NO. 11-35564

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PINE BAR RANCH LLC and OWEN TORREY,

Appellants

v.

UNITED STATES OF AMERICA, ACTING REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, ROCKY MOUNTAIN REGIONAL OFFICE, SUPERINTENDENT EDWARD LONE FIGHT, BUREAU OF INDIAN AFFAIRS, and DEPARTMENT OF INTERIOR, INTERIOR BOARD OF INDIAN APPEALS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, BILLINGS DIVISION

Dist. Ct. No. 1:10-CV-00088-RFC
The Honorable Richard F. Cebull
United States District Court Judge

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The BIA argues Pine Bar's administrative appeal and declaratory action must be dismissed for three reasons. They are:

1. The Quiet Title Act bars this action;

2. The doctrine of collateral estoppel applies and thereby precludes this action, and;

3. Pine Bar's argument is meritless.

I. The BIA'S Quiet Title argument fails because Pine Bar has never claimed an interest in the United States' title.

The District Court addressed the QTA issue in six lines. The District Court wrote:

> Plaintiffs appear to concede the Quiet Title Act (QTA) is inapplicable to this dispute. Generally, the government waives its sovereign immunity in both quiet title and foreclosure actions. See 28 U.S.C. §§ 2410(a)(1). Nevertheless, the Court finds that the Indian Lands exception to the government's waiver of sovereign immunity applies in this case and would bar any QTA claim5. (CR # 28, District Court Order Granting Summary Judgment to BIA, pp. 11-12).

In its response brief, the BIA argues "...if the lawsuit seeks relief affecting the United States' title to real property, then a litigant suing the government must fall within the terms of the Quiet Title Act's limited waiver of sovereign immunity." (BIA Brief, p. 11-12). Neither side argued to the District Court that Pine Bar was contesting the United States' title in Surrell Creek Road. Although the BIA argued the road crosses federal land, the BIA provided no basis for

concluding that the relief sought by Pine Bar (i.e. recognition of a statutory right to use the road) constitutes an interest in real property. The District Court never made a finding that Pine Bar was contesting the United States' title. Yet, for the first time in the response brief, the BIA argues Pine Bar is contesting the United States' title to Surrell Creek Road. (BIA Brief, p. 18).

Contrary to the BIA's assertion, Pine Bar has consistently maintained throughout all proceedings the right to travel across Surrell Creek Road was granted by Congressional authority. (CR # 13, Second Amended Complaint, p.5; CR # 16, Pine Bar Summary Judgment Brief, pp. 10-12). Pine Bar is not claiming an interest to the United States' title, and consequently this Court's holding in *Robinson v. United States*, 586 F.3d 683 (9th Cir. 2009) is fatal to the BIA's QTA argument. In *Robinson*, Robinson appealed the dismissal of the complaint for lack of subject matter jurisdiction. The district court held that the United States had not waived its sovereignty, thereby preventing the district court from hearing the matter. *Id*. at 684.

Robinson argued on appeal that the lawsuit did not fall under the Quiet Title Act, but fell under the Federal Tort Claims Act and therefore the district court would have jurisdiction to hear the matter. *Id*. at 686. The *Robinson* Court reversed and remanded with instructions for the district court to determine whether the *Robinson* claims fell under the FTCA. The key to the *Robinson* Court's

holding was " . . . a suit that does not challenge title but instead concerns the use of land as to which title is not disputed can sound in tort or contract and not come within the scope of the QTA." *Id*. at 688.

Trying to get around the *Robinson* holding, the BIA argues that "any order declaring that the road is "public" or, in other words, that the public enjoys a right-of-way easement through the Reservation would place an encumbrance on the United States' title." (BIA Brief, p.10). The BIA's position is incorrect. The Courts have held the right of an individual to use a public road is not a right or interest in property for the purposes of the QTA. *Long v. Area Director*, 236 F.3d 910, 915 (8th Cir. 2001), *citing, Kinscherff v. United States,* 586 F.2d 159, 160 (10th Cir. 1978).

BIA cites to *Metropolitan Water Dist. of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987) in support of its QTA argument. Unlike this matter, *Metropolitan* concerned a claim to the United States' title. In *Metropolitan* the Secretary of Interior determined the original survey of the Fort Mohave Reservation was incorrect. When the new exterior boundary lines of the reservation were established, it gained 3500 acres. With the increased acres, the reservation was entitled to additional water rights in the Colorado River. *Id.* at 140.

The *Metropolitan* Court reasoned because the case concerned the determination of the boundaries of the reservation the QTA and its Indian lands exception would apply. *Id*. at 143. The *Metropolitan* Court held that the lawsuit challenged the Secretary of Interior's authority to establish reservation boundaries and therefore the district court did not have jurisdiction. *Id.* at 143-144.

