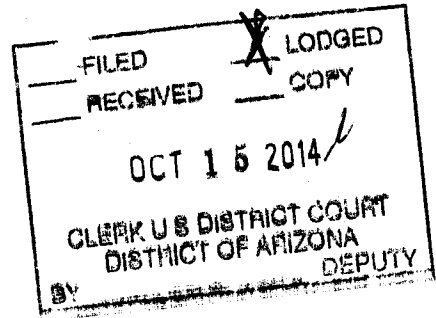


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9 UNITED STATES DISTRICT COURT
 10 DISTRICT OF ARIZONA

13 **ROGER FRENCH,**

CV-13-02153-JJT

14 Plaintiff,

15 v.

**BRIEF OF THE STATE OF
 CALIFORNIA AS AMICUS CURIAE
 IN SUPPORT OF PLAINTIFF'S
 MOTION FOR SUMMARY
 JUDGMENT**

17 **HONORABLE KARLA STARR;
 HONORABLE ROBERT N. CLINTON;
 18 and HONORABLE ROBERT MOELLER,
 in their capacities as judges of the CRIT
 19 Tribal Appellate Court; HONORABLE
 LAWRENCE C. KING, in his capacity as
 20 the Chief and Presiding Judge of the
 Colorado River Indian Tribes Tribal Court;
 21 SILVIA HOMER in her official capacity as
 CRIT Tribal Council Chairman, and
 22 HERMAN "TJ" LAFFOON is his official
 capacity as a member of the CRIT Tribal
 23 Council,**

24 Defendants.

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INTRODUCTION AND STATEMENT OF INTEREST

1
2 A longstanding dispute exists over the boundary of the Colorado River Indian Tribes'
3 (CRIT) Reservation (Reservation). The dispute focuses on whether the western boundary is
4 riparian in nature—moving with the Colorado River (Colorado) as it changes course over time—
5 or fixed at the high-water mark on the Colorado's western side as it existed in 1876. If the
6 boundary is riparian, the Reservation excludes portions of land on the California side of the
7 Colorado, and CRIT has no jurisdiction over that area. If instead the boundary is fixed, the
8 Reservation includes portions of land on the California side of the Colorado. The area of land
9 within these two candidate boundaries commonly is referred to as the "disputed area."¹ Because
10 plaintiff French's claims involve property in the disputed area, this case—should it proceed to the
11 merits—may resolve this dispute among the parties before it.

12 The United States filed an amicus brief in this matter asserting that a 1969 Order of the
13 Secretary of the Interior (1969 Secretarial Order) resolved the boundary as a *fixed* meander line at
14 the high-water mark on the western side of the Colorado as it existed in 1876, based upon a
15 survey conducted at or around that time. The United States argues that the statute of limitations
16 for challenging the 1969 Secretarial Order has run, and, therefore, the 1969 Secretarial Order is
17 unchallengeable and definitively resolves the dispute.

18 The State of California files this brief to bring the Court's attention to the fundamental
19 defects in the United States' position. First, the United States Supreme Court has stated multiple
20 times that the 1969 Secretarial Order did not resolve the boundary dispute. Second, in later
21 litigation, the United States unequivocally asserted that the Reservation boundary was riparian, in
22 direct contradiction to the 1969 Secretarial Order. Third, the dispute was expressly left
23 unresolved by a settlement, which the Supreme Court approved, between the United States and
24 California in 2000. Most importantly, as a matter of law and fact, under the 1876 Executive

25
26
27 ¹ As a convention in this memorandum, the phrase "disputed area" refers to the area at
28 issue in California south of Riverside Mountain along the Colorado River.

1 Order issued by President Grant regarding the Reservation boundary, its western boundary is
 2 riparian and, thus, the disputed area is not part of the Reservation.

3 California has a number of important state interests at stake in the appropriate resolution of
 4 the Reservation boundary issue. California has an interest in the presence or absence of its
 5 jurisdiction over the disputed area, and the effect that that jurisdiction may have on the State and
 6 its residents. For example, if the disputed area is Reservation land, California has an interest in
 7 whether tribal gaming may be conducted by CRIT on the California side of the Colorado in the
 8 disputed area. 25 U.S.C. §§ 2703(4)(A) (defining “Indian lands” to include “all lands within the
 9 limits of any Indian reservation”), 2710(7)(A)(i) (requiring a state to negotiate in good faith
 10 regarding tribal-state gaming compacts). Additionally, California has a strong interest in
 11 environmental and land use issues that may arise in relation to CRIT’s purported exercise of
 12 governmental jurisdiction in the disputed area. Also, if CRIT has jurisdiction over the disputed
 13 area, its exercise of claims to water from the Colorado may profoundly affect California. Finally,
 14 on behalf of the non-Indian residents in the disputed area, California has an interest in their access
 15 to the State judicial system to resolve disputes, such as the one before this Court here, involving
 16 Plaintiff French.

17 For all of these reasons, California submits the following to assist the Court in this matter.

18 **BACKGROUND OF THE RESERVATION BOUNDARY DISPUTE**

19 The Reservation boundary dispute finds its way into Supreme Court and Ninth Circuit
 20 decisions, as well as legislative or administration actions, spanning more than fifty years. Those
 21 cases and actions consistently show that, as a result of the 1876 Executive Order, the
 22 Reservation’s western boundary is riparian.

