NO. 15-15872

In The
United States Court of Appeals
Ninth Circuit

IN THE MATTER OF: MICHAEL KEITH SCHUGG, D/B/A 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. CV 05-2045-PHX-JAT

APPELLEE G. GRANT LYON'S ANSWERING BRIEF

Paul F. Eckstein
Richard M. Lorenzen
Joel W. Nomkin
Alexis E. Danneman
PERKINS COIE LLP
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400
(602) 351-8000

Colin P. Ahler
SNELL & WILMER
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
(602) 382-6586

Attorneys for G. Grant Lyon

TABLE OF CONTENTS

Page

Jurisdictional Statement 1
Statement of Issues Presented for Review 1
Statement of the Case 2
A. Factual Background 3
1. History and Geography of Section 16 and Surrounding Area 3
2. Land Use of Section 16 and Surrounding Area 5
B. Procedural History 6
1. The First Trial and Appeal 6
2. Post-Remand Developments and Proceedings 7
Summary of Argument 10
Argument 13
I. THE TRUSTEE HAD STANDING TO ASSERT HIS POST-REMAND CLAIM CONCERNING THE SCOPE OF THE EASEMENT 13
A. The Trustee Sought a New Claim for Declaratory Relief Based on Facts that Occurred After Remand 14
B. Even Assuming the Trustee's Present Claim is Not Deemed "New," the Post-Remand Facts Create Injury-In-Fact for Article III Purposes 16
C. The Trustee had Article III Standing When He Requested Declaratory Relief that the Easement Supports Development at Existing Zoning 18
D. Sovereign Immunity is Irrelevant to Article III Standing 20
II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRUSTEE'S POST-REMAND CLAIM WAS RIPE 21
A. The Court Should Not Consider the Prudential Component of Ripeness in this Dispute 21
B. Even If This Court Were to Consider the Prudential Component of Ripeness, It Is Satisfied 23

TABLE OF CONTENTS
(continued)

Page

1. The Scope of the Easement is Fit for Judicial Resolution 23
2. The Hardship to the Trustee of Delaying Review is Great 30

III. THE DISTRICT COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT FOR THE TRUSTEE ON THE SCOPE OF THE EASEMENT 31

A. Congress Intended to Allow Normal Development of Section 16 32
B. The Trustee Seeks Normal Development of Section 16 33
C. The Trustee Cannot Develop Section 16 Without Paved Access 36
D. The Trustee Cannot Develop Section 16 Without Underground Utilities 37

IV. THE DISTRICT COURT CORRECTLY DETERMINED AT TRIAL THAT THE ADDITIONAL TRAFFIC GENERATED BY RESIDENTIAL DEVELOPMENT OF SECTION 16 WILL NOT UNREASONABLY BURDEN THE COMMUNITY'S LAND 38

A. The Trustee Proved Its Case Without Quantitative Evidence Concerning the Future Traffic Generated by Section 16 39
B. The District Court Correctly Disregarded Evidence Concerning Alleged Impacts to the Community's Fire and Police Resources 42
C. The District Court Did Not Shift the Burden of Proof at Trial to the Community 44

Conclusion 45

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967).....24

Alcoa v. Bonneville Power Admin.,
698 F.3d 774 (9th Cir. 2012).....23

Barnum Timber Co. v. United States EPA,
633 F.3d 894 (9th Cir 2011).....19

Buse Timber & Sales, Inc. v. United States,
45 Fed. Cl. 258 (1999).....15

Cal. Pro-Life Council, Inc. v. Getman,
328 F.3d 1088 (9th Cir. 2003).....18, 21

Cardenas v. Anzai,
311 F.3d 929 (9th Cir. 2002).....27

ConnectU LLC v. Zuckerberg,
522 F.3d 82 (1st Cir. 2008).....14

Covington v. Jefferson Cty.,
358 F.3d 626 (9th Cir. 2004).....19

Crittenden v. Chappell,
804 F.3d 998 (9th Cir. 2015).....40

Elmore v. Colvin,
617 F. App'x 755 (9th Cir. 2015).....43

In re Coleman,
560 F.3d 1000 (9th Cir. 2009).....22, 23, 29

In re Hunt,
238 F.3d 1098 (9th Cir. 2001).....18

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Van Dusen,
654 F.3d 838 (9th Cir. 2011) 39

Iowa Tribe of Kansas & Nebraska v. Salazar,
607 F.3d 1225 (10th Cir. 2010) 14

Kellogg Brown & Root Servs., Inc. v. United States,
115 Fed. Cl. 46 (2014) 15

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
134 S. Ct. 1377 (2014).....22

Logan v. Brodrick,
631 P.2d 429 (Wash. Ct. App. 1981).....42, 44

Lyon v. Gila River Indian Cmty.,
626 F.3d 1059 (9th Cir. 2010) .....*passim*

Morongo Band of Mission Indians v. Cal. State Bd. of Equalization,
858 F.2d 1376 (9th Cir. 1988) 14

Morrell v. Rice,
622 A.2d 1156 (Me. 1993).....37

Nat'l Park Hospitality Ass'n v. Dep't of Interior,
538 U.S. 803 (2003).....21

Nguyen v. United States,
792 F.2d 1500 (9th Cir. 1986) 16

Northstar Fin. Advisors Inc. v. Schwab Invs.,
779 F.3d 1036 (9th Cir. 2014) 14, 17, 18

Nw. Requirements Utils. v. FERC,
798 F.3d 796 (9th Cir. 2015) 20

Oklevueha Native Am. Church of Hawaii, Inc. v. Holder,
676 F.3d 829 (9th Cir. 2012) 23, 30, 31

TABLE OF AUTHORITIES
(continued)

Page(s)

Paxson v. Glovitz,
50 P.3d 420 (Ariz. Ct. App. 2002).....31, 32

Portman v. Cty. of Santa Clara,
995 F.2d 898 (9th Cir. 1993) 21

Principal Life Ins. Co. v. Robinson,
394 F.3d 665 (9th Cir. 2005) 22

Reg'l Rail Reorganization Act Cases,
419 U.S. 102, 138 (1974).....18, 23

Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc.
801 F.3d 1079 (9th Cir. 2015) 39

Righthaven LLC v. Hoehn,
716 F.3d 1166 (9th Cir. 2013) 14

Rockwell Int'l. Corp. v. United States,
549 U.S. 457 (2007).....18

San Diego Cty. Gun Rights Comm. v. Reno,
98 F.3d 1121 (9th Cir. 1996) 20, 23

San Luis & Delta-Mendota Water Auth. v. Salazar,
638 F.3d 1163 (9th Cir. 2011) 23, 30

Shooting Point, L.L.C. v. Wescoat,
576 S.E.2d 497 (Va. 2003) 38, 42, 44

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014).....18, 22

Toll Bros., Inc. v. Twp. of Readington,
555 F.3d 131 (3d Cir. 2009) 19

United States v. 176.10 Acres of Land,
558 F. Supp. 1379 (D. Mass. 1983).....37

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Moran,
493 F.3d 1002 (9th Cir. 2007) 43

United States v. Webb,
219 F.3d 1127 (9th Cir. 2000) 43

Verizon Cal. Inc. v. Peevey,
413 F.3d 1069 (9th Cir. 2005) 24

W. Radio Servs. Co. v. Qwest Corp.,
530 F.3d 1186 (9th Cir. 2008) 18

Weeks v. Wolf Creek Indus., Inc.,
941 So.2d 263 (Ala. 2006).....38, 42, 44

Yamada v. Snipes,
786 F.3d 1182 (9th Cir. 2015), *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015).....14

OTHER AUTHORITIES

25 C.F.R. § 169.3 26

80 Fed. Reg. 72491 (Nov. 19, 2105).....26

80 Fed. Reg. 79258 (Dec. 21, 2015) 26

Federal Rule of Civil Procedure 15(d).....15, 17

Restatement (Third) of Property: Servitudes § 4.1(1) (2000).....24, 43

Restatement (Third) of Property: Servitudes § 4.10 (2000) .....*passim*

Jurisdictional Statement

Appellee G. Grant Lyon (the "Trustee"), the Chapter 11 Trustee for the Bankruptcy Estate of Michael Schugg and Debra Schugg, agrees with the Jurisdictional Statement of Appellant Gila River Indian Community (the "Community"), except that the Trustee disputes the Community's contention that neither this Court nor the district court has jurisdiction to grant the Trustee's requested declaratory relief. *See* Part I, *infra*.

Statement of Issues Presented for Review

1. Following the 2010 remand by this Court, did the Trustee have Article III standing to assert a new claim based on the Community's post-remand refusal to permit the Trustee to develop Section 16 in accordance with the existing zoning designation of one house per 1.25 acres?

2. On the issue of prudential ripeness:

   a. Given federal courts' "virtually unflagging" duty to hear cases within their jurisdiction, may the Trustee's post-remand claim regarding the scope of its easement be dismissed on prudential ripeness grounds, particularly since this claim is not against an administrative agency and concerns only non-constitutional issues of property law?

   b. Alternatively, did the district court correctly determine that the Trustee's post-remand claim concerning the scope of its easement was prudentially ripe given: (i) the Community's unequivocal refusal to permit the Trustee to develop Section 16 in accordance with its current zoning designation, and (ii) the evidence regarding the marginal impact on surrounding Reservation land from the paving and utility improvements required to accommodate such development?

3. Did the district court correctly determine that Congress's grant of Section 16 as school trust land to the then-Territory of Arizona included an

easement broad enough in scope to accommodate normal economic development of the property and that, based on the undisputed facts concerning the historical and present land use in the area, Section 16's normal development includes rural residential housing at a density of one house per 1.25 acres, paved access, and utilities?

4. Did the district court clearly err in concluding that the Trustee proved at trial that the increased traffic generated by residential development of Section 16 at one house per 1.25 acres would not unreasonably damage or interfere with the Community's land?

