Chemehuevi Indian Tribe

P. O. BOX 1976 HAVASU LAKE, CA 92363 • (760) 858-4219 FAX: (760) 858-5400

Law Offices Of

RAPPORT AND MARSTON

An Association of Sole Practitioners
405 W. Perkins Street
P.O. Box 488
Ukiah, California 95482
e-mail: rapmar@jps.net

David J. Rapport (707) 462-6846
Lester J. Marston FAX 462-4235
Scott Johnson

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April 22, 1999

Ed Hastey, State Director
United States Department of the Interior
Bureau of Land Management
California State Office
2135 Butano Drive
Sacramento, CA 95825-0451

Re: Request of the United States Department of the Interior, Bureau of Indian Affairs for a Trust Patent for the Chemehuevi Indian Reservation
Our File No. 80.5.3.2

Dear Mr. Hastey:

I am in receipt of your letter dated November 20, 1998, to Wayne C. Nordwall, Area Director, Bureau of Indian Affairs, regarding the August 10, 1998, Bureau of Indian Affairs' request for a Trust Patent on behalf of the Chemehuevi Indian Tribe for the Chemehuevi Indian Reservation.

First, I would like to inquire as to why the letter or a request for comments was not sent directly to the Chemehuevi Indian Tribe, the party most affected by the proposed action. I am requesting that in the future that all correspondence pertaining to this issue be sent directly to Gjrjle Dunlap, Chairwoman, Chemehuevi Indian Tribe, at P.O. Box 1976, Havasu Lake, CA 92363, with a courtesy copy directed to me at the address and/or telephone number on the above letterhead.

Hasty.TrustPatent.doc
April 23, 1999

Second, please be advised that our law firm represents the Chemehuevi Indian Tribe with respect to all issues concerning the request of the Bureau of Indian Affairs for a Trust Patent for the Chemehuevi Indian Reservation.

Third, it is difficult to submit comments to you letter of November 20, 1998, addressed to Wayne C. Nordwall, Area Director, Bureau of Indian Affairs, without having the opportunity to review the documents to which you refer in your letter. Therefore, I am requesting that you provide me with a copy of the following documents: (1) The January 22, 1941 Executive Order 8647 issued by President Franklin
Roosevelt; (2) the maps attached as enclosure 4 and enclosure 5 to your letter; (3) attachment A to the Secretarial Order of 11/1/97, listing all of the persons holding concession contracts and special use permits; (4) the cooperative contract for construction and operation of Parker Dam, dated February 10, 1933, between the Metropolitan Water District of Southern California and the United States; (5) the contracts between the same parties dated September 29, 1936; April 7, 1939; and December 16, 1952, amending and supplementing the February 10, 1993, contract and (6) any map or survey that you might have which would depict lots 2, 3, and 4 within Section 29 and lots 1, 2, and 3 within Section 32, which you assert in your letter are now legally located within the boundaries of the State of Arizona.

Until I have copies of these documents, the Chemehuevi Indian Tribe is unable to submit complete comments to your November 20, 1998, letter. Therefore, I am requesting that you allow the Chemehuevi Indian Tribe an additional thirty (30) days to submit comments to your November 20, 1998, letter after I receive the documents I have requested. The Tribe would appreciate it you would send a letter to me acknowledging receipt of this letter and that you will give the Tribe an additional thirty (30) days to submit comments after it has received the documents requested herein.

In this letter, the Tribe will address two issues: first, why the need for a Trust Patent and how the issuance of the Trust Patent will effect the Tribe; and second, the obligation of the Bureau of Land Management to issue a Patent in conformity with the legal description contained in the Secretarial Order of February 2, 1907.

Since your letter omits certain key laws and facts pertaining to the creation of the Reservation and title to the lands within the boundaries of the Reservation, I feel compelled to set forth an accurate statement of facts pertaining to the Reservation before addressing each of the above issues.

STATEMENT OF FACTS PERTAINING TO THE RESERVATION

Since time immemorial the Chemehuevi Indian Tribe has occupied the lands that presently comprise the Chemehuevi Indian Reservation in the Chemehuevi Valley, California. See, Indian Claims Commission Docket No. 351 (Final Judgment entered January 18, 1965). See, also, Report Of Special Agent Kelsey, Letter Dated July 10, 1907 ("this valley is a deep low valley by

* NOTE *

THE CLAIMS MADE IN THIS "STATEMENT OF FACTS" ARE SIMPLY LES MARSTON'S PERSONAL FABRICATION OF HISTORY. IT HAS BEEN REFUTED BY BLM OFFICIALS.

the Colorado River and has been occupied from time immemorial by the Chemehuevi Indians.").

On March 3, 1853, Congress specifically withdrew from settlement and protected from white encroachment any tract of land in the occupation or possession of any Indian tribe.

> Provided further, that this Act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of an Indian tribe, or to grant any preemption right to the same.

