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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 19, 2019)

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934 F.3d 1076 (9th Cir. 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEMEHUEVI INDIAN TRIBE, on its Own Behalf and on Behalf of its Members *Parens Patrie* [sic]; CHELSEA LYNN BUNIM; TOMMIE ROBERT OCHOA; JASMINE SANSOUCIE; NAOMI LOPEZ,

Plaintiffs-Appellants,

v.

JOHN MCMAHON, in His Official Capacity as Sheriff of San Bernardino County; RONALD SINDELAR, in His Official Capacity as Deputy Sheriff for San Bernardino County,

Defendants-Appellees.

No. 17-56791

D.C. No. 5:15-cv-01538-DMG-FFM

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Before: Kim McLANE WARDLAW and
Andrew D. HURWITZ, Circuit Judges,
and Edward R. KORMAN,* District Judge.

HURWITZ, Circuit Judge:

In 2015, San Bernardino County Sheriff's Deputies cited four enrolled members of the Chemehuevi Indian Tribe for violating California regulatory traffic laws. Two of the Tribe's members were cited on Section 36 of Township 5 North, Range 24 East ("Section 36"), a one square mile plot the Tribe claims is part of its Reservation; two were cited elsewhere on the Reservation.

It is undisputed that the Sheriff cannot enforce regulatory traffic laws in "Indian country." *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360. "Indian country" includes, but is not limited to, land within the boundaries of a reservation. 18 U.S.C. § 1151. The issues for decision today are (1) whether the individual Tribe members and the Tribe can challenge the citations through a 42 U.S.C. § 1983 action; and, if so, (2) whether Section 36 is Indian country. We hold that the individual plaintiffs, but not the Tribe, can challenge the citations under § 1983. And, we conclude that all the citations occurred within Indian country. We therefore vacate the district court's judgment dismissing the complaint as to the individuals but affirm the judgment as to the Tribe.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

I. BACKGROUND

A. Facts.

Chelsea Lynn Bunim, Jasmine Sansoucie, Tommie Robert Ochoa, and Naomi Lopez are enrolled members of the Chemehuevi Tribe. Each was stopped and cited by a San Bernardino County Sheriff's Deputy for violating a California regulatory traffic law. Deputy Sheriff Ronald Sindelar stopped and cited Bunim on Section 36 for driving without a valid registration. Sindelar impounded Bunim's car, leaving her alone on the roadside. Deputy Sindelar also stopped Sansoucie on Section 36, citing her for driving with a suspended license.

Deputy Sindelar cited Ochoa for driving without a valid registration and failing to provide evidence of financial responsibility. Sindelar had Ochoa's car towed, leaving him alone on the roadside. Deputy Sheriff J. Wagner cited Lopez for driving without a valid registration. Both of these citations were issued at locations that the parties agree are inside the boundaries of the Chemehuevi Reservation.

Bunim, Sansoucie, Ochoa, Lopez, and the Tribe sued the Sheriff and the Deputies under 42 U.S.C. § 1983, alleging violations of various federal statutory and constitutional rights. The complaint sought monetary damages, a declaratory judgment, and injunctive relief. The defendants argued that none of the plaintiffs' claims was cognizable under § 1983. In addition, in response to the claims raised by Bunim and Sansoucie, the defendants argued that Section 36 was outside the Reservation boundaries, and therefore within the County's regulatory jurisdiction.

B. Procedural History.

The district court initially entered a preliminary injunction prohibiting the defendants from "citing, arresting, impounding the vehicles of, and prosecuting Chemehuevi tribal members for on-reservation violations" of California regulatory vehicle laws, including violations occurring on Section 36. The court determined there were "at least serious questions going to the merits" of whether Section 36 was "Indian country."

But, the court later granted summary judgment to the defendants, concluding that Section 36 was not part of the Chemehuevi Reservation and therefore not Indian country under 18 U.S.C. § 1151(a). In a motion to amend the judgment, Ochoa and Lopez noted that they were not ticketed in Section 36. The district court denied the motion, holding that even if the plaintiffs were cited on the Reservation, they failed to allege "a well-established constitutional violation for purposes of their section 1983 claim." The court reasoned that § 1983 "is concerned with the relationship between individuals and the state, not the distribution of power between state, federal, or tribal governments," and therefore neither the "right to be free of state regulation" nor "the right to tribal government" is "within the scope of section 1983."[1]

The Tribe and the individual plaintiffs timely appealed. We have jurisdiction of that appeal under

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[1] The complaint also alleged that the citations "constitute[d] racial discrimination in direct violation" of the Equal Protection Clause. The district court held that "the specter of racial animus" was not "sufficient to create a triable issue of fact that Defendants violated" the Fourteenth Amendment. The plaintiffs do not challenge that ruling on appeal.

28 U.S.C. § 1291 and review the summary judgment de novo. *Parravano v. Babbitt*, 70 F.3d 539, 543 (9th Cir. 1995).

II. DISCUSSION

A. Is Section 36 Indian Country?

We turn first to the question whether Section 36 is in the Chemehuevi Reservation, and thus Indian country under 18 U.S.C. § 1151(a). But it is important also to note at the outset what issues are not before us. We need not—and do not—decide today who holds title to Section 36. Indian country includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). "[A]djudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987) (internal quotation marks and footnote omitted); *see Solem v. Bartlett*, 465 U.S. 463, 466-68 (1984).

Our inquiry as to the reservation status of Section 36 begins in 1853. After California gained statehood, Congress ordered a survey of its public lands and granted the State title to sections 16 and 36 of each township.[2] Act of March 3, 1853, ch. 145, 10 Stat. 244, 245-46. But, the 1853 Act specifically excluded

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[2] *See* U.S. Geological Survey, *The Public Land Survey System*, The National Map Small Scale (Jan. 18, 2018), https://nationalmap.gov/small_scale/a_plss.html (explaining township, range, and section designations).

from that grant any land "in the occupation or possession of any Indian tribe." *Id.* at 246-47. The Surveyor General approved a survey of the land at issue in this case in 1895.

While that survey was being conducted, Congress ordered the Secretary of the Interior "to select a reservation" for each California Mission Indian tribe. Mission Indian Relief Act, ch. 65, 26 Stat. 712, 712 (1891). The reservations were to "include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians." *Id.* Although the Secretary was also instructed to "cause a patent to issue for each" reservation, and thus transfer title to the land to the United States as trustee for the tribes, the Act provided that the reservations would be "valid when approved by the [Executive Branch]." *Id.* In 1905, Congress authorized the Secretary "to investigate through an inspector . . . existing conditions of the California Indians and to report to Congress at the next session some plan to improve the same." Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1058.

