CERTIFICATE OF SERVICE

I hereby certify that on the 28th of June, 2010, I electronically filed the foregoing RESPONSE BRIEF OF APPELLEE AND CROSS-APPELLANT'S PRINCIPAL BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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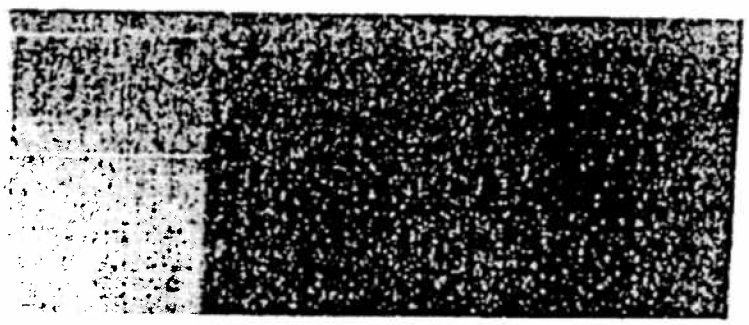
ADDENDUM

ADDENDUM:

25

Indians

Revised as of Apr 1 1975



SUBCHAPTER W—MISCELLANEOUS ACTIVITIES

SUBCHAPTER W—MISCELLANEOUS ACTIVITIES

SUBCHAPTER A—PROCEDURES; PRACTICE

SUBCHAPTER A—PROCEDURES; PRACTICE

PART 1—APPLICABILITY OF RULES OF THE BUREAU OF INDIAN AFFAIRS

AUTHORITY: The provisions of this Part 1 issued under 5 U.S.C. 301; R.S. 463, 25 U.S.C. 2.

SOURCE: The provisions of this Part 1 appear at 25 F.R. 3124, Apr. 12, 1960, unless otherwise note.

§ 1.1 [Reserved]

§ 1.2 Applicability of regulations and reserved authority of the Secretary of the Interior.

The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

§ 1.3 Scope.

Chapters I and II of this title contain the bulk of the regulations of the Department of the Interior of general application relating to Indian affairs. Subtitle B, Chapter I, Title 43 of the Code of Federal Regulations contains rules relating to the relationship of Indians to public lands and townsites. Subtitle A of Title 43 of the Code of Federal Regulations has application to certain aspects of Indian affairs and, among other things, governs practice before the Department of the Interior, of which the Bureau of Indian Affairs is a part. Indian health matters are covered in 42 CFR Part 36. Title 30 of the Code of Federal Regulations contains regulations on oil and gas and other mining operations which, under certain circumstances, may be applicable to Indian resources.

§ 1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

[30 F.R. 7520, June 9, 1965]

§ 1.10 Availability of forms.

Forms upon which applications and related documents may be filed and upon which rights and privileges may be granted may be inspected and procured at the Bureau of Indian Affairs, Washington, D.C., and at the office of any Area Director or Agency Superintendent.

PART 2—APPEALS FROM ADMINISTRATIVE ACTIONS

Subpart A—General

Subpart D—Procedures

AUTHORITY: The provisions of this Part 2 issued under R.S. 463, 465, 5 U.S.C. 301, 25 U.S.C. 2, 9.

SOURCE: The provisions of this Part 2 appear at 25 F.R. 9106, Sept. 22, 1960, unless otherwise noted.

Subpart A—General

§ 2.1 Definitions.

As used in this part:

(a) "Person" includes any Indian or non-Indian individual, corporation, tribe, or other organization.

(b) "Interested party" means any person whose interests would be adversely affected by proceedings conducted under this part.

(c) "Petitioner" means any person who files an appeal under this part.

(d) "Appeal" means a written request for correction of an action or decision claimed to violate a person's legal rights or privileges.

(e) "Complaint" means a written request for correction or reconsideration of an action or decision claimed to be legally or administratively incorrect but not violative of the complainant's own legal rights or privileges.

(f) "Right" means a favorable position in a legal relationship, the continued enjoyment of which may not be withdrawn save by a change in fundamental constitutional law.

(g) "Privilege" means a favorable position in a legal relationship, the continued enjoyment of which may be withdrawn only upon a change in law, statute or regulations upon which the relationship is based.

§ 2.2 Applicability.

This part provides appeals procedures for requesting correction of actions or decisions by officials of the Bureau of Indian Affairs where the action or decision is protested as a violation of a right or privilege of the appellant. Such rights or privileges must be based upon fundamental constitutional law, applicable Federal statutes, treaties, or upon Departmental regulations. Such regula-

tions appear in the FEDERAL REGISTER and, where of general application in Indian affairs, in Title 25 of the Code of Federal Regulations. "Appeals" shall be processed in accordance with the regulations in this part. "Complaints," on the other hand, may be either informally or formally made and ordinarily first presented to the office immediately responsible for the action or decison questioned and thereafter if necessary to higher officials. An action or decision which is subject to appeal shall be reduced to writing by the official making the decision either at his own instance or upon request of the petitioner. The appeal procedures in this part do not apply to decisions made under statutes or other regulations which provide specific appeals procedures, nor to "complaints."

§ 2.3 Who may appeal.

In accordance with the procedures in this part, any interested party adversely affected by a decision of an official under the supervision of an Area Director of the Bureau of Indian Affairs may appeal to the Area Director; an appeal may be taken to the Commissioner of Indian Affairs from a decision of the Area Director; and an appeal may be taken to the Secretary of the Interior from a decision of the Commissioner.

§ 2.4 Notice of administrative action.

Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

Subpart B—Appeals to the Area Director or to the Commissioner

§ 2.10 Appeal, how taken; time limit.

(a) An interested party who wishes to appeal to the Area Director or Commissioner shall initiate his appeal by filing a written petition with the official who made the decision. Such official if requested by an Indian or Indian tribe shall render such assistance as is appropriate in the preparation of any appeal by an Indian or Indian tribe. The petition should give an identification of the case a statement of reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the decision complained of to the petitioner unless further time is granted pursuant to the regulations in this part. The petitioner also may file an additional written statement of reasons and arguments or briefs with the Area Director or the Commissioner within 10 days after the filing of the petition.

(b) Whether or not the decision complained of will be suspended during the appeal will be within the discretion of the officer to whom the appeal is made. He may require an adequate bond to protect the interest of any Indian, Indian tribe, or other parties involved.

§ 2.11 Service of petition and of other documents.

(a) The petitioner, or the officer with whom the petition is filed when the petitioner is an Indian or Indian tribe not represented by counsel, shall serve a copy of the petition and of any additional written statement of reasons, arguments, or briefs on each interested party known to him as such, in the manner prescribed in § 2.33, at the time of filing thereof. Failure to serve within the time required may subject the appeal to summary dismissal as provided in § 2.36. Proof of such service as required by § 2.33 must be filed with the Area Director or Commissioner within 15 days after service unless filed with the petition or with the additional statement of reasons, arguments or briefs.

§ 2.12 Answers.

If any party served with a petition wishes to participate in the proceeding on appeal, he must file a written answer within 20 days after service of the petition upon him. If an additional statement of reasons is filed by the petitioner, the interested party shall have 10 days after service thereof within which to answer. Answers must be filed with the Area Director, the Commissioner, or other Bureau employee with copy to the Commissioner, whichever is appropriate, and be served on the petitioner in the manner prescribed in § 2.33 at the time the answer is filed. Proof of such service, as required by § 2.33, must be filed with the Area Director or the Commissioner within 15 days after service. If an answer is not filed within the time required, a default will not result but the answer may be disregarded in deciding the appeal.

§ 2.13 Action by Area Director or Commissioner on appeal.

The Commissioner or the Area Director will render a written decision in each case appealed to him, copies of which will be mailed to all interested parties.

§ 2.14 Effect of failure to appeal.

When any party fails to appeal a decision of the Superintendent, Area Director, or the Commissioner, that decision shall be final as to such party and will not be disturbed except for fraud or gross irregularity, or where it is found by higher authority that the failure to appeal on the part of an Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe.

Subpart C—Appeals to the Secretary

§ 2.21 Right of appeal to the Secretary.

Any party adversely affected may file an appeal from a decision of the Commissioner to the Secretary except a decision which received the Secretary's approval at the time it was made.

§ 2.22 Appeal, how taken; time limit.

(a) An interested party who wishes to file an appeal from a decision of the Commissioner to the Secretary must file a written petition with the Commissioner that he wishes to appeal. The petition must give an identification of the case, a statement of the reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the decision complained of to the petitioner. The petitioner also may file an additional statement of reasons, arguments, or briefs with the Commissioner or Secretary within 10 days after the filing of the petition.

(b) Whether or not the decision complained of will be suspended during the appeal will be within the discretion of the Secretary. He may require an adequate bond to protect the interest of any Indian, Indian tribe, or other parties involved.

§ 2.23 Service of petition and of other documents.

The petitioner, or the Commissioner when the petitioner is an Indian or Indian tribe not represented by counsel, shall serve a copy of the petition and any accompanying written statement of reasons, arguments or briefs on each interested party known to him as such, in the manner prescribed in § 2.33 at the time of filing the petition and at the time of filing any additional statement of reasons, arguments or briefs. Failure to serve within the time required may subject the appeal to summary dismissal as provided in § 2.36. Proof of such service as required by § 2.33 must be filed with the Secretary within 15 days after service unless filed with the petition or with the additional statement of reasons, arguments or briefs.

§ 2.24 Answers.

If a party served with a petition wishes to participate in the proceeding on appeal, he must file a written answer within 20 days after service of the petition upon him. If an additional statement of reasons is filed by the petitioner, the interested party shall have 10 days after service thereof within which to answer. Answers must be filed with the Secretary and be served on the petitioner in the manner prescribed in § 2.33 at the time the answer is filed. Proof of such service as required by § 2.33 must be filed with the Secretary within 15 days after service. If an answer is not filed within the time required, default will not result but the answer may be disregarded in deciding the appeal.

§ 2.25 Finality of decision.

No further right of appeal or request for reconsideration exists within the Department of the Interior from a decision of a Secretarial Officer, except when he finds as a matter of discretion that reconsideration should be had in order to avoid injustice and such decision shall constitute the final administrative action. Copies of such decision will be mailed to all interested parties.

Subpart D—Procedures

§ 2.31 When a document is filed.

A document is properly filed when received in the office of the official with whom the filing is required during regular office hours. No degree of formality is required, a simple letter will suffice

and the appellant need not be represented by counsel. An appeal by an Indian or Indian tribe received in an office other than that to which it should be properly addressed shall be transmitted to the proper office and the appellant advised. If such office is unknown where received, it shall be returned to the writer.

§ 2.32 Record address.

Every interested party who files a document in connection with an appeal shall state his address at the time of initial filing in the matter. Thereafter, he must promptly inform the official with whom the filing was made of any change in address, giving appropriate identification of all matters in which he has made such a filing; otherwise, the address as stated shall be accepted as the proper address. The successors of such party shall likewise promptly inform the official of their interest in the matter and state their addresses. If an interested party fails to furnish his address as required in this section, he will not be entitled to notice in connection with the proceedings.

§ 2.33 Service.

(a) Wherever this regulation requires that a copy of a document be served, service shall be made by delivering the copy personally or by sending the document by registered or certified mail, return receipt requested, to the address of record as required in § 2.32. Where a tribe is an interested party, service shall be made on the authorized tribal official or tribal governing body. Notice of a decision is sufficient if mailed by regular mail.

(b) A document will be considered to have been served at the time (1) of acknowledgment, (2) of personal service, (3) of delivery of a registered or certified letter, or (4) of the return by the post office of an undelivered registered or certified letter.

(c) In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the same on behalf of his client, and service of any document relating to the proceeding upon such attorney shall be deemed to be service on the party he represents. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

§ 2.34 Computation of time for filing and service.

In computing any period of time prescribed herein for filing or serving a document, the day upon which the decision or document to be appealed or answered was mailed or served, or the day of any other event after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included unless it falls upon a Saturday, Sunday, or legal holiday.

§ 2.35 Extensions of time.

The period for filing or serving any document may be extended or waived on behalf of an interested party by the officer to whom the appeal is taken, for good cause found by the officer. The Secretary in his discretion may extend or waive any time limitation established by these regulations.

§ 2.36 Summary dismissal.

An appeal to the Area Director, Commissioner or the Secretary may be subject to summary dismissal by the officer to whom it is made for any of the following causes:

(a) If a statement of the reasons for the appeal is not included in the petition.

(b) If the petition or additional statement of reasons in support of the appeal are not received or not served upon the interested parties within the time required.

(c) If proof of service of any document is not filed within the time required.

No appeal shall be dismissed because of a procedural error or informality which is satisfactorily explained as being the result of ignorance, mistake, or circumstances beyond the control of the appellant.

§ 2.37 Scope of review.

When a matter is before an official of the Bureau of Indian Affairs or higher echelon of the Department of the Interior on appeal, any information available to the reviewing officer may be used whether formally part of the record, if any, or not, but where reliance is placed on information not of record such information shall be identified as to source and nature.

PART 5—RESERVATION ACCELERATION PROGRAM (RAP)

Sec.
5.1 Purpose.
5.2 Applicant eligibility.
5.3 Application submission and acceptance.
5.4 Implementation procedures.

AUTHORITY: The provisions of this Part 5 issued under 5 U.S.C. 301.

SOURCE: 37 F.R. 23262, Nov. 11, 1972, unless otherwise noted.

§ 5.1 Purpose.

The regulations in this part govern the procedures by which Indian or Native Alaska communities may negotiate with the Bureau of Indian Affairs to restructure the Bureau's programs.

§ 5.2 Applicant eligibility.

Applicant must be an Indian or Native Alaska community currently receiving services from the Bureau of Indian Affairs or an intertribal organization representing a group of such communities.

§ 5.3 Application submission and acceptance.

(a) The governing body of the community or the intertribal organization making application must support participation in the Reservation Acceleration Program by a formal resolution. The resolution requesting participation in the program may be submitted at any time to the Commissioner of Indian Affairs.

(b) If the applicant is a community or communities served by a single Bureau of Indian Affairs Agency which serves no other communities, the Commissioner of Indian Affairs will, within 30 days after the date the application is received, inform the applicant of the date when negotiations may begin. In other cases, the Commissioner will direct members of his staff to meet with the applicant to develop special procedures that are acceptable both to the Commissioner and to the applicant. As soon as such procedures are accepted, a date for the start of negotiations will be announced.

§ 5.4 Implementation procedures.

(a) Leaders of communities selected to participate in the program will meet with the staff of the Bureau of Indian Affairs Agency that serves their communities to familiarize themselves with all aspects of the current Bureau program in their locality. The governing body will then prepare recommendations for changes in the Bureau program that it feels will support the comprehensive development plans of the community. These recommendations will be discussed with the Agency staff to determine if the Superintendent has the authority to implement them. When agreement is reached on those recommendations which are within the Superintendent's authority, he will implement them providing the changes proposed will not adversely affect services to other communities. All RAP recommendations will be forwarded to the area office.

(b) The same procedures described for negotiations at the Agency level will also apply at the area office level. In addition, when a community indicates it would be willing to exchange Bureau funds or staff in a single activity for funds or staff of another activity, the Area Director will be responsible for contacting other communities within his service area to inform them of the offer. When such an exchange is agreed to by all parties, the Area Director will implement it. Other recommendations that are within his authority and on which agreement is reached will also be implemented immediately by the Area Director.

(c) All RAP recommendations will then be forwarded to the Central Office where the negotiation process will be repeated. The Commissioner will be responsible for contacting other area offices to facilitate program exchanges that could not be made within a single area.

(d) Upon completion of the Central Office negotiations, the agreement will be signed by the tribal leader, the Superintendent, the Area Director and the Commissioner of Indian Affairs.

(e) The Area Director will be responsible for making any changes in the staffing or program of the area office that are necessary to implement the agreement.

e selection of such selectee shall be de within five days from the date of notification. Otherwise, the order of ference obtained in the drawing will forfeited and his selection may not be de prior to the selection of the holder the next highest number in the draw- , unless, due to circumstances beyond control, he is unable to appear. If selection is not made before the der of the second highest number to has made his selection, then his nber shall be placed next in line. In event he again fails to make a selec- n for himself or a member of his ily, the Area Director or his author- l representative shall make such se- tions as may be necessary in order t the selection process may not be lay delayed and that the schedule of otments may be closed.

30.10 Disposition of improvements.

Any member owning improvements on d selected properly by another mem- may remove, or otherwise dispose of improvements, within a 60-day pe- l from the date of notification by the a Director to such member to dis- e of such improvements. If in any e the whereabouts of the owner of improvements is not immediately own, an additional reasonable time y be allowed by the Area Director in which to locate the owner so that he, or his duly appointed representative, may have an opportunity to remove or dispose of such improvements.

§ 130.11 Submittal of allotment schedule.

Upon the completion of the allotment selections, a certified allotment schedule containing the names of the allottees, the legal descriptions of their selections and other pertinent information, shall be prepared by the Area Director. The allotment schedule shall be submitted to the Secretary of the Interior, through the Commissioner of Indian Affairs, for approval.

§ 130.12 Issuance of trust patents.

With the request for approval of the allotment schedule, the Area Director shall also request the Secretary of the Interior to authorize the Director, Bureau of Land Management to issue trust patents for each of the selections in accordance with the act of January 12, 1891 (26 Stat. 712), as amended by the act of March 2, 1917 (39 Stat. 969, 976).

§ 130.13 Special instructions.

To facilitate the work of the Area Director, the Commissioner, Bureau of Indian Affairs, may issue special instructions consistent with the rules and regulations in this part.

SUBCHAPTER L—LEASING AND PERMITTING

PART 131—LEASING AND PERMITTING

AUTHORITY: The provisions of this part 131 issued under 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 64 Stat. 745, 1057, 80 Stat. 308, secs. 1, 2, 80 Stat. 962, sec. 5, 84 Stat. 46, secs. 1, 2, 4, 5, 6, 84 Stat. 470, 69 Stat. 539, 540, 72 Stat. 965; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 413, 415, 415a, 415b, 415c, 415d, 477, 635.

SOURCE: The provisions of this Part 131 appear at 26 F.R. 10966, Nov. 23, 1961, unless otherwise noted.

§ 131.1 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of the Interior or his authorized representative acting under delegated authority.

(b) "Individually owned land" means land or any interest therein held in trust by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance.

(c) "Tribal land" means land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians, and land that is held by a tribe, band, community, group or pueblo of Indians subject to Federal restrictions against alienation or encumbrance, and includes such land reserved for Indian Bureau administrative purposes when it is not immediately needed for such purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476). This term also includes assignments of tribal land. Unless the terms of the assignment provide for the leasing of the land by the holder of the assignment, the tribe must join with the assignee in the grant of a lease.

(d) "Government land" means land, other than tribal land, acquired or reserved by the United States for Indian Bureau administrative purposes which are not immediately needed for the purposes for which they were acquired or reserved and land transferred to or placed under the jurisdiction of the Bureau of Indian Affairs.

(e) "Permit" means a privilege revocable at will in the discretion of the Secretary and not assignable, to enter on and use a specified tract of land for a specified purpose. The terms "lease", "lessor", and "lessee", when used in this part include, when applicable, "permit" "permittee", and "permittee", respectively

§ 131.2 Grants of leases by Secretary.

(a) The Secretary may grant leases on individually owned land on behalf of: (1) Persons who are non compos mentis; (2) orphaned minors, (3) the undetermined heirs of a decedent's estate; (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf.

(b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve such property.

(c) The Secretary may grant permits on Government land.

§ 131.3 Grants of leases by owners or their representatives.

The following may grant leases: (1) Adults, other than those non compos mentis, (2) adults other than those non compos mentis, on behalf of their minor children, and on behalf of minor children to whom they stand in loco parentis when such children do not have a legal representative, (3) the guardian, conservator or other fiduciary, appointed by a state court or by a tribal court operating under an approved constitution or law and order code, of a minor or persons who are non compos mentis or are otherwise under legal disability, (4) tribes or tribal corporations acting through their appropriate officials.

§ 131.4 Use of land of minors.

The natural or legal guardian, or other person standing in loco parentis of minor children who have the care and custody of such children may use the individually owned land of such children during the period of minority without charge for the use of the land if such use will enable such person to engage in a business or other enterprise which will be beneficial to such minor children.

§ 131.5 Special requirements and provisions.

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval

(b) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental.

(1) An adult Indian owner of trust or restricted land may lease his land for religious, educational, recreational or other public purposes to religious organizations or to agencies of the Federal, State or local government at a nominal rental. Such adult Indian may lease land to members of his immediate family with or without rental consideration. For purposes of this section, "immediate family" is defined as the Indian's spouse, brothers, sisters, lineal ancestors, or descendants.

(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of Federal, State, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character.

(3) Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises, the lessee may also be required to furnish appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

(e) No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part. No lease shall be entered into more than 12 months prior to the commencement of the term of the lease. Except with the approval of the Secretary no lease shall provide for payment of rent in advance of the beginning of the annual use period for which such rent is paid. The lease contract shall contain provisions as to the dates rents shall become due and payable.

(f) Leases granted or approved under this part shall contain provisions as to whether payment of rentals is to be made direct to the owner of the land or his representative or to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(g) All leases issued under this part shall contain the following provisions:

(1) While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of his sureties, are to the United States as well as to the owner of the land.

(2) Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land.

(3) The lessee agrees that he will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

(h) Leases granted or approved under this part on individually owned lands which provide for payment of rental direct to the owner or his representative shall contain the following provisions:

(1) In the event of the death of the owner during the term of this lease and while the leased premises are in trust or restricted status, all rentals remaining due or payable to the decedent or his representative under the provisions of the lease shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(2) While the leased premises are in trust or restricted status, the Secretary may in his discretion suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

§ 131.6 Negotiation of leases.

(a) Leases of individually owned land or tribal land may be negotiated by those owners or their representatives who may execute leases pursuant to § 131.3.

(b) Where the owners of a majority interest, or their representatives, who may grant leases under § 131.3, have negotiated a lease satisfactory to the Secretary he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases under § 131.2 (a) (1), (2), (3), and (5).

(c) Where the Secretary may grant leases under § 131.2 he may negotiate leases when in his judgment the fair annual rental can thus be obtained.

§ 131.7 Advertisement.

Except as otherwise provided in this part, prior to granting a lease or permit as authorized under § 131.2 the Secretary shall advertise the land for lease. Advertisments will call for sealed bids and will not offer preference rights.

§ 131.8 Duration of leases.

Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by § 131.5(b) (1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary.

(a) Leases for public, religious, educational, recreational, residential, or business purposes shall not exceed 25 years but may include provisions authorizing a renewal or renewals for one additional term of not to exceed 25 years, except such leases of land on the Hollywood (formerly Dania) Reservation, Fla.; the Navajo Reservation, Ariz., N. Mex., and Utah; the Palm Springs Reservation, Calif.; the Southern Ute Reservation, Colo.; the Fort Mohave Reservation, Calif., Ariz., and Nev.; the Pyramid Lake Reservation, Nev.; the Gila River Reservation, Ariz.; the San Carlos Apache Reservation, Ariz.; the Spokane Reservation, Wash.; the Hualapai Reservation, Ariz.; the Skokomish Reservation, Wash.; the Pueblos of Cochiti, Pojoaque, Tesuque, and Zuni, N. Mex.; and land on the Colorado River Reservation, Ariz., and Calif., as stated in § 131.13, which leases may be made for terms of not to exceed 99 years.

