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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROGER FRENCH,

Plaintiff,

v.

KARLA STARR, et al.

Defendants.

Case No. 2:13-cv-02153-JJT

COMBINED REPLY BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For more than forty years, the United States government has unambiguously asserted that the boundary of the Colorado River Indian Reservation in the area surrounding the property at issue in this case ("Property") is a fixed line following the course of the Colorado River as it flowed in 1865, when the Reservation was created. This fixed line, sometimes called the "Benson Line," lies to the west of the River's current course and thus includes within the Reservation a substantial amount of land on the River's west bank.

Over the last four decades, the United States has issued numerous legal opinions and regulations affirming this fixed Reservation boundary. It has filed scores of quiet title and ejectment actions reclaiming western boundary lands for the Colorado River Indian Tribes ("CRIT" or "Tribes"). And it has authorized, on behalf of the Tribes, hundreds of leases and permits in the area, including the permit between CRIT and Plaintiff Roger French that originally allowed French to occupy a valuable river-front lot within the Reservation.

In his cross-motion for summary judgment, French asks this Court to overturn this long and unbroken line of federal regulation, interpretation, and action so that he can avoid the consequences of his decision to occupy tribal land without paying rent for more than a decade. Specifically, he argues that the location of the Reservation boundary is "disputed," and, as a result, the Tribal Court did not have jurisdiction to evict him, a non-member, from the lands within the "disputed" area.

French's claims must be denied. As a preliminary matter, his personal belief that the United States erred in establishing the Reservation boundary has no effect on whether the CRIT Tribal Courts had jurisdiction to evict him. Moreover, any direct challenge to the Reservation boundary or the Tribes' beneficial ownership of the Property French occupied is barred for at least three reasons: (1) French is estopped from challenging either CRIT's ownership of the Property at issue in this case or its location within the Reservation because he rented the Property from the Tribes pursuant to a permit that expressly states and relies on these facts; (2) the United States and CRIT, two parties necessary to the adjudication of any boundary dispute, are not and cannot be made party to this case; and (3) French waived any direct challenge to the Reservation boundary in his brief. Plaintiff's Opposition to Defendants' Motion for Summary Judgment and Notice of Motion and

Motion for Summary Judgment; Combined Opening/Opposition Brief ("Plaintiff's Br.") (ECF No. 61) at 15 ("French is [] not challenging the status of the land . . . .").

Contrary to French's assertions, this case presents only a narrow question of law with a straightforward answer dictated by a nearly identical Ninth Circuit decision. The question here is confined to whether the CRIT Tribal Court and Court of Appeals (collectively, "Tribal Courts") properly exercised jurisdiction over an eviction action brought by the Tribes against French. In *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), a case that also challenged the CRIT Tribal Courts' jurisdiction to evict a non-member trespasser from the western boundary area of the Reservation, the Ninth Circuit responded to this question with an unequivocal "yes." This Court should do the same here and uphold the Tribal Courts' exercise of jurisdiction.

ARGUMENT

I. This Court's Review Is Limited to Whether the Tribal Courts Lawfully Exercised Jurisdiction over French.

Federal courts have repeatedly recognized that only two questions may be considered in cases challenging a tribal court's assertion of jurisdiction: (1) whether the tribal court lacked jurisdiction; and (2) whether the tribal court violated due process rights. *AT & T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903-04 (9th Cir. 2002) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)); *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). French does not dispute this black letter law (and indeed, never addresses it), yet he asks this Court to reach far beyond the limited scope it defines.

In particular, French asks this Court to make a factual finding that the western boundary of the Colorado River Indian Reservation is "disputed." Plaintiff's Br. at 15. As described below, such a finding is irrelevant to either of the questions before the Court. Moreover, it is a contention that French is specifically estopped from making.