Act of March 3, 1853, Ch. 145, Section 6, 10 Stat. 244, 246.

In enacting Section 6 of the 1853 Act, Congress clearly acknowledged that the aboriginal occupancy rights of the Chemehuevi Indian Tribe (along with the other California tribes) survived California's admission into the union and protected those occupancy rights from further unauthorized encroachments by white settlers. This intent was expressed by Senator Fletcher who offered Section 6 as an amendment to the Act of March 3, 1853. In July 1852 on the floor of the Senate he stated:

> The truth is, that we have little or actual knowledge on the subject of the Indian Tribes in that country. Officially, we have none, for I believe we have no treaties that have ever been made with any of them. It is, however, understood that a large portion of the country occupied by the whites is relieved of the original inhabitants. Still I understand that there are portions of the country to which the Indians have retired - perhaps mineral portions - in which they are occupying to a considerable extent. My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians. The way to get rid of the Indians is not by sending white men to claim rights among them. It is to form treaties with them as the government is heretofore done, according to the provisions of the constitution. . . I do not apprehend that this provision will embarrass anybody, but, on the other hand, it seems to me to be quite proper that we should give the Indian that security which I desire to give him by this provision.

Congressional Globe, Vol. 24, Part 3, July 1852, p. 1773.

On January 12, 1891, Congress passed an "Act for the Relief of the Mission Indians in the State of California." Kappler, Charles J., Indian Affairs Laws and Treaties, Vol. 1 ("Kappler"), p. 383-385. Under the Act, the Secretary of the Interior was authorized "to select reservations for each band or village of the Mission Indians residing within" the State of California. Kappler, p. 383.

Pursuant to the Act of June 17, 1902 (32 Stat. 388) the Secretary of the Interior, by Departmental Orders of July 2, August 26, and September 15, 1902, and February 5 and September 8, 1903, withdrew the lands that presently comprise the Chemehuevi Indian Reservation, in connection

with the Colorado River Reclamation Project. Burlew, E.K., Decisions of the Department of the Interior, 57 I.D. 87-93, December 15, 1939.

On or about March 3, 1905, C.E. Kelsey, a San Jose attorney and officer of the Northern California Indian Association, was appointed special agent to the Commissioner of Indian Affairs for the purpose of reporting to the Commissioner on the condition of Indians within the State of California. See, Act of March 3, 1905, 33 Stat. 1048, 1058.

On December 27, 1906 and January 31, 1907, Special Agent Kelsey issued his reports on the condition of the Chemehuevi Indian Tribe, which resided in the Chemehuevi Valley along the Colorado River. In these reports, Kelsey recommended that the lands occupied by the Chemehuevi Indian Tribe be added to the Colorado River Indian Reservation or in the alternative be set aside and proclaimed as a separate reservation for the Chemehuevi Indian Tribe upon passage of a bill amending the Mission Indian Relief Act of 1891. Report of Special Agent Kelsey, Letter dated February 2, 1907, Report dated January 31, 1907; See Also, Burlew, E.K., Decisions of the Department of the Interior, 57 I.D. at 89.

On January 31, 1907, pursuant to Kelsey's reports, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior requesting that he withdraw certain lands from settlement and entry for the use and occupancy of 12 separate bands of Mission Indians, including the Chemehuevi Indian Tribe. In his letter the Commissioner wrote:

> Referring to office letter of January 28, transmitting reports of Special Agent C.E. Kelsey on the condition of the Mission Indian Reservations in California, and the draft of a proposed bill for the betterment of their condition [i.e. Act of March 1, 1907 "An Act Amending Section 3 of the Act of January 12, 1891, An Act for the Relief of the Mission Indians in the State of California"], I have the honor to transmit herewith certain descriptions of lands which he recommends be withdrawn from all forms of settlement and entry pending action by Congress whereby they may be added to several reservations. The proposed additions are as follows:
>
> * * *
>
> Chemehuevi Valley. Fractional townships 4 N., R. 25 E., T, 4 N., R 26 E., T. 5 N., 25 E., 6 N., 25 E.; the E/2 of 5 N., R. 24 E, and Secs. 25, 26, 35 and 36, T. 6 N., R. 24 E, S.B.M.

On February 2, 1907, the Secretary of the Interior, pursuant to the Commissioner's recommendation, issued an order to the general land office directing that the lands be withdrawn from settlement and entry. In his order the Secretary stated:

> In view of the recommendation of the Indian office, I have to direct that the lands referred to be withdrawn from all form of settlement or entry until further notice, also that the local land officers of the District in which the said lands are located,

be advised of such withdrawal. In this connection you are advised that the Department on the 31st ultimo forwarded to Congress, with favorable recommendation, the draft of a bill to authorize the addition of certain lands to the Mission Indian Reservation.

Secretarial Order of February 2, 1907.

