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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROGER FRENCH,

Plaintiff,

v.

KARLA STARR, et al.

Defendants.

Case No. CV-13-02153-PHX-MHB

DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; OPENING BRIEF IN SUPPORT OF SAME

Oral Argument Requested

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF ROGER FRENCH (*PRO SE*):

NOTICE IS HEREBY GIVEN that Defendants Karla Starr, et al., will and hereby do move the Court for an order granting Defendants summary judgment on all of the claims set forth in Plaintiff's Complaint for Declaratory and Injunctive Relief (Amended) (ECF No. 6) ("First Amended Complaint"). This motion is brought pursuant to Federal Rules of Civil Procedure Rule 56 and Local Rules 56.1 and 56.2 on the grounds that there is no genuine issue of material fact presented by the First Amended Complaint and that Defendants are entitled to judgment as a matter of law.

This motion is based on this Joint Notice of Motion and Motion, the Opening Brief in Support of Same, Defendants' Joint Separate Statement of Facts in Support of Summary Judgment, Defendants' Request for Judicial Notice, the pleadings and papers on file herein, and upon such other matters as may be presented to the Court prior to submission of the motion.

INTRODUCTION

In 1983, Plaintiff Roger French entered into a permit ("Permit") with the Colorado River Indian Tribes ("CRIT" or "the Tribes"), authorizing French to occupy one residential lot "within the Colorado River Indian Reservation" on a year-to-year basis. For a decade, French paid rent pursuant to the terms of this Permit. But, after formulating a theory that the property he leased was not located within the Reservation, French stopped paying rent. The Bureau of Indian Affairs ("BIA") consequently terminated his Permit in 1996. Nevertheless, French remained on the property for an additional fifteen years without paying rent and without any claim of ownership or other authorization.

In response to French's continuing trespass, CRIT filed a complaint for eviction and damages in the CRIT Tribal Court. In litigation that spanned nearly two years, French presented a vigorous defense, asserting, *inter alia*, that the CRIT Tribal Court and Court of Appeals lacked jurisdiction over the action. After considering both parties' arguments, however, the Tribal Court ultimately granted CRIT's motion for summary judgment with respect to the eviction action, issued a writ of restitution, and, following a trial, awarded damages, costs, and attorneys' fees to CRIT. The CRIT Court of Appeals affirmed, but reduced the amount of costs and damages awarded. French vacated the property in October 2011.

French now seeks judicial review of these Tribal Court orders, alleging that the Tribal Courts lacked jurisdiction to issue them because the property he occupied, together with other areas, lie outside of the Colorado River Indian Reservation. French's claim is not based on any factual dispute with the Tribes; instead, the crux of his claim is that Secretary of the Interior incorrectly determined the location of the Reservation's western boundary back in 1969, more than forty years ago.

This Court need not, and indeed cannot, revisit the Secretary's 1969 boundary determination now, even under the guise of a review of tribal court jurisdiction. As the Tribal Courts held, French is estopped from challenging CRIT's title to the property or its location within the Reservation because he entered the Property as a tenant under a Permit that states—expressly and repeatedly—that the property is tribal land within the Reservation. Moreover,

French has named neither the United States nor the Tribes as defendants; without their participation, no new boundary determination can be made.

Leaving the boundary question alone, as this Court must, this case falls squarely within Ninth Circuit case law on the scope of tribal court jurisdiction. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, that court reviewed a similar eviction proceeding on the Colorado River Indian Reservation and held that "where the non-Indian activity in question occurred on tribal land, . . . the tribe's status as landowner is enough to support [tribal court] jurisdiction . . . ." 642 F.3d 802, 814 (9th Cir. 2011). The Tribes' status as landowner here is similarly dispositive. The only question this Court can address—whether the Tribal Courts properly exercised civil jurisdiction—must be answered in the affirmative.

