Docket No. 09-17349

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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WATER WHEEL CAMP RECREATIONAL AREA, INC. et al.,
Plaintiffs and Appellants,

vs.

GARY LARANCE, The Honorable Judge in his capacity as the Chief and Presiding Judge of the Colorado River Indian Tribes Tribal Court; et al.,
Defendants and Appellees.

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Appeal From The United States District Court
For The District of Arizona
D.C. No. 2:08-cv-00474-DGC

---

# MOTION OF COLORADO RIVER INDIAN TRIBES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN RESPONSE TO WATER WHEEL'S EMERGENCY MOTION FOR ORDER ENJOINING TRIBAL COURT PARTIES

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Attorneys for Amicus Curiae Colorado River Indian Tribes

Pursuant to Fed. R. App. P. 29(b), the Colorado River Indian Tribes ("CRIT" or "Tribes") respectfully submits this Motion seeking leave to file the accompanying response to Water Wheel's Emergency Motion for Order Enjoining Tribal Court Parties From Issuing Writ of Restitution Ordering CRIT Tribal Police to Evict Water Wheel Now ("Motion"), as amicus curiae in support of Appellants/Cross-Appellees The Honorable Gary LaRance and Jolene Marshall (together, "Tribal Court"). CRIT previously filed a motion for leave to file an amicus brief and an amicus brief on the merits of the appeal in support of the Tribal Court. CRIT's previous motion is pending with this Court.

**CRIT's Interest In the Appeal and the Motion**

CRIT is a federally recognized Indian tribe whose Reservation is located along the Colorado River in southeastern California and western Arizona. In 2007, CRIT filed an action in the tribal court of the Colorado River Indian Tribes seeking to evict Water Wheel and Johnson from the Tribes' land and recover related damages. Water Wheel and Johnson filed this action in federal district court, seeking review of the tribal court's jurisdictional determination pursuant to *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). The district court held that the tribal court properly exercised jurisdiction over Water Wheel and refused to enjoin the tribal court proceedings pending this appeal.

On August 17, 2010, acting upon the district court's final determination that the tribal court has jurisdiction over Water Wheel, CRIT filed a motion for writ of restitution in the tribal court, seeking Water Wheel's eviction from CRIT's property. By its Motion, Water Wheel asks this Court enjoin the Tribal Court from adjudicating CRIT's motion.

CRIT will be directly affected by the outcome of the Motion. This Court's decision will impact when CRIT can regain possession of its property from Water Wheel. More generally, this Court's decision will affect CRIT's ability to enforce commercial contracts against non-members in tribal court.

**Reasons the Amicus Brief Would Be Helpful To the Court**

CRIT's amicus brief would be helpful to the Court in understanding the tribal court proceedings that are the subject of Water Wheel's motion. As the plaintiff in the tribal court proceedings, CRIT has a substantial, direct interest in the outcome of the case. CRIT's land and tribal court judgment hang in the balance. This perspective is distinct from that of the Tribal Court.

CRIT's proposed amicus brief supplements the Tribal Court's response by highlighting Water Wheel's failure to establish (1) that it will be irreparably harmed in the absence of an injunction; and (2) that the public interest lies in its favor. In particular, CRIT's brief explains that, under the terms of the lease agreement between CRIT and Water Wheel, Water Wheel agreed to vacate CRIT's

property in 2007, when the lease expired. Thus, the only "harm" claimed by Water Wheel—vacating CRIT's property—is precisely what Water Wheel bargained for in its lease.

Because CRIT's amicus brief would serve the "classic role" of "supplementing the efforts of counsel," this Motion for Leave should be granted. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982).

## Conclusion

For the foregoing reasons, CRIT respectfully request that this Court grants it leave to submit an amicus curiae brief in response to the Motion, in support of the Tribal Court.

DATED: September 2, 2010 SHUTE, MIHALY & WEINBERGER LLP

By: s/Ellison Folk

Attorneys for Amicus Curiae Colorado River Indian Tribes

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 2, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, to the following non-CM/ECF participants:

Michael Leland Frame
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1308 Joshua Avenue
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Dated: September 2, 2010

s/Natalia Thurston

Docket No. 09-17349

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

WATER WHEEL CAMP RECREATIONAL AREA, INC. et al.,
Plaintiffs and Appellants,

vs.

GARY LARANCE, The Honorable Judge in his capacity as the Chief and Presiding Judge of the Colorado River Indian Tribes Tribal Court; et al.,
Defendants and Appellees.

---

Appeal From The United States District Court
For The District of Arizona
D.C. No. 2:08-cv-00474-DGC

---

# BRIEF OF AMICUS CURIAE COLORADO RIVER INDIAN TRIBES IN RESPONSE TO WATER WHEEL'S EMERGENCY MOTION FOR ORDER ENJOINING TRIBAL COURT PARTIES FROM ISSUING WRIT OF RESTITUTION

---

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## Cases



## Rules

## INTRODUCTION

This appeal concerns the ability of the Colorado River Indian Tribes ("CRIT") to use its own tribal court procedures to evict tenants that are unlawfully occupying tribal land after the expiration of a lease. It is undisputed in this appeal that the United States holds in trust for CRIT the tribal land occupied by Water Wheel pursuant to a lease that expired by its own terms in 2007. Since the expiration of the lease, Water Wheel has paid no rent to the Tribe and has refused to vacate the property. By its emergency motion, Water Wheel asks this Court to allow it to remain indefinitely on tribal property to which it has no right of possession – a remedy specifically denied by the district court because it found Water Wheel's arguments regarding tribal court jurisdiction over it to be without merit.

As the district court correctly found, Water Wheel's emergency request for an injunction must be denied because it cannot show any chance of success on the merits of its appeal. But more fundamentally, the motion must fail because Water Wheel cannot meet the other two requirements for issuance of an injunction: 1) that it will suffer irreparable harm from being required to vacate tribal land and 2) that allowing it to remain on tribal property well after expiration of its lease is in the public interest. Indeed, CRIT's enforcement of the tribal court judgment, after the district court denied Water Wheel's request for a stay, does not constitute

irreparable harm, but simply results in Water Wheel being held to the terms of the lease that it bargained for. Nor, as a trespasser that has unlawfully occupied tribal land for more than three years, can Water Wheel establish that the public interest lies in its favor. As such, Water Wheel fails to establish the necessary elements for an injunction and its emergency motion must fail.

## STATEMENT OF INTEREST

CRIT is a federally recognized Indian tribe whose Reservation is located along the Colorado River in southeastern California and western Arizona. CRIT is the plaintiff in the underlying tribal court proceedings at issue in this motion and appeal, and CRIT's land and tribal court judgment hang in the balance. Pursuant to Federal Rule of Appellate Procedure 29(b), CRIT is concurrently filing a motion for leave to file this response. CRIT previously filed a motion for leave to file an amicus brief and an amicus brief on the merits of the appeal, in support of Appellants/ Cross-Appellees The Honorable Gary LaRance and Jolene Marshall.

## FACTS

In 1975, the Colorado River Indian Tribes (CRIT") and Water Wheel entered into a lease ("Lease"), whereby CRIT leased to Water Wheel approximately twenty-six acres of land within the boundaries of the Colorado River Indian Tribes Reservation (the "Property") for a fixed term of thirty-two years. *See* Water Wheel's Emergency Motion for Order Enjoining Tribal Court

Parties From Issuing Writ of Restitution Ordering CRIT Tribal Police to Evict Water Wheel Now ("Mot.") Ex. B (Lease) at pp. I-II. The Property is located on land owned by the United States in trust for CRIT. *See* CRIT Response Ex. 1 (Judgment entered March 5, 1975 in *United States v. Denham*, Civ. No. 73-495-ALS (C.D. Cal.)) at 1-2.[1] Water Wheel has paid no rent to CRIT since 2005. CRIT Response Ex. 2 (Tribal Court Judgment) at pp. 8-9. The Lease expired by its own terms on July 6, 2007. Mot. Ex. B at pp. II & VII; CRIT Response Ex. 2 at pp. 1-2.

After the lease expired, CRIT brought an action in tribal court to evict Water Wheel and Robert Johnson ("Johnson") from the Property. In June, 2008, the tribal court entered judgment against Water Wheel and Johnson, finding that they had no right to occupy the Property and that CRIT was entitled to a writ of restitution evicting them. CRIT Response Ex. 2 at pp. 1-2. Water Wheel and Johnson appealed the judgment to the CRIT Tribal Appeals Court, which affirmed the tribal court's judgment in relevant part. CRIT Response Ex. 3 (Tribal Court of Appeals Order).

[1] Shortly before the Lease was executed, the United States obtained a federal judgment against Bert Thomas Denham and Barbara I. Denham, then-owners of Water Wheel, quieting title to the Property in favor of the United States, as owner in trust for CRIT. CRIT Response Ex. 1 at 1-2. The Denhams subsequently executed the Lease on behalf of Water Wheel. Mot. Ex. B at V-IV.

Water Wheel then sought review in federal district court of the tribal court's exercise of jurisdiction pursuant to *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). Water Wheel named the tribal court judge and the tribal court clerk as defendants (together, "Tribal Court"). The district court held that the Tribal Court properly exercised jurisdiction over Water Wheel.[2] *See* Mot. Ex. A. at Ex. 2. The district court denied Water Wheel's motion for a stay pending appeal, finding that it had demonstrated no likelihood of success on the merits of its appeal. *See* Mot. Ex. A at Ex. 6.

Throughout the course of this extensive litigation in tribal and federal court, CRIT has been deprived of its right to use the Property. The Lease anticipated that Water Wheel would restore the Property to CRIT, with improvements, upon expiration of the Lease. Mot. Ex. B at pp. III-IV. And indeed, CRIT intended to take over operation of the business, as contemplated by the Lease. *See* Mot. Ex. D. Instead, years after the Lease expired, Water Wheel remains on the Property without paying any rent to CRIT.

On August 17, 2010, CRIT filed a motion for a writ of restitution in tribal court, seeking to evict Water Wheel from the Property. *See* Mot. Ex. A. In doing so, CRIT simply sought to enforce the tribal court judgment entered against Water

[2] The Tribal Court appealed the district court's ruling that the Tribal Court did not have jurisdiction over Robert Johnson. That appeal is not at issue in Water Wheel's motion.

Wheel nearly two years ago. As explained below, CRIT's motion in tribal court is consistent with the district court's judgment in this case, and, because Water Wheel has not demonstrated that an injunction pending appeal is warranted, CRIT is entitled to seek the immediate eviction of Water Wheel in tribal court.

## ARGUMENT

### I. CRIT Is Entitled To Seek Eviction of Water Wheel In Tribal Court While This Appeal Is Pending.

Water Wheel asserts that CRIT is attempting to "sidestep" this Court's jurisdiction by moving to evict Water Wheel while this appeal is pending. Mot. at 14. In fact, CRIT is acting in accordance with well-settled law that a prevailing party is entitled to enforce a district court judgment while an appeal is pending, absent a stay or an injunction. *See In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977). Here, the district court held that the Tribal Court properly exercised jurisdiction over Water Wheel and denied Water Wheel's motion for stay pending appeal. *See* Mot. Ex. A at Exs. 2 & 6. Thus, the Tribal Court may enforce the district court's judgment by exercising jurisdiction over Water Wheel, and CRIT properly returned to tribal court to seek the relief to which it is entitled under tribal law.

### II. Water Wheel Cannot Demonstrate That An Injunction Is Warranted.

To obtain an injunction pending appeal, a party must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

absence of relief, that the balance of equities tip in his favor, and that a stay is in the public interest." *Humane Soc'y of the United States v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) (citing *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ----, 129 S.Ct. 365, 374 (2008)). If a party demonstrates a likelihood of irreparable harm and that the public interest lies in his favor, he may obtain an injunction by establishing that serious questions going to the merits are raised and the balance of hardships tips sharply in his favor. *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2010 WL 2926463, at *7 (9th Cir. July 28, 2010). The district court order clearly sets forth the reasons why Water Wheel is not likely to succeed on the merits of its case. Thus, under either formulation of the standard, Water Wheel is not entitled to a stay of the tribal court's order. Moreover, regardless of the likelihood of success on its appeal, Water Wheel must demonstrate that irreparable harm is likely in the absence of an injunction and that the public interest lies in its favor. As detailed below, because Water Wheel cannot demonstrate that it is entitled to remain on the Property after expiration of the Lease, it cannot make the required showing of irreparable harm and public interest.

### A. The Only "Harm" Or "Hardship" Identified By Water Wheel Is Being Held To The Terms Of The Lease It Bargained For.

A party seeking an injunction pending appeal must "show that irreparable harm is likely to result in the absence of the injunction." *Alliance for the Wild*

*Rockies*, 2010 WL 2926463 at *7; *Winter*, 129 S.Ct. at 374. Water Wheel asserts that it will suffer irreparable harm if the Property is restored to CRIT prior to disposition of this appeal. Mot. at 11-12. Yet the harm Water Wheel identifies cannot be considered "harm" at all, because restoring the Property to CRIT is an anticipated outcome of the expiration of the Lease.

The Lease at issue in this case is a business development lease, entered into by CRIT to facilitate development on tribal land. CRIT leased the Property to Water Wheel for a fixed term of thirty-two years, with the expectation that Water Wheel would develop a business on the Property. Mot Ex. B at PP. II-IV. Upon expiration of the Lease, Water Wheel was obligated to restore the Property, along with all improvements, to CRIT. *See id.* (Lease Addendum) at pp. 5-6, 19-20.

Nothing in the Lease provides Water Wheel with the option of remaining on the Property beyond the term of the Lease. *See id.* at pp. 19-20. Thus, Water Wheel has been aware since it entered into the Lease in 1975 that it would be required to return the Property and all improvements to CRIT upon expiration of the Lease. Water Wheel received the benefit of its bargain through the modest rental rates established in the Lease. *See id.* at pp. II-III. CRIT, however, has yet to reap the benefit of the Lease, due to Water Wheel's refusal to leave the Property.

As explained above, the Lease expired, by its own terms, on July 6, 2007. The Lease expressly provides that holding over after expiration of the Lease does

not give Water Wheel any rights under the Lease or any interest in the Property. *See id.* at 19. Yet, three years later, Water Wheel remains on the Property, without claim of right and without paying rent to CRIT.

The only potential "harm" identified by Water Wheel is restoring the Property to CRIT—precisely what it agreed to do under terms of the Lease. This purported "harm" cannot form the basis for an injunction pending appeal. *See eBay, Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058, 1068-69 (N.D.Cal. 2000) (noting that "any harm alleged to result from being forced to cease an ongoing trespass may not be legally cognizable"). Because Water Wheel fails to establish the requisite likelihood of irreparable harm, its Motion must be denied. *See Winter*, 129 S.Ct. at 374.

For the same reasons that Water Wheel cannot establish irreparable harm, it cannot demonstrate that the balance of hardships tips in its favor. In essence, Water Wheel argues that this Court should allow it to remain on the Property illegally pending the outcome of this appeal. Yet being required to vacate the Property, as it agreed to do in the Lease, cannot constitute hardship to Water Wheel any more than it constitutes irreparable harm.

### B. The Public Interest Favors The Enforcement Of CRIT's Property Rights.

The public interest favors the enforcement of CRIT's right to occupy the Property, regardless of the forum of that enforcement. As explained above, CRIT

has been deprived of its right to use and occupy the Property during the course of extensive litigation. Water Wheel, having occupied the Property for three years beyond the expiration of the Lease, asks this Court to extend its unauthorized occupancy for an undetermined period of time. This is not only unfair to CRIT, the entity with lawful claim of possession to the Property, it also sends a message that the federal courts will protect the unlawful behavior of other trespassers on tribal land. Given the generally-acknowledged difficulties of law enforcement on tribal land, such a message is not in the public interest of the people of CRIT. *C.f. I. C. C. v. Big Sky Farmers and Ranchers Marketing Co-op. of Mont.*, 451 F.2d 511, 515 (9th Cir. 1971) (finding it contrary to public interest to allow illegal activities to continue "for the indeterminable period of time that might elapse before" final decision).

Water Wheel nevertheless asserts that the public interest favors granting an injunction because allowing the Tribal Court to adjudicate CRIT's motion to evict Water Wheel would deprive "the federal courts" of a final determination in this case. Mot. at 15. Water Wheel's argument ignores the fact that the federal district court held that the Tribal Court properly exercised jurisdiction over Water Wheel, and refused to enjoin the tribal court proceedings. The district court's ruling is a final determination in favor of tribal court jurisdiction over Water Wheel. Thus,

the pendency of this appeal does not further any purported public interest in federal adjudication of Water Wheel's claim.

### C. Water Wheel Has Not Raised Any Serious Questions On The Merits Of Its Appeal.

Finally, even if Water Wheel had established a likelihood of irreparable harm and that the public interest lies in its favor, Water Wheel offers no convincing argument that it will succeed on the merits, or that it raises any serious questions with respect to the tribal court's exercise of jurisdiction over it. *See* Mot. at 9-10.

Water Wheel's principal argument is that the tribal court lacks jurisdiction over CRIT's eviction action under *Montana v. United States*, 450 U.S. 544 (1981), a federal common law doctrine that limits tribal court jurisdiction over non-members in some circumstances, because Water Wheel is a non-member of CRIT. *Montana* involved a tribe's exercise of regulatory authority over land held in fee by non-members within the boundaries of a reservation. *See* 450 U.S. at 564. As explained in the amicus brief filed by the United States in support of the Tribal Court, because CRIT retains inherent sovereign power to exclude non-members from tribal land held in trust by the United States, such as the Property, it is not clear that *Montana* applies as a limitation on tribal jurisdiction in this case. *See* Brief for the United States as Amicus Curiae in Support of the Tribal Defendants-Appellants at 15-22. Even if it applies, however, under *Montana*, a tribe may

exercise civil jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (citations omitted).

Every court that has considered the issue agrees that, if *Montana* applies, the tribal court's exercise of jurisdiction over Water Wheel falls squarely within this "consensual relationship" rule. Mot. Ex. A at Ex. 2, pp. 6-15; Mot. Ex. A at Ex. 3, pp. 1-3; CRIT Response Ex. 3 at 22-37. Indeed, the district court opined that the Lease is a "virtually dispositive fact" on this issue, and that "it is difficult to think of a more consensual relationship than a nonmember's occupancy of tribal land under a formal written agreement with the tribe." Mot. Ex. A at Ex. 2, p. 6. Water Wheel's conclusory statement in the Motion that it has raised "serious questions" regarding the tribal court's exercise of jurisdiction over it (Mot. at 10) therefore is belied by the existence of the Lease itself, as well as by the district court's straightforward application of the *Montana* "consensual relationship" rule.

## CONCLUSION

For the foregoing reasons, Water Wheel's emergency motion to enjoin the Tribal Court should be denied.

Dated: September 2, 2010

Respectfully submitted,
SHUTE, MIHALY & WEINBERGER LLP

By: s/Ellison Folk
Attorneys for Amicus Curiae Colorado River Indian Tribes

# EXHIBIT 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>BERT THOMAS DENHAM AND BARBARA I. DENHAM,<br>Defendants. | CIVIL NO. 73-495-ALS<br>JUDGMENT |

Plaintiff, United States of America, and defendants Bert Thomas Denham and Barbara I. Denham, by their respective attorneys of record, having stipulated and agreed that a Judgment may be entered in the within action, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff, United States of America, is the owner of the real property and premises situated in the County of Riverside, State of California, described as follows:

Fractional Section 11 and Fractional Section 14 Township 3 South, Range 23 East, San Bernardino Meridian, California, together with any accretions thereto.

