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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROGER FRENCH,

Plaintiff,

v.

HONORABLE KARLA STARR; HONORABLE ROBERT N. CLINTON; and HONORABLE ROBERT MOELLER, in their capacities as judges of the CRIT Tribal Appellate Court; HONORABLE LAWRENCE C. KING, in his capacity as the Chief and Presiding Judge of the Colorado River Indian Tribes Tribal Court; SILVIA HOMER in her official capacity as CRIT Tribal Council Chairman, and HERMAN "TJ" LAFFOON is his official capacity as a member of the CRIT Tribal Council,

Defendants.

CV-13-02153-JJT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND STATEMENT OF INTEREST

A longstanding dispute exists over the boundary of the Colorado River Indian Tribes' (CRIT) Reservation (Reservation). The dispute focuses on whether the western boundary is riparian in nature—moving with the Colorado River (Colorado) as it changes course over time—or fixed at the high-water mark on the Colorado's western side as it existed in 1876. If the boundary is riparian, the Reservation excludes portions of land on the California side of the Colorado, and CRIT has no jurisdiction over that area. If instead the boundary is fixed, the Reservation includes portions of land on the California side of the Colorado. The area of land within these two candidate boundaries commonly is referred to as the "disputed area."[1] Because plaintiff French's claims involve property in the disputed area, this case—should it proceed to the merits—may resolve this dispute among the parties before it.

The United States filed an amicus brief in this matter asserting that a 1969 Order of the Secretary of the Interior (1969 Secretarial Order) resolved the boundary as a *fixed* meander line at the high-water mark on the western side of the Colorado as it existed in 1876, based upon a survey conducted at or around that time. The United States argues that the statute of limitations for challenging the 1969 Secretarial Order has run, and, therefore, the 1969 Secretarial Order is unchallengeable and definitively resolves the dispute.

The State of California files this brief to bring the Court's attention to the fundamental defects in the United States' position. First, the United States Supreme Court has stated multiple times that the 1969 Secretarial Order did not resolve the boundary dispute. Second, in later litigation, the United States unequivocally asserted that the Reservation boundary was riparian, in direct contradiction to the 1969 Secretarial Order. Third, the dispute was expressly left unresolved by a settlement, which the Supreme Court approved, between the United States and California in 2000. Most importantly, as a matter of law and fact, under the 1876 Executive

[1] As a convention in this memorandum, the phrase "disputed area" refers to the area at issue in California south of Riverside Mountain along the Colorado River.

Order issued by President Grant regarding the Reservation boundary, its western boundary is riparian and, thus, the disputed area is not part of the Reservation.

California has a number of important state interests at stake in the appropriate resolution of the Reservation boundary issue. California has an interest in the presence or absence of its jurisdiction over the disputed area, and the effect that that jurisdiction may have on the State and its residents. For example, if the disputed area is Reservation land, California has an interest in whether tribal gaming may be conducted by CRIT on the California side of the Colorado in the disputed area. 25 U.S.C. §§ 2703(4)(A) (defining "Indian lands" to include "all lands within the limits of any Indian reservation"), 2710(7)(A)(i) (requiring a state to negotiate in good faith regarding tribal-state gaming compacts). Additionally, California has a strong interest in environmental and land use issues that may arise in relation to CRIT's purported exercise of governmental jurisdiction in the disputed area. Also, if CRIT has jurisdiction over the disputed area, its exercise of claims to water from the Colorado may profoundly affect California. Finally, on behalf of the non-Indian residents in the disputed area, California has an interest in their access to the State judicial system to resolve disputes, such as the one before this Court here, involving Plaintiff French.

For all of these reasons, California submits the following to assist the Court in this matter.

BACKGROUND OF THE RESERVATION BOUNDARY DISPUTE

The Reservation boundary dispute finds its way into Supreme Court and Ninth Circuit decisions, as well as legislative or administration actions, spanning more than fifty years. Those cases and actions consistently show that, as a result of the 1876 Executive Order, the Reservation's western boundary is riparian.

