No. 11-

IN THE
Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,
Petitioner,

v.

G. GRANT LYON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Linus Everling
General Counsel
Thomas L. Murphy
Deputy General Counsel
GILA RIVER INDIAN COMMUNITY
PIMA MARICOPA TRIBE LAW OFFICE
P.O. Box 97
Sacaton, AZ 85247-0400

Patricia A. Millett
Counsel of Record
Mark J. MacDougall
Troy D. Cahill
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

QUESTIONS PRESENTED

I. Whether, under Federal Rule of Civil Procedure 19(b), courts may adjudicate and compromise legal rights in land to which the United States holds title without the United States' participation in the litigation.

II. Whether, in light of this Court's recent decision in *United States v. Jicarilla Apache Nation*, No. 10-382 (June 13, 2011), the Ninth Circuit properly held, as a matter of law, that litigation compromising the United States' title in land can proceed in the United States' absence as long as an Indian tribe is a party to the litigation.

PARTIES TO THE PROCEEDING

All parties to this case are reflected in the caption. In addition, Michael Keith Schugg, d/b/a Schuburg Holsteins, and Debra Schugg were the debtors in the underlying bankruptcy and were noted as such in the case caption in the district court and court of appeals.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND RULES

JUDICIAL MATERIALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Gila River Indian Community, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 626 F.3d 1059 (9th Cir. 2010). The district court's findings of fact and conclusions of law (App., *infra*, 34a-75a) are reported at 384 B.R. 263 (D. Ariz. 2008). The district court's decisions at the motion to dismiss stage (App., *infra*, 96a-103a) and the summary judgment stage (App., *infra*, 76a-95a) are not reported.

JURISDICTION

The court of appeals entered its judgment on November 24, 2010. App., *infra*, 1a. The Community's petition for rehearing and rehearing en banc was denied on February 15, 2011. App., *infra*, 104a. On May 6, 2011, Justice Kennedy extended the time for filing a petition for writ of certiorari to and including June 15, 2011, and, on June 2, 2011, Justice Kennedy further extended the time for filing the petition to and including July 15, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES PROVISIONS

The relevant provision of the federal rules, Federal Rule of Civil Procedure 19, is reproduced in full in the Appendix to the Petition (App., *infra*, 106a-108a).

STATEMENT OF THE CASE

1. Federal Rule of Civil Procedure 19(a) identifies those persons that must be joined in litigation if feasible. Under Rule 19(a), a party is "required" if, "in that person's absence, the court cannot accord complete relief among existing parties," or if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a).

If the court finds that a party is required, the court then applies Rule 19(b)'s prescribed factors to determine whether the party is indispensable such that the litigation must be dismissed unless the party can be joined. Those factors are: (i) the prejudice to any party or to the absent party; (ii) whether relief can be shaped to lessen prejudice; (iii) whether a judgment rendered in the person's absence would be adequate; and (iv) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder, *i.e.*, whether there exists an alternative forum. Fed. R. Civ. P. 19(b).

2. This case arises from the bankruptcy trustee's attempt to obtain a judicially implied easement providing access to a 657-acre parcel of land in south-central Arizona known as "Section 16." App., *infra*, 2a. Section 16 is fully encircled by individually held lands and petitioner's lands. *Id*. at 3a. The United States holds title to all of the land across which the purported easement runs, holding that title in trust for the individual allottee landowners and for petitioner, the Gila River Indian Community, a federally recognized Indian tribe. *Id*. at 9a, 62a.

Section 16 was originally reserved as school lands for the Territories of New Mexico and Arizona, and then the State of Arizona. *See* Act of July 22, 1854, ch. 103, § 5, 10 Stat. 308, 309; R. S. § 1946 (1873); Act of June 20, 1910, ch. 310, § 24, 36 Stat. 557, 572. In 1929, however, Arizona sold Section 16 to a private owner, and since that time the land has been used exclusively for agricultural and animal husbandry purposes. App., *infra*, at 3a.

3. In 2004, Section 16's owners, Michael and Debra Schugg, declared Chapter 11 bankruptcy and listed Section 16 as their largest asset. App., *infra*, 4a. G. Grant Lyon is the bankruptcy trustee for the Schugg bankruptcy estate. *Id*.

On January 20, 2005, the trustee attempted to provide Wells Fargo a priority lien in the land by collateralizing Section 16 in the bankruptcy proceedings. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #150 (Bankr. D. Ariz. Jan. 20, 2005). Petitioner objected and asserted title to Section 16. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #221 (Bankr. D. Ariz. Apr. 29, 2005). The trustee

then asserted, for the first time in the bankruptcy proceedings, a right of access in the form of an easement across petitioner's and the individual allottees' surrounding lands. *In re Michael Schugg*, No. 04-bk-13326-GBN, dkt. #224 (Bankr. D. Ariz. May 5, 2005). Obtaining a right of access across petitioner's and the individual allottees' lands was an indispensable part of the trustee's high-density residential development plans for Section 16, which the trustee had begun marketing to developers. *Lyon v. Gila River Indian Cmty.*, No. 05-ap-384-GBN, dkt. #1, at 9 ¶ 42 (Bankr. D. Ariz. May 25, 2005); *see also* App., *infra*, 52a; Pet. C.A. App. 352-353. In accordance with bankruptcy law, Fed. R. Bankr. P. 3003; 11 U.S.C. § 501, petitioner then filed a proof of claim to protect its beneficiary interests in the lands. App., *infra*, 12a-13a.

The trustee subsequently initiated an adversary proceeding in the bankruptcy court against the Community. App., *infra*, 12a. In that action, the trustee sought not only to quiet title to Section 16, but also to obtain a judicial ruling that it had a full right of access across the lands held by the United States in trust for petitioner and the individual landowners. *Id.* at 4a. The trustee sought an easement for the purpose of opening the rural land up to residential development, with an estimated 2,250 new homes and 850 cars traveling the road during peak periods, *id.* at 52a, 56a.

Petitioner filed counterclaims seeking a declaration that no easement existed and asserting aboriginal title and control over Section 16. App., *infra*, at 5a. Petitioner also moved to dismiss the trustee's action on the ground that the United States,

as title holder of all the lands over which the alleged easement would run, was an indispensable party to the litigation under Federal Rule of Civil Procedure 19(b). The district court initially denied the Rule 19 motion without prejudice to its renewal. *Id.*

Following a bench trial, the district court entered final judgment partially in favor of the trustee. App., *infra*, at 34a-75a. As relevant here, the district court ruled that the United States was a "required" party under Rule 19(a). *Id.* at 59a. The court also held that, because the Quiet Title Act had specifically preserved the United States' sovereign immunity for suits over Indian lands held in trust by the United States, the United States could not be joined. App., *infra*, 60a; *see* Quiet Title Act, 28 U.S.C. § 2409a.

However, instead of dismissing the case under Rule 19(b), the district court reasoned that the case could proceed without the United States (and the individual landowners) because petitioner was a party to the action. App., *infra*, 59a (citing *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983)). The court also stated that neither the United States nor the individual allottees would technically be bound by its judgment implying an easement across their lands. App., *infra,* at 61a, 62a n.3.

4. The United States Court of Appeals for the Ninth Circuit affirmed. App., *infra*, 1a-33a. As relevant here, the court agreed that, as title-holder for the land across which the easement was being implied, the United States was a required party under Rule 19(a), whose joinder was impossible because the United States had not waived sovereign

immunity. App., *infra*, at 9a. The court also agreed that "judicial recognition of an easement would impair the government's right[s]." *Id.*

In addition, the court acknowledged that this Court had previously held that the United States is an indispensable party, whose absence requires dismissal, in litigation designed to determine a "right of way" over Indian land held in trust, and "'to any suit to establish or acquire an interest in the lands'" to which the United States "'is confessedly the owner of the fee.'" App., *infra*, 10a-11a (quoting *Minnesota v. United States*, 305 U.S. 382, 386 (1939)).

The Ninth Circuit nevertheless held that this suit to determine a right of way over reservation and individual allottee lands to which the United States holds title could proceed because petitioner was a party to the litigation. App., *infra,* 14a. In holding that this Court's decision in *Minnesota* did not govern, the Ninth Circuit applied what it admitted was its "somewhat incongruous" rule, *id.* at 12a, that the United States' interest in lands to which it holds title can be litigated in its absence if an Indian tribe as plaintiff files suit "to protect its own interest," *id.* at 11a (citing *Puyallup, supra*). The court then extended the *Puyallup* rule to cases where the tribe is a defendant in litigation and the United States' title is being compromised, reasoning that, by filing a proof of claim in bankruptcy, petitioner "had to know" that the trustee would initiate an adversary action to establish its claim to the land. *Id.* at 12a-13a.

The Ninth Circuit further found inapplicable *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), in which this Court held that a foreign

sovereign government is a necessary party to litigation over rights to property in which it holds an interest, and that, under Federal Rule of Civil Procedure 19(b), its absence due to sovereign immunity bars the suit from going forward, *id.* at 867. The court of appeals ruled that *Pimentel*'s holding about the nature of a sovereign's interest in litigation implicating its property interests only "narrowly" applied to the interests of a "foreign sovereign that had invoked sovereign immunity." App., *infra*, 14a.

The court then held that the easement was properly implied because it arose in 1877 when Section 16 was reserved as school lands and all of the surrounding lands were public lands held by the United States. App., *infra*, 19a-20a.

In so holding, the Ninth Circuit found it immaterial, App., *infra*, 15a-16a, that Congress has prescribed an alternative administrative process for obtaining access to and easements across land held by the United States. *See* 25 U.S.C. § 323 (Secretary of the Interior may "grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, * * * or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes."); *see also* 25 C.F.R. § 169.1 *et seq.*[1]

---

[1] The Ninth Circuit also held that the district court erred in concluding that the access roads were publicly open Indian Reservation Roads, App., *infra*, 23a, and that the trustee failed

5. The court of appeals subsequently denied petitioner's timely request for rehearing and rehearing en banc. App., *infra*, at 104a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's holding is extraordinary. Notwithstanding this Court's on-point and directly binding decisions in, *inter alia*, *Minnesota v. United States*, 305 U.S. 382 (1939), and *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008), the Ninth Circuit held that courts remain free to compromise the United States' title both to public lands held exclusively by the United States and to lands held by the United States in its sovereign role as trustee, without the United States' participation in the litigation and despite the Quiet Title Act's undisputed preservation of the United States' sovereign immunity from precisely such claims, 28 U.S.C. § 2409a(a). The court, moreover, made that ruling while openly acknowledging that "judicial recognition of an easement would impair the government's right[s]" in its absence. App. *infra*, 9a.

That holding flies in the face of this Court's decision in *Pimentel*, which ruled that, in applying Rule 19(b)'s indispensable party criteria, courts must

---

to show that the access roads were public highways under R.S. 2477, App., *infra*, 30a. In addition, the held that petitioner's aboriginal title to Section 16 was extinguished. *Id.* at 31a-32a. Finally, the panel held that the issue whether petitioner had zoning authority over Section 16 was not ripe for decision. *Id.* at 32a-33a. None of those issues are presented to this Court for review.

"give full effect to sovereign immunity," 553 U.S. at 865, and a court cannot evade that rule by reasoning that the sovereign "would not be bound by the judgment in an action where they were not parties," *id.* at 871.

The Ninth Circuit's decision is also flatly irreconcilable with this Court's directly on-point holding in *Minnesota* that the United States is an indispensable party in whose absence the litigation cannot proceed when a party seeks to adjudicate a claimed right of way over Indian lands to which the United States holds fee title in trust. That is this case.

Invocation of "somewhat incongruous" circuit precedent, App., *infra*, 12a, that treats Indian tribes as proxies for the United States—a rule that no other court of appeals applies—is no excuse for ignoring binding precedent from this Court.

The gap between Ninth Circuit law and the law of this Court has only gotten worse with this Court's recent issuance of its decision in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). That case discussed at length the unique and distinct sovereign interests of the federal government that are implicated when the United States holds property in trust for Indian tribes, *id.* at 2323-2327. Plaintiffs cannot keep the United States' sovereign interests sidelined in a lawsuit while compromising the United States' title by the mere expedience of suing an Indian tribe.

Finally and unsurprisingly, the Ninth Circuit's stark departure from binding precedent conflicts with the decisions of other courts of appeals on issues of

fundamental and recurring importance—the consistent application of Rule 19(b) in cases implicating sovereign immunity. Given the Ninth Circuit's refusal to reconsider its "somewhat incongruous" law en banc, only this Court can correct the Ninth Circuit's expansive inroad on sovereign immunity and disregard of settled Rule 19 precedent.

I. THE NINTH CIRCUIT'S DECISION ALLOWING LEGAL CLAIMS TO THE UNITED STATES' PUBLIC AND TRUST LANDS TO BE ADJUDICATED IN THE UNITED STATES' ABSENCE DEFIES PRECEDENT FROM THIS COURT AND OTHER CIRCUITS

The Ninth Circuit fully agreed that (i) the United States is a required party to this litigation, for purposes of Federal Rule of Civil Procedure 19(a), because it has a substantial legal interest in a claimed easement across lands to which it holds title, (ii) "judicial recognition of an easement would impair the government's right[s]," and (iii) the United States' joinder is barred by sovereign immunity. App., *infra*, at 9a. The only question is whether, under Rule 19(b), the litigation must be dismissed because the United States cannot be joined or whether, instead, the litigation can proceed and the United States' title can be compromised in its absence.

While ordinarily "[t]he decision whether to dismiss * * * must be based on factors varying with the different cases," some factors are "compelling by themselves." *Provident Tradesmen Bank & Trust Co.*

v. Patterson, 390 U.S. 102, 118-119 (1968). In *Pimentel*, this Court held that a "claim of sovereign immunity" is just such a compelling factor, 533 U.S. at 869, and that lower courts err when they "fail[] to give full effect to sovereign immunity" in the Rule 19(b) calculus, 533 U.S. at 865. Likewise, in *Minnesota*, this Court held specifically that the United States is an indispensable party, in whose absence the litigation cannot proceed, when a right of way is sought over Indian lands held by the United States. 305 U.S. at 386-387 & n.1. The decision below casts that precedent and the law of other circuits aside in favor of a "somewhat incongruous" exception to sovereign immunity devised by the Ninth Circuit, App., *infra*, 12a.

A. The Ninth Circuit's Decision Flatly Defies This Court's On-Point Precedent.

Because, as the Ninth Circuit admitted, "judicial recognition of an easement would impair the government's right[s]," App., *infra*, 9a, binding precedent of this Court mandated dismissal of this action because the judgment granting the easement "necessarily affect[ed] adversely and immediately the [interests of the] United States." *See Texas v. New Mexico*, Report of the Special Master, No. 9 Orig., p. 41 (March 15, 1954) (recommending the dismissal of the complaint for failure to join the United States as an indispensable party); *see also Texas v. New Mexico*, 352 U.S. 991 (1957) (per curiam) (dismissing the bill of complaint "because of the absence of the United States as an indispensable party").

In *Republic of the Philippines v. Pimentel*, this

Court held quite straightforwardly that a sovereign immunity barrier to joinder requires dismissal under Rule 19(b) because "[a] case may not proceed when a required-entity sovereign is not amenable to suit." 553 U.S. at 867. That is this case. Here, as in *Pimentel*, the United States was a "required-party" with a substantial interest in the case under Federal Rule of Civil Procedure 19(a); the United States' interest in the land is "not frivolous"; and the court of appeals agreed that "there is a potential for injury to the interests of the absent sovereign." *Id.*; *see* App., *infra*, 9a. Accordingly, "[t]he court's consideration of the merits was itself an infringement on * * * sovereign immunity." *Pimentel*, 553 U.S. at 864. The cases cannot fairly be distinguished.

The Ninth Circuit reasoned that the litigation could proceed because the United States would not be bound by the judgment as it was not a party to the litigation. App., *infra,* 14a. This Court rejected that very same rationale when the Ninth Circuit used it in *Pimentel*, holding that permitting litigation to proceed in the absence of a required sovereign does "not further the public interest in settling the dispute as a whole." 553 U.S. at 870-871. The Ninth Circuit's rationale also defies *Arizona v. California*, 298 U.S. 558 (1936), which specifically held that the fact that a particular decision will not "bind or affect the United States" is "not an inducement for this Court to decide the rights of the [parties] which are before it by a decree which, because of the absence of the United States, could have no finality," *id.* at 572.

That already twice-rejected rationale works no better here. Once a court adjudicates rights in property, material consequences follow as conduct is

undertaken in reliance on that judgment. As a result, the rights and interests of non-parties in land can become, for all practical purposes, irretrievably lost. In this case, for example, an easement was sought to allow development of a high-density subdivision in the middle of a rural, agrarian area. Once such a right is recognized by a court, the only way the sovereign can protect its legal interests is to come to court to challenge the order—and thus to surrender the very sovereign immunity from litigation over title that Congress statutorily preserved in the Quiet Title Act. In addition, adjudicating property interests in the absence of the title holder confounds the "public stake in settling disputes by wholes" and in "the avoidance of multiple litigation." *Pimentel*, 553 U.S. at 870-871.

But the Ninth Circuit now leaves the United States no choice except either (i) to acquiesce in the court's grant of an easement across its land, or (ii) to multiply the litigation, surrender its immunity, and go to court to try to defend its legal interests within the straitened framework already set by the Ninth Circuit's precedential legal rulings and the district court's fact findings. That unravels all of *Pimentel*'s protections. The sovereign immunity "privilege is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection." 553 U.S. at 868-869.[2]

---

[2] Because no court notified the United States about the litigation or invited its views on the trustee's claim to its land,

The Ninth Circuit's only other distinction of *Pimentel* was to declare it a "narrow[]" ruling limited to "foreign sovereign[s]." App., *infra*, 14a. That makes no sense at all. Nothing in *Pimentel* or Rule 19(b) creates a hierarchical stacking of sovereigns' immunities or relegates the United States' immunity to a lower, more judicially dispensable class than that of foreign nations.

In any event, other decisions of this Court, which the Ninth Circuit also disregarded, compel equal treatment for the United States' and foreign governments' sovereign immunity in Rule 19 decisions. Most specifically, in *Minnesota v. United States*, this Court slammed the door shut on the Ninth Circuit's reasoning. *Minnesota* held that the United States' sovereign interest in Indian lands to which it holds title requires dismissal if sovereign immunity bars joinder of the federal government. In *Minnesota*, the State brought suit to establish a right of way by condemning the land of Indian allottees to which the United States held fee title. 305 U.S. at 383. The district court dismissed the United States as a defendant, but allowed the suit to proceed, reasoning that "the United States is not a necessary

---

the United States did not appear in this litigation and itself assert sovereign immunity. But sovereign immunity principles cannot be dodged that easily. Congress, in the Quiet Title Act, has already asserted that immunity, 28 U.S.C. § 2409a. Because the Executive Branch cannot waive sovereign immunity that Congress has preserved, *see Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 423-434 (1990); *United States v. Shaw*, 309 U.S. 495, 502 (1940), its formal assertion or not of immunity in a particular case cannot alter the weight of the sovereign immunity interest in the Rule 19(b) analysis.

party." *Id.* at 384.