/ / /

BNF:dmg

2. That, of those portions of the lands described in Paragraph 1 heretofore occupied by defendants, the plaintiff, United States of America, is the owner in trust for the Colorado River Indian Tribes of the real property and premises described as follows:

The lands as shown on the Bureau of Land Management plat of survey of Township 3 South, Range 23 East, San Bernardino Meridian, California, accepted May 21, 1962,

Section 14: Lots 5 and 6
Containing 50.86 acres more or less, together with any accretions thereto formed subsequent to said survey

3. That, of those portions of the lands described in Paragraph 1 heretofore occupied by defendants, the plaintiff, United States of America, is the owner in its sovereign capacity of the real property and premises described as follows:

The lands as shown on the Bureauof Land Management plat of survey of Township 3 South, Range 23 East, San Bernardino Meridian, California, accepted May 21, 1962,

Section 11: Lot 4
Section 14: Lot 1

4. That the possession by the defendants, and each of them, of said property is, and has been, without any right, title or interest therein;

5. That plaintiff recover possession of said real property and premises wrongfully occupied by the defendants;

6. That the defendants remove themselves and all personal belongings from said real property and premises, wrongfully occupied by them, within thirty (30) days following the entry of this Judgment;

7. That the defendants may not and shall not in any manner interfere with plaintiff's right to administer, possess, and control said real property and premises from and after thirty (30) days following the entry of this Judgment;

8. That the defendants cease and desist from trespassing on said real property and premises from and after thirty (30) days following the entry of this Judgment;

9. That plaintiff's second cause of action filed herein is hereby dismissed with prejudice;

10. That each party bears his own costs of suit.

DATED: This 5th day of March, 1974.

ALBERT LEE STEPHENS, JR.
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division

BRYAN N. FREEMAN
Special Assistant to the
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Attorneys for Plaintiff,
United States of America

# EXHIBIT 2

IN THE TRIAL COURT
OF THE COLORADO RIVER INDIAN TRIBES
PARKER, ARIZONA



COLORADO RIVER INDIAN TRIBES,

Petitioner/Plaintiff,

vs.

WATER WHEEL CAMP RECREATIONAL AREA, INC., ROBERT JOHNSON, and DOES 1-20,

Respondents/Defendants.

Case No. CV-CO-2007-0100

# JUDGMENT

THIS MATTER having come before the Colorado River Indian Tribes (CRIT) Trial Court for TRIAL on June 4-6, 2008.

The Petitioner/Plaintiff appeared through Attorneys Winter King, Amanda Garcia and Eric Shepard. Defendant Water Wheel Recreational Area appeared through Attorney Michael Frame. Defendant Robert Johnson appeared with Attorney Fred Welch.

After duly considering the pleadings, the testimony of witnesses, the evidence, and the arguments of counsel, and being otherwise fully informed of the causes of action, the responses and all factual and legal issues bearing on the same, the Court hereby finds as follows.

1. The Court hereby adopts and incorporates into this Judgment all findings of facts and conclusions of law previously entered by the Court in all Orders issued to date, also known as "the law of the case".

## FIRST CAUSE OF ACTION
## OCCUPATION OF TRIBAL LAND WITHOUT PERMISSION OR AGREEMENT
## (CRIT Property Code § 1-101 et seq.)

2. In July 1975, the Plaintiff Colorado River Indian Tribes ("CRIT" or "Tribes") entered into Lease No. B-468-CR ("Lease") with Defendant Water Wheel Camp Recreational Area, Inc. ("Water Wheel"). Per the Lease, CRIT is the "Lessor" and "Water Wheel" is the Lessee. The term of the Lease is thirty-two (32) years beginning July 1975 and ending July

6, 2007. Per the Lease, CRIT agreed to lease twenty-six (26) acres of CRIT reservation trust land ("real property") to Water Wheel. The leased land is more fully described in Plaintiff's Exhibit 1, at pg I, para. I.

a. Plaintiff's Exhibit 1, pg I and II, para. II.

3. The Lease between Water Wheel and CRIT expired on July 6, 2007.

a. Plaintiff's Exhibit 1, at para. II.

b. Plaintiff's Request for Admissions to Defendant Robert Johnson, served on Defendant Johnson on February 8, 2008 ("First Johnson RFA"), at 2(a).

c. Plaintiff's Request for Admissions to Defendant Water Wheel, served on Defendant Water Wheel on February 8, 2008 ("First Water Wheel RFA"), at 2(a)

4. CRIT, as Lessor of the real properly, is entitled to pursue an "eviction" action against Defendants under the CRIT Property Code, § 1-101 et seq. and to obtain any and all relief authorized under the Code.

5. Pursuant to Property Code, § 1-302, CRIT made reasonable notice and demand on Defendants to: vacate the property upon expiration of the Lease, that CRIT did not intend to renew the Lease, that CRIT intended the Lease to expire, and that CRIT intended to take over operation of Water Wheel resort after expiration of the Lease.

a. Plaintiff's Exhibit 2, Letter from Herman Laffoon, Jr., Commercial Manager for CRIT Realty Services, to Johnson, dated January 3, 2007.

b. First Johnson RFA, Requests 2(c) & (d).

c. First Water Wheel RFA, Requests 2(c) & (d).

d. Plaintiff's Petition for Eviction; Complaint for Damages in Contract and Tort ("Complaint").

e. Testimony of Herman Laffoon, Jr. that he told Johnson that CRIT was not going to renew the Lease and that CRIT was going to take over the operation of the Water Wheel park as a tribal operation after expiration of the Lease;

f. Testimony of Johnson that he knew that CRIT wanted to take over operation of Water Wheel park as a tribally run business after expiration of the Lease.

g. Plaintiff's Second Request for Admissions to Defendant Water Wheel served on March 3, 2008 ("Second Water Wheel RFA"), Request 3(g).

h. Plaintiff's Second Request for Admissions to Defendant Robert Johnson served on March 3, 2008 ("Second Johnson RFA"), Request 3(g).

6. Defendants have continued to remain on, use and occupy the Water Wheel resort property and collect rental payments from tenants and/or sub lessees and/or members of Water Wheel Resort after expiration of the Lease on July 7, 2007.

a. Testimony of Defendant Johnson.

b. Testimony of Mr. Laffoon.

c. First Johnson RFA, Request 2(e).

d. First Water Wheel RFA, Request 2(e).

e. Second Johnson RFA, Request 3(f).

f. Second Water Wheel RFA, Request 3(f).

7. Defendants do not have CRIT's permission to continue to occupy the property after expiration of the Lease on July 6, 2007.

a. Testimony of Mr. Laffoon.

b. First Johnson RFA, Request 2(b).

c. First Water Wheel RFA, Request 2(b).

8. CRIT has proven by a preponderance of the evidence that the Tribes are entitled to Judgment and a Writ of Restitution against the Defendants ordering their eviction and delivery of the property to the Tribes.

**SECOND CAUSE OF ACTION**
**DECLARATORY RELIEF**

9. There is an actual controversy between CRIT and Defendants insofar as CRIT asserts that: (a) Defendants are occupying the Tribes' property without the Tribes' permission after a reasonable demand to vacate was made; (b) as a result, CRIT has

been deprived of the use of its property since July 7, 2007; (c) CRIT has also been deprived of adequate rent under the terms of the Lease. The facts establishing CRIT'S entitlement to declaratory relief are set forth herein.

**THIRD CAUSE OF ACTION**
**BREACH OF LEASE AGREEMENT**

10. Pursuant to the Lease, Defendant Water Wheel was required to pay CRIT the following percentages of gross receipts of business: (1) Sales of alcoholic beverages: 5%; (2) Rentals of trailer and camping spaces: 4%; (3) All other income derived from business conducted on the premises: 2%.

a. Plaintiff's Exhibit 1, Lease, pages II-III, paragraph IV(B).

11. Water Wheel owed CRIT $24,903.09 in percentages of gross receipts for the 2001-02 year.

a. Plaintiff's Exhibit 12.

12. Water Wheel owed CRIT $28,255.77 in percentages of gross receipts for the 2002-03 year.

a. Plaintiff's Exhibit 13.

b. Defendants' Exhibit 2.

13. Water Wheel owed CRIT $27,447.54 in percentages of gross receipts for the 2003-04 year.

a. Plaintiff's Exhibit 14.

b. Defendants' Exhibit 2.

14. Water Wheel owed CRIT $32,340.48 in percentages of gross receipts for the 2004-05 year.

a. Plaintiff's Exhibit 15.

b. Defendants' Exhibit 2.

15. Water Wheel owed CRIT $41,245.89 in percentages of gross receipts for the 2005-06 year.

a. Testimony of Robert Johnson.

b. Defendants' Exhibit 2.

16. Water Wheel owed CRIT $36,664.39 in percentages of gross receipts for the 2006-07 year.

a. Testimony of Robert Johnson.

b. Defendants' Exhibit 2.

17. In total, Water Wheel owed CRIT $190,857.16 in percentages of gross receipts for the years 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, and 2006-07.

18. Defendants did not pay CRIT any percentages of gross receipts of business for the following years: 2001-02; 2002-03; 2003-04; 2004-05; 2005-06; 2006-07.

a. Testimony of Mr. Laffoon.

b. Plaintiff's Exhibits 3-9.

c. Second Water Wheel RFA, Requests 3(a), (b) & (c).

d. Second Johnson RFA, Requests 3(a), (b) & (c).

e. Special Appearance, Motion to Dismiss, and Answer of Robert Johnson, paragraph 21 (admitting that "payments were made as set forth in ¶ 20(a) through (h)" of Plaintiff's Complaint).

f. Special Appearance, Motion to Dismiss, and Answer of Water Wheel, paragraph 21 (admitting that "payments were made as set forth in ¶ 20(a) through (h)" of Plaintiff's Complaint).

g. Plaintiff's Complaint, paragraph 20(a) through (h) (indicating the payments made by Water Wheel and whether they were for base annual rent or percentages).

19. Pursuant to the Lease, Water Wheel was required to pay CRIT a minimum annual rent of $100 per acre per year for the first through the twenty-fifth years of the Lease.

a. Plaintiff's Exhibit 1, Lease, at pg II, para. IV(A).

20. Pursuant to the Lease, prior to the twenty-sixth year of the Lease, the parties were to renegotiate the minimum annual rent to the then current fair annual rental value of the property exclusive of improvements, which value was to be estimated by normal appraisal procedures and methods.

a. Plaintiff's Exhibit 1, Lease, at pg II, para. IV(A).

21. In 2000 and 2001, CRIT attempted to establish the minimum annual base rent that would be due from Defendants beginning the twenty-sixth year of the Lease.

a. Plaintiff's Exhibit 10 and 11.

b. Testimony of Mr. Laffoon.

c. Defendant's Exhibit 1

d. Testimony of Mr. Johnson.

22. The Tribes' position was that the new minimum annual rent should have been $101,500.

a. Plaintiff's Exhibit 11.

b. Testimony of Mr. Laffoon.

23. The Tribes informed Defendants that, according to the Tribes' appraisal, the new minimum annual rent would be $101,500.

a. Plaintiff's Exhibit 11.

b. Testimony of Mr. Laffoon.

24. The parties failed to reach an agreement as to the minimum annual base rent due beginning the twenty-sixth year of the Lease.

a. Testimony of Mr. Laffoon.

b. Defendant's Exhibit 1

c. Testimony of Mr. Johnson.

25. Pursuant to the terms of the Lease, lessee Water Wheel was required to pay the following minimum annual rent:

> the sum of one hundred dollars ($100.00) per acre per year *for the first through the twenty-fifth year of the lease*. Prior to the beginning of the twenty-sixth

> year, Lessee and Lessor shall renegotiate the minimum annual rent to the then current fair annual rental value of the leased premises exclusive of improvements. *Said fair annual rental to be estimated by normal appraisal procedures and methods. . . .*

a. Plaintiff's Exh. 1, Lease, at II (emphases added).

26. According to the plain language of this provision, two things are clear: First, the "one hundred dollars per acre per year" minimum annual rental applies only to the first through the twenty-fifth year of the Lease. It is not a default rent for the entire thirty-two years of the Lease. Second, the rent for the twenty-sixth through the thirty-second years of the lease was to be set at the "then current fair annual rental value" of the property, and this value was to be established "by normal appraisal procedures and methods." Thus, the rent for the last seven years of the Lease was not simply to be the result of open-ended negotiations by the parties, but instead was to be established by the objective standards of professional appraisal.

27. CRIT has shown at trial that the parties never agreed on what the true fair annual rental value of the property was for 2000 through 2007. CRIT sought to establish the new minimum annual rent.

a. Plaintiff's Exhibits 10 and 11.

b. Testimony of Mr. Laffoon.

28. CRIT's original position was that the fair annual rental value for the property was $130,000 per year; CRIT subsequently reduced that figure to $101,500. CRIT notified Defendants of its position by letter. *See* Plaintiff's Exhibits 10 & 11. Water Wheel did not pay this increased rent. Instead, Water Wheel paid CRIT $14,503.58—the rental value Water Wheel argued was the fair annual value for the property—for three years (2000-01, 2001-02, and 2002-03), then paid CRIT $2,600 for two years (2003-04, 2004-05), then stopped paying CRIT completely (2005-06, 2006-07).

29. Because the parties never agreed on what that fair annual rental value should have been, CRIT is now asking the Court to make that determination. Although the

parties could have sought resolution of this issue earlier, the delay in bringing suit did not harm Water Wheel. Water Wheel was clearly on notice that the minimum annual rent would increase to the fair market value of the property for the last seven years of the Lease. In support of this fact, Water Wheel actually paid CRIT $14,503.58 per year for the first three years of the period in which the new minimum annual rent was to apply. *See* Plaintiff's Exhibits 3, 4, 5, 6. This increase reflected Water Wheel's position on what the new minimum annual rent should have been. *See* Compl. ¶ 17; Water Wheel Answer ¶ 18; Johnson Answer ¶ 19 (admitting that Water Wheel's position was $14,503.58). Finally, CRIT notified Water Wheel of its position on the new minimum annual rent, and gave Water Wheel the opportunity to either accept the new rent, or request a cancellation of the Lease. Plaintiff's Exhibits 10 & 11. Water Wheel did neither, instead choosing to remain on the property and pay significantly less rent than the fair annual rental value of the property.

30. At trial, CRIT presented evidence of Walter Winius, Jr., an expert appraiser, establishing that the fair market rental value of the property exclusive of improvements as of July 1, 2000 was $192,000 per year. Mr. Winius also testified that he reached this conclusion by using normal appraisal methods. This testimony supports CRIT's claim for damages in two ways. First, it supports CRIT's claim that, pursuant to the Lease, CRIT should have received $192,000 per year for the last seven years of the Lease. Mr. Winius's testimony also supports CRIT's alternative argument that, of the two appraisals relied upon by parties in renegotiating the rent, CRIT's appraisal of $101,500 per year was much closer to the true fair market value of the property than Water Wheel's appraisal of $14,503.58 per year, and thus CRIT should have received at least $101,500 per year.

31. Finally, the actions of Water Wheel indicate that it, too, interpreted the Lease to provide for an increase in the minimum annual rent to the fair market rental value of the property for the last seven years, regardless of when or whether the parties reached

a negotiated agreement on the new rent. Although CRIT never agreed to Water Wheel's proposed new rent of $14,503.58 per year, Water Wheel paid that amount for the first three years of the new rental period (2000-2003). Thus, Water Wheel apparently shared CRIT's interpretation of the Lease that, regardless of the status of negotiations at the time, Water Wheel was going to be required to pay the fair market rental value for the property for the last seven years of the Lease. Accordingly, CRIT is entitled to damages in the amount of the unpaid minimum annual rent, as that minimum annual rent is determined by the Court.

32. The fair market rental value of the property as of July 1, 2000 was $192,000.

a. Testimony of Walter Winius, Jr.

33. Water Wheel paid CRIT the following amounts in minimum annual rent for the years 2000-01, 2001-02, 2002-03, 2003-04, and 2004-05:

a. July 7, 2000: $2,600 (base rent for 2000-2001)

b. January 31, 2001: $11,903.58 (additional base rent for 2000-2001)

c. January[1] 19, 2001: $14,503.58 (base rent for 2001-2002)

d. August 16, 2002: $14,503.58 (base rent for 2002-2003)

e. August 14, 2003: $2,600 (base rent for 2003-2004)

f. October 10, 2005: $2,600 (base rent for 2004-2005)

i. Plaintiff's Complaint ¶ 20.

ii. Special Appearance, Motion to Dismiss, and Answer of Robert Johnson, paragraph 21 (admitting that "payments were made as set forth in ¶ 20(a) through (h)" of Plaintiff's Complaint).

iii. Special Appearance, Motion to Dismiss, and Answer of Water Wheel, paragraph 21 (admitting that "payments were made as set forth in ¶ 20(a) through (h)" of Plaintiff's Complaint).

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[1] Plaintiff's Exhibit 5 shows an actual receipt date of "July" 19, 2001.

iv. Plaintiff's Exhibits 3-8.

v. Testimony of Mr. Laffoon.

34. The payments listed in paragraph 33 are the only payments Water Wheel made to CRIT for the minimum annual rent due under the Lease for the years 2000-01, 2001-02, 2002-03, 2003-04, and 2004-05.

a. Testimony of Mr. Laffoon.

b. Second Johnson RFA, Request 3(b).

c. Second Water Wheel RFA, Request 3(b).

35. Pursuant to Property Code, § 1-316(b), CRIT has proven by a preponderance of the evidence that the Tribes are entitled to actual damages, including interest, as provided in the Lease (Plaintiff's Exhibit 1, Lease, at pg II, para. IV(A).

**FOURTH CAUSE OF ACTION**
**INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

36. Pursuant to the terms of the Lease, CRIT was entitled to regain possession of the real property subject to the Lease, along with improvements thereto, upon expiration of the Lease.

a. Plaintiff's Exhibit 1, Lease, Addendum page 5, paragraph 6; Addendum page 20, paragraph 29.

37. The Tribes' intended to take over operation of the Water Wheel Resort when the Lease expired.

a. Testimony of Mr. Laffoon.

b. Testimony of Mr. Johnson.

38. One or more CRIT employees informed Water Wheel that the Tribes intended to take over operation of the Resort upon expiration of the Lease. Defendant Johnson knew that CRIT intended to operate the Water Wheel park after expiration of the lease on July 6, 2007.

a. Second Johnson RFA, Request 3(g).

b. Second Water Wheel RFA, Request 3(g).

c. Testimony of Mr. Laffoon.

d. Testimony of Mr. Johnson.

39. Defendants nonetheless continued to occupy the property and operate the Resort after expiration of the Lease. See paragraph 6 above.

40. Defendants' interference with CRIT's right to operate the Resort after expiration of the Lease was intentional.

a. Inference from facts set forth above. *See Ramona Manor Convalescent Hospital v. Care Enterprises*, 177 Cal. App. 3d 1120, 1132 (1986).

41. As a result of Defendants' actions, CRIT could not take over operation of the Resort.

a. Testimony of Mr. Laffoon.

**CRIT'S ATTORNEYS' FEES**

42. CRIT has prevailed in its action to evict Defendants.

43. CRIT has prevailed in its action alleging Defendants breached the lease with the Tribes and that CRIT is entitled to recover damages (rents due) under the lease.

44. CRIT has prevailed in its Motion to Compel Discovery. Defendants disobeyed the Court's order compelling discovery.

45. The amount of attorneys' fees requested by CRIT is reasonable in light of the complexity of this case and Defendants' litigation strategy.

46. During the course of this case, the Defendants filed numerous motions, interlocutory appeals and disobeyed the court orders compelling discovery. As a result of Defendants litigation strategy, the amount of time CRIT's attorneys had to spend litigating Defendants' motions, interlocutory appeals and disobedience of court orders compelling discovery, the Plaintiff's attorney fees and costs have increased significantly. Defendants refused to comply with any of the Court's discovery orders or procedures, requiring CRIT to file a motion to compel discovery and two motions in

limine.

