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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROGER FRENCH, Plaintiff, vs. KARLA STARR; et al Defendants.	Case No. CV-13-02153-JJT **REPLY BRIEF IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Defendants' assert "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 the case ("Property") is a fixed line following the course of the Colorado River as it flowed in 1865, when the Reservation was created." *See* Combined Reply Brief in Support of Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Defendants' Br.") (ECF No.66) at 1.

As trustee for the Colorado River Indian Tribes (CRIT), it is commendable that the U.S. government is indeed fulfilling its obligation to this domestic dependent sovereign. But paradoxically, the same U.S. government is also responsible for insuring that its responsibilities to CRIT do not infringe upon the rights of other United States citizens, and in particular, due process and property rights. And it is that paradox that this Court must consider in these proceedings.

In spite of Defendants' gross mischaracterizations of French's arguments throughout their briefs, drawing wild conclusions while extrapolating tangential hypothetical scenarios, French's primary argument is very simple and plainly stated. From Plaintiff's Combined Opening/Opposition Brief (ECF No. 62) ("Plaintiff's Br.") at 9:

> Federal law established by a Congressional statute, PL88-302, denies authority to the Secretary of the Interior to approve leases within the disputed area until a final determination of the reservation western boundary finds these lands included within the reservation. Therefore, until the boundary has been finally determined in CRIT's favor, CRIT cannot possibly have inherent authority or the power of exclusion over nonmembers in accordance with federal law. See SOF ¶ 1.

It is abundantly clear from this Congressional statute, that the crux of the issue here is whether there has been a final determination of the reservation western boundary. The preponderance of evidence before the court, including findings by two U.S. Supreme Court Special Masters, the Ninth Circuit Court of Appeals, CRIT's admissions in the *AZ v CA* Stipulation and Agreement, CRIT's admissions by its Attorney General and Tribal Council

Chairman, and pleadings by the State of California, clearly demonstrates that the reservation western boundary is still in dispute and that the boundary has not been "finally determined". Yet all such evidence is dismissed by Defendants' with "French's examples simply show that others share his misguided worldview". Defendants' Br. at 4.

Or instead, Defendants' insist that "the Property is tribal land, within the reservation, and French is barred from arguing otherwise". Defendants' Br. at 5. Defendants' assert that French is barred from 1) suggesting that the boundary is in dispute, 2) the Property is not conclusively on tribal land, and 3) a final determination of the boundary has not been made.

The tactics employed here are consistent with similar cases involving CRIT's attempts to confiscate or destroy private property of non-tribal member families within the disputed area; or alternatively, force residents from their homes through intimidation tactics, which have frequently included burning down confiscated homes. Rather than allowing adjudication of the issues for which CRIT claims jurisdiction, the Tribes simply utilize their sovereign immunity to prevent adjudication. *See* Plaintiff's Statement of Facts ("Plaintiff's SOF") **Exhibits A, & K**.

However, this case stands apart from those that have come before because sovereign immunity does not apply and the cannons of justice can finally be utilized to tender an end to this disgraceful saga of the unintended consequences of providing Indian favoritism under the law. Or at a minimum, a ruling that Defendants' have no subject matter jurisdiction over French and relief must be granted as requested.

ARGUMENT

I. French is Not Estopped from Citing the Boundary Dispute

Defendants' claim that French is estopped from seeking the Court's recognition of the boundary dispute. *See* Defendants' Br. at 2. However, Defendants' offer no case law supporting this argument on estoppel. From the Ninth Circuit Court of Appeals ruling in *Turley v. Eddy* 70 Fed. Appx. 934 (2003) WL 21675511 (9th Cir. July 16, 2003) that

specifically found a boundary dispute existing, it is clear that no such estoppel argument can prevail. *See* Plaintiff's SOF ¶12.

Defendants' claim that "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." *See* Defendants' Br. at 2. However the word "finding" is nowhere on the page cited. The statement is simply "French's jurisdictional question only asserts and only requires the Court's recognition of the boundary dispute." As such, French has not requested any finding by the Court. This is because within the case law cited, *AZ v. CA* and *Turley v. Eddy*, it is abundantly clear that previous courts have recognized the boundary dispute, negating the need for any subsequent finding. *See* Plaintiff's SOF ¶1-4, 12. *See Arizona v. California* 376 U.S. 340 [*Arizona I]*, *Arizona v. California,* 460 U.S. 605, 636 (1983) [*Arizona II]*, *Arizona v. California*, 493 U.S. 886 (1989) [Arizona III].