(b) Leases may be made for 25 years for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops. To determine whether a long term lease is justified, it is necessary to give consideration to the nature of the crop to be grown, including the feasibility of growing the proposed crop. The amount of substantiality of the investment, as well as the necessity of such an investment in order to grow the proposed crop, are also elements to consider in evaluating the term of the proposed lease.

(c) Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land.

(d) Grazing leases which require substantial development or improvement of the land shall not exceed ten years.

(e) Leases granted by the Secretary pursuant to § 131.2 (a) (3) shall be for a term of not to exceed two years except as otherwise provided in § 131.6(b).

[26 FR 10906, Nov. 23, 1961, as amended at 29 FR 2542, Feb. 16, 1964, 34 FR 3536, Mar. 1, 1969.]

§ 131.9 Ownership of improvements.

Improvements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted.

§ 131.10 Limitation for leasing.

Where it appears advantageous to the owners and associations to the opera-

tion of the land a single lease contract may include more than one parcel of land in separate ownerships, tribal or individual, provided the statutory authorities and other applicable requirements of this part are observed.

§ 131.11 Conservation and land use requirement.

Farming and grazing operations conducted under leases granted or approved under this part shall be conducted in accordance with recognized principles of good practice and prudent management. Land use stipulations or conservation plans necessary to define such use shall be incorporated in and made a part of the lease.

§ 131.12 Subleases and assignments.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument, must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold without the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.

[26 F.R. 10968, Nov. 23, 1961, as amended at 29 F.R. 2542, Feb. 18, 1964]

§ 131.13 Payment of fees and drainage and irrigation charges.

(a) Except as provided in Part 221 of this chapter, any lease covering lands within an irrigation project or drainage district shall require the lessee to pay annually on or before the due date, during the term of the lease and in the amounts determined, all charges assessed against such lands. Such charges shall be in addition to the rental payments prescribed in the lease. All payments of such charges and penalties shall be made to the official designated in the lease to receive such payments.

(b) Unless otherwise provided in this part or by the Secretary, fees based upon the annual rental payable under the lease shall be collected on each lease, sublease, assignment, transfer, renewal, extension, modification, or other instrument issued in connection with the leasing or permitting of restricted lands under the regulations in this part.

(1) Except where all or any part of the expenses of the work are paid from tribal funds, in which event an additional or alternate schedule of fees may be established subject to the approval of the Secretary, the fee to be paid shall be as follows:

Rental	*Percent*
On the first $5,000	5
On the next $5,000	2
On all rental above $10,000	1

In no event shall the fee be less than $2.00 nor exceed $250.

(2) In the case of percentage rental leases, the fee shall be calculated on the basis of the guaranteed minimum rental. Where rental consists of a stated annual cash rental in addition to a percentage rental, the estimated revenue anticipated from the percentage rental shall be mutually agreed upon solely for the purpose of fixing the fee. The fee to be collected in case of crop-share or other special consideration leases or permits shall be based on an estimate of the cash rental value of the acreage, or the estimated value of the lessor's share of the crops. No fees so collected shall be refunded.

§ 131.14 Violation of lease.

Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective actions to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises. The notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter. Where breach of contract can be satisfied by the payment of damages, the Secretary may approve the damage settlement between the parties to the lease, or where the Secretary has granted the lease, he may accept the damage settlement. With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities for the purpose of providing lands on which housing for Indians is to be constructed, may contain a provision prohibiting the cancellation or termination of the lease during the period that a loan, loan insurance, or loan guarantee is in effect without the approval of the lender or the agency of the United States which has made, insured or guaranteed the loan for the construction of housing on the leased premises.

[29 F.R. 2542, Feb. 18, 1964]

§ 131.15 Crow Reservation.

(a) Notwithstanding the regulations in other sections of this Part 131, Crow Indians classified as competent under the Act of June 4, 1920 (41 Stat. 751), as amended, may lease their trust lands and the trust lands of their minor children for farming or grazing purposes without the approval of the Secretary pursuant to the Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80). However, at their election Crow Indians classified as competent may authorize the Secretary to lease, or assist in the leasing of such lands, and an appropriate notice of such action shall be made a matter of record. When this prerogative is exercised, the general regulations contained in this Part 131 shall be applicable. Approval of the Secretary is required on leases signed by Crow Indians not classified as competent or made on inherited or devised trust lands owned by more than five competent devisees or heirs.

(b) The Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80), provides that no lease for farming or grazing purposes shall be made for a period longer than five years, except for tribal lands under the Big Horn Canal. Such may be leased for periods of ten years. No such lease shall provide the lessee a preference right to future lease. Such, if exercised, would thereby extend the total period of encumbrance beyond the five or ten years authorized by law.

(c) All leases entered into by Crow Indians classified as competent, under the Act of June 4, 1920, special statute, must be recorded at the Crow Agency. Such recordation shall constitute notice to all persons. Under the special statutes, Crow Indians classified as competent are free to lease their property within certain limitations. The five-year (ten-year in the case of lands under the Big Horn Canal) limitation is intended to afford a protection to the Indians. The essence of this protection is the right to deal with their property free, clear, and unencumbered at intervals of lease as frequent as those provided by law. If leases are able to obtain new leases long before the [illegible]

they are in a position to set their own terms. In these circumstances lessees could perpetuate their leaseholds and the protection of the statutory limitations as to terms would be destroyed. Therefore, in implementation of the foregoing interpretation, any lease which, on its face, is in violation of statutory limitations or requirements, and any grazing lease executed more than 12 months, and any farming lease executed more than 18 months, prior to the commencement of the term thereof or any lease which purports to cancel an existing lease with the same lessee as of a future date and take effect upon such cancellation will not be recorded. Under a Crow tribal program, approved by the Department of the Interior, competent Crow Indians may, under certain circumstances, enter into agreements which require that, for a specified term, their leases be approved. Information concerning whether a competent Crow Indian has executed such an instrument is available at the office of the Superintendent of the Crow Agency, Bureau of Indian Affairs, Crow Agency, Montana. Any lease entered into with a competent Crow Indian during the time such instrument is in effect and which is not in accordance with such instrument will be returned without recordation.

(d) Where any of the following conditions are found to exist, leases will be recorded but the lessee and lessor will be notified upon discovery of the condition: (1) The lease in single or counterpart form has not been executed by all owners of the land described in the lease, (2) there is, of record, a lease on the land for all or a part of the same term, (3) the lease does not contain stipulations requiring sound land utilization plans and conservation practices, or (4) there are other deficiencies such as, but not limited to, erroneous land descriptions, and alterations which are not clearly endorsed by the lessor.

(e) Any adult Crow Indian classified as competent shall have the full responsibility for obtaining compliance with the terms of any lease made by him pursuant to this section. This shall not preclude action by the Secretary to assure conservation and protection of these trust lands.

(f) Leases made by competent Crow Indians shall be subject to the right to issue permits and leases to prospect for, develop, and mine oil, gas, and other minerals, and to grant rights-of-way and easements, in accordance with applicable law and regulations. In the issuance or granting of such permits, leases, rights-of-way or easements due consideration will be given to the interests of lessees and to the adjustment of any damages to such interests. In the event of a dispute as to the amount of such damage, the matter will be referred to the Secretary whose determination will be final as to the amount of said damage.

[29 F.R. 473, Jan. 18, 1964]

§ 131.16 Fort Belknap Reservation.

Not to exceed 20,000 acres of allotted and tribal lands (nonirrigable as well as irrigable) on the Fort Belknap Reservation in Montana may be leased for the culture of sugar beets and other crops in rotation for terms not exceeding 10 years.

§ 131.17 Cabazon, Augustine, and Torres-Martinez Reservations, California.

(a) Upon a determination by the Secretary that the owner or owners are not making beneficial use thereof, restricted lands on the Cabazon, Augustine, and Torres-Martinez Indian Reservations which are or may be irrigated from distribution facilities administered by the Coachella Valley County Water District in Riverside County, California, may be leased by the Secretary in accordance with the regulations in this part for the benefit of the owner or owners.

(b) All leases granted or approved on restricted lands of the Cabazon, Augustine, and Torres-Martinez Indian Reservations shall be filed for record in the office of the country recorder of the county in which the land is located, the cost thereof to be paid by the lessee. A copy of each such lease shall be filed by the lessee with the Coachella Valley County Water District or such other irrigation or water district within which the leased lands are located. All such leases shall include a provision that the lessee, in addition to the rentals provided for in the lease, shall pay all irrigation charges properly assessed against the land which became payable during the term of the lease. Act of August 25, 1950 (64 Stat. 470); Act of August 28, 1958 (72 Stat. 968).

§ 131.18 Colorado River Reservation.

The Act of April 30, 1964 (78 Stat. 188), fixed the beneficial ownership of the Colorado River Reservation in the Colorado River Indian Tribes of the Colorado River Reservation and authorized the Secretary of the Interior to approve leases of said lands for such uses and terms as are authorized by the Act of August 9, 1955 (69 Stat. 539), as amended (25 U.S.C. 415, et seq.), including the same uses and terms as are permitted thereby on the Agua Caliente (Palm Springs), Dania, Navajo, and Southern Ute Reservations. Regulations in this Part 131 govern leasing under the Act of August 9, 1955. Therefore, Part 131 shall also govern the leasing of lands on the Colorado River Reservation: *Provided, however*, That application of this Part 131 shall not extend to any lands lying west of the present course of the Colorado River and south of sec. 12 of T. 5 S., R. 23 E., San Bernardino base and meridian in California and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation; *Provided further*, That any of the described lands in California shall be subject to the provisions of this Part 131 when and if determined to be within the reservation.

[30 F.R. 14156, Nov. 10, 1965, as amended by 35 F.R. 18061, Nov. 25, 1970]

§ 131.19 Grazing units excepted.

Tribal or individually owned lands within range units established pursuant to Part 151 of this chapter, general grazing regulations, shall not be leased and permits respecting such lands shall not be issued under this part.

§ 131.20 San Xavier and Salt River Pima-Maricopa Reservations.

(a) *Purpose and scope.* The Act of November 2, 1966 (80 Stat. 1112), provides statutory authority for long-term leasing on the San Xavier and Salt River Pima-Maricopa Reservations, Ariz., in addition to that contained in the Act of August 9, 1955 (69 Stat. 539), as amended (25 U.S.C. 415). When leases are made under the 1955 Act on the San Xavier or Salt River Pima-Maricopa Reservations, the regulations in §§ 131.1 through 131.14 and in § 131.19 apply. The purpose of this § 131.20 is to provide regulations for implementation of the 1966 Act. The 1966 Act does not apply to leases made for purposes that are subject to the laws governing mining leases on Indian lands.

(b) *Duration of leases.* Leases made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes may be made for terms of not to exceed 99 years. The terms of a grazing lease shall not exceed 10 years; the term of a farming lease that does not require the making of a substantial investment in the improvement of the land shall not exceed 10 years; and the term of a farming lease that requires the making of a substantial investment in the improvement of the land shall not exceed 40 years. No lease shall contain an option to renew which extends the total term beyond the maximum term permitted by this section.

(c) *Required covenant and enforcement thereof.* Every lease under the 1966 Act shall contain a covenant on the part of the lessee that he will not commit or permit on the leased land any act that causes waste or a nuisance or which creates a hazard to health of persons or to property wherever such persons or property may be.

(d) *Notification regarding leasing proposals.* If the Secretary determines that a proposed lease to be made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes will substantially affect the governmental interests of a municipality contiguous to the San Xavier Reservation or the Salt River Pima-Maricopa Reservation, as the case may be, he shall notify the appropriate authority of such municipality of the pendency of the proposed lease. The Secretary may, in his discretion, furnish such municipality with an outline of the major provisions of the lease which affect its governmental interests and shall consider any comments on the terms of the lease affecting the municipality or on the absence of such terms from the lease that the authorities may offer. The notice to the authorities of the municipality shall set forth a reasonable period, not to exceed 30 days, within which any such comments shall be submitted.

(e) *Applicability of other regulations.* The regulations of §§ 131.1 through 131.14 and in § 131.19 shall apply to leases made under the 1966 Act except where such regulations are inconsistent with this § 131.20.

(f) *Mission San Xavier del Bac.* Nothing in the 1966 Act authorizes development that would detract from the scenic, historic, and religious values of the Mission San Xavier del Bac owned

by the Franciscan Order of Friars Minor and located on the San Xavier Reservation.

[33 F.R. 14641, Oct. 1, 1968]

PART 132—PRESERVATION OF ANTIQUITIES

Sec.

AUTHORITY: The provisions of this Part 132 issued under secs. 3, 4, 34 Stat. 225, as amended; 16 U.S.C. 432.

SOURCE: The provisions of this Part 132 appear at 22 F.R. 10570, Dec. 24, 1957, unless otherwise noted.

CROSS REFERENCE: For uniform regulations issued by the Secretaries of the Interior, Agriculture, and Army pertaining to the preservation of antiquities, see Public Lands: Interior, 43 CFR Part 3.

§ 132.1 Penalty.

The appropriation, excavation, injury, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the Government of the United States, by any person or persons, without the permission of the Secretary of the department having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, subject such person or persons to be fined not to exceed $500 or imprisoned for not to exceed 90 days, or both.

§ 132.2 Permits.

The Departmental Consulting Archeologist may grant permits for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity on Indian tribal lands or on individually owned trust or restricted Indian lands. Permit application forms may be obtained from the Departmental Consulting Archeologist, National Park Service, Interior Building, Washington, D.C. 20240. Completed applications should be directed to the Departmental Consulting Archeologist who will grant permits to reputable museums, universities, colleges or other recognized scientific or educational institutions, or to their duly authorized agents, subject to the regulations in this Part and 43 CFR Part 3. Copies of these regulations will be attached to the permit. Permits may be granted only after obtaining the consent of the Indian landowners, who may impose special conditions for inclusion in the permit, and the concurrence of the Bureau of Indian Affairs official having immediate jurisdiction over the property. Said Bureau official should not permit any excavation or explorations except as granted to the holders of permits.

[38 FR 18547, July 12, 1973]

§ 132.3 Supervision.

Superintendents may at all times examine the permit of any person or institution claiming the privileges referred to, and may fully examine all work done under such permit.

§ 132.4 [Reserved]

§ 132.5 Restoration of land after work completed.

After the work is completed, institutions and persons receiving permits for excavation shall restore the lands upon which they have worked to their customary condition, to the satisfaction of the Indian owners and the Bureau of Indian Affairs official having immediate jurisdiction over said lands.

[38 FR 18548, July 12, 1973]

§ 132.6 Superintendents authorized to confiscate antiquities illegally obtained or possessed.

Superintendents or others in administrative charge of reservations are hereby directed and authorized to confiscate any antiquities that may have been illegally obtained or that may now be illegally in the possession of licensed Indian traders or others and to submit a report and description of the articles confiscated and request instructions as to their disposition.

NOTE: This section prescribed to carry out provisions of 43 CFR 3.16.

§ 132.7 Notice to public.

Copies of the act of June 8, 1906 (34 Stat. 225), and the interdepartmental regulations of December 28, 1906 (43 CFR Part 3), shall be posted conspicuously at all agency offices where the need is justified, and warning notices posted on the reservations and at or near the ruins or other articles to be protected.

All licensed traders shall be notified immediately that failure to cease traffic in antiquities will result in a revocation of their license.

NOTE: This section prescribed to carry out provisions of 43 CFR 3.16.

§ 132.8 Report of violations.

Any and all violations of the regulations in this part should be reported to the Bureau of Indian Affairs immediately.

NOTE: This section prescribed to carry out provisions of 43 CFR 3.16.

§ 132.9 Report on objects of antiquity.

Superintendents shall from time to time inquire and report as to the existence, on or near their reservations, of ruins, and archaeological sites, historic or prehistoric ruins, or monument, historic landmarks and prehistoric structures, and other objects of antiquity.

SUBCHAPTER M—FORESTRY

PART 141—GENERAL FOREST REGULATIONS

Sec.

AUTHORITY: The provisions of this Part 141 issued under secs. 7, 8, 36 Stat. 857, 25 U.S.C. 406, 407; and sec. 6, 48 Stat. 986, 25 U.S.C. 460; 47 Stat. 1417, 25 U.S.C. 413. § 141.23 issued under 5 U.S.C. 301, 25 U.S.C. 2, unless otherwise noted.

CROSS REFERENCES: For rights-of-way, see Part 161 of this chapter. For sale of forest products, Red Lake Indian Reservation, Minnesota, see Part 144 of this chapter. For sale of lumber and other forest products produced by Indian enterprises from other reservations, see Part 142 of this chapter. For wilderness and roadless areas, see Part 163 of this chapter. For law and order, see Part 11 of this chapter.

§ 141.1 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Indian forest lands" means lands held in trust by the United States for Indian tribes or individual Indians or owned by such tribes or individuals subject to restrictions against alienation, that are considered to be chiefly valuable for the production of forest crops, or on which it is considered that a forest cover should be maintained in order to protect watershed or other values. A formal inspection and land classification action is not required before applying the provisions of this Part 141 to the management of any particular tract of land.

(c) "Stumpage value" means the value of uncut timber as it stands in the woods.

(d) "Stumpage rate" means the stumpage value per thousand board feet or other unit of measure.

[24 F.R. 7870, Sept. 30, 1959, as amended at 27 F.R. 12929, Dec. 29, 1962]

§ 141.2 Scope.

The regulations in this part are applicable to all Indian forest lands except as this part may be superseded by special legislation.

[24 F.R. 7870, Sept. 30, 1959]

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and

§ 161.801 May decisions under this part be appealed?

(a) Appeals of BIA decisions issued under this part may be taken in accordance with procedures in part 2 of 25 CFR.

(b) All appeals of decisions by the Grazing Committee and Resources Committee will be forwarded to the Navajo Nation's Office of Hearings and Appeals.

§ 161.802 How will the Navajo Nation recommend amendments to this part?

The Resources Committee will have final authority on behalf of the Navajo Nation to approve amendments to the Navajo Partitioned Lands grazing provisions, upon the recommendation of the Grazing Committee and the Navajo-Hopi Land Commission, and the concurrence of BIA.

PART 162—LEASES AND PERMITS

Subpart A—General Provisions

Sec.

Subpart B—Agricultural Leases

Subpart C—Residential Leases [Reserved]

Subpart D—Business Leases [Reserved]

Subpart E—Special Requirements for Certain Reservations 162.500 Crow Reservation.

Subpart F—Non-Agricultural Leases

AUTHORITY: 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 477, 635, 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733; 44 U.S.C. 3101 *et seq.*

SOURCE: 66 FR 7109, Jan. 22, 2001, unless otherwise noted.

Subpart A—General Provisions

§ 162.100 What are the purposes of this part?

(a) The purposes of this part are to:

(1) Identify the conditions and authorities under which certain interests in Indian land and Government land may be leased;

(2) Describe the manner in which various types of leases may be obtained;

(3) Identify terms and conditions that may be required in various types of leases;

(4) Describe the policies and procedures that will be applied in the administration and enforcement of various types of leases; and

(5) Identify special requirements that apply to leases made under special acts of Congress that apply only to certain Indian reservations.

(b) This part includes six subparts, including separate, self-contained subparts relating to Agricultural Leases (Subpart B), Residential Leases (Subpart C, reserved), Business Leases (Subpart D, reserved), and Non-Agricultural Leases (Subpart F), respectively. Subpart E identifies special provisions applicable only to leases made under special acts of Congress that apply only to certain Indian reservations. Leases covered by subpart E are also subject to the general provisions in subparts A through F, respectively, except to the extent those general provisions are inconsistent with any of the special provisions in subpart E or any special act of Congress under which those leases are made.

(c) These regulations apply to all leases in effect when the regulations are promulgated; however, unless otherwise agreed by the parties, these regulations will not affect the validity or terms of any existing lease.

§ 162.101 What key terms do I need to know?

For purposes of this part:

Adult means an individual who is 18 years of age or older.

Agricultural land means Indian land or Government land suited or used for the production of crops, livestock or other agricultural products, or Indian land suited or used for a business that supports the surrounding agricultural community.

Agricultural lease means a lease of agricultural land for farming and/or grazing purposes.

AIARMA means the American Indian Agricultural Resources Management Act of December 3, 1993 (107 Stat. 2011, 25 U.S.C. 3701 *et seq.*), as amended on November 2, 1994 (108 Stat. 4572).

Assignment means an agreement between a tenant and an assignee, whereby the assignee acquires all of the tenant's rights, and assumes all of the tenant's obligations, under a lease.

BIA means the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of BIA under § 162.109 of this part.

Bond means security for the performance of certain lease obligations, as furnished by the tenant, or a guaranty of such performance as furnished by a third-party surety.

Day means a calendar day.

Emancipated minor means a person under 18 years of age who is married or who is determined by a court of competent jurisdiction to be legally able to care for himself or herself.

Fair annual rental means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market.

Fee interest means an interest in land that is owned in unrestricted fee status, and is thus freely alienable by the fee owner.

Fractionated tract means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein.

Government land means any tract, or interest therein, in which the surface estate is owned by the United States and administered by BIA, not including tribal land that has been reserved for administrative purposes.

Immediate family means a spouse, brother, sister, lineal ancestor, lineal descendant, or member of the household of an individual Indian landowner.

Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land in trust or restricted status.

Individually-owned land means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

Interest, when used with respect to Indian land, means an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration, including a life estate.

Lease means a written agreement between Indian landowners and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of Indian land, for a specified purpose and duration. Unless otherwise provided, the use of this term will also include permits, as appropriate.

Lessee means tenant, as defined in this section.

Life estate means an interest in Indian land that is limited, in duration, to the life of the life tenant holding the interest, or the life of some other person.

Majority interest means more than 50% of the trust or restricted interests in a tract of Indian land.

Minor means an individual who is less than 18 years of age.

Mortgage means a mortgage, deed of trust or other instrument that pledges a tenant's leasehold interest as security for a debt or other obligation owed by the tenant to a lender or other mortgagee.

NEPA means the National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*)

Non compos mentis means a person who has been legally determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.

Permit means a written agreement between Indian landowners and the applicant for the permit, also referred to as a permittee, whereby the permittee is granted a revocable privilege to use Indian land or Government land, for a specified purpose.

Remainder means an interest in Indian land that is created at the same time as a life estate, for the use and enjoyment of its owner after the life estate terminates.

Restricted land or restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to federal law.

Secretary means the Secretary of the Interior or an authorized representative.

Sublease means a written agreement by which the tenant grants to an individual or entity a right to possession no greater than that held by the tenant under the lease.

Surety means one who guarantees the performance of another.

Tenant means a person or entity who has acquired a legal right of possession to Indian land by a lease or permit under this part.

Trespass means an unauthorized possession, occupancy or use of Indian land.

Tribal land means the surface estate of land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians, and land that is held by a tribe, band, community, group or pueblo of Indians, subject to federal restrictions against alienation or encumbrance, and includes such land reserved for BIA administrative purposes when it is not immediately needed for such purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. §476).

Tribal laws means the body of law that governs land and activities under the jurisdiction of a tribe, including ordinances and other enactments by the tribe, tribal court rulings, and tribal common law.

Trust land means any tract, or interest therein, that the United States holds in trust status for the benefit of a tribe or individual Indian.

Undivided interest means a fractional share in the surface estate of Indian land, where the surface estate is owned in common with other Indian landowners or fee owners.