**WATER WHEEL AND JOHNSON ARE DEEMED TO BE ALTER EGOS AS A SANCTION FOR VIOLATING THE COURT'S ORDER COMPELLING DISCOVERY**

47. Defendants willfully violated the Court's order compelling discovery.

a. Declaration of Winter King in Support of Plaintiff's Motion in Limine to Exclude Evidence at Trial on the Merits filed June 2, 2008.

48. Plaintiff was prejudiced by Defendants' failure to provide discovery.

a. Declaration of Winter King in Support of Plaintiff's Motion in Limine to Exclude Evidence at Trial on the Merits filed June 2, 2008.

49. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. Therefore, the Court finds that Defendant Robert Johnson is the majority shareholder and person with ultimate decision-making authority for Water Wheel.

a. Johnson Document Request No. 16; Water Wheel Document Request No. 21; Water Wheel Interrogatories Nos. 6, 7, 11.

50. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that Defendant Water Wheel is inadequately capitalized as a corporation.

a. Water Wheel Document Request Nos. 14, 23, 24; Water Wheel Interrogatories Nos. 14, 15.

51. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that from 1999 to the present, Water Wheel has made loans and gifts to Johnson.

a. Johnson Document Request No. 13; Water Wheel Document Request No. 26; Johnson Interrogatories Nos. 17, 20.

52. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that from 1999 to the present, Johnson has made loans and gifts to Water Wheel.

a. Johnson Document Request No. 14; Water Wheel Document Request No. 27.

53. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that from 1999 to the present, Johnson has borrowed and used Water Wheel funds for his personal use and for the use of third persons.

a. Johnson Interrogatories Nos. 17, 18, 19, 20.

54. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that Water Wheel and Johnson's financial records are not separately maintained.

a. Document Request No. 12; Water Wheel Document Request No. 25; c. Johnson Interrogatories Nos. 23, 24; Water Wheel Interrogatories Nos. 12, 13.

55. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that since Johnson became president of Water Wheel, Water Wheel has not kept corporate minutes or elected directors.

a. Water Wheel Document Request No. 19, 20.

56. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that Johnson's compensation from Water Wheel has increased from 1999 to the present.

a. Johnson Document Request No. 18; Water Wheel Document Request No. 14; Water Wheel Interrogatories No. 9.

57. Sanctions are imposed against Defendant Johnson in accordance with TRCP Rule 37. The Court therefore finds that Johnson has commingled rent monies Water Wheel owes to the Tribes with his own personal assets.

a. Johnson Document Request No. 13; Water Wheel Document Request Nos. 25, 26; Johnson Interrogatories No. 17, 18, 19, 20.

## DAMAGES

58. CRIT is entitled to its lost profits of **$33,549.58** per month, from July 7, 2007 until Defendants vacate the property. The damages (lost profits) and judgment shall bear interest at ten percent (10%) per annum.

a. Testimony of Walter Winius.

59. CRIT is entitled to **$190,857.16** for unpaid percentages of gross receipts of business under the Lease. The damages (unpaid percentages of gross receipts of business) and judgment shall bear interest at ten percent (10%) per annum from the date each annual rental payment was due under the terms of the lease

a. Evidence in support of Paragraphs 10-18, *supra*.

b. Plaintiff's Exhibit 1, Lease, pg III, para. V.

c. Property Code, § 1-316(b).

60. CRIT is entitled to **$1,295,289.26** in damages for unpaid minimum annual rent under the Lease from July 7, 2000 to July 7, 2007. The damages (unpaid minimum annual rent) and judgment shall bear interest at ten percent (10%) per annum from the date each annual rental payment was due under the terms of the lease

a. Evidence in support of Paragraphs 19-31, *supra*.

b. Plaintiff's Exhibit 1, Lease, pg III, para. V.

c. Property Code, § 1-316(b).

61. Per Property Code, § 1-316(i) and per the Lease, Plaintiff's Exhibit 1, Addendum, pg 19, para. 22, CRIT is entitled to **$281,382.00** in attorneys' fees and **$2,110.72** in costs.

a. Declaration of Winter King in Support of Plaintiff's Request for Attorney's Fees and Costs filed June 2, 2008.

b. Supplemental Declaration of Winter King in Support of Plaintiff's Request for Attorney's Fees and Costs filed June 11, 2008.

**DEFENDANTS ARE NOT ENTITLED TO "OFFSETS" OR "DAMAGES"**

62. Defendants waived any claim to "offsets" or "damages" by failing to plead them as affirmative defenses.

63. Sanctions are imposed against Defendants Water and Johnson in accordance with TRCP Rule 37. The evidence presented in support of Defendants' claim for damages must be excluded as a sanction for Defendants' refusal to produce documents requested by CRIT and ordered by this Court.

a. Plaintiff's Second Request for Production and Inspection of Documents to Defendants Water Wheel, served on March 3, 2008 ("Second Water Wheel Document Request"), Requests 12-14, 23-24.

64. Defendants failed to prove that they are entitled to "offsets" or "damages."

65. Defendants failed to prove that CRIT breached the terms of the Lease.

66. Defendants failed to present any credible evidence of the amount of damages supposedly incurred by Defendants.

**WHEREFORE IT IS ORDERED THAT:**

67. CRIT's Petition for Eviction is GRANTED.

68. The Court finds that Defendant Water Wheel has breached the lease with CRIT by failing to pay rent, and awards CRIT the following damages:

1. One Hundred Ninety Thousand, Eight Hundred Fifty-Seven dollars and Sixteen cents (**$190,857.16**) for unpaid percentages of gross receipts of business, and

2. One Million, Two Hundred Ninety-Five Thousand, Two Hundred Eighty-Nine dollars and Twenty-Six cents (**$1,295,289.26**) for unpaid minimum annual rent.

3. Total damages for unpaid rent is One Million, Four Hundred Eighty-Six Thousand, One Hundred Forty-Six dollars and Forty-Two cents (**$1,486,146.42**).

4. The total damages shall bear interest at ten percent (10%) per annum from the date each rental payment was due to the Tribes under the terms of the lease.

69. The Court finds that Defendants have intentionally interfered with CRIT's prospective economic advantage. The Court finds that Defendants have occupied CRIT's property without CRIT's permission and awards CRIT Thirty-Three Thousand, Five Hundred Forty-Nine dollars and Fifty-Eight cents **($33,549.58)** per month as damages for its lost profits from July 7, 2007 until the date Defendants vacate the property. The damages shall bear interest at ten percent (10%) per annum.

70. The Court declares that the Lease has expired on or about July 7, 2007 and that Defendants have no right, title, and/or interest in the property.

71. The Court awards CRIT Two Hundred Eighty-One Thousand, Three Hundred Eighty-Two dollars **($281,382.00)** in attorneys' fees and Two Thousand, One Hundred Ten dollars and Seventy-Two cents **($2,110.72)** in costs.

72. CRIT's Motion in Limine to Exclude Evidence at Trial on the Merits filed June 2, 2008 is GRANTED.

73. Defendants Water Wheel and Robert Johnson are jointly and severally liable for all damages awarded pursuant to this Order.

74. Pursuant to the Order issued by United States District Judge David G. Campbell on March 14, 2007 in *Water Wheel Camp Recreational Area, Inc., et al. vs. Gary LaRance, et al.*, Case No. CV08-0474-PHX-DGC, Plaintiff Colorado River Indian Tribes shall afford Defendants Water Wheel and Johnson a period of 15 days, commencing the date the CRIT Court of Appeals enters a final appellate decision, to seek review of their *Montana* arguments in the U.S. District Court for the District of Arizona before taking any action to evict Defendants from the property or otherwise interfering with Defendants' occupancy of the property.

Date June 13, 2008

Gary LaRance, Chief Judge
Colorado River Indian Tribes Trial Court

# EXHIBIT 3

# The Court of Appeals of the Colorado River Indian Tribes

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| COLORADO RIVER INDIAN TRIBES,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>WATER WHEEL CAMP RECREATION AREA, INC., ROBERT JOHNSON, and DOES 1-20,<br><br>Defendants/Appellants | No. 08-0003<br><br>Opinion and Order |

NOTE: As provided for in the Law and Order Code "[a]ll decisions" of this Court "including those made prior to enactment of this provision, are memorandum decisions that shall not be regarded as opinions of binding precedent in any other cases." See Colorado River Indian Tribes (CRIT) Law and Order Code, Article II, Chapter B, Section 211(d) (as amended on December 14, 1999, by Ordinance No. 99-3).

Appearances: Eric Sheppard, Esq., Colorado River Indian Reservation, Parker, Arizona, Elison Folk, Esq,. San Francisco, California, and Amanda Garcia, San Francisco, California for Colorado River Indian Tribes, the Plaintiff/Appellee; Dennis J. Whittlesey, Washington, D.C., appearing *pro hac vice*, and Michael L. Frame, Parker Arizona, for Defendant/Appellant Water Wheel Camp Recreation Area, Inc.; Dennis J. Whittlesey, Washington, D.C., appearing *pro hac vice*, and Fred Welch, Parker, Arizona, for Defendant Robert Johnson.

**Per curiam (Before Karla J. Starr, Chief Justice; and, Robert N. Clinton and Ron Eagleye Johnny, Associate Justices).**

This matter involves an eviction proceeding initiated by the Colorado River Indian Tribes (Tribe or CRIT), the Plaintiff/Appellee, seeking to oust the defendants from possession of lands formerly

leased by them from the Tribe and seeking rents, damages, and attorneys fees claimed due under the lease and for the defendants continued possession after termination of the lease and for interference with the Tribe's business opportunities for the lands. In a final Judgment dated June 13, 2008, the Tribal Court ruled in favor of the Tribe. That Judgment determined that the Lease under which the Defendants/Appellants occupied the property expired under the lease terms on July 7, 2007 and that the Defendants/Appellants had no continuing right title or interest thereafter in the disputed property. The Court therefore granted the Tribe's petition for eviction, awarded damages for unpaid rent due under the lease prior to its expiration in the amount of $1,486,146.42 plus interest at ten percent (10%) per annum, awarded damages for continued illegal possession of the lands after expiration of the lease based on the interference with the Tribe's prospective economic advantages in the amount of $33.459.58 per month from July 7 2007, the date of the expiration of the lease, measured by the Tribe's lost profits, and, under the lease terms, awarded the Tribe a total of $281,382.00 in attorneys fees and $2,110.72 in costs.

Water Wheel Camp Recreation Area, Inc. and Robert Johnson, the Defendants/Appellants, filed a timely Petition for Appeal from the final Judgment which this Court granted.

For the reasons stated below, as to that portion of the Judgment awarding damages for overstaying the lease term based on interference with the Tribe's business advantages that supported the award set forth in Paragraph 69 of the Judgment, this Court reverses that portion of the Judgment and remands to the Tribal Court with directions to recalculate and amend Paragraph 69 of the Judgment based solely on the record already made at trial calculated not on business loss but, rather, on the fair rental value of the property after the expiration of the lease.

As to all other portions of the Judgment other than Paragraph 69 and the analysis supporting it, this Court affirms the Tribal Court Judgment dated June 13, 2008.

This Court has further determined that the calculation of damages for continued illegal

occupancy after expiration of the lease term constitutes a separable matter that does not require delay in enforcement of the remainder of the judgment. Accordingly, the Court directs that all other portions of the judgment other than Paragraph 69 shall become immediately enforceable upon entry of this Opinion and Order.

Nevertheless, recognizing that a related cases is currently pending before the United States District Court for Arizona, out of deference to the federal court and in the interest of comity, this Court has determined to grant a stay of the enforcement of the Judgment (as modified by this Opinion and Order) for two weeks (14 calendar days) to afford the federal court sufficient time to consider whether it thinks that it should continue to prolong the occupancy of the disputed property by the Defendants/Appellants over 19 months after their Lease on the property expired.

During this period the Defendants/Appellants collectively and individually are expressly ordered and enjoined from damaging, removing, destroying, defacing, or otherwise intentionally impairing the value of any portion of the real property, improvements, structures, or fixtures previously covered by the Lease.

During this period, Defendants/Appellants shall expressly hold any rents or commissions it receives on any portion of the formerly leased property from its subtenants in a separate escrow account agreed upon by and fully disclosed to the Tribe.

This stay is expressly conditioned on the Defendants/Appellants filing with the Tribal Court within three (3) business days following the announcement of this Opinion and Order a surety bond to secure payment of the Judgment in an amount equal to double that portion of the Judgment which is affirmed by this Opinion and Order. In the event that the Defendants/Appellants are either unwilling or unable to post such a surety bond within three (3) business days from the date of this decision, the mandate of this Court shall issue forthwith and those portions of the Judgment in this matter that are herein affirmed, including the order of eviction, shall immediately become enforceable.

**Background**

On or about July 6, 1975, CRIT entered into Lease No. B-468-CR (Lease) with the Water Wheel Camp Recreation, Inc. (Water Wheel), a Lease which was approved by the Secretary of the Interior as required by federal law. Under the Lease, CRIT was expressly designated at the Lessor and Water Wheel as the Lessee. The Lease described 26 acres of land within the CRIT Reservation which was held in trust for the Tribe. Under the terms of the Lease, occupancy by Water Wheel began in July 1975 and the Lease terminated July 6, 2007. The land described in the Lease is on the Western Boundary of the CRIT Reservation.

The Lease was entered into after litigation involving a dispute as to the western boundary of the CRIT Reservation. In 1973, the United States brought a trespass action against Bert and Barbara Denham, who had occupied without lawful authority a large parcel of land to the west of the Colorado River. *United States v. Denham,* Civ. No. 73-495-ALS (C.D. Cal.). The United States claimed ownership of that land, alleging that it was part of the Colorado River Indian Reservation and that they held it in trust for the Tribes. In 1975, this litigation was settled by agreement resulting in a stipulated judgment in the United States District Court entered March 5, 1975 decreeing that the United States was the owner of the contested property and, specifically, held approximately 50 acres including the lands in dispute in trust for CRIT as a part of its Reservation. In addition, the Tribes and the United States waived any damages to which they were entitled for the Denham's unlawful occupation of the property to that date and the Tribes agreed to lease for a term of 32 years approximately 26 acres of the disputed property (leased property) to the Denhams, who had incorporated Water Wheel in 1974, apparently in anticipation of this purpose, and who employed Water Wheel to take that lease as part of the settlement of the litigation. Thus, the Lease in question in this case arose directly from the settlement of this trespass action against the Denhams which had finally determined that the lands covered by the Lease were held by the United States in trust for CRIT and were part of the CRIT

Reservation. By its express terms, this lease expired on July 6, 2007. Section 34 of the Lease, clearly entitled "Reservation Law and Ordinances." expressly provided, "the Lessee, Lessee's employees, agents and sublessees and their employees and agents agree to abide by all laws, regulations, and ordinances of the Colorado River IndianTribes." The Lease also expressly provided that upon its expiration, Water Wheel was to "peaceably and *without legal process* deliver up the possession of the leased premises" to the Tribes. Lease Addendum, ¶ 29. The Lease called for rent payments based both on certain minimum payments as well as a percentage gross revenue, which it defined.

Pursuant to the Lease, Water Wheel developed and operated a trailer park resort on the leased property. Until the last few years of the Lease, Water Wheel collected rents from its subtenants on the property and duly paid its rent to the Tribe, never disputing either the validity of the Lease or the Tribe's ownership of the property. During the term of the Lease, Defendant Robert Johnson (Johnson) purchased all of the Denhams' interest in Water Wheel and became, so far as the record show, the sole owner and operator thereof. He operated the Water Wheel trailer park resort for over twenty years, never disputing, until the Lease expired, the Tribe's ownership of the land and his duties to the Tribe under the Lease.

Beginning in 2000, the Tribe and Johnson (on behalf of Water Wheel) began efforts to renegotiate the Lease pursuant to its terms to more accurately reflect then current market value for the leased land. Despite those attempts, the parties never reached any agreement as to a new rent amount under the Lease. Whether because of these unsuccessful negotiations or otherwise, during the last years of the Lease Water Wheel failed to fully pay the rent amounts due under the Lease and in some cases failed to pay any rent at all. Clearly, during the last years of the Lease relationships between Water Wheel and the Tribe deteriorated when Water Wheel failed to honor its rent and other obligations under the Lease. Nevertheless, the Tribe took no immediate action to cure these breaches of the Lease by Water Wheel and instead patiently awaited the expiration of the Lease.

The Lease expired by its terms on July 6, 2007. Notwithstanding the expiration of the Lease and the express obligation of Water Wheel under the Lease to "peaceably and *without legal process* deliver up the possession of the leased premises" to the Tribes, Water Wheel and Johnson remained on the property after expiration of the Lease and unlawfully continued to operate the trailer park resort, collecting rents and remitting absolutely nothing to the Tribe. Accordingly, the Tribe filed the present eviction action on October 1, 2007, almost three months after the expiration of the Lease, seeking to evict Water Wheel and Johnson from the formerly leased property pursuant to Tribal Ordinance 04-06, to recover payment for unpaid rents owed under the express terms of the Lease, to recover costs and attorneys fees authorized by the Lease, and to recover damages from the Tribe's loss of use of the formerly leased property caused by the failure of the Defendants/Appellants to quit the property and return peaceable possession thereof to the Tribes at the expiration of the Lease, as expressly required by the Lease terms.

The ensuing litigation history of this case can only be described as a litany of what appears to be delaying tactics by Water Wheel and Johnson that successfully continued their unauthorized occupancy of the formerly leased property for 19 months after the Lease expired by its express terms. Despite the fact that neither Water Wheel nor Johnson claim any ownership right or other right of occupancy of the property other than through the Lease itself,[1] they challenged, in what one member of this panel in his native language would call the ultimate in *chutzpah*, both the Tribe's right to evict them and the jurisdiction of the CRIT Tribal Courts. They claimed, among other things, that despite settling the *Denham* litigation, paying rents for most of the terms of the Lease to the Tribe and otherwise acknowledging the Tribe's ownership of the land when it benefitted them, they were now entitled to challenge and have their day in court on whether CRIT owned the previously leased land and whether the lands were within the CRIT Reservation. Significantly, at no time during any of the proceedings in

1 At oral argument before this Court, counsel for the Defendants/Appellants conceded that his clients claimed no ownership or other occupancy right in the property other than through the lease. Oral Arg. Tr. p. 4.

the Tribal Court or this Court has Water Wheel or Johnson made any claim to lawful ownership or possession of the leased property other than through the Lease. Thus, they offered no claim of right in the leased property that would conflict with or otherwise contradict the CRIT ownership rights. Nevertheless, despite being the successors in interest to the Denhams through Water Wheel, despite the final adjudication of the ownership of the leased property in favor of CRIT in the *Denham* litigation, and despite having acknowledged and benefitted from CRIT ownership of the land during the term of the Lease, Water Wheel and Johnson now seek to relitigate the ownership question that was finally resolved in the *Denham* litigation.

As part of those efforts, Water Wheel and Johnson filed motions to dismiss the Complaint based on three grounds: (1) the Tribal Court lacked subject matter jurisdiction over the matter under *Montana v. United States,* 450 U.S. 544 (1981) because the leased property was not, according to their claims, within the CRIT Reservation and they were non-Indians; (2) the Tribal Court lacked personal jurisdiction over Johnson; and (3) the United States was an indispensable party to the action. Following full briefing on the motions and supplemental briefing ordered by the Tribal Court on designated issues, the Tribal Court on January 15, 2008 denied the motions to dismiss in part, expressly holding that both the Defendants were both equitably and collaterally estopped from arguing that the leased property is outside the boundaries of the CRIT Reservation or that the leased property is not held in trust by the United States for CRIT. The January 15, 2008 order recognized that a hearing was required on the remaining issues raised by the motions to dismiss, including the questions of subject matter jurisdiction under *Montana v. United States,* 450 U.S. 544 (1981). Accordingly, the Tribal Court ordered the remaining issues raised by the motions to dismiss to be set for hearing. Despite the fact that the Tribal Court had not finally resolved either the motions to dismiss or the case, the Defendants/ Appellants filed their first petition for appeal with this Court. Noting that under CRIT law the jurisdiction of this Court is expressly limited to final judgments and that the denial of a motion to

dismiss does not constitute a final judgment, this Court denied their first petition for appeal.

