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

RESPONSE AND REPLY BRIEF FOR APPELLANT/CROSS-APPELLEE GILA RIVER INDIAN COMMUNITY

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SUMMARY OF ARGUMENT

1. The Trustee's brief reveals that the goal of his litigation is to establish such complete legal title and legal access to Section 16 as to permit the construction of a high-density, residential development in the midst of the Community's predominantly agrarian Reservation – a development that would result in 8,000 non-Indian residents in 4,000 cars traveling over and across Community Reservation roads and lands daily. The law, however, forecloses the Trustee's arguments.

First, the Trustee's argument that legal title to land can be compromised in the absence of the sovereign titleholder (the United States) – or, with respect to the allotted lands, in the absence of *both* the legal and beneficial titleholders – is foreclosed by binding Supreme Court and Circuit precedent. And that is for good reason: fundamental principles of fair process preclude adjudicating title to land without those whose interests are compromised being present. The Trustee's response that the judgment will not be binding on the absent titleholders makes no sense. There is one title to this land, and the Trustee initiated suit to quiet that title. Either the litigation did quiet the title – in which case the absentees' interests were necessarily compromised – or title was not quieted and the judgment was advisory and piecemeal, in violation of Rule 19.

Second, the Trustee's argument that the court properly implied an easement

ignores precedent of this Court holding that nothing passes by implication in a public grant, and that school lands generally did not compromise Indian title to their own land. More fundamentally, the district court had no business judicially implying an easement under the common law when Congress has prescribed an administrative procedure for the resolution of such easement claims – a process that, by the way, permits the participation of the title-holding United States without the sovereign immunity and Rule 19 problems that infected the district court's actions here.

Third, with respect to the district court's application of laches, the Trustee makes no effort to defend the court's offensive use of that equitable defense to relieve the Trustee of his burden of proving an access right along Murphy Road. That is not surprising since the court's affirmative use of that defensive doctrine lacks any grounding in law or logic.

Fourth, with respect to zoning, the Trustee insists that ripeness concerns can be dismissed just because an issue was hard fought below. That is wrong. Parties can neither stipulate nor litigate their way our of Article III's limitations. In any event, the Trustee's legal arguments against the Community's zoning authority never come to grips with the reality that agrarian land completely surrounded by Reservation land cannot be transmogrified into a high-density suburban subdivision without affecting the Tribe's integrity, economic security, or welfare.

Fifth, zoning authority is particularly appropriate because the Community retains aboriginal title to Section 16. The Trustee never identifies any plain or explicit extinguishment of that title, and his reliance on Section 16's prior school-land status is foreclosed by precedent.

2. On cross-appeal, the Trustee contends that Murphy and Smith-Enke Roads qualify as publicly accessible highways under Revised Statute 2477. The district court properly rejected that claim.

First, the court lacked jurisdiction to resolve the question. Resolution of the R.S. 2477 issue would necessarily compromise title held by the United States to the lands over which those roads run. After all, the roads either are or are not R.S. 2477 highways. They cannot bear that status for purposes of a lawsuit against the Community, but have a different status as against the United States. Courts have repeatedly held that such claims can only be brought under the Quiet Title Act. That Act, however, expressly preserves the United States' sovereign immunity for claims involving Indian lands held in trust. The Trustee cannot circumvent that barrier by proxy litigation against the Community, especially since R.S. 2477 does not create individually enforceable rights.

Second, Smith-Enke and Murphy Roads are not R.S. 2477 highways because they did not meet the relevant legal definition of highway prior to their inclusion in the Community's Reservation. The Trustee's only response is to contend that the

Executive Orders adding land to the Reservation did not withdraw those lands from the public domain. The Supreme Court has held the opposite.

ARGUMENT

I. THE UNITED STATES AND INDIVIDUAL INDIAN ALLOTTEES ARE INDISPENSABLE PARTIES

The rule in this Circuit is that "[t]he United States is an indispensable party to any suit brought to establish an interest in Indian trust land," and that the "[i]nability to join the United States as an indispensable party must result in dismissal." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991). The Supreme Court concurs, holding in *Minnesota v. United States*, 305 U.S. 382 (1939), that "[t]he United States is an indispensable party defendant" in a case seeking to establish a right of way across Indian land held in trust by the United States. *Id*. at 386. Even the case upon which the Trustee centrally relies emphasizes that, if "the litigation was initiated by non-Indians for the purpose of effecting the alienation of tribal or restricted lands," then the United States is an indispensable party. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255 n.1 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). The prejudice, ineffectual relief, and piecemeal litigation occasioned by the district court's decision to proceed in the United States' absence underscores the magnitude of the Rule 19 violation.

A. The Failure to Dismiss Resulted in Prejudice

1. The Trustee does not dispute that (i) there is one and only one title to the Community land over which the Trustee asserts a right of legal access, (ii) the United States holds that title; and (iii) judicially recognizing an easement over that land directly qualifies that title and diminishes the legal rights in land that it embodies. After all, "th[e] right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994), and recognition of an easement withdraws that right to exclude.

Instead, the Trustee (like the district court) insists the impact of the court's judgment is inconsequential for the United States because it would not be bound by the court's judgment. But the Trustee never explains what he means by that assertion or why it is relevant.

Perhaps the Trustee means that the United States would not be bound as a matter of *res judicata*. But that is beside the point and, indeed, it would render Rule 19 an empty protection because an absent party is rarely bound by a judgment to which it was not a party. *See, e.g.*, *Taylor v. Sturgell*, 128 S. Ct. 2161, 2175 (2008) ("emphasiz[ing] the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party"); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.4 (1996) (*res judicata* applies when "the party to

be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action"). Certainly the United States would not have been bound by a judgment between Minnesota and the Chippewa in *Minnesota*, or between the Mine Safety Appliances Company and Mr. Forrestal in *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945). *See generally United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("[N]onmutual offensive collateral estoppel is not to be extended to the United States."). Nor would the Republic of the Philippines have been bound by the district court's interpleader judgment in *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008). Yet every one of those cases was dismissed under Rule 19, notwithstanding that the absent party would not have been formally "bound" by any ensuing judgment.

That is because the prejudice to which Rule 19 refers is not limited to issue or claim preclusion, but encompasses any case in which there is a "potential for injury to the [non-frivolous] interests of the" United States. *Pimentel*, 128 S. Ct. at 2191. Indeed, the Supreme Court recognized in *Pimentel* that the absent sovereign parties would not be bound by the judgment, *id.* at 2193, but still found prejudice because "[t]he court's consideration of the merits was itself an infringement on * * * sovereign immunity," *id*. at 2189.

This case is the same. Whether or not formally bound by the judgment, the district court's decision resolved an important alleged limitation on the legal title to land held by the United States. The title held by the Community and the title held by the United States are one and the same, so when the Community's interests in the land are judicially retracted, so are the United States'. At a bare minimum, because "record title to the land at issue was in the absentee[]," the adjudication "would 'place[] a cloud upon the title of the absent'" United States, and thus cannot proceed under Rule 19. *Puyallup*, 717 F.2d at 1256 n.4 (quoting *McShan v. Sherrill*, 283 F.2d 462, 463 (9th Cir. 1960)).

Beyond that, the Trustee's focus on whether the United States would be bound never comes to grips with the implications of that argument. In any subsequent litigation involving the United States, a court would have two choices. It could conclude that, for the reasons (wrongly) relied upon by the district court, an easement exists. But that would mean that the district court's ruling, in fact, was "an important and consequential ruling affecting the sovereign's substantial interest," and is barred by Rule 19. *Pimentel*, 128 S. Ct. at 2192.

Alternatively, a court could hold that legal title to this land does *not* include any easement. After all, "it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party has no binding effect." *Minnesota*, 305 U.S. at 386 n.1. But that ruling would be

flatly inconsistent with the district court's decision here regarding the same title to the same land. And that would mean that the district court's tentative or quasi-adjudication here to the contrary did not result in an "adequate" judgment within the meaning of Rule 19(b)(3), and confounded that Rule's insistence that disputes be resolved "by wholes, whenever possible." *Pimentel*, 128 S. Ct. at 2193.[1]

2. The district court's singular focus on whether the United States would be bound by its judgment also "failed to give full effect to sovereign immunity," *Pimentel*, 128 S. Ct. at 2190, and, in fact, cannot be reconciled with the Supreme Court's command that "[a] case may not proceed when a required-entity sovereign is not amenable to suit," *id*. at 2191. Indeed, neither the court nor the Trustee has ever suggested that the United States' interests in this land are frivolous – they are not, *Minnesota*, 305 U.S. at 386 – and the Supreme Court was quite clear that, when the sovereign's interests "are not frivolous, 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 (emphasis added). That potential is present here.

