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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Pursuant to Fed. R. App. P. 27, Cross-Appellant Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Appellee Robert Johnson ("Johnson"), respectfully move this Court for leave to file a reply to the United States *Amicus Curia* Brief.

The United States has identified its interest in that matter as directly associated with its assertion that the Water Wheel land at issue in the original Tribal Court litigation is in both tribal reservation and trust status. However, as a

matter of federal law, the land (which is wholly within California) cannot be reservation land. Moreover, there is nothing in the record to indicate that the land is in trust status, other than the United States' assertion that it is trust land because it is reservation land. Without reservation status, there is no explanation for trust status.

I. INTRODUCTION

The United States has filed its Amicus Curiae Brief in Support of the Tribal Court Defendants-Appellants and in opposition to the case presented by these movants, Cross-Appellant Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Appellee Robert Johnson ("Johnson").(Dkt. 20).

The *Amicus* Brief includes the federal government's Statement of Interest (Dkt. 20 at 1), and the primary predicate concerns the status of the land at issue claimed by the Colorado River Indian Tribes ("CRIT"):

> CRIT resides on the Colorado River Indian Reservation (the "Reservation"), established by Congress in 1965, 13 Stat. 559 (March 3, 1865), and subsequently expanded by executive order. *See* Charles J. Kappler, Indian Affairs: Laws and Treaties, vol. I, 803-804 (1904) (orders of Nov. 22, 1873, Nov. 16, 1874, and May 15, 1876); Kappler, Vol IV, 1001 (1929) (order of Nov. 22, 1915). All "unallotted lands of the . . . Reservation . . . are . . . tribal property held in trust by the United States for the use and benefit of [CRIT]." Public L. 88-302, 78 Stat. 188, 189 (1964).

The Brief then goes on to identify the California land on the West Bank of the Colorado River occupied by Water Wheel as being within the Reservation and, thus, both tribal reservation and trust land. (Dkt. at 1-2). At issue in this appeal is whether there was CRIT Tribal Court jurisdiction over Water Wheel and Johnson so as to permit a tribal eviction of them in that court. Opposing parties Gary LaRance and Jolene Marshall are the Judge and Court Clerk, respectively, of the Tribal Court ("Tribal Court Parties). Given its stated interest in this appeal based on the assumption that the Water Wheel land is both with the CRIT Reservation and in trust, the United States then proceeds to explain why the Tribal Court has jurisdiction to evict Water Wheel and Johnson. However, the stated foundation of this amicus participation is simply error as a matter of federal law, as is either known or should have been known to federal counsel. As discussed *infra*, the land is not reservation land and cannot be so as a matter of statutory law. In short, the United States Amicus Brief is grounded on a legally incorrect premise and should be given little-to-no credence in this Court's assessment of the merits of this appeal.

II. DISCUSSION

The Reservation was established by Congress in the Territory of Arizona only – not in California – by the Act of March 3, 1865, 13 Stat. 559 ("1865 Act"), a territorial limitation which was consistent with, and unquestionably **did not**

amend, the California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act"), limiting to four the number of Indian reservations which lawfully could be established in California. Although the Tribe has long ignored this statutory preclusion and claimed that the Reservation extends beyond the Colorado River into California, the specificity of the 1864 Act mandates that any lawful intrusion of the CRIT Reservation into California must have been authorized by a specific federal statute. That statute has never been enacted. Thus, Water Wheel is occupying land which has been adjudicated to be within the public domain, which is accordingly administered by the Bureau of Land Management and not the Bureau of Indian Affairs.

Moreover, any claim that the Tribal Court has jurisdiction over Water Wheel or Johnson by virtue of the Lease is contrary to the provisions of Section 5 of the Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302). That law expressly prohibits the Secretary of the Interior ("Secretary") from leasing any land on the Colorado River's West Bank on behalf of CRIT pursuant to the Indian Long Term Leasing Act of 1955, 25 U.S.C. § 415, until the western boundary of the Reservation has been **formally** determined. In other words, pursuant to the specific terms of Section 5, the Secretary's authority to lease the West Bank Land on behalf of CRIT can only occur after the land has been formally and lawfully

determined to be eligible under the statutory precondition of a "determination" to that effect. While the Secretary purported to make the required determination in 1969, that legal of that action has been rejected by the U.S. Supreme Court. [1]

The required lawful formal determination is not a precondition to the Secretary's authority to lease federal lands, but *is* a precondition to the Secretary's authority to lease any land in California on CRIT's behalf. Thus, there is a statutory predicate for the Secretary's lawful exercise of the leasing authority upon which CRIT asserts jurisdiction, which has not been satisfied.

