No. 15-15872

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF: MICHAEL KEITH SCHUGG, DBA SCHUBURG HOLSTEINS; DEBRA SCHUGG,
Debtors,

G. GRANT LYON, CHAPTER 11 TRUSTEE; WELLS FARGO BANK, NA,
Plaintiffs-Appellees,
v.

GILA RIVER INDIAN COMMUNITY,
Defendant-Appellant.

On Appeal from the United States District Court for the
District of Arizona, No. 2:05-cv-02045-JAT

OPENING BRIEF FOR APPELLANT GILA RIVER INDIAN COMMUNITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES:

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. §§ 1331 and 1334. The district court entered its final judgment on March 31, 2015. [E.R. 1]. The Gila River Indian Community timely appealed on April 27, 2015. [E.R. 59-62]. This Court has jurisdiction under 28 U.S.C. § 1291 to review a final order of the district court. Neither the district court nor this Court, however, has jurisdiction to grant the Trustee's requested declaratory relief. *See* Part I, *infra*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the claim for declaratory judgment as to the scope of an implied easement should have been dismissed for lack of jurisdiction, when the alleged injury-in-fact giving rise to Article III standing with respect to that claim arose only after remand from this Court's 2010 decision finding no injury.

2. Whether the scope of an implied easement, and specifically whether it could be expanded to accommodate a hypothetical 440-home residential development, was prudentially ripe for declaratory judgment absent a concrete development plan or an identified developer.

3. Whether summary judgment was improperly granted on two disputed questions of fact: (i) whether building a 440-home residential subdivision constitutes "normal" economic development of a parcel of land surrounded on all sides by an Indian Reservation; and (ii) whether expanding and paving an

easement, and installing unspecified utilities, are "reasonably necessary" to support that hypothetical development.

4. Whether the district court erred in finding that the Trustee satisfied his trial burden of showing that the hypothetical development would not unreasonably burden the Reservation.

PRELIMINARY STATEMENT

Michael and Debra Schugg, the operators of a dairy farm on a parcel of land known as "Section 16" in south-central Arizona, filed voluntary petitions for bankruptcy in 2004. Because Section 16 is completely surrounded by the Gila River Indian Community's Reservation and allotted Indian land, a dispute arose over whether Section 16's owners were entitled to cross the Community's land to access their property. After a first bench trial, the district court concluded that the owners held a legal right of access across the Reservation to their parcel, but that any opinion concerning the scope of the easement—in particular, its proposed expansion in light of hypothetical development plans—would be advisory. On appeal, this Court affirmed, holding that although the Schuggs could access their property via an easement along Murphy Road, there was no injury-in-fact giving rise to a case or controversy regarding the scope of the easement. This Court remanded for the sole purpose of allowing the district court to adjudicate an unrelated claim.

The trustee acting on behalf of the Schuggs' bankruptcy estate (Trustee) promptly abandoned that remaining claim, and the parties jointly informed the district court that there were "no longer any issues to be decided by this court on remand." [E.R. 318]. Before the district court could enter final judgment, however, the Trustee changed his mind. He advised the court that as a result of new, post-remand circumstances, "an actual case or controversy *now* exists" as to the scope of the easement. [E.R. 314] (emphasis added). Apparently believing that an Article III standing defect can be cured by an injury materializing six years *after* the suit had been filed, the district court granted the Trustee partial relief on summary judgment and additional relief following a bench trial.

This appeal contends that: (i) the district court lacked jurisdiction to adjudicate the scope-of-the-easement claim, both because the Trustee (as this Court found the first time around) previously lacked Article III standing with respect to that claim and because the claim remains prudentially unripe now; (ii) the grant of partial summary judgment overlooked material factual disputes; and (iii) the bench trial was tainted by legal error.

STATEMENT OF THE CASE

A. Factual Background

The Community is a federally recognized Indian tribe with its ancestral homeland in south-central Arizona. *Lyon v. Gila River Indian Cmty.*, 626 F.3d

1059, 1065 (9th Cir. 2010). Congress created a Reservation for the Community in 1859, and later enlarged the Reservation's borders through a series of Executive Orders. *Id.* at 1066. Today, the Reservation consists of approximately 372,000 acres situated north of the City of Maricopa. [E.R. 322-323].

The parcel in dispute, Section 16, spans more than 650 acres of land in Pinal County, Arizona. [E.R. 322]. In 1853, the United States acquired title to Section 16 and the surrounding land from Mexico through the Gadsden Purchase. *Lyon*, 626 F.3d at 1065. The federal government transferred the tract to the then-territory of Arizona the following year "to produce funds supporting its schools." *Id.* at 1066. Today, Section 16 is located within the boundaries of the Reservation and is completely surrounded by Community and allotted lands held in trust by the United States. *See id.* Without crossing Indian lands, there is no physical access to Section 16. *See id.*

The Community's Reservation is divided into 7 districts. [E.R. 5]. Section 16 is located within Reservation District 5, whose more than 100 square miles house only 2,222 residents. [E.R. 5; 231]. The Reservation area immediately surrounding Section 16 on all sides is wilderness or farmland owned by the Community and Indian allottees. [E.R. 7]. The Community has no plans to change the land designations surrounding Section 16 from "open space" or "agricultural." [E.R. 31; 231-232]. The City of Maricopa is located approximately

0.5 miles south of Section 16's southern boundary (and approximately 1.5 miles south of its northern boundary). [E.R. 296].

Section 16 has been privately owned since 1929. *Lyon*, 626 F.3d at 1066. Since at least that time, and throughout the ensuing decades, Section 16 has either remained desert wilderness or been used for agricultural purposes. *See* [E.R. 37]. In 2001, a company owned by Mr. Schugg's adult children purchased Section 16 for $1.6 million and began to construct a dairy on the property. *Lyon*, 626 F.3d at 1066; [E.R. 279]. Title to the tract was subsequently transferred to Schugg and his then-wife Debra. *Lyon*, 626 F.3d at 1066. Today, the dairy occupies slightly less than a quarter of the approximately 650 total acres that comprise Section 16. *See* [E.R. 142].

Since the Schuggs have owned the property, it has had limited access to utilities. When the dairy sought to construct an electric line in 2002, the Community advised that there was no legal access to Section 16; the Community nevertheless worked with the dairy and the Bureau of Indian Affairs to allow a utility easement to support dairy operations. *See* [E.R. 232; 329].

In addition, since the Schuggs have owned the property, the only avenue of access has been via a dirt road crossing Indian lands. *See* [E.R. 325-329]. As displayed on the maps attached as Addendum A (ADD1-ADD2), Murphy Road, "a north-south dirt road running adjacent to the eastern boundary of Section 16," cuts

across Reservation land and connects Section 16 to the surrounding road system and the City of Maricopa. [E.R. 31]. At trial, Trustee's counsel represented that the current traffic on Murphy Road consists of approximately 100 vehicles per day (or 1 vehicle every 15 minutes). *See* [E.R. 167]; *see also* [E.R. 145] (noting up to "20, 25 cars" during particular peak "half-hour to hour period[s] of time"). Traffic is currently so sporadic because:

> [t]he road suffers from washboarding (perpendicular bumps) as well as rutting (longitudinal marks). At times, the road's poor condition forces vehicles to drive on the shoulder. Vehicles traveling on Murphy Road also generate noise as they chatter and bounce along the imperfections of the dirt roadway.

[E.R. 6-7]. Farms exist on both sides of Murphy Road south of Section 16, and a number of irrigation canals intersect the road. [E.R. 7].

B. Prior Proceedings

After the Schuggs filed for bankruptcy in 2004, the Community filed a proof of claim in bankruptcy court, asserting aboriginal title over Section 16 and a trespassing claim. *Lyon*, 626 F.3d at 1066. In response, the Chapter 11 Trustee "initiated an adversary proceeding seeking a declaratory judgment that the ***

estate had legal title and access to" the tract. *Id*. at 1066-1067; *see* [E.R. 336-351].[1]

After a two-week bench trial, the district court held that the Community's aboriginal title had been extinguished and that the estate held an implied easement over two roads, including Murphy Road. [E.R. 330]. Although the Trustee had additionally sought a determination as to the *scope* of its implied easements, [E.R. 332-335], the district court declined on the ground that the absence of any "actual case or controversy" would make "any ruling *** an improper advisory opinion." [E.R. 330]. "There has been no showing," the court continued, "that the easements, as configured, are insufficient to support the current use of Section 16. Any ruling on the scope of the easements, based on possible future use or development of Section 16, would be speculative at best[.]" *Id*.

The Community appealed and the Trustee cross-appealed. In 2010, this Court affirmed in part and reversed in part. *See Lyon*, 626 F.3d at 1067. After affirming the existence of the implied easement, the Court addressed the scope-of-the-easement question, holding "that there was no actual controversy regarding the

[1] G. Grant Lyon was the Chapter 11 Trustee of the bankruptcy estate. [E.R. 322]. When the Schuggs' bankruptcy cases were closed in March 2013, Michael Schugg became the Trustee of the post-bankruptcy trust. [E.R. 246]. In addition to acting as Trustee, Mr. Schugg indirectly holds a 50% interest in the Trust, while two other individuals indirectly hold the remaining 50%. [E.R. 246-247]. Unless otherwise noted, this brief uses "Trustee" to refer to whoever was then Trustee.

scope of the Trustee's easement." *Id.* at 1074 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992)). It explained:

> The Trustee has not shown that there is a live controversy with regard to the *scope* of any easement. There is no indication that the roads or utilities as they currently exist are inadequate to support the current use of Section 16, or that the Trustee has any intent to improve the roads or utilities. The parties may disagree in principle over what activities the Trustee may undertake on those roads, but there is as yet ***no particularized or imminent injury*** arising out of that disagreement.

