Nos. 08-15712 and 08-15570

In The
United States Court of Appeals
Ninth Circuit

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

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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

# APPELLEE/CROSS-APPELLANT G. GRANT LYON'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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## Corporate Disclosure Statement

Appellee/Cross-Appellant G. Grant Lyon, the Chapter 11 Trustee for the Bankruptcy Estate of Michael Schugg and Debra Schugg, is not a publicly held corporation, does not have any parent corporation, nor does any publicly traded corporation own any of its shares.

## Table of Contents

**Page**

## Table of Authorities

**Cases** **Page(s)**

**Statutes**

**Rules and Regulations**



**Miscellaneous**

## Jurisdictional Statement

Appellee/Cross-Appellant G. Grant Lyon (the "Trustee"), the Chapter 11 Trustee for the Bankruptcy Estate of Michael Schugg and Debra Schugg (the "Estate"), agrees with the Jurisdictional Statement of Appellant Gila River Indian Community ("GRIC").

## Issues Presented

1. Given that GRIC filed a proof of claim in the bankruptcy court and counterclaims in the district court contesting the Trustee's title and access rights to Section 16, did the district court abuse its discretion in reaching the merits of those issues without requiring the joinder of the United States or the beneficial titleholders of Indian allotments (the "Allottees") to the south, west and east of Section 16?

2. On the issue of the Trustee's right to access Section 16:

    a. Did the district court correctly determine that when Congress conveyed Section 16 as school trust land to the Territory of Arizona, it also conveyed implied easements to Section 16 so that the property would not be economically worthless to the Territory?

    b. Did the district court correctly determine that Murphy Road is a public road based on federal regulations requiring that federally maintained Indian Reservation Roads be open for public use?

    c. Did the district court abuse its discretion in finding that laches bars GRIC from denying access to Section 16 due to its decades-long acquiescence in such access, and the

purchase and development of Section 16 that resulted from its acquiescence?

d. Did the district court err in determining that Murphy and Smith-Enke Roads are not public roads under Revised Statute 2477 ("R.S. 2477"), given that at all relevant times those roads provided access to Section 16 and the Encircling Strip and cross public land that is alienable by Congress?

3. On the issue of GRIC's zoning authority over Section 16:

a. Is the district court's ruling that GRIC does not have zoning authority over Section 16 as it is currently zoned subject to appellate review given that GRIC does not challenge that ruling?

b. Is the issue of GRIC's authority to zone Section 16 so as to prevent future residential development ripe for review given GRIC's avowals below that the prospect of such development would require an "immediate[]" modification of its land use scheme for the Reservation?

c. In holding that GRIC has no zoning authority to restrict future residential development of Section 16, did the district court clearly err in finding that GRIC failed to establish that such development would have a "demonstrably serious impact that imperils GRIC's political integrity, economic security, or health and welfare," let alone a "catastrophic impact" as required by the most recent Supreme Court precedent decided after the district court issued its decision in this matter?

4. Did the district court correctly conclude that Congress extinguished GRIC's aboriginal title to Section 16 when it conveyed the property to Arizona as school land, and that in any event, GRIC is collaterally estopped from litigating that issue because it has already been decided by the Indian Claims Commission?

## Statement Of The Case

This appeal arises from the district court's judgment that the current owners of a 657-acre parcel of land known as Section 16—which is not part of, but is surrounded by, the GRIC Reservation (the "Reservation")—may continue to access Section 16 over roads that Section 16's owners have used for decades and may occupy and develop their property free from any interference by GRIC. The relevant procedural history occurred in the bankruptcy and district courts.

Michael and Debra Schugg (the "Debtors") purchased Section 16 in 2003. [ER32] That year, the Debtors separately filed voluntary Chapter 11 bankruptcy petitions that were later consolidated. [*Id.*] The bankruptcy court approved a plan of reorganization and appointed a plan trustee.

In the bankruptcy court, GRIC filed its "Limited Objection to Final Entry of Order Authorizing and Approving Stipulations Between Trustee and Wells Fargo Bank, N.A. Regarding Cash Collateral and Other Related Matters," asserting that GRIC had "valid, aboriginal title" to Section 16 and that the Trustee had no access rights to the property. [ER33 at ¶¶14-21] GRIC also filed its Proofs of Claim, asserting "sole and exclusive legal and equitable ownership and right of possession and other interests in and relating to [Section 16]," that the Trustee had no access rights thereto, and that GRIC had zoning authority over Section 16. [ER338-40, 349-50 ]

In response, the Trustee filed a Complaint for Declaratory Relief (the "Adversary Case") against GRIC in bankruptcy court, seeking (i) to quiet title to Section 16 and (ii) a declaratory judgment that Section 16 is owned by the Estate free and clear of GRIC's claims or interests and (iii) that the Estate has a right to access Section 16 via Smith-Enke and Murphy Roads. [ER32; SER 236-52]

In November, 2005, the Trustee and GRIC agreed to settle the issues raised in the Adversary Case, and GRIC agreed to purchase Section 16 for $10.3 million. [*Id.*] The bankruptcy court approved the settlement and sale. [ER32] Following a stipulated withdrawal of the reference, the Adversary Case moved to the district court. [ER32] The district court then set aside the bankruptcy court's order approving the settlement and sale, which order Mr. Schugg separately appealed. [ER33]

The district court next addressed GRIC's motion to dismiss under Federal Rule of Civil Procedure 19 ("Rule 19"), which alleged that the action could not proceed without the United States. [ER45-51] The court denied GRIC's motion, holding:

> In filing a proof of claim asserting sole legal and equitable title to the Debtor's single asset, GRIC had to know that there would be an objection which could be litigated only as an adversary proceeding with GRIC named as the defendant. This is the procedural posture even though GRIC really stands in the shoes of a plaintiff because it first sought relief in the bankruptcy court and ultimately bears the burden of persuasion on its proof of claim.

[*Id.*][1]

GRIC thereafter filed a First Amended Answer and Counterclaims seeking (i) a declaration that the Trustee cannot legally access Section 16 and an injunction to prohibit the Trustee from accessing the property, and (ii) a declaration that it holds aboriginal title to, and the authority to impose zoning restrictions on, Section 16. [ER297-322] GRIC's counterclaims also included a damages claim for trespass based on the Debtors' operation of a dairy farm on Section 16 and their "ent[ry] upon Reservation land and allotments within the Reservation and use [of] Reservation roads to gain access to Section 16." [ER320 at ¶91]

GRIC and the Trustee cross-moved for summary judgment. The district court granted the Trustee's motion for summary judgment as to the issue of aboriginal title to Section 16, and denied the remainder of the parties' motions. [ER31-44]

The district court conducted a seven-day bench trial. [ER2] In its Findings of Fact and Conclusions of Law, the court granted judgment in the Trustee's favor and declared that the Trustee "is entitled to legal access to Section 16, that [GRIC] is not entitled to exercise zoning authority over Section 16, and that no trespass on the Gila River Indian Reservation has occurred." [ER29] The court also

[1] Later, the Bureau of Indian Affairs ("BIA") expressly disavowed any interest in this litigation. [SER 253-55]

determined that neither the United States nor the Allottees were indispensable parties to adjudicating the legal access issue. [ER18-21] GRIC filed a timely Notice of Appeal from a final judgment entered against GRIC on February 12, 2008, and the Trustee filed a timely Notice of Cross Appeal. [ER52-58]

## Statement Of Facts

### A. Section 16 And The Evolution Of The Reservation.

#### 1. History Of The Ownership Of Section 16.

The United States acquired land that included Section 16 through the Gadsden Purchase in 1853. [ER4 at ¶15; SER 317-25] One year later, Congress declared that, "sections numbered sixteen and thirty-six in each township" in the Territory of New Mexico, "shall be, and the same are hereby, reserved for the purpose of being applied to schools." Law of July 23, 1854, § 5. [ER4 at ¶16; SER 312-16] In 1863, Congress partitioned the Territory of New Mexico to create the Territory of Arizona, and again declared that Section 16 was reserved as school trust land. Law of Feb. 24, 1863, 12 Stat. 665. [ER4-5 at ¶¶16-17] Congress completed its conveyance of Section 16 as school trust land to the Territory of Arizona in 1877, when the federal government filed its official survey of the land. [ER5 at ¶18] In the Enabling Act creating the State of Arizona, Congress re-confirmed that all sections numbered 16 and 36 in the State were reserved for support of common schools. Enabling Act of June 20, 1910, ch. 310, § 24, 36 Stat. 557, 568-579. [ER4-5 at ¶¶16-17, 20-21]

Arizona owned Section 16 until 1929, when it sold the land by patent to J.L. Hodges, conveying to him "all the rights, privileges, immunities, and appurtenances of whatsoever nature" and "subject to any and all easements or rights of way heretofore legally obtained." [ER6 at ¶31; SER 32-33, 36-37, 305-06] Section 16 has been sold many times since then, but always through deeds containing the same or similar language contained in the Hodges patent. [ER67 at ¶¶32-37; SER 32-33, 36, 305-11, 330-40]

In 2003, S&T Dairy, then the owner of Section 16, conveyed Section 16 to the Debtors "together with all rights, easements, benefits and privileges appurtenant to the Subject Real Property." [ER7-8 at ¶42; SER 5, 34, 336-40] GRIC never attempted to deny Section 16's owners access to the property before that conveyance.

### 2. History Of The Gila River Indian Reservation.

Congress created the Reservation in 1859. *See* §§ 3 and 4 of the Act of Feb. 28, 1859, ch. 66, 11 Stat. 388, 401. [ER5 at ¶22; SER 138-39, 326-29] Between 1876 and 1915, the boundaries of the Reservation were modified by seven Executive Orders, resulting in its current size of approximately 372,000 acres (as illustrated by the Expansion of Reservation Chart, attached hereto as Appendix A). [ER5 at ¶23; SER 46-51, 75-76, 256-57, 297-304] The land contiguous to Section 16 was added to the Reservation by two Executive Orders: one dated November

15, 1883[2] (adding the land immediately north of Section 16) and the other dated June 2, 1913[3] (adding the land immediately to the south, east, and west of Section 16, with the land added to the south and west known as the "Encircling Strip"). [ER5 at ¶24; SER 46-51, 75-76, 139, 256-57, 297-304] While Section 16 is within the exterior boundaries of the Reservation, it has never been part of the Reservation. [ER13 at ¶111; SER 46] However, "[t]he land surrounding Section 16 includes allotments for individual Indians and GRIC." [ER6 at ¶28]

### B. Access To And From Section 16.

#### 1. The Uninterrupted Public Use Of Murphy And Smith-Enke Roads.

"At all relevant times, there have been roadways that touched, provided access to, or physically crossed Section 16." [ER10 at ¶75; SER 57-68, 144-47, 151-52] This litigation centers on two such roadways—Smith-Enke Road and Murphy Road. "For decades the owners of Section 16 and other members of the public traveled across the Encircling Strip via Smith-Enke Road and Murphy Road

