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

REPLY BRIEF FOR APPELLANT GILA RIVER INDIAN COMMUNITY

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INTRODUCTION

Article III of the U.S. Constitution contemplates federal courts of limited jurisdiction. It imposes a strict requirement that standing must exist when a claim is first filed and then persist throughout all phases of a lawsuit. That requirement is not relaxed to facilitate the hypothetical sale of real property based on post-filing factual developments.

The Trustee does not dispute that he lacked Article III standing to bring a scope-of-the-easement claim in 2005 (at the time the Complaint was filed) and as of 2010 (when this Court found no injury-in-fact). The Trustee also does not dispute that, at least in the absence of a new pleading, subsequent factual developments cannot cure a standing defect for a preexisting claim. Those two concessions compel the conclusion that, although the Trustee was free to bring a new lawsuit, the district court lacked Article III jurisdiction to adjudicate the claim in this lawsuit on remand.

Faced with that reality, the Trustee now asserts that his scope-of-the-easement claim constitutes a "new" claim asserted for the first time after remand. That assertion is belied, however, by the fact that the Trustee never filed (or even sought to file) an amended or supplemental complaint alleging any purportedly new claim. Nor can the district court's pre-trial order, which itself never purported

to amend or add a new claim to the complaint, impart standing where none had existed.

On top of that Article III deficiency, the Trustee's telling reliance on his plans to *sell* the parcel at issue—without expressing any intention of developing the property himself or identifying any other potential developer—reveals the lack of a prudentially ripe dispute. It also underscores the district court's error in resolving disputed issues of fact in favor of the Trustee—both on summary judgment and after trial—when the Trustee failed to offer sufficient evidence (let alone undisputed evidence) regarding his purely hypothetical development plans.

ARGUMENT

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

A. Post-Remand Events Did Not Cure The Trustee's Lack Of Article III Standing

The Trustee does not dispute that he lacked Article III standing to seek a declaration concerning the scope of the Murphy Road easement when this case began in 2005. Nor does the Trustee dispute that this Court held in 2010 that the Trustee had not suffered any cognizable injury-in-fact concerning that claim. *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1074 (9th Cir. 2010) (Although "[t]he parties may disagree in principle over what activities the Trustee may undertake on those roads," there was "no particularized or imminent injury arising out of that disagreement."). Because Article III standing must exist with respect to each claim

at all phases of a lawsuit, notwithstanding later-occurring facts, *see* Opening Br. 28 (collecting cases), this Court's 2010 finding of a lack of injury-in-fact required dismissal of Trustee's scope-of-the-easement claim *at that time*.

The Trustee nevertheless argues that post-complaint and post-remand events gave rise to standing here because (i) he "seeks an entirely different claim for relief" than he did in the original complaint or during the 2010 appeal, Br. 14; or, in the alternative, (ii) any standing defect was cured in September 2014 with the entry of the final pre-trial order, Br. 18 (citation omitted). Neither theory has merit.

1. The Trustee failed to plead a "new" claim for relief.

The Trustee initially argues that standing need not exist at the outset of a case if, after the case has begun, "a plaintiff seeks an entirely different claim for relief based on facts that took place after the complaint's filing date." Br. 14. But the Trustee never asserted a "different claim for relief" through either a supplemental or an amended complaint. *See* FED. R. CIV. P. 15(a), (d). The Trustee's admission that his *original* claim for declaratory relief regarding the scope of the easement "is no longer part of this case and thus bears no relevance to a standing analysis" therefore deprived the district court of jurisdiction on remand. Br. 13.

The Trustee's five-count "Complaint for Declaratory Relief" filed in the bankruptcy court in May 2005 requested, among other things, a declaration

concerning his right to access Section 16 and providing "that private and public utility providers may construct, use, operate, maintain, remove or replace all Necessary Utilities upon, over, above, across, and under Murphy Road." [E.R. 348]. Over the next decade—which included a transfer to the district court, a trial, a final judgment, an appeal to this Court, a remand, and a second trial—the Trustee never sought leave either to supplement or to amend that original complaint. That is so even though the district court explicitly invited him to do so. Specifically, on remand after this Court's earlier judgment, the district court set a schedule providing that "any motion to amend the Complaint shall be filed no later than October 1, 2012." [Further Excerpts of Record ("F.E.R.") 26]. That date came and went, with no motion from the Trustee. Thus, the Trustee's original complaint was the lone operative complaint from its initial filing in 2005 until final judgment was entered, nearly 500 docket entries later, in March 2015.