II. The Tribal Courts Correctly Determined Their Own Jurisdiction.

A. French's Claim that the Reservation Boundary Is "Disputed" Does Not Divest the Tribal Courts of Jurisdiction.

French's principal argument in support of his motion for summary judgment is that, because he has provided "clear evidence" of an alleged "boundary dispute," the Tribal Courts were

precluded from exercising jurisdiction over him. Plaintiff's Br. at 2. According to this argument, if this Court recognizes the presence of *any* "dispute" regarding the boundary, it must find that the Tribal Courts had no power to remove French from the Reservation. *Id.* at 15 ("French's jurisdictional question only asserts and only requires the Court's *recognition* of the boundary dispute . . . .") (emphasis added)).

French offers no case support for this argument, nor have the Tribal Defendants[1] found any. French's theory, which would divest tribal courts of jurisdiction anytime a defendant claimed to "dispute" the tribe's reservation boundaries, would lead to absurd results and a run on the federal courts by defendants declaring such a "dispute" to avoid the consequences of their on-Reservation actions. In *Water Wheel*, the Ninth Circuit rejected a similar attempt to condition tribal court jurisdiction on the subjective beliefs of defendants. *Water Wheel*, 642 F.3d at 818 (holding that subjective beliefs related to the consensual relationship prong of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), "do not change the consensual nature of the relationship for purposes of [] jurisdiction").

Nor does Public Law 88-302 lend any support. French argues that this statute required a "final determination" of the Reservation boundary before CRIT was permitted to lease land in this area, and the alleged boundary "dispute" precludes a finding that a final determination was made. Plaintiff's Br. at 2, 9. However, that statute dealt specifically with the Secretary of the Interior's authorization to lease lands within the Reservation; it imposed no restrictions on tribal court jurisdiction nor did it offer any opinion on where the Reservation boundary was. Moreover, the record clearly demonstrates that there was a "final determination" of the Reservation boundary, as required by Public Law 88-302. The Secretary of the Interior made that determination in 1969; it was reaffirmed the following year; and the determination was codified in federal regulations authorizing leasing of the western boundary lands shortly thereafter. Defendant's Joint Separate

[1] Throughout this brief, defendants Karla Starr, et al., are referred to collectively as "Tribal Defendants." Defendant Robert Moeller recently passed away, and his successor has not yet been appointed. Pursuant to Federal Rule of Civil Procedure Rules 25(a)(2) and (d), this action can proceed against the remaining parties and Judge Moeller's successor will be substituted once identified.

Statement of Facts in Support of Summary Judgment (ECF No. 55) ("Defendants' Statement of Facts") ¶¶ 17-18, 22-23.

The "disputes" French cites do nothing to undermine the finality of the 1969 Order. Plaintiff's Br. at 7 (citing *Turley v. Eddy*, 70 Fed. Appx. 934 (2003), a letter from CRIT's Attorney General, and the deposition testimony of CRIT's Tribal Chairman). Far from conceding a legitimate legal boundary dispute, French's examples simply show that others share his misguided worldview. For instance, the whole point of the CRIT Attorney General letter is that *there is no legitimate dispute* over the Reservation boundary, but that the finality of the boundary determination has not stopped interested parties like French from trying to convince lawmakers and courts otherwise to avoid their obligations to the Tribes. *See* Plaintiff's Separate Statement of Facts in Support of Motion for Summary Judgment ("Plaintiff's Statement of Facts") (ECF No. 63), Exhibit E, at 10 (explaining that "disputing" the legitimacy of the boundary has become the regular practice of individuals with an interest in "either forestalling a legal action being pursued by the Tribes, or delaying fulfillment of a legal obligation due the Tribes").[2]

Other examples, such as the reference to Public Law 88-302 in CRIT's constitution (Plaintiff's Br. at 7), are simply irrelevant. Rather than recognizing any perceived "dispute" included in Public Law 88-302, the CRIT Constitution, in its jurisdictional statement, references that statute's declaration that all unalloted lands within the Reservation are tribal property held in trust by the United States for CRIT. Act of April 30, 1964, Pub. L. No. 88-302, 78 Stat. 188 (1964)