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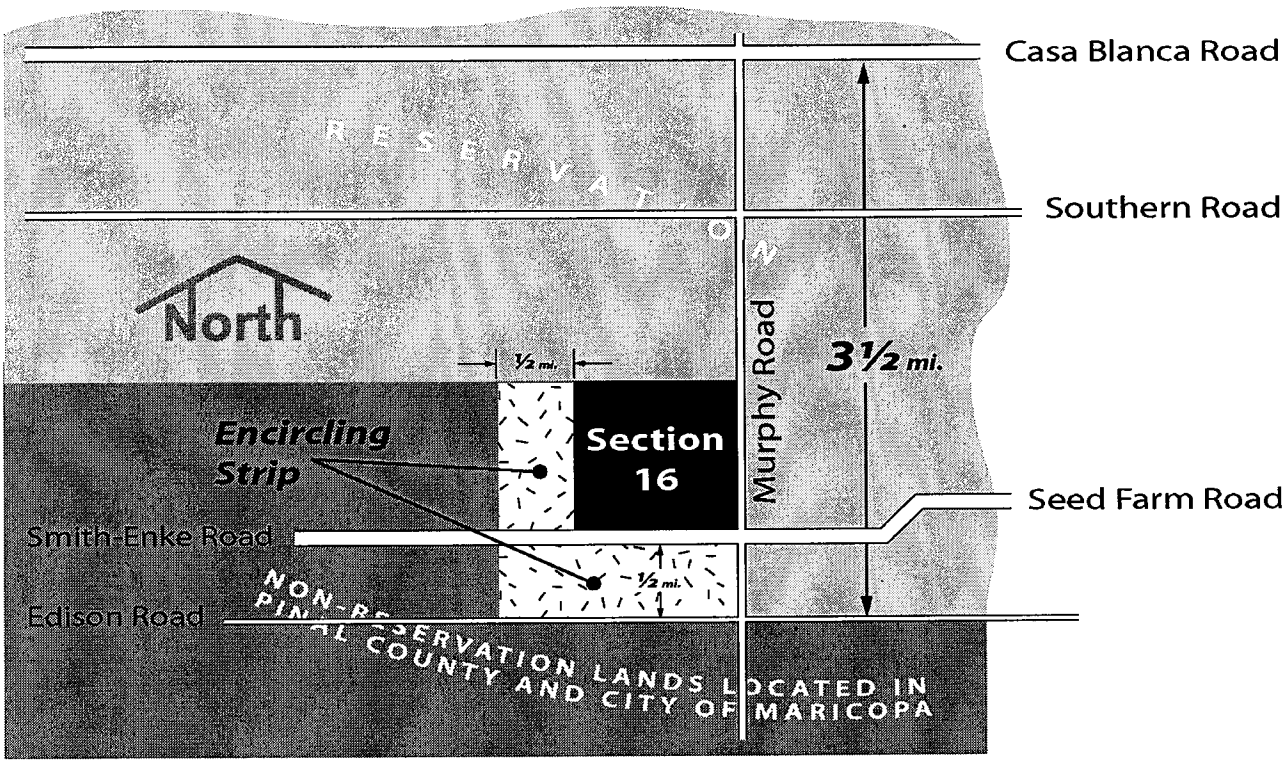
[2] The 1883 Executive Order did not include "any tract or tracts of land . . . the title of which has passed out of the United States Government." [ER5 at ¶26; SER 297-304]

[3] The 1913 Executive Order was subject to "any existing valid rights of any persons to the land described." [ER6 at ¶27; SER 297-304] While this Order added land to the south, east, and west of Section 16, during the trial it was only the land to the south and west that was referred to as the "Encircling Strip."

without GRIC's objection." [ER9 at ¶62; SER 10, 12-15, 18-23, 41-45, 159][4] This geography is illustrated below:




The roads themselves have a long history. As early as "1875, there existed a north-south road from the general location of present-day Casa Blanca Road going south to meet [major roadways to the south of Section 16]." [ER10 at ¶68; SER 54-56, 145-50, 154-57] The current Murphy Road runs north-south, adjacent to the eastern boundary of Section 16, and serves the same function. [ER8-9 at ¶¶45, 51, 54; SER 21-22, 67-68]

[4] The availability of both Smith-Enke and Murphy Roads is important for zoning purposes because Pinal County requires "two ingress and egress areas for police and fire" for residential developments. [ER14 at ¶124; SER 200-01]

"In 1913, there existed an east-west road from the city of Maricopa to the city of Sacaton." [ER10 at ¶72; SER 22-23, 68, 80-81, 142] Smith-Enke Road, which runs adjacent to the southern boundary of Section 16, also provides a route from Maricopa to Sacaton, although east of Section 16 its name changes to Seed Farm Road. [ER8 at ¶¶46, 48; SER 10-11, 19, 22-23, 87-88, 109-10] Traveling west from Section 16, Smith-Enke Road crosses the Encircling Strip for approximately one-half mile and continues to the City of Maricopa, outside the boundaries of the Reservation. [ER8 at ¶47; SER 10-11, 19, 22-23, 87-88, 109-10]

In 1922, Pinal County created public roads along all section lines in an area known as the "Valley District," an area that included Section 16 and adjacent sections of land. [ER10 at ¶¶76-77; SER 65-68, 158, 258-66] Maps and aerial photographs dated after 1922 show the alignment of Smith-Enke and Murphy Roads along the southern and eastern section lines of Section 16, and today Smith-Enke and Murphy Roads continue to provide physical access to Section 16 via these section lines. [ER8 at ¶45; SER 65-71, 85-86, 122, 130, 218-19]

### 2. The Maintenance Of Murphy And Smith-Enke Roads.

For decades, Smith-Enke and Murphy Roads were publicly maintained and provided public access to and from Section 16. The Bureau of Indian Affairs ("BIA") maintained Murphy Road, from Casa Blanca Road to the Reservation's southern boundary, until the mid-1990's when GRIC contracted with the BIA to

maintain Murphy Road with federal public funds. [ER9 at ¶¶58-59; SER 7-8, 92-95, 114-121] GRIC maintained Murphy Road for several years thereafter, although it stopped doing so about one year before trial in this matter. [ER9 at ¶¶60-61; SER 89-91] Additionally, Pinal County maintained Murphy Road, from Smith-Enke Road south to the Reservation's southern boundary, and Smith-Enke Road, from Murphy Road west to the Reservation's western boundary, from at least 1996 to at least 2001. [ER9 at ¶¶55-56; SER 78-83]

#### 3. Access To Smith-Enke And Murphy Roads.

GRIC "has not attempted to block use of Smith-Enke Road or Murphy Road near Section 16." [ER12 at ¶94; SER 83-84, 96-97, 111-13, 127-28, 133] However, in 2004, for the first time, GRIC placed "no trespassing" signs along those roads, and in 2006, GRIC issued civil trespass warnings to users of Murphy Road. [ER11-12 at ¶¶92, 94; SER 113, 127-28, 267-83] Those efforts did not curtail the public's use of the roads. [ER11-12 at ¶93; SER 18-19, 35, 129]

### C. Zoning And Development On And Around Section 16.

#### 1. Development On The Reservation.

GRIC's economy, although once primarily agricultural, has become more diversified. [ER13 at ¶¶105-07; SER 160-61, 176-77, 206-07] GRIC has developed three casinos, a resort hotel, a race track, a Western-themed attraction, two operating industrial parks, and other commercial development—all on the Reservation. [ER13 at ¶112; SER 167, 177, 206-07] GRIC's casinos are its

"major economic engine"—they are the Reservation's largest employers and account for approximately 80% of GRIC's total income. [ER13 at ¶¶105-07; SER 206-07] These businesses bring thousands of non-GRIC members onto the Reservation daily. [ER17 at ¶¶161-62, 164, 170; SER 132, 216-17] Of the Reservation's 372,000 acres, only about 12,000 acres are used for agricultural cropping by Gila River Farms. [ER3, 13 at ¶¶3, 115; SER 205]

### 2. Development Of The Area Surrounding The Reservation And Section 16.

Residential and commercial development surround the Reservation. [ER15 at ¶137; SER 165, 171, 197, 211] The City of Maricopa, which is separated from Section 16 by a half mile of the Encircling Strip, is undergoing rapid residential and commercial development. [ER14-15 at ¶¶129-30; SER 77, 197, 211] Likewise, "[t]here are residential communities, both on and off the Reservation, that are located near farms." [ER14-15 at ¶¶120, 139; SER 166, 172-75, 178-80, 182, 213-14] The growth and development in the City of Maricopa, surrounding Section 16, is illustrated by Trial Exhibit 37, attached hereto as Appendix B.

Despite the extensive growth surrounding Section 16 and the Reservation, GRIC claimed that the residential development of Section 16 would have an adverse impact on GRIC's agricultural operations, water supplies, cultural resources and police resources. [ER15-16 at ¶¶118, 140-42] But GRIC performed

no actual studies to substantiate these concerns. [ER15-16 at ¶¶140-142; SER 184-85, 188-92, 212] In fact:

- From 2003-2006, no farm on the Reservation had to shut down due to surrounding growth. [ER14 at ¶119; SER 180-81]
- No farming operations on or around the Reservation have been materially harmed by adjacent residential developments. [ER14 at ¶¶118-119; SER 186-87, 212]
- The 2004 Water Settlement Act enables GRIC to use an additional 600,000 acre-feet of water. [ER13 at ¶116; SER 183]
- GRIC has never surveyed Section 16 for cultural resources. In one survey in 2002 along the eastern boundary of Section 16, no significant cultural resource sites were found. [ER17-18 at ¶¶167, 171; SER 163-64, 284-96]
- GRIC's police has no jurisdiction on Section 16. If the police were needed on Section 16, other law enforcement agencies would be permitted access to Section 16. [ER16-17 at ¶¶151, 160; SER 125-26, 130-31, 198-99] Likewise, other emergency medical service providers can provide services to Section 16's residents. [SER 196]

### 3. The Development And Zoning Of Section 16.

Since the 1940s, private owners have operated farms on Section 16, with the owners, operators and the public freely traveling to and from Section 16 via Murphy and Smith-Enke Roads. [ER10 at ¶66; SER 4-5, 7-8, 10, 14-19, 38-41, 83-84, 111-13, 130-31, 133] Around 2001 to 2003, S&T Dairy built a dairy on Section 16 for $9 million without objection from GRIC.[5] [ER7 at ¶¶38-39; SER 13-14] Trucks used Smith-Enke and Murphy Roads for the dairy construction project, and then used those roads to "pick up loads of milk and to deliver feed for the dairy cattle." [ER9-10 at ¶¶63-64; SER 14-15, 19-20]

## Summary Of Argument

Since 1929, when the State of Arizona conveyed title to Section 16, the private owners of Section 16 have enjoyed the uninterrupted right to use, develop and access that property. GRIC now seeks to eliminate those rights, arguing that Section 16's owners cannot legally access their property, cannot use their property for residential development unless GRIC gives its zoning approval, and must allow GRIC to occupy their property pursuant to purported aboriginal title rights. Most incredibly, GRIC contends that under Rule 19, the Trustee has no forum to defend

[5] In fact, before 2004, GRIC never objected to any use of Murphy and Smith-Enke Roads, including the placement of various utility lines along those roads. [ER12 at ¶¶99, 103; SER 24-31]

the Trustee's title and access rights against GRIC's attack. As the district court correctly held, GRIC's contentions have no merit.