Thereafter, the Tribal Court held an evidentiary hearing on the remaining issues raised by the motions to dismiss including the *Montana* issues. Following the evidentiary hearing, the Tribal Court denied the remaining elements of the Defendants' motions to dismiss. Apparently ignoring this Court's prior order denying the first petition for appeal, the Defendants again filed a second petition for appeal, seeking review of the order denying their motion to dismiss. Again reiterating that under CRIT law the jurisdiction of this Court is expressly limited to final judgments and that the denial of a motion to dismiss does not constitute a final judgment, this Court denied the Defendants' second petition for appeal. The Defendants' actions in filing the second petition for appeal so obviously ignored the contents of the order denying their first petition for appeal that this Court, with the benefit of hindsight, is left with the firm and definite impression that their repeated petitions for appeal seeking interlocutory review of interim orders by the Tribal Court were filed not only without any basis in CRIT law but also solely for the purposes of delay, in order to leave the Defendants in occupancy of the formerly leased property for as long as possible, collecting rents (which were not turned over to the Tribe) from the resort patrons, long after the expiration of the term of the Lease.

In addition to the motions to dismiss, the Tribe ultimately had to file motions to compel discovery and for sanctions when the Defendants absolutely refused to disclose financial records required by discovery in order to ascertain gross receipts under the Lease (employed in calculating rents due) and the financial and corporate relationship between Water Wheel and Johnson. As of the time of the trial on the merits of the Complaint, Water Wheel and Johnson had still completely failed to comply with discovery orders to turn over the necessary records.

Commencing on June 4, 2008, the Tribal Court held a three day trial on the merits of the Complaint. After hearing all of the evidence and arguments for all parties, the Tribal Court issued its Judgment on June 13, 2008 including extensive findings of fact and conclusions of law. In the

Judgment, the Tribal Court ruled in favor of CRIT on all claims. The Court found that after the expiration of the Lease Water Wheel and Johnson had no lawful interest in or right to occupy the formerly leased property and granted the petition for eviction. The Court further found based on the evidence that during the term of the Lease Water Wheel had failed to pay, as required by the Lease, $1,295,289.26 in annual minimum rent and $190,857.16 in gross receipts from business for a total of $1,486,146.42 which it awarded with ten percent interest per annum from the date each rent payment was due. As expressly authorized by the terms of the Lease, the Court also awarded $281,382.00 in attorneys fees and $2,110.72 calculated only for the eviction and recovery of unpaid rent. Finding that the failure of the Defendants to relinquish the occupancy of the leased premises to the Tribe at the expiration of the Lease unlawfully interfered with the Tribe's use of the property after the expiration of the term of the Lease, the Tribal Court awarded the Tribe $33,549.58 per month as damages "for its lost profits" from July 7, 2007 until the date the defendants vacate the property. This award also bore interest at ten percent per annum from the date each payment was due. The theory advanced by the Tribal Court for this portion of the Judgment was that Defendants, by continuing to occupy the formerly leased property after expiration of and in violation of the Lease, had interfered with CRIT's known prospective economic business opportunities for the property. Finally, the Judgment resolved the remaining issues involving the Tribe's motion for discovery sanction against the Defendants for their repeated refusal to turn over financial and corporate records in discovery. In its Judgment, the Tribal Court found all facts relevant to those records against the Defendants as a sanction for their refusal to comply with discovery. Based on those preclusive findings of fact, the Tribal Court found that Robert Johnson employed Water Wheel as a financial and business *alter ego* without complying with necessary corporate law requirements and formalities and that both the Defendants therefore were jointly and severally responsible for all damages awarded in the Judgment. While not as clearly stated in the Judgment as might be desirable, this Court also understands the findings of fact and conclusions

of law in the Judgment to include a finding, in the alternative, that Defendant Robert Johnson (as well as Water Wheel) was individually responsible, as well as jointly and severally responsible with Defendant Water Wheel, for unlawfully interfering with the Tribe's use of the property by continuing his personal occupation of the formerly leased property after expiration of the Lease. Thus, in addition to the theory of piercing the corporate veil under which the Tribal Court held the two defendants jointly and severally liable for all damages awarded in the Judgment, this Court also reads the damages set forth in Paragraph 69 of the Judgment as being awarded individually against both Water Wheel and Robert Johnson each for their unlawful continuing occupation of the leased property after expiration of the Lease. That conclusion is independent of any theory of the corporate relationship between Water Wheel and Johnson.

The Defendants/Appellants filed a third petition for appeal, seeking this time to appeal the June 13, 2008 Judgment. In their third petition for appeal, Defendants/Appellants advanced six grounds for reversal: (1) lack of jurisdiction of the Tribal Court; (2) claimed irregularities in the Tribal Court that they claim substantially prejudiced their rights; (3) abuse of discretion by the Tribal Court that they claimed denied them due process; (4) newly discovered material evidence; (5) insufficient evidence to the support the judgment; and (6) other errors of law that substantially prejudiced their rights.

Since that Judgment constituted a final order, this Court granted the petition and this appeal ensued. While having asserted six grounds for appeal in their third petition for appeal, in Appellants' Opening Brief the Defendants/Appellants only advanced arguments related to three of those claims, i.e. the claimed lack of jurisdiction of the Tribal Court, the claim of newly discovered material evidence related to that jurisdictional issue, and the assertion that the Tribal Court erred in its finding piercing the corporate veil and holding Defendant/Appellant Robert Johnson jointly and severally liable for all damages awarded against Water Wheel. Following full briefing, this Court held oral argument on this appeal at the Courthouse of the Colorado River Indian Tribes on November 6, 2008. At that argument,

while local counsel for each side was present in the courtroom with this panel of Justices, the Court nevertheless heard argument telephonically from counsel for both sides. Amanda Garcia from San Francisco, California, represented the Tribe and had been granted leave to argue telephonically since her doctors advised her against travel due to her advanced pregnancy. Pursuant to a motion for leave to appear telephonically and *pro hac vice* filed on the afternoon of the day before the long scheduled oral argument, Dennis J. Whittlesey, of Washington D.C., was permitted to argue telephonically for *both* Defendants/Appellants.[2] As in their Opening Brief, the Appellants limited their oral argument to the three issues set forth above above – claimed lack of Tribal Court jurisdiction, newly discovered material evidence related to that jurisdictional question, and the claimed Tribal Court error in piercing the corporate veil and finding Defendant/Appellant jointly and severally liable for all damages awarded against Defendant/Appellant Water Wheel. Following telephonic argument, this Court took the case under advisement.

## Discussion

### A. Subject Matter Jurisdiction

While the Defendants/Appellants asserted numerous jurisdictional and procedural claims for reversal in their third Petition for Appeal, in Appellants' Opening Brief, they limited most of their arguments to contesting the Tribal Court decisions finding that the Court had jurisdiction over this dispute and over the defendants. The gist of that claim can be divided into three basic parts. First,

2 This Court notes that until oral argument of this Appeal both Defendants had been separately represented by different counsel. While one counsel frequently filed separate documents simply adopting the papers filed by counsel for the co-defendant, the separateness of the representation was formally preserved until this appeal. While the Appellants' Opening Brief before this Court was joint, it was separately signed by each of the local counsel representing each Defendant/Appellant. Notwithstanding that fact, Dennis J. Whittlesey purported both in his motion for leave to appear and in his oral presentation to jointly represent *both* defendants and was permitted to do so by this Court.

while abandoning this argument at oral argument before this Court,[3] in Appellants' Opening Brief and some of the arguments made in the Tribal Court suggested that the Tribal Court had no jurisdiction over this case since the land in question either was not within the Colorado River Indian Tribes ("CRIT") Reservation or not owned by the Tribe. Thus, for example, they previously complained that the Tribal Court ruled that the *Denham* decision finally adjudicated ownership and that application of the legal principles of both collateral and equitable estoppel foreclosed the Defendants/Appellants from presenting evidence that contested both ownership of the leased property by the Tribe and and its location within the CRIT Reservation. Second, the Defendants/Appellants objected that that they had never consented to the jurisdiction of the Tribal Court which, they claimed, constituted an essential prerequisite for the exercise of Tribal Jurisdiction under both the line of decisions following *Montana v. United States,* 450 U.S. 544 (1981) and under the Lease. Third, the Defendants/Appellants assert a number of procedural problems that preclude Tribal Court jurisdiction over this proceeding, including, but not limited to, the claim that the federal leasing remedial procedures spelled out in the Lease constitute an exclusive remedy for both nonpayment of rent and for overstaying the lease. While the Defendants/Appellants seem to have abandoned many of their claims during oral argument, particularly those related to the Tribe's ownership of the formerly leased property or its location within the CRIT Reservation, this Court will nevertheless deal with these arguments in the order set forth above since such claims were advanced in the Defendants/Appellants Opening Brief and then seemingly withdrawn at oral argument. Before it does so, however, the Court will briefly describe the relationship of tribal and federal law to the jurisdictional issues posed by this case. Since the challenges to the jurisdiction

3 At the conclusion of Appellants' oral argument, the following colloquy occurred:

> JUSTICE CLINTON: So as I understand your argument, you are not arguing that the land in question which CRIT leased is not part of the reservation. You are instead arguing that even if part of the reservation, there's been no consent to jurisdiction.
>
> MR. WHITTLESEY: That is correct.
>
> Oral Arg. Tr. p. 16.

of the Tribal Court involve questions of law, we review the determination of the Tribal Court *de novo*.

**1. Introduction: Tribal and Federal Law Relating to Tribal Court Jurisdiction.**

Tribal court jurisdiction is initially determined by legal documents, either tribal constitutions or ordinances, creating a tribal court and establishing the scope of its jurisdiction. In this case, both the Tribal Court and this Court were established by the Colorado River Indian Tribes by tribal ordinances set forth in the Colorado River Indian Tribes Tribal Codes. Specifically, the CRIT. Law and Order Code, Article I, Section 102(B) entitled Subject Matter Jurisdiction provides in relevant part:

> B. *Subject to any restrictions or exceptions imposed by or under the authority of the Constitution of laws of the United States*, or by the Constitution or Bylaws of the Tribes, or by the ordinances or codes of the Tribes, or by express provisions elsewhere in this Code, the courts of the Tribes shall have jurisdiction over all civil causes of action and over all controversies between any persons.

Emphasis supplied. Likewise CRIT. Law and Order Code, Article I, Section 101, entitled Personal Jurisdiction, provides in relevant part:

> *Subject to any limitations or exceptions imposed by or under the authority of the Constitution or laws of the United States*, or by the Constitution or Bylaws of the Tribes, or by ordinances of the Tribes, or by express provisions elsewhere in this Code, the courts of the Tribes shall have civil and criminal jurisdiction over the following persons:
>
> a. Any person residing, located or present within the Reservation for:
>
> (1) any civil cause of action; or
>
> . . .
>
> b. Any person who transacts, conducts or performs any business or activity within the Reservation, either in person or by an agent or representative, for any civil cause of action . . . arising from such business or activity.
>
> c. Any person who owns, uses, or possesses any property within the Reservation, for any civil cause of action . . . arising from such ownership, use or possession.

Other than at times questioning whether the formerly leased property was owned by the Tribe and located within the CRIT. Reservation, a claim they expressly abandoned and waived at oral argument, the Defendants/Appellants with one additional notable exception have never made any claim to this Court or to the Tribal Court that both this proceeding and their actions did not fall within the tribal

statutes establishing both the subject matter and personal jurisdiction of both the Tribal Court and this Court. Since the Tribe claims the leased property was located within the the CRIT. Reservation and that the Tribe owned it, as reflected by its position as Lessor under the Lease, this case, as plead by the Tribe, clearly fell within the subject matter jurisdiction authorized by Section 102(B) subject to the italicized language of that section as set forth above. Likewise, since the Defendants/Appellants occupied the leased property under a lease from the Tribe and for decades operated a business thereon within lands over which they claimed no ownership or possessory right other than through the Lease from the Tribe, their actions clearly satisfied each and every element required for personal jurisdiction over them by the above quoted portions of Section 101 subject to the italicized language of that section as set forth above. Thus, other than their now abandoned claim that the leased property was not located within the Reservation or owned by the Tribe, the essence of the claims of Defendants/Appellants do not in any way dispute that they satisfy the *factual* predicates for personal and subject matter jurisdiction under Sections 101 and 102 respectively. Rather, they claim that federal law, primarily through the *Montana* line of cases, restricts the application of the otherwise broadly defined tribal court jurisdiction over them. They also claim, apparently independent of the *Montana* line of cases, that the terms of the Lease also prelude the exercise of tribal court jurisdiction over them.

Thus with the single exception of the prior claim, now waived, that the formerly leased property was not owned by the Tribe or located within its Reservation, Defendants/Appellants have not disputed and do not dispute before this Court any of the other underlying *factual* claims that resulted in the Tribal Court finding of personal and subject matter jurisdiction in this proceeding under Sections 101 and 102. Rather, as finally presented to this Court at oral argument, their sole jurisdictional dispute (although presented in a somewhat disorganized fashion) involves legal claims that neither the *Montana* line of cases nor the provisions of the Lease permit the exercise by the Tribal Court over the subject matter of this case or over them without their consent. This Court will turn to these claims in

subpart 3 of this section. Before doing so, however, this Court deems it important to first address the now abandoned and waived claim of the Defendants/Appellants that the leased property is not owned by the Tribe or located within its Reservation.

**2. Preclusion and the Ownership and Location of the Formerly Leased Property**

Before the Tribal Court and in the papers filed with this Court, Defendants/Appellants repeatedly contested both (1) whether the Tribe owned the property and whether it was located within its Reservation and (2) whether they had been denied due process and their day in court on such questions by the rulings of the Tribal Court precluding them from contesting through evidentiary hearing the issues raised in the first set of questions. Nevertheless, at oral argument, the Defendants/Appellants completely abandoned and thereby waived such claims. Under Article III, Section 3 of the Constitution and Bylaws of the Colorado River Indian Tribes these non-Indian defendants, just like any member of the Tribe, are entitled in the tribal courts and elsewhere in the functioning of the Tribe to "[a]ll rights secure to the citizens of the United States of America by the Federal or State Constitutions," including "a guarantee of due process and equal protection under the law." Despite the fact that the Defendants/Appellants have abandoned and thereby waived this claim, this Court deems it appropriate to nevertheless review the record on its own motion in order to assure that due process was accorded the Defendants/Appellants on these questions, *without in any fashion rejecting the effectiveness of the Defendants/Appellants waiver of these claims.*

The Tribal Court in its initial partial disposition of the motions to dismiss by its Order dated January 15, 2008 ruled against the Defendants/Appellants on all of these questions on two separable grounds: (1) collateral estoppel and (2) equitable estoppel. In light of the foregoing, this Court must consider whether that ruling constituted a denial of the due process rights of the Defendants by foreclosing them from contesting factual questions that they claimed were or should have been at issue in determining the jurisdiction of the Tribal Court.

The very nature of legal doctrines of preclusion, such as issue and claim preclusion (often called collateral estoppel and *res judicata* respectively)[4] and equitable preclusion involves promoting judicial efficiency by preventing the relitigation of questions that as a matter of law should not be relitigated. In the case of collateral estoppel, the first Justice Harlan succinctly stated this principle in *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48-49 (1897):

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

See also, *Allen v. McCurry*, 449 U.S. 90, 94 (1980); see generally, Allan Wright Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* Vol. 18, Ch. 13, § 4416. As the Supreme Court more recently put the matter in *Parklane Hosiery Inc. v. Shore,* 439 U.S. 322, 336, n. 23 (1979), "[t]he whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, *there is no further factfinding function to be performed*." Emphasis supplied. Thus, as the Supreme Court noted in *Arizona v. California (Arizona II)*, 480 U.S. 605, 619-20 (1983), collateral estoppel protects "adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

Following briefing and argument on the matter, the Tribal Court determined that the stipulated judgment in the *Denham* litigation entered on March 5, 1974 finally determined as between the parties

4 Given the terminological inconsistency employed by courts in these doctrines, this Court will employ the terms issue preclusion and collateral estoppel interchangeably to refer to the same doctrine, i.e. preclusion caused by the prior final judicial resolution of an issue involving the same parties or parties in privity.

and those in privity with them both the ownership of the formerly leased property (i.e. that the leased property was held by the United States in trust for the Tribe) and its location within the Tribe's reservation. The law in both California, the state in which the land is located, and the Ninth Circuit both recognize that collateral estoppel or issue preclusion applies to a consent judgment or decree. *Green v. Ancora-Citronella Corp.,* 577 F.2d 1380, 1383 (9th Cir. 1978); *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n,* 60 Cal. App. 4th 1053, 1065 (1998) ("A judgment entered . . . by consent or stipulation, is as conclusive a . . . bar as a judgment rendered after trial."). In the interest of both consistency of land title and clarity, we agree with the Tribal Court that the Colorado River Indian Tribes should follow the same rule. As the Supreme Court also noted in *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983), "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land, and water," because certainty as to ownership is critical to investment and development of property. In fact, both this Court and the Tribal Court are mandated to follow the federal and state rules respectively in those cases, like the present one, where no tribal positive or customary law exists that govern the situation. CRIT. Law and Order Code, Art. I. sec. 110(B).

While the Defendants/Appellants both object that they were not literally parties to the *Denham* litigation and therefore claim not to be bound by the judgment in that case, their denial simply misstates both the record and the nature of the law involving preclusion. While the Denhams literally were the adverse parties in the *Denham* judgment, the relationship of both Water Wheel and Johnson to the Denhams in that litigation certainly is sufficiently close to place them in privity for purposes of preclusion. The Denhams organized the Water Wheel corporation, apparently to take the lease that was part of the settlement of the *Denham* litigation. Thereafter, until the Denhams sold their interest in 1981, the Denhams owned Water Wheel and Mr. Denham served as its President. Thus, Water Wheel constituted the corporate form the Denhams employed to implement the settlement of the *Denham*

litigation. Johnson purchased the entirety of the Denham interest in Water Wheel in 1981 and has owned and operated the corporation ever since that purchase. Thus, he is in direct contractual privity with the Denhams and since 1981 has owned and operated the corporation set up to implement the *Denham* litigation settlement. He has therefore benefited from the Lease and operated thereunder. In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court recognized that preclusion applied not only to those who were parties to the prior litigation, but also to those who were in privity with such parties. In *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir, 1983) the Ninth Circuit explained that "[p]rivity exists when there is a 'substantial identity' between parties, that is, when there is sufficient commonality of interest." Another formulation of the same rule is found in *Headwaters, Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052-53 (9th Cir. 2005), which notes that privity constitutes "a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." The judgment in the *Denham* litigation determined title to and fixed the location of the formerly leased property within the Tribe's Reservation. Water Wheel was the Denhams' corporate form for implementing that judgment and the attendant settlement. The Denhams were the owners of Water Wheel and served at its operating officers. Johnson purchased all of the Denhams interest in Water Wheel in 1981 and since that time has been its President and shareholder. He thereafter benefitted from the judgment and operated his business under both the settlement and the Lease for 26 years. A closer identity of interest among the parties is hard to imagine. Each party defendant constitutes a successor in interest to the Denhams over the very disputed property whose title and location was finally resolved in the *Denham* settlement judgment. The California law on the same question also clearly indicates that both Water Wheel and Johnson are in privity and thereby bound by the prior judgment since privity "for purposes of . . . collateral estoppel refers to a mutual or *successive relationship to the same rights of property*." *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1070 (1998).