STANDARD OF REVIEW

A decision regarding tribal court jurisdiction is reviewed de novo, and factual findings are reviewed for clear error. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990). This rule reflects the quasi-appellate role of federal courts in tribal jurisdiction cases, not as a fact-finder, but as a reviewer of questions of purely federal law. *FMC*, 905 F.2d at 1313-14.; *Water Wheel*, 642 F.3d at 817 n.9 (rejecting consideration of evidence not submitted to the tribal court). Because tribal courts are competent law-applying bodies, the tribal court's determination of its own jurisdiction is entitled to "some deference." *FMC*, 905 F.2d at 1313 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978)). When considering questions of tribal jurisdiction, courts are mindful of "the federal policy of deference to tribal courts" and that "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); *see also United States v. Wheeler*, 435 U.S. 313, 332 (1978), superseded on other grounds as stated in *United States v. Lara*, 541 U.S. 193, 207 (2004) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests").

Questions of tribal court jurisdiction are properly reviewed on a motion for summary judgment. *Plains Commerce Bank v. Long Family Land & Cattle Company, Inc.*, 554 U.S. 316,

322 (2008). CRIT is entitled to summary judgment if no genuine issue of material fact exists and CRIT is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Whether a fact is "material" turns on the substantive law governing the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is genuine only if the evidence in the summary judgment record permits a reasonable fact finder to return a verdict for the nonmoving party. *Id.* at 249. The inquiry is whether the evidence disclosed in the summary judgment record "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

CRIT bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After CRIT has met its initial burden, French then bears the burden to come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[M]ere disagreement or bald assertion that a genuine issue of material fact exists" will not preclude summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1987). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248 (1986). The mere existence of a scintilla of evidence supporting French's position is insufficient. *Id.* at 252.

When parties submit cross-motions for summary judgment, as here, each motion must be considered on its own merits. *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978).

STATEMENT OF FACTS

Defendants have filed a separate statement of facts concurrently with this Joint Opening Brief, per Local Rules of Civil Procedure Rule 56.1(a).

ISSUE PRESENTED

1. Whether CRIT's Tribal Courts had civil jurisdiction to decide CRIT's eviction action against French under the Ninth Circuit's rule in *Water Wheel.*

ARGUMENT

I. Federal Court Review Is Limited to a Determination of Tribal Court Jurisdiction.

As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity. *Wilson v. Machington*, 127 F.3d 805, 810 (9th Cir. 1997). Only two circumstances warrant federal intrusion into the decisions of tribal courts: when the tribal court lacks jurisdiction, or when the defendant was not afforded due process of law. *Id.* Federal courts are not permitted to enquire into the merits of the tribal court decision or affirmative defenses raised by the defendant. *AT & T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903-04 (9th Cir. 2002) (citing *Iowa Mut. Ins.*, 480 U.S. at 19) ("Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.").

Consequently, the sole question before this Court is whether, as a matter of law, the Tribal Courts properly exercised jurisdiction over French, as a non-member occupying Tribal land within the Colorado River Indian Reservation.[1]

II. The Tribal Courts Correctly Determined They Had Jurisdiction to Decide CRIT's Action for Eviction and Damages.

The primary allegation in French's Complaint is that CRIT's Tribal Court and Court of Appeals (together, "CRIT's Courts" or "Tribal Courts") lacked jurisdiction to evict him because the property he occupied ("Property") is not within the boundaries of the Reservation. First Amended Complaint (ECF No. 6) at 2. The Tribal Courts properly rejected this argument for two reasons. First, the Property is tribal land within the Reservation, a fact French is estopped from challenging. Second, under longstanding Supreme Court precedent, tribal courts have jurisdiction over matters arising from consensual relationships between tribes and non-members.

[1] While French also complained generally of "due process" violations in the Tribal Court proceedings, the CRIT Court of Appeals noted he was "totally unable to come up with any particularization of a right not accorded him." Defendants' Joint Separate Statement of Facts in Support of Summary Judgment ("Statement of Facts") ¶ 76. As a result, French has failed to exhaust his tribal court remedies for such claims and they are not properly before this Court. *Iowa Mut. Ins.*, 480 U.S. at 16.

The Permit entered into by French and CRIT clearly constitutes such a relationship. For both of these reasons, this Court should uphold the Tribal Courts' jurisdiction.

A. Under *Water Wheel*, CRIT's Power to Exclude Confers Jurisdiction for On-Reservation Actions.

The U.S. Supreme Court has long recognized Indian tribes possess inherent sovereign powers, including the authority to exclude non-members from tribal lands. *Duro v. Reina*, 495 U.S. 676, 696-97 (1990), superseded on other grounds as stated in *Lara*, 541 U.S. at 207; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.").

