ORIGINAL

Nos. 08-15712 and 08-15570

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MICHAEL KEITH SCHUGG, d/b/a Schuburg Holsteins; DEBRA SCHUGG,
Debtors

G. GRANT LYON,

Appellee/Cross-Appellant

v.

GILA RIVER INDIAN COMMUNITY,

Appellant/Cross-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CASE NO. CV 05-2045-PHX-JAT

OPENING BRIEF FOR APPELLANT/CROSS-APPELLEE GILA RIVER INDIAN COMMUNITY

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. §§ 157(d), 1331, and 1334. The district court entered its final judgment on February 12, 2008. [E.R. 1] The Gila River Indian Community filed a timely notice of appeal on March 10, 2008 [E.R. 56], and the Trustee filed its notice of cross-appeal on March 21, 2008, [E.R. 52]. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the United States or individual Indian allottees are indispensable parties to litigation seeking to establish an easement over tribal and Indian allottee land held in trust by the United States.

2. Whether the Community retains aboriginal title to Section 16 where that title has never been expressly extinguished by Congress.

3. Whether, when a party bypasses the established statutory process for obtaining a right to cross Indian territory, a court can judicially imply an easement across Indian land.

4. Whether laches applies offensively to bar the Community's defense that a road crossing Section 16 is not an Indian Reservation Road to which the public has access.

5. Whether the Community has zoning authority for the limited purpose of regulating the construction and population of a high-density residential neighborhood surrounded by agrarian reservation land.

STATEMENT OF THE CASE

In 2004, Michael and Debra Schugg, the operators of a dairy farm on a parcel of land completely surrounded by reservation and allottee land ("Section 16"), filed voluntary petitions for bankruptcy. *In re Michael K. Schugg*, 2-04-13326-GBN, dkt. #1 (Bankr. D. Ariz. July 29, 2004); *In re Debra Schugg*, 2-04-19091-GBN, dkt. #1 (Bankr. D. Ariz. Nov. 1, 2004). The Gila River Indian Community ("Community") filed a proof of claim in the bankruptcy case in which it asserted "sole and exclusive legal and equitable ownership and right of possession and other interests in and relating to [Section 16]." [E.R. 349-350] The Trustee then filed a complaint against the Community in which he sought a declaratory judgment concerning the Schuggs' title and legal access to Section 16. *Lyon v. Gila River Indian Cmty.*, 05-ap-384-GBN, dkt. #1 (Bankr. D. Ariz. May 25, 2005). The Community filed counter-claims asserting title and control over Section 16. [E.R. 297]

In January 2006, the bankruptcy reference was withdrawn based on both parties' consent, and the litigation proceeded in district court. [E.R. 341-342] The district court granted the Trustee's motion for summary judgment in part, holding

that the Community's aboriginal title had been extinguished. [E.R. 31-44] Following a two week bench trial, the district court entered final judgment, holding that the Schuggs had a legal right of access across the reservation and allotted land, but only to use the land as a dairy farm. [E.R. 2-30]

STATEMENT OF FACTS

A. Factual Background

Section 16 comprises roughly 657 acres of land in Pinal County, Arizona, just outside the City of Maricopa. [E.R. 3] Section 16 is completely surrounded by the Community's Reservation which includes allotments to the Community and individual Community members. [*See* Addendum E; E.R. 6, 357] Without crossing Indian lands, there is no physical access to Section 16.

The Community is a federally recognized Tribe and land-owning entity that held aboriginal title to more than 3.75 million acres of land in south-central Arizona, including the Reservation land and Section 16. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm'n 301, 335 (1970). The Community's culture has always been distinctly agrarian. *Id.* at 318-28.

In 1853, the United States acquired territory from Mexico, including the land that was later designated as Section 16. [E.R. 4] Congress subsequently reserved Section 16 "for the purpose of being applied to schools in said Territory [of New Mexico]." Act of July 22, 1854, ch. 103, § 5, 10 Stat. 308, 309. Congress

reaffirmed that reservation following the creation of the Territory of Arizona. *See* R. S. § 1946 (1875).

In 1859, Congress created a reservation for the Community, the borders of which were later enlarged by seven Executive Orders, two of which added the land immediately to the south, east and west of Section 16. [E.R. 357, 359-365] As a result, Section 16 is located within the boundaries of the Reservation and completely surrounded by lands allotted to the Community and individual Community members and held in trust by the United States. [Addendum E; E.R. 6] The Executive Orders, however, did not include any easements providing access to Section 16. *See ibid.* Currently, two undocumented and unpaved roads that cross Community and allotted lands, Smith-Enke Road and Murphy Road, approach Section 16, and both roads cross Community and allotted lands within the Reservation. [Addendum D; E.R. 8].

Currently, approximately 12,000 Community members reside on the Reservation. [E.R. 12] In 1984, the Community created and adopted a General Land Use Plan for the Reservation that was designed to preserve the Community's culture and history by creating more agricultural areas and protecting open spaces. [E.R. 15]

Section 16 has had only a handful of purported owners, all of whom preserved its agrarian character consistent with the surrounding Reservation lands.

[E.R. 6-7] In 2001, a company owned by the Schuggs' children, then aged 19 and 20, purchased Section 16 and constructed a dairy on the property. *Ibid.* Subsequently, the Schuggs obtained title to Section 16 from their children. [E.R. 7-8] When the dairy sought to construct an electric line in 2002, the Community advised that there was no legal access to Section 16, but worked with the dairy and the Bureau of Indian Affairs to allow a utility easement to support dairy operations pursuant to 25 C.F.R. § 169.1, *et seq.* [E.R. 12, 89, 354] Thereafter, the Schuggs announced an intent to sell Section 16 to developers for purposes of converting it into a high-density residential development. According to the Schuggs, they possessed a right of access across the Indian lands surrounding Section 16, and a right to grade, gravel, and pave Indian lands in furtherance of its intended development. [E.R. 114]

B. Procedural History

In 2004, the Schuggs filed voluntary petitions for bankruptcy and listed Section 16 as their largest asset. *See In re Michael K. Schugg*, 2-04-13326-GBN, dkt. #12 (Bankr. D. Ariz. July 29, 2004); *In re Debra Schugg*, 2-04-19091-GBN, dkt. #7 (Bankr. D. Ariz. Nov. 1, 2004). Cross-appellant G. Grant Lyon is the Chapter 11 trustee of their bankruptcy estates. [E.R. 3]

The Community filed a proof of claim in the bankruptcy case, asserting "sole and exclusive legal and equitable ownership and right of possession and

other interests in and relating to [Section 16]." [E.R. 338-340, 349-350] The Trustee then filed a complaint and initiated an adversary proceeding seeking a declaratory judgment on the questions of title and legal access to Section 16. *Lyon v. Gila River Indian Cmty*, 05-ap-384-GBN, dkt. #1 (Bankr. D. Ariz. May 25, 2005). Based on the Community's and Trustee's agreement, the district court withdrew the reference and transferred the proceeding to district court. [E.R. 341-342] The Community then filed counter-claims asserting aboriginal title to and zoning authority over Section 16, the absence of a right of access to Section 16, and trespass. [E.R. 317-322] The Community also moved to dismiss on the grounds of sovereign immunity and the indispensability of the United States and individual allottees as parties. [E.R. 46] The district court denied the motion to dismiss on indispensable party grounds, reasoning that further factual development was needed, and held that the Community waived its sovereign immunity when it filed a proof of claim. [E.R. 46-47]

At summary judgment, the district court rejected the Community's assertion of aboriginal title. [E.R. 31-44] In so holding, the court acknowledged the absence of any express congressional abrogation of aboriginal title, but held that the grant of Section 16 to Arizona for school land implicitly extinguished the Community's title. [E.R. 39] The court also held that the Indian Claims Commission's adjudication of the Community's claims to compensation for the loss of land implicitly abrogated aboriginal title. [E.R. 41]

Following a bench trial, the district court entered final judgment in part in favor of the Trustee. [E.R. 1, 2-30] The court first held that neither the United States nor individual allottees were indispensable parties to the litigation. [E.R. 19-21] The court agreed with the Community that the United States was a required party for the legal access and aboriginal title issues, and that the United States' joinder was barred by sovereign immunity. [E.R. 19] The court then concluded that dismissal was not required because its decision disposing of rights in trust lands would not be binding on the United States. [E.R. 20] With respect to the individual allottees, the court reasoned that they were not indispensable because the United States protected their interests. [E.R. 20-21]

On the question of legal access to Section 16, the district court first held that there was neither an express easement over the Community's lands, nor an implied easement by necessity because federal law provided an administrative procedure for seeking such a right of access. [E.R. 11, 26-27]. The district also ruled that neither Smith-Enke Road nor Murphy Road are public roads under R.S. § 2477. [E.R. 25] The court, however, judicially implied an easement over Murphy and Smith-Enke roads based on the reservation of Section 16 as school lands. [E.R. 25-26] In addition, the court employed laches as an offensive doctrine to bar the Community's defense and to declare Murphy Road an Indian Reservation Road that provided public access to Section 16. [E.R. 22-23] With regard to the

Trustee's request for a ruling that the scope of the alleged easements allowed for full residential development of Section 16, the court ruled that question to be unripe and that any ruling would be an improper advisory opinion. [E.R. 27]

Finally, the court rejected the Community's assertion of zoning authority over Section 16. The court first held that, because "there are no current plans to sell Section 16 to a developer and no current plans to construct residential homes on Section 16," there was no justiciable case or controversy concerning the Community's zoning authority over Section 16 for non-agrarian uses. [E.R. 27-28] The court held, in the alternative, that the development of a high-density residential neighborhood in the middle of the Community's agrarian lands would not affect the Community's political integrity, economic security, or welfare. [E.R. 28]

SUMMARY OF ARGUMENT

The district court's holding that the Trustee has title and a right of legal access to Section 16 – a ruling issued in the absence of the United States and individual Indians who hold title to the land being compromised – was flawed on multiple levels and should be reversed.

1. The United States and individual Indian allottees were indispensable parties whose absence from this litigation required its dismissal, pursuant to Federal Rule of Civil Procedure 19. The district court held that the Trustee has legal rights – easements – in property to which the United States holds title, without the United States' presence to defend its title. The court reasoned that the

case could proceed because the United States would not be bound by its judgment. But that means that the court's judgment was either (i) an academic, advisory opinion proscribed by Article III, or (ii) an actual adjudication of legal interests in the land, in violation of the United States' sovereign interests and in defiance of its sovereign immunity. The court's decision to proceed in the absence of the individual allottees was even more flawed, because the court's central rationale was that the allottees' interests would be protected by the United States. But that would only work if the United States were present in the case, which it was not.

2. The district court's conclusion that the Trustee has a legal right of access to Section 16 across Reservation lands is equally flawed. Because Congress has established a specialized statutory scheme to resolve such access claims, the the Trustee could not end-run Congress's prescribed process by seeking judicial implication of an easement. Beyond that, the implication of an easement runs afoul of established federal law prohibiting the alienation of interests in Indian land without the federal government's consent.

The district court also erred in concluding that Murphy Road was an Indian Reservation Road that provided public access to Section 16. First, Murphy Road does not satisfy the statutory and regulatory definition of an Indian Reservation Road, as the Bureau of Indian Affairs itself has concluded, because the relevant portion is not open to public use. Second, the district court's affirmative use of

laches to *prevent* the Community from raising a defense and to *establish* a legal right to property defies controlling precedent holding that laches is a *defense* to claims of equitable relief, not an *offensive* weapon designed to excuse plaintiffs from proving the merits of their legal claims.

3. The district court erred in holding that the Community lacks reasonable zoning authority to prevent the development of a high-density suburban subdivision in the middle of its agrarian Reservation lands. To begin with, that question was not ripe for adjudication, and thus the court's decision should be vacated. Moreover, even if the question had been properly determined,the substantial threat that suburban residential development would pose to the Community's integrity and culturally agrarian identity, and the crushing strain that the addition of 8000 new non-Indian residents, traversing Reservation lands daily in 4000 cars, would put on the Community's very limited public safety resources supports the exercise of reasonable regulation.

4. Finally, the Community retains aboriginal title to Section 16. Congress has never expressly extinguished its title, and that should have been the end of the matter under established law requiring explicit abrogation. The district court's holding that aboriginal title disappeared with the reservation of Section 16 as school lands overlooks controlling Supreme Court precedent holding that the

reservation of school lands – including the precise reservation at issue in this case – did not extinguish aboriginal title.

The district court's conclusion that the Indian Claims Commission proceeding estopped the Community from asserting aboriginal title fares no better. The Commission had no legal authority to extinguish aboriginal title, did not purport to extinguish claims to land, never paid the Community compensation for Section 16 or otherwise adjudicated Section 16's status, and had no capacity to entertain claims to adjudicate a Tribe's assertion of continued aboriginal title.

ARGUMENT

The central question in this case is whether the Trustee has established either legal title or a legal right of access to Section 16, under an implied easement, which would permit the land's development regardless of the impact of that development on the integrity of the Community's reservation and culture. The district court's conclusions that the Community's aboriginal title has been extinguished and that the Trustee enjoys a limited and unregulable right to access and develop Section 16 reflect errors both in the law and in the procedural protections that should have attended the alienation of Indian rights in land.

I. THE UNITED STATES AND INDIVIDUAL INDIAN ALLOTTEES WERE REQUIRED PARTIES

Federal Rule of Civil Procedure 19 requires dismissal of an action if a required party cannot be joined. *See UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996).[1] In this case, joinder of the United States and individual allottees was necessary, and thus dismissal was warranted, because (i) the federal government is a required party to any adjudication of Tribal rights in Indian land, particularly when it holds legal title to the land in trust; (ii) the United States' and the allottees' absence precluded the court from ordering complete relief; and (iii) adjudication in their absence resulted in substantial prejudice to the federal government, the Community, and the allottees.