Since both Water Wheel and Johnson were plainly in privity with the Denhams for purposes of collateral estoppel, it made no difference that they were not literally parties to the *Denham* litigation resulting in the preclusive settlement judgment; they are still bound by it and it has the same preclusive effects on their relitigating both the questions of title to and location of the formerly leased property. As between the parties to this litigation, that matter was finally determined by the *Denham* settlement judgment and they had no legal right to attempt to relitigate such questions.[5] Thus, the Tribal Court correctly held that the Defendants/Appellants were precluded by the *Denham* settlement judgment from claiming either that the Tribe did not own the formerly leased property or that such property was not located within the Tribe's Reservation. Since operation of the doctrine of collateral estoppel precluded both Defendants/Appellants from any further fact-finding on these questions, they were not, accordingly, denied due process of law by not being able to present evidence on questions as to which they were precluded by operation of law.

Separate from this conclusion, the Tribal Court also correctly concluded in the alternative that the quite separate doctrine of equitable estoppel foreclosed the Defendants/Appellants from contesting either the Tribe's ownership of the formerly leased property or its location within the Reservation.

5 The Defendants/Appellants object that they have subsequently discovered that in settlement negotiations and Congressional correspondence related to on-going water law issues involving the Tribe's water rights in *Arizona v. California* parties in which various parties ventured the view that the western boundary of the Tribe's reservation may not be finally determined. This evidence, since not presented at trial, did not constitute part of the record in this appeal. What the Defendants/Appellants ignore is that the claimants to water adverse to the Tribe's interest in the water litigation were neither parties to nor in privity with any parties in the *Denham* litigation. *As to them,* an argument may perhaps exist that the western boundary of the Tribe's reservation has not been finally determined. By contrast, both Water Wheel and Johnson are in privity with the Denhams and as to these Defendants/Appellants the western boundary of the Reservation was adversely determined by the *Denham* settlement judgment. While others who are not so precluded, might still perhaps be able to litigate such questions, the Defendants/Appellants cannot do so as a result of the doctrine of collateral estoppel. As to them, the western boundary of the Tribe's Reservation has been finally determined by the *Denham* settlement judgment and the formerly leased property was unquestionably within that boundary because it was leased to them directly pursuant that judgment. Thus, the preclusive effect of the consent judgment in the *Denham* litigation indicates that claim of error based on this newly discovered evidence contains no merit since the Defendants/Appellants are legally precluded by the doctrine of collateral estoppel from relitigating the issue on which they claim this evidence is relevant.

Additionally, this Court also notes that by their response to this Court's question at oral argument in the colloquy set forth in footnote 3, the Defendants/Appellants also fully waived this claim of error. If they no longer claim the land in question is not part of the Tribe's Reservation, then their assertion of newly discovered evidence on that question becomes irrelevant.

Unlike collateral estoppel, equitable estoppel does not arise from former litigation, but, rather, from a course of conduct by a party patently at odds with the claims made in the litigation. The doctrine, accordingly, prevents parties from perpetrating frauds on the court by making claims inconsistent with their actual conduct. In particular, the precise equitable estoppel bar invoked by the Tribal Court involves the generally recognized rule that after benefitting from a lease, a tenant may not defend against an eviction proceeding by contesting the landlord's title to the property. As a California court put the matter in *Greenhut v. Wooden*, 129 Cal. App. 3d 64, 68 (1982), a "tenant in possession is estopped from denying the landlord's title as it existed at the outset of the relationship." *See also, McKissick v. Ashby*, 98 Cal. 422, 425-26 (1893) (holdover tenant estopped from challenging landlord's title). This doctrine is long-standing and in the federal courts has the approval of at least the United States Supreme Court, *Goode v. Gaines*, 145 U.S. 141, 152 (1892) and *Williams v. Morris*. 95 U.S. 444, 455 (1877), the Ninth *Circuit, United States v. Jorgensen*, 116 F.3d 1487, 1997 WL 355849 at *1 (9th Circ. 1997) (unpublished memorandum decision rejecting mobile home resident's defense against ejectment claiming that Indian tribe was not the beneficial owner of the lands because "tenant in possession is estopped from contesting the landlord's title in an ejectment action"), and the California federal district courts, *Wendt v. Smith*, 2003 WL 21750676 at *5 (C. D. Cal. 2003) ('a tenant in possession is estopped from contesting the landlord's title in an ejectment action"). The Arizona Supreme Court once described this rule as a "universal law." *Quon v. Sanfuinetti*, 60 Ariz. 301, 303 (1943); see also, *Gibbs v. Basham,* 53 Ariz. 357, 384 (1939) ("a defendant in any action affecting real property, who has gone into possession thereof by virtue of a lease . . . . is estopped from denying the title of the plaintiff from whom he received possession so long as he retains that possession.").

The Defendants/Appellants admit that they claim no ownership or other possessory right in the formerly leased property other than through the Lease during its term. The Lease plainly indicates by its terms that the Tribe constitutes the lessor of the formerly leased property. Water Wheel assumed

occupancy and benefitted from the Lease during its entire term and Johnson did the same by operating Water Wheel on the formerly leased property since 1981 when he purchased all of the Denhams' interest in Water Wheel. While Johnson objects that his signature appears nowhere on the Lease, he is plainly in privity with the Denhams, as noted above, and therefore constitutes the Denhams' successor in interest through the purchase of the Denhams' interest in the lessee, Water Wheel. Furthermore since a corporation can only operate through its agents and employees and the actual owner and operator of Water Wheel since 1981 has been Johnson, he too has clearly benefited from the Lease as the owner of Water Wheel and until the last few years of the Lease conducted himself in a fashion completely inconsistent with his current denial of the Tribe's ownership of the formerly leased property. Accordingly, the Tribal Court correctly found that both Water Wheel and Johnson, the former as lessee and the latter as owner of the lessee, were equitably estopped from denying the ownership rights of their landlord, the Tribe. Since their only claim that the land was not within the western boundary of the Tribe Reservation turned on their claim that the Tribe did not own the formerly leased land, equitable estoppel also precluded them from contesting the locational point as well. Since equitable estoppel foreclosed the Defendants/Appellants from contesting the Tribe's ownership of the formerly leased premises (or indirectly its location within the Tribe's Reservation), the Tribal Court did not deny the Defendants/Appellants due process of law when it foreclosed them from presenting evidence on these questions.[6]

Up to the time of oral argument, arguments made by Defendants/Appellants sometimes appeared to either misapprehend or ignore the legal impacts of the twin doctrines of collateral estoppel

6 Defendants/Appellants also make a series of arguments derived from a limitation set forth in Section 5 of Public Law 88-302 purporting to prevent the leasing of the Tribe's land in California until the western boundary of the Reservation beyond the Colorado River could be finally determined. The Tribe claims the Secretary later accepted that the final determination had occurred and leased lands (including the lease to the Defendants/Appellants), while the Defendants/Appellants deny that fact. The problem with the argument of the Defendants/Appellants is that the leasing of the land did actually occur, they were a principle beneficiary such leasing (having enjoyed the use of the formerly leased property during the extended term of the Lease). Accordingly, by the same principles of both collateral estoppel and equitable estoppel they are foreclosed as a matter of law from contesting the lawfulness under Section 5 of Public Law 88-302 of the leasing, the benefits of which they enjoyed for decades.

(issue preclusion) and equitable estoppel discussed in this subsection. Perhaps review of additional outside counsel who in this Court orally presented this matter for the Defendants/Appellants resulted in a different view of the case. In any event, for whatever reason, the Defendants/Appellants ultimately appear to have accepted the rulings of the Tribal Court on preclusion since they withdrew and waived at oral argument any claim that the formerly leased lands are not owned by the Tribe or are not within the Tribe's Reservation. While their argument was less clear on the question of whether any hearing was required on these issues, this discussion patently indicates that as a direct result of the doctrines of collateral estoppel and equitable estoppel the Defendants/Appellants were not only not entitled to a hearing on such questions, they were legally foreclosed from contesting them. Thus, no reversible error or denial of due process can be found in the Tribal Court's determinations on collateral estoppel and equitable estoppel in its Order Denying Defendant Water Wheel Recreation Area, Inc., and Robert Johnson's Motions to Dismiss for Lack of Jurisdiction dated January 15, 2008.

3. ***Montana*, Tribal Court Jurisdiction, the Lease, and the Relevance of Consent**

Independent of the ownership and location of the formerly leased property, Defendants/Appellants also argue that even if the formerly leased property is located within the Tribe's reservation a series of federal common law and Lease-based limitations prevent the Tribal Court from exercising jurisdiction over them without their consent, which they claim they have never given. Most importantly, Defendants/Appellants claim that the line of cases following and applying *Montana v. United States*, 450 U.S. 544 (1981), foreclose the jurisdiction of the Tribal Court over this matter. They also claim that under the Lease they never consented to Tribal Court jurisdiction and that remedial provisions contained within the Lease constitute the exclusive remedy both for their failure to pay rents as required during the term of the Lease and for their holding over in possession of the property after the expiration of the Lease. For reasons stated in this subsection all of these arguments are misplaced

either in misstating the law or the Lease or misapplying each to the facts of this case.

Under the express language of CRIT. Law and Order Code, Article I, Sections 102(B) and 101, the jurisdiction of the Tribal Court is spelled out as being " [s]ubject to any restrictions or exceptions imposed by or under the authority of the Constitution or laws of the United States." Thus, as a matter of *tribal law*, the Colorado River Indian Tribes has chosen to incorporate any federal law limitations on tribal court jurisdiction into their own definition of the scope of jurisdiction of their tribal courts. Thus, in interpreting Sections 102(B) and 101, this Court must also look to federal law limitations on tribal court jurisdiction. The Defendants/Appellants correctly note that a federal common law line of cases following, interpreting, and applying *Montana v. United States*, 450 U.S. 544 (1981) constitutes the primary such federal law.[7] Since Johnson is non-Indian and since he is the owner and operator of Water Wheel, both Defendants/Appellants argue that the *Montana* line of cases precludes the exercise of any tribal jurisdiction over them without their consent (which they claim they have not given). In so doing, Defendants/Appellants rely before this Court only on two cases in the *Montana* line of cases, *Montana* and the recent decision of the United States Supreme Court in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. ___ , Sl. Op. No. 07-411(2008)[8]

7 This Court notes that the express provisions of sections 101 and 102(B) of Article I the CRIT. Law and Order Code incorporate only limitations found in the "Constitution *or laws* of the United States." Emphasis supplied. This Court notes that neither *Montana v. United States*, 450 U.S. 544 (1981) nor any of the cases that follow, interpret or apply its tests purport to be based on either the Constitution of the United States or any positive written law of the United States adopted by Congress or implemented through federal regulation. Rather, the *Montana* line of cases constitutes an entirely judge-made body of common law limitations of tribal court jurisdiction neither mandated nor authorized by any positive federal statute or regulation. *See generally*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Az. St. L. Rev. 113, 204-35 (2002). In *United States v. Lara*, 541 U.S. 193 (2004), the majority of the Supreme Court expressly held that the judge-made jurisdictional limitations on tribal court were *not* constitutionally mandated and therefore could be altered by Congress. This Court recognizes that the interpretation of the "or laws" language of the federal law limitation set forth in sections 101 an 102(b) raises the important question of whether that language is limited to positive written law enacted by Congress or adopted through federal regulation or also includes judge-made common law limitation, such as the *Montana* line of cases. Since the parties failed to notice this legal problem and did not brief or argue it, this Court will assume for purposes of this case only, without finally deciding, what both parties appear to have assumed in their briefs and oral arguments, i.e. that the phrase "or laws" contained in sections 101 and 102(B) is broad enough to encompass the *Montana* common law limitations on tribal court jurisdiction.

8 Associate Justice Robert N. Clinton notes, in the interest of full disclosure, that he additionally sits as an Associate Justice of the Cheyenne River Sioux Tribal Court of Appeals. The jurisdiction of the Cheyenne River Sioux tribal courts was at issue in *Plains Commerce Bank*. Nevertheless, Associate Justice Clinton did not sit on the panel of Cheyenne River Sioux Tribal Court of Appeals that heard the *Plains Commerce Bank* appeal since he was at the time on a sabbatical from his permanent job as a law professor at the Sandra Day O'Connor College of Law at Arizona State

In *Montana*, the Supreme Court for the first time considered the relevance and application of its decision in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) (holding that Indian tribes lacked inherent tribal *criminal* jurisdiction over non-Indians in the absence of Congressional action) to question of civil, as opposed to criminal, jurisdiction. Specifically, in *Montana*, the question involved the regulatory power of the Crow Tribe over non-member hunting and fishing on non-Indian owned land within the Crow Reservation, While the Supreme Court expressly rejected automatic application of the *Oliphant* case to determine questions of the scope of tribal power over non-members on non-Indian owned lands within the Reservation, it nevertheless rejected application of the Crow laws in that limited context. Finding that Congress had not through treaty or statute expressly or implied authorized the Crow Tribe to exercise such jurisdiction, the Court announced the classic so-called *Montana* test which thereafter commonly has been employed in the absence of any other Congressional indication to determine for federal common law purposes the limitations on tribal jurisdiction over non-members for conduct on non-Indian owned lands within an Indian reservation. The so-called *Montana* test derives from the following language in the *Montana* opinion which occurs immediately after rejecting the application of *Oliphant* to questions of tribal civil jurisdiction over non-members:

> A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee,* [358 U.S. 217 (1959] at 223, *Morris v. Hitchcock*, 194 U.S. 384 [1904]; *Buster v. Wright*, 135 F. 947, 950 (CA8 [1905]); *see Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152-154 [1980]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court*, 424 U.S. 382, 386 [1976]; *Williams v. Lee, supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 [1906]; *Thomas v. Gay*, 169 U.S. 264, 273 [1898].

*Montana v. United States*, 450 U.S. 544, 56-66 (1981). Based on this quoted language, the *Montana*

University and was spending his semester sabbatical in New Zealand. He was replaced on the Cheyenne River Sioux Tribal Court of Appeals panel for the *Commerce Plains* Bank appeal by another Associate Justice *pro tem.*

test generally recognizes tribal jurisdiction, including tribal court jurisdiction over " the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or when "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." While not cited or otherwise relied upon by the Defendants/Appellants, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court surprisingly held that it believed that, unlike federal and state courts, tribal court subject matter jurisdiction should be no broader than than tribal regulatory and taxing authority. Therefore it suggested that the *Montana* test should be applied to determine the scope of tribal court subject matter jurisdiction and found under that test that a tribal court lacked civil jurisdiction over an automobile accident case cases between non-Indian drivers that occurred on a state highway right-of-way within an Indian reservation. Critical to its analysis was the fact that under the indefinite highway right-of-way granted to the state for the highway in question, the Tribe has no continuing possessory or other right to occupy the land although it may have had a theoretical ownership and possessory right in the land sometime in the future should the state ever abandon its highway. Thus, the lack of actual ownership and occupancy in the state highway right of way was critical to decision.

Originally, developed exclusively as a test for tribal jurisdiction over non-member activities *on non-Indian owned land* within an Indian reservation, the Supreme Court has gradually eroded this requirement to the point that in *Nevada v. Hicks,* 533 U.S. 353 (2001), the Court suggested that the *Montana* tests constituted the appropriate test to apply to most exercises of tribal civil jurisdiction over non-members. In *Hicks* the Court relegated the question of ownership of the affected land to an important factor in the applying the *Montana* tests:

> The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of non-members is "necessary to protect tribal self-government or to control internal relations." *It may sometimes be a*

*dispositive factor.*

*Id.* at 360 (Emphasis supplied). Since federal law has always recognized the power of Indian tribes to exclude non-Indians from Indian-owned land within the reservation, the last sentence of the above-quoted portion of the *Hicks* opinion has proved accurate. With perhaps the since exception of *Hicks*, the United States Supreme Court, as it recognized in *Montana*, has consistently upheld the exercise of tribal authority over non-member activity *on tribal or other Indian owned land* within an Indian reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that both the tribal power to exclude non-members and the tribe's inherent sovereignty sustained tribal oil and gas severance taxes on non-Indian firms developing Indian oil and gas reserves under lease); *Kerr-McGee Corp. v. Navajo Tribe*, 471 US 195 (1985) (same result despite no requirement for federal approval of the tribal tax ordinance); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (tribe could regulate and license non-Indian hunting of game on its lands where it developed and managed the game herds as part of its tourist industry); *Washington v. Conf'd Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (tribes had inherent sovereign authority to tax cigarette sales to non-members at stores they owned and operated on their lands); *Williams v. Lee*, 358 U. S. 217 (1959) (tribal court had exclusive jurisdiction over a collection case brought by a licensed Indian trader against a tribal member for goods sold on the reservation). In *Hicks*, the facts were truly unusual both because the tribal court asserted jurisdiction not only over a non-member, but over a *state official*, for damages occasioned by repeated and unsuccessful search warrants and seizures of his property on the reservation. Furthermore, while the searches and seizures allegedly occurred on the plaintiff's Indian owned land (not tribal land) within the Reservation, they actually involved a state investigation of *off-reservation* crimes, not crimes arising on tribally-owned land within the Reservation.

While many Supreme Court decisions (many of which are cited above or in the *Montana* quotation announcing the *Montana* tests) sustain tribal civil authority (including regulatory, taxing, and

adjudicatory powers) over non-Indians for conduct occurring *on tribal lands* within the Reservation, the Defendants/Appellants have not cited and this Court is not aware of any decisions of the United States Supreme Court or any Ninth Circuit holding that an Indian tribe lacks civil adjudicatory power, i.e. subject matter jurisdiction, over a cause of action affecting the Tribe arising from non-member conduct *on tribal land.* Tribal jurisdiction in such cases would seem almost compelled by the *Montana* tests. As in this case, most non-member conduct occurring on Indian lands within a reservation occurs there because of consensual commercial or other relationships between the Tribe or its members and the non-Indians in questions. In *Williams v. Lee* and *Colville,* the consensual relationship involved the businesses conducted by non-Indian traders and the tribes respectively on Indian lands. As in this case, in both *Merrior* and *Kerr-McGhee* the consensual relationship involved leasing, surface leasing in this case and oil and gas or mineral leasing in *Merrior* and *Kerr-McGhee*. Thus, both *Merrion* and *Kerr-McGhee* clearly hold that Indian tribes have inherent sovereignty over non-member activities occurring pursuant to lease on tribally-owned lands. Those two cases therefore compel the result that where, as here, the possessory claims of Defendants/Appellants derive solely from a federally-approved tribal surface Lease of lands owned by the Tribe within its Reservation, the Tribe has power to regulate, tax and adjudicate that business relationship. Consequently, these cases plainly hold that this case fully satisfies the consensual relationship prong of the *Montana* test. That ground alone constitutes a sufficient reason to affirm the decision of the Tribal Court rejecting the motions to dismiss on *Montana* jurisdictional grounds filed by the Defendants/Appellants.

In addition, however, to the consensual relationship prong of the *Montana* test, this case also fully satisfies the economic security prong of the last sentence of the *Montana* test. For the Tribe, as for most Indian tribes, its land constitutes its single most valuable economic asset. Federal law has long encouraged both surface and subsurface tribal leasing of Indian land for tribal revenue purposes. *See* 25 U.S.C. §§ 415; 397-398e. If the Tribe has no power to monitor whether a lessee like Water

Wheel actually pays its rents under such leases and to enforce such rents against the lessee through its tribal laws, it frequently will have no effective way to assure that it is paid the substantial tribal rents that it is due. The size of the rents due in this case and the damages awarded based on the evidence presented to the Tribal Court clearly indicate that substantial tribal revenues are involved. Clearly this not insubstantial cash flow constitutes an essential portion of the Tribe's "economic security," within the meaning of the last sentence of the *Montana* test. Thus, in addition to satisfying the consensual relationship prong of the *Montana* test, the Tribe also carried its burden in demonstrating this case also satisfies the "economic security" part of the last sentence of the test since the failure of the Defendants/ Appellants to both pay rents due under the Lease and to return peaceable possession to the Tribe without the need for legal process as expressly required by the Lease clearly interfered with a significant revenue stream that Tribe was due *from its own land.* Nothing could more clearly imperil the economic security of an Indian tribe than losing control over both its own lands and the rental income derived therefrom. If this Court were to sustain the Appellants/Defendants claims no Indian tribe would ever again avail itself of the leasing opportunities provided to the Tribes by federal statute for fear that such leasing might result in the *permanent* loss of control over their own lands notwithstanding subsequent expiration of the Lease, as occurred here.

