SLOVAK, BARON, EMPEY, MURPHY & PINKNEY LLP
Shaun M. Murphy, Esq. (CASB# 194965)
Katelyn K. Empey, Esq. (CASB# 292110)
1800 East Tahquitz Canyon Way
Palm Springs, California 92262
Telephone: (760) 322-2275
Fax: (760) 322-2107

In Association with:
MILES KOWALSKI, Deputy County Counsel (CASB# 257269)
JEAN-RENE BASLE, County Counsel (CASB# 134107)
385 North Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415-0140
Telephone: (909) 387-5455
Fax: (909) 387-3070
E-mail: Miles.Kowalski@cc.sbcounty.gov

Attorneys for Defendants, JOHN McMAHON & RONALD SINDELAR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE, *et al.*,

Plaintiffs,

vs.

JOHN McMAHON, *et al.*

Defendants.

Case No. 5:15-CV-01538-DMG (FFM)
[Case Assigned to: Hon. Dolly M. Gee, Courtroom 8C]

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT [FRCP 56]

Date: **June 30, 2017**
Time: **2:00 p.m.**
Location: **350 W. 1st St.**
Los Angeles, CA 90012
Courtroom 8C

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PLEASE TAKE NOTICE that on June 30, 2017, at 2:00 p.m., or as soon thereafter as counsel may be heard before the Honorable Dolly M. Gee, Judge Presiding, in the United States District Court, Courtroom 8C, 350 West 1st Street, Los Angeles, California, 90012, Defendants John McMahon and Ronald Sindelar ("Defendants") will move the Court pursuant to Federal Rules of Civil Procedure Rule 56 for summary judgment dismissing Plaintiff's complaint in its entirety. In the alternative, Defendants request partial summary judgment.

Defendants bring this motion on the grounds that Plaintiff cannot prove the necessary preliminary fact that Section 36, the land in question in this action, is within the boundaries of the Chemehuevi Indian Reservation or is "Indian Country" as defined in 18 U.S.C. 1151(a). Because the undisputed facts demonstrate that Plaintiff cannot prove an essential element of its causes of action, Defendants are entitled to judgment as a matter of law.

This Motion shall be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Statement of Uncontroverted Facts and Conclusions of Law; Defendants' Request for Judicial Notice, including exhibits; the Proposed Judgment; the alternative Proposed Order, all documents on file in this case, and any other evidence or oral argument as the Court may consider in connection with this Motion

This Motion is made following conference of counsel pursuant to Local Rule 7-3, which took place on Friday, May 26, 2017.

Dated: June 2, 2017 SLOVAK BARON EMPEY MURPHY & PINKNEY LLP

By: */s/ Shaun M. Murphy*
Shaun M. Murphy, Esq.
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants John McMahon and Ronald Sindelar ("Defendants") move for summary judgment on Plaintiffs' First Amended Complaint ("FAC") because Plaintiffs cannot establish an essential element of their causes of action. In the FAC, Plaintiffs bring causes of action for (1) Violation of P.L. 280 (Issuing Citations without Jurisdiction on Reservation Land); (2) Interference with Tribal Self-Government; (3) Preemption; and (4) Civil Rights Violation.

As the Court aptly points out in its August 16, 2016 Order, "**the likelihood of success on the merits of all of Plaintiffs' causes of action turns on the pivotal question: Is Section 36 within the boundaries of the Chemehuevi Tribe's Reservation?**" (Order, at p. 4 [Doc #51]) (emphasis added.). It cannot legitimately be disputed that Section 36 is not part of the Reservation. Section 36 is also not landlocked within the continuous boundaries of the Reservation to be considered "Indian Country." Consequently, Plaintiff's entire FAC fails, and Defendants are entitled to judgment as a matter of law.

