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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 **BRIEF OF UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In tribal court proceedings, Roger French was evicted from land he leased from the Colorado River Indian Tribes and ordered to pay damages. He now seeks to invalidate tribal court orders, claiming the court lacked jurisdiction over him. Faced with clear authority that tribes have jurisdiction to exclude non-Indians from tribal land, including the authority to regulate and adjudicate matters involving hold-over tenants like himself, Mr. French bases his challenge on a purported "dispute" about the location of the Reservation boundary and trust status of the land for which he obtained a permit assignment in 1983. The permit, pursuant to which he paid rent for more than ten years, was approved by the Department of the Interior and listed the Tribe as the "Permitter."

The United States files this amicus curiae brief in support of Defendants' Motion for Summary Judgment. The United States has a significant interest in defending the federal government's determinations regarding tribal lands from improper collateral attack. The United States also has a significant stake in protecting the trust status of these lands, which Mr. French appears to challenge here. The United States, tribes, state and local governments, and private citizens rely on trust land determinations in many contexts, such as determining civil and criminal jurisdiction, and for purposes of effectuating leasing programs and other economic development. Because Mr. French's boundary claim also implicates the trust status of the land at issue, adjudicating the merits of Mr. French's claim without the United States' presence as a party would open the door to time-barred lawsuits, allowing dozens of similarly-situated permittees on CRIT's Reservation to litigate the validity of a decades-old trust decision and challenge the United States' property interest in these lands. It would be particularly unreasonable if the court were to allow a challenge to the trust status of the land in the context of this case, where Mr. French voluntarily entered into an agreement with the Tribe as Permitter and paid rent for many years.

This case also involves the federal interest in protecting the jurisdiction of tribal courts. The federal government has a longstanding policy of encouraging tribal self-

government, see, e.g., Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982), and this policy is embodied in numerous federal statutes, e.g., 25 U.S.C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 476-479 (Indian Reorganization Act); and 25 U.S.C. §§ 1301-1341 (Indian Civil Rights Act). Tribal courts play a "vital role in tribal self-government," and '[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system . . . ." Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 16-17 (1987). Courts should be "mindful" of this federal policy in "consider[ing] questions of tribal jurisdiction." Water Wheel Camp Recreational Area, Inc., et al. v. LaRance, 642 F.3d 802, 808 (9th Cir. 2011).

BACKGROUND

CRIT is a federally-recognized Indian Tribe residing on the Colorado River Indian Reservation ("Reservation"), which was established by Congress in 1865. Defs.' Stmt. Facts Ex. A (Act of March 3, 1865, 13 Stat. 541). In 1865, the entire Reservation was located to the east, or Arizona side, of the Colorado River. The Reservation was subsequently expanded, however, by Executive Orders dated November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. Defs.' Stmt. Facts Exs. B, C; see also Pub. L. No. 88-302, § 2(b), 78 Stat. 188, 188 (1964) (deeming the lands identified in the 1865 Act and the 1873, 1874, 1876 and 1915 Executive Orders to constitute the Colorado River Indian Reservation). With these expansions, the Reservation grew to its current configuration, with land on both the Arizona and the California side of the River. Lands in California were first added to the CRIT Reservation by the Executive Order of November 16, 1874, in order to "make possible control of access to the reservation from the west and avoid the loss (transfer of land) caused by changes in the channel of the Colorado River." Defs.' Stmt. Facts Ex. J at 2 (Solicitor of the Dep't of the Interior's Op., "Western Boundary of the Colorado River Indian Reservation," January 17, 1969). After it was determined that a tract of valuable land had been inadvertently severed from the Reservation by the 1874 Executive Order, a

subsequent Executive Order was issued in 1876, which set the western boundary line. Id. at 3.

In water rights litigation between the states of Arizona and California initiated in 1952, the United States claimed water rights on behalf of CRIT for the irrigable lands on the California side of the Colorado River. Arizona v. California (Arizona I), 373 U.S. 546 (1963). California contested these claims, arguing that the western boundary of the CRIT Reservation as set forth in the 1876 Executive Order was the River itself. Defs.' Stmt. Facts Ex. J at 3.[1] In a 1964 water rights decree, the Supreme Court recognized CRIT's federally-reserved water rights in Arizona I for all of the practicably irrigable acreage on CRIT's reservation as established in 1865 and expanded by subsequent Executive Orders, but it did not finally resolve all aspects of the water rights for the CRIT Reservation. Arizona v. California (Arizona 1964 Decree), 376 U.S. 340, 345 (1964); see also Arizona I, 373 U.S. at 600-01. In particular, the Court found it unnecessary for purposes of its 1964 decree to resolve the boundary dispute raised by California. Id.; see also Arizona I, 373 U.S. at 601.