Special Agent C.E. Kelsey was then dispatched to visit the Chemehuevi Tribe and identify territory for a reservation. In 1907, Kelsey issued a report to the Commissioner of Indian Affairs, identifying land to be included in the reservation. He specifically recommended that the reservation include the eastern half of Township 5 North, Range 24 East ("E. 1/2 of T. 5 N., R. 24 E.")— which contains Section 36. Kelsey noted that this land was the "present location" of the tribal members and that "there is no question but they have occupied this land since primeval times."

The Commissioner forwarded Kelsey's recommendation to the Secretary of the Interior.

In an executive order (the "1907 Order"), the Secretary then "direct[ed] that the lands referred to" by Kelsey and the Commissioner "be withdrawn from all form of settlement," and created the Chemehuevi Reservation. The Secretary also asked Congress "to authorize the addition of certain lands to the Mission Indian Reservations." Although Congress did not act upon this proposed legislation, it subsequently recognized the existence of the Chemehuevi Reservation in the Parker Dam Act, ch. 522, 54 Stat. 744 (1940).

It is clear that a Chemehuevi Reservation was validly established by the Secretary's 1907 Order, notwithstanding the absence of subsequent Congressional approval. Indeed, the Supreme Court has expressly so recognized:

> Congress and the Executive have ever since recognized these as Indian Reservations. . . . They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this late date to the argument that the reservations . . . are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. 546, 598 (1963); *see also id.* at 596 & n.100.[3]

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[3] The defendants cite *Arizona v. California*, 460 U.S. 605, 636 n.26 (1983), for the proposition that "the secretarial orders do not constitute 'final determinations.'" But, "the secretarial orders" at issue in that litigation were issued in the 1960s and 1970s. *See id.* at 631-32. In 1919 and 1927, Congress "prohibited future

The defendants argue that the 1907 Order was invalid *ab initio* because Section 36 had already been deeded to California. The factual premise of that argument, however, is subject to question. The 1853 Act excluded any land "in the occupation or possession of any Indian tribe," 10 Stat. at 246-47, and the Kelsey survey, adopted by the Secretary, documents that Section 36 falls in that exception. The district court erred in excluding the Kelsey report as hearsay. It is plainly admissible as an ancient document, Fed. R. Evid. 803(16), which may contain multiple levels of hearsay. 30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice & Procedure* § 6935 (2018 ed.) ("[E]xclusion of statements in qualifying ancient documents on the grounds that the author lacked firsthand knowledge, or (relatedly) that the document contains hearsay-within-hearsay should be rare."). Review of historical documents is typical—indeed often necessary—in cases involving the boundaries of Indian reservations. *See, e.g.*, *Idaho v. United States*, 533 U.S. 262, 265-71 (2001).

But, as noted, we need not today decide the extent of the 1853 land grant. "[E]xecutive orders must be liberally construed in favor of establishing Indian rights," *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996), and are "interpreted as the Indians would have understood them," *Parravano*, 70 F.3d at 544. Given the language of the 1853 Act, the Kelsey report identifying Section 36 as land occupied historically by Indians, and the express inclusion of Section 36 in the 1907 Order, the

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changes in Indian reservations by executive order." *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 & n.15 (9th Cir. 1976). That prohibition plainly does not affect the 1907 Order.

Chemehuevi Tribe (and indeed, the Secretary of the Interior) surely understood Section 36 to be within the Reservation.

Nor can we conclude that the boundaries of the Reservation as established in the 1907 Order were later diminished. "We do not lightly infer diminishment of reservations." *Confederated Tribes of Chehalis*, 96 F.3d at 343-44. After 1927, Congress prohibited any change to the boundaries of existing executive-order reservations except by Congressional act. Act of March 3, 1927, ch. 299, § 4, 44 Stat. 1347 (codified at 25 U.S.C. § 398d); *see S. Pac. Transp.*, 543 F.2d at 686 & n.15. There is no such act removing Section 36 from the Chemehuevi Reservation.

The defendants also rely on a patent issued to the Tribe by the Bureau of Land Management in 2010, which excluded "[t]hose lands granted to the State of California . . . on July 10, 1895"—the date on which the government survey was finalized—"located in . . . sec. 36, T. 5 N., R. 24 E." But, as noted above, we do not today adjudicate title. More importantly, because the 2010 patent was issued over a century after the Reservation was established, it provides no evidence of the intent of the Executive or the understanding of the Tribe in 1907. Nor can it, nor does it purport to, diminish the Chemehuevi Reservation. The patent cites the 1907 Order, then grants *some* of the land covered by that order to the Tribe in trust—an issue of ownership. It is silent as to the reservation status of any land excluded from the patent.

We therefore conclude that Section 36 is within the Chemehuevi Reservation and hence "Indian country" under 18 U.S.C. § 1151(a).

B. Can the Plaintiffs Sue Under § 1983?

California cannot enforce state law that regulates —but does not prohibit—tribal members' conduct inside a reservation. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 147 (9th Cir. 1991) (citing 18 U.S.C. § 1162; 28 U.S.C. § 1360). The defendants concede that the citations at issue involved regulatory laws and therefore could not be issued against enrolled members of the Tribe within the boundaries of the Reservation. *See id.* at 148. But, they argue that even such citations cannot be the subject of a § 1983 action.

We disagree. Section 1983 allows any "person" to sue for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Because § 1983 "was designed to secure private rights against government encroachment," *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 712 (2003), tribal members can use it to vindicate their "individual rights," but not the tribe's "communal rights," *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515-16 (9th Cir. 2005) (en banc). And, "traditional section 1983 suit[s]"—for example, those challenging an arrest on tribal land—seek to vindicate an "individual right." *See id.* at 516 n.8 (citing *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 n.5 (9th Cir. 1991)).

Bunim, Sansoucie, Ochoa, and Lopez's claims are "traditional" § 1983 suits. Each was stopped and detained by a San Bernardino County Deputy; some had their vehicles seized. They contend that their detentions and citations violated the Constitution and federal statutes. They have a cause of action under § 1983 against the defendants.

The Tribe, however, does not have a § 1983 claim. An Indian tribe "may not sue under § 1983 to vindicate" a "sovereign right," such as its right to be free of state regulation and control. *Inyo Cty.*, 538 U.S. at 712. Nor can the Tribe assert its members' individual rights as *parens patriae* in a § 1983 action. To assert *parens patriae* standing, the Tribe would have to "articulate an interest apart from the interests of particular private parties," *i.e.*, "be more than a nominal party," and "express a quasi-sovereign interest." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017). That requirement is inconsistent with a § 1983 action: quasi-sovereign interests are not individual rights.

III. CONCLUSION

The Chemehuevi Reservation, as established by the 1907 Order, includes Section 36. Section 36 is therefore Indian country, and San Bernardino County does not have jurisdiction to enforce California regulatory laws within it. The individual plaintiffs may bring § 1983 claims against the defendants. The Tribe, however, cannot assert its sovereign rights under that statute.[4]

AFFIRMED in part, VACATED and REMANDED in part. Each party shall bear its own costs.

