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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WATER WHEEL CAMP RECREATIONAL AREA, INC. *et al.*, Plaintiffs, v. THE HONORABLE GARY LARANCE, *et al.*, Defendants.	CIV 08-474-PHX-DGC **PLAINTIFFS' BRIEF CONCERNING THE LACK OF TRIBAL COURT JURISDICTION PURSUANT TO THE RULE OF *MONTANA v. UNITED STATES***

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I. INTRODUCTION

This Brief is filed in accordance with the schedule established by This Court in its Order of March 25, 2009.

Plaintiffs Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Robert Johnson ("Johnson") (collectively, "Plaintiffs"), by and through their attorneys, hereby request that this Court grant judgment in their favor and against Defendants The Honorable Gary LaRance, Chief Judge of the Colorado River Indian Tribes ("Tribe" or "CRIT") Tribal Court, and Jolene Marshall, Chief Clerk of the CRIT Tribal Court (collectively, "Tribal Court Officials" or "Defendants"), by (1) declaring that the Tribal Court Officials lack jurisdiction over Water Wheel and Johnson, and (2) enjoining the Tribal Court Officials from exercising jurisdiction over Water Wheel and Robert Johnson pursuant to the seminal and controlling case of *Montana v. United States*, 450 U.S. 544 (1981) ("*Montana*"), and its progeny.

At the outset, it is emphasized that no judicial determinations or relief are sought by Plaintiffs other than the declaratory and injunctive relief identified in the foregoing paragraph.

This filing has been written in accordance with this Court's Order of March 14, 2008 ("March 14 Order"), which directed the Tribal Court Officials to afford Plaintiffs a period of 15 days from a final judgment of the CRIT Tribal Court and Appellate Court to seek review of their *Montana* arguments before entering any order that would empower CRIT to evict Plaintiffs or take any other action to interfere with Plaintiffs' occupancy of the property at issue. In that March 14 Order, the Court advised that its ultimate review of the matters at issue would require it to conduct a "close examination of [1] the lease [between the United States and Water Wheel ("Lease")], [2] the statutes in issue, [3] the Solicitor's opinion, [4] the history of the parties' dealings, and [5] the decision of the Supreme Court [in *Arizona v. California*, 460 U.S. 605 (1983).]"

This Brief addresses the specific matters identified in the March 14 Order and documents as matters of fact and law that there is no Tribal Court jurisdiction over these non-Indian and non-tribal Plaintiffs. Simply stated, neither Water Wheel nor Johnson has consented to the CRIT Tribal Court's jurisdiction over any matter arising under the Lease, the threshold requirement for such jurisdiction as articulated by *Montana*.[1]

In addition to the *Montana* discussion, and in response to the March 14 Order, Plaintiffs are here addressing the following matters: (1) the Lease; (2) the history of the Lease and the parties' dealings; (3) the dispute resolution provisions of Title 25 Code of Federal Regulations Part 162; (4) CRIT's Eviction Ordinance and Property Code; (5) the relevant federal statutes; (6) the Solicitor's Opinion dated January 17, 1969, and the Secretarial Order rendered on that same date ("1969 Secretarial Order"), which was the direct product of, and relied upon, that Opinion; (7) the Supreme Court's rejection of the 1969 Secretarial Order in *Arizona v. California;* (8) the Department's failure to consummate the necessary agency action; and (9) the current status of the dispute concerning the western boundary of the CRIT Reservation.

Finally, while Plaintiffs are not here contesting the reservation status of the leasehold in this lawsuit ("West Bank Land"),[2] there are statutory barriers to CRIT's ability to claim

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[1] The Lease originally was signed in 1975 by Bert Denham, Johnson's predecessor-in-interest in both the Lease and Water Wheel. *See* Section II.C, *infra,* for a discussion of the Lease and its relevant terms. The Lease was first filed in this matter as Exhibit A to the Tribal Court Complaint, which is Exhibit A to the Complaint in this action (Dkt. 1); a more legible copy was filed on March 12, 2008 (Dkt. #5).

[2] The West Bank Land is defined in the Complaint at ¶ 15 as "non-Indian federal fee land from the U.S. Department of the Interior on lands west of the Colorado River." Specifically, lands are legally described in Section 5 of the Act of April 30, 1964, 78 Stat. 188 ("Public Law 88-302"), which is discussed in Section III, *infra*. Generally, however, the Court should regard the West Bank Land as those lands within the State of California which are west of the Reservation and on the present west bank of the Colorado River (within California).

jurisdiction over the land until certain preconditions are satisfied which cannot be ignored. They are discussed at Section III in response to the matters identified in the Court's March 14 Order.

II. THE TRIBAL COURT LACKS JURISDICTION OVER PLAINTIFFS PURSUANT TO *MONTANA V. UNITED STATES*

A. The *Montana* Rule.

Montana and its progeny have established the general rule that absent express authorization by federal statute or treaty, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe," unless the defendants can meet their heavy burden to demonstrate that either of two limited exceptions apply. To this end, a tribal court may exercise civil jurisdiction over a non-Indian where (1) the non-Indian has entered into a "consensual relationship" with the Tribe or (2) the non-Indian conduct "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Montana v. U.S.* 450 U.S. at 565-66.

The most recent case to examine *Montana* and the scope of tribal jurisdiction is *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S ___, 128 S.Ct. 2709 (June 25, 2008) ("*Plains Commerce Bank*"), where the Supreme Court reiterated "the general rule that tribes do not possess authority over non-Indians who come within their borders." 128 S.Ct. at 2712 (emphasis added). "This general rule restricts tribal authority over non-member activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* at 2719 (emphasis added). In examining the two exceptions to *Montana's* rule, the Court stated that "[b]y their terms, the exceptions concern regulation of the 'activities of nonmembers' or 'the conduct of non-Indians on fee land.'" *Id.* at 2720. "[E]fforts by a tribe to regulate nonmembers … are presumptively invalid." *Id.* (internal

quotations omitted). "The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land [within a reservation]." *Id.* And, significantly, if the non-Indian activity does not occur "within [the Tribe's] borders,"[3] *i.e.*, within reservation boundaries, then as a threshold matter, there can be no tribal jurisdiction *per se*.[4]

B. The Tribal Court Officials Cannot Establish The Threshold Requirements For Tribal Jurisdiction.

1. There Has Been No Congressional Grant Of Jurisdiction And Plaintiffs Are Neither Indians Nor Tribal Members.

Here, there has been no express jurisdictional authorization by federal statute or treaty which would confer tribal court jurisdiction over Plaintiffs, and it is undisputed that Congress has never extended to CRIT jurisdiction over non-Indians. Accordingly, if Plaintiffs are non-Indians, there cannot be jurisdiction over them in the CRIT Tribal Court unless one of *Montana's* limited exceptions apply.