This Court disagreed and held that the suit must be dismissed in its entirety because it was a "proceeding against property in which the United States has an interest," and the United States had not consented to suit. 305 U.S. at 386, 388-389. Because the United States "is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees," this Court held that "the right of way cannot be condemned without making it a party." *Id.* at 386.

Indeed, in sharp contrast to the Ninth Circuit's decision here, this Court emphasized that "no effective relief can be given in a proceeding to which the United States is not a party and that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands." *Minnesota*, 305 U.S. at 387 n.1. The Ninth Circuit's holding that "an interest in the lands," including specifically a "right of way," could be established over Indian trust lands without the United States' participation is completely irreconcilable with *Minnesota*.

Nor was *Minnesota*'s protection of sovereign immunity an isolated event. The Ninth Circuit's decision equally runs afoul of *Texas v. New Mexico*, 352 U.S. 991 (1957), where this Court dismissed an original-action complaint because the United States had an interest in the water rights at issue as trustee but could not be joined due to sovereign immunity. Texas filed suit claiming that New Mexico had violated the Rio Grande Compact. However, this Court agreed with the report of the Special Master,

that the United States was indispensable in its role as trustee for various Indians because, even though the United States would not be bound by a determination made in its absence, a decree in that case would have "necessarily affect[ed] adversely and immediately the United States" in its fiduciary capacity. *See Texas v. New Mexico*, Report of the Special Master, No. 9 Orig., p. 41 (March 15, 1954); *see also Texas v. New Mexico*, 352 U.S. 991 (1957) (*per curiam*) (dismissing the bill of complaint "because of the absence of the United States as an indispensable party").

The list of this Court's precedent that the Ninth Circuit's decision transgresses does not stop there. *See Arizona v. California*, 298 U.S. 558 (1936) (denying motion to file bill of complaint seeking division of unapportioned water in the Colorado River because the relief requested would affect the United States' interests in the river and the United States' joinder was barred by sovereign immunity); *Mine Safety Appliances Co. v. Forrestal,* 326 U.S. 371, 375 (1945) (where "the suit is essentially one designed to reach [assets] which the government owns," the "government is an indispensable party").

The departure from precedent here is doubly stark because, although the case involves lands now held in trust by the United States, the Ninth Circuit ruled that the easement actually arose in 1877, at a time when all of the lands at issue were *public* lands owned directly and exclusively by the United States. App., *infra*, 20a. There is no dispute that, had the trustee sued the United States directly to have that same easement across public lands declared, the lawsuit would have been barred by the Quiet Title

Act. *See* 28 U.S.C. § 2409a(a). Suing an Indian tribe does nothing to change the United States' *exclusive* legal interest in and title to those lands at the time of the easement's purported creation.[3]

Further compounding the harm of the decision is that it licenses plaintiffs not only to circumvent direct limitations on the United States' waiver of sovereign immunity, but also to avoid the very administrative processes that Congress and the Executive Branch have provided for obtaining easements over public and trust lands. *See* 25 U.S.C. § 323, *et seq*.; *see also* 25 C.F.R. § 169.1 *et seq*. The Ninth Circuit's contortion of precedent thus was entirely unnecessary to provide the trustee an avenue for relief on its claim. *See* Fed. R. Civ. P. 19(b) (existence of alternative sources of relief weighs in favor of dismissal).

Put simply, the Ninth Circuit has turned its back on binding law from this Court and charted in this precedential decision a path that is diametrically opposed to the principles of sovereign immunity and their role in joinder analysis that this Court laid down in, *inter alia, Pimentel, Minnesota,* and *Texas v. New Mexico*. Indeed, given the extent and on-point clarity of this Court's precedent on this important question of law, summary reversal may be warranted.

---

[3] Petitioner's reservation fully encompassing the relevant lands did not come into existence until 36 years after the Ninth Circuit said the easement arose.

B. The Ninth Circuit's Decision Contradicts The Law Of Other Circuits And The Position Of The United States.

While the Ninth Circuit has held that *Pimentel* is a "narrow[]" ruling limited to cases involving "foreign sovereign[s]," App., *infra*, 14a, the Federal Circuit has applied *Pimentel* to domestic governments' assertions of sovereign immunity. In *A123 Sys., Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed. Cir. 2010), the Federal Circuit held that *Pimentel* applies to sovereign States and dismissed the litigation under Rule 19(b) when sovereign immunity barred the State's joinder, *id.* at 1221. *See also School Dist. of the City of Pontiac v. Secretary of the United States Dep't of Educ.*, 584 F.3d 253, 305 (6th Cir. 2009) (en banc) (McKeague, J. concurring) (citing *Pimentel* for the proposition that, within Rule 19(b) analysis, State sovereign immunity "'may be viewed as one of those interests compelling by themselves'") (citation omitted).

Likewise, the Ninth Circuit's cramped view of *Pimentel* has been rejected by the United States itself. Although the lower courts here did not seek the views of the United States while compromising its title to land, the United States, like the Federal Circuit, reads *Pimentel* as extending to the federal government's sovereign immunity. *See* Brief of Amicus Curiae United States of America at 28-31, *BGA LLC v. Ulster County*, (2d Cir. 2008) (No. 08-0596-cv) (arguing that *Pimentel* applies to federal sovereign immunity).

Notably, the conflict among the courts of appeals

regarding the importance of sovereign immunity interests in the Rule 19(b) analysis is longstanding. *Compare Fluent v. Salamanca Indian Lease Auth.,* 928 F.2d 542, 548 (2d Cir. 1991) (emphasizing the "paramount importance accorded the doctrine of sovereign immunity under Rule 19"); *Enterprise Mgmt. Consultants, Inc. v. United States,* 883 F.2d 890, 894 (10th Cir. 1989) ("When, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.") (internal quotation marks omitted); *and Wichita & Affiliated Tribes v. Hodel,* 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (same), *with Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1162 (9th Cir. 2002) (applying traditional balancing of the Rule 19(b) factors and declining to treat sovereign immunity as a singularly compelling factor).

Thus this Court's review is needed to ensure that Rule 19(b) is enforced consistently across circuit boundaries and that the federal government's and States' activities within the Ninth Circuit receive the same sovereign immunity protections accorded by other circuits.

II. THE NINTH CIRCUIT'S APPLICATION OF ITS "SOMEWHAT INCONGRUOUS" EXCEPTION TO THE UNITED STATES' SOVEREIGN IMMUNITY CONFLICTS WITH *UNITED STATES V. JICARILLA APACHE NATION*

The Ninth Circuit attempted to justify its stark departure from this Court's binding and directly on-point precedent by relying on what it described as that Circuit's "somewhat incongruous" decision (App., *infra*, 12a) in *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). In *Puyallup*, the Ninth Circuit adopted the novel, seemingly categorical rule that the United States is not an indispensable party to "a suit by an Indian tribe" as a plaintiff "to protect its interest in tribal lands." App., *infra*, at 11a. The panel in this case extended *Puyallup* to cases where the Indian tribe is a defendant, hauled into court involuntarily and forced to litigate to protect its and the United States' existing interests in land. *Id*. at 12a.[4]

---

[4] The Ninth Circuit here reasoned that petitioner, although a named defendant in the trustee's suit, was akin to a plaintiff because petitioner had filed a proof of claim in response to the bankruptcy trustee's assertion of adverse claims to petitioner's property. App., *infra,* 12a. Once again, that rationale is squarely foreclosed by *Pimentel*. *See* 553 U.S. at 871 (formal party status controls in Rule 19(b) analysis regardless of whether "other parties press claims in the manner of a plaintiff."); *cf. Central Va. Cmty. College v. Katz*, 546 U.S. 356, 378-379 (2006) (unless validly abrogated, Eleventh Amendment immunity applies to States that file proofs of claim in bankruptcy proceedings).

Whatever *Puyallup*'s validity when an Indian tribe appears as a plaintiff seeking to assert new rights to land, Ninth Circuit law has now taken that concept far afield and extended it to situations when, as here, "the court quite literally cannot give the plaintiff the interest that it seeks without simultaneously taking that interest away from the absent non-party." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part). That is wrong. The circuit courts have no license to mint "somewhat incongruous" exceptions to sovereign immunity, App., *infra*, 12a, that are directly proscribed by this Court's precedent and that allow plaintiffs to take "interest[s] away from [an] absent non-party" sovereign. *Chehalis*, 928 F.2d at 1502. Indeed, *Minnesota* and *Texas v. New Mexico* both squarely addressed the joinder analysis when a plaintiff sought to take assets and interests away from a United States-held trust, and both held that the action must be dismissed in the United States' absence. *Minnesota*, 305 U.S. at 386, 388-389; *Texas v. New Mexico*, 352 U.S. 991 (1957). The presence in the litigation of Indians as defendants in *Minnesota* did nothing to salvage the litigation. *Minnesota*, 305 U.S. at 383-384.

Nor did the Ninth Circuit ever explain how the United States' legal interests could be sufficiently impacted by the litigation to trigger the Quiet Title Act's bar against suing the United States directly, but not sufficiently implicated to warrant giving those sovereign interests meaningful protection in litigation.

Indeed, the Ninth Circuit's decision that the tribe is a sufficient defensive proxy for the United States' legal interests is particularly "incongruous" because the court held that the easement arose more than three decades before the reservation encompassing the relevant lands was created by the federal government, and thus at a time when the lands over which the easement was applied were *public lands* directly and exclusively held by the United States. Plaintiffs cannot escape a direct sovereign immunity bar on lawsuits seeking easements over federal public lands by the simple expedience of suing an Indian tribe that *later* acquired reservation lands covering a *portion* of the easement.

Tellingly, no other circuit has adopted the Ninth Circuit's *Puyallup* rule. *See Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 304 (7th Cir. 1989) ("The nature of the Rule 19(b) inquiry—a weighing of intangibles—limits the force of precedent and casts doubt on generalizations such as [the *Puyallup* Rule]").

Finally, the Ninth Circuit's foundational assumption that "the government's interests are shared and adequately represented by" an Indian tribe defendant in the litigation, App., *infra*, at 14a, runs headlong into this Court's recent decision in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). In *Jicarilla*, this Court rejected the assumption that the United States' legal interests as trustee of Indian lands and the interests of a tribe are coterminous. The Court noted that the administration of laws concerning tribal trust property is a distinctly sovereign function and the sovereign "has often structured the trust relationship

to pursue its own policy goals," *id.* at 2324; *see also id.* at 2327 n.8 (the control over Indian tribes exercised by the government pursuant to the trust relationship and in restraining alienation "does not correspond to the fiduciary duties of a common law trustee"). Of most relevance here, this Court stated that, when the United States holds land in trust for Indian tribes, "the United States continue[s] as trustee to have an active interest" of its own "in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States." *Id.* at 2326. That "active interest" in avoiding an easement across United States-held lands was nowhere represented in this litigation.

The Ninth Circuit's unexplained equation of petitioner's and the United States' legal interests in the case thus paid no heed to the distinct and independent sovereign interests that the United States has in its role as trustee and titleholder of the land. Nor does the decision respect the sovereign immunity rules set forth in *Pimentel* and *Minnesota* that preclude compromising those interests in the United States' absence. *Jicarilla Nation*, however, compels attentiveness to the United States' distinct legal interests in the Rule 19(b) analysis. *See also United States v. Hellard*, 322 U.S. 363, 366-369 (1944) (United States indispensable in action to partition tribal land among tribe members because United States had its own "important governmental interests" that the tribe members could not represent).

Accordingly, if the Court does not grant the petition for a writ of certiorari for plenary review or summary reversal, it should grant, vacate and

remand for further consideration in light of *Jicarilla.*

III. THE QUESTIONS ARE IMPORTANT AND RECURRING

Resolution of the legal questions raised by the Ninth Circuit's decision here and the harmonization of inter-circuit law is critical. Issues involving the rights of sovereigns generally, and judicial solicitude for absent sovereigns in litigation directly implicating their property interests, are matters of great public significance, as this Court's decisions in *Pimentel* and *Minnesota* reflect. And this Court's recent decision in *Jicarilla* underscored the importance of respecting the United States' distinct sovereign interests in the trust relationships that exist between the United States and Indian tribes and individual allottee landowners.

The Ninth Circuit's disregard here of the United States' sovereign interests, moreover, has far-reaching implications for tribes and the United States, given that there are approximately 421 recognized tribal entities located within the Ninth Circuit. *See* 75 Fed. Reg. 60810, 60810-60814 (Oct. 1, 2010).

Finally, the impact of the Ninth Circuit's sharp departure from precedent going forward is profound. That Circuit encompasses a disproportionately large share of trust and restricted lands. Phone Interview with Q. Michael Jones, Acting Chief, Division of Land Titles and Records, Bureau of Indian Affairs (July 13, 2011) (as of March 30, 2009, approximately 38 million of the roughly 67 million acres of trust and restricted land in the United States sits within the

Ninth Circuit). As to all of those lands, the Ninth Circuit has now rolled back the rights of interested sovereigns to participate in litigation compromising their legal title. Given the frequency with which disputes arise involving trust and restricted lands, the questions presented here are bound to recur. This Court's correction of the Ninth Circuit's precedent-spurning course thus is critical.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the Ninth Circuit's judgment should either be summarily reversed or vacated and remanded for further consideration in light of *United States v. Jicarilla Apache Nation*, No. 10-382.

Respectfully submitted.

Linus Everling
General Counsel
Thomas L. Murphy
Deputy General Counsel
GILA RIVER INDIAN COMMUNITY
PIMA MARICOPA TRIBE LAW OFFICE
P.O. Box 97
Sacaton, AZ 85247-0400

Patricia A. Millett
Counsel of Record
Mark J. MacDougall
Troy D. Cahill
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

July 15, 2011

Appendix to the Petition for a Writ of Certiorari

TABLE OF CONTENTS

United States Court of Appeals,
Ninth Circuit.

G. Grant LYON, Plaintiff–counter–defendant–Appellee,

v.

GILA RIVER INDIAN COMMUNITY, Defendant–counter–plaintiff–Appellant.

In re Michael Keith Schugg, d/b/a Shuburg Holsteins; Debra Schugg, Debtor,

G. Grant Lyon, Plaintiff–counter–defendant–Appellee Cross Appellant,

v.

Gila River Indian Community, Defendant–counter–plaintiff–Appellant Cross Appellee.

Nos. 08–15570; 08–15712

Argued and Submitted Jan. 14, 2010

Filed Nov. 24, 2010

OPINION

WALLACE, Senior Circuit Judge:

This appeal involves a dispute between an Indian tribe and the trustee of a bankruptcy estate over the rights of access to and occupation of a parcel of land completely surrounded by Indian reservation land. The district court had jurisdiction pursuant to 28

U.S.C. §§ 1331 and 1334. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291, and we affirm in part and vacate in part.

I.

The center of the parties' dispute is "Section 16," a parcel of about 657 acres in Pinal County, Arizona. The land surrounding Section 16 is part of an Indian reservation (Reservation) belonging to the Gila River Indian Community (Community), a federally recognized Indian tribe. We start with the history of Section 16 and the Reservation.

The Community historically occupied the land that is now south-central Arizona. *See Gila River Pima–Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm'n 301, 303, 335 (1970). Through the 1853 Gadsden Purchase, the United States acquired title to land from Mexico, including what is now Section 16. The following year, Congress adopted a law providing that when a survey was completed of the lands within the purchased territory, "sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same." Act of July 22, 1854, ch. 103, § 5, 10 Stat. 308, 309. The lands were not literally meant to be sites for school buildings. Instead, the state was able to sell and lease them to produce funds supporting its schools. *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 463, 87 S. Ct. 584, 17 L.Ed.2d 515 (1967). In 1863, Congress partitioned the Territory of New

Mexico to create the Territory of Arizona. Act of Feb. 24, 1863, ch. 56, § 1–2, 12 Stat. 664, 664–65. Section 16 became property of Arizona when a survey of the land was filed in 1877. *See United States v. S. Pac. Transp. Co.*, 601 F.2d 1059, 1067 (9th Cir. 1979).

In 1859, Congress created a reservation for the Community. Act of Feb. 28, 1859, ch. 66, § 3–4, 11 Stat. 388, 401; *see also Gila River Pima–Maricopa Indian Cmty.*, 24 Ind. Cl. Comm'n at 303. The Reservation did not originally abut Section 16; the borders of the Reservation were later enlarged through a series of executive orders. Of relevance here, an executive order dated November 15, 1883 added to the Reservation a parcel of land immediately to the north of Section 16, and an executive order dated June 2, 1913 added to the Reservation the land immediately to the south, east and west of Section 16. The result is that since 1913, Section 16 has been completely surrounded by Reservation land. Section 16 can be accessed using Smith–Enke Road, an east-west road that runs adjacent to the southern boundary of Section 16 and crosses Reservation land before continuing west to the City of Maricopa and east to the City of Sacaton. Section 16 can also be accessed by Murphy Road, a north-south road that runs adjacent to the eastern boundary of Section 16 and crosses Reservation land before continuing south to the City of Maricopa, and north for two miles until intersecting with another road at a point within the Reservation.

The State of Arizona held Section 16 until 1929, when it sold the parcel to an individual named J.L. Hodges, pursuant to a patent conveying the land

"together with all the rights, privileges, immunities and appurtenances of whatsoever nature" and "subject to any and all easements or rights of way heretofore legally obtained." Section 16 has since been sold several times, each time conveyed by a deed containing similar language. In 2001, a company called S & T Dairy, L.L.C., owned by the children of Michael and Debra Schugg (the Schuggs), purchased Section 16 and constructed a dairy on the property. In 2003, S & T Dairy conveyed Section 16 to the Schuggs. In 2004, the Schuggs sought to have Section 16 rezoned, from "rural" to "transitional," a change that would allow construction of a higher-density housing development. Pinal County rejected the Schuggs' application to rezone Section 16.

Also in 2004, the Schuggs declared bankruptcy and listed Section 16 as their largest asset. G. Grant Lyon was appointed the Chapter 11 Trustee (Trustee) of the Schuggs' bankruptcy estates. During the bankruptcy proceedings, the Community filed a proof of claim asserting, of relevance here, that it had (1) "an exclusive right to use and occupy" Section 16, (2) "authority to impose zoning and water use restrictions" on Section 16, and (3) "a right to injunctive and other relief for trespass on reservation lands and lands to which it holds aboriginal title." In response, the Trustee initiated an adversary proceeding seeking a declaratory judgment that the Schuggs' estate had legal title and access to Section 16. The district court granted the Community's unopposed motion to withdraw the reference, thereby transferring the adversary proceeding to the district court.

