M E M O R A N D U M

To: Jonathan Holub, Esquire
Deputy County Counsel
Riverside County, California

From: Dennis J. Whittlesey

Re: *The status of the land located in and around Sections 11 and 14 of Township 3 South, Range 23 East of the San Bernardino Meridian, California.*

Date: March 17, 2010

As we discussed several weeks ago and you requested, the following is an analysis and discussion of the status of the Water Wheel Recreational Camp ("Water Wheel") leasehold located on the West Bank of the Colorado River, in and around Sections 11 and 14 of Township 3 South, Range 23 East of the San Bernardino Meridian, California. As you know, these lands are within Riverside County and for a number of years have been the subject of jurisdictional conflict between the non-Indian residents and the Colorado River Indian Tribes of Arizona ("CRIT").

I. Federal records confirm that the Water Wheel property is administratively withdrawn land held by, and under the jurisdiction of, the Bureau of Reclamation or Bureau of Land Management, but not the Bureau of Indian Affairs.

Bureau of Reclamation ("Reclamation") and Bureau of Land Management ("BLM") records appear to indicate that the Water Wheel leasehold ("the Property") is located on either Reclamation or BLM lands – not lands withdrawn and held in trust for CRIT) by the Department of the Interior and administered by the Bureau of Indian Affairs ("BIA"). As mentioned above, the Property is located at Sections 11 and 14 of Township 3 South, Range 23 East of the San Bernardino Meridian, California.

The BLM Plat Map (attached hereto as Exhibit A) for T.3S. R23E and its corresponding Plat Map Index (attached hereto as Exhibit B) indeed indicates that the "Entire Township" was withdrawn for the CRIT Reservation pursuant to an Executive Order issued on May 15, 1876. *See* Plat Index, at 1. However, the Plat Index also indicates that the "Entire Township" was subsequently withdrawn pursuant to a Secretarial Public Land Order for the Colorado River Reclamation Project promulgated in execution of an Act of Congress,[1] (Excl. MOD PLO 7262 (May 28, 1997)) (1st form 10-16-1931) (Partially Rest. July 13, 1956) (Partially Rev. PLO 2630 (March 13, 1962) and remaining portion in the California Conservation Area). This subsequent

[1] Act of June 17, 1902 (32 Stat. 388).

statutory withdrawal by Reclamation indicates that the land is no longer administered by the BIA but is now held by Reclamation. In fact, a Bureau of Reclamation Map of California T.2S. R.23E., T.3S R23E. and T.4S R23E. (attached hereto as Exhibit C) clearly indicates that Sections 11 and 14 of T.3S. R.23E., wherein the Property is located, is "Reclamation Withdrawn Land" and makes no reference whatsoever to the BIA or Indian Reservation status.

Despite the clear delineation of the Property as "Reclamation Withdrawn Lands" on the Reclamation Map at Exhibit C, the BLM has recently stated that "T.3 S., R. 23 E., [San Bernardino Meridian] Sections 11 and 14 is Public Domain Land" which is held and administered by the BLM. *See* Letter from Viola Hunting, BLM, California State Office (Jan. 15, 2010) (attached hereto as Exhibit D). The Property is located squarely within Sections 11 and 14. Therefore, in addition to Reclamation, the BLM also apparently claims to have jurisdiction over the Property.

II. Federal law prohibits the establishment of any CRIT Reservation in California.

At the outset of this Section, it must be noted that Congress holds exclusive and plenary power to dispose of public lands of the United States. *See* U.S. Const. art. IV, § 3 ("[t]he Congress shall have Power to dispose of the Territory or other Property belonging to the United States"). Thus, any power of the Executive Branch to convey an interest in public lands must be the product of a clear delegation of Congress' Article IV power. *Sioux Tribe v. United States*, 316 U.S. 317, 325 (1942). Indeed, the Department of Interior can only establish or expand a reservation pursuant to a specific Congressional authorization, as is clearly required by 43 U.S.C. § 150:

> No public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation *except by act of Congress*. [Emphasis supplied.]

As such, the Secretary of Interior has never had the legal authority to expand the CRIT Reservation beyond Arizona and into California public domain lands unless (and only unless) Congress specifically authorized the Secretary to do so. But Congress has never granted the Secretary any such authority.

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A. Congress only authorized the creation of four Indian reservations in California and the CRIT Reservation is not one of them.

To be sure, any assertion that the boundary of the CRIT Reservation extends into California public domain lands must be reconciled with the provisions of The California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act").[2] The 1864 Act expressly limited the number of Indian reservations that the Executive Branch was permitted to create in California by providing, in relevant part, as follows:

> *SEC. 2. And be it further enacted,* That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations *** [Emphasis supplied.]