II. FACTUAL BACKGROUND

The central historical events involving the Chemehuevi Indian Reservation are not in dispute. On March 3, 1853, Congress passed the "Act of March 3, 1853" ("***March 3, 1853 Act***") providing that all public lands within the State of California shall be subject to preemption by individuals living on federal land under the Act of 1841, *except those Sections sixteen (16) and thirty-six (36) which were conveyed to the State of California for the purpose of public schools.* (10 Stat. 244, ch. 145, § 6.)

The March 3, 1853 Act provided that "this act shall not be construed to authorize settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same"; ***however, it did not establish the boundaries of the Reservation.*** (*Ibid*; See

Defendants' Statement of Uncontroverted Facts and Conclusions of Law ("SS"), # 1.) On July 23, 1866, Congress passed the "Act of July 23, 1866" (***"July 23, 1866 Act"***) quieting title in Sections 16 and Sections 36 to the State of California. (14 Stat. 218, Ch. 219.)

Congress subsequently passed "An Act for the Relief of the Mission Indians of the State of California" ("***MIRA***"), on January 12, 1891, authorizing the Secretary of the Interior to appoint three disinterested persons as commissioners to select a reservation for each band or village of Mission Indians residing in California. (26 Stat. 712, ch. 65, § 1; SS#2) Thus, as of January 12, 1891, the boundaries of the Chemehuevi Indian Reservation had not yet been established.

MIRA provides that the reservations "shall include, ***as far as practicable***, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient to the extent to meet their just requirements, ***which selections shall be valid when approved*** by the President and the Secretary of the Interior." (*Id.* at § 2) [Emphasis added.] The commissioners were then to report the results to the Secretary of the Interior, who, "if no valid objection exists, ***shall cause a patent to issue for each of the reservations selected***... *Provided,* That ***no patent shall embrace any tract or tracts to which existing valid rights have been attached*** in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the [same]." (*Id.* at § 3 [Emphasis added]; SS# 3.)

The Commission submitted its report to the Secretary of the Interior on December 7, 1891, which was approved by the Secretary of the Interior and the President on December 29, 1891. The report did not contain a selection of the Reservation for the Tribe, and no patent was issued at that time. (*See* Office of the Solicitor's Opinion dated August 20, 1990, regarding Chemehuevi Request

for Trust Patent ("***Solicitor Opinion***") (*See* Defendants' Request for Judicial Notice, Exh. A).

Following the issuance of the Report, the Secretary of the Interior sent a letter to the Senate Committee on Indian Affairs outlining the Bureau of Indian Affairs' ("***BIA***") concerns that some tribes may not have received all of their land. Despite these concerns, legislation was not enacted at that time. (*Ibid.*) Before any action was taken to establish the boundaries of the Chemehuevi Indian Reservation, the ceding of the land within Section 36 to the State of California was finalized on July 10, 1895. (SS#5; *See* Defendants' Request for Judicial Notice, Exh. B (Certified Copy of July 10, 1895 Land Survey ceding Section 36 to State of California ("***Land Survey***").)

On December 27, 1906 and January 3, 1907, C.E. Kelsey, Special Agent for the California Indians, sent letters to the Commissioner of Indian Affairs reporting on the lands not yet added to the Mission Indian reservations, recommending that lands listed be formally added to the Reservation (collectively "***Kelsey Report***"). (*See* Defendants' Request for Judicial Notice, Exhs. C and D.)

On January 31, 1907, the Commissioner of Indian Affairs sent a letter to the Secretary of Interior requesting the lands listed in the Kelsey Report be withdrawn from settlement and entry pending action by Congress authorizing the addition. (*See* Defendants' Request for Judicial Notice, Exh. E.) Following this letter, the Secretary of Interior issued an Order on February 2, 1907, to the General Land Office recommending that the lands be withdrawn from settlement ("***February 2, 1907 Order***"). (SS# 8.) The Order contained a proposed draft of the bill to Congress to authorize such addition. (*See* February 2, 1907, Order as attached to Declaration of June Levias in Support of Plaintiffs' Application for TRO/Preliminary Injunction as Exhibit *"A"*. A certified copy of the February 2, 1907 Order was lodged with the Court on April 12, 2016.)