The Ninth Circuit recently applied this principle in upholding tribal court jurisdiction over a case with facts nearly identical to this one. *See Water Wheel*, 642 F.3d at 805. In *Water Wheel*, the tribe (CRIT) brought an action in tribal court seeking to evict and recover damages against a non-Indian, closely held corporation (Water Wheel) and its non-Indian owner (Johnson) who refused to vacate the Tribe's land after the corporation's lease expired. *Id.* at 805.[2] Water Wheel moved to dismiss the case, arguing the Court did not have jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), a Supreme Court case limiting tribes' civil jurisdiction over non-member activities on non-Indian, fee land. *Water Wheel*, 642 F.3d at 805-06. The Tribal Courts found that they had jurisdiction over the eviction action because the land at issue was tribal land within CRIT's reservation, and because the defendants had established a consensual relationship with the Tribe by leasing the land. *Id.* at 806.

After Water Wheel sought review in the federal courts, the Ninth Circuit agreed with the Tribal Courts, holding that, "where the non-Indian activity in question occurred on tribal land,

[2] For a more thorough discussion of *Water Wheel*, *see* King, Shepard & Smith, *Bridging the Divide: Water Wheel's New Tribal Jurisdiction Paradigm*, 47 Gonz. L. Rev. 723 (2011/12); *see also* Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, Ariz. St. L.J. (forthcoming 2014).

the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction [over the non-member's activity] without considering *Montana*." *Id*. at 814. The court also found that, in these circumstances, the Tribes (through its courts) had adjudicatory jurisdiction. *Id*. at 814–17. Applying this principle, the court held that "through its sovereign authority over tribal land, the CRIT had power to exclude Water Wheel and Johnson, who were trespassers on the tribe's land and had violated the conditions of their entry" and that "CRIT's right to exclude non-Indians from tribal land includes the power to regulate them . . . ." *Id*. at 811, 812.

Here, similar to *Water Wheel*, French is a private actor, French's activity took place exclusively on tribal land, and his refusal to pay rent or leave the property directly interferes with CRIT's inherent powers to exclude and manage its own lands. As such, CRIT's status as landowner alone is enough to support its courts' jurisdiction. *Water Wheel*, 642 F.3d at 814-17. Accordingly, the Court should find that the CRIT Tribal Courts properly exercised jurisdiction over French on the basis of CRIT's exclusionary power.

1. The Property at Issue Is Tribal Land Within the Reservation.

French has argued that *Water Wheel* does not apply because the Property is outside the Reservation. After reviewing the statutes, executive orders, Secretarial Order, and history described in Defendants' Separate Statement of Facts, the Tribal Courts disagreed, finding that the Property *is* trust land within the Reservation. Defendants' Joint Separate Statement of Facts in Support of Summary Judgment ("Statement of Facts") ¶¶ 65, 74. French did not dispute this history in the Tribal Court proceedings. Nor did he dispute that the Property lies to the east of the "Benson Line"—the fixed line used by CRIT and the United States for decades to define the Reservation's western boundary in this area. *See* Statement of Facts ¶ 62, Ex. Q (deposition testimony of French's expert, Robert Holt, explaining the location of the Property within this area). Instead, he argued that the Secretary's interpretation of the statutes and executive orders defining the Reservation boundary was incorrect. Statement of Facts ¶ 62, Ex. O. Those statutes and executive orders provide that the western boundary of the Reservation in this area is the

"west bank" of the Colorado River. Statement of Facts ¶ 4. French argued that the Secretary should have interpreted the phrase "west bank" as providing a "riparian" boundary that moves with the changing course of the Colorado River, not a fixed line. *E.g.*, Statement of Facts ¶ 62, Ex. O; *see also* First Amended Complaint at 12. Under this theory, the Property, which lies immediately west of the River as it currently flows, would be outside of the Reservation.