Id. (second emphasis added).

This Court remanded the lone, distinct claim of whether Murphy Road "was an Indian Reservation Road (IRR) open to the public[.]" *Id.* at 1074-1075.

C. Post-Remand Proceedings

On remand, the Trustee agreed that the case should be dismissed, but then changed his mind. After the Trustee abandoned the remanded IRR claim in November 2011, the parties jointly informed the district court that "there [were] no longer any issues to be decided by [the court] on remand." [E.R. 318]; *see* [E.R. 297] (Trustee: "After remand, the IRR issue became moot."). In response, the court asked the parties to "jointly submit a proposed form of judgment that 'will close this case.'" [E.R. 26]. When the parties were unable to agree on such a judgment, the Court ordered that each party separately submit "proposed forms of judgment" or "motions as to why judgment should not be entered at this time." [E.R. 315-316]. The Community moved for entry of final judgment, arguing (*inter*

alia) that there existed no case or controversy, and that both the district court and the Court of Appeals had already declared that opining on the scope of the Murphy Road easement would constitute an advisory opinion.

Rather than submit a proposed judgment, the Trustee moved for a Rule 16 scheduling conference, arguing that "an actual case or controversy *now* exists." [E.R. 314] (emphasis added). According to the Trustee, a December 2011 meeting between the parties—which occurred after the Trustee had abandoned the IRR claim the prior month—gave rise to a new disagreement over the Trustee's development plans. [E.R. 312-313]. At that meeting, Section 16's owners allegedly "informed the Community that they [had] decided *** to develop Section 16 consistent with the current zoning of Section 16, which allows one home per acre," and therefore wanted to pave Murphy Road and add "appropriate utility access." [E.R. 303]. Because the Community refused to grant permission, the Trustee argued that there was "now" a case or controversy over the scope of the implied easement. [E.R. 314].

The district court ruled in favor of the Trustee, granting his request to allow the case to proceed toward a second trial on the scope of the easement. [E.R. 58]. The court stated that it could identify "no next step that the Owners could take before an actual case or controversy exists" "short of beginning to pave the easements or install the utility lines." [E.R. 55].

D. Partial Summary Judgment To Trustee On Scope Of Easement

Following discovery, the Trustee moved for summary judgment on "the scope of the implied easement." [E.R. 295]. (The Community cross-moved to dismiss or, in the alternative, for summary judgment on grounds of ripeness and the Trustee's failure to come forward with sufficient evidence supporting his scope-of-the-easement claim.) The Trustee sought a declaration that "the Murphy Road easement should, at the very least, be construed to accommodate residential development" at one house per 1.25 acres. [E.R. 300]. That declaration, the Trustee contended, was "necessary to obtain *** County approval of a residential development at current zoning." [E.R. 295]. The Trustee conceded, however, that neither he nor the owners had any specific plans to develop the property or had submitted applications for residential development approval, but rather that "[t]he owners of Section 16 intend to sell the property for development" by someone else. *Id.* The Trustee introduced no evidence that he had any viable purchase offers for Section 16. *See* [E.R. 258-260].

The Community responded first that the claim was not ripe for adjudication. [E.R. 234-239]. The Community submitted a September 2013 letter from the Acting Regional Director of the Bureau of Indian Affairs making clear that no paving, widening, or other modification of Murphy Road could begin unless the Trustee first satisfied various federal requirements:

> The Act of February 5, 1948 (codified at 25 U.S.C. §§ 323-328), authorizes the Secretary of the Interior (acting through the BIA) to grant easements across allotted land, with the requisite consent of the Indian owners. It appears that the proposed development will require significant improvements on allotted land, including: (1) the paving and widening of existing roadways; (2) the installation of power, water, sewer, and telecommunications lines; and (3) the crossing of irrigation facilities administered by our San Carlos Irrigation Project. Express authorizations, in the form of owner consents and BIA grants of easement or encroachment permits, will be needed to support such improvements; those authorizations will, in turn, be contingent upon proper documentation and the payment of just compensation (in accordance with applicable federal law), and the satisfaction of applicable land use requirements, including those set forth in the National Environmental Policy Act and the National Historic Preservation Act.

[E.R. 288].

In addition, the Community argued that "the scope of the easement cannot be addressed in the abstract, *i.e.*, simply as declarations for the rights to pave and install utilities." [E.R. 274]; *see* [E.R. 275] ("The record is devoid of the facts and evidence a trier of fact or the Community would require to assess the burden on the servient property.").

The district court rejected the Community's ripeness arguments, refusing to "readjudicat[e]" that issue. [E.R. 29]. The Court did not disagree that some of the Trustee's prior "factual assertions" had since "proven to be inaccurate." *Id*. But it found the scope-of-the-easement claim ripe for review because "established paved access rights and adequate utility lines" were, in the court's view, required before

the Trustee could submit a tentative development plat application to Pinal County. *Id*. The district court did not address the September 2013 BIA letter.

The Community next pointed to genuine disputes of material fact with respect to the scope of the easement—in particular, whether the Trustee's hypothetical development of Section 16 would be "normal" development and whether the proposed easement expansion was "reasonably necessary" to support such normal development. *See* [E.R. 33-39; 240-244]. Evidence in the summary judgment record showed that (1) "since records have been maintained, Section 16 and the surrounding Reservation land have been agricultural"; (2) Section 16's current use remains agricultural today; (3) "Section 16 will continue to be surrounded on all sides by Reservation land"; (4) the "Community has indicated it has a long-term intention to maintain" the area surrounding Section 16 as "open or agricultural"; (5) the nearest city, Maricopa, is separated by, at its nearest point, a half mile of desert scrubland; and (6) the Trustee's proposed development would add "more than 1,000 residents" (not including guests, visitors, agents, etc.), when the entirety of District 5 currently accommodates only 2,222 residents. [E.R. 243-244].

The district court nonetheless granted the Trustee partial summary judgment on those two issues. The court noted that whether the use of an easement can be expanded beyond its historical uses ordinarily depends on a variety of "factors,"

including the purpose of the easement as judged by the (implied) intent of the granting parties, as well as the history of the dominant estates and the surrounding land. [E.R. 31-33]. Because of "the practical difficulty and uncertainty of divining the intent of Congress in 1877," the court examined all of the Restatement factors and determined that the Trustee was allowed to use its easement to support "normal" development. [E.R. 33]; *see also* [E.R. 33-35]. The court then declared that residential development was "normal" development, and that paving Murphy Road and installing utilities was "reasonably necessary" to accommodate such "normal" development. *See* [E.R. 37-42]. The court further found that the mere act of paving and widening Murphy Road to 40 feet, and installing utilities under it, would "not unreasonably burden the Reservation" "regardless of [the utilities'] size and number." [E.R. 41]; *see also id.* at [E.R. 40-42].

The district court reserved only a single factual issue for trial: whether *using* a paved and expanded Murphy Road to support the hypothetical subdivision would impose an unreasonable burden on the Reservation. As the Court instructed, "[a]t a bench trial, the Trustee must prove that the traffic and other attendant effects from such a use will not cause unreasonable damage to the Reservation or interfere unreasonably with the [Community's] enjoyment of the Reservation." [E.R. 43]. The relevant factors for trial included "the increased traffic to the surrounding

roads, vehicle noise, aesthetics of the area, and the character of the surrounding property, among other considerations." [E.R. 39].

E. Trial On Unreasonable Burden

The district court held a two-day bench trial, at which the court acknowledged that "this entire exercise involves a certain amount of speculation from both sides, attempting to predict the future." [E.R. 78].

The Trustee presented three witnesses, including Michael Schugg (the part-owner and current Trustee of the post-bankruptcy trust). None of the Trustee's witnesses testified about any specific plans either to develop Section 16 or to modify and expand the Murphy Road easement. When Mr. Schugg was asked whether he had "any plans" either to develop Section 16 or to pave Murphy Road, he twice responded, "[n]ot at this time." [E.R. 152].

Nor did any of the Trustee's witnesses testify as to the critical factor of the level of future expected traffic on Murphy Road. *See* [E.R. 92] (Trustee's concession that he did not establish "proof of some precise number of vehicles that will use Murphy Road"). Instead, the only traffic testimony the Trustee elicited was that paving Murphy Road would, in theory, reduce the noise and dust

produced from vehicles, *see, e.g.*, [E.R. 149; 155-163], and that paving would, in theory, speed travel down the road, *see, e.g.*, [E.R. 123-124].[2]

At the close of the Trustee's case, the Community moved for judgment. The Community argued that the court had asked the Trustee for "a showing of the level of traffic on Murphy Road and its attendant effects under the Trustee's proposed development," [E.R. 42], but the Trustee had put on "no evidence whatsoever" concerning "what the projected traffic will be" or "what the impact of the traffic will be on the Community's [R]eservation," [E.R. 83]. The Court denied the motion from the bench. [E.R. 97].

