No. 17-56791

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEMEHUEVI INDIAN TRIBE, ET AL.,

Plaintiffs-Appellants,

v.

JOHN MCMAHON, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Case No. 5:15-cv-01538-DMG-FFM
The Honorable Dolly M. Gee

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The Chemehuevi Indian Tribe and several of its members filed suit against San Bernardino County law enforcement officials in response to a concerted effort by those officials to enforce civil provisions of the California Vehicle Code against tribal members who were driving within the Tribe's Reservation. Through its complaint, the Tribe sought to stop the unlawful application of California's civil/regulatory laws to its members.

While the Tribe filed this lawsuit with the simple objective of stopping the unlawful application of state laws to its members, the litigation devolved into an unnecessary and irrelevant challenge to the Reservation's boundary. The District Court's decision ended up turning, in large part, on whether the Tribe's members occupied a particular section of the Reservation—Section 36—in 1853. This appeal can, nevertheless, be resolved by addressing a few basic facts and issues. Section 36 was expressly included within the Reservation as set forth in the February 2, 1907 Order of the Secretary of the Interior which established the boundaries of the Reservation. It is, therefore, Indian Country and the State's civil laws do not apply. The County law enforcement officials have no jurisdiction to issue civil/regulatory citations in Section 36 or any other part of the Reservation. The District Court's ruling must be reversed.

JURISDICTIONAL STATEMENT

1. The United States District Court for the Central District of California ("District Court") had jurisdiction over the claims of Appellants, the Chemehuevi Indian Tribe, Chelsea Lynn Bunim, Tommie Robert Ochoa, Jasmin Sansoucie, and Naomi Lopez (together, "Tribe") pursuant to:

(a) 28 U.S.C. § 1331, in that this action arises under the Constitution and laws of the United States, specifically Art. I, § 8, cl. 3, the 5th Amendment, the 14th Amendment, 42 U.S.C. § 1983, and 28 U.S.C. § 1651; and

(b) 28 U.S.C. § 1362, in that the Tribe is a federally recognized Indian tribe asserting that Appellees John McMahon and Ronald Sindelar's ("County Officials") actions or omissions violate the Constitution and laws of the United States, including federal common law.

2. The Court of Appeals has jurisdiction over this appeal based upon:

(a) 28 U.S.C. § 1291, in that the Tribes are appealing a final judgment of the District Court;

(b) On September 5, 2017, the District Court issued an order ("Order") denying the Tribe's motion for partial summary judgment and granting the County Official's motion for summary judgment, Excerpt of Record ("ER") 10-33;

(c) The District Court issued a final judgment in this case on September 5, 2017, ER 9;

(d) The District Court denied the Tribe's Amended Motion to Alter or Amend the Judgment filed pursuant to Fed. R. Civ. P. 59(e) ("Rule 59(e) Motion") on October 31, 2017, ER 1-8;

(e) The Tribe filed a notice of appeal on November 28, 2017, pursuant to Fed. R. App. P. 4(a)(4)(A)(iv). ER 117. The filing of the notice of appeal within thirty (30) days of the entry of the District Court's order denying the Tribe's Rule 59(e) motion was timely; and

(d) The Judgment issued pursuant to the District Court's Order constitutes a final judgment that disposed of all of the claims of all of the parties.

STATEMENT OF ISSUES

1. Is Section 36 "Indian Country," as defined by 18 U.S.C. § 1151 ("Section 1151"), since it was included within the legal description of the boundaries of the Chemehuevi Indian Reservation ("Reservation") as established by the Secretary of the Interior's ("Secretary") Order dated February 2, 1907 ("1907 Order")?

2. Did 25 U.S.C. § 398d prohibit the District Court from issuing its Order diminishing the boundaries of the Reservation?

3. Is the Department of the Interior's ("Department") determination that Section 36 is located within the boundaries of the Reservation entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)?

4. Did the County Officials have jurisdiction to enforce the Vehicle Code provisions at issue in this case against tribal members within the boundaries of the Reservation?

5. Did the District Court improperly exclude the Tribe's evidence relating to the occupation of Section 36 by Chemehuevis in 1853 and 1907 and fail to give proper weight to the Indian Claims Commission's findings concerning the Tribe's aboriginal title?

6. Did the District Court err by granting the County's motion for summary judgment ("MSJ") when there existed genuine disputes as to material facts relating to the Tribe's claims?

STATEMENT OF THE CASE

I. History of the Reservation

The Tribe is a federally recognized Indian tribe, organized under 25 U.S.C. § 476, pursuant to a written constitution that has been approved by the Secretary. ER 892. The Chemehuevi Constitution designates the Chemehuevi Tribal Council as the governing body of the Tribe. *Id*. The Tribe is the beneficial owner of the Reservation, which consists of approximately 32,487 acres of trust and fee land located in San Bernardino County ("County") in the State of California ("State"). *Id*. at 892-893. Since time immemorial, the Tribe has occupied and used the lands

within and adjacent to the Chemehuevi Valley, including all of the lands within the boundaries of the Reservation. ER 395.

On January 12, 1891, Congress enacted the Mission Indian Relief Act, 26 Stat. 712 ("MIRA"), which established a commission to select reservations for each band or village of the Mission Indians residing within the State. On or about March 3, 1905, pursuant to the Act of March 3, 1905, 33 Stat. 1408, 1058, C.E. Kelsey, ("Special Agent Kelsey"), was appointed special agent to the Commissioner of Indian Affairs ("Commissioner") for the purpose of reporting to the Commissioner on the condition of American Indians within the State. ER 286-320.

On December 27, 1906, January 3, 1907, and July 10, 1907, Special Agent Kelsey issued reports (the "Reports") on the condition of the members of the Tribe who resided on the lands in the Chemehuevi Valley along the Colorado River that currently comprise the Reservation. *See* ER 547-550; ER 551-567; and ER 263-266. In the Reports, Kelsey acknowledged that the Tribe had occupied the area along the Colorado River since time immemorial. Special Agent Kelsey, therefore, recommended, in the alternative, that the lands occupied by the Tribe be set aside and proclaimed as a separate reservation for the Tribe upon passage of a bill amending the MIRA.

Pursuant to the Reports, on January 31, 1907, the Acting Commissioner wrote to the Secretary requesting that the Secretary withdraw certain lands from settlement and entry for the use and occupancy of 12 separate bands of Mission Indians, including the Tribe. ER 886-890. In his letter, the Commissioner proposed setting aside the following lands for the Reservation: "Chemehuevi Valley. Fractional townships 4 N., R. 25 E., T, 4 N., R 26 E., T. 5 N., 25 E., 6 N., 25 E.; the ***E/2 of 5 N., R. 24 E***, and Secs. 25, 26, 35 and 36, T. 6 N., R. 24 E, S.B.M." (Emphasis added.) *Id*.

Pursuant to the Commissioner's recommendations, the Secretary issued the 1907 Order, directing the General Land Office to withdraw certain lands for the Chemehuevis. ER 578. In the 1907 Order, the Secretary stated:

> In view of the recommendation of the Indian office, I have to direct that the lands referred to be withdrawn from all form of settlement or entry until further notice, also that the local land officers of the District in which the said lands are located, be advised of such withdrawal. In this connection you are advised that the Department on the 31st ultimo forwarded to Congress, with favorable recommendation, the draft of a bill to authorize the addition of certain lands to the Mission Indian Reservations.

Id.

With the issuance of the 1907 Order, the Secretary established the exterior boundaries of the Reservation. ER 578. The 1907 Order expressly included within said boundaries the eastern half of Township 5 North, Range 24 East, which included Section 36 therein. ER 875-876.

On March 1, 1907, Congress amended the MIRA, 34 Stat. 1022-1023 ("MIRA Amendment"). The MIRA Amendment authorized the Secretary 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, as he shall find upon investigation to have been in the occupation and possession of the several bands or villages of Mission Indians.

The 1907 Order was recognized by a Decision of the Department of the Interior ("Department") (*see* 57 I.D. 87, 89 (1939)); by maps produced by the Bureau of Indian Affairs ("BIA")[1]; by Secretarial approval of the Tribe's Constitution; by a 1974 secretarial order restoring certain lands within the boundaries of the Reservation to the equitable ownership of the Tribe ("Restoration Order"), ER 388-393; and in countless other ways throughout the years, such as in requests for congressional appropriations, and Secretarial approvals of leases, loans, rights of way, etc.[2] Congress recognized the Reservation in the Parker Dam

[1] In 1931, the BIA produced two maps: (1) a grazing map of the Reservation, ER 137; and (2) a map entitled "Chemehuevi Valley Indian Reservation," ER 138, which both showed Section 36 within the boundaries of the Reservation as established by the 1907 Order.

[2] In 1992, the Solicitor's Office in Washington, D.C., issued a legal opinion concluding that the boundaries of the Reservation had not been diminished and still existed as originally created by the Secretary, pursuant to the 1907 Order. ER 400-402.