It is not disputed that both Plaintiffs are non-Indians. Water Wheel is a non-Indian, family-owned corporation, which is wholly owned by non-Indians and not chartered by CRIT. *See* Declaration of Robert Johnson ("Johnson Decl.") at ¶ ¶ 2-3;[5] Complaint at ¶ 1. Johnson is

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3 *Plains Commerce Bank*, 128 S.Ct. at 2712.

4 Plaintiffs' counsel is unaware of any published decision in which a court of competent jurisdiction has held that a tribe may adjudicate in tribal court its disputes with non-Indians that arise from non-Indian activity occurring on land not within an Indian reservation or on tribal trust land.

5 The Johnson Declaration dated March 11, 2008, is Exhibit 1 to Docket #8, and is reproduced and attached hereto as Exhibit A. Mr. Johnson made a second declaration on April 12, 2008 ("Second Johnson Declaration") (Exhibit G to Dkt #26) which was relied upon in Plaintiffs' Statement of Facts in Support of Second Emergency Application and Motion for Temporary Restraining Order and Preliminary Injunction ("Statement of

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the President, Chief Executive Officer and primary shareholder of Water Wheel. His actions in this matter have been strictly confined to his corporate duties and obligations, and he has never taken any action, signed any documents, or conferred with any official of the Tribe other than in his capacity as President and CEO of Water Wheel. Johnson Decl. at ¶ ¶ 2-3; Complaint at ¶ 2. Johnson has never been and is not now a member of the Colorado River Indian Tribes. Johnson Decl. at ¶ ¶ 2-3; Complaint at ¶ 3.

The courts have made it clear that tribal membership is a major consideration for any judicial review of tribal court jurisdiction and jurisdiction over non tribal members does not attach merely because their conduct occurred on tribal lands. *Phillip Morris U.S.A., Inc. v. King Mountain Tobacco Company, Inc.*, 552 F.3d 1098, 1103 (9th Cir. 2009) (in considering tribal jurisdiction over a nonmember, "[i]t is the membership status of the unconsenting party, not the status of the real property, that counts as the primary jurisdictional fact" (*quoting Nevada v. Hicks*, 533 U.S. 353, 382 (2001)); *see also, Smith v. Salish Kootenai College*, 434 F.3d 1127, 1131 (9th Cir. 2006) ("*Salish Kootenai*") ("[t]he Court has repeatedly demonstrated its concern that tribal courts not require [nonmembers] to defend themselves against ordinary claims in an unfamiliar court"). The importance of this rule is demonstrated by the fact that the Supreme Court has consistently rejected claims of tribal jurisdiction over nonmembers even when the activity at issue occurred on tribal lands. *Salish Kootenai*, 434 F.3d at 1132.

2. The Leasehold Has Never Been Lawfully Determined To Be Eligible For Leasing In Favor Of CRIT.

As discussed in Sections III.A-B in response to the Court's expressed need to examine certain materials, there has never been a lawful or statutory-required "determination" that the

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Facts") (Dkt. #26). The Statement of Facts and the Second Johnson Declaration are, together, attached hereto as Exhibit B.

West Bank Land is eligible for Secretary leasing on CRIT's behalf. The absence of this determination impugns the ability of the Tribal Court Officials to establish their right to exercise jurisdiction over Plaintiffs apart from the issue of a consensual relationship between Plaintiffs and the Tribe.

The Reservation was established by Congress in the Territory of Arizona only – not in California – by the Act of March 3, 1865, 13 Stat. 559 ("1865 Act"), a territorial limitation which was consistent with, and did not amend, the California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act") limiting to four the number of Indian reservations in California. Although the Tribe has long ignored this statutory preclusion and claimed that the Reservation extends beyond the Colorado River into California, any lawful intrusion of the Reservation into California can only be attained through enactment of a specific federal statute. That has not occurred, and thus the West Bank Land remains in the public domain and in federal fee status. Thus, Water Wheel is occupying public domain land which is administered by the Department of the Interior ("Department"). Johnson Decl. at ¶ ¶ 2-3; Complaint at ¶ 15.

Moreover, any claim that the Tribal Court has jurisdiction over Water Wheel or Johnson by virtue of the Lease is contrary to the provisions of Section 5 of the Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302) ("PL 88-302"). That law expressly prohibits the Secretary of the Interior ("Secretary") from leasing lands in the West Bank Land on behalf of CRIT pursuant to the Indian Long Term Leasing Act of 1955, 25 U.S.C. § 415, until the western boundary of the Reservation is formally determined. In other words, pursuant to the specific terms of Section 5, the Secretary's authority to lease the West Bank Land and on behalf of CRIT can only occur after the land has been formally and lawfully determined to be eligible under the statutory precondition of a "determination" to that effect. As discussed below, there never has been the

lawful formal determination – which is not a precondition to the Secretary's authority to lease federal lands, but is a precondition to the Secretary's authority to lease the West Bank Land for the benefit of CRIT –which is a statutory predicate for the Secretary's lawful exercise of the leasing authority relied on by CRIT in asserting jurisdiction.[6] Nonetheless, the provisions of the Lease establish certain requirements before the Tribal Court Officials can exercise jurisdiction over the Plaintiffs, requirements which have not been satisfied.

