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' REPLY BRIEF

Lester J. Marston
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
Tel. (707) 462-6846
Fax (707) 462-4235
Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

United States Codes

Other Authorities

INTRODUCTION

Defendants-Appellees' ("County") Answering Brief ("AB") appears to be primarily designed to obscure the issues before the Court. The County repeatedly cites to legal authority that does not support the proposition for which it is cited. The County consistently attempts to move the discussion from the legal issues before the Court to issues that are either peripheral or, in many cases, irrelevant. In this Reply Brief, Plaintiffs-Appellants ("Tribe") will return the Court's attention to the issues that are relevant to the Court's analysis of the Tribe's claims and demonstrate that the County has failed to rebut the arguments presented in the Tribe's Opening Brief ("OB").

The Tribe will first demonstrate that the fundamental issues before the Court (i.e., whether the Secretary of the Interior's ("Secretary") February 2, 1907, Executive Order ("1907 Order") established the boundaries of the Chemehuevi Indian Reservation ("Reservation") and whether the Secretary had the authority to establish the Reservation and its boundaries) were conclusively determined by the United States Supreme Court. Second, the Tribe will demonstrate that the Secretary had the authority to include Section 36 within the boundaries of the Reservation. Third, the Tribe will show that, to the extent that the Court might wish to address the County's argument that the central issue in this case is title to Section 36, and not whether Section 36 is located within the boundaries of the

Reservation for 18 U.S.C. § 1151 ("§ 1151") jurisdictional purposes, the Act of March 1, 1853, 10 Stat. 244 ("1853 Act") did not grant California title to Section 36. Finally, the Tribe will demonstrate that the County's assertion that 42 U.S.C. § 1983 ("§ 1983") does not encompass claims based on the right to be free of State regulation and control is simply wrong.

I. The Supreme Court Ruled that the Reservation Was Established by the 1907 Order and the County Cannot Challenge that Ruling.

The County asserts that the Tribe waived the argument that the County is prevented from challenging the establishment of the Reservation, or the Secretary's authority to establish the Reservation and its boundaries, because those issues were resolved in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*") and *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), *citing K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015)["We will not . . . review *an issue not raised below* unless necessary to prevent manifest injustice." (emphasis added)]. As the County admits, however, the Tribe argued before the District Court that the Supreme Court in *Arizona I* determined that the Reservation and its boundaries were established by the 1907 Order and that the Secretary had the authority to do so: "While Plaintiffs cited [*Arizona I*] in some of their briefs, they never argued that this decision barred Defendants from 'relitigating' any issues." AB 33. Because the Tribe unquestionably addressed the conclusive effect of that decision

on the issues before the District Court, *see* Dkt #64, p. 4, the Tribe has not waived the argument.

The County's assertion that the Tribe's argument is "frivolous" is based on misrepresentations of the Supreme Court's rulings in *Arizona v. California*. That litigation was brought to establish the respective rights to the Lower Basin waters of the Colorado River of several states and the United States, including the water rights of five Indian tribes whose interests were represented by the United States. The Tribe was one of the parties to the litigation.

Whether the reservations of the five tribes were properly established (and the boundaries of those reservations) were central issues in the *Arizona v. California* litigation. The tribes' water rights claims were based on the principle that "the creation of the reservations by the Federal Government implied an allotment of water necessary to 'make the reservation livable.'" *Arizona II*, 460 U.S. at 616, *citing Arizona I*, 373 U.S. at 599-600; *see Winters v. United States*, 207 U.S. 564, 576-577 (1908). In the course of the litigation, Arizona challenged the boundaries of some of the reservations and the Court concluded that "enough water was reserved [by the United States] to irrigate all the practicably irrigable acreage on the reservations." *Arizona I*, 373 U.S. at 600.

The Court could not have determined the tribes' water rights if it had not concluded that their reservations had been lawfully established. After describing the creation of the Colorado River Indian Tribe's reservation, the Court stated:

> Other reservations were created by Executive Orders and amendments to them, ranging in dates from 1870 to 1907. The Master found both as a matter of fact and law that *when the United States created these reservations* or added to them, it reserved not only land but also the use of enough water …to irrigate the irrigable portions of the reserved lands.

