment was entered on November 27, 1990. (CT 110-111.) On December 5, 1990, defendants served plaintiffs with a Notice of Entry of Judgment. (CT 110-111.)

Sixteen days later, on December 21, 1990, plaintiffs filed their Notice of Intention to Move for New Trial on the grounds of newly discovered evidence. (CT 113-130.) Plaintiffs failed to serve and file a memorandum of points and authorities in support of the motion for new trial or any supporting affidavits reciting that the "newly discovered evidence" could not have been, with reasonable diligence, discovered and produced at trial. On January 18, 1991, plaintiffs' motion for new trial was denied based on plaintiffs' failure to timely file and serve a memorandum of points and authorities and affidavits in support thereof. (CT 145-146, 147.) Plaintiffs now appeal from the judgment and from the order denying their motion for new trial.

LEGAL DISCUSSION

I.

BECAUSE PLAINTIFFS HAD TO PLEAD AND PROVE OWNERSHIP OF THE PROPERTY RIGHT ALLEGEDLY INFRINGED TO STATE A CAUSE OF ACTION FOR INVERSE CONDEMNATION, THE SPECIFIC DENIAL IN DEFENDANTS' ANSWER OF PLAINTIFFS' ALLEGATION OF OWNERSHIP AND THE AFFIRMATIVE DEFENSE OF FAILURE TO STATE A CAUSE OF ACTION WERE SUFFICIENT TO RAISE THE "PUBLIC HIGHWAY OR ROAD" DEFENSE.

Defendants' position below was that the easement rights claimed by plaintiffs were extinguished in May 1988 when the District dedicated and the County accepted for "public road" purposes the new road. (RT 263; 7, 116.) The trial court so found. (RT 273.) The thrust of plaintiffs appeal is that the trial court erred by allowing defendants to raise this defense, characterized by plaintiffs as the "public highway or road defense," on the grounds that it constituted "new matter" which defendants did not plead affirmatively. (Appellants' Opening Brief, "AOB" at pp. 3-6.) As we now discuss, "the public highway or road" defense shows that an essential allegation of the complaint, namely plaintiffs' ownership at all times of the property interest allegedly invaded, is not true and that plaintiffs are not entitled to recovery. Under controlling law, the defense is therefore not "new matter" and, even if it were, it was adequately

raised in defendants' answer by pleading the affirmative defense of failure to state a cause of action.

A. <u>A Denial In An Answer Which Shows That An Essential Allegation Of The Complaint Is Not True And That Plaintiffs Are Not Entitled To The Recovery Sought Is Not "New Matter."</u>

The statutory requirement that an answer to a complaint include "new matter" and what "new matter" is has been summarized as follows:

> "Under Code of Civil Procedure section 431.30, subdivision (b)(2), the answer to a complaint must include '[a] statement of any new matter constituting a defense.' The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. [Citation] Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.' [Citation]. Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter,' but only a traverse. [Citation.] (<u>State Farm Mut. Auto Ins. Co. v. Superior Court</u> (1991) 228 Cal.App.3d 721, 725 [holding that in insurance bad faith action defense of advice of counsel is not 'new matter' and need not be specifically pleaded in the answer].)

The California Supreme Court long ago expounded upon this distinction:

> "Anything which shows that the plaintiff has not the right of recovery at all, or to the extent he claims, on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. Where, however, something is relied on by the defendant which is not put in issue by the plaintiff, then the defendant must set it up." (Bridges v. Paige (1859) 13 Cal. 640, 641, quoted in Erler v. Five Points Motors, Inc. (1967) 249 Cal.App.2d 560, 566 [holding trial court erred in denying admission under general denial in defendant's answer of evidence of plaintiff's earnings in action for breach of employment contract].)