The Trustee relies on pre-*Pimentel* law that described sovereign immunity as just one factor in the Rule 19(b) calculus. *See* Trustee Br. 23-24 (citing *Stock West*

[1] A ruling for which the efficacy of judicial relief is so contingent on the future actions of third parties also raises substantial questions under Article III of the Constitution. *See* Community Opening Br. 16-17.

Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993)). But the law in this Circuit is now *Pimentel*. *See Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 970 n.8 (9th Cir. 2008) ("In *Pimentel*, the Supreme Court reversed the decision of a panel of this court because it had not 'giv[en] full effect to sovereign immunity' in its Rule 19(b) calculus."). And *Pimentel* held that, while "multiple factors must bear on the decision whether to proceed without a required person," 128 S. Ct. at 2189, some factors can be "'compelling by themselves,'" *ibid.* (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968)), and the sovereign immunity interest is "compelling," *id*. at 2192. *Pimentel* thus reinforces this Court's rule that, when sovereign immunity is at stake, "there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

The Trustee next responds (Br. 28-29) that the Community could adequately represent the United States' interest. In theory that may be true, but not in the law. Congress has assigned that task to the Attorney General, 28 U.S.C. § 516, and basic separation of powers principles would, in any event, prevent such judicial circumvention of sovereign immunity and displacement of the Political Branches' control of the federal government's litigation. That is why the presence of other parties, like the Chippewa Tribe in *Minnesota*, was not sufficient to protect the

United States' interests and avoid a Rule 19 dismissal. *See also Taylor*, *supra* (rejecting "virtual representation" theory of res judicata).[2]

B. The Judgment Was Not Adequate and Promotes Piecemeal Litigation

1. The Supreme Court stressed in *Pimentel* that an "adequate" judgment, Fed. R. Civ. P. 19(b)(3), is a judgment that enforces "the 'public stake in settling disputes by wholes, whenever possible.'" 128 S. Ct. at 2193. The Trustee contends (Br. 31) that this public interest "disappear[ed]" after the district court held a trial on the merits. That cannot be right. The lawsuit in *Pimentel* had also proceeded to final judgment, but the Supreme Court nevertheless held that the judgment was not "adequate," for purposes of Rule 19(b). *Ibid.* In so ruling, the Court rejected the very rationale offered by the Trustee and the district court here, holding that the completed litigation did not "further the public interest in settling the dispute as a whole because the [sovereign parties] would not be bound by the judgment in an action where they were not parties." *Ibid*.

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[2] The Trustee's contention (Br. 27) that the federal government has formally disavowed any interest in this case is incorrect. The Trustee relies on the pre-deposition statement of an attorney representing a paralegal in the Real Estate Services Office of the Bureau of Indian Affairs' Western Regional Office, who simply underscored that the paralegal was not there to take sides in the dispute and that, in that sense, the paralegal's appearance did not reflect an interest in the "parcel of land" – Section 16. S.E.R. 255. He did not purport or claim authority to disavow the United States' historic and legal interest in the Indian land held in trust over which legal access is sought. *Cf. OPM v. Richmond*, 496 U.S. 414 (1990).

2. Having lost every other factor, the Trustee protests (Br. 22-23) that he would not "have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). That is not so. There is an established administrative process for recognition of easements, which the district court acknowledged elsewhere in its decision, but that the court ignored for purposes of Rule 19. *See* 25 C.F.R. Pt. 169.[3]

The Trustee contends (Br. 23) that, because he asserts that an easement already exists, he can circumvent that administrative process. But parties cannot avoid administrative processes simply by unilaterally declaring that they have a right already and then seeking judicial recognition of it. After all, in this case there is no statutory or regulatory text identifying such an easement, or any legal record of it. The Rule 19(b) question thus is who should determine in the first instance whether such an easement right compromises the United States' title – the agency charged by Congress with administering such land consistent with the United States' sovereign immunity, or a court in the absence of the United States. At a minimum, the existence of that alternative process – with judicial review under the Administrative Procedure Act of the agency's ultimate decision – precludes

[3] That internal inconsistency in the court's ruling underscores that it was an abuse of discretion. *See United States v. Garcia-Guizar*, 160 F.3d 511, 525 (9th Cir. 1998) (district court abused its discretion in reaching a conclusion that is internally inconsistent and unsupported by the record).

reliance on Rule 19(b)'s "adequate remedy" factor as a basis for proceeding in the United States' absence.

Beyond that, the Trustee's argument simply disagrees with the principle of sovereign immunity itself. "Dismissal under Rule 19(b) will mean, in some instances that plaintiffs will be left without a forum for definitive resolution of their claims." *Pimentel*, 128 S. Ct. at 2194. Any prejudice caused by dismissal, however, "is outweighed by prejudice to the absent entities invoking sovereign immunity." *Ibid*. That, in fact, is exactly what happened in *Pimentel* itself. *Ibid*. It is also what this Court's precedent requires. *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005) (this Court has "regularly held that [tribal sovereign] immunity overcomes the lack of an alternative remedy or forum for the plaintiffs"), *cert. denied*, 546 U.S. 1173 (2006).

C. The Trustee Initiated the Litigation to Alienate Tribal Interests in Land

The Trustee relies, alternatively, on the rule that, "in a suit by an Indian tribe to protect its interest in tribal lands, * * * [the United States] is *not* an indispensable party." *Puyallup*, 717 F.2d at 1254. The short answer is that this litigation is *not* a "suit by an Indian tribe to protect its interests." *Ibid.* It is a suit "instituted by non-Indians [the Trustee] for the purpose of effecting the alienation of tribal or restricted lands," and, for that type of litigation, *Puyallup* reconfirmed that the United States is an indispensable party. *Id*. at 1255 n.1. It is the risk of

alienation by others (not enforcement by the Tribe) of land rights that triggers the necessity of the United States' participation. *Ibid.*

And the alienation of rights is exactly what the Trustee initiated this litigation to obtain. The Schuggs first asserted full title to Section 16 in their bankruptcy filings, *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #12 (Bankr. D. Ariz. Aug. 13, 2004); *In re Debra Schugg*, No. 04-bk-19091-GBN, dkt. #7 (Bankr. D. Ariz. Nov. 10, 2004), and then attempted to provide Wells Fargo a priority lien in the land by collateralizing Section 16 in the bankruptcy proceedings, *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #150 (Jan. 20, 2005); *id.*, dkt. #200 (Apr. 4, 2005); *id.*, dkt. #202 (Apr. 5, 2005). The Trustee also began marketing Section 16 for sale to residential developers. *Lyon v. Gila River Indian Cmty.*, No. 05-ap-384-GBN, dkt. #1, at 9 ¶ 42 (Bankr. D. Ariz. May 25, 2005) (Complaint). When the Community learned what was happening, it reacted defensively to protect its rights by objecting to the Wells Fargo stipulation. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #221 (Bankr. D. Ariz. Apr. 29, 2005). The Trustee's response forced the Community to file a proof of claim to protect its interests.

The Trustee then initiated an adversary proceeding by filing a complaint in the bankruptcy court as "Plaintiff[]," Complaint at 1, in which he sought, *inter alia*, to quiet title to the land, *id.* at 3 ¶ 10, 9 ¶ 43, a declaration that the Community "has

no ownership interest or any other kind of rights in or authority over" Section 16, *id*. at 11 ¶ 57, and a ruling that the Schuggs had a full right of legal access across Reservation lands via Smith-Enke and Murphy Roads, *id*. at 11-15 ¶¶ 61-74. The complaint also sought an order disallowing the Community's proof of claim. *Id*. at 14. The Trustee, thus, is the initiating plaintiff in this litigation both by name and by law and, having filed suit to alienate Indian rights in Indian trust land, the Trustee is bound by Circuit and Supreme Court precedent recognizing that the United States is an indispensable party to such an action.

The Trustee tries to shift responsibility for the litigation (Br. 19-20) by relying on the Community's filing of a proof of claim in the bankruptcy case. The federal rules, however, make the Trustee the plaintiff because he filed the complaint. *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Fed. R. Bankr. P. 7003 (Fed. R. Civ. P. 3 applies in adversary proceedings); Fed. R. Civ. P. 4 (identifying the plaintiff as the party who serves the summons and complaint); Fed. R. Bankr. P. 7004 (same). Indeed, the law is settled that the "filing of the proof of claim does not initiate either an adversary proceeding or a contested matter" under the bankruptcy code. *Fairchild v. IRS*, 969 F.2d 866, 868 (10th Cir. 1992). Rather, it is "[t]he filing of an objection to a proof of claim" – which is exactly what the Trustee did, Complaint at 14 ¶ 80 – "[that] 'creates a dispute which is a contested matter.'" *Lundell v. Anchor Constr.*

Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (quoting Adv. Comm. Notes to Fed. R. Bankr. P. 9014); *accord Poonja v. Alleghany Props.*, 278 F.3d 890, 894 (9th Cir. 2002); *Fairchild*, 969 F.2d at 868.[4]

The Trustee also invokes (Br. 20-21) the Community's filing of counterclaims. But counterclaims are just that – claims raised to counter the initiation of litigation by a plaintiff. *See* Fed. R. Bankr. P. 7013; Fed. R. Civ. P. 13. In fact, the Bankruptcy Rules explicitly identify the plaintiff as the party who "repl[ies] to a counterclaim," Fed. R. Bankr. P. 7012(a) – not the party who asserts a counterclaim.