A. The West Bank Land Is Not Within CRIT's Reservation as a Matter of Federal Law.

In order to litigate the case in District Court without triggering F.R.Civ.P. 19 because they could not sue either the United States or CRIT, Water Wheel and Johnson were prevented from challenging reservation status of the West Bank Land in California, although reservation status for the land is precluded by an 1864

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[1] As discussed *infra*, while the Secretary issued an Order dated January 17, 1969, declaring that the CRIT Reservation extends into California to include the West Bank Land, the Supreme Court rejected tribal arguments that the Secretarial Order satisfies the Section 5 requirement for a formal boundary determination. *See Arizona v. California*, 460 U.S. 605, 636, n 26 (1983) (stating that "the Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation") (emphasis supplied).

Act of Congress. Moreover, a 1964 law permitting certain federal leasing on CRIT's behalf specifically prohibits such leasing on the West Bank until a judicial determination of reservation status has been rendered. That determination has never been made.

1. The 1864 Act prohibits the Reservation from extending into California in the absence of specific legislation.

Any assessment of the boundaries of the Reservation must reconcile tribal claims with the provisions of the California Indian Reservation Act of April 8, 1864 (13 Stat. 39), which specifically limited to four the total number of Indian reservations that could be established in California:

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

The four reservation limitation was confirmed in *Mattz v. Arnett*, 412 U.S. 481, 489 (1973); in fact, the Court even identified the four reservations established under that law.[2] Once the 1864 Act became law, the process for establishing

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[2] *Mattz v. Arnett* recites the history of the 1864 Act at 412 U.S. 489-91, and identifies the reservations established pursuant thereto as (a) Round Valley, (b) Mission, (c) Hoopa Valley and (d) Tule River. The four reservations established

reservations within California became strictly limited in a way distinct to that state, in that no additional reservations could be established absent specific Congressional action. There is no such action extending reservation status for California lands to CRIT or the CRIT Reservation. *See Donnelly v. United States*, 228 U.S. 243, 255-59 (1913); *Jesse Short, et al. v. United States*, 202 Ct. Cl. 870 (1973).

The 1864 Act limited the number of reservations in California to no more than four – the creation and identification of which have been confirmed in a Supreme Court decision and other federal litigation as noted above – thereby imposing a unique statutory limitation prohibiting any additional reservations within California except as specifically authorized by subsequent Act of Congress [3] Thus, there can be no administrative recognition of any reservation land within California for CRIT until Congress or the courts reconcile the statutory limitations

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pursuant to that law also were identified in *United States v. Forty-Eight Pounds of Rising Star Tea*, 35 F. 403, 405 (N.D. Cal. 1888).

[3] Congress is well aware of the four reservation limitation and periodically has enacted special legislation authorizing additional reservations with California. A prime example is enactment of the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712), in which Congress authorized reservations for 42 separate bands of Mission Indians in Southern California. There are many other examples of statutory authorization of reservations for California tribes. No such law has been enacted as to CRIT and land within California.

of the 1864 Act with any administrative declaration that CRIT has reservation land within California.

Numerous cases have cited and upheld the 1864 Act. *See, e.g., Donnelly v. United States, supra*, *Jesse Short, et al. v. U.S., supra*; *Karuk v. United States*, 41 Fed. Cl. 486 (1998); *Donahue v. Butz*, 363 F. Supp. 1316, (N.D. Cal. 1973); *Parravano v. Babbitt*, 861 F. Supp. 914, (N.D. Cal. 1996); *Karuk v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992).