23 **I. 1963—FIRST SPECIAL MASTER’S REPORT ON BOUNDARY DISPUTE IN WATER** 24 **RIGHTS LITIGATION—ARIZONA I**

25 In the early 1960s, in relation to litigation before it, the Supreme Court appointed a Special
 26 Master to resolve water rights issues on the Colorado among several states, as well as several
 27 Indian tribes. The Special Master’s findings of fact and conclusions of law set forth the complex
 28

1 history of events that underlies the current dispute regarding the Reservation's western boundary.²
 2 (Amicus Curiae State of Cal.'s Request for Judicial Notice, Ex. A, attached, Excerpt from Report
 3 of Special Master Simon H. Rifkind, Part 2, 269-78, filed at *Arizona v. California*, 364 U.S. 940
 4 (1961).) The Reservation was established by an act of Congress in 1865, setting aside 75,000
 5 acres in the Territory of Arizona for CRIT. (*Id.* at 269.) In 1874, the Reservation was enlarged by
 6 executive order to include land on the western side of the Colorado in California.³ (*Id.* at 269-
 7 70.) In 1876, the United States Indian Agent reported that the Reservation border set forth in the
 8 1874 Executive Order put certain lands along the Colorado's eastern side that had been in the
 9 Reservation, outside its boundaries. (*Id.* at 270.) Consequently, an Executive Order was issued
 10 in 1876 setting new borders for the Reservation. (*Id.* at 270-71.) With regard to that 1876
 11 Executive Order, Special Master Rifkind unequivocally determined that the Colorado was the
 12 Reservation's western boundary, and that it was not a fixed boundary, but rather a riparian
 13 boundary:

14 A dispute concerning a portion of the west boundary of the
 15 Colorado River Indian Reservation arose between the United States
 16 and California when the United States sought to establish irrigable
 17 acreage within that Reservation. An Executive Order of May 15,
 18 1876, established the "west bank of the Colorado River" as the
 19 boundary of the Reservation. The United States contends that this
 20 language established a permanent, unchanging boundary defined by
 21 the west bank of the River as it existed in 1876. California
 22 contends that the language established a changing boundary defined
 23 by the west bank of the River as it may exist at any point of time.
 24 Since the Colorado River has in this area moved eastward since
 25 1876, California's contention, if sustained, would reduce the
 26 amount of irrigable acreage within the Reservation below the
 27 amount claimed by the United States.

22 ² While California agreed in the *Arizona v. California* settlement that the Special Masters'
 23 opinions, having not been reviewed and approved by the Supreme Court, would have "no
 24 precedential or preclusive effect," they are referred to herein only for their persuasive legal
 25 reasoning. The 1963 Special Master's Report remains the best single source of the history and
 26 legal implications of all events that affect the Reservation boundaries though 1963.

27 ³ An argument can be made that under section 2 of the Four Reservations Act (13 Stat.
 28 39, 40 (1864)), the President did not have the authority to expand the Reservation into California
 because that would have established more than the four reservations in California authorized by
 Congress. Because the 1876 Executive Order is dispositive of this dispute, the Court need not
 reach that argument here.

1 In the alternative, the United States contends that if the west
 2 bank of the River as it presently exists is held to be the correct
 3 boundary, then certain land west of the present west bank should
 4 nevertheless be held to be within the Reservation, since two
 5 changes in the course of the river were caused by avulsion.^{4]} The
 6 United States points to two artificial changes made in the channel of
 7 the River, both of which eliminated large loops or horseshoes in the
 8 river and caused its channel to move to the east. If the United
 9 States['] contention is accepted, the irrigable acreage in the
 10 Reservation will be somewhat greater than California concedes.

11 *I hold that California is correct in its assertion that the*
 12 *present boundary of the Reservation is the west bank of the River as*
 13 *it now exists, but that the United States is correct in claiming that*
 14 *the two artificial channel changes were avulsive and that changes*
 15 *did not affect the Reservation's western boundary.*

16 (*Id.* at 275-76 (emphasis added).)

17 The Supreme Court did not adopt the Special Master's determinations, because it found that
 18 resolving the boundary issue was not necessary at that time. In *Arizona v. California*, 373 U.S.
 19 546 (1963) (*Arizona I*), the Court stated in reference to the Special Master's Report that: "[w]e
 20 disagree with the Master's decision to determine the disputed boundaries of the Colorado River
 21 Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to
 22 resolve those disputes here. Should a dispute over title arise because of some future refusal by
 23 the Secretary to deliver water to either area, the dispute can be settled at that time." *Id.* at 601.

24 **II. 1964 FEDERAL LEGISLATION AUTHORIZES LEASING OF TRIBAL LANDS BUT**
 25 **EXCLUDES DISPUTED AREA**

26 In 1964, Congress passed Public Law 88-302, which authorized the Secretary of the Interior
 27 to approve leases of Reservation land, contained the following proviso limiting the authority to
 28 lease land:

That the authorization [to lease Indian lands] herein granted to the
 Secretary of the Interior *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

⁴ Black's Law Dictionary defines avulsion "[a]s a sudden and perceptible loss or addition
 to land by the action of water, or a sudden change in the bed or course of a stream." *Black's Law*
Dictionary (10th ed. 2014).

1 River Reservation: Provided further, *That any of the described*
 2 *lands in California shall be subject to the provision of this Act when*
and if determined to be within the reservation.