Id. at 596.

In a footnote, the Court explicitly determined that the Tribe's Reservation had been established by the 1907 Order: "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 emphasized that the issue of the establishment of the Indian reservations that were the subject of the litigation (and the Secretary's authority to do so) was beyond debate:

> 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.[1]

[1] This statement eliminates any possible basis for the County's assertion that the boundary of the Reservation was not established by the 1907 Order, pursuant to the inherent authority of the President, but, instead, was established by the issuance of the patent for the Tribe's reservation trust lands in 2010. *See* AB 24, 32.

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

These rulings by the Supreme Court leave no basis for the County to challenge either the establishment of the Reservation's boundary in 1907 or the President's authority to do so through an executive order.

The County ignores the Supreme Court's explicit determination that the Tribe's Reservation was established by the 1907 Order and the rejection of Arizona's challenge to the validity of that order based on the fact that it was an executive order. The County attempts to undermine the effect of the Court's ruling by mischaracterizing and citing out of context language from *Arizona II*: "After 'disputes about the boundaries' of the Reservation emerged as the result of a 1974 secretarial order, the Court held that 'secretarial orders do not constitute "final determinations"' of reservation boundaries." AB 35, *quoting Arizona II*, 460 U.S. at 630-631, 636-637 n. 26 (emphasis removed). The cited language is not a statement that *all* secretarial orders concerning the establishment of boundaries of a reservation do not constitute a determination of the reservation boundaries. Rather, the issue to which the Court referred in the quoted language from *Arizona II* was whether *specifically identified* executive orders issued **after** the establishment of the reservations in question qualified as "final determinations" as that term was used in Article II(D)(5) of the Court's March 9, 1964 decree ("Decree"). *See*

Arizona v. California, 376 U.S. 340, 345 (1964). The orders cited to in the quoted passage from *Arizona II* were orders addressing the boundaries of the reservations issued by the Secretary long after the establishment of the reservations. "In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies, or private water users holding priority rights." *Arizona II*, 460 U.S. at 636. The specifically identified secretarial determinations cited to in *Arizona II* did not include the 1907 Order.[2] *Id*.

The foregoing leaves no doubt that the Supreme Court determined that the boundaries of the Reservation were established by the 1907 Order and that the Secretary, acting on behalf of the President, had the authority to establish the Reservation and its boundaries and include the lands identified in the 1907 Order within the Reservation boundaries, including Section 36. California, as a party to the litigation, could have challenged the establishment of the Reservation and the authority of the Secretary to include Section 36 within the boundaries, but it did not. California also did not assert that Section 36 was not within the boundaries of the Reservation. Because California could have made those arguments, but did not,

[2] The referenced order pertaining to the Tribe was a 1974 order restoring title to certain former trust lands to the Tribe.

that challenge is waived. *Montana v. United States*, 440 U.S. 147, 153-154 (1979). Because the County was in privity with the State, and the individual Defendants-Appellees, as officials of the County, are the County for the purposes of res judicata and issue preclusion, they cannot assert that argument, either. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F. 3d 1000, 1008 (10th Cir. 2015).

II. The Secretary Had the Authority to Include Section 36 Within the Boundaries of the Reservation.

Despite the County's focus on title, this case is about reservation boundaries for purposes of § 1151 jurisdiction, *not* title to land. The 1907 Order did not divest the State of title to Section 36 (assuming that title was granted to the State), it merely included Section 36 within the boundaries of the Reservation, making it Indian country pursuant to § 1151. The Secretary had the authority to include such land within the exterior boundaries of the Reservation, regardless of title.

A. The County's Argument Fails to Address the 1853 Act's § 6 Occupation Exception.

The County's "Relevant History of the Land System of the United States, Section 36, and the Chemehuevi Reservation," AB 16-17, omits the 1853 Act's § 6 exception for lands occupied or possessed by tribes ("Occupation Exception"), which expressly states that the 1853 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 to grant any preemption right to the same." ER 269-70. The Occupation Exception is a congressional acknowledgement that the aboriginal use and occupancy rights of the Tribe survived California's admission into the United States and protected those use and occupancy rights from further unauthorized encroachments by white settlers.