Us/We/Our means the Secretary or BIA and any tribe acting on behalf of the Secretary or BIA under §162.110 of this part.

USPAP means the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

§162.102 What land, or interests in land, are subject to these regulations?

(a) These regulations apply to Indian land and Government land, including any tract in which an interest is owned by an individual Indian or tribe in trust or restricted status.

(b) Where a life estate and remainder interest are both owned in trust or restricted status, the life estate and remainder interest must both be leased under these regulations, unless the lease is for less than one year in duration. Unless otherwise provided by the document creating the life estate or by agreement, rent payable under the lease must be paid to the life tenant under part 179 of this chapter.

(c) In approving a lease under these regulations, we will not lease any fee interest in Indian land, nor will we collect rent on behalf of any fee owners. The leasing of the trust and restricted interests of the Indian landowners will not be conditioned on a lease having been obtained from the owners of any fee interests. Where all of the trust or restricted interests in a tract are subject to a life estate held in fee status, we will approve a lease of the remainder interests only if such action is necessary to preserve the value of the land or protect the interests of the Indian landowners.

(d) These regulations do not apply to tribal land that is leased under a corporate charter issued by us pursuant to 25 U.S.C. §477, or under a special act of Congress authorizing leases without our approval under certain conditions, except to the extent that the authorizing statutes require us to enforce such leases on behalf of the Indian landowners.

(e) To the extent any regulations in this part conflict with the Indian Land Consolidation Act Amendments of 2000, Public Law 106–462, the provisions of that Act will govern.

§162.103 What types of land use agreements are covered by these regulations?

(a) These regulations cover leases that authorize the possession of Indian land. These regulations do not apply to:

(1) Mineral leases, prospecting permits, or mineral development agreements, as covered by parts 211, 212 and 225 of this chapter and similar parts specific parts specific to particular tribes;

(2) Grazing permits, as covered by part 166 of this chapter and similar

parts specific parts specific to particular tribes;

(3) Timber contracts, as covered by part 163 of this chapter;

(4) Management contracts, joint venture agreements, or other encumbrances of tribal land, as covered by 25 U.S.C. §81, as amended;

(5) Leases of water rights associated with Indian land, except to the extent the use of such water rights is incorporated in a lease of the land itself; and

(6) Easements or rights-of-way, as covered by part 169 of this chapter.

(b) Where appropriate, the regulations in this part that specifically refer to leases will apply to permits that authorize the temporary, non-possessory use of Indian land or Government land, not including:

(1) Land assignments and similar instruments authorizing temporary uses by tribal members, in accordance with tribal laws or custom; and

(2) Trader's licenses issued under part 140 of this chapter.

§162.104 When is a lease needed to authorize possession of Indian Land?

(a) An Indian landowner who owns 100% of the trust or restricted interests in a tract may take possession without a lease or any other prior authorization from us.

(b) An Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given the landowner's permission to take or continue in possession without a lease.

(c) A parent or guardian of a minor child who owns 100% of the trust interests in the land may take possession without a lease. We may require that the parent or guardian provide evidence of a direct benefit to the minor child. When the child reaches the age of majority, a lease must be obtained under these regulations to authorize continued possession.

(d) Any other person or legal entity, including an independent legal entity owned and operated by a tribe, must obtain a lease under these regulations before taking possession.

§162.105 Can tracts with different Indian landowners be unitized for leasing purposes?

(a) A lease negotiated by Indian landowners may cover more than one tract of Indian land, but the minimum consent requirements for leases granted by Indian landowners under subparts through D of this part will apply to each tract separately. We may combine multiple tracts into a unit for lease negotiated or advertised by us, if we determine that unitization is in the Indian landowners' best interests and consistent with the efficient administration of the land.

(b) Unless otherwise provided in the lease, the rent or other consideration derived from a unitized lease will be distributed based on the size of each landowner's interest in proportion to the acreage within the entire unit.

§162.106 What will BIA do if possession is taken without an approved lease or other proper authorization?

(a) If a lease is required, and possession is taken without a lease by a party other than an Indian landowner of the tract, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the party in possession is engaged in negotiations with the Indian landowners to obtain a lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

(b) Where a trespass involves Indian agricultural land, we will also assess civil penalties and costs under part 166, subpart I, of this chapter.

§162.107 What are BIA's objectives in granting or approving leases?

(a) We will assist Indian landowners in leasing their land, either through negotiations or advertisement. In reviewing a negotiated lease for approval, we will defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible. In granting a lease on the landowners' behalf, we will obtain a fair annual rental and attempt to ensure (through proper notice) that the use of the land is consistent with the

landowners' wishes. We will also recognize the rights of Indian landowners to use their own land, so long as their Indian co-owners are in agreement and the value of the land is preserved.

(b) We will recognize the governing authority of the tribe having jurisdiction over the land to be leased, preparing and advertising leases in accordance with applicable tribal laws and policies. We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, through contracts and self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §450f *et seq.*

§ 162.108 What are BIA's responsibilities in administering and enforcing leases?

(a) We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations.

(b) We will ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.

§ 162.109 What laws, other than these regulations, will apply to leases granted or approved under this part?

(a) Leases granted or approved under this part will be subject to federal laws of general applicability and any specific federal statutory requirements that are not incorporated in these regulations.

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting such laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable federal law. These regulations may be superseded or modified by tribal laws, however, so long as:

(1) The tribal laws are consistent with the enacting tribe's governing documents;

(2) The tribe has notified us of the superseding or modifying effect of the tribal laws;

(3) The superseding or modifying of the regulation would not violate a federal statute or judicial decision, or conflict with our general trust responsibility under federal law; and

(4) The superseding or modifying of the regulation applies only to tribal land.

(c) State law may apply to lease disputes or define the remedies available to the Indian landowners in the event of a lease violation by the tenant, if the lease so provides and the Indian landowners have expressly agreed to the application of state law.

§ 162.110 Can these regulations be administered by tribes, on the Secretary's or on BIA's behalf?

Except insofar as these regulations provide for the granting, approval, or enforcement of leases and permits, the provisions in these regulations that authorize or require us to take certain actions will extend to any tribe or tribal organization that is administering specific programs or providing specific services under a contract or self-governance compact entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. §450f *et seq.*).

§ 162.111 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under 25 U.S.C. §450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

§ 162.112 How must records associated with this part be preserved?

(a) Any organization, including tribes and tribal organizations, that have records identified in §162.111(a) must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A tribe or tribal organization should preserve the records identified in §162.111(b) for the period of time authorized by the Archivist of the United States for similar Department of the Interior records in accordance with 44 U.S.C. Chapter 33. If a tribe or tribal organization does not preserve records associated with its conduct of business with the Department of the Interior under this part, it may prevent the tribe or tribal organization from being able to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons directly affected by its activities.

§ 162.113 May decisions under this part be appealed?

Yes. Except where otherwise provided in this part, appeals from decisions by the BIA under this part may be taken pursuant to 25 CFR part 2.

Subpart B—Agricultural Leases

GENERAL PROVISIONS

§ 162.200 What types of leases are covered by this subpart?

The regulations in this subpart apply to agricultural leases, as defined in this part. The regulations in this subpart may also apply to business leases on agricultural land, where appropriate.

§ 162.201 Must agricultural land be managed in accordance with tribe's agricultural resource management plan?

(a) Agricultural land under the jurisdiction of a tribe must be managed in accordance with the goals and objectives in any agricultural resource management plan developed by the tribe or by us in close consultation with the tribe, under AIARMA.

(b) A ten-year agricultural resource management and monitoring plan must be developed through public meetings and completed within three years of the initiation of the planning activity. Such a plan must be developed through public meetings, and be based on the public meeting records and existing survey documents, reports, and other research from federal agencies, tribal community colleges, and land grant universities. When completed, the plan must:

(1) Determine available agricultural resources;

(2) Identify specific tribal agricultural resource goals and objectives;

(3) Establish management objectives for the resources;

(4) Define critical values of the Indian tribe and its members and identify holistic management objectives; and

(5) Identify actions to be taken to reach established objectives.

(c) Where the regulations in this subpart are inconsistent with a tribe's agricultural resource management plan, we may waive the regulations under part 1 of this title, so long as the waiver does not violate a federal statute or judicial decision or conflict with our general trust responsibility under federal law.

§ 162.202 How will tribal laws be enforced on agricultural land?

(a) Unless prohibited by federal law, we will recognize and comply with tribal laws regulating activities on agricultural land, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.

(b) While the tribe is primarily responsible for enforcing tribal laws pertaining to agricultural land, we will:

(1) Assist in the enforcement of tribal laws;

(2) There is, of record, a lease on the nd for all or a part of the same term;
(3) The lease does not contain stipulations requiring sound land utilization ans and conservation practices; or
(4) There are other deficiencies such , but not limited to, erroneous land scriptions, and alterations which are t clearly endorsed by the lessor.
(e) Any adult Crow Indian classified competent shall have the full reonsibility for obtaining compliance th the terms of any lease made by m pursuant to this section. This all not preclude action by the Sectary to assure conservation and proction of these trust lands.
f) Leases made by competent Crow lians shall be subject to the right to ue permits and leases to prospect , develop, and mine oil, gas, and ier minerals, and to grant rights-of-y and easements, in accordance with plicable law and regulations. In the uance or granting of such permits, ses, rights-of-way or easements due sideration will be given to the inests of lessees and to the adjustment any damages to such interests. In event of a dispute as to the amount such damage, the matter will be red to the Secretary whose deteration will be final as to the amount aid damage.

2.501 Fort Belknap Reservation.

ot to exceed 20,000 acres of allotted tribal lands (non-irrigable as well rrigable) on the Fort Belknap Resation in Montana may be leased for culture of sugar beets and other s in rotation for terms not exceedten years.

2.502 Cabazon, Augustine, and Torres-Martinez Reservations, California.

) Upon a determination by the Secry that the owner or owners are making beneficial use thereof, reted lands on the Cabazon, Augus-, and Torres-Martinez Indian Restions which are or may be irrid from distribution facilities adstered by the Coachella Valley ity Water District in Riverside nty, California, may be leased by Secretary in accordance with the regulations in this part for the benefit of the owner or owners.

(b) All leases granted or approved on restricted lands of the Cabazon, Augustine, and Torres-Martinez Indian Reservations shall be filed for record in the office of the county recorder of the county in which the land is located, the cost thereof to be paid by the lessee. A copy of each such lease shall be filed by the lessee with the Coachella Valley County Water District or such other irrigation or water district within which the leased lands are located. All such leases shall include a provision that the lessee, in addition to the rentals provided for in the lease, shall pay all irrigation charges properly assessed against the land which became payable during the term of the lease. Act of August 25, 1950 (64 Stat. 470); Act of August 28, 1958 (72 Stat. 968).

§ 162.503 San Xavier and Salt River Pima-Maricopa Reservations.

(a) *Purpose and scope.* The Act of November 2, 1966 (80 Stat. 1112), provides statutory authority for long-term leasing on the San Xavier and Salt River Pima-Maricopa Reservations, Arizona, in addition to that contained in the Act of August 9, 1955 (69 Stat. 539), as amended (25 U.S.C. 415). When leases are made under the 1955 Act on the San Xavier or Salt River Pima-Maricopa Reservations, the regulations in part 162 apply. The purpose of this section is to provide regulations for implementation of the 1966 Act. The 1966 Act does not apply to leases made for purposes that are subject to the laws governing mining leases on Indian lands.

(b) *Duration of leases.* Leases made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes may be made for terms of not to exceed 99 years. The terms of a grazing lease shall not exceed ten years; the term of a farming lease that does not require the making of a substantial investment in the improvement of the land shall not exceed ten years; and the term of a farming lease that requires the making of a substantial investment in the improvement of the land shall not exceed 40 years. No lease shall contain an option to renew which extends the total term

beyond the maximum term permitted by this section.

(c) *Required covenant and enforcement thereof.* Every lease under the 1966 Act shall contain a covenant on the part of the lessee that he will not commit or permit on the leased land any act that causes waste or a nuisance or which creates a hazard to health of persons or to property wherever such persons or property may be.

(d) *Notification regarding leasing proposals.* If the Secretary determines that a proposed lease to be made under the 1966 Act for public, religious, educational, recreational, residential, or business purposes will substantially affect the governmental interests of a municipality contiguous to the San Xavier Reservation or the Salt River Pima-Maricopa Reservation, as the case may be, he shall notify the appropriate authority of such municipality of the pendency of the proposed lease. The Secretary may, in his discretion, furnish such municipality with an outline of the major provisions of the lease which affect its governmental interests and shall consider any comments on the terms of the lease affecting the municipality or on the absence of such terms from the lease that the authorities may offer. The notice to the authorities of the municipality shall set forth a reasonable period, not to exceed 30 days, within which any such comments shall be submitted.

(e) *Applicability of other regulations.* The regulations in part 162 of this title shall apply to leases made under the 1966 Act except where such regulations are inconsistent with this section.

(f) *Mission San Xavier del Bac.* Nothing in the 1966 Act authorizes development that would detract from the scenic, historic, and religious values of the Mission San Xavier del Bac owned by the Franciscan Order of Friars Minor and located on the San Xavier Reservation.

Subpart F—Non-Agricultural Leases

§ 162.600 What types of leases are covered by this subpart?

The regulations in this subpart apply to any leases other than agricultural leases, as defined in this part. To the extent that any of the regulations in this subpart conflict with the provisions of the Indian Land Consolidation Act Amendments of 2000, Pub. Law. 106-462, the provisions of that Act will govern.

§ 162.601 Grants of leases by Secretary.

(a) The Secretary may grant leases on individually owned land on behalf of:
(1) Persons who are non compos mentis;
(2) Orphaned minors;
(3) The undetermined heirs of a decedent's estate;
(4) The heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and
(5) Indians who have given the Secretary written authority to execute leases on their behalf.
(b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve such property.
(c) The Secretary may grant permits on Government land.

§ 162.602 Grants of leases by owners or their representatives.

The following may grant leases:
(a) Adults, other than those non compos mentis,
(b) Adults, other than those non compos mentis, on behalf of their minor children, and on behalf of minor children to whom they stand in loco parentis when such children do not have a legal representative,
(c) The guardian, conservator or other fiduciary, appointed by a state court or by a tribal court operating under an approved constitution or law and order code, of a minor or persons who are non compos mentis or are otherwise under legal disability,
(d) Tribes or tribal corporations acting through their appropriate officials.

§ 162.603 Use of land of minors.

The natural or legal guardian, or other person standing in loco parentis

of minor children who have the care and custody of such children may use the individually owned land of such children during the period of minority without charge for the use of the land if such use will enable such person to engage in a business or other enterprise which will be beneficial to such minor children.

§ 162.604 Special requirements and provisions.

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

(b) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental.

(1) An adult Indian owner of trust or restricted land may lease his land for religious, educational, recreational or other public purposes to religious organizations or to agencies of the federal, state or local government at a nominal rental. Such adult Indian may lease land to members of his immediate family with or without rental consideration.

(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of federal, state, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character.

(3) Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.

(c) Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises; the lessee may also be required to furnish appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

(e) No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part. No lease shall be entered into more than 12 months prior to the commencement of the term of the lease. Except with the approval of the Secretary no lease shall provide for payment of rent in advance of the beginning of the annual use period for which such rent is paid. The lease contract shall contain provisions as to the dates rents shall become due and payable.

(f) Leases granted or approved under this part shall contain provisions as to whether payment of rentals is to be made direct to the owner of the land or his representative or to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(g) All leases issued under this part shall contain the following provisions:

(1) While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of his sureties, are to the United States as well as to the owner of the land.

(2) Nothing contained in this lease shall operate to delay or prevent a termination of federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land.

(3) The lessee agrees that he will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

(h) Leases granted or approved under this part on individually owned lands which provide for payment of rental direct to the owner or his representative shall contain the following provisions:

(1) In the event of the death of the owner during the term of this lease and while the leased premises are in trust or restricted status, all rentals remaining due or payable to the decedent or his representative under the provisions of the lease shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(2) While the leased premises are in trust or restricted status, the Secretary may in his discretion suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

§ 162.605 Negotiation of leases.

(a) Leases of individually owned land or tribal land may be negotiated by those owners or their representatives who may execute leases pursuant to § 162.602 of this subpart.

(b) Where the owners of a majority interest, or their representatives, who may grant leases under § 162.602 of this subpart, have negotiated a lease satisfactory to the Secretary he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases under § 162.601(a)(1), (2), (3), and (5) of this subpart.

(c) Where the Secretary may grant leases under § 162.601 of this subpart he may negotiate leases when in his judgment the fair annual rental can thus be obtained.

§ 162.606 Advertisement.

Except as otherwise provided in this part, prior to granting a lease or permit as authorized under § 162.601 of this subpart the Secretary shall advertise the land for lease. Advertisements will call for sealed bids and will not offer preference rights.

§ 162.607 Duration of leases.

Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return t owner consistent with prudent m ment and conservation practice except as otherwise provided i part shall not exceed the numb years provided for in this sectio cept for those leases authoriz § 162.604(b)(1) and (2) of this subpar less the consideration for the le based primarily on percentage come produced by the land, le shall provide for periodic revie a less than five-year intervals, o th uities involved. Such review sha consideration to the economic tions at the time, exclusive of imp ment or development required by contract or the contribution all such improvements. Any adjustm of rental resulting from such re may be made by the Secretary w he has the authority to grant le otherwise the adjustment must made with the written concurrenc the owners and the approval of the retary.

(a) Leases for public, religious, cational, recreational, residential, business purposes shall not exceed years but may include provisions thorizing a renewal or an extension one additional term of not to exceed years, except such leases of land on Hollywood (formerly Dania) Reser tion, Fla.; the Navajo Reservati Ariz., N. Mex., and Utah; the Pa Springs Reservation, Calif.; the Su ern Ute Reservation, Colo.; the F Mohave Reservation, Calif., Ariz. a Nev.; the Pyramid Lake Reservati Nev.; the Gila River Reservation, Ari the San Carlos Apache Reservatio Ariz.; the Spokane Reservation, Was the Hualapai Reservation, Ariz. t Swinomish Reservation, Wash. t Pueblos of Cochiti, Pojoaque, Tesuqu and Zuni, N. Mex.; and land on the Co orado River Reservation, Ariz., and Calif.; which leases may be made f terms of not to exceed 99 years.

(b) Leases granted by the Secretar pursuant to § 162.601(a)(3) of this sub part shall be for a term of not to ex ceed two years except as otherwise pro vided in § 162.605(b) of this subpart.

§ 162.608 Ownership of improvements.

Improvements placed on the leased land shall become the property of the

lessor unless specifically excepted therefrom under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted.

§ 162.609 Unitization for leasing.

Where it appears advantageous to the owners and advantageous to the operation of the land a single lease contract may include more than one parcel of land in separate ownerships, tribal or individual, provided the statutory authorities and other applicable requirements of this part are observed.

§ 162.610 Subleases and assignments.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument, must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold without the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.

§ 162.611 Payment of fees and drainage and irrigation charges.

(a) Any lease covering lands within an irrigation project or drainage district shall require the lessee to pay annually on or before the due date, during the term of the lease and in the amounts determined, all charges assessed against such lands. Such charges shall be in addition to the rental payments prescribed in the lease. All payments of such charges and penalties shall be made to the official designated in the lease to receive such payments.

(b) We will charge an administrative fee each time we approve an agricultural lease, amendment, assignment, sublease, mortgage, or related document. These fees will be paid by the tenant, assignee, or subtenant, to cover our costs in preparing or processing the documents and administering the lease.

(c) Except as provided in paragraph (d) of this section, we will charge administrative fees based on the rent payable under the lease. The fee will be 3% of the annual rent payable, including any percentage or cropshare rent that can be reasonably estimated.

(d) The minimum administrative fee is $10.00 and the maximum administrative fee is $500.00, and any administrative fees that have been paid will be non-refundable. However, we may

waive all or part of these administrative fees, in our discretion.

(e) If all or part of the expenses of the work are paid from tribal funds, the tribe may establish an additional or alternate schedule of fees.

§ 162.612 Can a lease provide for negotiated remedies in the event of a violation?

(a) A lease of tribal land may provide the tribe with certain negotiated remedies in the event of a lease violation, including the power to terminate the lease. A lease of individually-owned land may provide the individual Indian landowners with similar remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the landowners.

(b) The negotiated remedies described in paragraph (a) of this section will apply in addition to the cancellation remedy available to us under § 162.619(c) of this subpart. If the lease specifically authorizes us to exercise any negotiated remedies on behalf of the Indian landowners, the exercise of such remedies may substitute for cancellation.

(c) A lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, or through arbitration or some other alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us under § 162.619 of this subpart.

§ 162.613 Will BIA notify a tenant when a rent payment is due under a lease?

We may issue bills or invoices to a tenant in advance of the dates on which rent payments are due under a lease, but the tenant's obligation to make such payments in a timely manner will not be excused if such bills or invoices are not delivered or received.

§ 162.614 Will untimely rent payments made under a lease be subject to interest charges or late payment penalties?

A lease must specify the rate at which interest will accrue on any rent payment not made by the due date o any other date specified in the lease. A lease may also identify additional late payment penalties that will apply if a rent payment is not made by a specified date. Unless otherwise provided in the lease, such interest charges and late payment penalties will apply in the absence of any specific notice to the tenant from us or the Indian landowners, and the failure to pay such amounts will be treated as a lease violation under § 162.618 of this subpart.

§ 162.615 What will BIA do if rent payments are not made in the time and manner required by a lease?

(a) A tenant's failure to pay rent in the time and manner required by a lease will be a violation of the lease, and a notice of violation will be issued under § 162.618 of this subpart. If the lease requires that rent payments be made to us, we will send the tenant and its sureties a notice of violation within five business days of the date on which the rent payment was due. If the lease provides for payment directly to the Indian landowners, we will send the tenant and its sureties a notice of violation within five business days of the date on which we receive actual notice of non-payment from the landowners.

(b) If a tenant fails to provide adequate proof of payment or cure the violation within the requisite time period described in § 162.618(b) of this subpart and the amount due is not in dispute, we may immediately take action to recover the amount of the unpaid rent and any associated interest charges or late payment penalties. We may also cancel the lease under § 162.619 of this subpart, or invoke any other remedies available under the lease or applicable law, including collection on any available bond or referral of the debt to the Department of the Treasury for collection. An action to recover any unpaid amounts will not be conditioned on the prior cancellation of the lease or any further notice to the tenant, nor will such an action be precluded by a prior cancellation.

(c) Partial payments and underpayments may be accepted by the Indian landowners or us, but acceptance will not operate as a waiver with respect to any amounts remaining unpaid or any

other existing lease violations. Unless otherwise provided in the lease, overpayments may be credited as an advance against future rent payments, or refunded.

(d) If a personal or business check is dishonored, and a rent payment is therefore not made by the due date, the failure to make the payment in a timely manner will be a violation of the lease, and a notice of violation will be issued under §162.618 of this subpart. Any payment made to cure such a violation, and any future payments by the same tenant, must be made by an alternative payment method approved by us.

§ 162.616 Will any special fees be assessed on delinquent rent payments due under a lease?