In the district court, the Community moved to dismiss the case on the basis that the litigation should not proceed without the United States as a party. *See* Fed. R. Civ. P. 19. The district court denied the motion without prejudice to its renewal. The Community then filed an answer and counterclaims against the Trustee. The Community alleged, as it had in its proof of claim, that it held aboriginal title to Section 16; that nonmembers had no right to cross Reservation land to access Section 16 and had therefore committed trespass to reach the parcel; and that it had authority to establish zoning and water use restrictions for Section 16. The Community sought declaratory and injunctive relief prohibiting the Schuggs from further trespass and compensatory damages for past trespasses.

On cross-motions for summary judgment, the district court granted the Trustee's motion in part, ruling that the Community did not hold aboriginal title to Section 16. It denied summary judgment on all other issues.

Following a bench trial, the district court issued findings of fact and conclusions of law. The district court held that the United States was not an indispensable party under Rule 19. The district court also determined that the Trustee had an implied easement over Smith–Enke Road to access Section 16. It further concluded that the Trustee had a right of access over Murphy Road, either because of an implied easement or because the relevant portion of the road was an Indian Reservation Road that must remain open for public use. The district court held, therefore, that the Schuggs had not trespassed on

Reservation land. The district court rejected the Trustee's argument that it had a right to access Section 16 on the additional ground that Smith–Enke and Murphy Roads were public roads under Revised Statute 2477 (R.S. 2477), 43 U.S.C. § 932 (repealed 1976). Finally, addressing the Community's assertion of authority to control the zoning of Section 16, the district court held that the issue was not ripe for decision. The Community appeals from the district court's judgment regarding necessary and indispensable parties, the Trustee's rights of access to Section 16, and the rejection of the Community's assertions of aboriginal title and zoning authority over Section 16. The Trustee cross-appeals from the district court's judgment that Smith–Enke Road and Murphy Road are not public roads under R.S. 2477.

II.

We first review the district court's determinations, under Rule 19, that this case could proceed without the United States or the individual Indian allottees of land abutting Section 16. We review a district court's decision regarding joinder for abuse of discretion, but we review legal conclusions underlying that decision de novo. *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 778 (9th Cir. 2005).

A court first determines which parties must be joined under the criteria of Rule 19(a). *See* Fed. R. Civ. P. 19(a). Then, if a party that meets the criteria cannot be joined, the court must decide "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

The Community argues that the United States was a necessary party to the dispute over the Community's aboriginal title claim and the Trustee's alleged rights of access to Section 16. The Community further argues that, because the United States could not be joined due to sovereign immunity, the case should have been dismissed. Of course, the United States may be necessary as to some claims and not others. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (Indian tribes were necessary to some, but not all, claims asserted in the action). We first determine whether the United States was a necessary and indispensable party to the Community's aboriginal title claim. We then analyze whether the United States was a necessary and indispensable party to claims regarding the Trustee's rights of access.

A.

Aboriginal title is a "permissive right of occupancy granted by the federal government to the aboriginal possessors of the land." *United States v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976). "It is mere possession not specifically recognized as ownership . . . and may be extinguished by the federal government at any time," although such "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.* (internal quotation marks and citations omitted). Whether a tribe has *aboriginal* title to occupy land is an inquiry entirely separate from the question of who holds *fee* title to land. Indeed, it is possible for a party to take title to land subject to an aboriginal right of

occupancy. *See, e.g., Beecher v. Wetherby*, 95 U.S. 517, 525–26, 24 L.Ed. 440 (1877) (federal government transferred fee "subject to" an aboriginal right of occupancy).

With regard to the Community's claim of aboriginal title, we hold that the United States is not a necessary party under the criteria of Rule 19(a). The United States does not "claim[ ] an interest" in Section 16. The United States granted Section 16 to Arizona and has not since held it either in fee or as a trustee. Fee title to the *Reservation* land is held by the United States in trust for the Community, but Section 16 is not, and has never been, part of the Reservation. Thus, the United States has no interest in Section 16.

In addition, complete relief can be accorded among the existing parties without joining the United States. *See* Fed. R. Civ. P. 19(a). The Community's claim of aboriginal title is based on a theory that the federal government's transfer of Section 16 to Arizona (and hence to all subsequent owners) was *subject to* the Community's aboriginal title. The Community argues that its aboriginal title to Section 16 cannot be extinguished without the consent of the United States, and that the United States must be joined to obtain that consent. This premise is wrong. The district court did not purport to extinguish aboriginal title. Rather, the district court determined whether *Congress* had *already* extinguished the Community's aboriginal title. Joinder of the United States is not necessary to answer that question.

Because the United States is not required to be

joined in order to adjudicate the Community's aboriginal title claims, we need not decide whether such claims can proceed without the United States under Rule 19(b). We also need not decide whether the United States has waived its sovereign immunity as to actions regarding aboriginal title.

B.

We next determine whether the United States is necessary and indispensable to adjudication of claims regarding the Trustee's rights of access to Section 16. In this regard, the Trustee does not dispute the district court's conclusion that the United States should be joined as a necessary party under Rule 19(a). The United States holds legal title to the Reservation lands as a trustee for the Community, and any right of access to Section 16 must run over Reservation land. The United States therefore has an interest in the parties' right of way disputes because judicial recognition of an easement would impair the government's right. *Cf. United States v. Vascarajs*, 908 F.2d 443, 445–47 (9th Cir. 1990). If the claims regarding rights of access to Section 16 are resolved without the federal government's participation in this action, the result may "as a practical matter impair or impede the [government's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Thus, the United States should be joined under Rule 19(a).

The district court concluded, and the Trustee does not dispute, that the United States' joinder was impossible because it had not waived sovereign immunity. We therefore review "whether, in equity and good conscience, the action should proceed

among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

The Community argues that the United States is an indispensable party under *Minnesota v. United States*, 305 U.S. 382, 59 S. Ct. 292, 83 L.Ed. 235 (1939). There, the State of Minnesota sought to take by condemnation a right-of-way for a highway over parcels of land that were part of a reservation and allotted to individual members of an Indian tribe. *Id.* at 383–84, 59 S. Ct. 292. The state named the United States, as holder of the fee in trust, as a defendant along with the individual allottees. *Id.* at 384, 59 S. Ct. 292. The United States moved to dismiss on the ground that, although it was a necessary party without which the case could not proceed, it could not be sued due to sovereign immunity. *Id.* The Court held:

> The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party. . . . The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land. . . . In the stronger case of a trust allotment, it would seem clear that no effective relief can be given in a proceeding to which the United States is not a party and

> that the United States is therefore an indispensable party to any suit to establish or acquire an interest in the lands.

Id. at 386–87 & n. 1, 59 S. Ct. 292 (internal citations omitted). *Minnesota* did not distinguish between attempts to create new interests in land and attempts to have pre-existing interests recognized. *See also Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1338–39 (9th Cir. 1975) (United States indispensable party to individuals' action to quite title to land claimed by Indian tribe as part of reservation).

Although an action to establish an interest in Indian lands held by the United States in trust generally may not proceed without it, that rule does not apply where the *tribe* has filed the claim to protect its own interest. We recognized this exception in *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). In that case, a tribe claimed beneficial title to twelve acres of exposed riverbed, and sued the Port of Tacoma, which possessed and controlled the land at issue. The Port argued that the United States was a necessary and indispensable party, but we disagreed: "[T]he rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." *Id.* at 1254. We distinguished *Minnesota* and *Tulalip Tribes* on the basis that those cases were "instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands, not by

individual Indians or a tribe seeking to protect Indian land from alienation." *Id.* at 1255 n. 1. We recognized that our holding was somewhat incongruous, but it was nevertheless our circuit's law: "Whether the Tribe is the plaintiff or the defendant in any given suit would not seem particularly relevant in a joinder decision under Rule 19(b), according to the factors set forth in the rule. We do not question, however, the distinction established in our circuit . . . for determining indispensability under Rule 19(b)." *Id.*; *see also Skokomish Indian Tribe v. France*, 269 F.2d 555, 556–57, 560 (9th Cir. 1959) (United States not indispensable party to trespass and quiet title action brought by Indian tribe).

The Community argues that the Trustee was the aggressor in this litigation because he asserted title to Section 16 by listing it as a bankruptcy asset, and because he initiated the adversarial proceeding in bankruptcy court. For purposes of the *Puyallup* exception, however, we conclude that the Community effectively initiated this litigation by filing a proof of claim in the bankruptcy court contesting the Trustee's title and access rights to Section 16. It is true that the filing of a proof of claim does not make the claim "disputed" or initiate an adversary proceeding. *See Lundell v. Anchor Constr. Specialists, Inc.,* 223 F.3d 1035, 1039 (9th Cir. 2000) ("The filing of an objection to a proof of claim 'creates a dispute which is a contested matter' within the meaning of Bankruptcy Rule 9014 . . ."). But we agree with the district court: the Community "really stands in the shoes of a plaintiff" in this case. By filing a proof of claim asserting that the estate had no right to occupy or access its most significant asset, the Community

"had to know that there would be an objection which could be litigated only as an adversary proceeding with [the Community] named as the defendant."

The Community argues that it was "forced" to "react[ ] defensively to protect its rights" by filing its proof of claim. The Trustee did not seek to alienate Section 16 from the Community, however: it simply listed what it believed was an asset of the Schuggs' bankruptcy estate. *Cf. In re G.I. Indus., Inc.*, 204 F.3d 1276, 1280 (9th Cir. 2000) ("By filing the proof of claim, Benedor voluntarily subjected the agreement [underlying the claim] to the bankruptcy court's jurisdiction . . . ."); *Bass v. Olson*, 378 F.2d 818, 820 & n. 4 (9th Cir. 1967) ("[W]hen an adverse claimant comes into a bankruptcy court of his own motion for a determination of title to property, he . . . consents to the entry of an affirmative judgment in favor of the trustee."). Moreover, the Community's proof of claim challenged not only the Schuggs' rights in Section 16, but also asserted the Community's "exclusive right[s] to use and occupy Reservation lands surrounding" Section 16, asserted that the Community possessed authority to impose "zoning and water use restrictions" on Section 16, and sought relief for previous trespasses. Filing a proof of claim contesting the Schuggs' right to *occupy* Section 16 did not inherently raise issues regarding *access* to and *zoning* of Section 16. Such disputes were solely raised by the Community.

In light of these several considerations, we hold that the *Puyallup* exception to the *Minnesota* rule applies here. This case is more similar to "a tribe seeking to protect Indian land from alienation," such

that the United States is not an indispensable party, than to a case of "litigation . . . instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands." *Puyallup*, 717 F.2d at 1255 n. 1. None of the specific Rule 19(b) factors suggests that we should carve out an exception to the *Puyallup* exception in this particular case. For example, the government's interests are shared and adequately represented by the Community. And this case presents significantly different circumstances than those in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 171 L.Ed. 2d 131 (2008), which narrowly held that a particular suit could not go forward when it threatened to prejudice the interests of a foreign sovereign that had invoked sovereign immunity. *Id.* at 855, 128 S. Ct. 2180. The United States is therefore not an indispensable party to this litigation under Rule 19(b).

C.

The district court also concluded that individual Indian allottees of the land surrounding Section 16 were not required parties under Rule 19. The district court observed that the Community "offered only conclusory statements concerning the individual allottees' interest in this action." The district court also observed that, like the United States, the individual allottees were not bound by any judgment in this case. The Community disagrees, arguing that these individuals claim an interest relating to the subject of the action, and that this case will impair their ability to protect that interest.

Assuming, without deciding, that the individual allottees were required parties under Rule 19(a), the litigation could proceed without them under Rule 19(b). The allottees' interests were adequately represented by the Community. There is no reason to believe that the Community did not make all of the arguments that would have been made by the individual allottees, or that the individuals "would offer any necessary element to the proceedings that the present parties would neglect." *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (internal quotation marks omitted).

III.

We next turn to the district court's rulings on the merits. We review the district court's findings of fact for clear error, and review its conclusions of law de novo. *Adams v. United States*, 255 F.3d 787, 792–93 (9th Cir. 2001).

We first consider whether the district court erred in holding that the Trustee had an implied easement over reservation lands, across Smith–Enke Road and Murphy Road, in order to access Section 16. The district court concluded that when Section 16 was conveyed to Arizona as school land in 1877, an implied easement to access Section 16 was also conveyed. This implied easement, the district court determined, then passed to all subsequent owners of Section 16.

A.

The Community first argues that the Trustee's claim to a common law easement is preempted by

federal procedures for obtaining rights of way over Indian lands. Although these procedures were not created until after conveyance of the alleged easement in 1877, the Community urges that preemption applies to the claim of the easement now asserted. But nothing in the scheme indicates that Congress, in creating procedures for obtaining *new* rights of way, intended to preempt all claims to *previously acquired* rights of way, such that holders of pre-existing easements would have to go through the new procedures.

To support its preemption argument, the Community relies on *Adams v. United States*, 3 F.3d 1254 (9th Cir. 1993); *Adams*, 255 F.3d at 787; and *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006). These three cases concerned landowners who claimed easements through national forests. They are of little help here because they dealt with an entirely different statutory scheme under which landowners whose property was surrounded by national forests were *guaranteed* reasonable access over federal land and therefore did not need a common-law easement to cross it. Even there, the presence of a preexisting common-law easement is relevant to whether regulations governing access are reasonable. *See Fitzgerald*, 460 F.3d at 1263–64.

We hold that the Trustee's claim of a pre-existing easement to access Section 16 is not preempted by the existence of a regulatory scheme for obtaining new easements over Indian lands.

B.

We turn now to the merits of the Trustee's right-

of-access claims. The Trustee argued that an implied easement gave the Schuggs a right to cross Reservation land in order to enter Section 16. The district court agreed, holding that, "when Section 16 was conveyed as school land to the then Territory of Arizona, an implied easement to the land also was conveyed," and the implied easement was conveyed to all subsequent purchasers, including the Schuggs.

We first examine whether the federal government's conveyance of Section 16 to Arizona, as part of a school land grant, included an implied easement. Courts normally construe federal land grants narrowly, under a longstanding "rule that unless the language in a land grant is clear and explicit, the grant will be construed to favor the [granting] government so that nothing passes by implication." *Fitzgerald*, 460 F.3d at 1265; *see also McFarland v. Kempthorne*, 545 F.3d 1106, 1112 (9th Cir. 2008). However, there is an exception to this general rule where the land grant at issue was made pursuant to "legislation of Congress designed to aid the common schools of the states;" in such cases, the grants are "to be construed liberally rather than restrictively." *Wyoming v. United States,* 255 U.S. 489, 508 (1921); *see also Oregon v. Bureau of Land Mgmt.,* 876 F.2d 1419, 1432 (9th Cir. 1989).

It is true that the statute conveying Section 16 to Arizona mentions no easement or right of access. But the question is whether the district court properly held there was an *implied* one. *Utah v. Andrus* dealt with a land grant to Utah by the United States on the condition that Utah "use the proceeds of the granted lands for a permanent state school trust fund." 486 F.

Supp. 995, 1000 (D. Utah 1979). The land so granted was surrounded by federal land. Many years later, Utah leased the land to a company that wished to mine it but could not do so without crossing federal land. The district court held:

> Given the rule of liberal construction [of school land grants] and the Congressional intent of enabling the state to use the school lands as a means of generating revenue, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend . . . . Therefore, the court holds that the state of Utah and . . . Utah's lessee do have the right to cross federal land to reach section 36, which is a portion of the school trust lands.

Id. at 1002.

This reasoning is persuasive: In granting lands to a state for the purpose of funding schools, the federal government must have intended some right of access to the land or the purpose of the land grants would fail. Thus, in *Koniag, Inc. v. Koncor Forest Resource*, we similarly implied a right of reasonable access. 39 F.3d 991, 996 (9th Cir. 1994). In *Koniag*, a partnership made up of Indian villages owned surface rights to harvest timber pursuant to a grant from the United States, while the subsurface rights were

owned by a regional corporation. We held that the Indian partnership had a reasonable right to use the subsurface rock to accomplish its timber-harvesting operations. In reaching this conclusion, we examined "several factors, including congressional intent, the degree of necessity for the easement, whether consideration was given for the land, whether the claim is against the United States or against a simultaneous conveyee, and the terms of the patent itself." *Id.* Here, Congress's intent in granting Section 16 to Arizona was to allow Arizona to use or to sell the parcel to raise money for the support of public schools. The property would have had little monetary value if there was no right of access to it.

The Community argues that we should not follow the reasoning of *Andrus* because there the right of access was implied over federal wilderness land, not across Indian land. The Community argues that no right of access should be implied over Indian land pursuant to the "principle deeply rooted in [the Supreme] Court's Indian jurisprudence: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269, 112 S. Ct. 683, 116 L.Ed.2d 687 (1992) (internal quotation marks and alteration omitted). The Community urges that any diminishment of rights in their land must be accomplished by language showing an "express congressional purpose" to do so. *Solem v. Bartlett*, 465 U.S. 463, 475, 104 S. Ct. 1161, 79 L.Ed.2d 443 (1984).

The Community's argument ignores the fact that in 1877, when the federal government granted

Section 16 to Arizona, *the lands surrounding Section 16 were not Indian lands*. The Community's Reservation, as created in 1859, did not abut Section 16. Land north of Section 16 was added to the Reservation in 1883, and land to the south, east, and west of Section 16 was added to the Reservation in 1913. Thus, when the federal government granted Section 16 to Arizona in 1877, an implied easement accompanying the grant would *not* have interfered with Indian land at all. Section 16 was not surrounded by Indian lands until 1913, pursuant to an executive order specifically providing that the expansion "shall be subject to any existing valid rights of any persons to the lands described." By this language, any pre-existing easements were effectively preserved, including the pre-existing implied easement to access Section 16. We hold, therefore, that the district court properly implied an easement in the federal government's grant of Section 16 to Arizona, and that easement was not disturbed by the subsequent expansion of the Reservation.

The Community alternatively argues that even if an implied easement was created in 1877 for the benefit of Arizona, it would not have "silently" passed to subsequent purchasers of Section 16. But the deed transferring Section 16 from Arizona to J.L. Hodges in 1929—more than a decade after the land became surrounded by the Reservation—clearly specified that the purchaser received "all the rights, privileges, immunities and appurtenances of whatsoever nature." We have held that "the word 'appurtenance' will carry with it an existing easement." *Fitzgerald*, 460 F.3d at 1267. Subsequent deeds transferring

Section 16 contained similar language. We therefore hold that the implied easement Arizona obtained from the federal government in 1877 was effectively conveyed to each subsequent purchaser of Section 16.

