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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE, on its own behalf and on behalf of its members *parens patriae*, CHELSEA LYNN BUNIM, TOMMIE ROBERT OCHOA, JASMINE SANSOUCIE, and NAOMI LOPEZ,

Plaintiffs,

v.

JOHN McMAHON, in his official capacity as Sheriff of San Bernardino County, RONALD SINDELAR, in his official capacity as Deputy Sheriff for San Bernardino County, MICHAEL RAMOS, in his official capacity as the District Attorney of San Bernardino County, JEAN RENE BASLE, in his official capacity as County Counsel for San Bernardino County, and MILES KOWALSKI, in his official capacity as Deputy County Counsel for San Bernardino County,

Defendants.

Case No. 5:15-cv-01538-DMG-FFM

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: June 30, 2017
Time: 2:00 p.m.
Courtroom 8C, 8th Floor
Before the Honorable Dolly M. Gee

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INTRODUCTION

This case requires the Court to engage in an exercise in statutory interpretation that must be carried out against the background of executive and congressional actions that established and continuously recognized the existence of the Chemehuevi Indian Reservation for more than 100 years. The Court is compelled to interpret the Act of March 1, 1853, 10 Stat. 244 (1853) ("1853 Act"), the Mission Indian Relief Act, 24 Stat. 714 (1891) ("MIRA"), the amendments to the Mission Indian Relief Act, 34 Stat. 1055 (1907) ("AMIRA"), and the Parker Dam Act, 54 Stat. 744 (1940) ("Parker Dam Act"). These statutes set aside land for Indian tribes throughout the country, authorized federal officials to identify and establish the boundaries of the lands to be reserved for Mission Indians in California, including the Chemehuevis, and reclaimed some of the Chemehuevi Indian Reservation ("Reservation"), while not changing the boundaries of the Reservation. Federal officials carried out the will of Congress expressed in these statutes by issuing orders that defined the boundaries of the Reservation, reclaimed reservation land needed for the creation of the Parker Dam, Lake Havasu, and the Havasu Wildlife Refuge, and maintained a government-to-government relationship with the Chemehuevis living on their Reservation since 1853.

Defendants' ("County Officials") shifting position on why the Court should not conclude that Section 36 is within the boundaries of the Reservation requires the Court to interpret these statutes in a manner that conflicts with the plain wording of the statutes, the congressional intent in enacting these statutes, and the understanding of the federal government and numerous courts, including the Supreme Court of the United States, as to the effect of such statutes. In this brief, plaintiffs, the Chemehuevi Indian Tribe and individually named Indians (collectively, the "Tribe") will demonstrate, again, that the County Officials' argument that the Reservation was not established until

2010 and that its boundaries were not established by the 1907 Secretarial Order conflicts with the applicable law and the undisputed facts in this case.[1]

ARGUMENT

I.

THE ACT OF 1853 RECOGNIZED THE TRIBE'S ABORIGINAL TITLE TO SECTION 36 AND CREATED THE CHEMEHUEVI INDIAN RESERVATION.

The relevant provisions of the Act of March 3, 1853, 10 Stat. 244, are contained in Section 6 of the Act and provide as follows:

> That all of the public lands within the State of California, . . . with the exception of sections sixteen and thirty-six, . . . which shall be and hereby are granted to the State for the purposes of public schools . . .
>
> * * * *
>
> And provided further, that **this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe**, or grant any preemption right to the same.
>
> * * * *
>
> . . . or where such sections [sixteen and thirty-six] may be **reserved for public uses** . . . other land **shall** be selected by the proper authorities of the State in lieu thereof . . .

10 Stat. 246-247 (emphasis added).

The County Officials allege that the above language conveyed Section 36 within the Reservation to the State of California ("State") prior to the issuance of the 1907 Order of the Secretary of the Interior ("1907 Order"), created no reservation for the

[1] In Defendants' Opposition ("Opposition"), the County Officials make a number of arguments that are identical to arguments made in their motion for summary judgment. To the extent that the Tribe has already responded to those arguments, the Tribe incorporates its response herein by this reference as if set forth here in full.