Although the Trustee bore the burden at trial, *see* [E.R. 39-40], the Community nevertheless affirmatively introduced evidence that the proposed

[2] The bulk of the Trustee's evidentiary submission focused on the fact that the Community had adopted a document known as the "Seven Districts Master Plans," [E.R. 170], a "tool to guide and shape the District[s'] future physical growth and redevelopment," [E.R. 173], that entertained the possibility of someday adding significantly more residential units to District 5, [E.R. 120]; *see also* [E.R. 180-181]. Testimony also demonstrated, however, that the Plans were merely a "vision" rather than a "zoning" law—a "vision" that "does not take into account the existing infrastructure or the infrastructure that needed to be put in place" as "developments went forward." [E.R. 176-177]; *see also, e.g.*, [E.R. 184; 189-190]. In fact, the Plans specifically stated that changes to any current land uses require approval of the Community Council. [E.R. 200-201]. The document (i) incorporated all of the opinions of various people within the Reservation—even if those opinions contradicted one another, [E.R. 186]; *see* [E.R. 203-204]; [E.R. 75]; (ii) explained that District 5 had "taken steps to keep traffic away from [its] neighborhoods, schools, and gathering places," [E.R. 203-204]; and (iii) cautioned that "development carries with it transportation and environmental impacts as well as threatening the District's rural character and agricultural heritage," [E.R. 209].

expanded use of the easement would unreasonably burden the Reservation. In particular, the Community's evidence showed that many people commute between Maricopa and Phoenix, [E.R. 196]; Murphy Road provides a more direct route to the interstate connecting those cities than other roads, [E.R. 196-197]; trespassing commuters had previously cut through the Reservation via Murphy Road when another road between Maricopa and Phoenix was backed up because of an accident, [E.R. 130]; commuters do not ordinarily use Murphy Road today due to the fact that it is a dirt road, [E.R. 193, 197]; and paving the road would "increase the flow of traffic onto the northern part of the Community" because commuters would cut through to get to Phoenix. [E.R. 118]; *see also id*. ("That will impact us greatly.").

The Community further introduced evidence that increased traffic on the Reservation, either from Section 16 residents or Maricopa-to-Phoenix commuters, would adversely affect enjoyment of the Reservation in several ways. Increased traffic would threaten the health and safety of those in nearby Casa Blanca Village, which includes "a Head Start school for the young children," a senior center and Veteran's Service Center, a park, a middle school, and "scattered home sites." [E.R. 206-208]; *see also* [E.R. 139] (Master Plan: The "challenge of non-residents using the District's transportation system *** poses significant public health and safety issues for the entire District, especially in and around the Casa Blanca

Village ***."). Increased traffic would also burden Community resources, by "put[ting] a strain" on Community police departments "to go out there and monitor new forms of traffic," [E.R. 131], and deal with "major traffic accidents," [E.R. 127], as well as delay fire and rescue responses. *See* [E.R. 112] (testimony that based on current traffic, responding to a fire call on the area between Section 16 and Maricopa would take at least 18 minutes); *see also* [E.R. 115] ("15 to 20 minutes" to reach the area north of Section 16); [E.R. 110] (no fire station in District 5). Finally, expert testimony showed that increasing traffic and expanding Murphy Road would necessarily affect the existing irrigation system alongside Murphy Road, *see* [E.R. 100-102, 107]—although the lack of any specific development plan meant that there was "really not enough evidence or solid engineering to determine what the full impacts" of paving the road and developing Section 16 would be, [E.R. 105]. *See id.* (noting that the record was currently devoid of "detailed engineering plans," including "grading plans," "paving plans," and "utility plans").

F. Final Written Order

The district court's written opinion following trial held that the Trustee had met his burden of showing that the potential increased traffic on Murphy Road would not unreasonably burden the Community's servient estate or unreasonably interfere with the Community's enjoyment of that estate.

In its Findings of Facts and Conclusions of Law, the court framed the "sole issue" for trial as "whether the scope of the Trustee's easement on Murphy Road permits the Trustee to use Murphy Road to carry the traffic generated by an approximately 440 house subdivision on Section 16," [E.R. 13], which depended on whether the "proposed use of the easement would 'cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.'" *Id*. (citation omitted); *see also* [E.R. 13-14] (defining "servient estate" to mean District 5). The court reaffirmed that the Trustee bore the burden of proof. *Id*.

On the issue of whether the Trustee had properly made a traffic "showing," the court found that the Trustee "failed to offer any specific estimates of traffic volume on any road." [E.R. 15]. Although the Trustee had tried to rely on evidence from the first bench trial held eight years earlier, the court specifically rejected that attempt because "the Trustee never moved to admit the testimony upon which he now seeks to rely." [E.R. 13]; *see id.* ("[T]hat testimony is inadmissible and the Court will not consider it."). The court concluded, however, that "[t]he Trustee was not required to quantify the level of traffic on Murphy Road," and that evidence of "projected traffic" was not necessary to show that proposed traffic "will not cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." [E.R. 16].

The court also found that "[t]he construction of approximately 440 houses on Section 16 will cause additional"—albeit unquantified—"traffic on Murphy Road," not just from "residents of Section 16" but also from "Maricopa residents [who] may use a paved Murphy Road as a shortcut to reach Phoenix[.]" [E.R. 8]. The court explained that "Maricopa residents do not use this shortcut because the dirt condition of Murphy Road is not conducive to commuting and also because Casa Blanca Road has a low speed limit." *Id.* The court acknowledged that the Community was "highly concerned with cut-through traffic originating and ending outside of the Reservation," particularly on Casa Blanca Road, [E.R. 9], and was interested in "preserving the peaceful, rural character of District 5," *id.* The court nevertheless dismissed the burden of cut-through traffic from non-residents of Section 16 as "not relevant" in light of its earlier partial grant of summary judgment. *See* [E.R. 16-19]. Although the trial evidence "supports th[e] assertion" "that it is the act of *paving* Murphy Road that will cause cut-through traffic," in the court's view those burdens carried no weight because "[p]aving Murphy Road is not an issue for trial." [E.R. 16-18] ("[T]he Court already decided the issue of paving in its ruling on the parties' cross-motions for summary judgment[.]").

The court also held that increased traffic (in whatever amount) "will be reasonable" ([E.R. 17]), given that the Community's "potential desires" for the surrounding land mentioned in a "visionary" planning document was "congruent

with" the idea of increased residential traffic. [E.R. 18]. The court found that any traffic impact on surrounding land would be "insignificant" because "the land near Section 16 is either agricultural or undeveloped." [E.R. 19]. Despite having earlier acknowledged that the trial "involves a certain amount of speculation" and that the burden of proof was on the Trustee, the court also faulted the Community for failing to provide "evidence" of certain hypothetical post-development traffic effects. [E.R. 18-20] (noting that "there is no evidence of actual speeding" in connection with the hypothetical development, "no evidence in the record of a threat of vandalism or pollution if the Proposed Traffic uses Murphy Road," and no evidence that hypothetical increased traffic "will increase the risk to [Community] members").

Finally, the court deemed irrelevant the Community's concerns about burdens being imposed on police and fire services. In the court's view, those concerns did not relate to reasonable use or enjoyment of the servient estate itself. [E.R. 21]. Although the court acknowledged that it "has at times discussed the burden upon public services," it "disavow[ed] those remarks" to the extent it implied that such burdens were relevant to the burden on the servient estate. *Id.*

SUMMARY OF THE ARGUMENT

I. In 2010, this Court held that the Trustee had suffered no injury-in-fact giving rise to a live controversy regarding the scope of the Trustee's implied

easement over the Community's ancestral Reservation. That conclusion required dismissal of the Trustee's declaratory judgment claim—and thus the entire case—on remand. Article III demands that an actual controversy exist throughout all stages of litigation, and post-remand developments cannot stand in for a controversy that was previously lacking. Because the Trustee premised his injury-in-fact on post-remand developments, the district court lacked jurisdiction to adjudicate the scope of the easement in this lawsuit.

Even accounting for any post-remand developments, the case also remained prudentially unripe for review. The Bureau of Indian Affairs told the Trustee that no paving or other modification of Murphy Road may proceed without federal authorization, and yet the Trustee offered no evidence that he had begun to seek such authorization. Nor did the Trustee offer any competent evidence that he had found an interested buyer or had made concrete plans to modify and expand the road or develop the property. In the end, the Trustee asked for (and received) an impermissible advisory judgment opining that, if a buyer someday purchased Section 16 and chose to develop it residentially in some fashion, modifying and expanding the use of Murphy Road would be reasonably necessary for its enjoyment and would not unreasonably harm the Reservation.

II. The district court resolved multiple disputed issues of material fact in entering partial judgment in favor of the Trustee as to the scope of the implied

easement, including that residential development was "normal" economic development for Section 16 and that expanding and modifying the easement was "reasonably necessary" for the enjoyment of such "normal" development. At a minimum, those issues must be remanded for trial.

III. After trial on the single issue of whether the anticipated increased level of traffic and other effects from the Trustee's hypothetical development plans would unreasonably burden the Community's Reservation, the district court erred in excusing the Trustee from meeting his burden of proof. The court effectively concluded that *any* level of traffic on Murphy Road would be reasonable. The court further erred in faulting the Community for failing to come forward with evidence and in discounting the evidence the Community did proffer, especially given that the Trustee introduced no traffic evidence whatsoever.