In *Mattz v. Arnett*, the Supreme Court affirmatively recognized the Act's Congressionally imposed limitation by reciting the Act's history and enumerating the reservations established thereunder. 412 U.S. 481, 489 (1973). Indeed, the Court even specifically identified the four reservations established by the Act as (1) Round Valley, (2) Mission, (3) Hoopa Valley and (4) Tule River. *Id.* at 412 U.S. at 489-91.[3] The Court's opinion is clear, and the CRIT Reservation was not among the California reservations established pursuant to lawful authority given to the Secretary by the 1864 Act. *To this day, no court has ever found to the contrary*.

Moreover, once the 1864 Act became law, it restricted the establishment of Indian reservations in California by specifically limiting the total number of reservations in the State to no more than four. Thus, any California Indian reservations, beyond four, could only be established pursuant to subsequent Congressional action authorizing more.[4] In light of that

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[2] Numerous cases have cited and upheld the 1864 Act. *See, e.g., Karuk v. United States*, 41 Fed. Cl. 486 (1998); *Donahue v. Butz*, 363 F. Supp. 1316, (N.D. Cal. 1973); *Parravano v. Babbitt*, 8 61 F. Supp. 914, (N.D. Cal. 1996); *Karuk v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992).

[3] These are the same four reservations that previously had been identified in *United States v. Forty-Eight Pounds of Rising Star Tea*, 35 F. 403, 405 (N.D. Cal. 1888).

[4] Congress actually has legislated exceptions to the 1864 Act, most notably through enactment of the Mission Indians Relief Act of January 12, 1891 (26 Stat. 712), establishing reservations within California for 42 designated tribes of Mission Indians. Additional Indian land acquisitions for the residency of homeless Indians were authorized by the Indian Appropriation Acts of June 21, 1906 (34, Stat. 333), and April 30, 1908 (35 Stat. 76), and subsequent appropriations following those two. However, none of the post-1864 federal laws
Footnote continued on next page …

limitation, it cannot be ignored that Congress has never taken any action to establish reservation status for California lands on behalf of CRIT. *See Donnelly v. United States*, 228 U.S. 243, 255-59 (1913); *Jesse Short, et al. v. United States*, 202 Ct. Cl. 870 (1973).

Thus, unless and until Congress takes action to remove the statutory preclusion to any California lands being CRIT reservation land, there is no CRIT reservation lands within that state, as a matter of federal law.

B. Congress established the CRIT Reservation in Arizona only.

Congress established the CRIT Reservation in the Territory of Arizona only – not in California – by the Act of March 3, 1865, 13 Stat. 559 ("1865 Act"). The 1865 Act authorized and established the Reservation with a single sentence:

> *Indian Service in the Territory of Arizona –*
> * * * * *
> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries. [Emphasis supplied.]

The statutory provision quoted above represents the only congressional authorization for the establishment of the CRIT reservation. And with those words, Congress established the Reservation on public domain lands within the Territory of Arizona.

Pointedly absent from the authorizing provision is any suggestion that Congress was or in any way intended to modify the 1864 Act or any other statute. Indeed, Congress definitively did not address one critical element necessary to authorize the Reservation's expansion into California – the statutory limit of four Indian reservations in California. Thus, the 1865 Act did not authorize the expansion of the CRIT Reservation into public domain lands in California. To the contrary, it limited the lands available for that Reservation to public domain lands within Arizona.

Any claim that the 1865 Act somehow authorized the Secretary to expand the CRIT reservation into California is plainly at odds with federal law. In fact, the 1865 Act made no reference to California and in no way modified or amended the 1864 Act's limitation on

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authorizing additional Indian land acquisitions for reservation or residential purposes within California included provision for any land acquisition within California for CRIT. Thus, the 1864 statutory restriction is in effect *vis a vis* CRIT.

California reservations. Rather, it limited the CRIT reservation to public domain land within Arizona, without modifying the prohibition of the 1864 Act which became law only one year before..

C. Executive Orders purporting to establish CRIT Reservation lands in California were issued without the requisite Congressional authorization.

President Ulysses S. Grant issued three Executive Orders relating to the establishment of the CRIT Reservation. The three Executive Orders are as follows:

- Executive Order of November 22, 1873.

  This Executive Order withdrew from sale and set aside land in the "Territory of Arizona" for the Indians of the Colorado River. Significantly, the Order specifically cites the 1865 Act as the Congressional authorization for establishing the CRIT Reservation in Arizona but makes no mention of California.