What the Trustee's argument forgets, moreover, is that before the Community ever asserted any counterclaims, he had already sought a declaratory judgment that the Community "has no ownership interest or any other kind of rights in or authority over" Section 16. Complaint at 11 ¶ 57. The Community's "counterclaims were filed in response to the [Trustee's] claims, not as affirmative claims for relief." *City of St. Paul v. Evans*, 344 F.3d 1029, 1035 (9th Cir. 2003). It was the Trustee – and not the Community – who "disturbed the equilibrium

[4] The cases cited by the Trustee (Br. 20) simply recognize the authority of a bankruptcy court to decide claims before it. *See Gardner v. New Jersey*, 329 U.S. 565, 572-574 (1947) (filing proof of claim waives sovereign immunity); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1279-1280 (9th Cir. 2000) (authority to decide validity of contract); *Bass v. Olson*, 378 F.2d 818, 820 n.4 (9th Cir. 1967) (submission to process).

between the parties by first challenging the validity of the [Community's property rights] in court," making the Trustee "the aggressor in this litigation." *Ibid.* Indeed, the Trustee dons and doffs the title of plaintiff as he deems convenient, disavowing it for purposes of Rule 19(b)'s prejudice prong, but embracing it for purposes of Rule 19(b)'s "adequate remedy" prong. *See* Br. 22. He cannot have it both ways.[5]

Lastly, the Trustee's complaint (Br. 21) that the Community is trying to deny his due process right to present a defense to the counterclaims is nonsensical. First, that "defense" is simply a repackaging of the Trustee's affirmative legal access claims. Second, and in any event, the Trustee has no due process right to litigate issues directly affecting legal title held by the United States in the absence of the United States *in court* rather than in the administrative forum (with judicial review) established for recognizing easements over Indian land.

D. The Individual Indian Allottees Are Indispensable Parties

The court's transgression of Rule 19 was compounded by its adjudication of the legal rights of individual Indian allottees in their own land without their participation in the litigation. The Trustee does not dispute (Br. 32) that each

[5] Although *Evans* concerned the applicability of statutes of limitations to counterclaims, its analysis regarding whether the assertion of counterclaims makes a defendant the aggressor in litigation applies with equal force here. The Trustee correctly points out (Br. 21), however, that our opening brief mistakenly read *Evans* as citing *Puyallup*, an error for which we apologize.

allottee holds an individualized, legally protected interest in his or her allotment, or that its easements traversing their land would directly diminish their property rights. Nor could he. Even where legal title is retained, the allottees will have lost "one of the[ir] most essential [property rights] * * *, the right to exclude others." *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 946 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002); *see Dolan*, *supra*.

Instead, the Trustee argues (Br. 32-33) that, because the court decided to "go forward without the fee titleholder * * * (the United States)," "it would have made no sense" for the district court to be concerned about the additional "absence of parties with only a beneficial interest in those allotments."

To be clear: the Trustee's position is that an individual's legal rights in his own land can be conclusively adjudicated and diminished without *anyone* in the case representing the landowner – either the person who holds legal title or the beneficial landowner himself. To state it is to refute it. *See, e.g.*, U.S. Const. Amend. V ("nor shall any person * * * be deprived of * * * property, without due process of law"); *Taylor*, 128 S. Ct. at 2171, 2174. Presumably the Trustee would *not* agree that the Schuggs' property rights can be adjudicated without either him or the Schuggs participating in the litigation.

Beyond that, the Trustee asserts that his argument that the United States would be "neither bound, nor prejudiced" by the judgment applies "just as strongly

to the Allottees." Br. 33. On that we can agree – the analysis is equally flawed for both. The judgment that an easement exists over their land is either meaningless (in which case it is neither "adequate" under Rule 19(b) nor permissible under Article III of the Constitution), or meaningful (in which case the legal rights of absentees have been significantly and impermissibly infringed).[6]

II. THE TRUSTEE HAS NO RIGHT OF LEGAL ACCESS TO SECTION 16

A. Section 16's Prior Status as School Lands Does Not Support Judicial Implication of an Easement

The Trustee does not challenge the district court's holdings that there is no express easement providing access to Section 16, and that no easement by necessity has been created. Instead, his central argument (Br. 37) is that the grant of Section 16 to Arizona as school lands silently included an implied easement across Smith-Enke Road and Murphy Road because that was allegedly necessary to make the land usable. There are four critical flaws in that argument.

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[6] The Trustee's reiteration of the same failed defenses for the aboriginal title issue fares no better. The Trustee further contends (Br. 35 n.13) that the Quiet Title Act waives the United States' sovereign immunity for aboriginal title claims. That is debatable (*see* Community Br. 17-19), but if true, then there was no excuse for the district court not to join the United States. At bottom, the district court's error with respect to aboriginal title was its refusal to resolve that predicate jurisdictional question. Nor can the Trustee avoid that problem by arguing that aboriginal title was already non-explicitly extinguished, since that argument simply disagrees with established law requiring *explicit* extinguishment *by the federal government*. *See* Community Br. 15, 18.

First, for the very reasons that the district court held – and the Trustee accepts – that no easement by necessity was created, it was not necessary for the court to judicially imply an easement either. There is an established statutory and regulatory process for obtaining easements and rights-of-way across tribal and allotted lands. *See* 25 U.S.C. § 323 and 25 C.F.R. Pt. 169. That procedure, moreover, involves the United States government – the titleholder to the land at issue – in the decisionmaking process consistent with sovereign immunity principles, which is something that the judicial implication process did not do. When such a legal framework exists for obtaining access to land, the claimant cannot circumvent that process by going to court in search of a judicially implied right of access. *See Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (*Adams I*) ("Common law rules are applicable only when not preempted by statute."); *Adams v. United States*, 255 F.3d 787, 794 (9th Cir. 2001) (*Adams II*) ("[T]he Adamses do not have a common law easement because all common law claims are preempted by [federal statutes].").

The Trustee contends (Br. 20) that the administrative process does not apply because, he alleges, the easement already exists. But the Trustee does not assert that he has any express easement or any easement that was previously recognized by a court, an official body, or an official document. The question, then, is who should decide whether an easement is appropriately recognized here – the expert

administrative agency deputized by Congress to make such decisions with the involvement of the title-holding United States, or a common law court acting outside that statutory process and in the absence of the sovereign. *Adams I* answers that question. There the claimant likewise contended that "an easement by implication * * * was created when the United States granted the land to their predecessors," 3 F.3d at 1259, yet this Court held that the statutory and administrative process preempted the common law claim of an implied easement.

That makes sense. Otherwise, the administrative process would be rendered a nullity because those seeking an easement could always reframe their argument as a contention that the law supports judicial implication of an allegedly pre-existing but unrecognized easement. The Trustee's quest for an easement thus was made in the wrong forum.

Second, the Trustee's contention that the grant of school lands silently implied an easement forgets that nothing passes by implication in a public grant. *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1265 (9th Cir. 2006) ("[U]nless the language in a land grant is clear and explicit, the grant will be construed to favor the government so that nothing passes by implication"); *see also Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987). Moreover, at the time Section 16 was conveyed as school lands, the custom of the United States was

merely to provide a license to access property and not an implied easement. *See Fitzgerald*, 460 F.3d at 1265.

The Trustee contends (Br. 37) that *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994), held that courts can imply easements in congressional land grants whenever necessary to effectuate the purpose of the grants. If that were so, *Koniag* would be an extraordinary intrusion of judicial power into Congress's plenary control over federal land, U.S. Const. Art. IV, § 3, cl. 2. But *Koniag* held no such thing. Instead, *Koniag* held only that, in determining whether a congressional land grant conveys an implied easement, this Court examines *several* factors, of which the perceived purpose is only one. *See* 39 F.3d at 996 (listing factors). And of those factors, necessity is a critical element. *Id.* at 998. The district court held, however, that there is no such necessity in this case. E.R. 26-27. Nor are the Trustee's protestations that, without judicial implication, the land will be rendered valueless well taken, because (i) the Trustee can still pursue an easement through the administrative process, (ii) the land has been used productively for decades, while easements were obtained administratively (E.R. 12, 89, 354), and (iii) the land could be sold for value to the Community (*see In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #372 (Bankr. D. Ariz. Dec. 6, 2005) (Community offered $10,300,000)).