II. Tribal Courts Finding of Jurisdiction Cannot be Affirmed

A. Tribal Court Jurisdiction is Lacking due to Both the Disputed Boundary and Public Law 88-302

Defendants' claim that "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". This is a deliberate gross mischaracterization of the statements made in French's brief, and the substance of French's argument presented. French's brief reads, "French has challenged these claims and affirmatively asserts that the tribal court has no jurisdiction over him as a non-tribal member, providing clear evidence that the boundary dispute has not been resolved **and as a result**, a congressional statute, Public Law 88-302, (Act of April 30, 1964, Public Law 88-302, 78 Stat. 188) (PL88-302) specifically precludes CRIT jurisdiction over him". *See* Plaintiff's Br. at 2. [Emphasis added]. Therefore it is quite clear that BOTH the boundary dispute and Public Law 88-302 together result in the preclusion of Secretarial authority to issue leases in the disputed area. It is this preclusion in the statute that

ultimately denies tribal court jurisdiction over French, not simply the boundary dispute as asserted by Defendants.

B. Defendants' Claim of Unsupported Allegations by French are Contrary to the Tribal Court Record

Defendants' attempt to obfuscate CRIT's past history of burning down homes, destroying private property, motivations for huge rent increases, and designs to secure rights to class III gaming in the disputed area by claiming that those references in French's brief are "unsupported allegations". *See* Defendants' Br. at 4, Fn 2. The following is a listing of the allegations and support in the record, in contrast to Defendants' claims.

(1) CRIT Burned Down 27 Mobile Homes

In 2000, CRIT burned down 27 mobile homes at Red Rooster. *See* Plaintiff's SOF ¶1 Exhibit A, The Holt Report, p. E.R.55. (The Holt Report is unrebutted in the record, and therefore Defendants' cannot at this late juncture refute French's expert witness.)

(2) CRIT Destroyed the Electrical Service to Another 22 Homes

In 2001, CRIT destroyed the electrical service in a brutal coordinated raid after the BIA refused to participate in a self help eviction. This criminal activity was the subject of *Turley v. Eddy* described at length in the Holt Report, and documented within the Ninth Circuit Court's ruling. *See* Plaintiff's SOF ¶1 Exhibit A, The Holt Report, p. E.R.53, SOF ¶12 Exhibit K.

(3) CRIT Has Sought to Obtain Class III Gaming in the Disputed Area

In spite of Defendants' denials, CRIT has indeed attempted to secure rights to class III gaming in the disputed area. *See* SOF ¶16.

C. Defendants' Repeated Claims of the Application of *Water Wheel* Ignore the Basis Required for Such Application

As clearly presented in French's brief:

> …the circumstances between this matter before the Court and *Water Wheel* are fundamentally incongruent due to the **concession of reservation land** by Water Wheel within the proceedings. In *Water Wheel*, the Court noted *"Plaintiffs are*

> *not here contesting the reservation status of the land[.] Dkt. #50 at 15. The Court will hold Plaintiffs to this position…The* ***Court therefore will proceed with the assumption that Water Wheel occupies reservation land.****"* No. CV-08-0474-PHX-DGC, 2009 WL 3089216, at III, (D.Ariz. Sept, 23, 2009), aff'd in part, vacated in part, rev'd in part, 642 F.3d 802 (citing Dawavendewa, 267 F.3d at 1161-63). [Emphasis added]. Unlike Water Wheel, French has not conceded that the subject land is reservation land. Therefore, the current matter before this Court bears no resemblance to *Water Wheel* due to the differing underlying premises and assumptions by the *Water Wheel* Court. *See* Plaintiff's Br. at 15-16.

Defendants' ignore this fundamental and indeed primary requirement for the application of a *Water Wheel* analysis; i.e. the concession of tribal land. *Water Wheel Recreational Area, Inc. v. La Rance*, 642 F.3d 802 (9th Cir. 2011). French does not concede Tribal land. French instead points out that the land is contained within an area that is disputed as conceded by the U.S. and CRIT, clearly demonstrated by the *Arizona III* Stipulation and Agreement. See SOF ¶6 Exhibit D.