In 1964, Congress enacted legislation providing that "unallotted lands of the . . . Reservation . . . are tribal property held in trust by the United States for the use and benefit of [CRIT]." Pub. L. No. 88-302, 78 Stat. 188, 189 (1964) (the 1964 Act). Recognizing the dispute over the lands west of the River, the 1964 Act exempted those lands from the Secretary of the Interior's leasing authority, but provided that such authority would extend to those lands "when and if determined to be within the reservation." Id. § 5. The legislative history of the 1964 Act makes clear, however, that

[1] California was not itself claiming a real property interest in the boundary land, but rather challenging the extent of the acreage within the Reservation, which potentially impacted the amount of the reserved water rights of the Tribes in accordance with Winters v. United States, 207 U.S. 564 (1908). See Arizona I, 373 U.S. at 600-01; Arizona 1964 Decree, 460 U.S. at 629. Under Winters, the United States' creation of an Indian reservation includes a reservation of sufficient water to accomplish the purposes of the reservation. See, e.g., Arizona I, 373 U.S. at 601.

Congress did not intend to legislate further on the matter. H.R. Rep. No. 88-1304, at 4 (1964) ("We believe that the leasing authorities should be made applicable to this area when the exact boundary has been determined and a provision [to this effect] has been included . . . . This will eliminate the necessity for obtaining legislation at a later date.").

In 1969, Secretary of the Interior Stewart Udall issued an Order determining the western boundary for purposes of the 1964 Act. In this Order, the Secretary found that an 1879 survey (the "Benson survey") properly conformed to the "call" (or detailed description of boundaries) of the lands added in the 1876 Executive Order, and that a fixed boundary line was appropriate instead of an ambulatory line that moved with the River. See Defs.' Stmt. Facts Ex. J, at 2 (Solicitor of the Dep't of the Interior's Op., "Western Boundary of the Colorado River Indian Reservation," January 17, 1969), id. at 6 (Order of the Secretary of the Interior on "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S. 23 E., S.B.M., California"). A year later the new Secretary of the Interior, Walter Hickel, affirmed that the "Benson Line" articulated in the 1969 Order was the proper location of the western boundary of the Reservation. See Defs.' Stmt. Facts Ex. J, at 8 (1970 Secretarial Order).[2]

In accordance with the two Secretarial Orders, the Department of the Interior's Bureau of Indian Affairs (BIA) published a notice in the Federal Register to extend the Indian leasing program to "those lands which the Secretary of the Interior has

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[2] The new Secretary revisited the boundary at the request of CRIT officials, who asked that the "Benson line" be established "officially and unqualifiedly" as the western boundary; that portions of the Solicitor's memorandum supporting the Secretary's 1969 Order be reconsidered; and that the portion of the Order relating to the southern boundary set forth in the 1969 Order be vacated. See Ex. A at 2 (Solicitor of the Department of the Interior's Opinion, May 25, 1970). The Secretary affirmed that the "Benson line" was final and unqualified, and indicated no further action was needed to establish that line as the western boundary. The Secretary declined to vacate the part of the Order pertaining to the southern boundary, which is not at issue in this litigation. See id. at 5-6 (transmittal letter and Secretarial Order dated June 2, 1970).

determined, pursuant to the Act of April 30, 1964 (78 Stat. 188), to be within the Colorado River Reservation." Defs.' Stmt. Facts Ex. J, at 9-10 (Certain California Lands Determined To Be Within Colorado River Reservation, 35 Fed. Reg. 18,051 (Nov. 25, 1970)). The BIA then approved permits to occupy the Reservation lands located west of the Colorado River ("west bank lands"), including the permit assigned to Mr. French in 1983. See Defs.' Stmt. Facts Ex. L, at 2, 18. The permit described the property as being "within the Colorado River Indian Reservation," and identified CRIT as the "Permitter." Id. at 4. It further stated that the permitted premises are "in trust or restricted status" and that "all of the Permittee's obligations under this permit . . . are to the United States as well as to the Permitter." See id. at 14. Mr. French's assignment, in which he accepted all "obligations, conditions, and stipulations" contained in the "lease," also lists the property as in a particular subdivision "within" the CRIT reservation, and similarly lists CRIT as the "lessor." See id. at 18.

In 1983, the Supreme Court revisited the 1964 Arizona v. California decree after the United States requested additional water rights on behalf of CRIT and other Tribes. Arizona v. California (Arizona II), 460 U.S. 605 (1983). The Court ruled that the Secretary's 1969 and 1970 reservation boundary determinations were not "final determinations" within the meaning of the Court's prior decree because the States, whose water rights could be adversely affected, had not had an opportunity to obtain judicial review of the Secretary's decisions. 460 U.S. at 636-638. Noting that California's agencies had initiated a judicial action in federal district court challenging the Secretary's boundary determination, the Court expressly declined to make any decision with respect to the boundary, stating, "we now intimate nothing as to the Secretary's power or authority to take the actions that he did or as to the soundness of the determinations on the merits." Id. at 637.

The Supreme Court ultimately approved a settlement that finally determined water rights associated with the lands west of the Colorado River, but expressly did not address title to those lands. Arizona v. California (Arizona III), 530 U.S. 392, 418-19 (2000).

The Arizona v. California Supreme Court proceedings regarding CRIT's water rights allocation thus concluded without any adjudication of the title to the west bank lands.