*First*, GRIC fails to show that the district court abused its discretion in determining that the United States and the Allottees were not indispensable parties to its adjudication of the legal access and aboriginal title issues.[6] GRIC filed its own claims raising these issues, and it need not join the United States or any other party to bring claims on its own behalf. Also, dismissal of this action would leave the Trustee with no alternative forum to remove the cloud that GRIC placed on Section 16 by contesting the Trustee's title and access rights to the property. And because the district court's judgment only binds GRIC, it does not prejudice the United States or the Allottees.

*Second*, Section 16's owners have a legal right to access their property via Smith-Enke and Murphy Roads. When Congress conveyed Section 16 to Arizona as school trust land, it granted an implied easement to access that land. Without that access, Section 16 would be valueless and Congress' conveyance would have been an empty gesture. Because Executive Orders expanded the Reservation to encircle Section 16 after the property was conveyed as school trust land, GRIC took its lands subject to the pre-existing easements.

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[6] GRIC does not argue that any indispensable party was missing for an adjudication of the zoning issue.

The Trustee has access rights to Section 16 for other reasons as well. Under the Indian Reservation Road ("IRR") Program, it has the right to access the land via Murphy Road, which for years had been a federally funded public road. In any event, as the district court found, GRIC's attempt to prevent the Trustee from accessing Section 16 is barred by laches. That finding was well within the court's discretion given GRIC's long acquiescence and the prejudice that would result if access were suddenly denied. Finally, under Revised Statute 2477, both Murphy and Smith-Enke Roads are public right-of-ways that give the Trustee access to Section 16.

*Third*, GRIC has no zoning authority over Section 16. GRIC does not appeal the district court's conclusion that GRIC has no zoning authority over Section 16 as it is currently being used. With respect to future use, GRIC has no zoning authority to prevent a residential development from being built on Section 16 since it presented no evidence to show that such development would have catastrophic consequences on its political integrity, economic security, or health and welfare, as Supreme Court precedent requires. This zoning question was ripe for review because, as GRIC itself avowed below, GRIC could not implement its Reservation-wide master land use plan unless it obtained an immediate ruling regarding its claimed authority to exercise zoning authority over, and prevent residential development of, Section 16.

*Fourth*, GRIC holds no aboriginal title to Section 16. Congress extinguished GRIC's aboriginal title to Section 16 when it conveyed the property to Arizona as school trust land. GRIC also is collaterally estopped from asserting aboriginal title to Section 16 because the Indian Claims Commission previously found that Congress extinguished GRIC's aboriginal title to all lands not part of the Reservation. GRIC, a party to that proceeding, received $6 million as compensation for the loss of its aboriginal title to the lands involved.

## Argument

### I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PROCEEDING TO THE MERITS OF THIS CASE WITHOUT THE UNITED STATES OR THE ALLOTTEES AS PARTIES

From the beginning of this case, GRIC has tried to obtain a judgment that it holds aboriginal title to Section 16 and that the Trustee cannot legally access that property. In the bankruptcy court, GRIC filed a proof of claim and limited objection that asserted these arguments. [ER338-40, 349-50] Likewise, in the district court, GRIC filed counterclaims against the Trustee claiming that (i) it holds aboriginal title to Section 16, (ii) the Trustee has no access rights to Section 16, (iii) GRIC has zoning authority over Section 16 and (iv) the Trustee is liable for trespass. [ER308-21] Now, having failed to prevail on the merits, GRIC argues that under Rule 19 the district court never should have allowed the action to proceed because of the absence of the United States and the Allottees. This Court,

however, "review[s] Rule 19 determinations for abuse of discretion." *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986). GRIC shows no such abuse.

### A. The District Court Properly Reached The Merits Of The Legal Access Issue.

#### 1. The District Court's Rule 19(b) Determination That The United States Was Not Indispensable Was Not An Abuse Of Discretion.

GRIC contends (at 12) that Rule 19 "requires dismissal of an action if a required party cannot be joined." Not so. Even if a required party under Rule 19(a) cannot be joined to an action, a court still must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). As shown below, equity and good conscience support the district court's exercise of discretion to proceed on the legal access issue without the United States.

##### a. Rule 19 Dismissal Is Inappropriate When An Indian Tribe Brings Its Own Claim To Protect Claimed Interests In Tribal Lands, As GRIC Did.

GRIC has no cause to seek dismissal under Rule 19 because, as the district court properly concluded, GRIC stepped into the shoes of a plaintiff by first challenging the Trustee's title and access rights to Section 16 in the bankruptcy court. [ER49]

"Congress is committed to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Consistent with that policy, courts routinely hold that "in a suit by an Indian tribe to protect its interests in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983); *see also Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1017-18 (9th Cir. 1973) (same).

This rationale applies here. For all practical purposes, this action began with GRIC's proofs of claim and limited objection in the bankruptcy court, both of which contested the Trustee's title and access rights to Section 16. [ER32-33, 338-40, 349-50)] As the district court recognized, "[i]n filing a proof of claim asserting sole legal and equitable title to [Section 16], GRIC had to know that there would be an objection which could be litigated only as an adversary proceeding with GRIC named as the defendant." [ER49] Against this procedural background, "GRIC really stands in the shoes of a plaintiff because it first sought relief in the bankruptcy court." [*Id.*] Because GRIC is the plaintiff—in substance if not in form—*Puyallup* prevents dismissal under Rule 19(b).

Attempting to distinguish *Puyallup*, GRIC asserts (at 22-23) that the Trustee is the "aggressor in this litigation" because the Debtors "filed for Chapter 11

bankruptcy and identified Section 16 as an asset." But a bankruptcy filing does not inherently raise issues of the existence of legal access or aboriginal title to property. The district court only reached those issues because *GRIC* raised them. "By filing [a] proof of claim," GRIC "voluntarily subjected [the issues raised in its proof of claim] to the bankruptcy court's jurisdiction." *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1280 (9th Cir. 2000). Having elected to contest the Trustee's title and legal access to Section 16 by its bankruptcy court filings, GRIC cannot now hide behind the United States' absence to avoid an adjudication it dislikes. *See Gardner v. New Jersey*, 329 U.S. 565, 573 (1947) ("It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure."); *Bass v. Olson*, 378 F.2d 818, 820 n.4 (9th Cir. 1967) ("[W]hen an adverse claimant comes into a bankruptcy court of his own motion asking for a determination of title to property, he . . . consents to the entry of an affirmative judgment in favor of the trustee.").

Even had GRIC not initiated this action through its bankruptcy court filings, *Puyallup* applies because GRIC also filed counterclaims against the Trustee seeking a declaration that the Trustee had no legal access to Section 16, injunctive relief preventing such access, and trespass damages. [ER297] The district court could not adjudicate these counterclaims without deciding whether the Trustee can

legally access Section 16. Indeed, the Trustee's primary defense against GRIC's trespass claim was that he had access rights to Section 16. GRIC does not argue that Rule 19 prevented the district court from hearing this defense, nor could it, because the Trustee had a due process right to present its defenses to GRIC's claims. *See Hall v. E. Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975) ("The presentation of one's defense is a basic due process right."). Since the district court had no choice but to determine whether the Trustee had legal access to Section 16 in the context of GRIC's trespass action and related counterclaims, it would have served no purpose to dismiss the Trustee's affirmative access claims under Rule 19.

GRIC argues (at 22) that *City of St. Paul, Alaska v. Evans*, 344 F.3d 1029 (9th Cir. 2003), interpreted *Puyallup* as not applying to counterclaims asserted by Indian tribes. In fact, *Evans* never cited *Puyallup* or Rule 19, but instead dealt with the different issue of whether a plaintiff can assert time-barred claims as affirmative defenses to counterclaims. 344 F.3d at 1036. *Evans* has no application here.[7]

[7] In light of *Puyallup*, the Supreme Court's decision in *Minnesota v. United States*, 305 U.S. 382 (1939), is also irrelevant. *Minnesota* merely held that the United States was an indispensable party to an action brought by a non-Indian party to establish a new highway over Indian lands through condemnation procedures. At a minimum, *Minnesota* does not apply to the counterclaims or proof of claim filed by GRIC, which *is* an Indian party. *See Puyallup*, 717 F.2d at 1255 n.1 (distinguishing *Minnesota* and *Carlson v. Tulalip Tribes of Wash.*, 510

### b. The Trustee Has No Other Adequate Forum To Protect His Access Rights Against GRIC's Attack.

Apart from GRIC's status as a claimant in this litigation, Rule 19(b) requires courts to consider "whether the plaintiff [would] have an adequate remedy if the action [were] dismissed for nonjoinder." This factor represents a "critical consideration" in Rule 19(b) analysis, and "[t]he absence of an alternative forum . . . weigh[s] heavily, if not conclusively against dismissal." *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500, 501 n.9 (7th Cir. 1980).

As the district court recognized, "if this action were dismissed for nonjoinder of the United States, then the Trustee would have no available forum within which to determine the legal access issue with regard to GRIC." [ER20] The inequity of having no alternative forum is especially glaring because GRIC precipitated this action by first challenging the Trustee's title and legal access to Section 16. [ER49][8]

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F.2d 1337 (9th Cir. 1975), on grounds that those cases did not involve any claims asserted by Indian parties). Beyond that, *Minnesota* does not apply *at all* because the Trustee has never sought to condemn a new easement across tribal land, but instead, requested a recognition of pre-existing access rights in the face of GRIC's challenge thereto.

[8] GRIC's position that it can claim aboriginal title over and deny access rights to Section 16, without any forum for the Trustee to contest those claims, has obvious implications for the marketability of Section 16. Under this scenario, the allegations in GRIC's proofs of claim—regardless of their lack of merit—would remain unsettled and continue to cast a cloud over the value of the Trustee's title to Section 16. The inequity of that result gave added force to the district court's

Attempting to downplay this inequity, GRIC argues (at 24) that 25 C.F.R. § 169 *et seq.* ("Part 169") provides the Trustee with an alternative "mechanism for establishing a legal right of access to Section 16." Part 169, however, only sets forth procedures for a party to purchase a *new* easement across Indian lands, and only after obtaining the consent of the Secretary of the Interior (the "Secretary") and the Indian tribe or allottees impacted by the easement. *See* 25 C.F.R. §§ 169 *et seq.* Part 169 does not address pre-existing access rights over Indian land. Because the Trustee holds implied easements to Section 16 pre-dating the 1883 and 1913 Executive Orders that expanded the Reservation to encircle Section 16 [ER25], Part 169 does not provide an adequate remedy for adjudication of the Trustee's access rights against GRIC's attack.[9]

GRIC also contends (at 24) that the district court's concern about the lack of an alternative forum was "insufficient as a matter of law" because the United States' sovereign immunity trumped that concern and automatically required

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decision to go forward and adjudicate the competing rights of the Trustee and GRIC.