I. 1963—FIRST SPECIAL MASTER'S REPORT ON BOUNDARY DISPUTE IN WATER RIGHTS LITIGATION—*ARIZONA I*

In the early 1960s, in relation to litigation before it, the Supreme Court appointed a Special Master to resolve water rights issues on the Colorado among several states, as well as several Indian tribes. The Special Master's findings of fact and conclusions of law set forth the complex

history of events that underlies the current dispute regarding the Reservation's western boundary.[2] (Amicus Curiae State of Cal.'s Request for Judicial Notice, Ex. A, attached, Excerpt from Report of Special Master Simon H. Rifkind, Part 2, 269-78, filed at *Arizona v. California*, 364 U.S. 940 (1961).) The Reservation was established by an act of Congress in 1865, setting aside 75,000 acres in the Territory of Arizona for CRIT. (*Id* at 269.) In 1874, the Reservation was enlarged by executive order to include land on the western side of the Colorado in California.[3] (*Id.* at 269-70.) In 1876, the United States Indian Agent reported that the Reservation border set forth in the 1874 Executive Order put certain lands along the Colorado's eastern side that had been in the Reservation, outside its boundaries. (*Id.* at 270.) Consequently, an Executive Order was issued in 1876 setting new borders for the Reservation. (*Id.* at 270-71.) With regard to that 1876 Executive Order, Special Master Rifkind unequivocally determined that the Colorado was the Reservation's western boundary, and that it was not a fixed boundary, but rather a riparian boundary:

> A dispute concerning a portion of the west boundary of the Colorado River Indian Reservation arose between the United States and California when the United States sought to establish irrigable acreage within that Reservation. An Executive Order of May 15, 1876, established the "west bank of the Colorado River" as the boundary of the Reservation. The United States contends that this language established a permanent, unchanging boundary defined by the west bank of the River as it existed in 1876. California contends that the language established a changing boundary defined by the west bank of the River as it may exist at any point of time. Since the Colorado River has in this area moved eastward since 1876, California's contention, if sustained, would reduce the amount of irrigable acreage within the Reservation below the amount claimed by the United States.

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[2] While California agreed in the *Arizona v. California* settlement that the Special Masters' opinions, having not been reviewed and approved by the Supreme Court, would have "no precedential or preclusive effect," they are referred to herein only for their persuasive legal reasoning. The 1963 Special Master's Report remains the best single source of the history and legal implications of all events that affect the Reservation boundaries though 1963.

[3] An argument can be made that under section 2 of the Four Reservations Act (13 Stat. 39, 40 (1864)), the President did not have the authority to expand the Reservation into California because that would have established more than the four reservations in California authorized by Congress. Because the 1876 Executive Order is dispositive of this dispute, the Court need not reach that argument here.

> In the alternative, the United States contends that if the west bank of the River as it presently exists is held to be the correct boundary, then certain land west of the present west bank should nevertheless be held to be within the Reservation, since two changes in the course of the river were caused by avulsion.[4] The United States points to two artificial changes made in the channel of the River, both of which eliminated large loops or horseshoes in the river and caused its channel to move to the east. If the United States[']contention is accepted, the irrigable acreage in the Reservation will be somewhat greater than California concedes.
>
> *I hold that California is correct in its assertion that the present boundary of the Reservation is the west bank of the River as it now exists*, but that the United States is correct in claiming that the two artificial channel changes were avulsive and that changes did not affect the Reservation's western boundary.

(*Id.* at 275-76 (emphasis added).)

The Supreme Court did not adopt the Special Master's determinations, because it found that resolving the boundary issue was not necessary at that time. In *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*), the Court stated in reference to the Special Master's Report that: "[w]e disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Id.* at 601.

II. 1964 FEDERAL LEGISLATION AUTHORIZES LEASING OF TRIBAL LANDS BUT EXCLUDES DISPUTED AREA

In 1964, Congress passed Public Law 88-302, which authorized the Secretary of the Interior to approve leases of Reservation land, contained the following proviso limiting the authority to lease land:

> That the authorization [to lease Indian lands] herein granted to the Secretary of the Interior *shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California,* and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado

[4] Black's Law Dictionary defines avulsion "[a]s a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream." *Black's Law Dictionary* (10th ed. 2014).

> River Reservation: Provided further, *That any of the described lands in California shall be subject to the provision of this Act when and if determined to be within the reservation.*

78 Stat. 189 (emphasis added). The language contained above in Public Law 88-302, excepting from the Secretary of the Interior's leasing authority land west of the Colorado and south of section 25 of township 2 south, range 23, San Bernardino base and meridian, precluded leasing in the disputed area until the dispute was resolved.