Mr. French asserts he was "cautioned about the dispute along the River" during the Arizona III proceedings. Pl.'s Combined Br. Supp. Mot. Summ. J. & Opp. to Defs.' Mot. Summ. J (Pl.'s Br.), at 4. From the time he obtained the permit through 1993, Mr. French annually renewed the permit and regularly and timely paid full rent pursuant to the terms of the permit. See Pl. Br. 4; Defs.' Stmt. Facts Ex. DD, at 3 (CRIT Court of Appeals Opinion and Order). In 1994, Mr. French stopped paying the full rent to the Tribe. See Pl.'s Br. 4. The Tribe sent him a letter notifying him he was in default and in violation of the terms of the permit. Defs.' Stmt. Facts Ex. DD, at 4. The BIA terminated his permit in 1996, but Mr. French remained on the property until 2011, after the Tribal Court issued a writ of restitution pursuant to eviction proceedings initiated by CRIT. Id. at 6.

ARGUMENT

The land that Mr. French occupied for nearly thirty years is part of the Colorado River Indian Reservation, and is held in trust by the United States for the Tribes. The Secretary of the Interior declared it so in 1969 (and reaffirmed it in 1970), and the Secretary's Order has never been withdrawn, reversed, or overturned. Mr. French occupied the land pursuant to a permit, issued according to the Bureau of Indian Affairs' regulations governing the leasing of Indian lands. The permit stated clearly that the leased property is "within the Colorado River Indian Reservation" and is "Tribal Land."

Indian tribes, including tribal courts, have clear authority to evict and recover damages against non-Indians who refuse to vacate tribal land after a lease has expired. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011). Accordingly, the CRIT Tribal Courts had jurisdiction to evict Mr. French from tribal land and assess damages arising from his tenancy. Mr. French seeks to avoid this rule by claiming that the status of the land he occupied is in "dispute." Because of this claimed dispute about whether the land is within the Reservation, he argues, the Tribal Court did

not have jurisdiction over the proceeding that evicted him from the land. Pl.'s Br. 21. But Mr. French cannot rely on a purported dispute that is not properly before this Court to defeat tribal jurisdiction.

The land Mr. French leased is held in trust by the United States pursuant to the 1876 Executive Order setting the western boundary of the Reservation. To locate the western boundary of the Reservation in his 1969 Order, the Secretary relied on surveys that occurred within a few years after the 1876 Order. By operation of law, the west bank lands within the Reservation where Mr. French's lease was located are held in trust for the Tribe by the United States. See Pub. L. No. 88-302, 78 Stat. 188, 189 (1964). If Mr. French wishes to contest the Secretary's determination, he must bring a direct challenge to the status of the land. Any litigation challenging this boundary determination, however, requires the United States' presence as a party because the boundary challenge directly implicates a United States property interest. Fed. R. Civ. P. 19(a). The United States has an important interest in its title to land held in trust for a tribe, but it cannot protect that interest if it is not a party. The United States is generally a required party under Rule 19 where its property interests are challenged, see Minnesota v. United States, 305 U.S. 382, 386 (1939), and that principle remains applicable when the government's title is challenged indirectly through a suit against third parties. Cf. City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1153 (8th Cir. 2013).

Any challenge, here, however, would be time-barred. Any affirmative challenge to a decision establishing the trust status of the land must be brought pursuant to the Administrative Procedure Act (APA). See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). The APA has a six-year statute of limitations. 28 U.S.C. § 2401(a). The Secretary's Order confirming the reservation boundary was issued in 1969, BIA published a decision in the Federal Register extending leasing to these lands in 1970, Mr. French assumed assignment of the BIA-issued permit in 1983, and his permit was terminated by BIA in 1996. Accordingly, any APA action would clearly be time-barred. As a result, to the extent that Mr. French's complaint can

be read to challenge the trust status of the land he leased, the Court may not consider that claim because the United States is a required party that cannot be joined at this late date.

The Court should reject Mr. French's efforts to collaterally attack the Secretary's Order and the trust status of the land in this challenge to tribal court jurisdiction. Because the land he leased is held in trust for CRIT, the CRIT courts had jurisdiction over his eviction proceeding.

A. The 1969 Order remains in effect, is presumed valid, and is not subject to collateral attack.

The Secretary's 1969 Order clearly determined the boundary of the Colorado River Reservation. The unallotted lands within the Reservation, including the land Mr. French leased, are thereby held in trust by the United States for the Tribes by operation of the 1964 Act. See Pub. L. No. 88-302, 78 Stat. 188, 189 (1964). The Secretary's determination has not been withdrawn by the Executive Branch, legislatively overridden by Congress, or overturned by a Federal court, and thus remains valid and legally binding. See, e.g., Redmond v. United States, 507 F.2d 1007, 1011-12 (5th Cir. 1975) ("[T]he agency action stands, unless the plaintiff proves that it should be set aside."); see also United States v. Chem. Found., 272 U.S. 1, 14-15 (1926) (in the absence of "clear evidence to the contrary, courts presume that [agencies] have properly discharged their duties.").