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[4] We take no position on any defenses, including immunity, the defendants might have to the claims raised by the individuals.

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [57] AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [61] (SEPTEMBER 5, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE, ET AL.,

Plaintiffs,

v.

JOHN McMAHON, ET AL.,

Defendants.

Case No.: ED-CV-15-1538-DMG (FFMx)

Before: Dolly M. GEE, United States District Judge.

On August 4, 2015, Plaintiffs Chemehuevi Indian Tribe, Chelsea Lynn Bunim, Tommie Robert Ochoa, Jasmin Sansoucie, and Naomi Lopez filed their First Amended Complaint ("FAC") against Defendants John McMahon (County Sheriff) and Ronald Sindelar (Deputy Sheriff), who are sued in their official capacities. [Doc. # 11.] Plaintiffs seek monetary damages, as well as declaratory and injunctive relief, on the grounds that (1) Defendants violated Public Law 280, 18 U.S.C. § 1162, and 28 U.S.C. § 1360 by issuing motor vehicle citations without jurisdiction on reservation

land; (2) Defendants interfered with tribal self-government; (3) state authority is preempted; and (4) Defendants violated their civil rights. *Id.*

On August 16, 2016, the Court granted Plaintiffs' motion for a preliminary injunction, finding in part that "Plaintiffs have raised at least serious questions going to the merits of their claim that Section 36 is Indian country." Aug. 16, 2016 Order at 13 [Doc. # 51]; *see also id.* at 2 ("The piece of land where San Bernardino County Sheriff's deputies issued at least three of the citations is a one square mile plot of land known as Township 5N, Range 24E, SBM, Section 36 ('Section 36').").

The Court will refer to the land at issue in this case as Section 36 or "Section 36 of T. 5 N., R. 24 E." This Section 36 must be distinguished from other areas also demarcated as "Section 36" located in other fractional townships, such as T. 6 N., R. 24 E.

On June 2, 2017, Defendants filed a motion for summary judgment on the issue of whether Section 36 is within Indian country as defined in 18 U.S.C. section 1151(a). ("Def. Mot.") [Doc. # 57.] Whether Section 36 falls within Indian country determines whether Defendants had jurisdiction to issue motor vehicle citations to members of the Tribe on that piece of land and is dispositive of the FAC's first three causes of action. Defendants' summary judgment motion also seeks to dispose of Plaintiffs' section 1983 claim.

Plaintiffs subsequently filed a motion for partial summary judgment on the issue of whether Section 36 falls within the Chemehuevi Indian Reservation or is Indian country, or both. (Pl. Mot.") [Doc. # 61.] Plaintiffs

do not move for summary judgment on the section 1983 claim "because of the evidentiary requirements for that claim and the likelihood that the Tribe would need to engage in extensive discovery." *Id.* at 2 n.3.

Having duly considered the parties' written submissions, the Court **GRANTS** Defendants' summary judgment motion in full, and **DENIES** Plaintiffs' motion for partial summary judgment.

I. FACTUAL BACKGROUND

The Court sets forth the material facts. Unless otherwise indicated, the following facts are uncontroverted.

The Chemehuevi Tribe is a federally recognized Indian tribe. Defendants' Statement of Genuine Disputes of Material Fact ("Def. SGDMF") ¶ 1 [Doc. # 63.] The Tribe is the beneficial owner of the Chemehuevi Indian Reservation ("the Reservation"), which consists of approximately 32,487 acres of trust land located in San Bernardino County, California. *Id.* ¶ 3. This land is within and adjacent to the Chemehuevi Valley. *Id.* ¶ 4.

A. Relevant Statutes and Orders

1. The 1853 Act

On March 3, 1853, Congress passed legislation ("1853 Act") that conveyed to the State of California Sections 16 and 36 in each township for public school purposes. 10 Stat. 244, ch. 145, § 6; Pl. Ex. 3; *see also United States v. Southern Pacific Transp. Co.*, 601 F.2d 1059, 1061 (9th Cir. 1979) (stating the 1853 Act "established the United States' public lands system for California, a newly admitted state"); Def. SGDMF

¶ 7 ("The 1853 Act reserved (2) sections, sections 16 and 36, within each township to be granted to the State for school purposes."). The 1853 Act did not establish the boundaries of the Chemehuevi Reservation. *See* Plaintiffs' Statement Genuine Disputes of Material Fact ("Pl. SGDMF") ¶ 1 [Doc. # 64-2.]

Section 6 of the 1853 Act does contain additional language that the Court will refer to as the "Occupation Provision": it states that the Act "shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same." Def. SGDMF ¶ 5; *see also* Pl. Ex. 3.

Section 7 of the 1853 Act goes on to state "[t]hat where any settlement . . . shall be made upon the sixteenth and thirty-six sections, before same shall be surveyed, or where such sections may be reserved for public uses . . . , other land shall be selected by the proper authorities of the State in lieu thereof. . . . " Def. SGDMF ¶ 9.

According to Plaintiffs, the Occupation Provision and Section 7 of the 1853 Act essentially mean that "[w]here a section 16 or 36 was in the occupation or possession of an Indian tribe, the 1853 Act provided that the State had the right to select lands in the public domain in lieu of section 16 or 36, to sell the in lieu lands, and to use proceeds from the sale to purchase other land within the State to build schools." *Id.* Defendants dispute Plaintiffs' reading of the 1853 Act's Occupation Provision and Section 7. *Id.*

2. Mission Indian Relief Act of 1891

On January 12, 1891, Congress enacted the Mission Indian Relief Act ("MIRA"), which authorized the Secretary of the Interior of the United States ("the Secretary") to oversee the establishment of new reservations for Mission Indians[1] residing in California. 26 Stat. 712, ch. 65 (1891); Pl. Ex. 7; Pl. SGDMF ¶ 3. This involved the Secretary's appointment of commissioners to propose reservation sites. 26 Stat. 712, ch. 65 §§ 1, 2.; Def. SGDMF ¶ 15. These selected sites would then become "valid when approved by the President and the Secretary of the Interior." 26 Stat. 712, ch. 65 § 2. MIRA instructed that "if no valid objection exists, [the Secretary] shall cause a patent to issue for each of the reservations selected by the commission." *Id.* § 3.

Yet, MIRA explicitly constrained the Secretary of the Interior from issuing patents for lands where valid ownership rights have attached:

> [N]o patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand

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[1] Although Defendants note that members of the Chemehuevi Tribe may not ethnically be Mission Indians, Congress and the Department of the Interior treated the Chemehuevi as Mission Indians for the purposes of MIRA. *See* Aug. 16, 2016 Order at 9 n.9 ("The parties do not dispute that the Congressional acts mentioned *supra* apply to the Chemehuevi Tribe in this case.").