C.

The Trustee asked the district court to opine on the scope of any easement. The district court held that there was no actual controversy regarding the scope of the Trustees' easement, and properly declined to issue an advisory opinion on that subject. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

The Trustee has not shown that there is a live controversy with regard to the *scope* of any easement. There is no indication that the roads or utilities as they currently exist are inadequate to support the current use of Section 16, or that the Trustee has any intent to improve the roads or utilities. The parties may disagree in principle over what activities the Trustee may undertake on those roads, but there is as yet no particularized or imminent injury arising out of that disagreement.

IV.

The district court held that, in addition to or as an alternative to the implied easement, the Trustee has a right to access Section 16 across Murphy Road because that road was an Indian Reservation Road (IRR) open to the public. The district court observed that the Community had maintained the road and allowed public travel on it for many years, such that the owners of Section 16 came to rely on it. The

district court concluded that the doctrine of laches barred the Community from arguing that the relevant section of Murphy Road was not an IRR open to the public.

A.

An IRR is defined as "a public road that is located within or provides access to an Indian reservation" or other Indian land. 23 U.S.C. § 101(a)(12). A "public road," in turn, is "any road or street under the jurisdiction of and maintained by a public authority and open to public travel." *Id.* § 101(a)(27). A "public authority" may include a federal, state or municipal government or instrumentality, or an Indian tribe. *Id.* § 101(a)(23). IRRs generally must be open and available for public use. 25 C.F.R. § 170.120. "Certain IRR transportation facilities [a term that includes public roads, 25 C.F.R. § 170.5] owned by the tribes or BIA [Bureau of Indian Affairs] may be permanently closed when the tribal government and the Secretary agree. Once this agreement is reached, BIA must remove the facility from the IRR System." *Id.* at § 170.813(c). The "IRR System means all the roads and bridges that comprise the IRR." *Id.* at § 170.5.

Here, the Community argues that the part of Murphy Road running across Reservation land is neither publicly maintained nor open to the public. It submits that it once maintained the section of Murphy Road at issue, but stopped doing so when the BIA removed that section of road from the "IRR Inventory" in early 2007. "The IRR Inventory is a comprehensive database of all transportation

facilities eligible for IRR Program funding . . . ." 25 C.F.R. § 170.442(a). The Community also asserts that the BIA approved its posting of "No Trespassing" signs on the road. It unsuccessfully attempted to introduce evidence in the district court about the BIA's removal of the relevant section of Murphy Road from the IRR Inventory. The district court excluded the evidence on multiple grounds. The Community also moved for judicial notice of the BIA's action, but that motion was denied.

We hold that the district court erred in refusing to take judicial notice of this official action by the BIA, which represents the BIA's opinion that Murphy Road is not an IRR. Courts may take judicial notice of facts whose "existence is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1192 n. 4 (9th Cir. 2008). It must be taken when a party requests it and supplies all necessary information. Fed. R. Evid. 201(d); *cf. Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 924 n. 3 (9th Cir. 2002) ("Although that decision is still subject to further administrative and judicial review, and therefore not finally dispositive of any issue in the case, the existence of the ongoing litigation within FERC is an adjudicative fact relevant to this case. Further, the existence of the opinion is not in dispute, nor are its contents. Therefore, we take judicial notice of the entirety of [the decision]") (internal citations omitted). The Trustee does not allege that it would be prejudiced by the court's taking of judicial notice of the BIA's action. Indeed, the Trustee was informed of the BIA's decision "in a

matter of days" after it was made, and has apparently appealed the BIA decision.

The district court's decision also conflicts with the primary jurisdiction doctrine, which applies when "an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). This doctrine "is not designed to secure expert advice from agencies every time a court is presented with an issue conceivably within the agency's ambit," but should be used "if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Id.* (internal quotation marks and citations omitted).

We conclude that the district court should not have ignored the BIA's removal of the relevant portion of Murphy Road from the IRR Inventory. Instead, the district court should have at least stayed its decision pending ongoing BIA proceedings on the issue. *See Clark*, 523 F.3d at 1114–15. BIA proceedings on the issue are apparently ongoing. The BIA's initial decision that the relevant portion of Murphy Road should not be included in the IRR Inventory is on appeal to the Interior Board of Indian Appeals. The IRR system is administered by the BIA under a detailed regulatory scheme, and uniformity is important. We therefore vacate and remand this

issue to the district court for further consideration.

There is a related issue that we should review in order to guide the district court on remand: the application of laches. The district court held that, because the Community had allowed public access to Murphy Road and maintained the road for many years, the doctrine of laches precluded the Community from now disclaiming that Murphy Road is an IRR. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *United States v. Dang*, 488 F.3d 1135, 1144 (9th Cir. 2007) (internal quotation marks omitted). Prejudice typically means that evidence is no longer available or that the party asserting laches has "altered its [behavior] in reliance on a plaintiff's inaction." *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1412 (9th Cir. 1993). Here, the Trustee asserts that Section 16 owners, and particularly the Schuggs, have relied on the Community's treatment of Murphy Road as an IRR. That reliance was not reasonable, however, given that the regulations governing IRRs *explicitly contemplate* that a road may be closed to the public upon the agreement of the tribe and the BIA. 25 C.F.R. § 170.813. There is also no evidence that the Schuggs were relying on the road's status as an IRR rather than on the implied easement the district court found to exist. We therefore hold that the district court erred in applying laches to conclude that a section of Murphy Road is an IRR.

V.

The Trustee cross-appeals from the district court's

holding that Smith–Enke Road and Murphy Road, which provide access to Section 16, are not public roads under R.S. 2477. Prior to its repeal in 1976, R.S. 2477 authorized rights-of-way for the construction of highways over public lands not reserved for public uses. 43 U.S.C. § 932 (repealed 1976). The law repealing R.S. 2477 expressly preserved any valid, existing right-of-way. *See Adams,* 3 F.3d at 1258. The question is therefore whether Smith–Enke Road and Murphy Road were valid R.S. 2477 roads in 1976.

A.

We must first address the Community's arguments that the district court lacked jurisdiction to decide this issue. The Community argues that the Trustee's R.S. 2477 claim is essentially an action to quiet title to lands held by the United States. The Community points out that such an action may only be brought under the Quiet Title Act, which expressly preserves the federal government's sovereign immunity with respect to claims regarding Indian lands held in trust by the United States. 28 U.S.C. § 2409a(a).

The Trustee's R.S. 2477 argument is not effectively an action to quiet title. The Trustee is not seeking a declaration against the United States. He does not contest the federal government's "title" to the roads or claim a property interest in them. Rather, the Trustee seeks only a declaration against the Community that he has legal access to Section 16, which will not bind the United States.

The Community next argues that the Trustee does

not have Article III "standing to assert the public's collective right to use a road under R.S. 2477" because he has no more particularized interest than any other member of the public. To have standing, the Trustee must have a "concrete and particularized" injury that is more than a "mere generalized grievance." *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 848–49 (9th Cir. 2007). But here, the Trustee has not attempted to obtain a general declaration against the United States regarding whether Murphy Road and Smith–Enke Road are R.S. 2477 roads. Rather, he simply seeks a declaration that will bind the Community, to defeat its assertion that the Schuggs have been trespassing on Reservation land. The "threat of liability for civil or criminal trespass constitutes the type of injury that . . . is both 'concrete and particularized,' and 'actual or imminent'" for purposes of standing. *Dixon v. Edwards*, 290 F.3d 699, 712 (4th Cir. 2002).

B.

Moving to the merits of the issue, it is the Trustee's burden to establish the existence of an R.S. 2477 route. *Shultz v. Dep't of Army*, 96 F.3d 1222, 1223 (9th Cir. 1996). Federal Revised Statute 2477 did not itself *create* R.S. 2477 roads; rather, it *authorized* the states to construct highways over public lands. Thus, for Murphy Road and Smith–Enke Road to be R.S. 2477 roads, Arizona had to establish them as highways over public land in accordance with Arizona state law. *See Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974) (explaining that right of way under R.S. 2477 comes into existence "automatically *when a public*

highway [is] established across public lands in accordance with the law of the state") (emphasis added). R.S. 2477 acts "as a present grant which takes effect as soon as it is accepted by the State," and acceptance requires merely "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 882 (D.C. Cir. 1973) (internal quotation marks omitted). Thus, the first question is whether Arizona at some point established these roads as public highways under Arizona law and if so, whether these roads crossed lands that were "public lands" at that time.

1.

As to the first question, the Trustee urges that there is evidence that a road existed in the general location of present-day Smith–Enke Road since at least 1913, and a road in the general location of present-day Murphy Road since at least 1875. The mere existence of these roads is not enough to make them "public highways," however. Rather, Arizona must have taken some affirmative act to accept the grant represented by R.S. 2477. *See id.*

The Trustee points to a declaration by Pinal County in 1922 that public roads ran along all section lines in the region. Because Smith–Enke Road and Murphy Road were aligned with section lines, the Trustee argues that the 1922 declaration made these roads into public highways under Arizona law. We will assume without deciding that Pinal County's 1922 declaration was a sufficient governmental action to create state "highways," which eventually

became present-day Murphy Road and Smith–Enke Road. We will also assume without deciding that Arizona thereby took sufficient action to accept the grant of an R.S. 2477 right of way.

2.

The question then becomes whether, in 1922, those "highways" ran across "public land." This is where the Trustee's argument fails. It is undisputed that a 1913 executive order expanded the Community's Reservation to completely surround Section 16. The district court therefore concluded that, at the time of Pinal County's 1922 declaration, Murphy Road and Smith–Enke Road ran across land that had become part of the Reservation and therefore lost its public character.

The Trustee's reply is a counterintuitive proposition: that the Reservation land added by executive order was somehow still "public land." The Trustee's argument invokes a distinction between the creation or expansion of a reservation by executive order and by an act of Congress. The Trustee asserts that Indian reservation boundaries set by executive order may be modified by Congress at any time, and that Congress need not compensate Indian tribes for reducing a reservation expanded by executive order. The Trustee relies on *Sioux Tribe of Indians v. United States*, which held that an Indian tribe was not entitled to compensation upon the abolition of a reservation established by executive order, although a tribe would be entitled to compensation upon the abolition of a reservation established by Congress. 316 U.S. 317, 62 S. Ct. 1095, 86 L.Ed. 1501 (1942).

But the Supreme Court recognized in *Sioux Tribe of Indians v. United States* that it still "lay within the power of the President to withdraw lands from the public domain." 316 U.S. 317, 325, 62 S. Ct. 1095, 86 L.Ed. 1501 (1942). Executive and congressional reservation grants may differ as to whether a tribe is entitled to compensation in the event of revocation, but that does not change the fact that "the executive orders . . . involved here were effective to withdraw the lands in question from the public domain." *Id.*; *see also Id.* at 326, 331, 62 S. Ct. 1095. Accordingly, the relevant lands in this case were removed from the public domain by the executive order expanding the Community's Reservation.

We hold that the Trustee failed to show that Arizona established Smith–Enke Road and Murphy Road as public highways crossing public land. They are not R.S. 2477 roads.

VI.

We now turn to the Community's claim of aboriginal title to Section 16. The district court held that any aboriginal title held by the Community to Section 16 was extinguished in 1877 when the federal government conveyed Section 16 to Arizona. The court concluded that because Section 16 was granted to Arizona "for the 'support of common schools,'" it followed "that Congress would not intend the land, to be used as a revenue generator, to be burdened with a superior right of use and occupancy such as aboriginal title."

The Community argues that aboriginal title can only be extinguished through an unambiguous action

and should not have been implied here, because the school land grant was silent on the issue. The Community cites cases in which the Supreme Court has held that school land conveyances vest the fee in the state *subject to* any aboriginal title. These cases are distinguishable because they involved situations where a preexisting *treaty* had preserved the aboriginal title. *See United States v. Thomas*, 151 U.S. 577, 584, 14 S. Ct. 426, 38 L.Ed. 276 (1894) (holding that "*by virtue of the treaty* . . . the title and right which the state may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians." (emphasis added)); *Wisconsin v. Hitchcock*, 201 U.S. 202, 213–15, 26 S. Ct. 498, 50 L.Ed. 727 (1906); *Beecher*, 95 U.S. at 525.

The Community protests that there is no rationale for a distinction between an Indian tribe's right of possession pursuant to a treaty (as in *Beecher*, *Thomas* and *Hitchcock*) and an Indian tribe's right of possession pursuant only to aboriginal title. But the rationale in those cases is that the Indian tribe's right of possession gained by treaty is akin to a contract right negotiated in exchange for some valuable consideration and not subject to unilateral revocation by the federal government. Here there was no such right of possession when Section 16 was conveyed to Arizona in exchange for some valuable consideration. In this case, at the time that Section 16 was conveyed to Arizona, the Community had no such *recognized* right of possession.

The district court thus correctly held that the conveyance extinguished the Community's aboriginal

title to Section 16. *Accord Gemmill*, 535 F.2d at 1147–49 (series of federal actions "clearly demonstrate[d]" title extinguished).

Because we hold that the Community's aboriginal title was extinguished in 1877, we need not reach the Trustee's alternative argument that the Community is collaterally estopped from asserting aboriginal title because the Indian Claims Commission already determined that the Community's aboriginal title had been extinguished and awarded compensation to the Community for the loss of that title.

VII.

We have now determined that the Trustee had a valid right of access to Section 16, and that the Community's aboriginal title to Section 16 has been extinguished. The parties raise one final question: does the Community have zoning authority to prevent future residential development of Section 16? The district court correctly found that the issue was not ripe for decision. *See Cal. ex rel. Lockyer v. United States Dept. of Agriculture*, 575 F.3d 999, 1011 (9th Cir. 2009).

The record before us shows that the possibility that Section 16 might be developed as a housing subdivision is speculative at this time. Pinal County has refused to alter the zoning of Section 16 to allow such a development, and there are no current plans to sell Section 16 to a developer or to construct a housing development on Section 16. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S.

296, 300, 118 S. Ct. 1257, 140 L.Ed.2d 406 (1998) (internal quotation marks and citation omitted); *see also Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). We have no opportunity to address the claim on its merits, or to review the district court's alternative holdings.

AFFIRMED in Part; Vacated and Remanded in Part. Each party shall bear its own costs.

United States District Court,
D. Arizona.

In re Michael Keith Schugg, dba Schuburg Holsteins,
Debtor.

In re Debra Schugg,
Debtor.

G. Grant Lyon, in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg; Wells Fargo Bank, N.A.,
Plaintiffs,

v.

Gila River Indian Community,
Defendant.

No. CV 05–2045–PHX–JAT

BK No. 2–04–13226–PHX–GBN; BK No. 2–04–19091–PHX–GBN

ADV. No. 2–05–ap–00384–GBN

Feb. 12, 2008

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JAMES A. TEILBORG, District Judge.

On September 18, 19, 20, 25, 26, 27, and 28, 2007, the Court presided over a bench trial in this matter. In the Final Pretrial Order (Doc. # 239), G. Grant Lyon, the Chapter 11 trustee of the consolidated

estates of Michael Keith Schugg and Debra Schugg, and the Gila River Indian Community set forth approximately forty-five (45) issues of fact and law to be tried and determined. Generally, the issues can be summarized as follows: (1) whether there is an easement or right-of-way via Smith–Enke Road or Murphy Road for access and utilities to Section 16 of Township 4 South Range 4 East in Pinal County ("Section 16"); (2) whether Murphy Road is an Indian Reservation Road that must remain open for public use; (3) whether Smith–Enke Road and/or Murphy Road are public rights-of-way under R.S. 2477 that must remain open for public use; (4) whether the easement and/or right-of-way access (if any) to Section 16 includes the right to improve the easements or install additional utilities thereon; (5) whether GRIC has the power to regulate zoning on Section 16; and (6) whether the Trustee, the Debtors, representatives of the S & T Dairy and/or their respective invitees, employees, assignees, agents or representatives have trespassed on tribal or allotted lands within the Gila River Indian Community's reservation. Following the bench trial, the Court hereby finds and concludes as follows:

I. Findings of Fact

Introduction

1. This action was filed by G. Grant Lyon acting solely in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the "Trustee").

2. The Defendant/Counter–Plaintiff Gila River Indian Community ("GRIC") is a federally-recognized

Indian Community organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq*.

3. GRIC is based on the Gila River Indian Reservation (the "Reservation"), which consists of approximately 372,000 acres in south-central Arizona, and includes members of the federally-recognized Akmil O'odham ("Pima") and Peeposh ("Maricopa") Tribes.

4. In or about September 2003, Michael Schugg and Debra Schugg (the "Debtors") acquired title to land known as Section 16 of Township 4 South, Range 4 East in Pinal County, Arizona, comprising approximately 657 acres ("Section 16").

5. On May 22, 2006, the Bankruptcy Court entered an order directing the Trustee to pay Wells Fargo's principal and interest in full.

6. On March 12, 2007, Wells Fargo, N.A., released its lien on Section 16.

7. On June 1, 2007, all claims and counterclaims between Wells Fargo and GRIC were dismissed with prejudice, resulting in the dismissal of Wells Fargo from this case.

Indispensable Party

8. On March 9, 2006, the Court denied without prejudice GRIC's Motion to Dismiss, in which GRIC argued, *inter alia,* that the United States is an indispensable party.

9. Before the trial of this matter, GRIC filed a

brief entitled Gila River Indian Community's Trial Brief Regarding the Lack of Jurisdiction Over the Trustee's Access Claims Due to the Fact that the United States Is an Indispensable Party (Doc. # 218).

10. In response, the Trustee filed a Memorandum Regarding the United States Not Being an Indispensable Party to Legal Access Claims (Doc. # 225).

11. On January 8, 2008, the Court ordered the parties to file supplemental briefs to address the fact that Smith–Enke Road and Murphy Road cross land owned by or allotted to individuals not made parties to this litigation and the impact thereof on the analysis under Rule 19 of the Federal Rules of Civil Procedure.

12. On January 11, 2008, both parties filed their respective briefs.

13. There is no pending motion to dismiss for failure to join a party under Rule 19 of the Federal Rules of Civil Procedure.

Uncontested History of Section 16 and the Gila River Indian Reservation

14. In 1850, the United States Government reserved all sections numbered sixteen and thirty-six in each township of the Territory of New Mexico for the purpose of being applied to schools.

15. In 1853, the United States acquired land that later became part of the State of Arizona through the Gadsden Purchase, including land that was later

designated as Section 16.

16. In 1854, the United States promulgated the Law of July 23, 1854, § 5, which stated, in part: "sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same."