3 78 Stat. 189 (emphasis added). The language contained above in Public Law 88-302, excepting
 4 from the Secretary of the Interior's leasing authority land west of the Colorado and south of
 5 section 25 of township 2 south, range 23, San Bernardino base and meridian, precluded leasing in
 6 the disputed area until the dispute was resolved.

7 **III. 1969 SECRETARIAL ORDER PURPORTS TO INCLUDE DISPUTED AREA IN**
 8 **RESERVATION**

9 In 1969, the Solicitor for the Department of the Interior ("Solicitor") interpreted the events
 10 to that date and issued an opinion that the Reservation included the land on the California side of
 11 the Colorado that was set forth in the 1874 Executive Order. The Solicitor's opinion stated that
 12 the 1876 Executive Order established the ordinary high water line of the west bank to be the
 13 Reservation boundary. (Ex. B⁵ to State's Req. for Judicial Notice, 2098, Solicitor of the Dep't of
 14 the Interior's Op., "Western Boundary of the Colorado River Indian Reservation," (Jan. 17, 1969)
 15 ("1969 Solicitor's Memorandum").) The Solicitor went on to opine that under California Civil
 16 Code section 830, as of 1873, the United States, as the upland owner on the river, owned the area
 17 between the high-water mark and the low-water mark, and that under the 1876 Executive Order
 18 that land was reserved to CRIT. (*Id.* at 2099.) The Solicitor wrote: "[i]t must be concluded that
 19 the [1876] Executive Order was effective to reserve any lands within the river to the United States
 20 as such order clearly intended the river be included in the [R]eservation." (*Id.* at 2099-2100.)
 21 Based upon this analysis, the Solicitor went on to opine that the ordinary high-water mark of the
 22 Colorado as it existed in 1876, the so-called "meander line," was the current boundary of the
 23 CRIT Reservation. (*Id.* at 2100.) Immediately thereafter, the Secretary of the Interior issued an
 24 order to a similar effect, the so-called "1969 Secretarial Order." (Defs.' Jt. Separate Stmt. Facts
 25 in Supp. of Summ. J., Ex. J at 204-05, Memo. of Sec'y of Interior, "Western Boundary of the

26 ⁵ The Solicitor of the Department of the Interior's opinion, "Western Boundary of the
 27 Colorado River Indian Reservation," (Jan. 17, 1969), is also Exhibit J to Defendants' Joint
 28 Separate Statement of Facts in Support of Summary Judgment, but appears to be missing a page.
 (See Defs.' Jt. Separate Stmt. Facts in Supp. of Summ. J., Ex. J, 200-02.).

1 Colorado River Indian Reservation from the top of Riverside Mountain, California, through
2 section 12, t. 5 S., R. 23 E., S.B.M., California.”)

3 **IV. ARIZONA II—SUPREME COURT DETERMINES THAT THE 1969 SECRETARIAL ORDER**
4 **DOES NOT RESOLVE RESERVATION BOUNDARY DISPUTE**

5 The United States Supreme Court, commenting on the 1969 Secretarial Order in *Arizona v.*
6 *California*, 460 U.S. 605, 636-37 (1982) (*Arizona II*), declined to decide the boundary dispute:

7 In [*Arizona I*], when we set aside Master Rifkind’s
8 boundary determinations as unnecessary and referred to possible
9 future final settlement, *we in no way intended that ex parte*
10 *secretarial determinations of the boundary issues would constitute*
11 *“final determinations” that could adversely affect the States, their*
12 *agencies, or private water users holding priority rights. In the first*
13 *place, Article II(D)(5) was a stipulated provision; it is implausible*
14 *to suggest that the States would have so meekly stipulated to ex*
15 *parte secretarial determinations beyond the reach of judicial review.*
16 *. . . The United States wanted those matters to be adjudicated here;*
California apparently wanted them resolved elsewhere. But no one
contended that they should not be judicially resolved at all. Present
and former officials of the Department of the Interior testified and
cooperated fully with the United States at the hearing before Master
Rifkind. The Department’s views appeared to be as definitive and
final as they ever would be. No one suggested that future
administrative determinations were being contemplated, or that any
such future proceedings would purport conclusively to determine
the issue then before the Court.

17 *Id.* (emphasis added). In *Arizona II*, the Supreme Court, thus, clearly stated its view that the 1969
18 Secretarial Order was *not* a final determination of the boundary dispute.

19 In 1984, in another supplemental decree in the *Arizona v. California* water rights cases, the
20 Supreme Court declared that water rights for all five reservations at issue, which included the
21 CRIT Reservation, “shall be subject to appropriate adjustments by agreement or decree of this
22 Court *in the event that the boundaries of the respective reservations are finally determined.*”
23 *Arizona v. California*, 466 U.S. 144, 145 (1984) (emphasis added).

24 **V. ARANSON—NINTH CIRCUIT EMPLOYS RIPARIAN THEORY IN ANALYZING**
25 **RESERVATION BOUNDARY**

26 The Ninth Circuit in *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983) (*Aranson*),
27 addressed the Reservation boundary in the context of a dispute over the ownership of certain
28 parcels on the California side of the Colorado. In *Aranson*, the United States—as trustee for

1 CRIT—clearly asserted a riparian Reservation boundary. It did so to obtain the benefits of
 2 property ownership on the California side of the Colorado, based upon avulsive changes in the
 3 river’s course. This assertion was reflected as follows:

4 Under the federal and common law rule, land formed by a
 5 process of accretion, or gradual deposition of soil upon the shore of
 6 an upland bounded by water, belongs to the upland owner. *Hence,*
 7 *if a river forming the boundary between the properties* of two
 8 upland owners changes its course by a gradual process of erosion
 from one bank and accretion to the other, the boundary moves with
 the river. However, sudden or “avulsive” changes in a river’s
 course do not alter the boundaries, which remain in the abandoned
 riverbed.