Tribe, and prohibited the Secretary of the Interior ("Secretary") from withdrawing Section 36 for the Tribe's use in the 1907 Order. Opposition, pp. 2-5.[2]

The Tribe, on the other hand, asserts that because the Tribe was occupying and using Section 36 on March 3, 1853, Section 6 of the 1853 Act recognized the Tribe's aboriginal title to Section 36, created the Reservation, prohibited the United States from conveying Section 36 to the State for school purposes, required the State to select in lieu lands in place of Section 36 or, in the alternative, if the conveyance of Section 36 was valid to the State, subjected the State's title to the aboriginal Indian title of the Tribe.

The question is, therefore, whose interpretation of Section 6 of the 1853 Act is correct? The County's or the Tribe's?

It is well settled that land used and occupied by an Indian tribe is subject to the Tribe's aboriginal title and can only be extinguished by an act of Congress pursuant to the provisions of the Indian Non-Intercourse Act, 25 U.S.C § 177.

> By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. [citation omitted] The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land **or otherwise terminate aboriginal title without the consent of the sovereign** [the United States].

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233 (1985)("*Oneida*") (emphasis added).

[2] Interestingly, the County Officials do not cite one single case in support of their position, but instead, rely solely on the wording contained in Section 6, cited above.

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

Spalding v. Chandler, 160 U.S. 394, 402-403 (1896).

It is also well established that, at the time of the enactment of the 1853 Act, the Chemehuevis were using and occupying the lands designated in the 1907 Order, including Section 36. *Chemehuevi Tribe of Indians v. United States of America,* 14 Ind. Cl. Comm. 651, 653-654 and 674-675 (1965). *See also*, Letter from Special Agent C.E. Kelsey to Commissioner of Indian Affairs dated January 3, 1907 ("Kelsey Report"), Exhibit D to Defendants Opposition to Plaintiffs' Motion for Preliminary Injunction.

Thus, the effect of Section 6 of the Act of 1853 was to recognize the aboriginal title of the Chemehuevi and to reserve and set aside the land they were occupying from "settlement" by any non-Indians.

The language prohibiting "any settlement to be made on any tract of land in the occupation and possession of" the Chemehuevi was sufficient to create a reservation.

> Now in order to create a reservation, it is not necessary that there should be a formal cession or a formal act **setting apart a particular tract**. It is enough that from what has been done, there results a certain defined tract appropriated to certain purposes. Here, the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902) (emphasis added).

The 1853 Act set apart for the Chemehuevis use of the lands that were actually in the occupation and use of the Tribe in 1853. Although the 1853 Act did not specifically define the exterior boundaries of the lands occupied by the Tribe, it did formally recognize the Tribe's aboriginal or Indian title to the land, including Section 36.

Recognition of the Tribe's aboriginal title in the 1853 Act had two consequences. First, it invalidated the conveyance of Section 36 to the State for school purposes since the land was "reserved" for a "public use": the use and occupancy of the Tribe. Second, it subjected whatever title the State received to Section 36 to the Tribe's Indian title that had not been extinguished by the United States but was expressly reserved by Section 6 of the 1853 Act ["this act shall not be construed to authorize any settlement to be made of any tract of land in the occupation or possession of" the Tribe].

In *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) ("*Hitchcock*"), the Supreme Court addressed this very issue of the effect of Indian title on Section 16 and 36 conveyances to a state and held that the United States conveyance of Section 36 to the State of Minnesota, authorized by an 1857 Act, which contained no language prohibiting "any settlement" on any land in the occupation of "any Indian tribe," was not available for selection by Minnesota. The court based its opinion on two principles: first, that it is not necessary to have "a formal cession or a formal act setting apart a particular tract" of land for Indians to establish Indian title to the land, *id.* at 390, and second, that the grant of Section 36 to the State of Minnesota was encumbered by the Chippewa's Indian title. *Id* at 391.