Here, Pine Bar is not contesting the United States' title to the property over which Surrell Creek Road runs. Pine Bar acknowledged that the United States holds title to the property on which Surrell Creek Road lies, except for the section crossing Pine Bar Ranch. (CR # 16, Pine Bar Summary Judgment Brief, pp. 7-8).

Rather, Pine Bar has repeatedly argued Congressional authority allows the public to use Surrell Creek Road. (CR # 16, Pine Bar Summary Judgment Brief, pp. 8-13; CR # 25, Pine Bar Summary Judgment Reply Brief, pp. 13-22). The BIA violated Pine Bar's due process rights when the BIA closed Surrell Creek Road to outsiders and threatened users with criminal prosecution for trespass. (CR# 25, Pine Bar Summary Judgment Reply Brief p. 9). As a matter of law, the Quiet Title Act and the Indian lands exception within it do not prevent the district court from hearing this matter.

II. The doctrine of Collateral Estoppel is inapplicable.

For the first time the BIA argues the doctrine of collateral estoppels bars the Second Amended Complaint. The BIA contends that because this review is *de*

novo the Court may analyze whether this matter should be dismissed under the doctrine of collateral estoppel. However, the Court stated in *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, a review of collateral estoppel for the first time on appeal "depends on the adequacy of the record and whether the issues are purely legal[.]" *Golden Nugget v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987). Because it is being raised for the first time on appeal, there is nothing in the District Court's decision on this subject.

To determine whether the collateral doctrine or issue preclusion bars this lawsuit, the following factors are reviewed by the Court: (1) the issue was necessarily decided at the previous proceeding and is identical to the one which is sought to be re-litigated; (2) the first proceeding ended with the final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 649 F.3d 1067, 1070 (9th Cir. 2011).

Here, the BIA's argument cannot survive the first factor. The Court has been clear that issues not litigated on their merit are not subject to collateral estoppel. *Id.* The BIA argues that the issues before this Court have already been determined by the Wyoming Supreme Court.

The only issue addressed in the Wyoming State action was:

> "Did the Board of County Commissioners of Fremont County err when it determined that the Surrell Creek Road is a public road for

> purposes of *Wyo. Stat. Ann. § 24-9-101 et seq.*" *Pine Bar Ranch, LLC v. Luther et al*., 2007 WY 35 P2, 152 P.3d 1062.

The Wyoming Supreme Court decided the narrow issue of whether a public road existed within the context of the Wyoming Private Road statute. The Wyoming Supreme Court does not have jurisdiction over federal law, did not adjudicate federal law and, more specifically, did not render a decision regarding Section 3 of the CCC Act or Pine Bar's Constitutional claims.

The Wyoming Supreme Court acknowledged that it "cannot adjudicate its statutes so as to in any fashion bind the United States." *McGuire v. McGuire*, 698 P.2d 1278, 1287 (1980). Only Congress has the power to regulate the use of federal land. United States Constitution Article IV, Section 3 CL. 2, *See United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997). The State of Wyoming cannot determine the use of federal property. Therefore the BIA's argument that this matter should be dismissed because the State of Wyoming has already determined the issue is without merit.

III. The BIA acted arbitrarily and capriciously when it closed Surrell Creek Road to outsiders.

The BIA claims Pine Bar reinvents its APA claim as a challenge to agency action under 5 U.S.C. § 706(2). Beginning with the appeal to the Regional Director and continuing with the proceedings before the IBIA and District Court, Pine Bar argued that the BIA's actions were contrary to the law and arbitrary and

capricious. 5 U.S.C. § 706(2)(A)(B)(C). Pine Bar, in response to the BIA's position, again shows how the BIA's actions were contrary to the law and arbitrary and capricious.

Regarding the merits of the case, the BIA argues that Pine Bar has not explained "why they believe the CCC Act established a public right-of-way through the Reservation." (BIA Brief, p. 28). Throughout this proceeding Pine Bar has repeatedly explained that the plain language of the CCC Act establishes the right of the public to use the CCC roads. The project was explicitly approved by the Tribes and Surrell Creek Road was established using federal money for the purposes set by Congress.

The BIA does not dispute that Surrell Creek Road is a CCC Road. (C.R. # 20, Response Brief and Brief Supporting Federal Defendants' Cross, Motion for Summary Judgment, pp.13-16). Rather, the dispute is whether the public has the right to use the CCC road which connects the Pine Bar Ranch to U.S. Highway 287.

Regarding the interpretation of a statute by an agency the following standard controls:

> When reviewing an agency's interpretation of a statute it is charged with administering, we look first "to the statutory text to see whether Congress has spoken directly to the question at hand. 'If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" [Citations

> omitted]. Thus, "[t]he language of a statute is controlling when the meaning is plain and unambiguous." [Citations omitted]. *Arizona State Board for Charter Schools v. U.S. Dept. of Education*, 464 F.3d 1003, 1006 (9th Cir. 2006).