9 *Id.* 659-60 (citations omitted) (emphasis added). Avulsion and the movement of the Reservation
 10 boundary with the Colorado’s course were the same riparian concepts applied by Special Master
 11 Rifkind in relation to the Reservation boundary in *Arizona I.* (Amicus Curiae State of Cal.’s
 12 Request for Judicial Notice, Ex. A, attached, Excerpts of Report of Special Master Simon H.
 13 Rifkind, Part 2, 269-78.) Adopting the United States’ assertion, *Aranson* thus applied riparian
 14 theory in determining the Reservation boundary.⁶

15 **VI. 1993—ANOTHER SPECIAL MASTER FINDS THE WESTERN RESERVATION**
 16 **BOUNDARY TO BE RIPARIAN**

17 In 1990, the United States Supreme Court appointed another special master, Frank McGarr.
 18 *Arizona v. California*, 498 U.S. 964 (1990). Special Master McGarr determined that the
 19 boundary of the Reservation did not include the disputed area. (Pl.’s Separate Statement of Facts
 20 in Supp. of Mot. for Summ. J., Ex. G, E.R. 134-52, Memo. of Op. and Order No. 14, Special
 21 Master Frank McGarr filed at *Arizona v. California* 510 U.S. 930 (1993).) Rather, he came to the
 22 same conclusion as Special Master Rifkind—that the Reservation’s western boundary is riparian
 23 (i.e., the Colorado’s west bank as it moves over time), and not a fixed line encompassing land in
 24 California, outside of such parcels on the California side which were caused by avulsive changes
 25 in the course of the river. (*Id.* at ER 143-52.)

26 ⁶ Curiously, the 1969 Secretarial Order, which the United States now contends to be the
 27 final and unchallengeable resolution of the Reservation boundary dispute was not even mentioned
 28 in *Aranson*. (See also Ex. C to State’s Req. for Judicial Notice, *United States v. Aranson*, No. 72-
 1621-R Civil, “Findings of Fact and Conclusions of Law” (C.D. Cal. Feb. 11, 1977).)

1 **VII. ARIZONA V. CALIFORNIA—1999 SETTLEMENT OF WATER RIGHTS LITIGATION**
 2 **LEAVES RESERVATION BOUNDARY DISPUTE UNRESOLVED**

3 In 1999, California entered into a stipulated settlement with CRIT in *Arizona v. California*,
 4 530 U.S. 392 (2000) (*Arizona III*). The stipulation again left the Reservation boundary dispute
 5 unresolved, stating in pertinent part:

6 Disputed Boundary. The parties agree not to seek
 7 adjudication in this phase of the litigation of the validity,
 8 correctness, or propriety of the January 17, 1969 Order of the
 9 Secretary of the Interior, Western boundary of the Colorado River
 10 Indian Reservation from the top of Riverside Mtn., Cal., through
 11 section 12. T. 5. S., R. 23 E., S.B.M., Cal., No. 90-1-5-668, 41-54
 12 (1969 Secretarial Order). The United States and the Tribes, but not
 13 the other parties to this Stipulation and Agreement, agree that the
 14 lands described in the 1969 Secretarial Order, are included within
 15 the Reservation set aside by Executive Order of May 15, 1876 and
 16 are held in trust by the United States for the benefit of the Tribes.
 17 *The State of California disagrees, and expressly reserves the right*
 18 *to challenge the validity, correctness, and propriety of the 1969*
 19 *Secretarial Order.* The United States and the Tribes reserve any
 20 and all defenses they may have, including, but not limited to,
 21 exhaustion of administrative remedies and lack of subject matter
 22 jurisdiction, in the event that the 1969 Secretarial Order is
 23 challenged.

24 (Pl.'s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. D, E.R. 177-78, Joint Mot.
 25 to Approve Stip. and Agreement (emphasis added).) Importantly, the parties also stipulated that
 26 "because the opinions issued by the Special Master in [the *Arizona v. California* water rights
 27 cases] respecting the Colorado River Indian Reservation have not been reviewed by the Supreme
 28 Court, those opinions shall have no precedential or preclusive effect in any future litigation
 among the parties." (*Id.* at ER 179.)