On March 1, 1907, Congress passed an "Act Making Appropriations For The Current And Contingent Expenses Of The Indian Department, For Fulfilling Treaty Stipulations With Various Indian Tribes, And For Other Purposes, For The Fiscal Year Ending June 13, 1908." Kappler, Vol. III, p. 266. The Act provided in part that:

> ...Section 3 of the Act approved January 12, 1891, entitled "An Act for the Relief of the Mission Indians in the State of California", be, and the same is hereby, so amended as to authorize the Secretary of the Interior to select, set apart, and cause to be patented to the Mission Indians such tracts of the public lands of the United States, in the State of California, as he shall find upon investigation to have been in the occupation and possession of the several bands or villages of Mission Indians, and are required and needed by them, and which were not selected for them by the Commissioner as contemplated by Section 2 of said Act,...

Kappler, Vol. III, p. 273-274.

On June 25, 1910, Congress enacted Title 42 of the United States Code Section 141 (36 Stat. 847). That statute provided:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States ... and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

On March 3, 1927, Congress enacted Title 25 of the United States Code Section 398(d). That section provides:

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

On June 18, 1934, Congress enacted Title 25 of the United States Code §465. That

Section provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired. . ..

On July 8, 1940, Congress passed an "Act for the Acquisition of Indian Lands for the Parker Dam and Reservoir Project, and for Other Purposes." That Act provides in part:

> That, in aid of the construction of the Parker Dam Project, authorized by the Act of August 30, 1935 (40 Stat. 1028), there is hereby granted to the United States, its successors and assigns, subject to the provisions of this Act, all the right, title, and interest of the Indians in and to the tribal and allotted lands of the ... Chemehuevi Reservation in California as may be designated by the Secretary of the Interior.
>
> Sec. 2. The Secretary of the Interior shall determine the amount of money to be paid to the Indians as just and equitable compensation for the rights granted under Section 1 hereof. Such amount of money shall be paid to the Secretary of the Interior by the Metropolitan Water District of Southern California, a public corporation of the State of California, in accordance with the terms of the contract made and entered into on February 10, 1933, between the United States of America, acting through the Secretary of the Interior and the Metropolitan Water District of Southern California. In the case of tribal lands, the amount due to the ... tribe shall be deposited by the said Secretary in the Treasury of the United States.

Kappler, Vol. VI, pp. 88-89 (54 Stat. 744).

On January 25, 1941, pursuant to the authority granted to him by the Act of January 25, 1910 (i.e. 42 U.S.C. Section 141, See page 7 infra.), the President of the United States issued Executive Order No. 8647, establishing the Havasu Lake National Wildlife Refuge. That order provided in part:

> By virtue of the authority vested in the Act of June 25, 1910 ... and as President of the United States, it is ordered that all lands owned by the United States within

Re: **Request of the United States Department of the Interior, Bureau of Indian Affairs for a Trust Patent for the Chemehuevi Indian Reservation**

> the following described areas ... are hereby, reserved and set apart, subject to valid existing rights, for the use of the Department of the Interior as a refuge and breeding ground for migratory birds and other wildlife; and all lands hereinafter acquired by the United States within such areas including tribal and allotted Indians lands in which complete interest may hereafter be acquired by the United States pursuant to the Act of July 8, 1940 shall upon acquisition thereof become and be reserved as a part of the said refugee . . ..

On October 9, 1949, pursuant to the Act of July 8, 1940, Acting Secretary of the Interior A.J. Wirtz determined the amount of money to be paid to the Indians of the Chemehuevi Reservation as just and equitable compensation for their right, title and interest to the tribal and allotted lands granted to the United States government by Section 1 of the Act of July 8, 1940. In his determination Secretary Wirtz acknowledged that the United States was acquiring the most valuable lands on the Reservation (i.e., the only lands on the Reservation suitable for agricultural production and the grazing of livestock). The United States acquired 7,776.12 acres of land within the approximately 32,000 acre Reservation. For this the Tribe and individual allottees received a total aggregate payment in the amount of $108,104.95. This amount represented the appraised fair market value of the land, the improvements located thereon and severance damages. The appraisals did not include nor was any compensation paid to the Chemehuevi Indian Tribe for hunting and fishing rights appurtenant to the land.

After the United States acquired title to those portions of the Chemehuevi Indian Reservation designated by the Secretary of the Interior, the United States completed the construction of Parker Dam, thereby creating Lake Havasu. The Lake level, however, only rose to the 450 contour line leaving a strip of land, owned by the United States of America, lying between the high water mark of Lake Havasu and the 465 contour line (i.e., those lands owned by the United States in trust for the Tribe).

This strip of land was administered by the Bureau of Land Management and the United States Fish and Wildlife Service until November 1, 1974. During this time, the United States, through these agencies, issued permits to non-Indians to operate concessions on the property. One such permit was issued to the Havasu Landing Resort, Inc., a for-profit California Corporation, for the purpose of constructing and operating a mobile home park, marina, and small café.