Following the February 2, 1907, Order on March 1, 1907, Congress enacted "An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, for Fulfilling Treaty Stipulations with Various Indian Tribes, and for Other Purposes, for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight" ("***Appropriations Act***"). (34 Stat. 1015, 1022-1023.) The Appropriations Act amended MIRA to "authorize the Secretary of the Interior to select, set apart, and ***cause to be patented*** to the Mission Indians such tracts of public lands of the United States, in the State of California, as he shall find upon investigation to have been in the occupation and possession of the several bands or villages of Mission Indians, and are now required and needed by them, and which were not selected for them by the Commission…*Provided*, That ***no patent issued under the provisions of this Act shall embrace any tract or tracts to which valid existing rights have attached*** in favor of any person under any of the United States laws providing for the disposition of the public domain…" (*Id.* [Emphasis added]; SS# 6,7.)

Following the enactment of the Appropriations Act, the Department of Interior "investigated" the status of certain land withdrawn pursuant to the February 2, 1907, Order. Although additional action was taken with regard to land for the Chemehuevi living at 29 Palms, no further action was taken with regard to the land withdrawn by the Colorado River.[1]

The Bureau of Land Management ("***BLM***") did not take action until June 28, 2010, at which time it issued a trust patent for the Chemehuevi Tribe. (SS#10.) The trust patent includes lands that were withdrawn for the Tribe's benefit in the 1907 Secretarial Order, *subject to exclusions of specific federal and*

[1] According to the Office of the Solicitor, no trust patent was issued to the Tribe pursuant to MIRA because the Chemehuevi are not Mission Indians. However, Congress considers them as such and therefore, they are covered by MIRA, as amended. (*See* Office of the Solicitor's Opinion dated August 20, 1990, regarding Chemehuevi Request for Trust Patent.)

private-owned lands and other valid existing rights associated with patented lands. The trust patent states in pertinent part:

> WHEREAS, there has been deposited in the Bureau of Land Management an order of the Secretary of the Interior dated February 2, 1907, withdrawing from settlement and entry the following described land…and…
>
> WHEREAS, an Order of the Authorized Officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that, pursuant to the Act of January 12, 1891 (26 Stat. 712), as amended by the Act of March 1, 1907 (34 Stat. 1015), and other acts, a trust patent issue to the Chemehuevi Tribe of Mission Indians ("Tribe") for the above described lands ***excluding…***
>
> 3. ***Those lands granted to the State of California as school sections on July 10, 1895, located in sec. 36, T. 4 N., R. 25 E and sec. 36, T. 5 N., R. 24 E…*** (*See* Defendants' Request for Judicial Notice, Exh. F (United States Department of Interior, Bureau of Land Management Trust Patent to the Chemehuevi Indians dated June 28, 2010).) [Emphasis added.]

Thus, Section 36 was *expressly excluded* from the patent because it never was included within the boundaries of the Reservation. The land held by the United States in trust for the Tribe does not include Section 36.

III. LEGAL ARGUMENT

A. Standard for Granting Summary Judgment

Federal Rule of Civil Procedure ("FRCP") Rule 56 provides in pertinent part that: "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact that the movant is entitled to judgment as a matter of law…" A moving party without the ultimate burden of persuasion at trial - usually, but not always, a defendant - has both the initial burden of

production and the ultimate burden of persuasion on a motion for summary judgment. (*Nissan Fire & Marine Ins. Co. v. Fritz Cos.* (9th Cir. 2000) 210 F.3d 1099, 1102 (10A C. Wright, A. Miller and M. Kane, Federal Practice and Procedure § 2727 (3rd ed. 1998).) In order to carry its burden of production, the moving party must produce either evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. (*Id.*) In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact. (*Id.*)

If the moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. (*Id.* citing *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. (See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").)