[9] In fact, Part 169 further illustrates the harm to the Trustee from having no alternative forum for litigating his right of legal access vis-à-vis GRIC. If forced to proceed under Part 169, the Trustee would have to forfeit his pre-existing access rights and pay GRIC and the Allottees for new easements. *See* 25 C.F.R. § 169.12. In reality, however, the Trustee likely would not be able to obtain any access rights since newly created easements under Part 169 are contingent on tribal and allottee consent. 25 C.F.R. § 169.3.

dismissal under Rule 19(b). This Court, however, has rejected such an argument. *See Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir. 1993) ("[T]he government argues that . . . sovereign immunity alone is sufficient to warrant dismissal under Rule 19. We have previously rejected this argument in favor of the traditional four-part test of Rule 19(b).").

Moreover, "whether a particular lawsuit must be dismissed in the absence of [a required] person . . . can only be determined in the context of particular litigation" and not by reference to mechanical rules. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118, 119 n.14 (1968); *see also Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1136 (9th Cir. 2005) ("Rule 19's necessary and indispensable party 'inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application.'") (quoting *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002)). Accordingly, no *per se* rule mandates that sovereign immunity must prevail over a plaintiff's interest in an alternative forum. *See, e.g., Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (analyzing Rule 19(b) and concluding that Indian tribe was not indispensable, despite its claim of sovereign immunity, because "perhaps most important, there does not appear to be any alternative forum in which plaintiffs' claims can be heard"). To the contrary, "[b]ecause Rule 19(b) does not state the weight to be given each factor [listed therein], the district court

in its discretion must determine the importance of each in the context of the particular case." *Thunder Basin Coal Co. v. S.W. Pub. Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir. 1997). While GRIC may believe that the United States' sovereign immunity outweighs the Trustee's interest in an alternative forum, GRIC cannot establish abuse of discretion by substituting its judgment for that of the district court.

Nor does the Supreme Court's decision in *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008), support GRIC's proposed formulaic application of Rule 19(b). *Pimentel* involved a class action against former Philippines President Ferdinand Marcos resulting in a $2 billion judgment against him. *Id.* at 2185. To enforce the judgment, the class sought to attach certain assets held in a brokerage account. *Id.* at 2186. The Republic of the Philippines (the "Republic") and the Philippine Presidential Commission on Good Governance (the "Commission") also claimed a right to those same assets. *Id.* In response to an interpleader action to resolve these conflicting claims, the Republic and the Commission invoked their sovereign immunity as foreign states and moved for dismissal under Rule 19. *Id.*

Assessing these unique facts, the Supreme Court held that the court of appeals failed to give appropriate weight to the sovereign immunity of the foreign entities and that Rule 19(b) required dismissal. *Id.* at 2189. As the Court

explained, the Republic and Commission had "unique interests in resolving the ownership of or claims to the . . . assets" because "[t]he claims . . . arise from events of historical and political significance for the Republic and its people." *Id.* at 2190. The Court also noted the "more specific affront that could result to the Republic and the Commission if property they claim is seized by the decree of a foreign court." *Id.* Additionally, the Court held that the court of appeals committed a legal error by determining the merits of the Republic's and Commission's claims to the assets after those parties had invoked their sovereign immunity. *Id.* at 2189. The Court did not, however, establish a rigid rule that the absence of a required party with sovereign immunity always requires dismissal under Rule 19(b). To the contrary, the Court affirmed that "the determination whether to proceed [under Rule 19(b)] will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations" and then analyzed all four Rule 19(b) factors. *Id.* at 2188, 2194.[10]

[10] As GRIC notes (at 20), *Pimentel* held that "[a] case may not proceed when a required-entity sovereign is not amenable to suit." 128 S. Ct. at 2191. But the Court was simply describing the holding of two earlier cases: *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945), and *Minnesota v. United States*, 305 U.S. 382 (1939). 128 S. Ct. at 2190-91. In both of those cases, the plaintiff could not obtain the relief he sought against the United States after the United States invoked its sovereign immunity, thus requiring dismissal. *See Mine Safety*, 326 U.S. at 375 (plaintiff seeking to restrain Navy official from stopping payment on defense contract); *Minnesota*, 305 U.S. at 386 (plaintiff seeking to condemn highway over land held in trust by United States). By contrast, here the Trustee

GRIC cannot argue credibly that the district court's judgment in this action causes the same intrusion on the United States' interests as that faced by the sovereigns in *Pimentel*. Among other things, this case differs from *Pimentel* in that (i) the absent sovereign has specifically told the parties that it has "no interest" in Section 16 or this litigation [SER 253-55]; (ii) no harm to foreign relations will result from the district court's judgment; (iii) this action involves a dispute over land, not personal property subject to class distribution and dissipation; (iv) the district court did not decide the merits of claims of any absent sovereign since the United States has never made any claims in this case; and (v) neither the Trustee nor GRIC attempted to join the United States as a party so as to require the United States to assert its sovereign immunity. Given these facts, the district court properly evaluated United States' sovereign immunity and allowed the case to go forward.

### c. In Reaching The Merits, The District Court Did Not Prejudice The United States Or GRIC.

Under Rule 19(b)(1), courts analyze "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." This factor takes "immediate and serious" prejudice into account, but

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can obtain effective relief against the named defendant, GRIC, by preventing GRIC from blocking access to Section 16 or taking possession of the property.

does not consider "remote or minor" injuries. Fed. R. Civ. P. 19, advisory committee's note (1966).

GRIC asserts (at 12) that the United States' absence from this action resulted in "substantial prejudice" to GRIC and the United States, yet GRIC fails to support that assertion with any facts. GRIC had a full opportunity to litigate its access claim, and the district court's rejection of that argument did not leave GRIC subject to "double, multiple, or otherwise inconsistent obligations." *See* Fed. R. Civ. P. 19(a)(1)(B)(ii).

Likewise, the United States suffers no prejudice because it is not bound by the district court's judgment. *See Choctaw & Chickasaw Nations v. Seitz,* 193 F.2d 456, 458 (10th Cir. 1952) ("Since, unless the United States becomes a party to the action it will not be bound by any judgment entered therein, a judgment entered as between the Nations and the defendants below would not radically and injuriously affect the interest of the United States."). Critically, only GRIC challenged the Trustee's legal access to Section 16. The United States has never contested such access, and the district court expressly recognized that its judgment would not prevent the United States from challenging access in the future. [ER19-20; SER 253-55]

Even if the district court's judgment could affect the United States' interests, the United States still would suffer no prejudice because GRIC, as a party,

adequately represented those interests. *See S.W. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153 (9th Cir. 1998) (concluding that "as a practical matter, [an absent party's] ability to protect its interest [would] not be impaired by its absence from the suit because its interest will be represented adequately by the existing parties"). As GRIC states (at 13), the United States "acts in a fiduciary capacity" in holding fee title to certain tribal and allottee lands. Whatever fiduciary interests the United States may have in protecting GRIC lands, GRIC, as a governing body over the Allottees and an Allottee itself, shares the same interests as the United States and forcefully defended those interests in this case. *Cf. Puyallup*, 717 F.2d at 1254 (holding that Indian tribes can defend their claimed interests in tribal lands without the United States' participation).[11]

**d. The District Court's Judgment Provided The Trustee With Effective Relief Against GRIC.**

Rule 19(b)(3) asks "whether a judgment rendered in the [required] person's absence would be adequate." "[S]imply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be

[11] Because the district court's judgment did not prejudice the United States or GRIC, the district court had no need to consider, under Rule 19(b)(2), "the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures." *See Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1412 (10th Cir. 1996) ("Because prejudice here is minimal, we need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice.").

dismissed if meaningful relief can still be accorded." *Smith v. United Bhd. of Carpenters*, 685 F.2d 164, 166 (6th Cir. 1982). Accordingly, if a court can enter a judgment for the plaintiff that provides "effective declaratory and injunctive relief" against the named defendant, it should not dismiss the action under Rule 19. *United States ex rel. v. Morongo Rose*, 34 F.3d 901, 908 (9th Cir. 1994).

Here, the district court's judgment provided the Trustee with the declaratory relief it needed against GRIC. Before the judgment, GRIC placed "no trespassing" signs along Smith-Enke and Murphy Roads and issued civil trespass warnings. [SER 267-69] GRIC also filed its proof of claim and counterclaims against the Trustee disputing the Trustee's legal access to Section 16 and asserting a right to trespass damages. [ER338-40, 349-50] The judgment fully adjudicated this controversy between the parties by preventing GRIC from blocking access to Section 16 and recovering trespass damages.

Likewise, the district court's judgment does not constitute an improper "advisory opinion," as GRIC contends (at 9), because advisory opinions are judgments "which cannot affect the rights of the litigants in the case before it." *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1221 (9th Cir. 1971); *see also Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("case or controversy" exists when the outcome "affects the behavior of the defendant towards the plaintiff"). Because the district court's judgment against GRIC prevents it from blocking access to Section 16, it

unquestionably affects GRIC's rights. Moreover, in forcing a cessation of GRIC's own actions, the judgment does not require any affirmative acts by absent third parties such as the United States or the other Allottees. GRIC's statement (at 16-17) that "courts lack power under Article III to order relief entirely dependent on the future conduct of parties not before the court" thus has no relevance.

GRIC further contends (at 21) that adequate relief cannot be afforded if the United States can later contest legal access because adequacy "refers to the public stake in settling disputes by wholes." In *Provident*, however, the Court also held that the efficiency concern in avoiding piecemeal litigation "entirely disappear[s]" once a case has been tried and has "reached the Court of Appeals." 390 U.S. at 116. At this point, "there [is] no reason . . . to throw away a valid judgment just because it did not theoretically settle the whole controversy." *Id.* The district court has decided the legal access dispute between GRIC and the Trustee after a trial on the merits, and no efficiency would result from now dismissing its judgment.

### 2. The District Court Did Not Abuse Its Discretion In Concluding That The Allottees Were Not Required Parties.

GRIC—which is itself an Allottee—argues (at 25-26) that the district court's Rule 19(a) analysis failed to account for the Allottees' interests in the Encircling Strip. To the contrary, the district court's analysis recognized those interests.

Specifically, the district court concluded that the United States, by virtue of holding fee title to the Encircling Strip allotments in trust for the Allottees, was a required party under Rule 19(a) to the legal access issue. [ER18-19] The court thus had no need, and it would have been redundant, to also define the Allottees as required parties simply because of their beneficial interest in the same allotments. Because GRIC did not present any evidence at trial to show that the Allottees had any interests that the district court did not already account for in defining the United States as a required party, the district court held that GRIC failed to meet its burden of proof to show that the Allottees were also required parties. [ER20-21] That decision does not constitute an abuse of discretion.