Statement of the Case

Section 16 is "a parcel of about 657 acres in Pinal County, Arizona" that, while never part of the Community's Reservation, is surrounded by Community land. *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1065-66 (9th Cir. 2010). For over a decade, the Community has prevented the Trustee from making reasonable use of this parcel. Previously, this Court removed one obstacle to Section 16's reasonable enjoyment by holding that the Trustee can access his land through an implied easement over Murphy Road. *Id.* at 1072-73.[1] After remand from this Court, the district court removed another obstacle by holding that the Trustee can use the easement to accommodate rural residential development of Section 16 at the housing density currently authorized by Pinal County. In the present appeal, the Community seeks to deny the Trustee from exercising even these modest property rights.

[1] Because the Trustee represents the interests of the current owners of Section 16, this brief uses the term Trustee to refer collectively to those owners as well as the Trustee.

A. Factual Background

1. History and Geography of Section 16 and Surrounding Area

The United States acquired Section 16 in 1854 as part of the Gadsden Purchase. *Lyon*, 626 F.3d at 1065. Congress transferred Section 16 in 1877 to the then-Territory of Arizona for the purpose of supporting Arizona's public schools. *Id.* at 1066. School sections "were not literally meant to be sites for school buildings." *Id.* "Instead, the state was able to sell and lease them to produce funds supporting its schools." *Id.* (citing *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 463 (1967)).

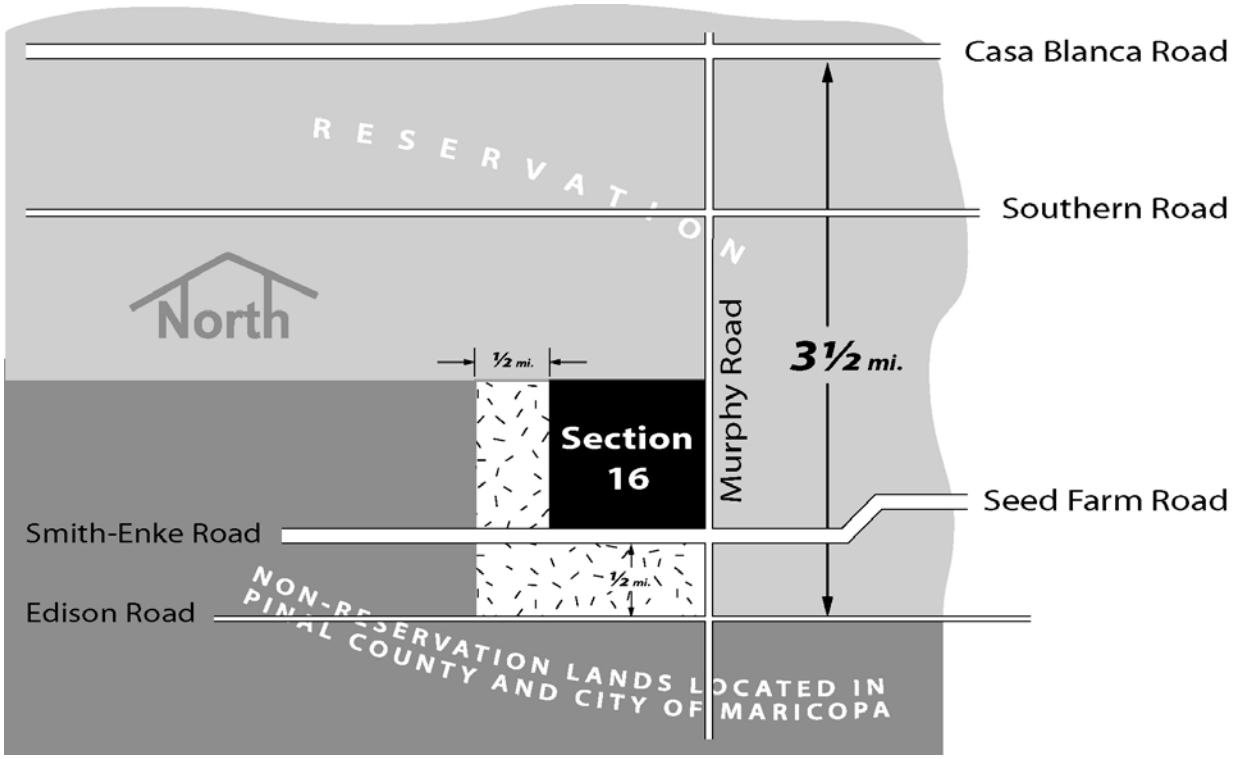
The State of Arizona sold Section 16 to a private individual in 1929. *Id.* Section 16 has been resold several times since then, each time with a deed that conveyed existing easements to the property. *Id.*

The Community's Reservation was established in 1859. *Id.* The Reservation did not abut Section 16 until 1883, however, when an executive order added the land directly north of Section 16 to the Reservation. *Id.* In 1913, another executive order added the land to the direct south, east, and west of Section 16 to the Reservation. *Id.* The result is that since 1913, Section 16 has been separated from non-Indian land in Pinal County and the City of Maricopa by a half-mile strip of Reservation land. *Id.* [*See also* E.R. 5]

The Community has divided its Reservation into seven districts. [E.R. 5] The Reservation land surrounding Section 16 is part of District 5, which encompasses approximately 100 square miles. [*Id.*]

The Trustee accesses Section 16 through its easement over Murphy Road, a north-south road that runs along the eastern boundary of Section 16 and through District 5. [*Id.*; *see also Lyon*, 626 F.3d at 1065] Traveling south from the southeastern corner of Section 16, Murphy Road continues approximately one-half

mile to the City of Maricopa. [E.R. 5] Traveling north from the northeastern corner of Section 16, Murphy Road intersects with Casa Blanca Road after approximately two miles. [*Id.*] The section of Murphy Road between the southern Reservation boundary and Casa Blanca Road is currently a dirt road. [E.R. 6]



Casa Blanca Road is a paved, east-west road that, in relevant part, connects to Interstate 10 ("I-10") and Arizona State Route 347. [E.R. 6, 16] The I-10 and State Route 347 are paved highways that travel through the Reservation in a north-south direction. [*Id.*] As of 2011, more than 65,000 vehicles per day travel along the portion of the I-10 highway that traverses District 5, and more than 41,000 vehicles per day use State Route 347. [E.R. 16] The intersection of Murphy Road and Casa Blanca Road is a few miles east of State Route 347 and about five miles west of I-10. [E.R. 6] Casa Blanca Road is a public road used by non-members of the Community. [*Id.*; *see also* S.E.R. 71 (A map illustrating Section 16 and the nearby highways)].

2. Land Use of Section 16 and Surrounding Area

When Congress conveyed Section 16 as school land in 1877, the land was vacant wilderness. [E.R. 37] Since the 1940s, Section 16 has been farmed. [*Id.*; S.E.R. 54 ¶ 66] Section 16's current use includes a dairy. [E.R. 3, 7, 37] Pinal County's zoning of Section 16 allows rural residential use at a maximum density of one house per 1.25 acres, which would allow for approximately 440 houses to be built on that section. [E.R. 4]

The Reservation land immediately surrounding Section 16 is either undeveloped or used for agriculture. [E.R. 7] But other areas of District 5 of the Reservation are more developed. [*Id.*] Community housing exists along the portion of Casa Blanca Road that connects the I-10 and State Route 347 in an area called Casa Blanca Village. [*Id.*] Community housing also exists in District 5 to the west of Murphy Road. [*Id.*]

Currently, the non-Indian land in the vicinity of District 5 includes significant development and traffic. [*See* E.R. 16, 31] Just a half-mile away from Section 16 and next to the southern Reservation border, Maricopa "is undergoing rapid development." [E.R. 31; S.E.R. 58-59 ¶¶ 129-30] And as noted, the I-10 and State Route 347 currently accommodate "high traffic volumes." [E.R. 16] Because Casa Blanca Road is a public road that connects these two highways, "cut-through traffic along Casa Blanca Road already exists." [*Id.*]

Significantly, after years of work, the Community completed the Seven-District Master Plan ("Master Plan") in 2011 "due to significant economic growth in and surrounding the Gila River Indian Reservation." [S.E.R. 72-73] The Community's governing body unanimously adopted the Master Plan as the "primary planning guide" for future land use on the Reservation. [E.R. 17-18, 18 n.9 (citation and quotation marks omitted)] Among other things, the Master Plan states the "Community's vision for additional residential development" in the

area of Section 16. [E.R. 17-18, 17 n.9] According to the Master Plan, the Community "could construct up to *10,217* homes in an area just north of and adjacent to Casa Blanca Road" in District 5. [E.R. 17 (emphasis added)]

B. Procedural History

1. The First Trial and Appeal

In 2004, the then-owners of Section 16, Michael and Debra Schugg, declared bankruptcy and listed Section 16 as their largest asset. *Lyon*, 626 F.3d at 1066. The Community filed a proof of claim in the bankruptcy court claiming, among other things, a right to relief for alleged trespass over Murphy Road. *See id*. In response, the Trustee filed an adversary proceeding in the bankruptcy court, seeking a declaration of a legal right to access Section 16. *Id.* at 1066-67. The adversary proceeding was transferred to the district court. *Id*. at 1067.

In 2007, the district court conducted a bench trial on various issues, including access to Section 16. [S.E.R. 46] Following trial, the district court concluded that Congress granted an implied easement to Section 16 when it conveyed that property to the then-Territory of Arizona, and this easement has been transferred to all subsequent owners of Section 16. [S.E.R. 63-64 ¶¶ 44-48] The district court explained that Congress "intended for the school sections, through the sale thereof, to provide a revenue base to support public education." [S.E.R. 63 ¶ 44 (*citing Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979)] "Unless a right of access is inferred, the very purpose of the school trust lands would fail." [*Id.* ¶ 45 (quoting *Andrus*, 486 F. Supp. at 1002)]

The district court declined at that time to rule on the Trustee's rights to improve his easement to support residential development. At the time of the 2007 trial, the Trustee wanted to use the property for development at three houses per acre. [E.R. 53] But that would have required that the property be re-zoned, and

Pinal County had rejected an attempt to amend Section 16's zoning designation in 2004. [*Id*.; S.E.R. 58 ¶¶ 125-26] Because a zoning change stood in the way of development at that time, the district court concluded that the possibility of future residential development of Section 16 was "speculative at best." [S.E.R. 65 ¶ 55; *see also* E.R. 53 (discussion by district court of its rationale for previous ripeness determination)]

This Court affirmed the district court's conclusion regarding the existence of an implied easement. *Lyon*, 626 F.3d at 1072-74. The Court agreed that "Congress's intent in granting Section 16 to Arizona was to allow Arizona to use or to sell the parcel to raise money for the support of public schools," and "[t]he property would have had little monetary value if there was no right of access to it." *Id*. at 1073. This Court also agreed with the district court's decision to not issue a decision on the scope of the easement following the 2007 trial. *Id*. at 1074. After noting that Pinal County had previously rejected an attempt to re-zone Section 16, *id*. at 1066, this Court concluded that the record did not indicate "any intent to improve the roads or utilities" to the property. *Id*. at 1074.