A. Standard Of Review

Generally, a district court's decision under Rule 19 is entitled to "some degree of deference." *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2189 (2008); *see United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 907 (9th Cir. 1994) (abuse of discretion). However, any interpretation of law underlying that decision is reviewed de novo. *Pimentel*, 128 S. Ct. at 2189; *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 778 (9th Cir. 2005).

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[1] The 2007 revisions to Rule 19 revisions eliminated the phrase "indispensable," but "the substance and operation of the Rule * * * [is] unchanged." *See Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2184 (2008).

B. The United States Is A Required Party

The United States is a required party for the determination of both the Trustee's alleged easement across lands held in trust by the United States and the Community's aboriginal title. Under Rule 19, a party's joinder is required when (i) the absent party has an interest in the subject of the action that "may * * * as a practical matter [be] impair[ed] or impede[d]" "in the person's absence," or (ii) "the court cannot accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A) and (B)(i). Both apply here.

1. The United States has a vital legal interest in the disposition of Indian rights in land

The United States' legal interests were directly and significantly impaired by the implication of an easement across Indian lands. "[I]n its dealings with Indian tribal property," the Government "acts in a fiduciary capacity," *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993), and the Indian Nonintercourse Act has long proscribed the alienation of Indian lands without the express consent of the United States. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention."); 25 U.S.C. § 348 (conveyances of allotments held in trust by the United States "shall be absolutely null and void"). Those statutes thus require the United States' consent prior to any legal disposition of a claim to Indian land and establish "a real

and direct" federal legal interest in litigation seeking to diminish Tribal property rights without the United States' consent. *United States v. Minnesota*, 270 U.S. 181, 194 (1926). Indeed, the alienation of Indian land contrary to those laws violates the "governmental rights of the United States." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979). Furthermore, as the trustee of this land, the United States is a "real party in interest" in the litigation. *United States v. Washington*, 233 F.2d 811, 817 (9th Cir. 1956).

That is why both this Court and the Supreme Court have repeatedly held that "[t]he United States is an indispensable party to any suit brought to establish an interest in Indian trust land." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991); *see Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("real party in interest" is a "necessary party"). Indeed, in a ruling that controls this case, the Supreme Court held in *Minnesota v. United States* that a right of way to land held by the United States in trust for Indian allottees cannot be established "without making it a party." 305 U.S. 382, 386 (1939); *see Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975) ("[T]he United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation.").

The United States is likewise a required party to the Trustee's effort to extinguish the Community's aboriginal title. The United States "has an interest in

maintaining and enforcing" the statutory restrictions on alienation of Indian land, *United States v. Candelaria*, 271 U.S. 432, 443-444 (1926); *see Wilson, supra*; and that interest applies equally to lands held in aboriginal title, *see Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("'aboriginal title' could not be extinguished without a sovereign act and, therefore, any conveyance without the sovereign's consent was invalid"). Indeed, it is precisely because of the United States' distinct legal and fiduciary interests that "[t]he United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation." *Carlson*, 510 F.2d at 1339. When, as here, there has been no express abrogation of aboriginal title by the federal government itself, [E.R. 39], the United States' inclusion in the litigation is the only mechanism for obtaining the required federal consent to the extinguishment of aboriginal title.

2. Complete relief cannot be afforded in the United States' absence

Because the United States holds in trust all of the land across which the district court implied an easement, the United States is also a required party because "complete relief" cannot be afforded in its absence. Fed. R. Civ. P. 19(a)(1)(A). The court and the Trustee both rightly acknowledged that the court could not alienate the United States' interest in the land or enforce any judgment recognizing such a right against the United States in its absence. [E.R. 18-20] But

the district court's implication of an easement did just that. It recognized a right of access across land to which the United States holds title and thus compromised that title, without the United States being present to defend its interests. If, on the other hand, the court did not compromise the United States' interest, then it confessedly failed to afford "complete relief" because it could neither recognize any durable legal right nor provide any *effectual* relief to the Trustee.

The district court nevertheless adjudicated the case, reasoning that "the United States will not be bound by the Court's judgment," and "any legal access will be clouded by the risk that the United States will hereafter contest such access." [E.R. 20]. That, however, proves the indispensability of the United States' presence. Judicial determination of a "right" of access across land that remains subject to complete nullification by the holder of title to that land is no right at all. It is nothing more than the recognition of a potential or hypothesized right, which Article III courts may not do. *See United States National Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 447 (1993).

A court cannot provide "complete relief" unless it is "likely," rather than "speculative," that the Trustee's claimed legal interest in the land "will be remedied by the relief" sought in the litigation *at hand*, not in some unspecified future eventuality. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2535 (2008). Time and again, the Supreme Court has held that courts lack

power under Article III to order relief entirely dependent on the future conduct of parties not before the court. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (court cannot order relief for indigent patients the effectiveness of which is contingent on the actions of hospitals not before the court); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-619 (1973) (no standing to seek prosecution of spouse for failure to pay child support because effective relief requires compliance by the non-party father). Rule 19's requirement of "complete relief" can require no less than Article III. Yet here, all the district court could decide in the United States' absence was that the Trustee might have a legal right of access, but then again might not, because the "judgment against the [Community] would not bind the [United States], which could assert its right to possess the [property]." *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994). That is not the "complete relief" that Rule 19 requires. *Ibid.*

C. Sovereign Immunity Bars Joinder Of The United States

As the district court recognized, although the United States is a required party, sovereign immunity precluded its joinder. [E.R. 19]. While Congress has generally waived the federal government's immunity from suits seeking to quiet title, "it has expressly excluded Indian trust lands from that waiver of immunity." *Imperial Granite*, 940 F.2d at 1272 n.4; *see* 28 U.S.C. § 2409a; 25 C.F.R. §

151.2(d). That exception "constitutes an 'insuperable hurdle' to a suit to establish title to an easement across reservation land." *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994).

The United States is likely immune from suit with respect to the aboriginal title claim as well. Aboriginal title is protected against alienation by the Non-Intercourse Act. *See County of Oneida, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240 (1985) ("[T]he Non-Intercourse Acts" codified "the accepted rule – that the extinguishment of [aboriginal] title required the consent of the United States."). Thus, because aboriginal land shares the same protected status as trust or restricted land and triggers the same unique federal interests, it should likewise enjoy the same treatment under the Quiet Title Act.

The district court, however, denied the Community's motion to dismiss because it was unable to resolve definitively whether title to aboriginal land falls within the Quiet Title Act's exception. [E.R. 47] But courts may not avoid such threshold jurisdictional questions, particularly when sovereign immunity is at stake. Because the United States was a required party, the United States had to be joined if jurisdiction existed. *See* Fed. R. Civ. P. 19(a). The court thus was obliged either to hold that jurisdiction was lacking (and proceed to the Rule 19(b) inquiry), or to find no immunity and order the United States joined. Whether

either the former or the latter was preferable, the district court's decision to do neither was wrong.

The district court's quest for certainty was similarly misplaced. The Indian lands exception to the Quiet Title Act applies as long as there is "some rationale" for considering the property in question to be "trust or restricted Indian land[]" and as long as that position "was not undertaken in either an arbitrary or frivolous manner." *Alaska*, 38 F.3d at 1076. Thus, rather than justify the district court's avoidance of the immunity question, the difficulty of the aboriginal title inquiry triggered the court's obligation either to join the United States as a party or to find a jurisdictional barrier to joinder. To require more, as the district court did, would involve the court in making the very type of merits-based inquiry that the Quiet Title Act precludes. *Cf. Pimentel*, 128 S. Ct. at 2189.

D. In The United States' Absence, Dismissal Was Mandated

When, as here, jurisdiction is lacking over a required party, Rule 19(b) requires the court to determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).[2] Those factors mandate dismissal in this case for four reasons.

First, allowing the litigation to proceed, despite the United States' substantial interest as title holder to the land, did "not giv[e] the necessary weight

[2] Those factors are not exhaustive. *See Pimentel*, 128 S. Ct. at 2188.

to" the government's "sovereign immunity." *Pimentel*, 128 S. Ct. at 2189. Indeed, a sovereign immunity barrier to joinder weighs strongly in favor of dismissal because, as long as the sovereign entity's potential interest is not frivolous, "[t]he court's consideration of the merits [will] itself [be] an infringement on * * * sovereign immunity." *Ibid.* The court's dismissal decision thus must give "full effect to sovereign immunity," *id.* at 2190, and "when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor," *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). Accordingly, "[a] case may not proceed when a required-entity sovereign is not amenable to suit," and "dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign," *Pimentel*, 128 S. Ct. at 2191 – which exists here because the United States holds title to the very land and the interests in it that were compromised.

Second, the district court stressed that the government "will not be bound by the Court's judgment," and can "hereafter contest such access." [E.R. 20]. But that consideration counts doubly against allowing the action to proceed. Because the United States' consent is the linchpin to establishing any legal right of access, issuing a "definitive holding" regarding rights in land subject to such supervening federal control substantially erodes the immunity. *Pimentel*, 128 S. Ct. at 2192.

The very point of immunity is to prevent judicial erosion of the United States' interests without the United States' consent.

Beyond that, the district court's embrace of the semi-adjudication of rights flies in the face of *Pimentel*, which held that Rule 19(b)'s requirement that any judgment be "adequate" "refers to the public stake in settling disputes by wholes," rather than through piecemeal litigation. 128 S. Ct. at 2193. Thus, in exact opposition to the district court's decision, the Supreme Court held in *Pimentel* that the fact that absent sovereigns "would not be bound by the judgment in an action where they were not parties" weighs strongly *in favor* of dismissal. *Ibid.*

Third, the very factors that make the United States a necessary party under Rule 19(a) also establish the prejudice that the United States would suffer if this litigation proceeds in its absence. *See Dawavendewa v. Salt River Project Agric. Imp. and Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (conforming prejudice analyses under Rule 19(b) and 19(a)). Due to (i) the United States' unique fiduciary relationship to Indian tribes and their property, (ii) its trust relationship with respect to this land, and (iii) the fact that it holds the very title to the land threatened with diminishment, the Trustee's claims on tribal property directly implicate the United States' legal interests, as well as its statutory and historical obligations. "A proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota*, 305 U.S. at 386. That the

United States might evade enforcement of the judgment does not change the legal reality that any diminishment of rights in land to which the United States holds title, without its consent, necessarily defeats the United States' "government[] right[]" to prevent such non-consensual alienation and to protect the land to which it holds title. *Wilson*, 442 U.S. at 657 n.1.[3]

Citing *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), the Trustee argued that the United States' presence is not indispensable when an Indian tribe files claims to protect its own interest in the lands. [E.R. 61-64, 291-293] The problem for the Trustee, however, is that the *Puyallup* exception has no application to claims, like those asserted by the Community, that are asserted in defensive response to another party's initiation of judicial proceedings. In *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029 (9th Cir. 2003), this Court held that the narrow *Puyallup* exception to mandatory joinder is not triggered by claims "filed in response to the [plaintiff's] claims, not as affirmative claims for relief," *id.* at 1035.

Evans controls here. The Schuggs, not the Community, initiated this case when they filed for Chapter 11 bankruptcy and identified Section 16 as an asset.

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[3] With respect to whether "any prejudice could be lessened or avoided by" remedial measures, Fed. R. Civ. P. 19(b)(2), the Trustee never proposed, the district court never found, and the Community is not aware of any means by which prejudice could be mitigated.

See In re Michael K. Schugg, supra; In re Debra Schugg, supra. Because "[t]he discharge of a debt by a bankruptcy court is . . . an *in rem* proceeding," that court's discharge order binds all parties "whether or not [those parties] choose to participate in the proceeding." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447-448 (2004). As a result, the Schuggs forced the Community to appear in court to *prevent* the alienation of its rights.[4]

The Community's filing of a proof of claim does not change that because it is the debtor's objection to a proof of claim (or its opening of an adversary proceeding) that "initiates a contested matter." *In re Fairchild*, 969 F.2d 866, 868 (10th Cir. 1992); *see* 11 U.S.C. § 502(a) ("A claim or interest * * * is deemed allowed, unless a party in interest * * * objects."). Thus, the Trustee is responsible for the litigation before this Court because it filed an adversary proceeding against the Community. And the Community's counterclaims do not change the fact that the Trustee "was the aggressor in this litigation" and the Trustee's "defenses to those counterclaims are mirror images of its [affirmative] claims." *Evans*, 344 F.3d at 1035.

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[4] *See also Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (States are bound by bankruptcy proceedings notwithstanding sovereign immunity); *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997) (sovereign's failure to appeal in federal bankruptcy court "carries with it the consequence of foregoing any challenge to the federal court's actions").

Fourth and finally, the district court's concern that "the Trustee would have no available forum" if the action were dismissed is both wrong and legally insufficient. The court was wrong because the Trustee has a non-judicial mechanism for establishing a legal right of access to Section 16. *See* 25 C.F.R. § 169.1. That procedure not only eliminates the district court's central rationale for allowing the action to proceed, but also underscores the inappropriateness of employing Rule 19(b) to circumvent both the government's sovereign immunity and the non-judicial means of addressing interests in Indian land that was specifically created by Congress to resolve these issues in a manner that preserves its sovereign immunity.