GRIC argues (at 26) that the district court's Rule 19 decision as to the Allottees "makes no sense" because the United States is not a party to this action and thus cannot protect the Allottees' interests. This argument misunderstands Rule 19's two-part inquiry. The district court expressly acknowledged the United States' and the Allottees' interests in the Encircling Strip allotments by declaring the United States a required party under Rule 19(a); however, the district court nevertheless proceeded on the merits based on its consideration of equity and good conscience under Rule 19(b). [ER18-19] Given the district court's Rule 19(b) analysis, GRIC's argument collapses. Having determined that this action could go forward without the fee titleholder to the Encircling Strip allotments (the United

States), it would have made no sense for the district court to dismiss this action based on the absence of parties with only a beneficial interest in those allotments (the Allottees). Indeed, the district court's Rule 19(b) analysis applies just as strongly to the Allottees as it does to the United States. For example, just like the United States, the Allottees are neither bound, nor prejudiced, by the district court's judgment. Thus, whether under Rule 19(a) or (b), the district court properly proceeded without the Allottees. *See N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986) (holding that this Court "can affirm [Rule 19 determinations] on any basis supported in the record").

### B. The District Court Properly Reached The Merits Of GRIC's Aboriginal Title Claim.

In its summary judgment briefings, GRIC urged the district court to determine that it holds aboriginal title to Section 16, notwithstanding the United States' absence as a party. After losing this issue, GRIC now argues that the district court should have ignored its request to reach the merits because of the United States' absence. But GRIC cannot show that the United States was either "required" or "indispensable" to the adjudication of aboriginal title.

The district court's Rule 19(b) analysis on the access issue applies equally to the aboriginal title issue. First, GRIC need not join the United States to bring claims on its own behalf—which it did by filing a proof of claim in the bankruptcy court and a counterclaim in the district court claiming aboriginal title to Section 16.

[*See* ER18-19 at ¶7 (citing *Puyallup*, 717 F.2d at 1254)] Second, the Trustee would have no alternative forum to defeat GRIC's claim that it holds aboriginal title to Section 16 if this action were dismissed. [ER20 at ¶13] Third, the district court's decision that GRIC holds no aboriginal title to Section 16 does not bind, and thus does not prejudice, the United States. [ER19-20 at ¶11] Fourth, the district court's judgment provides adequate and effective relief against GRIC by preventing it from taking possession of Section 16. Finally, a dismissal of the aboriginal title issue would not result in increased judicial efficiency since the district court has already decided the issue on the merits. GRIC fails to show any abuse of discretion in the district court's Rule 19(b) analysis.

But this Court need not reach the Rule 19(b) inquiry because GRIC cannot meet its burden to show that the United States is a required party, as defined by Rule 19(a), to the aboriginal title issue. *See Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (holding that moving party on Rule 19 motion bears burden of proof). In fact, GRIC fails to satisfy either of Rule 19(a)'s requirements.[12]

As for Rule 19(a)(1)(A), the district court ordered "complete relief" on the aboriginal title issue without the United States as a party. GRIC contends (at 14-15) that the Trustee sought "to extinguish the Community's aboriginal title" and

[12] Contrary to GRIC's assertion (at 7), the district court never held that the United States was a required party to the aboriginal title claim. [ER18-19 at ¶7 (only stating that United States is required for adjudication of legal access)]

that the United States thus had to be added as a party to obtain the "required federal consent" to such extinguishment. The Trustee never asked the district court to extinguish aboriginal title, and the district court did not purport to do so. The district court actually held that Congress extinguished GRIC's aboriginal title to Section 16 long before GRIC asserted that claim against the Trustee. [ER41]

With respect to Rule 19(a)(1)(B), the United States does not "claim an interest" in Section 16. [*See* SER 253-55] Congress designated Section 16 as a state school section more than 150 years ago, and never added the land to the Reservation or allotted it to individual GRIC members. [SER 297-304] Unlike the Encircling Strip, the United States does not hold title to Section 16 in trust for anyone. GRIC nevertheless asserts (at 14-15) that any time an Indian tribe makes a claim of aboriginal title to a piece of property, regardless of its merits, the claim necessarily confers upon the United States a legally protected interest in the disposition of the property such that its joinder is required. GRIC does not (and cannot) cite one case supporting that broad proposition, which offends the principle that an Indian tribe can bring claims on its own behalf without joining the United States "to protect its interests in tribal lands." *Puyallup*, 717 F.2d at 1254.[13]

[13] GRIC incorrectly contends (at 18) that the United States would enjoy sovereign immunity if joined to GRIC's aboriginal title claim. The relevant exception in the Quiet Title Act (which generally waives the United States' sovereign immunity in actions to quiet title) only applies to "trust or restricted Indian lands." 28 U.S.C. § 2409a. GRIC's aboriginal title claim does not,

## II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE OWNERS OF SECTION 16 HAVE LEGAL ACCESS VIA SMITH-ENKE AND MURPHY ROADS

Section 16 would have no value if its owners could not legally access the property. That result would be as unlawful as it is nonsensical. The district court correctly concluded that the Trustee may continue accessing Section 16 via Smith-Enke and Murphy Roads, as the owners of Section 16 have done for decades, because (i) the Trustee holds implied easements to Section 16 pre-dating the expansion of the Reservation to surround the property; (ii) Murphy Road is a federally funded public road under the Indian Reservation Road ("IRR") program; and (iii) the laches doctrine bars GRIC's attempts to obtain declaratory and injunctive relief denying access to Smith-Enke and Murphy Roads.[14]

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however, involve Indian trust land or restricted land. *See* 25 C.F.R. § 151.2(d) (defining Indian "[t]rust land" as "land the title to which is held in trust by the United States for an individual Indian or a tribe"); 25 C.F.R. § 151.2(e) (defining "[r]estricted land" as "land the title to which is held by an individual Indian or a tribe").

[14] Except for the IRR argument, all of the Trustee's legal access arguments apply to both Smith-Enke and Murphy Roads.

### A. The Trustee Holds Implied Easements Over Smith-Enke And Murphy Roads.

#### 1. The United States Conveyed Implied Easements To The Territory Of Arizona When The United States Granted Section 16 As A School Section.

In 1877, when Congress granted Section 16 as school land to the Territory of Arizona, Congress also conveyed implied easements so that the Territory could access the property. Those easements passed to all subsequent owners of Section 16 and survive to this day.

As this Court has recognized, a congressional land grant conveys an implied easement when necessary to effectuate the purpose behind the grant. *See Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996 (9th Cir. 1994) ("Congress's intent in granting ... land is an important factor in determining the existence and extent of [easements]."). In *Koniag*, Congress granted various surface estates to tribal corporations so that the corporations would "be able to develop that land and to realize [its economic] potential." *Id.* at 997. To give effect to that purpose, *Koniag* held that Congress conveyed implied easements allowing the tribal corporations to use the subsurface rock below their surface estates, reasoning that "Congress did not intend to grant . . . land whose value could be reduced to zero by fiat of a subsurface owner that refused to sell it rock needed for development, or that charged an unreasonably high price for that rock." *Id.*

*Koniag's* recognition of implied easements to avoid rendering worthless the land conveyed is rooted in hornbook property law. "In most cases, servitudes are implied on the basis of the inferred intent of the parties to the conveyance." Restatement (Third) of Property (Servitudes) § 2.11 cmt. e (2000). "The inference may . . . arise from the fact that, without a servitude, the land conveyed or retained by the grantor would be landlocked" and thus economically worthless. *Id.*

This principle applies to Section 16. Beginning in 1802, Congress conveyed various sections of land to new states, with the specific purpose that each state use its sections to produce revenue for public schools. *See Lassen v. Ariz. Highway Dep't*, 385 U.S. 458, 463 (1967) ("The grant [of school trust land to Arizona] was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act."). Based on this congressional intent, the district court properly concluded that "when Section 16 was conveyed as school land to the then Territory of Arizona, an implied easement to the land was also conveyed," reasoning that "[u]nless a right of access is inferred, the very purpose of the school trust lands would fail. *Without access the state could not develop the trust lands in any fashion and they would*

*become economically worthless*. This Congress did not intend." [ER25 (quoting *Utah v. Andrus*, 486 F. Supp. 995, 1001-02 (D. Utah 1979) (emphasis added))][15]

The district court's judgment also followed *Wyoming v. United States,* 255 U.S. 489, 508 (1921), which held that "the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively." *See also Oregon v. Bureau of Land Mgmt.,* 876 F.2d 1419, 1432 (9th Cir. 1989) (same). GRIC's reliance (at 31) on *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987), for the general proposition that "[i]n a public grant nothing passes by implication" simply does not apply when dealing with school trust lands where the liberal rule of construction specific to school section legislation controls. *See Utah v. Kleppe*, 586 F.2d 756, 761 (10th Cir. 1978), *rev'd on other grounds*, 446 U.S. 500 (1980) (holding that land grants are to be construed favorably and nothing passes except by clear language but legislation "designed to aid the common schools of the states is to be construed liberally rather than restrictively") (internal citation omitted).

Attempting to avoid *Wyoming*, GRIC argues (at 32) that "[t]here is no rule of liberal construction when abrogation of Indian land rights is at issue." That

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[15] GRIC argues (at 32) that *Andrus* only proscribed restrictions on access to school lands that would "destroy the lands' economic value." To the contrary, *Andrus* was more broadly concerned with access restrictions that would "render the [school] lands incapable of their *full economic development*." *Andrus*, 486 F. Supp. at 1009 (emphasis added).

argument, however, wrongly assumes that Congress' grant of implied easements diminished Indian land rights. In truth, when Congress conveyed Section 16 as a school section in 1877 and simultaneously granted implied easements to the property, the Reservation did *not* include the land surrounding Section 16.

GRIC also contends (at 31) that "even if an implied easement had been created [for the State of Arizona], it would not be silently passed on to subsequent purchasers." But here the conveyance was not silent. When the State sold Section 16 by patent in 1929, it expressly conveyed "all the rights, privileges, immunities, and appurtenances of whatsoever nature." [ER6 at ¶31; SER 305-06] All subsequent deeds conveying Section 16 have included similar language. [ER6-7 at ¶¶32-35] As this Court has observed, "the word 'appurtenance' will carry with it an existing easement." *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1267 (9th Cir. 2006). In any event, no explicit language was necessary because "[w]here an easement is annexed as an appurtenance to land by an express or implied grant or reservation, or by prescription, it passes with a transfer of the land although not specifically mentioned in the instrument of transfer." C.J.S. Easements § 130.[16]

[16] GRIC cites (at 31) *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976), for its argument that Arizona could not silently convey its easements to Section 16 when it sold the property in 1929. *Clarke*, however, did not address how the grantee under a public land grant can later convey the implied easements it

### 2. Federal Statutes And Regulations Do Not Extinguish Preexisting Easements To Section 16.

There is no evidence that Congress or the President intended to extinguish the implied easements to Section 16, or that the federal government ever paid just compensation to Section 16's owners so that it could take away their property rights. To the contrary, the 1883 Executive Order expanding the Reservation did not include "any tract or tracts of land . . . the title of which has passed out of the United States Government." [ER5 at ¶26; SER 297-304] Likewise, the 1913 Executive Order was subject to "any existing valid rights of any persons to the land described." [ER6 at ¶27] GRIC thus received the Encircling Strip subject to all implied easements, including those relating to Section 16. *Cf. Bird Bear v. McLean County*, 513 F.2d 190, 193 (8th Cir. 1975) (where public roads over certain lands were created before that land was allotted to individual Indians, this "compel[led] the conclusion that the land involved . . . was allotted . . . fully subject to the prior statutory grant of right of ways to the state").