2. The 1865 Act created the Reservation in Arizona only.

Only 14 months after passing the 1864 Act, Congress enacted the Colorado River Reservation Act of March 3, 1865 (13 Stat. 559), which established CRIT's Reservation with a single sentence:

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

Other than these 52 words, no law has ever established a reservation for CRIT. To this point, Congress pointedly did not amend the two elements in the 1864 Act critical to authorization of the Reservation's expansion into California:

(1) the statutory limit of four reservations within the state, and (2) the exclusion of non-California tribes from California presence in Section 1 of the 1864 Act, stating "the state of California shall, for Indian purposes, constitute one superintendency" to manage and control "the Indians and Indian Reservations that are or may hereafter be established in said state . . . ." While the second point may appear to be less legally-significant than the first, it decidedly is instructive as to Congress' intentions in authorizing the CRIT Reservation in 1865 in that there is not even a suggestion that the "Territory of Arizona" Reservation would be under the jurisdiction of the California superintendency.

Congress holds exclusive and plenary power to dispose of public lands of the United States. *See* U.S. Const. art. IV, § 3 ("The Congress shall have Power to dispose of the Territory or other Property belonging to the United States"). Thus, any power of the Executive Branch to convey an interest in public lands must be the product of a clear delegation of Congress' Article IV power. *Karuk v. United States, supra*; *Sioux Tribe v. United States*, 316 U.S. 317, 325 (1942). Indeed, the Secretary could have extended the Reservation into public domain lands in California only with specific Congressional authorization, as is clearly required by 43 U.S.C. § 150:

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

It is adjudicated that the lands on the West Bank are public domain lands and, thus, cannot be withdrawn for an Indian reservation without the Congressional action mandated by the above-quoted law. *See Indians of California v. The United States,* 98 Ct. Cl. 583 (1942), in which the court considered a claim filed on behalf of all of the Indians of California seeking compensation for the value of their lands taken by the United States through the Treaty of Guadalupe Hidalgo of 1848. The Court ruled that the California Indians had no legal claim to their historic lands for failure to perfect title under a special Act of Congress enacted to review and determine the validity of all land title held during Mexico's ownership of what today is California:

> These Indians did not qualify before the Commission created by the Act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California." Therefore whatever lands they may have claimed **became a part of the public domain of the United States**. *Barker v. Harvey,* 181 U.S. 481; *United States v. Title Ins. & Trust Co. et al,* 265 U.S. 472. [Emphasis supplied.]

In light of the adjudicated public domain status of California's West Bank Lands, it is important to stress that while the 1865 Act did provide for the Colorado River Indian Reservation to be withdrawn from Arizona's public domain land; it

pointedly did not authorize the Reservation's extension into the public domain lands in California. CRIT claims to the contrary simply are at odds with statutory law and federal adjudication.

3. Public Law 88-302 restricts the Secretary's leasing authority in the West Bank land.

Section 5 of Public Law 88-302 did not authorize the Secretary to render an *ex parte* determination of the Reservation's western boundary so that he, in turn, could approve leases in favor of CRIT. Rather, it required that a determination **be made as a precondition to** the Secretary having authority to lease California lands in CRIT's behalf. While mandating a "determination," the law did authorize the Secretary himself to make it. Congress could have directly authorized the Secretary to exercising the leasing authority, or it could have provided that the Secretary himself could simultaneously make the requisite determination and approve leases. In not doing so, Congress withheld the determination from the Secretary, in clear contemplation that the determination had to come from some entity other than the Department of the Interior. As is discussed *infra*, the Supreme Court has stated that the determination must come either from the federal courts or Congress itself.

The Tribal Court ruled that the Lease created a consensual relationship with Water Wheel sufficient to satisfy the applicable exception of *Montana v. United*

States, 450 U.S. 544 (1981). However, the Lease cannot lawfully be construed to create a consensual relationship between Water Wheel and CRIT because it was executed with the Department of the Interior at a time when there was no lawful federal leasing authority in favor of CRIT as to land within California.

The 1969 Secretarial Order does not constitute the formal and lawful determination of the Reservation's boundary contemplated and required by Public Law 88-302 as a precondition to Secretarial approval of leasing on the West Bank Land. In the absence of an action meeting that precondition, the Secretary lacked authority to lease the West Bank Land on behalf of CRIT. Section 5 of Public Law 88-302, which states in pertinent part:

> The Secretary . . . is authorized to approve leases of lands on the [CRIT Reservation] . . . [p]rovided, however, that the authorization herein granted to the Secretary . . . shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation: Provided further, That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation.

78 Stat. 188 (emphasis added). The lands underlying the Water Wheel leasehold are located within the above-referenced area commonly known as, and herein referred to as, the "West Bank Land."