The court's concern that an alternative *judicial* forum must be available is also insufficient as a matter of law. While "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims, * * * that result is contemplated" by the doctrine of sovereign immunity. *Pimentel*, 128 S. Ct. at 2194. Indeed, this Court has "regularly held that the * * * interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002); *see also Dawavendewa*, 276 F.3d at 1162 (listing seven dismissals of cases under Rule 19 notwithstanding the absence of any alternative forum).

E. The Individual Indian Allottees Are Also Indispensable Parties

The Trustee has asserted a right to access Section 16 not only through Community land, but also through allotments held by individual Community members, none of whom were joined. Rule 19 required joinder of the allottees as well because complete relief cannot be afforded in their absence.

First, the Trustee seeks a declaration of the Debtors' right to use, develop, excavate, and expand Murphy and Smith-Enke roads as they cross *both* Community and allotted land, which requires that he obtain a judgment against the competing property rights of the allottees in the land that Murphy and Smith-Enke roads cross. The judgment in this case did not purport to resolve the allottees' claims. [E.R. 21] But litigation that fails to resolve rights that are the linchpin to a claim produces only a semi-adjudication of a legal claim and hinges effective relief entirely on third parties who are not before the court. That is neither the "complete relief" required by Rule 19(a), nor "adequate" relief effectuating the "public stake in settling disputes by wholes," *Pimentel*, 128 S. Ct. at 2193; *see Pit River*, 30 F.3d at 1099.

Second, the allottees' legally protected interests were directly impaired by this litigation. The Trustee has asserted a right not only to cross over the allottees' property, but also to grade, gravel, and pave both roads; to install future utility lines, poles, and other unspecified "facilities" along both roads; and to make any

other "improvements" that he believes are "reasonably necessary" to those roads. [E.R. 114-115] Those claims entail the type of substantial "potential for injury" requiring joinder of the allottees, whose *own* rights in their *own* land will be directly impaired by recognition of the Trustee's requested easement over *their* land. *See Pimentel*, 128 S. Ct. at 2191; *cf. Kescoli v. Babbitt*, 101 F.3d 1304, 1309-1310 (9th Cir. 1996) (Indian tribes were required to be joined due to their interest as lessees in the property at issue).

The district court nevertheless held that the individual allottees were not indispensable parties to litigation diminishing their own property rights "in light of the United States holding the land in trust for their benefit." [E.R. 20]. That makes no sense because the United States – at the district court's order – was also absent from the litigation. The United States cannot protect the allottees' interests if it is not a party to the suit. *See Minnesota*, 305 U.S. at 386 ("[The United States] is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees," and so "the right of way cannot be condemned without making it a party."). The district court cannot have it both ways – permitting the legal rights of individual land owners in their own land to be resolved in litigation to which neither they nor the titleholder of the land participates.[5]

[5] The district court stated that the Community "has offered only conclusory statements concerning the individual allottees' interest in this action." [E.R. 20].

II. THE TRUSTEE HAS NO LEGAL RIGHT TO CROSS RESERVATION TERRITORY TO ACCESS SECTION 16

Even if the case properly proceeded, the court erred in holding that the Trustee has a legal right to use the two cross-Reservation roads that provide access to Section 16 – Murphy and Smith-Enke – without the prior authorization and consent of the United States, the Community, or the individual Indian allottees.

A. Standard Of Review

Whether federal law precludes the finding of an implied easement across Indian lands is a question of law that this Court reviews de novo. *Cf. Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 462 (9th Cir. 1996). Whether the equitable doctrine of laches can be applied affirmatively to preclude defenses and establish legal claims on their merits is also a question of law that this Court review de novo. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 833 (9th Cir. 2002). Application of the laches doctrine to the facts is reviewed for an abuse of discretion. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1125 (9th Cir. 2006).

But, given the obviousness of the allottees' stake in the case and their undisputed absence, there was nothing more to say.

B. Because Congress Provided A Statutory Mechanism For Obtaining Access, The Court Erred In Judicially Implying An Easement

As the district court correctly ruled, the Schuggs have no express easement across Reservation lands to access Section 16. [E.R. 11] Indeed, the Schuggs knew what they were buying. Their contract to purchase Section 16 expressly warned them that "access to the property may be restricted"; "[t]he Seller does not warrant or guarantee access or right-of-ways or easements for access or utilities"; and the Schuggs "acknowledge the limited access and potential problems of being located with[in] the Boundary of the Reservation." [E.R. 358]

The district court likewise properly recognized that there was no implied easement by necessity across the land because Congress created a specific statutory mechanism for obtaining an easement from the federal government, *See* 25 U.S.C. § 323, making implication of an easement unnecessary. [E.R. 26-27]

The district court nevertheless held that the conveyance of Section 16 to Arizona for use as school lands created an implied easement across Indian and Reservation land to support the current use of the land as a dairy.[6] [E.R. 25] The existence of a statutory scheme for obtaining a right of access, however, precluded such judicial implication of an easement.

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[6] In so holding, the district court properly ruled that the question of whether the easement permitted full residential development of Section 16 is unripe for review. [E.R. 27]

Since 1948, the Secretary of the Interior has had the power "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, * * * or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes." 25 U.S.C. § 323. Obtaining such rights-of-way generally requires "the consent of the proper tribal officials," unless the request falls within a recognized exception, and the payment of compensation. 25 U.S.C. §§ 324, 325; *see generally Strate v. A-1 Contractors*, 520 U.S. 438, 454-455 & n.10 (1997); *United States v. Mitchell*, 463 U.S. 206, 223 (1983). Pursuant to that statutory mandate, the Secretary of the Interior has established procedures, terms, and conditions for obtaining a right-of-way across tribal or allotted lands, including conditions designed to protect federal and tribal interests. *See* 25 C.F.R. § 169.1 *et seq.*

That process for obtaining a right-of-way across the Community's land was and is fully available to the Trustee, as the district court specifically found, [E.R. 26], and the existence of that remedial scheme precludes the Trustee's attempted circumvention. "Common law rules" for obtaining easements across federally protected lands "are applicable only when not preempted by statute." *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (*Adams I*); *see Adams v. United States*, 255 F.3d 787 (9th Cir. 2001) (*Adams II*). In both *Adams I* and *Adams II*,

this Court rejected exactly the tactic employed by the Trustee here, holding that plaintiffs cannot avoid statutory permit processes by asserting a common-law easement. *See Adams II*, 255 F.3d at 794 ("[T]he Adamses do not have a common law easement because all common law claims are preempted by [federal statutes]."); *see also Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1263 (9th Cir. 2006) (federal agency may require permit to use road through federal land "regardless of any common law easement held by [landowners]"). That rule applies with special force here, given the primacy afforded to federal law and federal interests when Indian rights in land are at stake. *Cf. Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996) (federal law preempts state jurisdiction "if it interferes or is incompatible with federal and tribal interests reflected in federal law").

The Trustee's common law claim remains preempted even though the statutory scheme was created after the point in time that he asserts the easement arose by implication. The only requirement for preemption is that the statutory scheme be in place at the time the claim is asserted. That is because the whole point of *Adams I* and *Adams II* statutory preemption is that the existence (or not) of a claimed preexisting right of access must be resolved through Congress's prescribed statutory scheme. Indeed, in *Adams I*, the plaintiffs (like the district court here) "contend[ed] that an easement by implication or by necessity was

created when the United States granted the land to their predecessors," which was decades before the federal administrative schemes were created. *Compare Adams I*, 3 F.3d at 1259; *id.* at 1256 (plaintiffs "purchased the property in 1964"), *with* Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (both: creating federal scheme for rights of way). This Court nevertheless held that the age of the asserted right was irrelevant. As long as Congress's statutory scheme exists at the time the right is asserted, the statutory scheme is the proper forum for resolving the question.

In any event, the district court's conclusion ([E.R. 25]) that the implied easement arose when Section 16 was conveyed to Arizona for use as school lands is wrong. The statutes conveying Section 16 to Arizona made no mention of an easement, *see* Act of July 22, 1854, ch. 103, § 5, 10 Stat. 308, 309; R. S. § 1946 (1875), and "[i]n a public grant nothing passes by implication." *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987). Rather, any such grant must be "explicit with regard to the property conveyed." *Ibid.*

Furthermore, even if an implied easement had been created, it would not be silently passed on to subsequent purchasers. *United States v. Clarke*, 529 F.2d 984, 987 (9th Cir. 1976) (any implied easement held by the United States would not pass to subsequent private purchasers in the absence of an express provision).

Indeed, the Schuggs recognized this absence of a pre-existing easement in 2002 when they invoked Congress's prescribed scheme to obtain a utility easement. [E.R. 12, 89, 354] The Trustee can and must do the same.

Finally, the district court's reliance on *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979) ([E.R. 25]), was misplaced. To begin with, *Andrus* involved a claim of access across federal wilderness lands, not across Indian lands, which renders that court's predicate assumption that school land grants should be liberally construed inapplicable. There is no rule of liberal construction when abrogation of Indian land rights is at issue. *See Beecher*, 95 U.S. at 526. Quite the opposite, any diminishment of Indian rights in their land must reflect "an express congressional purpose," *see Solem v. Bartlett*, 465 U.S. 463, 475 (1984), with any ambiguity resolved in favor of the Indians, *see County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

Beyond that, *Andrus* proscribed only those constraints on access that would "destroy the lands' economic value." 486 F. Supp. at 1009. Given the existence of the statutory procedure for obtaining an easement, judicial intervention was not required to preserve the land's value. Indeed, *Andrus* emphasized that the federal government retained the authority to "regulate the manner of access under [federal] statutes." *Ibid.*; *see also Adams I*, 3 F.3d at 1259 (citing *Andrus* for the proposition that "existing rights of access . . . can be regulated since Congress had the

constitutional authority and responsibility to manage federal land"). *Andrus* thus underscores the absence of any basis for judicial implication of an easement across Reservation lands here.

C. The Trustee Has No Legal Right Of Access Over Murphy Road

As an alternative to its implication of an easement, the district court ruled that the Trustee had a legal right of access to Section 16 over the southern section of Murphy Road, because the court deemed that portion of the road to be an Indian Reservation Road ("IRR"), to which the public has access. [E.R. 23] That ruling is fundamentally flawed in two respects.

1. Murphy Road is not an Indian Reservation Road

An IRR is a "public road" – that is, a "road or street under the jurisdiction of and maintained by a public authority and open to public travel," 23 U.S.C. § 101(a)(27) – "that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land," 23 U.S.C. § 101(a)(12). The federal government provides funds for the construction and maintenance of IRRs. 23 U.S.C. § 202(d); 69 Fed. Reg. 43,090 (July 19, 2004). IRRs funded through these appropriations "must be open and available for public use." 25 C.F.R. § 170.120

(2005). The southern portion of Murphy Road does not meet the definition of an IRR for two reasons.[7]

First, the relevant portion of Murphy Road is a dirt road that neither the Community nor any other public authority maintains. [E.R. 9]. While the Community had previously done some maintenance, that was due to the Bureau of Indian Affairs mistakenly characterizing it as an IRR. The Community ceased that maintenance once Murphy Road's status was corrected by the Bureau. *Ibid.*[8]

Second, the southern section of Murphy Road is not open and available for public travel. The Bureau approved the Community placing "No Trespassing" signs around the southern section of Murphy Road and Community law enforcement officers have issued civil trespass citations to individuals traveling on that section. [E.R. 295-296]

Indeed, the Bureau – which is the agency charged with administering the IRR Program, *see* 69 Fed. Reg. 43,090 – has determined that the southern portion of Murphy Road is not an IRR. [E.R. 65-71]. While that decision has been stayed and administratively appealed, the district court's decision to ignore that agency

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[7] Murphy Road is a north-south dirt road that runs adjacent to the eastern boundary of Section 16. *See* Addendum D; E.R. 8, 351. Only the southern portion of Murphy Road (from Casa Blanca Road south to the boundary of the Reservation) is at issue in this case.

[8] At one point, the entirety of Murphy Road was included in the Bureau's inventory of IRRs, but the Bureau subsequently recognized its error and "officially removed" the portion of Murphy Road at issue here from the inventory. [E.R. 11]

viewpoint entirely was wrong. The Bureau has primary jurisdiction over such matters. *See Golden Hill Paugussett Tribe*, 39 F.3d at 60 (deferring to the Bureau's determination of tribal status); *cf. Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113, 114-115 (1973) (per curiam) (agency has primary jurisdiction over issues that "lay at the heart of the task assigned the [agency] by Congress"). The proper course for the district court was either to abstain pending the agency determination or to defer to the present Bureau position. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (when primary jurisdiction applies, "the court either stays the proceedings or dismisses the case without prejudice, so that the parties may seek an administrative ruling").

2. Laches cannot transform Murphy Road into an Indian Reservation Road

The district court held that, regardless of whether Murphy Road was an IRR as a matter of law or fact, it would hold that the southern portion of Murphy Road was an IRR because the doctrine of laches barred the Community from arguing otherwise. [E.R. 22-23] But that use of laches *affirmatively* to silence a defense and to establish a legal right of access through Indian land is as wrong as it is unprecedented.

Laches is an equitable doctrine designed to debar a plaintiff who waited too long to assert its rights from receiving equitable relief against a defendant. The doctrine ensures that those who come to court seeking its intervention do so in a

timely manner that does not prejudice the defendant's ability to defend itself. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001).