This presumption of the validity of agency action has particular force with respect to Secretarial determinations on land surveys. Russell v. Maxwell Land-Grant Co., 158 U.S. 253, 256 (1895) (only the Secretary of the Interior maintains the authority to determine the accuracy of land surveys); Craigin v. Powell, 128 U.S. 691 (1888). Here, the Secretary's 1969 Order determined the "Benson" survey to conform to the "call" of the 1876 Executive Order; the Secretary's determination and the underlying survey are not open to collateral attack in other court proceedings. See, e.g., Baros v. Texas Mexican Ry. Co., 400 F.3d 228, 238 (5th Cir. 2005) ("By failing affirmatively to act to protect their interests by intervening in the agency proceedings, the landowners cannot

now advance their claims in a collateral action that necessarily challenges several agency decisions and orders as being issued after the agency's jurisdiction over the line terminated . . . ."); cf. Mays v. Kirk, 414 F.2d 131, 135-36 (5th Cir. 1969) (examining whether certain lands were swamp lands validly issued to the State of Florida, and holding that, "in the absence of fraud the Secretary's determination of the status of the land, one way or the other, is conclusive and not subject to collateral attack and re-litigation in the Courts"); Thomas v. Union Pac. R. Co., 139 F. Supp. 588, 596 (D. Colo. 1956) (recognizing that the court "will not entertain jurisdiction to adjudicate a collateral attack upon a Federal patent"). Secretarial determinations on land use boundaries, where private ownerships are not implicated,[3] are thus conclusive except when challenged in a properly-filed APA proceeding. See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, et al., 132 S. Ct. 2199 (2012).

Mr. French relies heavily on selective quotes and never-adopted factual findings from the Arizona v. California water rights cases to support his contention that the Secretary's 1969 decision is in dispute and is not a final boundary determination for purposes of the leasing program and 1964 Act. However, none of these sources establish that the Order has been invalidated or is otherwise not final for purposes other than the adjudication of water rights. He points to two special masters' findings with respect to the western boundary land. With respect to the first, the Supreme Court explicitly declined to adopt the special master's findings in its 1963 Arizona I opinion. 373 U.S. at 601 ("We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation . . . ."). In the other proceeding, the special master provided initial findings as to the boundary. See Br. of U.S. on Exception to the Report of the Special Master, Arizona III, 1999 WL 34797586, at *11 (1999). The settlement ultimately recommended by the master and approved by the Supreme Court did not

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[3] Mr. French does not contend he has an ownership interest in the land. See Compl. ¶ 29 (alleging that "The United States owns the Disputed Area in fee").

determine the location of the boundary; it determined with finality the water rights associated with the west bank lands, according CRIT additional water rights for those lands pursuant to a settlement among the parties recommended by the master. Arizona III, 530 U.S. at 418-19, 420-21; see also Br. of U.S. on Exception to the Report of the Special Master, Arizona III, 1999 WL 34797586, at *11. Since it is the Supreme Court and not the special master that has the ultimate responsibility for making findings of fact, the special masters' findings have no precedential value. See Colorado v. New Mexico, 467 U.S. 310, 317 (1984); United States v. Maine, 475 U.S. 89, 98 (1986).

Mr. French also cites language in the 1983 Arizona II decision that he argues supports his claim that the Secretary's Order was not "final," and thus cannot provide a basis for the Secretary's leasing authority for the west bank lands. Pl.'s Br. 9. The Court's statement cited by French, however, was in the context of evaluating the effect of the Order on determining water rights with finality. The Court indicated that the decision as to the boundary was not "finally determined," as required by the Arizona 1964 decree, for purposes of the water rights adjudication because the States, users whose priorities could be adversely impacted by the decision, had not had the opportunity to challenge the Secretary's determination. See 460 U.S. at 636, 638. If the Supreme Court had granted CRIT additional water rights based solely on the Secretarial Order issued in 1969, it would have diminished water rights of the States that pre-existed that Order without providing the States an opportunity to challenge the Order. By contrast, French claims no ownership interest in these lands and simply a permit interest in the land after the 1969 Secretarial Order, thus there is no potential for diminishment or impairment of his interest.

Notably, in approving a settlement that resolved with finality the water rights associated with the western boundary lands in Arizona III, 530 U.S. at 418-19, the Supreme Court declined to consider the objections of the Western Bank Homeowners Association, a group challenging the boundary determination on behalf of permit holders in the west bank area. In so doing, the Court cited the special master's observation that

the "Association's members do 'not own land in the disputed area and the [Association] makes no claim to title or water rights,' and thus their interests will 'not be impeded or impaired by the outcome of this litigation.'" 530 U.S. at 418 n.6. Accordingly Mr. French's efforts to rely on the Arizona litigation are unavailing, as his interest as a permit holder is the same interest that was advanced by the Homeowners Association in that case, but not considered by the Court.

In sum, Mr. French can cite to no evidence that the Secretarial determination as to the western boundary and associated modifications to the leasing regulations to include the west boundary lands have been declared invalid, superseded, or not final in any legally appropriate forum. Nor is there any legal basis to allow the determination to be collaterally attacked here.