On November 1, 1974, the Secretary of the Interior issued an Order restoring certain lands within the boundaries of the Chemehuevi Indian Reservation previously acquired by the United States pursuant to the Act of July 8, 1940, to the equitable ownership of the Chemehuevi Indian Tribe. The Order provided in part:

> ...The Chemehuevi Tribe has full equitable title to all those lands within the Chemehuevi Indian Reservation designated to be taken by Secretary's Ikes in 1941 between the operating pool level of Lake Havasu on the east, and the following north and south boundaries:

The 1974 Secretarial order was based on a Solicitor's Opinion dated August 15, 1974, which concluded that the Secretary's power under the Act of July 8, 1940, to designate certain land to be taken for the Parker Dam and Reservoir project, was a continuing power rather than one which terminated with the original designation for the project in 1941. In that opinion the Solicitor also concluded:

> ...Such Secretarial action would not be barred by statute such as 25 U.S.C. Section 398d or 43 U.S.C. Section 150, which imposed restrictions with respect to actions affecting Indian reservations. The first of these statutes, 25 U.S.C. Section 398d, prohibits making any change in the boundaries of reservations except by Act of Congress. But just as the original designation affected only title to land within the Chemehuevi Reservation and did not change the reservation's boundaries, See, United States v. Celestine, 215 U.S. 278, 285 (1909), so too the redesignation would work no "boundary change, it would merely confirm equitable title in the Chemehuevis to the lands in question. Under the other statute referred to, 43 U.S.C. Section 150, Executive action "withdraw[ing]" public lands "for or as an Indian reservation" is prohibited. But the Secretary would not be "withdrawing" lands; he would merely be exercising his authority to correct his designation of the lands needed for the Parker Dam project. The transaction would have to do with title, as indicated above, and would not affect the existence or extent of the reservation. (Emphasis added.)

Lindgren, David E., Acting Solicitor, Authority of the Secretary to Determine Equitable Title to Indian Lands, August 15, 1974.

This November 1, 1974 Secretarial Order amended a previous order issued by the Secretary of the Interior on August 15, 1974, restoring title to the lands between the 450th and 465th contour lines to the equitable ownership of the Chemehuevi Indian Tribe.

With these historical facts in mind, I will now address the two issues that concern the Chemehuevi Indian Tribe.

THE REASONS THAT JUSTIFY THE ISSUANCE OF THE PATENT AND HOW THE ISSUANCE OF THE PATENT WILL AFFECT THE CHEMEHUEVI INDIAN TRIBE

First and foremost, Federal law requires the Secretary of the Interior to issue a trust patent for the Chemehuevi Indian Reservation.

There is absolute no doubt that the Secretary issues his order creating the Reservation under the authority of the Mission Indian Relief Act and the Amendments to the Act ("Act"). Both the Commissioner's letter to the Secretary recommending the withdrawal of these lands and the Secretary's order specifically state that the land was being withdrawn under the authority of "the bill that was presently before Congress" at that time (i.e., the amendments to the Mission Indian Relief Act). The fact that the order was issued prior to the passage of the amendment does not

effect its validity. Administrative action taken to create an Indian Reservation in anticipation of Congressional authorization is legally valid. United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939).

The amendment to the Act places a mandatory non-discretionary duty on the Secretary to "cause to be patented to the Mission Indians such tracts of the public lands of the United States . . ., as he shall find . . . to have been in the occupation and possession of the several bands . . . of Mission Indians . . .. Kappler, Vol. III, p. 273-274. The Secretary in fact did issue a patent for all the other reservations named in his February 2, 1907 order, except the Chemehuevi Indian Reservation.

This interpretation of the Act (i.e., that the Secretary has a duty to issue the Tribe a trust patent for the Reservation) is consistent with the plain wording of the Act, its legislative history as set forth above and the canons of statutory construction that statutes passed for the benefit of Indians are to be liberally construed with all doubts and ambiguities resolved in their favor. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

Second, a reservation created by the Secretary rather than by Act of Congress creates no compensable interest in the Tribe if the Reservation is terminated. Also, a reservation created by Secretarial order probably could be revoked by the Secretary or the President at any time. See, Confederated Band of Ute Indians v. United States, 330 U.S. 169 (1947); Sioux Tribe v. United States, 316 U.S. 317 (1942). On the other hand, if the Secretary creates a reservation pursuant to Congressional authorization, the reservation can only be terminated by Act of Congress after paying the Tribe just compensation for the lands taken. Shoshone Tribe v. United States, 299 U.S. 476 (1937). Issuance of the trust patent will make it absolutely clear that the Chemehuevi Reservation was created pursuant to an Act of Congress.