III. 1969 SECRETARIAL ORDER PURPORTS TO INCLUDE DISPUTED AREA IN RESERVATION

In 1969, the Solicitor for the Department of the Interior ("Solicitor") interpreted the events to that date and issued an opinion that the Reservation included the land on the California side of the Colorado that was set forth in the 1874 Executive Order. The Solicitor's opinion stated that the 1876 Executive Order established the ordinary high water line of the west bank to be the Reservation boundary. (Ex. B[5] to State's Req. for Judicial Notice, 2098, Solicitor of the Dep't of the Interior's Op., "Western Boundary of the Colorado River Indian Reservation," (Jan. 17, 1969) ("1969 Solicitor's Memorandum").) The Solicitor went on to opine that under California Civil Code section 830, as of 1873, the United States, as the upland owner on the river, owned the area between the high-water mark and the low-water mark, and that under the 1876 Executive Order that land was reserved to CRIT. (*Id.* at 2099.) The Solicitor wrote: "[i]t must be concluded that the [1876] Executive Order was effective to reserve any lands within the river to the United States as such order clearly intended the river be included in the [R]eservation." (*Id.* at 2099-2100.) Based upon this analysis, the Solicitor went on to opine that the ordinary high-water mark of the Colorado as it existed in 1876, the so-called "meander line," was the current boundary of the CRIT Reservation. (*Id.* at 2100.) Immediately thereafter, the Secretary of the Interior issued an order to a similar effect, the so-called "1969 Secretarial Order." (Defs.' Jt. Separate Stmt. Facts in Supp. of Summ. J., Ex. J at 204-05, Memo. of Sec'y of Interior, "Western Boundary of the

[5] The Solicitor of the Department of the Interior's opinion, "Western Boundary of the Colorado River Indian Reservation," (Jan. 17, 1969), is also Exhibit J to Defendants' Joint Separate Statement of Facts in Support of Summary Judgment, but appears to be missing a page. (See Defs.' Jt. Separate Stmt. Facts in Supp. of Summ. J., Ex. J, 200-02.).

Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, t. 5 S., R. 23 E., S.B.M., California.")

IV. *ARIZONA II*—SUPREME COURT DETERMINES THAT THE 1969 SECRETARIAL ORDER DOES NOT RESOLVE RESERVATION BOUNDARY DISPUTE

The United States Supreme Court, commenting on the 1969 Secretarial Order in *Arizona v. California,* 460 U.S. 605, 636-37 (1982) (*Arizona II*), declined to decide the boundary dispute:

> In [Arizona I], when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, *we in no way intended that ex parte secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States*, their agencies, or private water users holding priority rights. In the first place, Article II(D)(5) was a stipulated provision; it is implausible to suggest that the States would have so meekly stipulated to ex parte secretarial determinations beyond the reach of judicial review. . . . The United States wanted those matters to be adjudicated here; California apparently wanted them resolved elsewhere. *But no one contended that they should not be judicially resolved at all.* Present and former officials of the Department of the Interior testified and cooperated fully with the United States at the hearing before Master Rifkind. The Department's views appeared to be as definitive and final as they ever would be. *No one suggested that future administrative determinations were being contemplated, or that any such future proceedings would purport conclusively to determine the issue then before the Court.*

Id. (emphasis added). In *Arizona II*, the Supreme Court, thus, clearly stated its view that the 1969 Secretarial Order was *not* a final determination of the boundary dispute.

In 1984, in another supplemental decree in the *Arizona v. California* water rights cases, the Supreme Court declared that water rights for all five reservations at issue, which included the CRIT Reservation, "shall be subject to appropriate adjustments by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*" *Arizona v. California*, 466 U.S. 144, 145 (1984) (emphasis added).