This is consistent with the intent that was expressed by Senator Felch, who offered the Occupation Exception as an amendment to the 1853 Act:

> My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians . . . . it seems to me to be quite proper that we should give the Indian that security which I desire to give him by this provision.

Congressional Globe, ER 272. The Tribe is now asserting the security given to it by the Occupation Exception.

B. The Secretary Had the Authority to Include Section 36 Within the Reservation, Regardless of Title.

Presuming that Section 36 was conveyed to the State, *see* AB 20, the County ignores that such conveyance would have been subject to the Tribe's right of use and occupancy. It also ignores a critical fact: the Secretary *did* include Section 36 within the exterior boundaries of the Reservation in the 1907 Order. ER 337 (referencing ER 333).

1. The County Ignores the Inherent Authority of the Secretary.

The Reservation was established under the inherent authority of the Secretary pursuant to the *Midwest Oil* doctrine, not the Mission Indian Relief Act ("MIRA"), 26 Stat. 712 (1891). *See Arizona I*, 373 U.S. at 596, *citing Midwest Oil Co.*, 236 U.S. at 469-475. The *Midwest Oil* doctrine was the Supreme Court's affirmation of the executive branch's authority to reserve lands for various purposes, including Indian settlement, based on the finding that Congress' "acquiescence" in a multitude of executive land withdrawals over a long period of time had "readily operated as an implied grant of power." *Yount v. Salazar*, 933 F. Supp. 2d 1215, 1221 (D. Ariz. 2013), *citing and quoting Midwest Oil*, 236 U.S. at 471; *see also* OB 15-16, 19-20, 22.

The County ignores the *Midwest Oil* authority and focuses on *Pechanga Band of Mission Indians v. Kacor Realty, Inc.* to argue that the MIRA required the Secretary to issue a patent in order to include Section 36 within the Reservation. AB 13, *citing* 680 F.2d 71, 73, 75 (9th Cir. 1982). The *Pechanga* decision, however, does not apply to this case. *Pechanga* did not address *Midwest Oil*. The reservation at issue in *Pechanga* was created under the MIRA, the Chemehuevi Reservation was not. The *Pechanga* case was a quiet title action, and this case is not. Unlike *Pechanga*, the Tribe is not claiming ownership of land that the Secretary intentionally excluded from the reservation when it was established.

Acceptance of the County's argument based on *Pechanga*, moreover, would lead to an absurd result. If a trust patent was indeed required to create the Reservation, the Reservation was not established until the trust patent was issued in 2010. This is simply not true, as is clear from the federal court case law addressing the issue. *Arizona I*, 373 U.S. at 596 n. 100, 598; *United States v. Jorgensen*, United States District Court for the Central District of California, Case No. CV 92-3809-TJH(CTx), ER 528; *see* OB 21-24.

The 1907 Order was issued in anticipation of the amendments to the MIRA, but the Secretary was authorized to issue the 1907 Order pursuant to the *Midwest Oil* doctrine. The amendments to the MIRA merely confirmed the Secretary's authority to establish the Reservation and to issue a patent for the lands owned by the United States in trust for the Tribe within the established boundaries of the Reservation. Anticipating Congress' "acquiescence" was consistent with the essence of the *Midwest Oil* doctrine.

2. The County's Construction of § 1151 Is Contrary to the Purpose of the Statute and the Case Law Interpreting § 1151.

Land within the limits of any Indian reservation is Indian country for purposes of § 1151 jurisdiction. 18 U.S.C. § 1151(a). Indian country frequently includes non-Indian land within the exterior boundaries of an Indian reservation. *See Hagen v. Utah*, 510 U.S. 399, 425-426 (1994)["Reservation boundaries, rather

than Indian title, thus became the measure of tribal jurisdiction"]; *United States v Crowe*, 563 F.3d 969, 971 n.1 (9th Cir. 2009)[Montana town is "located within the exterior boundaries of the Fort Peck Indian Reservation and thus is 'Indian country' within the meaning of 18 U.S.C. § 1151(a)"]; *Alexander Bird in the Ground v. District Court of Thirteenth Judicial Dist.*, 239 F. Supp. 981, 983-84 (D.C. Mont. 1965), *citing Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962)["'Indian country' includes private lands located within the exterior boundaries of an Indian reservation"].