This Court remanded to the district court on a separate issue concerning the Bureau of Indian Affairs' designation of Murphy Road as an "Indian Reservation Road." *Id*. at 1075-76. The IRR issue became moot after remand. [E.R. 25-26]

2. Post-Remand Developments and Proceedings

Following the remand, the Trustee elected not to file another application with Pinal County for a zoning amendment to increase the allowable housing density. [E.R. 4, 53] The Trustee instead decided to proceed with development in accordance with the existing zoning that authorizes one house per 1.25 acres. [*Id*.] In a December 2011 in-person meeting, representatives for the Trustee informed Community officials about this plan and the Trustee's intent to pave

Murphy Road and add utility lines in order to support the housing development. [E.R. 54] In that same meeting, the Community "representatives responded by telling the [Trustee's representatives] that they would not allow the implied easements to be paved and would not allow the easements to be used to support the traffic that would result if Section 16 is developed consistent with its currently zoned use of one house per 1.25 acres." [*Id*.] "The [Community] does not deny that this meeting occurred and that this was their position." [E.R. 55]

Despite the Community's opposition, the Trustee continued to pursue his development plan. Among other things, the Trustee's representatives participated in meetings with Pinal County employees relating to the planned development, submitted required forms to the County, and prepared a diagram showing the planned division of Section 16 into residential lots. [*See* S.E.R. 36 ¶¶ 34-36] But the Trustee's plan soon hit a roadblock. The Pinal County regulations for subdivisions require that the owner of a planned residential development provide paved access and appropriate utilities to the property. [E.R. 29, 54] Pinal County will not accept "even a *tentative* plat application . . . unless there are established paved access rights and adequate utility lines." [E.R. 29]

In view of the foregoing, the Trustee requested an order that a ripe controversy existed over whether the Murphy Road easement accommodated the Trustee's development plan. [E.R. 48] The district court issued such an order in May 2012, concluding that the issue was both constitutionally and prudentially ripe. [E.R. 55-58] Notably, while the Community raised ripeness issues below, it never raised the Trustee's standing to bring this post-remand claim.

On the issue of constitutional ripeness, the district court explained that the Community unequivocally refused to allow the Trustee to make the necessary improvements to his easement in order to satisfy Pinal County's requirements for a rural residential subdivision. [E.R. 55] Accordingly, "short of beginning to pave

the easements or install the utility lines on the easements," the district court could "ascertain no next step that the [Trustee] could take before an actual case or controversy exists without potentially infringing the [Community's] rights to the easements." [E.R. 55-56] "The ripeness doctrine does not require a party to possibly infringe on another's rights before an actual case or controversy exists." [E.R. 56 (citing numerous cases)]

On prudential ripeness, the district court explained that additional factual development was not required since the Community unequivocally refused to allow *any* improvements to the easement, regardless of "what the development plan encompassed." [E.R. 57] The district court further explained that the Trustee "will suffer hardship without review of the scope of the easements" since he "will be unable to improve the easements and thus, develop [his] property, unless he make[s] an attempt to improve the easements in possible violation of the [Community's] rights." [E.R. 57-58]

After discovery, the parties filed cross-motions for summary judgment on the scope of the easement. [E.R. 23] The district court denied the Community's motion, including the Community's re-assertion of its ripeness argument. [E.R. 29-30, 44] The district court found no reason to re-consider its previous ripeness order since the undisputed facts continued to demonstrate that Pinal County will not approve a housing development at existing zoning without paved access and utilities, and the Community refused to allow *any* improvements to the easement. [E.R. 29-30]

The district court granted the Trustee's summary judgment motion in part, concluding that the Trustee may construct a paved, 40-foot wide access road on the Murphy Road easement and install utility lines beneath the road. [E.R. 41-44] In reaching this conclusion, the district court explained that: (a) Congress conveyed Section 16 as school land with the intent "to permit the owner of Section 16 to

access the property in a manner commensurate with its normal economic development" (E.R. 43); (b) Section 16's gradual transition from farming to a dairy to low-density rural housing constitutes normal development, especially in light of the rapid development in nearby Maricopa (E.R. 37); and (c) paving Murphy Road and installing underground utility lines is reasonably necessary for Section 16's normal development and will not cause unreasonable damage to the Community land encompassing the servient estate or interfere unreasonably with its enjoyment. [E.R. 40-42]

The district court left one issue for trial: whether the effects of increased traffic generated by development of Section 16 at one house at 1.25 acres would impose an unreasonable burden on the servient estate. [E.R. 43] The district court imposed the burden of proof at trial on this issue on the Trustee. [*Id*.; *see also* E.R. 14-15] After a bench trial and post-trial briefing, the district court adopted the Community's position that the "servient estate" includes all of District 5 of the Reservation. [E.R. 13-14] The district court then concluded that, for a multitude of reasons, the increased traffic will not have an unreasonable impact on this land. [E.R. 16-22] Among other things, the district court discussed the high traffic volumes and development that already exist in the area, and the Community's implicit admission in its primary land-use planning document that the addition of more than 10,000 homes in District 5, and the resulting traffic, would not pose an unreasonable burden to the Community's land. [*See* E.R. 16-18]

This appeal followed.

Summary of Argument

In conveying Section 16 as school land, Congress intended to include an easement broad enough in scope to accommodate normal economic development of the property. The Community has refused, however, to allow the minimal

improvements to the easement that would make normal development possible. On remand, the district court properly removed this obstacle so that the Trustee could finally enjoy Section 16 as Congress intended. The Community's efforts to overturn the district court's judgment have no merit.

First, the Trustee had standing under Article III of the Constitution to seek a declaration that the Murphy Road easement may be used for Section 16's residential development in accordance with its current zoning designation. The Community does not and could not deny that its refusal to permit such development has caused the Trustee particularized and actual injury. Instead, the Community argues that this injury does not count for Article III standing because it occurred after the original complaint was filed. But the standing doctrine permits a party, as here, to assert a new claim for relief after the commencement of an action when post-complaint events give rise to that new claim. Nothing in this Court's previous opinion in this case is to the contrary. The claim here is based on facts that did not exist at the time of that opinion.

Second, prudential ripeness has no application here. Both the Supreme Court and this Court have questioned the use of prudential considerations as a basis for denying federal jurisdiction when Article III requirements are otherwise met. Prudential ripeness considerations are particularly inapplicable in a case such as this, which does not arise in the administrative context or raise constitutional questions.

Even if prudential ripeness applies, the substantial factual record developed over the course of this long-running dispute gave the district court ample basis to evaluate the access rights that were reasonably necessary to accommodate Section 16's normal economic development and the resulting impact to the Community's land. Moreover, prudential ripeness did not, as the Community suggests, require the Trustee to secure the approval of the Bureau of Indian Affairs ("BIA") of the

planned use of the easement. This Court previously held that the BIA's approval procedures for *new* rights-of-way over Indian land do not apply to *pre-existing* easements, such as the implied easement to Section 16. *See Lyon*, 626 F.3d at 1071-72. Nor did prudential ripeness require the Trustee to secure a buyer that will ultimately develop Section 16. The Community's continual efforts to block normal development of Section 16 and restrict the property to agricultural use only have placed a cloud over the property, and Section 16 cannot be sold at its true value until this cloud is removed.

Third, the district court correctly granted partial relief on the scope of the Murphy Road easement at the summary judgment stage. The district court's conclusion that Section 16's normal economic development includes residential housing at a density of one house per 1.25 acres rested on undisputed facts, including various findings made in the first trial in this case. Neither party disputed below that Section 16 is just a half-mile away from the explosive growth in the City of Maricopa, or that Section 16 has slowly evolved over the course of decades from vacant land to farming to a dairy. Low-density rural housing represents the next step in Section 16's normal development.

The district court similarly relied on undisputed facts to determine that paving and installing utilities beneath Murphy Road are reasonably necessary to accommodate Section 16's normal development. Pinal County will not approve a housing development on Section 16 at its current zoning designation without paved access and utility service to the subdivision. Pinal County also requires that the paved access road be at least 40-feet wide, which is consistent with the current dimensions of Murphy Road. The Community never suggested that some lesser width will be sufficient for the planned development.

Fourth, the Community fails to show that the district court erred—let alone clearly erred as required by the standard of review—in finding after trial that the

traffic generated by the addition of approximately 440 houses to Section 16 will not unreasonably damage or unreasonably interfere with the enjoyment of the surrounding Reservation land. The district court did not need expert testimony quantifying the exact number of future vehicles to arrive at this factual determination. High traffic volumes and extensive residential development already exist in the vicinity of Section 16, including in District 5 of the Reservation. And the Community envisions much more residential development in the future, as the Community's primary land-use planning guide states that more than 10,000 homes could be constructed in District 5, just a few miles from Section 16.