C. The Exceptions To *Montana's* General Rule Do Not Apply.

Without regard to question of whether the Secretary ever had leasing authority over the West Bank Land, there can be no jurisdiction over these non-Indian Plaintiffs under *Montana's* general rule unless the Tribal Court Officials can meet their burden to establish one of two narrow exceptions – a burden which must be met by Defendants as was clearly stated in *Plains Commerce Bank:* (1) that Plaintiffs have entered into a "consensual" relationship with the Tribe or (2) that Plaintiffs' conduct threatens or has a direct effect on the political integrity, economic integrity or health or welfare of the Tribe. The Tribal Court Officials have made no allegations as to the second exception; thus, they must establish a consensual relationship between Plaintiffs and the Tribe which confers tribal court jurisdiction. As demonstrated below, they cannot do so because no consensual relationship can be construed from (1) the Lease itself, (2) the parties'

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[6] As discussed in Section III.B, *infra*, while the Secretary issued an Order dated January 17, 1969, declaring that the CRIT Reservation extends into California to include the West Bank Land, the Supreme Court has rejected tribal arguments that the Secretarial Order satisfies the Section 5 requirement of a formal boundary determination. *See Arizona v. California*, 460 U.S. 605, 636, n 26 (1983) (stating that "the Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation.") *See also* Complaint at ¶ ¶ 23-26.

dealings under the Lease, (3) the 25 C.F.R. process, or (4) the tribal Eviction Ordinance and Property Code.

1. Water Wheel's Lease Terms Do Not Give Rise To Tribal Jurisdiction.

Both CRIT and the Tribal Court Officials have proposed that Water Wheel's Lease is *prima facie* evidence of a consensual relationship between Plaintiffs and the Tribe and, therefore, establishes the basis for tribal jurisdiction. Their argument is misplaced.

On May 15, 1975, Water Wheel signed the Lease with the Department which, in turn, named CRIT as the "lessor." It was approved by the Superintendent of the Colorado River Reservation under authority delegated from the Secretary on July 7, 1975.

The preamble to Water Wheel's Lease incorporates by reference the federal leasing regulations contained in 25 C.F.R. pt. 131 (1975),[7] and Part 131 in turn contains the leasing prohibition language of Public Law 88-302,[8] thus providing further evidence that Congress had not then, and has not since, vested authority in the Secretary to lease these lands for the benefit of CRIT. Thus, as a matter of law, the Lease can only be with the United States and not CRIT, and cannot possibly be the source of a consensual relationship that might otherwise give rise to tribal jurisdiction under *Montana's* first exception.

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[7] 25 C.F.R. § 131 (1975) is attached hereto as Exhibit C. In 2001, the Department reorganized its regulations and the former Part 131 is now the current Part 162. *See* 66 Fed. Reg. 7068 (Jan. 22, 2001). Subpart A (General Provisions) and Subpart F (Non-Agricultural Leases) are the applicable regulatory provisions, and they are attached hereto as Exhibit D.

[8] The prohibition on CRIT's leasing authority had been included in Title 25 of the Code of Federal Regulations until 2001, when the Department amended the regulations and dropped the leasing prohibition language "at the request of the Tribe." *See* 66 Fed. Reg. 7068, 7079 (Jan. 22, 2001).

Section 34 of the Lease Addendum states that the "[l]essee . . . agree[s] to abide by all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, or that may be hereafter in force and effect provided, that no such future laws, regulations or ordinances shall have the effect of changing or altering the express provisions and conditions of this lease unless consented to in writing by the lessee." *See* Complaint, Exhibit A at 21 (emphasis added). There is no dispute that Water Wheel did not, and has not "consented to in writing" the jurisdiction of the CRIT Tribal Court.[9] Indeed, such a written consent has never been suggested by CRIT or the Tribal Court officials; if it existed, they would have produced it long ago. Moreover, the Tribe's Eviction Ordinance, pursuant to which the Tribe is proceeding in the Tribal Court Action, was not enacted until October 12, 2006 and, thus, did not exist on May 15, 1975, the date on which the Lease was executed. Johnson Decl. at ¶ ¶ 2-3; Complaint at ¶ 20. And, in any event, the Lease was entered into with the United States – not with the Tribe – and thus does not satisfy *Montana's* consensual relationship exception.

The Eviction Ordinance purports to establish the process for the resolution of disputes arising under the Lease, in direct conflict with 25 C.F.R. pt 162. Not only does that ordinance purport to unilaterally impose a dispute resolution process at odds with the Lease terms, but – to again emphasize the point – there is not even a suggestion by CRIT or the Tribal Court Officials that Water Wheel ever executed the required written consent.[10]

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[9] *See* Johnson Decl. at ¶¶ 2-3; Complaint at ¶ 19.

[10] Since the Lease is silent as to tribal court jurisdiction for eviction proceedings and dispute resolution, Title 25 of the C.F.R. exclusively governs those matters. *See, e.g.*, *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983) ("*Yavapai-Prescott*") (rejecting a tribe's attempt to unilaterally cancel a lease by bringing an action in its tribal court where it lacked jurisdiction and where such a proceeding was in direct conflict with the terms of the lease, which incorporated by reference 25 C.F.R. pt. 131).

2. Neither The History Of The Lease Nor The Parties' Dealings Give Rise To Tribal Jurisdiction.

For a thorough explanation concerning the history of the Lease, as well as the parties' dealings, *see generally* Plaintiffs' Statement of Facts in Support of Second Emergency Application and Motion for Temporary Restraining Order and Preliminary Injunction ("Statement of Facts"), which relies principally on the Second Declaration of Robert Johnson[11] and may be summarized as follows:

- The Lease requires payments to be made to Bureau of Indian Affairs ("BIA"). Thus, payment disputes and/or lease negotiations should be exclusively with BIA. Statement of Facts, Exhibit B at ¶ 4 (discussing Article IV of the Lease, which provides for rental payments).

- As President and CEO of Water Wheel, Johnson never agreed or consented (and certainly not in writing) to deal with CRIT. Second Declaration of Robert Johnson, Exhibit B at ¶ 3.

- Johnson was forced to make the Lease rental payments to CRIT only when BIA refused to process them. *Id.* at ¶ 5.

- With respect to building permits, inspections and electrical services requests, all such dealings had been with Riverside County, California (in accordance with the Lease) during the early years of the leasehold. *Id.* at ¶ ¶ 3, 6, 7.