"New matter" is that which admits the truth of all the essential allegations of the complaint and attempts to avoid them. (See Goddard v. Fulton (1863) 21 Cal. 430, 436; Pomeroy, Code Remedies (5th ed. 1929) § 549, p. 901 ["The new matter of the codes *admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery*"]; italics in original.) Facts which directly tend to disprove an essential allegation of the complaint--to show it is not true--do not constitute new matter and may be offered under a general denial. (See Bridges v. Paige, supra, 13 Cal. at 642; State Farm Mut. Auto Ins. Co. v. Superior Court, supra, 228 Cal.App.3d at 725 [concluding that defense of reliance on advice of counsel may be shown under a general denial of the complaint]; Lever v. Garoogian (1974) 41 Cal.App.3d 37, 39 [holding that defense of fraud and misrepresentation may be shown under a general denial of the complaint].)

In the final analysis, the question as to whether the "public highway or road defense" constitutes new matter hinges on whether the defense is directed to the essential elements of plaintiff's cause of action. (Erler, supra, 249 Cal.App.2d at 566.) Because, as we discuss below, ownership of the property right allegedly invaded is an essential element of a cause of action for inverse condemnation, and because defendants denied plaintiffs' allegation thereof and affirmatively pleaded that plaintiffs failed to state a cause of action, the "public highway or road defense" is not new matter and was adequately raised by defendants' answers.

B. Possession of The Property Right Allegedly Infringed Is An Essential Element of A Cause Of Action For Inverse Condemnation.

The California Supreme Court "has laid down the basic requirements for pleading inverse condemnation: 'In order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury.'" (Gilbert v. State of California (1990) 218 Cal.App.3d 234, 249 [emphasis added], quoting Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119-120; see also Rancho La Costa v. County of San Diego (1980) 111 Cal.App.3d 54, 60; Pier Gherini v. California Coastal Com. (1988) 204 Cal.App.3d 699, 713.) "The burden is on the owner to allege and prove the owner's property right and its infringement." (Gilbert, supra, 218 Cal.App.3d at 249-250.)

As the trial court properly noted, plaintiffs had to allege and prove possession of a valuable property right to state a cause of action for inverse condemnation. (RT 255.) The First Amended Complaint was filed on July 11, 1988 and alleged, in pertinent part,

> "1. Plaintiffs are, and at all times herein mentioned were, individuals and owners of a certain easement over real property as described in the Exhibits A and B attached to this Complaint and made a part hereof by reference." (CT 1.)
>
> * * *
>
> "6. Beginning on or about February, 1986 and continuing to the present time, Defendants, and each of them, without Plaintiffs' consent entered the easement described in 'Exhibit A and B', of which Plaintiffs are the owners and possessers, and substantially destroyed the easement . . . and erected a fence which prevents access to and from the easement." (CT 2.)

Defendants did not admit and attempt to avoid these allegations of ownership and possession but rather specifically denied them. (See answers attached to Plaintiffs' Application to Augment, respectively, at p. 1.) These denials joined in issue the essential allegation that plaintiffs at all times owned the property interest they claim defendants infringed and that plaintiffs allegations of continuing ownership were not true. Specially, defendants claimed that plaintiffs did not own the Deichsel Easement after May 12, 1988, when any easement rights plaintiff may have possessed terminated by the District's dedication of the new road to the County for "public road"

purposes. Defendants' specific denials that plaintiffs owned at all times a property interest went to an essential element of plaintiffs' cause of action, and the defense was therefore not "new matter."

Moreover, even assuming arguendo that plaintiffs' lack of ownership of the easement at all times could somehow be construed as "new matter," because continuing ownership was an essential element of plaintiffs' cause of action, it was adequately raised by defendants' first affirmative defense which asserted that the First Amended Complaint failed to state facts sufficient to constitute a cause of action. (See answers attached to Plaintiffs' Application to Augment Record, respectively, at p. 2.) For these reasons, defendants sufficiently raised the "public highway or road" defense, and plaintiffs' contention that the trial court erred by allowing defendants to rely on it is wholly without merit.

C. Even If The Trial Court Erred (Which It Did Not) By Allowing Defendants' To Rely On The "Public Highway Or Road Defense, Any Such Error Was Not Prejudicial.