Third, at present there is no document, including the Secretary's order, which specifically designates the Chemehuevi Indian Tribe as the beneficial owner of the Reservation. While I am confident that the Tribe would prevail in any lawsuit brought by any other Indian group claiming a beneficial interest in the Reservation, such claims can be laid to rest conclusively by the issuance of a trust patent for the Reservation designating the Tribe as the beneficial owner. In light of what has occurred in northern California in Jessie Short v. United States, 486 F.2d 561 (Ct. Cl. 1973), I would think the United States would be anxious to clear up any ambiguities as to who is the beneficial owner of the Reservation.

Fourth, the failure of the United States to issue a trust patent to the Tribe would be inconsistent with the United States' continuing trust obligation. It is clear that the United States acting through the Secretary did not fulfill his statutory and fiduciary obligation under the Mission Indian Relief Act (i.e., issuance of a trust patent), duties that must be exercised with "great care," . . . in accordance with "moral obligations of the highest responsibility and trust," that must be measured "by the most exacting fiduciary standards." Smith v. United States, 515 F. Supp. 46, 60 (N.D. Cal. 1978). Such a willful failure and/or delay in compliance with its statutory obligations under the Mission Indian Relief Act would certainly be reviewable by a federal court under the Administrative Procedure Act and could expose the United States to liability for money damages

for breach of trust. United States v. Mitchell, 463 U.S. 206 (1983); Duncan v. United States, 667 F.2d 36 (1981); Smith v. United States, 515 F. Supp. 56 (1978).

Finally, non-Indians who are holding over after their leases with the Tribe have expired, are asserting as a defense to eviction actions brought by the United States, that the Chemehuevi Indian Reservation was not lawfully created because, among other things, the Secretary never issued a trust patent for the Reservation, as required by the Amendments to the Mission Indian Relief Act. See, e.g., United States v. Jorgensen, et al., United States District Court, Central District of California, Case No. 92-3809-13 TJH.

Issuance of the trust patent will once and for all put an end to this argument and be consistent with the position that the United States, acting through the United States Attorney General's Office, has taken in the litigation.

Therefore, because the Secretary has a moral and legal obligation to issue the trust patent, the Bureau of Land Management should issue the patent as requested by the Tribe.

THE TRUST PATENT SHOULD BE ISSUED TO MAKE IT CLEAR THAT THE ORIGINAL BOUNDARIES OF THE RESERVATION, AS ESTABLISHED BY THE 1907 SECRETARIAL ORDER HAVE NOT BEEN DISESTABLISHED OR THE RESERVATION OTHERWISE DIMINISHED

The second and last major concern of the Chemehuevi Indian Tribe is that the Trust Patent be issued consistent with the Secretary of the Interior's order of February 2, 1907, creating the Reservation. Statements in your November 20, 1998, letter, such as: "If any of the lands have returned to the jurisdiction of the United States and are available for inclusion in the Reservation," cause the Tribe great concern.

As originally established by the February 2, 1907, Secretarial Order, the western boundary of the Chemehuevi Indian Reservation went to the high water mark of the Colorado River. If the Secretary had done his job as was required under the amendments to the Missions Indian Relief Act, the Bureau of Land Management, or its predecessor would have issued a Trust Patent for the Reservation along with the other twelve reservations that were created pursuant to that Secretarial Order. If that had been done the trust patent would have included the exact same legal description that was contained in the 1907 Secretarial Order. Because of the negligence of federal officials, no such trust patent was issued. As a result, since the issuance of the 1907 Secretarial Order, various tracts of land have passed out of Tribal ownership within the boundaries of the Chemehuevi Indian Reservation. While tracts of land have passed out of Tribal ownership, they have not effectuated a change in the original boundaries of the Reservation as established by the 1907 Secretarial Order.

As you may know, Title 18 of the United States Code §1151 provides that all lands within the exterior boundaries of an Indian Reservation are Indian Country as that term is defined under Section 1151. For most purposes, it is the territorial boundaries of the Reservation and not title to the ownership of land that determines whether the Tribal government can exercise jurisdiction

over persons or property located within the boundaries of the Reservation. DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975), holding that while the definition in Title 18 of the United States Code §1151 is for purposes of determining federal criminal jurisdiction on an Indian Reservation, it is also used for determining Tribal civil jurisdiction.

Non-Indians who come within the territorial boundaries of the Chemehuevi Indian Reservation frequently challenge the jurisdiction of the Tribe to regulate their activities. Therefore, it is essential to the political integrity of the Tribe that the Trust Patent issued by the United States mirrors the legal description contained in the 1907 Secretarial Order and then carves out from that legal description all valid conveyances of land, easements, and right of ways that were subsequently conveyed to third parties after the issuance of the 1907 Order.