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[2] French's unsupported allegations go beyond his opinion regarding the boundary. For instance, he claims that the Tribes' sole motivation in evicting French is to "secur[e] a trust patent" for the area in order to build a casino. Plaintiff's Br. at 1; *see also id.* at 3 (suggesting French tried unsuccessfully to broker a legislative solution allowing CRIT to build a casino in Arizona). These statements are unsupported by French's Statement of Facts and by the tribal court record; they also ignore the clear motivation of the Tribes to evict a non-paying, non-member trespasser occupying trust land without permission for 15 years. Similarly, French recounts a biased history of other previous eviction actions in the area—including an accusation that CRIT burned down 27 mobile homes and destroyed electrical service to another 22 homes (Plaintiff's Br. at 2)—without providing any factual support for these irrelevant, inflammatory remarks. Finally, French accuses CRIT of raising rent in the western boundary area "due to the impending Supreme Court ruling against them." Plaintiff's Br. at 4. Once again, not only is this hypothesis irrelevant to the issues before this Court and prejudicial to CRIT, but completely unsupported by any facts in the tribal court record.

(fixing the beneficial ownership of the Colorado River Indian Reservation located in the States of Arizona and California).

B. *Water Wheel* Is Dispositive, and the Tribal Courts Properly Asserted Jurisdiction Under It.

Despite French's personal belief to the contrary, this case falls squarely within the Ninth Circuit's decision in *Water Wheel*, 642 F.3d at 814. In that case, the Ninth Circuit reviewed a similar eviction proceeding against a non-Indian within the western boundary area of the Colorado River Indian Reservation and held that the Tribal Courts had jurisdiction over the action. *See* Defendants' Joint Notice of Motion and Motion for Summary Judgment; Opening Brief in Support of Same ("Defendants' Br.") (ECF No. 54), at 5-6. After conducting an extensive review of the case law, the court held that the Tribal Courts jurisdiction was based in the Tribes' inherent authority to exclude non-members from the Reservation; in such cases, the Tribes' status as landowner was sufficient to demonstrate jurisdiction. *Water Wheel*, 642 F.3d at 805, 811-12.

French attempts to side-step *Water Wheel* by arguing that, unlike the land at issue in that case, the Property he occupied is the "equivalent of non-Indian fee land." Plaintiff's Br. at 9-10. As a preliminary matter, both cases involve land within the same western boundary area of the Reservation that French claims is disputed.

Moreover, the case relied upon by French in making this argument, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), involved markedly different facts. There, the court was asked to decide whether a tribal court had jurisdiction over non-member activities on a *state* highway right-of-way crossing the Three Affiliated Tribes of the Fort Berthold Indian Reservation. After reviewing the terms of the right-of-way agreement, which specifically divested the tribe of any right to exercise control over the right-of-way apart from the construction of crossings, the Court held the highway was "non-Indian land." Applying *Montana*'s two-prong test, the Ninth Circuit held that the tribal court lacked jurisdiction over the non-member activities. *Id*. at 454-55 (citing *Montana*, 450 U.S. at 565-66).

Here, on the contrary, the Property is tribal land, within the Reservation, and French is barred from arguing otherwise, as discussed in Defendants' Brief, Section II.A.1 and Defendants'

Statement of Facts ¶¶ 1-28. No right-of-way grant or other alienation of the land has occurred. *Strate* is therefore inapplicable.

Likewise, French cannot avoid application of *Water Wheel* by arguing that his failure to concede the ownership of the land makes *Water Wheel* "fundamentally incongruent." Plaintiff's Br. at 15-16. In fact, French repeatedly disavows any challenge to CRIT's ownership of the Property in his brief. *E.g.*, *id.* at 15. And with good reason: If he sought to challenge CRIT's ownership here, his claims would be barred by Federal Rules of Civil Procedure Rule 19, as discussed below. In addition, given French's history as a tenant of the Tribes, he is estopped from raising such a challenge. S*ee* Section II.C and D, *infra*. French cannot avoid the application of *Water Wheel* by asserting a challenge to the status of the land, while simultaneously disavowing such a challenge to escape the doctrines of estoppel and Rule 19. Plaintiff's Br. at 15; *see* Section II.C and D, *infra*.[3]