22 **VIII. ARIZONA III—SUPREME COURT APPROVES SETTLEMENT AGREEMENT BETWEEN**
 23 **CALIFORNIA AND UNITED STATES REGARDING CRIT WATER RIGHTS, BUT**
 24 **RECOGNIZES THAT THE RESERVATION BOUNDARY DISPUTE IS UNRESOLVED BY**
 25 **THE SETTLEMENT**

26 In *Arizona III*, the Supreme Court, upon the recommendation of Special Master McGarr,
 27 approved the settlement of CRIT's water rights. The Supreme Court recounted some of the
 28 history of the Reservation boundary dispute and noted that the boundary dispute remained open:

1 Moreover, and of large significance, the 1979 and 1984
 2 supplemental decrees [in the *Arizona v. California* water rights
 3 litigation] *anticipated that the disputed boundary issues for all five*
 4 *reservations, including the Fort Yuma Reservation, would be*
 5 *“finally determined” in some forum, not by preclusion but on the*
 6 *merits. See 1984 Supplemental Decree, Art. II(D)(5), Arizona v.*
 7 *California, 466 U.S. at 145 (Water rights for all five reservations*
 8 *“shall be subject to appropriate adjustments by agreement or decree*
 9 *of this Court in the event that the boundaries of the respective*
 10 *reservations are finally determined.”); 1979 Supplemental Decree,*
 11 *Art. II(D)(5), Arizona v. California, 439 U.S. at 421 (same).*

12 The State parties themselves stipulated to the terms of the
 13 supplemental decree we entered in 1979. They also appear to have
 14 litigated the *Arizona II* proceedings on the understanding that *the*
 15 *boundary disputes should be resolved on the merits. See Arizona II,*
 16 *460 U.S. at 634 (“[The State parties] argued . . . that the boundary*
 17 *controversies were ripe for judicial review, and they urged the*
 18 *Special Master to receive evidence, hear legal arguments, and*
 19 *resolve each of the boundary disputes, but only for the limited*
 20 *purpose of establishing additional Indian water rights, if any.”);*
 21 *Report of Special Master Tuttle, O. T. 1981, No. 8 Orig., p. 57*
 22 *(describing the State parties' contention “that the boundaries [of all*
 23 *five Reservations] have not been finally determined and that I*
 24 *should make a de novo determination of the boundaries for*
 25 *recommendation to the Court”). As late as 1988, the State parties*
 26 *asked the Court to appoint a new Special Master and direct him “to*
 27 *conclude his review of the boundary issues as expeditiously as*
 28 *possible and to submit a recommended decision to the Court.”*

Arizona III, 530 U.S. at 411-12 (emphasis added).

 In approving Special Master McGarr’s recommendation regarding California and the
 United States’ settlement agreement on CRIT’s water rights, the Court further stated:

 The Master has also recommended that the Court approve the
 parties' proposed settlement of the dispute respecting the Colorado
 River Indian Reservation. The claim to additional water for that
 reservation stems *principally from a dispute over whether the*
reservation boundary is the ambulatory west bank of the Colorado
River or a fixed line representing a past location of the River. See
Arizona II, 460 U.S. at 631. The parties agreed to resolve the
 matter through an accord that (1) awards the Tribes the lesser of an
 additional 2,100 acre-feet of water or enough water to irrigate 315
 acres; (2) precludes the United States or the Tribe from seeking
 additional reserved water rights from the Colorado River for lands
 in California; (3) *embodies the parties' intent not to adjudicate in*
these proceedings the correct location of the disputed boundary;
 (4) *preserves the competing claims of the parties to title to or*
jurisdiction over the bed of the Colorado River within the
reservation. . . . The Master expressed concern that the settlement
does not resolve the location of the disputed boundary, but
 recognized that it did achieve the ultimate aim of determining
 water rights associated with the disputed boundary lands. *Id.* at 10-

1 12, 13-14. We again accept the Master's recommendation and
2 approve the proposed settlement.

3 *Arizona III*, 530 U.S. at 418-19 (emphasis added). Here again, the Supreme Court has expressly
4 recognized that the boundary dispute was not resolved.

5 ARGUMENT

6 **I. THE 1969 SECRETARIAL ORDER DID NOT, AND DOES NOT, RESOLVE THE DISPUTE 7 OVER THE RESERVATION BOUNDARY.**

8 The linchpin of the United States' argument in its amicus brief is that the 1969 Secretarial
9 Order finally resolved the boundary dispute, and it cannot now be challenged. That position
10 contradicts federal law, the United States Supreme Court's multiple statements on that exact
11 issue, and the position that the United States, itself, took in *Aranson*.

12 In *Arizona I*, Special Master Rifkind persuasively opined that 1876 Executive Order
13 established a riparian boundary on the Reservation's western side that excluded the disputed area
14 from the Reservation. The Supreme Court, however, stated that the boundary dispute's resolution
15 was unnecessary and that in the event of "some future refusal by the Secretary to deliver water to
16 either area, the dispute can be settled at that time." *Arizona I*, 373 U.S. at 601. In Public Law 88-
17 302, Congress expressly excluded the disputed area from the Secretary of the Interior's leasing
18 authority. Nonetheless, in a unilateral administrative action in 1969, the Secretary of the Interior
19 attempted to expand the Reservation beyond the terms of the 1876 Executive Order to include the
20 disputed lands.

21 In *Arizona II*, the Supreme Court disapproved of the 1969 Secretarial Order as the
22 resolution of the dispute that it envisioned in *Arizona I*, stating "[i]n [*Arizona I*], when we set
23 aside Master Rifkind's boundary determinations as unnecessary and referred to possible future
24 final settlement, *we in no way intended that ex parte secretarial determinations of the boundary*
25 *issues would constitute "final determinations" that could adversely affect the States, their*
26 *agencies, or private water users holding priority rights.*" *Arizona II*, 460 U.S. at 636 (emphasis
27 added). The Supreme Court in a subsequent supplemental decree in the *Arizona v. California*
28 water rights cases again expressly recognized that the boundary dispute was not resolved.
Arizona v. California, 466 U.S. 144, 145 (1984).