The following special fees will be assessed if rent is not paid in the time and manner required, in addition to any interest or late payment penalties that must be paid to the Indian landowners under a lease. The following special fees will be assessed to cover administrative costs incurred by the United States in the collection of the debt:

The tenant will pay . . .	For . . .
(a) $50.00	Administrative fee for dishonored checks
(b) $15.00	Administrative fee for BIA processing of each notice or demand letter
(c) 18% of balance due	Administrative fee charged by Treasury following referral for collection of delinquent debt.

§ 162.617 How will BIA determine whether the activities of a tenant under a lease are in compliance with the terms of the lease?

(a) Unless a lease provides otherwise, we may enter the leased premises at any reasonable time, without prior notice, to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will initiate an appropriate investigation within five business days of that notification.

§ 162.618 What will BIA do in the event of a violation under a lease?

(a) If we determine that a lease has been violated, we will send the tenant and its sureties a notice of violation within five business days of that determination. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within ten business days of the receipt of a notice of violation, the tenant must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or

(3) Request additional time to cure the violation.

§ 162.619 What will BIA do if a violation of a lease is not cured within the requisite time period?

(a) If the tenant does not cure a violation of a lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) The lease should be canceled by us under paragraph (c) of this section and §§162.620 through 162.621 of this subpart;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The tenant should be granted additional time in which to cure the violation.

(b) If we decide to grant a tenant additional time in which to cure a violation, the tenant must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the tenant and its sureties a cancellation letter within five business days of that decision. The cancellation letter must be sent to the tenant by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners, as

appropriate. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the tenant of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the tenant of its right to appeal under part 2 of this chapter, as modified by §162.620 of this subpart, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and

(4) Order the tenant to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time.

§ 162.620 Will BIA's regulations concerning appeal bonds apply to cancellation decisions involving leases?

(a) The appeal bond provisions in §2.5 of part 2 of this chapter will not apply to appeals from lease cancellation decisions made under §162.619 of this subpart. Instead, when we decide to cancel an agricultural lease, we may require that the tenant post an appeal bond with an appeal of the cancellation decision. The requirement to post an appeal bond will apply in addition to all of the other requirements in part 2 of this chapter.

(b) An appeal bond should be set in an amount necessary to protect the Indian landowners against financial losses that will likely result from the delay caused by an appeal. Appeal bond requirements will not be separately appealable, but may be contested during the appeal of the lease cancellation decision.

§ 162.621 When will a cancellation of a lease be effective?

A cancellation decision involving an agricultural lease will not be effective until 30 days after the tenant receives a cancellation letter from us. The cancellation decision will remain ineffective if the tenant files an appeal under §162.620 of this subpart and part 2 of this chapter, unless the decision is made immediately effective under part 2. While a cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease. If an appeal is not filed in accordance with §162.620 of this subpart and part 2 of this chapter, the cancellation decision will be effective on the 31st day after the tenant receives the cancellation letter from us.

§ 162.622 Can BIA take emergency action if the leased premises are threatened with immediate and significant harm?

If a tenant or any other party causes or threatens to cause immediate and significant harm to the leased premises during the term of a lease, we will take appropriate emergency action. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm. Reasonable efforts will be made to notify the Indian landowners, either before or after the emergency action is taken.

§ 162.623 What will BIA do if a tenant holds over after the expiration or cancellation of a lease?

If a tenant remains in possession after the expiration or cancellation of a lease, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

PART 163—GENERAL FORESTRY REGULATIONS

Subpart A—General Provisions

Subpart B—Forest Management and Operations

ORDINANCE 04-06

Be it enacted by the Tribal Council of the Colorado River Indian Tribes (hereinafter the Tribal Council) an ordinance establishing procedures for obtaining possession of real property within the Colorado River Indian Reservation, to be effective October 12, 2006, as follows:

PROPERTY CODE
ARTICLE I. EVICTIONS

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PROPERTY CODE
ARTICLE I. EVICTIONS

[NOTE: Except as otherwise noted the provisions of Ordinance No. 04-06 were enacted on October 12, 2006, and becomes effective upon its enactment.]

ARTICLE I. EVICTIONS

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Section 1-101. Purpose.

The purpose of this Article is to provide authority for lessors or landlords, including the Tribes, to regain possession of real property and to evict a lessee or tenant or other occupant therefrom.

Section 1-102. Jurisdiction.

The provisions of this Article shall govern relationships between all landlords and tenants and over all property whether private or public real property within the exterior boundaries of the CRIT reservation and subject to the authority of the Tribes.

Section 1-103. Relation to other laws.

The remedies established in this Article are in addition to any other remedies that may be available under Tribal, federal or state law.

Section 1-104. Definitions.

As used in this Article, the following words will have the meanings given them in this Section unless the context plainly requires otherwise.

a) "Landlord" means the Tribes, [CRRMC/Indian Housing Authority,] a person, or entitythat is the owner, lessor, or sublessor of real property that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household.

b) "Lease" means all agreements, including, but not limited to a permit, rental agreement, or lease-to-purchase agreement, whether written or oral, as well as valid rules and regulations, regarding the terms and conditions of the use or occupancy of real property.

c) "Lessor" means the legal, beneficial, or equitable owner of real property under a lease, and may include the heir(s), successor(s), executor(s), administrator(s), or

assign(s) of the lessor.

d) "Lessee" means the user and/or occupier of real property under a lease and includes a homebuyer under any federal mortgage program including the Mutual Help program. The lessee may, for purposes of federal agency home mortgage programs, be the CRRMC/Indian Housing Authority.

e) "Nuisance" means the maintenance or allowance on real property of a condition which the lessee has the ability to control and which unreasonably threatens the health or safety of the public or nearby land users or unreasonably and substantially interferes with the ability of nearby property users to enjoy the reasonable use and occupancy of their property.

f) "Person" includes an individual or organization, and where the meaning of this Article requires, it may mean the Tribes, a public agency, corporation, partnership, or other entity.

g) "Premises" means a portion of real property, and all facilities and areas connected thereto, including grounds, common areas, and facilities, intended for the use of lessees or tenants or the use of which is promised for lessees or tenants.

h) "Rent" means all periodic payments to be made to the landlord or lessor under a lease.

i) "Reservation" means the Colorado River Indian Reservation.

j) "Tenant" means the lessee(s), sublessee(s), or person(s) entitled under a lease to occupy real property to the exclusion of others.

k) "Term of lease" means the initial term or any renewal or extension of the written rental agreement currently in effect not including any wrongful holdover period.

l) "Tribal Council" or "Council" means the tribal council of the Colorado River Indian Tribes.

m) "Tribal Court" or "Court" means the tribal court established by the Colorado River Indian Tribes.

n) "Tribes" means the Colorado River Indian Tribes.

o) "Waste" means spoil or destruction by a tenant of land, buildings, gardens, trees, or improvements which results in substantial injury to the lessor's interest in real property.

p) "Writ of Restitution" means an order of the Tribal Court restoring an owner, lessor or landlord to possession of real property and evicting a lessee, tenant or other occupant therefrom.

q) "Writ of Possession" means an order of the Tribal Court giving immediate possession of real property to the person entitled to such possession under the court order.

CHAPTER 2. PROCEDURES FOR SELF-HELP EVICTION

Section 1-201. Use of Self-Help Eviction.

The Tribes may utilize self-help eviction in accordance with this Chapter.

Section 1-202. Grounds.

The Tribes may utilize self-help eviction under the following circumstances:

(a) Where a lease has expired or been canceled and the lessor has given notice, as required by the lease and in accordance with the law, that the lease has been terminated and the former lessee must vacate the premises, and the time provided in the notice to vacate has expired; or

(b) Where the person to be evicted has entered onto or remains on the premises of another without permission and without having any substantial claim of a lease or other legal interest in the premises; or

(c) Ten (10) days after the lessee's interest has been foreclosed in a foreclosure proceeding in the Tribal Court ; or

Section 1-203. Approval of the Tribal Council.

Self-help evictions pursuant to this Chapter may be conducted only with the approval of the Tribal Council pursuant to a Resolution adopted by the Council for that purpose, but shall not occur when termination of the lease is subject to appeal and the appeal is pending. The Council may consider such a Resolution upon request by the Attorney General or on the motion of any Council Member.

Section 1-204. Notice.

Prior to conducting any self-help eviction pursuant this Chapter, the Realty Services Department or other designee of the Council (known henceforth in this Chapter as "Realty Officer") shall serve a three(3) day written notice upon the person to be evicted that the person is occupying Reservation premises without the consent of the Tribes and

that unless the person to be evicted voluntarily vacates such Reservation premises and removes the person's property from the premises within three (3) calendar days of receiving the notice, the Tribes shall take possession of the premises in question by forcible entry and dispose of any remaining property pursuant to the June 10, 1994 Tribes' Abandoned Property Resolution, (Resolution #66-94).

(a) The notice required by this Section may be served either:

(1) By delivering a copy to the person to be evicted personally; or

(2) If the person is absent from the premises, by leaving a copy with a person of suitable age and discretion on the premises and sending a copy through the United States Mail addressed to the person at his or her current place of residence, if known, or the person's last known place of residence or business; or

(3) If a person of suitable age or discretion on the premises cannot be found, then by fixing a copy in a conspicuous place on the premises and by sending a copy through the United States Mail addressed to the person to be evicted at his or her current place of residence, if known, or the person's last known place of residence or business; or

(4) If a person of suitable age or discretion on the premises cannot be found, and a place of residence or business cannot be ascertained, then by fixing a copy in a conspicuous place on the premises.

(b) The notice required by this Section may be combined with any other notice given to vacate the property pursuant to Section 1-202 of this Chapter.

Section 1-205.Self-Help Evictions.

The Realty Officer is hereby authorized, after the notices required by Section 1-204 of this Chapter have been given and in accordance with the provisions of this Chapter, to take possession of the premises by forcible entry, including, but not limited to, the following means:

(a) Forcing locks, breaking open doors, windows, or other parts of a dwelling and any gates, fences, or security systems on the property; or

(b) Using whatever reasonable force is necessary to retake possession of and reoccupy the premises.

Section 1-206.Abandoned Property.

Once the Realty Officer has taken possession of any Reservation premises pursuant to this Chapter, the Realty Officer is hereby authorized to remove any personal property from such premises and to raze or remove any structure located upon such premises. Any property removed pursuant to this Chapter shall be disposed of in accordance with the June 10, 1994 Tribes' Abandoned Property Resolution, (Resolution #66-94).

Section 1-207.Posting the Property.

After taking possession of any Reservation premises pursuant to this Chapter, the Realty Officer shall post the property with signs indicating that the property is Reservation premises and that trespassers will be prosecuted. In addition, the Realty Officer shall notify appropriate law enforcement officials that the Tribes has taken possession of such premises and that any person who enters such premises without the express written permission of the Tribes should be arrested and prosecuted.

Section 1-208.Breach of Peace Prohibited.

In taking possession of any Reservation premises pursuant to this Chapter, the Realty Officer shall not breach the peace or threaten or use any physical force against any person.

CHAPTER 3.SUMMARY TRIBAL COURT PROCEDURE FOR EVICTION AND REGAINING POSSESSION OF LANDS

Section 1-301.Grounds for Eviction.

A person may be evicted for:

(a) Occupation of any premises without permission or agreement, following any reasonable demand by a person in authority over the premises to leave, including where a lease has expired or been cancelled, or where the person to be evicted entered onto the premises without permission, or under other circumstances described in Chapter 2, Section 1-202 of this Article; or

(b) Nonpayment of rent under an agreement for the lease of the premises when such payments are not made after ten (10) calendar days of the agreement date for payment, or ten (10) calendar days following the first day of the month in a month-to-month tenancy; or

(c) Any agreement in rent, costs, or damages which have been due and owing for thirty (30) calendar days or more. The receipt by a landlord of partial payments under an agreement shall not excuse the payment of any balance due upon demand;

or

(d) Nuisance, waste, intentional or reckless damage, destruction, or injury to the property of the landlord or other tenants, or disturbing another tenant's right to quiet enjoyment of property; or

(e) Serious or repeated violations of the lease, any applicable rules or regulations, or any applicable building or housing codes; or

(f) Conviction of a criminal offense where the activity of such criminal offense threatens the health, safety, welfare, or right of peaceful enjoyment of other residents of the community and no appeal is pending and he has been given notice, in accordance with this Article, that the lease shall terminate at a time specified by the notice, but not less than thirty (30) calendar days from the date of such notice; or

(g) Conviction of a criminal offense regarding drugs on or near the premises and no appeal is pending and he has been given notice, in accordance with this Article, that the lease shall terminate at a time specified by the notice, but not less than thirty (30) calendar days from the date of such notice; or

(h) Under other terms in the lease which do not conflict with the provisions of this Article

Section 1-302.Notice to Quit Requirements.

(a) When Notice to Quit is Required.

(1) When a landlord desires to obtain possession of premises that are occupied without permission or agreement, following any reasonable demand to leave as described in Section 1-301 (a) of this Chapter, no additional notice to quit is required.

(2) When a landlord desires to obtain possession of premises, and when there exists one or more legally cognizable reasons to evict the tenant as set forth in Section 1-301 (b)-(h) of this Chapter, the landlord shall give notice to the tenant to quit possession of such premises pursuant to this Section.

(b) Statement of Grounds for Eviction Required. The notice to quit shall be addressed to the tenant and shall state the reason(s) for the termination of the tenancy and the date by which the tenant is required to quit possession of the premises.

(c) [Form of Notice. The notice shall be in writing and in substantially the following form:

"I (or we) hereby give you notice that you are to quit possession or occupancy of the premises now occupied by you at (insert the address or other reasonable description of the location of the premises), on or before the (insert the date) for the following reason (insert the legally cognizable reason or reasons for the notice to quit possession using the statutory language or words of similar import). Signed, (insert the signature, name and address of the landlord, as well as the date and place of signing)."]

(d) Time Requirements for Notice. The notice required by this Section must be delivered within the following periods of time:

(1) No less than seven (7) calendar days before the date to quit for any failure to pay rent or other payments required by the agreement.

(2) No less than three (3) calendar days prior to the date to quit for nuisance, serious injury to property, criminal convictions set forth in Section 1-301 (f) and (g), or injury to persons.

(3) In situations in which there is an emergency, such as a fire or condition making a dwelling unsafe or uninhabitable, or in situations involving an imminent or serious threat to the public health or safety, the notice may be made in a period of time which is reasonable, given the circumstances.

(4) No less than fourteen (14) calendar days in all other circumstances.

Section 1-303.Serving the Notice to Quit.

(a) Any notice to quit must be in writing, and must be delivered to the tenant by either:

(1) Delivering a copy to the tenant personally; or

(2) If the tenant be absent from the premises, by leaving a copy with some person of suitable age and discretion on the premises and sending a copy through the United States Mail addressed to the tenant at his or her current place of residence, if known, or his or her last known place of residence or business; or

(3) If a person of suitable age or discretion on the premises cannot be found, then by fixing a copy in a conspicuous place on the premises and by sending a copy through the United States Mail addressed to the tenant at his or her current place of residence, if known, or his or her last known place of residence or business; or

(4) If a person of suitable age or discretion on the premises cannot be found,

and a place of residence or business cannot be ascertained, then by fixing a copy in a conspicuous place on the premises.

(b) Proof of service by either of the above methods may be made by affidavit of any adult person stating that he or she has complied fully with the requirements of this Section.

Section 1-304.Summons and Complaint.

If, after the date set forth in the notice to quit, the tenant has not quit possession, the landlord may commence an action in the Tribal Court for eviction and such other relief as the Court may deem just and proper, by filing with the Tribal Court, in writing, the following documents:

(a) A complaint stating:

(1) The names of the person(s) against whom the suit is brought;

(2) A description of the lease, if any;

(3) The address or reasonable description of the location of the premises;

(4) The grounds for eviction;

(5) Evidence demonstrating that the notice to quit has been properly served, which may include an affidavit;

(6) The relief demanded, including any claim(s) for possession of the premises, damages, fees, costs, or other special relief.

(b) A copy of the summons, issued in accordance with established Tribal Court procedures, requiring the defendant to appear for a trial upon the complaint on a date and time specified in the summons pursuant to Section 1-305 of this Chapter and notifying defendant that judgment will be taken against him or her in accordance with the terms of the complaint unless he or she files an answer with the Court in accordance with Section 1-306 of this Chapter and appear for trial at the time, date and place specified in the summons.

(c) A copy of the summons and complaint shall be served upon the defendant in the manner provided by established Tribal Court procedures.

Section 1-305.Action Upon Filing Complaint; Setting Trial Date; Procedures.

(a) When a complaint is filed in the Tribal Court, it shall be immediately presented to a

Tribal Court Judge. This shall be on the date of filing, or if no judge is present, on the first regular Court day after filing or when a judge may first be found. The judge shall review the complaint and shall, if it appears to be in compliance with this Chapter, issue an order of the Court requiring the defendant named in the complaint to appear before the Court for a trial on a certain date. The trial date shall be not less than twelve (12) days nor more than thirty (30) days from the date of filing. Upon setting of the date for appearance, the plaintiff shall have the defendant served with the complaint and a summons to appear for the trial date.

(b) Except as otherwise provided in this Chapter, the action shall proceed according to the procedures ordinarily applicable in the Tribal Court.

Section 1-306.Answer.

In any action under this Chapter, unless otherwise ordered by the Court for good cause shown, the time allowed for defendant to answer the complaint shall not exceed ten (10) calendar days from service of the complaint and summons. The answer shall be in writing and may deny any allegations contained in the complaint and/or set forth any factual disputes, and must specifically set forth any of the defenses described in Section 1-311 of this Chapter that he or she is asserting.

Section 1-307.Necessary Party Defendants; Joinder; Subtenants after Notice to Tenant; Persons Bound by Judgment.

No person, other than the person in actual occupation of the premises when the complaint is filed, need be made a party defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made a party defendant, but when it appears that any of the defendants served with process, or appearing in the proceeding, are unlawfully in tenancy pursuant to this Chapter, judgment must be rendered against that defendant. In case a defendant has become a subtenant of the premises after the service of the notice to quit provided for by this Chapter, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action.

Section 1-308.Motion to Quash Service or Stay or Dismiss Action.

In any action under this Chapter, where the defendant files a motion to quash service, stay proceedings, or dismiss the complaint, the time for filing the motion shall be the same for the filing of an answer, and the time for hearing the motion shall be not less than three (3) days nor more than seven (7) days after filing the motion. The filing of such a motion shall extend the defendant's time to answer such that defendant shall have until five (5) days after service of a notice of entry of an order denying the defendant's

motion to file his or her answer.

Section 1-309. Entry of Default.

If at the time appointed, any defendant served with a summons does not answer the complaint or appear at the trial and defend, the Court shall, upon written application of the plaintiff and proof of the service of summons and complaint, enter the default of any defendant so served, and, if requested by the plaintiff, immediately enter judgment thereon.

Section 1-310. Extensions of Time; Rents.

(a) Unless specified otherwise, extensions of time for dates established in this Chapter may be granted only with the consent of the adverse party or upon good cause shown.

(b) The Court may in its discretion on motion from the landlord order the tenant to pay into the Court rents for the use and occupancy during the pendency of the eviction case.

(c) A defendant may, upon the payment of a reasonable sum for the fair rental value of the premises between the date on which the complaint was filed and the date of the hearing, obtain an extension of time beyond the period allowed for a trial. Such an extension is not to exceed fourteen (14) days without the consent of the adverse party. The Court may refuse to extend the date of hearing where the complaint is based upon nuisance, and shall not extend the date of hearing where the complaint is based upon conduct which is alleged to constitute a serious danger to the public health, safety, or peace.

Section 1-311. Defenses.

The Court shall grant the remedies allowed in this Chapter, except that one or more of the following may constitute a sufficient defense, to the extent necessary to ensure justice, to an action brought under this Chapter:

(a) The premises are untenable, uninhabitable, or constitute a situation where there is a constructive eviction of the tenant, in that the premises are in such a condition, due to the fault of the landlord, that they constitute a real and serious hazard to human health and safety and not a mere inconvenience.

(b) The landlord has failed or refused to make repairs which are the landlord's responsibility after a reasonable demand by the tenant to do so, without good cause, and the repairs are necessary for the reasonable enjoyment of the premises.

(c) There are monies due and owing to the tenant because the tenant has been required to make repairs which are the obligation of the landlord and the landlord has failed or

refused to make them after a reasonable notice. Such sums may be a complete or partial defense to a complaint for eviction, but only to the extent that such sums set off monies owed for occupancy. A tenant may be evicted after such a period if he or she fails or refuses to pay the reasonable rental value of the premises.

(d) That due to the conduct of the landlord, there is injury to the tenant in such a way that justice requires that relief be modified or denied. This may include the equitable defenses of estoppel, laches, fraud, misrepresentation, and breaches of serious and material obligations for public health, safety, and peace standards.

(e) That there are such serious and material breaches of applicable housing law on the part of the landlord that it would be unjust to grant the landlord a remedy.

(f) The landlord is evicting the tenant because of his or her race, sex, sexual orientation, religion, age, marital status, family status, or because the tenant is disabled.

(g) The landlord terminated the tenancy in retaliation for the tenant's attempt to secure his or rights under this Code or to force the landlord to comply with his duties under this Code.

(h) Any other material fact relevant under this Code or Tribal customs and traditions the tenant might present that may explain why the eviction is unjust and unfair.

(i) On the trial of an action brought under this Chapter, the issue shall be the right of actual possession and the merits of title shall not be inquired into.

Section 1-312.Discovery and Pre-hearing Procedures.

Extensive, prolonged, or time consuming discovery and prehearing proceedings will not be permitted, except in the interests of justice and for good cause shown by the moving party. Discovery shall be informal, and reasonably provided on demand of a party, and it shall be completed no later than five (5) calendar days before the date of hearing. Requests for discovery shall be made no later than five (5) calendar days following the setting of a hearing date. The court may enter reasonable orders requiring discovery or protecting the rights of the parties upon reasonable notice.

Section 1-313.Evidence.

The Court may consider any oral or documentary evidence presented that is relevant to the facts and issues raised by the Complaint without regard to its admissibility under the rules of evidence that apply to other court proceedings; however, the Court may give less weight to evidence that is hearsay or otherwise inadmissible under the rules of evidence. Evidence of the customs and traditions of the Tribes shall be freely admitted.

Section 1-314. Burden of Proof.

The burden of proof in all proceedings under this Chapter shall be preponderance of the evidence.

Section 1-315. Trials.

Whenever an issue of fact is presented by the pleadings, it shall be tried by the Tribal Court Judge. No party shall have the right to a trial by jury for actions brought under this Chapter.

Section 1-316. Judgment.

Within five (5) calendar days of the date of the hearing, the Court shall grant and enter judgment and the judgment shall grant all relief that the parties are entitled to as of the date of the judgment. The judgment may:

(a) Order issuance of a Writ of Restitution ordering the immediate eviction of a tenant and delivery of the premises to the landlord;

(b) Grant actual damages as provided in the agreement of the parties or this Chapter, including interest;

(c) Order the parties to carry out an obligation required by law;

(d) Establish a payment plan for the tenant;

(e) Order rent payments out of per capita payment or through garnishment;

(f) Establish a Power of Attorney in another person/agency to fulfill rights or obligations of either landlord or tenant;

(g) Remediate the action in part or in whole through appropriate recalculation of rent;

(h) Order the tenant to perform work for the landlord, lessor or owner to pay off back rent due and/or damages;

(i) Order the payment of attorneys' fees and, where allowed by law or agreement, costs and expenses of litigation, except where such costs and fees would be awarded against the Tribe without its express and unambiguous written consent;

(j) Order the parties into negotiations; or

(k) Grant any relief provided in this Code or allowed in law or equity, or by the Tribes'

customs and traditions.