Nothing in the arguments of the Defendants/Appellants contradicts this analysis. Defendants/Appellants place primary reliance for their *Montana* argument on the the Supreme Court recent decision in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.,* 554 U.S. ___ , Sl. Op. No. 07-411(2008). They read the decision in *Plains Commerce Bank* to generally hold that tribal efforts to regulate non-members are "presumptively invalid" and that "tribes, do not, as a general matter possess authority over non-Indians who come within their borders." Appellant's Opening Brief, p. 5 (selectively quoting *Plains Commerce Bank*). The problem with this analysis is that totally ignores the central reason for the result in *Plains Commerce Bank.* In that case, the tribal court asserted subject

matter jurisdiction over a banking transaction involving a bank located on *non-Indian* owned land within the reservation that did business with a business owned by tribal members. The precise business in question, however, involved the sale of fee land, i.e. non-Indian owned land, within the reservation. Thus, as the Court noted, both the location of the bank and, more importantly, the land that constituted the central issue in the case involved non-Indian owned fee land that the Indian owned business sought to purchase. Central to Chief Justice Roberts' analysis for the Court was the point that "[o]ur cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." Commerce *Plains Bank*, Sl. Op. p. 10. Throughout the opinion, the Supreme Court carefully highlights the fact that the Tribal Court purported to assume jurisdiction over a transaction involving non-Indian owned land, i.e. fee land, within the reservation. In their selective quotations from *Commerce Plains Bank*, the Defendants/Appellants consistently edited out those portions of the Supreme Court opinion, incorrectly making it appear that the case had flatly held that the Court had squarely held that tribal courts lacked subject matter jurisdiction over non-members even for transactions with the Tribe involving the leasing of tribal lands. Careful reading of the *Commerce Plains Bank* opinion clearly indicates that the fee status of the land involved in the contested transaction constituted the central element determining the lack of tribal court jurisdiction. In light of the foregoing discussion, *Commerce Plains Bank* clearly falls into that line of cases holding that Tribes lack civil jurisdiction over non-member activities on *non-Indian owned lands* within the reservation. Those cases include *Montana*, *Strate*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), *Brendale v. Confederated Tribes of the Yakima Res.*, 492 U.S. 408 (1989), and *South Dakota v. Bourland,* 508 U.S. 679 (1993). Since this case does *not* involve non-Indian fee lands, but, rather, the continued authorized occupancy by the Defendants/Appellants of tribally-owned leased land located within the Tribe's Reservation, *Commerce Plains Bank*, the primary authority relied upon by the Defendants/Appellants, plainly involves a distinguishable situation.

Contrary to the reading of *Montana* and *Plains Commerce Bank* offered by the Defendants/Appellants nothing in those cases demands individual consent as a precondition to the exercise of Tribal Court jurisdiction over non-members. While one prong of the the *Montana* test involves non-members engaging in consensual relations with the Tribe or its members through commercial dealings or, as here, leasing, nothing in the consensual relationship prong of the *Montana* test demands, as *Atkinson Trading Co.* makes clear, a separate consent to jurisdiction so long as the matter regulated, taxed or adjudicated arises directly from the preexisting consensual relationship. Here the consensual relationship constitutes the Lease of tribally-owned lands the Tribe entered into with Water Wheel in 1975. Since Johnson owned and operated Water Wheel since 1981, he clearly constituted the central operating cog in that relationship. The cause of action in this matter derives directly from that relationship since it involves both the failure to required rents during the term of the Lease and the failure of the Defendants/Appellants to peaceably return possession of the formerly leased property to Tribe, as expressly required by the Lease, at the expiration of the Lease term. Nothing in *Montana* requires any further consent on the part of the Defendants/Appellants to the exercise of subject matter jurisdiction over this proceeding. Furthermore, if any separate consent to jurisdiction were required, Paragraph 34 of the Lease Addendum provides precisely that consent, as explained below.

As the Supreme Court recognized in *United States v. Wheeler,* 435 U.S. 313, 323 (1978), "[w]e have recently said that: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory* . . . . [U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Quoting *United States v. Mazurie,* 419 U.S. 544, 557 (1975) (Emphasis added). This case involves precisely the type of case both *Montana* and *Wheeler* anticipated – a Tribe exercising civil subject matter jurisdiction over

non-Indians who, after leasing *tribal property,* refused both to pay required rents under the Lease and to vacate the property and return possession of the leased property to Tribe at the expiration of the Lease as required by the express Lease provisions. No case could more clearly fall within the *Montana* exceptions or the general description of tribal sovereignty contained in *Wheeler* and *Mazurie*. Thus, the Tribal Court correctly rejected that portion of the motions to dismiss filed by Defendants/Appellants that relied upon the *Montana* line of cases.

In addition, to relying on *Montana*, the Defendants/Appellants also advanced a separate line of analysis that relied on on their interpretation of the Lease terms under which they claimed they could not be subjected to the jurisdiction of the Tribal Court without their consent. Before detailing the Defendants/Appellants hyper-technical parsing and interpretation of the lease provisions, this Court must note that their technical reading of the provisions of the Lease rings quite hollow as a defense to their eviction upon overstaying the Lease term. Under the provisions of the lease, Water Wheel was expressly required to "peaceably and *without legal process* deliver up the possession of the leased premises" to the Tribes, which they admittedly and obviously failed to do. Lease Addendum, ¶ 29. This Court finds it more than a bit ironic that the Defendants/Appellants should continue to advance their hypertechnical reading of the Lease terms relative to the jurisdiction to enforce the Lease when they have so obviously failed to comply with this critical provision of the Lease. Notwithstanding the extraordinary irony in their position, this Court nevertheless will briefly address their claim which it finds totally lacking in merit.

At its core, the jurisdictional claim advanced by the Defendants/Appellants asserts that *by the terms of the Lease*, they were assured that they would not be subject to the jurisdiction or laws of the Tribe without their consent. While the express terms of the Lease contradict this argument, as more fully explained below, this Court begins by noting that the United States Supreme Court expressly rejected a similar argument. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the oil and gas

lessees of Jicarilla Apache lands contested the imposition of tribal oil and gas severance taxes on their operations, claiming that their oil and gas leases failed to authorize such taxation and since the leases eliminated the tribal power to exclude them from those lands, the Tribe had no legal basis for exercising such jurisdiction over them. The United States Supreme Court expressly rejected this contention. It held that the Tribe's inherent sovereignty reached the activities of non-members conducted on Indian owned land pursuant to leases with the Tribe. Accordingly, the Court wrote:

> The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980); *Wisconsin v. J. C. Penney Co*., 311 U.S. 435, 444 -445 (1940). They benefit from the provision of police protection and other governmental services, as well as from "`the advantages of a civilized society'" that are assured by the existence of tribal government. *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.

455 U.S. at 137-38. Thus, the Court held that, notwithstanding the existence of the oil and gas leases, the Tribe continued to exercise jurisdiction over the non-member lessees of tribal lands and such inherent sovereignty sustained the validity of the tribal oil and gas severance taxes. Furthermore, insofar as the oil and gas leases failed to authorize or mention such taxes, the Supreme Court held that the leases did not constitute a limitation on the power of the tribe to exercise its jurisdiction, in that case taxing authority, over non-members who lease its lands. The Court indicated:

> [I]t does not follow that the lawful property right [derived from the leases] to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation. *A non-member who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.* The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.

455 U.S. at 144-145. (Emphasis added, footnotes omitted). Thus, based on *Merrion*, the failure to the

Lease to expressly authorize the exercise of jurisdiction by the Tribe to enforce the lease or to evict the Defendants/Appellants after the expiration of the Lease neither precluded the Tribe from exercising its inherent sovereignty over its lands nor constituted a lease modification, as argued by the Appellants/Defendants. Consequently, the argument of the Appellants/Defendants fails as a matter of law since it involves a legal claim that already has been squarely rejected by the United States Supreme Court.

In addition to being incorrect as a matter of law, however, the argument of the Defendants/Appellants regarding the Lease also constitutes an inaccurate reading of the Lease that ignores its express terms. The dispute over how to interpret the Lease turns on section 34 of the Lease Addendum, which provides in relevant part:

> Lessee . . . agree[s] to abide by all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, *or that may be hereafter in force or effect* provided, that no future laws, regulations or ordinances shall have the effect of changing or altering the express provisions and conditions of this lease *unless consented to in writing by the lessee.*

(Emphasis supplied in both italics and underscoring). The dispute over the significance of the Lease to the jurisdictional question turns on how one reads this Lease provision. The Tribe, emphasizing the italicized and non-underscored language of Section 34, notes that under the Lease Water Wheel agreed to be subject to laws of the Tribe, and therefore to tribal authority to enforce those laws, both the laws existing at the time of entering into the Lease in 1975 and those "that may be hereafter in force or effect." While there is no dispute that the precise eviction ordinance under which the Complaint in this matter was filed, CRIT Ordinance 04-06, was first enacted in 2004, long after the Lease had been entered into by the parties, they disagree on whether the tribal eviction ordinance can be applied to this case. The Defendants/Appellants, noting that the Lease expressly provides what the law otherwise would indicate, i.e. that the Lease was subject to 25 C.F.R. pt. 131 providing dispute resolution

procedures for disagreements arising under and during the terms of the lease, expressly argue that such procedures constituted an exclusive remedy and therefore were not subject to alteration by the Tribes without their express consent, which they claim was expressly required by the underscored and italicized language above. Thus, based on this express language in Section 34 of the Lease, the Defendants/Appellants claim they cannot be subjected to the jurisdiction of the Tribal Court without their express written consent, which they claim has not occurred.

In addition to violating the express holding of *Merrion,* this argument offered by the Defendants/Appellants also completely misreads the provisions of the lease. Nothing in the Lease or the law purports to make the provisions 25 C.F.R. pt. 131 the *exclusive* way in which disputes over the lease could be resolved during the lease term. More importantly, even the Defendants/Appellants admit in their Opening Brief (p. 15), 25 C.F.R. pt. 131 only covers disputes regarding the Lease *during the lease term*, i.e. to use their terminology "arising under the lease." The Tribe filed an action for eviction *after* expiration of the Lease. In its Complaint, the Tribe seeks (1) to evict the Defendants/Appellants from the formerly leased property to which they concede they otherwise have no lawful right to occupy, (2) to secure damages to their illegal occupancy after expiration of the Lease, and (3) to recoup the remaining unpaid rent. Since the Lease had already expired *by its own terms* when the Tribe first filed its Complaint, nothing in 25 C.F.R. pt. 131 applied to the matters raised in the Complaint. Consequently, exertion of jurisdiction by the Tribal Court did not constitute a change or alteration of the "the express provisions and conditions of this lease" within the meaning of section 34 and therefore did not require express written consent from the Defendants/Appellants under that provision.

Defendants/Appellants cite *Marlin D. Kuykendall v. Director, Pheonix Area, BIA,* IBIA 80-24-A 8 IBIA 76, 13-14 (1980) in support of their position regarding 25 C.F.R. pt. 131. For the reasons stated above, however, the *Kuykendall* case is completely distinguishable. That case involved an effort by an Indian tribe to terminate a federally-approved lease of tribal lands *during the term of the lease* without

the approval of the Secretary of the Interior. Both *Kuykendall* and the Ninth Circuit decision approving that decision, *Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072 (9th Cir. 1983), basically required involvement of the Secretary of the Interior in tribal efforts to terminate federally-approved tribal leases *during the lease term.* The present case does not involve any efforts by the Tribe to terminate the lease. Rather, in the instant case, the Lease terminated by its express terms at the expiration of the 32 year Lease duration. Neither *Kuykendall* nor *Yavapai-Prescott Apache Indian Tribe* held that 25 C.F.R. pt. 131 constituted an exclusive remedy that completely divested tribes of jurisdiction to enforce federally-approved leases of tribal lands. They only held that the Secretary must be involved through such procedures in any termination of such a federally approved lease *before its expiration.* Thus, *Kukendall* is totally inapplicable. Accordingly, despite the protests of the Defendants/Appellants to the contrary based on these cases, the Tribal Court correctly relied on the unpublished opinion in *Wendt v. Smith*, 2003 WL 21750676 at 5 (C.D. Cal. 2003) for the proposition that entering into a lease of tribal lands constituted a consent to tribal court jurisdiction under *Montana.*

In addition to the complete inapplicability of 25 C.F.R. pt. 125 to actions, like the present one, commenced *after expiration of the Lease,* the interpretation of section 34 offered by the Defendants/Appellants also contradicts the express terms of the Lease. Unquestionably, by agreeing to section 34 of the Lease the Defendants/Appellants agreed that they were subject to the laws of the Tribe and, therefore, to tribal authority and jurisdiction. Thus, the Defendants/Appellants expressly agreed to abide by and be subject to tribal jurisdiction when they signed the Lease. While it is quite true that the Eviction Ordinance under which this action was brought was first enacted in 2004, long after the Lease was signed, that did not mean that prior to enactment of the ordinance the Tribe previously had no authority to evict the Defendants/Appellants. The Defendants/Appellants confuse the question of jurisdiction with the law that creates the cause of action. As *Merrion* and *Kerr*-McGhee held, the Tribe's jurisdiction to evict persons who illegally occupy tribal lands constitutes part of its inherent

tribal sovereignty and existed long before the parties entered into the Lease. Prior to enactment of the ordinance, any such eviction could have occurred under a tribal common law eviction procedure. Thus, since sovereignty and control over tribal land and the corollary power to evict those who trespass on it constitute an essential part of the sovereignty of any tribe, as noted above, clearly when the Defendants/ Appellants agreed to be subject to the laws of Tribe in section 34 of the Lease Addendum they consented to the exercise of such jurisdiction by the Tribal Court to enforce those laws. If no common law action existed under tribal law, CRIT law also authorized a tribal court to adopt as tribal law any applicable federal or state procedure in the absence of any governing tribal law. CRIT. Law and Order Code, Art. I. sec. 110(B). While enactment of the Eviction Ordinance, changed a formerly common law action (or one that adopted federal or state statutory procedures) into a tribal statutory cause of action, it did not otherwise change or alter in any fashion either the jurisdiction of the Tribe or "the express provisions and conditions of this lease." Therefore, under the express provisions of section 34 no written consent was required for this change since it did not alter the preexisting consent the Defendants/Appellants had given to be subject to the laws, and, therefore, the jurisdiction of the Tribe and its courts and in no other way changed their obligations under the Lease. Accordingly, the demand of the Defendants/Appellants for written consent to the exercise of jurisdiction by the Tribal Court simply misreads section 34. Water Wheel formally provided such written consent when they signed the Lease, as the *Wendt* case indicates. By purchasing all of the Denhams' interest in Water Wheel in 1981, residing thereon, and benefitting from the Lease since that date by operating the Water Wheel resort, Robert Johnson also consented to the exercise of jurisdiction by the Tribal Court. Accordingly, this Court finds that the Defendants/Appellants are completely incorrect in their interpretation of the Lease and that any and all consent to the jurisdiction of the Tribal Courts necessary to support such authority occurred when Water Wheel entered into the Lease and when Robert Johnson acquired the Denhams' interest in Water Wheel in 1981 and operated Water Wheel under the Lease since that date.

Accordingly, neither the *Montana* line of cases, including *Plains Commerce Bank*, nor the Lease precluded the exercise of jurisdiction by the Tribal Court. For this reason, the Tribal Court correctly rejected the motions to dismiss filed by the Defendants/Appellants on these grounds.

**4. Various Other Procedural Claims Relating to the Jurisdictional Issues**

Insofar as the Defendants/Appellants object to the failure of the Tribal Court to admit evidence regarding the ownership by the Tribe or the western boundary of the CRIT Reservation or otherwise object that recently discovered evidence suggests the western boundary has not been finally determined as to other parties, the foregoing discussion suggests that such objections cannot legally constitute reversible error. Both collateral estoppel (sometimes known as issue preclusion) and equitable estoppel legally foreclosed both Defendants/Appellants from contesting and re-litigating these issues. Likewise, for the same reasons, the Defendants/Appellants are precluded from arguing, as they have, that section 5 of the Public Law 88-302 precluded the Secretary and the Tribe from leasing of the very property which the Defendants/Appellants or their predecessors in interest actually leased for 32 years from the Tribe.

Finally, both Water Wheel and Robert Johnson were properly served while on the leased property within the Reservation. Thus, no proper challenge can be made to the personal jurisdiction the Tribal Court exercised over the person of both defendants.

This Court therefore rejects the remaining arguments offered by the Defendants/Appellants contesting the jurisdiction of the Tribal Court. For the reasons discussed above, this Court concludes that the Tribal Court correctly held that it had jurisdiction over this matter and therefore dismissed the motions to the dismiss filed by the Defendants/Appellants. For that reason, this portion of the Judgment and the proceedings on which it was based must be affirmed.

**B. Piercing the Corporate Veil**

In addition to challenging the jurisdiction of the Tribal Court, the Appellants/Defendants also

focused the remainder of their Opening Brief and their oral argument suggesting that the Tribal Court committed reversible error in finding against Appellant/Defendant Robert Johnson on a theory of piercing the corporate veil. At various points in their brief and oral argument, they suggested inconsistently either that insufficient evidence in the record supported such a finding or that this finding was made as a *legal sanction* for failure to comply with discovery orders. For the reasons stated in this section, this Court rejects this claim of error.

First, in suggesting that the finding of liability against Johnson rested solely on piecing the corporate veil, Appellants/Defendants misread the Judgment and its basis. Defendant Robert Johnson has never contested that he owned and operated Water Wheel and that he resided at the resort. Thus, insofar as Defendant Robert Johnson remained on the formerly leased property after expiration of the term of the Lease, the Tribal Court correctly found that Johnson, like Water Wheel, had trespassed on property owned by the Tribe and was therefore liable for damages for overstaying the lease. Thus, insofar as the Tribal Court was authorized to award trespass damages for continued occupation of the formerly leased property after expiration of the term of the Lease, those damages were properly awarded *directly* against Appellant/Defendant Robert Johnson, jointly and severally with his co-trespasser, Water Wheel. The damages for overstaying the Lease therefore were not primarily based on a theory of piercing the corporate veil, but, rather, on a direct theory of trespass. Piercing the corporate veil merely constituted a secondary, alternative ground for such damages for trespass from overstaying the Lease. As discussed more fully below, this Court has found that by adopting a theory of damages for overstaying the Lease based on interference with advantageous business relationships, the Tribal Court employed an incorrect measure of damages which must be reversed and remanded for recalculation on a measure of fair rental value. Nevertheless, when the trespass damages for overstaying the Lease are recalculated, Appellant/Defendant Robert Johnson will remain jointly and severally liable for them due to his continuing trespass on the formerly leased property after expiration

of the term of the Lease. Since Appellant/Defendant Robert Johnson has not challenged in this Appeal the finding of trespass caused by overstaying the Lease and since the award of damages for his continuing trespass on the formerly leased property after expiration of the term of the Lease alternatively rests on those independent grounds, his claimed error in the award of damages based on piercing the corporate veil cannot justify reversing the award of trespass damages for overstaying the Lease after expiration of its term. Rather, this claimed error in piercing the corporate veil only can apply to those portions of the Judgment finding Appellant/Defendant Robert Johnson jointly and severally liable for damages for unpaid rent due under the Lease and for the attorneys fees the Lease expressly provides for enforcing its terms, including the obligation to return the leased property to the Tribe at the expiration of the Lease.