As the Tribal Courts held, French's argument runs up against several insurmountable hurdles. First, French is estopped from arguing that the Property is not part of the Reservation because he entered a Permit with the Tribes that was premised on this very fact. Second, the Secretary's 1969-1970 determination of the proper location of the boundary cannot be challenged now, more than forty years after the fact. And third, the United States and CRIT are indispensable parties to any such challenge.

a. French Is Estopped from Contesting the Property's Location Within the Reservation or Its Status as "Tribal Land."

As described in Defendants' Separate Statement of Facts, French occupied the Property pursuant to a permit from CRIT ("Permit")[3] for more than a decade. Statement of Facts ¶¶ 36, 58, 70. The Permit repeatedly and expressly described the Property as being "within the Colorado River Indian Reservation." Statement of Facts ¶¶ 31, 33. CRIT was expressly designated the "Permitter." Statement of Facts ¶ 33. Given this history, the CRIT Court of Appeals held, "French is precluded by law and estopped both by the express terms of the Permit and by his conduct . . . from contesting the Tribe's beneficial ownership of the Leased Property." Statement of Facts ¶ 73.

This holding—which invokes the doctrines of both "estoppel by conduct" and "estoppel by contract"—is supported by more than a century of federal and state common law, as well as California and Arizona statutes.[4] Under the doctrine of estoppel by conduct, courts have found it

[3] The Federal leasing regulations, now codified at 25 C.F.R. Part 162 rather than Part 131, clarify that a "Permit" has the same meaning as a lease. 25 C.F.R. § 162.101.

[4] Under CRIT Law & Order Code Section 110, "[i]n the event that a case or controversy arises which is not covered by the traditional customs and usages of the Tribes, or ordinances of the Tribal Council, the Court may be guided by appropriate Federal law and regulations or by the

(footnote continued on next page)

a "universal law" that a tenant is estopped from challenging his landlord's title as a defense to eviction. *Quon v. Sanguinetti*, 60 Ariz. 301, 303 (1943); *see also Williams v. Morris*, 95 U.S. 444, 455 (1877) ("[W]henever the possession is acquired under any species of tenancy, . . . the tenant is estopped from denying the title of the landlord."); *Wendt v. Smith*, No. EDCV 02-1361-VAP (SGL), 2003 WL 21750676, at *5 (C.D. Cal. Jan. 30, 2003) ("a tenant in possession is estopped from contesting the landlord's title in an ejectment action"); *Richardson v. Van Dolah*, 429 F.2d 912, 917 (9th Cir. 1970) (same); *Greenhut v. Wooden*, 129 Cal. App. 3d 64, 68 (1982) (same); Cal Evid. Code § 624 ("A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation."); Ariz. Rev. Stat. Ann. § 33-324 ("When a person enters into possession of real property under a lease, he may not, while in possession, deny the title of his landlord in an action brought upon the lease by the landlord . . . ."); CRIT Property Code § 1-311(i) ("[T]he issue [in any eviction action] shall be the right of actual possession and the merits of title shall not be inquired into."). Here, French entered the Property as CRIT's tenant; as a result, he cannot challenge CRIT's title as a defense to his eviction.

Likewise, under "estoppel by contract," facts recited in a contract are "conclusively presumed to be true" as between the parties to it. Cal. Evid. Code § 622; *see also Sanders Constr. Co. v. San Joaquin First Fed. Sav. & Loan Ass'n*, 136 Cal. App. 3d 387, 395 (1982) (applying rule to prevent party from asserting invalidity of lease); *First Fed. Trust Co. v. Stockfleth*, 98 Cal. App. 21, 26-27 (1929) (explaining that rule prevents parties from contradicting the factual recitals in their contracts because such contradictions would "necessarily change the contract in essential matters"). Again, French's Permit and assignment repeatedly describes the Property as being "within the Colorado River Indian Reservation" and

(footnote continued from previous page)
laws of the State of Arizona or California." The CRIT Courts consequently cited to California and Arizona law in holding that estoppels bars French's challenge to the Property's status. Statement of Facts ¶¶ 66, 73. As a tribal court's determination of its own jurisdiction is entitled to "some deference" (*FMC*, 905 F.2d at 1313), this Court may also look to Arizona and California law as persuasive authority. *See* F. Cohen, *Handbook of Federal Indian Law* § 4.05[1], 269 (2012 ed.) (tribal courts may "borrow from the law of other tribes, states, and the federal government"); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 351 n.3 (2008) (Ginsberg, J., dissenting) (recognizing practice).