In particular the CCC Act states:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established the Civilian Conservation Corps, *** for the purpose of providing employment, *** through the performance of **useful public work**…" (Emphasis added, Section 1, 50 Stat. 319, June 28, 1937)
>
> In order to carry out the purpose of this Act, the Director is authorized to provide for the employment of the Corps and its facilities on works of public interest or utility for the protection, restoration, regeneration, improvement, development, utilization, maintenance, or enjoyment of the natural resources of lands *** belonging to, or under the jurisdiction or control of, the United States, its Territories, and insular possessions, and the several States: ***
>
> *Provided further*, That no projects shall be undertaken on lands or interests in lands, other than those belonging to or under the jurisdiction or control of the United States, unless adequate provisions are made by the cooperating agencies for the maintenance, operation, and utilization of such projects after completion. (Section 3, 50 Stat. 319, June 28, 1937). (CR # 17, Statement of Undisputed Facts, ¶ 8).

This matter comes down to the intent of Congress with respect to "public utility" of CCC projects. The statutory language, as well as agency construction and administration of the statute over many decades, establish the public's right to use roads constructed pursuant to the CCC Act.

Congress specifically classifies CCC projects as "works of public interest or utility" and requires the cooperating agencies to provide for "maintenance, operation, and utilization of such projects after completion." "Public works" are defined in general terms as "works (as schools, highways, docks) constructed for public use or enjoyment especially when financed and owned by the government," Merriam-Webster Dictionary, Ninth New Collegiate Dictionary, c. 1984. In the 1930's, when the CCC Act was passed, "public works" were defined in the National Industrial Recovery Act as including "any project . . . constructed or carried on with public aid to serve the interests of the public." *See, e.g., United States use of Noland Co. Inc. v. Irwin*, 316 U.S. 23, 28, 62 S.Ct. 899, 901 (1942).

Pine Bar believes the language of the statute is clear. Congress intended the CCC to perform "useful public work" to construct "works of public interest or utility" for public "utilization … after completion." This interpretation of the Act is consistent with agency construction and administration of the statute by those who were charged with bringing it into effect, particularly with respect to the CCC roads.

However, if the language is not clear and unambiguous to the Court, the Court may resolve the meaning of the statue under the following standard:

> Conversely, if the statute is uncertain or ambiguous, we "cannot simply impose our own construction." *United States v. Lopez-Perera, 438 F.3d 932, 935 (9th Cir.2006)*. Rather, under *Chevron*, we defer to the agency's interpretation if it is based on

> "a permissible construction of the statute." *467 U.S. at 843*. However, interpretations embodied in opinion letters, policy statements, agency manuals, and enforcement guidelines -- "all of which lack the force of law -- do not warrant *Chevron*-style deference. " *Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)*. Instead, such views are entitled to *Skidmore* deference "insofar as they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Vigil v. Leavitt, 381 F.3d 826, 835 (9th Cir. 2004)*(quoting *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*). In other words, " '[c]ogent administrative interpretations . . . not the products of formal rule-making nevertheless warrant respect.'" *Id. at 835* (quoting *Alaska Dep't of Envtl. Conservation v. E.P.A., 540 U.S. 461, 488, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004)*). As the Supreme Court noted: "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp., 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)* (footnotes omitted). *Id*. at 1006-1007.

Here, the agency record supports Pine Bar's position. On March 31, 1933, President Roosevelt signed into law an act "for the relief of unemployment through the performance of useful public work." (Public, No. 5, 73d Congress, 48 Stat 22). The benefits of the CCC were to the Nation as a whole, including Native Americans. [1] On May 10, 1933, John Collier, Commissioner of Indian Affairs, notified Rueben P. Haas, Superintendent of the Shoshone Agency, that a program for Emergency Conservation Work on Indian Reservations had been approved.

[1] Executive order of May 12, 1933 (No. 6131) extended the CCC program to Indian Reservations.

Superintendent Haas was given instructions to prepare a work program for the Shoshone Reservation.[2] The Commissioner envisioned several types of projects for the Shoshone Reservation including truck trails. (Pine Bar's Further Excerpts of the Record, (hereinafter "FER"), pp. 40-41.

On September 2, 1941, the Surrell Creek Road project was presented to the Shoshone and Arapaho Joint Business Council as a modification of the CCC work program. The Joint Business Council approved it unanimously. (FER, pp. 113-114). The project proposal form describes the project as construction of "a truck trail from U. S. Highway 287 ... for a distance of approximately seven miles to the reservation boundary in Section 20, T.2S., R.1W." The proposal stated that the truck trail "will serve all activities in the southwest corner of the reservation below the mountain area." (FER, pp. 115).