ARGUMENT

I. THE SCOPE-OF-THE-EASEMENT CLAIM IS NOT JUSTICIABLE.

Article III of the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lujan*, 504 U.S. at 559 (quoting U.S. CONST. art. III, § 1). Although the Declaratory Judgment Act affords a federal court discretion to "declare the rights and other legal relations" of a party, it grants such discretion only "[i]n a case of actual controversy within its jurisdiction[.]" 28 U.S.C. § 2201(a); *see MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

This Court already held in 2010 that the Trustee had not suffered any cognizable injury-in-fact concerning the scope of the Murphy Road easement. That Article III standing defect necessarily required dismissal of the Trustee's lone remaining scope-of-the-easement claim. The district court thus erred in assuming that the Trustee—after remand and six years after filing of the suit—could acquire standing to press the same claim, as post-remand developments cannot create "the 'personal interest that must exist at the commencement of the litigation.'" *Davis v. FEC*, 554 U.S. 724, 732 (2008). The district court erred again when it deemed the claim ripe as a prudential matter in the face of significant uncertainties about the Trustee's hypothetical development of Section 16.

Both of those jurisdictional defects, which are reviewed *de novo*, *see Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-852 (9th Cir. 2007) (standing and ripeness), independently compel vacatur of the district court's decision. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'") (alteration in original) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)).[3]

[3] Pursuant to Circuit Rule 28-2.5, the Community states that it disputed the existence of a case or controversy below. *See, e.g.*, [E.R. 262-273; 310]. In

A. The Trustee's Lack Of Article III Standing To Seek Declaratory Relief As To The Scope Of The Easement Required Dismissal

1. This Court Already Determined that the Trustee Lacked Any Article III Injury to Litigate this Dispute

The Trustee, as the "party seeking a declaratory judgment[,] has the burden of establishing the existence of an actual case or controversy." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–241 (1937)). The Trustee's burden is to "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (citation omitted); *see id.* (dispute must also be "definite and concrete" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (alteration in original).

These constitutional and statutory limits are reflected in the concepts of "standing" and "ripeness." Standing refers to the plaintiff's "personal interest that must exist at the commencement of the litigation." *Davis*, 554 U.S. at 732; *see Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (jurisdiction "depends

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addition, this Court's subject matter jurisdiction may be considered at any time, including *sua sponte*. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.") (alteration in original).

upon the state of things at the time of the action brought"). In *Lujan v. Defenders of Wildlife*, the Supreme Court explained that demonstrating the "irreducible constitutional minimum of standing" requires proof of "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." 504 U.S. at 560 (citations and quotation marks omitted). Each "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (quotation marks omitted).

Standing "overlap[s]" with the related concept of ripeness, which is also derived from Article III requirements and refers to when a case is appropriate for adjudication. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). This Circuit has explained that a lack of constitutional ripeness at the outset of a case may also entail a lack of standing. *See, e.g.*, *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 & 1094 n.2 (9th Cir. 2003) ("Whether we frame our jurisdictional inquiry as one of standing or of ripeness, the analysis is the same.").

Citing *Lujan*, this Court held in the 2010 appeal in this case "that there was no actual controversy regarding the scope of the Trustee's easement." *Lyon*, 626 F.3d at 1074. It further explained:

> The Trustee has not shown that there is a live controversy with regard to the *scope* of any easement. There is no indication that the roads or

> utilities as they currently exist are inadequate to support the current use of Section 16, or that the Trustee has any intent to improve the roads or utilities. The parties may disagree in principle over what activities the Trustee may undertake on those roads, but there is as yet ***no particularized or imminent injury*** arising out of that disagreement.

Id. (second emphasis added). Although the Trustee may have desired development of Section 16 and the attendant modification of the easement prior to and during his initial appeal, that desire was always at most a "disagree[ment] in principle," *id.*, and fell short of articulating an Article III injury. *See Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (no justiciability where claim depends on "contingent events"). Accordingly, it is a matter of binding precedent that, as of 2010, the Trustee had suffered no cognizable injury-in-fact concerning the permissible scope of the Murphy Road easement.

Because an actual controversy must exist with respect to *each* claim at *all* phases of a lawsuit, this Court's 2010 finding of a lack of injury-in-fact required dismissal of the scope-of-the-easement claim *at that time*. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("Article III demands that an 'actual controversy' persist throughout *all stages of litigation*.") (emphasis added); *Williams v. Boeing Co.*, 517 F.3d 1120, 1128 (9th Cir. 2008) ("[A] plaintiff's stake in the litigation must continue throughout the proceedings[.]"). Any new dispute over that question should have been resolved in a new lawsuit. *See Yamada v. Snipes*, 786 F.3d 1182, 1203, 1204 n.15 (9th Cir. 2015) ("Nothing we say today

*** precludes [plaintiff] from bringing a future challenge" in response to plaintiff's argument that it "now has standing.").

2. An Injury-in-fact that Develops Post-Remand Cannot Retroactively Create Jurisdiction

In an effort to avoid that conclusion, the Trustee on remand argued that "an actual case or controversy *now* exists." [E.R. 314] (emphasis added). Specifically, the Trustee pointed to a *new* disagreement with the Community, arising out of a December 2011 meeting, concerning the Trustee's "substantially different" post-remand "plans." [E.R. 306]; *see* [E.R. 53] (Trustee's current "plan" for Section 16 was "developed" after remand). But a 2011 change in circumstances cannot cure a standing defect that existed (at least as of 2010) in a case filed back in 2005. The plaintiff must instead show an actual or imminent injury-in-fact for the *entire duration* of a case, including "when the suit was filed." *Davis*, 554 U.S. at 734.

Although the Trustee was free to pursue a new lawsuit to enlarge the scope of the easement based on his alleged December 2011 injury, as a matter of law he was not permitted to cure his lack of standing based on a new and more "particularized or imminent injury" (*Lyon*, 626 F.3d at 1074) that did not exist either at the time of his original lawsuit in 2005 or his 2010 appeal. The Supreme Court has recognized narrow exceptions to the broader rule that "jurisdiction is based on facts that exist at the time of filing," but "permitting standing based on" a dispute that arises after the last complaint was filed "is not one of them."

Righthaven LLC v. Hoehn, 716 F.3d 1166, 1171 (9th Cir. 2013) (alleged post-filing acquisition of property interest did not cure standing).

This Court and others have thus squarely held that alleged injuries that occurred for the first time after the last complaint was filed are irrelevant to the standing inquiry. *See Yamada*, 786 F.3d at 1203-1204 (rejecting plaintiff's argument "that it now has standing" after a change in law because "[s]tanding is determined as of the commencement of litigation" (alteration in original)); *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) ("The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing.") (quoting *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005)), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *see also, e.g., Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 1101 (10th Cir. 2006) (noting "glaring problem" that alleged injury "could not have occurred until *after* the 'time th[is] action [wa]s brought'") (alterations in original); *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000) (events occurring after plaintiff filed her original complaint not "relevant on the issue of standing" to seek injunctive relief); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for Perry to attempt to satisfy the requirements of standing as the case progresses. The requirements of standing must be satisfied from the outset and in this case, they were not."). It follows that any

alleged injury incurred in 2011 cannot create standing to pursue a claim arising from a complaint filed years earlier.

3. Dismissal Furthers Principles of Tribal Sovereign Immunity

Vacating the judgment below and requiring the Trustee to pursue his claim for declaratory relief in a separate lawsuit is no mere formality. Beyond adherence to core Article III constitutional requirements, dismissal would reinforce principles of tribal sovereign immunity.

This Court has recognized the "fundamental principle that tribal sovereign immunity remains intact unless surrendered in express and unequivocal terms." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *see, e.g.*, *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002) (dismissing claims where plaintiffs "have not shown that the Community has waived its immunity"). Although the Community was found to have waived sovereign immunity for claims arising out of the "same transaction or occurrence" as its bankruptcy proof of claim, 11 U.S.C. § 106(b), the Community did *not* expressly and unequivocally waive its immunity for every conceivable subsequent dispute, including for an injury-in-fact that did not even exist in 2005. *Cf. Lewis v. Norton*, 424 F.3d 959, 961-962 (9th Cir. 2005) (tribal sovereign immunity waivers "may be limited to the issues necessary to decide the action brought by the tribe") (quoting *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989)).

Yet evasion of the Community's tribal sovereign immunity is precisely why the Trustee resisted entry of final judgment on remand. After this Court held in 2010 that the Trustee lacked an injury-in-fact—and after even the Trustee agreed that there were "no longer any issues to be decided by" the district court, [E.R. 318]—the Trustee candidly asked that court to keep the case alive post-remand anyway because "[i]f the Court were to enter final judgment without considering [the new] controversy[,] *** the Owners will likely be foreclosed by sovereign immunity" from initiating another action. [E.R. 305]; [E.R. 225]; [E.R. 218] ("[T]he owners would never be able to come back into this court. The[] [Community has] sovereign immunity.").