"Tribal Land." Statement of Facts ¶¶ 31, 33, 41. The Tribal Courts therefore properly presumed these facts to be true. Statement of Facts ¶¶ 66, 73.

Nor can French avoid these rules of estoppel by couching his challenge as a jurisdictional one. In fact, presented with nearly identical facts, the Central District of California rejected just such a jurisdictional argument in *Wendt v. Smith*, 2003 WL 21750676. In that case, the Chemehuevi Tribe evicted several nonmembers who had previously held leases with the Tribe. *Id*. at *2. The nonmembers then filed an action in federal district court, challenging the Tribal Court's jurisdiction on the grounds that the Chemehuevi Tribe did not hold title to the land. *Id*. at *4. After restating the general rule that a tenant may not contest the landlord's title in an ejectment action, the court reasoned:

> In this case, Plaintiffs are not directly attacking the title of their landlord; they couch their challenge as one on the jurisdiction of the Tribal Court. Plaintiffs contend that a defect in the Tribe's title destroys the Tribal Court's authority to exercise jurisdiction over this land. This is precisely the argument that this doctrine bars: a tenant "defending a suit for rent by challenging his landlord's right to put him into possession."

Id. at *5 (quoting *Richardson*, 429 F.2d at 917). Here, as in *Wendt*, French cannot perform an end-run around these principles of estoppel by couching his challenge as a jurisdictional one.

b. The Secretary's 1969 Boundary Determination, which Places the Property within the Reservation, Cannot Be Challenged Now.

At least two doctrines of finality also bar French from challenging the Secretary's 1969 determination that the "Benson Line" is the Reservation's western boundary in this area. First, the time to challenge the Secretary's interpretation of the boundary has long since passed. *See* 28 U.S.C. § 2401 (providing general six-year statute of limitations for actions against United States). The BIA amended its leasing regulations for this area of the Reservation in 1970, more than four decades ago. Statement of Facts ¶ 23.

Second, as the Court aptly noted during the scheduling conference on March 14, 2014,[5] a federal land survey, "is not open to challenge by any collateral attack in the courts." *Russell v.*

[5] Telephonic Scheduling Conference, *French v. Starr et al.*, No. CV-13-02153-PHX-NVW, at 15 (March 14, 2014) ("Transcript").

Maxwell Land-Grant Co., 158 U.S. 253, 256 (1895). Well-settled law dictates that courts lack the authority to determine the accuracy of land surveys, except by direct proceeding—that authority lies solely with the Secretary of the Interior. *Id.*; *see also Knight v. United Land Ass'n*, 142 U.S. 161, 178, (1891). As the Solicitor's Opinion noted, the United States' determination of a boundary between reservation lands and other federal lands is not "assailable in the courts." Statement of Facts ¶ 10 (citing *Cragin v. Powell*, 128 U.S. 691 (1888)). The United States and CRIT have a protected interest in the finality of the century-old executive order establishing the western boundary of the CRIT Reservation; this executive order—and the federal land survey relied on to codify executive intent—are entitled to preclusive effect and may not be collaterally attacked, particularly in the absence of the United States. While there may be a cognizable challenge to such an action where a private party claims to hold title to land affected by the boundary determination (*see id.*), French has made no such claim here (Statement of Facts ¶¶ 62, Ex. P; 72), also raising serious questions about his Article III standing.[6]

c. CRIT and the United States Are Necessary and Indispensable Parties to Any Claim Challenging the Reservation Boundaries and They Cannot Be Joined.

Even if French could somehow avoid these doctrines of estoppel and finality, he cannot challenge the Secretary's determination of the boundary because he has failed to join two required parties: the United States and CRIT. This failure forecloses consideration of the boundary question under principles of sovereign immunity and unavoidable prejudice to the absent parties under Federal Rule of Civil Procedure 19 ("Rule 19").