Act of July 8, 1940,[3] 54 Stat. 744 § 1 (1940) ("Dam Act") and, by reference thereto, in the Act of October 28, 1942. The Reservation has been recognized by the Indian Claims Commission, as evidenced by the final judgment entered in *Chemehuevi Indian Tribe v. United States of America*, 14 Ind. Cl. Com. 651 (1965)("*Chemehuevi v. U.S.*"). The Reservation has been recognized by the Supreme Court, as evidenced by *Arizona v. California*, 373 U.S. 546, 596 n. 100, 598 (1963). It has been recognized by the United States District Court for the Central District of California, as evidenced by the October 10, 1995, Statement of Uncontroverted Facts and Conclusion of Law, *United States v. Ron Jorgenson, et al.*, United States District Court Central District of California, Case No. CV-92-3809-TJH ("*Jorgenson*").

In 1956, the County prepared a map for its use in making application to the BIA for a right of way for the construction of the County Road, "Havasu Lake Road within the boundary of the Reservation." ER 378-386. On the map, the County designated Section 36 as being within the boundaries of the Reservation. *Id*.

[3] At the direction of the Department, the Metropolitan Water District ("MWD") prepared a map ("MWD Map") depicting those portions of the Reservation that were designated by the Secretary for taking, pursuant to the Act of July 8, 1940. ER 386-387.

On March 3, 1927, Congress enacted 25 U.S.C. § 398d, which prohibits changes in the boundaries of Indian reservations except reservations created by executive order by an act of Congress.

II. The Parties

John McMahon is the Sheriff of the County, Ross Tarangle is a Captain with the County's Sheriff Department, and both Ronald Sindelar and John Wagner are Deputy Sheriffs for the County.

Chelsea Lynn Bunim is a member of the Tribe. ER 913. On February 23, 2015, Deputy Sindelar issued Ms. Bunim a citation within Section 36 for violating California Vehicle Code § 4000 (a)(1), driving a vehicle without a valid registration. ER 914.

Tommie Robert Ochoa is a member of the Tribe. ER 920. On February 14, 2015, Deputy Sindelar issued Mr. Ochoa a citation, while Mr. Ochoa was driving on trust land within the Reservation, but not within Section 36, for violating California Vehicle Code Section 4000 (a)(1), driving a motor vehicle with an expired registration and California Vehicle Code Section 16028(A), failure to provide evidence of financial responsibility. ER 920-921.

Jasmine Sansoucie is a member of the Tribe. ER 909. On February 21, 2015, Deputy Sindelar issued Ms. Sansoucie a misdemeanor citation, within Section 36,

for a violation of California Vehicle Code Section 14601.1(A), driving a motor vehicle with a suspended license. ER 910.

Naomi Lopez is a member of the Tribe. ER 917. On May 1, 2015, Deputy Sheriff J. Wagner Deputy Wagner issued Ms. Lopez a citation on trust land within the Reservation, but not within Section 36, for a violation of California Vehicle Code Section 4000 (a)(1), driving without a valid registration.[4] ER 918.

III. The Proceedings Below

The Tribe filed its Amended Complaint for Declaratory and Injunctive Relief and for Money Damages on August 4, 2015. ER 933. On August 7, 2015, the Tribe filed its Application for Temporary Restraining Order and Motion for Order to Show Cause Re: Preliminary Injunction. *Id*. The County filed its answer to the amended complaint on August 28, 2015. ER 935. On February 5, 2016, the District Court ordered supplemental briefing and evidence on questions and concerns regarding standing, irreparable harm, and Fed. R. Civ. P. 19. *Id*. The Tribe filed its supplemental brief on February 11, 2016, and the County did the same on February 19, 2016. ER 936.

On March 3, 2016, the District Court issued an Order Re Stipulation to File Supplemental Briefs, and the Tribe filed another supplemental brief on March 2, 2016, on the limited topic of whether the June 28, 2010 Trust Patent issued by the

[4] The citations issued to the plaintiffs in this case are hereinafter referred to collectively as the "Citations."

Bureau of Land Management ("BLM") created the Reservation and established its boundaries. *Id*. The County filed its response to the Tribe's supplemental brief on March 9, 2016. *Id*.

On March 25, 2016, the District Court issued an order requesting supplemental information on the 1907 Order; the boundaries of the Reservation; and the July 10, 1895, grant of Section 36 to the State. ER 937. On April 4, 2016, the Tribe filed its response to the District Court's request for supplemental information. ER 938.

On August 16, 2016, the District Court issued an order granting the Tribe's motion for preliminary injunction. *Id*. On June 2, 2017, the Tribe filed its Notice of Motion and Motion for Partial Summary Judgment ("MPSJ"), the County filed its MSJ, and the parties filed a stipulation narrowing the issues in the case. ER 939; ER 534-537.

On June 29, 2017, the District Court issued an order requesting supplemental information as to the supporting declaration for the Tribe's exhibits 1-25, the Webb Declaration, the Realty Office Map (without the words "Grazing Map"), and deadlines and hearing date. ER 941. On July 5, 2017, the Tribe filed the Declarations of Lester J. Marston and Stan Webb in Response to Court Order Dated June 29, 2017. *Id*. On July 7, 2017, the District Court issued an order on clarification of prior request for supplemental information. ER 942-942. On July

10, 2017, the Tribe filed the Declaration of Lester J. Marston in Response to Court's Clarification of Prior Request for Supplemental Information Dated July 7, 2017. ER 942; ER 121-127.

On September 5, 2017, the District Court issued an order and judgment (collectively "Order") granting the County's MSJ and denying the Tribe's MPSJ. *Id*. On September 26, 2017, the Tribe filed its Rule 59(e) Motion. ER 943. On October 31, 2017, the District Court issued an order denying the Tribe's Rule 59(e) Motion ("Rule 59(e) Order"). *Id*.

The rulings presented for review are the District Court's Order, and the District Court's Rule 59(e) Order.

SUMMARY OF ARGUMENT

The 1907 Order established and fixed the boundaries of the Reservation. ER 578. Section 36 is located within the boundaries of the Reservation. It is, therefore, Indian Country, as defined by 18 U.S.C. § 1151. The County Officials issued some of the Citations to tribal members within Section 36, pursuant to the California Vehicle Code. California was not granted jurisdiction to enforce the Vehicle Code against Indians within Indian Country. *California v. Cabazon Band of Indians*, 480 U.S. 202, 267 (1987)("*Cabazon*").

In ruling on the Tribe's MPSJ and the County Officials' MSJ, the District Court ruled that the County officials had jurisdiction to issue the Citations because

Section 36 is not part of the Reservation. ER 10-33. The District Court erred in reaching that conclusion because: (1) the 1907 Order and the boundaries of the Reservation were upheld by the Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963), *Arizona v. California*, 376 U.S. 340 (1964), and *Arizona v. California*, 460 U.S. 605 (1983), and those decisions are res judicata and are binding on the County Officials; (2) the District Court did not have the authority to alter the boundaries of the Reservation, 25 U.S.C. § 398d; and (3) the District Court failed to give *Skidmore* deference to the Department's interpretation of the boundary of the Reservation.

The District Court's ruling was based in part on the conclusion that the evidence cited in support of the Tribe's MPSJ concerning the Chemehuevis' occupation of Section 36 was inadmissible. *See* ER 3-4 and ER 25-26. The evidence, the Reports identifying the aboriginal territory of the Tribe for the purpose of creating the Reservations, fall under a number of exceptions to the rule against hearsay, Fed. R. Evid. 803(8), 803(15), 803(16), 803 (20), and 807(a). The District Court also erred in concluding that the Indian Claims Commission ("ICC") decision in *Chemehuevi Indian Tribe v. U.S.* did not finally and conclusively determine that the Tribe's "original Indian title" encompassed the lands that comprise the Reservation, including Section 36. ER 4-6.

Based on those evidentiary rulings, the District Court concluded that there was no dispute of material fact, denied the Tribe's MPSJ and granted the County Officials' MSJ. ER 33. The District Court did not properly apply the standard for granting a motion for summary judgment and the District Court did not require the County Officials to submit any affirmative evidence in support of their allegation that the Chemehuevi did not occupy Section 36 in 1853 or in 1907.

Finally, the District Court improperly dismissed one of the Tribe's 42 U.S.C. § 1983 claims by concluding that there was no genuine dispute of material fact relating to the claim. ER 31-33. In doing so, the District Court only addressed the facts and evidence relating to its claim of racial profiling and failed to address the facts and evidence in support of the Tribe's claim that its members' right to be free of state regulation had been violated. *Id*.

STANDARD OF REVIEW

A district court's decision to grant or deny summary judgment is reviewed de novo. *See, e.g.*, *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); and *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F. 3d 712, 719-720 (9th Cir. 2003). A district court's decision on cross motions for summary judgment is also reviewed de novo. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011); *Travelers Prop. Cas. Co. of Am. v. Conoco Phillips Co*., 546 F.3d 1142, 1145 (9th Cir. 2008).