By excluding from preemption and selection for the purpose of aiding education in California "any tract of land in the occupation or possession of any Indian tribe" in the 1853 Act, Congress clearly intended that the Tribe should retain its right of occupancy or "Indian title," to the lands it was occupying on March 3, 1853, including

Section 36.[3] In California, the case for retention of Indian title is stronger than under the facts in *Hitchcock* since the explicit language of Section 6 of the 1853 Act was lacking in the congressionally enacted statute at issue in Minnesota. Thus, if the Chippewa retained Indian title on the facts in *Hitchcock,* the Chemehuevi most certainly retained Indian title to Section 36 in this case. *Id. See also*, *United States v. Santa Fe P.R. Co.* 314 U.S. 339 (1941) ("*Santa Fe*").

Clearly, this is a case of statutory construction with each of the parties interpreting the 1853 Act differently. However, the Tribe's interpretation is not contrary to the plain wording of the statute and the Supreme Court's decisions in *Oneida, Santa Fe,* and *Hitchcock.*

Since that portion of Section 6 of the 1853 Act dealing with a tribe's "occupation and possession" was enacted to benefit tribes, Section 6 must be construed in favor of the Tribe with all ambiguities in Section 6 of the 1853 Act being interpreted in the Tribe's favor. *Coyote Valley Band v. United States*, 639 F. Supp. 165 (E.D. Cal. 1986).

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[3] The County Officials argue, Opposition, pp. 2-3, that the phrase in Section 6 of the 1853 Act that prohibits "any settlement" on any land in the occupation of "any Indian tribe" applies only to patents issued to individuals under the federal preemption laws and not to grants to the State for school purposes. Such a strained interpretation is absurd. The very purpose of granting the State Section 36 was so the State could subdivide the Section and sell parcels of land within the Section to persons, organizations, and entities for entry and settlement to raise money to build schools within the State. It makes no sense that Congress would prohibit persons, organizations, and entities to do indirectly, through a purchase from the State, that which they could not do directly, acquisition or purchase from the United States. Moreover, the County Officials interpretation of the phrase flies in the face of the plain wording of Section 6 in the 1853 Act. The phrase contains two prohibitions: (1) "any settlement to be made on any tract of land" or (2) "grant any preemption right to the same." 24 Stat. at 246-247. If Congress wanted to limit the prohibition to individuals seeking title to the lands within Section 36 under the federal laws governing the acquisition of public lands, it would have been sufficient to prohibit "any preemption right to the same." But, Congress went beyond that. Congress prohibited "any settlement" then or in the future, including "any settlement" arising from a conveyance from the State.

The 1853 Act confirmed the Tribe's Indian title to Section 36 and reserved and set aside all of the lands occupied by the Tribe on March 3, 1853, including Section 36. The language of the 1853 Act, withdrawing from settlement all the lands occupied by the Tribe on March 3, 1853, therefore, created the Reservation and any title to Section 36 that the State received from the United States took subject to the Tribe's Indian title.

II.

THE 1907 ORDER ESTABLISHED THE BOUNDARIES OF THE RESERVATION AND THE SECRETARY HAD THE AUTHORITY TO INCLUDE SECTION 36 WITHIN THE RESERVATION BOUNDARIES.

Again, without citing to any case law to support its position, the County Officials argue that the Secretary did not have the authority to include Section 36 in the 1907 Order withdrawing the land for the Tribe because the land had already been patented to the State for school purposes. Opposition, p. 6. The County Officials fail to see the forest for the trees.

First, the County Officials fail to recognize that the 1853 Act specifically confirmed the Tribe's aboriginal or Indian title to Section 36. 24 Stat. 246-247.