Instead Defendants' again insist "the Property is tribal land, within the Reservation, and French is barred from arguing otherwise" without any evidence controverting the preponderance of evidence in the record that the land is in dispute. *See* Defendants' Br. at 5. So by ignoring the fact that tribal land was conceded by Water Wheel and the subsequent "assumptions by the *Water Wheel* Court" as presented in French's brief, Defendants' argument centers upon their unfounded assertions of conclusively tribal land to apply a *Water Wheel* analysis. *See* Plaintiff's Br. at 15-16.

D. Application of *Strate* is Indeed the Appropriate Analysis

Defendants' reject the application of an analysis from *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), by claiming that the Property is conclusively tribal land and "no right-of-way or other alienation of the land has occurred". See Defendants' Br. at 6. But Defendants' ignore the reasoning in *Strate* included in French's brief:

> the Court held that the grant of right-of-way to the state, **which precluded the tribe from exercising proprietary rights of exclusion**, rendered the highway the equivalent of non-Indian fee land. *Id.* at 454. Like *Strate*, this case concerns lands whereby the Tribe cannot exercise proprietary rights of exclusion or a landowner's right to exclude, due to the dispute over the western boundary

> coupled with PL 88-302. And like *Strate*, the preclusion of the right to exclusion is due to the state's interests in the lands at issue. Therefore the irrefutable conclusion is that since CRIT is precluded from exercising proprietary rights of exclusion, the disputed area as in *Strate*, is the equivalent of non-Indian fee land. *See* Plaintiff's Br. at 9.

The *Strate* Court was correct in recognizing that the first step in the determination of tribal court jurisdiction over a non-member is to make a finding of whether the activity at issue occurred on tribal or non-tribal land. It subsequently recognized that the dividing line between these two choices can sometimes be fuzzy as it was in *Strate*. The state highway was without question on tribal land. But from a jurisdictional standpoint, was it? The Court determined wisely that the state highway was the equivalent of non-Indian land for the purposes of determining whether it was subject to tribal jurisdiction.

The matter before this Court presents a similar situation where the dividing line between tribal and non-tribal land is fuzzy. Fortunately, the *Strate* court has provided sage guidance: Is CRIT precluded from exercising a proprietary right of exclusion in the disputed area? Considering Public Law 88-302 coupled with the existing boundary dispute, the answer to this question is undeniably "YES".

For this Court to find that CRIT is not precluded from exercising a proprietary right of exclusion because French is barred from presenting the reality of the boundary dispute would effectively make a mockery of the U.S. judicial system, force French and hundreds of others similarly situated to be stripped of their constitutional rights while being subjugated to a hostile foreign sovereign, and set precedent with extreme negative consequences. The Court cannot reach such a finding as it defeats all notions of justice.

E. <u>Citing a Boundary Dispute is Not "Splitting Hairs"</u>

Defendants' claim that the Standard Rules of Estoppel still apply even though they are now apparently cognizant of French's argument that the Property is not within the undisputed boundaries of the reservation and there is no direct challenge to ownership of the Property. *See* Defendants' Br. at 6-7. Just as the *Strate* court recognized that the determination of tribal land involves taking into account many factors, this Court

similarly must consider the third possibility in the evaluation of tribal/non-tribal land. In spite of Defendants' characterization of this as "splitting hairs", the boundary dispute requires acknowledgment and consideration of its reality.

F. Defendants' Attempts to Invoke FRCP 19 are Without Merit

Once again we have Defendants attempting to invoke the Catch 22 of Rule 19 in this matter. "French does not contest that Rule 19 applies in this case". *See* Defendants' Br. at 7. However, Defendants' same Rule 19 arguments were soundly rejected by the *Water Wheel* court as presented in French's brief:

> The citation to FRCP 19 by Defendants (Def's Brief at 10-12) is confounding because the *Water Wheel* decision rather than supporting grounds for dismissal as claimed by Defendants, instead rejected CRIT's assertions of indispensible party based on FRCP 19. Quoting *Water Wheel, Id.*at VII. :
>
> *CRIT urges the Court to dismiss this action because CRIT is an indispensable party under Federal Rule of Civil Procedure 19 and has not been sued. CRIT makes several arguments.* ***The Court finds none of them persuasive….***
>
> *See* Plaintiff's Br. at 16.