V. *ARANSON*—NINTH CIRCUIT EMPLOYS RIPARIAN THEORY IN ANALYZING RESERVATION BOUNDARY

The Ninth Circuit in *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983) (*Aranson*), addressed the Reservation boundary in the context of a dispute over the ownership of certain parcels on the California side of the Colorado. In *Aranson*, the United States—as trustee for

CRIT—clearly asserted a riparian Reservation boundary. It did so to obtain the benefits of property ownership on the California side of the Colorado, based upon avulsive changes in the river's course. This assertion was reflected as follows:

> Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner. *Hence, if a river forming the boundary between the properties* of two upland owners changes its course by a gradual process of erosion from one bank and accretion to the other, the boundary moves with the river. However, sudden or "avulsive" changes in a river's course do not alter the boundaries, which remain in the abandoned riverbed.

Id. 659-60 (citations omitted) (emphasis added). Avulsion and the movement of the Reservation boundary with the Colorado's course were the same riparian concepts applied by Special Master Rifkind in relation to the Reservation boundary in *Arizona I.* (Amicus Curiae State of Cal.'s Request for Judicial Notice, Ex. A, attached, Excerpts of Report of Special Master Simon H. Rifkind, Part 2, 269-78.) Adopting the United States' assertion, *Aranson* thus applied riparian theory in determining the Reservation boundary.[6]

VI. 1993—ANOTHER SPECIAL MASTER FINDS THE WESTERN RESERVATION BOUNDARY TO BE RIPARIAN

In 1990, the United States Supreme Court appointed another special master, Frank McGarr. *Arizona v. California*, 498 U.S. 964 (1990). Special Master McGarr determined that the boundary of the Reservation did not include the disputed area. (Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. G, E.R. 134-52, Memo. of Op. and Order No. 14, Special Master Frank McGarr filed at *Arizona v. California* 510 U.S. 930 (1993).) Rather, he came to the same conclusion as Special Master Rifkind—that the Reservation's western boundary is riparian (i.e., the Colorado's west bank as it moves over time), and not a fixed line encompassing land in California, outside of such parcels on the California side which were caused by avulsive changes in the course of the river. (*Id.* at ER 143-52.)

[6] Curiously, the 1969 Secretarial Order, which the United States now contends to be the final and unchallengeable resolution of the Reservation boundary dispute was not even mentioned in *Aranson*. (*See also* Ex. C to State's Req. for Judicial Notice, *United States v. Aranson*, No. 72-1621-R Civil, "Findings of Fact and Conclusions of Law" (C.D. Cal. Feb. 11, 1977).)

VII. *ARIZONA V. CALIFORNIA*—1999 SETTLEMENT OF WATER RIGHTS LITIGATION LEAVES RESERVATION BOUNDARY DISPUTE UNRESOLVED

In 1999, California entered into a stipulated settlement with CRIT in *Arizona v. California*, 530 U.S. 392 (2000) (*Arizona III*). The stipulation again left the Reservation boundary dispute unresolved, stating in pertinent part:

> Disputed Boundary. The parties agree not to seek adjudication in this phase of the litigation of the validity, correctness, or propriety of the January 17, 1969 Order of the Secretary of the Interior, Western boundary of the Colorado River Indian Reservation from the top of Riverside Mtn., Cal., through section 12. T. 5. S., R. 23 E., S.B.M., Cal., No. 90-1-5-668, 41-54 (1969 Secretarial Order). The United States and the Tribes, but not the other parties to this Stipulation and Agreement, agree that the lands described in the 1969 Secretarial Order, are included within the Reservation set aside by Executive Order of May 15, 1876 and are held in trust by the United States for the benefit of the Tribes. *The State of California disagrees, and expressly reserves the right to challenge the validity, correctness, and propriety of the 1969 Secretarial Order.* The United States and the Tribes reserve any and all defenses they may have, including, but not limited to, exhaustion of administrative remedies and lack of subject matter jurisdiction, in the event that the 1969 Secretarial Order is challenged.

(Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. D, E.R. 177-78, Joint Mot. to Approve Stip. and Agreement (emphasis added).) Importantly, the parties also stipulated that "because the opinions issued by the Special Master in [the *Arizona v. California* water rights cases] respecting the Colorado River Indian Reservation have not been reviewed by the Supreme Court, those opinions shall have no precedential or preclusive effect in any future litigation among the parties." (*Id.* at ER 179.)