On September 11, 1941, D. E. Murphy, the Director of the Indian Department CCC approved the funds necessary to build Surrell Creek Road. (FER, pp. 116). At the time Surrell Creek Road was constructed, Forrest Stone, Superintendent of the Wind River Reservation, knew it would be used by outsiders. In a 1942 memo to Forrest Stone, Forman-Mechanic John L. Boyd referred to it as "the road to the Pine Bar and Hart Ranch." (FER, pp. 88). The Pine Bar and Hart ranches lie in the North Fork Canyon south of the reservation

[2] The name was later changed to the Wind River Reservation.

boundary. Aerial photographs of the area traversed by Surrell Creek Road were taken in 1939 and 1949. The 1949 photo shows Surrell Creek Road commencing at the southern reservation boundary, extending northeasterly across the Wind River Reservation toward U.S. Highway 287, crossing a corner of Pine Bar Ranch property along the way. (FER, pp. 54-55, 147).

In establishing a road for the express purpose of providing access to ranches outside the reservation, Forrest Stone must have known outsiders would be using the road. In 1942, Superintendent Stone wrote the owner of the Hart Ranch giving him permission to install a gate. Superintendent Stone wrote:

> Upon your representation that the County has given you the necessary permission for the construction of a new road from the reservation boundary to your ranch on North Fork of the Popo Agie, you are hereby granted permission to put a gate in the present boundary fence approximately three-fourths of a mile west of the present gate. (FER, pp. 89).

Superintendent Stone was one of the individuals charged with carrying the CCC Act into effect and in doing so he authorized use of the road by outsiders. He could not have done this without statutory authority. Regulations at the time stated:

> The Superintendent or other officer in charge is expected to keep closely in touch with conditions within his jurisdiction and when any unauthorized entry upon Indian lands is made the individual or corporation responsible therefore should be immediately notified to cease operations until proper authority has been obtained. (25 CFR 256.1, in force as of June 1, 1938)

The BIA would not have expended public money to establish a road that crosses non-tribal property, as Surrell Creek Road does, without the expectation that the public would be using the road. In 1938, D. E. Murphy, Director of the Indian Division CCC, advised Forest Stone: "Whenever funds are used on private lands the guiding purpose should be that a public benefit is achieved …" (FER, p. 42). The history here shows Congressional intent that when public funds were used to create a road like Surrell Creek Road, the public right to use the road was considered to be a very important aspect of the project.

In 2006, the BIA addressed the meaning of the CCC Act in a road dispute with Alfred McAdams. Mr. McAdams installed and locked a gate across Trout Creek Road on the Wind River Reservation where the road traversed his allotment, thereby blocking public access to the west. In the decision which forced Mr. McAdams to remove the gate the BIA found it significant that the road had been built with federal money under the CCC program.

The BIA, through the Regional Director, told Mr. McAdams:

> The Act of June 28, 1937, was to establish a Civilian conservation Corps to perform useful public work.
>
> ***
>
> This [Trout Creek] road was constructed with Federal money by the Federal government pursuant to the Congressional authority outlined in the Act of June 28, 1937. (FER, p. 119).

Clearly, the expenditure of CCC money to build Trout Creek Road supported, in part, the BIA's decision to order Mr. McAdams to remove the gate.

The BIA now ignores its own statements in the McAdams' decision concerning the purpose of the CCC to perform useful public work and the federal source of funding. In light of the BIA's paradoxical position it should be held to its original long standing interpretation of the CCC Act with respect to public use of CCC roads. The United States Supreme Court has addressed inconsistent interpretation of a statute by an agency:

> Even if the United States Supreme Court would, in some cases, sanction departure from the principle of not giving deference to an agency counsel's interpretation of a statute where the administrative agency itself has articulated no position on the question, the court will not do so where the agency's litigating position does not represent a reasoned and consistent view of the scope of the statute, but instead is contrary to the view of the statute advocated by the agency in past cases, since deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate. *Bowen v Georgetown Univ. Hosp.*, 488 US 204, 212-213, 102 L Ed 2d 493, 502-503, 109 S Ct 468, 473-474 (1988).

The BIA's litigating position in this case should not be given deference because it is inconsistent with the BIA's prior agency construction and administration of the CCC Act.

Finally, the BIA argues the CCC Act was "long-ago-repealed" and therefore cannot be basis for any argument. (BIA Brief p. 28). Again, the BIA's argument is counter to its 2006 statement in McAdams. Admittedly, specific sections of the

CCC Act were repealed by 80 Stat 632, although not section 3. Section 8 (a) of the Act mandates that the rights and obligations created under the CCC Act remain:

> The laws specified in the following schedule are repealed except with respect to rights and duties that matured, penalties that were incurred, and proceedings that were begun, before the effective date of this Act and except as provided by section 7 of this Act. (80 Stat 632).