G. Defendants ' Attempts to Invalidate U.S. Supreme Court Findings and Special Master Orders Fail as Demonstrated by the Ninth Circuit Court

Defendants' claim "erroneous" that the U.S. Supreme Court rejected the argument that the 1969 Secretarial Order was a "final determination". Defendants' claim "irrelevant" the findings by U.S. Supreme Court Special Master McGarr. Defendants also claim that the Supreme Court's decision in *Arizona v. California*, 460 U.S. 605 (1983) has "no bearing on the validity of the 1969 Secretarial Order for the purposes of this litigation". *See* Defendants' Br. at 8. All of these claims and arguments supposedly supporting these wild assertions cannot be reconciled with the Ninth Circuit Court of Appeals ruling in *Turley v. Eddy* that was premised on the fact that the CRIT western boundary is in dispute within the disputed area. *See* Plaintiff's Br. at 7. From the Ninth Circuit's ruling:

> "**it is clear that there is a legitimate dispute about the boundaries of the CRIT'S reservation…… *See Arizona v. California,* 460 U.S. 605, 629–31, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *Arizona v. California,* 530 U.S. 392, 418–**

19, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000)".

See Plaintiff's SOF ¶ 12 Exhibit K.

Most conclusive of evidence damaging to Defendants' assertions is the citing by the Ninth Circuit to the same U.S. Supreme Court cases that Defendants' claim has "no bearing on the validity of the 1969 Secretarial Order".

It should be emphasized that *Turley v. Eddy* was centered upon a similar eviction of disputed area residents by CRIT, whose self help eviction in that matter involved a portion of the Paradise Point resort, fully explained in French's briefs. *See* Plaintiff's Br. at 2. *See* also Plaintiff's SOF Exhibit A, The Holt Report p. E.R. 53. Like the current case through the tribal court proceedings, the funding for the rights of Paradise Point in *Turley v. Eddy* was provided entirely by the residents through the West Bank Homeowners Association.

H. Denial of CRIT's Inconsistent Position in *Aranson* Ignore the Facts

Defendants' claim:

> 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' Br. at 8.

Regardless of claims of CRIT's aboriginal title (that were rejected in *Arizona III*) U.S. Supreme Court Special Master McGarr correctly cited CRIT's consistent premise with the U.S. that the western boundary was indeed riparian in order to recover land previously lost to avulsive acts. Boundaries are either fixed or riparian. There is no other option, nor is there any law that allows Indians to have it both ways where the boundary is a call to a river. Recovery of land lost to avulsive acts can only apply if the boundary is riparian. Therefore, Defendants' defense of CRIT's obvious inconsistent position by asserting aboriginal title cannot prevail as noted by the Special Master. See Plaintiff's Br. at 8. *See* also Plaintiff's SOF ¶¶ 9. 10.

III. Tribal Courts Finding of Jurisdiction Cannot be Supported by a *Montana* Analysis

A. French Never had a "Consensual Relationship" with CRIT

Defendants' claim:

> 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"… See Defendants' Br. at 9.

However, French's briefs are replete with disputed facts that demonstrate there was no basis whatsoever for a "consensual relationship". From French's Opposition to Motion for Summary Judgment:

> Contrary to the factually unsubstantiated legal conclusion asserted by CRIT that the Permit was valid and created a **consensual relationship** between CRIT and Defendant (MSJ P.15 L. 2-26), a close examination of the document(s) in dispute show just the opposite. *Nowhere* in the original permit entered into by and between the United States Department of Interior Bureau of Indian Affairs and Assignors Donald & Shirley Neatrour (or the subsequent assignment to Defendant French) is there supporting evidence of any kind that establishes:
>
> …..(6) That the original "Permittees'" the Neatrours' or subsequent assignee Defendant French ever entered into an expressed consensual relationship with anyone other than the United States Department of the Interior.

