No. 15-15470

In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

Roger French

Plaintiff and Appellant

vs.

Karla Starr, et al.,

Defendants and Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

D.C. No. 2:13-cv-02153-JJT

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Appellant Roger French filed litigation in the U.S. District Court for the District of Arizona on October 22, 2013, seeking declaratory and injunctive relief over whether the Tribal Court of the Colorado River Indian Tribes ("CRIT") has jurisdiction over him in a supposed "eviction" action. At issue was his occupancy of a lease on federal land claimed by CRIT to be within the Colorado River Indian Reservation. However, the leasehold at issue is actually on land that the courts have determined to be within a disputed area defined by the Act of April 30, 1964, Public Law 88-302, 78 Stat. 188 Public Law 88-302, (hereinafter the 1964 Act) where the reservation boundary has never been "finally determined". The Defendants before this Court are the tribal appellate court judges, the tribal court judge, the CRIT tribal council chairman, and the CRIT tribal councilmember responsible for tribal realty. CRIT tribal council members are before the court in their official capacity only.

The basis for jurisdiction in the District Court was a federal question of jurisdiction pursuant to 28 U.S.C. § 1331.

This is an appeal from a final Order of the District Court disposing all parties' claims and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final District Court Judgment was entered on February 12, 2015. ER at 001. French filed a Notice of Appeal on March 12, 2015. Dkt. #86.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The primary issue before this Court is whether a *Water Wheel* analysis was correctly applied considering that the land in question has not been determined to be within the boundaries of the Reservation. *Water Wheel Recreational Area, Inc. v. La Rance*, 642 F.3d 802 (9th Cir. 2011). Derived or secondary issues include:

1. Whether CRIT can have inherent authority to exclude on land that has not been determined to be within the boundaries of the Reservation.
2. Whether the District Court properly considered the 1964 Act in its

determination of tribal jurisdiction over French, a non-Indian.

3. Whether the District Court properly engaged the principle of estopped to prevent French from presenting the Court's own findings in the current matter.
4. Whether the District Court properly considered the lack of regulatory jurisdiction in a finding of tribal adjudicative jurisdiction over French.
5. Whether the District Court correctly applied federal Indian law in its determination of CRIT tribal jurisdiction over French.
6. Whether the District Court committed prejudicial error by refusing to accept the State of California's Amicus Curiae in support of French after accepting the U.S. Dept of Justice's Amicus Curiae in support of CRIT. ER at 097, 019.
7. Whether the District Court properly considered the State of California's competing interests in this matter.

III. STATEMENT OF THE CASE

A. History of the Matter

In spite of the District Court's characterization of this matter as a simple eviction with damages, this case is really about CRIT's attempt to establish jurisdictional control over an entire disputed area, populated by hundreds of non-Indian families, so as to continue either destroying homes, or confiscating residents' properties without compensation, illegally subjecting them to CRIT's dominion and tribal legal system, while fully enjoying the benefits of tribal sovereign immunity. *See* Plaintiff's Br. (Dkt. #62) at 1-2, ER at 145, 109 *ll.* 1-9, 128, 048-53, 215-236.

B. French's History with the West Bank Homeowners Association

French took a position on the board of directors of the West Bank Homeowners Association in 2001, the organization formed specifically to resist the tyrannical imposition of CRIT's strong arm tactics and assert the legal rights of the residents. French assumed the role of President in 2003. It was a daunting task, but French felt

that saving the homes of hundreds of families was a just and worthy cause, knowing full well the difficulties and expense that would lie ahead. *See* Plaintiff's Br. (Dkt. #62) at 2-3, ER at 065-85.

C. French's Permit

In 1983, French assumed an Assignment of Permit WB-129(R) from the United States Department of the Interior, Bureau of Indian Affairs (BIA). ER at 129-42. CRIT is listed as Permitter, which is further generally defined within the document as the property "caretaker". The Permit required rental payments be made to the BIA, defined remedies for default by the Secretary of the Interior, and set the terms between the Permittee and the Secretary of the Interior / BIA.

IV. SUMMARY OF ARGUMENT

In spite of arguments to the contrary by both CRIT and the United States, the District Court correctly found that the nature and location of the Colorado River Indian Reservation Western Boundary is still disputed and that "*no court has finally determined the western boundary of the Reservation*" (ER at 005, *ll*. 6 – 7), [French's] "*lot may or may not be within the boundaries of the Reservation*", (ER at 017, *ll*. 21 – 22), and "*the location of the Reservation's boundary remains unresolved*", (ER at 018, *ll*. 3 – 4).

The District Court has framed the jurisdictional question as follows:

> "… the case now before the Court is that, unlike in *Water Wheel*, Plaintiff here does not concede – nor is it clear – that the lot CRIT leased to him is within the boundaries of the Reservation. The essence of Plaintiff's argument is that CRIT may not exercise the inherent authority to exclude non-members from its lands, which leads to its Tribal Court jurisdiction over this case, when the question of whether the lot at issue is within the Reservation remains unresolved. And the Court agrees that such an exercise of a tribe's inherent authority may exceed that contemplated in *Water Wheel* …". ER at 010-11, *ll*. 18–5.

The District Court's conclusion:

> "Because Plaintiff is estopped under the terms of the Permit and his conduct from

> asserting that the lot he leased from CRIT was not within the Reservation, the Tribal Court had adjudicative jurisdiction over CRIT's action to evict Plaintiff from the lot and related damages… under *Water Wheel*." ER at 018, *ll*. 19–22.

French contends that the District Court erred in its ruling by failing to properly apply either a *Water Wheel* analysis or federal Indian law to the sole question before the Court, tribal jurisdiction over a non-Indian. French further contends that the District Court erred by refusing to consider a Congressional statute, the 1964 Act, in its finding of tribal adjudicatory jurisdiction over him. Lastly, French protests the District Court's mischaracterization of his citing the existing boundary dispute, a portion of his principle argument, as somehow equivalent to asserting that the lot "*was not within the Reservation*".

V. ARGUMENT

A. Standard of Review

Whether a tribal court has jurisdiction over a nonmember is a federal legal question which federal courts review *de novo*. *FMC v. Shoshone-Bannock* Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990). A tribal court's factual findings are reviewed for clear error. *Id*. at 1313.

From WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL, 6th Edition 254 (2015) [hereinafter CANBY'S INDIAN LAW]:

> If, during exhaustion, the tribal court decides that it has jurisdiction, it presumably will proceed to decide the merits of the case. The objecting party may then return to federal court, where the federal court will review de novo the federal question of the tribe's jurisdiction, being "guided" but not controlled by the tribal court's views. It will review the tribe's jurisdictional factual findings only for clear error. Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir.2004); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir.1990). If the federal court decides that the tribal court had jurisdiction, it will not relitigate the tribal decisions on the merits. See Iowa Mut. Inc. Co. v. LaPlante, 480 U.S.9, 19 (1987). **The only exception occurs when the tribal court jurisdiction decision is so intertwined with the merits that one cannot be reviewed without the other**. See Enlow v. Moore, 134 F.3d 1993 (10th Cir.1998).