B. Under Water Wheel, tribal courts properly exercised jurisdiction to evict Mr. French from tribal lands.

In his brief, Mr. French claims he is not bringing a direct challenge to the boundary but only claims that there is a "dispute." Pl.'s Br. 8, 15. Any alleged dispute by itself is insufficient to divest a tribal court of jurisdiction, particularly where there has been no invalidation of the Secretary's determination. Accordingly, the land must be considered tribal land for purposes of this lawsuit. Indian tribes, including tribal courts, have clear authority to evict and recover damages against non-Indians who refuse to vacate tribal land after a lease has expired. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011). In Water Wheel, the court reviewed a similar eviction proceeding on the west bank lands of 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 at 814.

In considering the extent of a tribe's civil authority over non-Indians on tribal land, the Water Wheel court relied on the long-standing rule that tribes possess inherent sovereign powers, including the power to exclude. 642 F.3d at 808 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983)). A tribe's inherent power to

exclude encompasses an incidental power to regulate. South Dakota v. Bourland, 508 U.S. 679, 689 (1993). Finding CRIT had regulatory authority, the Water Wheel court concluded that it also had adjudicatory jurisdiction, reasoning any other conclusion would "impermissibly interfere with the tribe's inherent sovereignty, contradict longstanding principles that the Supreme Court has repeatedly recognized, and conflict with Congress' interest in promoting tribal self-government." 642 F.3d at 816. The same reasoning applies here. CRIT has clear authority to exclude individuals, including Mr. French, from tribal lands.[4]

Mr. French argues that Water Wheel does not give CRIT the ability to exercise its proprietary rights or a landowner's right to exclude because the boundary has not been "finally determined in CRIT's favor." Pl.'s Br. 9. As demonstrated *infra* at Part A., however, the 1969 Secretarial Order was a final determination for purposes of the 1964 Act, which provided that all unallotted land determined to be within the Reservation was held in trust for CRIT and subject to the authority of BIA's leasing program. That fact created a basis for the tribal court's jurisdiction. Mr. French can point to no invalidation of the Secretary's boundary determination. Accordingly, Mr. French's argument that

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[4] Mr. French argues that Water Wheel's rule does not apply to him because his permit involved the United States as signatory as well as CRIT, whereas the lease at issue in Water Wheel is described as being directly between CRIT and the lessee. Pl. Br. at 16. For purposes of application of Water Wheel, this is a meaningless distinction. By law in effect at the time French assumed the permit, the Secretary of the Interior—through the Bureau of Indian Affairs—retains the authority to approve and terminate leases on Indian lands. See 25 U.S.C. § 415 (1983) (Indian Long Term Leasing Act of 1955); 25 C.F.R. §§ 162.14 (1983); Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983) (Secretary's approval required to cancel leases on Indian land by law at time). Here, the BIA approved the permit and assignment, consistent with the statutory and regulatory scheme for the leasing of tribal lands. BIA's authority in this area is predicated on the fact that these are tribal lands, held in trust for the Tribe. Mr. French's permit expressly designated the Tribe as the "Permitter" and described the property as being "within the Colorado River Indian Reservation." See Defs.' Stmt. Facts Ex. L, at 5.

there is a boundary "dispute" is insufficient to defeat tribal jurisdiction.[5] If he wishes to challenge the trust status of the land, he must challenge the boundary determination directly pursuant to a properly-filed Administrative Procedure Act action. See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, 132 S. Ct. 2199. However, as discussed in Part D, *infra*, he is time-barred from doing so here.

C. The United States is a required party in an action that challenges the United States' property interests in the western boundary land.

Any affirmative litigation contesting the boundary determination and trust status of the land requires the United States' presence as a party. The United States has an important interest in its title to land held in trust for a federally-recognized tribe, but it cannot protect that interest if it is not a party. See Fed. R. Civ. P. 19(a)(1)(B (providing that a person is a necessary party if that person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede that person's ability to protect the interest"). The Supreme Court and the Ninth Circuit have held that the United States is generally a required party under Rule 19(a) to any case where its property interests are challenged. Minnesota v. United States, 305 U.S. 382, 386 (1939) ("A proceeding

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[5] Mr. French also argues that the test for tribal jurisdiction set forth in Montana v. United States, 450 U.S. 544 (1981), governs and establishes that CRIT tribal courts lack jurisdiction here. Pl.'s Br. 10-12. As a preliminary matter, the Montana test only applies to non-Indian fee land within a reservation; it does not apply to tribal actions to evict a tenant from trust land within a reservation, as is the case here. See Water Wheel, 642 F.3d at 816 (finding Montana test inapplicable where activity occurs on trust lands, but explaining why, even if Montana applied, the tribe would have subject matter jurisdiction). Even under Montana's test, however, tribal jurisdiction exists under the first prong because tribes may regulate the activities of non-members who enter into "commercial dealing, contracts, leases or other arrangements." 450 U.S. at 565. French's relationship with the Tribes, beginning with his assumption of a permit establishing CRIT as "permitter" and continuing through his repeated payments pursuant to that permit, readily establish a basis for jurisdiction under Montana. See Water Wheel, 642 F.3d at 816-19.

against property in which the United States has an interest is a suit against the United States"); United States v. City of Tacoma, 332 F.3d 574, 579-80 (9th Cir. 2003); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1254 (9th Cir. 1983); Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975).[6] That principle remains applicable when, as here, the government's title is challenged indirectly through a suit against third parties. Cf. City of Duluth, 706 F.3d at 1153 (declining to consider a challenge to the National Indian Gaming Commission's determination that a consent decree violated the Indian Gaming Regulatory Act where the Commission was not a party to the litigation).