The Trustee offers no support for his contention that, without ever amending or supplementing his complaint, he should be deemed to have filed an "entirely different" claim for declaratory relief regarding the scope of his Murphy Road easement. He relies (Br. 15) only on two Court of Federal Claims decisions that reiterate the same black-letter proposition the Community advances here: "jurisdiction is determined at the time the complaint is filed." *Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258, 266 (1999); *Kellogg Brown & Root*

Servs., Inc. v. United States, 115 Fed. Cl. 46, 56 (2014) (same). To be sure, these cases additionally describe how the time-of-filing rule operates when a new claim is "actually filed" in an amended complaint. *Buse Timber,* 45 Fed. Cl. at 266. Because the Trustee never "actually filed" a new claim here, however, his authority confirms that "'jurisdiction must be determined' at the time the original complaint was filed." *Kellogg*, 115 Fed. Cl. at 56 (holding that jurisdiction must be assessed as of time of original complaint when amended complaint does not add a "new claim") (citation omitted).[1]

Even if there were a rule that a plaintiff could assert a "new" claim for relief without amending or supplementing his complaint, the facts here would not support it. On appeal, this Court characterized the Trustee's claim for declaratory relief as over the "scope of any easement" on Murphy Road, without specifying a numerical development density for Section 16. *Lyon*, 626 F.3d at 1074. On remand, the Trustee sought to resuscitate his request for a judgment on that issue

[1] Beyond that, the Court of Federal Claims rule on which the Trustee relies—that when a new claim is asserted, "jurisdiction should be considered at the time the claim is actually filed," *Buse Timber*, 45 Fed. Cl. at 266—cannot be reconciled with Ninth Circuit law. "In determining federal court jurisdiction, we look to the original, rather than to the amended, complaint." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380-1381 (9th Cir. 1988). This Court recognized that "[s]ubject matter jurisdiction must exist as of the time the action is commenced," and because "jurisdiction was lacking" over the original complaint, "then the court's various orders, including that granting leave to amend the complaint, were nullities." *Id.*

based on new *facts*, not because it was a new *claim*. *See, e.g.*, [E.R. 305] ("Although this Court and the Court of Appeals previously held that the dispute over the scope of the implied easements was not yet ripe, the facts on remand have changed substantially such that this issue is now ripe for review."); [E.R. 306] (noting that "the facts surrounding the Owners' plans for Section 16 have changed substantially" since the earlier ripeness rulings).

For its part, the district court accepted the Trustee's representations that he was still pressing the same claim. *See* [E.R. 48] ("[T]he Trustee argues that entry of final judgment is no longer appropriate in this case because the issue regarding the scope of the easements[] *** has recently become ripe for adjudication."). Although the Trustee now faults the Community for "aggregating the different relief sought by the Trustee at different times and generically referring to them as a single 'scope of the easement' claim," Br. 16, that is how both he and the district court referred to the claim below. [E.R. 313] (Trustee: "Under the current facts, therefore, an actual case or controversy exists between the Trustee and the Community concerning the scope of the implied easements over *** Murphy Road.") (emphasis added); [E.R. 52] (district court reference to Trustee's "scope of the easement[] claim").

If the Trustee had actually sought leave to add a "new," post-remand claim after more than five years of litigation, the Community would have opposed based

on prejudice. *See* FED. R. CIV. P. 15(a)(2) (party may amend "only with the opposing party's written consent or the court's leave"); FED. R. CIV. P. 15(d) (court may permit supplementation only "[o]n motion and reasonable notice" to opposing party and "on just terms"). And even if the district court had permitted (over objection) amendment or supplementation, the Community would also have had the right to file an amended answer, asserting defenses to any "new" claims—including sovereign immunity, which was deemed waived only in relation to the Trustee's *original* claims. Although the Trustee argues that the Community "never attempted to reassert an immunity defense in the post-remand proceedings" (Br. 20), the Community lacked the opportunity to do so because the Trustee never asserted a new claim.