The court's interpretation of the hearsay rule is reviewed de novo. *See Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Orr v. Bank of America*, 285 F.3d 764, 778 (9th Cir. 2002). The court's decision to allow or to exclude evidence based on the hearsay rule is reviewed for an abuse of discretion. *See Calmat*, 364 F.3d at 1122; *Orr*, 285 F.3d at 778. However, the court has stated that "it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review." *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013).

ARGUMENT

I. THE ISSUE OF WHETHER SECTION 36 IS WITHIN THE BOUNDARIES OF THE RESERVATION WAS CONCLUSIVELY DECIDED BY THE SUPREME COURT IN FAVOR OF THE TRIBE AND ITS DECISION IS RES JUDICATA AND BINDING ON THE COUNTY OFFICIALS.

In *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona v. California I*"), the State challenged the authority of the Secretary to issue the 1907 Order. The Court rejected the State's challenge. "The Chemehuevi Reservation was established by the Secretary of the Interior on February 2, 1907, pending congressional approval." *Id.*, at 596, fn. 100.

The Court later reaffirmed the validity of the establishment of the Reservation:

> Congress and the Executive have ever since [the establishment of the reservations at issue by Executive Order] recognized these as Indian

> Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift 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.

Id. at 596, citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-475 (1915).

In ruling that the Reservation was created by the 1907 Order, the Supreme Court confirmed that the Secretary had the authority to create the boundaries of the Reservation and include all of the lands withdrawn within those boundaries, including Section 36. *Id.*

In 1983, the Supreme Court issued another opinion, *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona v. California II*"), in which the Court addressed the State's claim that the boundaries of the Reservation had been changed by the Restoration Order. The Court ruled that the Restoration Order had no effect on the Tribe's reserved water rights boundary because neither the United States nor the Tribe was claiming additional irrigable lands within the disputed boundary area.

> The Chemehuevi Indian Reservation boundaries have also been changed since 1964. Some 2,430 acres were "restored" to this reservation by Secretarial Order of August 15, 1974. This resulted from a secretarial determination that part of the land taken from the reservation for the construction of Parker Dam was not needed. However, neither the United States nor the Tribe claims before the Special Master that there is any irrigable acreage within this addition.

Arizona v. California, 460 U.S. 605, 634 (1983).

The significance of these two Supreme Court decisions is that the very issue raised in this case, whether the Secretary had the authority to issue the 1907 Order creating the Reservation and include the land encompassed by the legal description, including Section 36, within the boundaries of the Reservation, was raised and litigated in *Arizona v. California*. While the Court did not explicitly state that the Secretary had the authority to include Section 36 within the boundaries of the Reservation, that conclusion was implicit in the Court's ruling that the 1907 Order establishing the boundaries of the Reservation, which included within those boundaries Section 36, was valid. *Arizona v. California I*, *supra*, 373 U.S. at 596.

California was a party to *California v. Arizona* in 1964 and 1983. As such, the rulings in those decisions are res judicata and binding on California. *Montana v. United States*, 440 U.S. 147, 153-154 (1979). California is precluded from re-litigating not only the issues raised in *California v. Arizona*, but any issues that California could have raised based on the facts of that case. *Id*.

Unquestionably, in 1964 and 1983, California was aware of the fact that the Secretary had issued the 1907 Order including Section 36 within the boundaries of the Reservation. California did not challenge the Secretary's inclusion of Section 36 within Reservation and in light of its failure to do so, the doctrine of issue

preclusion prevents the State or any party in privity with the State from doing so in this case. *Id*.

It is well settled law that when a county sheriff is investigating and enforcing state criminal laws, the sheriff is acting for the county government. *Brewster v, Shasta County*, 275 F. 3d 803, 807 (9th Cir. 2001).

It is also well settled that a county is in privity with a state when the state has participated as a party in an earlier lawsuit.

> Eventually accepting as it must that it really does want to relitigate settled issues, the County replies that it's entitled to do so because it wasn't a party to [prior stages of the litigation]. But here we encounter another sort of problem. It's not just parties who are bound by prior decisions: those in privity with them often are too, and counties are usually thought to be in privity with their states for preclusion purposes when the state has lost an earlier suit.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 790 F. 3d 1000, 1008 (10th Cir. 2015) ("*Ute*").

For purposes of this litigation, the County Officials were acting on behalf of the County and the County was in privity with the State with respect to not only the issues raised and decided in *Arizona v. California I* and *II*, but also the issues of whether the Secretary's 1907 Order was valid and whether the 1907 Order established the boundaries of the Reservation. *Arizona v. California*, *supra*, 376 U.S. at 596, and fn. 100; 460 U.S. at 634. Those decisions are final, non-appealable

decisions. The doctrines of res judicata and issue preclusion prohibit the County Officials from relitigating those issues in this case.[5]

II. THE DISTRICT COURT IS PROHIBITED FROM DIMINISHING THE BOUNDARIES OF THE RESERVATION.

A. The 1907 Order Included Section 36 Within the Exterior Boundaries of the Reservation.

At the time that the Secretary issued the 1907 Order, the President had the authority to issue orders creating Indian reservations without congressional authorization. ER 487. *United States v. Midwest Oil Co*., 236 U.S. at 472 (emphasis added); *accord U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 686 (9th Cir. 1976).[6] As head of the Department, the Secretary, on behalf of the President, had the authority to establish the boundaries of the Reservation. *See United States v. Walker River Irrigation District*, 104 F.2d 334, 338 (9th Cir.

[5] Officials of the State and the County knew or should have known that Section 36 was included within the boundaries of the Reservation when the Secretary issued the Order on February 2, 1907. Clearly by 1983 when the issue of the lawfulness of the 1907 Order was litigated in *Arizona v. California I*, and the Chemehuevi boundary issue was raised in *Arizona v. California II*, the State and County should have been aware of the issue. Yet 111 years after the issuance of the 1907 Order, 54 years after *Arizona v. California I* and 35 years after *Arizona v. California II*, the County Officials are challenging the authority of the Secretary to issue the 1907 Order, which included Section 36 within the Reservation. That claim is not only barred by res judicata and issue preclusion, it is barred by the applicable statute of limitations and the doctrine of laches.

[6] The Picket Act of 1910, 36 Stat. 847, amended in 1912, specifically described the withdrawal authority of the President.

1939); *Wilcox v. Jackson*, 38 U.S. 498, 513 (1839); *Wolsey v. Chapman*, 101 U.S. 755, 769 (1879); 45 I.D. 502 (1916).

The 1907 Order contained a legal description,[7] in aliquot parts, of the parcels of land to be set aside as the Reservation. *See* ER 487; ER 886-890; and ER 869-885. The purpose of a legal description of land is to set forth the exact boundaries of parcels of land so that they can be identified and transferred.[8] If such a legal description was not exact and was not to be implemented by its terms, land title would be in a constant state of uncertainty.

The 1907 Order's legal description setting aside the Reservation includes

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[7] The 1907 Order cited to the legal description of the land stated in the Commissioner's January 31, 1907, letter, which was identified in Kelsey's January 3, 1907 Report, as the basis for the legal description of the land to be set aside for the Tribe. ER 487; ER 886-890; and ER 869-885.

[8]

> The PLSS typically divides land into 6-mile-square townships, which is the level of information included in the National Atlas. Townships are subdivided into 36 one-mile- square sections. Sections can be further subdivided into quarter sections, quarter-quarter sections, or irregular government lots.

https://nationalmap.gov/small_scale/a_plss.html

The relevant terms are defined by the United States Geological Survey as:

> **Range**--A vertical column of townships in the PLSS.
> **Section**—A one-square-mile block of land, containing 640 acres, or approximately one thirty-sixth of a township.
> **Township**—An approximately 6-mile square area of land, containing 36 sections.

Id.

"E/2 of T. 5 N., R. 24 E." *See* ER 487; ER 888; ER 875-876. A grant of the eastern half of Township 5 North, Range 24 East includes all of the sections (1, 2, 3, 12, 11, 10, 13, 14, 15, 23, 22, 24, 25, 26, 27, 34, 35, and ***36***)[9] within that legal description.[10] ER 875-876.

Based upon the legal description in the 1907 Order, there can be no doubt that the Secretary included Section 36 within the exterior boundaries of the Reservation.[11] The meaning of that legal description is not subject to question.[12]

B. The Establishment of the Reservation's Boundaries by the 1907 Order Has Been Continuously Recognized, Confirmed and Ratified by the Department, the Supreme Court, and Congress.

An Indian reservation created by an executive order deserves the same protection as an Indian reservation created by treaty or statute. *Blake v. Arnett*, 663

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[9] Such a description conforms to survey instructions of the BLM Cadastral Survey. *See* BLM, the Manual of Survey Instructions, Figure 1-2 "A Regular Township," page 12. The authorizing statute for the Manual is 43 U.S.C. §§ 2 and 1201.

