

JUL 27 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAZEL GREEN RANCH, LLC, a
Delaware limited liability company,

Plaintiff - Appellant,

and

MARIPOSA COUNTY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR; KENNETH LEE
SALAZAR, in his capacity as Secretary of
the United States Department of the
Interior; NATIONAL PARK SERVICE;
DANIEL N. WENK, in his capacity as
Acting Director, National Park Service;
DAVID V. UBERUAGA, in his capacity
as Acting Superintendent, Yosemite
National Park; UNITED STATES
DEPARTMENT OF AGRICULTURE;
TOM VILSACK, in his capacity as
Secretary of the United States Department
of Agriculture; NATIONAL FOREST
SERVICE; GAIL KIMBALL, in her

No. 10-16519

D.C. No. 1:07-cv-00414-OWW-
SMS

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

capacity as Chief, United States
Department of Agriculture, National
Forest Service; UNITED STATES OF
AMERICA,

Defendants - Appellees,

SIERRA CLUB; NATURAL
RESOURCES DEFENSE COUNCIL;
WILDERNESS SOCIETY,

Intervenor-Defendants -
Appellees.

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, Senior District Judge, Presiding

Argued and Submitted April 18, 2012
San Francisco, California

Before: REINHARDT, NOONAN, and MURGUIA, Circuit Judges.

Hazel Green Ranch, LLC appeals the district court's dismissal of its claims against the Defendants-Appellees, the United States Department of Interior, et al. ("United States"), pursuant to the Quiet Title Act, 28 U.S.C. § 2409a, seeking to assert its easement rights over alleged county roads leading to the Yosemite Valley floor. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the dismissal *de novo*, *see Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), and affirm.

Hazel Green Ranch first asserts that it has an easement over the alleged county roads by virtue of its status as an abutting landowner. California recognizes an abutting landowner's easement over a public road as a property right, not merely as a right of access akin to the right of the public. *See, e.g., Breidert v. Southern Pac. Co.*, 394 P.2d 719, 721 (Cal. 1964); *People v. Ricciardi*, 144 P.2d 799, 803 (Cal. 1944); *Zack's, Inc. v. City of Sausalito*, 81 Cal. Rptr. 3d 797, 818 (Ct. App. 2008). Such an easement is a sufficient interest in property to assert a claim against the United States under the Quiet Title Act. We nevertheless affirm because Hazel Green Ranch can no longer assert that property interest against the United States. In the proceedings below, Mariposa County, which Hazel Green Ranch alleges owns the disputed roads, was joined as a party. Its claim to ownership of the roads was dismissed with prejudice, and the County did not appeal that dismissal. The County has therefore forfeited whatever interest it had in the disputed roads, at least for purposes of this case. Hazel Green Ranch recognizes as much, but argues that under California Streets & Highways Code, a county's vacation of a road does not affect the easement rights of an abutting landowner. Hazel Green Ranch is correct that the Code provides that "vacation of a street, highway, or public service easement . . . does not affect a private easement or other right of a person . . . in, to, or over the lands subject to the street, highway, or

public service easement, regardless of the manner in which the private easement or other right was acquired.” Cal. Sts. & High. Code § 8352(a) (1980). The California Court of Appeal has held, however, that “an abutting owner whose private rights, if any, stem from the mere fact that his property is contiguous to a county road . . . may [not], upon abandonment, insist upon its continued use as against the fee owner of the road[,] or recover damages against him for its closure.” *Norcross v. Adams*, 69 Cal. Rptr. 429, 433 (Ct. App. 1968). Even more directly, that court ruled: “On abandonment of a public easement in a road, an abutting landowner’s right to the use of the public easement is terminated.” *Metzger v. Bose*, 6 Cal. Rptr. 337, 340 (Ct. App. 1960), *overruled on other grounds by Valenta v. L.A. Cnty.*, 394 P.2d 725 (Cal. 1964); *see also Smith v. Ricker*, 37 Cal. Rptr. 769, 771 (Ct. App. 1964). “Damages resulting from substantial interference with [the easement] rights of the abutting owner . . . are compensable,” but only against the county or other state entity responsible for abandoning or vacating the road. *Norcross*, 69 Cal. Rptr. at 432-33.

Therefore, if, as Hazel Green Ranch asserts, Mariposa County has vacated the roads by failing to appeal the dismissal with prejudice of its claim of ownership of the disputed roads, Hazel Green Ranch may be able to seek damages against the County. It cannot, however, insist on continued use of the roads, which is what it

seeks here. We therefore affirm the dismissal of the quiet title claim premised on any alleged easement acquired as an abutting landowner.