> and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter.

Id. Defendants assert that on July 10, 1895, the federal government surveyed the subject land within Section 36 and granted it to the State of California as school sections. Pl. SGDMF ¶ 5.[2]

3. 1907 Secretarial Order

On December 27, 1906 and January 3, 1907, C.E. Kelsey, who was appointed special agent to the Commissioner of Indian Affairs for the purpose of reporting on the condition of American Indians in California, issued reports concerning the Chemehuevi Indian Tribe, which resided on the lands in the Chemehuevi Valley along the Colorado River. Def. SGDMF ¶¶ 17–18; Pl. Exs. 9, 10. Notably, in his January 3, 1907 report to the Commissioner of Indian Affairs, Kelsey stated: "These [Chemehuevi] Indians regard their present location as their place of origin. I believe there is no question but they have occupied this land since primeval times." Pl. Ex. 10. He then identifies certain lands that should be set aside for the Chemehuevi Indians on the Colorado River reservation:

> T. 4 N. R. 25 E., T. 4. N. R. 26 E., T. 5. N. R. 25 E.,

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[2] Plaintiffs dispute Defendants' characterization that Section 36 was "ceded" to the State of California. As the Court will discuss later, Plaintiffs argue that the Occupation Provision of the 1853 Act "specifically withdrew from settlement and protected from white encroachment any tract of land in the occupation or possession of any Indian tribe"—this includes Section 36. Pl. SGDMF ¶ 5.

> 6. N. 25 E.[,] the E. 1/2 of T. 5.N. R. 24 E.[, and] Sections 25, 26, 35, and 36 of T. 6 N., R. 24 E.[,] and possibly a right of way for an irrigating ditch through T. 7 N. R. 24 E.

Id. This January 3, 1907 report makes no specific mention of the land at issue in this case: Section 36 of T. 5.N, R. 24 E. Nonetheless, the Court will interpret the term "E. 1/2 of T. 5.N. R. 24 E. to mean the eastern half of Township 5 North, Range 24 East. Section 36 lies within this township.[3]

In a later July 19, 1907 Report, Kelsey acknowledged that the Tribe had occupied the area along the Colorado River since "time immemorial." Def. SGDMF ¶ 18; Pl. Ex. 2 at 2 (report from Kelsey to Commissioner of Indian Affairs stating that "though I have not been able as yet to visit that locality [the Chemehuevi Valley on the Colorado River,] [t]his valley is a deep low valley by the Colorado River and has been occupied from time immemorial by the Chimehuevi [sic] Indians."); *see also* Pl. Ex. 19, David E. Lindgren, Authority of Secretary to Determine Equitable Title To Indian Lands, 1974 DOINA LEXIS 47 at 48, ("The Chemehuevi Reservation was established in 1907 on the ancestral homelands of the Chemehuevi Indians; it included 'a deep low valley (made) by the Colorado River (which) has been occupied from time immemorial' by the Tribe.").

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[3] At the July 11, 2017 hearing on the motions for summary judgment, Plaintiffs argued that the term "E. 1/2 of T.5.N., R.24.E." or "E/2 of T.5.N., R.24.E." means the "one half of Township 5 North Range 24 East [, which] includes Section 36." Hearing Tr. (7/11/17) at 4. Defendants then orally stipulated that it is reasonable to interpret "E/2" to mean the eastern half of T.5.N., R. 24.E., subject to their argument that Section 36 is not part of the Reservation.

In the December 27, 1906 and January 3, 1907 reports, Kelsey recommended that the lands the Tribe occupied be added to the Colorado River Indian Reservation or, alternatively, be set aside and proclaimed as a separate reservation for the Tribe upon passage of a bill amending MIRA. Def. SGDMF ¶ 19; *see infra* (amendment to MIRA). While both of these reports mention section "36 of T. 6 N. R. 24 E" as being part of the reservation, it makes no explicit mention of Section 36 of T. 5 N. R. 24 E., the land at issue here. *See* Pl. Exs. 9 and 10. They do reference the "east one half of T. 5 N. 24 E." or the "E. 1/2 of T. 5.N. R. 24 E." *Id.*

On January 31, 1907, relying upon Kelsey's reports and recommendations, the Commissioner of Indian Affairs sent a letter to the Secretary of the Interior requesting that he withdraw certain lands from settlement and entry for the use or occupancy of twelve separate bands of Mission Indians, including the Tribe. Def. SGDMF ¶ 20. In particular, the Commissioner of Indian Affairs identified Section 36 of T.6 N., R. 25 E. as part of the "lands which [Kelsey] recommends be withdrawn from all forms of settlement and entry pending action by Congress whereby they may be added to several reservations," including the Tribe's. *Id.* ¶ 21. The January 31, 1907 report did not specifically identify the Section 36 at issue located at T. 5 N., R. 24 E., although it did reference the "E/2 of T. 5 N., R. 24 E." *Id.*; Pl. Ex. 11 ("January 31, 1907 Report").

On February 2, 1907, the Secretary of the Interior issued a written Order ("1907 Order"), which included a copy of the January 31, 1907 Commissioner's Letter. *Id.* ¶ 22. The 1907 Order stated that the Commissioner identified lands in California, "which he recommends

be withdrawn from all form of settlement and entry, *pending action by Congress* authorizing the addition of lands described to the various Mission Indian Reservations." Pl. Ex. 12 ("1907 Order") (emphasis added) [Doc. # 61-5]. The 1907 Order then stated:

> In view of the recommendation of the Indian Office, I have to direct that the lands referred to [in the Commissioner's Letter] be withdrawn from all form of settlement or entry *until further notice*, also that local land officers of the districts in which the said lands are located, be advised of such withdrawal.
>
> In this connection you [the Commissioner of the General Land Office] are advised that the Department on the 31st ultimo [sic] *forwarded to Congress, with favorable recommendation, the draft of a bill to authorize the addition of certain lands* to the Mission Indian Reservations."

Id. (emphasis added); Def. SGDMF ¶ 23.

The Secretary of the Interior did not cause a patent to issue to the Chemehuevi Tribe, after the February 2, 1907 Order. Pl. SGDMF ¶ 9. Indeed, as explained *infra*, no trust patent was issued to the Chemehuevi Tribe until June 28, 2010. *Id.* ¶ 10.

4. Congressional Appropriations Act of March 1907

On March 1, 1907, Congress amended MIRA through passage of an "Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, for Fulfilling Treaty Stipulations with Various Indian Tribes, and for Other Purposes, for the Fiscal Year Ending June 13, 1908," 34 Stat. 1015,

1022–1023 ("1907 Appropriations Act"). The 1907 Appropriations Act amended MIRA to:

> authorize the Secretary of the Interior to select, set apart, and *cause to be patented* to the Mission Indians such tracts of public lands of the United States, in the State of California, as he shall find upon investigation to have been in the occupation and possession of Mission Indians, and now required and needed by them. . . .