Despite having taken its land subject to preexisting rights, GRIC asserts that any easements to Section 16 disappeared with the expansion of the Reservation and that the Trustee must now obtain new access rights, subject to GRIC's approval. GRIC argues (at 29) that statutes relating to the purchase of an easement

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received from Congress. *Clarke* concerned whether a congressional land grant of a homestead—not school land—conveyed easements. 529 F.2d at 586-87.

across Indian land, 25 U.S.C. §§ 323-28 ("Sections 323-28"), and the implementing regulations in Part 169, "preempt" the Trustee's assertion that implied easements to Section 16 exist.

Implied easements, however, are creatures of common law, C.J.S. Easements § 75, and there is a strong presumption against the federal preemption thereof. *See Ishikawa v. Delta Airlines, Inc.,* 343 F.3d 1129, 1132 (9th Cir. 2003) (describing presumption against preemption of common law). Given the purpose behind Sections 323-28 and Part 169, that presumption cannot be overcome here. Sections 323-28 and Part 169 provide a process for a party to purchase an easement from the United States over Indian land, if that party does not already own such an easement. *See* 25 U.S.C. § 323 (Secretary of the Interior can "grant rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes."); 25 C.F.R. § 169.2 ("the regulations in this Part 169 prescribe the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land and Government owned land may be granted"). A party seeking to purchase an easement over Indian lands must file an application with the Secretary, 25 C.F.R. § 169.5, and obtain the affected Indian tribe or allottee's consent, 25 U.S.C. § 324; 25 C.F.R. § 169.3. If approved, that party must then pay for the newly created access right. 25 U.S.C. § 325; 25 C.F.R. § 169.12.

While Sections 323-28 and Part 169 set forth a process for purchasing a new easement, nothing in those provisions purports to extinguish, or set forth procedures for asserting a claim regarding, preexisting rights-of-way over Indian land. In fact, Part 169 only gives the Secretary limited authority to terminate "rights-of-way granted under the regulations in this part." 25 C.F.R. § 169.20. GRIC's argument (at 30) that "a claimed preexisting right of access [over Indian land] must be resolved through Congress's prescribed statutory scheme" thus makes no sense—no such scheme exists.

With no statutory or regulatory support for its preemption theory, GRIC primarily relies (at 29-31) on *Adams v. United States*, 3 F.3d 1254 (9th Cir. 1993) (*Adams I*), *Adams v. United States*, 255 F.3d 787 (9th Cir. 2001) (*Adams II*), and *Fitzgerald*—cases where private landowners surrounded by national forest land had access to their property. *See Adams I*, 3 F.3d at 1255; *Fitzgerald*, 460 F.3d at 1261. Those cases involved the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3101 *et seq.*, which expressly guarantees "access to nonfederally owned land within the boundaries of the National Forest System." 16 U.S.C. § 3210; *Adams I*, 3 F.3d at 1259; *Adams II*, 255 F.3d at 795; *Fitzgerald*, 460 F.3d at 1262 n.5.[17] Given this statutory access right, the landowners in *Adams*

[17] "Despite its name, the provisions of the [ANILCA] apply outside of Alaska." *Adams I*, 3 F.3d at 1258.

*I & II* and *Fitzgerald* could not establish a common law easement by necessity. *Adams I*, 3 F.3d at 1259; *Fitzgerald*, 460 F.3d at 1266-67. Still, this Court concluded that the Forest Service had to provide private landowners with reasonable access, as ANILCA required, and that the Forest Service could only require a permit if the landowner's use of Forest Service roads exceeded the general public's use. *See Adams I*, 3 F.3d at 1257, 1259; *Adams II*, 255 F.3d at 795.

Here, GRIC argues that the Trustee has no legal access at all to Section 16. Unlike ANILCA, however, Sections 323-28 and Part 169 do not guarantee access rights; those statutes and regulations merely provide a procedure for filing an easement application (which the Secretary might deny) and obtaining tribal or allottee consent (which might not be granted). With no such guarantee, Sections 323-28 and Part 169, unlike ANILCA, cannot adequately replace preexisting easements.

Most fundamentally, GRIC's attempt to extinguish the Trustee's implied easement, and to require him to pay for access rights to which he is already entitled, violates basic due process principles. "It is well established that the government may not take an easement without just compensation." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003); *see First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir.

2002) (same); *see also Fitzgerald*, 460 F.3d at 12-64 ("the fee provision of the [Federal Land Policy Management Act] easement would be unreasonable under the APA if the Fitzgeralds owned a preexisting easement because the Forest Service would be imposing a fee for something the Fitzgeralds already owned"). Under GRIC's preemption theory, anyone holding a preexisting common law easement over Indian land would have to forfeit that easement without receiving just compensation in return, and attempt to purchase a new easement from the pertinent tribe or allottees, which it may or may not be able to obtain. Congress expressed no such intent in Sections 323-28, and it should not be presumed to have acted unconstitutionally. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (holding that there is a "reasonable presumption that Congress did not intend [a statutory interpretation] which raises serious constitutional doubts"). Sections 323-28 and Part 169 instead must be recognized for their true purpose: to provide a means of purchasing a new easement over Indian land, but not for extinguishing preexisting ones.

### B. Murphy Road Must Remain Open For Public Use Because It Is An Indian Reservation Road.

Apart from the implied easement issue, the district court correctly found that, as an IRR, Murphy Road is a public road. An IRR is "a public road that is located within or provides access to an Indian reservation." 23 U.S.C. § 101(a)(12). A "public road" is "any road or street under the jurisdiction of and

maintained by a public authority and open to public travel." *Id.* § 101(a)(27); 25 C.F.R. § 170.5. Under the IRR program, Indian tribes receive an annual allocation of federal funds for the maintenance of IRRs providing access to a reservation or to individual tribal allotments. *See* 23 U.S.C. § 202(d). A tribe's receipt of those federal funds is conditional: IRRs "*must* be open and available for public use." 25 C.F.R. § 170.120 (emphasis added).

Murphy Road meets the definition of an IRR: It has been publicly maintained and used for several years, and GRIC has never disputed that the road is located within the Reservation and under the jurisdiction of a public authority, the BIA. [*See* ER9 at ¶¶58-59, 22 at ¶22]

GRIC nevertheless contends (at 34) that Murphy Road is not publicly maintained or open to public travel because in recent years GRIC stopped maintaining Murphy Road, installed "no trespassing" signs, and issued civil trespass warnings. GRIC apparently believes it can unilaterally terminate Murphy Road's IRR status, despite having received years of federal tax dollars for the road's maintenance. It does not have such power.

The requirement that IRRs "be open and available for public use," 25 C.F.R. § 170.120, would have no meaning if an Indian tribe could close an IRR at its whim. Moreover, the federal government pays for the maintenance of numerous types of roads, not just IRRs. *See* 23 U.S.C. § 101 *et seq.* As such, the federal

statutory definition of "public road" as "open to public travel," 23 U.S.C. § 101(a)(27), simply distinguishes federally maintained roads intended for public use (such as IRRs) from federally maintained roads not used by the public and never intended for public use (such as restricted roads on military reservations). *See* 23 U.S.C. § 210(a) (authorizing funds for maintenance of military roads). It does not, and cannot, render 25 C.F.R. § 170.120 nugatory by giving Indian tribes unilateral authority to close IRRs. *See United States v. Alisal Water Corp.*, 431 F.3d 643, 653 (9th Cir. 2005) ("When interpreting a regulation, [courts] must avoid an interpretation that would render another regulation superfluous.").

GRIC also contends (at 34) that Murphy Road is not an IRR because the BIA removed the relevant portion of the road from the "IRR Inventory" in March 2007, after GRIC requested such removal. But there is no requirement that a road be on the IRR Inventory to be an IRR. Moreover, the BIA's removal of Murphy Road from the IRR Inventory is not final given the pending appeal to the Interior Board of Indian Appeals ("IBIA") on this issue. [ER44] Even more importantly, the district court excluded evidence of Murphy Road's removal from the IRR Inventory, finding that GRIC failed to timely disclose the evidence. [ER30; SER 98-105, 123-24] GRIC does not question the district court's exercise of discretion in excluding that evidence, and neither should this Court. *See Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1135 (7th Cir. 1997) ("[A] district judge isn't

obligated to consider untimely presented evidence, and neither [is the court of appeals].").

Finally, GRIC argues (at 35) that the BIA had primary jurisdiction to determine whether Murphy Road is an IRR. But the primary jurisdiction doctrine "does not require that all claims within an agency's purview be decided by the agency. Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). The doctrine extends only to complex and far-reaching issues. *Id.* at 1173; *County of Santa Clara v. Astra USA, Inc.*, 540 F.3d 1094, 1108-09 (9th Cir. 2008) (similar). It does not apply here, where the IRR definition is straightforward and the district court's judgment only impacts a 3.5 mile stretch of road.

### C. The Laches Doctrine Independently Bars GRIC's Attempts To Close Murphy And Smith-Enke Roads.

GRIC asserts (at 10) that the district court used laches as "an *offensive* weapon designed to excuse plaintiffs from proving the merits of their legal claims." Not true. The court actually applied laches to bar *GRIC's* counterclaims for declaratory and injunctive relief, which sought to bar the Trustee's access to Section 16. As the district court found "laches prevents GRIC from obtaining declaratory relief that there is no legal access to Section 16 via the southern portion

of Murphy Road." [ER22 at ¶28][18] Counterclaims for declaratory and other equitable relief are subject to laches. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 905 n.12 (9th Cir. 1994) ("a declaratory judgment, because it is equitable in nature, can be barred by laches"); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001) (applying laches to counterclaim); *see also City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217, 221 (2005) (holding that laches applies to Indian tribes and that "[i]t is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief").

GRIC nevertheless argues (at 36-37) that it should be exempt from laches because it only filed its counterclaims in response to the Trustee's claims rather than as affirmative claims for relief. In support of this theory, GRIC cites (at 36-37) *Evans*. As discussed above, *Evans* merely held that time-barred claims could not be asserted as purported affirmative defenses to counterclaims. 344 F.3d at 1036. *Evans* did not limit the scope of laches.

GRIC further contends (at 37) that the district court erred by applying laches without considering the "applicable statute of limitations." GRIC waived any right to raise this argument on appeal, however, since it did not assert the argument

[18] Although the district court focused its application of laches to Murphy Road, the record amply supports the same result regarding Smith-Enke Road.

before the district court. *See DirecTV, Inc. v. Webb*, __ F.3d __, 2008 WL 4350172, *2 n.1 (9th Cir. 2008) (rejecting argument raised for first time on appeal). Moreover, GRIC does not cite any statute of limitations applicable to its counterclaims, and the Trustee is unaware of any statute that would apply.

Unlike a statute of limitations, laches does not depend on the lapse of a specific time period; instead, courts apply laches based on an unreasonable delay in asserting an equitable claim and resulting prejudice to the opposing party. *Danjaq*, 263 F.3d at 955. This Court reviews a district court's application of laches for abuse of discretion. *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1125 (9th Cir. 2006). GRIC cannot show such abuse here, as both elements of laches are amply supported by the record.