B. The 1969 Secretarial Order Did Not Satisfy The Precondition or Secretarial Leasing Authority Established By PL 88-302.

To this day, there has never been a final, lawful determination concerning the Reservation's western boundary.

The 1865 Act did not authorize the Secretary to make that determination through an administrative order (particularly, the 1969 Secretarial Order) because the Secretary's apparent objective in propounding that order was to extend the Reservation into California in direct contravention of the 1864 Act, and to resolve long-standing claims by CRIT that its Reservation **has always** extended into California. Any notion that the Secretary had some **inherent legal authority** to resolve unilaterally the boundary issue **through administrative order** previously was rejected by the Department's Solicitor 10 years before issuance of the 1969 Secretarial Order. That earlier conclusion is memorialized in a formal legal opinion concluding that the Reservation status of land within the West Bank Land would have to be resolved through legislation or judicial determination:

> Until the provisions of the special leasing act, now expired, are in effect reinstated by further **legislation**, or the beneficial ownership of the reservation **judicially determined**, it is our opinion that no leasing authority exists concerning the unassigned lands on the Colorado River Reservation.

66 Interior Decisions 57 (1959) (emphasis added). Thus, both the **Solicitor** and the **Secretary** knew in 1959 that any resolution of the status of the West Bank Land

would require either Congressional or judicial action. The only subsequent action by either Congress or the courts was enactment of PL 88-302, and any authority of the Secretary for leasing of West Bank Land must be found in that law.

The Secretary also was unsuccessful in persuading the Justice Department to take action to fix the boundary to satisfy CRIT's claims, so on January 17, 1969 (three days before the end of the Johnson Administration), Interior Secretary Stewart Udall, relying on an opinion of the Solicitor issued earlier on that same day, propounded an *ex parte* order defining the upper two-thirds of the disputed boundary in Riverside County as a fixed line along the location of an 1876 meander line. **This is the very boundary that the Justice Department and Public Law 88-302 pointedly had refused to accept and the 1864 Act prohibited** yet Secretary Udall proceeded to impose his personal and unauthorized determination through an Order rendered as he was leaving the Department.

The 1969 Secretarial Order purported to make the "determination" required by Section 5 of Public Law 88-302. Yet, the Justice Department had not previously agreed with the Secretary's position. *See* Memorandum dated Sept. 22, 1965, from Solicitor Frank J. Berry of the Department of the Interior to the Commissioner of Indian Affairs:

> [The Department of Justice is] not willing to file an action to fix the boundary of the Colorado River Indian Reservation at the place where

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

Thus, as of September 22, 1965, the Department knew that the Justice Department had assessed the situation subsequent to enactment of PL 88-302 and concluded that the current west bank of the river – and not the "high bluffs" beyond the west bank and deep within the State of California – was the boundary of the CRIT Reservation, and would not litigate the issue for CRIT's benefit.

The Tribal Court has concluded and ruled that it has jurisdiction over the Water Wheel leasehold with the assumption that the land is within the Reservation, an assumption dependent on that Court's acceptance of tribal contentions that the 1969 Secretarial Order constituted the final "determination" required by Section 5 of PL 88-302. **Yet, to this day, no final, lawful determination has ever been made concerning the Reservation's western boundary, as has been confirmed by the Supreme Court.**

The express language of PL 88-302 confirms that Congress not only recognized the existence of a dispute over the Reservation's boundary but also specifically provided that the Section 5 leasing authority should not "be construed

to affect the resolution of any controversy over the location of the boundary. . . ." Accordingly, Congress said that the Secretary can only approve leases for the West Bank Land "when and if determined within the reservation." Indeed, the Senate Report on S. 2111, enacted as PL 88-302, states:

> A portion of the reservation in California was omitted from the operation of these statutes because there is a question as to where the boundary is located in this area due to the changes in the course of the Colorado River. Under the bill, the leasing authorities are made applicable to this area when the exact boundary has been determined and provision for this has been included in section 5. **This will eliminate the necessity for obtaining further legislation at a later date.**

S. REP. NO. 88-585, at 3 (1963) (emphasis supplied). The House Report on S. 2111, contains language nearly identical to that in the Senate Report.[4]