[10] A review of the Kelsey correspondence reveals that he was authorized to recommend entire townships for withdrawal. See the Santa Rosa Reservation which included "the entire township . . ..", ER 871-872, and, with respect to the Capitan Grande Reservation: "all T. 15 S. R. 3 E. S.B.M." ER 872.

[11] See Stan Webb Declaration, ER 571.

[12] *See* Specifications For Declarations Of Tracts Of Land For Use In Land Orders And Proclamations, U.S. Department Of The Interior, Bureau Of Land Management, Cadastral Survey, ("BLM Specifications") Revised 1979, p. 10, entitled "ABBREVIATIONS (stating North is abbreviated "N"; Northeast "Ne., etc." meaning "E" means East)"; Manual of Surveying Instructions For The Survey Of The Public Lands Of The United States, United States Department Of The Interior, Bureau Of Land Management, Cadastral Survey, Government Printing Office (2009 Edition), pp. 43-75 (Showing a capital "E" means "Eastern," capital "T" means "Township" and capital "R" means "Range."

F.2d 906 (9th Cir. 1981); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976).

Numerous courts have directly and continuously recognized the creation of the Reservation by the 1907 Order based on the authority of the Secretary to do so pursuant to the *Midwest Oil* doctrine. *Arizona v. California,* 373 U.S. 546, 598 (1963); *see id.* at 596, fn. 100.

> [T]he ***Chemehuevi Indian Reservation*** was established by duly authorized Secretarial order of February 2, 1907. The power of the executive branch to establish Indian reservations by Executive Order, as was done in this case, has been unequivocally sustained by the United States Supreme Court. See e.g. Arizona v. California, 373 U.S. 546, 598 . . . (1963). Defendants' arguments to the contrary notwithstanding, this Court finds that the ***Chemehuevi Indian Reservation*** . . . is a duly authorized Indian reservation held in trust by the United States of America for the Chemehuevi Indian Tribe.

Jorgenson, ER 528.

Congress and the Department have also recognized the establishment of the Reservation pursuant to the 1907 Order with the enactment of the Dam Act, which provided:

> [I]n aid of the construction of the Parker Dam project, authorized by the Act of August 30, 1935 (49 Stat. 1028), there is hereby granted to the United States, its successors and assigns, subject to the provisions of this Act, all the right, title, and interest of the Indians in and to the tribal and allotted lands of . . . ***the Chemehuevi Reservation in California*** as may be designated by the Secretary [].

54 Stat. 744, § 1 (1940) (emphasis added).

In 1939, the Department issued a Solicitor's Opinion[13] pertaining to the Dam Act. In the Opinion, the Solicitor repeatedly confirmed the establishment of the Reservation by the 1907 Order and the Tribe's right of use and occupancy of the land that predated any non-Indian title. "Obligation of the Metropolitan Water District of Southern California for Damages to Lands of Chemehuevi Indians," 57 I.D. 87, 92 (1939) ("1939 Opinion").

> In the instant case, **the Indian rights of use and occupancy are not indefinite nor incapable of proof**. **The order of February 2, 1907, marked off the area claimed and recognized and confirmed the Indian title thereto**. . . .

57 I.D. at 92 (emphasis added).

In 1974, the Department, through its solicitor, again acknowledged that the 1907 Order established the Reservation: "The Chemehuevi Reservation was established in 1907 on the ancestral homelands of the Chemehuevi Indians . . . ." 2 DOINA 2071, 1974 DOINA LEXIS 47 (August 15, 1974), ER 388-393.

Based on the foregoing, it is clear: (1) the Secretary established the boundaries of the Reservation in 1907 under the inherent authority of the President; (2) Section 36 was included within the boundaries of the Reservation; (3) the Department has recognized the Reservation boundaries since its establishment, and (4) the United States Supreme Court in *California v. Arizona*

[13] The Solicitor's Opinion was issued as an "M" opinion and therefore is the official position of the Department and binding on the Department.

and Congress in the Dam Act have ratified and confirmed the 1907 Order as being valid.

C. The District Court Violated 25 U.S.C. § 398d and the Dam Act by Altering the Exterior Boundaries of the Reservation.

The law is well established, that only Congress has the power to diminish the boundaries of an Indian reservation, and its intent "must be clearly expressed." *Osage Nation v. Irby*, 597 F. 3d 1117, 1121-22 (10th Cir. 2010).

In this case, Congress has never manifested any intent to diminish or alter the boundaries of the Reservation. Just the opposite. With the passage of 25 U.S.C. § 398d and the Dam Act, Congress has made it abundantly clear that once the boundaries of the Reservation were established by the Secretary they could not be altered except by a subsequent act of Congress.

> Changes in the boundaries of a reservation created by Executive Order, proclamation, or otherwise for the use and occupation of Indians **shall not be made except by Act of Congress**.

25 U.S.C. § 398d (emphasis added). *See also* ER 850-856.

The language of § 398d is clear and unambiguous. It evidences a clear congressional intent to prevent the alteration or changes in the boundaries of Indian reservations created by Executive Order, such as the 1907 Order, except by a later Act of Congress.

> . . . the "cardinal canon" of statutory interpretation is "that a legislature says in a statute what it means and means in a statute what it says there."

Yankton Sioux Tribe v. Podhradsky, 606 F. 3d 994, 1012 (8th Cir. 2010).

With the enactment of § 398d, Congress has made it perfectly clear that once established, the Reservation boundaries could not be altered, even if a parcel of land within those boundaries remained in non-Indian ownership.

> Prior to the passage of 1151, land had generally ceased to be Indian country when Indian title was extinguished [citation omitted]. Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction **even if such lands pass out of Indian ownership**.

Id. at 1007 (emphasis added).

Further support for the Tribe's argument can be found in the Dam Act. ER 500. In the Act, Congress expressly ratified the boundaries of the Reservation as established by the 1907 Order by using the phrase "the Chemehuevi Reservation in California" to describe the Reservation. *Id*. Prior to passage of the Act, the only action of either Congress or the Executive pertaining to the Reservation was the 1907 Order. Yet, Congress used no diminishment language in the Act to describe the Reservation. The Act contains no language such as: "the Chemehuevi Reservation as diminished," or "as diminished by the 1853 Act," or "as diminished by issuance of the 1895 Patent to the State."[14] Instead Congress used the phrase

[14] Congress was fully aware of the means by which an Indian reservation's boundaries could be diminished. For example: " . . . 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservation be,

"Chemehuevi Reservation in California" which, pursuant to the 1907 Order, included Section 36 within the boundaries of the Reservation.

The Dam Act and § 398d, taken separately or together, express a clear Congressional intent to keep intact the boundaries of the Reservation as created by the 1907 Order, including placement of Section 36 within those boundaries.

> [O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation **and no matter what happens to the title of individual plots within the area**, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Barlett, 465 U.S. 463, 470 (1984) ("*Solem*") (emphasis added); *see also*, Opinion of the Solicitor, Authority of Secretary to Determine Equitable Title to Indian Lands, 1974 DOINA LEXIS. 47. ER 394-399.

The District Court's ruling that Section 36 is not part of the Reservation and thus, that the western boundary of Section 36 is not the western boundary of the Reservation, flies in the face of § 398d and the Act's clear language to the contrary. While the District Court has the authority to declare § 398d and the Act unconstitutional or interpret ambiguous provisions set forth in § 398d and the Act, it does not have the authority to violate a clear Congressional mandate to the contrary. U.S. Const. Art. III.

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and the same are hereby, abolished")." *Mattz v. Arnett*, 412 U.S. 481, 504, 22 (1973).

Congress has not granted the District Court the authority to alter the boundaries of an Indian reservation created by Executive Order. 25 U.S.C. § 398d. Such a diminishment can only be accomplished through an act of Congress, and in this case, Congress has not exercised its power to do so.

Also having recognized Congress's exclusive power to disestablish reservation boundaries, the Supreme Court has developed a framework to determine whether Congress has exercised its power to diminish the boundaries of a specific reservation. *Solem.* That framework requires district courts to presume that a reservation's boundaries continue, absent a federal statute evidencing a clear Congressional intent to the contrary. *Solem*, at 481.

The District Court failed to apply the required legal standards established in *Solem* to the facts of this case. Instead of finding a presumption in favor of the Tribe, that the Reservation boundary still existed, the Court flipped the presumption by holding that the burden was on the Tribe to prove that Section 36 was still part of the Reservation by introducing evidence that the Indians occupied Section 36 in 1853. ER 25; ER 6; ER 3-4. Placing the burden on the Tribe, rather than the County, to prove the Reservation boundary still existed was a clear error requiring reversal by this Court.

> Instead of heeding *Solem's* "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had **not** been disestablished – that

> it "still exists today," (citation omitted). In other words, the OCCA improperly required Mr. Murphy to show the Creek Reservation had **not** been disestablished instead of requiring the State to show that it had been. This "contradicts" governing law.