The laches doctrine, however, has never been understood to constrain the ability of *defendants* like the Community to respond to and defend against a plaintiff's claims. It is the duty of the plaintiff to show that it is entitled to the court's intervention; the defendant has no corresponding duty to prove its entitlement to defend itself after being involuntarily haled into court. That is why laches "is a shield of equitable defense rather than a sword for the investiture or divestiture of legal title or right." *Halcon Int'l, Inc. v. Monsanto Australia, Ltd.*, 446 F.2d 156, 159 (7th Cir. 1971). Laches "cannot be invoked by [a] plaintiff to bar rights asserted by [a] defendant merely by way of defense." *Northern Pac. Ry. Co. v. United States*, 277 F.2d 615, 624 (10th Cir. 1960); *cf. United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72 (1956) (statute of limitations cannot be used "to cut off the consideration of a particular defense in the case"). The burden of proof thus rested at all times on the Trustee to establish a right of access over Murphy Road, and nothing in the doctrine of laches prevented the Community from defending against that claim.

That the Community also filed counterclaims in response to the Trustee's litigation is beside the point. First, laches does not bar a defendant's counter-claims when they "were filed in response to the [plaintiff's] claims, not as affirmative claims for relief." *Evans*, 344 F.3d at 1035. The Trustee is "the

aggressor in this litigation," *ibid.*, and so cannot assert laches against the Community's defensive counterclaims.

Second, the district court did not find that the Community's counterclaims were barred by the statute of limitations, and the Trustee never moved to dismiss the counterclaims on that ground. Yet "[l]aches is not a defense to an action filed within the applicable statute of limitations." *United States v. Milstein*, 401 F.3d 53, 63 (2d Cir. 2005); *see United States v. Mack*, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law."); *Jarrow*, 304 F.3d at 835 ("If the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable.").

Third, even if the Community's counterclaims were debarred by laches, that would simply require dismissal of *the Community's* claims. It would not relieve the Trustee of his affirmative obligation to prove *his* legal claim that Murphy Road is an IRR. Laches is a limitation on equitable *relief* sought by a party. It cannot be used offensively to establish legal *rights* that otherwise would not exist. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005) (under laches, "[t]he distinction between a claim or substantive right and a remedy is fundamental"). Yet that is exactly what the district court did, holding that, "[a]s a result" of laches, the Trustee "has shown that Murphy Road * * * is an [IRR]." [E.R. 22-23]

Fourth, the offensive use of laches is particularly inappropriate against Indian tribes. Courts have long been reluctant to apply laches against the property claims of Indian tribes at all, out of respect both for the Tribes' sovereign status and for the primacy of federal law. *See County of Oneida*, 470 U.S. at 245 n.16 (1985) ("It is questionable whether laches properly could be applied."); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922) ("[T]he equitable doctrine of laches * * * cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."). While the Supreme Court applied the laches doctrine to bar certain property claims by Indian tribes in *Sherrill*, in that case, the Tribe was the plaintiff seeking equitable relief, and the doctrine was used defensively. 544 U.S. at 217. To the Community's knowledge, the doctrine has *never* been applied offensively to prohibit Indians from defending their rights in their own land.[9]

Moreover, "[i]t is well settled that the United States is not * * * subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *see Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939) ("[S]tate notions of laches * * * have no applicability to suits by the

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[9] Nor would the narrow determination of whether a three-mile stretch of Murphy Road provides access to a single landowner's plot of land entail the type of extraordinary disruption that the relief sought in *Sherrill* would have occasioned. *See* 544 U.S. at 202.

Government, whether on behalf of Indians or otherwise."). Because the United States holds title to the land at issue here, the district court erred in relying on laches to carve an easement out of that land.

Finally, the district court's application of laches fails on its own terms. The defense of laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961); *United States v. Dang*, 488 F.3d 1135, 1144 (9th Cir. 2007). Neither exists here.

There has been no lack of diligence on the part of the Community. Quite the opposite, the Community erected "no trespassing" signs adjacent to Murphy Road, and its police force issued warnings and citations to trespassers on the road. [E.R. 295-296] The district court stressed the Bureau's mistaken designation of the southern portion of Murphy Road as an IRR, but mistakes by a third party make the application of laches less, not more, appropriate. *See Coalition for Canyon Pres. v. Bowers*, 632 F.2d 774, 799 (9th Cir. 1980) ("An essential part of the diligence requirement is proof of knowledge of a legal right, assertion of which is delayed."); *cf. In re Beaty*, 306 F.3d 914, 927 (9th Cir. 2002) ("Delay for the purpose of awaiting a change of previously unfavorable law is reasonable delay for purposes of laches."). Beyond that, the district court should have given the

Bureau's determination that the southern portion of Murphy is not an IRR at least as much weight.

Nor have the Schuggs been prejudiced by the Community's failure to initiate litigation against them. The Schuggs' purchase contract put them on full notice that they had no established right of access. [E.R. 7] Similarly, the title insurance policy expressly excluded coverage for "the lack of a legal right of access * * * to and from said land." [E.R. 356] During the operation of the dairy farm, Community officials expressly informed the Debtors that "there was no legal access to Section 16" and that the Community's consent was required to obtain access. [E.R. 12] Finally, because there was a statutory and administrative mechanism available to the Schuggs and the Trustee at all times to determine their right of access – a process that they were fully aware of but never bothered to invoke – any prejudice that might have resulted from any lingering uncertainty was self-inflicted.

III. THE COMMUNITY RETAINS ZONING AUTHORITY TO PREVENT THE DEVELOPMENT OF A HIGH-DENSITY SUBURBAN SUBDIVISION IN THE MIDDLE OF ITS RESERVATION

A. Standard of Review

Whether a dispute is ripe is a question of law that this Court reviews de novo. *See Chang v. United States*, 327 F.3d 911, 921 (9th Cir. 2003). Whether a Tribe has zoning authority over the conduct of non-Indians within Reservation land is also a question of law that this Court reviews de novo. *See Arizona Pub. Serv.*

Co. v. Aspaas, 77 F.3d 1128, 1132 (9th Cir. 1995). The district court's findings of fact are reviewed for clear error. *See Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 535 (9th Cir. 1987), *aff'd in part, rev'd in part* by *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

B. The District Court's Limitation Of The Community's Zoning Authority Was Not Ripe For Review

Even if the Trustee has legal access to Section 16, the Community retains the authority to regulate and prevent the Trustee's usage of Section 16 in a manner that would substantially harm the interests, safety, integrity, and culture of the Community and its members, and the district court's limitation on that authority was erroneous.

As an initial matter, the district court properly ruled that the Trustee's challenge to the Community's zoning authority was unripe. [E.R. 28] Because Pinal County has refused to alter the zoning of Section 16 to permit new and substantial housing development, [E.R. 14], and because "there are no current plans to sell Section 16 to a developer and no current plans to construct residential homes on Section 16," [E.R. 27-28], the question of the Community's authority to regulate such development is insufficiently concrete to permit its determination at this time. Claims that are "contingent [upon] future events that may not occur as

anticipated, or indeed may not occur at all, are not ripe for adjudication." *Texas v. United States*, 523 U.S. 296, 300 (1998).

The district court, however, went on to rule in the alternative that substantial suburban development of Section 16 would not implicate the Community's zoning authority. [E.R. 28] That was wrong. Ripeness goes to the existence of an Article III case or controversy and, as such, is a jurisdictional (as well as prudential) limitation on the court's authority. *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (2003). The district court thus was not free to offer an advisory ruling on the existence of the Community's zoning authority, and that aspect of its judgment should be vacated. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1452 (2007).

C. The Community Has The Authority To Regulate Usages That Substantially Affect Tribal Lands And Roads

Even if the question were ripe, the court's ruling was wrong. The Community may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). That regulatory authority is necessary because "certain activities on non-Indian fee land * * * or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule." *Plains Commerce Bank v. Long Family*

Land and Cattle Co., 128 S. Ct. 2709, 2723 (2008). In particular, the imposition of zoning regulations on land held by non-Indians in "the heart of [a] closed portion of the reservation" falls within the legitimate scope of Tribal authority. *Brendale*, 492 U.S. at 440 (plurality opinion of Stevens, J.); *see id.* at 458-459 (opinion of Blackmun, J.); *see also Plains Commerce*, 128 S. Ct. at 2722 (noting the *Brendale* exception).

This case falls squarely under *Brendale* and *Plains Commerce*. The Community seeks recognition of its authority to regulate and zone the "commercial development," *Plains Commerce*, 128 S. Ct. at 2723, of a plot of land within the "heart" of its Reservation, *Brendale*, 492 U.S. at 440 (Stevens, J.), to avert degradation of the Community's surrounding agrarian uses, culture, and identity. In addition, the Community's already limited public safety resources would be strained to the breaking point by the influx of 2250 suburban families traversing Reservation lands daily. [E.R. 14]

More specifically, the residential development sought by the Trustee would flood the Reservation area with 8000 new residents (the Community's own population is just 12,000), in 2250 new homes, and put 4000 new automobile commuters on Community roads and land. [E.R. 14, 352-353] Such a profound departure from the historically agrarian and very limited use of Section 16 – and all of the new power, water, utility, public safety, policing, and other community

support demands that such development would entail – would impose enormous costs on the Community, would fundamentally change the character of its Reservation, and would introduce new and substantial civil and criminal regulatory obligations on the Community's already strained resources.

In particular, the Community's already small, 80-member police force would be overwhelmed. Even now, the Community relies on just five to seven officers at any given time to patrol 372,000 acres of predominantly agrarian land. [E.R. 3, 16, 74] The large size of the Reservation and the small number of patrolling officers already prevents the Community's police force from regularly patrolling Murphy and Smith-Enke roads. [E.R. 17] An influx of thousands of additional residents and cars, and the concomitant rise in traffic, would strain the force to its breaking point, forcing the Community to divert more of its resources away from Community needs and into policing the influx of non-Indian residents and commuters. The Community's 13-member emergency medical services staff would be similarly overrun by the increased population and traffic, which would directly imperil the health and safety of Community members. [E.R. 16, 77-79] That need for substantial "added police and fire protection" supports the Community's zoning authority. *Brendale*, 492 U.S. at 420 n.5 (Stevens, J.).

In addition, by situating a densely populated residential parcel in the middle of agricultural land farmed by the Community and individual Indian allottees, the

suburban development of Section 16 would necessarily intrude on the agricultural uses of the surrounding Reservation land, interfering with "an otherwise coherent scheme of land use," that is consonant with the Community's agrarian heritage and culture. *Brendale*, 492 U.S. at 446; *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) (reservations were created "to provide a homeland for the Indians to maintain their agrarian society"). Were Section 16 converted to residential use, parcels of Indian land to the south and west of Section 16 would be surrounded on at least two sides by residential properties, largely foreclosing the use of pesticides and thus severely constraining, if not prohibiting, the agricultural development of that land. That would "pose[] such serious and substantial threats" to the Community's "welfare that Tribal regulation [is] essential." *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998). "Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often unilaterally – destructive." *Brendale*, 492 U.S. at 433 (Stevens, J.).

Indeed, the Community's entitlement to regulatory authority is even stronger than in *Brendale* because there can be no development at all of Section 16 without traversing Community lands and roads directly under Community policing and control. The Community has the inherent and sovereign authority to regulate

"activities that occur on land owned and controlled by the tribe." *Nevada v. Hicks*, 533 U.S. 353, 392 (2001); *see Plains Commerce*, 128 S. Ct. at 2719; *Adams I*, 3 F.3d at 1259. Any new development of Section 16 – particularly one that anticipates significantly altering its current agricultural status and exponentially increasing Section 16's population by approximately 7000%– will necessarily have a profound impact on the roads that provide access to Section 16, the Indian lands that they cross, and the Community public-safety resources that are consumed. The regulation of Section 16 is thus inextricably and directly intertwined with the exercise of sovereignty over the Tribal land and roads providing access to Section 16 and over Community resources. *See Plains Commerce*, 128 S. Ct. at 2723 ("[C]ertain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight.").[10]

The district court, however, denied the Community's zoning authority because Section 16 "is close to the City of Maricopa, which is undergoing rapid residential and commercial development." [E.R. 28] The court was correct that such geography is relevant, but only in a way that undermines its ruling. The whole point of setting Reservation land aside for Indian Tribes is that the Tribes are given the control and thus the right to resist such creeping assimilation and

[10] For purposes of this appeal, the Community does not dispute the district court's holding that the current agricultural use of Section 16 as a dairy farm is consistent with the Tribe's sovereign interests. *See* [E.R. 12].

penetration and to preserve within their boundaries – no matter how close those boundaries are to a municipal development – the Tribe's unique land and culture. The relevant question is not whether the land at issue is at the epicenter or the outskirts of the Reservation; it is whether zoning authority is needed to preserve "the essential character of the territory." *Brendale*, 492 U.S. at 445. That is all the Community seeks to do here, and the district court erred in holding that the Community must succumb to surrounding development and open its Tribal land and roads under Tribal control to suburban development.

IV. THE COMMUNITY HAS ABORIGINAL TITLE TO SECTION 16.

Underlying the Trustee's claims of legal access to Section 16 is the contention that the Schuggs have full legal title to Section 16. They do not. Any claim to Section 16 is subject to the Community's right of aboriginal title, which has never been extinguished.

A. Standard of Review

Whether aboriginal title has been extinguished is a question of law that is reviewed *de novo,* under the same summary judgment standard applied by the district court. *See Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir.1997). This Court also reviews *de novo* whether collateral estoppel bars litigation of a claim. *Maciel v. C.I.R.*, 489 F.3d 1018, 1023 (9th Cir. 2007).