The law is clear that "[p]rocedural defects which do not affect the substantial rights of the parties do not constitute reversible error. (Lever v. Garoogian, supra, 41 Cal.App.3d at 40; Code Civ. Proc., § 475.) Before a judgment may be reversed or affected by any error or defect, it must appear from the record that such error or defect was prejudicial. (Code Civ. Proc., § 475.) No prejudice is present here.

The Easement Deed provides that the Deischel Easement would terminate when a "public highway or street" was extended to the easterly part of Section 22.

(CT 7.) The prejudice plaintiffs claim to have suffered as a result of defendants' failure to affirmatively raise the "public highway or road defense" is the lack of an opportunity to designate an expert to testify about what constitutes a "public highway or road." Plaintiffs contend that such determination requires "special training" and the "application of law and engineering." (AOB at p. 7-8.) This is absurd.

The issue of whether the dedicated new road constituted a "public highway or road" so as to extinguish the Deischel Easement pursuant the terms of the Easement Deed was a question of interpretation for the trial court. (See City of Los Angeles v. Howard (1966) 244 Cal.App.2d 538, 542 ["the extent of an easement is a question of interpretation," citing Civ. Code, § 806]; Jones v. Wilterding (1950) 100 Cal.App.2d 210, 212 [trial court's interpretation of an instrument cannot be disturbed on appeal if reasonable and consistent with the intention of the parties]; Civ. Code, § 1066 [grants are to be interpreted in a like manner as contracts in general].)

The issue is not one that required expert testimony, it is one that required only that the trial court interpret the express terms of the Easement Deed and the document dedicating the new road pursuant to applicable law. As we now discuss, the court's interpretation of these instruments and its application of the law were entirely reasonable and proper.

II.

THE NEW ROAD CONSTRUCTED BY THE DISTRICT AND DEDICATED TO AND ACCEPTED BY THE COUNTY FOR "PUBLIC ROAD" PURPOSES EXTINGUISHED PLAINTIFFS' EASEMENT.

A. The Road Constructed By The District Constituted A "Highway" or "Street" As Contemplated By The Terms Of The Easement Deed.

Plaintiffs contend that whether the "road easement" constructed by the District qualified as a "public highway or road" under various provisions of the Streets and Highways and the Vehicle Codes required expert testimony and the application of law and engineering. (AOB at p. 7.) Any such code provisions were, however, wholly irrelevant to the issue at bar. What had to be interpreted by the trial court were (1) the Easement Deed and (2) the grant from the District to the County deeding an easement for "public road" purposes. In interpreting these instruments, the controlling element is the intention of the parties. (Jones v. Wilterding, supra, 100 Cal.App.2d at 212; Civ. Code, § 1638 [the language of a contract is to govern its interpretation].)

The Easement Deed expressly states that the easement was granted to provide the Deischels ingress and egress to their "landlocked remainder" in the south half of Section 22, and that the easement "shall cease and determine" if a "public highway or street" was extended to the accessed property. (CT 7.) Obviously, the express purpose of the parties to the Easement Deed and their main intention was to afford

the Deischels a means of ingress and egress until such time as they could access their property by a public thoroughfare, i.e., a public highway or road.

"The primary purpose of a highway is the passing and repassing of the public . . . " (Argues v. City of Sausalito (1954) 126 Cal.App.2d 403, 407.) "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, 774-775, citing B. & H. Transportation Co. v. Johnson (1932) 122 Cal.App. 451, 453 ["Roads and highways are generic terms embracing all kinds of public ways . . . "] and San Francisco-Oakland Terminal Rys. v. County of Alameda (1924) 66 Cal.App. 77, 81 ["A public road or highway through unincorporated territory is generally a public way dedicated to the public use but not owned as such by the county. Generally speaking, the same applies to a public street within a municipality"]; see also Santa Ana v. Santa Ana Val. Irr. Co. (1912) 163 Cal. 211, 219 ["streets" is "a term which as applied to cities or towns or growing communities contiguous thereto means a public thoroughfare"].)