The Trustee also suggests that this Court need not be concerned with "strategic behavior," because manufacturing jurisdiction based on post-filing events is "not present in the mine-run of federal question cases." Br. 14 n.2 (citation omitted). But as the Community explained in its opening brief (at 29-31)—and as the Trustee nowhere disputes—the Trustee's behavior in keeping this case alive post-remand rather than simply filing a new suit *was* strategic. Specifically, the Trustee repeatedly argued below that "[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]; *see also* [E.R. 218, 225] (similar). The fact that other cases may not present the same strategic behavior is beside the point.[2]

2. The pre-trial order cannot save the Trustee's lawsuit.

The Trustee's only other argument in support of standing is that, even if his lone claim for declaratory relief as to Murphy Road is not "new," this Court would still have jurisdiction because his standing can be assessed at the time his complaint was "effectively amended" by the district court's September 2014 pre-trial order (Br. 18). That argument is likewise mistaken.

Although "the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed," *Davis*, 554 U.S. at 734, the Trustee relies on this Court's recent decision in *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036 (9th Cir. 2015), for the proposition that "standing may be predicated on 'events that occurred after the commencement of the action' if the original complaint has been superseded by a later pleading." Br. 17 (citing 779 F.3d at 1046). *Northstar* cannot be stretched so far. *Northstar* dealt with whether a plaintiff could rely on

[2] In a footnote, the Trustee relies on out-of-circuit cases for the proposition that the "time-of-filing" rule strictly applies only in *diversity* cases. Br. 14 n.2. That argument is foreclosed. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 734 (2008) (holding, in federal-question case, that "the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed").

post-filing events asserted in a "supplemental pleading[] *** pursuant to Fed. R. Civ. P. 15(d)" to establish standing. 779 F.3d at 1046. As noted, however, the Trustee in this case never sought leave to file a supplemental complaint under Rule 15(d). *Northstar* is thus not implicated here.

Northstar acknowledged this Court's binding precedent that "subsequent events do not confer subject matter jurisdiction" when it was originally lacking, *Morongo Band of Mission Indians*, 858 F.2d at 1380-1381, but distinguished *Morongo* as "not involv[ing] a *supplemental pleading*, much less one with allegations of events that occurred after the commencement of the action," *Northstar*, 779 F.3d at 1046. Disclaiming the expansive scope that the Trustee attributes to its holding, this Court in *Northstar* continued: "[I]n order to decide this case, it is enough to say that the rule as stated in *Morongo* does *not extend to supplemental pleadings filed pursuant to Fed. R. Civ. P. 15(d)*." *Id.* (emphasis added). As such, *Northstar*'s "supplemental pleading" exception does not disturb the default rule applicable when no such pleading is filed. *See, e.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1203-1204 (9th Cir. 2015) (holding, in case where no supplemental complaint filed, that plaintiff may not rely on facts that post-date the complaint to establish standing, but may instead file a new suit).[3]

[3] Even if *Northstar* were not expressly limited to the Rule 15(d) context, the Court should decline to extend it given the serious questions about whether it was

Moreover, there was no other type of "later pleading" here that could save the Trustee's standing. Latching on to language from *Rockwell International Corp. v. United States*, 549 U.S. 457, 474 (2007), the Trustee contends that the final pre-trial order "supersedes" his prior pleadings for Article III standing purposes. *Rockwell* involved whether a False Claims Act relator could qualify as an original source based on allegations that were made in the *original* complaint but subsequently dropped both from the *amended* complaint and from the "statement of claims" in the final pre-trial order. The case presented no Article III or "standing" issue, nor did it involve the assertion of a new "claim." Accordingly, *Rockwell*'s holding that a court must look to the "allegations as amended—here, the statement of claims in the final pre-trial order—to determine" whether "original-source status" no longer existed says nothing about whether the pre-trial order can *cure* the lack of a cognizable injury-in-fact that this Court identified in 2010.