Here, the County is attempting to further erode what little remains of Indian country by excluding from it land that was allegedly previously granted to a state. Nonetheless, "the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to 'include all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of **any patent** . . . .'" *Id.* at 357-358 (emphasis added).

The County's position is contrary to the Supreme Court's rejection of unwarranted constructions of § 1151:

> For [the] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even

> though committed within the reservation, is in the State or Federal Government. [] **Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.**

Id. at 358 (emphasis added).

There is no basis for limiting the application of § 1151 and *Seymour* to situations in which disputed land was patented after an Indian reservation had been created but before its boundaries were determined. Assuming that Section 36 was properly granted to the State, it is fee land located within the exterior boundaries of the Tribe's Reservation, as established by the 1907 Order, and it would constitute Indian country. Finding otherwise, simply because Section 36 was patented to the State prior to the establishment of the exterior boundaries of the Tribe's Reservation, would constitute an unwarranted construction of § 1151. The result would be to recreate the confusion (i.e., checkerboard jurisdiction) that Congress and the Supreme Court specifically sought to avoid.

Other circuit courts have also recognized that adopting the County's position would require narrowly construing the Supreme Court's concerns with checkerboard jurisdiction. In *Cardinal v. United States*, 954 F.2d 359 (6th Cir. 1992), the Sixth Circuit was also faced with an assertion that certain property was not within "Indian country" as defined by § 1151 because it was granted to a state prior to the creation of an Indian reservation. Noting that "the district court []

concluded that, to the extent that the [] lands were sold before the [] treaty became effective, that fact did not impact upon whether the lands were 'Indian country' for the purposes of federal subject matter jurisdiction," the Sixth Circuit went on to acknowledge that reading "the *Seymour* decision as extending federal jurisdiction over land patented to non-Indians only when that land is patented *subsequent* to the establishment of the Indian reservation . . ." would mean that the Supreme Court's "concerns with checkerboard jurisdiction are to be construed narrowly . . .". *Id.* at 363 (emphasis in original).

The County is *de facto* asking for the Supreme Court's concerns with checkerboard jurisdiction to be construed narrowly. But, like the state in *Seymour*, the County fails to point to any language in § 1151's definition to support its position. This Court should not adopt such an unwarranted construction of § 1151. Such an interpretation would recreate the confusion that Congress specifically sought to avoid. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976)["Congress by its more modern legislation has evinced a clear intent to eschew any checkerboard approach within an existing Indian reservation."]; *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420

U.S. 425, 466 (1975)["[C]razy quilt pattern" or "'checkerboard' jurisdiction defeats the right of tribal self-government" (Douglas, J., dissenting).][3]

3. Even If Title to Section 36 Was Conveyed to the State, It Was Subject to the Tribe's Right of Occupancy.

The Tribe's right of occupancy "is considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. 711, 746 (1835). "Whether a tribe has aboriginal title to occupy land is an inquiry entirely separate from the question of who holds fee title to land. Indeed, it is possible for a party to take title to land subject to an aboriginal right of occupancy." *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1068 (9th Cir. 2010).

The Supreme Court has consistently held that tribes have "legal as well as just claims to retain possession" of the lands that they historically occupied within the United States that is not dependent on the United States' recognition for its existence. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *Holden v. Joy*, 84 U.S. 211, 244 (1872). Although Congress has the power to modify or extinguish Indian title, the intent to extinguish Indian title must be clearly expressed on the face of a treaty or statute. *Jones v. Meehan*, 175 U.S. 1 (1899); *M'Intosh*, 21 U.S. at 585.

[3] The Tribe notes that fee lands, called "inholdings," exist within National Park and Monument boundaries. *See*, Congressional Research Services Report R41330, National Monuments and the Antiquities Act, by Carol Hardy Vincent, p. 7 (September 7, 2016).