VIII. *ARIZONA III*—SUPREME COURT APPROVES SETTLEMENT AGREEMENT BETWEEN CALIFORNIA AND UNITED STATES REGARDING CRIT WATER RIGHTS, BUT RECOGNIZES THAT THE RESERVATION BOUNDARY DISPUTE IS UNRESOLVED BY THE SETTLEMENT

In *Arizona III*, the Supreme Court, upon the recommendation of Special Master McGarr, approved the settlement of CRIT's water rights. The Supreme Court recounted some of the history of the Reservation boundary dispute and noted that the boundary dispute remained open:

> Moreover, and of large significance, the 1979 and 1984 supplemental decrees [in the *Arizona v. California* water rights litigation] *anticipated that the disputed boundary issues for all five reservations, including the Fort Yuma Reservation, would be "finally determined" in some forum, not by preclusion but on the merits*. See 1984 Supplemental Decree, Art. II(D)(5), *Arizona v. California*, 466 U.S. at 145 (Water rights for all five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined."); 1979 Supplemental Decree, Art. II(D)(5), *Arizona v. California*, 439 U.S. at 421 (same).
>
> The State parties themselves stipulated to the terms of the supplemental decree we entered in 1979. They also appear to have litigated the *Arizona II* proceedings on the understanding that *the boundary disputes should be resolved on the merits*. See *Arizona II*, 460 U.S. at 634 ("[The State parties] argued . . . that the boundary controversies were ripe for judicial review, and they urged the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes, but only for the limited purpose of establishing additional Indian water rights, if any."); Report of Special Master Tuttle, O. T. 1981, No. 8 Orig., p. 57 (describing the State parties' contention *"that the boundaries [of all five Reservations] have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court"*). As late as 1988, the State parties asked the Court to appoint a new Special Master and direct him "*to conclude his review of the boundary issues as expeditiously as possible and to submit a recommended decision to the Court.*"

Arizona III, 530 U.S. at 411-12 (emphasis added).

In approving Special Master McGarr's recommendation regarding California and the United States' settlement agreement on CRIT's water rights, the Court further stated:

> The Master has also recommended that the Court approve the parties' proposed settlement of the dispute respecting the Colorado River Indian Reservation. The claim to additional water for that reservation stems *principally from a dispute over whether the reservation boundary is the ambulatory west bank of the Colorado River or a fixed line representing a past location of the River.* See *Arizona II*, 460 U.S. at 631. The parties agreed to resolve the matter through an accord that (1) awards the Tribes the lesser of an additional 2,100 acre-feet of water or enough water to irrigate 315 acres; (2) precludes the United States or the Tribe from seeking additional reserved water rights from the Colorado River for lands in California; (3) *embodies the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary*; (4) *preserves the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation*. . . . The Master expressed concern *that the settlement does not resolve the location of the disputed boundary,* but recognized that it did achieve the ultimate aim of determining water rights associated with the disputed boundary lands. *Id.* at 10-

> 12, 13-14. We again accept the Master's recommendation and approve the proposed settlement.

Arizona III, 530 U.S. at 418-19 (emphasis added). Here again, the Supreme Court has expressly recognized that the boundary dispute was not resolved.

ARGUMENT

I. THE 1969 SECRETARIAL ORDER DID NOT, AND DOES NOT, RESOLVE THE DISPUTE OVER THE RESERVATION BOUNDARY.

The linchpin of the United States' argument in its amicus brief is that the 1969 Secretarial Order finally resolved the boundary dispute, and it cannot now be challenged. That position contradicts federal law, the United States Supreme Court's multiple statements on that exact issue, and the position that the United States, itself, took in *Aranson*.

In *Arizona I*, Special Master Rifkind persuasively opined that 1876 Executive Order established a riparian boundary on the Reservation's western side that excluded the disputed area from the Reservation. The Supreme Court, however, stated that the boundary dispute's resolution was unnecessary and that in the event of "some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Arizona I*, 373 U.S. at 601. In Public Law 88-302, Congress expressly excluded the disputed area from the Secretary of the Interior's leasing authority. Nonetheless, in a unilateral administrative action in 1969, the Secretary of the Interior attempted to expand the Reservation beyond the terms of the 1876 Executive Order to include the disputed lands.

In *Arizona II,* the Supreme Court disapproved of the 1969 Secretarial Order as the resolution of the dispute that it envisioned in *Arizona I*, stating "[i]n [*Arizona I*], when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, *we in no way intended that ex parte secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States*, their agencies, or private water users holding priority rights." *Arizona II*, 460 U.S. at 636 (emphasis added). The Supreme Court in a subsequent supplemental decree in the *Arizona v. California* water rights cases again expressly recognized that the boundary dispute was not resolved. *Arizona v. California*, 466 U.S. 144, 145 (1984).