In other words, the Court in *Rockwell* nowhere suggests that a pre-trial order can shift the date for the time-of-filing inquiry. *See Rockwell*, 549 U.S. at 473

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correctly decided. In addition to the problems identified by the dissenting opinion, *see* 779 F.3d at 1065-1069 (Bea, J., dissenting), *Northstar* is difficult to reconcile with this Court's holdings that Article III jurisdiction must exist at all stages of a proceeding. Indeed, if *Northstar* applied here, it would permit a case that had become moot by November 2011 to become "un-moot" a month later. *See* [E.R. 297, 318]; Trustee Br. 7 ("The IRR issue became moot after remand.").

("The state of things and the originally alleged state of things are not synonymous; *demonstration that the original allegations were false will defeat jurisdiction.*") (emphasis added). A contrary reading of *Rockwell*, or an extension of *Northstar* based on *Rockwell*, would mark a stark change in the law. If the Trustee were correct, the standing inquiry would shift before every trial: courts would never demand proof of the facts existing "when the suit was filed," *Davis*, 554 U.S. at 734, but would instead ask only about the facts existing at the time of the pre-trial order. It is hard to believe that *Rockwell*, a case that preceded *Davis* and does not discuss standing, was intended to have that effect.

It is true that the district court, via a pre-trial order, may "amend[] the pleadings *if necessary or desirable*." FED. R. CIV. P. 16(c)(2)(B) (listing "matters for consideration" at "any pretrial conference") (emphasis added). That is consistent with the rule that a plaintiff may seek leave to amend his complaint even after the final pre-trial order is entered. *See* FED. R. CIV. P. 15(b) (describing procedure for amending complaint "During and After Trial"). But a final pre-trial order is not itself a pleading, let alone a superseding or supplemental one.

The pre-trial order in this case, as in every case, "formulate[d] a trial plan" and "control[led] the course of action" at trial, FED. R. CIV. P. 16(d)-(e), but never purported to supplement the Trustee's pleadings. It did *not* provide that new or additional claims nowhere appearing in the pleadings would be "tried by consent."

FED. R. CIV. P. 15(b)(2). On the contrary, the Community specifically raised (and reserved its right to challenge) the lack of an Article III case or controversy *in the final pre-trial order itself*. [F.E.R. 3] (Community "contends that this Court lacks jurisdiction to adjudicate the scope of the implied easement because that issue is not ripe for adjudication").

The Trustee's argument also proves too much. By acknowledging that the September 2014 pre-trial order was necessary to cure the lack of an Article III case or controversy, the Trustee concedes that he lacked standing to litigate the scope of the easement before that date. *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[.]"). As such, "the court's various orders" rendered *before* the pre-trial order—including, critically, its grant of partial summary judgment in the Trustee's favor—"were nullities" rendered without jurisdiction. *Morongo Band of Mission Indians*, 858 F.2d at 1380-1381. At a minimum, the court should vacate the grant of summary judgment and remand for further proceedings.

B. The Trustee's Claim Is Not Ripe

The Trustee's scope-of-the-easement claim—even as recast by the Trustee—also remains unripe for review. The Trustee essentially concedes that he does not know how (or whether) Section 16 will be developed, and thus how the easement will be used, paved, or equipped with utilities. *See* Br. 27-28. Nevertheless, he seeks a federal-court order declaring that the scope of his easement "includes the right to use this roadway for the purpose of supporting a residential development on Section 16 with one house per 1.25 acres," as well as a declaration that any such use will not "unreasonably burden" the Community. Br. 18, 38. Those questions are unfit for review, and the balance of the hardships confirms that the district court should have reserved judgment on them.

1. The prudential ripeness doctrine applies to this dispute.

The Trustee first argues that this Court should not apply the prudential ripeness doctrine because this case "does not arise out of an administrative policy or proceeding." Br. 23. That argument is doubly foreclosed. In the prior appeal of this case, this Court relied in part on prudential ripeness concerns in affirming that a related "issue was not ripe for decision." *Lyon*, 626 F.3d at 1079 (citing *California ex rel. Lockyer v. United States Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009)); *see also Lockyer*, 575 F.3d at 1011 (discussing prudential ripeness). And one of the Trustee's own cases (Br. 23) confirms that the prudential ripeness

doctrine applies to "disputes in the bankruptcy context," even if those disputes "involve a unique case-specific inquiry" rather than an interpretation of a Bankruptcy Code provision. *In re Coleman*, 560 F.3d 1000, 1007 & n.16 (9th Cir. 2009). The Trustee overlooks that holding.