Id. (emphasis added); Pl. SGDMF ¶ 6.

The 1907 Appropriations Act excluded from the scope of the lands to be selected, set apart, and caused to be patented to the Mission Indians, "any tract or tracts to which valid existing rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain" absent consent by the rights holder to be included within the selected lands. Pl. SGDMF ¶ 7.

In 1931, the Bureau of Indian Affairs produced a grazing map of the lands identified in the 1907 Order, entitled "Grazing Map, Chemehuevi Valley Indian Reservation." Pl. Ex. 14 ("Grazing Map"); Def. SGDMF ¶ 28 (citing Webb Declaration that the map is "maintained in the files and records of the [BIA regional office]" and identifying the physical location of the different parcel sections at issue in this matter, *i.e.*, Sections 30 and 36).[4] In July 1931, the Bureau of

[4] Defendants dispute "that the map accurately represents the boundaries of the Reservation." Def. SGDMF ¶ 28. Defendants, however, offer no evidence to dispute the map's accuracy and its depiction of the lands. Defendants do object that the map is irrelevant and hearsay. Defendants assert that map is "irrelevant"

Indian Affairs also produced a map entitled "Chemehuevi Valley Indian Reservation," showing the location of the lands identified in the 1907 Order. Pl. Ex. 15 ("Reality Office Map"); Def. SGDMF ¶ 29 (citing Webb Declaration).[5]

5. 2010 Trust Patent

On June 28, 2010, the Bureau of Land Management ("BLM") issued a trust patent to the Tribe. Pl. SGDMF ¶ 10; Pl. Ex. 25 ("U.S. Trust Patent No. 04-2010-0007" ("2010 Trust Patent"). While the trust patent acknowledges the Secretary's February 2, 1907 Order, it expressly excluded Section 36 from the Reservation just as the 1907 Order did:

> WHEREAS, there has been deposited in the Bureau of Land Management an order of the Secretary of the Interior dated February 2, 1907, withdrawing from settlement and entry

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because it is a "grazing map that simply evidences the opinion of the Bureau of Indian Affairs and/or other governmental entities regarding the grazing boundaries, and is only a legal conclusion." Def. Obj. ¶ 18 [Doc. # 66]. They also object that the map is hearsay to the extent it "purports to prove the truth of the boundaries of the Reservation." The Court **OVERRULES** Defendants' objections. The map is relevant to Plaintiffs' factual assertion regarding the exterior boundaries of the Reservation. *See* Fed. R. Evid. 401. Moreover, as the Court stated in its August 16 Order, "Webb has properly authenticated the documents as the custodian of record for the BIA regional office. As such, these documents are admissible either as business records maintained by the BIA regional office or as public records." Aug. 16 Order at 13 n.14 (citing Fed. R. Evid. 803(6) or 803(8)).

[5] Defendants raise the same objections it raised to the grazing map. Def. Obj. ¶ 19. The Court **OVERRULES** Defendants' objections. *See supra* n.4.

the following described land:

> San Bernardino Meridian, California Fractional townships T.4 N., R 25 E., T. 4 N., R. 26 E., T. 5 N., R. 25 E., T. 6 N., R. 25 E., the E/2 of T. 5 N., R. 24 E., and secs. 25, 26, 35, and 36 of T. 6 N., R. 24 E.[6]

and

> WHEREAS, an Order of the Authorized Officer of the Bureau of Indian Affairs is now deposited in the Bureau of Land Management, directing that, pursuant to the Act of January 12, 1891 (26 Stat. 712), as amended by the Act of March 1, 1907 (34 Stat. 1015), and other acts, a trust patent issue to the Chemehuevi Tribe of Mission Indians ("Tribe") for the above described lands **excluding the following lands and subject to any existing valid rights associated therewith** . . .
>
> 3. Those lands granted to the State of California as school sections on July 10, 1895, located in sec. 36, T. 4 N., R. 25 E **and sec. 36, T. 5 N., R. 24 E**. . . .

2010 Trust Patent at 2 (emphasis added). The land immediately south of Section 36 does not consist of Reservation land, but rather is Bureau of Reclamation land managed by the Bureau of Land Management. Pl. SGDMF ¶ 12.[7]

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[6] These lands mirror the fractional townships identified in the February 1907 Order. *See* Pl. Ex. 11 [Doc. # 61-5 at 48].

[7] The Court **OVERRULES** Plaintiff's relevance objection to this fact—it goes to the issue of whether Section 36 is Indian country. *See* Doc. # 64-1.

6. The Traffic Stops

Individual Plaintiffs Bunim, Ochoa, Lopez, and Sansoucie are American Indians and enrolled members of the Chemehuevi Tribe. Def. SGDMF ¶¶ 52, 55, 58, 62. Defendant John McMahon is the Sheriff of San Bernardino County. *Id.* ¶ 49. Defendant Ronald Sindelar is Deputy Sheriff for the County. *Id.* ¶ 51. From February 14, 2015 to March 15, 2015, Defendants or their agents issued citations to individual Plaintiffs for various California Vehicle Code violations, including driving without a valid registration and driving with a suspended license. *Id.* ¶¶ 53–64. Defendants stopped Bunim and Sansoucie while they drove within Section 36. *Id.* ¶¶ 53, 59. Defendants stopped Lopez while she drove on trust land within the Reservation, but not within Section 36. *Id.* ¶ 63. The parties dispute whether Defendants stopped and pulled Ochoa over within Section 36 or on trust land within the reservation. *Id.* ¶ 56; *see also* Declaration of Ron Sindelar ("Sindelar Decl.") ¶ 9–10 (observed violation while Ochoa passed through intersection within Section 36, but conducted traffic stop on Havasu Lake Road, between the cross-streets of Lake Boulevard and Smith Road).

II. REQUESTS FOR JUDICIAL NOTICE

The parties submitted requests for judicial notice of various documents. The Court addresses below only the documents that it references throughout this Order. The Court otherwise **DENIES** as moot Plaintiffs' and Defendants' separate requests for judicial notice of all other documents—the Court did not rely upon them in reaching its conclusion. *See infra*, n.13.

The Court **GRANTS** Defendants' request for judicial notice [Doc. # 58] of the following documents:

(1) the December 27, 1906 Letter from Kelsey to the Commissioner of Indian Affairs; (2) the January 3, 1907 Letter from Kelsey to the Commissioner of Indian Affairs; (3) the January 31, 1907 Letter from the Commissioner of Indian Affairs to the Secretary of Interior; (4) the Final Survey for Township No. 5 North, Range No. 24 East, San Bernardino Meridian, dated July 10, 1895 ("Land Survey"); and (5) the 2010 Trust Patent. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of 'matters of public record.'").