B. Section 36 Is Not Within the Boundaries of the Reservation

In order to prevail on the merits of their claims, Plaintiffs must show that Defendants exceeded their jurisdiction in citing and prosecuting traffic citations against Tribal members that occurred within Section 36.[1] In order to do so, Plaintiffs must present evidence establishing the preliminary fact that Section 36 is within the boundaries of the Chemehuevi Indian Reservation, such that the

[1] Although one citation was issued outside of Section 36, the violation itself occurred within Section 36.

County Officials do not have jurisdiction over those claims. The uncontroverted facts in this case negate such a conclusion.

To establish an Indian Reservation pursuant to MIRA or Appropriations Act (the relevant acts in this case) was a twostep-process. First, the Secretary had to select and set aside the designated land; second, the Secretary was required to issue a trust patent. (The MIRA provided that the Secretary "***shall cause a patent to issue for each of the reservations selected***..." Similarly, the Appropriations Act authorized the Secretary to "select, set apart, and ***cause to be patented***" land for the Mission Indians.) In this case, although certain lands were identified, the Secretary did not issue the patent to the Tribe. (SS# 9.) The patent was not issued until 2010 by the BLM, which expressly excluded Section 36. (SS# 10, 11.)

A similar issue was presented in *Pechanga Band of Mission Indians v. Kacor Realty, Inc.* (680 F.2d 71 (9th Cir. 1982)). The Pechanga tribe claimed that the reservation included 320 acres of undeveloped land in Riverside County, California, to which the defendants held title. The trial court entered summary judgment against the tribe, and the tribe appealed. The Court of Appeal affirmed the ruling, holding that the Federal Government did not grant the land to the tribe. In so holding, the court found that "...the Secretary had to issue a patent to the land [under the MIRA] in order to include it in the reservation." (*Id.* at 75.) Because the record was "unambiguous that [the Secretary] purposefully elected not to take this final step [to issue the patent]" the court "cannot speculate whether the Secretary would have preferred in the abstract to grant the land to [the tribe.]" (*Ibid.*)

As established in *Pechanga Band of Mission Indians*, 680 F.2d at 75, creation of an Indian reservation under MIRA was not self-executing. If the Secretary did not issue a trust patent under MIRA to include certain land within a reservation, that land was not included in a reservation. As such, the Chemehuevi

Indian Reservation was not lawfully established until the BLM issued the Trust Patent establishing the boundaries of the reservation.

Here, it is uncontroverted that a patent was not issued until June 28, 2010. At that time, Section 36 was already privately owned in fee by County residents. As such, the trust patent specifically excludes "[t]***hose lands granted to the State of California as school sections on July 10, 1895, located in sec. 36, T. 4 N., R. 25 E and sec. 36, T. 5 N., R. 24 E…*** (Trust Patent)[Emphasis added.]

Plaintiffs seek to, but may not rely on the Secretary's order recommending that the land be withdrawn from settlement. The Order, by itself, did not establish the boundaries of the Reservation. The Secretarial Order states only that certain lands were withdrawn until further notice. The order further makes the land designation contingent on the passage of legislation by Congress. The "until further notice" reference suggests that lands may be added or withdrawn until final approval.

Moreover, even if the Secretary could have established the boundaries of the Reservation without a patent, Section 36 was not subject to Congress' power of disposition, and therefore could not have been included in the Reservation. The MIRA and Appropriations Act expressly provided "that no patent shall embrace any tract or tracts to which existing valid rights have *been attached.*"

Because Section 36 had already been surveyed and granted to the State prior to the Secretarial Order, Congress—and thus the Secretary—could not include this land in the Reservation, even if so intended. (*See U.S. v. Southern Pac. Transp. Co.* 601 F.2d 1059, 1067 (9th Cir. 1979) (Where inapposite facts were at issue, with the court finding that Congress has the power of disposition up until the point of survey, which had not occurred. It stated the principle that "[t]he State's right to school grant lands does not vest until the lands have been surveyed. Until that time, the land remains subject to Congress' power of disposition").)