B. The Community Holds Aboriginal Title To Section 16

Aboriginal title is a right of use and occupancy that the Community holds to "lands they . . . inhabited from time immemorial." *County of Oneida*, 470 U.S. at 234. While other, later-arriving nations (like the United States) became vested with fee title to the lands, that title remained "subject to the Indians' right of occupancy and use," *ibid.*, and that right is "as sacred as the fee simple of the whites," *id.* at 235 (quoting *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)). The right of Indian nations to "the exclusive possession of their lands" has been "unquestioned" and "reaffirmed consistently" by the Supreme Court since the United States' earliest days. *Oneida*, 470 U.S. at 235; *see Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) ("[Indian Tribes] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (Indians "have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished.").

That right of occupancy can "only be interfered with or determined by the United States," *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941), and congressional action extinguishing aboriginal title must be "plain and unambiguous," *id.* at 346. Extinguishment "cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.* at 354. Accordingly, any "doubtful expressions * * * are to be

resolved in favor of a weak and defenseless people, who are wards of the nation and dependent wholly upon its protection and good faith." *Ibid.*

There is no dispute that the Community's aboriginal title attached to Section 16. Since time immemorial, the Community has held aboriginal title to more than 3.75 million acres of land, including Section 16, in south-central Arizona. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm. 301, 335 (1970).

C. Aboriginal Title To Section 16 Has Never Been Extinguished

The United States has never plainly and unambiguously extinguished the Community's aboriginal title to Section 16.

First, no statute, treaty, resolution, or other express congressional direction has ever extinguished the Community's aboriginal title to Section 16. That silence is telling because "the United States Code displays throughout that," when Congress wishes to extinguish aboriginal title, it knows how to "say[] so." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995).[11]

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[11] *See, e.g.*, 43 U.S.C. § 1603 (providing for "Aboriginal title extinguishment" and "extinguishment of the aboriginal title"); *ibid.* ("All aboriginal titles, if any, and claims of aboriginal title in Alaska * * * are hereby extinguished."); 25 U.S.C. § 1705(a)(2) (providing for "extinguishment of such aboriginal title"); 25 U.S.C. § 1723(b) (same).

Second, aboriginal title survived the reservation of Section 16 as school land. Nothing in the statutes conveying and later reaffirming the reservation of Section 16 as school land mentioned – let alone, plainly and unambiguously extinguished – aboriginal title, as the Supreme Court itself has recognized. *See Santa Fe*, 314 U.S. at 349-350 (statutes reserving Section 16 as school land "did not extinguish any Indian title based on aboriginal occupancy"); *see also* 10 Stat. 308, 309 § 5; Rev. Stat. of 1873-1874, § 1946. Indeed, Congress statutorily preserved the Community's aboriginal title even after Section 16's reservation as school land. Section 20 of the Enabling Act of June 20, 1910, which authorized Arizona's admission to the Union, expressly recognized and preserved the Indians' aboriginal title to their lands:

> [T]he people inhabiting said proposed State do agree and declare that * * * until the title of such Indian or Indian tribes shall have been extinguished the same shall remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Id. § 20, 36 Stat. 557, 569.

The district court reasoned that the bare act of transferring Section 16 to the Territory of Arizona for the support of common schools extinguished aboriginal title. [E.R. 38-39]. The short answer is that the Supreme Court has ruled exactly the opposite, holding that transfers of land for school purposes "vest in the State the fee to" the land "subject * * *, as in all other cases of grants of public lands, to the existing occupancy of the Indians." *Beecher v. Wetherby*, 95 U.S. 517, 526

(1877); *see Santa Fe, supra* (statutes reserving Section 16 as school lands did not extinguish aboriginal title); *United States v. Thomas*, 151 U.S. 577, 583 (1894) ("The general rule * * * in reference to the school lands in the different states is that the title to them vests in the several states * * *, subject to any prior right of occupation by the Indians."); *Wisconsin v. Hitchcock*, 201 U.S. 202, 214 (1906) (same).

The longer answer (if more were needed) is that the extinguishment of aboriginal title cannot be so lightly implied. It must be explicit. *Santa Fe*, 314 U.S. at 353-354. And any such implication is, by definition, ambiguous, triggering the rule that any doubt regarding congressional intent must be resolved in favor of preserving the Community's title. *Id.* at 354.

The trial court relied ([E.R. 37-38]) on *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 641 (1987) and *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977). But both of those cases hurt, rather than help, the Trustee's cause.

In finding that aboriginal title was extinguished in *Zuni Tribe*, the Claims Court relied not upon implicit assumptions, but on several specific acts and omissions of the United States that "resulted in the loss of aboriginal land." 12 Cl. Ct. at 660. While one of the cited actions was the granting of school lands, the court tellingly did not consider that alone to be sufficient (nor could it have, in light of Supreme Court precedent). What was critical was that the grant of school

lands was both preceded and accompanied by numerous acts by the government and rival tribes asserting exclusive dominion and control over the lands occupied by the Zunis, such as the United States granting allotments to individuals who actively prevented the Zunis from controlling their lands. *Id.* at 653-654 & n.14. *Zuni* thus highlights the types of explicitly exclusionary actions required to extinguish aboriginal title, none of which occurred with respect to Section 16. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm'n 301, 336 (1970) (finding that the Community did not abandon any part of its tribal land).

The court's reliance on *Atlantic Richfield* fares no better. Extinguishment in that case was effected by Congress's passage of the Alaska Native Claims Settlement Act, which contained the very type of clear expression of congressional intent required to extinguish aboriginal title and that is missing in the case at hand. *See* 43 U.S.C. § 1603.

Finally, the district court cited the proceedings before the Indian Claims Commission in *Gila River Pima-Maricopa Indian Cmty. v. United States*, 27 Ind. Cl. Comm'n 11 (1972), which concluded that the transfer of land to settlers extinguished aboriginal title to certain portions of the Community's aboriginal land. [E.R. 38]. The trial court's reliance on the Indian Claims Commission's decision was misplaced for several reasons.

To begin with, the Commission's conclusion that the ownership of the tribal land by settlers alone was sufficient to extinguish aboriginal title defied Supreme Court precedent. *See Santa Fe, supra; Hitchcock, supra; Thomas, supra; Beecher, supra.* In refusing to follow the holdings of those cases, the trial court relied upon a purported dichotomy between claims of Indian title pursuant to treaty and claims of Indian title pursuant to aboriginal title. [E.R. 38]. But that distinction lacks any legal basis. The Supreme Court's decision in *Beecher* itself, for example, involved aboriginal title, not treaty-based title. Nor would such a distinction make any sense, given that the rules, as well as the underlying rationale, governing the extinguishment of Indian title based on aboriginal title and based on treaty do not differ in any material respect. *See United States v. Dion*, 476 U.S. 734, 738-739 (1986) (applying same abrogation rule for claims based on Indian treaty rights).

Beyond that, the Commission proceeding concerned only the question of when, *not* whether, the Community's aboriginal title to the lands given to settlers was extinguished. *See* 27 Ind. Cl. Comm'n at 11 ("Here at issue is the determination of the date of extinguishment of plaintiffs' aboriginal title."). Indeed, unlike Section 16, the Community did not assert before the Commission any continuing title to those lands. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm'n 301 (1970). Thus, to the extent it discussed the law of extinguishment, the Commission's decision was dicta of no persuasive value.

D. The Community's Claim of Aboriginal Title Has Been Preserved

The district court ruled, in the alternative, that the earlier Indian Claims Commission proceeding collaterally estopped the Community from asserting aboriginal title. [E.R. 41] That argument fundamentally misunderstands the role of the Commission and the nature of the proceeding before it.[12]

The most essential element of issue preclusion is that the "identical" issue be both actually adjudicated and essential to the judgment in earlier litigation between the same parties. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). That essential element is missing here.

First, the extinguishment of title was not and could not have actually been adjudicated by the Commission because it was not vested with and had no power to extinguish aboriginal title. The Commission's sole charge was to compute and provide compensation for takings of land and extinguishments that had already occurred outside of and external to its proceedings and for which the Tribes sought compensation. *United States v. Dann*, 706 F.2d 919, 928 (9th Cir. 1983) ("It was not within the jurisdiction of the Indian Claims Commission to extinguish Indian title on its own authority, nor did the Commission purport to exercise such jurisdiction."), *rev'd on other grounds by* 470 U.S. 39 (1985); *Navajo Tribe of*

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[12] The burden of establishing those factors rests squarely on the Trustee. *See Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (9th Cir. 1980).

Indians v. New Mexico, 809 F.2d 1455, 1461 (10th Cir. 1987) (Commission has "one definite purpose"; Tribes "either get an award in cash or their case is dismissed").

Thus, until the Community's claim of aboriginal title to Section 16 had been extinguished by Congress, there was no mechanism for it to present the issue of Section 16's status to the Commission or to seek compensation for an interest in land that, in fact, the Community still retained. Indeed, in *Yakima Tribe of Indians v. United States*, 5 Ind. Cl. Comm'n 661, 663, 676 (1957), the Commission itself held that a party could not seek compensation or relief from the Commission for land when aboriginal title had not yet been extinguished.

Second, the Community never sought compensation from the Commission for Section 16 or in any way indicated that its title in that land had been extinguished (and thus was compensable), and the Claims Court itself explained that "Section 16 was not specifically identified in the ICC proceedings." *Gila River Pima-Maricopa Indian Cmty.*, 2 Cl. Ct. at 16. The issue of extinguishment of aboriginal title in that land thus was not raised, was not litigated, was not adjudicated and thus, perforce, was not part of, let alone essential to, the Commission's decision. *See Gila River*, 27 Ind. Cl. Comm'n at 11.

Nor was the Section 16 parcel included in the award area for which the United States was paid compensation. In determining the award area, the Claims Court found that GRIC had once held aboriginal title to a total area of 3,751,000

acres. *Gila River Pima-Maricopa Indian Cmty.*, 2 Cl. Ct. at 16. The Commission then subtracted from its calculation of compensable land, *inter alia*, all of the area within the boundaries of the Gila River Indian Reservation (372,022 acres), *including Section 16. Ibid.* Furthermore, the Commission proceedings never expressly identified Section 16 as land for which aboriginal title had been extinguished or as land for which compensation was to be paid. Thus, contrary to the Trustee's argument and contrary to the trial court's conclusion, the Community has never received any compensation for any purported extinguishment of title to Section 16, and the Trustee thus has failed to carry his burden of establishing issue preclusion. *See Catholic Soc. Servs., Inc. v. INS.*, 232 F.3d 1139, 1152-53 (9th Cir. 2000) (although court in prior action analyzed statute at issue and "appear[ed]" to reach the issue, decision was too unclear to conclude that issue was "actually and necessarily" decided); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1520 (9th Cir. 1987) (collateral estoppel not available because it was not clear that the issue was actually litigated); *see also Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 245-246 (1991) (earlier decision too unclear to preclude relitigation).[13]

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[13] The trial court's reliance on *Western Shoshone National Council v. Molini,* 951 F.2d 200 (9th Cir. 1991), is misplaced. *Western Shoshone* concerned the question whether an award paid by the federal government for an agreed upon area of land precluded a later action against a State, and whether certain hunting

Third, the district court seemed to equate any assertion of continued title in Section 16 in this case with a request for compensation for a taking of that land (governed by the Claims Commission proceedings). But that is not what this case is about. The Community is not seeking compensation from the United States, but is asserting continued aboriginal title to land for which the Trustee has claimed title. Indeed, because aboriginal title remains, there was nothing for the Commission to compensate, and the district court's *assumed* prior compensation for an *assumed* prior extinguishment of aboriginal title based on the *assumed* presentation of such a claim to the Commission and the Commission's *assumed* authority to make such a ruling collapses on itself.

CONCLUSION

For the foregoing reasons, the judgment of the district court with respect to indispensable parties, the Trustee's right of access to Section 16, the Community's zoning authority, and aboriginal title should be reversed.

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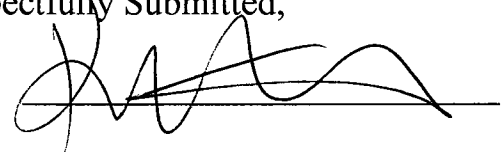
and fishing rights survived the extinguishment of title. *Id.* at 202. The case did not involve a dispute over whether certain lands were included in an award.

Respectfully Submitted,

By: 

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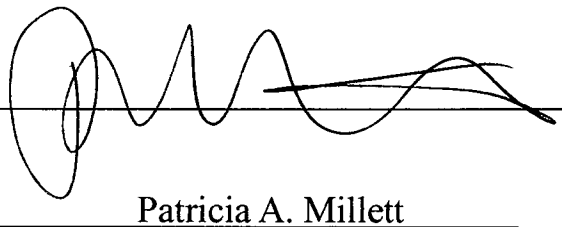
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief of Appellant/Cross-Appellee Gila River Indian Community is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,778 words.

(s) 

Patricia A. Millett
Counsel for Appellant/Cross-Appellee
September 8, 2008

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Gila River Indian Community states that there are no known related cases pending in this court.

CERTIFICATE OF SERVICE

I hereby certify that an original and fifteen (15) copies of the foregoing Opening Brief of Appellant/Cross-Appellee Gila River Indian Community and five (5) copies of the accompanying excerpts of record were filed on this 8th date of September 2008 via overnight delivery addressed to the Clerk's Office, U.S. Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103-1526.

I hereby further certify that two (2) true and correct copies of the foregoing Opening Brief of Appellant/Cross-Appellee Gila River Indian Community and one (1) copy of the accompanying excerpts of record were served via overnight delivery on this 8th day of September, 2008, to:

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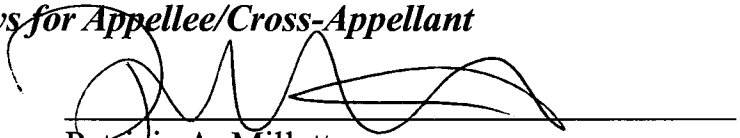

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ADDENDUM A

Westlaw.