Murphy v. Royal, 875 F. 3d 896, 926 (10th Cir. 2017).

III. SECTION 36 IS INDIAN COUNTRY.

A. Section 36 is Indian Country Pursuant to 18 U.S.C. § 1151(a).

18 U.S.C. § 1151(a) defines "Indian country," in relevant part, as:

> [A]ll 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 . . . .

The concept of "Indian country," thus, is focused on jurisdiction over land, not ownership. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998).

> The 1948 Indian country statute settled the matter [of jurisdiction] by providing that Indian country includes all land within reservations "**notwithstanding the issuance of any patent**, and, including rights-of-way running through the reservation." In *Seymour v. Superintendent* [368 U.S. 351, 358 (1962)], the Supreme Court confirmed this reading of the statute and recognized the intent of Congress to avoid checkerboard jurisdiction.

Cohen's Handbook of Federal Indian Law, §3.04[2][c][ii] (2015) (emphasis added).[15]

[15] The Supreme Court has repeatedly found that the "plain language of 18 U.S.C. § 1151" seeks to avoid "an impractical pattern of checkerboard jurisdiction" and cautioned against "adopting an unwarranted construction of [18 U.S.C. § 1151] where the result would be merely to recreate confusion Congress specifically sought to avoid." *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). See also

If an area of land falls within the definition set forth in 18 U.S.C. § 1151, it is Indian country. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Murphy v. Royal*, 875 F.3d 896, 917 (10th Cir. 2017). The 1907 Order includes Section 36 within the limits of the Tribe's Reservation. Pursuant to 18 U.S.C. § 1151(a), Section 36 is Indian country. See *Ute*, 790 F. 3d 1000 (10th Cir. 2015). ER 487; ER 875-876.

B. The County's Enforcement of State Vehicle Codes Against the Tribe's Members on the Reservation is Unlawful.

State law does not apply against Indians within their Indian country unless Congress has enacted a law specifically granting states such jurisdiction. *Worcester v. Georgia*, 31 U.S. 515 (1832); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

In *Cabazon*, the Supreme Court held that 18 U.S.C. § 1162 and 28 U.S.C. § 1360, which granted California limited civil and criminal jurisdiction within Indian country, did not grant the State jurisdiction to enforce its civil regulating laws against Indians while within their Indian country. *Cabazon*, at 209.

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479 (1976). *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 466 (1975)(Douglas, J., dissenting). The District Court's construction of 18 U.S.C. § 1151 created a checkerboard pattern on the Reservation that the Supreme Court held is prohibited.

A civil regulatory law is one which regulates, rather than prohibits a specific type of conduct. *United States v. E.C. Invs*., 77 F. 3d 327, 330 (9th Cir. 1996).

The conduct involved in this case is driving. California does not prohibit driving, rather, the State allows persons to drive vehicles, provided that they comply with various regulatory requirements. 89 Ops. Cal. Atty. Rev. 6 (Feb. 8, 2006). ("Opinion").

Citations were issued in this case for violations of Vehicle Code ("VC") § 4000(a)(i), no registration; VC § 16028(a), no proof of insurance; and VC § 14601.1(a), no possession of valid driver's license. (collectively "Vehicle Codes").

The Vehicle Codes are civil regulatory laws that California has no jurisdiction to enforce against Chemehuevis within the boundaries of the Reservation. Opinion at 1; *Cabazon* at 208-209.

The County Officials' issuance of the Citations to Tribal members within the boundaries of the Reservation, including Section 36, was illegal and a violation of federal law. *Id*.

IV. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN RULING ON THE TRIBE'S AND THE COUNTY'S MOTIONS.

A. The District Court Erred by *Sua Sponte* Excluding the Tribe's Evidence.

The District Court, in denying the Tribe's MPSJ and granting the County's MSJ, ruled that the Tribe failed to submit admissible evidence demonstrating that

the Chemehuevis occupied Section 36 at the time that Congress enacted the Act of 1853 and at the time that the Secretary issued the 1907 Order.[16] ER 25; ER 6; ER 3-4. In support of its argument that the Chemehuevis occupied the land that comprises the Reservation since time immemorial, including Section 36, the Tribe submitted the Kelsey Reports. ER 547-550; ER 551-567; and ER 263-266. The Tribe also cited to a letter from the Commissioner to the Secretary dated January 31, 1907, ER 886-890, and the February 2, 1907 Order, ER 487, establishing the Reservation. In further support of the argument, the Tribe cited to the Indian Claims Commission's Findings of Fact and Conclusions of Law in *Chemehuevi Indian Tribe v. U.S.*. ER 241-262.

The District Court's ruling was erroneous, on a number of grounds. First, the District Court ruled, *sua sponte*, that the Kelsey Reports were inadmissible because they lacked foundation and constituted inadmissible hearsay. ER 25; ER 6; ER 3-4. The Tribe was given no notice that the admissibility of the Kelsey Reports was in question until the District Court issued its September 5, 2017 Order. ER 10-33. The County had not argued that the Tribe had failed to plead a proper foundation for the admission of the Kelsey Reports or that the Reports constitute

[16] The Court does not have to address the issue of occupation of Section 36, since the District Court's Order must be overturned for the reason set forth in Sections 1-111, above. The District Court's exclusion of the evidence relating to the historic occupation of the Reservation by members of the Tribe constitutes an additional reversible error.

hearsay. The District Court excluded the evidence without affording the Tribe a chance to address the evidentiary objections.

Parties to an action must ordinarily be given notice of an act contemplated by the court and an opportunity to respond thereto. *See Day v. McDonough*, 547 U.S. 198, 210 ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). A party offering evidence should be allowed to respond to objections made to the admission of that evidence. *See SDS Korea Co. v. SDS USA, Inc.*, 732 F. Supp. 2d 1062, 1070-71 (S.D. Cal. 2010). That requirement is particularly significant in this case. The Tribe was denied the opportunity to address the fundamental issue upon which the District Court based its ruling on both the Tribe's motion for partial summary judgment and the County's motion for summary judgment.

Second, the Court concluded that "generalized statements from high-ranking government officials that the Tribe occupied certain lands since 'time immemorial' inadmissible evidence for the purposes of supporting the Tribe's motion for partial summary judgment as to the status of Section 36 or creating a triable issue of fact in opposition to Defendants' summary judgment motion." ER 26. The statements at issue, however, were not mere generalized statements of high ranking officials. They were, rather, the conclusions of authorized government officials set forth in

the official reports that were the basis for the Executive Order that established the Reservation. ER 547-550; ER 551-567; and ER 263-266.

Pursuant to Fed. R. Evid. 803(8), a record or statement is not excluded as hearsay if it sets out a matter observed while under a legal duty to report . . . or . . . in a civil case[,] . . . factual findings from a legally authorized investigation; and . . . the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803 (8) ("Rule 803(8)"). Rule 803(8) allows admission of reports that contain facts as well as opinions and conclusions on matters of fact that flow from the investigative findings. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169-70 (1988).

The justification for the public records and reports exception in Rule 803 (8) is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *United States v. De Water*, 846 F.2d 528, 530 (9th Cir. 1988), citing Advisory Committee's Note to Fed. R. Evid. 803 (8). Pursuant to this exception, it is assumed that public officers lack a motive to falsify, and that public inspection to which many such records are subject will disclose inaccuracies. 5 Wigmore, Evidence § 1632 at 618-21 (Chadbourn rev. 1974).

In light of this presumption, a trial court may presume that public records are authentic and trustworthy. See *Johnson v. City of Pleasanton*, 982 F.2d 350, 352

(9th Cir. 1992). The burden of establishing that they are not authentic or trustworthy falls on the party opposing the admission of the records or reports, who must come "forward with enough negative factors to persuade a court that a report should not be admitted." *Id*.; see also Fed. R. Evid. 803 (8) Advisory Committee's Note to 2014 amendment.

If the circumstances indicate that the government agency has functioned within its authorization and in a trustworthy and reliable manner, the law "assumes admissibility . . . but with ample provision for escape if sufficient negative factors are present." Fed. R. Evid. 803 (8) Advisory Committee's Note.

It is not strictly necessary for the application of Rule 803 (8) that the person who prepares the record or report have first-hand knowledge of the events or facts described therein. Pursuant to Rule 803(8), records and reports may rely on sources of information other than the preparer's own personal observations. *Alexander v. CareSource*, 576 F.3d 551, 563 (6th Cir. 2009).

The Court may use four factors in assessing whether a report is trustworthy: (1) the timeliness of the investigation, (2) the special skill or experience of the official, (3) whether a hearing was held and the level at which conducted, and (4) possible motivation problems. See Fed. R. Evid. 803(e), Advisory Committee's Note. In the 9th Circuit, courts have not interpreted the "legal duty" requirement in Rule 803 (8)(A)(ii) to mean that a statute or regulation expressly imposes duties to

observe, report, and keep records. Rather, it suffices if the nature of the responsibilities assigned to the public agency are such that the record is appropriate to the function of the agency. 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8.88 (3d ed. 2012). *United States v. Lopez*, 747 F.3d 1141, 1150 (9th Cir. 2014).