In *Worcester v. Georgia*, 31 U.S. 515, 546 (1832), the Supreme Court noted that while the United States' interest in Indian aboriginal title to land under the doctrine of discovery permitted the United States to issue grants of land still held in Indian title, the issuance of a grant was insufficient by itself to extinguish a tribe's Indian title to the land. Until the government purchased the land from the tribe in question or otherwise extinguished the tribe's aboriginal title, the grant "asserted a title against Europeans only and was considered as blank paper so far as the rights of natives were concerned." *Id.*; *see also Cramer v. United States*, 261 U.S. 219 (1923)[holding that issuance of a patent did not extinguish the Indian's right to occupy the land].

This tribal right of Indian title was expressly protected by Congress with the passage of the Non-Intercourse Act, 25 U.S.C. § 177, in 1790, which prohibited the "purchase, grant, lease, or other conveyance of lands" from any Indian tribe without the approval of Congress.

Thus, only the United States could extinguish the aboriginal title of an Indian tribe and the issuance of a patent by the United States to the land held pursuant to Indian title took subject to the Indians' right of use and occupancy. *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

It is well settled that the aboriginal territory of the Tribe included all of the lands that presently comprise the Reservation, including Section 36. *Chemehuevi*

Indian Tribe, et al. v. United States of America, 14 Ind. Cl. Comm. 651 (1965); ER 241-262; Ind. Cl. Comm. Map, ER 118-120.

The County claims that the federal government extinguished the Tribe's aboriginal title to Section 36 twice: once when the Tribe "failed to present claims in the land confirmation proceedings undertaken pursuant to the Treaty of Guadalupe Hidalgo and the Act of 1851," *citing United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 644, 645 (9th Cir. 1986); and again when California's title to Section 36 "vested in 1895" since "no 'pre-existing *treaty* had preserved the aboriginal title' . . ." *Citing Lyon*, 626 F.3d at 1078-79 (emphasis in original). AB 12. Both of the County's assertions are incorrect.

First, the Act of 1851 has no application to this case. In *Cramer*, the Supreme Court rejected precisely the same argument the County has made here:

> This statute [the Act of 1851] required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians described. The act plainly has no application. The Indians here concerned do not belong to any of the classes described therein and their claims were in no way derived from the Spanish or Mexican governments.

261 U.S. at 230-31.

The Tribe would only have had to file a claim pursuant to the Act of 1851 if the Tribe's interest in its Reservation lands derived from the Mexican government

or if another party claimed to have received a land grant from the Mexican government for the land that constitutes the Reservation. No such claim was filed and the County presents no evidence or argument that Mexico ever issued a land grant that included the Tribe's Reservation lands. Moreover, as the *United States ex rel. Chunie v. Ringrose* decision makes clear, if such a claim had been filed, the State of California would also have been required to file a claim asserting its interest, or it would have lost any interest it claimed in Section 36: ". . . California's claim must have been presented in the patent proceedings or be barred." *United States ex rel. Chunie v. Ringrose*, 788 F.2d at 646.

The County's argument that Section 36 was not subject to any aboriginal title because no pre-existing treaty had preserved it is also meritless. A treaty is not the only way to preserve rights to Indians. "Congress can create a reservation, reserve rights to the Indians, and dispose of lands of the United States by statute as well as by treaty." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981), *citing Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-104 (1949).

The County's argument also relies on its omission of any discussion of the 1853 Act's Occupation Exception. As demonstrated above, that provision specifically protected the Tribe's rights to lands that were in its occupation or possession from the rights of pre-emption. The *Cramer* decision again supports the Tribe's interpretation:

> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy.

Id. at 228-229.

Congress would not have exempted such lands based on Indian occupation or possession if it did not anticipate that such lands would either remain or become part of an Indian reservation. *See Solem v. Bartlett*, 465 U.S. 463, 474 (1984)[considering whether certain surplus land acts diminished Indian reservations]. The Secretary had the authority to include such lands within the exterior boundaries of the Reservation and the inclusion of Section 36 within the boundaries of the Reservation is consistent with the Tribe's right of occupancy as confirmed by the Occupation Exception.