Section 1-317.Form of Judgment.

The judgment shall state the relief granted by the Court to any party, but need not state findings of fact or conclusions of law in support of the judgment. The judgment may state brief reasons for it. If a trial is held, the judge should, whenever possible, render his or her decision immediately after both parties have rested their case and award costs and restitution as appropriate.

Section 1-318.Execution of the Judgment.

The judgment may be executed by a duly authorized law enforcement officer or officer of the Court, appointed by the Court for such a purpose.

(a) To execute a Writ of Restitution, the officer shall:

(1) Remove all the evicted persons from the premises and verbally order them not to re-enter;

(2) Provide a copy of the Writ of Restitution to all adult tenants;

(3) Post copies of the Writ of Restitution on the doors of the premises, if applicable, if there is not any adult tenant present at the time of execution; and

(4) Supervise the removal of the possessions of the evicted persons by the former tenants or pursuant to the June 10, 1994 Tribes' Abandoned Property Resolution, (Resolution #66-94), if applicable, or, if the abandoned property resolution is not applicable, pursuant to Subsection (b) below.

(b) If the Tribes' abandoned property resolution is not applicable and the former tenant does not remove his or her belongings, personal property shall be handled as follows: Following forcible eviction of the defendant and/or other occupants, the former occupant's personal property shall be stored by the landlord for at least thirty (30) days, either on the premises or at another suitable location. In order to reclaim their property, the former occupants shall pay the reasonable costs of its removal and storage. If they do not pay such costs within thirty (30) days, the landlord is authorized to sell the property in order to recover these costs. The landlord shall not condition return of the former occupant's personal property on the payment of any costs or fees other than those of removal and storage of those personal possessions. If a landlord attempts to condition return of personal possessions on payment of any other cost or fee, the landlord shall forfeit his or her right to the costs of removal and storage. Upon request by the former

occupants, the landlord shall provide them with pertinent information concerning the sale, including the time, date and location. Any proceeds from the sale in excess of the storage and removal costs shall be remitted to the former occupants. Nothing in this Section shall be construed to prevent the former occupants from reclaiming property remaining after the sale if they can arrange to do in a manner satisfactory to the owner. If the abandoned property is of cultural, religious, or ceremonial significance, the landlord shall have an affirmative duty to locate next of kin and/or contact the Tribes in order to return these items.

(c) Any law enforcement officer shall, upon receipt of an order of the Court, execute the judgment or order made by it within five (5) calendar days of the date of the judgment or order and make a report to the Court on what was done to enforce it. Otherwise, the judgment shall be subject to execution in the manner otherwise provided under Tribal law.

Section 1-319.Forcible Eviction.

Where the Court orders an eviction, and the defendant or any other occupant of the premises refuses to vacate voluntarily by the effective date of that Order, the defendant or other occupants may be forcibly removed from the premises by a Tribal or other appropriate law enforcement officer. In the event of a forcible eviction, any abandoned property shall be disposed of pursuant to the June 10, 1994 Tribes' Abandoned Property Resolution, (Resolution #66-94), if applicable or, if the abandoned property resolution is not applicable, as described in Section 1-318 of this Chapter.

Section 1-320.Immediate Possession.

(a) Upon filing the complaint, the plaintiff may, upon motion, have immediate possession of the premises by a writ of possession issued by the Tribal Court and directed to an appropriate law enforcement official for execution, where it appears to the satisfaction of the Tribal Court, after notice to the defendant and a hearing on the motion, from the complaint and from any affidavits filed or oral testimony given by or on behalf of the parties, that the defendant resides off of the Reservation, has departed from the Reservation, cannot, after due diligence be found on the Reservation, or has concealed himself or herself to avoid the service of summons.

(b) Written notice of the hearing on the motion shall be served on the defendant by the plaintiff in accordance with the Tribal Court's rules, and shall inform the defendant that he or she may file affidavits on his or her behalf with the Court and may appear and present testimony on his or her behalf, and that, if he or she fails to appear, the plaintiff may apply to the Court for a writ of possession.

(c) The Court may require the plaintiff to file an undertaking with good and sufficient sureties in a sum to be fixed and determined by the Court to the effect that, if the plaintiff

fails to recover judgment against the defendant for the possession of the premises or if the suit is dismissed, the plaintiff will pay to the defendant such damages, not to exceed the amount fixed in the undertaking, as may be sustained by the defendant by reason of such dispossession under the writ of possession. An action to recover such damages shall be commenced by the defendant in the Tribal Court within one year from the date of entry of dismissal or of final judgment in favor of the defendant.

(d) Notwithstanding the foregoing, the Tribes shall not be required to post bond or any other type of surety in order to obtain a writ of possession.

Section 1-321.Stay of Execution.

If judgment for possession of the premises enters in favor of the landlord, the tenant may apply for a stay of execution of the judgment or order within five (5) calendar days of the judgment being rendered. The Court may grant the stay for good cause, if any of the following is established:

(a) Good and reasonable grounds affecting the well being of the party are stated; or

(b) There would be no substantial prejudice or injury to the prevailing party during the period of the stay; or

(c) Execution of the judgment could result in extreme hardship for the party; or

(d) A bond is posted or monies are paid to the Court, to satisfy the judgment or payment for the reasonable use and occupancy of the premises during the period of time following the judgment. No stay may exceed three months in the aggregate. The clerk shall distribute such arrearages to the landlord in accordance to any order of the Court.

Section 1-322.Appeals.

Appeals under this Chapter shall be handled according to the general Tribal appellate provisions, with the exception that the party taking the appeal shall have only five (5) calendar days from the entry of the order of judgment to file an appeal. All orders from the Court will remain in effect during the pendency of an appeal under this Chapter unless otherwise ordered by the Court.

* * *

NOS. 09-17349 & 09-17357 (CONSOLIDATED)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC.,

Plaintiff / Cross-Appellant, and

and ROBERT JOHNSON,

Plaintiff / Appellee,

v.

GARY LaRANCE, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribal Court, and JOLENE MARSHALL, in her capacity as Clerk of the Colorado River Indian Tribal Court,

Appellants / Cross-Appellees.

On Appeal from the United States District Court for the District of Arizona United States District Jude David G. Campbell (No. 2:08-cv-00474)

RESPONSE BRIEF OF APPELLEE AND CROSS-APPELLANT'S PRINCIPAL BRIEF

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ATTACHMENT RELATING TO EXTENSION OF TIME FOR FILING

On May 21, 2010, the Clerk of the 9th Circuit granted Appellee's / Cross Appellant's telephonic request for a 14-day extension of time for filing Appelle's Response Brief and Cross-Appellants Principle Brief pursuant to 9th Cir. R. 31-2.2(a). Per the Clerk's request, a letter was sent to opposing counsel advising them of said extension. See attached document.

s/Dennis J. Whittlesey
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May 21, 2010

Via Internet Transmission

Tim Vollmann, Esquire
3301-R Coors Rd., N.W.
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Albuquerque, New Mexico 87120

Re: *Water Wheel Camp Recreational Area, et a. v. LaRance, et al.*,
In The United States Court of Appeals for the Ninth Circuit
Case Nos. 09-17349 and 09-17357
New Briefing Schedule

Dear Mr. Vollmann:

Pursuant to our telephone conversation on the above listed date, I am writing to inform you that the Clerk of the Court (Extension Clerk) for the Ninth Circuit has granted my request for a 14 day extension of time in which to file Appellees' Response/Cross Appellants' Principal Brief (see 9th Cir.R.31-2.2(a)). Consequently, the following is the revised Briefing Schedule to the above-listed case:

Appellees' (Plaintiffs'/Cross-Appellants) Principal/Response Brief (Brief #2)	June 28, 2010
Appellants' Reply/Response Brief (Brief #3)	July 28, 2010
Appellees' Optional Reply Brief (Brief #4)	Aug.11, 2010[1]

A copy of this correspondence will be attached to Appellees' Principle/Response Brief, as required by the Clerk of the Court. Should you have any questions regarding this revised Briefing Schedule please do not hesitate to contact me.

Very truly yours,

Dennis J. Whittlesey

DJW/sll

DC 35609-1 154599

[1] Due 14 days following service of Appellants' Reply/Response Brief.

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES PURSUANT TO RULE 28-2.1

The undersigned counsel of record certifies as follows:

A. Parties

The Parties to this case are Appellee Robert Johnson and Cross Appellant Water Wheel Camp Recreational Area, Inc. Appellants / Cross Appellees are Gary LaRance, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribal Court, and Jolene Marshall, in her capacity as Clerk of the Colorado River Indian Tribal Court.

B. Ruling Under Review

Appellee and Cross Appellant seek review of the Order issued on September 23, 2009 by the United States District for the District of Arizona (Civil Action Number CV-08-0474-PHX-DGC).

C. Related Cases Pursuant to Cir. R. 28-6

The only case related to this appeal is the matter appealed herein.

D. Certificate Pursuant to FRAP 26.1

Cross Appellant Water Wheel Camp Recreational Area, Inc. is a non-Indian California corporation with all shares being owned by non-Indians and its principal place of business in Blythe, California.

s/Dennis J. Whittlesey

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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GLOSSARY OF ABBREVIATIONS

25 *CFR*	25 *C.F.R.* Part 131 (renumbered Part 162)
CRIT	Colorado River Indian Tribes
District Court	United States District Court for the District of Arizona
ER	Excerpts of Record
Eviction Ordinance	Colorado River Indian Tribes Property Code, Ordinance 04-06, Article I Evictions (October 12, 2006).
Johnson	Robert Johnson, CEO of Water Wheel Camp Recreational Area, Inc.
Lease	July 7, 1975, Lease between Colorado River Indian Tribes and Water Wheel Camp Recreational Area, Inc.
Lessee	Water Wheel
Lessor	CRIT
SER	Supplemental Excerpts of Record
Tribal Court	Colorado River Indian Tribes' Tribal Court
Tribal Court Parties	Chief Judge Gary LaRance and Chief Clerk Jolene Marshall
Water Wheel	Water Wheel Camp Recreational Area, Inc.

JURISDICTIONAL STATEMENT

Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Robert Johnson ("Johnson") filed litigation in the U.S. District Court for the District of Arizona on March 11, 2008, seeking declaratory and injunctive relief that the Tribal Court of the Colorado River Indian Tribes ("CRIT") lacked subject matter jurisdiction over them in an eviction action. At issue was their occupancy of a leasehold on federal land claimed by CRIT to be within the Colorado River Indian Reservation. Although CRIT is an Arizona tribe, the land at issue is within the State of California. The Defendants – Appellants/Cross-Appellees before this Court – were the Chief Judge and Chief Clerk of the CRIT Tribal Court (herein known as the "Tribal Court Parties").

The basis for jurisdiction in the District Court was federal question jurisdiction pursuant to 28 U.S.C. § 1331.

This is an appeal from a final Order of the District Court and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final District Court Order was entered on September 23, 2009, and the Tribal Court Parties timely filed their Notice of Appeal on October 22, 2009, from that portion of the Order which granted relief to Plaintiff Robert Johnson. On October 23, 2009, Water Wheel filed a Notice of Appeal (the "cross-appeal") from that portion of the District Court's Order which denied relief to Water Wheel.

Both the appeal and the cross-appeal are from a final order of the District Court disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLEE AND CROSS-APPELLANT

1. Whether the District Court correctly held that the Tribal Court Parties failed to meet their burden to establish that they had personal jurisdiction over Appellee Robert Johnson under the law of *Montana v. United States* and its progeny.

2. Whether the District Court properly accepted and considered the two Declarations filed by Johnson.

3. Whether the District Court correctly ruled that an "inherent tribal exclusionary power" did not provide the Tribal Court with personal jurisdiction over Johnson in the action before it.

4. Whether the District Court erred in ruling that the CRIT Tribal Court had jurisdiction over Cross Appellant Water Wheel in an eviction action under the CRIT Eviction Ordinance, which was not in existence when the Lease at issue was executed and to which Water Wheel had never consented in writing despite the Lease's provision that written consent was a precondition to applicability of such a tribal law.

5. Whether the District Court erred in ruling that the Lease allowed CRIT to prosecute the eviction of the tenant in the absence of the tenant's

insolvency or bankruptcy, wherein the tenant's insolvency or bankruptcy was a precondition to CRIT's right of prosecution.

STATEMENT OF THE CASE

This matter is before the Court on cross appeals from the District Court decision concluding that the CRIT Tribal Court had jurisdiction over an eviction action against Water Wheel, a non-Indian California corporation, but did not have jurisdiction over Johnson, the non-Indian President and CEO of Water Wheel. Specifically at issue was whether the corporation and Johnson were subject to Tribal Court jurisdiction as a matter of law as articulated in the seminal case of *Montana v. United States,* 450 U.S. 544 (1981). The Tribal Court Parties are challenging the District Court's conclusion that there was no Tribal Court jurisdiction over Johnson as an individual, and Water Wheel is challenging the District Court's conclusion that Water Wheel was subject to Tribal Court jurisdiction in an action seeking eviction from Water Wheel's leasehold property.

The resolution of the case below, as well as in this Court, turns on whether Water Wheel and/or Johnson **consented** to Tribal Court jurisdiction through the corporation's execution of a federal lease for land claimed by CRIT to be within its reservation, so as to trigger the first exception of *Montana* providing for tribal court jurisdiction over nonmembers. The first exception provides that there must be a "consensual relationship" through which the nonmembers have consented to

the jurisdiction claimed. Simply stated, this case involves the interpretation of a federal Lease between the United States (although CRIT is identified as the Lessor) and Water Wheel.

This is a **simple case** involving the extent to which a corporate lessee consented to tribal jurisdiction. Its resolution involves an examination of facts and application of the law set forth in *Montana* and its progeny. Despite the limited nature of this matter and its careful presentation to the District Court, the United States has filed an *amicus curiae* brief offering its views for this Court's consideration. With this sudden – and unexpected – attention[1], one would assume that some monumental principle of law is here at issue, when in fact the only matter at issue is an interpretation of the terms of a single federal Lease (1) prescribing procedures for dispute resolution and (2) with which Johnson was involved solely in his capacity as a Water Wheel corporate official. Any *amicus curiae* participation is both misplaced and inappropriate to the case before this Court. The facts are clear, the issues discrete and applicable law is well-established that there is no Tribal Court jurisdiction over Johnson or Water Wheel. There is no "cause" here for which legal argument from *amici* need be considered.

---

[1] In addition to the United States' filing, three additional *amicus curiae* briefs have been proposed through motion for this Court's consideration. As of the date of this filing, no action on those motions has been taken by the Merits Panel of this Court.

The Lease ostensibly expired, although Water Wheel's long-pending 25 *C.F.R.* appeal (which has, to date, been wholly-ignored by the United States) has asserted otherwise. Regardless of the Lease status, CRIT undertook to evict the tenant corporation from the leasehold property through its Tribal Court rather than invoking the Lease-dictated process authorizing the Secretary of the Interior – and only the Secretary of the Interior – to pursue eviction pursuant to federal regulations. Indeed, an essential legal protection afforded the Lessee is the integrity of due process guaranteed by federal law and those regulations but not in tribal courts.

The question is not whether Water Wheel can be prosecuted for eviction from the leasehold for cause, but rather what party can prosecute that eviction and in what forum. The answer is the United States through fair and lawful administrative processes within the Department of the Interior, and not CRIT seeking the certainty of the "home court advantage" of its Tribal Court.

As for Johnson, it is clear, and as adjudicated in the District Court, that all of his actions throughout the relevant time were undertaken in his capacity as an agent of Water Wheel. Indeed, this was conceded in the District Court by counsel for the Tribal Court Parties. It strains credulity for that same counsel to now argue that Johnson somehow was simultaneously acting in an individual capacity. That

assertion is not supported by the record, it was repudiated by counsel's own statements and it was properly rejected by the District Court.

SUMMARY OF ARGUMENT

The District Court correctly found that Johnson did not consent to Tribal Court jurisdiction under the applicable *Montana* exception, which requires a "consensual relationship" between Johnson and CRIT. ER 22.

Montana and its progeny have established the general rule that absent express authorization by federal statute or treaty (neither of which is present here), "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe," unless the parties seeking to invoke Tribal Court jurisdiction can meet their heavy burden to demonstrate that either of two limited exceptions apply. *Montana,* 450 U.S. at 565. To this end, a tribal court may exercise civil jurisdiction over a non-Indian where (1) the non-Indian has entered into a "consensual relationship" with the Tribe or (2) the non-Indian's conduct "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* 565-66.

The District Court correctly noted that the Tribal Court Parties argued below that "*Montana*'s first exception – the consensual relationship exception – applied to both Water Wheel and Robert Johnson." ER 5, *ll.* 10 - 11. The Court further noted that the Tribal Court Parties presented "no argument with respect to the second

exception," and stated that it "therefore will confine its analysis to the first *Montana* exception." *Id.* at *ll.* 11 - 15.

The District Court then examined the Lease and the actions of Water Wheel and Johnson in the context of the Tribal Court Parties' invocation of jurisdiction, and found that Water Wheel had consented to Tribal Court jurisdiction (ER 15) but Johnson had not (ER 22).

As to Johnson, the District Court correctly held that the Tribal Court Parties failed to meet their burden of showing that there was a lawful basis for Tribal Court jurisdiction over him under *Montana*. In the course of this deliberation, the Court properly considered, *inter alia*, two Declarations filed by Johnson in support of the action pending before the District Court. Those Declarations were not contradicted by any finding of the Tribal Court (although the Declarations were filed prior to the trial and final decision in that court) or by the Tribal Court Parties (who were fully aware of the existence and content of both of those sworn statements of fact during the briefing and arguments before Judge Campbell) during the District Court action. ER 16-17.

The District Court also properly rejected the Tribal Court Parties' contention that Johnson somehow consented (through his actions) to be personally subject to Tribal Court jurisdiction; finding that no referenced action of Johnson was taken in his individual capacity, but rather his actions were exclusively in his capacity as an

executive and agent of the Water Wheel corporation. ER 18, *ll.* 9 – 12. In short, there was no consensual relationship between the individual Robert Johnson and CRIT pursuant to which *Montana*'s first exception could be invoked, and the District Court held so.

Finally, the District Court properly determined that CRIT's inherent exclusionary power is constrained by *Montana*, and thus does not provide an independent basis for Tribal Court jurisdiction. That is, because the relevant facts demonstrated that there was no Tribal Court jurisdiction over Johnson under *Montana*, there is likewise no Tribal Court jurisdiction pursuant to CRIT's inherent exclusionary power. ER 21.

As for Water Wheel, the invocation of Tribal Court jurisdiction, which was erroneously confirmed by the District Court, was pursuant to the CRIT Eviction Ordinance. That Ordinance was not enacted until October 12, 2006, some 31 years subsequent to execution of the Lease on May 15, 1975. ER 225. Section 34 of the Lease Addendum specifically provided that after-enacted tribal laws such as the Eviction Ordinance would not be applicable to Water Wheel "unless consented to in writing by the lessee." ER 249. It is undisputed that Water Wheel never consented to the applicability of the CRIT Eviction Ordinance, either in writing or otherwise.

The District Court also erred in concluding that CRIT could prosecute the eviction against Water Wheel. The Court's conclusion was in direct contravention of Lease Addendum Section 21, which expressly provided that litigation could be maintained by the United States – but not CRIT – in the case of a default of any Lease provisions. ER 243 – 246. While that same section did authorize CRIT to take certain actions upon occurrence of a Lease default, the trigger for that authorization was Water Wheel's insolvency, bankruptcy, or financial distress, which the corporation has never experienced. Thus, the District Court wrongly relied on a Lease provision which contained an express condition precedent which was here non-existent.

I. APPELLEE'S ARGUMENT: NO TRIBAL COURT JURISDICTION OVER ROBERT JOHNSON

A. Standards of Review Applicable to *Montana* Arguments With Respect to Johnson

Whether a tribal court has jurisdiction over a nonmember pursuant to *Montana*'s exceptions is a federal legal question which federal courts review *de novo*. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). A tribal court's factual findings are reviewed for clear error. *Id.* at 1313. As such, the question of whether *Montana*'s general rule prohibiting tribal court jurisdiction over a nonmember applies to Johnson is a federal legal question which this Court reviews *de novo*. Pursuant to *Montana*, this Court should begin its analysis with

the presumption that CRIT does not have jurisdiction over Johnson (a nonmember). *See*, discussion, *infra*, at I. B. Starting with that presumption, this Court would next evaluate whether *Montana*'s first exception applies in this case and, if so, to what extent the Tribe may regulate Johnson's conduct. In order for this Court to find that CRIT's assertion of jurisdiction over Johnson was proper, it must **first** find (with the burden of proof resting on the Tribal Court Parties) that Johnson entered into a personal "consensual relationship" sufficient to trigger *Montana*'s first exception. *Id.*

The question of whether Johnson had a personal "consensual relationship" with CRIT is a mixed question of fact and law, but the inquiry into whether the nature of Johnson's contacts with CRIT were sufficient to form a personal "consensual relationship" is "essentially factual." *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). Where the application of the law to the facts of a particular case requires this Court to conduct an inquiry that is essentially factual, this Court reviews for clear error. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

Accordingly, this Court should review the District Court's finding that Johnson did not have a personal consensual relationship with the Tribe for clear error. Unless this Court has "a definite and firm conviction that a mistake has been made," this Court must uphold the District Court's finding that Johnson did not

have a consensual relationship with the Tribe. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (appellate court must uphold decision so long as district court's account of "the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though . . . it would have weighed the evidence differently").

If this Court concludes that the District Court committed clear error and that Johnson had a personal consensual relationship with the Tribe, then this Court could apply that factual finding to *Montana* and find its first exception was triggered by that relationship. However, this Court would still need to evaluate whether that consensual relationship supports the Tribe's assertion of Tribal Court jurisdiction over Johnson with regard to the specific claims asserted in the Tribal Court. *See Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) ("[e]ven with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory and adjudicative jurisdiction over a nonmember"). And, in that event, the extent of Tribal Court jurisdiction over a nonmember is a question of federal law which this Court should review *de novo*.

B. The District Court Correctly Held that the Tribal Court Parties Failed to Meet Their Burden to Establish that *Montana* Provided a Lawful Basis for Tribal Court Jurisdiction Over Johnson.[2]

During oral argument, counsel for the Tribal Court Parties explained his theory as to why Johnson should be found subject to Tribal Court jurisdiction despite the evidence that every action taken by him was in his capacity as an executive and agent of Water Wheel. ER 71 - 72. In support of this argument, counsel cited to Lease Addendum Section 34, which provides that the corporate lessee and its employees and agents were to abide by all [tribal] laws. ER 72, *ll.* 5 - 8. However, counsel did not reconcile his argument with Section 34's additional requirement that the lessee must provide written consent to be subject to after-enacted laws as a precondition to their applicability to the lessee. ER 249, *ll.* 15 - 20. With that, the District Court initiated the following discussion:

> THE COURT: Let me ask you a couple of questions on that.
>
> Speaking hypothetically for a moment, let's assume Peabody Coal enters into a lease with the Navajo Tribe for a big coal mine and **a vice-president of Peabody** goes repeatedly to the reservation to deal with the Tribe on matters related to that, goes there in its capacity as vice-president.
>
> Do those actions of the vice-president on behalf of the corporation create a consensual relationship between

---

[2] The arguments herein were preserved by Johnson for appeal in Docket No. 50 at 7-14; Docket No. 67 at 5-27 and during oral argument (ER 30-55, 76-80).