Section 36 was surveyed in 1895. (SS#5.) Thus, by express provisions of the applicable statutes it was excluded from any subsequently created reservation. Section 36 is therefore not within the boundaries of the Reservation. That explains why in 2010 it was expressly excluded from the boundaries established by the BLM.

C. Section 36 Is Not Landlocked By the Reservation

Additionally, Section 36 is not landlocked by the Reservation such that it is "Indian County". Under 18 U.S.C. 1151, "Indian County" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not be extinguished, including rights-of-way running through the same.

Here, it is not seriously disputed that Section 36 is owned by private parties, not the Tribe or the federal government in trust for the Tribe, and is not a dependent Indian community or allotted land. Consequently, it does not fall within section (b) or (c) above. Moreover, because the Trust Patent issued to the Tribe on June 28, 2010, specifically excludes Section 36, Section 36 is not, nor has it ever been, part of the Chemehuevi Indian Reservation. (SS#11.) For Section 36 to be "Indian County," it must be or have been—at one point in time—located "within the limits of [the] Indian reservation." The uncontroverted facts in this case establish that it was not.

In construing the phrase "within the limits" of the Reservation, courts have found that "[i]f the lands in question are within a continuing 'reservation,' jurisdiction is in the Tribe and the Federal Government 'notwithstanding the

issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation.' 18 U. S. C. § 1151 (a). ***On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.***'" (*DeCoteau v. District County Court*, 420 U.S. 425, 427 fn. 2 (1975) (emphasis added.) The purpose of this provision is to avoid an "impractical pattern of checkerboard jurisdiction." (*Id.* at 468.)

Here, Section 36 is not within the boundaries of a continuing reservation, and thus, no checkerboard jurisdiction is created. (SS#12.) To the contrary, Section 36 is bordered on its south side not by reservation property, but by Bureau of Reclamation land managed by the Bureau of Land Management. In fact, although Defendants dispute that the Grazing Map submitted by Plaintiffs is evidence of the true Reservation boundaries; that map shows the land bordering Section 36 to the south is not within the Reservation. (Pltfs Third Suppl., Declaration of Stan Webb, Exh. A, B [Doc #45-2].) Because it is not landlocked, the concern about an impractical pattern of checkerboard jurisdiction is not present. Section 36 is not part of the Chemehuevi Indian Reservation, and because the land bordering the south of Section 36 is not part of the Chemehuevi Indian Reservation, Section 36 does not fall within "Indian Country."

D. Plaintiffs Cannot Succeed on their §1983 Causes of Action

Finally, Plaintiffs cannot present any admissible evidence whatsoever in support of their contention that the conduct of Deputy Sindelar was racially-motivated or that Defendants otherwise failed to have probable cause to stop and/or issue the citations in question. Plaintiffs conclude, without any factual support, that the conduct in question constitutes "racially-motivated discriminatory practices." However, all stops were made with probable cause,

and all citations issued for legitimate vehicle code violations. Other than the conclusory allegation that the practices were racially motivated, Plaintiffs have presented no factual evidence supporting this proposition.

Moreover, Plaintiffs contentions are based on the improper conclusion that Deputy Sindelar is exceeding the boundaries of his authority by improperly citing tribal members on land within the boundaries of the Reservation. However, because Section 36 is not within the boundaries of the Reservation, this conclusion fails, as does the claim based thereon.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request the Court grant its Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment.

Date: June 2, 2017

SLOVAK BARON EMPEY MURPHY & PINKNEY LLP

By: */s/ Shaun M. Murphy*
Shaun M. Murphy, Esq.
Attorney for Defendants

CERTIFICATE OF CONFERENCE

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on Friday, May 26, 2017.

/s/ Shaun M. Murphy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 2, 2017, a true and correct copy of the foregoing DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT [FRCP 56] was served on Plaintiffs in accordance with the Federal Rules of Civil Procedure.

By: */s/ Shaun M. Murphy*
Shaun M. Murphy