- CRIT directed the County to stop rendering governmental services to Water Wheel, again forcing Johnson to deal with the CRIT tribal government for those services. *Id.* at ¶ ¶ 8, 9.

- There is absolutely nothing consensual about Johnson's relationship with CRIT. *See generally id.* at ¶ 1-19 (detailing the nonconsensual nature of Johnson's relationship with CRIT and its agents).

- Tribal rental payments, permits and services' requests unilaterally were forced upon Water Wheel and Johnson – the Plaintiffs never consented to them, orally or in writing. *See*, *e.g.*, *id.* at ¶ 5 (rental payments); ¶ 3 (permits and services); ¶ 6-9 (same).

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[11] *See* Statement of Facts and Second Johnson Declaration, *supra*, note 5 and accompanying text.

As the Supreme Court stated in *Plains Commerce Bank,* "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 128 S.Ct. at 2720. The Court then concluded that tribal courts lack jurisdiction when the tribe itself lacks the civil authority to regulate the activity at issue. Here, there is no tribal civil authority over matters not consented to by Water Wheel in the Lease. As a consequence, the CRIT Tribal Court does not have jurisdiction over these matters. Moreover, the *Plains Commerce* Court explained that because nonmembers of the tribe have "no part" and "no say" in the laws and regulations that govern tribal territory, "those laws and regulations may be fairly imposed on nonmembers *only* if the nonmember has consented . . ." *Id.* at 2724. And, as stated above, the Court made clear in *Plains Commerce* that the tribe and not the non-Indian party has the burden of establishing that one of the exceptions applies. It is not these Defendants' burden to prove that the exceptions do not apply: "Given Montana's general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe . . . [t]he burden rests on the tribe to establish one of the exceptions to Montana's general rule . . ." *Id.*. *See also Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997) (recognizing that, in order to prevail, the party asserting claimed tribal court jurisdiction over a nonmember pursuant to *Montana* must prove that a *Montana* exception applies).

Assuming, *arguendo*, that Water Wheel consented to tribal jurisdiction by merely executing the Lease, that consent is absolutely limited to, and must be construed in accordance with, the terms of the Lease. As discussed above, at Section 34 of the Lease Addendum, Water Wheel expressly agreed to abide by "all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, or that may be hereafter in force and effect provided, that no such future laws, regulations or ordinances shall have the effect of changing or altering the express

provisions and conditions of this lease unless consented to in writing by the lessee." *See* Lease at 21 (emphasis supplied).

The absence of the required written consent is dispositve.

3. Title 25 Of The Code Of Federal Regulations Exclusively Governs Disputes Arising Under The Lease.

Water Wheel's Lease incorporates the provisions of 25 C.F.R. pt. 131 (1975). The Tribe's lawsuit against Water Wheel in the CRIT Tribal Court is preempted by dispute resolution provisions contained in Title 25 of the Code of Federal Regulations. Thus, this case is not dissimilar to *Yavapai-Prescott*, *supra*, which reinstated an opinion of the Interior Board of Indian Appeals ("IBIA") captioned *Marlin D. Kuykendall v. Director, Phoenix Area, BIA*, IBIA No. 80-24-A, 8 IBIA 76 (1980) ("*Kuykendall*"). *Kuykendall* considered whether a tribe, through its tribal court, unilaterally could cancel a lease executed by a private land owner and the Secretary (on behalf of the tribe) when the lease incorporated by reference 25 C.F.R. pt. 131. *Kuykendall,* 76 IBIA at 82. The Interior Board of Indian Appeals ("IBIA") declared that not only was the tribe without authority to do so, but that the Secretary was *required* to "administer the contract according to the terms" of the lease by first explaining that the agency is bound by its own regulations: "Especially where these regulations [25 C.F.R. pt. 131] insure that private citizens directly affected by Government action shall not be deprived of their interest without due process protections furnished by the agency regulations." *Kuykendall*, 76 IBIA at 86-87. *Kuykendall*, 8 IBIA at 87- 88. Consequently, the IBIA found that the lease could only be canceled in conformity with 25 C.F.R. § 131.14, "which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of Indian Affairs and to this Board." *Id.* .

As noted above, the Lease incorporates 25 C.F.R. pt. 131 (1975), which provides dispute resolution provisions for disagreements arising under the Lease, including § 131.14, while

making no mention of the resolution of disputes arising from the Lease under tribal law or in tribal court. Consequently, when the dispute with CRIT arose, Water Wheel invoked its only course of action for dispute resolution available under the Lease by filing in 2001 a "25 C.F.R. Appeal." That appeal is still pending.[12]

4. The Tribe's Property Code And Eviction Ordinance Are Inapplicable To Water Wheel And Johnson.

Some 31 years into the Lease term, CRIT adopted the Property Code and Eviction Ordinance pursuant to which the Tribal Court action was prosecuted. The Tribe did so without consulting with, or securing consent to its terms from, Water Wheel. Yet, the Eviction Ordinance purports to establish both the cause(s) of action against Water Wheel and Johnson and the Tribal Court's jurisdiction over them, despite the facts that the Ordinance (i) was enacted *after* the Lease was executed, (ii) was never consented to in writing by Water Wheel or Johnson, and (iii) is in direct conflict with 25 C.F.R. pt. 162.[13] *See, e.g.*, *Kuykendall*, *supra* (opinion reinstated by *Yavapai Prescott*, *supra*). These tribal ordinances have the effect of both changing and altering Water Wheel's rights under the Lease. Most notably, they provide that Lease and property disputes *must be* adjudicated in the CRIT Tribal Court. Water Wheel has never consented, in writing or otherwise, to be subject to CRIT's Property Code or Eviction Ordinance. Therefore, pursuant to Section 34 of the Lease Addendum, the tribal ordinances cannot be applicable to Water Wheel or Johnson.

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12 *See* January 31, 2008 Letter from then Assistant Secretary of the Interior for Indian Affairs, Carl J. Artman, to Plaintiffs' legal counsel, Dennis J. Whittlesey, confirming the filing and pendency of Water Wheel's 25 C.F.R. Appeal ("Artman Letter"). The Artman Letter was previously filed with the Court as Exhibit C in Docket 26, and is attached hereto as Exhibit E.