The Court also **GRANTS** Plaintiffs' request for judicial notice [Doc. # 61-8] of the following document: the February 2, 1907 Order. In ruling on both motions, the Court relied primarily on the exhibits Plaintiffs submitted.[8]

III. LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby,*

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[8] On June 29, 2017, the Court ordered Plaintiffs to submit a declaration authenticating the 25 exhibits filed in connection with their motion for partial summary judgment. [Doc. # 75.] Defendants filed an objection to Plaintiffs' failure to submit a declaration, arguing that Plaintiffs now have "waived their right to authenticate these exhibits." *See* Doc. # 79. Defendants' objection is **OVERRULED**. The Court subsequently issued a clarification order and Plaintiffs have since complied with the Court's requests. *See* Doc. ## 80, 81.

Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 447 U.S. at 324 (quoting Fed. R. Civ. P. 56(c), (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "Rather, it draws all inferences in the light most favorable to the nonmoving party." *Id.*

Issues of law may be resolved by summary judgment. *Asuncion v. District Director of U. S. Immigration and Naturalization Service*, 427 F.2d 523, 524 (9th Cir. 1970). Whether Section 36 is Indian country is a question of law. *See United States v. Sohappy*, 770 F.2d 816, 822 n.6 (9th Cir. 1985) ("The issue of what constitutes Indian country is properly a matter for the judge and not the jury."); *see also United States v. Roberts*, 185 F.3d 1125, 1139–40 (10th Cir. 1999).

IV. DISCUSSION[9]

A. Section 36 Is Not Within the Reservation

In their motion for partial summary judgment, Plaintiffs argue that the 1853 Act "created the Reservation, but did not define its boundaries," and that the 1907 Order "established the exterior boundaries of the Reservation." Pl. Mot. at 2–3. Defendants oppose Plaintiffs' reading of the statutes, and argue that it was not until 2010, when the Bureau of Land Management issued a trust patent to the Tribe, that the federal government established the boundaries of the Reservation. Def. Opp. at 2–9 [Doc. # 62.] It is uncontroverted that as of 2010, the federal government had established the boundaries of the Reservation. A comparison of the 2010 Trust Patent's description of the lands withdrawn from settlement to the relevant lands described in the 1907 Order reveal that they are identical. *Compare* 2010 Trust Patent at 2, *with* January 31, 1907 Report at 2.

Nonetheless, Plaintiffs contend that "Section 36 was *expressly included* within the boundaries of the Reservation by the 1907 Order." Pl. Mot. at 3 (emphasis added); *see also* Pl. Reply at 18 ("Section 36 was expressly reserved and set aside for the Tribe by the 1907 Order. *See* 1907 Order [Section 36 was "withdrawn from all form of settlement or entry. . . . "]."). The Court disagrees that Section was expressly included. Nothing in the 1907 Order—or the January

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[9] Defendants make various objections to Plaintiffs' evidence. The Court responds to objections to evidence only where such evidence is relied upon in the Court's ruling. Plaintiffs make only one evidentiary objection to Defendants' evidence, which the Court already addressed. *See supra*, n.7.

31, 1907 Report it incorporated—expressly states that Section 36 of T. 5 N., R. 24 E. is within the boundaries of the Reservation. Indeed, the 1907 Order does not even specifically refer to or mention Section 36 of T. 5 N., R. 24 E. Still, Plaintiffs argue that Section 36 is implicitly included by the 1907 Order's reference to "E/2 of T. 5 N., R. 24 E."

Notwithstanding that reference, Plaintiffs offer no authority to support their position that the 1907 Order could withdraw lands from settlement—and include as part of any Indian Reservation—those lands previously conveyed to the State of California. Instead, Plaintiffs contend that Section 36 never belonged to California to begin with because the land was subject to the Tribe's aboriginal title. According to them, the Occupation Provision of the 1853 Act not only created the Reservation but actually "prohibited the United States from conveying Section 36 to the State for school purposes, required the State to select in lieu lands in place of Section 36 or, in the alternative, if the conveyance of Section 36 was valid to the State, subjected the State's title to the aboriginal Indian title of the Tribe."[10] Pl. Reply at 3 [Doc. # 71.]; *see*

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[10] Plaintiffs' position regarding California's ownership interest in Section 36 contradicts the position they took in their previous motion for preliminary injunction, wherein Plaintiffs explicitly disavowed any challenge to California's ownership of Section 36, because "they are not required in order to stop the specific harm at issue in this case—the unlawful citation, prosecution, and racial profiling of tribal members." Pl. Supp. Br. at 11 ("All the Tribe and the Indians are seeking is a determination that the Vehicle Code cannot be enforced against tribal members who drive the one-half mile of road through Section 36 from one portion of trust land to another. Such a finding requires only a determination that Section 36 is Indian country.") [Doc. # 28].

also Pl. Opp. at 15 ("the 1853 statute expressly recognized the Tribe's aboriginal title to Section 36 and that the conveyance by the United States of Section 36 to the State of California for school purposes took subject to the Tribe's aboriginal title or right of occupancy"). Plaintiffs further assert that the language in the 2010 Trust Patent stating that the exclusion of Section 36 from the patent was "subject to any existing valid rights," refers to the "Tribe's aboriginal title to Section 36" as recognized by the Occupation Provision. *Id.* at 2, 18.

The Occupation Provision does not authorize settlement on land occupied by or in possession of any Indian Tribe: "this act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preemption right to the same." *See* Pl. Ex. 3 at 3–4. But as Defendants correctly point out, Plaintiffs fail to offer any admissible evidence that the Tribe currently occupies or is in possession of the one square mile expanse of land that makes up Section 36.

Plaintiffs' current position regarding the federal government's alleged invalid conveyance of Section 36 to the State of California is not only contrary to Plaintiffs' previous position, but raises Rule 19 concerns. *See* Fed. R. Civ. P. 19. The Court previously found that even though the State of California was not a party to the action, Rule 19 did not require dismissal in part because "Plaintiffs do not deny that California has an ownership interest in Section 36," and that its interests could be adequately represented on the issue of whether state or local governments could enforce traffic laws on the land. Aug. 16, 2016 Order at 6. The Court may have found otherwise had it known that Plaintiffs would be directly challenging the State of California's or other persons' ownership interests in Section 36.