Both PL 88-302 and its legislative history make clear that Congress recognized the existence of an ongoing dispute with regard to (a) the Reservation boundary and (b) the Secretary's legal authority to lease the West Bank Lands in favor of CRIT. Section 5 indicates Congress' intended that PL 88-302 not affect

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[4] *See* H.R. REP. NO. 88-1304, at 2 (1963) ("a portion of the reservation in California was omitted from the operation of these earlier statutes because there is a question as to where the boundary is located. Under the bill the leasing authorities will become effective with respect to this area when the exact boundary has been determined. This will eliminate the necessity for further legislation at a later date.").

the outcome of the dispute, while also showing that Congress anticipated the dispute **might be resolved at some time**; thus, Section 5 provides that **only then** would PL 88-302's leasing provisions apply to the California lands.

Congress pointedly stated that the Secretary could not approve leases for land on the West Bank until there has been the prescribed determination, but in so doing did not assign that decision-making role to the Secretary. Rather, the Secretary was directed to await the "determination" before he/she could lease the West Bank Land, a determination which very clearly would have to come from some other lawful authority. Had Congress intended to give the Secretary that authority, it would have done so. However, by not giving the Secretary the authority to make the determination, Congress left as the decision to the other two branches of government: the judiciary and Congress. Given the statement in the House and Senate Reports that no further legislation would be required, it is clear that Congress saw the judiciary as the appropriate decision-maker.

With that in mind, it is important to view PL 88-302 in its historical context. While the proposed law was moving through Congress, the water adjudication litigation of *Arizona v. California* had been in litigation for decades. Among many issues confronted by the Supreme Court in that case was the lawful boundary of the Reservation, a critical element in the Court's adjudication of the relative water

rights of CRIT. In fact, during 1964, while Congress was writing the legislation which became PL 88-302, the Court entered a decree based on provisions agreed upon by the parties in 1963, which stipulated "the quantities of water fixed in the paragraphs setting the water rights of the Colorado River . . . Reservation shall be subject to appropriate adjustment by agreement or decree of this Court **in the event that the boundaries of the . . . reservation [are] finally determined**." *Arizona v. California*, 460 U.S. 605, 630 (citing Agreed Provisions for Final Decree 10 (Dec. 18, 1963)).

C. The Supreme Court rejected the 1969 Secretarial Order.

Although the Tribal Court ruled that Water Wheel's leasehold land is within the Reservation, that conclusion was based solely on the 1969 Secretarial Order. Thus, the Tribal Court simply ignored the Supreme Court's rejection of the contention that the Secretarial Order formally established the Reservation's western boundary: "the Colorado River Tribes will have to await the results of **further litigation** before they can receive an increase in their water allotment **based on the land determined to be part of the reservation**." *Arizona v. California*, 460 U.S. at 636, n. 26 (emphasis added).

In 2000, the Supreme Court accepted a settlement agreement between the parties to that litigation and entered a supplemental decree that awarded some

additional water rights to the United States (on behalf of CRIT) but also expressly "embodie[d] the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary" and "preserve[d] the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation." *Arizona v. California*, 530 U.S. 390, 419 (2000).

III. CONCLUSION

This Court should reject the United States' *amicus* brief for the reason that the **stated interest** of the federal government **in this appeal** is premised on the assumption that the land on the California side of the Colorado River is within the CRIT Reservation and, thus, tribal land in reservation status and under the jurisdiction of the Bureau of Indian Affairs.

However, as a matter of federal law, there can be no CRIT Reservation in California until, and unless, Congress specifically legislates an exception to the four reservation limitation of the 1864 Act. No such legislation has been enacted, and it is beyond dispute that the West Bank Lands remain in the public domain and, thus, within the jurisdiction of the Bureau of Land Management ("BLM"). While the Secretary of the Interior also presides over the BLM, his interests over the public domain are different from those in reservation status and the discussion in the *amicus* brief simply is off point and irrelevant.

While Water Wheel could not raise the land status in the District Court, it certainly is appropriate to raise it in response to the Secretary's stated interest which is simply inappropriate and without legal predicate.

DATED this 10th day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certified that on this 10th day of September 2010, I did file with this Court and did serve via ECF/Pacer Electronic Filing, all parties, Water Wheel and Robert Johnson's Motion for Leave to File Response to the United States Amicus Curiae Brief.

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