Argument

I. THE TRUSTEE HAD STANDING TO ASSERT HIS POST-REMAND CLAIM CONCERNING THE SCOPE OF THE EASEMENT

From the beginning of this long-running dispute, the Community has sought to avoid an adjudication of the Trustee's rights to use and enjoy Section 16. The Community continues that effort in this appeal, arguing for the first time that the Trustee lacked standing to seek the relief granted by the district court on remand. But the argument ignores that at different points of this case, the Trustee has asserted two distinct claims for declaratory relief related to the scope of the Murphy Road easement. Initially, the Trustee sought relief that would have supported development of Section 16 at three houses per acre, which would have required a re-zoning of the property. [*See* E.R. 53] Later, after the development plans for Section 16 changed, the Trustee sought declaratory relief that the scope of the Murphy Road easement accommodates residential development at the existing zoning of one house per 1.25 acres.

The first type of declaratory relief is no longer part of this case and thus bears no relevance to a standing analysis. The district court properly exercised

jurisdiction over the new declaratory relief sought after the remand, as the Community's actions created the injury-in-fact that gave the Trustee Article III standing to pursue declaratory relief concerning development at existing zoning.

A. The Trustee Sought a New Claim for Declaratory Relief Based on Facts that Occurred After Remand

The Community's standing argument relies on the proposition that Article III standing must exist at the commencement of and throughout all stages of the litigation. [Opening Brief for Appellant Gila River Indian Community, dated Dec. 4, 2015 ("Opening Br.") at 27-29] But "the broad statement that 'subject matter jurisdiction must exist as of the time the action is commenced' . . . is more nuanced than the inflexibility suggested by its language." *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1046 (9th Cir. 2014).[2] Most notably, that broad statement has no applicability where, as here, a plaintiff seeks an entirely different claim for relief based on facts that took place after the complaint's filing date.[3]

---

[2] This broad statement should not be applied "indiscriminately" when this case arises out of federal question jurisdiction. *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008). The rule on which the Community relies first arose in the context of diversity cases, where "[t]he letter and spirit of the rule apply most obviously" given the "heightened concerns about forum-shopping and strategic behavior offer special justifications for it." *Id.* "These concerns are not present in the mine-run of federal question cases, and courts have been careful not to import the time-of-filing rule indiscriminately into the federal question realm." *Id.*; *see also Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1232-33 (10th Cir. 2010) (refusing to apply time-of-filing principle outside of diversity jurisdiction context).

[3] None of the cases cited by the Community are to the contrary. For instance, in *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015) *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015), and *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1171 (9th Cir. 2013), this Court refused to consider *new* jurisdictional evidence regarding *existing*, jurisdictionally deficient claims.

As the district court explained, "[a]t the outset of this case and throughout the [original] appeal, the [Trustee] wanted to develop the property to have three houses per acre." [E.R. 53] But after remand, the Trustee elected to proceed with residential development at the current zoning designation that authorizes one house per 1.25 acres. [*Id*.] The Community responded with an unequivocal refusal to allow any improvements to Murphy Road for this planned use. [E.R. 53-54] Based on these new facts arising from the Community's actions, the Trustee sought declaratory relief on remand he had not requested before—a declaration that the Community may not prevent use of the Murphy Road easement for Section 16's development at existing zoning.

Because the Trustee's post-remand claim arose out of post-remand factual developments, the Trustee could not have asserted that claim at the same time as the original complaint. Federal Rule of Civil Procedure 15(d) reflects this reality by permitting, "on just terms . . . a supplemental pleading setting out any transaction, occurrence, or event that happened *after* the date of the pleading to be supplemented." (emphasis added.) And courts recognize that a plaintiff's standing to assert a new claim for relief should be analyzed, at the earliest, based on *when that claim* is actually asserted, and not based on facts as they existed when the case was filed. *See Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258, 266 (1999) ("[I]f a claim appearing in an amended complaint is not the same as one found in the original complaint, jurisdiction should be considered at the time the claim is actually filed."); *see also, e.g., Kellogg Brown & Root Servs., Inc. v. United States*, 115 Fed. Cl. 46, 56 (2014) (similar).

The Community contends that the Ninth Circuit's previous injury determination in this case precludes the Trustee from asserting his new

post-remand claim.[4] Not so. When this Court issued its 2010 decision, the Trustee had not yet asked for a declaration that the Murphy Road easement may be used to accommodate rural residential development at existing zoning. As the Community acknowledges (at 25), Article III of the Constitution requires a separate standing inquiry "for each claim [a plaintiff] seeks to press and for *each form of relief* that is sought." (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis added). But the Community disregards this principle by aggregating the different relief sought by the Trustee at different times and generically referring to them as a single "scope of the easement" claim.

Additionally, the fact that the Trustee's current development plan for Section 16 does *not* depend on a re-zoning of the property fundamentally changed the standing analysis post-remand. By contrast, the Trustee's previous desire to develop Section 16 at three houses per acre did require a zoning change, and Pinal County rejected a zoning amendment application in 2004. [E.R. 53] "*Based on these facts*," the district court held after the first trial "that there were not current plans to sell Section 16 or to construct homes on Section 16 and thus, any decision about the scope of the easements to accommodate such construction would be advisory." [*Id*. (emphasis added)] This Court affirmed based on those same facts, including the contemplated use of Section 16 at that time for a higher-density housing development. *See Lyon*, 626 F.3d at 1066, 1074.

---

[4] Notably, the district court concluded that this Court's 2010 mandate did not preclude it from adjudicating the Trustee's request for a declaration that the Murphy Road easement accommodates development at existing zoning. [*See* E.R. 52-53; *see also Nguyen v. United States*, 792 F.2d 1500, 1502-03 (9th Cir. 1986) ("Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to 'file additional pleadings [and] vary or expand the issues'"). The Community does not appeal the district court's determination regarding the mandate.

B. Even Assuming the Trustee's Present Claim is Not Deemed "New," the Post-Remand Facts Create Injury-In-Fact for Article III Purposes

Even if the different relief requested by the Trustee on remand is for some reason not deemed a "new" claim, this Court still has jurisdiction over the Trustee's claim concerning the scope of the Murphy Road easement. This Court's *Northstar* decision is on point.

Northstar held 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. 779 F.3d at 1046. There, the plaintiff—an investment advisory firm—filed a shareholder class action on behalf of investors in a mutual fund. At the time it filed its original complaint, the plaintiff did not have the injury-in-fact required for standing because it did not own any shares in the fund nor had it obtained an assignment of claims from any of the fund's investors. *Id.* at 1043. Three months after it filed the complaint, the plaintiff attempted to cure the jurisdictional defect by obtaining an assignment of claim from one of the fund investors. After plaintiff filed an amended complaint based on the assignment, defendant moved to dismiss on Article III grounds, arguing (just as does the Community here) that standing must be determined at the time a complaint is filed.

The district court denied the motion to dismiss and this Court affirmed. Citing to Federal Rule of Civil Procedure 15(d), this Court held that, "while '[l]later events may not create jurisdiction where none existed at the time of filing,' the proper focus in determining jurisdiction are 'the facts existing at the time the complaint *under consideration* was filed.'" *Id.* at 1044-45 (quoting *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008)). Because the "operative pleading" in the case before it was the amended complaint, and that complaint (through the assignment of claim) met the injury-in-fact requirement, this Court held that Article III standing existed. *Id.* at 1047.

In this case, the Trustee effectively amended its complaint after this case was remanded. Specifically, in the final pretrial order, the Trustee and the Community framed the following issue: "Whether the scope of the Murphy Road 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." [S.E.R. 2]

As the Supreme Court has recognized, final pretrial orders supersede all prior pleadings and "control[] the subsequent course of the action." *Rockwell Int'l. Corp. v. United States*, 549 U.S. 457, 474 (2007) (quoting Fed. R. Civ. P. 16(e)). Consequently, "the inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim'" *Id.* (quoting *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002)); *In re Hunt*, 238 F.3d 1098 (9th Cir. 2001) ("A pretrial order 'has the effect of amending the pleadings.'") (quoting *999 v. C.I.T. Corp.*, 776 F.2d 866, 871 n.2 (9th Cir. 1985)). The pretrial order in this case is, thus, "the operative pleading . . . on which subject-matter jurisdiction must be based," and the proper focus in evaluating Article III standing are "the facts existing" at the time of that order. *Northstar*, 779 F.3d at 1047.[5]

[5] The fact that newly arising events can, in some circumstances, establish a case or controversy under Article III is further confirmed by authority applying the ripeness doctrine. Ripeness and standing are closely related as they "'originate' from the same Article III limitation." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014). Indeed, "[t]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). Ripeness "is assessed based on the facts as they exist at the present moment." *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1205 (9th Cir. 2008); *see also Reg'l Rail Reorg. Act Cases*, 419 U.S. at 140 (in determining ripeness "[i]t is the situation now rather than the situation at the time of the district court's decision that must govern").

C. The Trustee had Article III Standing When He Requested Declaratory Relief that the Easement Supports Development at Existing Zoning

The Trustee did not request a declaration that the Murphy Road easement accommodates development at existing zoning until after remand, when he had Article III standing for this relief. Standing has three elements: (a) an injury-in-fact, (b) that is "fairly traceable to the conduct complained of," and (c) is likely to be redressed by a favorable decision. *Barnum Timber Co. v. United States EPA*, 633 F.3d 894, 897 (9th Cir 2011) (internal quotations and citations omitted). The Community does not argue than any of these elements were absent when the Trustee's post remand claim for relief was actually asserted or at the time of the final pretrial order.

The first and second elements are satisfied because the Community's actions directly caused a "concrete and particularized" and "actual or imminent" harm. *See id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (defining injury-in-fact). Pinal County will not approve housing at current zoning without paved access and appropriate utilities, but the Community has refused to allow those easement improvements. [*See* E.R. 29, 54-55] Based on these facts, the district court correctly determined that the Trustee cannot proceed any further with Pinal County's approval process for his current development plan since "even a *tentative* plat application to Pinal County" requires "established" paving and utility rights. [E.R. 29] The Community's interference with the Trustee's use and enjoyment of Section 16 and the Murphy Road easement constitutes injury-in-fact. *See, e.g., Covington v. Jefferson Cty.*, 358 F.3d 626, 641 (9th Cir. 2004) (when landowners' "enjoyment of their property is diminished," "[t]hat is enough [to establish] injury in fact"); *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131,

139 (3d Cir. 2009) (party "suffers the requisite injury" under Article III when defendant's actions have "block[ed] the planned development" of a property).[6]

As to the third element of Article III standing, there is more than a "substantial likelihood" that the injury suffered by the Trustee will "be redressed by a favorable judicial decision." *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 806 (9th Cir. 2015) (citation and quotation marks omitted). The district court's judgment on remand was such a decision. This judgment allows the Trustee to proceed with developing Section 16 at one house per 1.25 acres, including the associated easement improvements, without interference by the Community. [*See* E.R. 22]

D. Sovereign Immunity is Irrelevant to Article III Standing

The Community argues (at 29) that dismissing this action on Article III grounds "would reinforce principles of sovereign immunity." But standing and sovereign immunity cannot be conflated. They are separate doctrines, each governed by different principles and serving different purposes.