Third, the Trustee invokes (Br. 39) the general proposition that congressional acts to benefit schools are to be construed liberally. Perhaps that is true as a general proposition, but when legislation benefiting schools conflicts with Indian land rights, the school interests must yield. *Minnesota v. Hitchcock*, 185 U.S. 373, 402 (1902) ("Contrasting the two policies – that in respect to public schools and that in respect to the care of the Indians – it would seem that we are called upon to uphold the rights of the Indians."). That is particularly true when, as here, Congress has provided alternative mechanisms (the administrative process) to protect the grantee's rights. *Ibid*.

Fourth, even if an implied easement arose when Section 16 was conveyed to Arizona, such easements would not pass to subsequent, non-governmental purchasers in the absence of clear and explicit language. *United States v. Clarke*, 529 F.2d 984, 987 (9th Cir. 1976).

The Trustee contends (Br. 40) that the word "appurtenance" carries with it pre-existing easements. Even if correct, the problem for the Trustee is that "appurtenance" does not appear in the deed conveying Section 16 from the Hills to the Schuggs. *See* E.R. 6, Trial Ex. 197 (deed only conveys the "rights and privileges appurtenant to" Section 16). Anyhow, the argument is not correct. *Fitzgerald* held *only* that the word "appurtenance" would convey an "express easement" that is already "manifest on the face of the instrument." 460 F.3d at

1267. Because there is no explicit easement in the grant at issue here, the word "appurtenances" "lacks the intent and the specificity to convey an easement." *Ibid.*[7]

Finally, the Trustee's argument (Br. 45) that consigning him to the administrative process is an unconstitutional taking of property lacks merit. No unconstitutional taking occurs before the relevant administrative process is exhausted. *See, e.g.*, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *see also Adams II*, 255 F. 3d at 794-795 ("Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").

B. The District Court's Application of Laches Was Erroneous

The district court held that the equitable doctrine of laches established Murphy Road as an Indian Reservation Road (IRR) that provides legal access to Section 16. But 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), *cert. denied* 404 U.S. 949

[7] The Trustee attempts to distinguish *Clarke* as involving grants of a homestead, rather than school lands, but offers no reason why the rule – which is designed to protect sovereign property interests against mistaken diminution by judicial action – would be any different for school grants.

(1971), particularly when the use of laches would abridge the United States' legal title to land, *see, e.g.*, *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (laches inapplicable to the United States).

Recognizing the lack of authority for such offensive (rather than defensive) use of laches, the Trustee insists (Br. 48-49) that the district court only used the laches doctrine to debar the Community's counterclaims. The district court's opinion plainly says otherwise. In paragraphs 26 through 28 of its findings, the court held that laches prevented the Community from arguing and the court from holding that there is no legal access to Section 16. E.R. 22-23. Having so held, the court straightforwardly stated in the very next paragraph that, "*[a]s a result*, the Court concludes that the Trustee has shown that Murphy Road * * * is an Indian Reservation Road." E.R. 23 (emphasis added). Laches is the sole reason and the sole analysis provided for the IRR ruling. No other basis for that decision is provided.

The Trustee further contends (Br. 49-50) that the Community's argument fails because no statute of limitations has been identified for the Community's counterclaims. But that is because statutes of limitations do not bar purely defensive arguments like the contention that Murphy Road is *not* an IRR. In the absence of a claim of legal access, landowners have no obligation to go into court and proactively negate any potential legal claims of access that any hypothetical

future plaintiff might be able to conjure. In any event, the absence of a statute of limitations bar makes the laches doctrine even less appropriate to apply. *See, e.g., Shouse v. Pierce County,* 559 F.2d 1142, 1147 (9th Cir. 1977) ("It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitations in an analogous action at law has run.").[8]

Finally, even if laches could be applied offensively, its elements were not proven here. The alleged delay in the Community's argument was attributable to the mistaken designation of Murphy Road by the BIA, and such mistakes by third parties provide no basis for laches. *See, e.g., Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (unreasonable delay must be attributable to the plaintiff). Nor did the Trustee establish prejudice, even though that is what the doctrine of laches is "primarily concerned with." *In re Beaty*, 306 F.3d 914, 924-925 (9th Cir. 2002). The documents conveying land to the Schuggs repeatedly

[8] The Trustee contends (Br. 49-50) that the Community "waived any right" to point out that the district court applied laches to claims that were not barred by a statute of limitations. That is incorrect. The Community objected to the Trustee's invocation of laches. *Lyon v. Gila River Indian Cmty.*, No. 05-cv-02045-JAT, dkt #144, 12-14 (D. Ariz. Feb. 15, 2007); 9/28/07 Trial Tr. 164-166. The statute-of-limitations point "is not a new claim; rather, it constitutes an alternative argument to support what has been [the Community's] consistent claim from the beginning" that laches does not apply. *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). "As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *Ibid*. (citing *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378-379 (1995)); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied* 510 U.S. 1093 (1994).

warned them that access rights were not established, *see* E.R. 7, 356, and, in fact, the Schuggs in the past had worked cooperatively with the Community to obtain a utility easement through the administrative process, E.R. 12, 354.

C. Murphy Road Is Not an Indian Reservation Road

Although the district court undertook no legal or factual analysis of the question, the Trustee asks this Court to find in the first instance that Murphy Road is an IRR. The Court should decline the invitation because no public authority maintains Murphy Road, the Community closed Murphy Road to public travel, and the Bureau of Indian Affairs agreed to remove the relevant portion of Murphy Road from the IRR Inventory. E.R. 9, 11, 22.

The Trustee contends (Br. 46) that Murphy Road is an IRR because federal funds have been provided for the road's maintenance. But the Community does not receive any funds to maintain Murphy Road under the IRR Program and, in fact, spending for routine maintenance is *not* included within the IRR Program. 23 U.S.C. § 204(c); 25 C.F.R. § 170.116(a); *see also* Cohen's Handbook of Federal Indian Law § 21.04[3][c], at 1323 (Nell J. Newton, et al. eds., 2005).

Nor does any public authority maintain the section of Murphy Road at issue. E.R. 9, 22. And even if one did, the IRR regulations, 25 C.F.R. §§ 170.100 *et seq.*, allow tribes to close an IRR transportation facility permanently "when the tribal government and the Secretary agree. Once that agreement is reached, BIA must

remove the facility from the IRR System." 25 C.F.R. § 170.813(c). Thus, even if Murphy Road were once an IRR, that status has been terminated. Indeed, the Bureau has removed Murphy Road from its registry of IRRs, an official public act of which this Court can take judicial notice.[9]

In any event, the prudential doctrine of primary jurisdiction counsels against a judicial determination of Murphy Road's status pending conclusion of the Bureau's ongoing administrative process. *See* Community Br. 34-35. The Trustee argues (Br. 48) that primary jurisdiction applies only to "complex and far-reaching issues." Putting aside that IRR determinations are historically and legally complex and can involve sensitive policy judgments, the critical question is whether the issue "l[ies] at the heart of the task assigned the [agency] by Congress." *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113, 114-115 (1973) (per curiam); *see Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) ("[P]rotection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."). Where Congress has assigned the issue to an agency in the first instance, courts may not override that

[9] *See Lyon v. Gila River Indian Cmty.*, No. 05-cv-02045-JAT, dkt #164, Exh. B to Supplemental Declaration of Jennifer Giff (BIA letter order (Mar. 19, 2007), appeal pending, *Meda v. Western Regional Director, Bureau of Indian Affairs*, No. IBIA 07-101-A (Department of the Interior Board of Indian Appeals); *see generally NLRB v. E.C. Atkins & Co*, 331 U.S. 398, 406 n.2 (1947); *Western Radio Servs., Co. v. Qwest Corp.*, 530 F.3d 1186, 1192 n.4 (9th Cir. 2008); *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 841 n.5 (6th Cir. 1998).

assignment just because they deem the issue insufficiently "complex [or] far-reaching."

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

A. The Trustee's Zoning Issue Is Not Ripe

The district court correctly ruled that the question of whether the Community would have zoning authority over the development of a high-density subdivision in Section 16 is not ripe for review. Pinal County's zoning scheme currently forbids such use of Section 16 (E.R. 14), and the court found that there are "no current plans" to undertake such development, (E.R. 27-28). The Trustee, however, insists (Br. 58) that the issue is ripe because there was "factual development and extensive presentations of proof on the issue" below. Ripeness, however, does not hinge upon whether parties submitted evidence (extensive or not). It depends exclusively on whether the legal question presented involves completed events or "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Given that Pinal County's zoning law bars the very type of residential development that would trigger the Community's zoning authority and that no residential sales are being pursued, the issue lacks the imminence needed to establish ripeness. Ripeness, moreover, has a jurisdictional component that cannot be altered by the

parties' litigation behavior. *See National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 808 (2003).