Rule 19(a) requires joinder of a person where disposing of the action in a person's absence would not afford complete relief to existing parties, where doing so would impair or impede the person's protected interest, or would subject an existing party to substantial risk of

[6] French would not have had standing to challenge the 1969 Secretarial Order because he actually benefited from it: without that Order, the Secretary would not have been able to approve CRIT's permit with the Neatrours, and French never would have been able to lease the property in the first place. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that Article III standing requires plaintiff to have suffered an "injury in fact").

inconsistent obligations. All of these factors are implicated here. A ruling in favor of French would not afford him complete relief, as it would not bind either sovereign government with permitting and eviction authority. *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1156 (9th Cir. 2002); Rule 19(a)(1)(A). The absence of CRIT and the United States precludes them from defending their legally protected, sovereign interests, not to mention the longstanding federal program of leasing Indian lands, which has not only benefited French, but dozens of lessees, as well as CRIT. *Dawavendewa*, 276 F.3d at 1157; Rule 19(a)(1)(B). And French's challenge to the land status underlying his Permit implicates scores of other permits, thereby exposing CRIT and the United States to conflicting obligations. Rule 19(a)(1)(B)(ii).

In circumstances identical to those now before the Court, the Arizona District Court, in *Water Wheel*, correctly noted that under Federal Rule of Civil Procedure 19, dismissal would be required if the plaintiffs disputed the reservation status of the land in the absence of the United States and CRIT. No. CV-08-0474-PHX-DGC, 2009 WL 3089216, at *2 n.3 (D. Ariz. Sept. 23, 2009), *aff'd in part, vacated in part, rev'd in part*, 642 F.3d 802 (citing *Dawavendewa*, 276 F.3d at 1161–63). Both of these parties would be severely prejudiced if such a challenge were considered in their absence, and neither can be joined because they are immune from suit.

Despite French's strategic attempt to avoid dismissal by naming tribal officials, both the United States and CRIT are necessary parties that cannot be joined under Rule 19, as the Ninth Circuit has held. For example, in *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), a tribal member sought to invalidate a Hopi tribal coal lease in a lawsuit against the Secretary of the Interior, but did not name the Hopi Tribe as a defendant. The court held that "[n]o procedural principle is more deeply imbedded [sic] in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Id.* at 1325; *see also Dawavendewa*, 276 F.3d at 1156-57 (reiterating that "[u]ndermining the [Navajo] Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively").

Rule 19(b) requires dismissal of an action if joinder of a required person would result in prejudice to existing parties or to the person. Because CRIT and the United States are required

parties, but their joinder is not feasible due to their sovereign immunity, the boundary question must be set aside and the action dismissed. Neither Congress nor CRIT has explicitly waived CRIT's inherent tribal sovereign immunity to French's boundary claims. *Dawavendewa*, 276 F.3d at 1161-62 (holding that tribe's sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as 'one of those interests "compelling by themselves,"' which requires dismissing the suit")[7]; *see also Shermoen v. United States*, 982 F.2d 1312, 1318-1319 (9th Cir. 1992) (holding joinder of tribes not feasible due to sovereign immunity). The United States, too, is immune from French's boundary claim. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 205-07 (1882) (discussing the Federal government's immunity from unconsented suit).

Either way French attempts to plead his claim leads him to a dead end. If French's argument is that the land is not within the Reservation, then he has failed to join the United States and CRIT as required parties, neither of which can be joined due to their sovereign immunity. Alternatively, if French is not seeking to quiet title *per se*, he fails to satisfy any of the three prongs of Article III standing on the boundary question: (1) without a property interest he cannot show an injury in fact; (2) because the Tribal defendants were not the individuals who executed or approved the Permit, they could not have caused an injury; and (3) because French admits the land is federal and that he trespassed on that land for 14 years, French's return to the land is "not on the table,"[8] and therefore, his claim is not redressable. *Lujan*, 504 U.S. at 560–

[7] If Rule 19(b) is implicated, the significant sovereign interests of both the United States and CRIT would be severely prejudiced in their absence, requiring rejection of this claim. Rule 19(b)(1); *Dawavendewa*, 276 F.3d at 1162 ("The prejudice to the Nation stems from the same impairment of legal interests that makes the Nation a necessary party under Rule 19(a)(2)(i).").