First, GRIC unreasonably delayed in filing its counterclaims for equitable relief. As the district court found, "[f]or decades, the owners of Section 16 and other members of the public traveled across the Encircling Strip via Smith-Enke Road and Murphy Road without GRIC's objection." [ER9 at ¶62] GRIC's placement of "no trespassing" signs along Smith-Enke and Murphy Roads occurred in 2004, and those signs have not curtailed the public's use of the roads. [ER11-12 at ¶¶92-93] Second, GRIC's unreasonable delay prejudiced the Debtors and all prior owners of Section 16. The district court found that "GRIC's lack of objection and acquiescence to the use of Murphy Road by the public, both before

and after the sale of Section 16 to the Debtors, induced the Debtors to rely thereon and use the southern portion of Murphy Road to access Section 16." [ER22 at ¶28] The same is true of Smith-Enke Road. Using Smith-Enke and Murphy Roads for access, the Debtors constructed a dairy on Section 16 at a cost of nine million dollars. [ER7 at ¶39] If GRIC succeeds in its attempts to cut off access, Section 16 would be worthless.[19]

Laches independently bars GRIC's counterclaims seeking to put an end to the historical use of Murphy and Smith-Enke Roads to reach Section 16.

## III. THE DISTRICT COURT ERRED IN HOLDING THAT SMITH-ENKE AND MURPHY ROADS ARE NOT PUBLIC ROADS UNDER R.S. 2477[20]

The district court made the necessary factual findings to conclude that Smith-Enke and Murphy Roads are public roads under R.S. 2477. However, relying on a legally erroneous premise that executive order Indian reservations are not public lands, the district court incorrectly determined that Smith-Enke and

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[19] GRIC states (at 40) that the Debtors' purchase contract and title insurance "put them on full notice that they had no established rights of access." GRIC's assertion is wrong; the purchase contract merely did not *guarantee* such access. [ER7 at ¶37] Similarly, the title insurance just excluded coverage for the lack of a *recorded* easement. [ER356] Moreover, the Debtors obtained a letter from the BIA before they purchased Section 16 stating that the stretch of Murphy Road along Section 16 and the Encircling Strip was a public road. [ER11 at ¶91; SER 7-9] The Debtors always believed that they had access rights to Section 16. [SER 12]

[20] This argument is the subject of the Trustee's cross-appeal.

Murphy Roads did not come within R.S. 2477's grant for public highways. In reviewing R.S. 2477 determinations, this Court "review[s] issues of fact for clear error . . . [and] issues of law de novo." *Adams I*, 3 F.3d at 1257.

### A. The District Court Made The Necessary Factual Findings To Determine That Smith-Enke And Murphy Roads Are R.S. 2477 Roads.

From 1866 until its repeal, R.S. 2477 provided "rights-of-way for the construction of highways over public lands not reserved for public uses." 43 U.S.C. § 932 (1976) (repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(A), 90 Stat. 2743, 2793). R.S. 2477 establishes public rights-of-way for highways constructed before 1866, *see Cent. Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 473 (1932), and also "operates prospectively to grant rights of way for highways constructed after its enactment in 1866," *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir. 1984). The repeal of R.S. 2477 was not retroactive, and thus R.S. 2477 roads in existence as of 1976 are still valid. 43 U.S.C. § 1769(a).

To establish a public right-of-way under R.S. 2477, the test is whether the road "was built before the surrounding land lost its public character." *Adams I*, 3 F.3d at 1258. Both Smith-Enke and Murphy Roads satisfy this test based on the district court's findings. First, since at least 1913, an east-west road has provided access between the towns of Maricopa and Sacaton, just as Smith-Enke and Seed

Farm Roads do today. [ER8, 10 at ¶73] Second, since at least 1875, a north-south road has provided access from "the general location of present-day Casa Blanca Road" to the major roadways to the south of Section 16, just as Murphy Road does today. [ER10 at ¶68; SER 22] The district court thus observed that "[a]t *all relevant times*, there have been roadways that touched, provided access to, or physically crossed Section 16." [ER10 at ¶75 (emphasis added)]

Additionally, Pinal County's 1922 declaration of public roads applied to all section lines in the "Valley District," an area that included Section 16 and its surrounding township. [ER10 at ¶76] This declaration satisfied then-existing Arizona statutes for the creation of public highways. *See* Ariz. Civ. Code 1913, § 5057; Ariz. Civ. Code 1901, § 3956 [attached hereto as Appendix C]. In accord with Pinal County's declaration, "[p]ost-1922 maps and aerials show the alignment of Smith-Enke Road and Murphy Road on section lines." [ER10 at ¶77]

### B. The District Court's Holding That R.S. 2477 Was Not Satisfied Relied On A Legally Erroneous Assumption.

The district court concluded that Smith-Enke and Murphy Roads did not comply with R.S. 2477 because Pinal County's 1922 declaration of public roads occurred after the President, by Executive Order, expanded the Reservation to surround Section 16 in 1913. [ER24-25] In the district court's view, executive order Indian reservations are exempt from R.S. 2477 because they do not constitute public lands. [ER24 at ¶38] That conclusion is incorrect as a matter of law.

"The United States Supreme Court has consistently held that 'public lands' means lands which are subject 'to sale or other disposal under general laws.'" *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 602 (9th Cir. 1981) (citing Supreme Court precedent). Executive order Indian reservations meet that definition. Congress can dispose of lands within executive order Indian reservations because it can modify their boundaries at any time. *See* 25 U.S.C. § 398d. If Congress terminates or reduces an executive order Indian reservation, it need not compensate the affected Indian tribe. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942). That is so because "the Constitution places the authority to dispose of public lands exclusively in Congress." *Sioux Tribe*, 316 U.S. at 326; *see also* U.S. Const. art. IV, § 3. For this reason, "[t]he President has no authority to convey *any* interest in public lands without a clear and definite delegation in an Act of Congress." *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (emphasis added); *Sioux Tribe*, 316 U.S. at 326 (similar). Without such authority, "[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." *Hynes*, 337 U.S. at 103; *Karuk*, 209 F.3d at 1374 (same). In short, executive order Indian reservations are public lands.

A different analysis applies to reservations created by statute or treaty. Such reservations are non-public and require payment of compensation if terminated or reduced in size. *See Sioux Tribe*, 316 U.S. at 326; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955). Significantly, the district court relied on *United States v. Schwarz*, 460 F.2d 1365, 1372 (7th Cir. 1972), for its conclusion that "Indian reservation land is not public land." [ER24 at ¶38] *Schwarz* involved Indian land created *by treaty*, however, not an executive order Indian reservation. 460 F.2d at 1368.

GRIC's executive order reservation lands thus were public lands that remained subject to congressional disposal. *See Columbia Basin*, 643 F.2d at 602; *Karuk*, 209 F.3d at 1374. R.S. 2477 was just one way that Congress exercised its power to dispose of public lands, and because of Congress' plenary authority over public lands, the President had no authority to rescind or limit this grant. Pinal County perfected the R.S. 2477 grant for Smith-Enke and Murphy Roads with its 1922 declaration of public roads along section lines, and accordingly, Smith-Enke and Murphy Roads are public roads that provide legal access to Section 16.

## IV. GRIC HAS NO ZONING AUTHORITY OVER SECTION 16

In response to GRIC's counterclaim seeking a declaration of its authority to zone Section 16, the district court addressed two distinct issues—one issue

concerns the current use of the property, and the other concerns the future use of the property. The two issues have very different postures in this appeal.

As to the first issue—concerning GRIC's "right to control the zoning over Section 16 as it presently is being used"—the district court concluded that GRIC has no zoning authority because it "has failed to show that the present use has a demonstrably serious impact and imperils the political integrity, economic security, or health and welfare of the tribe." [ER28 at ¶60] GRIC does not appeal that conclusion, and it is therefore not subject to review by this Court.

GRIC's appeal concerns the second issue—regarding its authority to control the zoning over Section 16 to prevent future residential development of Section 16. The district court initially ruled that issue unripe because "there are no current plans to sell Section 16 to a developer and no current plans to construct residential homes on Section 16." [ER27-28 at ¶59] Alternatively, however, the district court found that if the issue is ripe, then GRIC's claim of zoning authority again failed because it had not shown that the development of Section 16 would have a "demonstrably serious impact that imperils GRIC's political integrity, economic security, or health and welfare." [ER28 at ¶62; *see also* ¶63]

GRIC's own avowals made the second issue ripe. And on the merits, the district court was not clearly erroneous in finding that GRIC has failed to establish

the requisite factual predicate to control Section 16's zoning for future development.

### A. GRIC's Authority To Prevent Residential Development On Section 16 Is Ripe For Review.

Having raised and lost the zoning authority issue on the merits below, GRIC now embraces (at 41-42) the district court's alternative ripeness ruling. In doing this about-face, GRIC ignores its own factual representations.

As the district court found, "[i]n 2004, GRIC became aware that a request was being made to amend the Pinal County land use designation for Section 16 from 'Rural' (allowing 1.25 houses per acre) to 'Transitional' (allowing a higher-density housing development)." [ER14 at ¶121] The district court also found that there were "[d]evelopers interested in purchasing Section 16 [who] intended to develop it." [ER14 at ¶122] Although Pinal County ultimately decided to deny the zoning amendment, GRIC avowed below that the prospect of residential development created an urgent need for an adjudication of its zoning authority over Section 16.

In particular, GRIC represented that "tens of millions of dollars of combined federal and [GRIC] resources are being expended" to implement GRIC's "Master Plan for Land and Water Use" on its Reservation. [ER314-15 at ¶¶46, 48] The Master Plan, according to GRIC, assumes that Section 16 "will continue to remain uninhabited and predominantly or exclusively agricultural." [ER315 at ¶48] If

"Section 16 could possibly be developed as a housing subdivision," GRIC stated that it would "need to *immediately* account for this contingency by revising both the Community's Master Plan as well as the numerous resource management plans and Tribal Council decisions that were predicated on this fundamental document." [ER at ¶¶49-50 (emphasis added)] GRIC also avowed that "[b]ecause of the limited resources available to accomplish Community resource and economic development objectives, any alteration of these plans results in Reservation-wide adjustments that must be addressed immediately in light of the possibility that Section 16 could be developed as a housing subdivision." [ER at ¶52]

GRIC therefore asserted that "[a]n *actual, justiciable* controversy exists concerning [its] authority to establish zoning restrictions over Section 16." [ER318 at ¶76 (emphasis added)] The Trustee agrees. GRIC, having created the zoning controversy—and requiring factual development and extensive presentations of proof on the issue—cannot now avoid the issue because it dislikes the district court's ruling on the merits.

### B. GRIC Cannot Overcome The District Court's Factual Finding That It Has Not Established That Residential Development Of Section 16 Would Have The Requisite Adverse Impact To Justify Tribal Zoning Authority.