Thus, the public's right to use the CCC roads and the BIA's duty to provide for their utilization after completion are not affected. Notably, the CCC Act mandates "[t]hat no projects shall be undertaken on lands or interests in lands, other than those belonging to or under the jurisdiction or control of the United States, unless adequate provisions are made by the cooperating agencies for the maintenance, operation, and utilization of such projects after completion." *Supra*, p. 8.

In this matter the BIA simply ignores the plain wording of the CCC Act and refuses to assign any meaning to statutory language inconvenient to its current litigating position such as "performance of useful public work," "works of public interest or utility," and "utilization of such projects after completion." The Court should hold the BIA to its original interpretation of the CCC Act as reflected in the BIA's historical view and administration of the CCC Act, and affirm that Surrell Creek Road is open to the public.

IV. Pine Bar's right to use Surrell Creek Road is not contingent on BIA management of right of way documents.

Pine Bar's right to use the road is not contingent upon right of way documents. The BIA's decision in McAdams supports Pine Bar's position. Although the BIA never found the CCC right of way document pertaining to the section of Trout Creek Road across Mr. McAdams' property, the Regional Director concluded one must have been granted prior to construction of the road. (FER, p. 120).

The Regional Director informed Mr. McAdams that the value of the road constituted consideration for the grant and that it was not necessary for the Indian landowner to have granted the right of way personally. He wrote: "Prior to the Act of February 5, 1948, the Superintendent (Secretary) had the authority to approve a right-of-way without consent or compensation, as long as the right-of-way or easement was in the best interest of the Indian landowner(s). (25 USC 321-324)." (FER, p. 120).

At the inception of the CCC program, John Collier, Commissioner of Indian Affairs, instructed the Superintendents to obtain rights of way for the CCC projects. (FER, p.64). Standardized right of way consent forms were provided specifically for this purpose.[3] (FER, p.112). Significantly, the BIA quoted

[3] The original form cites "Executive Order of May 12, 1933, (Pub. 5, 73d Congress)". The form used subsequent to reauthorization of the CCC refers to the "Act of June 28, 1937, (Pub. 163, 75th Congress)"

provisions on this form in the McAdams decision. Commissioner Collier's letter and the right of way forms reflect contemporaneous interpretation of the CCC statutes by the agency charged with their implementation. Notably, the title quotes the purpose stated in section 1 of the CCC Act: "the performance of useful public work." (FER, p. 112).

The record reveals that the Superintendents were required to obtain rights of way for CCC roads on the Reservation and this is true regardless of the BIA's position on the purpose of the roads. The inability of the BIA to locate them now may be evidence of a failed document management and retrieval system but is not indicative of Congressional intent under the CCC Act.

In 2006, BIA Regional Director Edward Parisian quoted a CCC right of way form in his decision to force the reopening of Trout Creek Road although he admits not having the right of way specifically for the disputed section of the road. (FER, pp. 119-120). The same fundamental principle that allowed the Regional Director to conclude there was a right of way across the McAdams property also applies to Surrell Creek Road. The United States affords itself a presumption of correctness in its administration of the law; it would not have constructed Surrell Creek Road across "Tribal, Allotted and Deeded" land, opened the road to "all activities" without obtaining the necessary consent of the allottees and landowners along the route. (FER, p. 115). Indeed, even without direct access to BIA records,

Pine Bar has shown that the BIA obtained unanimous consent for the Surrell Creek Road project from the Shoshone and Northern Arapahoe Joint Business Council[4]. Any claim of an unlawful taking would have arisen when the road was constructed, not six or seven decades later.

V. The IRR status of Surrell Creek is not determinative of the public's right to use the road.

The BIA argues that the Tribes did not include the contested portion of Surrell Creek Road in the Indian Reservation Road inventory and therefore the road is not open to the public. (BIA Brief, p. 25). However, the dispute in this case arises under the CCC Act (50 Stat 319) not the statute that created the IRR program. (45 Stat 750). Under the United States Constitution, Congress is not limited to a single statutory program for creating public access on Indian reservations. The existence of one does not preclude the existence of others.

Prior to 2006, the disputed road in the McAdams case had been added to the IRR inventory.[5] When Mr. McAdams blocked the road across his property with a locked gate, it became necessary for the Regional Director to find statutory authority to reopen it and resume operating it as a public road and for that he relied on the CCC Act.[6] The Regional Director determined consent of the allottee was granted when the road was established under the CCC Act and that this consent

[4] Joint Business Council authority for "all transactions involving tribal land" stems from Act of July 27, 1939, ch. 387, § 4, 53 Stat 1128, 1129 (codified at 25 U.S.C. § 574)
[5] BIA records indicate this occurred on or about October 10, 1951.
[6] The parties agree roads in the IRR inventory are public roads.