[8] The Court noted as much during the scheduling conference. *See* Transcript at 35-36, 47 (stating that no matter the resolution of the case, the land is federal land, and that French's return to the land was "not on the table").

562.[9] The Court's inability to join the United States and CRIT means that the boundary issue cannot be countenanced; if it is, dismissal of the Complaint is the only remedy.

d. French Offers No Credible Explanation for a Different Reservation Boundary.

Despite these procedural bars, French appears to challenge in this action the Secretary's determination of the Reservation's western boundary. Throughout the tribal court proceedings, he relied primarily on one source to support his theory that the federal government's interpretation of the 1876 Executive Order was incorrect: the opinions of a special master to the Supreme Court in the water rights litigation of *Arizona v. California*, 530 U.S. 392 (2000). *E.g.*, Statement of Facts ¶ 62, Ex. O; First Amended Complaint at 6, 8. While these special master's opinions, penned by Special Master McGarr, concluded that the term "west bank" should have been interpreted as an ambulatory boundary that moved with the changing course of the Colorado River, the Supreme Court never adopted them. *See Arizona v. California*, 530 U.S. at 418-19. Instead, the parties reached a settlement agreement whereby the location of the Reservation boundary was not addressed. *Id.* at 419. As a result, the special master's opinions have no precedential value whatsoever. *See Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (holding that the responsibility for making findings of fact lies with the Supreme Court, not Special Master); *United States v. Maine*, 475 U.S. 89, 98 (1986) (same).

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[9] Redressability concerns also necessitate the dismissal of certain defendants. Indian Tribes enjoy sovereign immunity from suit unless Congress abrogates or the tribe specifically waives such immunity. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). While immunity also applies to individual tribal officials acting in their representative capacity and within the scope of their authority (*Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)), the doctrine of *Ex Parte Young* can be a mechanism to avoid tribal sovereign immunity defenses if the plaintiff can allege an ongoing violation of federal law and seeks prospective relief. *Burlington Northern v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). French alleges such circumstances apply here. First Amended Complaint at 2. However, *Ex Parte Young* also requires that the named official "have 'the requisite enforcement connection to' the challenged law." *Burlington Northern*, 509 F.3d at 1092. Here, the Tribal Council Defendants did not apply tribal court jurisdiction; as the Tribal Council decides as a body to prosecute an eviction action, the Tribal Council Defendants also lack the requisite power to individually enforce the Property Code. As French does not allege that the Tribal Council Defendants are "in any way responsible" for enforcement, the complaint must be dismissed as to them. *Id.* at 1093.

In addition, French claims that the Supreme Court's decision in an earlier iteration of *Arizona v. California* entirely rejected the 1969 Secretarial Order. First Amended Complaint at 10. But the Supreme Court never questioned the validity of the 1969 Secretarial Order, which found that the Reservation's western boundary followed the Benson line. *See* 460 U.S. 605, 637 (1983). Rather, the Court simply noted that it would not reopen its prior decree and increase CRIT's water allotment based on the Secretarial Order because other water claimants had not had an opportunity to obtain judicial review of its determination. *Id.* at 636. This decision therefore has no bearing on whether the 1969 Secretarial Order properly confirmed the location of the boundary as set forth in the 1876 Executive Order.

French also alleges that CRIT's position in *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), dictates the location of the Reservation boundary in the western boundary area. First Amended Complaint at 6-7. However, CRIT did not take the position in *Aranson* that the western boundary of the Reservation is ambulatory and moves with the changing course of the River, instead of fixed, as adopted by the Department of Interior in 1969. French cites no pleading filed by CRIT in the *Aranson* case to support this argument, even though CRIT provided French with more than a hundred pleadings from this case during tribal court discovery. Statement of Facts ¶ 62, Ex. R. In fact, CRIT argued in *Aranson* that it was entitled to the land at issue under a theory of aboriginal title. *Id*.

Moreover, French's argument ignores a significant difference between *Aranson* and this case. While the Property lies within the area addressed by the 1969 Secretarial Order, the *Aranson* lands lie to the south of this area. Statement of Facts ¶ 18 (1969 Secretarial Order determines the boundary from section 25, township 2 south, range 23 east, through section 12, township 5 south, range 23 east, San Bernardino base and meridian).[10] Because the Secretarial Order clearly provides the boundary of the Reservation relevant to this case, any position

[10] The boundary continues along the "west bank" of the River for approximately ten miles south of "section 12, township 5 south, range 23 east."

allegedly taken by the United States or CRIT for a different portion of the boundary is irrelevant.