> the vice-president individually and the Tribe that would subject the vice-president to jurisdiction over him personally in Tribal Court? ER 71 – 72 (emphasis supplied).
>
> MR. VOLLMANN: Jurisdiction, yes. Whether there would be liability is another matter. But I believe **if the language of Section 34 were there**, yes, that would be a [personal] consensual relationship. ER 72, *ll.* 5 - 9 (emphasis supplied).

Counsel went on to emphasize his belief that, in the District Court's hypothetical, Peabody Coal officials acting solely in "their capacity as agents" can be personally sued in the Tribal Court. ER 72 - 73. The District Court continued to press the issue, and counsel for the Tribal Court Parties attempted to inject an issue now being argued here that Water Wheel is purportedly in corporate trespass, an asserted fact which counsel argued in turn establishes Tribal Court jurisdiction over Johnson personally:

> MR. VOLLMAN: And if [Peabody Coal] is in trespass, as an agent of the corporation [the corporate vice president] can be sued because he's responsible for that trespass.
>
> THE COURT: And you say that the Tribal Court then has jurisdiction not only over the corporation but over him personally.
>
> MR. VOLLMANN: Yes, under paragraph 34.
>
> THE COURT: Do you have any authority to support that?

> MR. VOLLMANN: I do not; just the language of the lease. ER 74, *ll.* 10 – 20.

This discussion emphasizes the reality of the Tribal Court Parties' case against Johnson personally: it is the product of a novel, unprecedented and unsupported notion that a corporate official can be **personally** sued in a tribal court for actions exclusively taken as an executive or agent of the corporation. The District Court carefully considered and correctly rejected this argument. ER 15-18.

Nevertheless, the Tribal Court Parties continue to insist that there is a general presumption that civil jurisdiction over the activities of non-Indians "lies in the tribal courts . . . . " Appellants' Br. at 12 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). There is no such presumption. To the contrary, the general presumption is that the inherent powers of an Indian tribe **do not** extend tribal court jurisdiction to nonmembers. *See Montana*, 450 U.S. at 565. Indeed, as recently as 2008, the Supreme Court reaffirmed the general rule that "tribes . . . do not possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2718-19 (2008). This axiom flows from the fact that Indian tribes, by virtue of their incorporation into the United States, have been divested of some aspects of their sovereign power. *Id.* at 2719 ("tribes have, by virtue of their incorporation into the American republic, lost the right of governing . . . persons within their limits except themselves") (additional citation and quotations omitted). With respect to matters in which tribes have been

implicitly divested of sovereignty, the Supreme Court has stated that they are those that "involve the relations between an Indian tribe and nonmembers of the tribe." *See, e.g., United States v. Wheeler*, 435 U.S. 313, 326 (1978).

It is accurate to say that tribes do retain authority to exercise "**some forms** of civil jurisdiction over [nonmembers] on their reservations." *Montana,* 450 U.S. at 565 (emphasis added). To this end, *Montana* defined the two **limited** exceptions to the general rule precluding tribal jurisdiction over nonmembers. *See Plains Commerce Bank,* 128 S. Ct. at 2720. First, a tribal court may exercise civil jurisdiction over a nonmember where the nonmember has entered into a "consensual relationship" with the tribe. *Montana,* 450 U.S. at 565. Second, a tribal court may exercise jurisdiction over a nonmember where the nonmember's conduct "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 565 - 66.

Despite the Tribal Court Parties' attempts to broaden the scope of the exceptions – and, therefore, broaden the scope of the Tribal Court's jurisdiction – it is important to note that *Montana*'s exceptions have been repeatedly recognized as narrow. *Plains Commerce Bank*, 128 S. Ct. at 2720 (stating that the exceptions are "limited ones . . . and cannot be construed in a manner that would swallow . . . or severely shrink" *Montana*'s general rule).

To bolster their case, the Tribal Court Parties contend that where, as here, the leasehold is located within CRIT's reservation, that fact is dispositive in determining whether the Tribal Court has jurisdiction over nonmember Johnson. Appellants' Br. at 13. As authority, they cite *Nevada v. Hicks*, 533 U.S. 353 (2001), for the proposition that tribal ownership "may sometimes be a dispositive factor" when considering tribal regulation of nonmembers. But the Tribal Court Parties fail to explain that the *Hicks* court was merely confirming that there is an **absolute** lack of tribal jurisdiction over nonmembers when the case concerns land **not owned by the tribe**. *Hicks*, 533 U.S. at 360. Indeed, the *Hick*s court explained that while "the absence of tribal ownership has been virtually conclusive of absence of tribal civil jurisdiction with one minor exception," (*id.*) the inverse is **not necessarily true** (despite the Tribal Court Parties' suggestion to the contrary). In fact, *Hicks* specifically held that the "general rule of *Montana* [that tribes are without authority over nonmembers] applies to **both Indian and non-Indian land**." *Id.* (emphasis added).

As noted above, whether a nonmember's conduct occurred on land that is not owned by the tribe is a relevant factor, but this Court has made clear that the membership status of the unconsenting party is **the primary consideration** for any judicial review of tribal court jurisdiction over nonmembers. *Phillip Morris U.S.A., Inc. v. King Mountain Tobacco Co., Inc.*, 552 F.3d 1098, 1102 (9th Cir.

2009) ("[i]t is the membership status of the unconsenting party, not the status of the real property, that counts as the primary jurisdictional fact") (quoting *Hicks*, 533 U.S. at 382); *see also, Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1131 (9th Cir. 2006) ("[t]he Court has repeatedly demonstrated its concern that tribal courts not require [nonmembers] to defend themselves against ordinary claims in an unfamiliar court"). The importance of this rule is demonstrated by the fact that the Supreme Court has consistently rejected claims of tribal jurisdiction over nonmembers, **even when the activity at issue occurred on tribal lands**. *Salish Kootenai*, 434 F.3d at 1132.

Thus, the fact that the leasehold is located on the reservation is inapposite to the *Montana* analysis in this case. In order to prevail, the party asserting tribal court jurisdiction over a nonmember must prove that a *Montana* exception applies, even if that conduct took place on the reservation. *See Hicks*, 533 U.S. at 360 (concluding that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers" and stating that "the general rule of *Montana* applies to both Indian and non-Indian land"). And the District Court correctly followed this rule when finding that the Tribal Court Parties failed to meet their heavy burden of showing that Johnson had entered into a qualifying consensual relationship with the Tribe sufficient to support Tribal Court

jurisdiction. ER 18, *ll.* 1-12 (discussing the lack of a consensual relationship); *Id.* at *ll.* 13-16 (concluding Tribal Court Parties failed to meet burden).

1. The District Court properly found that the Tribal Court was without jurisdiction over Johnson because he never entered into a "consensual relationship" with the Tribe sufficient to qualify for *Montana*'s "first exception."

The District Court correctly found that the Tribal Court Parties failed to meet their burden of showing that Johnson entered into a qualifying consensual relationship pursuant to *Montana* and, therefore, the Tribal Court was without jurisdiction to render a $4 million dollar judgment against him **personally**.

The Tribal Court Parties now argue that the District Court's ruling as to Johnson was in error, and they propose a number of theories in support of that contention. The crux of their argument is, however, that the Court improperly narrowed the *Montana* exception so as to "require nothing less than an explicit agreement on the part of Robert Johnson to subject himself to tribal jurisdiction." Appellants' Br. at 25. For a number of reasons, the Tribal Court Parties are wrong.

First, the District Court correctly recognized that *Montana*'s "consensual relationship" exception provides that tribes may "**regulate** through taxation, licensing or other means, the activities of **nonmembers who enter consensual relationships** with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. " ER 4 – 5, *ll.* 21 – 3 (emphasis added). The Court further recognized that tribal laws and regulations may be imposed on nonmembers

"only if the nonmember has consented, either **expressly**, or by his actions. " ER 17, *l.* 23. At the same time, the Court acknowledged that the *Montana* exceptions are "limited" and "should not be construed broadly." ER 18, *ll.* 13-14 (citing *Plains Commerce Bank*, 128 S. Ct. at 2720). Applying these standards, the District Court correctly held that the Tribal Court Parties failed to overcome the presumption against Tribal Court jurisdiction because they did not meet their burden of showing that Johnson **personally** – and not Water Wheel – entered into a consensual relationship with the Tribe. *See* ER 18, *ll*. 14-16; ER 22, *ll*. 2-3.

At the outset, the Tribal Court Parties contend that the District Court held that "a nonmember who has maintained a commercial relationship with the tribe . . . may not be subjected to tribal court jurisdiction in an action pertaining to that commercial relationship unless the tribal court finds that the nonmember has voluntarily submitted to the tribe's adjudicatory authority." Appellants' Br. at 18. This argument mischaracterizes the District Court's ruling and is at odds with the nature of the consensual relationship exception.

The District Court understood that in order for the *Montana* exception to apply (and therefore begin a discussion of the potential scope of the Tribe's adjudicatory authority), there first must be a qualifying consensual relationship between Johnson and the Tribe. ER 17, *ll.* 19 – 20 ("a nonmember may not be subjected 'to tribal regulatory authority without the commensurate consent'")

(citing *Plains Commerce Bank,* 128 S. Ct. at 2724). Without the requisite consensual relationship, there could never be Tribal Court jurisdiction over Johnson pursuant to *Montana*'s first exception. *Id*., *ll*. 22-23 (tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or through his actions"). As such, the District Court conducted an evaluation of whether Johnson personally, as an individual, entered into a qualifying consensual relationship with the Tribe and concluded that he did not. ER 15-18.

The District Court stated that *Montana*'s consensual relationship exception "must stem from commercial dealings, contracts, leases or other arrangements" (ER 5), noting that a lease is one of the "classic examples" of a consensual relationship. ER 6, *ll.* 5-6. Although this dispute involves a lease, Johnson himself was not party to it. ER 16 at n. 14. Moreover, there is no evidence in the Tribal Court record to support its finding that Johnson personally was a party to the Lease. *Id*.; ER 225 (Lease identifies "Water Wheel" as Lessee). In fact, in the Tribal Court's January 15, 2008 Order denying Water Wheel and Robert Johnson's Motions to Dismiss for Lack of Jurisdiction, Tribal Court Judge LaRance found that:

> **Water Wheel is the Lessee** under the Lease . . . Bert Denham, acting as President of the corporation signed the Lease on behalf of Water Wheel in 1975 and then transferred his interest in Water Wheel to Johnson in 1981

> . . . **[and] Johnson did not sign the Lease**. ER 291 (emphasis added).

Notwithstanding Judge LaRance's initial finding, he later (inexplicably) reversed his own finding and ruled that Johnson was "in fact a party to the Lease" – a finding that is unsupported by any evidence in the Tribal Court record or anywhere else. *See* ER 266 ("all the above findings of fact . . . establish that Robert Johnson is in fact a party to the Lease"). *But see* ER 16 at n. 14 (District Court rejecting Tribal Court's finding).

To the contrary, and as noted by the District Court, the uncontroverted evidence is that the Lease was executed before Johnson acquired the company and he never signed the Lease or any amendment thereto. ER 16 at n.14. Accordingly, the District Court correctly found that the Lessee is Water Wheel – not Johnson – (ER 16, *ll.* 19) and rejected the Tribal Court's finding to the contrary as clearly erroneous. *Id*. at n. 14. As such, the Lease does not and cannot give rise to a consensual relationship between Johnson and the Tribe.

Since Johnson was not a party to the Lease or any other contract with CRIT, in order to fall within *Montana*'s first exception, he must have entered into some "other arrangement" with the Tribe. *Hicks*, 533 U.S. at 359 n.3 (*Montana*'s reference to "other arrangements . . . clearly [means] another *private consensual* relationship"). Thus, the Tribal Court Parties argument must be that Johnson implicitly, through his actions, entered into some "other arrangement" and thereby

entered into a personal consensual relationship with the Tribe. The District Court resolved this issue when it correctly found that Johnson's "largely involuntary dealings" (ER 17, *ll*. 14-15) with CRIT were insufficient to show that "Johnson personally chose to enter into a consensual relationship with the Tribe." ER 18 *ll.* 1-4.

The Tribal Court Parties take issue with the District Court's use of the term "voluntary." Appellants' Br. at 22. Nothing in *Montana,* they claim, requires a nonmember's "personal consent" to tribal court jurisdiction based upon the nonmember's understanding that he or she is being subjected to tribal jurisdiction. Appellants' Br. at 21. The Tribal Court Parties mischaracterize the Court's holding and, for that reason, their argument misses the mark.

The District Court's finding in this regard did not go to whether Johnson voluntarily agreed to Tribal Court jurisdiction *per se*, but whether he voluntarily entered into a consensual relationship with the Tribe. This concept follows from *Montana*'s consensual relationship test, which presumes that a nonmember has consented to be subject to certain aspects of tribal authority by virtue of having entered into a "consensual relationship" with a tribe. To be sure, a nonmember may enter into such a relationship with a tribe either expressly, or implicitly through his actions. However, that does not mean that a nonmember may be deemed to have entered into a **consensual** relationship (of the qualifying kind)

with a tribe without taking any voluntary action to enter into a relationship that could be reasonably interpreted to cause a tribe to have authority over him.

With that in mind, it is useful to consider the meaning of the word "consent". Black's Law Dictionary defines "consent" as:

> [a]greement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person.

Blacks Law Dictionary 130 (2d Pocket ed. 2001). It follows then, that Johnson, as an individual separate and apart from Water Wheel, must have taken some action, especially a voluntary action,[3] that would constitute an agreement to enter into a relationship with the Tribe (or approval of that relationship), sufficient to subject him to Tribal regulation (in this case, civil tort adjudication).

Indeed, this Court has implied that a relationship must be both **consensual** (or voluntary) and of a commercial nature. In *Boxx v. Long Warrior*, this Court held that "[u]nder *Montana*'s first exception, a relationship is of the qualifying kind if it is **both** consensual **and** entered into through commercial dealing, contracts, leases or arrangements." *Boxx v. Long Warrior*, 2001 U.S. App. LEXIS 24917, *9 (9th Cir. 2001) (emphasis added). It is therefore relevant that Johnson – in his

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[3] *Cf. Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003) ("[a] tribe's civil jurisdiction over nonmembers is limited but is broadest with respect to nonmembers who **voluntarily involve** themselves with tribal activities") (emphasis added).

capacity as an individual apart from his role as a corporate official or agent – was not choosing his actions freely and/or voluntarily because he was (1) acting in his capacity as President and on behalf of Water Wheel (not as Robert Johnson)[4] and (2) forced to interact with CRIT on behalf of Water Wheel, even though the Lease nowhere provided that he would be required to do so.

To that point, as the District Court correctly noted, Johnson purchased Water Wheel with the understanding that he would be dealing with the County of Riverside and the State of California with respect to building matters (business activities dictated by Lease Addendum Paragraph 5), would be dealing with Southern California Edison with respect to power (business activity dictated by Lease Addendum Paragraph 14), and would make rent payments to the Bureau of Indian Affairs (in accordance with Lease Section IV). ER 16, SER 17-19. It is undisputed that the parties never agreed, and Water Wheel never consented, to amend the Lease at any point after Johnson's purchase of Water Wheel. ER 16 n.14.

Nevertheless, and contrary to the Lease, Johnson was later directed by the BIA to make rental payments directly to the Tribe. ER 147, ¶ 5. In his capacity as President of Water Wheel, Johnson did so. The Tribe later unilaterally assumed

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[4] *See CFTC v. Weintraub*, 471 U.S. 343, 348 (1985) ("[a]s an inanimate entity, a corporation must act through agents").

the duties of Riverside County with respect to building and inspection matters. Water Wheel never consented to the Tribe's assumption of the duties assigned to Riverside County pursuant to the Lease. ER 148. But Johnson, as President of Water Wheel, was later forced to deal with the Tribe as to such matters. ER 148-152. The Tribe also assumed the duty to provide electrical service to Water Wheel, causing Southern California Edison to refuse to energize any additional portions of the Water Wheel leasehold without approval from the Tribe. ER 148. Although the Lease provided that Southern California Edison would provide electrical services, Johnson, in his capacity as President of Water Wheel, was forced to interact with the Tribe to obtain electricity. *Id.*

To reiterate, Water Wheel never consented to any amendment of the Lease, but Johnson in his capacity as President of Water Wheel nonetheless was forced to deal with the Tribe's unilateral assumption of duties that were otherwise assigned pursuant to the Lease (to which Johnson is not even a party). It is important to note that the Tribal Court Parties admit that "the Lease is a self-imposed limitation on the Tribes' ability to exercise [its] power to exclude [and thus regulate] nonmembers." ER 56 – 57, *ll.* 25 - 4. Despite this admission, they attempt to utilize the Tribe's extra-legal and unilateral assumption of duties with respect to Water Wheel's leasehold as the basis for their claim that the corporation's President consented to personal jurisdiction. Setting aside the fact that Johnson only

interacted with the Tribe in his capacity as President of Water Wheel, each and every instance of CRIT-Johnson contact cited by the Tribal Court Parties relates to the development, improvement and/or maintenance of **Water Wheel**. *Cf. Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 655 (2001) (finding that a nonmember "has not consented to the Tribes' adjudicatory authority" simply by virtue of his presence within a reservation and his "actual or potential receipt of tribal police, fire, and medical services"). Indeed, the instances of contact and interaction with the Tribe occurred as a result of the Tribe's assumption of duties otherwise assigned to the County, the State and/or Southern California Edison. SER 26- 67 (evidencing same); SER 16 -25.

Moreover, even if it could be shown that Johnson entered into a consensual relationship with the Tribe, *Montana* does not grant the Tribe unlimited regulatory or adjudicative authority over a nonmember.[5] *See Plains Commerce Bank*, 128 S. Ct. at 2721 (additional citations omitted). Indeed, *Montana* only permits tribal regulation of nonmembers to the extent "necessary to **protect tribal self-**

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[5] In *Montana*, the Court distinguished between powers retained by tribes (*i.e.*, self government and controlling internal relations) and those that have been divested. With respect to a tribe's power over self government and/or internal tribal relations, the Supreme Court has stated that such powers involve "only the relations among members of a tribe." *See Montana*, 450 U.S. at 563-64 (finding that determinations of membership as well as criminal jurisdiction over members, domestic relations between members and rules of inheritance for members are included among those powers).

government or to_control internal relations." *Hicks*, 533 U.S. at 359 (noting that anything more would be "inconsistent with the dependent status of the tribes.") (emphasis added). A Tribal Court tort suit resulting in a $4 million judgment against Johnson personally at best goes well beyond any tribal interest in self-government and certainly does not affect tribal internal relations. For this reason alone, the Tribal Court's assertion of jurisdiction over Johnson personally must fail.

As the Supreme Court reaffirmed in *Plains Commerce Bank*, "when it comes to tribal regulatory authority, it is not in for a penny, in for a pound." *Plains Commerce Bank*, 128 S. Ct. at 2724-25. In *Plains Commerce Bank*, the Supreme Court held that the Cheyenne River Sioux Tribal Court lacked jurisdiction to award damages against an off-reservation bank (the "Bank") in a suit brought by a tribal member-owned company (the "Longs"). 128 S.Ct. at 2726. The Longs alleged that the Bank discriminated against tribal members with respect to the sale of fee land within the reservation. *Id.* at 2720. In conducting its jurisdictional analysis, the Supreme Court recognized that the Bank had a "lengthy on-reservation commercial relationships" with the Longs. *Id.* at 2724-25. However, with respect to *Montana*'s consensual relationship analysis, the Court only considered the specific transaction at issue:

> The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions . . . there is no reason the Bank should have anticipated that its general business dealings with [the Longs] would permit the Tribe to regulate the Bank's sale of land it owned in fee simple. *Id*. at 2725.

Similarly, CRIT points to Water Wheel's lengthy commercial relationship with the Tribe but can identify no such transactions with Johnson personally. Instead, the Tribal Court merely relied on Johnson's contacts with the Tribe on behalf of Water Wheel and broadly imputed those transactions to Johnson. Like the Bank in *Plains Commerce*, Johnson had "no reason to anticipate that [his] general business dealings with [the Tribe as the President of Water Wheel] would permit" the Tribe to assert civil adjudicatory authority over him personally and award against Johnson $4 million in tort damages. *See Id.* (notwithstanding Bank's significant tribal contacts, tribal court tort suit still unforeseeable).

Accordingly, the District Court correctly held that Johnson's general contact with the Tribe did not equate to consent to Tribal Court jurisdiction. ER 18, *ll*. 1-16 ("[s]uch an understanding by Johnson cannot fairly be characterized as his personal consent to the tribe's jurisdiction").

2. The "second exception" of *Montana* was not raised by the Defendants below and was, therefore, properly excluded from the District Court's analysis.

The Tribal Court Parties did not present an argument in the District Court based on *Montana*'s "second exception," yet they propose to raise it now on appeal.

The District Court noted that the Tribal Court Parties "contend that *Montana*'s first exception – the consensual relationship exception – applies to both Water Wheel and Robert Johnson." ER 5, *ll.* 10 - 11. The Court went on to observe that the Tribal Court Parties "advance no argument with respect to the second exception; they do not contend that Plaintiffs' conduct threatens or has a direct effect on the political integrity, economic security, health, or welfare of the [T]ribe." *Id.* Accordingly, the Court properly limited its analysis to *Montana*'s first exception. The Tribal Court Parties should not now be permitted to raise here an argument based on *Montana*'s second exception.

Although it is beyond dispute that they now are raising *Montana*'s second exception for the first time, the Tribal Court Parties nonetheless argue that the District Court "inaccurately" found that they did not present this argument. Appellants' Br. at 43 n.4. Faced with the total absence of any second exception argument in any of their pleadings below, the Tribal Court Parties assert that they raised the argument by virtue of their reliance on the Tribal Court record in support of their jurisdictional arguments. *Id.* But not even that record validates the

assertion that the issue was even presented to, let alone considered by, the Tribal Court.

The CRIT Court of Appeals decision apparently includes **a single sentence** mentioning the second exception, and that statement now is cited as the basis for the Tribal Court Parties' current claim that arguments as to the second exception were preserved below. *Id.* The absurdity of this argument is underscored by the fact that they utterly failed to discuss it in the District Court. Their eleventh-hour attempt to raise this issue via an apparently newly-discovered, single statement in the CRIT Appellate Court record must not be countenanced.

This Court should reject any argument regarding *Montana*'s second exception as without foundation, and having been waived, following a long-standing rule that it "will not consider arguments that are raised for the first time on appeal." *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007) (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)).

Although this general rule is subject to several exceptions, none of them apply in this case. To that point, this Court will consider a new issue only if: (1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arose during the pendancy of the appeal due to a change in the law; or (3) the issue presented is a pure question of law and the opposing party will

suffer no prejudice as a result of the failure to raise the issue below. *Raich,* 500 F.3d at 868.