The Community's sovereign immunity cannot be so easily evaded. If the Trustee (or a subsequent developer) wishes to adjudicate the scope of an easement on Murphy Road, it is free to initiate a new lawsuit against the Community, and the Community is free to invoke or to waive its immunity. What the Trustee may not do is circumvent that consequence based on adoption of a "substantially different" "plan[]" designed to belatedly manufacture an injury-in-fact with respect to the scope of the easement. [E.R. 306]. Article III, which requires injury-in-fact for the entire duration of a civil case, ensures that sovereign immunity waivers are not subject to expansion based merely on a plaintiff's later imagination. In all events, "Article III standing is jurisdictional and can neither be waived by the parties nor

ignored by the court." *Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 654 F.3d 919, 932 n.17 (9th Cir. 2011).

B. The Scope-Of-The-Easement Claim Is Not Prudentially Ripe

The Trustee's request for a declaratory judgment fails for an independent reason: as a prudential matter, it remains unripe for adjudication. Like standing, ripeness doctrine is "drawn *** from Article III limitations on judicial power," but it also refers to "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); *see, e.g.*, *National Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ("[T]he prudential aspect of ripeness *** extends beyond standing's constitutional core.") (citation omitted).

Accordingly, even if this Court permits the Trustee to rely on an Article III injury-in-fact that arose for the first time post-remand, that is not the end of the jurisdictional inquiry. The claim must also be prudentially ripe for review, and that requires evaluation of "[1] 'the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.'" *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990) (citation omitted). On *de novo* review, this Court should reverse the district court's erroneous conclusion that the dispute over the easement's scope was prudentially ripe.

1. The Scope of the Easement Is Unfit for Judicial Resolution

The district court found that paving the easement was a requirement for development approval from Pinal County, and that the Community had to date refused to permit paving. [E.R. 29]. Even if those facts were sufficient to state an Article III injury, they are not sufficient to establish prudential ripeness. The claim must also be "fit for judicial resolution."

"A question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1132 (9th Cir. 2015) (quoting *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010)). In addition, an issue is fit for judicial consideration only if it "need[s] no further factual development." *Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992). "[P]ure[ly] legal questions" are thus "more likely to be ripe" than those that depend on "factual context." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). Accordingly, this Court has deemed disputes unripe when they "come to [it] upon a sketchy record and with many unknown facts." *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 730, 736 (1998) (challenge to legality of plan that "ma[de] logging more likely" was

premature, in part because "review would have to take place without benefit of the focus that particular logging proposals could provide," and because future events could mean that "review now may turn out to have been unnecessary").

These considerations militate strongly against a finding of fitness for judicial resolution on the record below.

a. Bureau of Indian Affairs Permission

As a threshold matter, there exists an unaddressed obstacle to the Trustee's ability to pave, expand, and install utilities under Murphy Road: Bureau of Indian Affairs permission. In September 2013, after the district court's initial 2012 decision finding the dispute prudentially ripe, an Acting Regional Director of the Bureau of Indian Affairs sent a letter to the Trustee's counsel explaining that federal law controls the authorization of easements and other rights of way across Indian land, including allotted land. Because "the proposed development will require significant improvements on allotted land, including: (1) the paving and widening of existing roadways; (2) the installation of power, water, sewer, and telecommunications lines; and (3) the crossing of irrigation facilities administered by our San Carlos Irrigation Project," the Bureau explained that:

> Express authorizations, in the form of owner consents and BIA grants of easement or encroachment permits, will be needed to support such improvements; those authorizations will, in turn, be contingent upon proper documentation and the payment of just compensation (in accordance with applicable federal law), and the satisfaction of applicable land use requirements, including those set forth in the

> National Environmental Policy Act and the National Historic Preservation Act.

[E.R. 288]. Although the letter also gave instructions about how to go about obtaining the requisite federal authorization, *see id.*, no record evidence suggests that the Trustee has initiated or intends to initiate the process. On the contrary, the Trustee's response letter to the Bureau indicates that it "respectfully disagree[d]" that such steps were required. [E.R. 223].[4]

The federal government's position goes to the heart of the Trustee's ability to pave, expand, and install utilities along the implied Murphy Road easement. As things stand, the Bureau would bar the Trustee from *ever* expanding the Murphy Road easement unless and until he can first satisfy various requirements of federal law—regardless of whether his easement, as a matter of *Arizona* law, might accommodate such expansion. The Trustee may "disagree" with federal requirements, but that disagreement hardly satisfies the regulations or renders them inapplicable. And even if federal approval could ultimately be obtained, that approval might itself be contingent on plans quite different than those submitted to the court—rendering a judicial opinion concerning such plans wholly advisory.

[4] Because the letter was sent in September 2013, the district court had no occasion to address it in its May 2012 ruling on prudential ripeness. Although the Community cited and attached the letter at summary judgment, *see* [E.R. 268-269], the court did not mention it in declining to "readjudicate" ripeness, *see* [E.R. 23-44].

Based on this federal obstacle alone, the theoretical issue of whether the Trustee has the right to proceed under Arizona law cannot be considered prudentially ripe for adjudication.

b. The Trustee's Speculative "Plan" for Section 16

The Trustee's plan for the Section 16 parcel that his easement will accommodate is entirely—and fatally—speculative. The underlying questions here include, among others, whether the hypothetical expanded use of the Murphy Road easement is "reasonably necessary for the convenient enjoyment" of a hypothetical new residential development on Section 16 and whether the expanded use from that new development would unreasonably burden the Reservation. *See* [E.R. 32] (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (AM. LAW INST. 2000) ("RESTATEMENT")). Such questions necessarily depend on actual facts regarding what the development on Section 16 will entail.

The Trustee's proffered "plan" for Section 16, however, was nothing more than a barebones chain of speculative future events. Most glaringly, the Trustee's request for a declaration concerning the scope of the easement was disconnected from *any* concrete future development plans (contingent or otherwise), given that the only true "plan" the Trustee proffered was "to sell the land for development" to a hypothetical developer. [E.R. 295]; *see also* [E.R. 282] ("Q. So you would build a residential subdivision around his dairy farm, and then -- and people would live

there, *** A. *First of all, I wouldn't develop it. I'm going to sell it to a developer*.") (Schugg Dep.) (emphasis added).

Even if an alleged diminution in the value of Section 16 from the current unimproved easement could support the existence of the Trustee's asserted post-remand injury, it does not render his request for a declaration concerning rights he might never exercise fit for judicial review. As the Trustee acknowledged during his deposition, the specific plans for Section 16—including the size of the development and the fate of the existing dairy—would necessarily "depend[] upon what the developer wants to do." [E.R. 282]. Thus, although the district court concluded that the Trustee's claim was sufficiently ripe because the Trustee had "created a plan for developing Section 16," [E.R. 28], in reality that "plan" remains wholly abstract and might never materialize—at least not in the way the Trustee predicted. Indeed, the Trustee even failed to offer competent evidence that any buyer was willing to purchase the property for development under the current zoning—let alone a commitment—in the event the scope of the easement was expanded. *See* [E.R. 259-260].

In short, the Trustee sought an advisory opinion as to whether he could improve an implied easement to carry a hypothetical level of traffic to support a hypothetical form of development that, if the property were someday hypothetically sold, an unknown third-party developer might someday

hypothetically build. That "speculative chain of possibilities," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013), offers no assurance that the development will occur at all—never mind that it would involve the same-sized road, the same mix of utilities, the same access points, the same density or uses, or anything else the same as the way the Trustee proposes. As the district court itself recognized at trial, adjudicating the scope of an easement under these circumstances involves "attempting to predict the future." [E.R. 78]. The court should have thus declined to adjudicate the scope of an easement based on such "contingent future events." *Name.Space*, 795 F.3d at 1132.

c. The Absence of Relevant Facts

Fact issues predominate in the resolution of the scope of the easement. As things stand, the record on those issues is worse than "sketchy"; it is evanescent.

Because his development "plans" were entirely theoretical, the Trustee (i) failed to offer precise details of the paving of the implied easement and installation of utility lines that would be necessary to support the development of Section 16 at one house per 1.25 acres as promised, [E.R. 307-308]; (ii) failed to seek approval from the City of Maricopa to pave the portion of Murphy Road within city limits, [E.R. 257]; (iii) failed to commission any legitimate traffic study regarding the effects on traffic along Murphy Road from a new development, [E.R. 253]; (iv) failed to secure any written commitments to provide water, sewer,

electrical gas, telephone services, solid waste services, fire protection, or school services to Section 16 upon development, [E.R. 256]; (v) failed to commission an engineering study to determine where utilities would go, *id*; (vi) failed to take twelve of the thirteen steps necessary for submission of a tentative plat application to Pinal County, [E.R. 251-254], including commissioning drainage and environmental reports; and (vii) failed (as noted above) to obtain "[e]xpress authorizations" from the Bureau of Indian Affairs and allottees, [E.R. 257].

Even today, after litigating the hypothetical burden of the Trustee's plan to the Community at trial, the Community still does not know such basic facts as exactly which utilities the Trustee hopes to install; how the Trustee intends to expand the current footprint of Murphy Road (which is 29.5 feet wide at its widest point) to 40 feet without disrupting the existing irrigation network or farms; or whether Pinal County will permit development of a subdivision based on the Trustee's 40-foot-wide paving plan, rather than require a wider (and more burdensome) 110-foot-wide road. *See* [E.R. 248-260].