B. Alternately, French's Consensual Relationship with the Tribe and the Potential Impacts to Economic Security Are Sufficient to Confer Jurisdiction under *Montana*.

As the Ninth Circuit concluded in *Water Wheel*, "*Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land." 642 F.3d at 810. Because French's conduct at issue occurred on tribal land, the Court need not reach the independent jurisdictional grounds provided by *Montana* to find that the CRIT Tribal Court properly exercised jurisdiction. *Id.* at 814; *Grand Canyon Skywalk Dev. v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204 (9th Cir. 2013) (concluding, "the district court correctly relied upon *Water Wheel*, which provides for tribal jurisdiction without even reaching the application of *Montana*," but also applying *Montana* to find tribal jurisdiction).

However, out of an abundance of caution, the Court may also uphold Tribal Court jurisdiction over French under *Montana. Water Wheel*, 642 F.3d at 816 (finding that "*Montana* does not apply to this case. However, . . . we briefly explain why, even if *Montana* applied, the tribe would have subject matter jurisdiction."). The oft-cited "rule" of *Montana* is as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (internal citations omitted). These exceptions have come to be known as the two *Montana* exceptions. Leases are a paradigmatic "consensual relationship" under *Montana*'s first exception. *Id.* at 565 (listing leases among several other documents that create a consensual relationship). The Tribal Court properly exercised jurisdiction over French under the first *Montana* exception as a result of the CRIT's consensual relationship with French.

Here, French assumed all the rights and obligations of the Permit through assignment. Statement of Facts ¶¶ 36, 37. By remaining on the Property and continuing to pay rent, French

renewed the Permit annually, from 1984 through 1993. Statement of Facts ¶ 30, 42. After CRIT assumed direct management responsibility from the United States, French paid CRIT directly. Statement of Facts ¶ 44. Finally, the Permit expressly required compliance with various CRIT laws. Statement of Facts ¶ 33. Applying the rule of *Water Wheel*, that, "for purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established 'expressly or by [the nonmember's] actions,'" French's conduct created a direct consensual relationship with CRIT. *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 337).

This Court can also find Tribal Court jurisdiction under *Montana*'s second prong: when the conduct of non-Indians threatens or has some direct effect on the political integrity or the economic security of the tribe. *Montana*, 450 U.S. at 566; *see also Elliot v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009) (suggesting that violations of tribal regulations designed to protect tribal property may threaten political integrity and economic security); *Water Wheel*, 642 F.3d at 819 (holding that if *Montana* were to apply, the second exception would confer jurisdiction where ongoing trespass prevented CRIT from controlling "an asset capable of producing significant income"). French's conduct not only resulted in the loss of his rental payments, but also the expenditure of significant tribal resources to bring the eviction action. Moreover, given French's status in the West Bank Homeowners Association, his refusal to pay rent has indirectly resulted in additional hold-over tenants in the western boundary area. Transcript at 40. This cumulative financial impact has been significant. While the Tribal Court of Appeals did not reach this prong—finding jurisdiction under both *Water Wheel* and the first prong of *Montana* (Statement of Facts ¶ 75)—it nevertheless provides an independent ground to support the exercise of Tribal Court jurisdiction. *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1469-70 (9th Cir. 1991) (under de novo review of jurisdictional claim, court can affirm "on any ground finding support in the record").

Accordingly, CRIT has regulatory and adjudicative jurisdiction over French even if *Montana* applies to these acts arising on CRIT's tribal land. *See Merrion*, 455 U.S. at 146-47

(noting jurisdiction where tribe acts as both a landowner to enforce the terms of the lease and a sovereign government to regulate the lessee's conduct).

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court uphold the Tribal Courts' determination that they had jurisdiction in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, I electronically filed the foregoing with the Clerk of the U.S. District Court using the CM/ECF System which will send notification of such filing to all persons on the CM/ECF list for this matter, as indicated below:

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