17. In 1863, Congress partitioned the Territory of New Mexico to create the Territory of Arizona.

18. In 1876, a survey of the Territory of Arizona, which included Section 16, was conducted by Theodore White, a United States Deputy Surveyor for Arizona. The survey was filed with the Surveyor General's Office in Tucson, Arizona, the following year.

19. In 1921, a resurvey of certain parcels surrounding Section 16 was filed.

20. In 1910, Congress authorized Arizona's statehood by passing the Enabling Act.

21. Arizona became a state on February 14, 1912.

22. In 1859, Congress created a reservation for the confederated bands of Pima and Maricopa Indians by enacting sections 3 and 4 of the Act of February 28, 1859, ch. 66, 11 Stat. 388, 401.

23. After 1859, the Reservation's boundaries were revised by seven Executive Orders issued between 1876 and 1915, resulting in its current size of

approximately 372,000 acres.

24. The land contiguous to Section 16 was added to the Reservation by two Executive Orders: one dated November 15, 1883 (adding the land immediately north of Section 16) and the other dated June 2, 1913 (adding the land immediately to the south, east and west of Section 16).

25. The Executive Orders that expanded the Reservation lands did not identify any specific easements providing legal access to Section 16.

26. The 1883 Executive Order, which added to the Reservation land immediately north of Section 16, stated in part:

> [A]ny tract or tracts of lands included within the foregoing-described boundaries [added to the Reservation] the title of which has passed out of the United States Government, or to which valid homestead or pre-emption rights have attached under the laws of the United States prior to the date of this order, are hereby excluded from the reservation hereby made.

27. The 1913 Executive Order, which added to the Reservation land south, east and west of Section 16 (hereinafter referred to as the "Encircling Strip"), stated that the lands "shall be subject to any existing valid rights of any persons to the lands described."

28. The land surrounding Section 16 includes allotments for individual Indians and GRIC.

29. Allotment Deeds for certain allotments in the vicinity of Section 16 were issued in 1921.

30. The Allotment Deeds state that the federal government will hold the land in trust for twenty-five years for the sole use and benefit of the Indian, and when the period expires "the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever."

31. On November 1, 1929, the State of Arizona transferred Section 16 to J.L. Hodges by a patent conveying fee simple ownership "with all the rights, privileges, immunities, and appurtenances of whatsoever nature" and "subject to any and all easements or rights of way heretofore legally obtained."

32. On January 11, 1944, Mr. Hodges and Grace Atkins Hodges conveyed to H.G. Tiffany and Virginia Tiffany, Frances H. Raymond, and Walter H. Coleman and Pearl F. Coleman title to Section 16 by warranty deed "together with all and singular the rights and appurtenances thereto in anywise belonging unto the said GRANTEES." The warranty deed did not otherwise identify any easement across Indian lands to Section 16.

33. On March 7, 1946, Mr. and Mrs. Tiffany, Ms. Raymond, and Mr. and Mrs. Coleman conveyed to Charles and Lena Hill title to Section 16 by warranty deed "together with all and singular the rights and appurtenances thereto in anywise belonging unto the said GRANTEES." The warranty deed did not otherwise identify any easement across Indian lands

to Section 16.

34. On July 19, 2001, Wells Fargo loaned S & T Dairy $500,000 to help purchase Section 16 in exchange for a deed of trust on the property.

35. By warranty deed recorded in Pinal County on July 26, 2001, Charles A. Hill, a descendant of Charles Hill and general partner of Hill Farms, Ltd., an Arizona limited partnership, conveyed to S & T Dairy, L.L.C., an Arizona limited liability company ("S & T Dairy"), title to Section 16 "together with all rights and privileges thereto." The warranty deed did not otherwise identify any easement across Indian lands to Section 16.

36. In June 2001, Michael Schugg and Charles Hill entered into an agreement under which S & T Dairy, a company owned by Stacey and Travis Schugg, Mr. Schugg's children, purchased fee simple title to Section 16 for $1.6 million.

37. On behalf of S & T Dairy, Michael Schugg signed a contract for the purchase of Section 16, an addendum to which stated:

> The Hill Farm is located within the boundary of the Reservation and access to the property may be restricted. The Seller does not warrant or guarantee access or right-of-ways or easements for access or utilities. The Buyer (Mr. Michael Schugg) has personally researched access to the property and has visited with the Bureau of Indian Affairs and is satisfied with the current access to the property. Mr. Schugg and/or heirs acknowledge

> the limited access and potential problems of being located with [sic] the Boundary of the Reservation and they will hold the Seller and Broker (Aztec Agricultural Group, Inc.—Melvin D. Young, Broker) harmless for any potential liability or cost that may be incurred due to the location/access of the property.

38. In 2001, S & T Dairy constructed a dairy on Section 16.

39. Construction of the dairy lasted from August 2001 to approximately March 2003 and cost approximately $9 million.

40. On June 10, 2002, Wells Fargo loaned S & T Dairy $4 million to construct the dairy on Section 16 and obtained a deed of trust and assignment of rents and leases on the property.

41. On April 29, 2003, Wells Fargo increased the value of its deed of trust on Section 16 for granting S & T Dairy a $500,000 line of credit on a "Term Note," a $3.3 million line of credit on a "Herd Note," and an $800,000 line of credit on a "Feed Note."

42. In or about September 2003, S & T Dairy conveyed to the Debtors title to Section 16 "together with all rights, easements, benefits and privileges appurtenant to the Subject Real Property on the Effective Date." The document transferring title did not otherwise identify any easement across Indian lands to Section 16.

43. On March 22, 2004, the Debtors fully assumed the obligations of S & T Dairy described in the April

29, 2003, Amended and Restated Deed of Trust.

Access to Section 16

44. Section 16 is located wholly within the Reservation. On the north, Section 16 is bordered by Reservation land that includes allotments for individual Indians and GRIC. On the south, east and west, Section 16 is bordered by the Encircling Strip, an approximately one-half mile strip of Reservation land that includes allotments for individual Indians and GRIC.

45. Smith–Enke Road and Murphy Road provide physical access to Section 16.

46. Smith–Enke Road is an east-west road that runs adjacent to the southern boundary of Section 16.

47. Traveling west from Section 16, Smith–Enke Road crosses the Encircling Strip for approximately one-half mile and continues to the city of Maricopa, which is outside the boundaries of the Reservation.

48. Traveling east from Section 16, Smith–Enke Road extends to the city of Sacaton, although at some point east of Section 16 the name of the road changes to Seed Farm Road.

49. Smith–Enke Road abuts or crosses tribal land and land allotted to individual Indians within the Reservation boundaries.

50. Murphy Road is a north-south road that runs adjacent to the eastern boundary of Section 16. Murphy Road intersects with Casa Blanca Road

approximately two miles north of Section 16.

51. Traveling south from Section 16, Murphy Road crosses the approximately one-half mile wide Encircling Strip and continues at least to the city of Maricopa.

52. Traveling north from Section 16 for approximately two miles, Murphy Road intersects with Casa Blanca Road.

53. Casa Blanca Road is a road running east and west approximately two miles north of the northern boundary of Section 16.

54. Murphy Road abuts or crosses tribal land and land allotted to individual Indians within the Reservation.

55. Pinal County maintained Murphy Road from Smith–Enke Road south to the Reservation's southern boundary from at least 1996 to at least 2001. The maintenance occurred once every two or three months.

56. Pinal County maintained Smith–Enke Road from Murphy Road west to Hartman Road (which road runs along the western boundary of Section 16), and sometimes farther west to the University of Arizona agricultural farm land, from at least 1996 to at least 2001. The maintenance occurred once every two to three months.

57. Pinal County no longer maintains the portions of Smith–Enke Road or Murphy Road within the Reservation's boundaries.

58. The BIA was responsible for maintaining Murphy Road from Casa Blanca Road south to the Reservation's southern boundary until the mid–1990's, at which time GRIC contracted with the BIA to assume maintenance of the BIA roads on the Reservation.

59. Federal funds have been used to maintain Smith–Enke Road and Murphy Road.

60. Beginning in 2000, GRIC maintained Murphy Road from Casa Blanca Road south to the Reservation's southern boundary.

61. Approximately one year before trial, GRIC terminated its maintenance of Murphy Road from Casa Blanca Road south to the Reservation's southern boundary because neither GRIC nor the BIA has a legal right-of-way on that portion of road.

62. For decades, the owners of Section 16 and other members of the public traveled across the Encircling Strip via Smith–Enke Road and Murphy Road without GRIC's objection.

63. Trucks used Smith–Enke Road and Murphy Road to complete the dairy construction project.

64. After the dairy was constructed, trucks used Smith–Enke Road and Murphy Road to pick up loads of milk and to deliver feed for the dairy cattle.

65. GRIC did not object to the construction of the dairy on Section 16 or travel to and from Section 16 until 2003 or 2004.

66. Portions of Section 16 have been farmed since at least the 1940s.

67. Dirt wagon trails were the primary roadways in south-central Arizona in the 1800's and early 1900's.

68. In 1875, there existed a north-south road from the general location of present-day Casa Blanca Road going south to meet the main military road coming up past Picacho.

69. As of 1885, maps showed the existence of roadways in the township in which Section 16 is located.

70. As GRIC's expert concedes, in 1911, 1912, and 1913, there were roads that provided physical access to Section 16.

71. Roads existing in 1913 were flexible in their location because of water run-off and flooding, among other reasons.

72. In 1913, there existed an east-west road from the city of Maricopa to the city of Sacaton. There are indications that the road was graded.

73. The 1913 east-west road provided a route between the communities of Maricopa and Sacaton.

74. In 1915, there was a north-south road beginning at Casa Blanca Road and proceeding in a general southerly-southeast direction to the railroad tracks. The road touched the northeast corner of Section 16.

75. At all relevant times, there have been roadways that touched, provided access to, or physically crossed Section 16.

76. In 1922, Pinal County declared public roads along all section lines in the "Valley District." The Valley District included Section 16.

77. Post–1922 maps and aerials show the alignment of Smith–Enke Road and Murphy Road on section lines.

78. There are no recorded easements or rights-of-way on Murphy Road south of Casa Blanca Road.

79. There are no recorded easements or rights-of-way on Smith–Enke Road.

80. No one has ever requested an easement or right-of-way to Section 16.

81. Other than the installation of the SCIP electricity poles and lines in 2002, there is no record of anyone requesting an easement or right-of-way to Section 16.

82. The BIA maintains roads that are listed on the BIA road system, which roads are known as Indian Reservation Roads ("IRR").

83. The BIA only needs a right-of-way for an IRR if the road was constructed, which means a surveyed and engineered road.

84. The BIA did not construct Murphy Road south of Casa Blanca Road.

85. To get a road listed on the BIA road system, an Indian tribe must file an application.

86. The BIA receives federal funds to maintain IRRs and considers the roads to be public roads.

87. Murphy Road is listed as an IRR and is designated as BIA Route 93.

88. Murphy Road, north of Casa Blanca Road, is paved.

89. Murphy Road, from Casa Blanca Road south to the Reservation's southern boundary, was listed in the past as part of BIA Route 93.

90. BIA Route 93 is listed in GRIC's 1984 General Land Use Plan as being 4.8 miles long.

91. In 2001, Vernon Palmer, BIA's Western Regional Roads Engineer, wrote: "BIA Route 93, locally known as Murphy Road, is a public roadway extending 1 mile north of Casa Blanca Road and 3 miles south of Casa Blanca Road. This 4 mile roadway section has been constructed and is maintained with public funds."

92. In 2004, GRIC erected "no trespassing signs" at the Reservation's southern boundary, adjacent to Murphy Road, and at the Reservation's western boundary, adjacent to Smith–Enke Road.

93. Despite the presence of the "no trespassing" signs, public use of Smith–Enke Road and Murphy Road continues.

94. The Gila River Police Department has not attempted to block use of Smith–Enke Road or Murphy Road near Section 16.

95. In 2002, Michael Schugg spoke with Fred Ringlero, at the time the Director of Land Use Planning and Zoning for GRIC, concerning Mr. Schugg's request for the San Carlos Irrigation Project ("SCIP") to bring electric power to Section 16.

96. Mr. Schugg worked with the Bureau of Indian Affairs ("BIA") and GRIC to obtain a utility easement for the construction of an electric line to Section 16 in 2002, which was granted.

97. Mr. Ringlero told Mr. Schugg that there was no legal access to Section 16 and helped Mr. Schugg get the utility easement because it was for a dairy, which was consistent with the use of the surrounding land.

98. There are electricity poles and lines adjacent to Smith–Enke Road, serviced by Arizona Public Service Company ("APS"), that extend across the Encircling Strip and provide electricity to Section 16.

99. There is an underground gas line adjacent to Smith–Enke Road, serviced by Southwest Gas Corporation, that extends across the Encircling Strip and provides gas services to Section 16.

100. There are electricity poles and lines adjacent to Murphy Road, installed by the San Carlos Irrigation Project ("SCIP"), a division of the Bureau of Indian Affairs ("BIA"), that extend across the Reservation and provide electricity to Section 16.

101. At the Debtors' request, SCIP installed the electricity poles and lines in 2002.

102. When the Debtors sought installation of the SCIP poles and lines, GRIC participated in the process and did not object to the installation.

103. There are telephone lines adjacent to Smith–Enke Road that extend across the Encircling Strip and provide telephone service to Section 16.

Zoning

104. Currently, approximately 12,000 GRIC members reside on the Reservation.

105. In the past, GRIC primarily had an agricultural-based economy, but has since diversified. The major economic engine in the diversification are the three casinos: the Wild Horse Pass Casino and Resort, Vee Quiva Casino and Lone Butte Casino.

106. The casinos account for approximately 80% of GRIC's total income.

107. From 2003 to 2006, casino revenue increased.

108. From 2000 to 2006, casinos were the largest employers on the Reservation.

109. In 2003, GRIC had a budget of approximately $100 million. In 2006, the budget was about $110 million.

110. The Reservation contains remnants of the Japanese Internment Camps from World War II nearby Section 16. During World War II,

approximately 13,000 Japanese individuals were interned at the camps.

111. Section 16, while located within District 5 of the Reservation, was never a part of the Reservation.

112. GRIC has developed several casinos, a resort hotel with two eighteen-hole golf courses, a race track, a Western-themed attraction (Rawhide), two operating industrial parks, and other commercial development on the northern part of the Reservation.

113. Gila River Farms, Inc., an entity owned and operated by GRIC, leases and farms certain lands within Districts 3 and 5 of the Reservation, including the land to the south and west of Section 16.

114. Gila River Farms currently leases 957 acres to the south and west of Section 16 from GRIC and the individual allottees. The collection of these leases is referred to as the "960 Lease."

115. Gila River Farms grows or crops about 12,000 acres per year.

116. The 2004 Water Settlement Act, which provides GRIC with more than 600,000 acre-feet of new water, will allow for additional acres to be farmed.

117. While the Gila River Farms manager is concerned that the residential development of Section 16 would hinder farming on the 960 Lease because of groundwater issues, no independent research has been done to support such a concern.

118. While the Gila River Farms manager is concerned that the residential development of Section 16 would hinder farming on the 960 Lease by increasing traffic and limiting the spraying of insecticides, other residential developments in or around the Reservation are located near farming operations and such farming operations, other than issues of garbage, broken canals and trespassers, have not been adversely impacted.

119. From 2003 to 2006, no farm had to shut down because of residential developments on the Reservation's border.

120. The city of Sacaton is a good example of farms and residential housing right next to or adjacent to one another.

121. In 2004, GRIC became aware that a request was being made to amend the Pinal County land use designation for Section 16 from "Rural" (allowing 1.25 houses per acre) to "Transitional" (allowing a higher-density housing development).

122. Developers interested in purchasing Section 16 intended to develop it.

123. With a density of 3.5 homes per acre, a developer could build approximately 2,250 homes on Section 16.

124. For a developer to get a recorded plat for a subdivision, major cities and counties require two ingress and egress areas for police and fire.

125. On July 26, 2004, GRIC submitted an

objection to Pinal County regarding the application to amend the County's land-use designation for Section 16.

126. Pinal County ultimately rejected the application to amend the land-use designation for Section 16.

127. The Pinal County Sheriff's Department provides law enforcement services to the City of Maricopa.

128. The owners of Section 16 have over 2,000 acre-feet of water rights.

129. The nearby City of Maricopa, Arizona, is undergoing rapid development, and real estate developers are seeking land in the vicinity of the city for the purpose of residential and commercial development.

130. The City of Maricopa is separated from Section 16 by approximately one-half mile of Indian lands the majority of which consist of Indian allotments.

131. In 1984, GRIC created and adopted a General Land Use Plan (the "Plan") for the entire Reservation.

132. The general goal of the Plan is to accommodate GRIC's cultural values by creating more agricultural areas and protecting open spaces.

133. The Plan attempts to limit industrial and commercial development to the "north central

planning area."

134. The Plan is not a detailed plan for any land use or particular parcel of land.

135. After adoption of the Plan, a Reservation-wide zoning ordinance was to be created. However, no such zoning ordinance was ever created.

136. Only one area of the Reservation, near the Wild Horse Pass Casino and Resort, is zoned.

137. In contrast to the Plan's projections, there has been significant residential and commercial development north, south and east of the Reservation.

138. Some of the land on which the Wild Horse Pass Casino and Resort is located was under agricultural use prior to construction.

139. There are residential communities, both on and off the Reservation, that are located near farms.

140. While GRIC is concerned that residential development on Section 16 would have an adverse impact on agricultural operations on land surrounding Section 16, no actual studies were performed to explain such impact.

141. While GRIC is concerned about water supplies and waste water disposal should residential development on Section 16 occur, there is no indication why such residential water use and disposal is unacceptable or would adversely impact GRIC's water resources.

142. While GRIC is concerned about the lack of a storm water plan and about ground contaminants (from the dairy operation) being forced into the groundwater, no actual studies were performed to support such concerns.

143. Gila River Emergency Medical Services ("GREMS") employs 40 full-time and 20 part-time employees.

144. During a typical 24–hour shift, GREMS has six emergency medical technicians, six paramedics and one supervisor on duty, and has six ambulances in use.

145. GREMS cannot differentiate between an emergency call from a GRIC member and an emergency call from a non-member.

146. GREMS has one ambulance stationed in District 5, the district in which Section 16 is located.

147. There are 82 sworn officers employed by the Gila River Police Department ("GRPD").

148. The GRPD employs rangers who protect the exterior boundaries of the Reservation.

149. During a typical shift, there are four patrol officers, one supervisor and one to two rangers on duty.

150. Seven officers are assigned to school campuses on the Reservation as school resource officers.

151. The GRPD's jurisdiction includes the Reservation surrounding Section 16 but does not include Section 16.

152. There has been an increase in the frequency of non-resident trespassers on the Reservation, which is attributed to the residential development around the Reservation.