Even considered afresh, the prudential ripeness doctrine applies to cases like this one. *See, e.g.*, *Blanchard Sec. Co. v. Rahway Valley R. Co.*, 191 F. App'x 98, 101 (3d Cir. 2006) (dispute over whether use of servient estate might interfere with easement "was not yet ripe"). This case trenches on the authority of a federal agency, the Bureau of Indian Affairs (BIA), which has informed the Trustee that "[e]xpress authorizations" from both landowners and "BIA grants of easement or encroachment permits" are necessary before any improvements to the land will be authorized. *See* Opening Br. 33-35. The Trustee also wrongly asserts that "resolution of this case" does not "involve any constitutional issues." Br. 23. This case presents an Article III standing question that may be avoided if the case is instead dismissed on prudential ripeness grounds. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998) (addressing prudential ripeness rather than standing).

2. The scope of the easement is unfit for judicial resolution.

The Trustee concedes, as he must, that a claim is fit for resolution only when it "can be resolved without considering contingent future events that may or may

not occur as anticipated, or indeed may not occur at all." Br. 24 (citation and internal quotation marks omitted); *see Dietary Supplemental Coal. Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992) ("The fitness element requires that the issue be primarily legal [and] need no further factual development[.]"). That rule requires dismissal in this case.

a. As the Community explained (Br. 31-40), this claim is unfit for review because the Trustee sought a declaration from the Court regarding potential paving and utility installation along the Murphy Road easement before asking for—nevermind obtaining—BIA approval. Contrary to the Trustee's argument (Br. 27), such approval is not the mere "possibility of a future lawsuit by a non-party"; it is a regulatory requirement that the Trustee has made no effort to satisfy. A BIA objection would thus render advisory any judicial opinion concerning the scope of the easement—a point the district court failed to consider.

The Trustee responds that this Court already held in 2010 that BIA approval was unnecessary. That is not correct. This Court held only that an easement created in 1877 could *exist* without BIA approval. *See Lyon*, 626 F.3d at 1072. The BIA's letter—which acknowledges this Court's prior decision—instead speaks to whether any *improvements*, to be made on Indian land (*i.e.*, both the easement itself and adjacent farmland and irrigation infrastructure), would still require BIA approval. [E.R. 287-288]. The Bureau's interpretation of the regulatory scheme

that it administers is entitled to deference, *see, e.g.*, *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 439 (9th Cir. 1994), and independently demonstrates that "review now may turn out to have been unnecessary," *Ohio Forestry*, 523 U.S. at 736.

b. The Trustee's claim is also unfit for review because it centrally concerns a contingent future development plan that, by the Trustee's own admission, is all but guaranteed never to "occur as anticipated," if it "occur[s] at all." Br. 24; *see Ohio Forestry*, 523 U.S. at 736. The Community's opening brief explained (at 35-37) that the Trustee seeks a declaration regarding his right to use an easement to support future development, even though he has no intention of developing Section 16 and knows of no potential developer interested in developing it. The Community also identified the Trustee's concession that any specific development plans would necessarily "depend[] on what the" non-existent "developer wants to do." [E.R. 282].

None of these points is disputed by the Trustee. Instead, he makes the extraordinary claim that, without an advisory opinion as to the extent of his easement rights, "no developer will purchase Section 16 *at a reasonable price*." Br. 27 (emphasis added); *see id.* at 28 (characterizing goal as being able to sell Section 16 for "its true value"). The Trustee makes no assertion that the Community is interfering with his present use of the easement, that he intends to

change his present use, or that any sale (let alone development) is imminent or at all likely to occur. Rather, his only claim is that he would like to sell his land for a higher price, and a federal-court decree would aid him in that endeavor.