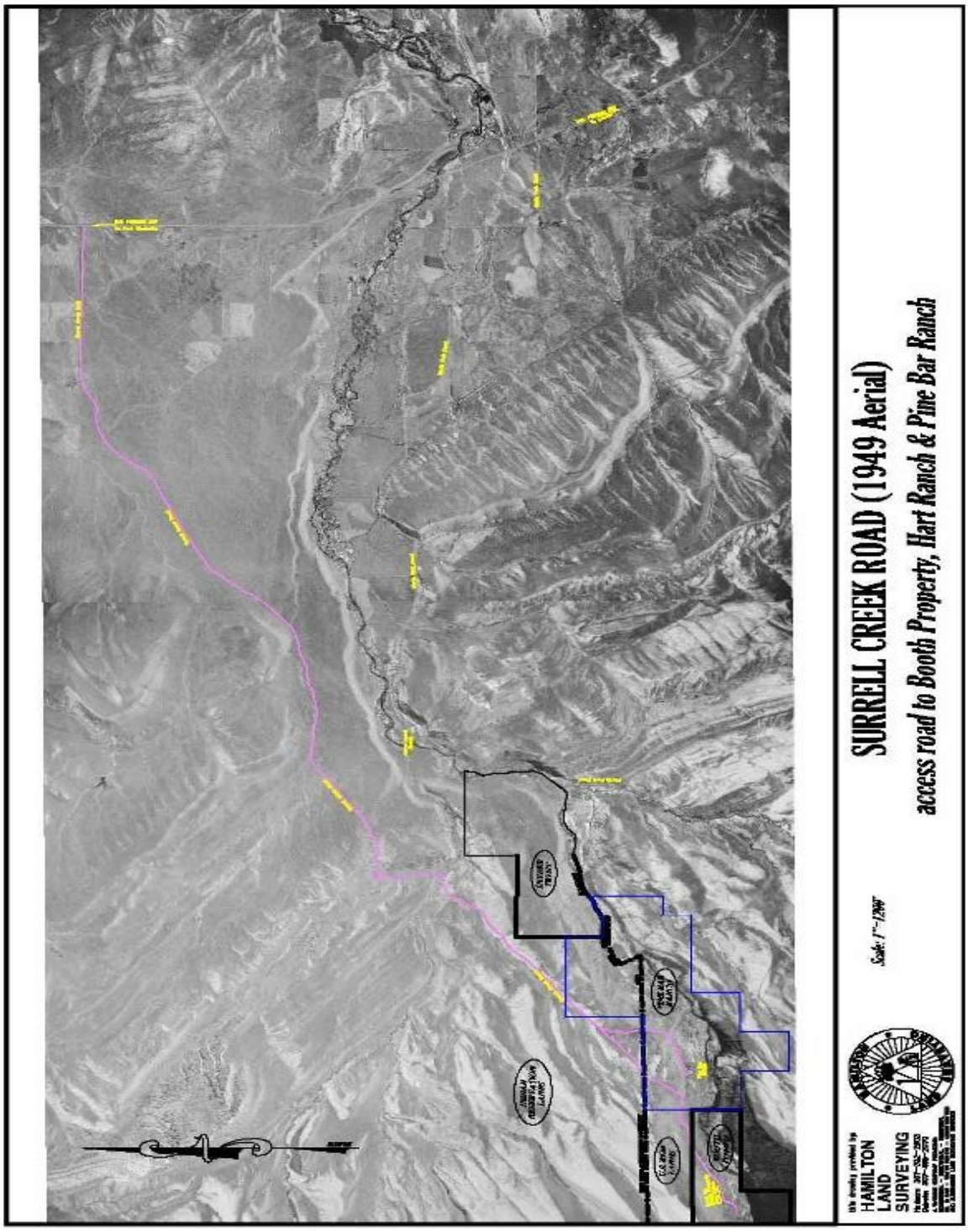
was enough to foreclose the allottee from blocking the road to public use. He did not find that subsequent consent of the landowner was required for the BIA to place the road in the IRR public road program. (FER, p.3). The IRR designation does not undo the mandates of the CCC Act.

VI. Pine Bar's Due Process claim.

In the lower proceedings neither the BIA nor the District Court addressed Pine Bar's due process claims. The BIA states it may argue the merits of the lawsuit while not addressed in the District Court because under an APA review this Court may decide the merits of the case. (BIA Brief, pp. 22-23). However, if facts in dispute raise a genuine issue regarding Pine Bar's due process claims, this matter must be remanded back to the district court for further proceedings.