13 The Tribe's Eviction Ordinance is attached hereto as Exhibit F.

Should the Court conclude that CRIT's ordinances *do* apply to Water Wheel – despite the absence of written consent and their direct conflict with 25 C.F.R. pt. 162 – the Court still must consider the fact that the ordinances necessarily would have the effect of modifying the agreed-upon terms of the Lease because they effectively would be replacing the traditional *and contracted for* dispute resolution procedures provided by Title 25 of the Code of Federal Regulations (25 C.F.R. pt. 162 and 25 C.F.R. pt. 2). The Lease contains a specific provision for modifications: "any modification of or amendment . . . shall not be valid or binding . . . *until approved by the Secretary*." *See* Lease Addendum at Section 34 (emphasis supplied). It is undisputed that the Secretary has neither approved incorporation of the tribal ordinances into the Lease nor agreed that the Tribe – and not the Interior Department pursuant to 25 C.F.R. pt. 131 (1975) and 25 C.F.R. pt. 2 – has jurisdiction over disputes arising under the Lease.

In short, Water Wheel has not consented in writing to be subject to CRIT's Property Code, Eviction Ordinance or *any* procedure for resolving Lease disputes in the CRIT Tribal Court and the Secretary has not approved either of those tribal enactments. Accordingly, the Lease itself is the controlling document and it provides that disputes shall be resolved through Title 25 of the Code of Federal Regulations. They are not to be resolved in CRIT Tribal Court. *See generally Yavapai-Prescott*, *supra* (reinstating *Kuykendall*, *supra*).

III. DISCUSSION OF MATTERS IDENTIFIED BY THE COURT AS REQUIRING ITS "CLOSE EXAMINATION"

As previously emphasized, Section II directly addresses the rule of *Montana* and the absence of the consensual relationship between the Tribe and Water Wheel upon which the Tribal Court determined its jurisdiction. However, this Court's Order of March 14, 2008, identified certain things which it had identified as requiring examination, and Plaintiffs concur that they contribute to an understanding of the instant litigation.

Accordingly and in response to the March 14 Order, Plaintiffs are addressing the following in this Section III: (1) the Lease; (2) the history of the Lease and the parties' dealings; (3) the dispute resolution provisions of Title 25 Code of Federal Regulations Part 162; (4) CRIT's Eviction Ordinance and Property Code; (5) the relevant federal statutes; (6) the Solicitor's Opinion dated January 17, 1969, and the Secretarial Order of January 17, 1969 ("1969 Secretarial Order"); (7) the Supreme Court's rejection of the 1969 Secretarial Order in *Arizona v. California;* (8) the Department's failure to consummate the necessary agency action; and (9) the current status of the dispute concerning the western boundary of the CRIT Reservation.

A. The Applicable Federal Statutes Confirm That The West Bank Land Has Never Been Determined To Be Land Within The Reservation Eligible For Leasing On CRIT's Behalf.

While Plaintiffs are not here contesting reservation status of land within the West Bank Land, a close and concise reading of applicable federal statutes demonstrates that the West Bank Land has never been determined as a matter of law to be land within the CRIT Reservation which is eligible for leasing on behalf of CRIT. And, as discussed *infra,* until such a lawful determination is made, the terms of Section 5 of PL 88-302 prohibit the Secretary from leasing these lands for the benefit of CRIT.

1. The 1864 Act Prohibited The Reservation From Extending Into California In The Absence Of Subsequent Legislation.

Any assessment of the boundaries of the Colorado River Indian Reservation must reconcile tribal claims with the provisions of the 1864 Act, which specifically limited to four the total number of Indian reservations that could be established in California:

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

The four reservation limitation was confirmed in *Mattz v. Arnett*, 412 U.S. 481, 489 (1973), and the Court even identified the four reservations established under that law.[14] Once the 1864 Act became law, the process for establishing reservations within California became strictly limited in a way distinct to that state in that no additional reservations could be established absent specific Congressional action. There is no such action extending reservation status for California lands to CRIT or the CRIT Reservation. See *Donnelly v. United States*, 228 U.S. 243, 255-59 (1913); *Jesse Short, et al. v. United States*, 202 Ct. Cl. 870 (1973).

The 1864 Act limited the number of reservations in California to no more than four – the creation and identification of which have been confirmed in a Supreme Court decision and other federal litigation as noted above – thereby imposing a unique statutory limitation prohibiting any additional reservations within California except as specifically authorized by subsequent Act of Congress. No ruling purporting to recognize any reservation land within California for CRIT

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[14] *Mattz v. Arnett* recites the history of the 1864 Act at 412 U.S. 489-91, and identifies the reservations established pursuant thereto as (a) Round Valley, (b) Mission, (c) Hoopa Valley and (d) Tule River. These are the same four reservations that previously had been identified in *United States v. Forty-Eight Pounds of Rising Star Tea*, 35 F. 403, 405 (N.D. Cal. 1888).

can be rendered until the Court addresses the statutory limitations legislated by the 1864 Act and reconciles it with any conclusion that CRIT has reservation lands within California.

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

2. The 1865 Act Created The Reservation In Arizona Only.

The 1865 Act authorized and established the Reservation with a single sentence:

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

There is no other statutory provision providing for the Reservation. These 52 words are all there is.

And with these words, Congress established the Reservation on public domain lands *within the Territory of Arizona* and without any suggestion that Congress was in any way modifying any other statute, particularly the 1864 Act. To this point, Congress definitively did not address the two elements critical to authorization of the Reservation's expansion into California: (1) the statutory limit of four Indian reservations in California, and (2) the exclusion of non-California tribes from California presence found at Section 1 of the 1864 Act stating that "the state of California shall, for Indian purposes, constitute one superintendency" to manage and control "the Indians and Indian Reservations that are or may hereafter be established in said

state... ." While the second point may appear to be less legally-significant than the first, it decidedly is instructive as to Congress' intentions in authorizing the Reservation in that there is not even a suggestion that the "Territory of Arizona" Reservation would be under the jurisdiction of the California superintendency.