What is more, they fail to offer admissible evidence that the Tribe occupied or possessed Section 36 during the time of the 1853 Act or the 1907 Order's passage, such that it could not be validly conveyed to the State of California. To be sure, Plaintiffs present evidence of general statements in Kelsey's July 10, 1907 Letter that the Tribe has occupied the "deep low valley by the Colorado River" since "time immemorial" or "since primeval times." *See* Pl. Ex. 2. The Court finds, however, that Kelsey did not have personal knowledge to make these broad factual assertions, especially as they concern Section 36—he himself admits he "ha[s] not been able as yet to visit that locality" located in the Chemehuevi Valley on the Colorado River. Plaintiffs have not otherwise laid any foundation for Kelsey's statements. Kelsey's statements are further confounded by the fact that he goes on to state that "[t]he [Chemehuevi] Indians are counted among the Indians of the Colorado River reservation, *though they have never lived there*." *See id.* at 2 (emphasis added).

To the extent Kelsey's assertion regarding the Tribe's occupation of the land in question is based on what members of the Tribe told him—"These [Chemehuevi] Indians regard their present location as their place of origin"—it is inadmissible hearsay.[11] Perhaps most significantly, Kelsey makes no specific reference in the July 10, 1907 Letter to the Tribe's alleged occupation of Section 36 or lands located on the eastern half of T. 5 N., R. 24 E.

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11 While it could be said that, as a matter of general knowledge, Native Americans occupied large swaths of the United States, let alone Section 36, "for time immemorial," that is not a sound evidentiary basis upon which to base a ruling on a summary judgment motion in a court of law.

At the July 11, 2017 hearing, Plaintiffs argued certain "survey notes" that they "believe [is] in the record"—and "think the County actually offered it" as evidence— show that the 1895 surveyors of the lands at issue "saw Indians . . . on the hill." Hearing Tr. (7/11/17) at 16. The Court reviewed the documents submitted as part of Defendants' Request for Judicial Notice. They did not seek judicial notice of any survey notes referencing "Indians on the hill." The only 1895 document in Defendants' RJN consists of the Land Survey, which is a map with limited notations. *See* Doc. # 58 at 14–16. Plaintiffs also did not include any 1895 surveyor notes in its exhibits binder in connection with its summary judgment motion. Even if the Court were to accept Plaintiffs' representation that the 1895 land surveyors saw "Indians on a hill," that vague statement is not enough to establish that the Tribe occupied or possessed Section 36 such that it could not be validly conveyed to the State of California.[12]

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[12] At oral argument, Plaintiffs repeatedly invoked *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). According to Plaintiffs, the Supreme Court in *Hitchcock* "[held] grants of Section 16 and 36 '[were] of public lands' . . . and therefore, lands encumbered by Indian aboriginal title were not available for selection" by the state. Pl. Opp. at 10 (citing *Hitchcock*, 185 U.S. at 391). The Supreme Court has indeed recognized that "Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial" and that "no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign [Federal Government]." *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 233–34 (1985). Yet, as discussed *supra*, Plaintiffs have failed to offer admissible evidence that the Tribe inhabited Section 36 "from time immemorial," much less during the time that Congress conveyed Section 36 to the State of California. Moreover, as Defendants point out,

In short, the Court finds that generalized statements from high-ranking government officials that the Tribe occupied certain lands since "time immemorial" inadmissible evidence for the purposes of supporting Plaintiffs' motion for partial summary judgment as to the status of Section 36 or creating a triable issue of fact in opposition to Defendants' summary judgment motion. As such, the Court rejects Plaintiffs' argument that the Occupation Provision of the 1853 Act invalidates the conveyance of Section 36 to the State of California.

Accordingly, because Section 36 is not part of the Reservation, the Court **DENIES** Plaintiffs' motion for partial summary judgment and **GRANTS** Defendants' summary judgment motion as to that issue.[13]

B. Section 36 Is Not Within the Definition of Indian Country

The Court incorporates herein its discussion of 18 U.S.C. section 1151(a) and California's jurisdic-

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Hitchcock did not involve the creation of reservations under the Mission Indian Relief Act. *See* Def. Reply at 3 [Doc. # 68].

[13] During its examination of the "serious questions" factor in its August 16, 2016 Preliminary Injunction Order, the Court stated that Section 36 is not part of the Reservation because the "Secretary must issue a trust patent to delineate the boundaries of the Reservation." *See* Aug. 16, 2016 Order at 11–12. For the purposes of this Order, the Court need not reach the question of whether a trust patent must issue to establish the Reservation or whether the Reservation existed even prior to the issuance of the trust patent. The salient fact is that 1853 Act conveyed Section 36 to the State of California—thus, the Secretary could not include that land within the Reservation under the 1907 Order.

tion over Indian country from its August 16, 2016 Order. Aug. 16, 2016 Order at 8–9.

In addition to "all land within the limits of any Indian Reservation," 18 U.S.C. § 1151(a), Indian country also includes:

> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Defendants do not contest the general assertion that they do not have jurisdiction to enforce the California Motor Vehicle Code in Indian country.

The issue then becomes whether Section 36 is Indian country, which is a question of law.

1. Section 1151(a): Exterior Boundaries of the Reservation

The Court incorporates its discussion of Section 1151(a) and checkerboard jurisdiction from its August 16, 2016 Order. *See* Aug. 16, 2016 Order at 12–13.

In that prior Order, the Court stated that "[a]s applied here, Section 36 is a landlocked parcel surrounded on all sides by Chemehuevi Reservation land, a near-perfect example of the type of checkerboard jurisdiction the Supreme Court counseled against." *Id.* at 13 (citing Stan Webb Declaration).

Despite extensive briefing regarding Plaintiffs' preliminary injunction motion, Defendants now for

the first time assert that because "Section 36 is bordered on its south side not by reservation property, but by Bureau of Reclamation land managed by the Bureau of Land Management," it is neither "landlocked" nor within the exterior boundaries of the Reservation. Def. Mot. at 11. Defendants fail, however, to cite evidence to support this proposition. Defendants do point to the Grazing Map previously submitted by Plaintiffs and upon which the Court relied in its August 16, 2016 Order. As it stands, this Grazing Map fails to identify who owns the property directly south of Section 36. The Court previously assumed that the outermost edges of the land mass depicted in the Grazing Map, with the exception of the Colorado River, comprised the "Chemehuevi Valley Indian Reservation," as the map is titled.[14] *See* 2016 Declaration of Stan Webb ¶ 9 ("The 'Grazing Map' and the 'Map' are both true and accurate depictions of the location of the boundaries of the Reservation as established by the Secretarial Order and the official surveys of the United States.") [Doc. # 45-2].[15]

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[14] At oral argument during the March 18, 2016 Hearing on Plaintiffs' preliminary injunction motion, the Court asked Defense counsel to assume that Section 36 is a "little circle" or oasis surrounded by Reservation land. Defense counsel did not object to that characterization and acknowledged the Court's visualization as "applying basic geography, geometry, . . . a circle within a square." Hearing Tr. dated Mar. 18, 2016.