153. The GRPD has seen an increase in traffic on Reservation roads, and increased complaints about drivers and traffic congestion, due to residential development south of Section 16 and the Reservation.

154. According to GRIC's estimates, if residential development of Section 16 were to occur, an estimated peak hour could have 850 vehicles using the roads in the vicinity of Section 16.

155. The GRPD does not have the resources to handle the increased traffic.

156. An increase in traffic in the vicinity of Section 16 would require improvements to Smith–Enke Road, Murphy Road and Casa Blanca Road.

157. The majority of the dirt section line roads within the Reservation, including Smith–Enke Road and Murphy Road, are in use.

158. When the GRPD gets an emergency call, they must determine if the emergency is on the Reservation before responding; however, if it is a life-threatening emergency, the GRPD will respond regardless of the location.

159. Smith–Enke Road and Murphy Road are periodically patrolled; they are not regularly patrolled because the GRPD lacks the personnel.

160. Other law enforcement agencies and emergency services (other than GRIC) would be allowed to access Section 16 to render services.

161. The development of the Wild Horse Pass Casino and Resort has led to increased calls of criminal conduct.

162. The presence of the Vee Quiva Casino and Lone Butte Casino has increased GRPD service calls in those areas.

163. The casinos on the Reservation employ private security; no GRPD officers are stationed at the casinos as part of a regular shift.

164. Casinos and other businesses bring thousands of non-GRIC members onto the Reservation every day.

165. Employees of GRIC's Cultural Resource Management Program ("CRMP") have surveyed 42% of the Reservation resulting in the discovery of approximately 1,150 cultural resource sites.

166. There are numerous cultural resource sites off the Reservation.

167. The CRMP has never surveyed Section 16.

168. There are extensive cultural resource sites within a five mile radius of Section 16.

169. Development around the Reservation has negatively impacted cultural resource sites.

170. There has been a negative impact on cultural resource sites around the Wild Horse Pass Casino and Resort and Vee Quiva Casino.

171. In 2002, a survey was done before the installation of the SCIP electricity poles and lines. The survey began along the eastern boundary of Section 16 and proceeded north. No significant cultural resource sites were found in the area of potential effect.

II. Conclusions of Law

1. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1334 and 1362.

Indispensable Party

2. The Court may raise *sua sponte* the failure to join a person under Rule 19 of the Federal Rules of Civil Procedure at any stage of the litigation. *UOP v. United States,* 99 F.3d 344, 347 (9th Cir. 1996); *Faunce v. Bird*, 210 F.R.D. 725, 727 (D. Or. 2002).

3. A party is "required" if in its absence complete relief cannot be accorded among existing parties. Fed. R. Civ. P. 19(a)(1)(A).

4. Alternatively, a party is "required" if it claims an interest in the subject of the action such that a decision in its absence will impair or impede its ability to protect that interest or expose an existing party to a risk of multiple or inconsistent obligations.

Fed. R Civ. P. 19(a)(1)(B)(i) and (ii).

5. If a party is required, the Court must order that the party be joined. Fed. R. Civ. P. 19(a)(2). However, if the party cannot be joined, the Court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

6. The factors the Court considers include (1) the extent to which a judgment rendered in the party's absence might prejudice that party or existing parties; (2) the extent to which any such prejudice could be lessened or avoided by protective provisions or shaping relief; (3) the adequacy of a judgment rendered in the person's absence; and (4) whether the plaintiff would have an adequate remedy of the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b)(1)-(4).

7. Following the reasoning set forth in the Court's March 9, 2006 Order, the Court concludes that the United States, with respect to GRIC's counterclaim disputing legal access across its tribal land, is a required party, but is not an indispensable party requiring dismissal of this action in its absence. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) ("[I]n a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b).").

8. The Court also concludes that the United States, in its capacity as trustee of the land allotted

to individual Indians and with respect to the Trustee's claim that it has legal access across that allotted land, is a required party under Rule 19(a). *See Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975) ("[T]he United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation.").

9. The Court further concludes that the United States cannot be joined because it has not waived sovereign immunity in actions to establish an easement across trust or restricted Indian lands. *See State of Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994) (concluding that "both the [Quiet Title Act's] general waiver of sovereign immunity, as well as its exception for Indian lands, apply to cases involving claims for less than fee simple title interests to disputed property.").

10. Nonetheless, considering the factors listed in Rule 19(b)(1)-(4), the Court concludes that "equity and good conscience" require that this action proceed among the existing parties such that the United States, as trustee of the land allotted to the individual Indians, is not an indispensable party requiring dismissal of this action in its absence.[1]

---

[1] The Court recognizes that, in the cases GRIC cites, the Ninth Circuit concluded that the United States, in actions involving title to Indian land, is a required party under Rule 19 and, because joinder is not feasible, an indispensable party requiring dismissal of the action. *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1272 n. 4 (9th Cir. 1991);

11. First, a judgment rendered in the United State's absence will not prejudice the United States because the United States will not be bound by the Court's judgment. *See Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 458 (10th Cir. 1951) (finding that the United States, "[b]y reason of its guardianship and its governmental interest" in Indian land, would not in its absence be bound by a judgment in an action to establish title to claimed Indian land).

12. Second, while a judgment rendered in the United State's absence may be prejudicial to and inadequate for the Trustee, insofar as any legal access will be clouded by the risk that the United States will hereafter contest such access, the Trustee has acknowledged that potential and urges the Court to proceed nonetheless. *See* Doc. # 277, p. 8 ("While it may be that the United States will not be bound by a decision of this Court in this matter, it is nonetheless important for this Court to determine the rights of the Trustee with regard to GRIC.").

13. Finally, the Court notes that if this action were dismissed for nonjoinder of the United States, then the Trustee would have no available forum within which to determine the legal access issue with regard to GRIC.

14. The Court also concludes that GRIC has failed

Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975). However, in neither case did the Ninth Circuit discuss the "equity and good conscience" prong of Rule 19 and its impact on the analysis.

to show that the individual Indian allottees are required parties under Rule 19.[2] GRIC has offered only conclusory statements concerning the individual allottees' interest in this action. GRIC has failed to present any evidence tending to show that the individual allottees' interest in the allotted land, in light of the United States holding the land in trust for their benefit, makes them required parties under Rule 19. *See Imperial v. Castruita*, 418 F. Supp. 2d 1174, 1178 (C.D. Cal. 2006) (finding conclusory statements, without evidence showing absent parties are indispensable, to be insufficient to support dismissal under Rule 19).[3]

Access to Section 16

15. The Trustee bears the burden of proving that it has legal access to Section 16.

16. Murphy Road, north of Casa Blanca Road, is an Indian Reservation Road ("IRR") identified as BIA

---

[2] While GRIC has not filed a motion seeking dismissal of this action for failure to join a person under Rule 19, GRIC has filed briefs in which it argues that dismissal under Rule 19 is appropriate. Accordingly, the Court concludes that GRIC bears the burden of showing that the individual Indian allottees are required parties under Rule 19. *See Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (citations omitted).

[3] Tempering the potential prejudicial impact on the individual Indian allottees is the principle that, "[a]s a general rule, one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Sandpiper Village Condominium Ass'n, Inc. v. Louisiana–Pacific Corp.*, 428 F.3d 831, 848–49 (9th Cir. 2005) (citations and internal quotations omitted).

Route 93.

17. However, the Trustee claims that all of Murphy Road, including the portion of Murphy Road from Casa Blanca Road south to the Reservation's southern boundary (the "southern portion"), is an IRR that provides legal access to Section 16. In response, GRIC counterclaimed seeking declaratory relief that Murphy Road does not provide legal access to Section 16. In support of that counterclaim, GRIC argues that the southern portion of Murphy Road is not part of the IRR because it lacks a right-of-way and, as a result, it was erroneously listed in the past as part of BIA Route 93.

18. The owner of property abutting a public road has the right to use the road and to access the road from his property. *See State of Arizona v. Thelberg*, 87 Ariz. 318, 350 P.2d 988, 991 (1960) (citations omitted) (stating that the "owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway . . ., but also a private right or easement for the purpose of ingress and egress to and from his property.")

19. An IRR is "a public road that is located within or provides access to an Indian reservation." 23 U.S.C. § 101(a)(12).

20. A public road is "any road or street under the jurisdiction of and maintained by a public authority and open to public travel." 23 U.S.C. § 101(a)(27).

21. The term " 'public authority' means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or

instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities." 23 U.S.C. § 101(a)(23).

22. Murphy Road is located within the Gila River Indian Reservation.

23. Murphy Road has been under the jurisdiction of and maintained by various public authorities, including GRIC. In the mid–1990's, GRIC contracted with the BIA and took over maintenance of the BIA roads on the Reservation.

24. For decades, Murphy Road has been open to public travel.

25. Approximately one year ago, GRIC stopped maintaining the southern portion of Murphy Road because it learned that no right-of-way exists on that part.

26. The doctrine of laches applies against Indian tribes. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221, 125 S. Ct. 1478, 161 L.Ed.2d 386 (2005). The doctrine of laches also applies to cases involving possessory Indian land claims. *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273–78 (2nd Cir. 2005).

27. "To invoke laches as a defense there must be (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Hecht v. Harris, Upham & Co.,* 430 F.2d 1202, 1208 (9th Cir. 1970).

28. The Court finds that the past inclusion of the

southern portion of Murphy Road as part of BIA Route 93, GRIC's maintenance of Murphy Road, and GRIC's lack of objection and acquiescence to the use of Murphy Road by the public, both before and after the sale of Section 16 to the Debtors, induced the Debtors to rely thereon and use the southern portion of Murphy Road to access Section 16. The Debtors and the Trustee would be prejudiced if GRIC were now allowed to prevent access to Section 16 by advancing a claim that the southern portion of Murphy Road is no longer an IRR and no longer maintained. Accordingly, the Court concludes laches prevents GRIC from obtaining declaratory relief that there is no legal access to Section 16 via the southern portion of Murphy Road by virtue of the argument that the southern portion was, in the past, erroneously listed as part of BIA Route 93 and that maintenance thereon has been terminated.

29. As a result, the Court concludes that the Trustee has shown that Murphy Road, from Casa Blanca Road south to the Reservation's southern boundary, is an Indian Reservation Road, as defined above, that is "open and available for public use." 25 C.F.R. § 170.120.

30. The Trustee next claims that both Smith–Enke Road and Murphy Road are public roads pursuant to Revised Statute § 2477.

31. R.S. § 2477, 43 U.S.C. § 932 (1976) (repealed), provided that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

32. R.S. § 2477 establishes rights-of-way for

highways constructed before its passage in 1866, *see Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 473, 52 S. Ct. 225, 76 L.Ed. 402 (1932), and also "operates prospectively to grant rights of way for highways constructed after its enactment," *United States v. Gates of the Mountains Lakeshore Homes, Inc.,* 732 F.2d 1411, 1413, n. 3 (9th Cir. 1984).

33. The repeal of R.S. § 2477 did not apply retroactively; thus, R.S. § 2477 was a congressional offer to construct roads over public lands that remained open until 1976. *See* 43 U.S.C. § 1769(a). Any rights-of-way that had existed prior to the date of the repeal were preserved. *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993).

34. To determine whether an R.S. § 2477 right-of-way exists, the Court looks to the law of the state in which the right-of-way purportedly exists in order to determine whether the federal grant was accepted. *See Standage Ventures, Inc. v. Arizona,* 499 F.2d 248, 250 (9th Cir. 1974).

35. Arizona cases analyzing R.S. § 2477 require "strict compliance with the provisions of Arizona law" for an R.S. § 2477 right-of-way to exist. *State v. Crawford*, 7 Ariz. App. 551, 441 P.2d 586, 590 (1968).

36. The *Crawford* court explained:

> Cases decided under 43 U.S.C.A. § 932 hold that it constitutes an offer on the part of the federal government to dedicate unreserved lands for highway purposes, which offer must be accepted by the public in order to become effective. Whether the offer to dedicate which

> is made under the federal act is accepted by the establishment of a public highway is an issue to be determined under the law of the state where the highway is located. The federal statute does not of itself operate to grant right-of-ways and establish highways contrary to the local laws. The latter case makes it clear that, in order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of the Arizona law. And, just as the local state law is determinative of the issue of whether or not a public highway exists at all, it is also determinative of the issue of the width and extent of the public right-of-way.

Id. (citations omitted).

37. The right-of-way must be established prior to the land losing its public character. *See id.* (stating that, for the establishment of a right-of-way for public highway purposes, the "critical question" is "whether the State did so establish its claimed right-of-way prior to the time when plaintiff's predecessors took fee title to all the land in question."); *see also Adams,* 3 F.3d at 1258 (stating, for the establishment of an easement, that the plaintiffs "must show that the road in question was built before the surrounding land lost its public character.").

38. "It has been long established that Indian reservation land is not public land." *United States v. Schwarz*, 460 F.2d 1365, 1372 (7th Cir. 1972) (citations omitted).

39. The Trustee has made no showing that the State of Arizona established any rights-of-way for public highway purposes in the vicinity of Section 16 prior to 1883 and/or 1913, when the land surrounding Section 16 lost its public character by virtue of the creation and additions to the Reservation.

40. While *Adams,* 3 F.3d 1254, appears to support the Trustee's argument that Smith–Enke Road and Murphy Road only needed to have existed prior to the land surrounding Section 16 losing its public character, the Court notes that *Adams* involved an alleged easement. In contrast, the Trustee herein is seeking to have Smith–Enke Road and Murphy Road declared public roads pursuant to R.S. § 2477, which the Court finds, pursuant to *Crawford*, 7 Ariz. App. 551, 441 P.2d 586, requires the State of Arizona to have established the rights-of-way prior to the land losing its public character.

41. The Court concludes that Smith–Enke Road and Murphy Road are not public roads under R.S. § 2477.

42. The Trustee next claims that there is an implied easement providing access to Section 16. The Trustee claims that the implied easement arises from the intent of the federal government to create an easement for school lands transferred to the states and/or by necessity.

43. Legislation dealing with school trust lands is liberally construed. *Utah v. Andrus*, 486 F. Supp. 995, 1001–02 (D. Utah 1979).

44. In granting school trust lands to the states,

the federal government intended for the school sections, through the sale thereof, to provide a revenue base to support public education. *Id.* at 1002.

45. *Andrus* further provides:

> Given the rule of liberal construction and the Congressional intent of enabling the state to use the school lands as a means of generating revenue, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

Id.

46. Based on *Andrus,* the Court concludes that, in 1877, when Section 16 was conveyed as school land to the then Territory of Arizona,[4] an implied easement to the land also was conveyed.

47. The Court also concludes that the implied

---

[4] The Court concludes that Section 16 was conveyed to the Territory of Arizona in 1877, when the survey of Section 16 was filed. While GRIC cites *United States v. Southern Pacific Transp. Co.*, 601 F.2d 1059, 1066 (9th Cir. 1979), to support its argument that the resurvey of parcels surrounding Section 16, filed in 1921, supersedes the original survey filed in 1877, the Court is not persuaded that such an effect results in the reversal of the prior conveyance of Section 16 to Arizona.

easement to Section 16 has been conveyed to all subsequent owners of Section 16. *See* C.J.S. Easements § 111 ("Where an easement is annexed as an appurtenance to land by an express or implied grant or reservation, or by prescription, it passes with a transfer of the land although not specifically mentioned in the instrument of transfer.").

48. Because access to Section 16 cannot be "so narrowly restrictive as to render the lands incapable of their full economic development," *Andrus*, 486 F. Supp. at 1009, the Court concludes that the Trustee has an implied easement over Smith–Enke Road. Further, in the alternative to the conclusion that the southern portion of Murphy Road is an Indian Reservation Road, the Court also concludes that the Trustee has an implied easement over Murphy Road.

49. An easement by necessity is created when: (1) there was at one time common ownership of the parcels in question, (2) the common ownership was severed by a conveyance of either the dominant or servient parcel, and (3) an easement is reasonably necessary for the owner of the dominant parcel at the time of the severance and at the time of exercise of the easement. *Montana Wilderness Ass'n v. United States Forest Service*, 496 F. Supp. 880, 885 (D. Mont. 1980); *Barnes v. Babbitt,* 329 F. Supp. 2d 1141, 1148 (D. Ariz. 2004).

50. An easement by necessity is extinguished once the necessity is no longer present. *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266 (9th Cir. 2006).

51. "With the existence of a statutory right of

access, no necessity exists for a common law easement." *Fitzgerald v. United States*, 932 F. Supp. 1195, 1203 n. 3 (D. Ariz. 1996).

52. The Trustee has a legal mechanism to obtain a right of access to Section 16. *See* 25 C.F.R. § 169.1, *et seq.*

53. While 25 C.F.R. § 169.1, *et seq.,* does not provide an absolute right of access, since consent of the tribe and Secretary of Interior is necessary, it nonetheless does provide the Trustee a method by which to obtain a right of access.

54. The Court concludes that until the Trustee applies for a right of access pursuant to 25 C.F.R. § 169.1, *et seq.,* and such right of access is denied, no necessity exists for a common law easement. The Court also concludes that no necessity exists for a common law easement because the Court already has concluded that Murphy Road, from Casa Blanca Road south to the Reservation's southern boundary, is an Indian Reservation Road, and that an implied easement exists over Smith–Enke Road and, in the alternative, Murphy Road.

55. While the Trustee is seeking to have the Court rule on the scope of the easements, for current and future owners, the Court concludes that there is no actual case or controversy such that any ruling would be an improper advisory opinion. *See Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007) (stating that courts may adjudicate only actual cases or controversies; otherwise, a judgment would be an unconstitutional advisory opinion). There has been no showing that the easements, as configured,

are insufficient to support the current use of Section 16. Any ruling on the scope of the easements, based on possible future use or development of Section 16, would be speculative at best and would constitute an advisory opinion.

Zoning

56. GRIC seeks a ruling from the Court that it has the right to regulate the conduct of nonmembers on Section 16 by controlling the zoning of Section 16.

57. GRIC may "'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.'" *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 428, 109 S. Ct. 2994, 106 L.Ed.2d 343 (1989), *quoting Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981).

58. "The impact *must be demonstrably serious and must imperil* the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 431, 109 S. Ct. 2994 (italics added).

59. At trial, it became clear that there are no current plans to sell Section 16 to a developer and no current plans to construct residential homes on Section 16.

60. To the extent GRIC seeks, if at all, the right to control the zoning over Section 16 as it presently is being used, the Court concludes that GRIC has failed

to show that the present use has a demonstrably serious impact and imperils the political integrity, economic security, or health and welfare of the tribe.

61. To the extent GRIC seeks the right to control the zoning over Section 16 based on the potential sale of Section 16 to a developer and the developer's potential plans for Section 16, the Court concludes, like the Trustee's claim seeking a ruling on the scope of the easements, there is no actual case or controversy and any such ruling would constitute an improper advisory opinion.