C. The Tribal Courts Properly Applied Standard Rules of Estoppel.

As the Tribal Courts held, French is barred from challenging the Tribes' beneficial ownership of the Property or its location within the Reservation under at least two well-established doctrines of estoppel. Defendants' Statement of Facts ¶ 73. First, because he acquired possession of the Property as a tenant of the Tribes, French is barred from contesting CRIT's ownership. *E.g.*, *Williams v. Morris*, 95 U.S. 44, 455 (1877); *Richardson v. Van Dolah*, 429 F.2d 912, 917 (9th Cir. 1970). Second, because the Permit identifies the Property as "tribal land" within the Reservation, these facts are "conclusively presumed to be true" as between the parties to the Permit: French and CRIT. *E.g.*, Cal. Evid. Code § 622.

French now attempts to evade these strictures with a new argument never presented to the Tribal Courts: French now claims estoppel was improperly applied to his case because he is not "direct[ly] challeng[ing] [] the ownership of the Property." Plaintiff's Br. at 9. French is splitting

[3] French also argues that the different parties to the underlying lease documents make *Water Wheel* inapposite. Plaintiff's Br. at 16. However, French misstates the facts. French's Permit not only contained multiple references to the Property's location within the Reservation as well as its trust status, it designated CRIT as the "Permitter." Defendants' Statement of Facts ¶ 33. The fact that he assumed the rights and obligations of the permit through assignment makes no difference, as the assignment incorporates the terms of the Permit. *Id.* ¶ 37.

hairs. The essence of his challenge to tribal court jurisdiction is his belief that the Property he occupied is not part of the Reservation. Because he entered a Permit with CRIT that was based on the fact that the Property is part of CRIT's Reservation and lands, he cannot now challenge those facts. *Sanders Constr. Co. v. San Joaquin First Fed. Sav. & Loan Ass'n*, 136 Cal.App. 3d 387, 395 (1982); *First Fed. Trust Co. v. Stockfleth*, 98 Cal.App. 21, 26-27 (1929).[4]

D. Any Challenge to the Reservation Boundary or CRIT's Title Must Be Dismissed.

French does not contest that Rule 19 applies in this case—in fact, he misses the mark entirely. French argues that because, in his view, the Property he occupied lies outside the Reservation, this case is distinguishable from *Water Wheel*, in which the plaintiff conceded the reservation status of the land. Plaintiff's Br. 16-17. But in *Water Wheel*, the District Court explained that Rule 19 did not apply in that case precisely *because plaintiffs were not disputing the reservation status of the land*. No. CV-08-0474-PHX-DGC, 2009 WL 2089216, at 2 n.3 (D. Ariz. Sept. 23, 2009) (citing *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1161-63 (9th Cir. 2002) (explaining, "Plaintiffs take this position for good reason. If the Court were to address the status of the leased land, both CRIT and the United States might well be indispensable parties. Because CRIT enjoys sovereign immunity . . . such a claim would [] require dismissal of this action."). Conversely, if French disputes the reservation status of the land in this case, Rule 19 plainly applies. Defendants' Br. at 10-13.

French also fails to respond to the redressability concerns raised by Tribal Council Defendants. Defendants' Br. at 13 n.9. The sovereign immunity of tribal officials can only be avoided if the plaintiff alleges that named defendants have an enforcement connection to the challenged law. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). French has explained neither how the Tribal Council Defendants have the requisite enforcement connection nor why *Burlington Northern* should not apply in this case. Consequently, this Court should find that the Tribal Council Defendants are immune from French's challenge.

[4] In addition, because French never raised this argument in tribal court, he has not adequately exhausted his tribal court remedies and is precluded from raising the argument here. *Iowa Mut. Ins.*, 480 U.S. at 15 ("[C]onsiderations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court.").