If that were sufficient to render the Trustee's claim fit for review, it is hard to imagine what claim would be considered *un*fit. On the Trustee's theory, he would be equally entitled to a federal declaratory judgment stating that his easement rights accommodate *any* equally speculative use permitted by current zoning—including a museum, a college, a processing plant, a hospital, or a sanatorium. *See* [F.E.R. 18-19] (GR General Rural Zone, Pinal County Code § 2.40.010 ("Uses permitted")). But that is not the law. As this Court recognized in 2010, "the possibility that Section 16 might be developed as a housing subdivision is speculative at this time," when there were "no current plans to sell Section 16 to a developer or to construct a housing development on Section 16." *Lyon*, 626 F.3d at 1079. Given that neither the Trustee nor anyone else has any concrete intention of implementing his development "plans," that issue was (and remains) unripe for decision.

The Trustee suggests that the obviously contingent nature of his asserted development plans is immaterial because the "scope-of-the-easement" decision was largely legal, and the "district court did not need any further factual amplification to conclude that the Murphy Road easement accommodates

residential development of Section 16 at existing zoning." Br. 24-26. That argument contradicts the district court's rulings. *See* [E.R. 43] (holding, at summary judgment, that "the Court cannot determine on the present factual record whether the Trustee may use such a roadway for the purpose of supporting a residential development with one house per 1.25 acres"); *see also* [F.E.R. 6] (pre-trial order describing permissibility of use of Murphy Road for "development of Section 16 at one house per 1.25 acres" as one of the "issues of fact to be tried and decided"). That argument also exposes the problem with the adjudication below: given that no development was planned by anyone at *any* development density, the district court could only render "an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted).

The Trustee responds that a future buyer would be "purchasing the property with the easement rights established in this lawsuit," such that "[a]ny attempt to expand the Murphy Road easement" by this hypothetical developer "would need to be resolved in separate litigation." Br. 28; *see id.* (acknowledging possibility that an actual developer may desire "a different sized access road, different access points, or a different housing density"). That is a revealing admission that the federal-court relief the Trustee seeks is wholly advisory here. Beyond that, forcing the Community to re-defend—and the federal courts to re-adjudicate—yet another

scope-of-the-easement claim once an actual developer formulates an actual development plan is exactly the sort of duplicative litigation the prudential ripeness doctrine is meant to address. *Ohio Forestry*, 523 U.S. at 736 (claim not prudentially ripe when "review now may turn out to have been unnecessary"). In short, federal-court adjudication of the easement's scope can and must await a time when the parties and the court can understand what an actual "developer wants to do" with it. [E.R. 282].

c. Finally, even assuming that someone might someday develop Section 16 in accord with the Trustee's plans, those plans are too hypothetical to render the claim fit for review. Because the Trustee (as his brief makes clear at 27-28) did not, and does not, intend actually to develop Section 16, he declined to present the district court with details concerning paving and utilities, such as how paving could occur without disrupting irrigation; he declined to draw up engineering plans that could eventually be submitted to Pinal County for approval; and he declined to perform a quantitative traffic study. *See* Opening Br. 35-38. Because the case comes to this court "upon a sketchy record and with many unknown facts," it is not fit for judicial review. *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510-511 (9th Cir. 1991).

Contrary to the Trustee's argument, the Community's point is not that he was required to perform "all steps of the development process" before his claim would

be ripe for review. Rather, the point is that, given the Trustee's lack of any actual or imminent development plans, he has not taken the minimal steps necessary to permit the court to adjudicate (or the Community to litigate) the substantial and fact-intensive questions underlying the easement's scope. There is little doubt that a specific engineering plan would have helped the court discern whether paving was "reasonably necessary" in light of potential impacts on the existing irrigation network, or that a traffic study would have shed light on whether changing Murphy Road was likely to cause Maricopa-to-Phoenix trespasser traffic that "unreasonably interfered" with the Community's Reservation.

3. The hardship inquiry further weighs against review.

When the hardship that would result from awaiting further factual development is "limited to financial expense," a court should require that development. *California, Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-834 (9th Cir. 1987) (declining to review fit issue); *compare Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838-839 (9th Cir. 2012) (court need not consider hardship where there was "*no* interest in delaying review") (emphasis added).