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

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

The 1865 Act did not do authorize the extension into public domain lands in California of the CRIT Reservation; to the contrary, it limited the lands available for that reservation to public domain lands within Arizona. The tribal claims to the contrary simply are at odds with the law.

3. Public Law 88-302 Restricts The Secretary's Leasing Authority In The West Bank Land.

Section 5 of Public Law 88-302 did not authorize the Secretary to render an *ex parte* determination of the Reservation's western boundary so that he then could approve leases in favor of CRIT. Rather, it required that a determination be made before the Secretary could exercise any leasing authority; by mandating such a decision and not authorizing the Secretary himself to make it, Congress clearly contemplated that the determination would come from some

other entity. And, as discussed below, the Supreme Court has confirmed that the determination must come either from the federal courts or Congress itself.

The Tribal Court ruled that the Lease created a consensual relationship with Water Wheel which satisfies the applicable *Montana* exception(s). To the contrary, however, the Lease cannot lawfully be construed to create a consensual relationship between the Plaintiffs and CRIT because it was executed with the Department of the Interior when there was no lawful federal leasing authority in favor of CRIT concerning the West Bank Land.

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

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

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

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

To this day, there has never been a final, lawful determination concerning the Reservation's western boundary. The 1865 Act did not authorize the Secretary to make that

determination through an administrative order (particularly, the 1969 Secretarial Order) because the Secretary's apparent objective in propounding that order was to extend the Reservation into California in direct contravention of the 1864 Act, and to resolve long-standing claims by CRIT that its Reservation *has always* extended into California. Any notion that the Secretary had some *inherent legal authority* to resolve unilaterally the boundary issue *through administrative order* previously was rejected by the Department's Solicitor 10 years before issuance of the 1969 Secretarial Order. That earlier conclusion is memorialized in a formal legal opinion concluding that the Reservation status of land within the West Bank Land would have to be resolved through legislation or judicial determination:

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

66 Interior Decisions 57 (1959) (emphasis added). Thus, the Department and the Secretary both knew in 1959 that any resolution of the status of the West Bank Land would require either Congressional or judicial action. The only subsequent action by either Congress or the courts was enactment of PL 88-302, and any authority of the Secretary for leasing of West Bank Land must be found in that law.

The Secretary also was unsuccessful in persuading the Justice Department to take action to fix the boundary to satisfy CRIT's claims, so on January 17, 1969 (three days before the end of the Johnson Administration), Interior Secretary Stewart Udall, relying on a new opinion of the Solicitor of the Department of the Interior issued the same day, propounded an *ex parte* order defining the upper two-thirds of the disputed boundary in Riverside County as a fixed line along

the location of an 1876 meander line.[15] This is the very boundary that the Justice Department and Public Law 88-302 pointedly had refused to accept and the 1864 Act prohibited yet Secretary Udall proceeded to impose his personal and unauthorized determination through an Order rendered as he was leaving the Department.

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

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

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

The Tribal Court has concluded and ruled that it has jurisdiction over the Water Wheel leasehold and the Plaintiffs because the land is within the Reservation, a conclusion dependent on that Court's acceptance of tribal contentions that the 1969 Secretarial Order constituted the

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[15] The Secretarial Order of January 17, 1969, is Exhibit G hereto. The Solicitor's Opinion of that same date is Exhibit H hereto.

final "determination" required by Section 5 of PL 88-302. Yet, to this day, no final, lawful determination has ever been made concerning the Reservation's western boundary.

The express language of PL 88-302 confirms that Congress not only recognized the existence of a dispute over the Reservation's boundary but also specifically provided that the leasing authority granted to the Secretary in Section 5 should not "be construed to affect the resolution of any controversy over the location of the boundary. . ." Accordingly, Congress said that the Secretary can only approve leases for certain lands in California – including the West Bank Land – "when and if determined within the reservation." Indeed, the Senate Report on S. 2111, enacted as PL 88-302, states:

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

S. REP. NO. 88-585, at 3 (1963) (emphasis supplied). The House Report on S. 2111, contains language nearly identical to that in the Senate Report.[16]

Both PL 88-302 and its legislative history make clear that Congress recognized the existence of an ongoing dispute with regard to the Reservation boundary and thus the Secretary's legal authority to lease the West Bank Lands in favor of CRIT. Although Section 5 indicates Congress' intent that PL 88-302 not affect the outcome of the dispute, it shows that Congress anticipated the dispute might be resolved at some point, and only then would PL 88-302's leasing

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

provisions apply to such lands. Congress pointedly stated that the Secretary could not approve leases for land on the West Bank until there has been the prescribed determination, but in so doing, Congress also pointedly did not assign that decision-making role to the Secretary. Rather, the Secretary was directed to await the determination (by Congress or the courts) before he/she could lease the West Bank Land, a determination which very clearly would have to come from some other lawful authority. Had Congress intended to give the Secretary that authority, it could have done so. But Congress did not.

With that in mind, it is important to view PL 88-302 in its historical context. While the proposed law was moving through Congress, the water rights case of *Arizona v. California* already had been in litigation for decades. Among many issues confronted by the Supreme Court in that case was the lawful boundary of the Reservation, a critical element in the Court's adjudication of the relative water rights of the parties. In fact, during 1964, while Congress was writing the legislation which became PL 88-302, the Court entered a decree based on provisions agreed upon by the parties in 1963, which stipulated "the quantities of water fixed in the paragraphs setting the water rights of the Colorado River . . . Reservation shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the . . . reservation [are] finally determined." *Arizona v. California,* 460 U.S. at 630 (citing Agreed Provisions for Final Decree 10 (Dec. 18, 1963)).

1. The Supreme Court Rejected The 1969 Secretarial Order.

Although the Tribal Court ruled that the lands underlying Water Wheel's leasehold are within the Reservation, that conclusion was based solely on the 1969 Secretarial Order. Thus, the Tribal Court simply ignored the Supreme Court's rejection of the contention that the Secretarial Order formally established the western boundary of the CRIT Reservation: "the

Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation." *Arizona v. California*, 460 U.S. at 636, n. 26.