Here, the condition of Indians in California described in the Kelsey Reports was, for purposes of Rules 803 (8)(A)(ii) and 803(8)(A)(iii), a matter observed while under a legal duty to report and make factual findings from a legally authorized investigation.

C.E. Kelsey was appointed special agent of the Commissioner of Indian Affairs for the purpose of reporting on the condition of American Indians within the State.[17] Miller, Larisa K. (2013) "Primary Sources on C.E. Kelsey and the Northern California Indian Association," *Journal of Western Archives*: Vol 4: Iss. 1, Article 8. The Reports are a public record of: (1) the investigation of the condition of Indians in California, performed for the agency responsible for and authorized to make decisions on behalf of Indians related to their territory; and (2) factual findings made by Kelsey on Indians in California as directed and authorized by the Commissioner and Congress.

[17] See Congressional Act of 1905, Fifty-Eighth Congress, Sess. III, Ch. 1479 (1905), p. 1058, 62d Congress, 2d Session, Senate Document 719.

The Kelsey Reports were letters to the Commissioner transmitting Special Agent Kelsey's findings from his investigation. Kelsey duly conducted his investigation into the lifestyle and territory of California Indians throughout the State and made recommendations to the Commissioner on the allocation and preservation of Indian lands, using both his own first-hand observation made on visits to Indian lands and, given the difficult and time-consuming nature of travel at the time, second-hand sources. ER 264-265. The officials of the agency that commissioned the Kelsey Reports found them trustworthy and persuasive—on January 31, 1907, pursuant to the Reports, the Commissioner wrote to the Secretary requesting that he withdraw certain lands from settlement and entry for the use and occupancy of twelve (12) bands of Mission Indians, including a request that certain lands, including Section 36, be withdrawn from settlement and entry for the use and occupancy of the Chemehuevis. ER 875-876.

The District Court did not rule that the Kelsey Reports were not trustworthy. The County did not argue that they should not be admitted. On the contrary, the County requested that the District Court take judicial notice of two of the Kelsey Reports. To the degree that the trustworthiness of the Kelsey Reports is to be considered by this Court, the factors enumerated in the Advisory Committee's Notes for Fed. R. 803(8) support the conclusion that the reports are admissible.

The Kelsey Reports were issued as Kelsey conducted his investigation. The last was issued less than a year and a half after Kelsey began his investigation of the thirty-four remote reservations of Southern California. No hearing was held on Kelsey's findings but, as noted above, the Commissioner who ordered the investigation found them persuasive enough to guide his recommendations to the Secretary. Kelsey's primary motivation, as expressed in his Reports, was to conduct as exhaustive an investigation as possible in the light of the necessity of extensive travel to remote areas with little infrastructure. The Kelsey Reports were not prepared in preparation for litigation, but to inform and guide the policies of the Department on Indian lands. The Kelsey Reports are trustworthy public records prepared at the order and direction of Congress, the Secretary, and the Commissioner. It is, therefore, admissible under Rule 803 (8).

Kelsey's Reports also qualify for hearsay exceptions under Fed. R. Evid. 803(15) and 803(16).

Rule 803(15) applies to a "statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document."

"The requirements for admissibility under Rule 803(15) are that the document is authenticated and trustworthy, that it affects an interest in property,

and that the dealings with the property since the document was made have been consistent with the truth of the statement." *Silverstein v. Chase,* 260 F.3d 142, 149 (2d Cir. 2001) citing Jack B. Weinstein, *Weinstein's Federal Evidence* § 803.20 (Joseph M. McLaughlin ed., 2d ed. 1999). The Kelsey Reports and the statements therein are intended to establish the boundaries of the Tribe's Reservation and its aboriginal territory. As was demonstrated above, the Kelsey Reports are trustworthy. As to the dealings with the property since the Reports were prepared, the legal description of the Tribe's aboriginal lands set forth in *Chemehuevi v. U.S.* encompassed the Reservation as described in the Kelsey Reports. Under Rule 803(15), the Kelsey Reports are admissible.

Pursuant to Rule 803(16), a "statement in a document that is at least 20 years old and whose authenticity is established" is admissible. For the "ancient documents" exception, proof of personal knowledge is not required for admissibility, due to the length of time since the document was created. *Columbia First Bank, F.S.B. v. United States,* 58 Fed. Cl. 333, 337 (2003), citing John W. Strong et al., McCormick on Evidence, § 323 n.15 (5th ed. Supp. 2003).

The "ancient document" technique of authentication is "universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents." Fed. R. Evid. 803(16),

Advisory Committee's Note, citing 7 Wigmore, Evidence § 21451 (Chadbourn rev.1974).

The authenticity of the Kelsey Reports was not in dispute before the District Court. Even if their authenticity were in question, Fed. R. Evid. 901 (b)(8) states that an ancient document satisfies the standard for authenticity if the document: "(A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered."

The Kelsey Reports are more than 20 years old, they are not visibly altered or damaged, and were contained in the records of the Commissioner. The statements about the aboriginal lands of the Chemehuevis in the Kelsey Reports are, therefore, admissible under Rule 803(16).

The District Court further ruled that "[t]o the extent Kelsey's assertion regarding the Tribe's occupation of the land in question is based on what members of the Tribe told him," the Indians' statements were hearsay. ER 25.[18] That ruling are erroneous. To the extent any of the findings in the Reports were derived from information conveyed to him by Chemehuevis, other Indians, Indian agents,

[18] In the Order, the District Court offered a slightly different conclusion, that the Indians' statements were double hearsay. ER 3. The statements by Indians upon which Kelsey relied, are admissible, so long as the statements upon which Kelsey relied are not hearsay, the Kelsey reports and their contents are admissible. Fed. R. Evid. 805.

surveyors, or other individuals with personal knowledge about Chemehuevi territory, the hearsay exceptions under Fed. R. Evid. 803(20) and 805(a) would apply.

Rule 803(20) applies to a statement about "a reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation." Any statements in the Kelsey Reports that were not based on Kelsey's personal observations were based on the reputation regarding the boundaries of the tribes' aboriginal territory among the Indians of Southern California whom Kelsey would have interviewed during his investigation (and well before the events leading to the filing of this lawsuit).

The statements by Indians relied on in the reports fall under the exception to hearsay set forth in Fed. R. Evid. 807(a)(1)-(4). The statements have "equivalent circumstantial guarantees of trustworthiness" arising from the fact that the Indians knew the land that they and other tribes occupied. The statements were "offered as evidence of a material fact"—that the Chemehuevis occupied the land that was withdrawn from settlement in 1907. The statements are "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." The Kelsey Reports are the information upon which the Secretary based his 1907 Order withdrawing the land from occupation and

creating the boundaries of the Reservation. There is no better available evidence of the land that the Chemeheuvis occupied and the land that Kelsey and the Secretary intended to set aside for the Chemehuevis than the Kelsey Reports. Finally, admitting the Reports "will best serve the purposes of these rules and the interests of justice."[19] The rules of evidence are best served by admitting the most reliable information on the issue before the District Court: the Kelsey Reports.

Because the foregoing hearsay exceptions apply to the Kelsey Reports and the statements within those reports, the Kelsey Reports are admissible as to the issue of whether the Indians occupied Section 36.

The reliability of the Kelsey Reports was confirmed by the ICC, which finally and conclusively determined that the Tribe's "original Indian title" or "aboriginal lands" were much larger than the Reservation established pursuant to the 1907 Order and encompassed the lands that comprise the Reservation, including Section 36. ER 503-511.[20] This Court is bound by that determination and has no authority to overturn or amend that final decision. The "chief purpose of the [Act was] to dispose of the Indian claims problem with finality." *United States v. Dann,* 470 U.S. 39, 45 (1985).

[19] The County offered no evidence on the issue, so the Court did not have to weigh the comparative reliability of conflicting evidence.

[20] A copy of an ICC map that depicts the area the ICC concluded constituted the Tribe's aboriginal lands was filed in support of the Tribe's Rule 59(e) motion. ER 118-120. *See* http://pubs.er.usgs.gov/publication/70114965.

The inherent unfairness of the District Court's evidentiary ruling was compounded by the Court's apparent misunderstanding of the legal description of the Reservation:

> Nothing in the 1907 Order—or the January 31, 1907 Report it incorporated—expressly states that Section 36 of T. 5 N., R. 24 E. is within the boundaries of the Reservation. Indeed, the1907 Order does not even specifically refer to or mention Section 36 of T. 5 N., R. 24 E. Still, Plaintiffs argue that Section 36 is implicitly included by the 1907 Order's reference to 'E/2 of T. 5 N., R. 24 E.'

ER 23.

