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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE, on its own behalf and on behalf of its members parens patrie, CHELSEA LYNN BUNIM, TOMMIE ROBERT OCHOA, JAMSINE SANSOUCIE and NAOMIE LOPEZ, Plaintiffs, v. JOHN McMAHON in his official capacity as Sheriff of San Bernardino County, RONALD SINDELAR, in his official capacity as Deputy Sheriff for San Bernardino County; MICHAEL RAMOS, in his official capacity as the District Attorney of San Bernardino County, JEAN RENE BASLE, in his official capacity as County Counsel for San Bernardino County, and MILES KOWALSKI, in his official capacity as Deputy County Counsel for San Bernardino County, Defendants.	CASE NO. 5:15 –CV-01538-DMG-FFM [Action filed: July 30, 2015 Case Assigned to: Hon. Dolly M. Gee Courtroom 7] **DEFENDANTS' RESPONSE TO PLAINTIFFS' MARCH 2, 2016 SUPPLEMENTAL BRIEF** **Hearing Date:** **March 18, 2016** **Time:** **9:30 a.m.** **Courtroom:** **7**

In opening their March 2 supplemental brief, Plaintiffs contend that Defendants raised for the very first time in their February 19 supplemental brief the argument that the boundaries of the reservation were not defined until the Trust Patent was issued in 2010. Even a cursory review of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (***"Defendants' Opposition"***) clearly refutes Plaintiffs' supposed justification for further briefing. [*See Doc. 24*].

Beginning on page 6 of Defendants' Opposition, Defendants articulated the argument that none of the legislation, including MIRA as amended, letters from Special Agents and others, Commission reports, agency recommendations, or Secretarial Orders actually established the boundaries of the reservation. [*See, e.g., Doc. 24*, p. ID# 357-358]. In fact, the historical record shows quite clearly that the Chemehuevi in Lake Havasu were excluded; thus necessitating the need for future legislation and federal action.

The argument on this point continued at page 9, which discussed the Trust Patent issued by the Bureau of Land Management and the effect of that conveyance. [*See Doc. 24*, p. ID# 359]. Defendants asserted that "Section 36 was *expressly excluded* from the land that was issued to the United States to be held in trust for the Tribe." [*See Doc. 24*] [Emphasis in original.] Furthermore, on the very same page, Defendants cited to and discussed the Ninth Circuit decision in *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, 680 F.2d 71 (9th Cir. 1982). Specifically, Defendants emphasized that *Pechanga* held that the reservation did not include land excluded from the trust patent regardless of the Secretary's intent.

Finally, Defendants argued: "because the survey of Section 36 preceded the Secretary's Order recommending the land be included in the Reservation, the land was no longer subject to Congress' power of disposition and, therefore, the land was no longer included in the Reservation." [*Doc. 24*, p. ID# 361]. Plaintiffs' request for, and their further supplemental briefing, is really nothing more than an opportunity for them to restate the same arguments made in their original motion and the February 5, 2016 supplemental brief.

Regarding the substance of Plaintiffs' further arguments, Defendants squarely addressed most of Plaintiffs' argument in their February 19 supplemental brief and will not repeat those arguments here. Contrary to Plaintiffs' suggestion, Defendants do not contend that a patent is the *only* way to establish the boundaries of a reservation; nor do Defendants dispute that the land held in trust by the federal government for the Tribe, where the Havasu Landing Casino is operated, is within the boundaries of the Reservation.

Here, Defendants dispute that the Secretary of the Interior ("Secretary") had the authority to expand the boundaries of the reservation to include land already surveyed and ceded to the state *pursuant to MIRA as amended*, without first issuing a patent. MIRA authorized the Secretary to "***cause a patent to issue*** for each of the reservations selected by the commission…which ***patents*** shall be of the legal effect, and declare that the United States does and ***will hold the land thus patented…***"(26 Stat. 712, ch. 65, § 3) [Emphasis added.] Similarly, the Appropriations Act authorized the Secretary to "select, set apart, and ***cause to be patented***" land for the Mission Indians. (34 Stat. 1015, 1022-1023.)

Thus, although a reservation was established for the Chemehuevi Tribe, its boundaries were not confirmed until the Trust Patent issued in 2010. The Trust Patent did not include Section 36.

The rule announced in *Pechanga Band of Mission Indians*, *supra*, is directly applicable to the facts of this case. There, the Ninth Circuit interpreted MIRA, and found that "…the Secretary had to issue a patent to the land [under MIRA] in order to include it in the reservation." (*Id*. at 75.) Because the Secretary did include the disputed land in the trust patent establishing the boundaries of the reservation, the disputed land was not included in the reservation.