So too here. The Trustee seeks to do only one thing with Section 16: sell it at a higher price than the price he can extract from the Community. The harm of preparing further development plans is purely financial, and—as the Trustee does

not dispute—the Trustee has adduced no evidence concerning the *amount* of cost that further planning would have required. *See* Opening Br. 39. Any harm to the Trustee, moreover, was far outweighed by the harm inflicted on the Community by premature review. The Trustee dismisses that hardship as "irrelevant" (Br. 31) and ignores authority cited in the Community's opening brief, *see Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc) ("[B]y being forced to defend the housing laws in a vacuum ***, the [defendants] would suffer hardship were we to adjudicate this case now."). Because the details of the Trustee's made-for-court development plan remain shrouded in mystery, the Community has suffered the hardship of having to shadow box against ill-defined plans. That hardship further counsels in favor of dismissing this case as unripe.

II. THE DISTRICT COURT ERRED IN RESOLVING MULTIPLE FACTUAL DISPUTES WHEN IT GRANTED PARTIAL SUMMARY JUDGMENT

On summary judgment, the district court resolved two disputed questions of material fact in the Trustee's favor: (1) the Trustee's hypothetical development plan for Section 16 was "normal"; and (2) paving and installing utilities under Murphy Road was "reasonably necessary" to support that development. Because "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," but rather may only "determine whether there is a genuine issue for trial," the district court's grant of partial summary judgment must be

reversed. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). The fact that the district court held a subsequent trial only on the subsidiary issue of unreasonable burden on the Reservation (Part III, *infra*) does not in any way obviate its error in deciding the predicate issues on summary judgment.

A. What Is "Normal" Development Is A Question Of Fact

The Trustee argues (Br. 33) that "[t]he district court's analysis of normal development did not, as the Community suggests, require resolution of any disputed factual issues." That argument overlooks that whether a form of development is "normal" *is itself* a factual question that depends on a variety of circumstances. Opening Br. 44 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 cmt. f (2000)). A reasonable factfinder could have relied on the many facts supporting the Community's position that were undoubtedly relevant to the "normal" development question, including the degree in abruptness of the proposed change to Section 16. RESTATEMENT § 4.10 cmt. f; *see, e.g.*, [E.R. 243-244] (emphasizing that "Section 16 and the surrounding Reservation land have been agricultural" or wilderness for millennia, including today). Summary judgment was inappropriate because, "taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the" Community, a reasonable factfinder could have ruled in the Community's favor as to what

constitutes "normal" development. *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015) (citation and internal quotation marks omitted).

The Trustee does not dispute that a reasonable factfinder, evaluating the live testimony and exhibits introduced at trial, might have ruled in the Community's favor. Rather, the Trustee (like the district court) simply ignores the summary judgment standard, asserting instead that the district court's factual "conclu[sions]" were "proper[]." *E.g.*, Br. 33 ("The district court properly concluded that the Trustee's proposed development at one house per 1.25 acres is normal in comparison to the existing development in the surrounding area."). Although that standard might be appropriate *after* trial, at summary judgment courts may only "determine whether there is a genuine issue *for* trial." *Tolan*, 134 S. Ct. at 1866 (emphasis added) (citation and internal quotation marks omitted). Simply put, "there is no such thing as *** findings of fact, on a summary judgment motion." *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (en banc) (citation omitted). That is true even where, as here, the issue will be tried to the bench. *See id.* (reversing summary judgment and remanding for bench trial because a "trial on the record, even if it consists of no more than the trial judge rereading what he has already read, and making findings of fact and conclusions of law instead of a summary judgment decision, may have real significance").

Because a reasonable factfinder could have concluded that a 440-home subdivision in the midst of the Community's reservation was not "normal" development—especially when taking facts and inferences in the Community's favor—the district court should have resolved this question based on the presentation of evidence and testimony at trial.

B. What Is "Reasonably Necessary" Is A Question Of Fact

Similarly, the reasonableness of the expanded easement use is a question of fact. *See Payne v. Lemons*, No. 1 CA-CV 09-0122, 2010 WL 569891, at *5 (Ariz. Ct. App. Feb. 18, 2010); *see, e.g.*, RESTATEMENT § 4.10 cmt. g ("Straightening and paving roads *** in a rural area may significantly damage the servient estate."); *see also* Opening Br. 45-46 (discussing additional pertinent facts). Yet the Trustee's discussion of the reasonableness issue (Br. 36-38) again overlooks that critical point.