Federal Rules of Civil Procedure Rule 19

C
UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE **FOR THE UNITED STATES DISTRICT COURTS**
TITLE IV. PARTIES

→**Rule 19. Required** Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) 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:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

Amendments received to 08-01-08

END OF DOCUMENT

ADDENDUM B

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 1, 62 Stat. 17.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C.A. § 461 et seq.]; the Act of May 1, 1936 (49 Stat. 1250) [25 U.S.C.A. §§ 473a, 496]; or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C.A. § 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 2, 62 Stat. 18.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 3, 62 Stat. 18.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 326. Laws unaffected

Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838) [16 U.S.C.A. § 791a et seq.], nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 4, 62 Stat. 18.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under sections 323 to 328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 5, 62 Stat. 18.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

Westlaw.

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 8. Rights-of-Way through Indian Lands
§ 328. Rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title.

CREDIT(S)

(Feb. 5, 1948, c. 45, § 6, 62 Stat. 18.)

Current through P.L. 110-316 (excluding P.L. 110-234, 110-246, 110-289, 110-314, and 110-315) approved 8-14-08

END OF DOCUMENT

ADDENDUM C

Westlaw.

25 C.F.R. § 169.1

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
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→§ 169.1 Definitions.

As used in this Part 169:

(a) Secretary means the Secretary of the Interior or his authorized representative acting under delegated authority. Before proceeding under these regulations anyone desiring a right-of-way should inquire at the Indian Agency, Area Field Office, or other office of the Bureau of Indian Affairs having immediate supervision over the lands involved to determine the identity of the authorized representative of the Secretary for the purposes of this part 169.

(b) Individually owned land means land or any interest therein held in trust by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance.

(c) Tribe means a tribe, band, nation, community, group or pueblo of Indians.

(d) Tribal land means land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance, and includes such land reserved for Indian Bureau administrative purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

(e) Government owned land means land owned by the United States and under the jurisdiction of the Secretary which was acquired or set aside for the use and benefit of Indians and not included in the definitions set out in paragraphs (b) and (d) of this section.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.1, 25 CFR § 169.1

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25 C.F.R. § 169.1

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25 C.F.R. § 169.2

C

Effective: [See Text Amendments]

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→ § 169.2 Purpose and scope of regulations.

(a) Except as otherwise provided in § 1.2 of this chapter, the regulations in this Part 169 prescribe the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land and Government owned land may be granted.

(b) Appeals from administrative action taken under the regulations in this Part 169 shall be made in accordance with Part 2 of this chapter.

(c) The regulations contained in this Part 169 do not cover the granting of rights-of-way upon tribal lands within a reservation for the purpose of constructing, operating, or maintaining dams, water conduits, reservoirs, powerhouses, transmission lines or other works which shall constitute a part of any project for which a license is required by the Federal Power Act. The Federal Power Act provides that any license which shall be issued to use tribal lands within a reservation shall be subject to and contain such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of such lands. (16 U.S.C. 797(e)). In the case of tribal lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), the Federal Power Act requires that annual charges for the use of such tribal lands under any license issued by the Federal Power Commission shall be subject to the approval of the tribe (16 U.S.C. 803(e)).

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.2, 25 CFR § 169.2

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25 C.F.R. § 169.3

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→§ 169.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when

(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

(2) The land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant;

(3) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant;

(4) The heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof;

(5) The owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

[36 FR 14183, July 31, 1971. Redesignated at 47 FR 13327, Mar. 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C.F.R. § 169.3

25 C. F. R. § 169.3, 25 CFR § 169.3

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25 C.F.R. § 169.4

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§ 169.4 Permission to survey.

Anyone desiring to obtain permission to survey for a right-of-way across individually owned, tribal or Government owned land must file a written application therefor with the Secretary. The application shall adequately describe the proposed project, including the purpose and general location, and it shall be accompanied by the written consents required by § 169.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover twice the estimated damages which may be sustained as a result of the survey. With the approval of the Secretary, a surety bond may be substituted in lieu of a check or money order accompanying an application, provided the company issuing the surety bond is licensed to do business in the State where the land to be surveyed is located. The application shall contain an agreement to indemnify the United States, the owners of the land, and occupants of the land, against liability for loss of life, personal injury and property damage occurring because of survey activities and caused by the applicant, his employees, contractors and their employees, or subcontractors and their employees. When the applicant is an agency or instrumentality of the Federal or a State Government and is prohibited by law from depositing estimated damages in advance or agreeing to indemnification, the requirement for such a deposit and indemnification may be waived providing the applicant agrees in writing to pay damages promptly when they are sustained. An application filed by a corporation must be accompanied by a copy of its charter or articles of incorporation duly certified by the proper State official of the State where the corporation was organized, and a certified copy of the resolution or bylaws of the corporation authorizing the filing of the application. When the land covered by the application is located in a State other than that in which the application was incorporated, it must also submit a certificate of the proper State official that the applicant is authorized to do business in the State where the land is located. An application filed by an unincorporated partnership or association must be accompanied by a certified copy of the articles of partnership or association, or if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Secretary an application accompanied by the evidence required in this section, a reference to the date and place of such filing, accompanied by proof of current financial responsibility and good faith, will be sufficient. Upon receipt of an application made in compliance with the regulations of this Part 169, the Secretary may grant the applicant written permission to survey.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C.F.R. § 169.4

25 C. F. R. § 169.4, 25 CFR § 169.4

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Effective: [See Text Amendments]

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→§ 169.5 Application for right-of-way.

Written application identifying the specific use requested shall be filed in duplicate with the Secretary. The application shall cite the statute or statutes under which it is filed and the width and length of the desired right-of-way, and shall be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant. An application filed by a corporation must be accompanied by a copy of its charter or articles of incorporation duly certified by the proper State official of the State where the corporation was organized, and a certified copy of the resolution or bylaws of the corporation authorizing the filing of the application. When the land covered by the application is located in a State other than that in which the applicant was incorporated, it must also submit a certificate of the proper State official that the applicant is authorized to do business in the State where the land is located. An application filed by an unincorporated partnership or association must be accompanied by a certified copy of the articles of partnership or association, or if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Secretary an application accompanied by the evidence required by this section, a reference to the date and place of such filing will be sufficient. Except as otherwise provided in this section, the application shall be accompanied by a duly executed stipulation, in duplicate, expressly agreeing to the following:

(a) To construct and maintain the right-of-way in a workmanlike manner.

(b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to § 169.4, determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right-of-way.

(c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.

(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.

(e) To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project.

(f) To take soil and resource conservation and protection measures, including weed control, on the land covered

by the right-of-way.

(g) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.

(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(i) That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.

(j) To at all times keep the Secretary informed of its address, and in case of corporations, of the address of its principal place of business and of the names and addresses of its principal officers.

(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.

When the applicant is the U.S. Government or a State Government or an instrumentality thereof and is prohibited by law from executing any of the above stipulations, the Secretary may waive the requirement that the applicant agree to any stipulations so prohibited.

[33 FR 19803, Dec. 27, 1968, as amended at 45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.5, 25 CFR § 169.5

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25 C.F.R. § 169.6

C

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→§ 169.6 Maps.

(a) Each application for a right-of-way shall be accompanied by maps of definite location consisting of an original on tracing linen or other permanent and reproducible material and two reproductions thereof. The field notes shall accompany the application, as provided in § 169.7. The width of the right-of-way shall be clearly shown on the maps.

(b) A separate map shall be filed for each section of 20 miles of right-of-way, but the map of the last section may include any excess of 10 miles or less.

(c) The scale of maps showing the line of route normally should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary and when an increase in scale cannot be avoided through the use of separate field notes, but the scale must not be increased to such extent as to make the maps too cumbersome for convenient handling and filing.

(d) The maps shall show the allotment number of each tract of allotted land, and shall clearly designate each tract of tribal land affected, together with the sections, townships, and ranges in which the lands crossed by the right-of-way are situated.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.6, 25 CFR § 169.6

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25 C.F.R. § 169.7

C

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§ 169.7 Field notes.

Field notes of the survey shall appear along the line indicating the right-of-way on the maps, unless the maps would be too crowded thereby to be easily legible, in which event the field notes may be filed separately on tracing linen in such form that they may be folded readily for filing. Where field notes are placed on separate tracing linen, it will be necessary to place on the maps only a sufficient number of station numbers so as to make it convenient to follow the field notes. The field notes shall be typewritten. Whether endorsed on the maps or filed separately, the field notes shall be sufficiently complete so as to permit the line indicating the right-of-way to be readily retraced on the ground from the notes. They shall show whether the line was run on true or magnetic bearings, and, in the latter case, the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.7, 25 CFR § 169.7

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25 C.F.R. § 169.7

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→§ 169.7 Field notes.

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SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.7, 25 CFR § 169.7

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25 C.F.R. § 169.8

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§ 169.8 Public survey.

(a) The terminal of the line of route shall be fixed by reference of course and distance to the nearest existing corner of the public survey. The maps, as well as the engineer's affidavit and the certificate, shall show these connections.

(b) When either terminal of the line of route is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the maps, in the engineer's affidavit, and in the certificate. The notes and all data for the computation of the traverse must be given.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.8, 25 CFR § 169.8

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25 C.F.R. § 169.9

C

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§ 169.9 Connection with natural objects.

When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The maps must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data concerning the traverse, and the engineer's affidavit and the certificate on the maps must state the connections.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.9, 25 CFR § 169.9

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25 C.F.R. § 169.10

C

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→§ 169.10 Township and section lines.

Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner shall be noted. The maps shall show these distances and the station numbers at the points of intersections. The field notes shall show these distances and the station numbers.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.10, 25 CFR § 169.10

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25 C.F.R. § 169.11

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→§ 169.11 Affidavit and certificate.

(a) There shall be subscribed on the maps of definite location an affidavit executed by the engineer who made the survey and a certificate executed by the applicant, both certifying to the accuracy of the survey and maps and both designating by termini and length in miles and decimals, the line of route for which the right-of-way application is made.

(b) Maps covering roads built by the Bureau of Indian Affairs which are to be transferred to a county or State government shall contain an affidavit as to the accuracy of the survey, executed by the Bureau highway engineer in charge of road construction, and a certificate by the State or county engineer or other authorized State or county officer accepting the right-of-way and stating that he is satisfied as to the accuracy of the survey and maps.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.11, 25 CFR § 169.11

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25 C.F.R. § 169.12

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→§ 169.12 Consideration for right-of-way grants.

Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.

[45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.12, 25 CFR § 169.12

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25 C.F.R. § 169.13

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§ 169.13 Other damages.

In addition to the consideration for a grant of right-of-way provided for by the provisions of § 169.12, the applicant for a right-of-way will be required to pay all damages incident to the survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.13, 25 CFR § 169.13

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25 C.F.R. § 169.14

C

Effective: [See Text Amendments]

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§ 169.14 Deposit and disbursement of consideration and damages.

At the time of filing an application for right-of-way, the applicant must deposit with the Secretary the total estimated consideration and damages, which shall include consideration for the right-of-way, severance damages, damages caused during the survey, and estimated damages to result from construction less any deposit previously made under § 169.4. In no case shall the amount deposited as consideration for the right-of-way over any parcel be less than the amount specified in the consent covering that parcel. If in reviewing the application, the Secretary determines that the amounts deposited are inadequate to compensate the owners, the applicant shall increase the deposit to an amount determined by the Secretary to be adequate. The amounts so deposited shall be held in a "special deposit" account for distribution to or for the account of the landowners and authorized users and occupants of the land. Amounts deposited to cover damages resulting from survey and construction may be disbursed after the damages have been sustained. Amounts deposited to cover consideration for the right-of-way and severance damages shall be disbursed upon the granting of the right-of-way. Any part of the deposit which is not required for disbursement as aforesaid shall be refunded to the applicant promptly following receipt of the affidavit of completion of construction filed pursuant to § 169.16.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.14, 25 CFR § 169.14

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25 C.F.R. § 169.15

C

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→§ 169.15 Action on application.

Upon satisfactory compliance with the regulations in this Part 169, the Secretary is authorized to grant the right-of-way by issuance of a conveyance instrument in the form approved by the Secretary. Such instrument shall incorporate all conditions or restrictions set out in the consents obtained pursuant to § 169.3. A copy of such instrument shall be promptly delivered to the applicant and thereafter the applicant may proceed with the construction work. Maps of definite location may be attached to and incorporated into the conveyance document by reference. In the discretion of the Secretary, one conveyance document may be issued covering all of the tracts of land traversed by the right-of-way, or separate conveyances may be made covering one or several tracts included in the application. A duplicate original copy of the conveyance instrument, permanent and reproducible maps, a copy of the application and stipulations, together with any other pertinent documents shall be transmitted by the Secretary to the office of record for land documents affecting the land covered by the right-of-way, where they will be recorded and filed.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.15, 25 CFR § 169.15

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25 C.F.R. § 169.16

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→§ 169.16 Affidavit of completion.

Upon the completion of the construction of any right-of-way, the applicant shall promptly file with the Secretary an affidavit of completion, in duplicate, executed by the engineer and certified by the applicant. The Secretary shall transmit one copy of the affidavit to the office of record mentioned in § 169.15. Failure to file an affidavit in accordance with this section shall subject the right-of-way to cancellation in accordance with § 169.20.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.16, 25 CFR § 169.16

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25 C.F.R. § 169.17

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§ 169.17 Change of location.