Review standards must also consider recent Supreme Court guidance on the presumption against tribal jurisdiction over nonmembers:

From CANBY'S INDIAN LAW at 87-88:

> *Hicks* and *Plains Commerce Bank* are thus the culmination of a series of cases that has reversed the usual presumption regarding sovereignty when the tribe's power over nonmembers is concerned. Instead of presuming that tribal power exists, and searching to see whether statutes or treaties negate that presumption, the Court presumes that tribal power over nonmembers is absent unless one of the *Montana* exceptions applies or Congress has otherwise conferred the power. *Hicks*, 533 U.S. at 359-60; *Plains Commerce Bank*, 554 U.S. at 328-30…. Both *Hicks* and *Plains Commerce Bank* build on *Strate*'s formulation that a tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction….. In any event**, the Supreme Court appears to have cemented firmly its view that tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two Montana exceptions (narrowly construed) applies,** and no criminal authority over non-Indians at all unless Congress authorizes it**.** [Emphasis added]

Leases on tribal land must be approved by the Secretary of the Interior. *See* 25 U.S.C. § 415(a) (Supp.IV 2010); 25 C.F.R. §162.604(A) (2011) ("All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval."). *See Water Wheel*, 642F.3d at 805.

B. The *Water Wheel* Analysis

The District Court has cited *Water Wheel* as the basis for its conclusion of tribal adjudicative jurisdiction over French. The *Water Wheel* analysis can be characterized as a step by step process whereby inquiries established by federal Indian law are applied to the ultimate determination of tribal court jurisdiction over a non-Indian.

Although the *Water Wheel* conclusion is centered upon a tribe's inherent authority to exclude as a new avenue for regulatory jurisdiction (as provided in *Merrion*), the analysis provides a very complete consideration of federal Indian law

in general because it has included the *Montana* progeny approach as well. *Montana v. United States*, 450 U.S. 544 (1981). Thus, the Water Wheel ruling provides a very complete guide for analysis here, even for the current matter before this Court that involves an undermined reservation boundary, and a state asserting its interests in the determination of tribal jurisdiction.

The *Water Wheel* analysis is presented here as a flow diagram, included as Exhibit 1. French recognizes that Exhibit 1 represents his interpretation of the various legal tests, yet hereby requests that the Court consider the exhibit, if for nothing else, to understand the basis for the arguments presented herein.

1. Step 1 – Reservation Land Test

The first test in the determination of tribal jurisdiction over non-Indians is to evaluate whether the activity at issue occurred on the Indian Tribe's reservation where the tribes retain fundamental attributes of sovereignty which have not been divested by Congress. Although the *Water Wheel* court considered the case before it as involving non-Indian activity on the reservation, it expressed the significance of reservation status in the determination of tribal jurisdiction:

> Furthermore, *Philip Morris* did not involve a question related to the tribe's authority to exclude or its interest in managing its own land. To the contrary, **the activity in question occurred off reservation**. The tribal court clearly lacked jurisdiction and arguably, *Montana* did not even apply because there the Court considered a tribe's regulatory jurisdiction over activities on non-Indian fee land within the reservation, **not beyond the reservation's borders where the tribe lacked authority to regulate a non-Indian**. *Atkinson Trading Co.*, 532 U.S. at 657 n. 12 (observing that except in limited circumstances, "there can be no assertion of civil authority beyond tribal lands"); see *Philip Morris* 569 F.3d at 945-46 … . [Emphasis added] *Water Wheel* at 815.
>
> We examine the extent of an Indian tribe's civil authority over **non-Indians acting on tribal land within the reservation**. [Emphasis added] *Water Wheel*, 642 at 804-05.

2. Step 2 – Tribal Land Test

The next step in the determination of tribal jurisdiction over non-Indians is to

evaluate whether the activity at issue occurred on tribal land within the reservation. Even though the *Water Wheel* Court considered the matter before it as occurring on tribal land, it repeatedly reiterated the principles cited and findings determined were specific to tribal land:

> The court noted the importance the **Supreme Court has placed on land ownership in determining questions of civil jurisdiction**. [Emphasis added] *Water Wheel*, 642 F.3d at 806.
>
> **Here, through its sovereign authority over tribal land**, the CRIT had power to exclude Water Wheel… [Emphasis added] *Water Wheel*, 642 F.3d at 811.
>
> **Here, the land is tribal land** and the tribe has regulatory jurisdiction over Water Wheel… . [Emphasis added] *Water Wheel*, 642 F.3d at 816.

3. Step 3 – Relationship between Tribal Land and the Authority to Exclude

Although the *Water Wheel* court assumed that the matter involved tribal land, the Court explained the resulting loss of the power to exclude when land ceases to be tribal land:

> *See Bourland*, 508 U.S. at 688-89, 113 S.Ct. 2309 (describing Montana as establishing that **when tribal land is converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land** and thereby also loses "the incidental regulatory jurisdiction formerly enjoyed by the Tribe");… . [Emphasis added] *Water Wheel*, 642 F.3d at 812.

4. Step 4 – Tribe's Sovereign Interest Provides a Parallel Basis

The *Water Wheel* Court explained that a tribe's sovereign interest in managing its own land provides a parallel basis for regulatory jurisdiction separate from the power to exclude:

> Further bolstering our conclusion that the tribe has regulatory jurisdiction is the fact that this is an action to evict non-Indians who have violated their conditions of entry and trespassed on tribal land, **directly implicating the tribe's sovereign interest in managing its own land**. [Emphasis added] *Water Wheel* at 812 n.7.

5. Step 5 – State Interest – The *Hicks* Test

The *Water Wheel* Court recognized precedent established in *Nevada v. Hicks*, 533 U.S. 353 (2001), where a state's interest may impose an exception to a Tribe's

inherent power to exclude, thus requiring a *Montana* analysis to determine regulatory authority:

> …the Supreme Court has on only one occasion established an exception to the general rule that Montana does not apply to jurisdictional questions arising from the tribe's authority to exclude non-Indians from tribal land. *See Hicks*, 533 U.S. 353. *Water Wheel*, 642 F.3d at 813.

6. Step 6 – Regulatory Jurisdiction Test

The *Water Wheel* Court reiterated Supreme Court precedent that the court must determine whether regulatory jurisdiction exists, and recognize the significance of regulatory jurisdiction in the determination of tribal jurisdiction over a non-Indian:

> Having established that the tribe had the power to exclude, we next consider whether it had the power to regulate. *Water Wheel* at 811.

7. Step 7 – Congressional Statutes Test

The *Water Wheel* Court recognized the plenary power of Congress over tribal sovereignty and its overriding effect on asserted tribal authority over non-Indians:

> …we first acknowledge the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude,… **unless Congress clearly and unambiguously says otherwise**. … see also William C. Canby, Jr., American Indian Law in a Nutshell 101 (5th ed. 2009) [98 6th ed. 2015)] ("Although the doctrine of **plenary power of Congress over tribal sovereignty** has its critics, it remains in full strength in the courts…). [Emphasis added] *Water Wheel*, 642 F.3d at 808.

8. Step 8 – Adjudicative and Legislative Jurisdiction

The *Water Wheel* Court recognized that tribal adjudicative jurisdiction over non-Indians requires legislative jurisdiction and cannot exceed its regulatory jurisdiction:

> Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. *Water Wheel*, 642 F.3d 805.
>
> Johnson was on notice through the lease's explicit terms that Water Wheel, its agents, and employees were **subject to CRIT laws**, regulations, and ordinances. [Emphasis added] *Water Wheel*, 642 F.3d at 818.