Here, the Tribal Court Parties nowhere state (because they cannot) that there were "exceptional circumstances" regarding their failure to raise *Montana*'s second exception. There are no new issues in this case, and *Montana* was decided nearly 30 years prior to this litigation. In addition, the issue of Tribal Court jurisdiction over Johnson is a mixed question of fact and law, a truism essentially conceded by the Tribal Court Parties' own filings. Appellants' Br. at 31. What is more, Johnson would be subjected to extreme prejudice if the Tribal Court Parties are permitted to raise *Montana*'s "second exception" at this time, given that there is no factual record supporting its application to this case. *See Raich*, 500 F.3d at 868 ("[the Court] assesses prejudice to a party by asking whether the party is in a different position than it would have been absent the alleged deficiency").

Because the Tribal Court Parties previously never claimed that *Montana*'s second exception applied (a claim for which they bear the burden of proof), Johnson presented no argument regarding the second exception (although he could and would have) and offered no evidence (although he could and would have) specifically aimed to rebut such an argument. All of the parties to this appeal are limited to and bound by the factual record developed by the District Court. Yet, the Tribal Court Parties surprisingly argue that this Court should evaluate new

claims based on a factual record which is silent as to this issue, with the further suggestion that this Court should evaluate the issue without "the benefit of the District Court's prior analysis." *Raich*, 500 F.3d. at 868 n. 18.

Accordingly, this Court should reject the Tribal Court Parties' attempt to "sandbag[] their opponents with new arguments on appeal," and refuse to consider any arguments regarding *Montana*'s second exception. *Id.* (quoting *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004)).

3. Even if the issue had been raised below, *Montana*'s "second exception" does not apply to this case.

Should this Court consider the Tribal Court Parties' arguments as to *Montana*'s second exception despite their failure to raise them in the District Court, it is nonetheless clear that the second exception does not apply to this case. "*Montana*'s second exception can be misperceived" but "[t]he second exception is only triggered by nonmember conduct that directly threatens the Indian tribe; it does not broadly permit the exercise of civil authority whenever it might be considered necessary to self-government." *Phillip Morris USA, Inc..,* 569 F.3d at 943) (citing *Atkinson*, 532 U.S. at 657 n. 12). As this Court explained in *County of Lewis v. Allen*, the key to the application of *Montana*'s second exception is understanding that:

> Indian tribes retain their inherent power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations.

163 F.3d 509, 515 (9th Cir. 1998) (citing *Montana*, 450 U.S. at 564) (additional citation and internal quotations omitted). Thus, in order to trigger *Montana*'s second exception, the nonmember conduct must impact one of the areas identified above.

However, not just **any** impact on those retained tribal powers is sufficient. Indeed, the Supreme Court has stated that in order for *Montana*'s second exception to apply, the nonmember conduct at issue must "imperil the subsistence of the tribal community." *Plains Commerce Bank*, 128 S. Ct. at 2726. Even then, "the elevated threshold [necessary] for application of the second *Montana* exception suggests that [the] tribal power [asserted over the nonmember] must be **necessary to avert catastrophic consequences**." *Id.* (emphasis added). Indeed, this Court has recognized that in order to "invoke the second *Montana* exception, the impact must be **demonstrably serious** and **must imperil** the political integrity, the economic security, or the health and welfare of the tribe." *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) (emphasis added).

With respect to specific powers asserted by tribes over nonmembers, the Supreme Court has found that "the desire to assert and protect excessively claimed sovereignty" is not a sufficient interest to meet *Montana*'s second exception. *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996), *aff'd*, 520 U.S. 438, 459 (1997). Along the same line, this Court has held that "a suit in tribal court is not necessary to protect Indian tribes or members who may pursue their causes of action in state or federal court" and thus refused of find the second exception applicable. *County of Lewis*, 163 F.3d at 516.

The second *Montana* exception does not apply in this case because Johnson's conduct does not imperil the tribal community, and tribal adjudicatory authority over Johnson is unnecessary. To be sure, Johnson's conduct has never interfered with the Tribe's right to self government, and the Tribal Court Parties do not purport that it has. In fact, the tribal community continues peaceably to function notwithstanding the fact that the alleged "wrongful conduct" at issue has continued throughout this litigation.

The Tribal Court Parties can only point to an unsubstantiated statement of the Tribal Court of Appeals that a "trespass on tribal lands necessarily threatens the 'economic security' of the [T]ribe." Appellants' Br. at 43. This unsupported single sentence does not show a "demonstrably serious" impact on economic security or that Johnson's conduct "imperil[s]" the same. Indeed, the CRIT

Appellate Court language cited by the Tribal Court Parties appears to be nothing short of an attempt by the Tribal Court to invent an otherwise non-extant record in the event the federal courts later examined that record for evidence related to the second *Montana* exception. In any event, the Tribe's ability to litigate a civil tort suit against Johnson in Tribal Court is simply not necessary to protect the Tribe from "catastrophic consequences." In fact, the Tribal Court Parties have not pointed to *any* consequence of Johnson's conduct, let alone one that could possibly be characterized as "catastrophic."

Accordingly, this Court should reject any consideration of *Montana*'s second exception.

C. The District Court Properly Accepted and Considered the Two Declarations of Johnson.

1. The District Court's consideration of the Johnson Declarations was not a matter that the Tribal Court Parties preserved for appeal.

The Tribal Court Parties failed to preserve any objection to the two declarations of Robert Johnson (the "Johnson Declarations") as a matter for appeal. If the Tribal Court Parties opposed the District Court's consideration of the Johnson Declarations, they certainly had both the opportunity and the ability to raise, and have decided the pertinent objection.

The Johnson Declarations were filed with the District Court in support of Johnson's Motion for Temporary Restraining Order (ER 140-155) before either the

development of the Tribal Court record or the District Court litigation following exhaustion of tribal remedies. To be sure, the Tribal Court Parties' Response Memorandum filed in the District Court (Docket No. 59) notes that the Declarations "are not a matter of record in the Tribal Court proceedings and, thus, should not be relied upon by this Court, unless and until Plaintiffs can demonstrate that the Tribal Court's findings are 'clearly erroneous.'" *Id.* at pp 3-4. However, the Tribal Court Parties offered no further explanation, citation or argument to support that statement beyond a curious footnote (*Id.* at p. 3 n. 1), in which they "reserve the opportunity to file a motion and/or memorandum such as a Sur-reply to address the appropriateness of the Court's consideration of any particular piece of evidence."

The Tribal Court Parties never followed through on their footnote suggestion: (a) they never filed a Sur-reply; (b) they never moved to strike the Declarations; (c) they never formally objected to the Declarations being considered by the District Court; (d) they never cited any legal authority supporting the notion that the Declarations should not be considered; and (e) they never raised the issue at oral argument.

As such, this Court should not consider the Tribal Court Parties' argument regarding the admissibility and, therefore, the District Court's consideration of the Johnson Declarations because they failed to sufficiently raise their objection

below. *See generally* Appellants' Br. at 25-31 (arguing that the Johnson Declarations were improperly admitted as evidence by the District Court). Generally, appellate courts will not "hear an issue raised for the first time on appeal." *Arizona v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995). This Court has stated that "[a]lthough there is no bright-line rule to determine whether a matter has been raised below, a workable standard is that the argument must be raised sufficiently for the trial court to rule on it." *Id.* (finding issue was only referenced tangentially in footnote in the record from district court; issue did not appear in and was not ruled on in district court's opinion and, therefore, concluding issue was not "sufficiently raised" below).

The District Court did not rule on or even discuss the admissibility of the Johnson Declarations (let alone engage in the inquiry that the Tribal Court Parties now propose be done in this Court). The District Court simply stated that "[d]efendants have presented no evidence to contest Johnson's factual assertions" and "rely instead on the Tribal Court's factual findings." ER 17. The Declarations were uncontradicted.

If the Tribal Court Parties had wanted the Declarations excluded, they should have brought the matter before the District Court for a ruling as to their relevance / admissibility. Instead, they consciously elected to do nothing – a fact which is underscored by the Tribal Court Parties' failure to "to state where in the

record on appeal the issue was raised and ruled on" as required by 9th Circuit Rule 28-2.5. Indeed, they cannot do so because the Tribal Court Parties failed to raise their objection sufficiently for the District Court to rule on it. As such, this Court should not permit the Tribal Court Parties to pursue the issue here on appeal.

2. This Court should review the District Court's decision to consider the Johnson Declarations for abuse of discretion.

The Tribal Court Parties urge this Court to conduct a *de novo* review when evaluating the propriety of the District Court's decision to consider the Johnson Declarations as well as the Tribal Court findings of fact. Appellants' Br. at 25. In support of their argument, the Tribal Court Parties cite *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 970 (9th Cir. 2008), for the proposition that appellate courts conduct a *de novo* review of "whether [a] District Court had a basis for reviewing evidence outside of the [tribal court record]." Appellants' Br. at 25. *Cachil Dehe Band* stands for no such proposition. That decision contains no discussion regarding either tribal court jurisdiction or federal court review of the same. *Cachil Dehe Band*, 547 F.3d at 965 (affirming judgment dismissing tribe's claims for failure to negotiate gaming compact in good faith and reversing lower court's finding that absent tribes were indispensable parties).

While the Tribal Court Parties understandably attempt to define a standard of review they feel is the most favorable to their case, that standard is not appropriate for this Court's assessment of the District Court's decision to consider

the Johnson Declarations in addition to the Tribal Court record. The appropriate standard of review here is abuse of discretion. *See Brown v. Sierra Nevada Mem'l Miners Hosp.*, 849 F.2d 1186, 1189 (9th Cir. 1988) ("[t]his [C]ourt has stated that it reviews a district court's evidentiary decisions for an abuse of discretion").

The Tribal Court Parties argue that the District Court's reliance on the Johnson Declarations was erroneous because they were not "placed in evidence in the Tribal Court." Appellants' Br. at 26. They then assert that "reliance on the declaration . . . was reversible error" (Appellants' Br. at 27) without citing any authority for their proposition that district courts are without discretion to consider relevant evidence not included in the Tribal Court record. *But see* Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible except as otherwise provided by the Constitution . . . by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court . . . .").

Admittedly, federal courts are to "show **some** deference to a tribal court's determination of its own jurisdiction," and tribal court **findings of fact** are reviewed for "clear error." Appellants' Br. at 27 (citing *FMC*, 905 F.2d at 1313) (emphasis added). But it does not follow that a district court's review of a tribal court's jurisdictional determination is, in every case, strictly limited to the tribal court's record. No known case holds otherwise. The existence and extent of tribal court jurisdiction is a federal question and federal courts are final arbiters of

federal law, *FMC*, 905 F.2d at 1314 and this means that they have discretion to exercise powers consistent with that role, including the right to make determinations regarding the consideration of relevant evidence. Since no federal law or precedent limited the District Court's review strictly to the record of the Tribal Court, its limited reliance on the evidence presented in the Johnson Declarations was reasonable[6] for a number of reasons. *Cf. Hunt v. Nat'l Broad. Co.*, 872 F.2d 289, 292 (9th Cir. 1989) (a district court only "abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law"). Accordingly, even if this Court determines that the issue was properly preserved, this Court should find that the District Court did not abuse its discretion when considering the Johnson Declarations. *Cf. Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) ("decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances").

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[6] *See*, discussion, *infra.*, at I.C.3.

3. The District Court did not require the Tribal Court to rebut the Declarations, but rather found that it improperly failed to consider whether Johnson voluntarily entered into a personal consensual relationship with the Tribe.

The Tribal Court Parties assert that the District Court "fault[ed] [Tribal Court] Judge LaRance for not making a 'factual finding of voluntariness,' (ER 18, n. 16) *i.e.* for not rebutting evidence which he had never seen." Appellants' Br. at 28. This argument is flawed for several reasons.

First, it is disingenuous for the Tribal Court Parties to claim that the Tribal Court Judge was unaware of the general content of the Johnson Declarations in light of the extensive evidence supporting Johnson's assertions which was presented to the Tribal Court.[7] But, more importantly, the District Court was not faulting the Tribal Court for failing to rebut the Declarations but rather for its failure to evaluate whether Johnson – not Water Wheel – **chose** (voluntarily) to

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[7] *See* ER 136 – 139 (correspondence from Tribal Court Record). Water Wheel's 25 CFR appeal and supporting documentation was filed as an Exhibit with the District Court. Docket No. 26-1. Correspondence between Water Wheel and CRIT was included and filed as documentation supporting the CFR appeal. SER 38-61. A number of the documents that were filed were also before the Tribal Court and (although not before the District Court as "Tribal Court Records," *per se*) were, in fact, included in the Tribal Court Record. *See* SER 38-40, 42-43, 46, 51, 54-61. The documents provide additional support for Johnson's assertions and indicate that the Tribal Court had notice of the substance of the Johnson Declarations.

enter into some "arrangement" with CRIT which would form the basis for a consensual relationship with the Tribe.

Indeed, even though the Declarations *per se* were not before the Tribal Court, it is beyond question that the Tribal Court Parties had general knowledge of the assertions made in the Johnson Declarations at all times relevant to this dispute. In fact, CRIT's Trial Brief in Tribal Court called attention to the subject matter of Johnson's assertions and argued that the Court should not consider those matters. SER 2-6. That brief stated:

> [Water Wheel and Johnson's] assertion that the Tribes improperly withheld permission to develop the Property in violation of the Lease is also irrelevant to the issues before the Court. Even if this assertion is correct . . . a breach of the lease by the Tribes has no bearing on whether the Defendants have minimum contacts with the jurisdiction or have entered into a consensual relationship with the Tribes. Thus, such information has no bearing on whether the Court may exercise personal or adjudicatory jurisdiction over Defendants.

Id. at 4 ("similarly . . . Defendants' '25 *CFR* appeal' before the IBIA does not tend to disprove Defendants' contacts with the jurisdiction or their relationship with the Tribes"). In addition, each and every letter of correspondence between Water Wheel and CRIT that was before the Tribal Court show Johnson's exclusive role as CEO, and the Tribe's assumption of duties otherwise assigned in the Lease. ER 75 (remarking that correspondence between CRIT and Johnson are, in fact, "all Water Wheel documents").

Regardless of whether the evidence was (or was not) actually before the Tribal Court, the critical flaw in the Tribal Court's reasoning was that it failed to even recognize the fact that Johnson – not Water Wheel – must have taken some **personal** action in order to form a consensual relationship with the Tribe. ER 18. To this point, the District Court correctly found that "the Tribal Court decision merely recounted Johnson's contacts with the tribe [which were all as CEO of Water Wheel] and **did not address** the voluntariness of those contacts . . ." ER 18 n. 16; *see also* ER 18 *ll.* 15-16 ("Defendants have not presented evidence sufficient to show that Johnson personally entered into a consensual relationship with the tribe"). The Tribal Court Orders do not contain any finding regarding any voluntary action taken by Johnson **in his individual capacity** to form the basis of a consensual relationship with the Tribe. ER 18 n. 16 ("there is no finding of voluntariness to which the clearly erroneous standard can be applied"). Similarly, the Tribal Court record is utterly devoid of evidence regarding Johnson's **personal** contacts with CRIT. ER 18, *ll.* 1-4, 13-16. The absence of any such evidence coupled with the lack of Tribal Court findings regarding voluntary actions by Johnson, makes clear that the Tribal Court merely **assumed** that any contact he had with the Tribe was both voluntary and attributable to him as an individual (not as President of Water Wheel). But the Tribal Court's jurisdiction over Johnson could only be proper under *Montana*'s first exception if Johnson, himself, had a **personal**

consensual relationship with the tribe. *See Plains Commerce*, 128 S. Ct. at 2724 (nonmembers are not subject to tribal regulation absent the "commensurate consent").

It is relevant that the District Court looked at the Tribal Court record and observed that "CRIT does present three letters in which Johnson, acting on behalf of Water Wheel, proposed to the Tribe that additional commercial development be permitted on the property." ER 17 n. 15. But the Court then went on to note that none of the letters even suggest that Johnson, personally, voluntary entered into a consensual relationship with the Tribe; to the contrary, the Court properly concluded, Johnson was forced to deal with the Tribe in order to conduct the corporation's business. *Id.*; ER 15-16 (finding that the Tribal Court's findings of fact went to "Water Wheel's commercial dealings with CRIT" but not Johnson's). In addition, the District Court considered the terms of the Lease (which was before the Tribal Court) and noted that the Lease terms were consistent with Johnson's Declarations. ER 16, *l.* 8.

Despite the obvious lack of evidence regarding any personal consensual relationship between Johnson and the Tribe, the Tribal Court Judge nevertheless failed to identify, address or reconcile any of these issues when ordering that it had jurisdiction over Johnson. ER 264 - 267. In doing so, the Tribal Court committed a critical error by failing to consider whether Johnson had taken any voluntary

action so as to establish a personal consensual relationship with the Tribe. *Cf. Salish Kootenai*, 434 F.3d at 1138 (9th Cir. 2006) ("[s]imply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember"); *Atkinson Trading*, 532 U.S. at 656 (holding that "a nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another. . . .").

Given the Tribal Court's findings and record, the District Court exercised reasonable discretion in considering the Johnson Declarations in conjunction with the Tribal Court's factual findings as part of his review for clear error. ER 16 n. 14 (finding Tribal Court's ruling that Johnson was a party to the Lease was clearly erroneous). Furthermore, the District Court recognized that the Tribal Court Parties presented no evidence to rebut the critical facts stated in the Declarations. ER 17, *l.* 7 (Tribal Court Parties "presented no evidence to contest Johnson's factual assertions"); ER 16, *ll.* 19 – 21 (Declarations "provide support for Johnson's claim that *he* did not intentionally enter into a consensual relationship with the tribe"). With this careful review and assessment, the District Court then correctly found that Tribal Court was without jurisdiction over Johnson. *Cf. FMC*, 905 F.2d at 1313-14 (finding that tribal courts are given initial review of jurisdiction because federal courts may "benefit from [a tribal court's] expertise" but "federal courts have no obligation to follow that expertise").

4. The District Court properly exercised its discretion to consider the evidence necessary to determine that there was no Tribal Court jurisdiction over Johnson.

The Tribal Court Parties argue that the District Court's consideration of the Declarations was "erroneous" because Johnson was "offering evidence which could have first been presented in the Tribal Court." Appellant's Br. at 28. They then offer a theoretical question to dramatize their argument: "[W]hat would stop tribal court litigants from simply failing to appear and taking a default judgment, knowing that they have the opportunity in federal court to present new evidence in opposition to tribal court jurisdiction?" *Id.*

The question is irrelevant to this case. First, the well-reasoned discretion of a competent federal district court would stand in the way of such defendants. Second, and more importantly, that hypothetical activity is not what happened in this case. Johnson did not shun the tribal court process. ER 3 ("Plaintiff's exhausted their Tribal Court remedies . . . ."). The Tribe deposed Johnson. ER 135 (citing February 29, 2008 deposition of Robert Johnson); SER 69-71 (stipulating and agreeing to Johnson's deposition). Johnson testified at trial in Tribal Court. *See* ER 164-165 (CRIT Court of Appeals Opinion and Order, dated May 10, 2009, stating that "on June 4, 2008, the Tribal Court held a three day trial on the merits of the Complaint"). Johnson's attorney filed briefs and motions on his behalf. *See, for example*, SER 7-15 (Petition for Appeal). Johnson litigated his

case through both the Tribal Court and the Tribal Appellate Court. In short, Johnson exhausted his tribal remedies. ER 3.

Setting aside the specific facts of this case, this Court should also consider the consequences of accepting the Tribal Court Parties' theory regarding the proper scope of federal court evidentiary review. More specifically, this Court should consider the countervailing theoretical question: *What would stop a tribal court from refusing or erroneously failing to admit favorable evidence offered by a nonconsenting nonmember defendant, thereby forever foreclosing any federal court's opportunity to review that evidence simply because it was not included in the tribal court record?*

If the Tribal Court Parties' argument was the law, there would be a virtual prohibition of any federal court evaluation of evidence not included in a tribal court record, including evidence establishing beyond question that a tribal court was without jurisdiction over a nonmember as a matter of federal law. *See Hicks*, 533 U.S. at 358-59 (federal law provides that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers"). This Court should not open the door to application of a standard that would hamper (or even preclude) federal judicial review of tribal court jurisdiction over nonmembers.

It is also worth noting that the Tribal Court Parties' argument involves the **process and procedure** pursuant to which the District Court reached its decision,

and proposes that this Court should ignore facts going directly to whether the Tribal Court had jurisdiction over Johnson under *Montana*. If the Tribal Court was without jurisdiction over Johnson, then this Court must not deny him the Constitutional rights which are not applicable in the Tribal Court. *Plains Commerce Bank*, 128 S. Ct. at 2724 ("the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action"). Accordingly, even if this Court finds that the District Court abused its discretion in accepting the Johnson Declarations, it could be no more than a harmless error in route to the correct result;[8] in any event, neither the Tribal Court findings (or lack thereof) nor its record supports a finding of jurisdiction over Johnson. *Cf. Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 616 (9th Cir. 1985) (appellate court

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[8] Even absent the Johnson Declarations, there is ample evidence of record (*e.g.,* Johnson was not a party to the Lease; extensive correspondence between Johnson and CRIT showing that Johnson engaged with CRIT exclusively pursuant to role as CEO of Water Wheel; and absence of any record evidence indicating Johnson had any contacts with CRIT other than as the Water Wheel CEO) to conclude that Johnson had no personal consensual relationship with CRIT. *Cf. Brown v. Sierra Nevada Mem'l Miners Hosp.*, 849 F.2d 1186, 1190 (9th Cir. 1988) (in order to "reverse on the basis of an evidentiary error," appellate court "must say more probably than not, the error tainted the judgment") (internal citations and quotations omitted).

"may affirm the district court on any ground supported by the record, even if the district court relied on different reasons").

D. The District Court Correctly Ruled That the Tribe's Inherent Exclusionary Power Did Not Provide the Tribal Court With Jurisdiction Over Johnson in the Action Before It.

The District Court correctly recognized that the Tribe's power to exclude nonmembers is necessarily constrained by *Montana*, and confirmed that the Tribe's power to exclude must be exercised within the context of *Montana*. ER 21. Here, because the Tribe failed to show that any *Montana* exception applied to Johnson as an individual, the power to exclude could not form the basis for jurisdiction over him personally. *Id.* at *ll.* 12 - 13.

In contrast, the Tribal Court Parties argue that the District Court's interpretation of relevant case law is wrong because they view Johnson as a trespasser on the leasehold, and because none of the authority relied upon by the District Court "involve[s] nonmember trespass on tribal lands. " Appellants' Br. at 38. In a somewhat circular argument, the Tribal Court Parties then argue that because the District Court improperly held that *Montana*'s first exception did not apply and because trespassers (by definition) could never be in a "consensual relationship" with the Tribe, the Court's decision with respect to the Tribe's power to exclude must be flawed. Appellants' Br. at 39-40.

The Tribal Court Parties' argument is directly contrary to the Supreme Court's specific identification of the basis for a tribe's "traditional and undisputed power to exclude persons from tribal land" as a form of "regulation [] approved under *Montana*" which flows from a tribe's retained sovereign interests. *Plains Commerce Bank*, 128 S. Ct. at 2723. The District Court cited this language and noted that *Plains Commerce Bank* later referenced the power to exclude as an example of the "sort of regulations [which] are permissible under *Montana*." ER 19, *l.* 24. Applying the law as articulated by the Supreme Court, the District Court thus found that the power to exclude was constrained by *Montana* and, in these circumstances, could only be exerted within the *Montana* framework.