As the Supreme Court has recently confirmed, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720

(2008) (citation omitted). "GRIC may 'retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation [only] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" [ER27 at ¶57 (quoting *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 428 (1989)] An Indian tribe does not have zoning authority merely because nonmember land is located within the exterior boundaries of its reservation. *Brendale,* 492 U.S. at 428. Furthermore, an Indian tribe is not entitled to "complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Id.* at 431. Rather, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Id.* At trial, GRIC had the burden of proving this "demonstrably serious" impact, which it did not do.

After the trial in this matter, the Supreme Court ruled that tribal authority over nonmembers on fee land "must be necessary to avert catastrophic consequences." *Plains Commerce Bank*, 128 S. Ct. at 2726 (citing Cohen § 4.02[3][c], at 232 n. 220). The Supreme Court held that a tribe must establish that the nonmembers' "conduct menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* (citing *Montana*, 450 U.S. at 566). Here, the district court found that GRIC failed to show that the development

of Section 16 would have a demonstrably serious impact—let alone the now required *catastrophic impact*—that would imperil GRIC's political integrity, economic security, or health and welfare. [ER28 at ¶¶62-63] That factual finding is unassailable—and certainly not clearly erroneous. The evidence shows that (i) residential developments and farms have coexisted in, on, and around the Reservation for some time [ER14 at ¶¶118-20]; (ii) it is pure speculation that residential development on Section 16 would adversely impact GRIC's water resources [ER15 at ¶141]; (iii) Section 16 can obtain police, fire, and emergency medical services ("EMS") protection from surrounding communities [ER17 at ¶160]; and (iv) there is no evidence of any demonstrably serious impact on GRIC's cultural resources. [ER28 at ¶63] Based on these facts, the district court correctly concluded that GRIC has no authority over the zoning of Section 16.

Moreover, Section 16 is located near the Reservation border close to the City of Maricopa, which is undergoing rapid residential and significant commercial development; it is *not* "in 'the heart of [a] close[d] portion of the reservation'" as GRIC claims (at 43). [ER28 at ¶63] And, while development of Section 16 would bring additional people onto the Reservation, GRIC failed to show that the impact on its police department, EMS, water resources, farming operations, and cultural resources would be demonstrably serious and would imperil GRIC's political integrity, economic security, or health and welfare. [ER28 at ¶63] In fact, GRIC's

director of EMS admitted that other EMS providers could provide services to residents on Section 16. [SER 196] And GRIC's chief of police testified that the Pinal County Sheriff's Office provides law enforcement services on Section 16 and that GRIC's police force does not respond to calls about criminal activity on, or even have jurisdiction over, Section 16. [ER16 at ¶151; SER 199] GRIC itself has invited thousands of non-tribal members on to the Reservation by building its three casinos and other tourist attractions.

Despite GRIC's allegations (at 44-45) that development on Section 16 would have a negative impact on the surrounding lands, including farms, the record shows exactly the opposite. Farming operations have not been adversely affected (other than minor issues of garbage, broken canals, and trespassers). [ER14 at ¶118] Moreover, GRIC cites no studies addressing the impact of residential development of Section 16 on agricultural operations surrounding Section 16. [ER15 at ¶140; SER 202-04]

On these facts, the district court rightly rejected GRIC's claim of zoning authority.

## V. GRIC DOES NOT HAVE ABORIGINAL TITLE TO SECTION 16

Aboriginal title is a "right of occupancy which the sovereign grants." *Tee-Hit-Ton Indians*, 348 U.S. at 279. Aboriginal title is not a fee simple property right, but a possessory right, "established by offering historical evidence of the

tribe's long-standing physical possession" of the land. *Zuni Indian Tribe of New Mexico v. United States*, 16 Cl. Ct. 670, 671 (1989).

Because the United States holds title to all aboriginal land, Congress has the right to extinguish aboriginal title. *Id.*; *see Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823) ("[T]he exclusive right of the United States to extinguish [aboriginal] title, and to grant the soil, has never, we believe, been doubted."). Congress can extinguish aboriginal title in many ways so long as its intent to do so is clearly expressed. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1942) (aboriginal title can be abrogated "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise").

The district court correctly concluded, in granting in part the Trustee's motion for summary judgment, that Congress clearly intended to extinguish aboriginal title when it conveyed Section 16 to the Territory of Arizona in 1877. In any event, the Indian Claims Commission ("ICC") had already adjudicated this issue and GRIC is barred from relitigating it again here.

### A. Congress Extinguished Any Claim To Aboriginal Title When It Conveyed Section 16 To The Territory Of Arizona As School Land In 1877.

Congress' conveyance of land manifests an intent to extinguish aboriginal title, unless the conveyance statute provides otherwise:

> [A]boriginal title, as opposed to Indian title recognized by treaty or reservation, is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands.

*United States v. Atlantic Richfield*, 435 F. Supp. 1009, 1020 n.45 (D. Alaska 1977). Consistent with this principle, courts view the conveyance of school lands as an unequivocal Congressional intent to divest a tribe of aboriginal title. *See Zuni Indian Tribe*, 12 Cl. Ct. at 660 ("the United States' grant of school land to Arizona and New Mexico, in violation of the Zunis' rights to the land, resulted in the loss of aboriginal title"). As the district court explained below, "Congress would not intend [school section] land, [which is] to be used as a revenue generator, to be burdened with a superior right of use and occupancy such as aboriginal title." [ER38]

Here, Congress extinguished aboriginal title when the federal government filed its survey of Section 16 in 1877. [ER41] *See Andrus v. Utah*, 446 U.S. 500, 506 (1980) (congressional conveyance of title to school section land vests upon "completion of an official survey").

When the Territory of Arizona was admitted to the Union pursuant to the Enabling Act, Congress acknowledged its previous conveyance of Section 16 as school lands to the Territory by expressly re-confirming this grant to the State of

Arizona. Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 568-579. [ER36] The Enabling Act, therefore, did not preserve aboriginal title to Section 16 as GRIC claims (at 50). Rather, section 20 of that Act preserved aboriginal title only to lands for which tribes continued to hold title, and Section 16 was not among those lands. [ER39 (finding that Congress' conveyance of Section 16 as school land prior to Arizona's admission to the Union "demonstrate[d] the requisite intent to extinguish the Indian right of exclusive use and occupancy to that land") (quoting *Atlantic Richfield*, 435 F. Supp. at 1020)]

GRIC relies on (at 50-51) several cases holding that aboriginal title is not extinguished when the land at issue is subject to a pre-existing treaty.[21] Those cases are inapposite here. This case does not involve any abrogation of a treaty obligation: Section 16 has never been the subject of a treaty, nor has it otherwise ever been reserved for GRIC by Congress or Executive Order. *See Atlantic*

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[21] *See, e.g., United States v. Thomas*, 151 U.S. 577, 584 (1894) (if land is previously granted to tribe by treaty, conveyance of school land cannot extinguish aboriginal title, especially when treaty indicates the state's rights in the school land were "subordinate to this right of occupancy of the Indians"); *Wisconsin v. Hitchcock*, 201 U.S. 202, 214 (1906) (similar); *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877) (similar).

Equally inapposite, is *United States v. Santa Fe Pac. RR. Co.*, 314 U.S. 339 (1941), which GRIC also cites in support of its aboriginal title argument. *Santa Fe* did not involve school trust lands, and there were no claims that the school trust lands statute extinguished aboriginal title. Besides, *Santa Fe* held that aboriginal title there was extinguished. *Id.* at 358-59 (settlement on reservation was relinquishment of aboriginal title rights to non-reservation lands).

*Richfield,* 435 F. Supp. at 1020 n.45 (a statutory conveyance extinguishes aboriginal title, "as opposed to Indian title recognized by treaty or reservation").

### B. The ICC Adjudicated That GRIC's Aboriginal Title Has Been Extinguished, And GRIC Is Barred From Re-Litigating That Issue.

As the district court also correctly recognized, collateral estoppel principles bar GRIC from raising the issue of aboriginal title because that issue was already raised and decided by the ICC.

In 1970, in litigation in which GRIC was a party, the ICC ruled that GRIC's aboriginal title to all land it had occupied in central Arizona, excluding the Reservation, had been extinguished by the federal government. *Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm. 301 (1970); *see also Gila River Pima-Maricopa Indian Cmty. v. United States*, 27 Ind. Cl. Comm. 11, 15 (1972). The ICC's adjudication itself did not extinguish that title, as GRIC claims (at 54). Rather, the ICC determined that the federal government had previously abrogated that title. *See Gila River,* 27 Ind. Cl. Comm. at 15. Later, the federal claims court awarded GRIC over $6 million as compensation for the loss of its aboriginal title to all land outside the Reservation. *Gila River Pima-Maricopa Indian Cmty. v. United States*, 8 Cl. Ct. 569, 570 (1985). The only land excluded from this award was the Reservation because the Reservation was tribal owned land. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 2 Cl. Ct. 12,

16 (1982). Section 16 "was not part of the Reservation," and so it was included within the ICC award. [ER41]

GRIC nonetheless argues (at 55) that because the ICC did not specifically identify Section 16 in its adjudication, the identical issue has not been previously adjudicated. GRIC does not dispute, however, that Section 16 is not part of the Reservation. As such, it necessarily was part of the award area for which GRIC has already received compensation. Because GRIC litigated the issue of the extinguishment of its aboriginal title before the ICC, it is precluded from re-litigating that issue now. *See United States v. Dann*, 470 U.S. 39, 45 (1985) (holding that payment by the federal government for extinguishment of aboriginal title bars any future claims of aboriginal title).

**Relief Requested**

The district court's judgment should be affirmed in all respects except as follows: (i) this Court should hold that Smith-Enke and Murphy Roads are public roads under R.S. 2477 and should reverse the district court's contrary holding; and (ii) this Court should hold that the issue of future zoning is ripe (and therefore affirm the district court's holding on the merits of the zoning issue).

November 21, 2008

Respectfully submitted,

PERKINS COIE BROWN & BAIN P.A.

By 

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**Certificate of Service**

I certify that on November 21, 2008, I caused the original and 15 copies of the foregoing Appellee/Cross-Appellant G. Grant Lyon's Answering Brief on Appeal and Opening Brief on Cross-Appeal; and the original and 5 copies of Appellee/Cross-Appellant G. Grant Lyon's Supplemental Excerpts of Record (Volumes 1 and 2) to be sent by U.S. First Class Mail to:

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

I further certify that on November 21, 2008, I caused two copies of the foregoing Appellee/Cross-Appellant G. Grant Lyon's Answering Brief on Appeal and Opening Brief on Cross-Appeal to be sent via U.S. First Class Mail and via e-mail to counsel of record for all parties at the following addresses:

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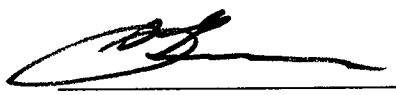
Paul F. Eckstein

## Certificate Of Compliance

1. This principal and response brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because this brief contains 16,129 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

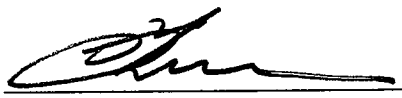
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft® Word 2002.



Paul F. Eckstein

## Statement Of Related Cases

Pursuant to Circuit Rule 28-2.6, the Trustee is not presently aware of any related cases, as defined in subparts (a) through (d) of said Circuit Rule.



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