The requirement to establish legislative jurisdiction as a condition for

adjudicative jurisdiction is also found within the District Court's order:

> With regard to tribal courts, a tribe's adjudicative authority does not exceed its **legislative** and regulatory authority. *Id*. at 330; *Strate v. A-1 Contractors*, 250 U.S. 438, 453 (1997). [Emphasis added] ER at 008 *ll*. 21-23.

9. Step 9 – Subject Matter Jurisdiction

The *Water Wheel* Court characterizes tribal subject matter jurisdiction as a result of the affirmation of both regulatory and adjudicative jurisdiction:

> To exercise its inherent civil authority over a defendant, a tribal court must have both **subject matter jurisdiction – consisting of regulatory and adjudicative jurisdiction**. [Emphasis added] *Water Wheel*, 642 F.3d at 809.

10. Step 10 – Personal Jurisdiction Test

The *Water Wheel* Court described the basis for personal jurisdiction as having a geographical nexus to the tribal court's territorial jurisdiction:

> One of the most "firmly established principles of personal jurisdiction" is that the personal jurisdiction exists over defendants physically **present in the forum state**. [Emphasis added] *Water Wheel*, 642 F.3d. at 819.

11. Step 11 – Civil Authority / Tribal Court Jurisdiction over Non-Indians

The *Water Wheel* Court described the exercise of civil authority in bringing a non-Indian into tribal court requires both subject matter jurisdiction and personal jurisdiction:

> To exercise **its inherent civil authority over a defendant,** a tribal court must have both subject matter jurisdiction – consisting of regulatory and adjudicative jurisdiction – and personal jurisdiction. [Emphasis added] *Water Wheel*, 642 F.3d. at 809.

12. Step 12 - *Montana* Analysis: Jurisdictional Inquiry for non-Tribal Land

Between the determination of whether the activity involved tribal land (Step 2) and the *Hicks* test (Step 5) is the appropriate test when the activity concerns fee land on the reservation or alienated non-tribal land in general. *See* Plaintiff's Reply Br. (Dkt. #75) at 5-6. This is the *Montana* test which is well documented within federal Indian law and described extensively in French's briefs. See Plaintiff's Br. (Dkt.

#62) at 9-10, 10-13, Plaintiff's Reply Br. (Dkt. #75) at 8-11. The *Water Wheel* Court itself applied the *Montana* test in the matter before it, even though it had determined that a *Montana* analysis was not required under the circumstances of the case. Included in the *Water Wheel* Court's analysis utilizing the *Montana* test:

> *"Montana* is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 455. In *Montana*, the Supreme Court stated that the "**exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.**" *Montana*, 450 U.S. at 564." [Emphasis added] *Water Wheel,* 642 F.3d. at 809.

C. District Court Erred in the Application of a *Water Wheel* Analysis

1. Reservation Land Test (Step 1)

As established within the *Water Wheel* analysis, the first step in the determination of tribal jurisdiction over a non-Indian is to examine whether the activity at issue occurred on the Tribe's reservation. The District Court correctly started at this point and analyzed it as follows:

> The distinctive aspect of this case is that the lot Plaintiff leased from CRIT is on **land that may or may not be within the boundaries of the Reservation**. If the Court considers that the lot is CRIT's land within the Reservation, *Water Wheel* applies. If as Plaintiff urges, the Court considers that the lot is not within the Reservation, *Philip Morris* provides that CRIT's Tribal Court would lack jurisdiction. 569 F.3d at 938 ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries.") (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.12 (2001)). [Emphasis added] ER at 010 n.3.

Acknowledging difficulty applying federal Indian law where the subject land has never been determined to be within the boundaries of the Reservation, the District Court concedes that CRIT's Tribal Court would lack jurisdiction if the land is considered outside the boundaries of the Reservation. The District Court then reasons *Water Wheel* applies if it considers the land to be within the Reservation.

But the *Water Wheel* analysis includes many other inquiries besides the Reservation Land test. Therefore the analysis could have and should have proceeded without considering "*that the lot is CRIT's land within the Reservation*", even if the Reservation Land test is set aside, much like the resolution of the boundary dispute itself being set aside by the courts for so many years.

2. District Court Errs by Convoluting French's Primary Argument

The District Court asserts in its analysis that Plaintiff (French) urges the Court to consider that the lot is not within the Reservation: "*Because Plaintiff is estopped under the terms of the Permit and his conduct from* ***asserting that the lot he leased from CRIT was not within the Reservation****, the Tribal Court had adjudicative jurisdiction …*". ER at 018 *ll*. 19-21. However, French has made no such assertion that the lot "*was not within the Reservation*". Rather, French has only asserted a boundary dispute exists and that boundary dispute coupled with the 1964 Act, a Congressional statute, ultimately denies CRIT Tribal jurisdiction over him. From Plaintiff's Reply Br. at 1 *ll.* 17- 23:

> French's primary argument is very simple and plainly stated. From Plaintiff's Combined Opening/Opposition Brief (ECF No. 62) ("Plaintiff's Br.") at 9:
>
> *Federal law established by a Congressional statute, PL88-302, denies authority to the Secretary of the Interior to approve leases within the disputed area until a final determination of the reservation western boundary finds these lands included within the reservation. Therefore, until the boundary has been finally determined in CRIT's favor, CRIT cannot possibly have inherent authority or the power of exclusion over nonmembers in accordance with federal law. See SOF ¶ 1.* [ER at 204-05].
>
> Also from French's Reply Brief (Plaintiff's Reply Br. at 3 *ll.* 21-26):
>
> *French … asserts that the tribal court has no jurisdiction over him as a non-tribal member, providing clear evidence that the boundary dispute has not been resolved* ***and as a result****, a congressional statute, Public Law 88-302, (Act of April 30, 1964, Public Law 88-302, 78 Stat. 188) (PL88-302) specifically precludes CRIT jurisdiction over him". See Plaintiff's Br. at 2. [Emphasis added].*

The only rationalization Judge Tuchi offers for the manipulation of French's primary argument is his characterization of a "*fine distinction*" between French's citing a boundary dispute and the Court's equating this to an assertion that the lot "*was not within the Reservation*". ER at 013 *ll.* 3. The District Court cites the following paragraph from French's MSJ in support of its "*fine distinction*" characterization. Plaintiff's Br. at 15:

> *However, French's Complaint at 2 reads "the actions at issue occurred on lands that are* ***outside the undisputed boundaries*** *of the CRIT Reservation…". Therefore Defendant's entire body of arguments defending the Secretarial Order is misapplied and inapplicable because French's jurisdictional question only asserts and only requires the Court's recognition of the boundary dispute. It is not French that challenges the Secretarial Order, as that was done (successfully) by the State of California.* ***French is also not challenging the status of the land; in fact French affirms the status of the land: disputed****. See SOF ¶¶ 1-4, 6-8, 11, 12, 15.* [Emphasis added] ER at 204-10.

Clearly, asserting or acknowledging a boundary dispute is not a challenge to Reservation status. (If it were, the District Court would find itself in the untenable position of having to recognize that its own finding of a boundary dispute is equivalent to challenging Reservation status of the land.) It is therefore quite clear from Judge Tuchi's cited paragraph that his reasoning of a "*fine distinction*" is somewhere between Fantasyland and The Twilight Zone, convoluted, illogical, beyond reason, and implausible unless words are infinitely elastic.