The Community's reference to sovereign immunity is also perplexing given that the district court disposed of any immunity defense many years ago. In 2006, the district court held that the Community "waived any [sovereign] immunity when it filed a proof of claim" in bankruptcy court relating to Section 16. [S.E.R. 68] The Community never appealed that ruling. Additionally, the Community never attempted to reassert an immunity defense in the post-remand proceedings, and it

---

[6] By obstructing the current residential development plans for Section 16 and any easement improvements, the Community has diminished the value of the Trustee's property. In December 2011, the Community acknowledged this economic harm by telling the Trustee's representatives that it would only purchase Section 16 if valued in accordance with its current agricultural use. [E.R. 54; *see also San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing.")]

does not explicitly raise that defense in this appeal. The Community has consistently acknowledged that sovereign immunity is no longer an issue in the case.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRUSTEE'S POST-REMAND CLAIM WAS RIPE

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The constitutional component of ripeness "focuses on whether there is sufficient injury, and thus is closely tied to the standing requirement." *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993). "[T]he prudential component, on the other hand, focuses on whether there is an adequate record upon which to base effective review." *Id*.

The Community does not question the constitutional ripeness of the Trustee's post-remand claim relating to the scope of the easement. That claim satisfies the constitutional component of ripeness for the same reasons the claim satisfies the injury-in-fact requirement of standing, and so we do not further address the constitutional issue. *See Cal. Pro-Life Council*, 328 F.3d at 1094 n.2 (constitutional ripeness and injury-in-fact are "synonymous").

The Community does dispute the prudential ripeness of the Trustee's claim. Prudential ripeness considerations, however, are inapplicable to this property dispute. And even if prudential ripeness considerations did apply, they are met here because the record was more than sufficient to review the Trustee's claim, and further judicial delay would have caused the Trustee undue hardship.

A. The Court Should Not Consider the Prudential Component of Ripeness in this Dispute

In making a prudential ripeness argument, the Community contends that the district court should have declined to adjudicate the Trustee's post-remand claim even if the claim was properly within the district court's Article III jurisdiction. But "'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Comm'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)). For that reason, the Supreme Court has questioned the "continuing vitality of the prudential ripeness doctrine." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

Even if the prudential ripeness doctrine has continuing application in other contexts, it should not be applied here. This Court has cautioned that prudential ripeness considerations "may only be appropriate in the administrative law context." *In re Coleman*, 560 F.3d 1000, 1006 (9th Cir. 2009). Indeed, the prudential ripeness doctrine is "root[ed] in cases involving administrative agencies" and was "intended to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over *administrative policies*, and also to *protect the agencies* from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665 (9th Cir. 2005) (quoting *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1381 (9th Cir. 1986)) (emphasis added). Accordingly, in *Principal*, this Court refused to apply the prudential ripeness doctrine to a private party contract dispute since it did not involve the same concerns "over 'judicial entanglement,' 'allocation of authority,' and the risks of 'wide-ranging and remote adverse consequences'" that are

presented in administrative agency actions. *In re Coleman*, 560 F.3d at 1006 (quoting *Principal*, 394 F.3d at 671).

The same rationale that prevents application of the prudential ripeness doctrine to private contract disputes also applies here. This case presents common law questions about the scope of an easement owned by private parties. It does not arise out of an administrative policy or proceeding, and so presents no concerns about judicial entanglement, allocation of authority, or wide-ranging and remote consequences. *Id.* Nor does resolution of this case involve any constitutional issues, and so it does not implicate the prudential policy of "judicial restraint from unnecessary decision of constitutional issues." *Reg'l Rail Reorganization Act* Cases, 419 U.S. 102, 138 (1974) (explaining that prudential ripeness furthers the policy of constitutional avoidance). Prudential ripeness considerations, therefore, cannot avoid a decision in this case.

B. Even If This Court Were to Consider the Prudential Component of Ripeness, It Is Satisfied

Even assuming prudential ripeness considerations applied, the district court correctly concluded that the Trustee's post-remand claim is prudentially ripe. In examining prudential ripeness, this Court "consider[s] the fitness of the issues for judicial review, followed by the hardship to the parties of withholding court consideration." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). Both factors render the Trustee's claim prudentially ripe.

1. The Scope of the Easement is Fit for Judicial Resolution

A claim is "fit for judicial review" where "further factual development would not 'significantly advance [the Court's] ability to deal with the legal issues presented." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538

U.S. 803, 812 (2003)). Additionally, a fit claim can be resolved without considering "'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'" *Alcoa v. Bonneville Power Admin.*, 698 F.3d 774, 793 (9th Cir. 2012) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998). Although a case is generally "more likely to be ripe" if it involves "pure legal questions," *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1132, "[t]he requirements that the issues raised be primarily legal and not require further factual development are, in fact, the same." *Verizon Cal. Inc. v. Peevey*, 413 F.3d 1069, 1075 (9th Cir. 2005) (stating that a "controversy is 'essentially legal in nature' . . . when no 'further factual amplification is necessary.'") (quoting *City of Auburn v. Qwest Corp*., 260 F.3d 1160, 1172 (9th Cir. 2001)).

Here, 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. This conclusion rested in important part on Congress's intent in creating the easement, which was a pure issue of law. [*See* E.R. 36, 42; *see also* Restatement (Third) of Property: Servitudes § 4.1(1) (2000) ("Restatement") ("A servitude should be interpreted to give effect to . . . the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (holding that "purely legal" issue of statutory interpretation was "appropriate for judicial resolution at this time")]

To the extent the district court considered the factual record, that record was well developed. When this case was remanded, the district court had already presided over a two-week bench trial in this case, and the district court relied on the *171* findings of fact from that first trial in its post-remand decisions. [*See* S.E.R. 47-62; *see also* E.R. 5 n.4 ("The parties have stipulated that all facts previously found by the Court in the first trial are uncontested and admitted in the

present trial."); E.R. 31, 36-38 (relying on findings from first trial to determine that Section 16's normal development includes rural residential housing)]

Additional factual development took place after remand. For instance, the Trustee presented expert testimony and other evidence to show that Pinal County's approval of a subdivision at existing zoning will require the construction of a two lane paved access road that is at least 40-feet wide, including shoulders, and installation of underground utility lines within the bounds of this paved roadway. [*See* E.R. 41-42; S.E.R. 32-33, 39 ¶ 30, 43-44 ¶¶ 1-3, 7] As such, the Community's contention (at 37, 39) that the Trustee failed to provide details on the necessary paving and utility improvements is incorrect.[7]

The Trustee also presented considerable evidence after remand that allowed the district court to evaluate the alleged burdens on the Community's land from the planned use of Murphy Road. The district court discussed this evidence at length in its 21-page post-trial decision, including, for example, the statement in the Community's Master Plan that more than 10,000 homes could be added to District 5 of the Reservation just a few miles from Section 16. [*See* E.R. 2-22]

The Community's prudential ripeness argument ignores the evidence that the district court had available on remand. The Community instead contends (at 31-38) that "contingencies" and "unknown facts" render this case prudentially unripe because: (a) the Trustee's development plan for Section 16 and Murphy Road has not been approved by the BIA; (b) the Trustee has not secured a buyer to develop the property; and (c) all steps in the development process have not yet been

[7] As the district court stated, the Trustee did not need to present further details on the paving or utilities to determine whether the Community would consent to the easement use. [*See* E.R. 29, 57] The Community "has unequivocally said no" to any use of Murphy Road to support residential development of Section 16. [E.R. 57]

completed. The district court's decision did not depend, however, on any of these supposed contingencies or unknown facts.

a. Ripeness Does Not Depend on BIA Approval

The Community argues (at 33-34) that prudential ripeness required the Trustee to obtain the BIA's permission to make the necessary improvements to Murphy Road that will support development at existing zoning. In support, the Community points to a 2013 BIA letter that referenced the federal procedures for obtaining new rights-of-way over Indian land set forth in 25 U.S.C. §§ 323-328 and 25 C.F.R. § 169. [E.R. at 287-88]

This Court previously held, however, that those procedures do *not* apply to the implied easement to Section 16. *See Lyon*, 626 F.3d at 1071-72. In its previous appeal, the Community argued that the regulatory scheme preempted the Trustee's claim to an implied easement to Section 16. *Id.* at 1071. This Court rejected the argument because Congress conveyed the easement to Section 16 in 1877, long before the scheme was created and the Community's Reservation was expanded to surround Section 16. *Id.* This Court explained that "nothing in the scheme indicates that Congress, in creating procedures for obtaining *new* rights of way, intended to preempt all claims to *previously acquired* rights of way, such that holders of preexisting easements would have to go through the new procedures." *Id.* at 1071-72; *see also id.* at 1073-74 (concluding that the 1913 expansion of the Reservation to surround Section 16 was made "'subject to any existing valid rights'" and did not disturb pre-existing easement to Section 16).

The Community also ignores that the regulatory scheme referenced in the BIA letter makes new rights-of-way over tribal land subject to tribal consent. *See*

25 C.F.R. § 169.3.[8] Were this Court to accept that ripeness is contingent on the Trustee obtaining approval under BIA regulations for new rights-of-way—which require the Community's *own* approval—the Community's "unequivocal[]" refusal to allow any improvements to the easement would prevent this dispute from *ever* becoming prudentially ripe.