That *Pechanga* was a quiet title action is immaterial to the current discussion. The issue there, as here, was whether disputed land was included in the reservation under MIRA. As the Ninth Circuit recognized, a trust patent is required under MIRA to establish the boundaries of the reservation. Plaintiffs recognized in their supplemental brief that the court expressly held: "[t]he Secretary thus ***did not take the final step required under the Act to include the land in the reservation.*** " (*Pechanga*, 680 F.2d at 74.) [Emphasis added.][1] Thus, it is clear that in order for the Secretary to include land within the reservation pursuant to the MIRA, he was required under the Act to "take the final step" and issue a patent. He did not do so; at least not until 2010 and that conveyance did not include Section 36.

Plaintiffs' redundant citations to the same general legal principles discussing "Indian Country" do not change the outcome. None of the cases Plaintiffs cited address the requirements for establishing a reservation in accordance with the requirements of MIRA. Instead, the cases describe generally that land becomes "Indian Country" when validly and lawfully set apart for use of the Indians or as an Indian reservation. Plaintiffs' argument begs the question: when have the boundaries been validly or lawfully established?

Defendants do not dispute that reservation land could have been established by executive order (such as in *Donnelly v. U.S.*), or defined by a treaty before surveyed by the government (such as *Minnesota v. Hitchcock*). Here, however, Plaintiffs have not shown that Section 36 was validly or lawfully set apart in any way. The Secretarial Order of 1907 was not self-executing. It required the issuance of a patent to "validly and lawfully" establish the reservation boundaries.

Plaintiffs' argument rests on a faulty legal conclusion that Section 36 was validly set aside and made part of the reservation. Whether the Secretary may have intended,

[1] That *Pechanga* has not been cited by other courts is not only *unremarkable*, but it is irrelevant. The case remains valid legal authority in the Ninth Circuit.

wanted or desired to include the land in the reservation is not before the Court. There is no dispute that the Trust Patent eventually issued did not include Section 36.

Plaintiffs' contention that ownership does not confer jurisdiction is generally accurate as far as it applies to private property. Plaintiffs, however, have cited to no authority holding that land conveyed to and held in fee by the State of California (or any other sovereign state in the United States) is subject to the jurisdiction of an Indian tribe.

The Tribe does not have "jurisdiction" over Section 36 because it was <u>never</u> "Indian Country" as that term is defined. Plaintiffs admit that the March 3, 1853, Act *did not* establish the boundaries of the Reservation. (*See* Decl. of Lester Marston in Support of Plaintiffs' Supplemental Brief [*Doc. #28-6*, pg. 4 of 8]). The March 3, 1853, Act said, "this act shall not be construed to authorize settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same" (10 Stat. 244, ch. 145, § 6.) However, the purpose of Section 6 of the Act was to establish that all public lands within the State of California shall be subject to preemption by individuals living on federal land under the Act of 1841, ***except those Sections sixteen (16) and thirty-six (36) which were conveyed to the State of California for the purpose of public schools***. (*Ibid*.)

In contrast, the "Act of July 23, 1866" *did* quiet title of Sections 16 and Sections 36 to the State of California. (14 Stat. 218, Ch. 219.) The land was then surveyed and ceded to the State of California *before* the Secretarial Order of 1907. Because the survey of Section 36 preceded the Secretary's Order recommending the land be included in the Reservation, the land was no longer subject to Congress' power of disposition. (*See U.S. v. Southern Pac. Transp. Co.* 601 F.2d 1059, 1067 (9th Cir. 1979) (Congress had the power of disposition up until the point of survey, which had not occurred). *Southern Pacific* stated the principle that "[t]he State's right to school grant lands does not vest until the lands have been surveyed. Until that time, the land remains subject to Congress' power of disposition.")

Plaintiffs have failed to meet their burden of showing a likelihood of success on the merits because they cannot demonstrate that Section 36 was ever part of the reservation. The Tribe therefore does not have jurisdiction or title over Section 36.

Finally, it is clear from the arguments raised in the two rounds of supplemental briefing that the boundaries of the Chemehuevi Indian Reservation are disputed. The Tribe, in both its most recent brief and the preceding brief of February 11, expressly ask the Court to recognize and find the boundaries of the reservation. But adjudicating the boundaries of the Chemehuevi Indian Reservation is not within the Court's jurisdiction in *this* case. If the Chemehuevi Indian Tribe believes the boundaries of its reservation include land not conveyed by the Trust Deed, the appropriate action would be to address it to the federal government; not the County of San Bernardino or County officials.

March 9, 2016

SLOVAK BARON EMPEY MURPHY & PINKNEY LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been filed electronically on this 9th day of March, 2016, and is available for viewing and downloading to the ECF registered counsel of record, if any, and has also been served by email as listed below.

Lester Marston, Esq.
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DATED this 9th day of March, 2016.

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