E. French Fails to Respond to Defendants' Arguments Regarding the Boundary.

While ostensibly seeking a forum in which to debate his belief as to the validity of the Reservation's western boundary, French utterly fails to respond to the points the Tribal Defendants made in their opening brief. For example, one of the arguments French finds "particularly relevant" is that, according to French, CRIT has taken inconsistent positions in federal court regarding the nature of the western boundary. *See* Plaintiff's Br. at 8 (citing *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983)). Yet, as the Tribal Defendants explained in their opening brief, 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, as opposed to fixed, as was adopted by the United States in 1969. In that case, CRIT argued that it was entitled to the land at issue under a theory of aboriginal title. Defendants' Statement of Facts ¶ 62, Ex. R. Rather than respond to this argument, or present any pleading to support his assertions, French again simply states, without support, that CRIT successfully argued in *Aranson* that the boundary moves with the riparian rules for accretion, erosion, and avulsion. Plaintiff's Br. at 8. This statement finds no support in the record.

Similarly, Defendants explained why the Supreme Court's decision in *Arizona v. California*, 460 U.S. 605 (1983), and the unadopted opinion of Special Master McGarr, have no bearing on the validity of the 1969 Secretarial Order for purposes of this litigation. Defendants' Br. at 13-14. Rather than respond to Defendants' arguments, French repeats what he asserted without support throughout the tribal court proceedings: that the Supreme Court rejected the argument that the 1969 Secretarial Order was a "final determination" (Plaintiff's Br. at 6-7) and that the "McGarr Orders unequivocally determined that the entire western boundary of the CRIT Reservation as defined by the Executive Order of 1876 is indeed riparian, not just the southern 8 miles." Plaintiff's Statement of Facts ¶ 8. As the Tribal Defendants have already explained, the first assertion is erroneous and the second is irrelevant. Defendants' Br. at 13-14.

III. The Tribal Courts' Jurisdiction Is Also Supported By *Montana*.

In addition to CRIT's power to exclude non-members from tribal land, which provides an independent basis for jurisdiction under *Water Wheel*, 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."); *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). *Montana* and the cases following it recognize tribal court jurisdiction over non-members in two circumstances: (a) where a non-member "enter[s] consensual relationships with the tribe or its members" or (b) where the conduct of a non-member "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. Here, the record indicates that both circumstances exist.

A. French's Consensual Relationship with CRIT Supports Tribal Court Jurisdiction.

Undisputed facts in the record establish that French had a consensual relationship with the Tribes. He leased the Property from the Tribes pursuant to a Permit that clearly listed CRIT as the "Permitter" and required him to comply with various CRIT laws. Defendants' Statement of Facts ¶¶ 33, 36, 37. The Permit renewed annually, from 1984 through 1993. *Id.* ¶ 30, 42. When CRIT assumed direct management responsibility over its leases from the United States, French paid rent to CRIT directly. *Id.* ¶ 44. Under *Montana*, a leasing arrangement like this one is a paradigmatic example of a "consensual relationship" sufficient to establish jurisdiction over a non-member. *Montana,* 450 U.S. at 565 (listing leases among several other documents that create a consensual relationship).

Notwithstanding these undisputed facts, French cites *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, 332 (2008), and argues that CRIT has no regulatory (and therefore, no adjudicatory) authority over him under the first prong of *Montana* because the Permit does not "implicate the 'tribe's sovereign interest.'" Plaintiff's Br. at 11 (quoting *Plains Commerce*, 554 U.S. at 332). As a preliminary matter, *Plains Commerce*, like *Montana* itself, addresses only the question of tribal jurisdiction over non-member activities *on non-Indian fee land* (554 U.S. at 330-32), and thus has no relevance to the question of tribal court jurisdiction over an eviction action on tribal trust land currently before this Court.

Moreover, *Plains Commerce* did not alter *Montana*'s consensual relationship test as it applies to leasing of tribal lands. In fact, it expressly acknowledged the continuing validity of tribal regulations and actions, including "licensing," that set conditions on entry into tribal land. *Plains Commerce*, 554 U.S. at 335. Such activities allow the Tribes to control "certain forms of nonmember behavior" that "implicate tribal governance and internal relations," such as the Tribes' ability to regulate the use of its trust land, the conditions of leasing, and the circumstances in which eviction is permitted. *Id.*

French also argues that *Plains Commerce* prohibits jurisdiction over "'contests with nonmembers over land ownership or the sale of land.'" Plaintiff's Br. at 10-11 (quoting Cohen's Handbook of Federal Indian Law § 402[3][c] at 241 (N.J. Newton ed. 2012)). Again, French cannot have it both ways: either he is challenging CRIT's ownership of the land, in which case the claim must be dismissed under Rule 19, or he is not, in which case this argument is of no help to his claim. Moreover, *Plains Commerce* held that the tribal court could not decide whether a non-member bank violated the rights of members in negotiating terms of a mortgage for *non-Indian fee lands*. 554 U.S. at 334. That "contest [] over land ownership" did not implicate tribal trust land, and therefore has no relevance to this case.