3. Tribal Land Test (Step 2)

Continuing the *Water Wheel* analysis by deferring the Reservation land test as suggested herein, an examination of tribal land is the next inquiry. But rather than making a determination of whether the land could possibly be treated as tribal land, the District Court simply bypasses this test by finding a *Montana* analysis inappropriate. ER at 010-11 n.3. This cavalier dismissal of a *Montana* analysis is not only at odds with a *Water Wheel* analysis, but in clear defiance of the entire line

of *Montana*, *Strate*, *Hicks*, and *Plains Commerce* cases establishing federal Indian law in the determination of tribal jurisdiction over non-Indians.

The required application of *Montana* is described in WINTER KING et al., *BRIDGING THE DIVIDE*: Water Wheel's *NEW TRIBAL JURISDICTION PARADIGM*, 47 Gonz., L. Rev. 746-7 (2011-2012) [hereinafter, WINTER KING'S BRIDGING THE DIVIDE]:

> First in *Atkinson Trading Co. v. Shirley*, the Court … noted that "[t]ribal jurisdiction is limited: For power not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty…. The Court further found that because *Merrion* noted that a tribe's inherent taxing power **only "extended to transaction occurring on trust lands** and significantly involving the tribe or its members… [it is] easily reconcilable with the *Montana-Strate* line of authority…." *Id*. at 653. Put differently**, a tribe's sovereign power to tax reaches no further than tribal land**…. The *Atkinson* Court stated the divide as plainly as it could: ***Merrion* applied to tribally owned land, and *Montana* applied everywhere else.**

In bypassing the Tribal Land test by dismissing a *Montana* analysis, the District Court effectively elects to treat the land as tribal trust land, completely ignoring the boundary dispute coupled with the 1964 Act, and *Atkinson* as cited above. By this dismissal, the District Court has clearly failed to follow federal Indian law in its finding of *Montana* "inappropriate", and is thus clear err by the District Court.

4. <u>Failing to Consider Alienated Land under *Montana* is Clear Err by the District Court</u>

The District Court, unlike the *Water Wheel* Court, fails to consider federal Indian law for alienated lands on a reservation. Here where the 1964 Act has clearly abrogated tribal sovereignty for the disputed area, if it indeed ever existed, the District Court errs by failing to consider a tribe's lack of authority over non-Indians on land which as a minimum would be considered alienated land.

The result of federal statutes abrogating inherent rights of Tribes is explained concisely in WINTER KING'S BRIDGING THE DIVIDE at 745-46:

> In the 1990s, the Supreme Court honed in on a key distinction between *Montana* and *Merrion* – namely, the nature of the land at issue--to find that the removal of certain lands from exclusive tribal control **carries with it an implicit divestiture of tribal civil jurisdiction.** A prime example of this movement is *South Dakota v. Bourland*, 508 U.S. 679 (1993). *Bourland* held that any **treaty rights** of the Cheyenne River Sioux Tribe to regulate non-Indian hunting and fishing **were abrogated when treaty lands were taken to create a reservoir under certain federal statutes**. *Id*. at 697 ("**These statutes clearly abrogated the Tribe's 'absolute and undisturbed use and occupation' of these tribal lands,** and thereby deprived the Tribe of the power to license non-Indian use of the lands**.**" (citation omitted)). The Court left for the lower court to determine whether either *Montana* exception applied, **but nonetheless applied a strong presumption that loss of tribal title divests tribal regulatory power**. *Id.* at 692-93.

Here, like *Bourland*, a congressional statute, the 1964 Act, has indeed removed "certain lands from exclusive tribal control" which "carries with it an implicit divestiture of tribal civil jurisdiction" as explained in *BRIDGING THE DIVIDE*.

Further support is found in *Strate* as described in CANBY'S INDIAN LAW at 165:

> *Strate* held that a tribe, by reason of its domestic dependent status, **could not exercise civil jurisdiction** over a tort suit between nonmembers arising from an accident on a state highway right-of-way, **where the tribe had no gatekeeping authority**, was the equivalent of non-Indian fee land, **and that tribes had no jurisdiction over nonmember activities on such land under *Montana***.

Therefore it is clear that the District Court erred in its dismissal of a *Montana* analysis because it refused to consider the significance of *Bourland*'s findings that a Congressional statute abrogating a Tribe's '*absolute and undisturbed use and occupation*' effectively strips Indian title, and *Strate*'s findings that where a tribe lacks "*gatekeeping authority*", the land is rendered at most alienated land. Here, the Court either could not, or would not, determine whether the land in question is within the boundaries of the CRIT reservation. Therefore, consideration of federal Indian law pertaining to alienated lands in accordance with *Montana* is required, as a minimum. Failure to consider alienated land under *Montana* is clear errs by the District Court.

5. District Court Errs in Finding that CRIT has Authority to Exclude (Step 3)

Without any basis, reason, or support, the District Court recognizes that CRIT has the "inherent authority to exclude" in order to apply a *Water Wheel* analysis to support tribal jurisdiction, all the while acknowledging that the land has never been determined to be within the boundaries of the reservation. ER at 017 *ll*. 24-25. Again, the District Court refuses to consider the 1964 Act, which clearly prohibits any inherent authority to exclude, and demonstrates clear err by the District Court.

A closer examination of the *Water Wheel* ruling reveals the impact of Congressional action on a tribe's inherent authority to exclude:

> *Bourland*, 508 U.S. at 689 (noting that in opening up the Cheyenne Sioux Tribe's tribal lands for public use, **Congress "eliminated the Tribe's power to exclude** non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe"); *id*. at 691 n.11. [Emphasis added] *Water Wheel*, 642 F.3d. at 811-12.
>
> Cohen's Handbook of Federal Indian Law § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) … n.6 …In *Bourland*, the Court recognized **that a tribe loses** the regulatory authority that implicitly exists, through **its power to exclude when the land in question ceases to be tribal land**, and cited *Montana* as supporting that rule. In other words, loss of the power to exclude implies the loss of the incidental power to regulate non-Indians unless a *Montana* exception applies." [Emphasis added] *Water Wheel*, 642 F.3d at 810-11 n.6.

Here as in *Bourland*, Congress has at a minimum, postponed any reasonable assertion that the disputed area is reservation land, let alone tribal land. Therefore CRIT does not and cannot have the power to exclude. The District Court's refusal to acknowledge specific Congressional action is clear err as applied to the *Water Wheel* analysis Step 3 - Relationship between Tribal Land and the Authority to Exclude.

6. District Court Commits Prejudicial Err in Ignoring California's Amicus Brief (Step 5)

The *Water Wheel* Court recognized precedent established in *Nevada v. Hicks*, 533 U.S. 353 (2001), where a state's interest may impose an exception to a Tribe's inherent power to exclude:

> In *Hicks*, the Court held that **where a state has a competing interest** in executing a warrant for an off-reservation crime, the tribe's **power of exclusion is not enough on its own to assert regulatory jurisdiction** over state officers and *Montana* thus applies. *Id*. at 359-60 … [Emphasis added] *Water Wheel,* 642 F.3d. at 813

Here, the filing of the Amicus Curiae by the State of California obviously demonstrates that the state has a competing interest in this matter. ER at 020-40. As presented within the Attorney General's Brief, California's interests include:

> California has an interest in the presence or absence of its jurisdiction over the disputed area, and the effect that that jurisdiction may have on the State and its residents…. Also, if CRIT has jurisdiction over the disputed area, its exercise of claims to water from the Colorado may profoundly affect California. Finally, on behalf of the non-Indian residents in the disputed area, California has an interest in their access to the State judicial system to resolve disputes, such as the one before this Court here, involving Plaintiff French. [ER at 025].