III. Title to Section 36 Was Never Properly Granted to the State of California.

The Tribe's position remains that neither this Court nor the District Court has to determine who owns Section 36.[4] Again, this case is about reservation boundaries for purposes of § 1151 jurisdiction, *not* title to land, *see infra*, Section II, and the County lacking jurisdiction to enforce the California Vehicle Code against the Tribe's members in their Indian country.

[4] The District Court implied that the Tribe changed its position during the course of the litigation. The Tribe's position has not changed.

But the County, not the Tribe, has raised the issue of title to Section 36, *see* AB 20, which requires the Tribe to respond. To the degree that the Court determines that it is necessary to address the issue of title, the Tribe's position is that title to Section 36 was never validly conveyed to the State.

An Indian reservation can be created by act of Congress from lands occupied by a tribe and held by the tribe under Indian title. *See infra*, Section II.B.3. The most common type of such legislation withdraws a portion of the public domain from entry or sale and dedicates the area to Indian use.

Indian reservations have been created by Congress and the President using designations such as Indian country, territory, town, village, settlement, reservation, reserve, tract, pueblo, allotment, rancheria, colony, and dependent Indian community. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), p. 42, Ch. 1, Sec. D4.

In fact, the Supreme Court has held that no particular formality or language is required to create an Indian reservation. It is enough that the treaty, statute, or executive order contain language showing an intent to set aside land for the use and occupation of an Indian tribe.

> Now in order to create a reservation it is not necessary that there should be a formal cession or 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.

Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902); *see also United States v. John*, 437 U.S. 634, 649 (1978); *Spalding v. Chandler*, 160 U.S. 394, 403-04 (1896).

With the passage of the 1853 Act and its § 6 Occupation Exception, *see infra*, Section II.A, Congress created the Reservation. In enacting the Occupation Exception, Congress excluded from all forms of settlement and entry all lands under the possession and occupation of the Indians tribes of California, including the Tribe. *See* ER 267-271. After passage of the 1853 Act, the only question remaining was what lands were possessed or occupied by the Tribe in 1853. In other words, the Reservation was established and only the boundaries of the Reservation needed to be determined.

The question of the boundaries of the Reservation was answered by Special Agent C.E. Kelsey, who Congress had appointed to report to it on the condition of California Indians and to make recommendations to Congress and the President on what should or could be done to improve their condition. *See* Act of March 3, 1905, ER 295.

On January 3, 1907, Kelsey did just that. ER 327-328. He inspected the lands occupied by the Chemehuevis and found that they had resided on those lands since "primeval times" and then recommended that the lands the Tribe was occupying be set aside for the Tribe's reservation.

> To get proper data from the Land office and **personally inspect** the proposed additions and to secure other information necessary required considerable time.
>
> * * *
>
> These Indians regard their present location as their place of origin. I believe there is no question but they have occupied this land since primeval times . . . I would therefore recommend that . . . the land to be set aside should be . . . the E. ½ of T. 5. N. R. 24E . . .

ER 326, 327-328 (emphasis added).

Pursuant to Kelsey's recommendation, on February 7, 1907, the Secretary issued the 1907 Order, under the inherent authority of the President, establishing the exterior boundaries of the Reservation and including within the boundary Section 36 of T. 5. N., R. 24E. ER 337.

The County argues that the Secretary did not have the authority to include Section 36 within the boundary of the Reservation because the United States, with passage of the 1853 Act, conveyed Section 36 to California for school purposes. An examination of the 1853 Act, however, reveals that because the Chemehuevis were occupying/possessing Section 36 on March 3, 1853, no conveyance of title to Section 36 to the State occurred.

The 1853 Act also provides:

> That all **public lands** in the State of California, . . ., with the exception of section sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township . . .

> . . . That where any settlement, by the creation of a dwelling-house, . . ., shall be made upon the sixteenth and thirty-sixth section . . . **or where such section may be reserved for public uses** . . . other land shall be selected by the proper authorities of the State in lieu thereof . . .

ER 269-270.

Thus, the conveyance of Section 36 was only valid if the lands comprising Section 36 were: (1) "public lands" or (2) were not already reserved for "public uses."

The setting aside of Section 36 from all forms of settlement and entry, because it was under the occupation of the Tribe, removed the lands from the public domain. Therefore, Section 36 was not "public lands" that were eligible for conveyance to the State for school purposes.