The legal description of the Reservation, as set forth in the January 31, 1907 letter from the Commissioner to the Secretary, which was incorporated into the February 2, 1907 Order, is: "Chemehuevi Valley. Fractional townships 4 N., R. 25 E., T, 4 N., R 26 E., T. 5 N., 25 E., 6 N., 25 E.; the E/2 of T 5 N., R. 24 E, and Secs. 25, 26, 35 and 36, T. 6 N., R. 24 E, S.B.M." ER 875-876. Section 36 is unquestionably within the "[eastern half of] of T 5 N., R. 24 E."

There would have been no reason for the Kelsey Reports to separately reaffirm that the Chemehuevis occupied Section 36. Such a separate statement would have been redundant and confusing. If the District Court's understanding of the legal description is accepted, each and every section located within the Reservation would have to be individually identified in order to be included within the legal description of the Reservation. That understanding is inconsistent with the

standards for establishing legal descriptions of land. *See* BLM Specifications, p. 15-17.

The District Court's requirement that Section 36 be individually identified was illogical and requires that Kelsey and the Indians do something they would not have done. Kelsey would have had no reason to treat Section 36 any differently from any other section of land within the legal description of the Reservation. He would have known that Section 36 was encompassed by E/2 of T 5 N., R. 24 E, SBM. The Indians would almost certainly not have been familiar with the land survey system utilized by the United States government. They would not have differentiated between Section 36 and any other land they occupied. In essence, the Court required the officials and the Indians occupying the land encompassing the Reservation to know that, 110 years later, there would be a dispute about the status of Section 36 and act in accordance with that knowledge.

B. The District Court Failed to Correctly Apply the Standard for Granting a Motion for Summary Judgment.

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary

judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e). In ruling on a motion for summary judgment, the facts contained in the materials presented in support of the motion "must be viewed [by the court] in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Here, the District Court failed to properly apply the standards for ruling on a motion for summary judgment in both denying the Tribe's MPSJ and granting the County's MSJ.

With regard to the Tribe's motion, as was demonstrated in the previous section, the Tribe submitted to the Court compelling evidence that the Chemehuevis occupied Section 36 in 1853 and 1907, including the Kelsey Reports and the ICC Decision. ER 547-550; ER 551-567; ER 263-266; and ER 503-511.[21] The only basis for concluding that the Tribe did not meet the initial burden of demonstrating that there is no dispute that the Chemehuevis occupied Section 36 from time immemorial was the District Court's erroneous refusal to admit the Kelsey Reports and to acknowledge the Findings of Fact in the ICC Decision. In opposition to the Tribe's MPSJ, the County presented no evidence that the land

[21] The Indians also presented evidence to the Court that Kelsey was not alone in reaching this conclusion. In the Second Annual Report to Congress dated October 22, 1866, the Commissioner of Indian Affairs included the account of Special Indian Agent J.Q.A. Stanley to Charles Maltry, Esq., Superintendent — Indian Affairs, which discussed the Chemehuevi's occupation of the land along the Colorado. ER 693-699.

was not occupied by the Chemehuevis in 1853 and 1907. On the contrary, Defendants merely disputed the meaning of the phrases "within the boundaries of the Reservation" and "time immemorial." In the absence of the District Court's erroneous ruling, the Tribe met the standard for the granting of the Tribe's MPSJ. The District Court's ruling on the Tribe's MPSJ should be reversed.

The grounds for reversing the District Court's grant of the County's MSJ are even more compelling. The County offered no evidence in support of its argument that the Chemehuevis did not occupy Section 36. The County, thus, failed to meet its initial burden of demonstrating that the Chemehuevis did not occupy Section 36. Even assuming Defendants' evidentiary objection is considered a submission of evidence that the land was not occupied by Indians, the Tribe affirmatively alleged specific facts and submitted supporting evidence, the Kelsey reports and ICC Decision, sufficient to create a genuine issue for trial on the issue of whether the Chemehuevis occupied Section 36 since time immemorial. A "plaintiff, to survive the defendant's motion [for summary judgment], need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson*, 477 U.S. at 257. The District Court's grant of the County's MSJ was clear error.

C. The Tribe Raised a Genuine Dispute as to the Tribe's 42 U.S.C. § 1983 Claim Based on the County's Issuance of Civil-Regulatory Citations to the Tribe's Members within the Tribe's Reservation.

"The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), *quoting Ex parte Virginia*, 100 U.S. 339, 346 (1880). Thus, "§ 1983 basically seeks 'to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief… It imposes liability only where a person acts 'under color' of a state 'statute, ordinance, regulation, custom, or usage.'" *Richardson v. McKnight*, 521 U.S. 399, 403 (1997), *quoting Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis in original).

Here, the County Officials, by citing tribal members on the Reservation and prosecuting those cases, acted under color of state law—specifically, the Vehicle Codes that do not apply to California Indians on their reservations. In doing so, the County Officials deprived Tribal members of their federally protected right to be free of state regulation and control, a right created by the United States Constitution, Article I., § 8, cl. 3 and affirmed through hundreds of years of Supreme Court jurisprudence. *See Worcester v. Georgia*, 31 U.S. 515 (1832).

By attempting to assert state civil/regulatory jurisdiction over tribal members on the Tribe's Reservation, the County Officials have violated the fundamental rule that "Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1178 (9th Cir. 1975). This "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). Thus, under color of the Vehicle Codes, the County Officials deprived Tribal members of a federally protected right and the County Officials are liable under § 1983 for such violations.[22]

The District Court also made multiple errors in dismissing the Tribe's § 1983 claim. In ruling on the Tribe's MPSJ and County's MSJ, the District Court did not address the Tribe's § 1983 claim based on violations of the Tribe's members' rights under the Fifth and Fourteenth Amendments of the United States Constitution, the Indian Commerce Clause, the 1907 Order, and federal common law.

The Tribe's Complaint specifically alleged that, "[b]y stopping, seizing the vehicles of, citing, arresting and prosecuting the Indians in State Court under the

[22] The doctrine of *parens patriae* permits the Tribe to bring suit on behalf of its members *parens patriae*. *See In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138 (9th Cir. 1994). The Alaska Supreme Court specifically held that a tribe can bring § 1983 actions *parens patriae* on behalf of its members. *Dept' of Health & Social Servs. v. Native Village of Curyung*, 151 P.3d 388, 413 (2006).

authority of state law for violations of the Vehicle Code Sections," *id*., the County officials, under color of state law, had violated Ms. Lopez[23] and Mr. Ochoa's[24] constitutionally protected rights to "be free of state regulation and control while driving vehicles on the Reservation . . . in direct violation of the Fifth and Fourteenth Amendments to the United States Constitution, the Indian Commerce Clause, the federal statutes creating the Reservation, federal common law, and ***42 U.S.C. § 1983***." *See* District Court DKT #11, pp. 25-28, ¶¶ 86-92. *Id*. at p. 27 (emphasis added). The Complaint also alleged that, as a result of the violations of Ms. Lopez's and Mr. Ochoa's federally protected rights, the plaintiffs had "suffered and will continue to suffer money damages in excess of Ten Thousand Dollars ($10,000)…." *Id*. at p. 27, ¶ 93.

Clearly, Ms. Lopez and Mr. Ochoa stated a claim under 42 U.S.C. § 1983 on the grounds that, by citing, arresting, seizing the vehicles of, and prosecuting them under color of the Vehicle Codes, the County Officials caused Ms. Lopez and Mr. Ochoa to be subjected to "the deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws of the United States . . ." 42 U.S.C. § 1983.

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[23] Deputy Sindelar did not stop Mr. Ochoa or cite him while he was driving in Section 36. ER 920-921. The citation itself states that the stop occurred within Section 30. Thus, Deputy Sindelar entered the Reservation, upon lands owned by the United States in trust for the Tribe, and, under color of state law, unlawfully applied a civil/regulatory state law to Mr. Ochoa while he was on his Reservation.

[24] The County admitted that Ms. Lopez was cited on tribal trust land for an alleged violation of the Vehicle Code that occurred on trust land not Section 36.

Accordingly, the officials who caused their injuries "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id*.

In light of the forgoing, the District Court improperly dismissed the claims based on the Tribe not proving racial motivation/animus. ER 8. Where the alleged violations of the Vehicle Codes occurred, and where the Citations were ultimately issued, are, therefore, relevant to the issue of whether Ms. Lopez and Mr. Ochoa's claims were properly dismissed. Since the Citations were issued to Ms. Lopez and Mr. Ochoa within the Tribe's Indian country,[25] the Citations and enforcement proceedings violated the Tribe's members' constitutionally protected rights, and are actionable under § 1983. Therefore, the District Court erred when it dismissed the claims made by Lopez and Ochoa.