B. The Community Would Have Zoning Authority to Prevent High-Density Residential Development Within Its Reservation

Section 16 is located in a Community district that is used predominantly for agrarian purposes and contains no commercial or non-agricultural facilities other than a single gas station and associated convenience store. 9/26/07 Trial Tr. 51:21-52:12. The Trustee, however, wishes to transform land that for decades has been used for agrarian purposes (a family-owned dairy farm) into a high-density suburban subdivision with approximately 8,000 residents in 2,250 new homes and 4,000 new automobiles traversing Reservation roads daily.

That is the type of massive transformation and intrusion on Tribal culture, welfare, and integrity that invests the Community with reasonable zoning authority. Indeed, just last Term, the Supreme Court reiterated that Indian tribes "may exercise 'civil authority over the conduct of non-Indians on fee lands within the 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.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008) (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)). That zoning authority should be redoubled when, as here, the Tribe retains aboriginal title to the land at issue. *Cf. Brendale v. Confederated Tribes & Bands of Yakima Indian*

Nation, 492 U.S. 408, 435 (1989) (Stevens, J.) (a Tribe's property rights derive from, *inter alia*, "aboriginal sovereignty"). But even if the Community lacked aboriginal title and Section 16 were purely non-Indian fee land, the Supreme Court specifically identified "*commercial development*" as the type of use of non-Indian fee land that "may intrude on the internal relations of the tribe or threaten tribal self-rule." *Plains Commerce*, 128 S. Ct. at 2723 (emphasis added).

The Trustee argues (Br. 59) that only the threat of "catastrophic consequences" could trigger tribal zoning authority. The *Plains Commerce* Court, however, simply borrowed that shorthand phrase from a commentator in the course of holding that the sale to a non-Indian of land that had been owned by another non-Indian for at least fifty years did not imperil the tribe. *Id.* at 2726-2727. The Court did not indicate that its shorthand altered the traditional *Montana* standard and, in fact, it concluded by reiterating and applying *Montana*'s test that the challenged conduct not "imperil[] the subsistence or welfare of the tribe." *Id*. at 2727. In any event, the massive intrusion into the Community's agrarian Reservation land and the 7,000% increase in the non-Indian population using and traversing Indian land and Indian roads daily, in need of Community safety, health, and welfare resources, would constitute the type of catastrophic imperiling of tribal welfare that triggers zoning authority.

Alternatively, the Trustee contends (Br. 60) that, because Section 16 is near an urbanized area, it is not sufficiently insulated to merit protection. That gets it exactly backwards. The encircling threat of unwanted assimilation or cultural transformation makes zoning authority critical to preserve "the essential character of the territory." *Brendale*, 492 U.S. at 445 (Stevens, J.); *see id.* at 438-440, 444-446 (how tribe has treated the land is relevant to zoning authority).

The Trustee attempts (Br. 60) to minimize the extent to which residential development of Section 16 would "require added police and fire protection" by the Community, *id.* at 420 n.5 (White, J.), contending that the neighboring cities and counties might contribute such protective services. That argument fails for three reasons. First, the Trustee offers no evidence that surrounding communities (whose own resources may be strained as well) have agreed to relieve the Community of any significant responsibility for those residents.[10] The Trustee cites (Br. 60) only the district court's finding that such agencies "would be allowed

[10] *See, e.g.*, Devon Hersom, *Babeu Plans to Overhaul Pinal Sheriff's Office*, EAST VALLEY TRIBUNE, Nov. 6, 2008 (noting "recent budget cutbacks" for the Pinal County Sheriff's Office), *available at* http://www.eastvalleytribune.com/story/129842 (last visited Jan. 16, 2009); Yvonne Wingett, *Sheriff, Treasurer Fail to Offer Budget-Cut Ideas*, ARIZONA REPUBLIC, Dec. 16, 2008 (Maricopa County supervisors have asked departments, including the Sheriff's Office, to cut budgets by up to twenty percent), *available at* http://www.azcentral.com/news/articles/2008/12/16/20081216budgetfight1216.html (last visited Jan. 16, 2009); *see also Johnston v. Nuclear Regulatory Comm'n*, 766 F.2d 1182, 1189 n.6 (7th Cir. 1985) (court may take judicial notice of official statements by public officials in news reports).

to access Section 16." E.R. 17. In fact, those neighboring cities and counties already make "mutual aide requests" of the Community, and such requests would increase dramatically with the addition of 8,000 new people. E.R. 353; 9/20 Trial Tr. 168:12-19. Beyond that, the Trustee's argument ignores altogether the police, emergency, welfare, and road maintenance needs that would be required on the surrounding Community lands and roads that provide daily ingress and egress for Section 16 and that would be inundated by 4,000 new cars.

Second, the Trustee suggests (Br. 61) that the Community may not complain of the burdens that residential development of Section 16 would create because the Community opened casinos and attractions on a different section of its land. What the Trustee forgets is that those casinos and attractions generate revenue for the Community that funds those extra services. Since Section 16 is non-Indian land, however, its residential development will not generate tax or other revenues for the Community to offset the enormous amount of tribal resources consumed. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (tribe may not tax nonmember activity occurring on non-Indian fee land); 9/25/07 Trial Tr. 145:7-8.

Beyond that, the casinos and other businesses are in a small, non-agrarian section of the Reservation eighteen miles away from Section 16. 9/25/07 Trial Tr. 236:25-237:2. Requiring public safety officials to patrol and service both that area and Section 16 and its surrounding roadways would exponentially increase the

strain on Community resources. Indeed, the whole point of zoning authority is to "ensure[] that neighboring uses of land are not mutually – or more often unilaterally – destructive." *Brendale*, 492 U.S. at 433 (Stevens, J.).

Finally, the law does not, as the Trustee would have it, force Tribes to choose between modernization and retaining the most elemental zoning authority needed to preserve their cultural and economic integrity. "[I]t must not be the case that tribes can retain the 'essential character' of their reservations (necessary to the exercise of zoning authority) only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically 'Indian' today." *Id.* at 465 (Blackmun, J.).

IV. THE COMMUNITY HAS ABORIGINAL TITLE TO SECTION 16

Aboriginal title is a right of use and occupancy that can only be abrogated or terminated "by the United States," and any such extinguishment must be "plain and unambiguous." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346-347 (1941). The Trustee does not dispute either that the Community was vested with aboriginal title to Section 16 or the legal rule that any subsequent extinguishment of that title by the United States would have to be "plain and unambiguous," *ibid.* Nor does the Trustee cite to any federal governmental document or action that "plain[ly] and unambiguous[ly]" extinguished aboriginal title. Instead, the Trustee asks this Court to find that aboriginal title was implicitly extinguished. But the

termination of aboriginal title "cannot be lightly implied," *id.* at 354, and none of the alleged grounds for extinguishment propounded by the Trustee withstand scrutiny.

A. The Conveyance of School Land Preserved Aboriginal Title

The Trustee contends that the conveyance of Section 16 to Arizona as school land extinguished aboriginal title. The Supreme Court, however, has ruled exactly the opposite no less than *four times*. In *Santa Fe*, the Supreme Court addressed the very same statute that conveyed Section 16 as school lands and specifically held that "[t]hese Acts did not extinguish any Indian title based on aboriginal occupancy." 314 U.S. at 350. Three more times the Supreme Court reiterated that transfers of land for school purposes "vest in the State the fee to" the land "subject * * * to the existing occupancy of the Indians." *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877); *see 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 Trustee objects that the claim of the Walapais Indians in *Santa Fe* did not pertain to school lands. That is true, but irrelevant. What is critical is that (as the Supreme Court held) the Act that conveyed Section 16 as school lands did not contain any language abrogating aboriginal title. For the Trustee to prevail, he

would have to show that there was something so distinctive about the text of the statutory provision that conveyed Section 16 that it would compel this Court to depart from the Supreme Court's directly contrary analysis and find the requisite "plain and unambiguous" extinguishment of aboriginal title within that particular provision. The Trustee, however, points to nothing in the relevant text. Furthermore, *Beecher*, *Thomas*, and *Hitchcock* each addressed school lands specifically, and each held that the grant did not extinguish aboriginal title.

The Trustee also notes (Br. 64 n.21) that *Santa Fe* ultimately found the Walapais' aboriginal title to be extinguished by an 1883 Executive Order. But that simply proves the Community's point that more was required to extinguish aboriginal title than the Act conveying school lands. The problem for the Trustee is that there is nothing more with respect to Section 16.