Finally, French's argument ignores the rule of *Water Wheel*, derived in part from *Plains Commerce*, that, "[f]or purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established 'expressly or by [the nonmember's] actions,'" *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 337). Accordingly, the Ninth Circuit made it clear that "tribal jurisdiction depends on what non-Indians reasonably should anticipate from their dealings with a tribe or tribal members on a reservation." 642 F.3d at 817 (internal quotation marks omitted). Here, French's action—entering a lease with the Tribes—created a direct consensual relationship with CRIT. Given this action, the Tribal Court properly exercised jurisdiction over French under the first *Montana* exception.

B. French Cannot Defeat Jurisdiction under *Montana* by Challenging the Validity of His Permit.

French attempts to avoid the jurisdictional implications of his prior lease with the Tribes by arguing that the Secretary never had authority to issue leases within the disputed area and therefore his Permit was *void ab initio*. Plaintiff's Br. at 13. Similarly, French briefly argues that the Permit was void, unenforceable and/or a nullity because of (a) the existence of an impossibility at the time of contract formation, (b) the existence of an illegality, and (c) improper title on behalf of CRIT. Plaintiff's Br. at 14. Though French does not explain how these claims relate to the narrow question of tribal court jurisdiction properly before this Court, presumably French intends to argue that a void or unenforceable contract cannot serve as the basis for a consensual relationship under *Montana*. *C.f.* Plaintiff's Statement of Facts, Ex. C, at 31 (French arguing in CRIT Court of Appeal that "CRIT's attempt to assert a '*Montana* theory of jurisdiction' under the permits" cannot survive as the permit is void).

As discussed in Defendants' Statement of Facts, the Permit was issued pursuant to the BIA's leasing regulations, which were adopted in 1970 as part of the Department of Interior's final determination that the lands were part of the Reservation. Defendants' Statement of Facts ¶¶ 23-24. As a result, it was valid and binding.

Indeed, because French enjoyed the benefits of the Permit for more than a decade, he cannot now contest its validity. Under both California and Arizona law, one who accepts the benefit of a contract is estopped from challenging its validity. Cal. Civ. Code § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."); *Commercial Sec. Co. v. Modesto Drug Co.*, 43 Cal.App. 162, 176 (1919) ("[T]he defendant is, by its act of accepting the benefits of the obligation, estopped from denying the binding force thereof upon it.") (citing Cal. Civ. Code § 1589); *Lockwood v. Mattingly*, 97 Ariz. 85, 87 (1964) (holding that a wife was estopped from contesting the validity of a contract entered into by her husband because she had accepted the benefits of the contract).

C. French's Conduct Had a Substantial and Adverse Effect on the Tribe.

This Court should 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 apply because "unlawful occupancy and use of tribal land . . . deprived [] CRIT of its power to govern and regulate its own land . . .").

French urges an exceedingly narrow interpretation of the second exception under *Montana*. Plaintiff's Br. at 12. However, cases limiting the scope of the second exception, to which French alludes, are least applicable in circumstances involving tribal land within a reservation, as in this case. *See Strate*, 520 U.S. at 442 (expressing no view on jurisdiction in dispute arising on tribal lands within a reservation); *Nevada v. Hicks*, 533 U.S. 353, 370 (2001) (tribal ownership of land "may . . . be dispositive"). The second exception supports CRIT jurisdiction here because French's trespass obstructs CRIT's ability, as the permitting authority, to enforce basic tribal health and safety laws on leased land, such as CRIT's building code (CRIT Health & Safety Code, Art. 1), fire code (*id.*), waste disposal code (*id.* Art. VIII), and numerous provisions of its land code. *See Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216 (9th Cir. 2007) (suggesting that jurisdiction may exist where incident on tribal land "prevented the Tribe from enacting or being governed by its laws" (*Todecheene*, 394 F.3d 1170, 1183 (9th Cir. 2005) *opinion withdrawn on reh'g*, 488 F.3d at 1216) and staying appeal to allow tribal court to determine jurisdiction); Cohen's Handbook of Federal Indian Law § 402[3][c] at 237 n.95, 96.