Hazel Green Ranch also asserts that it possesses an implied easement by use which it acquired as a result of the 1888 federal patent to its predecessors under the Homestead Act, which granted the predecessors the land together with all “appurtenances, of whatsoever nature.” We have held that although “the word ‘appurtenance’ will carry with it an existing easement, it will not create the easement.” *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1267 (9th Cir. 2006). “Thus, unless an easement existed at the time of the grant, [plaintiff] holds no easement.” *McFarland v. Kempthorne*, 545 F.3d 1106, 1111 (9th Cir. 2008). Here, Hazel Green Ranch asserts that an easement existed at the time of the patent, as demonstrated by its predecessors’ continuous use of the roads. Hazel Green Ranch failed to “set forth with particularity” the “nature of the claimed right, title, or interest” and “the circumstances under which [the easement] was acquired,” as required under the Quiet Title Act, 28 U.S.C. § 2409a(d). Hazel Green Ranch fails to specify whether the implied easement was obtained by prior use or prescriptive use and fails to meet the conditions for either. “Moreover, application of the common-law doctrine of easement implied by prior use is not appropriate in this case, where title was taken by way of a public grant.” *McFarland*, 545 F.3d at

1112. We therefore affirm the dismissal of the quiet title claim premised on the 1888 federal patent.

Finally, Hazel Green Ranch asserts that it holds an easement by necessity over the alleged county roads. However, it raised this claim only in passing in its opening brief. The easement by necessity claim is, therefore, waived. *See Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997).

AFFIRMED.

Hazel Green Ranch v. U.S. Department of Interior, 10-16519

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MURGUIA, Circuit Judge concurring in the Judgment

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I concur with the decision to affirm the district court, but depart from the majority's reasoning for dismissing Hazel Green's claim based on its easement right under California law as a landowner abutting a county road. I believe Hazel Green lacks a cognizable property interest to bring a claim under the Quiet Title Act. Hazel Green's interest in accessing the roads is ultimately not fundamentally different from public access rights which have been deemed insufficient to assert a claim under the Quiet Title Act. *See, e.g., Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001); *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1178 (E.D. Cal. 2007); *Alleman v. United States*, 372 F. Supp. 2d 1212, 1225-26 (D. Or. 2005); *Tudor v. Members of Ark. State Parks, Recreation and Travel Comm'n*, 83 F.R.D. 165, 170 (E.D. Ark. 1979). The fact that Hazel Green claims an interest as an abutting landowner does not alter the nature of its claim. *See, e.g., Staley v. United States*, 168 F. Supp.2d 1209 (D. Colo. 2001); *see also Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978) (noting that plaintiff asserts real property interest "as an owner of land abutting a public highway"). Nor am I persuaded that the fact that California law characterizes Hazel Green's interest as an easement sufficiently distinguishes

Hazel Green's claim from claims made by those with public access rights. "[T]he instructive value of state law is limited by federal interests," *McFarland v. Kempthorne*, 545 F.3d 1106, 1111 (9th Cir. 2008), and the waiver of sovereign immunity by the United States "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

The majority believes Hazel Green's property right is sufficient to bring a claim under the Quiet Title Act, but dismisses that claim on the basis that the County's abandonment of the road extinguishes Hazel Green's rights of access. Hazel Green argued that the state's decision not to appeal any claim to the roads in this lawsuit was tantamount to abandonment that did not preclude its claims because Hazel Green mistakenly believed its right of access would survive abandonment. While I agree with the majority that abandonment of the roads would extinguish easement access rights such as those alleged by Hazel Green, *Norcross v. Adams*, 69 Cal. Rptr. 429 (Ct. App. 1968), I disagree that this bears relevance to this case. There has been no determination that the roads have been abandoned and Hazel Green's arguing it does not make it so. "[A] county road, once properly established, continues to exist until properly abandoned as prescribed by statute. . . ." *Tucker v. Watkins*, 59 Cal.Rptr. 453 (Cal. App. 1967);

Western Aggregates, Inc. v. County of Yuba, 130 Cal.Rptr.2d 436, 458 (Ct. App. 2002); *San Diego Cnty. v. California Water and Tel. Co.*, 186 P.3d 124 (Cal. 1947); West's Ann.Cal.Str. & H.Code § 901. If Hazel Green could assert a claim against the United States, whether the County owned or abandoned the road would be established as a fact over the course of the litigation. The fact that Hazel Green needs the County to assert its ownership of the roads in order to preserve its easement claim against the United States, only confirms that its interest is not sufficient to be asserted under the Quiet Title Act. *See, e.g., Staley*, 168 F. Supp. 2d at 1214 (holding that right of landowner abutting county road was not sufficient interest to assert a claim under the Quiet Title Act and noting that “[u]nless Plaintiffs can convince the County of Boulder to join as a co-plaintiff in this action, the Court lacks jurisdiction to hear Plaintiffs’ [claims]”).