In 2000, the Supreme Court accepted a settlement agreement between the parties to that litigation and entered a supplemental decree that awarded some additional water rights to the United States (on behalf of CRIT) but also expressly "embodie[d] the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary" and "preserve[d] the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation." *Arizona v. California*, 530 U.S. 390, 419 (2000).

2. The Interior Department Failed To Carry Out The Regulatory Steps To Consummate The 1969 Secretarial Order.

Assuming *arguendo* that the 1969 Secretarial Order constituted a lawful determination of the Reservation's western boundary, the Secretary nonetheless failed to ensure that the Department took any – let alone all – of the regulatory steps required to consummate the administrative action. Indeed, neither the Secretary nor the BIA took any of the necessary regulatory steps including, but not limited to, the following:

- Federal Register publication of the 1969 Order or the amendments and/or revisions to 25 C.F.R. §131.18 necessary to implement the Order's determination.

- Notice and Comment Period for Parties Interested and Affected by the 1969 Order or the substantive changes to 25 C.F.R. §131.18 affected thereby.

The Department published neither the 1969 Secretarial Order nor any notification of the Order's substantial alteration of 25 C.F.R. §131.18 in the Federal Register, thus failing to give interested and affected parties notice – timely or otherwise – or an opportunity to comment.

a. The APA Requirements.

Despite the 1969 Order's general applicability and the Department's own prior recognition that implementation of Public Law 88-302's leasing provision required Federal Register publication, the Department failed to publish any notice of the 1969 Order or the changes to existing Department rules resulting from the Order. "The Administrative Procedure Act ("APA") was enacted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (*citing* SEN. REP. NO. 752, 79th Cong., 1st Sess, 12-13 (1945)) (additional citations omitted).[17] Consequently, the APA requires that "[e]ach agency shall separately state and currently publish, in the Federal Register for guidance to the public substantive rules of general applicability adopted as authorized by law and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. §552(a)(1)(D); *see also* 1 C.F.R. §5.2 (providing, among others, that "[e]ach document having general applicability and legal effect" is "required to be filed for public inspection with the Office of the Federal Register and published in the Federal Register").

Courts have ruled that "[o]nly regulations that become published in the Code of Federal Regulations ("CFR") become agency documents that have legal effect." *Armstrong v. Executive Office of the President*, 877 F. Supp. 690, 701 (D.D.C. 1995) (citing 44 U.S.C. § 1510(a)). *Cf.*

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[17] *Cf. Arizona v. California*, 460 U.S. at 631 (stating that the Secretary relied solely on a Solicitor's Opinion when issuing the 1969 Order "establishing the western boundary" of the CRIT reservation; stating that the Order "[was] issued unilaterally and without a hearing...."; observing that the Secretary's Order corrected "what he deemed to be an error in an old survey" and remarking that, despite the Order's purported "correction," it took the Secretary nearly a decade to "approve . . . the corrected plat adding 450 acres to the Reservation") (emphasis added).

1969 Secretarial Order (never published in the federal register); 25 C.F.R. §131.18 (1975) (clarifying that 25 C.F.R. §131.18 shall not apply to the lands on the West Bank and that the Secretary would only have authority to lease those lands, pursuant to Part 131, "when and if determined to be within the reservation"). Accordingly, "[r]egulations that become published in the Code of Federal Regulations are presumptively deemed rules of the agency." *Armstrong, supra*, 877 F. Supp. at 701 (*citing Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986). Moreover, the APA not only requires that certain administrative policies and actions be published in the Federal Register but also requires that "each amendment, revision or repeal of the foregoing" also be published in the Register. *Id.* at 5 U.S.C. § 552(a)(1)(E).

Further, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.* at §552.

3. The Secretary's 1965 Notice And Comment Rulemaking Confirms The Secretary's Understanding That Rulemaking Was Proper In This Instance.

Subsequent to PL 88-302's enactment on August 10, 1965, the Secretary of the Interior published a "Proposed Rule Making" in the Federal Register, which proposed an amendment to 25 C.F.R. §131.18 regarding "Colorado River Reservation Leasing and Permitting." 30 Fed. Reg. 9924 (Aug. 10, 1965). The Notice announced that the "purpose [of] this change [to 25 C.F.R. §131] is to implement the Act of April 30, 1964 (78 Stat. 188) [*i.e.* Public Law 88-302]." *Id.* In addition, the Notice declared "[i]t is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process" and, accordingly, invited "interested persons" to "submit written comment, suggestions or objections with respect to the proposed amendments to the [BIA] . . . within thirty 30 days of the date of publication." *Id.*

Three months after that publication, on November 10, 1965, the Secretary published a further Notice announcing the Department's intent to amend § 131.18 of Title 25 Code of Federal Regulations concerning the leasing of lands on the Colorado River Reservation." 30 Fed. Reg. 14155 (1965). This Notice discussed, and was intended to consummate, the Department's rulemaking which began with the August publication, and acknowledged that "since leasing of lands . . . is accomplished under 25 C.F.R. Part 131, we [the Department] feel it is reasonable that the same regulations should be followed in leasing under [PL 88-302]." *Id.* In addition, the November Notice advised that PL 88-302 included several caveats: (1) that the Act would only take effect when the Indian Claims Commission dismissed the petitions in Docket Nos. 185 and 283 and (2) that the certain "lands lying west of the Colorado River . . ." in California could only be leased by the Secretary pursuant to Part 131 "when and if they are determined to be within the reservation." *Id.* at 14155-56.

The Secretary provided interested persons with a 30-day comment period to address the rule change, received comments and then adopted the amendment without change. Thus, the Secretary's publication of an initial notice of the Department's intention to amend 25 C.F.R. § 131, the call for and acceptance of comments pursuant to the same, and publication of the November Notice consummated the administrative process of notice and comment rulemaking.

The Secretary's initiation and consummation of notice and comment rulemaking in order amend the leasing provisions of 25 C.F.R. and thereby implement PL 88-302 clearly evidences the Secretary's understanding that notice and comment rulemaking was proper in this instance, and led to amendment to 25 C.F.R. §131.18.