Moreover, in *Aranson*, which was decided after *Arizona II*, the Ninth Circuit predicated its decision on the Reservation's western boundary being riparian. *Aranson*, 696 F.2d at 659-60. The court also expressly held that the Colorado's riverbed was not part of the Reservation, effectively establishing the river's east bank as the Reservation's western boundary. *Aranson*, 696 F.2d at 666. These holdings directly contradict the 1969 Secretarial Order, and the United States' assertions in this action.

In 1989, in the context of the *Arizona v. California* water rights cases, the Supreme Court granted a motion of the state parties to reopen the previous decree issued in the case "to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations." *Arizona v. California*, 493 U.S. 886 (1989). In 1993, Special Master Frank McGarr determined that the Reservation boundary was riparian, but that finding was not part of the ultimate settlement of the parties approved by the Supreme Court. Nonetheless, the Supreme Court, in approving settlement, recognized that the Reservation boundary dispute was not resolved and that the settlement agreement expressly did not resolve the dispute. *Arizona III*, 530 U.S. at 410-11, 418-19.

The United States relies heavily upon *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) (*Water Wheel*) to suggest that the Reservation boundary dispute has been resolved in CRIT's favor. *Water Wheel* involved a land lease in the disputed area. However, in *Water Wheel*, the non-Indian plaintiffs did not put at issue the title to the land or the status of the land as being part of the Reservation. In fact, the district court in *Water Wheel* was very clear that the case did not involve a challenge to the "title or reservation of the land," and that if the court were to address that issue the case would be dismissed based upon tribal sovereign immunity. *Water Wheel Camp Rec. v. LaRance*, Case No. CV-08-0474 (Sept. 23, 2009), 2009 U.S. Dist. LEXIS 94196, *6-*7, n.3, *affd. and revd. in part*, *Water Wheel*, 642 F.3d 802. Even though the status of the land had not been put at issue in the case, the Ninth Circuit in *Water Wheel* appears to have based its decision on its belief that the property at issue was part of the "reservation" or "tribal land." *Water Wheel*, 642 F.3d at 812-13. Therefore, at most, the expansive language implying that the disputed area is part of the Reservation simply reflects an

assumption between the parties in the case, and constitutes nothing more than dictum. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"). Moreover, California was not a party to *Water Wheel*, and thus cannot be bound by the parties' pragmatic tactical assumptions in that case.

In sum, the 1969 Secretarial Order did not resolve the Reservation boundary dispute. The 1964 Congressional authorization expressly recognizes the existence of the dispute. Since the issuance of the 1969 Secretarial Order—and with full knowledge of it—the Supreme Court has opined multiple times that the dispute is not resolved, or has referenced it as not being resolved. *Aranson* did not reference the 1969 Secretarial Order, wholly contradicts it, and appears to definitively resolve the Reservation boundary dispute between California, on one hand, and the United States and CRIT, on the other, in direct opposition to the terms of the 1969 Order. Finally, California and the United States as trustee for CRIT in their settlement of the *Arizona v. California* water rights litigation expressly left the Reservation boundary dispute unresolved. Accordingly, the 1969 Secretarial Order is not binding upon California, and no statutes of limitation have run, or are running, in relation to it.[7]

II. THE COLORADO FORMS THE RESERVATION BOUNDARY FOR THE DISPUTED AREA AS AN AMBULATORY RIPARIAN BOUNDARY UNDER THE 1876 EXECUTIVE ORDER.

If this Court reaches the merits of the Reservation boundary dispute, the issue will be whether the western Reservation boundary is (1) an ambulatory riparian boundary—California's position; or (2) a fixed boundary set by the high-water mark on the west side of the Colorado as it existed in 1876—CRIT and the federal government's position. If the answer is the former, the disputed area is not part of the Reservation; if the answer is the latter, it is part of the Reservation. To the extent that this Court would reach that issue, California's position is that, as a matter of

[7] To the extent that the United States' position is based upon changes in title to land in the disputed area that have started the statute of limitations running or otherwise might preclude challenge, this case should be referred to a special master to make findings of law and fact in that regard.

law and fact, the western Reservation boundary is the Colorado as an ambulatory riparian boundary that does not encompass the disputed area.