In sum, the "many unknown facts" about the future development of Section 16 and Murphy Road made this fact-dependent claim unfit for judicial determination. *American-Arab*, 970 F.2d at 510.

2. The Hardship to the Trustee of Further Factual Development Is Minimal Compared to the Hardship on the Community

The Trustee also fails the second requirement for prudential ripeness: a showing that "withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Western Oil & Gas Ass'n v. Sonoma Cty.*, 905 F.2d 1287, 1291 (9th Cir. 1990) (citation omitted). The district court felt compelled to answer the "scope" question now because otherwise "the Trustee could *never* obtain an adjudication on the scope of the easements." [E.R. 30]. But the latter is not true.

The Trustee (or an actual developer) could have provided better defined plans for his hypothetical development in a variety of ways before asking the federal courts to resolve the easement's scope—*e.g.*, obtaining actual or tentative BIA authorization to modify Murphy Road; providing pertinent details as to the paving and utilities he seeks to install; preparing traffic, drainage, or environmental reports; or securing an offer or commitment from a buyer with concrete development plans. Any harm from waiting to undertake these modest burdens to simply find out whether some actual rather than theoretical project could proceed would be, at worst, "limited to financial expense." *State of California, Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-834 (9th Cir. 1987) (declining to review concededly fit issue). In any event, the Trustee offered no evidence of the *actual cost* he would have to incur to make his claim more fit for judicial review.

At the same time, adjudication of the scope-of-the-easement claim without such factual development imposed considerable hardship on the Community. The Community has been forced to oppose expansion of the Murphy Road easement on the ground that its impact would be unreasonable entirely "in a vacuum" and with a dearth of "particular" facts. *Thomas*, 220 F.3d at 1142. For example, when the Community pointed out potential damage to its Reservation from improving Murphy Road, *see, e.g.*, [E.R. 107], the Trustee responded with assurances that "any issues" will be "worked out throughout the design process," [E.R. 72]. *But see* [E.R. 105] ("There's really not enough evidence or solid engineering to determine what the full impacts are going to be.").

A party opposing a federal declaratory judgment should not be forced to engage in the impossible task of "shadow boxing" such speculative plans. *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 537-38 (1st Cir. 1995). Because the balance of hardship tips in the Community's favor, the district court's adjudication of the scope-of-the-easement claim was premature.

II. THE DISTRICT COURT ERRED IN RESOLVING MULTIPLE FACTUAL DISPUTES IN GRANTING PARTIAL SUMMARY JUDGMENT

The Trustee moved for summary judgment on "the scope of the implied easement" along Murphy Road under Arizona law. The question for the district court was whether, viewing the evidence in the light most favorable to the

Community, the Trustee met his burden of "demonstrating the absence of a genuine issue of fact for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002); *see* Fed. R. Civ. P. 56(a).

In granting partial summary judgment to the Trustee, however, the district court did not apply (or even cite) that standard. Instead, the court resolved a series of factual disputes in favor of the Trustee in the course of concluding that (1) a 440-home residential subdivision on Section 16 "appears" to be "normal" economic development; and (2) paving, widening, and installing utilities under Murphy Road was "reasonably necessary" to accommodate such normal development.[5] But "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment"; rather, they may only "determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). On *de novo* review, "apply[ing] the same standard as the district court," *ONRC Action v. U.S. Bureau of Reclamation*, No. 12-35831, 2015 WL 4978998, at *3 (9th Cir. Aug. 21, 2015), this Court should reverse.[6]

[5] As noted, the district court reserved one subsidiary issue for trial: whether hypothetical traffic from the proposed transformation and expanded use of the easement would unreasonably burden the Reservation. *See* Part III, *infra*.

[6] Pursuant to Circuit Rule 28-2.5, the Community states that it opposed summary judgment as to the scope of the easement. *E.g.*, [E.R. 273-275].

A. Determining The Scope Of The Implied Easement Is Largely A Question Of Fact

"An easement is a right which one person has to use the land of another for a specific purpose." *Etz v. Mamerow*, 233 P.2d 442, 444 (Ariz. 1951). Because an easement does not confer title to property, any use beyond that specific purpose is prohibited. *See Scalia v. Green*, 271 P.3d 479, 484 (Ariz. Ct. App. 2011). When an easement is created expressly, such as in a written deed, the scope of the easement may be gleaned from the terms of the written instrument. *Id.* at 481. But where, as here, an easement is created by implication, no instrument defines the grantee's rights. Accordingly, determining an implied easement's scope under governing Arizona law "demands a detailed inquiry into the particular facts and circumstances of the case, and the issues as to intent, reasonable expectations, purpose, reasonableness of use, and extent of damage and interference are usually intertwined." RESTATEMENT § 4.10 cmt. c; *see also Paxson v. Glovitz*, 50 P.3d 420, 424 n.3 (Ariz. Ct. App. 2002) ("In the absence of contrary precedent, Arizona courts look to the Restatement.").

The central dispute in this case is whether the Trustee's implied Murphy Road easement may be expanded beyond its historical agricultural and wilderness uses to accommodate a 440-home residential development. Although the use of an easement need not "remain precisely the same" over its life, any expanded use must be "of the same general character" and "no more burdensome" than its

original use. 3 TIFFANY REAL PROP. § 802 (3d ed.); *see* RESTATEMENT § 4.10 cmt. f ("If the manner of the use is changed, or the intensity, or frequency of the use is increased, the change is permissible *** only if the change is reasonably necessary to accommodate normal development of the dominant estate.").

As Arizona courts and others have recognized, whether a proposed different or expanded use falls within the scope of an easement ordinarily "creates an issue of fact that [can]not be resolved by summary judgment," *Paxson*, 50 P.3d at 427 (reversing and remanding grant of summary judgment), with the Trustee bearing the burden "to show that the rights granted by the easement are sufficiently extensive to justify the proposed use," *Burkhart v. Jacob*, 976 P.2d 1046, 1049-50 (Okla. 1999). *See also, e.g.*, *State v. Mabery Ranch, Co.*, 165 P.3d 211, 219 (Ariz. Ct. App. 2007) ("significant questions of material fact about the scope of that easement were presented in the parties' summary judgment papers"); *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266 (9th Cir. 2006) ("We reversed, concluding that a question of fact existed as to the necessity and the scope of the easement."). As the district court recognized, among the various fact-intensive "factors" the court may consider include "[t]he nature of the easement," "the prior use of the dominant estate," "[t]he degree and abruptness of transition" in use of the dominant estate over time, "how fast the transition is taking place in the area," and "conservation and neighborhood preservation concerns." [E.R. 32-33]; *see*

also [E.R. 3] (recognizing that "the scope of the implied easement" is a question of fact).

At summary judgment, the Community disputed the two critical fact-laden issues underlying the scope-of-the-easement determination: (1) whether a 440-home residential subdivision development on Section 16 was "normal" development in view of the parcel's history and environs, and (2) whether the requested paving and installation of utilities were "reasonably necessary" to support "normal" development.

As to the first, under Arizona law, "[d]etermining whether a particular change in use of the dominant estate is 'normal development'" often presents "difficult" factual questions that depend on a variety of circumstances. RESTATEMENT § 4.10 cmt. f; *see Town of Bedford v. Cerasuolo*, 858 N.E.2d 316, *1 (Mass. App. Ct. 2006) (Table) (what is normal development is "largely a question of fact," and the trial judge properly "articulated her factual findings supporting her conclusion that the proposed development does constitute normal development"); *Redwood Empire v. Gombos*, No. H024544, 2003 WL 22147630, at *10 (Cal. Ct. App. Sept. 16, 2003) ("Whether a change in use is a normal development that is reasonably foreseeable . . . [is a] question[] of fact for the trier of fact.") (unpublished). The Trustee did not contend otherwise; rather, he (unsuccessfully) argued that a residential subdivision must be considered "normal"

as a matter of law in light of Pinal County's current zoning for Section 16. [E.R. 299]; [E.R. 221]; *see* [E.R. 35] (district court holding that "the scope of the easement does not depend upon the current zoning of Section 16").[7]

As to the second, "reasonableness" in the context of evaluating an easement is a classic "issue of fact for the trier of fact to determine considering all relevant circumstances." *Payne v. Lemons*, No. 1 CA-CV 09-0122, 2010 WL 569891, at *5 (Ariz. Ct. App. Feb. 18, 2010); *see Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev. Inc.*, 719 P.2d 295, 298 (Ariz. Ct. App. 1986) (same); *see also Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d 887, 902 (9th Cir. 2012) ("[R]easonableness is normally a question of fact that the trial court can resolve only 'if reasonable minds could reach but one conclusion.'").

B. The District Court Erred By Resolving Disputed Issues Of Material Fact Concerning Normal Development

On the two critical issues regarding "normal development," the Community's evidence demonstrated that (1) "since records have been maintained, Section 16 and the surrounding Reservation land have been agricultural" or wilderness; (2) Section 16's current use remains agricultural today; (3) "Section 16 will continue to be surrounded on all sides by Reservation land"; (4) the

[7] The district court's conclusion that existing "zoning restrictions are not dispositive" ([E.R. 35]) is plainly correct. If zoning was the only relevant factor, what constitutes "normal" development would hinge on the whims of local zoning authorities, rendering the Restatement's multifactor test meaningless.