Clearly, the parties to the Easement Deed did not intend that the road providing access to the Deischels' landlocked land and extinguishing the easement satisfy any particular code definition of a "highway" or "street." They intended, as the court found, the easement to extinguish when access was available by means of a public road or way.[2/]

The District constructed and installed a new road to provide property owners with access to their properties. (RT 31, 69-70, 109.) Plaintiffs themselves refer to the

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2/ Contrary to plaintiffs' contention, the fact that the "road" was an easement further supports the court's interpretation. (See San Francisco-Oakland Terminal Railways, supra, 66 Cal.App. 77, 81 ["[i]n most cases the fee to the land rests in the adjoining property owner and the public holds an easement for the use"].)

road as the "new, unpaved road" or "road easement." (AOB 4, 7, 10.) There can be no doubt that the trial court's interpretation that the new road constituted a "highway or street" as contemplated by the Easement Deed and extinguishing the easement was entirely proper.

B. The Road Constructed By The District Became "Public" When It Was Dedicated To And Accepted By The County For "Public Road" Purposes.

Plaintiffs contend that the "road easement has never been accepted by the Board of Supervisors, and thus remains an easement, not a public street." (AOB p. 12.) Plaintiffs' position is that if a road is not officially accepted into the county-maintained road system pursuant to Streets and Highways Code section 941, it is not a public road. This contention is erroneous.

The termination of the easement does not, by the express terms of the Easement Deed, hinge on whether the "highway or street" accessing the landlocked parcel is officially accepted into the county-maintained system of roads. The termination of the easement hinges on whether the "highway or street" providing access to the Deischel property is "public."

The District expressly granted to the County an easement for "public road" purposes. (RT 69, 234-235; CT 116-117.) The Easement grant contains on its face a "Certificate of Acceptance" pursuant to "Government Code Section 27281" and bearing

the signature of Leroy D. Smoot, the Riverside County Road Commissioner in 1988. (RT 234-235; CT 116.)[3/]

Government Code section 27281 provides that

> "[d]eeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency for public purposes shall not be accepted without the consent of the grantee evidenced by its certificate or resolution of acceptance attached to or printed on the deed or grant." (Gov. Code, § 27281.)

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

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3/ 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).)

Directly on point is Hays v. Vanek (1989) 217 Cal.App.3d 271, in which the court discussed the question of whether "a county could accept an offer of dedication without also accepting responsibility for maintenance of the road" (id., at p. 283) and noted that Streets and Highways section 941 clearly empowered a county to do so. The court confirmed that

"'Although a road is a "public street" and subject to "public control," it need not necessarily be maintained by the local governing entity. All roads over which the public has a right to travel, whether express or prescriptive, are "public" roads. "Public" roads, however, are not "county" roads until accepted as such by appropriate resolution of the board of supervisors. (Sts. & Hy. Code § 941; 45 Ops.Cal.Atty. Gen. 98, 100 (1965).)' (County Responsibility for Public Roads, 61 Ops.Cal.Atty.Gen. 466, 468 (1978).)" (Id., at p. 284.)

(See also Mulch v. Nagle (1921) 51 Cal.App. 559, 568 [it is no defense to a claim of dedication to a county that the road does not meet the specifications generally required for county highways].)

By dedication and acceptance of the easement granted to the County by the District for "public road" purposes, the new road constructed by the District became a "public road" which, as the trial court correctly found, extinguished the Deischel Easement.

III.

THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFFS' RIGHTS IN THE EASEMENT WERE NOT IMPROPERLY INFRINGED UPON BECAUSE THE DISTRICT CONSTRUCTED THE NEW ROAD PURSUANT TO ITS EXPRESS AND PRIMARY RIGHT TO MAINTAIN AND OPERATE BAUTISTA CREEK CHANNEL.

Plaintiffs complain that defendants "substantially destroyed their easement, making portions of its unpassable, moved large quantities of earth on the easement and erected a fence which prevents access to and from the easement." (CT 2.) What the District did was construct a new access road and fence off the Channel in order to secure it from unauthorized access and vandalism. As the trial court correctly found, the District, in so doing, was well within its rights.