Although the district court's decision would not bind the United States, see, e.g., United States v. Candelaria, 271 U.S. 432, 443-44 (1926), a finding that the tribal court lacks jurisdiction to issue the eviction order on the basis that the property at issue may not be within the Reservation puts into question the status of the parcel as land held in trust by the United States on behalf of CRIT. Such a finding would risk imposing inconsistent obligations on the parties, the United States, and third parties. See Fed. R. Civ. P. 19(a)(1)(B)(ii) (joinder is required where a party's absence would "leave an existing party subject to a substantial risk of incurring . . . inconsistent obligations because of the

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[6] The United States is not a required party in every case that raises the issue of whether, for jurisdictional purposes, a particular parcel of land is within a reservation. See Spirit Lake Tribe v. North Dakota, 262 F.3d 732 (8th Cir. 2001). The Ninth Circuit recognized a distinction between "litigation [ ] by non-Indians for the purpose of effecting the alienation of tribal lands," where the United States is an indispensible party, see, e.g., Minnesota v. United States, 305 U.S. 382, 386 (1939) and Carlson v. Tulalip Tribes of Wash., 510 F.2d 1337, 1339 (9th Cir. 1975), from suits involving "individual Indians or a tribe seeking to protect Indian land from alienation," where the United States is not indispensible. Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1255 & n.1 (9th Cir. 1983) (United States is not indispensible to suit brought by Puyallup to quiet title in twelve acres of exposed former riverbed occupied by the Port of Tacoma); see also Barber v. Simpson, 286 Fed. App'x 969 (9th Cir. 2008) (United States is not indispensible to eviction action in tribal court as it does not involve a case instituted by a non-Indian for purpose of effecting alienation of tribal land).

interest."). Currently, both the Tribes and the United States treat the west bank lands as trust lands within the Reservation and under tribal jurisdiction; thus, CRIT exercises governmental authority on these lands, including with respect to aspects of the administration of the leasing program. If Mr. French prevails, CRIT officials would be prohibited from exercising jurisdiction over him and would lack authority to evict him, and perhaps other occupiers on west bank land. This would result in inconsistent obligations, since the United States would still view the land as trust land, but the Tribes would be unable to exercise full jurisdiction over it. In addition, federally-recognized tribes generally possess the right and authority to regulate activities on their land independent of state control, and confusion about the extent of trust land also could risk inconsistent obligations between the State of California and CRIT. This risk provides another basis to support the United States' status as a required party.[7]

D. If French's action is deemed a direct challenge to the land status, it is time-barred and joinder of the United States is not feasible.

To the extent French wishes to challenge the Secretary's Order determining the Reservation boundary, he cannot do so pursuant to the Administrative Procedure Act (APA), as the six-year statute of limitations on such an action has long since passed. See 28 U.S.C. § 2401(a). Two Secretarial Orders, issued in 1969 and 1970, confirm the land

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[7] Indeed, the Water Wheel district court decision, from which Mr. French cites extensively in arguing that the Tribe is not an indispensible party, suggests that both the Tribe and the United States would be a required party in this action. In Water Wheel, the plaintiffs did not challenge the land status of the west bank land, and thus the district court assumed that the land at issue was tribal trust land. 2009 WL 3089216 at *2, **12-13 (D. Ariz. Sept. 23, 2009). However, the court remarked that the plaintiffs' decision in Water Wheel not to contest the trust status of the land was "for good reason" because "[i]f the Court were to address the status of the leased land, both CRIT and the United States might well be indispensible parties." Id. at *2 n.3. Because the plaintiffs in Water Wheel were not challenging the trust status of the land, the only arguments the district court considered in evaluating whether CRIT was a required party were CRIT's arguments that it had an interest in preserving the tribal court judgment and in protecting sovereign immunity. Id. at **12-13.

is within the Reservation, as do BIA's 1970 amendments to its leasing regulations. See Defs.' Stmt. Facts Ex. J.