When confronted with this error through the Tribe's Rule 59(e) Motion, the District Court responded by committing further error. Acknowledging that the Tribe had also argued that the County violated the Tribe's members'

[25] As noted in previous footnotes, Ms. Lopez and Mr. Ochoa were not issued the Citations within Section 36 but rather on the Tribe's undisputed reservation land. Yet, it is worth repeating that the district court erred in concluding that Section 36 is not included within the Tribe's Indian country. A correct finding that Section 36 is part of the Tribe's Indian country would mean that all of the Citations issued by the County officials in Section 36 (including those issued to Chelsea Lynn Bunim and Jasmine Sansoucie) are also subject to the Tribe's § 1983 claim.

constitutionally protected rights to be free of state regulation while driving on the Reservation, the District Court concluded:

> [The Tribe's members'] right to be free of state regulation, however, is not within the scope of section 1983. Section 1983 is concerned with the relationship between individuals and the state, not the distribution of power between state, federal, or tribal governments. The tribal right of self-government is not grounded specifically in the Constitution or federal treaties. Instead, it is protected primarily through treaties or federal judicial decisions and is best characterized as a power, rather than a right. As a result, the right to tribal government falls outside the scope of section 1983.

ER 8. (internal citations and quotations omitted).

The Tribe's Complaint included a cause of action for interference with tribal self-government; however, that cause of action is distinct and separate from the individual Indians' civil rights claim. The District Court failed to distinguish between the right of tribal self-government and the right of individual Indians to be free of state regulation and control while driving vehicles on their own Reservation.[26] The Tribe is not seeking, as part of its § 1983 *parens patriae* claim, a determination as to who has the power to regulate tribal members on their reservation (i.e., the Tribe, state, or federal government), but, rather, a determination that individual Indians have a right to ***not*** be regulated by the State while on their reservation.

[26] In support of the complaint the District Court cited, *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989). But that reliance was misplaced since that case did not involve, as here, "protecting the personal liberty of [the Tribe's] members." *Id*. at 662.

Here, the question is not whether the Tribe has the power to regulate its members' conduct within the Reservation. The question is whether the County has deprived individual members of their **right to be free of state regulation** within the Reservation.

The Tribe is seeking to "protect the personal liberty" of its members. Its claim, as well as the individual claims of Lopez and Ochoa, therefore, fall within the scope of § 1983. The District Court dismissal of the Tribe's *parens patriae* claims, and the individual Indians' § 1983 claim, was therefore, clear error.

V. THE DISTRICT COURT ERRED BY FAILING TO DEFER TO THE BIA'S DETERMINATION THAT SECTION 36 IS WITHIN THE BOUNDARIES OF THE RESERVATION.

As demonstrated above, the District Court's determination that Section 36 is not Indian country conflicts with numerous decisions of federal government officials who have continuously and routinely found that the Reservation boundary was validly established by the 1907 Order. Instead of fashioning its own determination as to the boundaries established by the 1907 Order, the District Court was required to, but did not, defer to the BIA, the federal agency formally tasked with the establishment and regulation of Indian lands.

Under *Skidmore v. Swift & Co.*, 323 U.S. 134, "the rulings, interpretations and opinions of the [agency tasked with administering a statute], while not controlling upon the courts by reason of their authority, do constitute a body of

experience and informed judgment to which courts and litigants may properly resort for guidance." *Id*. at 140. "The weight [accorded to an agency's interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. Thus, a federal agency's administration of statutes that delegate duties to the agency merits deference where the agency has specialized experience, holds broader information that may be brought to bear on the question, and has shown consistency in its determinations. *Id*. at 139-40; *see also United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001), citing *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (internal quotations omitted) ["The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, . . . and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."].

In the proceedings below, the Tribe presented the District Court with numerous instances in which the BIA—the agency tasked with the duty to administer federal statutes that relate to Indian tribes—had opined and determined

that the boundaries of the Reservation were established by the 1907 Order and included Section 36 within them. *See* ER 568-572; ER 850-856; ER 810-816; ER 132-136; ER 139. Most directly, the Tribe submitted the declaration of Stan Webb, the Realty Officer for the Western Regional Office of the BIA. ER 568-572.[27] In his declaration, Mr. Webb testified that, in his "capacity as the Realty Officer [he] supervised the collection of all title documents pertaining to the creation of the Reservation and the conveyance of any right, title or interest in any lands located within the boundaries of the Reservation, for the purpose of assisting the [BLM] in issuing the Tribe a trust patent . . . for the lands owned by the United States of American in trust for the Tribe within the boundaries of the Reservation." ER 570-571. In that capacity, Mr. Webb "reviewed the 1907 Order of the Secretary of the Interior establishing the boundaries of the Reservation and all of the title documents that are listed and identified in the [p]atent." ER 571. Based on his specialized expertise, Mr. Webb concluded that the "boundaries of the Reservation were established by the Order of the Secretary of the Interior issued on February 2, 1907 . . . **[and that the] Secretarial Order specifically included Section 36 within the boundaries of the Reservation.**" *Id.* (emphasis added). In a subsequent

[27] Mr. Webb has held the position of Realty Officer for most of the last 25 years and has a law degree from the University of Kansas and a master's degree in public administration from Harvard. ER 568-572. In in private practice as an attorney, Mr. Webb specialized in Federal Indian Law. *Id.* Mr. Webb has also worked in the BIA's Central Office in Washington, D.C., and BIA agency offices in Minnesota and Wisconsin. *Id.*

declaration, Mr. Webb provided the District Court with a map in which he indicated the location of the Reservation boundary and included Section 36 therein. ER 132-135; ER 139. Through Mr. Webb's submissions, the BIA provided a thorough and informed judgment in which the BIA opinioned that Section 36 was included within the boundaries of the Reservation as set forth in the 1907 Secretarial Order. That qualified interpretation is entitled to deference under *Skidmore*.

The Tribe also provided the District Court with evidence demonstrating that the BIA has consistently interpreted the 1907 Order to include Section 36 within the boundaries. ER 850-856. In an August 20, 1990 letter from Fritz L. Goreham, Field Solicitor for the Department, to the Area Director of the Phoenix Office of the BIA, Mr. Goreham opined:

> The land in question **was withdrawn by the Secretary** in aid of legislation. The legislation was passed giving the Secretary the authority to permanently withdraw the lands and "convey" twenty-five years in the future, a patent.
>
> ***
>
> [I]n 1927 Congress prohibited the alteration of any Indian reservation [including the Chemehuevi reservation] created by "Executive order, proclamation or otherwise" except by Act of Congress. 25 U.S.C. 398d. In a November 19, 1963, letter . . ., the Branch Chief advised the Commissioner that "**remedial or clarifying" legislation was not needed as the Chemehuevi Indians already have a compensable interest in the reservation as a result of the passage of 25 U.S.C. 398d**.

Id. at 855 (emphasis added).

Thus, even going back to 1963, the BIA has consistently interpreted the 1907 Order as establishing the Reservation's boundary and that boundary includes within it Section 36. Furthermore, Mr. Goreham's 1990 letter also firmly establishes the agency's well-reasoned opinion that a patent was not required to establish the Reservation because 25 U.S.C. § 398d permanently fixed the boundaries as established in the 1907 Order.

Rather than defer, as required, to the agency's direct determination that Section 36 is within the boundaries of the Reservation, the District Court fashioned its own, contrary conclusion without any analysis of the agency's reasoning:

> Webb's yellow highlight delineating the "Reservation Boundary [as] described in 2010 Trust Patent" appears to show that Section 36 is just within the southern edge of the Reservation's boundaries. But as discussed *supra*, Section 36 is not part of the Reservation.

ER 29.

The District Court was required to accord considerable weight to the Department's construction of a statutory scheme it is entrusted to administer. Instead, the District Court failed to defer to (or even analyze) any of the numerous instances in which the BIA has concluded that the 1907 Order included Section 36 within the boundaries of the Reservation. That failure was an error of law and, standing alone, warrants reversal.

CONCLUSION

The Tribe has clearly demonstrated that the District Court's Order contained numerous procedural and legal errors requiring reversal.

In reversing the District Court's Order, this Court should hold that the doctrine of res judicata, issue preclusion and 25 U.S.C. § 398d prohibits the County from re-litigating the issue of whether Section 36 is within the boundaries of the Reservation as established by the 1907 Order. Based on the foregoing the Court should find that Section 36 is Indian country as defined by 18 U.S.C. § 1151 and that the County has no authority to enforce the Vehicle Codes against members of the Tribe while driving their cars within Section 36.

In the alternative, the Court should hold that the District Court's exclusion of the Tribe's evidence in support of its MPSJ was in error and in light of that error find that a material issue fact exists in this case and remand this case to the District Court with instructions to hold an evidentiary hearing on the issue of whether the Chemehuevis occupied Section 36 on March 3, 1853.

DATED: April 9, 2018

Respectfully Submitted

By: /s/ *Lester J. Marston*

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for Appellants, is not aware of any related cases.

Dated: April 9, 2017

Respectfully Submitted
RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: April 9, 2017

Respectfully Submitted
RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Participants in the case who are not registered CM/ECF users will be served by U.S. Mail.

Dated: April 9, 2017 Respectfully Submitted

By: */s/ Ericka Duncan*