If any change from the location described in the conveyance instrument is found to be necessary on account of engineering difficulties or otherwise, amended maps and field notes of the new location shall be filed, and a right-of-way for such new route or location shall be subject to consent, approval, the ascertainment of damages, and the payment thereof, in all respects as in the case of the original location. Before a revised conveyance instrument is issued, the applicant shall execute such instruments deemed necessary by the Secretary extinguishing the right-of-way at the original location. Such instruments shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.17, 25 CFR § 169.17

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25 C.F.R. § 169.18

C

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→§ 169.18 Tenure of approved right-of-way grants.

All rights-of-way granted under the regulations in this Part 169 shall be in the nature of easements for the periods stated in the conveyance instrument. Except as otherwise determined by the Secretary and stated in the conveyance instrument, rights-of-way granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), for railroads, telephone lines, telegraph lines, public roads and highways, access roads to homesite properties, public sanitary and storm sewer lines including sewage disposal and treatment plants, water control and use projects (including but not limited to dams, reservoirs, flowage easements, ditches, and canals), oil, gas, and public utility water pipelines (including pumping stations and appurtenant facilities), electric power projects, generating plants, switchyards, electric transmission and distribution lines (including poles, towers, and appurtenant facilities), and for service roads and trails essential to any of the aforestated use purposes, may be without limitation as to term of years; whereas, rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as determined by the Secretary and stated in the conveyance instrument.

[37 FR 12937, June 30, 1972. Redesignated at 47 FR 13327, Mar. 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.18, 25 CFR § 169.18

Current through August 28, 2008; 73 FR 50731

END OF DOCUMENT

Westlaw

25 C.F.R. § 169.19

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.19 Renewal of right-of-way grants.

On or before the expiration date of any right-of-way heretofore or hereafter granted for a limited term of years, an application may be submitted for a renewal of the grant. If the renewal involves no change in the location or status of the original right-of-way grant, the applicant may file with his application a certificate under oath setting out this fact, and the Secretary, with the consent required by § 169.3, may thereupon extend the grant for a like term of years, upon the payment of consideration as set forth in § 169.12. If any change in the size, type, or location of the right-of-way is involved, the application for renewal shall be treated and handled as in the case of an original application for a right-of-way.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.19, 25 CFR § 169.19

Current through August 28, 2008; 73 FR 50731

END OF DOCUMENT

Westlaw

25 C.F.R. § 169.20

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→ § 169.20 Termination of right-of-way grants.

All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 169.5(j) for any of the following causes:

(a) Failure to comply with any term or condition of the grant or the applicable regulations;

(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;

(c) An abandonment of the right-of-way.

If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. Such instrument shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing.

[33 FR 19803, Dec. 27, 1968, as amended at 45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.20, 25 CFR § 169.20

Current through August 28, 2008; 73 FR 50731

END OF DOCUMENT

Westlaw

25 C.F.R. § 169.21

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.21 Condemnation actions involving individually owned lands.

The facts relating to any condemnation action to obtain a right-of-way over individually owned lands shall be reported immediately by officials of the Bureau of Indian Affairs having knowledge of such facts to appropriate officials of the Interior Department so that action may be taken to safeguard the interests of the Indians.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.21, 25 CFR § 169.21

Current through August 28, 2008; 73 FR 50731

END OF DOCUMENT

25 C.F.R. § 169.22

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.22 Service lines.

(a) An agreement shall be executed by and between the landowner or a legally authorized occupant or user of individually owned land and the applicant before any work by the applicant may be undertaken to construct a service line across such land. Such a service line shall be limited in the case of power lines to a voltage of 14.5 kv. or less except lines to serve irrigation pumps and commercial and industrial uses which shall be limited to a voltage not to exceed 34.5 kv. A service line shall be for the sole purpose of supplying the individual owner or authorized occupant or user of land, including schools and churches, with telephone, water, electric power, gas, and other utilities for use by such owner, occupant, or user of the land on the premises.

(b) A similar agreement to that required in paragraph (a) of this section shall be executed by the tribe or legally authorized occupant or user of tribal land and the applicant before any work by the applicant may be undertaken for the construction of a service line across tribal land. A service line shall be for the sole purpose of supplying an occupant or user of tribal land with any of the utilities specified in paragraph (a) of this section. No agreement under this paragraph shall be valid unless its execution shall have been duly authorized in advance of construction by the governing body of the Indian tribe whose land is affected, unless the contract under which the occupant or user of the land obtained his rights specifically authorizes such occupant or user to enter into service agreements for utilities without further tribal consent.

(c) In order to encourage the use of telephone, water, electric power, gas and other utilities and to facilitate the extension of these modern conveniences to sparsely settled Indian areas without undue costs the agreement referred to in paragraph (a) of this section shall only be required to include or have appended thereto, a plat or diagram showing with particularity the location, size, and extent of the line. When the plat or diagram is placed on a separate sheet it shall bear the signature of the parties. In case of tribal land, the agreement shall be accompanied by a certified copy of the tribal authorization when required.

(d) An executed copy of the agreement, together with a plat or diagram, and in the case of tribal land, an authenticated copy of the tribal authorization, when required, shall be filed with the Secretary within 30 days after the date of its execution. Failure to meet this requirement may result in the removal of improvements placed on the land at the expense of the party responsible for the placing of such improvements and subject such party to the payment of damages caused by his unauthorized act.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

25 C.F.R. § 169.22

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.22, 25 CFR § 169.22

Current through August 28, 2008; 73 FR 50731

END OF DOCUMENT

25 C.F.R. § 169.23

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.23 Railroads.

(a) The Act of March 2, 1899 (30 Stat. 990), as amended by the Acts of February 28, 1902 (32 Stat. 50), June 21, 1906 (34 Stat. 330), and June 25, 1910 (36 Stat. 859; 25 U.S.C. 312-318); the Act of March 3, 1875 (18 Stat. 482; 43 U.S.C. 934); and the Act of March 3, 1909 (35 Stat. 781), as amended by the Act of May 6, 1910 (36 Stat. 349; 25 U.S.C. 320), authorize grants of rights-of-way across tribal, individually owned and Government-owned land, except in the State of Oklahoma, for railroads, station buildings, depots, machine shops, side tracks, turnouts, and water stations; for reservoirs, material or ballast pits needed to the construction, repair, and maintenance of railroads; and for the planting and growing of trees to protect railroad lines. Rights-of-way granted under the above acts shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way for the above purposes granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), shall also be subject to the provisions of this section.

(b) Rights-of-way for railroads shall not exceed 50 feet in width on each side of the centerline of the road, except where there are heavy cuts and fills, when they shall not exceed 100 feet in width on each side of the road. The right-of-way may include grounds adjacent to the line for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed 200 feet in width by a length of 3,000 feet, with no more than one station to be located within any one continuous length of 10 miles of road.

(c) Short spurs and branch lines may be shown on the map of the main line, separately described by termini and length. Longer spurs and branch lines shall be shown on separate maps. Grounds desired for station purposes may be indicated on the map of definite location but separate plats must be filed for such grounds. The maps shall show any other line crossed, or with which connection is made. The station number shall be shown on the survey thereof at the point of intersection. All intersecting roads must be represented in ink of a different color from that used for the line for which application is made.

(d) Plats of railroad station grounds shall be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats shall show enough of the line of route to indicate the position of the tract with reference thereto. Each station ground tract must be located with respect to the public survey as provided in § 169.8 and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(e) If any proposed railroad is parallel to, and within 10 miles of, a railroad already built or in course of construction, it must be shown wherein the public interest will be promoted by the proposed road. Where the Interstate Commerce Commission has passed on this point, a certified copy of its findings must be filed with the ap-

plication.

(f) The applicant must certify that the road is to be operated as a common carrier of passengers and freight.

(g) The applicant shall execute and file, in duplicate, a stipulation obligating the company to use all precautions possible to prevent forest fires and to suppress such fires when they occur, to construct and maintain passenger and freight stations for each Government townsite, and to permit the crossing, in a manner satisfactory to the Government officials in charge, of the right-of-way by canals, ditches, and other projects.

(h) A railroad company may apply for sufficient land for ballast or material pits, reservoirs, or tree planting to aid in the construction or maintenance of the road. The authority to use any land for such purposes shall terminate upon abandonment or upon failure to use the land for such purposes for a continuous period of 2 years.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.23, 25 CFR § 169.23

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END OF DOCUMENT

Westlaw

25 C.F.R. § 169.24

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.24 Railroads in Oklahoma.

(a) The Act of February 28, 1902 (32 Stat. 43), authorizes right-of-way grants across tribal and individually owned land in Oklahoma. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, railroad rights-of-way in Oklahoma granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), shall also be subject to the provisions of this section.

(b) One copy on tracing linen of the map of definite location showing the line of route and all lands included within the right-of-way must be filed with the Secretary. When tribal lands are involved, a copy of the map must also be filed with the tribal council.

(c) Before any railroad may be constructed or any lands taken or condemned for any of the purposes set forth in section 13 of the Act of February 28, 1902 (32 Stat. 47), full damages shall be paid to the Indian owners.

(d) After the maps have been filed, the matter of damages shall be negotiated by the applicant directly with the Indian owners. If an amicable settlement cannot be reached, the amount to be paid as compensation and damages shall be fixed and determined as provided in the statute. If court proceedings are instituted, the facts shall be reported immediately as provided in § 169.21.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.24, 25 CFR § 169.24

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25 C.F.R. § 169.25

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.25 Oil and gas pipelines.

(a) The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned and Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

(b) Rights-of-way, granted under aforesaid Act of March 11, 1904, as amended, for oil and gas pipelines, pumping stations or tank sites shall not extend beyond a term of 20 years and may be extended for another period of not to exceed 20 years following the procedures set out in § 169.19 of this part.

(c) All oil or gas pipelines, including connecting lines, shall be buried a sufficient depth below the surface of the land so as not to interfere with cultivation. Whenever the line is laid under a road or highway, the right-of-way for which has been granted under an approved application pursuant to an act of Congress, its construction shall be in compliance with the applicable Federal and State laws; during the period of construction, at least one-half the width of the road shall be kept open to travel; and, upon completion, the road or highway shall be restored to its original condition and all excavations shall be refilled. Whenever the line crosses a ravine, canyon, or waterway, it shall be laid below the bed thereof or upon such superstructure as will not interfere with the use of the surface.

(d) The size of the proposed pipeline must be shown in the application, on the maps, and in the engineer's affidavit and applicant's certificate. The application and maps shall specify whether the pipe is welded, screw-joint, dresser, or other type of coupling. Should the grantee of an approved right-of-way desire at any time to lay additional line or lines of pipe in the same trench, or to replace the original line with larger or smaller pipe, written permission must first be obtained from the Secretary and all damages to be sustained by the owners must be paid in advance in the amount fixed and determined by the Secretary.

(e) Applicants for oil or gas pipeline rights-of-way may apply for additional land for pumping stations or tank sites. The maps shall show clearly the location of all structures and the location of all lines connecting with the main line. Applicants for lands for pumping stations or tank sites shall execute and file a stipulation agreeing as follows:

(1) Upon abandonment of the right-of-way to level all dikes, fire-guards, and excavations and to remove all concrete masonry foundations, bases, and structural works and to restore the land as nearly as may be pos-

sible to its original condition.

(2) That a grant for pumping station or tank site purposes shall be subservient to the owner's right to remove or authorize the removal of oil, gas, or other mineral deposits; and that the structures for pumping station or tank site will be removed or relocated if necessary to avoid interference with the exploration for or recovery of oil, gas, or other minerals.

(f) Purely lateral lines connecting with oil or gas wells on restricted lands may be constructed upon filing with the Secretary a copy of the written consent of the Indian owners and a blueprint copy of a map showing the location of the lateral. Such lateral lines may be of any diameter or length, but must be limited to those used solely for the transportation of oil or gas from a single tract of tribal or individually owned land to another lateral or to a branch of the main line.

(g) The applicant, by accepting a pipeline right-of-way, thereby agrees that the books and records of the applicant shall be open to inspection by the Secretary at all reasonable times, in order to obtain information pertaining in any way to oil or gas produced from tribal or individually owned lands or other lands under the jurisdiction of the Secretary.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.25, 25 CFR § 169.25

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25 C.F.R. § 169.26

C

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Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.26 Telephone and telegraph lines; radio, television, and other communications facilities.

(a) The Act of February 15, 1901 (31 Stat. 790), as amended by the Act of March 4, 1940 (54 Stat. 41; 43 U.S.C. 959); the Act of March 4, 1911 (36 Stat. 1253), as amended by the Act of May 27, 1952 (66 Stat. 95; 43 U.S.C. 961); and the Act of March 3, 1901 (31 Stat. 1083; 25 U.S.C. 319), authorize right-of-way grants across tribal, individually owned, and Government-owned land for telephone and telegraph lines and offices, for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities. Rights-of-way granted under these acts shall be subject to the provisions of this section as well as other pertinent sections of this part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), shall also be subject to the provisions of this section.

(b) A right-of-way granted under the said Act of March 4, 1911, as amended, shall be limited to a term not exceeding 50 years from the date of the issuance of such grant.

(c) No right-of-way shall be granted for a width in excess of 50 feet on each side of the centerline, unless special requirements are clearly set forth in the application which fully justify a width in excess of 50 feet on each side of the centerline.