A. Plaintiffs' Easement Rights Were Expressly Subordinate To The District's Right To Construct, Maintain and Operate The Channel.

The Easement Deed expressly provides that the Deischel Easement is "subordinate to the rights of the District to construct, maintain and operate Bautista Creek Channel." (CT 7.) A subordinate easement "should not interfere with [the] prior and paramount right" to which it is subject, and the possessor of the primary property right is entitled to "free and unobstructed use and control" of its property. (See Santa Ana v. Santa Ana Val. Irr. Co., supra, 163 Cal. 211, 220-221 [holding easement for ditch subordinate to easement for public road purposes].) Here, plaintiffs' easement right was expressly subordinate to the District's express right, and indeed obligation, to maintain and operate Bautista Creek Channel. (RT 102; CT 7.) The Deischels knew that and agreed to it when they contracted for the Deischel Easement. (CT 6-7.)

In 1985 and 1986, the District began experiencing increasing incidences of vandalism and trespass in the Channel. (RT 106.) The District had already received a claim for damages and information about an auto accident. (Ibid.) In response to these problems, the District undertook measures to secure the Channel from unauthorized access. (RT 107.) Pursuant to this goal, the District constructed a new road to provide the Deischel successors with alternate access to their properties so that the Channel could be fenced out. (RT 108.)

Securing of the Channel necessitated construction of the new road replete with soil grading, the installation of culverts and the use of machinery. Securing of the Channel necessitated fencing it off. It is these protective measures instituted by the District to maintain the Channel about which plaintiffs complain. Because the

Easement Deed by its express terms makes plaintiffs' easement rights subordinate to the District's primary right to maintain and operate the Channel, and because the District, in constructing the new road and erecting a fence, was acting pursuant to that right, plaintiffs have no cause to complain.

B. Prior To Its Extinguishment, Plaintiffs' Easement Was Not Unreasonably Or Substantially Impaired.

Plaintiffs' claim that they suffered injury occasioned by defendants' construction of the new road. (CT 2.) The evidence shows, however, that as discussed, (1) plaintiffs' easement rights were subordinate to the District's right to operate and maintain the Channel, (2) the construction activities which resulted in the alleged interference with plaintiffs' easement were all performed pursuant to the District's plan to secure the Channel by construction of an alternate road and by the actual construction of that road, (3) certain alleged quantities of dirt were not on plaintiffs' easement but on the District's own property, and (4) at all times from inception of the construction of the new road to the road dedication in May 1988, plaintiffs had access from Fairview Avenue to their property. Based on this evidence, the trial court correctly concluded there was no substantial impairment to plaintiffs' easement prior to its extinguishment in May 1988.

The law as to compensability for injuries resulting from construction has been explained as follows:

> "Temporary injury resulting from actual construction of a public improvements is generally noncompensable. Personal inconvenience,

annoyance or discomfort in the use of property are not actionable types of injuries. [Citations.] 'It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement. [Citations.] Appellants are not entitled to compensation for temporary interference with their right of access, provided such interference is not unreasonable, that is, occasioned by actual construction work. It is often necessary to break up pavement, narrow streets and provide inconvenient modes of ingress and egress to abutting property during the time streets are being repaired or improved. Such reasonable and temporary interference with the property owner's right of access is noncompensable." (People v. Ayon (1960) 54 Cal.2d 217, 228, emphasis added.)

"[T]he right of a property owner to ingress and egress is not absolute. He cannot demand that the adjacent street be left in its original condition for all time to insure his ability to enter and leave his property in the same manner as that to which he has become accustomed." (People v. Ayon, supra, 54 Cal.2d at 223; People ex Rel. Dept. Pub. Wks. v. Romano (1971) 18 Cal.App.3d 63, 73.) "[L]andowners are not entitled to access at all points along their boundary." (Smith v. County of San Diego (1967) 252 Cal.App.2d 438, 445.)