62. In the alternative, if there is an actual case or controversy, then the Court concludes that speculation concerning the potential impacts of a potential sale and development of Section 16 is insufficient to show a demonstrably serious impact that imperils GRIC's political integrity, economic security, or health and welfare. *See Yellowstone County v. Pease*, 96 F.3d 1169, 1177 (9th Cir. 1996) (concluding that speculation concerning possible results is insufficient to show the necessary imperilment).

63. In the further alternative, if potential impacts can be found sufficient, then the Court concludes that the evidence GRIC presented at trial fails to show that the development of Section 16 will have a demonstrably serious impact and will imperil GRIC's political integrity, economic security, or health and welfare. Section 16 is located near the border of the Reservation and is close to the City of Maricopa, which is undergoing rapid residential and commercial development significant. While the

development of Section 16 will bring additional people onto the Reservation, GRIC has failed to show that the impact on its police department, emergency medical responders, water resources, farming operations, and cultural resources will be demonstrably serious and will imperil GRIC's political integrity, economic security, or health and welfare.

Trespass

64. GRIC claims that the Debtors and their invitees have trespassed on tribal and allotted lands by accessing Section 16 over roadways where no legal access existed.

65. Because the Court has concluded that legal access to Section 16 does exist, the Court also concludes that the Debtors and their invitees have not trespassed on GRIC's tribal and allotted lands.[5]

66. Further, the Court notes that GRIC, during the trial, failed to put on any evidence of damages related to the alleged trespass. While GRIC states in its proposed conclusions of law that it is entitled to damages, the amount of which shall be determined in a subsequent hearing, no such subsequent hearing was contemplated. Accordingly, even if GRIC had proven that the Debtors and their invitees trespassed

[5] Because of the limitations of this judgment as discussed in the indispensable party section, and questions the Court has concerning GRIC's authority to prosecute a claim of trespassing on land allotted to individual Indians, the Court limits its conclusion on trespass to GRIC and its tribal and allotted lands.

on GRIC's tribal and allotted lands, GRIC would not be entitled to any damages.

III. Judgment

Based on the foregoing,

IT IS ORDERED that Plaintiff is entitled to legal access to Section 16, that Defendant is not entitled to exercise zoning authority over Section 16, and that no trespass on the Gila River Indian Reservation has occurred, all in accordance with the foregoing findings and conclusions, and the Clerk of Court shall enter judgment accordingly in favor of Plaintiff and against Defendant;

IT IS FURTHER ORDERED that the Motion to Quash Subpoena to William Rhodes (Doc. # 231) is DENIED as moot; and

IT IS FURTHER ORDERED that the Motion for Judicial Notice of Removal of a Portion of Murphy Road from the BIA Road System (Doc. # 259) is DENIED.

Dated this 12th Day of February, 2008.

/s/
James A. Teilborg
United States District Judge

United States District Court,
D. Arizona.

In re Michael Keith SCHUGG, dba Schuburg Holsteins, Debtor.

In re Debra Schugg, Debtor.

G. Grant Lyon, in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg; Wells Fargo Bank, N.A., Plaintiffs,

v.

Gila River Indian Community, Defendant.

No. CV 05-2045-PHX-JAT

BK No. 2-04-13226-PHX-GBN; BK No. 2-04-19091-PHX-GBN

ADV No. 2-05-ap-00384-GBN

Entered May 24, 2007

ORDER

JAMES A. TEILBORG, United States District Judge.

Pending before the Court are the Trustee's Motion for Summary Judgment (Doc. # 136), and the Gila River Indian Community's Motion for Partial Summary Judgment (Doc. # 137). Also pending are numerous other motions, including the Trustee's

Motion to Strike (Doc. # 155), Gila River Indian Community's Motion to Strike Trustee's Summary Judgment Evidence (Doc. # 162), Gila River Indian Community's Motion to Take Judicial Notice and for Leave to File Additional Summary Judgment Evidence (Doc. # 164), and Gila River Indian Community's Motion to Exclude Trustee's Expert Witness John Lacy (Doc. # 169).

I. Background

On September 4, 2003, Michael Keith Schugg and Debra Schugg (the "Debtors") acquired an approximately 657 acre parcel of land identified as Section 16 of Township 4 South Range 4 East in Pinal County, Arizona (hereinafter "Section 16"). In 2004, the Debtors separately filed voluntary petitions under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Subsequently, the bankruptcy court entered an Order jointly administering and substantively consolidating the separate bankruptcy proceedings and appointing G. Grant Lyon (the "Trustee") as trustee of the Debtors' estates.

On May 25, 2005, the Trustee and Wells Fargo Bank, N.A. ("Wells Fargo"), filed their Complaint for Declaratory Relief (the "Complaint") against the Gila River Indian Community ("GRIC"). In the Complaint, the Trustee and Wells Fargo seek a declaratory judgment that Section 16 is owned by the Debtors' estates free and clear of any claims or other adverse interests of GRIC and that Wells Fargo's lien in certain real property in the Debtors' cases is valid, perfected, and may not be avoided under any legal

theory. The Trustee and Wells Fargo represent that the Complaint was a product of GRIC's contentions that Section 16 and other property rights are not property of the Debtors' estates and that Wells Fargo does not have a valid lien on any portion of the real property at issue.

On June 27, 2005, GRIC filed a motion to dismiss the Complaint and, thereafter, filed a motion to withdraw the reference. Following the Trustee's and Wells Fargo's stipulation to the withdrawal of the reference, the proceedings came before this Court. Thereafter, on March 9, 2006, the Court denied GRIC's motion to dismiss the Complaint.

On August 10, 2006, GRIC filed an amended answer to the Complaint and counterclaims against the Schuggs, the Trustee, and Wells Fargo. In the counterclaims, GRIC claims it holds aboriginal title to Section 16 and seeks declaratory relief concerning easement or right-of-way access to Section 16, and its right to use and occupy Section 16 and exercise zoning authority with respect thereto. GRIC also seeks an injunction prohibiting the Schuggs from trespassing upon Reservation land and allotments within the Reservation to access Section 16, and damages arising from the alleged trespass.

In November 2005, the Trustee, Wells Fargo and GRIC entered into an agreement to settle the issues raised in the Complaint. As part of the resolution, GRIC agreed to purchase Section 16 for $10.3 million. On or about December 6, 2005, the bankruptcy court issued an order approving the settlement and sale.

In a separate proceeding, Michael Keith Schugg filed an appeal challenging the bankruptcy court's order approving the settlement and sale of Section 16. *See Schugg v. Lyon, et al.,* No. CV 05-4158-PHX-JAT. On December 22, 2005, this Court entered a stay barring implementation of the settlement and sale during the pendency of Mr. Schugg's appeal. On May 23, 2006, this Court granted Mr. Schugg's appeal, in part, and overruled and set aside the order of the bankruptcy court approving the settlement and sale of Section 16. *See* Doc. # 54, No. CV 05-4158-PHX-JAT.

II. Trustee's Motion for Summary Judgment and GRIC's Motion for Partial Summary Judgment

In the Trustee's Motion for Summary Judgment, he moves for judgment declaring: (1) the estates of Michael Keith Schugg and Debra Schugg (the "Estates") own fee simple title to Section 16 free and clear of any adverse interests of GRIC; (2) GRIC does not have aboriginal title to Section 16; (3) the Estates and future owners have and will have legal access to Section 16 via Murphy Road and Smith–Enke Road; (4) the Estates and future owners have and will have the right to use utilities installed on Section 16 and to install or have installed additional utility services to Section 16; (5) GRIC does not have any zoning, land-use, or water-use authority over Section 16; and (6) GRIC is not entitled to any damages for trespass based on the Debtors' use of Murphy Road and Smith–Enke Road to access Section 16.

In GRIC's Motion for Partial Summary Judgment,

it moves for judgment that it has retained aboriginal title to Section 16 and that there is no legal access to Section 16 across the Reservation. GRIC also requests a permanent injunction precluding the Trustee and anyone else attempting to access Section 16 from trespassing on the Reservation without a permit or other authorization, as well as compensatory damages, costs and attorneys' fees. While GRIC maintains it is entitled to judgment on its counterclaim seeking declaratory relief as to its zoning authority over Section 16, it has opted not to seek summary judgment on the issue because of the fact-intensive nature of the inquiry.

A. Legal Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, summary judgment is mandated, ". . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to

the nonmovant to establish the existence of material fact. *Id.* The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. However, in the summary judgment context, the Court construes all disputed facts in the light most favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

B. Aboriginal Title

1. Introduction

Aboriginal title "is the right of Indian tribes to use and occupy 'lands they had inhabited from time immemorial.'" *Mashpee Tribe v. Secretary of the Interior,* 820 F.2d 480, 481-82 (1st Cir. 1987) (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985)). "Aboriginal title does not trace its roots to a written document or land grant, but is established by offering historical evidence of the tribe's long-standing physical possession" of the land. *Zuni Indian Tribe of New Mexico v. United States*, 16 Cl. Ct. 670, 671

(1989). As the definition implies, aboriginal title is not a fee simple property right; instead, it is defined as a "right of occupancy which the sovereign grants and protects against intrusion by third parties." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S. Ct. 313, 99 L.Ed. 314 (1955). "The United States holds the fee title to aboriginally held lands, and the tribe has a right of occupancy good against all but the United States." *United States v. Pend Oreille County Public Utility District No. 1,* 585 F. Supp. 606, 609 (E.D. Wash. 1984) *(citing Oneida Indian Nation v. Oneida Count*, 414 U.S. 661, 667, 94 S. Ct. 772, 39 L.Ed.2d 73 (1974). The "right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id.* The right to extinguish aboriginal title to land lies exclusively with Congress, *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544, 1551 (9th Cir. 1994) (*citing United States ex rel. Hualpai Indians v. Sante Fe Pac. R.R.,* 314 U.S. 339, 347, 62 S. Ct. 248, 86 L.Ed. 260 (1941)), and requires "express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history."[1]

---

[1] The Court previously stated that GRIC ultimately bears the burden of proving that it holds aboriginal title to Section 16. *See* Order dated March 9, 2006, Doc. # 37, p. 5. GRIC argues the Trustee bears the burden of proving aboriginal title has been extinguished. GRIC cites 25 U.S.C. § 194, which provides: "In all trials about the right of property . . . the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." GRIC alleges, as recognized by the Indian Claims Commission, that it exclusively used, occupied,

2. Undisputed History of Section 16

In 1853, Section 16 became part of the United States by virtue of the Gadsden Purchase. *See* Doc. # 140, Ex. 22. In 1854, the United States reserved Section 16 as school land for the Territory of New Mexico. *Id.* at Ex. 23, p. 3 (Law of July 22, 1854, ch. 103, 10 Stat. 308, § 5). In 1863, the Territory of New Mexico was divided into the Territory of Arizona and the Territory of New Mexico. Law of Feb. 24, 1863, ch. 56, 12 Stat. 664-65. In 1873, Congress reaffirmed the reservation of Section 16 for the newly formed Territory of Arizona. *See* Doc. # 140, Ex. 24, p. 2 (Law of 1873, § 1946). The General Land Office officially surveyed Section 16 in 1876. *Id.* at Ex. 25, pp. 1-1A; Ex. 26. The survey was approved and, in 1877, officially filed by the General Land Office. *Id.* at Ex. 26, p. 67; Ex. 27.

In 1910, the Territory of Arizona was authorized to be admitted as a state to the Union. *Id.* at Ex. 28 (Act of June 20, 1910, ch. 310, 36 Stat. 557, 568-579) (the "Enabling Act"). Under § 24 of the Enabling Act, Congress confirmed that Section 16 had been conveyed as a school section to the State of Arizona,

---

and possessed Section 16 since time immemorial such that it held aboriginal title to Section 16. The Trustee does not directly dispute GRIC's allegation. Instead, the Trustee argues that GRIC, if it had aboriginal title to Section 16, no longer has aboriginal title because that interest has been extinguished. Accordingly, the Court finds for the purpose of this Order that GRIC has established a presumption of aboriginal title and that the Trustee bears the burden of proving the interest has been extinguished.

stating: "That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools." *Id.*

GRIC's Reservation (the "Reservation") was first established in 1859 pursuant to the Act of February 28, 1859, ch. 66, 11 Stat. 401. *Id.* at Ex. 19. Thereafter, the size of the Reservation was modified by eight Executive Orders issued from 1876 to 1915 resulting in the current size of approximately 372,000 acres. *Id.* at Ex. 20. The land contiguous to Section 16 was added to the Reservation by two of the Executive Orders: one dated November 15, 1883, and the other dated June 2, 1913. *Id.* The 1883 Executive Order added the land immediately north and east of Section 16, while the 1913 Executive Order added the land immediately south and west of Section 16. *Id.* The federal government never purported to add Section 16 to the Reservation. *Id.*

3. Discussion

The Trustee argues that GRIC's aboriginal title was extinguished when, in 1877, the federal government conveyed Section 16 as school land to the Territory of Arizona.[2] The Trustee cites *Zuni Tribe of*

[2] The Trustee explains that, because of the completion and filing of the survey in 1877, title to Section 16 vested in the Territory of Arizona, and aboriginal title was extinguished, in 1877. *See Andrus v. Utah,* 446 U.S. 500, 506-07, 100 S. Ct. 1803,

New Mexico v. United States, 12 Cl. Ct. 641 (1987), and *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), to support his argument that the conveyance of school land evidences Congress' intention to extinguish aboriginal title.[3]

In *Zuni Tribe,* the Claims Court found that the United States' grant of school land to Arizona and New Mexico, in violation of the Zunis' rights to the land, resulted in the loss of aboriginal title. *Zuni Tribe*, 12 Cl. Ct. at 660.[4] In *Atlantic Richfield,* the Claims Court stated:

---

64 L.Ed.2d 458 (1980) (providing that title to school land does not vest in the State until completion of an official survey). In contrast, GRIC argues that parts of Section 16 were re-surveyed after 1919 due to errors in the original survey and, as a result, Arizona's title to Section 16 did not vest until that time. However, because the Court alternatively finds, *infra,* that aboriginal title was extinguished in 1883, the dispute concerning whether title in the school land vested in 1877, or sometime thereafter, is not material. Accordingly, for the purpose of this Order, the Court will consider that title in the school land vested in 1877.

[3] *See United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976) (stating that "[t]he relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights.").

[4] For this finding, the Claims Court relied on *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686, 694 (1968), in which the court held that the grant of school land, in violation of the Indian tribe's rights, was a compensable taking under the Fifth Amendment.

> [A]boriginal title, as opposed to Indian title recognized by treaty or reservation, is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands.

Atlantic Richfield, 12 Cl.Ct. at 1020. Like *Zuni Tribe* and *Atlantic Richfield,* which cases the Court finds persuasive, the present case does not involve a claim of Indian title recognized by treaty or reservation.[5]

---

[5] In contrast, the case law GRIC cites in support of its argument that the grant of school land does not extinguish aboriginal title involved pre-existing treaties or reservations. For example, *Minnesota v. Hitchcock*, 185 U.S. 373, 22 S. Ct. 650, 46 L.Ed. 954 (1902), and *Wisconsin v. Hitchcock,* 201 U.S. 202, 26 S. Ct. 498, 50 L.Ed. 727 (1906), both involved pre-existing treaties between the United States and the respective Indian tribes providing reservation land to the tribes. On this basis, it was found that the grant of school land did not extinguish aboriginal title to the previously granted reservation land. Similarly, *United States v. Thomas*, 151 U.S. 577, 14 S. Ct. 426, 38 L.Ed. 276 (1894), involved a treaty in which the United States reserved unto the Chippewa Indians certain occupancy rights encompassing school land later granted to the State. The *Thomas* court stated that "by virtue of the treaty," the State's rights in the school land were "subordinate to this right of occupancy of the Indians." *Thomas*, 151 U.S. at 585. The only case GRIC cites that does not involve a treaty or reservation is *United States v. Pend Oreille County Public Utility District No. 1*, 585 F. Supp. 606 (E.D. Wash. 1984), wherein the court found that the "equal footing doctrine," a constitutional principle that conveys the beds and banks of navigable waters to new states, did not extinguish aboriginal title. However, that case is

The Court also finds persuasive *Gila River Pima-Maricopa Indian Community v. United States,* 27 Ind. Cl. Comm. 11, 14-15 (1972), in which the ICC recognized that GRIC's aboriginal title to certain land in south-central Arizona was extinguished when the United States surveyed, patented and disposed of it to settlers. While the present case involves the grant of school land, the Court has not been persuaded that such a distinction warrants different treatment. Finally, the Court notes that the land was granted to the Territory of Arizona for the "support of common schools," and it follows that Congress would not intend the land, to be used as a revenue generator, to be burdened with a superior right of use and occupancy such as aboriginal title. Accordingly, while the extinguishment of aboriginal title "cannot be lightly implied,"[6] the Court finds that GRIC's aboriginal title to Section 16 was extinguished in 1877 when Congress conveyed Section 16 as school land to the Territory of Arizona, as it "demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to that land." *Id.*

To bolster his extinguishment argument, the Trustee also argues that aboriginal title to Section 16 has been extinguished because the Indian Claims Commission ("ICC") ruled that GRIC lost aboriginal title to the land they occupied in south-central Arizona, including Section 16. *See Gila River Pima-Maricopa Indian Community v. United States,* 24

---

inapposite because the instant case involves a Congressional act conveying school land, not a constitutional principle.

[6] *Santa Fe Pac. R. Co.*, 314 U.S. at 354.

Ind. Cl. Comm. 301 (1970); *Gila River Pima-Maricopa Indian Community v. United States,* 27 Ind. Cl. Comm. 11 (1972). The Trustee further argues that GRIC was awarded over $6 million in compensation for the federal government's extinguishment of their aboriginal title. *See Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl. Ct. 569 (1985).

In opposition, GRIC contends that the ICC does not have jurisdiction to extinguish aboriginal title. While this statement is true, *see Pend Oreille Public Utility District No. 1*, 28 F.3d at 1551, the Court finds that the ICC did not extinguish aboriginal title; instead, the ICC determined that the United States extinguished aboriginal title. Even GRIC admits this by stating that the "second phase of the [ICC proceedings] concluded with a determination that the United States had extinguished the Community's aboriginal title." *See* Doc. # 141, n. 4 *(citing Gila River Pima-Maricopa Indian Community,* 27 Ind. Cl. Comm. 11, 15 (1972)).