Yet the District Court not only ignores the State of California's interests by denying its Motion for Leave to File Brief (Dkt. # 80, ER at 041-44), it has erred by ignoring the State's interests in the application of the *Hicks* test – Step 5 in the *Water Wheel* analysis. *Water Wheel* explained that where a state has a competing interest, the power of exclusion is not enough on its own to assert regulatory jurisdiction and *Montana* thus applies. After accepting the United States' amicus brief, the District Court's rejection of California's interests is clearly prejudicial err.

7. <u>District Court Errs by Ignoring Regulatory Jurisdiction (Step 6)</u>

The *Water Wheel* Court made clear that it was the court's responsibility to ascertain whether regulatory jurisdiction exists as a condition to determining whether adjudicative jurisdiction exists:

> The majority's statement in *Philip Morris* that *Montana* applies to questions of adjudicative jurisdiction only aligns with Supreme Court precedent if interpreted as saying that **to determine whether adjudicative jurisdiction exists, a court must first determine whether regulatory jurisdiction exists**. [Emphasis added] *Water Wheel,* 642 F.3d. at 815.

However, instead of evaluating whether regulatory jurisdiction exists, the District Court simply ignores this requirement, except to cite the principle found in *Strate* "… a tribe's adjudicative authority does not exceed its legislative and regulatory authority. *Id*. at 330; *Strate v. A-1 Contractors*, 520 U.S. 438,453 (1997)". Due to the District Court's total disregard for its responsibility to make a finding of regulatory jurisdiction, the District Court erred in its conclusion and in its analysis.

Had the District Court reviewed regulatory authority as required, it could only have concluded that CRIT cannot possibly have regulatory authority over the lot at issue, and certainly nowhere else within the disputed area. As presented repeatedly within French's briefs, the boundary dispute (as found by the District Court) triggers the 1964 Act, which prohibits the Secretary of the Interior from approving leases within the disputed area. Plaintiff's Br. (Dkt. #62) at 10 *ll*. 9-22. Since Indian tribes can only lease tribal land with Secretarial approval, the 1964 Act specifically eliminates any regulatory authority over leasing, which is the activity at issue in the current matter. *See* 25 C.F.R. §162.604(A) (2011). Therefore, the inescapable conclusion is that CRIT has no regulatory authority over French.

8. <u>District Court Errs by Ignoring the Congressional Statute Test (Step 7)</u>

The *Water Wheel* Court affirmed that Congress has the authority to deny tribal regulatory authority:

> *Santa Clara Pueblo*, 436 U.S. at 56 ("**Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess**."). [Emphasis added] *Water Wheel*, 642 F.3d. at 813.

In this matter, the District Court acknowledges that "*no court has finally determined the western boundary of the Reservation*", "*the issue of the location of the Reservation's boundary remains unresolved*", and "*California addresses issues related to the boundary dispute*". ER at 005 *ll*. 6-7, 018 *ll*. 3-4, 14-15. Without question, the District Court indeed agrees with Plaintiff French that the boundary

dispute was not resolved by the 1969 Secretarial Order. *See* Plaintiff's Br. at 4-5, 6-8; Plaintiff's Reply Br. at 1-3; ER at 204-12.

Having established that the boundary dispute has never been resolved, Congress, via the 1964 Act prohibiting the Secretary of the Interior from approving leases in the disputed area, has most conclusively removed any right of CRIT to exclude non-Indians, divested that fundamental attribute of sovereignty, and eliminated that power of local self-government which the tribes might have otherwise possessed. *See* Plaintiff's Br. at 9, 10, 12-13; Plaintiff's Reply Br. at 1, 3, 6; ER at 162-64, 204-05, 281.

Here again, the District Court committed err by ignoring a *Water Wheel* directive in considering the effect of Congressional action, Step 7 – Congressional Statutes Test, and simultaneously demonstrated a clear defiance of Congressional authority.

9. District Court Ignores the Adjudicative and Legislative Jurisdiction Test (Step 8)

The *Water Wheel* criterion for determining adjudicative jurisdiction (Step 8):

> Since deciding *Montana*, the Supreme Court has specified limits to the extent of a tribe's adjudicative jurisdiction over non-Indians three times: first in *Strate*, then in *Hicks*, and most recently in *Plains Commerce Bank*. In all three cases, the Court articulated the general rule that a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction, and **in all three cases the Court found the tribe lacked regulatory, and therefore adjudicative, authority**… it is clear that the general rule announced in *Strate*, and confirmed in *Hicks* and *Plains Commerce Bank*, that adjudicative jurisdiction is confined by the bounds of a tribe's regulatory jurisdiction, applies. [Emphasis added] *Water Wheel*, 642 F.3d. at 814.

It is clear within the three cases cited above by *Water Wheel*, the District Court was required to determine if regulatory jurisdiction exists as a mandatory condition to conclude that adjudicative authority exists over French. Yet the District Court finds adjudicative authority independent from regulatory jurisdiction, without any foundation in federal Indian law, in direct conflict with the *Water Wheel* analysis,

and clearly in errs.

The District Court also failed to consider whether CRIT had legislative jurisdiction as required. Here, CRIT cannot possibly have legislative jurisdiction due to the 1964 Act triggered by the unresolved boundary. The failure to consider the criteria affirmed by *Water Wheel* Step 8 – Adjudicatory Jurisdiction, is again clear err by the District Court.

10. District Court Ignores the Test for Subject Matter Jurisdiction (Step 9)

From the *Water Wheel* analysis for Step 9 – Subject Matter Jurisdiction, both regulatory and adjudicative jurisdiction are required. Rather than applying the *Water Wheel* inquiry, the District Court simply disregarded it by ignoring its responsibility to examine regulatory jurisdiction. Since CRIT cannot have regulatory jurisdiction, it does not have subject matter jurisdiction and the District Court erred in failing to apply this crucial test in finding tribal jurisdiction over French.

11. District Court Ignores the Test for Personal Jurisdiction (Step 10)

The *Water Wheel* analysis for Step 10 – Personal Jurisdiction, requires a geographical nexus to the tribal court's territorial jurisdiction. The District Court erred in failing to consider this requirement for tribal jurisdiction. Had it considered personal jurisdiction, the District Court would have had to consider whether French was physically present in the "forum state", meaning within the Reservation. (Certainly the State of California does not consider the disputed area a "forum" state for jurisdiction over California citizens, explained in its Amicus Curiae. ER at 025 *ll*. 1-2, 035-40.) Since the District Court failed to determine if the lot was within the reservation, it could not have established the necessary nexus to CRIT's territorial jurisdiction. Therefore the CRIT tribal court could not have personal jurisdiction and the District Court again erred by ignoring this fundamental requirement as presented in *Water Wheel*.

12. District Court Ignores the Criterion for Civil Authority / Tribal Court Jurisdiction in Clear Err (Step 11)

The *Water Wheel* Court affirmed that the exercise of civil authority in bringing a non-Indian into tribal court requires both subject matter jurisdiction and personal jurisdiction in its analysis for Step 11. *See Water Wheel*, 642 F.3d at 809. Had the District Court applied this necessary inquiry, it would have been forced to find that neither subject matter jurisdiction nor personal jurisdiction exits, and therefore the CRIT tribal court cannot have civil authority over French.