1 Moreover, in *Aranson*, which was decided after *Arizona II*, the Ninth Circuit predicated its
2 decision on the Reservation's western boundary being riparian. *Aranson*, 696 F.2d at 659-60.
3 The court also expressly held that the Colorado's riverbed was not part of the Reservation,
4 effectively establishing the river's east bank as the Reservation's western boundary. *Aranson*,
5 696 F.2d at 666. These holdings directly contradict the 1969 Secretarial Order, and the United
6 States' assertions in this action.

7 In 1989, in the context of the *Arizona v. California* water rights cases, the Supreme Court
8 granted a motion of the state parties to reopen the previous decree issued in the case "to determine
9 disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian
10 Reservations." *Arizona v. California*, 493 U.S. 886 (1989). In 1993, Special Master Frank
11 McGarr determined that the Reservation boundary was riparian, but that finding was not part of
12 the ultimate settlement of the parties approved by the Supreme Court. Nonetheless, the Supreme
13 Court, in approving settlement, recognized that the Reservation boundary dispute was not
14 resolved and that the settlement agreement expressly did not resolve the dispute. *Arizona III*, 530
15 U.S. at 410-11, 418-19.

16 The United States relies heavily upon *Water Wheel Camp Recreational Area, Inc. v.*
17 *LaRance*, 642 F.3d 802 (9th Cir. 2011) (*Water Wheel*) to suggest that the Reservation boundary
18 dispute has been resolved in CRIT's favor. *Water Wheel* involved a land lease in the disputed
19 area. However, in *Water Wheel*, the non-Indian plaintiffs did not put at issue the title to the land
20 or the status of the land as being part of the Reservation. In fact, the district court in *Water Wheel*
21 was very clear that the case did not involve a challenge to the "title or reservation of the land,"
22 and that if the court were to address that issue the case would be dismissed based upon tribal
23 sovereign immunity. *Water Wheel Camp Rec. v. LaRance*, Case No. CV-08-0474 (Sept. 23,
24 2009), 2009 U.S. Dist. LEXIS 94196, *6-*7, n.3, *affd. and revd. in part*, *Water Wheel*, 642 F.3d
25 802. Even though the status of the land had not been put at issue in the case, the Ninth Circuit in
26 *Water Wheel* appears to have based its decision on its belief that the property at issue was part of
27 the "reservation" or "tribal land." *Water Wheel*, 642 F.3d at 812-13. Therefore, at most, the
28 expansive language implying that the disputed area is part of the Reservation simply reflects an

1 assumption between the parties in the case, and constitutes nothing more than dictum. *See*
2 *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither
3 brought to the attention of the court nor ruled upon, are not to be considered as having been so
4 decided as to constitute precedents”). Moreover, California was not a party to *Water Wheel*, and
5 thus cannot be bound by the parties’ pragmatic tactical assumptions in that case.

6 In sum, the 1969 Secretarial Order did not resolve the Reservation boundary dispute. The
7 1964 Congressional authorization expressly recognizes the existence of the dispute. Since the
8 issuance of the 1969 Secretarial Order—and with full knowledge of it—the Supreme Court has
9 opined multiple times that the dispute is not resolved, or has referenced it as not being resolved.
10 *Aranson* did not reference the 1969 Secretarial Order, wholly contradicts it, and appears to
11 definitively resolve the Reservation boundary dispute between California, on one hand, and the
12 United States and CRIT, on the other, in direct opposition to the terms of the 1969 Order.
13 Finally, California and the United States as trustee for CRIT in their settlement of the *Arizona v.*
14 *California* water rights litigation expressly left the Reservation boundary dispute unresolved.
15 Accordingly, the 1969 Secretarial Order is not binding upon California, and no statutes of
16 limitation have run, or are running, in relation to it.⁷

17 **II. THE COLORADO FORMS THE RESERVATION BOUNDARY FOR THE DISPUTED AREA**
18 **AS AN AMBULATORY RIPARIAN BOUNDARY UNDER THE 1876 EXECUTIVE ORDER.**

19 If this Court reaches the merits of the Reservation boundary dispute, the issue will be
20 whether the western Reservation boundary is (1) an ambulatory riparian boundary—California’s
21 position; or (2) a fixed boundary set by the high-water mark on the west side of the Colorado as it
22 existed in 1876—CRIT and the federal government’s position. If the answer is the former, the
23 disputed area is not part of the Reservation; if the answer is the latter, it is part of the Reservation.
24 To the extent that this Court would reach that issue, California’s position is that, as a matter of
25

26 ⁷ To the extent that the United States’ position is based upon changes in title to land in the
27 disputed area that have started the statute of limitations running or otherwise might preclude
28 challenge, this case should be referred to a special master to make findings of law and fact in that regard.

1 law and fact, the western Reservation boundary is the Colorado as an ambulatory riparian
2 boundary that does not encompass the disputed area.