At most, the BIA's letter suggests the possibility of future legal action involving the United States concerning the Trustee's planned use of Murphy Road. The Community cites no authority to suggest that the prudential ripeness of a dispute between existing parties in a case depends on the possibility of a future lawsuit by a non-party. Nor should such a rule exist. The district court's grant of declaratory relief *against the Community* to prevent it from interfering with the planned use of Murphy Road did not depend on the BIA's position on the matter.

b. Ripeness Does Not Require the Trustee to Secure a Buyer for Section 16

The Community argues (at 36) that the Trustee's development plan for Section 16 was not sufficiently concrete because a future buyer of the land could have a different development plan for the property or Murphy Road. But the lack of a sale only demonstrates why this dispute *is* ripe.

Without a decision on the scope of the Murphy Road easement, no developer will purchase Section 16 at a reasonable price in the face of the Community's refusal to allow that easement to be improved or otherwise used to support residential use of Section 16. The Community's actions have thus prevented the

[8] In November 2015, the Department of the Interior published a final rule relating to new BIA regulations for obtaining rights-of-way over Indian land. 80 Fed. Reg. 72491 (Nov. 19, 2105). This rule is scheduled to go into effect on March 21, 2016. 80 Fed. Reg. 79258 (Dec. 21, 2015). Under the new regulations, tribal consent is still required for new rights-of-way over tribal land. 80 Fed. Reg. at 72540.

sale that the Community contends is necessary to make this dispute ripe. This is not an "abstract disagreement[]"—the Community's actions have "been felt in a concrete way by" the Trustee. *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (quoting *Abbot Labs*, 387 U.S. at 148-49) (internal quotations omitted) (challenge to state's comprehensive settlement agreement with tobacco companies was prudentially ripe, "[d]espite the contingencies noted by the defendants" relating to settlement). The district court's relief on remand removes the cloud that the Community has placed on Section 16 and allows the subdivision approval process to proceed, thus making a sale of Section 16 at its true value possible.

Importantly, any future buyer of Section 16 will be purchasing the property with the easements rights established in this lawsuit. Any attempt to expand the Murphy Road easement beyond these parameters—if contested—would need to be resolved in separate litigation. As such, the Community's purported concerns about a future developer using a different sized access road, different access points, or a different housing density are irrelevant to the ripeness of this dispute.

c. Ripeness Does Not Require the Trustee to Complete All Steps of the Development Process

The Community also asserts (at 37-38) that the future development of Section 16 and Murphy Road has "many unknown facts" because some steps in the development process remain. Once again, this argument simply reinforces the ripeness of the dispute.

As the district court found, the Community's actions have put the development process at a standstill since "the Trustee . . . cannot submit even a *tentative* plat application to Pinal County" for a proposed subdivision "unless there are established paved access rights and adequate utility lines to the proposed

subdivision." [E.R. 29 (emphasis added) (citation omitted)][9] The district court also found that utility providers . . . will not commit to provide utilities unless there exists a right to install utility lines." [E.R. 30 n.1 (citation omitted)] The Community does not challenge these findings. The district court properly declined to make the prudential ripeness of this dispute depend on steps in the development process that could not possibly be completed by the Trustee due to the Community's refusal to allow easement improvements. [E.R. 30 ("Under the [Community's ripeness] argument, the Trustee could *never* obtain an adjudication on the scope of the easements") (citation omitted)]

Moreover, none of the Community's alleged "unknown facts" were necessary to adjudicate whether the Community can prevent the Trustee from using his easement to accommodate development at existing zoning. *See In re Coleman*, 560 F.3d at 1009 ("[F]act-intensive inquiries that depend on further factual development may nevertheless be ripe if, as here, that development would do little to aid the court's decision."). The City of Maricopa's approval of Murphy Road improvements is irrelevant to this issue since the City of Maricopa is not part of the Reservation. Commitments from utility providers or an engineering study on future utility lines would also "do little to aid the court's decision." *Id.* Neither the type or number of utility lines nor their placement underneath the 40-foot wide access road would have affected the district court's conclusion that the lines will

[9] In addition to showing that Pinal County will not accept a tentative plat application absent established paving and utility rights, the Trustee also presented evidence below that, without knowing the permissible width of the access road to the subdivision or utility installation rights, civil engineers cannot prepare the plat map or other engineering reports (including drainage and environmental reports) that are associated with a tentative plat application in Pinal County. [*See* E.R. 30 n.1 ("[A] professional engineer has testified that a tentative plat cannot be prepared without having first established the rights for paved access and utilities."); *see also* S.E.R. 23 ¶ 8, 28-29 ¶¶ 3-6]

not unreasonably burden the Reservation since they "will not be visible" and "will occupy otherwise unused underground space." [E.R. 41] Moreover, the district court recognized that while a quantitative traffic study "*may* be evidence" on the burden to the Community's land from the Trustee's planned easement use, "nothing in [the applicable] legal standard *requires* such a quantitative analysis." [E.R. 16 (emphasis added)] In short, "delay [was] unlikely to provide much, if any additional benefit to the . . . court's resolution of the issue." *In re Coleman*, 560 F.3d at 1009.

2. The Hardship to the Trustee of Delaying Review is Great

Because the Trustee's claim is fit for review, this Court need "not reach the second factor of the prudential ripeness inquiry—hardship to the parties in delaying review." *Oklevueha*, 676 F.3d at 838-39. "Hardship serves as a counterbalance to any interest the judiciary has in delaying the consideration of a case." *Id.*

In any event, the district court correctly determined that the Trustee "will suffer hardship without review of the scope of the easements." [E.R. 58] Without a decision on this issue, the Trustee "will be unable to improve the easements and thus, develop [his] property, unless [he] make[s] an attempt to improve the easements in possible violation of the [Community's] rights." [E.R. 57-58] Because the Community has prevented the Trustee from using Section 16 as he sees fit, the Trustee has suffered a "direct and immediate hardship" that "entail[s] more than possible financial loss." [E.R. 57 (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (quotation marks omitted)][10]

[10] By preventing the Trustee from developing Section 16 and improving his easement, the Community's actions have diminished the value of the Trustee's property. [*See supra* n.6; E.R. 54]

The Community argues (at 39) that the Trustee could have undertaken "modest burdens" to make his post-remand claim prudentially ripe, such as by obtaining the BIA's approval of the planned easement use, preparing additional engineering reports, or securing an offer or commitment from a developer to buy Section 16. But as explained above, none of these burdens were practicable or would have "significantly advanced" the district court's ability to adjudicate the scope of the Murphy Road easement. *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1173.

The Community also argues (at 40) it suffered "considerable hardship" from the district court's adjudication of the scope of the easement. That alleged hardship is irrelevant. In examining the second component of prudential ripeness, this Court considers "the hardship to the parties of withholding court consideration," not the hardship of permitting review. *Oklevueha Native Am. Church of Hawaii, Inc.*, 676 F.3d at 837. The Community's alleged hardship is also not supported by the record. Because the Trustee specified the necessary paving and utility improvements to Murphy Road, the Community had ample opportunity to present evidence that these improvements were not reasonably necessary for the planned subdivision or that they would unreasonably impact the Community's land.

III. THE DISTRICT COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT FOR THE TRUSTEE ON THE SCOPE OF THE EASEMENT

The permissible use of an implied easement need not remain static, but instead can evolve as land use in the surrounding area changes. Unless contrary to the parties' intent when the easement was created, "[t]he holder of an easement is entitled to use it 'in a manner that is reasonably necessary for the convenient enjoyment' of the easement or servitude." *Paxson v. Glovitz*, 50 P.3d 420, 427 (Ariz. Ct. App. 2002) (quoting Restatement § 4.10). "[T]he manner, frequency,

and intensity of the use" of an easement "may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate." *Id.* (quoting Restatement § 4.10).

Consistent with these principles, the district court correctly concluded, in its grant of partial summary judgment, that the undisputed facts showed that Trustee may use the Murphy Road easement for paved access and underground utilities in order to accommodate development of Section 16 at a density of one house per 1.25 acres. To hold otherwise would have thwarted "Congress's intent in granting Section 16 to Arizona . . . to allow Arizona to use or to sell the parcel to raise money for the support of public schools." *Lyon*, 626 F.3d at 1073.

A. Congress Intended to Allow Normal Development of Section 16

"The first step in determining whether the holder of an easement is entitled to make a particular use challenged by the owner of the servient estate is to determine whether the use falls within the purposes for which the servitude was created." Restatement § 4.10 cmt. d. Here, the district court rejected the Community's argument that Congress only intended for agricultural use of Section 16. [E.R. 36] The district court instead held that "Congress intended that Section 16 would undergo normal development." [E.R. 42] The district court further explained that "[t]he reasonable inference from Congress's grant of Section 16 is that Congress intended Section 16 to enjoy an easement commensurate with the *most productive use* of the property as it developed." [E.R. 36 (emphasis added)]

Because the Community does not appeal this interpretation of Congress's intent, its argument (at 49) that the Trustee can only use his easement to accommodate agriculture use of Section 16, and not "any purpose substantively different from its historical uses," has no merit. (quoting *Paxson*, 50 P.3d at 427). Unless the original parties to the easement intended otherwise, the permissible use

of an easement *can* evolve over time to accommodate normal development of the dominant land. *Paxson*, 50 P.3d at 427 (quoting Restatement § 4.10).[11]

B. The Trustee Seeks Normal Development of Section 16

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. This conclusion followed the Restatement, which recognizes that "land use normally evolves" and "what may be abnormal development at one time may become normal at a later time." Restatement § 4.10 cmt. f. "The degree and abruptness of transition may be relevant factors in determining whether the dominant owner may continue using an easement after changing use of the dominant estate." *Id*.