The District Court also failed to consider the presumption against tribal civil jurisdiction where there is an absence of tribal ownership:

From WINTER KING'S BRIDGING THE DIVIDE at 747-48:

> In *Nevada v. Hicks*, 533 U.S. 353(2001) …The Court distinguished *Merrion* in a parenthetical while also noting that "**the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction**…". *Id*.at 360.

By the District Court's findings of an undermined boundary, there is clearly an absence of tribal ownership of the disputed area. Therefore the presumption against tribal civil jurisdiction applies in accordance with *Hicks*.

Ignoring the requirement to consider the applicable criterion for tribal civil authority is clear errs by the District Court.

13. *Montana* Analysis – Jurisdictional Inquiry for non-Tribal Land (Step 12)

As presented herein, the District Court erred in both the Tribal land (Step 2) and *Hicks* (Step 5) tests, and as a result failed to properly consider the *Montana* analysis as provided in the *Water Wheel* analysis. Had the District Court properly considered *Montana* (Step 12) due to either the alienation of tribal land and/or California's interests, the conclusion would necessarily find that neither of the two Montana exceptions applies. *See* Plaintiff's Br. (Dkt. #62) at 10-12; Plaintiff's Reply Br. (Dkt. #75) at 5-6, 8-11; ER at 268, 277-78.

D. District Court Erred in Applying Estoppel to Find Tribal Jurisdiction

1. Suspending Federal Indian Law in Deference to Estoppel is Clear Err

The District Court has effectively circumvented federal Indian law by utilizing estoppel to determine tribal jurisdiction over non-Indian French, based upon a lease agreement not with the Tribe, but with the U.S. Secretary of the Interior. Such manipulation of federal Indian law is unsupported in law and in clear errs. The only support that Judge Tuchi offers are cases that are unrelated to federal Indian law, unrelated to the facts before the Court, and the twisted mischaracterization of French's assertion of a boundary dispute coupled with a Congressional statute:

> [French's] challenge to the Tribal Court's jurisdiction is premised on an assertion that the lot was not on Reservation land. (Pl.'s Mot. at 15) Because that assertion is contrary to what Plaintiff explicitly agreed to when he entered into the Permit, this Court may apply the doctrine of estoppel to preclude Plaintiff's opposition to the Tribal Court's jurisdiction. *Wendt v. Smith*, No.EDCV 02-1361-VAP(SGL), 2003 WL 21750676, at *5 (C.D. Cal. Jan. 30, 2003) (concluding that, while plaintiffs "couch their challenge as one on the jurisdiction of the Tribal Court" by contending "that a defect in the tribe's title destroys the Tribal Court's authority to exercise jurisdiction over the land," plaintiffs' true intent was to defend "a suit for rent by challenging [their] landlord's right to put [them] in possession," which is barred by the doctrine of estoppel) (citing *Richardson*, 429 F.2d at 917). ER at 013 *ll*. 11-21.

Although *Wendt* did involve tribal jurisdiction, the District Court's quotation above was not from the final jurisdictional Order, but instead from a ruling against Plaintiff's Motion for a Preliminary Injunction. The *Wendt* Order, which occurred two months later on 3/19/2003, dismissed Plaintiff's MSJ not because of estoppel, but because its tribal jurisdictional challenge required a determination of the location of the reservation boundary, which was barred by the Quiet Title Act due to the sovereign immunity of the United States. *Wendt v. Smith*, 273 F.Supp.2d 1078, 1080-84 (2003). Estoppel was not mentioned anywhere within the *Wendt* Order, nor was it considered in the jurisdictional decision. Also, as French has stated repeatedly throughout his briefs, a determination of the CRIT reservation boundary

is not required here. *Wendt* is further differentiated because it did not involve a Congressional statute specific to the jurisdictional issue as in the matter before this Court. Therefore, none of the deciding elements of *Wendt* are present or relevant to this matter, including estoppel.

But the biggest hurdle faced by the District Court in its reliance on this unrelated federal district court preliminary injunction ruling is constraint by the Supremacy Clause, Art. VI, and Article III ("one supreme Court") to follow the Supreme Court. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 1344, 75 L. Ed. 2d 260 (1983). Federal Indian law has been established by the U.S. Supreme court as adhered to within *Water Wheel*, and the District Court is required by the U.S. Constitution to follow as well. Creating a new avenue for tribal jurisdiction over a non-Indian via estoppel is inconsistent with Supreme Court precedent, and is particularly outrageous considering that the assertion being denied by estoppel is identical to the District Court's own admissions and findings of a reservation boundary dispute. Suspension of federal Indian law in favor of estoppel to determine jurisdiction is clear errs by the District Court, and in this matter arguably an abuse of judiciary discretion.

2. Implementing the District Court's Stated Equitable Consideration of Inherent Authority Would Create a Federally Sponsored Terrorist Organization

In support of the application of estoppel to find jurisdiction over French, the District Court cites three "equitable considerations". ER at 017 *ll*. 22-28. Most egregious of Judge Tuchi's political objectives disguised as "equitable considerations" is the attempt to establish CRIT's authority to exclude on land that has never been determined to be on their Reservation, the same land that has been inhabited by hundreds of non-Indian families for over half a century. On this very land, the Tribes have a history of burning down homes, confiscating mobile homes

via self-help evictions, stealing personal property, and confiscating homes through bullying and intimidation via an illegal utilization of its tribal court system. The implementation of this outrageous objective by the District Court would not only legitimize the illegal activities of this Indian tribe, but would also result in nothing short of federally sponsored domestic terrorism. See Plaintiff's Reply Br. at 4 *ll*. 3-21; Plaintiff's Br. at 2 *ll*. 4-15; ER at 086-96, 235, 254.

3. <u>District Court's Remaining Stated Equitable Considerations are Irrelevant</u>

The District Court's other stated equitable considerations: (ER at 017 *ll*. 22-28)

- *the policy of promoting tribal self-government and the development of tribal courts* (*See also* ER at 061 *ll*. 3-8)
- *the recognition of the government's role as trustee of reservation land on behalf of the tribes*

The District Court's citation of the "policy of promoting tribal self-government" within *Iowa Mutual Ins. Co. v. La Plante* has been effectively nullified by later Supreme Court decisions:

From CANBY'S INDIAN LAW at P. 165:

> The language in *LaPlante* presumptively placing civil jurisdiction in tribal court was said to stand for "nothing more than **the unremarkable proposition**" that "**where tribes possess authority to regulate activities of nonmembers**," jurisdiction presumptively lies in the tribal court. Id. [Emphasis added]

Here the District Court's citation to *LaPlante* is particularly invalidated by its refusal to consider whether CRIT possesses "authority to regulate activities of nonmembers", as explained within CANBY'S INDIAN LAW.