There can be no doubt that neither the July 8, 1940 Act for the acquisition of Indian lands for the Parker Dam and reservoir project ("Acquisition Act"), the Act of January 5, 1910 authorizing the President to establish the Havasu Lake National Wildlife Refuge ("Refuge Act") or Executive Order No. 8647, establishing the Havasu Lake National Wildlife Refuge ("Refuge Order") disestablished the eastern boundary of the Chemehuevi Indian Reservation.

NEITHER THE ACQUISITION ACT, REFUGE ACT, OR REFUGE ORDER ISSUES PURSUANT THERETO DISESTABLISHED THE EASTERN BOUNDARY OF THE CHEMEHUEVI INDIAN RESERVATION

1. Introduction.

The United States Supreme Court has frequently addressed disestablishment questions. From these cases certain principles of law have been developed which control the present case. First, once Congress has established a reservation, all of its tracts remain a part of the reservation until Congress says otherwise. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975) ("DeCoteau"); United States v. Celestine 215 U.S., 278, 285 (1909). Second, only Congress can divest a reservation of its land, diminish its boundaries, or disestablish it all together. Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("Solem"); Mattz v. Arnett, 412 U.S. 481, 405 (1973) ("Mattz"). Finally, a strong presumption prevails that reservation lands and boundaries are to remain intact. Solem, supra, at 472; DeCoteau supra, at 444. Accordingly, before disestablishment or diminishment of reservation boundaries will be found, a clear congressional intent to do so must be established. Solem, supra, at 470; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) ("Rosebud").

The United States Supreme Court has established three primary factors that this Court must consider to determine whether Congress intended by legislative enactment to disestablish the boundaries of the Chemehuevi Indian Reservation: 1) Did the Indians make an agreement to cede their lands to the United States or agree otherwise that Reservation boundaries would be altered? 2) Did the Act authorizing the acquisition of the land within the Reservation contain express language of termination, or, at the very least, clear language of cessation? and, 3) Did the legislative history contain clear expressions from Congress of intent to disestablish the Reservation boundaries, rather than merely intend to authorize non-Indian settlement or the

acquisition of land within the boundaries of the Reservation?

The United States Supreme Court has never held reservation boundaries to be altered in the face of negative answers to all three of these fundamental questions. With this in mind, the Tribe will now consider each of these factors in turn as they apply to the Acts to show that the eastern boundary of the Chemehuevi Indian Reservation was never disestablished.

2. Neither The Acquisition Act, Refuge Act Or Refuge Order Contain Provisions For An Agreement Of Cessation.

In both cases where the United States Supreme Court held reservations to be disestablished - DeCoteau and Rosebud - the Court stressed the importance of the Indians agreement to sell or cede the land to the United States in return for a sum certain payment by the United States (i.e., $2.50 per acre). The United States Supreme Court has ruled that the Indians agreement is significant, not because it was legally required to accomplish the result, but because it provides the clearest indication both that the Congress, in ratifying the agreements, intended to alter reservation boundaries, and that the Indians fairly understood this result would occur. Thus, when Indians agree to sell their lands and the United States agrees to purchase the lands for a fixed price, the lands unconditionally ceded are no longer part of the reservation. In Mattz, Solem, and Seymour v. Superintendent, 368 U.S. 351 (1962) ("Seymour") on the other hand, the United States Supreme Court held that where no agreement was concluded with the Indians prior to opening lands for settlement, the clear congressional intent necessary to a finding of disestablishment was lacking.

The Court in DeCoteau emphasized that it was "following and affirming the guiding principles of Mattz and Seymour. DeCoteau, 420 U.S. at 449. The critical distinction was the presence of a cessation agreement. Thus, in DeCoteau the Court characterized the 1906 Colville statute at issue in Seymour as:

> Unilateral in character; like that in question in Mattz, it merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit. The Seymour court was not confronted with a straight forward agreement ceding lands to the government for a sum certain.

Id. at 488.

By contrast, according to the Supreme Court, the 1891 Lake Traverse Act at issue in DeCoteau:

> . . .is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. The 1891 Act does not merely open lands to settlement; it also appropriates and invests in the Tribe a sum certain - $2.50 per acre - in payment for the express cessation and relinquishment of "all" of the Tribe's "claim, right, title and interest" in the unallotted lands.

Id. at 488.

In Rosebud, the United States Supreme Court reaffirmed the importance of the cessation agreement. There, a 3/4 majority of the Indians had agreed in 1901 to cede all of their unallotted lands in Gregory County to the United States for a sum certain. This agreement for an outright sale and purchase again provided the strongest evidence of intent to disestablish. As the court stated:

> [T]he effect and intent of the 1901 Agreement, if ratified, would have been to change the reservation boundaries. ...In this Agreement therefore we have - unlike the situation in Mattz v. Arnett, ... - an unmistakable base line purpose of disestablishment.

Id. at 592.