Appellants/Defendants persistently objected that the corporate veil only could be pierced by adducing sufficient proof at trial that would satisfy federal common law standards for piercing the corporate veil. Throughout their Petition for Appeal, Brief and oral argument, Defendants asserted that the only means to pierce the Defendant Water Wheel's corporate veil was in conformance with federal common law. See Petition for Appeal at 15-19. See also Appellants' Opening Brief at 4; Reporter's Transcript of Proceedings, Appeal Hearing at 4-9 (Thursday, November 6, 2008). During oral argument, it was asserted, despite Defendants' counsel having "conducted extensive computer research" (see Reporter's Transcript of Proceedings, Appeal Hearing at 8, line 18 (Thursday, November 6, 2008)), that piercing the corporate veil could not be done as the trial court did. Thus, Appellants/Defendants argue, without citing any support, that the lower court could not pierce the corporate veil because it "was not alleged in CRIT's lawsuit and goes beyond the scope of the Complaint" (Petition at 15) and there was "no allegation, no briefing and no trial testimony on the piercing of Water Wheel's corporate veil" (Petition at 15).

The problem with these claims by Appellants/Defendants is that they miss or ignore the basic

thrust of the Tribal Court's reasoning in piercing the corporate veil. Despite repeated discovery requests and enforcement orders, Appellants/Defendants had refused to supply the basic corporate and financial records required for the Tribe to ascertain the financial relationship between Defendants Water Wheel and Johnson and to ascertain whether and to what extent the corporate separation had been maintained. CRIT clearly was entitled to such records to determine whether it should amend its Complaint to add claim of piercing the corporate veil if such records disclosed that Defendant Robert Johnson was employing Defendant Water Wheel as a shell corporation to funnel the proceeds of the Water Wheel resort into his own personal accounts. CRIT was also entitled to discover whether it appeared that Defendant Johnson had adopted a strategy of overstaying the term of the Lease, continuing to collect rents from resort patrons during that period and potentially funneling those proceeds *without any payments to the Tribe* through Water Wheel into his own personal accounts so that in the event damages were awarded against Water Wheel, it could declare bankruptcy and Johnson could retain the potentially illegally secured proceeds. The persistence of Water Wheel and Johnson in refusing to supply requested corporate and financial records must have given the Tribal Court some suspicion that the Appellants/Defendants had adopted precisely such financial strategy.

While piercing the corporate veil had not originally been plead in the Complaint, the persistent discovery requests and orders related to those financial records, clearly placed Defendants on notice *before* trial that such questions were at issue. When Defendants ultimately filed a Motion in Limine to enforce the discovery orders, Defendants clearly received renewed formal notice of their discovery default and the fact that such questions were before the Trial Court. The transcript of the hearing on the Motion in Limine also demonstrates that Defendants and their counsel were placed on notice that findings of fact might be made against them if they did not supply the necessary financial and corporate records. The transcript of the Motion in Limine Hearing in the Tribal Court on on June 4, 2008 with attorneys Frame and Welch and Defendant Johnson present demonstrates the following admonition:

> THE COURT: . . . What I'm going to do is – I have the background that I need with regard to ruling on the motion in limine. I'm not going to grant the motion in limine. What I'm going to do is I'm going to piecemeal it. As we go through the trial, when [the plaintiff] present evidence, if you feel – if you are arguing that I enter a ruling with regard to that specific fact, [page 58] you can make our arguments at that time, and I'll hear the responses, and I'll make a ruling with regard to that particular fact. *Whether I'm going to find that that fact has been proven because of failure to respond to a pretrial request, I'll make the ruling at that time* . . . I don't know that we'll have a ruling at the end of three days – we may; we may not – . . . ."

Transcript, Motion in Limine Hearing, June 4, 2008 at 57-58 (Emphasis supplied). Notwithstanding such admonitions, the corporate and financial records continued to be withheld.

Thus, the findings of fact of the Tribal Court related to piercing the corporate veil ultimately were not and could not be based on evidence related to the capitalization of Water Wheel, its compliance with corporate formalities, and evidence of the relationship between Defendants Water Wheel and Johnson since both Defendants doggedly persisted in withholding such evidence from both the Tribe and the Tribal Court. Rather, the Defendants, by their refusal to comply with pretrial discovery requests and orders, forced the Tribal Court to do what it warned against in the June 4, 2008 hearing on the Motion in Limine, i.e. to find the facts relative to piercing the corporate veil against the Defendants as a sanction for their refusal to disclose the necessary financial and corporate records.

Before this Court, Appellants/Defendants have tried to rehabilitate their behavior and reconceptualize their litigation strategy. The argue:

> If the lower court "was attempting to infer that Water Wheel had somehow committed fraudulent acts during the discovery phase of [the] trial [as its basis for piercing Water Wheel's corporate veil] – such an inference is simply wrong and inappropriate. The Court should not and, indeed precedent indicates, can not disregard the corporate entity based on a corporate entity's litigation strategy"

Petition at 17, 17 n. 8. They cited *Board of Trustees of Mill Cabinet Pension Trust Fund for Northern California v. Valley Cabinet & MFG. Co.,* 877 F.2d 769 (9th Cir. 1989) for the proposition that because "corporate counsel advised sole shareholder that corporation 'did not owe contribution payments' to

plaintiff and finding this supported an inference that the shareholder [did] not intend to defraud the plaintiff" (Petition at 17 n. 8), Water Wheel's trial counsel's litigation strategy to refuse to comply with discovery requests and the trial court's Discovery Order, and the lower court's subsequent grant of CRIT's motion in *limine* ("simply because CRIT claimed that Johnson waived or admitted certain acts or omissions during the discovery disputes in this case that would subject him to personal liability – particularly when the Complaint made no allegation of piercing the corporate veil" (Petition at 18)), was reversible error. As in several other claims made by the Appellants/Defendants discussed above, the complaint that the Defendants Water Wheel and Johnson violated the trial court's Discovery Order based on "litigation strategy" is not supported by the record. Moreover, it appears the claim of "litigation strategy" is at best misleading and, at worst, an outright misrepresentation of the record.

When the Tribal Court afforded Defendants an opportunity to explain their failure to obey the its order, Defendants did not assert a *Board of Trustees* basis for their inaction:

> [page 21]
> THE COURT: I understand. I got that one. You said there was other –
> MS. GARCIA: They also offered to provide financial records.
> THE COURT: Was that in response to interrogatories or requests for documents?
> MS. GARCIA: I believe it was in response to request for documents.
> THE COURT: Was that an offer to provide all the requested documents you had made in your second set of –your second request for documents?
> MS. GARCIA: Your Honor, I don't believe so. It's a very vague offer. I can read you the e-mail if you would like. It just says, "Financial records are being gathered for your review. Will you accept scanned copies so we may e-mail them to you?"
> . . .
> [page 39]
> THE COURT: . . .
> My order to compel, which I entered on May 9th, specifically orders you to provide a witness for the deposition, as well as to answer the plaintiff's second request for production. So I believe that that is a ruling on your objection.
> MR. FRAME: Thank you, Your Honor.
> THE COURT: Okay. Moving on to the second [page 40] set of documents requesting production, it appears that you – I don't want to make your argument for you, Mr. Frame, but what is your response to the plaintiff's claim that their second request for production documents have not been answered or responded to?
> MR. FRAME: Your Honor, I'd like to renew previous statement concerning paragraph

> one. I'd like to renew those for paragraph two, which the court is referring to.
>
> Furthermore, Judge, I believe we did make substantial – rather, we made efforts to meet the inspection of documents, as indicated by opposing counsel, in some e-mail conversation about scanning some financial records and shipping it over to counsel, and we believe that we were in substantial compliance with Section 1-312 of discovery under the Property Code.
>
> I'd like to add, Your Honor, that the time between the May 9th order and the May 16th deadline is a very tight turnaround time, in our opinion, on those issues. And I do know that the trial was set and the court had to make its orders. I'd just like to point that out.
>
> THE COURT: And the defendants' response to [page 41] the plaintiff's claim that there has been no response or answer filed to date to the second request for admissions which was filed on March 3rd, 2008?
>
> MR. FRAME: Is the court referring to the second request for production inspection of documents, Your Honor?
>
> THE COURT: Well, according to Ms. Garcia, they filed a second request for admissions on March 3rd, 2008, that have not been answered or responded to. And according to her, pursuant to Rule 36 or Rule 1 of the rules, if there's no answer filed to the request for admissions, it's deemed admitted. . . .
>
> MR. FRAME: Your Honor, I believe that the same time line applies where we filed an appeal, and later there was a motion to stay, and I believe that that appeal was denied on April 2nd, and that request for admission was intended to be responded to in our objection on April 16th. That was our intent.
>
> THE COURT: And, finally, what's your [page 42] response regarding the failure to provide a corporate witness for the deposition on – was it May 26th?
>
> . . .
>
> MR. FRAME: Your Honor, again, that was a legal holiday. My office was not open, neither was Mr. Welch's. We did try to make accommodation, as opposing counsel indicated to the court, in communication to provide Mr. Johnson in his corporate capacity.
>
> . . . .

Transcript, Motion in Limine Hearing, June 4, 2008, at 21, 39-42. Despite the informal claim of willingness to scan some of the requested financial records, the record suggests that Defendants never provided the requested records and never responded to the requests for admissions. Thus, the record simply does not support Appellants/Defendants "litigation theory" argument. The Tribal Court did not find any fraudulent act during discovery (as Appellants/Defendants maintain), just a dogged and persistent refusal to comply with reasonable discovery requests and orders for financial and corporate records. It may well be that this refusal concealed a fraud on the Tribe but neither the Tribal Court nor this Court will ever know whether that is true since the Appellants/Defendants persistently refused to

disclose the records that would reveal the truth.

Since the findings of fact of the Tribal Court related to piercing the corporate veil were adopted as a preclusive sanction for noncompliance with discovery orders (*not* for fraudulent conduct), the protests of the Appellants/Defendants that they are not supported by evidence in the record entirely misses the point of such a sanction. Appellants/Defendants cannot simultaneously violate pretrial discovery requests and related court enforcement orders by withholding critical corporate and financial records and then protest that such evidence was not introduced by the Tribe at trial. The inability of the Tribe to present such evidence falls squarely on their dogged and persistent refusal to produce it in response to reasonable discovery requests and orders. Since the findings of fact of the Tribal Court relative to piercing the corporate veil were not based primarily on evidence presented during the trial on the merits, but, instead, adopted by the Tribal Court (as it expressly warned the Defendants it might do if they did not produce the necessary evidence) as a preclusive sanction for noncompliance with discovery requests and orders, the protests of Appellants/Defendants that the Tribe failed to prove the necessary elements of piercing the corporate veil under federal common law are entirely misplaced.[9]

Based on the reasons the Tribal Court adopted preclusive findings of fact related to piercing the corporate veil, the only questions therefore properly before this Court involve whether the preclusive findings of fact entered as a sanction for refusal to comply with discovery requests and orders that resulted in the award of damages jointly and severally against Defendant Johnson for unpaid rent during the term of the Lease based on a theory that pierced the corporate veil was within the proper discretion of the Tribal Court and whether that award was improper or violated the due process rights of Appellant/Defendant Robert Johnson since the theory was not plead in the original complaint. For the reasons that follow, this Court finds (1) that the Tribal Court did not abuse its discretion in

9 While not necessary to this part of the analysis, this Court also notes that piercing the corporate veil is far easier than suggested by the rigorous federal standards advanced by the Appellants/Defendants. *See e.g., Standage v. Standage*, 711 P.2d 612 (Ariz.Ct.App.1985) (a divorce action where the corporate veil was easily pierced).

sanctioning the persistent refusal by the Defendants to comply with reasonable discovery requests and orders by entering the preclusive findings of fact and (2) that the reliance of the Tribal Court on those findings to pierce the corporate veil was proper and did not deny Defendant Robert Johnson due process of law.

Discovery under the law of the Colorado River Indian Tribes basically follows the basic discovery system of the Federal Rules of Civil Procedure, or, more accurately, that system *before* the federal courts adopted mandatory disclosure as part of its discovery system. The Tribal Rules of Civil Procedure state:

> LOCAL RULES OF CIVIL PROCEDURE 'LRCP'
> I. SCOPE, DEFINITIONS AND CONSTRUCTION
> . . .
> LRCP 2
>
> Definitions and Construction. The definitions in these Rules and in all other Tribal law including, but not limited to, [Law and Order Code] L&O [Section] 104 and [Domestic Relations Code] DRC [Section] 102 are construed in *pari materia.*
> . . .
> (66) "Tribal Rules of Civil Procedure" or "TRCP" per L&O [Law and Order Code, Section] 202 (f), means, the Federal rules of Civil Procedure, as amended through 1993, and as thereafter amended, that are not inconsistent with another provision of L&O, not otherwise locally inapplicable because they refer to any special federal procedure or laws having no counterpart in the Courts of the Tribes. . . .
>
> Annotated Rules of Court, Colorado River Indian Tribes (1995) 3-9 (bold omitted).
>
> The Tribal Rules of Civil Procedure ["TRCP"] further state:
>
> The following are the applicable federal rules:
>
> TRCP 37 Civil Case, Failure to Make Disclosure or Cooperate in Discovery: Sanction, TRCP 37
> (a) Civil Case, Motion for Order Compelling Disclosure or Discovery
> (1) Appropriate Court
> (2) Motion
> (3) Evasive or Incomplete Disclosure, Answer or Response
> (4) Expense and Sanction
> (b) Civil Case, Failure to Comply with Order
> (1) Sanction by Court in District Where Deposition Is Taken
> (2) Sanction by Court in Which Action is Pending

> (c) Civil Case, Failure of Party to Attend at Own Deposition or Serve Answer to Interrogatory or Respond to Request for Inspection
> (d) Civil Case, Failure to Disclose; False or Misleading Disclosure; Refusal to Admit
> (g) Civil Case, Failure to Participate in the Framing of a Discovery Plan

Id at 14 (bold omitted) (TRCP 37 does not adopt FRCP 37(e) or (f)). Thus, CRIT TRCP Rule 37 expressly adopts Rule 37(a)-(d), (g) of the Federal Rules of Civil Procedure.[10] Rule 37(b)(2)(A)(i) of the Federal Rules of Civil Procedure (adopted as CRIT TRCP, Rule 37(b)(2)(A)(i)) expressly authorizes precisely the type of sanction employed by the Tribal Court:

> (2) Sanctions in the District Where the Action Is Pending.
> (A) *For Not Obeying a Discovery Order*. If a party or a party's officer, director, or managing agent . . .fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> > (i) directing that the *matters embraced in the order or other designated facts be taken as established for purposes of the action*, as the prevailing party claims;

(Emphasis supplied). Federal courts have long imposed such preclusive fact finding as sanctions for refusal to comply with discovery orders and requests. *E.g. McMullen v. Travelers Ins. Co.*, 278 F.2d 834 (9th Cir. 1960), *cert. denied* 364 U.S. 867 (1960); 8A Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice and Procedure* § 2289, fn. 19 (2008). In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the United States Supreme Court ruled that taking certain facts as true as a sanction for failure to comply with discovery could sustain a finding of personal jurisdiction without violating the due process clause of the fifth amendment.

In this case, the Tribal Court afforded the Appellants/Defendants more than ample opportunity to supply the missing financial and corporate records, including permitting them to introduce them at

10. A trial court also has inherent authority to impose sanctions for abuse of the discovery process. See Felix S. Stumpf, *Inherent Powers of the Courts; Sword and Shield of the Judiciary* xiv, 41-42 (Reno, NV: The National Judicial College, 1994). See also *Bentley v. Hickory Coal*, 849 P.2d 417, 420, 1992 Ok Civ App 68. Thus, the Tribal Court also had the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made.

trial which they did not do. They had been ordered to do so and had failed to respond to the Tribe's requests for admissions regarding the same subject. Their last warning, quoted above, came during the hearing on the Motion in Limine. It is obvious from the transcript of the June 4, 2008, Motion in Limine hearing that Defendant Johnson blatantly and intentionally disobeyed the Court's discovery order and refused to answer interrogatories and refused to produce the documents demanded.[11] In light

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11. THE COURT: Good Morning, Today is June 4th, 2008.
. . .
Are the petitioners/plaintiffs ready for trial today?
MR. SHEPARD: Yes, we are, Your Honor.
. . .
THE COURT: Are the defendants present?
MR. FRAME: Yes, Your Honor. Mr. Johnson is present. I'm Michael Frame, attorney for Water Wheel. And Fred Welch is present in the capacity of personal attorney for Mr. Johnson.
THE COURT: Is Mr. Johnson present?
MR. WELCH: Yes, Your Honor.
THE COURT: Okay. We'll begin with any
[Volume 1, Audio Transcription, 9:00 a.m., June 4, 2008, Motion in Limine Hearing, at 6]
pretrial matters that need to be taken u at this time.
Plaintiffs, do you have any pretrial matters that need to be addressed?
. . .
THE COURT: Okay. The plaintiffs have asked to hear arguments and for a ruling on their motion in limine which was filed on June 2nd, 2008. So
[Id., at 7]
what's the defendants' response to taking up that matter before we begin with the trial?
MR. FRAME: We have no objection to taking that up before –
THE COURT: I'm sorry. What?
MR. FRAME: We have no objection to doing that.
THE COURT: Okay. We'll go ahead and address the plaintiff's motion in limine. . .
I have made a list of, I think, the questions and the issues that I would like to – I'm going to need in order to make a proper ruing on the plaintiff's motion in limine and any responses by the defendants.
. . .
But the first question I have is: What were
[Id., at 8]
the orders that I issued regarding when trial would be set for the eviction and damages?
. . .
[Id., at 11]
[THE COURT:] The second question I have is: What dates did I enter orders regarding pretrial discovery.
. . .
And when I came to work, I found the plaintiff's motion in limine had been filed yesterday. So I didn't have a chance to read that motion in limine yesterday when it was filed. I read that this morning when I came to work.
And rather than going through the files trying to final all these orders, I read the motion in limine. And I looked for any responses from the defendants, and I note that the defendants have not filed a response to the plaintiff's motion in limine to date. . . .
[Id., at 12]
MS. KING: The first order setting discovery schedule was issued on February 1st, 2008.
. . .
MS. KING: The second was filed – or issued on April 3rd, 2008. . . .
MS. KING: Regarding the discovery. There was also an order compelling discovery, which set additional deadline, and that order was issued on

of these circumstances, the Tribal Court clearly did not abuse its discretion in invoking the sanction expressly authorized by CRIT TRCP Rule 37(b)(2)(A)(i) by finding all facts relative to the corporate and financial relationship between Water Wheel and Johnson necessary to pierce the corporate veil *against* both Defendants.[12] As plaintiffs point out,[13] the Tribal Court did not utilize the most severe sanction available to it by T.R.C.P. 37(b)(2)(A)(i) through (vii). That Court could have rendered a

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[Id., at 13]

May 9th, Your Honor.

. . .

[Id., at 17]

. . .

MS. GARCIA: And then the tribes filed a motion to compel and the court granted that motion on May 9th, 2008. The order granting the motion to compel provided that – or ordered defendants to provide responses to all of the written discovery requests, so interrogatories and document requests for document production, by May 16th, 2008, and also ordered Water Wheel to provide a Rule 30(b)(6) witness for deposition on May 26th, 2008.

THE COURT: Okay. Let's go ahead and take these documents one at a time, Ms. Garcia. The second set of interrogatories that you filed on March 3rd, '08, there has not been an answer to those set of interrogatories to date?

MS. GARCIA: That's correct, Your Honor. And that is true from both Water Wheel and Johnson.