> If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the …States …, or as a dedication of them for schools, it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, **nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians**,….

Hitchcock, 185 U.S. at 391-392 (emphasis added).

Finally, because Section 36 was already "reserved for a public use" (i.e., the Tribe's occupation), Section 36 was not eligible for conveyance to the State. The fact that the setting aside of Section 36 for the use of the Tribe was done by statute, instead of by treaty, makes no difference. There is no difference between an Indian

reservation created by treaty or statute. *Blake*, 663 F.2d at 909. As long as it is clear that Congress reserved or set aside Section 36 for the use or occupation of an Indian tribe, Section 36 was withdrawn from any other disposition and set apart from the public domain, making the Section ineligible for conveyance to the State. The State's remedy, under § 7 of the 1853 Act, was to select a section of land on the public domain "in lieu" of the reserved Section 36. See ER 270.

As a result, the State never got title to Section 36, and, for yet another reason, the Secretary had the authority to reserve and set it aside as part of the Reservation. *Hitchcock*, 185 U.S. at 968; *see also*, *Beecher v. Wetherby*, 95 U.S. 517 (1877).

IV. The Tribe's Arguments Regarding the District Court's Evidentiary Rulings and the Standard for Ruling on a Motion for Summary Judgment Are Essential to the Court's Analysis of this Appeal.

The County claims that the Tribe's arguments regarding the District Court's rulings on evidence and its standard for ruling on the motion for summary judgment are irrelevant because "any argument that the federal government's conveyance of Section 36 to California was subject to or prevented by the Tribe's aboriginal title fails as a matter of law." AB 29.

When considering the relevance of the evidence offered by the Tribe in support of its position that Section 36 was indeed occupied or in the possession of

the Tribe,[5] the Court should look once again to the Sixth Circuit for guidance. The record in *Cardinal* included a study of the history of the Indian reservation that was prepared for the Bureau of Indian Affairs, which acknowledged that title to certain lands "should have remained with the Indians" but that "portions of these lands were nevertheless claimed by [the state]" and "the record in the office of the Registrar of Deed . . . show that [the state] issued a patent for the [] property . . . and that all subsequent deeds to the property followed unchallenged from this patent." *Cardinal*, 954 F.2d at 362.

The *Cardinal* court found that the tribe's right of occupancy to disputed lands was subject to extinguishment by Congress, but that a review of the history showed that no extinguishment had happened. *Id.* at 364. As such, even though the state claimed the lands, any title that vested or patent that may have been issued prior to the creation of the Indian reservation "was subordinate to the right of occupation of the Indians." *Id.* at 365.

> In the absence of any proof that prior to [the formal creation of the Indian reservation] the Indians surrendered their right of occupancy or Congress expressly extinguished that right with respect to the [disputed] property or any other property within the limits of [the] township [in question], we conclude that all of township [] was set aside as a part of the [Indian] reservation.

Id. at 364-365 (internal citations omitted).

[5] The County focuses on whether the Tribe **currently** occupies Section 36, AB 26, fn. 5; however, that was not the point of the Occupation Exception, which focused on whether the Tribe occupied the land in 1853.

As presented by the Tribe in its filings before the District Court, under the Occupation Exception, if the Tribe occupied Section 36 in 1853, that occupation would have either prevented the State's title from vesting in 1895 or made that title subject to the Tribe's right of occupancy. As part of its evidence, the Tribe presented the reports of the special agent sent by Congress to report on the occupation, ER 327-328, as well as the decision of the Indian Claims Commission (which the County fails to address), ER 241-262, despite the Tribe specifically stating that it relied on it in support of its argument regarding occupation. *See* OB 31. The evidence submitted by the Tribe to the District Court is similar to, if not more substantial than, that relied on by the *Cardinal* court. At a minimum, the case must be remanded to the District Court for a hearing or trial on the issue of occupation.[6]