Neither the Acquisition or Refuge Acts nor the Refuge Order in question in this case contains a cessation agreement or required Congress to pay a sum certain to the Chemehuevi Indian Tribe. The Acquisition Act is a unilateral grant to the United States of such tribal and allotted lands as "maybe designated by the Secretary of the Interior" and only requires the Metropolitan Water District to pay the Tribe that "sum as the Secretary of the Interior shall determine is just and equitable compensation" for the land so acquired.

Likewise, the Refuge Act and the Refuge Order contain no language of cessation nor require the payment of a sum certain to the Chemehuevi Indian Tribe for the taking of its land. This is particularly true with respect to the Refuge Act which is a general statute that makes no mention of Indian reservations and which simply authorizes the President to temporarily withdraw from settlement, sale or entry any of the public lands of the United States. Clearly this Act evidences no congressional intent to acquire lands within the Reservation or to alter the boundaries of the Reservation.

As with the case of the Acquisition Act, the Refuge Order simply authorizes the President to include the lands acquired under the Acquisition Act within the Havasu Lake National Refuge.

> As with the case in Solem, these provisions stand in sharp contrast to the explicit language of cessation employed in Rosebud and DeCoteau. Rather than reciting an Indian agreement to "cede, sell, relinquish and convey" the open lands, the Act simply authorized the Secretary to "sell and dispose" of certain lands.
>
> * * *
>
> Nowhere else in the Act is there specific reference to the cessation of Indian interests in the open lands or any change in existing reservation boundaries.

Id. at 473-474.

3. Neither The Acquisition Act, Refuge Act Nor Refuge Order Contained Any Specific Language Of Disestablishment, Termination Or Cessation.

In DeCoteau and Rosebud, the Court ruled that clear language of cessation also shows an intent to disestablish. The operative language in the 1891 Lake Traverse Act at issue in DeCoteau was that the Indians "hereby cede, sell, relinquish and convey to the United States all their claim, right, title and "interest" to the unallotted lands. DeCoteau at 445. This language, taken verbatim from the 1889 Agreement, was held "precisely suited" to disestablishment. In sharp contrast, as stated above, neither the Acquisition Act, Refuge Act or Refuge Order contain any language of cessation. See, e.g., Duncan Energy v. Three Affiliated Tribes, 27 F. 3d 1294, 1297 (8th Cir. 1994) holding that the 1910 Act which authorized the Secretary of the Interior to "surve[y] and sell and dispose of . . . all the surplus unalloted and unreserved lands within [a] portion of the [Fort Berthold] Reservation . . ." did not diminish the Reservations' boundaries.

Moreover, none of the Acts at issue here manifested an intent to terminate the reservation status of the land affected by it. The Acts at issue here simply authorize the President to temporarily withdraw from settlement or entry lands on the public domain [Refuge Act] or unilaterally convey to the United States such lands within the Chemehuevi Indian Reservation as the Secretary may designate [Acquisition Act].

As the United States Supreme Court stated in Mattz, Congress knew how to use language of express termination when it sought that result:

> "The Smith River Reservation is hereby discontinued," 15 Stat. 221 (1868); the same being a portion of the Colville Indian Reservation * * * is hereby vacated and restored to the public domain," 27 Stat. 63 (1892); and the reservation lines of the said Ponca and Otoe and Missouri Indian Reservations be, and the same are hereby abolished," 33 Stat. 218 (1904) (emphasis added).[1]

In the present case none of the Acts or Executive Order contain any "clear language of express termination," as was cited by the Supreme Court in Mattz above, or found by the United States Supreme Court in Rosebud and DeCoteau to be particularly suited as evidencing a congressional intent to terminate reservation status. At most the Acquisition Act is in the nature of an eminent domain proceeding brought by the United States which allows the government, for the benefit of the public, to acquire as much land as was necessary to construct the Parker Dam and Reservoir.

This language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish reservation boundaries. Solem.

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[1]See also, Hagen v. Utah, ___ U.S., 114 S. Ct. 958, 966-67 (1994) (the phrase "restore to the public domain" evidenced a Congressional intent to disestablish the Uintah and Ouray Indian Reservations in Utah) (emphasis added).

4. The Legislative History Of The Acquisition And Refuge Acts Evidence No Clear Intent To Disestablish.

No agreement having been entered into between the United States and the Chemehuevi Indian Tribe, and having no statutory language of cessation contained in any of the Acts or the Order, only the most unequivocal expressions by Congress in the legislative history of either or both Acts could support a finding of disestablishment.

The legislative history of the Refuge Act is totally void of any language whatsoever dealing with tribal or allotted reservation lands. The scant legislative history of the Acquisition Act likewise does not contain an unequivocal expression by Congress to disestablish the Chemehuevi Indian Tribe's Reservation boundaries. The only remarks made by various Congressman regarding the Act merely recite the specific language of the Act. At most, the legislative history is ambiguous. As stated by the 8th Circuit Court of Appeals in United States v. Wounded Knee, 595 F.2d 798 (8th Cir.) cert. denied, 442 U.S. 921 (1979):

> While there are a few stray phrases which could be interpreted as indicating both the presence and absence of diminishment, we are mindful that "[a] Congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history". Mattz v. Arnett, 412 U.S. at 505, 93 S.Ct. at 2258 [Emphasis included]. There is simply nothing in the legislative history which satisfies this requirement.