In addition, French's refusal to pay $53,851.31 in rent over fourteen years, and his self-confessed encouragement of other tribal tenants to do the same, rendered valuable tribal land economically stagnant and caused a significant financial loss to the Tribes. Defendants' Statement of Facts ¶ 72 (Exhibit DD, at 3624); *Water Wheel*, 624 F.3d at 819 (second exception would confer jurisdiction where trespass prevented CRIT from controlling "an asset capable of producing

significant income"); Plaintiff's Br. at 3-4. *Montana* was not intended to leave tribes impotent to remove deadbeat tenants from their property; indeed, *Montana*'s second prong was designed to ensure that tribes could protect themselves from such abuse. *Montana*, 450 U.S. at 566. As a result CRIT has regulatory and adjudicative jurisdiction over French under *Montana*'s second prong, as well. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146-47 (1982) (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).

IV. French Has Not Made Any Cognizable Due Process Claim.

In one short paragraph, French once again attempts to argue that CRIT violated his due process rights throughout the tribal court actions. Plaintiff's Br. at 17. However, he fails to present any particularized facts to support his claim; at his most specific, he argues that the Tribal Courts "refus[ed] to provide the constitutional standards by which the issues before the Court were to be adjudicated." *Id.*

This allegation is belied by the tribal court record and, specifically, the opinion of the CRIT Court of Appeals. That Opinion spends five pages carefully addressing all of French's due process arguments, and even some he never properly raised or articulated. Defendants' Statement of Facts ¶ 72 (Ex. DD at 3620-24). For example, the court considered French's argument that the CRIT Constitution expressly incorporated all provisions of the United State Constitution, but rejected it as a misreading of the text. Defendants' Statement of Facts ¶ 72 (Ex. DD at 3624). The court went on to note that, under other applicable laws not cited by French, the Tribal Courts were nonetheless required to provide due process. Defendants' Statement of Facts ¶ 72 (Ex. DD at 3621-24).

The court then considered whether any of French's due process rights had been violated by the eviction action. *Id.* The court found no violation, and after noting that "[w]hen pressed repeatedly at oral argument regarding what element of due process had not been accorded him, French was totally unable to come up with any particularization of a right not accorded him in the proceedings below." Defendants' Statement of Facts ¶ 72 (Ex. DD at 3622).

In fact, as the record reflects, French received abundant procedural protections in tribal court. He had adequate and timely notice of the action and participated extensively at both the Tribal Court

and Court of Appeals, the touchstones of due process. Defendants' Statement of Facts ¶ 72 (Ex. DD at 3622-23). French also was permitted to testify in the CRIT Tribal Court and offer his own personal opinion of the value of the improvements on the property. Defendants' Statement of Facts ¶ 68, Ex. BB. French's Petition for Rehearing offered no new explanation of rights not accorded to him, and, as a result, the CRIT Court of Appeals denied the Petition.

In French's brief to this Court, he articulates only one perceived denial of due process: the Tribal Court's refusal to define constitutional standards. Plaintiff's Br. at 17. But as just explained, the CRIT Court of Appeals carefully outlined the constitutional standards that could apply to the eviction action, even going beyond those sources briefed or argued by French. Moreover, French fails to explain how this refusal—if it had occurred—constitutes a violation of due process. Due process of law imposes specific standards on governments; it is not a catch-all term for any possible complaint.

CONCLUSION

For all of these reasons, the Tribal Defendants respectfully request that this Court grant their motion for summary judgment and deny French's cross-motion.

DATED: August 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 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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