Moreover, they fail to address the effects that the 1853 Act had on the United States' grant of Section 36 to the State. The 1853 Act either: (1) prohibited the conveyance of Section 36 to the State because the 1853 Act expressly reserved Section 36 for a "public use": the "occupation and possession" of the land by the Tribe, requiring the State to select in lieu lands or (2) the conveyance to the State of Section 36 took subject to the Tribe's Indian title.[4]

[4] At the time of the issuance of the 1907 Order, the Secretary was well aware of the fact that the Chemehuevi were occupying Section 36. Evidence of this fact is found in Kelsey's Report to the Commissioner of Indian Affairs in which Kelsey states that the lands presently comprising the Reservation, including Section 36, had been used and occupied exclusively by the Chemehuevi since primeval times. Exhibit D to Defendants' Request For Judicial Notice In Support Of Defendants' Motion For Summary Judgment; Or In the Alternative, For Partial Summary Judgment ("DRIN"), ECF page ID# 1262. Kelsey's Report was the very basis for the Commissioner's

> Basic to the present causes of action [with respect to the Hualapai] is the theory that the lands in question were the ancestral home of the Walapais, that such occupancy constituted "Indian title" within the meaning of § 2 of the 1866 Act, which the United States agreed to extinguish, and **that in absence of such extinguishment the grant to the railroad "conveyed" the fee subject to this right of occupancy**. *Buttz v. Northern Pacific Railroad,* 119 U.S. 55, 66.

Santa Fe, 314 U.S. at 344-345 (emphasis added).

In either event, the Secretary most certainly had the authority to withdraw from settlement and entry all of the lands designated in the 1907 Order that were in the occupation and possession of the Tribe and to which the Tribe's Indian title, including Section 36, had never been extinguished. *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-475 (1915); *Arizona v. California*, 373 U.S. 546, 598 (1963); *Minnesota v. Hitchcock*, 185 U.S. 373, 390-392 (1902). The 1907 Order, therefore, lawfully created the Reservation, established its boundaries, and included Section 36 within its boundaries.

III.
THE AMIRA CONFIRMED THE SECRETARY'S AUTHORITY TO ISSUE THE 1907 ORDER AND TO INCLUDE SECTION 36 WITHIN THE BOUNDARIES OF THE RESERVATION.

The AMIRA amended the MIRA:

> . . . to authorize the Secretary of the Interior to select, set apart, and cause to be patented to the Mission Indians such tracts of the 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 . . . of Mission Indians,** and are now required and need by

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recommendation that the Secretary issue the 1907 Order creating and establishing the boundaries of the Reservation. Exhibit E to DRIN, ECF page ID# 1274-1277.

> them . . . *Provided*, That no patent issued under the provision 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, unless such **person** shall . . . accept the appraisal provided for in this Act . . . and shall thereafter, upon demand and payment of such appraised value, execute a release of all claims and title thereto.

AMIRA, 34 Stat. 1015, at 1022-1023 (emphasis added).

From a review of the above language it is clear that the AMIRA did a number of things. First, it eliminated the requirement that the commission select the reservation lands and that the President and Secretary approve the selection; second, it placed a mandatory, non-discretionary duty on the Secretary to select those lands in the actual occupation and possession of the Tribe, and finally, it made it clear that a patent could not be issued for those lands the United States would take title to in trust for the Tribe, which were subject to a claim of "valid existing rights" in favor of any "person." *Id.* at 1023.

It is important to also emphasis what the AMIRA did not do. What the AMIRA did not do is amend the provisions of the MIRA that made the selection and setting aside of the land as a reservation for the Tribe "valid" upon the approval of the selection by the Secretary. MIRA, 24 Stat. at 712.

Taken together, the MIRA and the AMIRA expressly provide that the creation of the Reservation became immediately "valid when" the Secretary issued the 1907 Order, approving the withdrawal of the lands comprising the Reservation.

In addition, under the AMIRA the Secretary now had a mandatory duty to select the lands in the actual "occupation" of the Chemehuevi as the Secretary "**shall** find upon investigation to have been in the occupation and possession" of the Tribe. Based upon Kelsey's Report the Secretary had evidence that the lands comprising the 1907 Order, including Section 36, were under the actual occupation of the Tribe. Thus, given

the mandatory selection criteria contained in AMIRA, the Secretary not only had the authority, but the duty, to include Section 36 within the boundaries of the Reservation. For this reason, the Secretary issued the 1907 Order formally creating the Reservation and establishing its boundaries.