The district court's analysis of normal development of Section 16 did not, as the Community suggests, require resolution of any disputed factual issues. The district court instead applied the Restatement to undisputed facts including the following:

- "[T]he use of Section 16 has transitioned since 1877 from open space ('wilderness') to agricultural in the 1940s to dairy operations (a more industrial agricultural use than simple farming)," (E.R. 37);

[11] Contrary to the Community's suggestion, nothing in *Paxson* contradicts the general principle set forth in Restatement § 4.10 that easement use can change over time to accommodate normal development of the dominant land. Instead, in *Paxson*, the easement owner contested whether Restatement § 4.10 applied at all by "disput[ing] that she is using the easement for any purpose substantively different from its historical uses." *Paxson*, 50 P.3d at 427; *see also* Restatement § 4.10 cmt. f ("Changes in use of the dominant estate, or enterprise benefited by an easement in gross, are irrelevant unless they also bring a change in the manner, frequency, or intensity of use of the easement.").

- The Reservation land immediately surrounding Section 16 is currently farm land or undeveloped, and the Community has no intention of developing this land in the future, (E.R. 31);
- District 5 of the Reservation encompasses 100 square miles and has 2,222 enrolled tribal members, (*Id.*);
- The Community estimated that development of Section 16 at one house per 1.25 acres could add more than 1,000 residents, (*Id.*); and
- "The City of Maricopa is located approximately one-half mile away and has undergone rapid development." [E.R. 37]

Some of these facts were undisputed because they were established in the first trial in this case. [*See* S.E.R. 51 ¶ 38, 52 ¶ 46, 57 ¶ 114, 58 ¶ 129, 59 ¶ 130 (factual findings concerning current and historical use of Section 16 and surrounding land)] Other facts were asserted by the Community after remand and accepted as true by the district court for purposes of its summary judgment decision. [*See* E.R. 31, 38 (discussing Community evidence regarding future land use, current size and population of District 5, and estimated population increase on Section 16)]

Based on the undisputed record, including the rapid growth in nearby Maricopa, the district court concluded that Section 16's "transition from agricultural dairy use to rural housing is not only normal development but abnormally *slow* development." [E.R. 37; *see also id.* ("The Court cannot imagine a smaller developmental step than the transition from a dairy farm to rural housing with one house per 1.25 acres.")] As stated by the Restatement, "[a] gradual transition from wilderness to agricultural to suburban subdivision might be considered normal." Restatement § 4.10 cmt. f; *see also id.* illustration 10 (when 40-acre dominant estate was "in a rural area close to the suburbs of a major city,"

"the easement can be improved to serve [a 160 lot] subdivision because the change from rural to suburban is normal development").

In reaching this conclusion, the district court did not question the accuracy of the Community's evidence. Instead, the district court correctly concluded that this evidence was irrelevant in defining Section 16's normal development. The district court explained that the Community's current and planned use of nearby Reservation land reflected "abnormally slow development" in comparison to Section 16 and the City of Maricopa. [E.R. 38] The district court then explained that "[a]lthough the [Community] has the sovereign right to develop or not develop its land as it best sees fit, it cannot use its abnormal lack of development as justification for mischaracterizing normal development as 'abrupt.'" [*Id*.] "To hold otherwise would permit the servient estate holder to undermine the easement holder's rights created at the time of the conveyance simply by choosing to forego normal development on its property." [*Id*.]

The Community argues (at 51) that, as a matter of law, its plans to keep the Reservation land immediately surrounding Section 16 undeveloped or agricultural can "stagnate" development of Section 16 because any improvements to the easement would occur on Community land.[12] The Restatement recognizes, however, that "[w]hen reasonably necessary to the convenient enjoyment of an easement, the holder of the easement may make improvements and construct improvements *on the servient estate*." Restatement § 4.10 cmt. e (emphasis added). The servient estate is protected by the general principle that the improvements to the easement cannot unreasonably damage the servient estate or interfere unreasonably with its enjoyment. *Id.*

[12] Notably, the Community fails to address that it acquired the Reservation land surrounding Section 16 subject to the pre-existing easement to this parcel. *See Lyon*, 626 F.3d at 1073.

The Community also argues (at 50) that the district court erred by measuring normal development "by the dominant and not the servient estate." The Community misconstrues this statement. The district court simply explained that although a land use may be "abnormal" for the servient land, the same use can nevertheless be normal for the dominant land. [E.R. 38] In so doing, the district court followed the applicable law. *See* Restatement § 4.10 cmt. f (easement use can change over time "to accommodate normal development of the *dominant estate*") (emphasis added). The district court did not ignore potential impacts to the Community's land, but instead analyzed whether the Trustee's proposed easement use would unreasonably damage the servient estate or interfere unreasonably with its enjoyment. [*See* ER 39-42]

C. The Trustee Cannot Develop Section 16 Without Paved Access

The owner of an easement is authorized to make "reasonably necessary" improvements "to accommodate normal development of the dominant estate." Restatement § 4.10 cmt. f. Following this principle, the district court correctly concluded that the Trustee can construct a two-lane, 40 foot wide paved road on Murphy Road. [E.R. 42] "Congress intended that Section 16 would undergo normal development, and such development includes the improvements of roads." [*Id.*; *see also* Restatement § 4.10 cmt. e and illustration 10 (owner of access easement allowed to pave it unless contrary to the parties' intent in creating easement or if paving would impose an unreasonable burden on the servient land)]

The Community fails to identify any material disputed facts relating to the necessity of paving at the Trustee's requested dimensions. The Trustee "presented uncontroverted evidence" below that Pinal County will not approve residential development of Section 16 at existing zoning unless the Trustee can construct a paved access road fixed at least 40-feet wide, including shoulders. [E.R. 42]

Although the Community argued below that Pinal County may require the width of the paved access road to *exceed* 40 feet, the Community never suggested that a width *less* than 40 feet will be sufficient. [*Id*.]

The undisputed facts before the district court further demonstrated that a paved, 40-foot wide access road will not "cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Restatement § 4.10. The Community argues (at 46) these dimensions "would unreasonably expand" the current width of Murphy Road. The district court recognized, however, that the Community's measurements only include the travelled surface and do not take into account the existing shoulder areas on the road. [E.R. 41] With the shoulder areas properly included in the measurement, the uncontroverted evidence established that "Murphy Road *presently* approximates forty feet in width." [E.R. 42 (emphasis added)] As such, "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." [*Id*.]

The Community also contends (at 48) that the mere act of "[s]traightening and paving roads" can cause "significant[] damage" to the servient estate "in a rural area." (quoting Restatement 4.10 cmt. g.) But the Restatement also recognizes that, "in urban environments," the same improvements "may enhance the value and enjoyment of both dominant and servient estates." Restatement 4.10 cmt. g. Here, having found in the first trial that Section 16 and the adjacent Reservation land sit on the edge of a rapidly expanding urban environment, the district court correctly determined that constructing a paved road along Murphy Road's current alignment will not impose an unreasonable burden on the servient estate. [E.R. 42]

D. The Trustee Cannot Develop Section 16 Without Underground Utilities

The district court correctly granted the Trustee's request for a declaration that it can install utility lines beneath the Murphy Road easement. This right naturally followed from the district court's conclusion that "Section 16's normal development includes residential use." [E.R. 41] The Community does not challenge the district court's statement that "residential use now involves utility service." [*Id*.; *see also Morrell v. Rice*, 622 A.2d 1156, 1160 (Me. 1993) (utilities are "essential for most uses to which property may reasonably be put in these times"); *United States v. 176.10 Acres of Land*, 558 F. Supp. 1379, 1382 (D. Mass. 1983) (because parties to easement foresaw residential use at time of easement's creation, the easement's scope included utilities)]

The Community also fails to identify any material factual dispute relating to utility service to Section 16. The undisputed facts before the district court demonstrated that underground utility lines "will not unreasonably burden the Reservation because the lines will not be visible and will occupy otherwise unused underground space within the easement under Murphy Road." [E.R. 41] The Community does not identify any contrary evidence in the record and, thus, fails to establish any need for a trial on this issue.

IV. THE DISTRICT COURT CORRECTLY DETERMINED AT TRIAL THAT THE ADDITIONAL TRAFFIC GENERATED BY RESIDENTIAL DEVELOPMENT OF SECTION 16 WILL NOT UNREASONABLY BURDEN THE COMMUNITY'S LAND

The district court's summary judgment order left one issue for bench trial: whether the increased traffic generated by development on Section 16 at one house per 1.25 acres would cause unreasonable damage to the Community's land or interfere unreasonably with its enjoyment. [E.R. 43] "[A]s a general rule, an increase in traffic over an easement in the process of normal development of the

dominant estate, in and of itself, does not overburden a servient estate." *Weeks v. Wolf Creek Indus., Inc.*, 941 So.2d 263, 272 (Ala. 2006) (citing numerous cases). "Ordinarily, to support a finding of overburdening, it must be shown that the use has changed in *kind*, rather than *extent*." *Id.*; *see also Shooting Point, L.L.C. v. Wescoat*, 576 S.E.2d 497, 503 (Va. 2003) (increased traffic from construction of residential subdivision on dominant estate "demonstrate[d] only an increase in degree of burden, not an imposition of an additional burden" on the servient land).

The district court thus focused its inquiry at trial on the *effects* of increased traffic on the Murphy Road easement and surrounding roads. After hearing the parties' evidence on this issue, the district court correctly concluded that no unreasonable harm will result. [E.R. 22]

A. The Trustee Proved Its Case Without Quantitative Evidence Concerning the Future Traffic Generated by Section 16

The Community argues (at 53-54) that the Trustee failed to satisfy his purported burden at trial because he did not offer evidence on the precise volume of future traffic that would be generated by Section 16's development at existing zoning.[13] But the Trustee had no obligation to present such evidence.

The applicable legal standard asks whether a proposed use of an easement will "cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Restatement § 4.10. Although "a traffic analysis showing projected traffic on Murphy Road and surrounding roads *may* be" relevant to the

[13] The Community's suggestion that there was no evidence at the trial relating to the traffic that would be generated by residential development of Section 16 is incorrect. One of the documents admitted at trial was a Community memorandum stating that "traffic engineers estimate peak hourly traffic using an assumption of ten trips per house per day." [E.R. 15] The district court disregarded this document on the grounds that it did not establish the distribution of traffic on different roads, but nevertheless concluded that the trial evidence established the absence of any unreasonable impact to the Community's land. [*Id.*]

issue, "nothing in this legal standard *requires* such a quantitative analysis." [E.R. 16 (emphasis added)] Indeed, the Community fails to city *any* authority requiring quantitative evidence on future traffic volume.