The District Court also advocates consideration of the federal "*government's role as trustee of reservation lan*d", citing *United States v. Ruby* 588 F.2d 697, 704 (9th Cir. 1978). But *Ruby* has nothing to do with an Indian Tribe's reservation or its relationship with the federal government. *Ruby* instead centered upon estoppel, which the District Court found as support for *"there is no evidence that the United*

States or CRIT engaged in a "misrepresentation, concealment, or other forms of misconduct necessary to support an estoppel against the government"" in its application of estoppel against French's assertions of a boundary dispute. ER at 017 *ll*. 11-13. But the District Court's reference to *Ruby* was not based on French's assertions of a boundary dispute, but rather its conclusion that French had implied "*that the United States and CRIT should themselves be estopped from denying the existence of the boundary dispute. (Pl.'s Mot. at 6-8 (citing United States v. Aranson, 696 F.2d 654 (9th Cir. 1983).)".* ER at 016 *ll*. 7-9, 109 *ll.* 11-21. Although French has indeed noted CRIT's inconsistent position in *Aranson* regarding the nature of the western boundary, the State of California has asserted that *Aranson* defeats CRIT's fixed line boundary assertions due to *res judicata* or collateral estoppel. ER at 038-40, 169. But CRIT's *Aranso*n position is hardly related to the application of *Ruby* to justify estoppel against French. The District Court's citing *Ruby* to support its position that the United States and CRIT did not engage in "*misrepresentation, concealment, or other forms of misconduct*" is wholly irrelevant to the "*government's role as trustee of reservation land"* as an "*equitable consideration*" of tribal jurisdiction over French, inapplicable as applied here, and by any other measure, sophistry and absurd.

4. The District Court Fails to Recognize non-Indian Equitable Considerations

The most fundamental consideration of the tribal jurisdiction over non-Indian question is the forfeiture of Constitutional rights of the non-Indian party before a non-impartial tribunal. This concern was addressed in *Rolling Frito-Lay*:

> The [Supreme] Court's most recent pronouncement leaves no ambiguity… "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," *Plains*, 554 U.S. at 328, 128 S. Ct. at 2718, and that "the general rule [of Montana and Oliphant] restricts tribal [*8] authority over nonmember activities taking place on the reservation … This is so because, as the Court noted, **subjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the**

> **Constitution**. *Id*. at 337, 128 S. Ct. at 2724. **Government with the consent of the governed is everything in America.** [Emphasis added] *Rolling Frito-Lay Sales LP v. Rebecca Stover,* No. CV 11-1361, 2012 U.S. Dist. LEXIS 9555, 2012 WL 252938, at *2.

Judge Tuchi's "equitable considerations" aside, there is no more equitable consideration for an American citizen than the preservation of his/her U.S. Constitutional rights in any jurisdiction within U.S. borders. In that context, the invocation of the District Court's "equitable considerations" to find for tribal jurisdiction, subjecting French to an "entity outside the Constitution" via estoppel, cannot be justified, and in a larger sense, offensive to the very fabric of this nation as intimated in *Rolling Frito-Lay*.

E. District Court Mischaracterizes the Underlying Issue as "Eviction"

The District Court concludes "*the Tribal Court had adjudicative jurisdiction over CRIT's action to evict Plaintiff from the lot and related damages, including unpaid rent, under Water Wheel".* ER at 018 *ll*. 20-22. (*See also* ER at 116 *ll*. 22-28.) However, the underlying issue is not simply eviction as asserted by the District Court; but rather the illegal confiscation of French's realty improvements without compensation, the denial of his constitutional rights including due process, CRIT's illegal assertion of jurisdiction over disputed area residents, and the abrogation of California's rights within the disputed area. Therefore by the District Court's attempt to oversimplify the underlying issue as an "eviction", it completely and intentionally ignored its responsibility to consider the significant, and indeed primary, issues before it.

1. French's Permit Did Not Allow for Confiscation of his Realty Improvements

Incorporated within the District Court's characterization of the eviction's "*related damages*" are the realty improvements that CRIT forced French to leave. ER at 152-54,158-59. These improvements included French's house which CRIT later rented to a tribal member and was subsequently destroyed by a "mysterious"

fire[1] on August 8, 2014. CRIT refused to allow an independent investigation of the fire. ER at 086-96. In spite of the Tribal Court's rulings, CRIT had no legal authority to confiscate French's realty improvements without compensation. *See* Plaintiff's Br. at 5 *ll*. 13-14; ER at 209 *ll*. 14-21, 288-90.

2. French's Denial of Due Process

The Tribal Appellate Court brazenly proclaims that due process was not required:

> **French had no liberty or property interest sufficient to require due process of law**… due process of law generally reduces down to requirements of fair notice and an opportunity to appear and defend one's position in the proceeding. ER at 190,151. [Emphasis added]

French's arguments addressing the Tribal Courts' lack of due process were presented extensively throughout his briefs as summarized within his Petition for Rehearing. ER at 149-52. Paramount for due process is a Court's recitation of the Constitutional standards to which the proceedings are based. As presented extensively through French's briefs, the CRIT tribal court refused to define which constitutional standards applied to the proceedings before it. *See* Plaintiff's Br. at 17 *ll*. 4-15; ER at 213, 277. As a conditional matter, French cited the CRIT Constitution which has fully adopted the U.S. and California constitutions. ER at 149-50, 259, 267. Yet French's arguments that CRIT's one-way attorney fee ordinance imposed upon him violates equal protection under the U.S. Constitution and thus the CRIT Constitution, the Tribal Courts' simply ignored without comment whether the U.S. Constitutional standards should be applied and French's assertion that the Fifth and Fourteenth Amendments apply to him as well as all CRIT members. ER at 270-76, 147-52

3. Abrogation of California's Rights

Although the sole question before this court is tribal jurisdiction over a non-

[1] The fire also burned down the neighbor's garage which contained 3 boats, 2 of which belonged to French. Loss estimated at $230,000. ER at 092-96.

Indian, the State of California has correctly and admirably brought forth the real issues in this matter. ER at 041-44. And unfortunately, instead of giving California the same respect as the U.S. Dept. of Justice (DoJ), Judge Tuchi simply discarded as "moot" the rights of California citizens. But rather than being bullied by the DoJ, California stood up for its citizens in their water rights, and access to California's court system in lieu of a foreign court where constitutional rights are forfeited and the pretext of impartiality is about as believable as a Hollywood tabloid. ER at 170-74, 122 *ll*. 13-25, 150-51, 154-58. California also sought to assert the rights of its citizenry to participate in decisions regarding environmental issues and Indian gaming facilities. ER at 165-67. And even though the District Court saw fit to reject California's motion, California's Amicus speaks volumes to the real issues before this court, issues which should not be cast aside as "moot", and issues that are far superior to the simple eviction matter advanced by the District Court. ER at 019 *ll*. 3-4, 020-40.

F. District Court's "Obstacles" to Challenging CRIT's Title are Misplaced

The District Court supports Defendants claims that in the absence of estoppel, French would have to overcome "*other obstacles in challenging CRIT's title to the lot*" including statute of limitations, collateral attack on the Secretary's Order, and indispensable parties under FRCP 19. ER at 018 *ll*. 5-11. These "obstacles" of course are based upon a false premise, that French is challenging CRIT's title. ER at 062 *ll*. 17-26, 060 *ll*. 6-13. But even if French's support of the District Court's finding of a disputed boundary is somehow a challenge to title, the District Court itself must endeavor to determine whether the land at issue is tribal land under federal Indian law. Therefore, where any inference that French's jurisdictional challenge is inseparable from a challenge to title, such inference is irrelevant due to Supreme Court guidance establishing the necessary inquiries in determinations of

tribal jurisdiction over nonmembers.