California agrees with the United States that the 1876 Executive Order "set the western boundary line [to the Reservation]." (Amicus Br. of the United States, 2.) The 1876 Executive Order states:

> EXECUTIVE MANSION, May 15, 1876.
>
> Whereas an Executive Order was issued November 16, 1874, defining the limits of the Colorado River Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3, 1865, and Executive Order dated November 22, 1873; and whereas the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and *the following are hereby declared to be the boundaries of the Colorado River Indian Reservation in Arizona and California*, viz:
>
> Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; *thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning;* thence to the place of beginning.
>
> U. S. Grant

(Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. A ER 46, Letter of Feb. 7, 2011, from Holt Group, Inc. (emphasis added).)

In the *Arizona v. California* water rights cases, two Special Masters appointed by the Supreme Court examined the 1876 Executive Order and other evidence, and separately concluded that the Reservation boundary in the disputed area was riparian.[8] Special Master Rifkind stated in relevant part:

> The call in the Executive Order of 1876 "to the west bank of the Colorado River; thence down said west bank" clearly

[8] See note 2, *supra*.

> established the west bank of the River as the boundary line. That bank is defined as the fast land along the west side of the Colorado River which serves to confine the waters within the bed and tends to preserve the course of the River.
>
> It is equally clear that the *boundary established along the west bank changes as the course of the River changes*, except in cases of avulsion. . . .
>
> There is substantial evidence that *the Executive Order of 1876 did not intend to establish a fixed boundary* and, certainly, a flexible boundary is not inconsistent with the purpose of the Order, which was to prevent the acquisition by non-Indians of land proximate to Indian land on the east side of the River. The evidence establishes that various officers and departments of the United States have considered the Colorado River itself and not the 1876 meander line to be the western boundary of the Reservation.

(Ex. A to State's Req. for Judicial Notice, Report of Special Master Simon H. Rifkind, Part 2, 278-81, filed in *Arizona v. California*, 364 U.S. 940 (citations omitted) (emphasis added).)

Over forty years later in 1993, Frank McGarr, another Special Master appointed by the Supreme Court in the *Arizona v. California* water rights cases, after an extensive examination of the history of the issue, documents, evidence, and cases, came to the same conclusion regarding the riparian nature of the Reservation boundary stating: "the Executive Order of 1876, which is controlling in this dispute, established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not as a fixed line." (Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. G, E.R. 152, Memo. of Op. and Order No. 14, Special Master Frank McGarr filed at *Arizona v. California*, 510 U.S. 930.)

Intervening between the two Special Masters' reports, the Ninth Circuit in *Aranson* applied the riparian principle of avulsion to the Reservation boundary to determine that title to certain portions of the land on the California side of the Colorado, not at issue here, was held by the United States. Avulsion and the movement of the Reservation boundary with the course of the Colorado were the same riparian theory concepts applied by Special Master Rifkind in relation to the Reservation boundary in *Arizona I*. (State's Req. for Judicial Notice, Report of Special Master Simon H. Rifkind, Part 2, 278-81, filed in *Arizona v. California*, 364 U.S. 940.)

The Ninth Circuit in *Aranson* further addressed the ownership of the riverbed: "[w]e find the evidence in this case insufficient to enable us to conclude that the government intended to

convey the eastern half of the riverbed to the Indians when it formed the Reservation. Accordingly, we hold that the eastern half of the river bed was not conveyed by the government to the Indians as part of the Reservation." *Aranson*, 696 F.2d at 666. This specific holding directly contradicts the basic premise of the 1969 Solicitor's Memorandum that: "[i]t is, therefore, concluded that the call to the west bank [in the 1876 Executive Order] must be taken to mean the line of ordinary high water [on the west bank] as it existed in 1876." (Ex. B to State's Req. for Judicial Notice, 2098, 1969 Solicitor's Memo.) Additionally, the *Aranson* opinion contradicts the second predicate of the 1969 Solicitor's Memorandum—that the 1876 Executive Order "clearly intended the [Colorado R]iver be included in the [R]eservation." (*Id.* at 2099.)