The BIA claims Pine Bar's due process claim fails because Pine Bar has no property interest in a public road. (BIA Brief, p. 24). The BIA's argument fails to consider the reality of the situation. Inserted here is the 1949 aerial photo of Surrell Creek Road. The photo shows Surrell Creek Road starting at U.S. Highway 287, crossing the Wind River Reservation, including a corner of the Pine Bar Ranch, and continuing to the southern boundary of the reservation. There it connects with the Booth road leading to the Hart Ranch.

EXHIBIT "P"



(CR # 16, Pine Bar Summary Judgment Brief, Exhibit "P").

Although Surrell Creek Road lies entirely on the Wind River Reservation, it does not lie entirely on Tribal and allotted land. The BIA's attempt to operate the Pine Bar Ranch section of the road as a private road for the exclusive benefit of the Tribes is inconsistent with statutory authority and constitutes a taking without due process.

The Due Process Clause of the Fifth Amendment forbids the federal government from depriving persons of "life, liberty, or property, without due process of law." Pine Bar must show a liberty or property interest in the benefit for which protection is sought. If Pine Bar can show a liberty or property interest the next issue becomes what process was due and whether the Pine Bar was actually afforded such process. *Buckingham v. Secretary of the Dept. of Interior*, 603 F.3d 1073, 1081 (9th Cir. 2010).

Pine Bar extensively argued it had a liberty interest to travel Surrell Creek Road pursuant to Congressional authority established under the CCC Act. *Supra*, pp. 6-15. Now, the BIA attempts to deprive Pine Bar of this statutory right without due process.

The BIA argues the threat of a citation does not give Pine Bar standing. The BIA's actions include more than a "mere threat ... of criminal sanction." On November 25, 2003, Officer Dale Hereford issued Harry F. Cutshaw a trespass citation for using Surrell Creek Road. (FER, p. 187). The continuing threat to

issue a citation makes this matter ripe for review. Pine Bar is not expected to test its Constitutional rights by receiving a trespass citation. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). Pine Bar seeks to avoid unlawful criminal prosecution at the hands of the BIA for using a public road which has provided access to their property for over sixty years. Under these facts, Pine Bar has standing under the APA and the Declaratory Act.

VII. The BIA's Tucker Act argument is incorrect.

The BIA claims Pine Bar cannot seek declaratory relief for "a taking without due process," at least without first seeking monetary relief pursuant to the Tucker Act. The BIA's argument is simply wrong as a matter of law.

The BIA cites to *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994), to support its position. In *Clouser*, the reference to the Tucker Act pertains to a taking of private property for public use without just compensation in violation of the Fifth Amendment. *Id*. at 1539. Unlike the relief sought in *Clouser*, Pine Bar's claims in no way concern compensation.

The BIA acted arbitrarily and capriciously by refusing to recognize a statutory right. Recognition of a right is a form of "relief" specifically listed under 5 U.S.C. § 551(11). Denial of a right is a discrete "agency action" under 5 U.S.C. § 551(13):

> "[A]gency action" includes the whole or a part of an agency rule, order, license, **sanction, relief,** or the equivalent **or denial thereof**, or failure to act[.] (emphasis added)

In this case, the relief sought from the BIA was recognition of the right to travel upon Surrell Creek Road. The Superintendent's decision barring non-Tribal use of Surrell Creek Road constitutes denial of a right and is subject to review under APA.

VIII. The issue of Tribal Sovereignty.

The BIA argues that Pine Bar requests relief which will violate Tribal sovereignty. The BIA responds any legislative intent to deprive Indian tribes of rights in land must be clearly and unequivocally stated in the relevant grant or statute.

The record shows the Tribes unanimously consented to the Surrell Creek Road project. Approval of all CCC projects was obtained from the Tribes and therefore the CCC Act did not deprive Indian Tribes of their rights. Immediately after authorization of the CCC program (Public No. 5, 73rd Congress, March 31, 1933), Commissioner of Indian Affairs John Collier wrote to the reservation Superintendents and explained his policy on delegation of responsibility:

> "...it is the desire of the Indian Service to place as much responsibility on the Indian Tribal Organizations as possible. This should be pursued to the end of making the Indians as nearly as possible, self-governing. Superintendents are therefore asked to strengthen Tribal Organizations, revive, if

> possible, organizations which have lapsed, and to seek advice and delegate responsibility to such groups." (FER, p. 44).

Contrary to the government's argument, the CCC program did not deprive the Tribes of their rights. The Tribes made the decisions.

The BIA also argues that a recently passed Tribal resolution regarding the use of Surrell Creek Road Road shields it from Pine Bar's claims. The Tribe's ex post facto resolution declares that "the unpaved portion of Surrell Creek Road is not and never had been a public road." (BIA Brief, p.25).

The BIA's decision to issue trespass citations to those who use Surrell Creek Road triggered this action. The Tribal resolution did not even exist at the time the dispute began.