In making a determination whether there is a substantial impairment of plaintiffs' right of access, the inquiry is tantamount to determining whether their right has been unreasonably interfered with. (Romano, supra, 18 Cal.App.3d 63, 72-73.) While, the determination of whether substantial impairment has been established must be reached as a matter of law (Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659, 664), whether a particular use of land by the servient owner is an unreasonable interference with the rights of the dominant owner is a question of fact for the court, and its findings based on conflicting evidence are binding on appeal. (City of Los Angeles v. Howard (1966) 244 Cal.App.2d 538, 543-544.)

Here, defendants' alleged interference with plaintiffs' easement rights was entirely reasonable. It is undisputed that (1) the Easement Deed expressly provides that plaintiffs' easement was "subordinate to the rights of the District to construct, maintain and operate Bautista Creek Channel." (CT 7.) It is further undisputed that the new road constructed by the District, which allegedly interfered with plaintiffs' easement, was part of a plan to secure Bautista Creek Channel and that the alleged interference was occasioned by actual construction of the new road.

Plaintiffs claimed that mounds were put over culverts installed under the new road and that large quantities of earth were moved to the south end of the maintenance road. Defendants, however, presented evidence that all the work the District did on the south end of the paved maintenance road was not on plaintiffs' easement, it was on the District's right-of-way. (RT 166-167.) Moreover, even if the dirt was on plaintiffs' easement, it created an impasse only at one point of access, a point beyond which there was no reason for anyone to go. (RT 78, 216.)

In addition, the evidence as to whether the temporarily installed culverts, necessary for drainage purposes, extended onto the paved road was in conflict. One witness who drove down the road did not recall if the culverts extended onto the paved road. (RT 130.) Two witnesses testified that the culverts <u>did not extend onto the paved road</u>. (RT 74, 111, 200-201.) It is undisputed that the culverts were subsequently removed. (RT 22, 85, 112.)

As to the barbed wire fence, there was undisputed testimony that the fence was (1) erected to secure the Channel, and (2) that there were openings from 20-25 feet wide left in the fence so that the property owners could access their properties. (RT 78, 120, 175, 207, 217.) It was only after construction of the new road was finished that the easement was permanently sealed off. (RT 218.)

Though perhaps inconvenienced due to the construction of the new road, there was substantial evidence that from 1986 through 1988, plaintiffs were able to use the Deischel Easement to access their properties and that any interference with the easement by the District due to the construction was both reasonable and necessary. (RT 59-60, 190-191; 239-241.) For these reasons, the trial court properly found that prior to its extinguishment, plaintiffs' easement was not substantially impaired.

IV.

THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR NEW TRIAL.

A. Plaintiffs' Notice of Intention To Move For New Trial Was Untimely.

Plaintiffs contend that the trial court erred in denying their motion for new trial on the basis of untimeliness. The law and the record, however, directly refute such contention.

Code of Civil Procedure section 659 provides that a party intending to move for a new trial must file with the clerk and serve upon adverse parties a notice of intention to move for new trial (1) before the entry of judgment; or (2) within 15 days of (a) the date of mailing notice of entry of judgment by the clerk of the court, (b) service upon him by any party of written notice of entry of judgment, or (c) within 180 days after the entry of judgment, whichever is earliest. (Code Civ. Proc., § 659.) The timely filing of notice of intention to move for new trial is jurisdictional. (Ehrler v. Ehrler (1981) 126 Cal.App.3d 147, 153.)

Judgment below was entered on November 27, 1990. (CT 110-111.) On December 5, 1990, defendants' served upon plaintiffs Notice of Entry of Judgment. (Ibid.) Plaintiffs therefore had 15 days, until December 20, 1990, to file their notice of intention to move for new trial. Plaintiffs filed their Notice of Intention To Move For New Trial on December 21, 1990--16 days after service of Notice of Entry of Judgment by defendants and one day past the jurisdictional limit. (CT 113-129.)