The Trustee does not dispute that a reasonable factfinder, viewing all inferences in the Community's favor, could side with the Community on what was "reasonable." The Trustee primarily argues that Pinal County would require a subdivision built in Section 16 to have an *at least* 40-foot-wide paved access road. *See* Br. 36-37. But as explained, a factfinder could have found that because a 440-home residential subdivision was not "normal" development on these facts, paving

and installing utilities was not "reasonably necessary" to support normal development, either.

The Trustee also suggests that the Community would be better off if, against its wishes, Murphy Road were paved. *See* Br. 37. Relying on the proposition that paving roads "may enhance" the value of a servient estate "in urban environments" and the fact that the city of Maricopa sits *outside* the Reservation, the Trustee concludes that "constructing a paved road along Murphy Road's current alignment will not impose an unreasonable burden on the servient estate." Br. 37. But the Community—and, more to the point, a reasonable factfinder—was free to disagree. Indeed, the district court conceded as much when it reserved for trial whether the Trustee's proposed use of Murphy Road would "unreasonably" damage or interfere with the Reservation. Like that dispute, the predicate factual disputes over what was "reasonable" and "normal" should have been resolved at trial.

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 committed three errors that undermine its judgment at trial that the traffic and attendant effects of residential development would not unreasonably burden or damage the Reservation. "[I]f 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 (1982). In any event, the district court's determination that the Trustee met his burden *was* clearly erroneous. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (finding clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

First, the district court erred in holding that the Trustee introduced sufficient evidence as to traffic, when it is undisputed that there was no "quantitative evidence concerning the future traffic generated by Section 16," Br. 39, and when the district court itself identified the "dispositive" issue at trial as "a showing of the level of traffic on Murphy Road and its attendant effects under the Trustee's proposed development." [E.R. 42]. The Trustee responds that he "had no obligation to present" evidence of the "exact number of vehicles on the easement or surrounding roads due to Section 16's development." Br. 39-40. But no one has ever argued that absolute precision—which would have been impossible even if the Trustee's development plans were not entirely hypothetical—was necessary. The problem is that the district court held a trial about whether burdens from an increased "level of traffic" associated with a new development would be "unreasonable," and yet the Trustee failed to introduce any evidence as what the increased traffic level would be. The district court clearly erred in concluding that

no amount of potential increased traffic from *any* future development could be unreasonable.

None of the evidence on which the Trustee relies is a substitute for the critical missing evidence. For example, the Trustee suggests that there existed "nearby" traffic, including traffic outside the Reservation limits in Maricopa, as well as on highway I-10. Br. 40. But testimony at trial confirmed that "the closest place that I-10 comes to . . . Murphy Road is about five miles, give or take[.]" [E.R. 193]. And the key, undisputed fact is that the current traffic *on Murphy Road*—a private, unpaved, dirt road currently closed to the public—is only about 1 vehicle every 15 minutes. *See* [E.R. 167]; Opening Br. 6. No one has any clue what the increased level of traffic on a paved Murphy Road from possible future development, or from Maricopa-to-Phoenix cut-through traffic, will be.

Second, the district court erred again when it deemed not "relevant" the impact that developing Section 16 would have on the Community's public services, given that the only question is the landowner's "enjoyment of the servient *land*." Br. 43. As the Community explained in its opening brief (at 54-55), unlike a private landowner, one of the ways the sovereign Community enjoys its land is by providing services to Community members—services that, the evidence showed, would be damaged by increased traffic from cut-through trespassers and Section 16 residents.

Finally, the district court impermissibly shifted the trial burden to the Community. The Trustee denies that the court did so, but the record speaks for itself. To take one example, the Trustee argues that the court found that certain speed limits "provide[d] an adequate safeguard against speeding." Br. 45. But it is evident the court placed that burden on the Community by finding "no evidence" that speed limits "are *insufficient*." Here, too, a finding rooted in "a mistaken impression of applicable legal principles" is patent. *Inwood*, 456 U.S. at 855 n.15.

CONCLUSION

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

Respectfully submitted,

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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 6,654 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 18, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016, 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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