(d) Applicants engaged in the general telephone and telegraph business may apply for additional land for office sites. The maps showing the location of proposed office sites shall be filed separately from those showing the line of route, and shall be drawn to a scale of 50 feet to an inch. Such maps shall show enough of the line of route to indicate the position of the tract with reference thereto. The tract shall be located with respect to the public survey as provided in § 169.8, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(e) Rights-of-way for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, shall be limited to 200 feet on each side of the centerline of such lines and poles; radio and television, and other forms of communication transmitting, relay, and receiving structures and facilities shall be limited to an area not to exceed 400 feet by 400 feet.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C.F.R. § 169.26

25 C. F. R. § 169.26, 25 CFR § 169.26

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END OF DOCUMENT

25 C.F.R. § 169.27

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.27 Power projects.

(a) The Act of March 4, 1911 (36 Stat. 1253), as amended by the Act of May 27, 1952 (66 Stat. 95; 43 U.S.C. 961), authorizes right-of-way grants across tribal, individually owned and Government-owned land for electrical poles and lines for the transmission and distribution of electrical power. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

(b) All applications, other than those made by power-marketing agencies of the Department of the Interior, for authority to survey, locate, or commence construction work on any project for the generation of electric power, or the transmission or distribution of electrical power of 66 kV or higher involving Government-owned lands shall be referred to the Office of the Assistant Secretary of the Interior for Water and Power Resources or such other agency as may be designated for the area involved, for consideration of the relationship of the proposed project to the power development program of the United States. Where the proposed project will not conflict with the program of the United States, the Secretary, upon notification to the effect, may then proceed to act upon the application. In the case of necessary changes respecting the proposed location, construction, or utilization of the project in order to eliminate conflicts with the power development program of the United States, the Secretary shall obtain from the applicant written consent to or compliance with such requirements before taking further action on the application.

(c) A right-of-way granted under the said Act of March 4, 1911, as amended, shall be limited to a term not exceeding 50 years from the date of the issuance of such grant.

(d) Rights-of-way for power lines shall be limited to those widths which can be justified and in no event shall exceed a width of 200 feet on each side of the centerline.

(e) The applicant shall make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision, for avoiding inductive interference between any project transmission line or other project works constructed, operated, or maintained by it on the right-of-way authorized under the grant and any radio installation, telephone line, or other communication facilities now or hereafter constructed and operated by the United States or any agency thereof. This provision shall not relieve the applicant from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

(f) An applicant for a right-of-way for a transmission line across Government-owned lands having a voltage of 66 kV or more must, in addition to the stipulation required by § 169.5, execute and file with its application a

stipulation agreeing to accept the right-of-way grant subject to the following conditions:

(1) The applicant agrees that, in the event it becomes necessary for the United States to acquire the applicant's transmission line or facilities constructed on or across such right-of-way, the United States reserves the right to acquire such line or facilities at a sum to be determined upon by a representative of the applicant, a representative of the Secretary of the Interior, and a third representative to be selected by the other two for the purpose of determining the value of such property thus to be acquired by the United States.

(2) To allow the Department of the Interior to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the grant for the transmission of electrical power in connection with the applicant's operations, or to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the applicant and the applicant shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the applicant for the transmission of electrical power in connection with the applicant's operations, and, if so, the extent of such surplus capacity.

(ii) In order to utilize any surplus capacity certified by the applicant to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the applicant's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits.

(iii) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the applicant's line will not be impaired.

(iv) After any interconnection is completed, the applicant shall operate and maintain its line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the applicant's control between the applicant's line and the interconnecting facilities provided by the Department.

(v) The interconnected power systems of the Department and the applicant will be operated in parallel.

(vi) The transmission of electrical power by the Department over the applicant's line will be effected in such manner and quantity as will not interfere unreasonably with the applicant's use and operation of the line in accordance with the applicant's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's ex- pense.

(vii) The applicant will not be obligated to allow the transmission over its line by the Department of electrical power to any person receiving service from the applicant on the date of the filing of the application for a grant, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(viii) The Department will pay to the applicant an equitable share of the total monthly cost of maintaining and operating the part of the applicant's line utilized by the Department for the transmission of electrical

power, the payment to be an amount in dollars representing the same proportion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the applicant's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the applicant's net total investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(ix) If, at any time subsequent to a certification by the applicant that surplus capacity is available for utilization by the Department, the applicant needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as being surplus to its needs, the applicant may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the applicant's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(x) If, during the existence of the grant, the applicant desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the applicant's line.

(xi) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the applicant and the Secretary of the Interior or his designee.

(g) Applicants may apply for additional lands for generating plants and appurtenant facilities. The lands desired for such purposes may be indicated on the maps showing the definite location of the right-of-way, but separate maps must be filed therefor. Such maps shall show enough of the line of route to indicate the position of the tract with respect to said line. The tract shall be located with respect to the public survey as provided in § 169.8, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

[33 FR 19803, Dec. 27, 1968, as amended at 38 FR 14680, June 4, 1973. Redesignated at 47 FR 13327, March 30, 1982]

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.27, 25 CFR § 169.27

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25 C.F.R. § 169.27

END OF DOCUMENT

Westlaw.

25 C.F.R. § 169.28

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 169. Rights-Of-Way Over Indian Lands (Refs & Annos)

→§ 169.28 Public highways.

(a) The appropriate State or local authorities may apply under the regulations in this part 169 for authority to open public highways across tribal and individually owned lands in accordance with State laws, as authorized by the Act of March 3, 1901 (31 Stat. 1084; 25 U.S.C. 311).

(b) In lieu of making application under the regulations in this part 169, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the Act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States. Under the provisions of that act, the applicant must serve the Secretary with notice of intention to open the proposed road and must submit a map of definite location on tracing linen showing the width of the proposed road for the approval of the Secretary prior to the laying out and opening of the road.

(c) Applications for public highway rights-of-way over and across roadless and wild areas shall be considered in accordance with the regulations contained in part 265 of this chapter.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.

25 C. F. R. § 169.28, 25 CFR § 169.28

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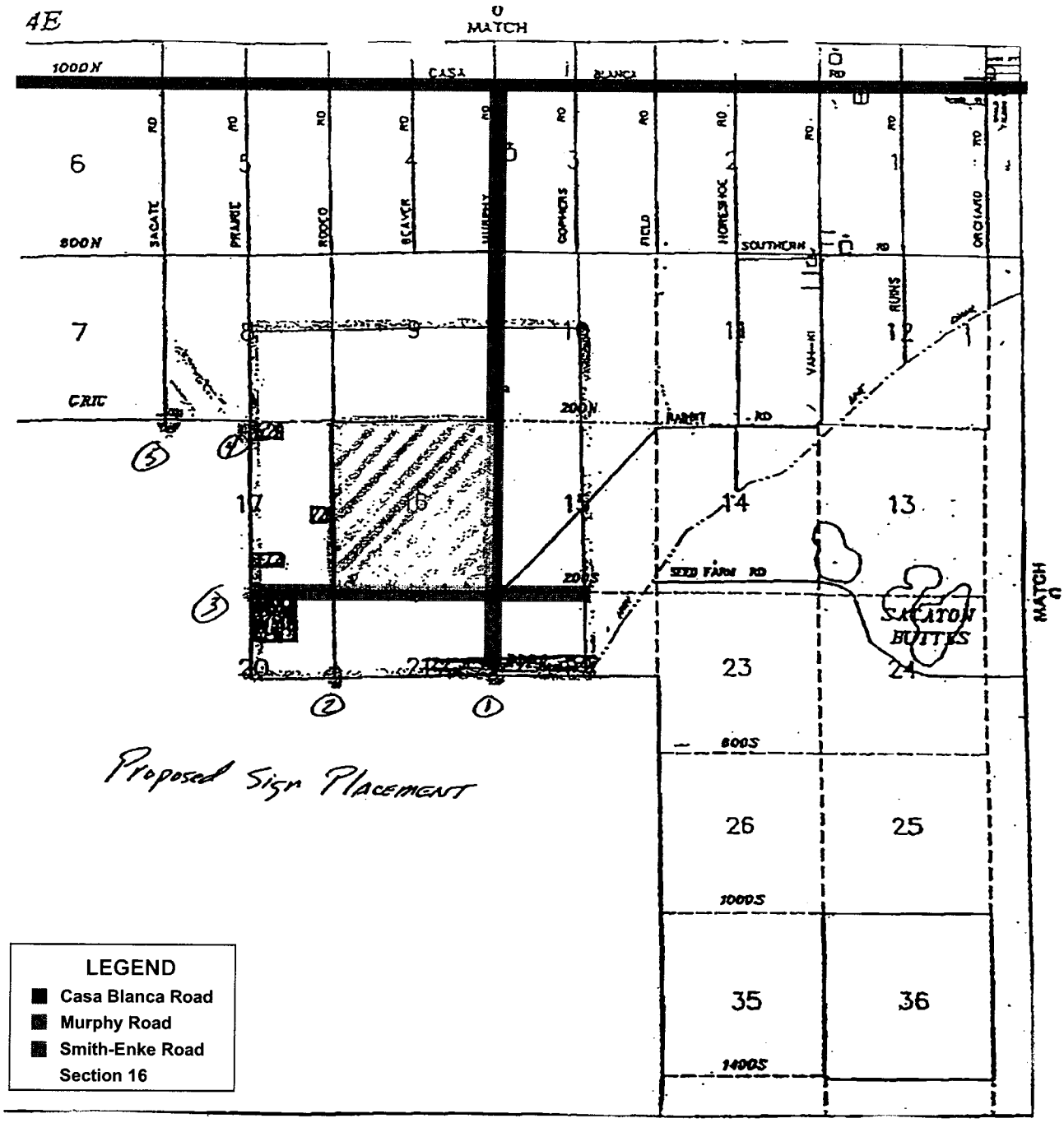
END OF DOCUMENT

ADDENDUM D

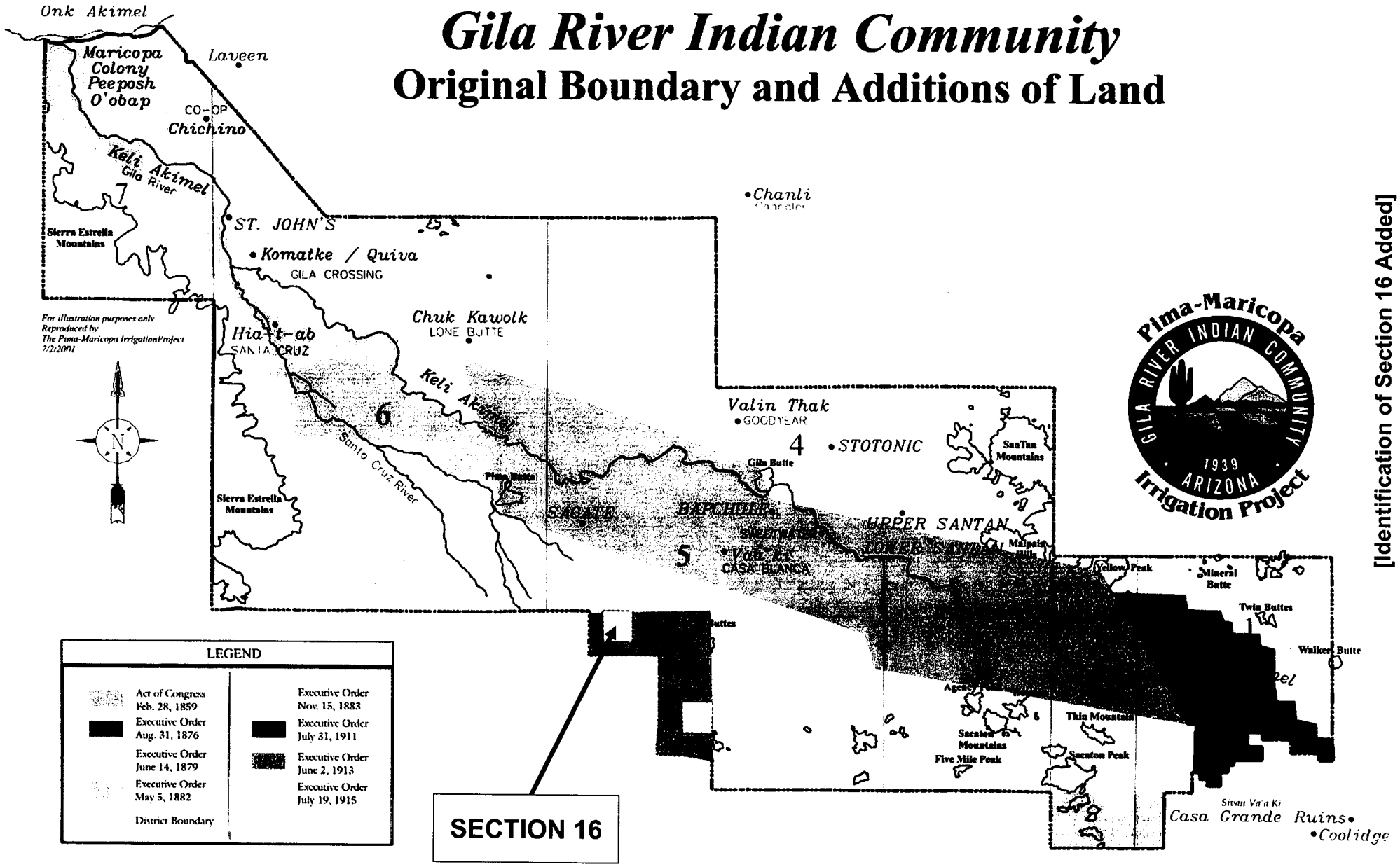


[Shading and Legend Added]

G-0000513

ADDENDUM E

Gila River Indian Community
Original Boundary and Additions of Land



[Identification of Section 16 Added]

G-0004155