The MIRA and AMIRA also imposed upon the Secretary a further duty to issue a deed or "trust patent" to the Tribe for the lands owned by the United States of America in trust for the Tribe within the boundaries of the Reservation. The purpose of the issuance of the trust patent was not to create the Reservation or establish its boundaries, since the plain language of the MIRA made it clear that the Reservation and its boundaries were validity created and established upon the issuance of the 1907 Order, by the Secretary approving the selection. MIRA, 24 Stat. at 712

Instead, the purpose for issuing a trust patent was to identify the land within the boundaries of the Reservation that would be owned by the United States in trust for the Tribe, and which would be available in the future for allotting at the expiration of the twenty-five (25) year trust period. *Id*.

Finally, there is nothing in AMIRA that prohibited the Secretary from including Section 36 within the boundaries of the Reservation as set forth in the 1907 Order.

In support of their position that the Secretary had no authority to include Section 36 within the Reservation, the County Officials relied on the phrase in the AMIRA that prohibits the Secretary from including among the lands patented to the Tribe any lands "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…" The County Officials' reliance on this phrase is misplaced for a number of reasons. First, as the Tribe demonstrated in its Opposition to Defendants Motion for Summary Judgement; Or In The Alternative, For Partial Summary Judgment ("Tribe's Opposition"), the State is not a "person within the meaning of the MIRA or the AMIRA. Tribe's Opposition, p. 9. *See also, United States v. Cooper,* 312 U.S. 600 (1941). Second, the State, even if it was a "person" within the meaning of the AMIRA, which it is not, never acquired any "valid

existing rights" to Section 36 since the land at the time was reserved for a "public use": the occupation and use by the Tribe, and therefore, the State had a mandatory duty to select other lands in lieu of Section 36. Finally, since on March 3, 1853, Section 36 was not "public domain" land subject to disposition under the United States preemption laws, the prohibition did not apply to Section 36. *Hitchcock* at 391-392 (holding "only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant [of Section 36] is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy").

Given the parties' different positions regarding the interpretation of the AMIRA, as was the case regarding the interpretation of the 1853 Act, the meaning and effect of the AMIRA is a case of statutory construction. The County Officials interpret the AMIRA one way and the Tribe another. But because the AMIRA is a statute passed for benefit of Indian tribes and the Tribe's interpretation of the AMIRA is not clearly contrary to the plain wording of the AMIRA, the Court is required to adopt the Tribe's interpretation of the statute and hold that the State is not a person within the meaning of the AMIRA and that the AMIRA did not preclude the Secretary from including Section 36 within the boundaries of the Reservation established by the 1907 Order. *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Artichoke Joe's Grand Casino v. Norton*, 353 F.3d 712, 731 (9th Cir. 2003).[5]

[5] Also, since the Department of the Interior's interpretation of the effects of the 1907 Order are consistent with that of the Tribe's, the Department's interpretation is entitled to deference and is binding on this Court. *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)("*Chevron")*.

IV.

PECHANGA BAND V. KACOR REALTY DOES NOT STAND FOR THE PROPOSITION THAT THE ISSUANCE OF A TRUST PATENT IS NECESSARY TO ESTABLISH THE CHEMEHUEVI INDIAN RESERVATION OR ITS BOUNDARIES.

The County Officials cite a single case, *Pechanga Band v. Kacor Realty*, 680 F.2d 71 (9th Cir. 1982)("*Kacor*"), in support of their position that the Reservation was not created and its boundaries established until the United States issued a trust patent to the Tribe for its Reservation trust land in 2010. *Kacor* is clearly distinguishable on its facts from the present case and, therefore, does not support the County Officials position.