In limited circumstances, the Ninth Circuit has permitted review of an agency decision "within six years of the agency's application of that decision to the specific challenger." Wind River Mining Corp. v. United States, 946 F.2d 710, 716 (9th Cir. 1991); see also N. Country Cmty. Alliance, Inc. v. Salazar, 573 F.3d 738, 743 (9th Cir. 2009) (a party must file its claim within six years of discovering that an agency decision negatively impacts its interests). This doctrine provides no assistance to Mr. French. He assumed assignment of the permit in 1983, and it is undisputed that the permit was approved by the Bureau of Indian Affairs, identifies the Tribes as the "Permitter," and describes the land as being "within the Reservation." Defs.' Stmt. Facts Ex. L, at 5.[8] He was thus clearly on notice in 1983 he was leasing land that the Department of the Interior and the Tribe considered to be tribal lands. Mr. French then made annual payments pursuant to the permit, the last three of which were submitted directly to the Tribe once the Tribe assumed responsibility for some aspects of the leasing program. See Defs.' Stmt. Facts Ex. L, at 2-3, 20. Mr. French admits he became aware that California was

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[8] Given that French was clearly on notice at the time he was assigned to the permit that CRIT was the "Permitter" and that the land was tribal land within CRIT's reservation, he is also barred from challenging the trust status on the grounds of estoppel. See Defs.' Br. Supp. Mot. Summ. J. at 7-9. A tenant is estopped from contesting the landlord's title in an eviction action. See, e.g., Richardson v. Van Dolah, 429 F.2d 912, 917 (9th Cir.1970) (tenant in peaceful possession is estopped to question title of landlord). French attempts to distinguish his situation, claiming that he is not bringing a "direct" challenge to the trust status of the property or Tribes' title. Pl.'s Br. at 8. However, in a case very similar to this one, tenants claimed that a defect in the tribe's title to the land destroyed the tribal court's authority to exercise jurisdiction over the land. Wendt v. Smith, 2003 WL 21750676 (C.D. Cal. Jan. 30, 2003). The court acknowledged that the plaintiffs were not "directly attacking the title of their landlord," but rather, as French does here, had "couch[ed] their challenge as one on the jurisdiction of the Tribal Court." Id. at 5. The court rejected the tenant's argument, reasoning, "[t]his is precisely the argument that this doctrine bars: a tenant 'defending a suit for rent by challenging his landlord's right to put him in possession.'" Id.

challenging the boundary in the context of a water rights dispute no later than 1994, when he stopped payment of full rent pursuant to the terms of his permit and supported the West Bank Homeowners' Association's challenge to the boundary. See Pl.'s Br. 4. Even if it is assumed that BIA's termination of Mr. French's permit in 1996 constitutes the first adverse application of the agency's decision regarding the trust status of the land to French, which, of course is completely contrary to the evidence, the six-year limitation also has passed for such an applied challenge.

CONCLUSION

French cannot rely on a purported dispute as to the status of the land to divest the tribal courts of jurisdiction. Jurisdiction can only be divested in a suit directly challenging the land status involving the United States as a party. Any such challenge would be time-barred. Accordingly, the Court should decline to consider the validity of the Secretary's boundary determination and affirm the exercise of jurisdiction by the Tribal courts based on the Tribe's inherent right to exclude as set forth in Water Wheel.

Dated: September 5, 2014

Respectfully Submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

/s/ Judy B. Harvey
JUDY B. HARVEY (CO 40379)
Trial Attorney
AMBER BLAHA
Assistant Chief, Law and Policy Section

SONIA OVERHOSER
Of Counsel, Department of the Interior

Exhibit A

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 15 1970

Date	Initials	To

MAY 25, 1970

Memorandum

To: The Secretary

From: Solicitor

Subject: Request of Colorado River Indian Tribes for review of Secretarial order and Solicitor's opinion pertaining to western boundary of Colorado River Indian Reservation

On January 17, 1969, Secretary Udall issued an order by which he determined the western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California. That order referred to a memorandum of the same date to the Secretary from Solicitor Weinberg. The Colorado River Indian Tribes, by Resolution No. R-19-69, and the Commissioner of Indian Affairs have requested that:

1. The "Benson Line," established by the survey made by W. F. Benson and approved on May 22, 1879, be recognized and established officially and unqualifiedly as the western boundary of the Reservation to the extent it pertains to that boundary;

2. The Solicitor's memorandum of January 17, 1969, be reconsidered; and

3. The part of the January 17 order pertaining to lands lying south of T. 4 S., R. 23 E., S.B.M., California, be vacated.

On June 4, 1969, you asked us to review the Secretarial order and the Solicitor's memorandum as requested by the Tribes and the Commissioner. The following are the results of our review and our recommendations.

First, Secretary Udall's January 17, 1969 order accomplished exactly what is desired by the Tribes with respect to the "Benson Line;" it declared, officially and unqualifiedly, that the "Benson Line" is the western boundary of the Reservation. By that order, Secretary Udall:

> "determined that the proper location of the reservation boundary from section 25, T. 2 S., R. 23 E., S.B.M., through section 12, T. 5 S., R. 23 E., S.B.M. is along the meander lines shown on the plats of survey in Tps. 2, 3 and 4 S., R. 23 E., S.B.M., approved May 22, 1879, and T. 5 S., R 23 E., S.B.M., approved December 23, 1874, all as established by the dependent resurvey of these townships reflected on the plats of survey accepted July 22, 1958.