Finally, the Trustee argues (Br. 64) that the cases preserving aboriginal title only apply when the land is subject to a pre-existing treaty. The Trustee, however, cites no authority or rationale for that distinction. Nor could he, because caselaw establishes that the rules, as well as the underlying rationale, governing the extinguishment of Indian title based on aboriginal title and on treaty do not differ in any material respect. *Compare United States v. Dion*, 476 U.S. 734, 738-739 (1986) (Congress's intention to abrogate Indian treaty rights must be clear and plain), *with Santa Fe*, 314 U.S. at 345 (similar rule for aboriginal title); *see also*

Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 338-339 (1945) (whether title is obtained by treaty or aboriginal use, the Indians' right was one of occupancy).[11] Thus, whether the Community claimed title to Section 16 via treaty or aboriginal title, the determinative fact is that the Community held a right of occupancy to Section 16 that has never been plainly or unambiguously abrogated by the United States.[12]

B. The Indian Claims Commission Did Not Address the Community's Aboriginal Title Claim

The Trustee echoes the district court's holding that the Indian Claims Commission proceeding collaterally estops the aboriginal title claim. In particular, the Trustee argues (Br. 65) that the Commission's award included compensation for the extinguishment of aboriginal title in Section 16. But the Trustee cites nothing to support that contention. Nor could he, because the record establishes that the Community never sought compensation for aboriginal title to Section 16 and, in

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[11] In the latter half of the twentieth century, the term "recognized title" entered the vernacular relating to Indian title. That term refers to tribal property that has been formally declared by Congress, through treaty or statute, to be held permanently thereafter by the Indians. Recognized title differs from aboriginal title in *only* two respects: (1) the treaty establishes the boundaries of the land as opposed to having to be proven by use or occupation; and (2) Congress may not take recognized title without paying compensation. Cohen, *supra*, § 15.04[3][a], at 974-975.

[12] The Trustee's citation of *United States v. Atlantic Richfield*, 435 F. Supp. 1009 (D. Alaska 1977), does not help his cause. The statute at issue in *Atlantic Richfield* contained the very plain and unambiguous language extinguishing aboriginal title that is missing here. *Id*. at 1022.

fact, "Section 16 was not specifically identified in the ICC proceedings." *Gila River Pima-Maricopa Indian Cmty. v. United States*, 2 Cl. Ct. 12, 16 (1982). The record also establishes that the entire Reservation area, including Section 16, was excluded from calculation of the Community's monetary award. *Ibid*.

Finally, though the Trustee refuses to acknowledge the distinction, the Community is asserting in this case a continuing right of use and occupancy in Section 16, not an action for compensation for the taking of that land. The Commission could only adjudicate the latter. It had no authority to adjudicate the predicate question of who holds title to the land. *See 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*, 470 U.S. 39 (1985); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987).

In short, because the identical issue was not and could not be adjudicated in the Commission proceedings, the foundation of the district court's collateral estoppel ruling has crumbled. *See New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (issue preclusion applies only when "an issue of law actually [was] litigated and resolved" in prior litigation); *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (similar). At a minimum, whether the issue was previously

adjudged is too ambiguous to support preclusion. *See Catholic Social Servs., Inc. v. INS.*, 232 F.3d 1139, 1152-1153 (9th Cir. 2000) (although prior decision "appear[ed]" to reach the issue, ruling was too unclear to conclude that the 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).

V. THE DISTRICT COURT CORRECTLY CONCLUDED THAT NEITHER SMITH-ENKE ROAD NOR MURPHY ROAD IS AN R.S. 2477 HIGHWAY

In 1866, as part of a larger legislative effort to facilitate settlement of the American West, Congress passed Revised Statute (R.S.) 2477, 43 U.S.C. § 932 (1970), *repealed by* Federal Land Policy Management Act, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976).[13] R.S. 2477 provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Although later repealed, Congress expressly preserved "any valid" right-of-way "existing on the date of [repeal]." Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. 2743, 2793. The Trustee argues that Smith-Enke and Murphy Roads are R.S. 2477 roads that provide a right of legal access to Section

[13] *See generally*, Congressional Research Service, *Report for Congress, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477*, 10-18 (1993); *see also Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 472-473 (1932).

16. That is both jurisdictionally and substantively incorrect.

A. The District Court Lacked Jurisdiction Over the Trustee's Claim

The determination that a road is a public highway within the meaning of R.S. 2477 does not establish an individual legal right of access to land. Instead, it establishes "an undifferentiated right" shared equally by every member of the public to traverse the road for any lawful purpose. *Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001); *see Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978) (per curiam) (right "is vested in the public generally"). Given the communal nature of an R.S. 2477 determination, the district court lacked jurisdiction over the Trustee's claim in two respects.[14]

First, the United States holds legal title to the land that the alleged R.S. 2477 roads traverse, E.R. 8, 9, and the Trustee's R.S. 2477 claim is an effort to quiet title in those portions of the lands. Complaint at 3 ¶ 10, 9 ¶ 43. The Quiet Title Act, however, proscribes jurisdiction over such claims. To begin with, the Quiet Title Act specifically preserves the United States' sovereign immunity from suit for any claim relating to Indian land held in trust by the United States. 28 U.S.C. § 2409a(a). The Trustee cannot circumvent that limitation by simply omitting the title-holding United States from the litigation and aiming his claims at the Tribe.

[14] *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988) (subject matter jurisdiction of the district court may be raised at any time).

"[W]hen the United States has an interest in the disputed property, the waiver of sovereign immunity must be found, if at all, within the [Quiet Title Act]." *Alaska v. Babbitt*, 38 F.3d 1068, 1073 (9th Cir. 1994); *see also Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 284-285 (1983) (party may not use "artful pleading" to escape Quiet Title Act's limits on suits against the United States); 28 U.S.C. § 2409a(a) (Quiet Title Act applies to suits "to quiet title to real property in which the United States claims an *interest*") (emphasis added).

In addition, as a number of courts have recognized, R.S. 2477 does not create the type of individual property right needed to support an action under the Quiet Title Act. That is because the collective public right to use a highway created under R.S. 2477 "is not an interest in real property." *Kinscherff*, 586 F.2d at 160; *see Long*, 236 F.3d at 915 ("[T]he right of an individual to use a public road is not a right or interest in property for purposes of the Quiet Title Act."); *see also Southwest Four Wheel Drive Ass'n v. BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004) (similar); *cf. United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915) (citizens have "no private right in land which was the property of the people"). Even when, as here, the plaintiff invokes R.S. 2477 to assert a right of access to his own property, the interest in access over a public road "is not of such a nature to enable [him] to bring suit to quiet title." *Kinscherff*, 586 F.2d at 160-161.

The second, and related, jurisdictional flaw is that the Trustee lacks standing to assert the public's collective right to use a road under R.S. 2477. The "irreducible constitutional minimum of standing" requires, *inter alia*, that the plaintiff have suffered an injury in fact in the form of the "invasion of a legally protected interest" that is both "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citation omitted). R.S. 2477, however, creates no "particularized" "legally protected interest" in the Trustee or any other individual. *See Long, supra; Kinscherff, supra*; *Friends of Panamint Valley v. Kempthorne*, 499 F.Supp.2d 1165, 1177 (E.D. Cal. 2007) (following *Kinscherff*); *Alleman v. United States*, 372 F. Supp. 2d 1212, 1226-1227 (D. Ore. 2005) (same). Nor does state law recognize an individually vindicable property interest in the public highways. *See State v. Schaffer*, 467 P.2d 66, 71 (Ariz. 1970). Instead, a claimed right to use a public highway in common with the general public is "a generally available grievance * * * claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan*, 504 U.S. at 573-574. Such a claim "does not state an Article III case or controversy." *Id*. at 574.[15]

[15] *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("Standing has been rejected" where "the alleged injury is not 'concrete and

B. Smith-Enke Road and Murphy Road Are Not R.S. 2477 Highways

The Trustee's argument is as flawed on the merits as it is lacking in jurisdictional basis. R.S. 2477 did not create roads or rights to roadways. It simply authorized States, if they so chose, to construct public highways across public lands that had not otherwise been reserved for public use. *See State v. Crawford*, 441 P.2d 586, 590 (Ariz. Ct. App. 1968) (R.S. 2477 is an offer on the part of the federal government "which offer must be accepted by the public in order to become effective"). Moreover, the 1913 Executive Order withdrew the lands over which Smith-Enke and Murphy Roads currently run from the public domain, as "[i]t has long been established that Indian reservation land is not public land." *United States v. Schwarz*, 460 F.2d 1365, 1372 (7th Cir. 1972); *see also Northern Pac. Ry. Co. v. Wismer*, 230 F. 591, 595 (9th Cir. 1916) (land occupied as an Indian reservation is not public land). Accordingly, the Trustee must establish that the State officially established Smith-Enke and Murphy Roads, in their present location, as public highways before 1913. That the Trustee has failed to do.