Because Section 131.18 is a Department rule of general applicability and legal effect, the APA requires that "each amendment, revision or repeal" to same also be published in the Federal

Register. Yet the Secretary further amended and revised Section 131.18 without invoking the notice and comment procedures and without any Federal Register publication. Thus, even if the 1969 Order had been authorized, the Secretary's failure to publish any notification and/or to solicit any comments with regard to substantive changes to Section 131.18 violated the APA's notice requirements. The Secretary's understanding that implementation of PL 88-302 had a substantive legal effect requiring notice and comment rulemaking is evidenced by the two 1965 Federal Register announcements. Certainly a Department decision to alter an agency rule and thereby grant the Secretary the legal right to lease thousands of acres of land which, as a matter of federal law, previously was prohibited, has a substantive legal effect on both the agency and on the general public.

It also is worth noting that the Department recognized the appropriateness of amending Part 131 through notice and comment rulemaking when the condition precedent to PL 88-302's applicability – dismissal of the claims – occurred. *See* 30 Fed. Reg. 14155 ("[o]n April 23, 1965, the Indian Claims Commission dismissed [the claims] . . . which under section 4 of the act was prerequisite to its becoming effective") (emphasis added). Similar qualifying language with regard to the lands in California – expressly prohibiting application of Part 131 to the West Bank Land if and until "determined to be within the reservation" – served as a condition precedent to the Act's effective date with regard to those lands. However, unlike the notice and comment rulemaking consummating the implementation of PL 88-302 after dismissal of the claims, there was no notice and comment rulemaking consummating the Act's implementation with regard to the West Bank Land. In fact, not only did the Secretary fail to publish the 1969 determination itself, but the Secretary failed to publish *any notice whatsoever* of a change to the existing 25 C.F.R. §131.18, as required by the APA.

4. Section 131.18's Prohibition On Leasing West Bank Land Was In Effect When The Lease Was Signed.

At the time the Lease was executed in 1975 (six years after the Secretary's 1969 Order), Section 131.18 still prohibited the application of Part 131 to the lands comprising the West Bank Land and still included the following provision: "any of the described lands in California shall be subject to the provisions of this Part 131 when and if determined to be within the reservation." 25 C.F.R. §131.18 (1975). Assuming *arguendo* that the 1969 Secretarial Order was a valid order, the Order, at a minimum, significantly altered the applicability of Section 131 to the aforementioned lands and constituted a statement of general policy or an interpretation of the existing agency rules. The Secretary's failure to publish the 1969 determination or to repeal, amend or revise this portion through publication in the Federal Register, conclusively establishes that the Secretary's 1969 determination did not repeal, amend or otherwise revise this regulation.

The Department continued to include the qualifying language with regard to the lands in California until January 22, 2001 – some 32 years after the Secretary's Order – when the Department published its "Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust; Final Rule." 66 Fed. Reg. 7068 (Jan. 22, 2001). The Final Rule discussed changes applicable to 25 C.F.R. §131.18, and notes simply:

> [w]ith respect to those regulations governing the administration of leases on specific reservation lands, the Final Rule will not effect any substantive changes, but renumbers those sections. The section pertaining to the Colorado River Reservation has been removed at the request of the Tribe.

Id. at 7079 (emphasis added). The Final Rule omits the language regarding the West Bank Land as well as the provision regarding the applicability of Part 131, "when and if determined part of the reservation." Although the Department's "explanation" as to why the aforementioned provisions were removed from Section 131.18 is woefully deficient, is unfathomably untimely

and fails to reference the 1969 Secretarial Order, the Department's amendment of the regulation through notice and comment rulemaking once again demonstrates the Department's understanding that the Secretary's ability to lease on behalf of CRIT pursuant to 25 C.F.R. §131.18 is subject to that process.

5. Johnson Cannot Be Adversely Affected By The 1969 Order Because The Secretary Failed To Take the Necessary Regulatory Steps And Failed To Provide The Required Notice.

The Secretary's 1965 publication of Section 5 of the 1964 Act (PL 88-302) was not only an acknowledgment that Section 5 had legal effect – as contemplated in 1 C.F.R. § 5.2 and 5 U.S.C. §552 – but also was a reflection of the Secretary's own understanding that such an agency action was the type for which notice must be published in the Federal Register. By failing to publish the 1969 Secretarial Order, continuing to publish 25 C.F.R. § 131 as it existed prior to 1969 until well after the Lease was executed, and generally failing to provide any notice of the 1969 Secretarial Order (an internal memorandum), the Secretary failed to provide "actual and timely notice of the terms" of the Order. Accordingly, Johnson and Water Wheel cannot be "adversely affected by a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552.

Thus, even if the Secretary had been given authority to make the final determination through an informal opinion and order, he and/or his successor failed to see the consummation of the administrative action through to finalization. As such, the western boundary of the CRIT Reservation has never been formally determined pursuant to federal law and regulation, which means the Tribal Court Officials cannot demonstrate legally or factually that the West Bank Land is part of the Reservation. And in their failure to demonstrate reservation status,

Defendants cannot possibly maintain a colorable claim under *Montana* to tribal jurisdiction over Water Wheel or Johnson.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request this Honorable Court to enter judgment in their favor and against the Tribal Court Officials by (1) declaring that no tribal jurisdiction exists over Water Wheel or Robert Johnson and (2) enjoining the Tribal Court Officials from exercising jurisdiction over Water Wheel or Robert Johnson in the Tribal Court Action or any subsequent action arising from a dispute under Water Wheel's Lease.

Respectfully submitted this 27th day of March 2009.

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LIST OF EXHIBITS

A. Declaration of Robert Johnson, dated March 11, 2008..

B. Plaintiffs' Statement of Facts In Support of Second Emergency Application And Motion For Temporary Restraining Order And Preliminary Injunction & Second Declaration of Robert Johnson, dated April 22, 2008.

C. 25 C.F.R. § 2 (1975) (Appeals From Administrative Actions) & 25 C.F.R. § 131 (1975) (Leasing and Permitting).

D. 25 C.F.R. § 162, Subparts A and F.

E. Letter from Carl J. Artman to Dennis J. Whittlesey (January 31, 2008)..

F. CRIT's Eviction Ordinance.

G. Secretarial Order of January 17, 1969.

H. Solicitor's Opinion of January 17, 1969.

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