Specifically, a review of the Permit at issue before this Court conclusively establishes:

a) The Permit is on the Letterhead of the U.S. Department of Interior (as prepared by the Secretary of Interior). (Permit/Assignment; French Decl.)

b) The Permit required the Secretary of Interior's signature as a necessary and indispensable party to the contract. (Permit/Assignment)

c) The Permit is wholly devoid of any expressed reference to CRIT Tribal Court Jurisdiction. (Permit/Assignment)

d) The Permit and all provisions thereunder including assignments specifically require the approval of the U.S. Secretary of Interior…CRIT's approval and or authority alone is insufficient under the terms of the Permit. (Permit/Assignment)

See Plaintiff's SOF Exhibit B, p. 9-11.

B. A *Montana* Analysis Does Not Require a Determination of the Permit's Validity

Defendants' claim that French attempts to avoid a *Montana* analysis by arguing that his Permit was void *ab initio*. *Montana v. U.S.* 450 U.S. 544 (1981). *See* Defendants Br.

at 11. However French' brief makes quite clear that even if the Permit were somehow valid, a *Montana* analysis would still conclude tribal jurisdiction cannot apply:

> However, even if a "consensual relationship" between French and CRIT could be established by a void and cancelled Permit between French and the U.S. Dept. of Interior, such could not possibly implicate the "tribe's sovereign interests" as is required in accordance with *Plains Commerce*. *See* Plaintiff's Br. 11.

Conveniently, Defendants' refuse to address the application of *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316 (2008) as cited by French (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.02[3] [c] at 241(Neil Jessup Newton ed.,2012) clarifying *Montana's* consensual relationship exception as it "must stem from the tribe's inherent sovereign authority to **set conditions on entry, preserve tribal self-government, or control internal relations"**); *id.* at 341 [Emphasis added]. *See* Plaintiff's Br. at 11.

C. Defendants' Attempts to Utilize *Montana's* Second Exceptions Also Fail

Defendants' attempt to persuade this Court that the second *Montana* exception applies to French by complaining that case law interpretations described in WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL, 5th Edition 85 (2009) are "exceedingly narrow". *See* Defendants' Br. at 12-13. Defendants instead offer case law concerning obstructions to tribal enforcement of health and safety on tribal land that prevents tribes from being governed by their own laws. But the cases cited only concern tribal land, which is at odds with a *Montana* analysis, rendering all the citations inapplicable and moot. However, even if one were to consider these elements in a *Montana* analysis, it is clear that any lost rental value from French's tiny property to a casino rich Indian tribe is hardly a "substantial and adverse effect on the Tribe" as asserted by Defendants. Considering the Tribes' wealth against French's loss of his realty improvements plus costs of litigation, Defendants' argument is indeed absurd at best.

IV. Defendants' Characterization of French as a "Deadbeat" Tenant Ignore the Facts in the Record and the History of his Efforts to Work with the Tribes

Defendants' assert:

> *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. *See* Defendants' Br. at 13.

The inference that French and other West Bank residents who choose not to pay rent to the Tribes are "deadbeats" would be insulting if such a characterization could be taken seriously. As the preponderance of evidence in the record clearly demonstrates, the reasons for the actions taken by the residents were to preserve their rights and resist an oppressive hostile foreign sovereign that has a history of committing brutal acts against them, continuing to this day, and has at best, questionable claims to the land at issue. *See* Plaintiff's SOF ¶¶1-4, 6-13, 15-17, Plaintiff's Br. at 1-2, and SOF Exhibit A, The Holt Report, p. E.R.54-56. Also, of particular note is the disingenuous nature of Defendants' complaints to the court of "the expenditure of significant tribal resources to bring the eviction action" while ignoring the costs of litigation on the other side paid for by the same "deadbeat" residents. *See* Defendants Motion for Summary Judgment p. 16. Fighting for their property and constitutional rights, French and the West Bank residents are hardly "deadbeats".

CONCLUSION

For all of the foregoing reasons, Plaintiff French respectfully requests that the Court deny Defendants' subject matter jurisdiction and grant relief as requested in his Complaint, (ECF 6) at p.14-16.

DATED: September 26, 2014

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CERTIFICATE OF SERVICE

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

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s/

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