1. The Trustee argues (Br. 52) that Murphy and Smith-Enke Roads existed prior to 1913. But the test is not whether the roads existed, but whether the State established those roads as "highways," 43 U.S.C. § 932 (1970). The creation

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particularized,' * * * but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'").

of a "highway" under R.S. 2477 requires "strict compliance with the provisions of Arizona law." *Crawford*, 441 P.2d at 589; *see also Tucson Consol. Copper Co. v. Reese*, 100 P. 777, 778-779 (Terr. Ariz. 1909).

Prior to 1913, the Territory of Arizona defined "public highways" within the Territory as (1) roads and highways located as public highways by order of the board of supervisors, or (2) roads in public use that have been recorded as public highways or recorded by authority of the board of supervisors. Ariz. Terr. Civ. Code 1901, § 3601 (Trustee's Br., App. C); *see Tucson Consol.*, 100 P. at 778. The State expressly disclaimed as public highways any roads in public use that did not meet that definition. Ariz. Terr. Civ. Code § 3601 (1901) ("[A]ll roads in the territory of Arizona now in public use [in 1901], which do not come within the foregoing provisions of this section, are hereby declared vacated."). "[O]nly such roads as may be located and recorded by authority of the board of supervisors have the status of a public highway." *Tucson Consol.*, 100 P. at 778.

After admission to the Union, Arizona also authorized the state engineer to identify highways for the State to establish, open, vacate, alter, or abandon, and to submit a written report identifying those roadways to the State Highway Commission. Ariz. Rev. Stat. § 18-154 (1960) (repealed 1974). If the Commission determined that the proposed action would serve "the public convenience," then

the Commission would authorize the state engineer to implement that action. *Crawford*, 441 P.2d at 590-591.

The Trustee has submitted no evidence that either Smith-Enke Road or Murphy Road was ever located, recorded, or otherwise identified by the board of supervisors as a highway. Nor does the Trustee offer any evidence that either the state engineer or the Arizona Highway Commission took any steps to recognize or manage either Smith-Enke or Murphy Road as a public highway during the relevant time. Instead, the Trustee offered maps identifying the two Roads. But those maps were created no earlier than 1919 – six years *after* the land over which the Roads run was removed from the public domain. Those maps thus provide no evidence that highways provided access to Section 16 in or prior to 1913.[16]

Moreover, the Trustee's expert's testimony shows that the roads indicated on the Trustee's maps were not in the same location as present day Smith-Enke Road and Murphy Road. 9/19/07 Trial Tr. 20:10-21:4; 9/18/07 Trial Tr. 243:1-5, 266:3-21. Indeed, the Trustee's expert acknowledged that his ultimate opinion regarding the existence of the alleged pre-1913 roads rested on conjecture. 9/19/07 Trial Tr. 21:6-26. However, an R.S. 2477 highway cannot exist if the road changed

[16] For example, trial exhibits 71 and 803 are a map filed in 1921 based on a survey conducted in 1919. 9/19/07 Trial Tr. 19:11-20:1. Trial exhibit 78 is a 1952 U.S. Geological Survey Map. 9/19/07 Trial Tr. 17:22-26. One map (trial exhibit 64) is dated 1877, but it does not identify any highways leading to Section 16 or anything else of relevance to the R.S. 2477 argument.

locations and was re-built after the land was withdrawn from the public domain. *Adams I*, 3 F.3d at 1256-1258 (no R.S. 2477 highway where present-day road was in a different location from road shown in 1881 map, and was built after the removal from public use).[17]

2. Because no highways existed under state law, the Trustee argues (Br. 52) that federal law, not Arizona law, determines whether a highway was created, and thus the only inquiry should be "whether the road 'was built before the surrounding land lost its public character.'" *Ibid.* That contention fails for three reasons.

First, the argument that federal law controls is foreclosed by precedent. In *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248 (9th Cir. 1974), this Court held that the status of a road under R.S. 2477 "turns entirely upon disputed questions of law and fact relating to compliance with state law, and not at all upon the meaning or effect of the federal statute itself." *Id*. at 250. More particularly, determination of whether a road is a public highway within the meaning of R.S. 2477 "require[s]

[17] Before the district court, the Trustee relied on *Bird Bear v. McLean Count*y, 513 F.2d 190 (8th Cir. 1975), and *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). The trustee has abandoned his reliance on those cases in this Court. That is for good reason – both are inapposite. *Bird Bear* involved a road that obtained its R.S. 2477 status prior to being withdrawn from the public domain. 513 F.2d at 192. *Southern Pacific* involved a right-of-way statute that, unlike R.S. 2477, specifically exempted Indian reservations. 543 F.2d at 686.

an interpretation of Arizona law as to what was required to establish a public highway, and a factual inquiry as to whether Arizona officials had complied with these requirements." *Ibid.*; *cf. Sierra Club v. Hodel*, 848 F.2d 1068, 1080-1083 (10th Cir. 1988) (holding that state law defines the scope of an R.S. 2477 right of way), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (en banc). Indeed, R.S. 2477 "is not to be construed as granting such rights of way and establishing highways contrary to the laws of the state or territory in which the lands affected are located." *Tucson*, 100 P. at 778-779. Notably, for almost 100 years after the enactment of R.S. 2477, a federal regulation echoed that conclusion. *See* 43 C.F.R. § 244.55 (1938) (highway grant under R.S. 2477 became effective "upon the construction or establishing of highways in accordance with the State laws"); 43 C.F.R. § 244.58 (1963) (same); 43 C.F.R. § 2822.2-1 (1979) (same); *cf.* United States Department of the Interior, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands 15 (June 1993) ("[The Department of Interior] has looked to state law to determine what constitutes a public highway under R.S. 2477.").

Second, even if federal law predominated, it would "'borrow[]' from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent." *Southern Utah*

Wilderness Alliance v. BLM, 425 F.3d 735, 768 (10th Cir. 2005). The definition of "highway," in particular, would appropriately reference state law. *See* Congressional Research Service, *Report for Congress, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477* at 21 (1993) ("[S]tate law can provide many of the details regarding acceptance of the grants," citing with approval Arizona law governing the definition of "highway."); *id*. at 22 ("Where state law was clear" – citing to Arizona law – "there are few disputes today as to which roads qualify under R.S. 2477."). [18]

Third, whether state or federal law governs, the Trustee offers no support for his sweeping test, which would encompass every road "built" before the land was withdrawn from the public domain. Br. 52. That definition would be vastly overinclusive, swallowing all manner of roadways, regardless of size, location, governmental involvement in their creation, or even governmental awareness of their existence. *See Crawford*, 441 P.2d at 590. In fact, "highway" in R.S. 2477 is a specialized term that refers to "a significant type of road * * * that was open for

[18] Moreover, if federal law controlled, the determination of whether an R.S. 2477 right of way existed would have to be made by the Bureau of Land Management, given its longstanding authority to administer the public lands and claims to those lands. *See Cameron v. United States*, 252 U.S. 450, 459-460 (1920) ("[E]xecution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the [Department of the Interior]"); *see also Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (where the United States retains underlying title, "determination of the validity of claims against public lands [is] entrusted to the * * * Department of the Interior").

public passage, received a significant amount of public use, had some degree of construction or improvement, and that connected cities, towns, or other significant places, rather than simply two places." *Highway Rights of Way*, *supra*, at 6. That definition is not met here.

C. Executive Order Reservation Lands Are Not Public Lands

The Trustee contends (Br. 53-55) that evidence of the Roads' status after 1913 can be considered because Executive Order reservations do not withdraw the land from public use. That argument fails for three reasons.

First, controlling precedent establishes that an Executive Order land grant "withdraw[s] or reserv[es] parts of the public domain." *United States v. Midwest Oil Co.*, 236 U.S. 459, 470-471 (1915) (recognizing that Executive Orders that established or enlarged 99 Indian reservations withdrew those lands from the public domain); *see Adams I*, 3 F.3d at 1257-1258 (land reserved for national forests by Executive Order is not public land).[19]

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[19] *See also Humboldt County v. United States*, 684 F.2d 1276, 1281 (9th Cir. 1982) (land reserved by Executive Order from "settlement, location, sale or entry" is not public land); Cohen, *supra*, § 15.04[4], at 983 ("Both Congress and the executive generally treat executive order reservations the same as those created by treaty or statute."); *cf. United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes

To be sure, the subsequent return of Executive Order lands to the public domain is not compensable under the Fifth Amendment's Takings Clause. *See Confederated Band of Ute Indians v. United States*, 330 U.S. 169, 180-181 (1947); *Sioux Tribe v. United States*, 316 U.S. 317, 331 (1942).[20] Tellingly, however, Congress has treated Executive Order reservations as standing on the same footing with respect to compensability as reservations created by treaty or statute and has, as a matter of modern practice, provided compensation for the taking of such Executive Order land. *See, e.g.*, 43 U.S.C. § 1522 (paying fair market value and relocation expenses for two reservations created by Executive Order).