"Community has indicated it has a long term intention to maintain as open or agricultural" the surrounding district; (5) the nearest city, Maricopa, is separated by a half mile of desert scrubland; and (6) the Trustee's proposed development would add "more than 1,000 residents" (not including guests, visitors, agents, etc.) within a district that currently accommodates just 2,222 residents. [E.R. 243-244]. The Community also proffered evidence that the 40-foot-wide roadway would unreasonably expand the width of Murphy Road from its current width of between 17 and 29.5 feet (or significantly more, if Pinal County required a 80- or 110-foot access road for the development). [E.R. 229].

Viewing that evidence in the light most favorable to the Community, genuine issues of material fact remained as to what constitutes "normal" development of Section 16, as well as whether the proposed expanded use of the easement was "reasonably" necessary to accommodate "normal" development. But rather than confining its summary judgment decision to whether the factual issues "may reasonably be resolved in favor of either party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), the district court instead resolved them. That was error. *See TransWorld Airlines, Inc. v. American Coupon Exch., Inc.*, 913 F.2d 676, 684-85 (9th Cir. 1990) ("[S]peculation about the facts [on summary judgment] must not take the place of investigation, proof, and direct observation"

that could be had at a bench trial, "[e]ven when the expense of further proceedings is great and the moving party's case seems to the court quite likely to succeed.").

After acknowledging the parties' dispute over "whether a change in use of Section 16 from agricultural to residential constitutes 'normal development,'" [E.R. 37], the district court simply found in favor of the Trustee: "Section 16's normal development includes residential use[.]" [E.R. 41]. That factual dispute, however, at least warranted trial in light of the Community's substantial evidence regarding concededly relevant factors like "how fast the transition is taking place in the area" and "conservation and neighborhood preservation concerns." [E.R. 32-33] (quoting RESTATEMENT § 4.10 cmt. h.). The district court even agreed with the Community that the Trustee's proposed development was "abrupt and abnormal compared to the surrounding Reservation." [E.R. 38].

The court, instead of viewing the evidence in the light most favorable to the Community, made a series of factual findings in the Trustee's favor as to what is "normal." *See, e.g.*, [E.R. 37] ("*The Court cannot imagine* a smaller developmental step ***") (emphasis added); *id.* ("The transition from agricultural dairy use to rural housing is *** abnormally *slow* development."); [E.R. 38] (noting that "the existing Pinal County rural zoning *appears to contain* the planned development to a normal pace") (emphasis added).

Besides deciding what is "normal" development, the district court also erred in resolving without trial factual disputes over whether the Trustee's proposed expanded use and attendant modifications to Murphy Road were "reasonable." The district court found on summary judgment that "the Trustee's proposed use of the easement for the development of Section 16 for rural residential use with one house per 1.25 acres is a manner *reasonably necessary* for its convenient enjoyment." [E.R. 38] (emphasis added). In addition, the district court "conclude[d] that the installation of utility lines, regardless of their size or number, will not *unreasonably* burden the Reservation"; that "it would not *unreasonably* increase the burden on the Reservation to fix the road's width at forty feet including shoulders, as the Trustee has requested"; and that "[p]aving a roadway is a *reasonable* improvement." [E.R. 41-42] (emphases added).

At a minimum, however, reasonable minds could differ on the fact-laden issue of whether paving the roads was "reasonably necessary" for the convenient enjoyment of Section 16's normal development. That is particularly true under Arizona law, which recognizes that "[s]traightening and paving roads in urban environments *** may enhance the value and enjoyment of both dominant and servient estates, while the same actions in a rural area may significantly damage the servient estate." RESTATEMENT § 4.10 cmt. g. And the district court later compounded its error when it relied on its summary judgment ruling to deem "not

relevant to the issue for trial" the burdens imposed by modifying Murphy Road. [E.R. 16-17] (citations and footnotes omitted).

C. The Court Misapplied The Law Of Easements

Although the district court's explicit reliance on its factual determinations are sufficient to mandate reversal of its partial grant of summary judgment, the court also misapplied the governing law in at least three respects. *See Leisek*, 278 F.3d at 898 (court's task in reviewing summary judgment grants *de novo* includes evaluating "whether the district court correctly applied the substantive law").

First, unless the terms of an easement say otherwise, an easement holder generally may not use "the easement for any purpose substantively different from its historical uses." *Paxson*, 50 P.3d at 427; *see also* RESTATEMENT § 4.10 cmt. h (noting that degree of change in use permitted "is generally less" when, as here, the easement was not "expressly created"). Nothing in the summary judgment record indicated that the easement had ever accommodated substantial residential use of Section 16; rather, the evidence showed that for at least 150 years (if not thousands), Section 16 has been vacant wilderness or, more recently, used for agricultural purposes. The district court erred in declaring, as a matter of law, that converting Section 16 into a 440-home subdivision would not substantially depart from its historical agricultural uses. [E.R. 37] (declaring that "transition from agricultural dairy use to rural housing" is "normal development").

Second, the district court erred when it held that permissible "development is measured by the dominant and not the servient estate." [E.R. 38]. To be sure, historical use of the dominant estate is *one* factor that courts consider in evaluating a proposed expansion in the use of an easement. But as the district court itself recognized, under Arizona law, it is not the only factor: impacts on the servient estate and on other surroundings matter, too. *See* [E.R. 33] (citing RESTATEMENT § 4.10 cmt. h). Courts "consider[] the neighborhood surrounding the right-of-way, the history of the use of the right-of-way and the use to which [the easement holder] proposes to put the property and the right-of-way." *Nadeau v. Town of Durham*, 531 A.2d 335, 338 (N.H. 1987) (affirming that proposed subdivision from 2 to 14 residences would overburden easement); *see, e.g., Stew-Mc Dev., Inc. v. Fischer*, 770 N.W. 2d. 839, 847 (Iowa 2009) ("The proposed use of Kress Lane for a major residential development *** greatly expands the original scope of the easement ***. Residential and agricultural access to two farm properties at the turn of the century is a much different proposition than access to a modern residential development.") (citation omitted); *Leffingwell Ranch, Inc. v. Cieri*, 916 P.2d 751, 757-758 (Mont. 1996) (easement historically used to access "two or three homesteads" could not be used to access "174 parcels," as that would "seriously impact" existing ranching operation); *Smith v. Fulkroad*, 451 A.2d 738, 740 (Pa. Super. Ct. 1982) (expanded use to cover 20-foot improved road for

commercial trucking improper because it "'altered the rural and residential character' of appellants' locale"); *see also* RESTATEMENT § 4.10, Illustrations 25 and 26 (agricultural access easement could be expanded to accommodate single residence, but not to serve new 100-lot subdivision, as "increase in use would be unreasonable given the size of the easement and the [grantor's] reasonable expectations").

Third, the district court erred in suggesting (without authority) that the Community could not "stagnate" the development of Section 16 by keeping the surrounding areas open or agricultural. That finding fundamentally misstates the underlying issue. The question at summary judgment was not whether the Trustee was allowed to residentially develop his *own land* in the way he sees fit. Rather, the question presented at summary judgment was whether the Trustee may, without additional compensation or permission, pave, modify, and expand his use of *the Community's* ancestral Reservation lands to support his new development. The district court erred in partially resolving *that* issue in favor of the Trustee, on disputed facts, at summary judgment.[8]

[8] For the same reason, the district court's "Times Square" hypothetical is inapt. [E.R. 38]. The district court claimed that it would be "absurd" if a servient estate owner in New York City's Times Square could prevent the owner of a neighboring dominant estate from developing his property commercially. But the dominant estate holder in that hypothetical (like the Trustee here) is free to develop the land; the question in both cases is only whether a dominant estate holder can

III. THE TRUSTEE FAILED TO PROVE THAT HIS HYPOTHETICAL DEVELOPMENT WOULD NOT UNREASONABLY BURDEN OR INTERFERE WITH THE ENJOYMENT OF THE RESERVATION

The district court reserved for trial only one issue underlying the scope-of-the-easement claim: whether the traffic and attendant effects (noise, dust, trespassing, littering, and so on) associated with a hypothetical development of Section 16 would cause "unreasonable damage" to the Community's Reservation or "interfere unreasonably" with the Community's enjoyment of the Reservation. [E.R. 43]; *see Paxson*, 50 P.3d at 427 (The only "permissible uses of an easement" are those that do not "cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.") (quoting RESTATEMENT § 4.10). The Trustee bore the burden of proof on that issue. [E.R. 43].

Factual findings made after a bench trial are ordinarily reviewed for clear error, *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 (9th Cir. 2002), but "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard," *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15

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use the servient estate's property to accommodate that development, without explicit permission or additional compensation. And, quite obviously, any commercial development would be far more "normal" and any development-related impacts (traffic, noise, etc.) far more "reasonable" in the hubbub of Times Square than on the Community's Reservation.

(1982). The court erred in holding that the Trustee had met his burden, particularly given the profoundly speculative nature of the limited evidence introduced at trial.[9]

First, given that the Trustee failed to introduce *any* traffic evidence whatsoever, the district court erred in finding that the Trustee met his trial burden of proving the level of expected traffic on Murphy Road. At summary judgment, the district court made clear that "a showing of *the level of traffic* on Murphy Road and its attendant effects under the Trustee's proposed development is *dispositive* as to the ultimate relief sought." [E.R. 42] (emphases added). Rightly so: increased traffic cannot be considered "reasonable" without knowing what that increase might be.