The "Benson Survey," the survey of 1879, extended as far south as the line between T. 4 S. and T. 5 S., and was adopted by Secretary Udall. This order adopting the "Benson Line" was a final order of the Secretary, and its language was clear and precise, without equivocation or qualification. Accordingly, there is nothing for you to do (indeed, there is nothing more you can do) to grant the first request of the Tribes.

The second request of the Tribes, for a reconsideration of the Solicitor's memorandum, indicates their real concern. That concern stems from certain language in the memorandum suggesting that the reservation boundary may be established along certain meander lines (notably those of the 1879 Benson survey) "as a matter of administrative convenience."

We have thoroughly reviewed the January 17 memorandum and the briefs submitted by the Tribes. We do not believe, for two reasons, there is any necessity to revise or change that memorandum. First, it does not find "administrative convenience" as the only (or even the paramount) basis for establishing the "Benson Line" as the Reservation's western boundary. We read the memorandum as also stating that the proper, as distinguished from "administratively convenient," location of the western boundary is along the "Benson Line."

Second, and of controlling importance, the Secretarial order is not founded on "administrative convenience" at all, but rather is founded on the Secretary's finding that the "proper location" of the western boundary is along the "Benson Line." It is hornbook law that Secretary Udall's order, and not the Solicitor's memorandum is the controlling document and the one which must be looked to in determining whether the Reservation's western boundary was definitely and finally located in this reach of the river. Significantly, the order omitted the memorandum's "administrative convenience" language. We do not believe, therefore, that there is any basis for the Tribes' concern or any necessity to alter the Solicitor's memorandum.

With respect to the Tribes' third request, no basis has been advanced by the Tribes or the Commissioner of Indian Affairs for vacating that part of the Secretarial order pertaining to the survey of 1874 and the western boundary in T. 5 S., R. 23 E., S.B.M. Accordingly, because the order was a final determination of Secretary Udall, we recommend that you not vacate or suspend the January 17 order in the reach of the river south of Township 4 South.

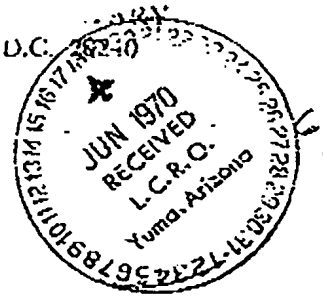
The attached order to the Director, Bureau of Land Management, and letters to representatives of the Tribes are in accord with this memorandum and are for your signature.

/s/

Solicitor

Attachments

WASHINGTON, D.C. 20240



6/2/70

Dear Mr. Fisher:

In response to Resolution No. R-19-69 of the Colorado River Indian Tribes, I requested the Solicitor to review Secretary Udall's January 17, 1969 order concerning the western boundary of the Colorado River Indian Reservation and the memorandum of that date by Solicitor Weinberg. The Solicitor has done so, and I am enclosing for your information a copy of his memorandum to me.

Secretary Udall's order was a final, official and unqualified declaration that the "Benson Line" was the proper location of the western boundary of the Reservation in the area referred to in the Tribes' resolution. Because that order was final, official and unqualified, there is nothing more for me to do to establish the "Benson Line" as the reservation's western boundary.

Secretary Udall also thoroughly considered the Reservation's western boundary in T. 5 S., R. 23 E., S.B.M. California, and the boundary in this area similarly was final, official and unqualified. For this reason, I do not believe vacating part of Secretary Udall's order as you request would be proper.

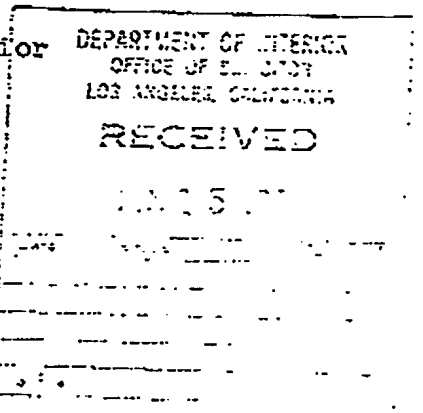
I am sending a copy of this letter and of the Solicitor's memorandum to me to the Tribes' counsel, Mr. Frederic L. Kirgis.

Please convey my best wishes to all the members of the Colorado River Indian Tribes.

Sincerely yours,

Walter J. Hickel

Secretary of the Interior



Enclosures

Mr. Adrian Fisher, Sr.
Chairman, Colorado River Indian Tribes
Colorado River Indian Reservation
Route 1, Box 23-B
Parker, Arizona 85344

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

6/2/70

Memorandum

To: Director, BLM
Through: Assistant Secretary-Public Land Management

From: Secretary of the Interior

Subject: Suspension of Secretary's Order of January 17 and Solicitor's memorandum of the same date respecting: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

Because the order of Secretary Udall, dated January 17, 1969, concerning the western boundary of the Colorado River Indian Reservation is a final and definite order, action pursuant to that order should no longer be suspended. Accordingly the instructions set forth in my June 4, 1969, memorandum to you are revoked.

Walter J. Hickel

Secretary