3 California agrees with the United States that the 1876 Executive Order “set the western
4 boundary line [to the Reservation].” (Amicus Br. of the United States, 2.) The 1876 Executive
5 Order states:

6 EXECUTIVE MANSION, May 15, 1876.

7 Whereas an Executive Order was issued November 16, 1874,
8 defining the limits of the Colorado River Indian Reservation, which
9 purported to cover, but did not, all the lands theretofore set apart by
10 act of Congress approved March 3, 1865, and Executive Order
11 dated November 22, 1873; and whereas the order of November 16,
12 1874, did not revoke the order of November 22, 1873, it is hereby
13 ordered that all lands withdrawn from sale by either of these orders
14 are still set apart for Indian purposes; and *the following are hereby*
15 *declared to be the boundaries of the Colorado River Indian*
16 *Reservation in Arizona and California, viz:*

17 Beginning at a point where La Paz Arroyo enters the Colorado
18 River, 4 miles above Ehrenberg; thence easterly with said arroyo to
19 a point south of the crest of La Paz Mountain; thence with said
20 mountain crest in a northerly direction to the top of Black
21 Mountain; thence in a northwesterly direction over the Colorado
22 River to the top of Monument Peak, in the State of California;
23 thence southwesterly in a straight line to the top of Riverside
24 Mountain, California; *thence in a direct line toward the place of*
25 *beginning to the west bank of the Colorado River; thence down said*
26 *west bank to a point opposite the place of beginning; thence to the*
27 *place of beginning.*

28 U. S. Grant

(Pl.’s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. A ER 46, Letter of Feb. 7,
2011, from Holt Group, Inc. (emphasis added).)

In the *Arizona v. California* water rights cases, two Special Masters appointed by the
Supreme Court examined the 1876 Executive Order and other evidence, and separately concluded
that the Reservation boundary in the disputed area was riparian.⁸ Special Master Rifkind stated in
relevant part:

The call in the Executive Order of 1876 “to the west bank of
the Colorado River; thence down said west bank” clearly

⁸ See note 2, *supra*.

1 established the west bank of the River as the boundary line. That
 2 bank is defined as the fast land along the west side of the Colorado
 3 River which serves to confine the waters within the bed and tends
 4 to preserve the course of the River.

5 It is equally clear that the *boundary established along the west*
 6 *bank changes as the course of the River changes*, except in cases of
 7 avulsion. . . .

8 There is substantial evidence that *the Executive Order of 1876*
 9 *did not intend to establish a fixed boundary* and, certainly, a
 10 flexible boundary is not inconsistent with the purpose of the Order,
 11 which was to prevent the acquisition by non-Indians of land
 12 proximate to Indian land on the east side of the River. The
 13 evidence establishes that various officers and departments of the
 14 United States have considered the Colorado River itself and not the
 15 1876 meander line to be the western boundary of the Reservation.

16 (Ex. A to State's Req. for Judicial Notice, Report of Special Master Simon H. Rifkind, Part 2,
 17 278-81, filed in *Arizona v. California*, 364 U.S. 940 (citations omitted) (emphasis added).)

18 Over forty years later in 1993, Frank McGarr, another Special Master appointed by the
 19 Supreme Court in the *Arizona v. California* water rights cases, after an extensive examination of
 20 the history of the issue, documents, evidence, and cases, came to the same conclusion regarding
 21 the riparian nature of the Reservation boundary stating: "the Executive Order of 1876, which is
 22 controlling in this dispute, established the western boundary of the Colorado River Indian
 23 Reservation as a riparian boundary and not as a fixed line." (Pl.'s Separate Statement of Facts in
 24 Supp. of Mot. for Summ. J., Ex. G, E.R. 152, Memo. of Op. and Order No. 14, Special Master
 25 Frank McGarr filed at *Arizona v. California*, 510 U.S. 930.)

26 Intervening between the two Special Masters' reports, the Ninth Circuit in *Aranson* applied
 27 the riparian principle of avulsion to the Reservation boundary to determine that title to certain
 28 portions of the land on the California side of the Colorado, not at issue here, was held by the
 United States. Avulsion and the movement of the Reservation boundary with the course of the
 Colorado were the same riparian theory concepts applied by Special Master Rifkind in relation to
 the Reservation boundary in *Arizona I.* (State's Req. for Judicial Notice, Report of Special
 Master Simon H. Rifkind, Part 2, 278-81, filed in *Arizona v. California*, 364 U.S. 940.)

The Ninth Circuit in *Aranson* further addressed the ownership of the riverbed: "[w]e find
 the evidence in this case insufficient to enable us to conclude that the government intended to

1 convey the eastern half of the riverbed to the Indians when it formed the Reservation.
 2 Accordingly, we hold that the eastern half of the river bed was not conveyed by the government
 3 to the Indians as part of the Reservation.” *Aranson*, 696 F.2d at 666. This specific holding
 4 directly contradicts the basic premise of the 1969 Solicitor’s Memorandum that: “[i]t is,
 5 therefore, concluded that the call to the west bank [in the 1876 Executive Order] must be taken to
 6 mean the line of ordinary high water [on the west bank] as it existed in 1876.” (Ex. B to State’s
 7 Req. for Judicial Notice, 2098, 1969 Solicitor’s Memo.) Additionally, the *Aranson* opinion
 8 contradicts the second predicate of the 1969 Solicitor’s Memorandum—that the 1876 Executive
 9 Order “clearly intended the [Colorado R]iver be included in the [R]eservation.” (*Id.* at 2099.)