The Trustee, however, conceded at trial that he did not even try to establish "proof of some precise number of vehicles that will use Murphy Road." [E.R. 92]. The Trustee proffered no traffic impact analysis to gauge the traffic on the easement or surrounding roadway network that would result from paving Murphy Road and developing Section 16. Nor did he introduce any expert reports or testimony as to estimated traffic. The district court recognized as much, noting that the Trustee failed to introduce any "competent evidence as to the traffic volume on

[9] Pursuant to Circuit Rule 28-2.5, the Community states that it preserved its objections to post-trial findings of fact and conclusions of law. *See, e.g.*, [E.R. 81-97] (no traffic evidence); [E.R. 64-69] (same); [E.R. 212-215] (burden on community resources); [E.R. 134-136] (same).

Murphy Road or surrounding roads" that would result from the hypothetical development. [E.R. 15].

The district court erred in flatly excusing after trial the Trustee's admitted failure to make such a traffic showing. *See* [E.R. 16]. The Trustee seeks to add hundreds of houses to Section 16—the traffic from which could inflict severe burdens on the servient estate. Beyond that, the district court itself acknowledged that the trial evidence "supports th[e] assertion" that the Trustee's plans for Section 16 and Murphy Road will result in increased "cut-through traffic." [E.R. 16]. The district court's implicit conclusion that *no* amount of hypothetical increased traffic and its attendant effects would be unreasonable—be it 500, 5,000, or 50,000 daily trips—is clearly erroneous.

Second, the district court wrongly disregarded evidence that the hypothetical development "may increase the burden upon the Community's public services, such as police and fire services." [E.R. 20]. Unlike private landowners, the Community funds its own infrastructure and public services on the Reservation. The Community's evidence showed that increased traffic would "put[] a strain" on Community police departments in monitoring increased traffic and dealing with "major traffic accidents," [E.R. 127, 131]. Traffic would also interfere with the Community's under-resourced fire department's ability to respond quickly to emergencies. *See, e.g.*, [E.R. 110-115].

The district court dismissed these circumstances as not "relevant." [E.R. 21]. Citing no authority, the district court explained that the Community's argument "conflates the governmental ownership of land with the government's role in providing public services to its citizens," and the only question was whether the burden related to "enjoyment of the *land*" itself. [E.R. 20-21]. But the way that the Community "enjoys" Reservation land is by using it to support its members—such that increased burdens on Community resources are directly tied to the Community's enjoyment. If anything, the Community's status as both landowner and government entity should have required the court to be particularly solicitous of the special circumstances surrounding the property. *See United States v. Webb*, 219 F.3d 1127, 1132 (9th Cir. 2000) (emphasizing the federal courts' "traditional solicitude for *** Indian tribes" on issues related to reservation land) (quoting *Solem v. Bartlett*, 465 U.S. 463, 472 (1984)). The court erred in disregarding that evidence completely.

Finally, the district court erred again in faulting *the Community* for failing to come forward with evidence at trial regarding the effects of the hypothetical development—by, for example, pointing to the lack of "evidence of actual speeding," of a "threat of vandalism or pollution," or of increased risk to the Community's members. Beyond impermissibly shifting the Trustee's burden to the Community, the district court placed the Community in the untenable position

of proving the "unreasonableness" of the hypothetical effects of an unquantified increase in traffic associated with a contingent future development. Especially given the district court's own recognition that "this entire exercise involves a certain amount of speculation from both sides," [E.R. 78], the Community should not have been asked to produce "evidence" of deleterious effects from a not-yet-paved road that might one day accommodate a not-yet-built development. If anything, the parties' speculative (and ultimately futile) attempts "to predict the future" (*id.*) should have indicated to the court that this matter remained unripe for adjudication. *See* Part I.B, *supra*.

CONCLUSION

This Court should vacate the judgment of the district court and remand with instructions to dismiss for lack of jurisdiction. *See supra* Part I. If this Court reaches the merits, however, it should reverse the judgment below and enter judgment in the Community's favor based on the Trustee's failure to carry his burden of proof. *See supra* Part III. Alternatively, the case should be remanded for a new trial. *See supra* Part II.

Respectfully submitted,

/s Pratik A. Shah

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December 4, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 13,343 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ Pratik A. Shah
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Attorney for Gila River Indian Community

Date: December 4, 2015

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Gila River Indian Community states that there are no known related cases pending in this Court. District court proceedings in this case have given rise to prior appeals that are no longer pending: *Lyon v. Gila River Indian Cmty.*, Nos. 08-15570 & 08-15712; and *In re: Michael Schugg, et al v. Gila River Indian Community*, No. 13-17396.

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Pratik A. Shah
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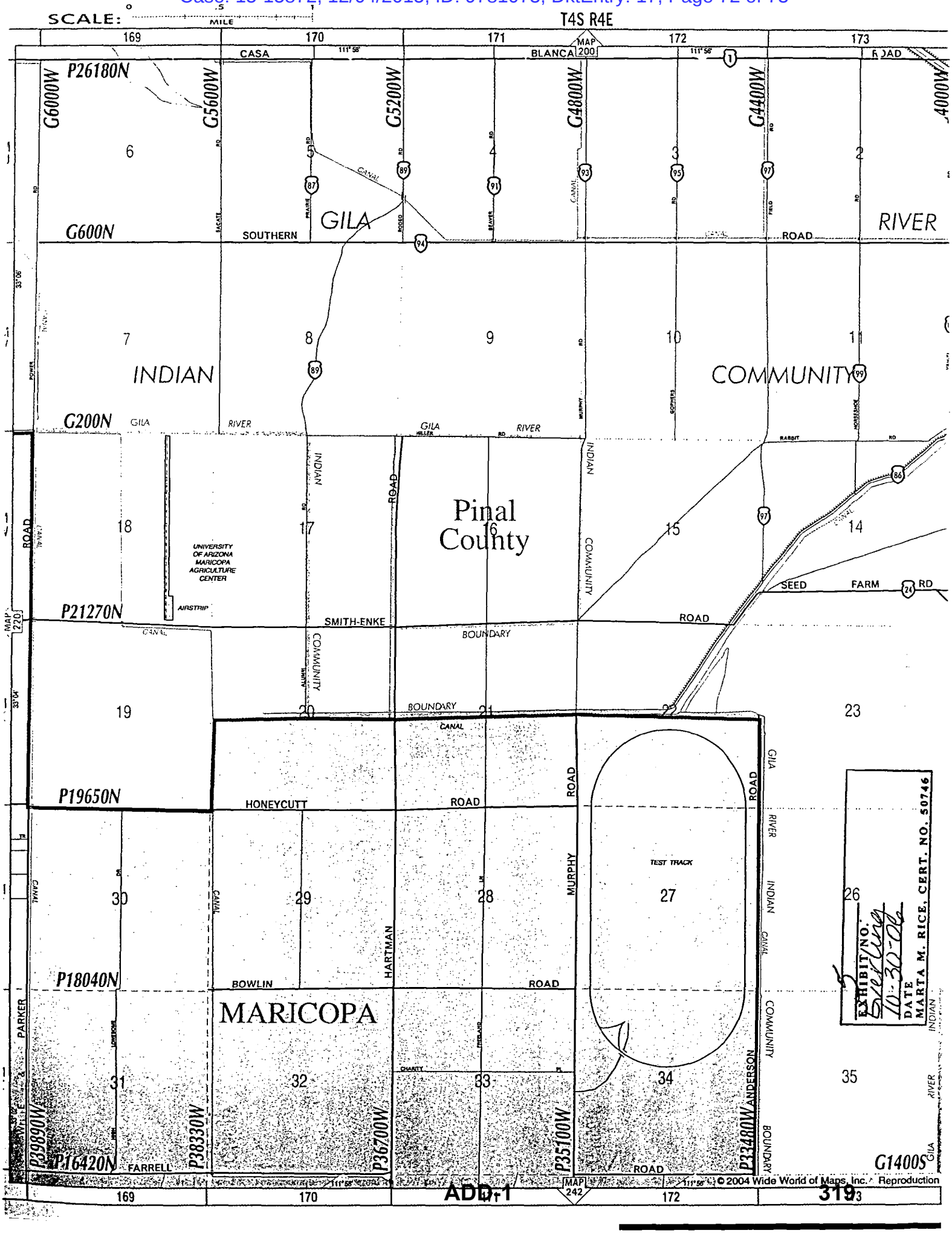
December 4, 2015

ADDENDUM A

TABLE OF CONTENTS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MAP 220
MAP 242
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GILA RIVER
INDIAN COMMUNITY
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MARICOPA
SMITH-ENKE ROAD
HONEYCUTT ROAD
BOWLIN ROAD
FARRELL ROAD
SEED FARM RD
RABBIT RD
INDIAN ROAD
COMMUNITY BOUNDARY
HARTMAN ROAD
MURPHY ROAD
ANDERSON ROAD
GILA RIVER INDIAN COMMUNITY BOUNDARY
INDIAN CANAL
TEST TRACK
UNIVERSITY OF ARIZONA MARICOPA AGRICULTURE CENTER
AIRSTRIP
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G600N
G200N
P21270N
P19650N
P18040N
P16420N
G6000W
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G4800W
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