1. The Indispensible Party "Obstacle" per FRCP 19 is Inapplicable

Water Wheel rejected CRIT's FRCP 19 assertions of indispensible party:

> CRIT urges the Court to dismiss this action because CRIT is an indispensable party under Federal Rule of Civil Procedure 19 and has not been sued. CRIT makes several arguments. **The Court finds none of them persuasive….**
>
> *13 CRIT argues that it has an interest in protecting tribal sovereign immunity, but this action does not challenge CRIT's sovereign immunity. It concerns Tribal Court jurisdiction. It is well settled that "federal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question." *FMC*, 905 F.2d at 1314. As the Ninth Circuit further observed, **"holding that a tribe is a necessary party 'whenever [its] jurisdiction is challenged would lead to absurd results.'"** *McDonald v. Means*, 309 F.3d 530,541 (9th Cir. 2002) (quoting *Yellowstone*, 96F3d at 1173).
>
> Finally, CRIT asserts that it can enforce the Tribal Court judgment against Johnson regardless of this Court's ruling. Dkt. #70 at 11. As the Supreme Court has explained, however, **a tribal court decision entered without jurisdiction is null and void**. *Plains Commerce Bank*, 128 S. Ct. at 2716. **The tribe cannot enforce a null and void judgment.** [Emphasis added]

See Plaintiff's Br. at 16-17. *Water Wheel*, 2009 WL 3089216 at *9.

The Ninth Circuit Court found FRCP 19 similarly inapplicable in *Salt River Project v Lee*, 672 F.3d 1176 (9th Cir. 2012); U.S. App. LEXIS 5432, at *5:

> In sum, we hold that (1) the Navajo Nation is not a necessary party under Rule 19(a)(1)(A) because the plaintiffs seek relief only against the current Navajo officials; (2) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(i) because the officials adequately represent the tribe's interests; and (3) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(ii) because its absence will not risk subjecting the plaintiffs to inconsistent obligations.
>
> Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52L. Ed. 714 (1908).
>
> …*Ex parte Young* is not limited to claims that officials are violating the federal Constitution or federal statute; it applies to federal common law as well. *See*

South Dakota v. Bourland, 949 F.2d 984, 989 (8th Cir. 1991), rev'd on other grounds, 508 U.S. 679, 113 S. Ct. 23009, 124 L. Ed. 2d 606 (1993).

Therefore, indispensable party arguments under FRCP 19 pose no "obstacle" to French's jurisdictional challenge under the *Ex parte Young* doctrine as plainly stated and framed in French's Amended Complaint. ER at 296, 298-99.

2. Statute of Limitations and Collateral Attack on the Secretary's Order "Obstacles" were Nullified by California's Amicus Brief

Responding to the U.S. DoJ's similar assertions of a statute of limitations and the impermissibility of a challenge to the Secretarial Order, California has provided clear evidence that both of these "obstacles" are only realized if the Court refuses to accept California's position and her brief ignored. French hereby requests that California's Motion to file Amicus Curiae in Support of French be reconsidered and indeed granted by this Court. ER at 035 *ll*. 6-16, 041-44, 060 *ll*. 6-13.

VI. CONCLUSIONS

For the foregoing reasons, neither the CRIT Tribal Court nor the CRIT tribal officials have jurisdiction over French. Therefore French respectfully requests this Honorable Court to reverse and vacate the District Court's Order of February 12, 2015, and grant him relief as requested in his Complaint for Declaratory and Injunctive Relief (Dkt. #6). ER at 308-10.

Respectfully submitted this 19th day of June, 2015,

Roger French, Appellant

s/

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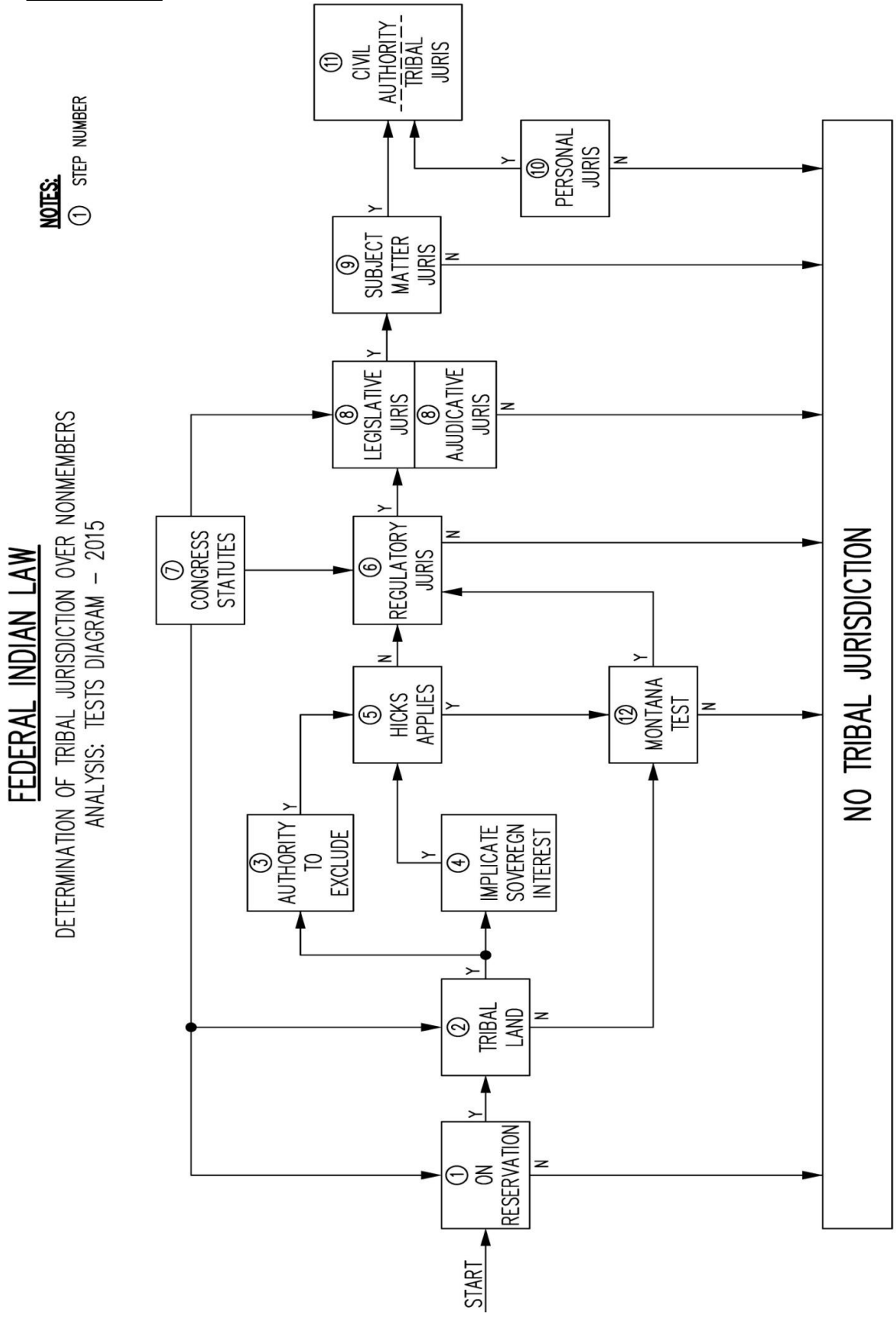
VII. EXHIBIT 1



9th Circuit Case Number(s) 15-15470

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****

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