Plaintiffs assert that the "Amended Notice of Entry of Judgment" by the Clerk, which corrected the date of service shown from November 26, 1990 to December 10, 1990, extended their time for filing their notice of intention to move for new trial to 15 days from December 10, 1990. Plaintiffs are incorrect. First, the judgment was not corrected, modified or amended. What was corrected or amended by the "Amended Notice of Entry of Judgment" was the notice. The correction was merely a ministerial correction of a clerical error that showed the date of service of the notice as November 26, 1990, when it presumably should have been November 27, 1990.

The law is clear, however, that only

> "a change that materially affects the judgment and the rights of the parties against whom it is rendered and which involves the exercise of judicial discretion amounts to a new judgment." (Machinery Etc. Co. v. University City Synd. (1934) 3 Cal.App.2d 425, 426.)

Here, there was no addition or change to the statement of decision or modification or vacation of the judgment sufficient to extend the jurisdictional deadline for plaintiffs' to file their notice of intention to move for new trial. (See Code Civ. Proc., § 662.)

Second, under Code of Civil Procedure section 659, the jurisdictional period began to run on December 5, 1990, when defendants properly and timely served on plaintiffs a Notice of Entry of Judgment. The Notice of Entry of Judgment correctly informed plaintiffs that judgment was entered on November 27, 1990. The Amended Notice of Entry of Judgment did the same.

Because plaintiffs' notice of intention to move for new trial was untimely, their motion for new trial was properly denied.

B. Even If Plaintiffs Had Timely Filed And Served A Notice Of Intention To Move For New Trial, The Trial Court Properly Denied Plaintiffs' Motion for New Trial Based On Their Failure To Timely File And Serve A Memorandum Of Points And Authorities And Supporting Affidavits.

The trial court expressly denied plaintiffs' motion for new trial on the grounds that plaintiffs failed to timely file and serve a memorandum of points and authorities and affidavits in support of their motion. (CT 145-146.) Even if plaintiffs had timely filed their notice of intention to move for new trial (which defendants contend they did not), the trial court was entirely within its discretion to deny plaintiffs' motion on the stated basis.

> Code of Civil Procedure § 659(a) provides, in pertinent part that "[W]ithin 10 days of filing the notice, the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion." (Code Civ. Proc., § 659, subd. (a).)

When a motion for new trial is made on the grounds of newly discovered evidence, the grounds upon which plaintiffs moved, "it must be made upon affidavits." (Code Civ. Proc., § 658, emphasis added; see also Bostard v. Bostard (1968) 258 Cal.App.2d 793 [new trial on grounds of newly discovered evidence will be granted only if affidavit in support recites facts showing evidence could not, by exercise of reasonable diligence, have been produced at trial].)

In addition, Rule 203 of the California Rules of Court provides

"Within 10 days after filing notice of intention to move for a new trial in a civil case, 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 Court, rule 203.)

Plaintiffs filed a Notice of Intention To Move for New Trial on December 21, 1990. In their notice of intention, plaintiffs made the following representation: "Said motion with respect to the grounds mentioned in paragraphs 1, 2, 3 and 4 above, is made on affidavits hereafter to be served in this case, and in respect to the rest of said grounds said motion is made on the minutes of the Court and on all the records in this case, and as to all said grounds, said motion is made on a Memorandum of Points and Authorities to be submitted hereafter." (CT 114-115, emphasis added.)

According to plaintiffs' calculations (with which defendants do not agree), plaintiffs had 10 days from December 21, 1990, or until December 31, 1990, to file and serve the memorandum of points and authorities and supporting affidavits represented. They failed to do so. The trial court thus clearly had and properly exercised discretion to deny plaintiffs' motion for new trial.

C. Even If Plaintiffs Had Timely And Properly Moved For A New Trial, The Motion Was Properly Denied Because The Alleged "Newly Discovered Evidence" Could Have Been Discovered By Reasonable Diligence And Was Wholly Immaterial To The Result.