The District Court's conclusions on this point are consistent with the dependant status of tribes, in that tribes retain only those powers which are "necessary to protect tribal self-government or to control internal relations." *Hicks*, 533 U.S. at 359 (noting that anything more would be "inconsistent with the dependent status of the tribes."). While the tribal power to exclude nonmembers may be a power retained by a tribe, *Montana* defines the situations in which a tribe may exercise such a retained (or inherent sovereign) power to regulate nonmember conduct, which is when one of the two *Montana* exceptions apply.

This Court has stated that "[o]utside of [*Montana*'s] two exceptions . . . [a tribe's] inherent sovereignty does not give [it] jurisdiction to regulate the activities

of nonmembers." *See Phillip Morris U.S.A.*, 552 F.3d at 938-39 ("[g]iven *Montana*'s general [rule] . . . efforts by a tribe to regulate nonmembers . . . are presumptively invalid") (quoting *Plains Commerce Bank*, 128 S. Ct. at 2720). Accordingly, even if the Tribe retains the power to regulate nonmember conduct by virtue of the power to exclude, it may do so **only within the context of *Montana***, and then **only to the extent necessary to protect self-government and internal relations**. *Cf. Plains Commerce Bank*, 128 S. Ct. at 2726 ("tribal jurisdiction . . . generally does not extend to nonmembers . . . [and] that bedrock principle does not vary depending on the desirability of a particular regulation").

The District Court concluded that *Montana*'s first exception does not apply with respect to the Tribal Court action against Johnson, meaning that the Tribal Court had no jurisdiction over him. ER 21, *ll.* 12 – 14. Moreover, personal jurisdiction by virtue of the Tribe's power to exclude can only be exercised to the extent necessary to protect tribal self-government and internal relations. *Cf.* ER 21 (stating that "the power to exclude [could not] provide a basis for the broad imposition of damages, attorneys' fees and alter ego liability attempted in this case"). Clearly, the sweeping adjudicatory jurisdiction the Tribal Court claimed

over Johnson went well beyond any possible tribal interest in self-government or internal relations and, for that reason alone, must fail.[9]

II. CROSS-APPELLANT'S ARGUMENT: NO TRIBAL COURT JURISDICTION OVER WATER WHEEL

A. Standard of Review Applicable to *Montana* Arguments with Respect to Water Wheel.

As stated above, whether a tribal court has jurisdiction over a nonmember pursuant to *Montana*'s exceptions is a federal legal question which courts review *de novo*. *FMC*, 905 F.2d at 1314. However, unlike the argument with respect to whether Johnson had a consensual relationship with the Tribe (he did not) which requires an essentially factual inquiry, this Court's consideration of Water Wheel's relationship with the Tribe is purely a question of law. This Court should therefore review *de novo* the District Court's finding with respect to the proper scope of Tribal Court jurisdiction over Water Wheel.

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[9] This Court has stated that "[i]t is an open question whether a tribe's adjudicatory authority is equal to its regulatory authority. *Hicks*, 533 U.S. at 358. It is possible, therefore, that the tribe may have authority to regulate a nonmember's trespass and destruction of natural resources yet lack authority to hale the nonmember into tribal court. . . ." *Elliot v. White Mountain*, 566 F.3d 842, 850 n.5 (9th Cir. 2009)

B. The District Court Erred in Ruling that the CRIT Tribal Court Had Jurisdiction over Water Wheel Under the CRIT Eviction Ordinance Which Was Enacted Subsequent to the Lease Execution.[10]

In concluding that there was a consensual relationship between Water Wheel and CRIT, the District Court found it "compelling" that Water Wheel had occupied the leasehold under a 32-year lease and a three-year hold-over tenancy during the pendancy of the Tribal Court and District Court litigations. ER 6, *ll.* 3-12. The Court also cited as supporting evidence Water Wheel's other commercial activities, *e.g.*, operating a mobile home resort, convenience store, restaurant and marina. ER 6-7, *ll.* 19 - 2. None of this is disputed.

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[10] In its Brief Concerning the Lack of Tribal Court Jurisdiction Pursuant to the Rule of *Montana v. United States* (Docket No. 50), Water Wheel preserved these issues for appeal by arguing below that *Montana*'s first exception did not apply and the Tribe was, therefore, without jurisdiction over it. Docket No. 50 at pp. 7-14. More specifically, Water Wheel asserted that the terms of the Lease did not give rise to a consensual relationship with CRIT because Section 34 of the Lease prohibited the application of after-enacted tribal laws without Water Wheel's consent; that the Lease controls dispute resolution as well as any relationship between the Tribe and Water Wheel; and that, in conjunction with the Lease, Title 25 of the Code of Federal Regulations exclusively governs disputes arising under the Lease. *Id.* In their Response Memorandum in Opposition to Plaintiffs' Brief, the Tribal Court Parties' challenged Water Wheel to point to any "lease condition or provision which [was] changed or altered by the application of the CRIT eviction ordinance." Docket No. 59, p. 18. Water Wheel replied by presenting arguments with respect to each specific term of the Lease and the applicable 25 *CFR* Part 131 and 25 *CFR* 162 regulations, along with a detailed explanation of the effect of each relevant Lease provision. *See generally* Docket No. 67, pp. 8-24. Water Wheel also preserved these issues during oral argument (ER 30-55, 76-80).

Assuming, *arguendo*, that there has been a breach of the Lease provisions – specifically, Lease Addendum Section 23 – HOLDING OVER (ER 247) – the question then turns to whether the Tribal Court eviction action against Water Wheel was lawful under the lessee's consent **defined by the Lease**.

It is undisputed that CRIT filed an action in Tribal Court invoking an enforcement process created by the CRIT Eviction Ordinance. ER 300 – 350. It is also undisputed that the Ordinance was adopted 31 years after execution of the Lease. And, it is further undisputed that CRIT prosecuted the eviction action in Tribal Court without consulting with Water Wheel, or securing Water Wheel's written consent to the terms of the Ordinance.

The Eviction Ordinance purports to establish both the cause(s) of action against Water Wheel and Johnson and the Tribal Court's jurisdiction over them, despite the facts that the Ordinance (i) was enacted *after* the Lease was executed, (ii) was never consented to in writing by Water Wheel or Johnson, and (iii) is in direct conflict with 25 C.F.R. Part 162 (as well as its predecessor, 25 *C.F.R.* Part 131). *See, e.g.*, *Marlin D. Kuykendall v. Dir., Phoenix Area, BIA*, IBIA No. 80-24-A, 8 IBIA 76, 13-14 (1980) (opinion reinstated by *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983)). These tribal ordinances have the effect of both changing and altering Water Wheel's rights under the Lease. Most notably, they provide that Lease and property disputes *must be* adjudicated in the

CRIT Tribal Court. Eviction Ordinance, § 1-304. Water Wheel has never consented, in writing or otherwise, to be subject to CRIT's Property Code or Eviction Ordinance. Therefore, pursuant to Section 34 of the Lease Addendum, the tribal ordinances cannot be applicable to Water Wheel (or Johnson).

Should this Court conclude that CRIT's ordinances *do* apply to Water Wheel – despite the absence of written consent and their direct conflict with 25 *C.F.R.* Part 162 – the Court still must consider the fact that the ordinances necessarily would have the effect of modifying the agreed-upon terms of the Lease because they effectively would be replacing the traditional *and contracted for* dispute resolution procedures provided by Title 25 of the Code of Federal Regulations.

The Lease contains a specific provision for modifications: "any modification of or amendment . . . shall not be valid or binding . . . *until approved by the Secretary*." ER 249 (Lease Addendum Section 34) (emphasis supplied). It is undisputed that the Secretary has neither approved incorporation of the tribal ordinances into the Lease nor agreed that the Tribe – and not the Interior Department pursuant to 25 *C.F.R.* Part 131 (1975) and 25 C.F.R. Part 2 – has jurisdiction over disputes arising under the Lease.

In short, Water Wheel has not consented in writing to be subject to CRIT's Property Code, Eviction Ordinance or *any* procedure for resolving Lease disputes in the CRIT Tribal Court, and the Secretary has not approved either of those tribal

enactments. Accordingly, the Lease itself is the controlling document and it provides that disputes shall be resolved through Title 25 of the Code of Federal Regulations. They are not to be resolved in CRIT Tribal Court. *See generally Yavapai-Prescott*, *supra*.

By the Lease's own terms, the absence of Water Wheel's written consent to that newly-adopted tribal law precludes its applicability to the lessee. Lease Addendum Section 34 - RESERVATION LAWS AND ORDINANCES requires the lessee to abide by all tribal laws, regulations and ordinances **in effect at the time of the Lease execution**. ER 249. As noted above, the Lease was executed on May 15, 1975, and Section 34 specifically exempted the lessee from being subject to any subsequently-enacted tribal laws, regulations and ordinances which "have the effect of changing or altering the express provisions and conditions" of the Lease unless consented to "in writing." *Id.* at *ll.* 19-20. The obvious purpose of this Lease provision was to preclude the enactment and imposition of *ex post facto* tribal laws rewriting the Lease to include provisions to which Water Wheel never agreed. But here, the CRIT Eviction Ordinance decidedly changed and altered express provisions and conditions of the Lease, including establishing the Tribal Court as the forum for eviction litigation.

At its Preamble, the Lease states that it was entered into pursuant to the terms of 25 *C.F.R.* Part 131 (now 25 *C.F.R.* Part 162) ("25 *CFR*"). That regulation

(and its successor) establishes a process through which Water Wheel could appeal to the Secretary to contest actions or inactions of Department of the Interior employees concerning the Lease. And when faced with arbitrary actions and inaction of CRIT against Water Wheel perpetrated by CRIT officials with the knowledge and acquiescence of BIA officials, Water Wheel filed with the Department of the Interior such a 25 *CFR* appeal on May 10, 2001. SER 26-67. This formal administrative submission provided for in the Lease was never acted on by the BIA, and in fact is still pending. ER 17, *ll.* 3-6. The substance of that appeal is that Lease Addendum Section 5 entitled "PLANS AND DESIGNS" (ER 232) provides that Water Wheel shall have the right to provide a general plan and design for the "complete development of the entire leased premises." Water Wheel filed the appeal because CRIT arrogated to itself the review and approval role exclusively assigned by the Lease to the State of California and Riverside County, and then refused to approve any development proposals submitted by Water Wheel.

Water Wheel's 25 *CFR* appeal challenged the legality of BIA inaction in failing to require CRIT compliance with the applicable Lease provisions following CRIT's pronouncement to both the State of California and Riverside County that CRIT, and not the State and County, would be the exclusive party to review and approve all of Water Wheel's development plans and designs, directly

contradicting the specific provisions of Section 5 that the State and County would have that role. The appeal also raised the BIA's failure to protect Water Wheel's ability to secure electrical service through Southern California Edison Company, when CRIT directed the utility to cease dealing with Water Wheel contrary to the Lease. ER 147-148. The 25 *CFR* Appeal went exclusively to the BIA's failure – or even refusal – to protect Water Wheel's Lease-guaranteed rights to develop its leasehold. And CRIT's unlawful breaches of the Lease over many years were well-known to the BIA officials who simply ignored the facts**.** ER 147 – 152 (documenting the actions of CRIT to curtail all development by Water Wheel[11] and the failure of the BIA to take steps to insure that all Lease obligations are being satisfied); SER 68 (acknowledging Water Wheel's 25 *CFR* appeal).

In addition to guaranteeing the administrative process of the *CFR*, the Lease further specifically provided for legal action against the lessee when appropriate at Lease Addendum Section 21 entitled "DEFAULT." ER 243. This is the **only section** of the Lease authorizing enforcement and legal action against Water Wheel for breaches of the Lease, and it specifically reserves the right to pursue any legal

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[11] Water Wheel's ability to develop its leasehold was flatly terminated by CRIT in 2002. The tribal Building Inspector advised Water Wheel by letter dated April 4, 2002, that "the [CRIT] Tribal Council had [recently] denied your request to allow any new building Projects within Water Wheel Resort. Therefore, the Colorado River Indian Tribes Department of Building & Safety will not issue any Building Permits to you." SER 1.

action to the Secretary. Nowhere does Section 21 even suggest that CRIT has a right to commence any legal action against Water Wheel for disputes arising from a perceived default or breach, or even for eviction upon expiration of the Lease.

Further, Section 21 strictly limits legal action arising from any default, including failure to comply with the Section 29 requirement that a lessee vacate the leasehold upon termination or expiration of the Lease. ER 11-14. The only remedy is at Section 21, and it restricts recourse for defaults to action taken by the Secretary, who shall first give notice to Water Wheel requiring some remedial action within a specified time, after which **only the Secretary** may either: (A) proceed **by suit or otherwise** to enforce any other provision of the Lease; or (B) **enter the premises and remove** the defaulting parties. ER 244. No provision of Section 21 is ambiguous and no provision even suggests there could be a predicate upon which CRIT could assert any right to initiate action for a default. The Secretary, **and only the Secretary**, has enforcement authority unless the lessee is insolvent or bankrupt.

When asked at oral argument by the District Court why CRIT did not follow Section 21 of the Lease and ask the Secretary to take action to deal with Water Wheel's purported breaches, rather than invoke the tribal Eviction Ordinance, counsel for the Tribal Court Parties responded simply that to have followed the

enforcement process dictated by the Lease provisions would have taken too much time: "the process is very ponderous." ER 67, l. 17.

"Too much time" is not a legal concept which justifies CRIT's going beyond the scope of Water Wheel's consent to the mechanism for prosecuting alleged Lease defaults. For the Lease to have any integrity, its provisions must control free of unilateral amendment or revocation action by CRIT. Yet, the Tribe took that action, the BIA did not intervene to insure the integrity of the Lease provisions, and the Tribal Court Parties rotely followed the tribal agenda. Strict compliance with the Lease would have left the Tribal Court **without jurisdiction** over Water Wheel to seek eviction in its own name. That right then rested, and still rests, with the Secretary.

The bottom line is that Water Wheel never consented to the Tribal Court jurisdiction over any eviction action. That jurisdiction was legislated by the CRIT Eviction Ordinance, an after-enacted tribal law to which Water Wheel did not consent in writing. There may be some forum in which CRIT could pursue an eviction, but it cannot be the Tribal Court because of the absence of consent to that court's jurisdiction. The District Court clearly considered that very point when it noted that Lease Addendum Section 21 states that the Secretary "may" bring legal

action to re-enter the leasehold (ER 13, *ll.* 9-11),[12] with the further observation that Lease Addendum Section 23 provides CRIT with a role in the eviction process by giving the Tribe a right to dispose of property of the lessee not removed at the time of leasehold vacation. *Id.* The Court then reached the ultimate conclusion that there was no tribal waiver of the "power to commence the Tribal Court action in 'unmistakable terms' as required by *Merrion* or in 'sufficiently clear contractual terms' as required by *Arizona Public Service,*" leading to his conclusion that the "Tribal Court's power has not been waived in the lease." ER 13-14, *ll.* 19 - 2.

The District Court's error is that it read Sections 21 and 23 as wholly independent of each other, although they – along with all of the Lease provisions – must be read *in pari materia*. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) ("cardinal principle of contract construction [is] that a document should be read to give effect to all [of] its provisions and to render them consistent with each other"); *see also* Restatement (Second) of Contracts §202(2) and Comment d ("[a] writing is interpreted as a whole, and all writings that are part

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[12] The District Court stated that "paragraph 21 provides that the Secretary can bring an action for breach of the lease, but does not prohibit CRIT from doing so." ER 12. However, the District Court misreads the meaning of "may" in Section 21. While that language certainly suggests permissive options, the options do not concern who or what may enforce the Lease. The options to which the "may" language refer are the Secretary's enforcement options. The Secretary "may" sue or the Secretary "may" re-enter, but no entity or individual other than the Secretary has those options.

of the same transaction are interpreted together"). Only by reading each of those sections as independent of the other, could the District Court conclude that CRIT had the right to litigate an eviction in Tribal Court. And that was in error.

Finally, Water Wheel never claimed there was a "waiver" of Tribal Court power; rather, the issue before the District Court was whether there was a "Tribal Court power" in the first place. If there was no such power, then the determination that it was never waived is irrelevant.

C. The District Court Erred in Ruling that the Lease Allowed CRIT to Prosecute the Eviction of the Tenant in the Absence of the Tenant's Insolvency or Bankruptcy.

The only legal enforcement action the Lease allows CRIT is articulated at Lease Addendum Section 21, which states: "Any action taken or suffered by Lessee as a debtor **under any insolvency or bankruptcy act** shall constitute a breach of this lease. **In such event** the **Lessor and the Secretary**[13] shall have the options set forth in sub-Articles A and B above." (Emphasis added.) Articles A and B are discussed above, and they otherwise provide that **the Secretary** has the

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[13] The parties to the Lease obviously knew how to include both the "Lessor and the Secretary" when they desired to do so. *Cf.* Lease Addendum 21 at line 23 ("Lessor and the Secretary"), *and* line 26 ("Lessor or the Secretary"), *with* Lease Addendum 21 at line 2 ("the Secretary may either . . ."). ER 244 – 246, *ll.* 2 – 26. The Lessor's enforcement right was strictly limited to the case of a financially distressed lessee.

right in the case of a default to (A) proceed by suit or (B) re-enter the leasehold premises. CRIT may take action only in the event of insolvency or bankruptcy.

The District Court found at Section 22 entitled "ATTORNEY'S FEES" what it felt was a "savings clause" to the restricted opportunity for CRIT to be the enforcer. ER 12. That Section allows CRIT to recover reasonable attorney fees in an action "brought by the Lessor" in unlawful detainer for "rent or other sums of money due under the Lease." However, Section 22's entitlement to recover legal fees is a derivation of CRIT's participation in legal action which CRIT *otherwise can prosecute*. ER 247, *ll.* 2 – 6. Specific contractual provisions control over general provisions[14]. And thus, a general provision for recovery of attorney's fees cannot establish enforcement rights not otherwise authorized in the specific enforcement action. That right is limited to the Section 21 authority which arises when the lessee is insolvent or bankrupt. ER 243 – 246.

While the District Court went on to declare that Section 22 unlawful detainer actions are "different from the breach-of-lease actions addressed in [Section] 21," (ER 12), the statement is contrary to the Lease provisions and structure. The Court

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[14] Restatement (Second) of Contracts § 203(a),(c) and cmt. e (1981) ("specific terms and exact terms are given greater weight than general language" and "an interpretation which gives a reasonable, lawful and effective meaning to **all the terms** is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect") (emphasis added).

defined an action for unlawful detainer as "separate from a breach-of-contract claim" which seeks to recover a leasehold from a holdover tenant "after the lease has expired" (*Id.*), while dismissing the holdover provisions of Lease Section 29 (ER 248) entitled "DELIVERY OF PREMISES." This Section provides that a tenant commits to vacate the leasehold without legal process – a "covenant" to vacate upon expiration. A breach of a Lease covenant takes the matter back to Section 21 – DEFAULT, which specifically assigns **to the Secretary** the enforcement role for a "**breach** [of] any covenant of this lease." (Emphasis supplied.) ER 243 – 244, *ll.* 28 - 2**.**

The District Court goes on to note that CRIT asserted a tort claim in Tribal Court as part of the eviction, observing that Section 21 does not mention "tort claims that might arise from the landlord-tenant relationship," and nothing in Section 21 suggests that such a claim may be asserted by the Secretary. ER 13, *ll.* 5 - 11. Whether Water Wheel could be prosecuted by CRIT in Tribal Court for a tort claim is not the issue before this Court. The issue is whether the basic eviction action arising from a Lease default could be prosecuted in Tribal Court. The tort claims asserted in the Tribal Court were derivative of the basic eviction action. If CRIT had independent claims in tort against Water Wheel, unrelated to the Lease, the Tribal Court might have had jurisdiction to hear them. However, that is not this case.

The Lease says that the Secretary shall enforce the Lease, and the applicable regulations set forth the power and procedures for such enforcement. This enforcement scheme was designated in the Lease and never expanded by the parties to it. The Lease defines the processes to which Water Wheel consented. Tribes are not free to manufacture claims in a way to sidestep the careful limitations of *Montana* and its progeny. The District Court erred in endorsing Tribal Court jurisdiction for an eviction action to which Water Wheel did not consent by, figuratively, allowing the [tort claim] tail to wag the [eviction] dog.

Finally, the District Court cited Addendum Section 23 (ER 247, *ll.* 8 - 17) as the ultimate acceptance of Tribal Court jurisdiction when it quoted that section as providing that a holdover tenancy does not give the lessee any rights "hereunder or in or to the leased premises." ER 14, *ll.* 8 - 9. And the Court concluded that even if Water Wheel was not subject to Tribal Court jurisdiction while the Lease was in effect, Section 23 makes clear that such a right expired with expiration of the Lease term. *Id.* While this conclusion is at odds with repeated pronouncements of counsel for the Tribal Court Parties that the Lease controls this matter, it does not answer the basic question of the source of the Tribal Court jurisdiction in the first place. Again, CRIT may have some legal standing to pursue eviction of a holdover tenant, but such an action is not cognizable in Tribal Court unless the first exception to *Montana* is satisfied. And here it is not.

III. CONCLUSION

At the outset, this Brief stated that this case turns on whether Johnson and Water Wheel consented to CRIT Tribal Court eviction action jurisdiction which was legislated by the CRIT Eviction Ordinance some 31 years after the Water Wheel Lease was executed. The foregoing discussions validates that statement. The language of the Lease and undisputed facts make clear that neither Johnson nor Water Wheel ever consented to the jurisdiction established by that Ordinance. Thus, *Montana*'s first exception is not satisfied in this case.

The Tribal Court Parties and their putative *Amicus Curiae* colleagues would have this Court believe that at stake is nothing less than the integrity of the well-established law as to when non-members are subject to tribal jurisdiction. Such simply is beyond the reality of this case. This is a *Montana* case – nothing more and nothing less.

The District Court correctly ruled Johnson was not subject to Tribal Court jurisdiction because he conducted business on the leasehold solely in his capacity as President and Chief Executive Officer of Water Wheel. There was no evidence to the contrary.

At the same time, the District Court apparently felt that it had to find some way to justify Water Wheel's eviction from what the Court viewed as a holdover tenancy on the leasehold. It could only do so by (1) ignoring the strict enforcement

provisions of the Lease to which Water Wheel consented and (2) selectively applying some Lease provisions without reconciling them with other provisions at odds with the Court's application. As discussed above, those sections must be read in conjunction with each other and the District Court's ruling was error. In fact, enforcement of the Lease was exclusively assigned to the Secretary of the Interior with some very narrow exceptions which are not present in this case. If eviction of Water Wheel is appropriate, it can only be prosecuted by the Secretary pursuant to the Lease and the facts of this case. CRIT does not have that authority.

For the reasons stated herein, Appellee Robert Johnson respectfully requests this Honorable Court to affirm that portion of the District Court Order of September 23, 2009, which granted relief he sought against the Tribal Court Officials by ruling that the Tribal Court had no jurisdiction over Johnson in the eviction action before it.

For the reasons stated herein, Cross-Appellant Water Wheel respectfully requests this Honorable Court to reverse and vacate that portion of the District Court Order of September 23, 2009, which denied the relief it sought against the Tribal Court Officials by ruling that the Tribal Court did have jurisdiction over Water Wheel in the eviction action before it.

Dated this 28th day of June 2010

Respectfully submitted:

s/Dennis J. Whittlesey

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