Id., at 796. (Footnote omitted).

In the absence of a cessation agreement, operative language of cessation or a clear legislative expression of intent to disestablish, there can be no finding by the BLM that Congress intended by passing the Acquisition or Refuge Acts to disestablish the eastern boundary of the Chemehuevi Indian Reservation. Absent that clear congressional intent to disestablish, the actions of the President creating the Havasu Lake Wildlife Refuge in and of itself cannot effectuate a change in the reservation boundary.

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries.

Solem, at 469.

In fact, any attempt by the President to issue an Executive Order reducing, diminishing or disestablishing the eastern boundary of the Chemehuevi Indian Reservation would have been in direct violation of 25 U.S.C. Section 398(d) which provides:

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

There being no clear congressional intent to disestablish the eastern boundary of the Chemehuevi Indian Reservation, particularly in light of the United States continuing trust duty, the BLM must conclude that the eastern boundary of the Chemehuevi Indian Reservation was not diminished by either the Acquisition Act, Refuge Act or the Refuge Order. See, Lower Brule Sioux Tribe v. State of S.D., 711 F.2d 809, 816-821 (8th Cir. 1983) and State of S.D. v. Bourland, 949 F. 2d 984, 990 (8th Cir. 1991) holding that various federal statutes authorizing the purchase of land from an Indian Tribe for the construction of a dam and reservoir, did not disestablish the boundaries of the reservation.

CONCLUSION

It has been over 90 years since Congress passed the amendments to the Mission Indian Relief Act imposing a mandatory duty on the Secretary of the Interior to issue a trust patent for the Chemehuevi Indian Reservation. As an agency or a department of the United States, the Bureau of Land Management has a trust obligation that it owes to the Chemehuevi Indian Tribe to issue a Patent that is consistent with the intent of the Mission Indian Relief Act and the Secretarial Order of 1907 creating the Reservation. The original intent of that Act and Order was to issue a trust patent for the Chemehuevi Indian Reservation as it existed in 1907. In 1907, all of the lands within the exterior boundaries of the Reservation were owned by the United States Government in trust for the Tribe.

Given the Bureau of Land Management's unique trust obligation, it has a legal obligation to issue a Trust Patent for the Reservation that does not conflict with the legal principle that the eastern boundary of the Chemehuevi Indian Reservation has not been disestablished. This could only be accomplished by issuing a Patent that contains the original description of the Reservation as contained in the 1907 Secretarial Order and excepting from that description those parcels of property, rights of way, and easements that have subsequently been conveyed to third parties. Such a Patent would not only carry out Congress's original intent as embodied in the amendments to the Mission Indian Relief Act, the Secretarial Order of 1907, and the United States government's trust obligation to support Tribal sovereignty but will also protect the rights of third party purchasers and other third parties who have acquired valid interests in lands located within the exterior boundaries of the Chemehuevi Indian Reservation as created by the 1907 Secretarial Order and as exists today. Thus, granting the Tribes request would not require the BLM to issue a patent for lands it does not hold title to, but rather, only those lands within the boundaries of the Reservation that are owned by the United States in trust for the Tribe.

Finally, in my telephone conversation of April 21, 1999, with Nancy Alex of your staff, Ms. Alex stated that the Bureau of Land Management could not issue the type of Trust Patent that the Chemehuevi Indian Tribe is requesting in this letter. When I asked her why the Bureau of Land Management could not issue such a Patent, Ms. Alex stated that it would be illegal. I then asked Ms. Alex what law would be violated if the BLM issued the Patent in the form that the Tribe was requesting. At that time, she could not cite any specific Act of Congress or Executive Order that would be violated. Rather, she made a bald assertion that the issuance of such a Patent would violate the United States Constitution. Since it at least appears that your staff believes that the Tribe's request would violate federal law, I am requesting that you refer this matter to the

Solicitor's Office for a formal legal opinion as to whether the issuance of the Trust Patent as requested by the Tribe would, in fact, violate any federal law. If the Solicitor determines that the issuance of such a Patent would not violate federal law, then I would demand, on behalf of my clients, that the BLM issue the Trust Patent to the Chemehuevi Indian Tribe for the Chemehuevi Indian Reservation in the form that the Chemehuevi Indian Tribe and the Bureau of Indian Affairs has requested.

I look forward to your reply to each and every one of the issues that I have raised in this letter. Your consideration of the matters raised by the Tribe in this letter are greatly appreciated. I look forward to your reply.

Yours very truly,

LESTER J. MARSTON
Attorney at Law

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