- Executive Order of November 16, 1874 ("1874 Order").

  California is mentioned for first time in this Executive Order. In relevant part, the Order purportedly extended the CRIT Reservation from a specified area in Colorado to "the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California . . . ." Prior to this Order, no official Executive or Congressional document or order had ever purported to grant CRIT any interest to any land in California. Notwithstanding the fact that establishing a reservation for the Tribe in California was in clear violation of both the 1864 Act's limitation on California reservations and the 1865 Act's specific authorization of a reservation only in Arizona – not California – this Executive Order purported to extend the Reservation into California.

- Executive Order of May 15, 1876 ("1876 Order").

  President Grant ostensibly issued this Executive Order for the purpose of correcting errors present in the November 16, 1874 Executive Order. Indeed, the 1876 Order claimed that the 1874 Order "purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3, 1865, and Executive Order November 22, 1873 . . . ."

  Nearly a century later, the Solicitor of Interior opined that the 1876 Executive Order was, in fact, issued at the insistence of the Indian Agent in charge of the CRIT Reservation. *See* Department of Interior, Solicitor's Opinion No. 2096

> (January 17, 1969). Apparently relying on an 1875 survey of the Reservation boundary (as it was established by the November 1874 Order), the Agent concluded that the boundary severed a large track of land on the east (or Arizona side) of the Colorado River which had been reserved for CRIT pursuant to the 1865 Act. As a result, on May 10, 1876 the Acting Commissioner for Indian Affairs authored a letter addressed to the Secretary wherein he recommended that the President be requested to change the location of the western boundary of the CRIT Reservation. Five days later, in concurrence with that recommendation, the President issued the Executive Order of May 15, 1876 which altered the Reservation's western boundary. In doing so the President gave rise to the long standing and ongoing dispute with respect to the proper location of the Reservation's western boundary – the very dispute that is the subject of this Memorandum.

None of the three Executive Orders discussed above were premised on a specific Congressional authorization to expand the CRIT Reservation beyond the specific grant of authority recited in the 1865 Act. Moreover, both the 1874 and 1876 Executive Orders directly contradict both the 1864 and 1865 Acts. What is more, even assuming that the 1876 Order was issued to somehow correct errors present in the 1874 Order, the 1874 Order was issued without Congressional authorization and in violation of Federal law. Thus, the 1876 Order, if for no other reason, is invalid.

III. There has never been a lawful determination of the true boundary of the CRIT Reservation.

A. Section 5 of Public Law 88-302 did not authorize the Secretary to render an *ex parte* determination of the Reservation's western boundary in order to resolve the ongoing western boundary disputes.

On April 30, 1964, Congress enacted Public Law 88-302 which was entitled "An Act to fix the beneficial ownership of the Colorado River Indian Reservation located in the States of Arizona and California." Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302) ("PL 88-302"). The primary purposes of PL 88-302 were to determine which Indians and/or persons could claim CRIT tribal membership and thus a right to the Reservation, to settle tribal claims against the United States pending in the Indian Claims Commission and establish CRIT as the governing body of the Colorado River Reservation (an issue which had been ambiguous since the Reservation was established for a number of tribes and not just one). *Id*. at Sections 3-4. However, PL 88-302 also sheds some light on the dispute regarding the Reservation's western boundary by (1) acknowledging the existence of an ongoing dispute regarding the boundary and (2) implying that Congress did not intend for the dispute to be resolved by Secretarial action.

To that point, Section 5 of Public Law 88-302, states in pertinent part:

> The Secretary . . . is authorized to approve leases of lands on the [CRIT Reservation] . . . [*p*]*rovided, however*, that the authorization herein granted to the Secretary . . . shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, 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 Act when and if determined to be within the reservation.

78 Stat. 188 (emphasis added). The lands referenced in Section 5 are commonly referred to as the "West Bank Lands" and include the Water Wheel leasehold.

Section 5 implicitly acknowledges the existence of the boundary dispute by clarifying that PL 88-302 is in no way intended to resolve any such controversy or dispute. Moreover, the Section also acknowledges that the unresolved controversy or dispute includes whether the West Bank Lands are part of the CRIT Reservation. In contrast, PL 88-302's restriction with respect to the Secretary's ability to lease the West Bank Lands may seem only marginally relevant, at least at first blush. However, the leasing restriction sheds some light on the means by which Congress envisioned or intended the boundary dispute to be resolved. To that point, the law expressly prohibits the Secretary from leasing any West Bank Lands on behalf of CRIT, until the western boundary of the Reservation is formally determined. In other words, pursuant to the specific terms of Section 5, the Secretary's authority to lease the West Bank Land on behalf of CRIT can only occur after the land has been formally and lawfully determined to be eligible under the statutory precondition of a "determination" to that effect.