First, the Pechanga Reservation was established, disestablished, re-established, and reshaped causing the boundaries of the reservation to constantly change. *Id.* at 71. Here, the boundaries of the Reservation were fixed when the Secretary issued the 1907 Order. The Reservation and its boundaries have never been diminished, disestablished, re-established, or reshaped.

> It is also our opinion, however, that neither the United States acquisition of reservation lands for the Parker Dam and Reservoir project, nor the establishment of the Havasu National Wildlife Refuge, by Executive Order No. 8647 . . . altered or diminished the eastern boundary of the Chemehuevi Indian Reservation. As such, the lands within the reservation acquired by the United States remain Indian country.

Plaintiffs' Request For Judicial Notice, Exhibit H, p. 2. *See also,* David E. Lindgren, Authority of Secretary to Determine Equitable Title To Indian Lands, 1974 DOINA LEXIS 47.

Second, Pechanga's reservation in *Kacor* was not reserved or set aside pursuant to Section 6 of the 1853 Act. Here, Section 6 of the 1853 Act expressly recognized the Chemehuevis' Indian title of use and occupancy to Section 36, which, once recognized, could only be extinguished by Congress. *United States v. Santa Fe P.R. Co*, 314 U.S. at 344-345.

Third, in *Kacor*, the Secretary never included the parcel of land at issue within the boundaries of the reservation. Thus, the taking of the land into trust was necessary to make the land part of the reservation. *Kacor*, 680 F. 2d at 72 (holding "the Secretary had to issue a patent to the land in order to include it in the reservation"). In the present case, the Secretary specifically withdrew and included Section 36 within the boundaries of the Reservation in the 1907 Order. Therefore, the issuance of a patent taking title to Section 36 in the name of the United States in trust for the Tribe, was not necessary to make it part of the Reservation.

Fourth, the Pechanga reservation was created under the authority of the MIRA, which did not mandate that the Commission select land under the "actual occupation and possession" of the Pechanga. By contrast, the Chemehuevi Indian Reservation was created pursuant to the inherent authority of the President in anticipation of passage of the AMIRA, which, as subsequently enacted, required that the Secretary select those lands actually in the use and occupation of the Tribe. AMIRA, 34 Stat. at 1023.

Fifth, in *Kacor*, Congress never enacted legislation expressly recognizing the Pechanga reservation prior to the issuance of Pechanga's trust patent. Here, Congress enacted legislation recognizing the Reservation, as created by the 1907 Order, prior to the issuance of the 2010 Chemehuevi Trust Patent. In 1940, Congress passed the Parker Dam Act, 54 Stat. 744, which authorized the Secretary to acquire certain lands within the Reservation as was necessary to construct Parker Dam. Obviously, if the Reservation was not created by the 1907 Order, there would have been no need for Congress to acknowledge the existence of the Reservation or grant the Secretary the authority to acquire lands within the Reservation's boundaries in the Parker Dam Act.

Sixth, the Supreme Court of the United States never rendered a decision holding that the Pechanga reservation, including the excluded parcel at issue in the *Kacor* case, was lawfully created by the President's original June 27, 1882 Order. That is not the case here. In 1963, forty-seven (47) years before the 2010 Chemehuevi Trust Patent was

issued, the Supreme Court upheld the validity of the 1907 Order and held that the 1907 Order lawfully created the Reservation.

> We can give but short shift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. at 598.

Finally, the Department of the Interior never took a position in the *Kacor* case. Unlike *Kacor*, the Department of the Interior, the federal agency responsible for administering the MIRA, the 1907 Order, and the AMIRA, has consistently held that the 1907 Order lawfully created the Reservation, that the boundaries of the Reservation established by the 1907 Order were never diminished or disestablished, and that the issuance of the 2010 Trust Patent was not necessary to create the Reservation.