V. Individual Tribal Members' Rights to Be Free of State Intrusion Is Within the Scope of § 1983.

[6] A party opposing a motion for summary judgment must put into evidence counter affidavits demonstrating that a fact asserted by the moving party is in dispute. Here, the County never disputed that the Tribe held aboriginal title to Section 36 based either on Kelsey's reports or the Indian Claims Commission decision. Instead, after the parties briefed, argued, and submitted their motions to the District Court, the Court, on its own motion, excluded the Kelsey Reports and the Claims Commission decision on evidentiary grounds not raised by the County. Had the Court denied both motions on the grounds that a dispute of fact existed with regard to whether the Tribe occupied Section 36 in 1853, the burden would have been on the County at trial to show that the Tribe was not occupying Section 36 in 1853. 25 U.S.C. § 194; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

42 U.S.C. § 1983 ("§ 1983") provides a remedy for deprivation, under color of state law, of "any rights . . . secured by the Constitution and laws of the United States." 42 U.S.C. § 1983. Under § 1983, a plaintiff must allege facts that show a deprivation of a right, privilege, or immunity secured by the Constitution or federal law by a person acting under color of state law. *Lopez v. Dep't of Health Services*, 939 F.2d 881, 883 (9th Cir. 1991), *citing Daniels v. Williams*, 474 U.S. 327 (1986). The federal right at issue need not derive only from equal rights laws; the phrase "and laws" in the text of § 1983 refers generally to all federal statutory law. *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980).

The scope of § 1983 coverage depends on whether the federal right asserted "is one that protects the individual against government intrusion," *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989). To evaluate whether a federal right has been violated, courts have considered whether the constitutional or statutory provision in question creates obligations binding on a governmental entity rather than simply stating a finding or Congressional preference. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). The right or interest the plaintiff claims must not be so abstract as to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987).

The central issue in this case started as an interpretation of whether, under 18 U.S.C. § 1162 or 28 U.S.C. § 1360 (collectively, "P.L. 280"), the County had the authority to enforce certain provisions of the California Vehicle Code against tribal members on their Reservation. Despite the County challenging the classification of Section 36 as Indian country pursuant to § 1151, the Tribe has other claims against the County for enforcement of the California Vehicle Code against tribal members on *undisputed* Indian country. See OB 47-48.

Here, the County has issued California Vehicle Code violations against individual Indians for operation of motor vehicles within their Indian country, even though they are not subject to the state civil/regulatory vehicle code provisions at issue in this case.

The Tribe, *parens patriae*, and individual appellants Naomi Lopez and Tommie Robert Ochoa, seek relief from deprivation of their individual right to be free of state regulation and control (i.e., the County's enforcement of civil/regulatory vehicle code provisions) within their Indian country as defined by § 1151. The individual tribal members' right is derived from federal law: the 1853 Act and the 1907 Order. *See Cramer*, 261 U.S. at 228-229 ["Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim right and title to lands 'owned or held by any Indian or Indian tribes.'"].

In addition, when Congress enacted P.L. 280, it did not grant the State the authority to enforce its state regulatory laws, such as Sections 4000(a)(1), 14601.1(a), and 16028(a) of the California Vehicle Code, against Indians within Indian Country. *California v. Cabazon Band of Indians*, 480 U.S. 202, 208-209 (1987); *United States v. E.C. Invs.*, 77 F.3d 327, 330 (9th Cir. 1996). Therefore, individual Chemehuevi Indians have the right, guaranteed by federal law, to be free of such regulation and enforcement. The State's enforcement of its Vehicle Code against Chemehuevi Indians is, therefore, actionable under § 1983.

CONCLUSION

For all of the foregoing reasons, the Tribe respectfully requests that the Court: (1) find that Section 36 is Indian country; (2) find that the County has no authority to enforce the Vehicle Code against members of the Tribe; and (3) hold that the District Court's exclusion of the Tribe's evidence in support of its motion partial summary judgment motion was in error and remand to the District Court with instructions to hold an evidentiary hearing on the issue of whether the Chemehuevis occupied Section 36 in 1853.

Date: July 30, 2018

Respectfully Submitted,
RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
Lester J. Marston, Attorney
for Appellant

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 6,980 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: July 30, 2018

Respectfully Submitted
RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
Lester J. Marston, Attorney
for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 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: July 30, 2018 Respectfully Submitted

By: */s/ Ericka Duncan*