But Section 5 pointedly did not authorize the Secretary to render an *ex parte* determination of the Reservation's western boundary so that he then could approve leases in favor of CRIT. Rather, it required that a determination be made before the Secretary could exercise any leasing authority; by mandating such a decision and not authorizing the Secretary himself to make it, Congress clearly contemplated that the determination would come from some other entity. Put differently, Congress directed the Secretary to await the determination before he/she could lease the West Bank Land, therefore meaning that such a determination would very clearly have to come from some other lawful authority. Had Congress intended to give the Secretary that authority, it could have done so. But Congress did not.

The fact that PL 88-302 precludes the Sectary from issuing the determination called for thereunder is relevant because the Tribe consistently asserts that a 1969 Secretarial Order constituted the formal and lawful determination of the Reservation's boundary as required by Public Law 88-302. However, as discussed below, the Supreme Court has confirmed that the

determination must come either *from the federal courts or from Congress itself* but neither the judiciary nor the legislature has issued such a determination.

B. Absent a Congressionally-legislated resolution, the Reservation's western boundary must be determined by the Courts.

Absent federal legislation to resolve the boundary issues, only the courts have the power to resolve the western boundary dispute, a fact that has confirmed by the Supreme Court.

Nevertheless, on January 17, 1969 (three days before the end of the Johnson Administration), Interior Secretary and Arizona resident Stewart Udall relied on a new opinion of the Solicitor of the Interior issued the same day, in order to propound an *ex parte* order defining the upper two-thirds of the disputed boundary in Riverside County as a fixed line along the location of an 1876 meander line.[5] Curiously, the boundary line established by that Secretarial Order is the very boundary line that the Justice Department had previously rejected and, as a result, refused to initiate litigation regarding the Reservation boundary. Indeed, in a Memorandum, dated September 22, 1965, addressed to the Commissioner of Indian Affairs then Solicitor Frank J. Berry of the Department of the Interior stated that:

> [The Department of Justice is] not willing to file an action to fix the boundary of the Colorado River Indian Reservation at the place where the west bank of the Colorado River was located when the 1876 Executive Order established the boundary as the west bank of the Colorado River. Accordingly, unless more evidence or legal arguments can be supplied than was available to the Department of Justice at the time this boundary dispute question was being considered in *Arizona v. California*, it appears the Department of Justice will not take action to establish the boundary at the location of the west bank on the Colorado River in 1876.

Thus, as of September 22, 1965, Interior knew that the Justice Department had assessed the situation and concluded that the current west bank of the river – and not the "high bluffs" beyond the west bank and deep within the State of California – was the boundary of the CRIT Reservation, and would not litigate the issue for CRIT's benefit. To this day, there has been no final judicial resolution of these issues.

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[5] Memorandum from the Secretary of the Department of Interior to the Director, Bureau of Land Management, entitled "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California" (Jan. 17, 1969).

The fact that a determination of the boundary must be made by Congress or the courts was further confirmed by the Supreme Court in the water rights case of *Arizona v. California*. Among the many issues confronted by the Court in that case was the lawful boundary of the Reservation, a critical element in the Court's adjudication of the relative water rights of the parties. In fact, in 1964, the Court entered a decree which stipulated "the quantities of water fixed in the paragraphs setting the water rights of the Colorado River . . . Reservation shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the . . . reservation [are] finally determined." *Arizona v. California*, 460 U.S. 605, 630 (1983) (citing Agreed Provisions for Final Decree 10 (Dec. 18, 1963)). At the same time, the Supreme Court acknowledged the dispute waged on as of 1983 and rejected the contention that the Secretarial Order formally established the western boundary of the CRIT Reservation. The Court stated: "the Colorado River Tribes will have to await the results *of further litigation* before they can receive an increase in their water allotment based on the land determined to be part of the reservation." *Arizona v. California*, 460 U.S. at 636, n. 26. [Emphasis supplied.]

In 2000, the Supreme Court accepted a settlement agreement between the parties to that litigation and entered a supplemental decree that awarded some additional water rights to the United States (on behalf of CRIT) but also expressly "embodie[d] the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary" and "preserve[d] the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation." *Arizona v. California*, 530 U.S. 390, 419 (2000).