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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC., Cross-Appellant, and ROBERT JOHNSON, Appellee,	)	Case Nos. 09-17349 & 09-17357 (CONSOLIDATED)
	)	District Court Case No.: 2:08-cv-00474
v.	)	
GARY LaRANCE, et al.,	)	**REPLY IN SUPPORT OF MOTION OF WATER WHEEL AND JOHNSON FOR LEAVE TO FILE RESPONSE TO THE UNITED STATES *AMICUS CURIAE* BRIEF**
Appellants/Cross-Appellees.	)	

Movants Water Wheel Camp Recreational Area, Inc. and Robert Johnson respectfully submit this Reply in support of their Motion for Leave to File Brief [in Opposition] to the United States' *Amicus Curiae* Brief filed on May 21, 2010 (Dkt. 20). This Reply specifically responds to the Response in Opposition to the Movants' Opposition, filed on September 23, 23010, by Appellants / Cross-Appellees, Tribal Court Judge Gary LaRance and Tribal Court Clerk Jolene Marshall ("Tribal Court Parties") (Dkt. 50).

These Movants are opposing the United States' brief solely on the basis for *amicus* participation stated therein. This Court's consideration of the contested brief should be based on whether the foundation identified for submission is legal. The legal argument challenging that foundation goes only to this matter, and Movants have carefully stated that they were not proposing that the argument should become part of the appeal itself. Indeed, Movants recognize and have repeatedly stated in this litigation (both in the District Court and here) that they do not challenge the land status because to do so would require dismissal under (a) the Quiet Title Act, 28 U.S.C. § 2409a(a) which precludes suit against the United States challenging Indian title to land, and (b) Fed. R. Civ. P. 19 which deems the Colorado River Indian Tribes ("CRIT") indispensable to a challenge of reservation status. Since CRIT enjoys tribal sovereign immunity from suit, a challenge to reservation status would be dismissed.

In order to challenge the jurisdiction of the CRIT Tribal Court while avoiding the preclusions of the Quiet Title Act and Rule 19, Movants carefully structured their action to establish that they never had consented to such jurisdiction consistent with the rule of *Montana v. United States*, 450 U.S. 544 (1981). For the purposes of tribal jurisdictional challenge only, Movants did not contest land status.

However, the United States has defined its interest in this matter solely as the product of the land being **both reservation and in trust** for CRIT, a declared interest that is contrary to law and fact. And so Movants respectfully reply to the Tribal Court Parties' Response as follows:

1. The Tribal Court Parties state there are "numerous places" in the District Court record to show that the land is in tribal trust status. Dkt. 50 at 2. While there **are** arguments in the record asserting trust status, at no place in the record is there citation to a single federal document demonstrating that the land has been accepted into trust status. Contrary to the Tribal Court Parties' apparent assumption to the contrary, statements of counsel and *dicta* of a federal court do not establish trust status.

2. The Tribal Court Parties correctly state that Movants did not raise the issue of title to the land in any pleading filed in this Court. Dkt. 50 at 4. As noted above, Movants deliberately did not do so, as the Tribal Court Parties have acknowledged. Dkt. 50 at 5.

3. The Tribal Court Parties assert that the *amicus* brief accurately cites the lower court record "making it plain" that the land is in trust status. Dkt. 50 at 2. The record below merely shows that the Movants did not contest land status for the purposes of this litigation. Again, the Tribal Court Parties do not cite – and have

never cited – a single document establishing that the land has been taken into trust, or is in reservation status.

4. The Tribal Court Parties confirm that Movants affirmatively agreed to not challenge Indian title, and the District Court did not rule on the issue. Dkt. 50 at 3. The legal status of the land remains unadjudicated.

5. The Tribal Court Parties seem to suggest that a stipulated judgment in litigation to which Movants were not parties somehow established trust status for the land, Dkt. 50 at 4, although they know or should know that a stipulated judgment is not the legal equivalent of an adjudication. Further, they suggest that "references" in the CRIT Tribal Court record to the land being in trust demonstrate trust status. *Id.* There are precise statutory and regulatory requirements for land being accepted into trust. *See, e.g.*, 25 U.S.C. § 465 and 25 C.F.R. Part 151. Casual statements of trust status in court rulings do not convey fee land to trust status as a matter of law.

6. The Tribal Court Parties attack Movants' statement that the United States "should have" known about the federal law restricting the number of Indian reservations in California to four and, thus, requiring further federal legislation for additional reservations. *Id.* As discussed in Movants' Motion, the 1864 Act is clear, has been the subject of Supreme Court confirmation and has been never modified so as to authorize a reservation in California for CRIT. Since the

California reservation would violate the 1864 Act, then the United States **definitely** should have known it.

7. The Tribal Court Parties confirm that Movants affirmatively agreed to not challenge Indian title in the District Court and the court accordingly did not rule on the issue. Dkt. 50 at 3. There is nothing in the record or in their Response to suggest that the Movants ever conceded that the land was in trust or reservation status. However, that issue is properly raised here in the context of its status as the foundation for the United States' interest in this case.

8. Finally, the Tribal Court Parties suggest that the Movants should have raised the trust and reservation issues in their briefs and, thus, should not be permitted to inject it into the appeal now. Dkt. 50 at 6. Again, the issues on appeal concern the strict assessment under *Montana* of whether the CRIT Tribal Court had jurisdiction over Movants. The issue with regard to the United States' interest as an *amicus* is based on a legal fiction of land status.

Dated this 30th day of September, 2010.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certified that on this 30th day of September 2010, I did file with this Court and did serve via ECF/Pacer Electronic Filing, all parties, Reply in Support of Motion of Water Wheel and Johnson Response for Leave to File Response To The United States *Amicus Curia* Brief.

s/ Dennis J. Whittlesey
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