> We see no present legal impediment to issuing such a patent. On the other hand, we see no real need for the issuance of such a patent either . . . most Indian reservations have no title documents. The only evidence of title is an order creating or withdrawing land for the reservation and a notation in the GLO . . . or BIA records.
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> * * * *
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> Next, as noted above, the purpose of the trust patent was to divide the land and allot it to individual members of the band or village. . . . The allotment policy was repudiated by Congress in Section 1 of the Indian Reorganization Act (IRA). 25 U.S.C. 461. In addition, Section 2 of the IRA extended indefinitely all periods of trust-thus no fee patents have been issued. 25 U.S.C. 462. . . . Thus, the original purpose of the MIRA has been changed by history and subsequent legislation and issuance of a trust patent at this time will serve no real purpose.

Plaintiffs' Request For Judicial Notice, Exhibit B, pp. 4-5.[6]

> The application of this policy to the Chemehuevi Indians requires the Department to hold that the Indians' use and occupancy of the land which antedated the reclamation withdrawals and was subsequently reorganized by the order of February 2, 1907, reserving the land for the Indians, gives them interests in the land which are entitled to protection. The order was based specifically on Special Agent Kelsey's reports describing their long residence in Chemehuevi Valley and merely confirmed their use and occupancy. It did not create any new rights for the Indians. In view of the reclamation withdrawals it could not do so without the land being released from these withdrawals. In order to be regarded as effective, it must be considered, therefore, as having recognized and confirmed the Indians' prior rights of use and occupancy so as to preserve the lands from encroachment by settlers and to provide a basis for allotment in the future.

Margold, 57 I.D. 87 at 90.

> The Chemehuevi Reservation was established in 1907 on the ancestral homelands of the Chemehuevi Indians; it included "a deep low valley (made) by the Colorado River (which) has been occupied from time immemorial" by the Tribe.

Lindgren, 1974 DOINA LEXIS 47 at 48.

As demonstrated above, the facts of this case and the legal issues raised in this case are clearly distinguishable from those in *Kacor*. For this reason, *Kacor* is of no precedential value in this case and should not be considered by the Court.

[6] A final decision of the Department of the Interior interpreting the MIRA, 1907 Order, and the AMIRA is entitled to deference by this Court and unless the Department's interpretation is clearly contrary to the plain wording of the MIRA, 1907 Order, and AMIRA, it must be adopted by this Court. *Chevron*.

V.

SECTION 36 IS ALSO INDIAN COUNTRY BECAUSE IT QUALIFIES AS A DEPENDENT INDIAN COMMUNITY UNDER 18 U.S.C. § 1151(B).

In their Opposition, the County Officials argue that Section 36 is not Indian country because the Tribe's Reservation, including Section 36, does not meet the requirements to be considered a dependent Indian community under 18 U.S.C. § 1151(b) and the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*"). Without providing a detailed analysis of the statute or the case law interpreting the statute setting forth the relevant criteria, the County Officials summarily conclude that the Tribe's Reservation, including Section 36, does not qualify as a dependent Indian community because, "[a]s the land [is] predominately, if not completely, non-Indian, Section 36 does not meet this criteria." Opposition, p. 15. However, as the Tribe demonstrated in the Tribe's Opposition, pp. 13-16, Section 36, clearly meets the requirements to be considered a dependent Indian community, and therefore is Indian country, under 18 U.S.C. § 1151(b) and *Venetie*.

"A formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status." *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987) (internal citations omitted). When enacting 18 U.S.C. § 1151(b), Congress defined "Indian country" to include, not only all land within any Indian reservation's exterior boundaries, but also "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." 18 U.S.C. § 1151(b).

The statute does not define "dependent Indian communities." 18 U.S.C. § 1151(b). Because § 1151(a) "covers reservations," and § 1151(c) "covers trusts and restricted fee allotments," § 1151(b) "appears to cover land outside of those categories." Cohen's Handbook of Federal Indian Law § 3.04[2][c], at 193-94. In fact, § 1151(b) "is a codification of the Supreme Court's holding in *United States v. Sandoval*." American

Indian Law § 7.B, at 14, citing *United States v. Sandoval*, 231 U.S. 28 (1913)("*Sandoval*"). Compare 18 U.S.C. § 1151(b), with *Sandoval*, 231 U.S. at 46 ["[T]he United States . . . [has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State."].