Further, GRIC contends that it has aboriginal title to Section 16 because the ICC proceedings excluded Section 16 from the area for which the United States paid compensation for the extinguishment of aboriginal title (the "Award Area"). GRIC supports its contention by arguing Section 16 is located within GRIC's Reservation's outer boundaries and the Reservation was excluded from the Award Area. GRIC also notes the ICC proceedings never identified Section 16 as land to which aboriginal title had been extinguished or as land for which compensation was to be paid. While it

is true that Section 16 was not specifically identified in the ICC proceedings, Section 16 lies completely within the boundaries of the Reservation, and the Reservation was excluded from the Award Area, the Court disagrees with GRIC's resulting conclusion that Section 16 was excluded from the Award Area and that GRIC presently possesses aboriginal title to Section 16.

In 1951, GRIC filed its petition with the ICC seeking compensation from the United States for taking a large tract of land that GRIC claimed to have exclusively used and occupied since time immemorial. *See* Doc. # 141, Ex. 7. In 1970, the ICC concluded that GRIC, as claimed in its petition, exclusively used and occupied a 3,751,000 acre tract of land in south-central Arizona until the land was taken from it. *Gila River Pima-Maricopa Indian Community,* 24 Ind. Cl. Comm. at 335. Thereafter, the ICC concluded that GRIC's aboriginal title to the land was extinguished in 1883, stating:

> The intention of the Government to assert dominion over the subject land does become manifest at the enlargement by Executive order of the Gila River Reservation in 1883. The reservation was enlarged to its present size by six executive orders subsequent to 1876. The greatest single addition was by the Executive Order of November 15, 1883 (1 Kappler 808), which enlarged it to almost its present 372,000 acres. There is an apparent attempt to make a final settlement of the Pima claims to land, and unequivocal exercise of dominion over the public domain thereafter.

> Therefore, the Commission has found that the date of taking in this case should be November 15, 1883, for those lands which had not been entered by white settlers before that point in time.

Gila River Pima-Maricopa Indian Community, 27 Ind. Cl. Comm. at 15.

In 1982, during proceedings to value the taking of aboriginal land, the Claims Court[7] found that "the perimeter of plaintiffs' aboriginal territory described in *[Gila River Pima-Maricopa Indian Community,* 24 Ind. Cl. Comm. at 311] contains a total area of 3,751,000 acres. *See Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12, 16 (1982). The Claims Court then determined that the Award Area excluded, *inter alia,* the "Gila River Indian Reservation" because the Reservation was tribal owned land. *Id.* After subtracting tribal owned land, the Claims Court calculated that the Award Area was comprised of 3,312,858 acres of land to which aboriginal title had been extinguished. *Id.*

Contrary to GRIC's interpretation of the ICC proceedings, the Court finds the logic to be irrefutable that Section 16 was included in the Award Area and the ICC did adjudicate the fact that aboriginal title to Section 16 was extinguished. The Claims Court, in determining the size of the Award

---

[7] In 1978, when the ICC's statutory authorization expired, the proceedings were transferred to the Court of Claims. The Claims Court is the successor to the Court of Claims.

Area, excluded the Gila River Indian Reservation because of its status as tribal owned land. The Reservation is considered tribal owned land by virtue of the various legislative and executive acts that created and modified the Reservation. None of the legislative or executive acts included Section 16 as a part of the Reservation. Thus, in excluding the Reservation from the Award Area, the Claims Court did not exclude Section 16 because it was not part of the Reservation as created and modified by the various acts. That Section 16 is completely encircled by the Reservation does not change the undisputed fact that Section 16 has never been made a part of the Reservation. Accordingly, the Court alternatively concludes that aboriginal title to Section 16 was extinguished in 1883 and that GRIC is precluded from now claiming aboriginal title to Section 16. *See Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991).

In sum, the Court finds that there is no genuine issue as to any material fact concerning the extinguishment of GRIC's aboriginal title to Section 16. GRIC's aboriginal title to Section 16 was extinguished in 1877 when Congress granted Section 16 to the Territory of Arizona for school land. In the alternative, the Indian Claims Commission adjudicated the fact that aboriginal title to Section 16 was extinguished in 1883 and GRIC is precluded from now claiming aboriginal title to Section 16. Accordingly, the Court concludes that GRIC does not have aboriginal title to Section 16.[8]

---

[8] The Trustee also seeks a declaration that the Estates hold

C. Legal Right of Access to Section 16

The Trustee contends that the Estates have a legal right of access to Section 16 via Smith–Enke Road and Murphy Road and have a legal right of access to install and use utility lines running to Section 16. In support thereof, the Trustee argues that Murphy Road is an Indian Reservation Road that must remain open for public use; that Smith–Enke Road and Murphy Road are public rights-of-way under Revised Statute § 2477; that the Estates hold an implied easement that provides access to Section 16; and that laches prevents GRIC from enjoining the use of Smith–Enke Road and Murphy Road and from enjoining the use of the utilities installed along the roads. Countering, GRIC contends that there is no legal access to Section 16 across Reservation land. In support thereof, GRIC argues that the portion of Murphy Road at issue herein is not a public road; that Revised Statute § 2477 did not create public rights-of-way across Smith–Enke Road and Murphy Road; that there are no implied easements providing access to Section 16; and that laches does not apply to its declaratory judgment claim concerning legal access to Section 16.

---

fee simple title to Section 16 free and clear of any adverse interests of GRIC. While the Court finds that GRIC's aboriginal title to Section 16 has been extinguished, the Court's finding, *infra,* of disputed issues of fact concerning GRIC's alleged zoning authority over Section 16 prevents a declaration that the Estates hold fee simple title free and clear of *any* adverse interests of GRIC.

The Court has reviewed the parties' submissions and finds that there are numerous disputed issues of material fact concerning access to Section 16 via rights-of-way and/or easements. Accordingly, the Court will deny summary judgment on the issue of legal access to Section 16.

D. Zoning Authority over Section 16

The Trustee contends that GRIC does not have the authority to impose zoning and water-use restrictions on Section 16. In support thereof, the Trustee argues that Congress never delegated such authority to GRIC and that GRIC has failed to establish that the Estate's proposed use of Section 16 would have a demonstrably serious impact on GRIC's political integrity, economic security, or health and welfare. In opposition, GRIC contends that the issue is too fact-intensive for resolution on summary judgment. The Court agrees that the issue is too fact-intensive and that it presents numerous disputed issues of material fact. Accordingly, the Court will deny summary judgment on the issue of GRIC's authority to impose zoning and water-use restrictions on Section 16.

E. Trespass on Reservation Land

Finally, the Trustee contends that the Debtors have not trespassed on Reservation land or on allotments within the Reservation. Because the Court concluded there are disputed issues of material fact concerning access to Section 16 via rights-of-way and/or easements, the Court cannot determine whether the Debtors have committed a trespass by

using Smith–Enke Road or Murphy Road to access Section 16. Accordingly, the Court will deny summary judgment on the issue of trespass by the Debtors' use of Smith–Enke Road and Murphy Road.

III. Miscellaneous Motions

Also pending before the Court are the Trustee's Motion to Strike (Doc. # 155), Gila River Indian Community's Motion to Strike Trustee's Summary Judgment Evidence (Doc. # 162), Gila River Indian Community's Motion to Take Judicial Notice and for Leave to File Additional Summary Judgment Evidence (Doc. # 164), and Gila River Indian Community's Motion to Exclude Trustee's Expert Witness John Lacy (Doc. # 169). In the motions, the parties seek to exclude certain evidence offered in support of the pending summary judgment motions. Further, GRIC seeks to supplement its summary judgment motion with additional evidence obtained after the dispositive motion deadline. In reaching the conclusions herein, the Court has not considered any of the evidence sought to be excluded or included. Accordingly, the Court will deny the pending motions seeking to exclude evidence or include additional evidence.

IV. Conclusion

For the foregoing reasons,

IT IS ORDERED that the Trustee's Motion for Summary Judgment (Doc. # 136) is GRANTED in part and DENIED in part. It is granted to the extent the Court declares that the Gila River Indian

Reservation does not hold aboriginal title to Section 16 of Township 4 South Range 4 East in Pinal County, Arizona, and denied in all other respects;

IT IS FURTHER ORDERED that the Gila River Indian Community's Motion for Partial Summary Judgment (Doc. # 137) is DENIED;

IT IS FURTHER ORDERED that the Trustee's Motion to Strike (Doc. # 155) is DENIED;

IT IS FURTHER ORDERED that the Gila River Indian Community's Motion to Strike Trustee's Summary Judgment Evidence (Doc. # 162) is DENIED;

IT IS FURTHER ORDERED that the Gila River Indian Community's Motion to Take Judicial Notice and for Leave to File Additional Summary Judgment Evidence (Doc. # 164) is DENIED;

IT IS FURTHER ORDERED that the Gila River Indian Community's Motion to Exclude Trustee's Expert Witness John Lacy (Doc. # 169) is DENIED.

Dated this 23rd Day of May, 2007.

/s/
James A. Teilborg
United States District Judge

United States District Court
D. Arizona.

In re: Michael Keith Schugg, dba Schuburg Holsteins,
Debtor.

In re: Debra Schugg,
Debtor.

G. Grant LYON, in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg; Wells Fargo Bank, N.A.,
Plaintiffs,

v.

GILA RIVER INDIAN COMMUNITY, Defendant.

No. CV 05-2045-PHX-JAT

BK No. 2-04-13226-PHX-GBN; BK No. 2-04-19091-PHX-GBN

ADV. No. 2-05-AP-00384-GBN

March 9, 2006

ORDER

TEILBORG, J.

Pending before the Court is Defendant's Motion to Dismiss (Doc. # 7 in 2:05-ap-00384-GBN). Plaintiff responded and Defendant replied. Pursuant to this Court's order, the parties submitted supplemental briefing on certain issues and the Court has

considered those briefs as well.

The Trustee brought this adversary proceeding seeking to, *inter alia,* have the proof of claim filed by GRIC disallowed and to have certain rights regarding Section 16 and the Murphy and Smith–Enke roads declared. In its proof of claim, GRIC asserts aboriginal title to the land encompassing Section 16. GRIC moves to dismiss the adversary complaint on the basis that it has sovereign immunity and that the United States is an indispensable party who cannot be joined.

The Court quickly disposes of GRIC's first argument in favor of dismissal, that it enjoys sovereign immunity. The Trustee pointed out in its response, and the Court agrees, that GRIC waived any such immunity when it filed a proof of claim in the Debtor's bankruptcy.[1] *See* Bankruptcy Code § 106(b)(a "governmental unit that has filed a proof of claim in [a bankruptcy] case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.")

GRIC claims that the Trustee seeks to extinguish its aboriginal title rights to Section 16 and that because only Congress can extinguish aboriginal title, the United States is an indispensable party to the

---

[1] The Court notes that GRIC did not address this issue in its reply brief.

proceeding. GRIC further argues that the United States has not consented to be sued in this action and that because this quiet title action involves "trust or restricted Indian lands" the consent to suit provision found in 28 U.S.C. § 2409(a) of the Quiet Title Act is inapplicable. Therefore, GRIC concludes that because the United States is an indispensable party that cannot be joined, the suit must be dismissed.

The Trustee also seeks a declaration of rights regarding two roads that lead to Section 16: Murphy and Smith–Enke. It is undisputed that Section 16 is surrounded entirely by the Gila River Indian Reservation. Murphy Road is a federally maintained highway. The Trustee alleges the Smith–Enke Road pre-existed President Wilson's grant of the land to GRIC and that GRIC took that land subject to the Smith–Enke easement.

The Court finds that Defendant has failed to meet its burden to show that the United States is an indispensable party in this matter. The motion will therefore be denied without prejudice to Defendant re-moving the Court to dismiss this action on a more complete record. *See Dredge Corporation v. Penny*, 338 F.2d 456, 463-64 (9th Cir. 1964) (stating that dismissal for failure to join indispensable party is without prejudice because it does not bar an action on the subject matter but "only operates to abate that particular action" and therefore must be decided on a motion to dismiss.) Defendant asks this Court to decide complex issues on a scant record. As counsel for the Trustee pointed out at oral argument, Defendant, as the movant, bears the burden of proving that the United States is an indispensable

party and the Court finds that it has failed to do so at this juncture.

The Court finds that there are significant disputed issues regarding whether a claim for aboriginal title even involves trust or restricted Indian land. *See* 25 C.F.R. § 151.2(d) (Indian Trust land means "land the title to which is held in trust by the United States for an individual Indian or a tribe."); 25 C.F.R. § 151.2(e)(defining restricted land as "land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations."). It is undisputed on this record that the federal government conveyed Section 16 to the state of Arizona and that fact alone raises a disputed issue of fact on whether the land is held in trust for GRIC. The Court fails to see the applicability of *Metropolitan Water District of Southern California v. U.S.*, 830 F.2d 139, 143-44 (9th Cir. 1987) to this case because it involved a dispute about the boundaries of reservation land. There is no claim by the Trustee to title of any land that has ever been dedicated to the GRIC reservation.[2] The Court further finds *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977) inapposite because that court merely concluded, with no analysis, that a land claim based on a tribe's asserted rights of possession involved

[2] The Trustee seeks a declaration of rights regarding use of the easements, but does not seek title to the easements.

"trust or restricted Indian land" as defined by the Quiet Title Act.

Even assuming that a claim for aboriginal title fits under the definition of trust or restricted Indian land, the Court finds that GRIC fails to make a colorable claim that Section 16 is trust or restricted Indian land. GRIC is correct that the question of whether the government has a colorable claim that lands are trust or restricted Indian lands "extends no further than a determination that the government has some rationale and that its position was not undertaken in either an arbitrary or frivolous manner." *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999). However, the Court rejects GRIC's argument that its aboriginal title claim is colorable merely because of the physical location of Section 16 within the external boundaries of the reservation.

In addition, GRIC did nothing to refute the Trustee's argument that "as a matter of federal law, it is well established that the validity of the deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *Raypath, Inc. v. City of Anchorage et. al.*, 544 F.2d 1019, 1021 (9th Cir. 1976). A further basis for denying the motion is that the Trustee's complaint makes no request to extinguish aboriginal title. If this Court determined that aboriginal title existed, it is certainly without jurisdiction to extinguish such rights. GRIC cites no authority, however, for the proposition that this Court lacks jurisdiction to interpret prior Indian claims litigation. Therefore, even if the admonition found in *Edwardsen v. Morton*, 369 F. Supp. 1359,

1375 (D.D.C. 1973) that "it is clear that federal officers are obligated to protect aboriginal title lands against intrusion by third parties" means that aboriginal title lands are "trust" lands, nothing in that case acts as a bar to this Court determining whether GRIC was previously compensated for the extinguishment of its aboriginal rights or whether its claim suffers from statute of limitations or laches problems.

The Court further finds that there are significant disputed issues regarding whether adjudication by this Court of the scope of the pre-existing easement of the Smith–Enke Road and the scope of the federally maintained highway Murphy Road would impact title to Indian lands. GRIC fails to allege that the Trustee seeks to use either of the existing easements in a manner that exceeds or is inconsistent with their current use. It is unclear to this Court how this suit would impact GRIC's title to the easements and therefore dismissal is inappropriate at this juncture.

Finally, the Court notes the unique procedural posture of this case where GRIC is a defendant strictly because the Debtor is in bankruptcy. As pointed out by GRIC at oral argument and in its supplemental brief, there is an anomaly in the law which allows an Indian or Indian tribe to sue without joining the United States, but prohibits a non-Indian plaintiff from suing an Indian or Indian tribe without joining the United States. The fact of Debtor's bankruptcy allowed GRIC to file a proof of claim to assert its aboriginal title rights instead of bringing a lawsuit, as it did in front of Judge Carroll regarding Section 36. In filing a proof of claim asserting sole

legal and equitable title to the Debtor's single asset, GRIC had to know that there would be an objection which could be litigated only as an adversary proceeding with GRIC named as the defendant. This is the procedural posture even though GRIC really stands in the shoes of a plaintiff because it first sought relief in the bankruptcy court and ultimately bears the burden of persuasion on its proof of claim.

This bankruptcy case was filed in July 2004. GRIC waited until the claims bar date almost a year later to file its proof of claim asserting an ownership interest in Section 16. Clearly, based on its arguments in the Motion to Dismiss, it believed that its proof of claim could not be adjudicated in the bankruptcy court. It is unclear to this Court why if GRIC believed that the Trustee would be unable to adjudicate the claim, it chose to file a proof of claim instead of moving for relief from the automatic stay so that it could pursue its aboriginal title claim before this Court as the plaintiff. Certainly, GRIC cannot take the position that because it believes the Trustee cannot adjudicate the claim that its claim should be automatically allowed.

We are almost two years into a bankruptcy case that is at a standstill because of GRIC's position that it is entitled to file a proof of claim that it then contests the jurisdiction of the bankruptcy court to adjudicate. If the Court found that the United States was an indispensable party, the only way this bankruptcy case could be resolved would be for GRIC, apparently on its own timetable, to seek automatic stay relief and bring an action, again before this same Court, seeking to resolve its claims. The net

effect of this litigation tactic is to delay resolution of this bankruptcy case where it is undisputed that the Debtor is experiencing cash collateral issues with its secured creditor. The Court notes that a significant justification by the Trustee in agreeing to sell Section 16 to GRIC is the inability of the estate to fund protracted litigation against the Tribe. The Court admonished at the hearing on the Debtor's Emergency Motion for Stay that delay tactics will not be tolerated and that admonition is repeated here.

The Motion to Dismiss is denied and Defendant is ordered to answer within five days. An order setting a Rule 16 Scheduling Conference shall follow. The parties are forewarned that although this case is on a Standard Track, the Court will impose deadlines to expeditiously resolve this adversary proceeding.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. # 7 in 2:05-ap-00384-GBN) is **DENIED**;

IT IS FURTHER ORDERED that Defendant shall answer within five days.

Dated this 9th Day of March, 2006.

/s/
James A. Teilborg
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

G. GRANT LYON, *Plaintiff-counter-defendant - Appellee*, v. GILA RIVER INDIAN COMMUNITY, *Defendant-counter-plaintiff - Appellant*.	No. 08-15570 D.C. No. 05-CV-02045-JAT District of Arizona, Phoenix ORDER
In re: MICHAEL KEITH SCHUGG, DBA Schuburg Holsteins; DEBRA SCHUGG *Debtor*, G. GRANT LYON, *Plaintiff-counter-defendant - Appellee Cross Appellant*, v. GILA RIVER INDIAN COMMUNITY, *Defendant-counter-plaintiff - Appellant Cross Appellee*.	No. 08-15712 D.C. No. 2:05-CV-02045-JAT District of Arizona, Phoenix Filed Feb. 15, 2011

Before: KOZINSKI, Chief Judge, WALLACE and CLIFTON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Chief Judge Kozinski and Judge Clifton have voted to deny the petition for rehearing en banc, and Judge Wallace has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Federal Rules of Civil Procedure for the United States District Courts

Title IV. Parties

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order*. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.