Because no rule mandates quantitative traffic evidence, clear error review applies to the district court's factual determination that the additional traffic generated by development of Section 16 will not unreasonably burden the Community's land. *See Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc*. 801 F.3d 1079, 1088 (9th Cir. 2015) (district court's findings of fact after a bench trial are reviewed for clear error). "'Clear error' is a highly deferential standard of review." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). To be clearly erroneous, a factual finding must be "'(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (internal quotation marks omitted)).

The Community cannot satisfy this demanding standard. Many facts in the record established the absence of any unreasonable burden, regardless of the exact number of vehicles on the easement or surrounding roads due to Section 16's development.

For example, the district court determined that "a developed Section 16," and the traffic it will bring, "is not out-of-place" with the development and "high traffic volumes" that *already* exist nearby. [E.R. 16] The existing development not only includes the City of Maricopa (just a half-mile away from Section 16), but also the Community's own Casa Blanca Village. [E.R. 5, 16, 18] The existing traffic includes more than *65,000* vehicles per day along the portion of the I-10 highway that traverses District 5, and more than *41,000* vehicles per day along State Route 347. [E.R. 6, 16]

Moreover, the Community's Master Plan—the "*primary* planning guide" for future land use on the Reservation—states that the Community "could construct up to *10,217* homes in an area just north of and adjacent to Casa Blanca Road" at "a density of up to 3.5 homes per acre." [E.R. 9, 17 (emphasis added)] By comparison, the Trustee only seeks to add approximately 440 homes and at a much lower density of one house per 1.25 acres. [E.R. 4] The Community's governing body adopted the Master Plan, and the Community did not offer any other competent evidence at trial concerning future land use on the Reservation. [E.R. 17-18, 18 n.9] As such, "the Community's vision for additional residential development in this area shows that residential traffic," including the traffic generated by Section 16's development at existing zoning, "is congruent with the Community's intended use of Casa Blanca Road." [E.R. 18][14] The Master Plan also shows the Community's belief that the addition of more than 10,000 homes to District 5, and the associated traffic, would not unreasonably damage the Reservation land in that area.

The district court also found that the evidence at trial disproved the Community's argument that increased traffic will endanger Community members in the vicinity of Casa Blanca Road. [*Id*.] The district court explained that "[c]ut-through traffic along Casa Blanca Road *already* exists" since the road currently connects "busy highways" and serves as the "main connector between different areas of the reservation." [E.R. 6, 16 (emphasis added)] The district court further explained that the Community "has already established adequate safeguards to protect the residents of Casa Blanca Village through the use of very low speed

[14] To say that it is congruent is a gross understatement. The traffic from the more than 10,000 homes the Community envisioned building could be expected to generate more than twenty times more traffic than that generated by the planned development on Section 16.

limits." [E.R. 18] These low speed limits, "coupled with the schools and other buildings located along [Casa Blanca Road], deters would-be commuters" between the cities of Maricopa and Phoenix. [E.R. 17 n.8][15]

In short, the district court had more than sufficient facts to conclude that the additional traffic resulting from Section 16's development will not unreasonably burden the Community's land.[16] Significantly, the district court arrived at this conclusion even though it incorrectly placed the burden of proof at trial on the Trustee, rather than the Community. The district court should have instead required the Community, as the owner of the servient estate, to prove that the Trustee's proposed use of the easement would impose an unreasonable burden on its land. *See Shooting Point*, 576 S.E.2d at 502 ("A party alleging that a particular use of an easement is unreasonably burdensome has the burden of proving his allegation.") (citation omitted); *Weeks*, 941 So.2d at 271-72 (servient estate owner ordinarily bears burden of proving overburdening); *Logan v. Brodrick*, 631 P.2d 429, 432 (Wash. Ct. App. 1981) ("The servient owner . . . has the burden of proving misuse" of an easement). Because the Community should have borne the burden of proof, this provides an additional reason why the Trustee had no obligation to present quantitative traffic evidence at trial.

---

[15] Alternatively, the district court concluded that any purported impacts from increased commuter traffic by *non-residents* of Section 16 was not relevant to the discrete issue for trial. [E.R. 16-17]

[16] The district court also found that the increased traffic would not: (a) unreasonably burden the Community lands immediately surrounding Section 16 since those lands are either "either agricultural or undeveloped"; or (b) cause any unreasonable inconveniences to irrigation operators in the vicinity of Section 16. [E.R. 19-20]

B. The District Court Correctly Disregarded Evidence Concerning Alleged Impacts to the Community's Fire and Police Resources

The Community argues (at 54) that the district court wrongly disregarded evidence that residential development of Section 16 may increase the burden on the Community's police and fire departments. Not so. Nothing in the legal standard concerning the scope of an easement requires consideration of impact to government-provided services. The standard instead focuses on whether a proposed easement use causes unreasonable damage to or interference with the enjoyment of the servient *land*. Restatement § 4.10. [*See also* E.R. 21 ("Any inquiry into the Community's enjoyment of the servient estate must concern enjoyment of the *land*.")]

As the district court explained, the Community's provision of police and fire services "is distinct from the Community's role as landowner" because "these services would continue even if the Community owned none of the land within the Reservation." [E.R. 20-21] The district court further recognized that the scope of an easement is determined "by the circumstances surrounding its creation," not "by whether the present owner of the servient estate is a governmental entity with public service obligations." [E.R. 21; *see also* Restatement § 4.1(1) ("A servitude should be interpreted to give effect to . . . the circumstances surrounding creation of the servitude.")] The Community cites no authority to the contrary.[17]

Regardless, even if the district court had considered evidence concerning the Community's police and fire resources, this would have made no difference to the district court's ultimate conclusion in favor of the Trustee. The evidence at trial did not establish any *unreasonable* impacts to the Community's police and fire departments from development of Section 16 at existing zoning, but instead

[17] The Community instead cites (at 55) *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), a decision which has nothing to do with easements.

showed that: (a) "the Community's police and fire departments have no obligation to serve Section 16," (E.R. 6); (b) the only witness from the Community's police department did *not* provide credible trial testimony (E.R. 20 n.12); (c) Casa Blanca Road *already* connects busy highways and is used by "cut-through traffic," (E.R. 16); and (d) the Community plans to add another interchange in District 5 at the I-10 highway, "with perhaps 22,000 vehicles per day using the interchange," despite the potential impact on its police and fire departments. [E.R. 19]

Because the Community's evidence would not have changed the end result, this Court should affirm. *See Elmore v. Colvin*, 617 F. App'x 755, 758 (9th Cir. 2015) (affirming decision by administrative law judge after concluding that ALJ committed harmless error in disregarding testimony of lay witness); *see also United States v. Moran*, 493 F.3d 1002, 1014 (9th Cir. 2007) (exclusion of evidence at bench trial reviewed under harmless error standard).

C. The District Court Did Not Shift the Burden of Proof at Trial to the Community

Before trial, the Community submitted a lengthy list of proposed factual findings relating to purported impacts from increased traffic. [S.E.R. 5-19] The Community failed, however, to offer any evidence at trial to support many of these alleged impacts and, thus, the district court did not include them in its post-trial decision. From this outcome, the Community concludes (at 55) that the district court forced it to bear the burden of proof at trial. The argument has no merit because, as stated above, the district court should have imposed the burden of proof at trial on the Community rather than the Trustee. *See Shooting Point*, 576 S.E.2d at 502; *Weeks*, 941 So.2d at 271-72; *Logan*, 631 P.2d at 432.

Additionally, the Community's argument that the district court forced it to bear the burden of proof at trial is factually incorrect. In its post-trial order, the district court discussed at length the trial evidence offered by the Trustee that

proved that the traffic generated by residential development of Section 16 at existing zoning will not unreasonably burden the Community's land. [*See* E.R. 16-21]

The Community asserts (at 55) that the district court required it to prove that speeding on Reservation roads will endanger Community residents. In fact, the district court concluded that this purported threat did not exist because the Community's use of "very low speed limits" already provides an adequate safeguard against speeding. [E.R. 18]

The Community also contends (at 55) that the district court required it to prove that increased traffic to and from Section 16 would result in vandalism or pollution of the Community's irrigation facilities. In fact, the district court concluded that the Trustee would have to pay for any necessary safety improvements to the irrigation facilities, "including the possible installation of fences as necessary to prevent trespassers." [E.R. 20] The record evidence thus did not support the Community's concerns about vandalism or pollution. [*Id*.]

Conclusion

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: March 4, 2016

PERKINS COIE LLP

By: s/ Paul F. Eckstein
Paul F. Eckstein
Richard M. Lorenzen
Joel W. Nomkin
Alexis E. Danneman

SNELL & WILMER
Colin P. Ahler

Attorneys for Appellee

Certificate of Compliance

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached answering brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 13,691 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated: March 4, 2016

PERKINS COIE LLP

By: s/ Paul F. Eckstein
Paul F. Eckstein
Richard M. Lorenzen
Joel W. Nomkin
Alexis E. Danneman

SNELL & WILMER
Colin P. Ahler

Attorneys for Appellee

Statement of Related Cases

Pursuant to Circuit Rule 28-2.6, the Appellee is not presently aware of any related cases, as defined in subparts (a) through (d) of said Circuit Rule.

Dated: March 4, 2016

PERKINS COIE LLP

By: s/ Paul F. Eckstein
Paul F. Eckstein
Richard M. Lorenzen
Joel W. Nomkin
Alexis E. Danneman

SNELL & WILMER
Colin P. Ahler

Attorneys for Appellee

Certificate of Service

I hereby certify that I electronically filed the foregoing APPELLEE'S ANSWERING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 4, 2016

PERKINS COIE LLP

By: s/ Paul F. Eckstein
Paul F. Eckstein
Richard M. Lorenzen
Joel W. Nomkin
Alexis E. Danneman

SNELL & WILMER
Colin P. Ahler

Attorneys for Appellee