In *Venetie*, the Supreme Court specifically established the elements of a dependent Indian community under 18 U.S.C. § 1151(b). *Venetie*, 522 U.S. at 526-31. Dependent Indian communities "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements -- first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id*. at 527. The Court's holding was based on its "conclusion that in enacting § 1151, Congress codified these two requirements, which previously we had held necessary for a finding of 'Indian country' generally." *Id*.

The Supreme Court then concluded:

> [I]n enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community" -- just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted. These requirements are reflected in the text of § 1151(b): The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.

Id. at 530-31 (emphasis in original).

Here, the Tribe meets both of the *Venetie* requirements. First, all of the land, including Section 36, was part of the Tribe's aboriginal territory reserved and set aside for the Tribe by the Act of March 1, 1853. Act of March 1, 1853, 10 Stat. 244, 246-247 [. . . "this Act shall not be construed' to authorize any settlement to be made on any land in the occupation or possession of an Indian tribe, or to grant any pre-exemption right to the same"]; *See also*, *Chemehuevi Indian Tribe v. United States*, 14 Ind. Cl. Comm. 651, 653-654 (Findings of Fact) (1965). Thus, the 1853 statute expressly recognized the Tribe's aboriginal title to Section 36 and that the conveyance by the United States of Section 36 to the State of California for school purposes took subject to the Tribe's aboriginal title or right of occupancy. *Oneida*; *Santa Fe*; *Hitchcock* [holding grants of Sections 16 and 36 "[were] of public lands," *id*. at 391, and therefore lands encumbered by Indian aboriginal title were not available for selection].

Second, Section 36 was expressly reserved and set aside for the Tribe by the 1907 Order. *See* 1907 Order [Section 36 was "withdrawn from all form of settlement or entry. . . ."].

Third, under the 2010 trust patent for the Reservation, the exclusion of Section 36 from the patent was "subject to any existing valid rights," including the Tribe's aboriginal title to Section 36. Finally, the Tribe has been under the continued superintendence of the United States since the issuance of the 1907 Order. *Arizona v. California*, 373 U.S. 546 (1963) [holding continued recognition by Congress and Executive of the Chemehuevi Reservation sufficient to find the Reservation was lawfully set aside and created]. It is immaterial to the dependent Indian community analysis whether the land within Section 36 has, since the 1907 Order, been sold to non-Indians. It was set aside by the Secretary for the Tribe and the Tribe has been under the federal superintendence of the federal government—meaning the Tribe has been a ward of the government—at least since 1907.

Thus, regardless of whether the 1907 Order created the Reservation, the lands set aside by the 1907 Order are a "dependent Indian community" and "Indian country," including Section 36.

CONCLUSION

In their conclusion, the County Officials assert that it is the Tribe that is at fault for opening a "very old and very deep wound" because the Tribe brought this litigation against the County—essentially stating that the Tribe was asking for it. This comment is unwarranted. Opposition, p. 16. The Tribe brought this litigation to put an end to the County Officials' practice of targeting Indians for alleged violations of the California Vehicle Code all over its Reservation, including some citations that occurred within Section 36. It was the County Officials, not the Tribe, that, after finally conceding the State did not have jurisdiction over the Tribe's Indian country, asserted that the Reservation was not lawfully established by the 1907 Order—a challenge to the very core of the Tribe's sovereignty. That is the wound that the County Officials are responsible for unnecessarily opening. And that is the wound that must be closed, once again, as it has before—with a finding that the 1907 Order lawfully created the Reservation and established its boundaries.

Dated: June 16, 2017

Respectfully Submitted,

RAPPORT AND MARSTON

By: /s/: Lester J. Marston
LESTER J. MARSTON
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Central District of California by using the CM/ECF system on June 16, 2017.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on June 16, 2017, at Ukiah, California.

/s/ Ericka Duncan
Ericka Duncan