Plaintiffs moved for a new trial based on "newly discovered" evidence. (CT 113-129.) To support a motion for new trial based on newly discovered evidence, the court must determine if the evidence existed at the time of trial and could have been discovered with reasonable diligence. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 138 [to support motion for new trial on grounds of newly discovered evidence, it is essential to establish that the evidence is newly discovered and that reasonable diligence has been exercised in its discovery and production]; Schultz v. Mathias (1970) 3 Cal.App.3d 904, 909-910 [same]; see also Bostard v. Bostard, supra, 258 Cal.App.2d at 797 [new trial on grounds of newly discovered evidence will be granted only where affidavit in support recites facts showing evidence could not have been, with reasonable diligence, produced at trial].)

The purported newly discovered "evidence" upon which plaintiffs' motion was grounded consisted of some documents purporting to show that since 1909, the Lake Hemet Water District has held a right-of-way across the property owned by District that was deeded to the County for public road purposes in May 1988. Plaintiffs did not submit affidavits reciting facts why such "evidence" could not have been, with reasonable diligence, discovered and produced at trial. The nature of the documents suggest that they indeed could have been.

However, even if plaintiffs had surmounted this hurdle, which they did not, the trial court would have been correct in denying the motion because the purported "newly discovered evidence" is wholly immaterial. (See e.g., Dankert v. Lamb Finance Co. (1957) 146 Cal.App.2d 499, 502 [newly discovered evidence must be material and of such a nature that if presented at retrial a different result would result].) Whether Lake Hemet Water District had an easement for its "main flume" across a portion of the property deeded by the District to the County of Riverside in May 1988, and/or whether Lake Hemet Water District was required to consent or consented to the District's dedication of the new road to the County are questions wholly without relevance to any material issue in this case.

For any or all of the aforementioned reasons, the trial court correctly denied plaintiffs' motion for new trial.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 544, Beverly Hills, California 90210.

On October 25, 1991, I served the foregoing document described as **RESPONDENT'S BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Robert D. Mabee
Martha A. Mabee
27750 Grant Avenue
Hemet, California 92344

Clerk
California Supreme Court
300 South Spring Street
Los Angeles, California 90013

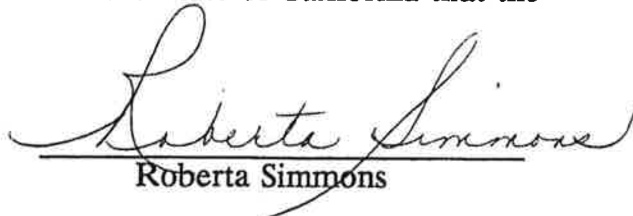
Clerk to the
Honorable Ronald T. Deissler
Riverside County Superior Court
4050 Main Street
Riverside, California 92501

I caused such envelope to be deposited in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 25, 1991, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Roberta Simmons

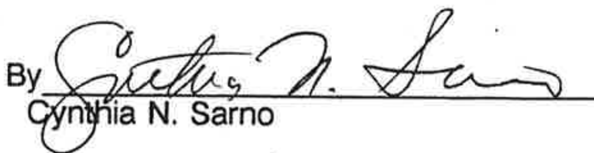
<u>CONCLUSION</u>

For all of the reasons stated, defendants and respondents County of Riverside and Riverside County Flood Control and Water Conservation District respectfully request that this Court affirm the trial court's entry of judgment in favor of defendants' and the order denying plaintiffs' motion for new trial.

Respectfully submitted,

KINKLE, RODIGER & SPRIGGS
PAUL REYNOLDS

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN
CYNTHIA N. SARNO



By
Cynthia N. Sarno

Attorneys for Attorneys for Respondent
County of Riverside and Riverside County
Flood Control and Water Conservation District

I, Stephen M. Kelly, Clerk of the Court of Appeal, Fourth Appellate District, State of California do hereby Certify that the preceding and annexed is a true and correct copy of Respondents Brief as shown by the records of my office.

WITNESS my hand and the seal of the Court this 20th day of September A.D. 1976.

STEPHEN M. KELLY, CLERK

By Helen J. Bradbury
Deputy Clerk