More importantly, the Court's decisions in *Confederated Band* and *Sioux Tribe* prove that Executive Orders do alter the public domain status of land, because both opinions spoke of subsequent Executive Orders as "restor[ing]" the land "to the public domain." *Confederated Band*, 330 U.S. at 174; *see Sioux Tribe*, 316 U.S. at 324 (same). If, as the Trustee contends, the land granted by the initial

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designated."); *Puyallup*, 717 F.2d at 1261 n.10 ("An Executive Order may convey title to an Indian tribe as effectively as any other conveyance from the United States."); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976) (as long as an executive order creating a reservation remains in effect, Indian title to the land deserves the same protection as that afforded to reservations created by treaty or statute).

[20] The reason for the distinction is that the President's authority to create reservations does not include the further authority to obligate the federal Treasury by conferring *compensable* property interests. *See Sioux Tribe*, 316 U.S. at 325-329.

Executive Order reservations in *Confederated Band* and *Sioux Tribe* was never removed from the public domain, then there would have been no need for a subsequent Executive Order to return the land to the public domain. In short, the Trustee's authority confirms that Executive Orders legally altered the public-domain status of lands.

Second, the Trustee contends (Br. 54) that Executive Order reservations remain public lands because the land remains subject to sale or disposal. That is wrong. Both the 1883 and 1913 Executive Orders that expanded the Reservation's boundaries expressly provided that the lands reserved for the Gila River Indian Reservation were *not* subject to sale or disposal. *See* ER 362 (1883 Order: the allocated land is "hereby, withdrawn from sale and settlement and set apart for the use and occupancy of the Pima and Maricopa Indians"); ER 364 (1913 Order: allocated land is "hereby, withdrawn from settlement, entry, sale, or other disposition, and set aside as an addition to the Gila River Indian Reservation"). The Supreme Court is of the same view. *See Midwest*, 236 U.S. at 471 (Executive Orders "withdrew land from private acquisition * * * [and] reserved [it] from sale").

The Trustee counters (Br. 54) that Congress could change its mind and "dispose of lands within executive order Indian reservations." That is true, but it is a legislative commonplace. Congress can always change its mind by enacting new

legislation (unless constitutionally constrained) – and thus can statutorily change the status of lands granted by statute as much as by Executive Order.

Third, the Trustee's claim that the President lacked authority to convey an interest in land without a specific delegation from Congress misunderstands the relevant law. Prior to 1919 – which is the time period of relevance here – the President had the constitutional authority to withdraw land from the public domain and create Indian reservations. That is precisely what *Midwest Oil* held. *See* 236 U.S. at 471 ("This right of the President to make reservations – and thus withdraw land from private acquisition – was expressly recognized in *Grisar v. McDowell*, 6 Wall. 364 [(1867)]."); *id*. at 475 ("The Executive, as [Congress's] agent, was in charge of the public domain," and Congress's "acquiescence all the more readily operated as an implied grant of power.").[21] In 1919, Congress withdrew the President's authority to create Executive Order reservations, *see* Act of June 30, 1919, § 27, 41 Stat. 3, but in so doing did not alter the status of pre-1919 reservations. Indeed, both *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), and *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied* 532 U.S. 941 (2001), upon which the Trustee relies (Br. 54), expressly recognized that

[21] *See also* Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627, 628 (1960) (prior to Congress ending the practice in 1919, 23 million acres of public lands were set aside by executive orders for use and occupancy by Indian tribes).

"[a]n Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress *or the President.*" *Hynes*, 337 U.S. at 103 (emphasis added); *see Karuk Tribe*, 209 F.3d at 1374 (same).

* * * * *

At the end of the day, the Trustee's effort to establish a legal right to transmogrify a parcel of land fully enclosed by agrarian Reservation land into a high-density suburban subdivision – one that would require thousands upon thousands of non-Indians to traverse Indian land and receive Community services daily – fails. It fails because of the elementary principle that title to land cannot be so significantly diminished without the titleholders' participation in the litigation. And it fails because plaintiffs cannot quiet title to and adjudicate the legal status of property held by the sovereign United States in the United States' absence and outside of the administrative process Congress has prescribed for such decisionmaking. Finally, it fails because centuries of caselaw have encircled the rights of the Community and the United States in Indian land with layers of protection that require clear and explicit direction before such rights are extinguished or diminished. For all its briefing, the Trustee never identifies any such clear direction from the Political Branches. In its absence, the district court erred in imputing the type of dramatic erosion of legal rights necessary to vest the

Trustee with legal title and legal access rights that, for centuries, have belonged to the Community and have been held in trust or otherwise protected by the United States.

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, and the district court's decision with respect to R.S. 2477 should be affirmed.

Respectfully Submitted,

By: /s Patricia A. Millett

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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 foregoing Response and Reply Brief of Appellant/Cross-Appellee Gila River Indian Community Opening Brief of Appellant/Cross-Appellee Gila River Indian Community is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,395 words.

/s Patricia A. Millett
Counsel for Appellant/Cross-Appellee
January 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, I electronically filed the foregoing Response and Reply Brief of Appellant/Cross-Appellee Gila River Indian Community with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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ADDENDUM A

FOREWORD

This volume is an exact photo-reproduction of an original copy of

UNITED STATES
STATUTES AT
LARGE

Volume 10

As a copy of the original is practically unobtainable, this reprint is offered to enable Law Libraries to complete their set.

The edition has a limited printing.

Buffalo, N.Y.
January, 1964

DENNIS & CO., INC.

July 22, 1854.

CHAP. CIII. — *An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes.*

Surveyor-General for New Mexico; his appointment, power, authority, duties and compensation.

1853, ch. 59.

Appropriation for clerk hire.

Location of his office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor-General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor-General of Oregon; he shall have proper allowances for clerk hire, office rent, and fuel, not exceeding what now is or hereafter may be allowed by law to the said Surveyor-General of Oregon; and he shall locate his office from time to time at such places as may be directed by the President of the United States.

Donation of public lands to every white male citizen, or to every white male above 21 years of age, who has declared his intention and who are residing in said Territory at passage of this act.

SEC. 2. *And be it further enacted*, That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however*, That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

Donation of public lands to those who shall remove there between January 1st, 1853, and January 1st, 1858.

Proviso.

Patent to issue — when.

SEC. 3. *And be it further enacted*, That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor-general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: *Provided, however*, That on the death of any such settler before the completion of the four years' occupancy and cultivation required by this act, the right shall descend to his heirs at law, who shall be entitled to a certificate and patent, as aforesaid, on proof, as before provided, of continued occupancy and cultivation by such settler to the time of his death: *Provided, however*, That when lands are claimed under any of the provisions of this act by persons who are not citizens of the United States, patents shall not issue therefor until they become citizens.

Proviso.

Proviso.

Patents to issue to citizens only.

Reservation of mineral and other lands.

SEC. 4. *And be it further enacted*, That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture, and all legal subdivisions settled on

and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold. 1844, ch. 17.

Reservation of land for schools.

SEC. 5. *And be it further enacted*, That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.

Reservation of land for a university.

SEC. 6. *And be it further enacted*, That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.

Land not taken under this act subject to the act of 1841, ch. 16.

SEC. 7. *And be it further enacted*, That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preëmption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

Time in which the land may be entered.

Spanish and Mexican claims to land to be ascertained.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bonâ fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

Portion of such claims to be reported. Vol. 9, 922.

The report to be laid before Congress for action.

Lands covered by such claims reserved from sale.

Full power given to execute this act.

SEC. 9. *And be it further enacted*, That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act.

Surveyor-General for Nebraska

SEC. 10. *And be it further enacted*, That the President of the United States shall be and he is hereby, authorized to appoint, by and with the

and Kansas; his appointment, powers, duties, and compensation.

advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

Standard meridian and other lines to be surveyed.

SEC. 11. *And be it further enacted*, That said Surveyor-General shall cause the necessary surveys to be made in said Territories of standard meridian, base, and parallel lines, and of township and subdivisional lines, under such rules and regulations as shall be prescribed by the Commissioner of the General Land-Office.

Certain lands subject to the operation of the Act of 1841, ch. 16.

SEC. 12. *And be it further enacted*, That all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preëmption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however*, That where unsurveyed lands are claimed by preëmption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided*, said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

Proviso.

Proviso.

Omaha Land District.

SEC. 13. *And be it further enacted*, That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the President may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Register and Receiver of Public Moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices of the United States. And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States.

Pawnee Land District.

Place of office.

Register and Receiver for said districts to be appointed.

Land to be surveyed and exposed for sale.

APPROVED, July 22, 1854.

ADDENDUM B

43 U.S.C. § 932 Right-of-way for highways

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Repealed by Pub. L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793.