The relevant statute states that CCC projects were to be performed on lands "...belonging to, or under the jurisdiction and control of, the United States..." (50 Stat 319). There is nothing in the statute to suggest that responsibility for these projects lies anywhere but squarely on the shoulders of the BIA.

The opinion expressed in the Tribal resolution that "the unpaved portion of Surrell Creek Road is not and never has been a public road" is contradicted by their own meeting minutes. Joint Business Council meeting minutes of 21 August 1935, which document the Council's discussion of a proposal to extend three CCC roads, reveal the Tribe knew the CCC roads were and would be open to the public and, in

spite of their concerns, the Tribes, through the Joint Business Council, continued to approve CCC road projects. (FER, pp. 84-85).

The record shows the Tribal decision makers on the Joint Business Council, understood "tourists" and "outside people" would be using the CCC built roads. The Tribes' resolution, made solely in response to this lawsuit, cannot change the fact that the Tribes knew and accepted that the CCC roads would be used by outsiders.

Additionally, the BIA argues that the Tribes' decision, as a sovereign, cannot be challenged in this Court. (BIA Brief, p. 25). BIA's tribal immunity claim is raised for the first time on appeal. However, the Tribes are not being sued. The subject of this case is United States law, not a tribal resolution. Under the supremacy clause of the United States Constitution, the Tribal resolution is subject to the supremacy of United States law. The CCC roads are under the jurisdiction and control of the United States, not the tribes. Therefore, the Superintendent, Regional Director, and IBIA are the correct defendants.

The BIA's position that Tribal sovereignty bars Pine Bar from asserting a right to use Surrell Creek Road is wrong and must be rejected.

IX. The BIA's reliance on 31 Stat 1084 is misplaced.

The BIA claims that 25 U.S.C. § 311 "provides the Secretary of the Interior with the exclusive authority to establish public highways through Indian lands," and therefore Pine Bar's CCC argument is misplaced. (BIA Brief, pp. 29-31).

"The control of land, water, and other property belonging to the United States is vested exclusively in Congress by the Constitution." (Felix S.Cohen, *Handbook of Federal Indian Law*, Univ. of New Mexico Press, p. 94, Section 5, Congressional Power). The authority of the Secretary of the Interior over federal land is delegated from Congress. Under the authority vested by the United States Constitution, Congress may establish public access across lands where title in fee is in the United States.

In 1901, Congress delegated authority to the Secretary of the Interior to grant permission for state and county roads to be built across Indian lands. (Section 4 of the Act of March 3, 1901 (31 Stat 1084, 25 U.S.C. 311). This law does not preclude the United States from operating its own system of public roads on Indian Reservations independent of state or local authorities. In May 15, 1943, Indian Affairs Roads Circular No. 65 advised the Superintendents and District Engineers:

> With the abolishment of CCC-ID, responsibility for the construction and maintenance of the prairie and forest truck trails is vested in the Roads Division. (FER, p. 56),

Thus, the responsibility for maintenance and utilization of the CCC roads lies with the BIA. The United States has authority to operate public roads without state or county participation. The absence of state or county participation in the Indian Department CCC program is not relevant to the intent of Congress under the CCC Act.

CONCLUSION

For the reasons and upon the authorities set forth hereinabove, and in the Appellants' Opening Brief, it is respectfully requested that the Court reverse the Order appealed from in this case and affirm that Surrell Creek Road is open to public use. At a minimum the District Court erred when it held it did not have jurisdiction over this matter. The matter should be remanded back to the District Court for a hearing on the issues raised by Pine Bar.

RESPECTFULLY SUBMITTED this 27th day of January, 2012.

/s/ William A. D'Alton
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Attorney for Plaintiffs/Appellants

STATEMENT OF RELATED CASES

I certify that pursuant to Fed. R. App. P. 28-2.6, I know of no related cases pending in this Court.

Dated: January 27, 2012.

/s/ William A. D'Alton
William A. D'Alton, MT Bar #4246
D'ALTON LAW FIRM, P.C.
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE WITH FED.R.APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-35564

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Appellants is proportionately spaced, has typeface of 14 points or more and contains no more than 6521 words (opening briefs must not exceed 14,000 words; reply briefs must not exceed 7,000 words).

Dated: January 27, 2012.

/s/ William A. D'Alton
William A. D'Alton, MT Bar #4246
D'ALTON LAW FIRM, P.C.
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

William A. D'Alton, being over the age of 18 and not a party to this action, certifies under penalty of perjury that on January 27, 2012, he caused to be filed and sent electronically via the Ninth Circuit ECF System, a true and correct copy of the REPLY BRIEF OF APPELLANT, to which this Certificate of Service is appended, to the following persons and parties:

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An original and 7 copies of the Reply Brief of Appellants will be sent via U. S. Mail to:

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San Francisco, CA 94103-1526

/s/ William A. D'Alton
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