THE COURT: Now, in the order granting the plaintiff's motion to compel discovery, which I

[Id., at 18]

entered on May 9th, 2008, in paragraph one . . . I ordered Water Wheel to respond to the plaintiff's interrogatories And the in paragraph two . . . I see I ordered Defendant Johnson also to respond to the interrogatories.

Volume 1, Audio Transcription, 9:00 a.m., June 4, 2008, Motion in Limine Hearing.

12 Before this Court, Appellants/Defendants have persistently mischaracterized the sanction imposed by the Tribal Court. They have repeatedly suggested that the Tribal Court pierced the corporate veil as a *legal* sanction for noncompliance with the Tribe's reasonable discovery requests and orders. While the preclusive fact finding adopted by the Tribal Court under CRIT TRCP Rule 37(b)(2)(A)(i) may have resulted in the piercing of the corporate veil, that result was *not* the sanction for noncompliance with discovery. The sanction was finding all of the relevant *facts* about the corporate and financial relationship between Water Wheel and Johnson *against* both defendants because of their persistent refusal to supply the necessary financial and corporate records required to establish that relationship as well as the admission of those facts through the refusal to answer requests for admission. Specifically, based on the noncompliance with reasonable discovery requests and orders, the Tribal Court found, that: "Defendant Johnson is the majority shareholder and person with ultimate decision-making authority for Water Wheel" (Judgment at 11, lines 11-13); "Defendant Water Wheel is inadequately capitalized as a corporation" (id at lines 16-18); "from 1999 to the present, Water Wheel has made loans and gifts to Johnson" (id at lines 21-23); "from 1999 to the present, Johnson has made loans and gifts to Water Wheel" (id at lines 26-28); "from 1999 to the present, Johnson has borrowed and used Water Wheel funds for his personal use and for the use of third persons" (id at 12, lines 4-6); "Water Wheel and Johnson's financial records are not separately maintained" (id, lines 9-10); "since Johnson became president of Water Wheel, Water Wheel has not kept corporate minutes or elected directors" (id, lines 15-16); "Johnson's compensation from Water Wheel has increased from 1999 to the present" (id, lines 19-20); and, "Johnson has commingled rent monies Water Wheel owes the Tribes with his own personal assets" (id, lines 24-25). Since all facts necessary to pierce the corporate veil were thereby found against the Defendants, joint and several liability for all damages (on a theory of piercing the corporate veil) was the logical legal result of the preclusive fact findings that constituted the actual sanction for discovery noncompliance. The actual sanction was preclusive fact finding, not a legal liability not directly authorized by CRIT TRCP Rule 37(b)(2)(A)(i). The legal liability constituted a direct result of the sanction, not the sanction itself.

13. See Transcript of Motion in Limine Hearing, June 4, 2008, at 50, lines 20-25.

default judgment against Defendants Johnson and Water Wheel. See T.R.C.P. 37(b)(2)(A)(vi).

Finally, Appellants/Defendants object to the invocation of the theory of piercing the corporate veil in the Judgment since such a theory was not originally plead in the Complaint. Since, as noted above. CRIT law basically follows the Federal Rules of Civil Procedure, the Tribe is a notice pleading jurisdiction that does not rigorously require every identifiable theory of liability to be plead so long as the Complaint sets forth "a short and plain statement of the claim showing the pleader is entitled to relief." Both Water Wheel and Johnson were named as defendants in the original Complaint and the Complaint sought damages from them both related to nonpayment of rents under the Lease and damages for overstaying the term of the Lease. No more particularization was required in the Complaint. Appellants/Defendants have cited no case and this Court is not aware of any case that would require the Tribe in a notice pleading system, like the CRIT TRCP, to select and particularize the precise legal theory of recovery under the claim plead in the Complaint. Such particularization is simply not required by CRIT pleading rules.

Even if more particularization were required, CRIT TRCP Rule 15(a) would have permitted the Tribe to amend its Complaint if and when the Appellants/Defendants had fully complied with discovery and disclosed the necessary corporate and financial information. Thus, assuming *arguendo* and contrary to the law that such a amendment was required, any inability of the Tribe to amend its Complaint to expressly include a theory of piercing the corporate veil can be directly traced to the dogged and persistent refusal of the Appellants/Defendants to comply with reasonable discovery requests and orders.

Nevertheless, the course of proceedings in this case, including the discovery requests, discovery orders, request for admissions, the Motion in Limine and the hearing on the Motion in Limine, clearly alerted the Appellants/Defendants that they had been placed on notice that the Tribe sought information about and intended to present a theory suggesting that the corporate veil should be

pierced due to the alleged failure to comply with corporate requirements and formalities and the nature of the financial relationship and records between Water Wheel and Johnson. CRIT TRCP Rule 15(b) expressly provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Despite all of these warnings, Appellants/Defendants failed to direct this Court to any express objection or motion that they filed in the Tribal Court seeking to exclude a theory of piercing the corporate veil from consideration by that Court. Having been placed on notice that such issues had been raised, having been warned that serious consequences could arise from their dogged and persistent refusal to supply financial and corporate records ordered by the Tribal Court, and having permitted the matter to go to trial without formal motion or objection, the Appellants/Defendants cannot now be heard to complain that the issue of piercing the corporate veil was not within the scope of the original Complaint.

Nevertheless, under the Constitution and ByLaws of the Colorado River Indian Tribes, the Defendants have a right to a fair trial and, specifically, to due process of law. See Bill of Rights, Colorado River Indian Tribes Constitution, Article III, Section 3 ("All rights secured to the citizens of the United States of America . . . shall not be impaired or abridged . . . these rights include . . . a guarantee of due process and equal protection under the law. . . ."). In a civil proceeding, like the present one, the essence of due process involves adequate notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). As described above, Appellants/ Defendants had more than ample notice that the Tribe intended to make the issue of the lack of corporate separation between Water Wheel and Johnson an important part of their legal theory of liability. The Tribe persistently sought discovery of such matters, secure discovery orders compelling discovery on such questions and filed in advance of trial a Motion in Limine on these issues. Likewise, the pretrial hearing on the Motion in Limine clearly placed the Appellants/Defendants on notice that

piercing the corporate veil based on their refusal to supply ordered discovery of corporate and financial records constituted a distinct possibility. Thus, the record in this case clearly indicates that the Appellants/Defendants had more than ample advance notice regarding the Tribe's intent to rely on the theory of piercing the corporate veil despite the fact that the Tribe had not spelled out (and was not required to specify) in the Complaint that precise legal theory for joint and several liability for nonpayment of rent due under the Lease. In addition, as the transcript of the hearing on the Motion in Limine advised the Defendants, the Tribal Court was prepared to hear evidence on these questions and then decide whether to invoke a preclusive sanction. Thus, the Tribal Court afforded the Appellants/Defendants perhaps more than their fair opportunity to defend themselves against findings that pierced the Water Wheel corporate veil and they declined right to the end to present the corporate and financial records that would demonstrate maintenance of corporate and financial separation between Water Wheel and Johnson. Accordingly, both Appellants/Defendants were perhaps afforded even more process than was due them on this question. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the United States Supreme Court declined to find a violation of the fifth amendment due process clause when a trial court, which took certain facts as true as a sanction for failure to comply with discovery, sustained a finding of personal jurisdiction based on such preclusive fact finding. Likewise, in this case no violation of due process occurred when the Tribal Court found all relevant facts regarding the financial and corporate relationship between Water Wheel and Johnson against both Defendants and, accordingly, held Johnson jointly and severally responsible for all damages, including the unpaid rent and attorneys fees due under the express terms of the Lease.

Thus, insofar as the Judgment finds Water Wheel and Johnson jointly and severally liable for all damages, the Tribal Court committed no error and that portion of the Judgment must be affirmed.

### C. The Tribal Court Did Not Abuse Its Discretion or Otherwise Deny a Fair Trial

#### 1. Expert Testimony from Walter Winius Was Not Improper.

Appellants contend that it was improper for the Tribal Court to accept the expert testimony of Walter Winius because he was not qualified to appraise tribal lands. In particular, Appellants argue that Mr. Winius did not know the difference between trust land and lands held in fee simple. In a footnote, Appellants further contend that there was no *Daubert* hearing, or other probing examination, to determine whether CRIT's witness was a competent or qualified expert on appraising tribal lands.

The issue of the admission of expert opinions is not covered by traditional customs and usages of the Tribes. "In the event that a case or controversy arises which is not covered by the traditional customs and usages of the Tribes, or ordinances of the Tribal Council, the Court may be guided by appropriate Federal Law and regulations or by the laws of the State of Arizona or California." L&O 110(B). As such, this Court will turn to Federal and State Law.

A review of the trial court transcript provided by the parties indicates that Mr. Winius testified extensively about his qualifications and experience. TR 194-201. CRIT then moved the court to accept Mr. Winius as an expert in the filed of property appraisal. TR 201. However, Appellants did not make a contemporaneous objection to accepting Mr. Winius as an expert in the field of property appraisal. TR at 201-202. Accordingly, the trial court accepted Mr. Winius as an expert.

A party who is claiming an error on the admission of evidence is required to make a contemporaneous objection at the time of trial. This rule is codified at Federal Rule of Evidence 103(a)(1), which provides that "[e]rror may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, and . . . [, i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Here, since Appellants did not

make a contemporaneous objection at the time of trial, the trial court did not abuse its discretion by allowing this testimony.

Even if there was a timely objection to preserve the record, the trial court did not abuse its discretion. Rule 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999), "require that the judge apply his gatekeeping role ... to all forms of expert testimony, not just scientific testimony." *White v. Ford Motor Co.*, 312 F.3d 993, 1007 (9th Cir. 2002)

That said, "far from requiring trial judges to mechanically apply the *Daubert* factors — or something like them — to both scientific and non-scientific testimony, *Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping function." *United States v. Hankey,* 203 F.3d 1160, 1168 (9th Cir. 2000). Indeed, as we recently noted in *Mukhtar,* a "trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding *how* to determine the testimony's reliability." *Mukhtar,* 299 F.3d at 1064.

Here, the trial court heard extensive testimony from Mr. Winius regarding his background and expertise. Even though the trial court did not hold a formal *Daubert* hearing, the court's knowledge and experience was sufficient to satisfy its gatekeeping role under *Daubert*. *See Mukhtar,* 299 F.3d at 1064 (noting that "a separate, pretrial hearing on reliability is not required"). Therefore, the trial court did not abuse its discretion when it did not conduct a formal *Daubert* hearing. We thus conclude that the trial court's inquiry was sufficient to comply with its gatekeeping role.

### 2. The Trial Court Did Not Abuse Its Discretion By Applying CRIT's Appraisal Evidence to Calculate Unpaid Rent Under the Lease.

Appellants contend that the trial court abused its discretion in interpreting the rental payments provisions contained in Section IV.A. of the lease by accepting CRIT's expert testimony and applying a fair market value appraisal as the rental payment rather than applying a plain reading of the lease. Appellants argue that a plain reading of Section IV.A. of the lease calls for the parties to renegotiate in good faith and reach an agreement on rental adjustments before the beginning of the 26th year of the lease. However, Appellants concede that the lease is silent on what happens if the parties do not reach an agreement. Nonetheless, Appellants contend that the parties were to compute the adjusted rental value based on standard appraisal methods but without improvements.

Here, the parties were not able to reach an agreement by the beginning of the 26th year of the lease. There is evidence that the parties attempted to negotiate. The parties met once at the Bureau of Indian Affairs Office in Phoenix. Also, CRIT provided the testimony of Mr. Laffoon at trial to demonstrate that CRIT attempted to negotiate with Appellants. SER000073-SER000074. Clearly, there is no evidence that CRIT failed to negotiate in good faith.

Next, the trial court did not abuse its discretion by applying the fair market value of the leasehold for the period beginning with the 26th year of the lease until the lease expired. Although the parties could not come to an agreement, the lease clearly calls for parties to apply the minimum annual rent at the current fair annual rental value of the property exclusive of improvements. The trial court, based on the evidence presented, applied the fair market value of the leasehold for the period beginning with the 26th year of the lease until the lease expired. The trial court did not abuse its discretion in applying the fair market value based on the evidence presented.

### 3. The Trial Court Did Not Abuse Its Discretion By Applying CRIT's Appraisal Evidence to Calculate Damages for the Holdover Period.

Without providing any legal basis or support, Appellants next contend that the trial court abused

its discretion by applying the fair market value of the leasehold based on CRIT's appraisal for the period after July 7, 2007. Appellants argue that it should be calculated under a plain reading of Section IV.A of the lease.

However, there is no dispute that the lease expired on July 6, 2007. Therefore, there is no basis for applying Section IV.A. of the Lease to calculate damages for the holdover period. The trial court did not abuse its discretion when it did not use the lease to calculate damages for the holdover period.[14]

**D. Problems with the Judgment.**

**1. Intentional Interference with Prospective Economic Advantage.**

The parties tried and presented to the Tribal Court two alternative theories for calculating damages for the continuing trespass to the formerly leased property after expiration of the term of the Lease – (1) fair rental value under the CRIT Property Code and (2) intentional interference with prospective economic advantage. In the final Judgment, the Tribal Court selected the second theory. For reasons discussed below, this portion of the Judgment was erroneous as a matter of law.

To succeed on an intentional interference with prospective economic advantage claim, a party must demonstrate "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." RESTATEMENT (SECOND) OF TORTS § 766 (1977); *Wells Fargo Bank v. Arizona Laborers,* 201 Ariz. 474, 38 P.2d 12 (2002); and *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 65 P.3d 397, 950 (2003) (citations omitted).

Applying these elements for a *prima facie* case, CRIT did not to raise a genuine issue of material fact as to the first element, the threshold causation requirement that it is reasonably *probable*

14 Although the trial court did not abuse its discretion when it did not calculate damages under the lease, this court will address the correct calculation for damages for the holdover period in the section regarding damages.

that the lost economic advantage would have been realized but for interference. The record is not clear that CRIT provided evidence that Appellants knew of a contractual relationship with a third party. Since CRIT failed to establish this element of an intentional interference with prospective economic advantage claim, the tribal court was incorrect in granting damages pursuant to this tort claim.

More importantly, under the CRIT Property Code and traditional common law, the normal measure of damages for trespass to land caused by overstaying a lease would be the fair market rental value of the property as well as any additional damages for any decrease the value of the property caused by the trespass. *E.g. Mikol v. Vlahopoulos,* 86 Ariz. 93, 340 P.2d 1000 (1959). Although the trial court incorrectly granted damages on the intentional interference with prospective economic advantage claim (a claim in tort), CRIT is not without remedies for Appellants' ongoing and continuing trespass on tribal land. Since the lease is no longer in effect, the tribal court should apply the Tribal Property Code and the normal measure of damages for trespass. Pursuant to the Tribal Property Code, the tribal court should determine a reasonable sum for the fair rental value of the premises from the lease expired to the present as well as any additional diminution in the value of the formerly leased property, such as any damages to buildings or fixtures occurring after the expiration of the Lease, attributable to the trespass. Since the question of fair rental value of property since the expiration of the Lease was fully tried as an alternative theory for trespass damages, there is no need for a new hearing on the matter. This matter is remanded to the Tribal Court with direction to recalculate Paragraph 69 of the Judgment to determine the correct amount of damages for Appellants' trespass since the expiration of the Lease based on the fair rental value of the property.

**2. There Was No Requirement to Serve a Notice to Quit.**

Appellants next contend that CRIT failed to serve a Notice to Quite prior to bringing a writ of restitution to evict a tenant. However, Appellants are incorrect. Section 1-302(a)(1), states:

"When a landlord desires to obtain possession of premises that are occupied without

> permission or agreement, following any reasonable demand to leave as described in Section 1-301(a) of this Chapter, ***no additional notice to quit is required.***"

Section 1-302(a)(1) (emphasis added). Additionally, Section 1-301(a) authorizes a landlord to evict a tenant for occupying premises without permission or agreement, "following any reasonable demand by a person with authority over the premises to leave, including where a lease has expired." Section 1-301(a).

Because Appellants were in possession of the premises without permission, CRIT was only required to make a reasonable demand. According to the record, CRIT complied with this requirement when CRIT's commercial manger sent a letter to Appellant. Therefore, there is no requirement that a notice to quit be served.

**3. Breach of Lease as a Defense.**

Appellants assert that CRIT breached the lease. Although Appellants did not assert this defense in its answer, Appellants raised this issue at a later time as a defense. CRIT contends that this claim is barred since it is an affirmative defense that was not raised in the Answer, and therefore, it is waived.

All affirmative defenses must be set forth in a defendant's answer. *See* TRCP 8(c). "An affirmative defense is defined as "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2nd Cir. 2003). Although Appellant did not allege breach of contract as a defense in the Answer, Appellant was not required to assert it since it is not an affirmative defense. A breach of contract as a defense would not defeat the plaintiff's claim. Rather, it is a defense that was timely raised prior to trial.

Although Appellants did not need to raise breach of contract by CRIT as an affirmative defense, Appellants did not prove that CRIT breached the terms of the Lease. In particular, according to the record, Appellants failed to present any credible evidence of the amount of damages allegedly incurred

by Appellants. Therefore, the trial court did not err when it rendered its order denying Appellants' claim for damages and/or offsets for breach by CRIT.

**Conclusion & Orders**

Based on the foregoing, this Court finds that the final Judgment in this matter entered by the Tribal Court and dated June 13, 2008 must be affirmed in all respects other than the calculation of the trespass damages awarded in Paragraph 69. As to Paragraph 69 (and the related findings) this Court reverses that portion of the Judgment and remands with directions to the Tribal Court to correct the Judgment based on the evidence received at the trial on the merits and *without further hearing* or delay to recalculate the amount of the trespass damages awarded in that Paragraph for overstaying the Lease based on the fair rental value of the formerly leased property.

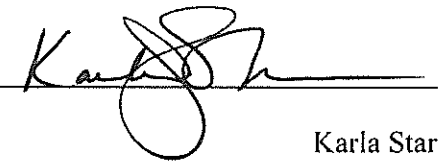
This Court has further determined that the calculation of damages for continued illegal occupancy after expiration of the lease term constitutes a separable matter that does not require delay in enforcement of the remainder of the judgment. Accordingly, the Court directs that all other portions of the Judgment other than Paragraph 69 shall become immediately enforceable upon entry of this Opinion and Order.

Nevertheless, recognizing that a related cases is currently pending before the United States District Court for Arizona, out of deference to the federal court and in the interest of comity, this Court has determined to grant a stay of the enforcement of the Judgment (as modified by this Opinion and Order) for two weeks (14 calendar days) to afford the federal court sufficient time to consider whether it thinks that it should continue to prolong the occupancy of the disputed property by the Defendants/Appellants over 19 months after their Lease on the property expired. During this period the Defendants/Appellants collectively and individually are expressly ordered and enjoined from damaging, removing, destroying, defacing, or otherwise intentionally impairing the value of any portion of the real property, improvements, structures, or fixtures previously covered by the Lease.

During this period, Defendants/Appellants shall expressly hold any rents, fees, commissions, or other cash or credit receipts received on any portion of the formerly leased property from its subtenants or business patrons in a separate escrow account agreed upon by and fully disclosed to the Tribe. This stay is expressly conditioned on the Defendants/Appellants filing with the Tribal Court within three (3) business days following the announcement of this Opinion and Order a surety bond to secure payment of the Judgment in an amount equal to double that portion of the Judgment which is affirmed by this Opinion and Order. In the event that the Defendants/Appellants are either unwilling or unable to post such a surety bond within three (3) business days from the date of this decision, the mandate of this Court shall issue forthwith and those portions of the Judgment in this matter that are herein affirmed, including the order of eviction, shall immediately become enforceable.

IT IS SO ORDERED

Entered this 10th day of March, 2009
on behalf of the entire panel

By: 

Karla Star
Chief Justice

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 2, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, to the following non-CM/ECF participants:

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Dated: September 2, 2010

s/Natalia Thurston