Notably, Special Master McGarr made specific reference to the United States' legal position in *Aranson*, stating, "[i]n the *Aranson* case the Government and the Tribes unequivocally urged upon the Court the position that the Colorado River was the moving boundary of the reservation. . . ." (Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. G, E.R. 142-43, Memo. of Op. and Order No. 14, Special Master Frank McGarr filed at *Arizona v. California*, 510 U.S. 930.) Indeed, he cited the United States' position in *Aranson* as "strong evidence" in support of his conclusion that the Reservation boundary was riparian, and not fixed as now asserted by CRIT and the United States. (*Id.*)

III. THE UNITED STATES IS PRECLUDED FROM ASSERTING THAT THE RESERVATION HAS A FIXED WESTERN BOUNDARY

The United States, acting as a trustee for CRIT, was a party to *Aranson*. *Aranson*, 696 F.2d at 656. The Ninth Circuit in *Aranson* referenced the res judicata effect of the district court's findings on the parties, stating "California has not appealed from the district court's judgment; it is res judicata and unreviewable by us." *Id.* at 662. Concomitantly, the United States, as the trustee for CRIT, is bound under the doctrine of res judicata or collateral estoppel by *Aranson's* determination that the Reservation boundary is riparian:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their

> privies . . . ." Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Montana v. United States, 440 U.S. 147 (1979). The district court's "Findings of Fact and Conclusions of Law" in *Aranson* establish that the Reservation boundary was determined to be riparian. (Ex. C to State's Req. for Judicial Notice, ¶ 26, *United States v. Aranson*, No. 72-1621-R Civil, "Findings of Fact and Conclusions of Law" (C.D. Cal. Feb. 11, 1977) ("In case of an avulsive change in the channel of a river which constitutes a boundary, the boundary remains in the abandoned channel as it existed immediately prior to the avulsive change"). Accordingly, the United States is barred by either res judicata or collateral estoppel from re-litigating the issue of the nature of the Reservation boundary. Therefore, to the extent that a final judicial resolution of the Reservation boundary dispute as envisioned by the Supreme Court in *Arizona I* has occurred, *Aranson*'s holding that the Reservation boundary is riparian on the Colorado's eastern bank is that final judicial determination.

Alternatively, the United States as trustee for CRIT should be judicially estopped from asserting any boundary other than that established by riparian principles. The doctrine of judicial estoppel is a discretionary and precludes a party from taking two contrary legal positions before a judicial tribunal. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2010). The doctrine applies as follows:

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, *simply because his interests have changed, assume a contrary position*, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."

Id. (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Here, more than thirty years ago, the United States, as trustee for CRIT, affirmatively asserted that the Reservation boundary was riparian. That assertion was the basis for the United States to claim title on behalf of CRIT to

certain parcels of land on the California side of the Colorado. The effect of the United States' assertion of a riparian boundary was to take title to the land for CRIT's benefit. (Ex. C to State's Req. for Judicial Notice, ¶¶ 26-30, *United States v. Aranson*, No. 72-1621-R Civil, "Findings of Fact and Conclusions of Law" (C.D. Cal. Feb. 11, 1977).) Therefore, the United States should be judicially estopped now from asserting a contrary position that the boundary is the fixed meander line of the high-water mark of Colorado as it was in 1876, to claim title to the disputed area for CRIT. *See Greene v. Marilyn Monroe LLC*, 692 F.3d 983, 998-1000 (9th Cir. 2012) (judicial estoppel precluded a party from changing its position on a material legal issue after forty years to gain a financial advantage).

CONCLUSION

The Reservation boundary dispute at issue here implicates significant State interests and, if resolved by this Court, will have long-term consequences for the parties, the amici, and the residents of the disputed area. While the dispute has lasted for many years, it is not resolved, and this Court is not precluded from bringing a final resolution to it. California urges this Court to fully review the long history of the dispute, particularly the 1876 Executive Order itself, and determine that the Colorado is the riparian western boundary of the Reservation and that the disputed area is not a part of the Reservation.

Dated: October 13, 2014

Respectfully Submitted,

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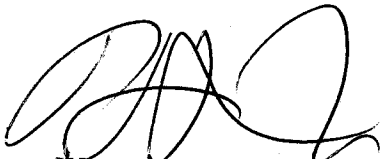

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