10 Notably, Special Master McGarr made specific reference to the United States’ legal
 11 position in *Aranson*, stating, “[i]n the *Aranson* case the Government and the Tribes unequivocally
 12 urged upon the Court the position that the Colorado River was the moving boundary of the
 13 reservation. . . .” (Pl.’s Separate Statement of Facts in Supp. of Mot. for Summ. J., Ex. G, E.R.
 14 142-43, Memo. of Op. and Order No. 14, Special Master Frank McGarr filed at *Arizona v.*
 15 *California*, 510 U.S. 930.) Indeed, he cited the United States’ position in *Aranson* as “strong
 16 evidence” in support of his conclusion that the Reservation boundary was riparian, and not fixed
 17 as now asserted by CRIT and the United States. (*Id.*)

18 **III. THE UNITED STATES IS PRECLUDED FROM ASSERTING THAT THE RESERVATION**
 19 **HAS A FIXED WESTERN BOUNDARY**

20 The United States, acting as a trustee for CRIT, was a party to *Aranson*. *Aranson*, 696 F.2d
 21 at 656. The Ninth Circuit in *Aranson* referenced the res judicata effect of the district court’s
 22 findings on the parties, stating “California has not appealed from the district court’s judgment; it
 23 is res judicata and unreviewable by us.” *Id.* at 662. Concomitantly, the United States, as the
 24 trustee for CRIT, is bound under the doctrine of res judicata or collateral estoppel by *Aranson*’s
 25 determination that the Reservation boundary is riparian:

26 A fundamental precept of common-law adjudication, embodied in
 27 the related doctrines of collateral estoppel and res judicata, is that a
 28 “right, question or fact distinctly put in issue and directly
 determined by a court of competent jurisdiction . . . cannot be
 disputed in a subsequent suit between the same parties or their

1 privies" Under res judicata, a final judgment on the merits
2 bars further claims by parties or their privies based on the same
3 cause of action. Under collateral estoppel, once an issue is actually
4 and necessarily determined by a court of competent jurisdiction,
5 that determination is conclusive in subsequent suits based on a
6 different cause of action involving a party to the prior litigation.

7 *Montana v. United States*, 440 U.S. 147 (1979). The district court's "Findings of Fact and
8 Conclusions of Law" in *Aranson* establish that the Reservation boundary was determined to be
9 riparian. (Ex. C to State's Req. for Judicial Notice, ¶ 26, *United States v. Aranson*, No. 72-1621-
10 R Civil, "Findings of Fact and Conclusions of Law" (C.D. Cal. Feb. 11, 1977) ("In case of an
11 avulsive change in the channel of a river which constitutes a boundary, the boundary remains in
12 the abandoned channel as it existed immediately prior to the avulsive change"). Accordingly, the
13 United States is barred by either res judicata or collateral estoppel from re-litigating the issue of
14 the nature of the Reservation boundary. Therefore, to the extent that a final judicial resolution of
15 the Reservation boundary dispute as envisioned by the Supreme Court in *Arizona I* has occurred,
16 *Aranson's* holding that the Reservation boundary is riparian on the Colorado's eastern bank is
17 that final judicial determination.

18 Alternatively, the United States as trustee for CRIT should be judicially estopped from
19 asserting any boundary other than that established by riparian principles. The doctrine of judicial
20 estoppel is a discretionary and precludes a party from taking two contrary legal positions before a
21 judicial tribunal. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2010). The doctrine applies as
22 follows:

23 "Where a party assumes a certain position in a legal
24 proceeding, and succeeds in maintaining that position, he may not
25 thereafter, *simply because his interests have changed, assume a*
26 *contrary position*, especially if it be to the prejudice of the party
27 who has acquiesced in the position formerly taken by him." This
28 rule, known as judicial estoppel, "generally prevents a party from
 prevailing in one phase of a case on an argument and then relying
 on a contradictory argument to prevail in another phase."

29 *Id.* (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Here, more than thirty years ago, the
30 United States, as trustee for CRIT, affirmatively asserted that the Reservation boundary was
31 riparian. That assertion was the basis for the United States to claim title on behalf of CRIT to

1 certain parcels of land on the California side of the Colorado. The effect of the United States'
 2 assertion of a riparian boundary was to take title to the land for CRIT's benefit. (Ex. C to State's
 3 Req. for Judicial Notice, ¶¶ 26-30, *United States v. Aranson*, No. 72-1621-R Civil, "Findings of
 4 Fact and Conclusions of Law" (C.D. Cal. Feb. 11, 1977).) Therefore, the United States should be
 5 judicially estopped now from asserting a contrary position that the boundary is the fixed meander
 6 line of the high-water mark of Colorado as it was in 1876, to claim title to the disputed area for
 7 CRIT. *See Greene v. Marilyn Monroe LLC*, 692 F.3d 983, 998-1000 (9th Cir. 2012) (judicial
 8 estoppel precluded a party from changing its position on a material legal issue after forty years to
 9 gain a financial advantage).

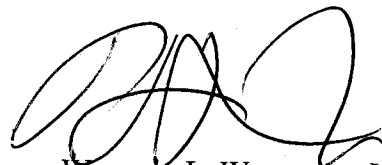
10 CONCLUSION

11 The Reservation boundary dispute at issue here implicates significant State interests and, if
 12 resolved by this Court, will have long-term consequences for the parties, the amici, and the
 13 residents of the disputed area. While the dispute has lasted for many years, it is not resolved, and
 14 this Court is not precluded from bringing a final resolution to it. California urges this Court to
 15 fully review the long history of the dispute, particularly the 1876 Executive Order itself, and
 16 determine that the Colorado is the riparian western boundary of the Reservation and that the
 17 disputed area is not a part of the Reservation.

18 Dated: October 13, 2014

Respectfully Submitted,

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