[15] Defendants also submit a request for judicial notice of a map maintained by the BLM, which purportedly shows that "the land immediately south of Section 36 does not fall within the Reservation." Def. RJN at 2, Ex. G (the BLM map) [Doc. # 58]. Yet, the Court finds that the BLM map is unclear as to the location of Section 36 and what lies south of it. *See id.* at 55.

In order to obtain more precise visual clarification regarding the exterior boundaries of the Reservation and the lands surrounding Section 36, the Court ordered Plaintiffs to submit a black and white copy of another map of the Reservation on file in the records of the Western Regional Office of the Bureau of Indian Affairs in Phoenix, Arizona ("Realty Office Map"). The Court then requested that BIA Realty Officer Stan Webb make certain colored annotations to the map in order to identify the Reservation's exterior boundaries and the location of Section 36. *See* Doc. # 75 (request for supplemental information); 2016 Webb Decl. ¶¶ 1, 8. Plaintiffs complied.

Contrary to the Court's previous understanding, Webb's recent declaration establishes that the land South of Section 36 does not belong to the Reservation—that land lies outside the Reservation's exterior boundaries. 2017 Declaration of Stan Webb ¶¶ 6–7, Ex. C (annotated Realty Office Map).[16] Plaintiffs themselves do not dispute that the land directly south of

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The Court therefore **DENIES** Defendant's RJN as to the purported BLM map.

16 Defendants object that Webb lacks foundation and personal knowledge to authenticate the Reality Office Map or that he is qualified to highlight appropriate portions of the exhibit. Def. Obj. to Pl. Suppl. ¶¶ 33–35. The Court **OVERRULES** the objections. *See* Webb Decl. ¶ 6 ("In my capacity as the Realty Officer I supervised the collection of all title documents pertaining to the creation of the Reservation and the conveyance of any right, title or interest in any lands located within the boundaries of the Reservation for the purpose of assisting the BLM in issuing the Tribe a trust patent . . . for the lands owned by the United States of American [sic] in trust for the Tribe within the boundaries of the Reservation.") [Doc. # 45-2].

Section 36 is Bureau of Reclamation land managed by the BLM. Pl. SGDMF ¶ 12.

The newly annotated Reality Office Map thus reveals that Section 36 abuts some edges of the exterior boundaries of the Reservation as established by the 2010 Trust Patent. Webb's yellow highlight delineating the "Reservation Boundary at [sic] described in 2010 Trust Patent" appears to show that Section 36 is just within the southern edge of the Reservation's boundaries. But as discussed *supra*, Section 36 is not part of the Reservation. While Section 36's northern, western, and eastern sides directly border Reservation land, its southern side does not. The southern edge of Section 36, therefore, does not make up a boundary of the Reservation. Rather, the Reservation's boundaries abut Section 36's northern, western, and eastern borders, which Webb delineates in pink highlighter. *See* 2017 Webb Decl., Ex. C. Moreover, the non-Indian land that borders Section 36's southern end is, like Section 36 itself, completely outside of the Reservation. Ultimately, Section 36 consists of an indentation located at the southern end of the Reservation. *See* 2017 Webb Decl., Ex. C attached hereto (copy of annotated Realty Office Map).

Given the evidence cited above, the Court must correct its previous erroneous finding in its Aug. 16, 2016 Order that Section 36 is a landlocked parcel surrounded on all sides by Reservation land. There are no concerns with checkerboard jurisdiction in this case. In fact, there is literally no checkerboard pattern involving Section 36. Because Section 36 is not part of the Reservation, lies just outside of the Reservation and is not within its boundaries, the Court finds that

Section 36 is not Indian country as defined by Section 1151(a).

2. Section 1151(b): Dependent Indian Communities

In order to qualify as a "dependent Indian community" under Section 1151(b), the lands at issue must (1) have been set aside by the federal government for use of Indians as Indian land, and (2) they must be under federal superintendence. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). To establish the set-aside element, "some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Id.* at 531 n.6. This "requirement ensures that the land in question is occupied by an 'Indian community.'" *Id.* at 531. The federal-superintendence element requires that the community be "sufficiently 'dependent' on the Federal Government that the Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land." *Id.*

Here, there is no evidence that the federal government took action to create or recognize Section 36 as Indian country. Indeed, the 2010 Trust Patent excluded Section 36 from the patent issued to the Tribe. The Court also rejects Plaintiffs' argument that the Occupation Provision of the 1853 Act recognized or reserved Section 36 as Indian country. *See supra*, section IV.A; *cf. Blunk v. Ariz. DOT*, 177 F.3d 879, 883–84 (9th Cir. 1999) ("The Navajo Fee Land is not a dependent Indian community because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government.")

Moreover, there is no evidence in the record that members of the Tribe occupy any part of the one square mile area of land that makes up Section 36 or that "the land in question, and not merely the Indian tribe inhabiting it . . . [is] under the superintendence of the Federal Government." *See Venetie*, 522 U.S. at 954 n.5. The 2010 Trust Patent itself acknowledges that Section 36 was "granted to the State of California as school sections," and therefore could not be under federal superintendence.

Because Section 36 does not satisfy the two elements for a dependent Indian community as described in *Venetie*, the Court finds that Section 36 is not Indian country as defined by Section 1151(b).

3. Section 1151(c): Indian Allotments

Plaintiffs do not argue that Section 36 should be recognized as Indian country under Section 1151(c). The Court therefore need not analyze the issue of whether Section 36 is an Indian allotment, the title to which has not been extinguished.

In sum, for the reasons discussed above, the Court **GRANTS** Defendants' summary judgment motion and **DENIES** Plaintiffs' partial summary judgment motion because Section 36 is neither part of the reservation nor Indian country. Thus, Defendants have jurisdiction to engage in vehicle code enforcement within Section 36, and Plaintiffs' first three claims in the FAC fail as a matter of law.

C. Section 1983 Claim

According to Defendants, Plaintiffs have not presented admissible evidence to support their allegations

that the deputies' conduct of issuing citations to Tribal members was racially motivated. Plaintiffs point to two types of evidence in response: (1) evidence that Defendants knew they did not have jurisdiction to issue Vehicle Code citations to tribal members but did so anyway, and (2) the practice that deputies "positioned themselves for traffic stops in an area within Section 36 in which only members of the Tribe usually have occasion to drive." Pl. Opp. at 20 [Doc. # 64].

The Court finds that Plaintiffs have failed to raise a triable issue of material fact as to their section 1983 claim. On the issue of the deputies' knowledge, Plaintiffs direct the Court's attention to certain paragraphs within the declarations of Brian McDonald and Charles Wood. *Id.* According to McDonald, an enrolled member of the Tribe whose father was issued a traffic citation by the County San Bernardino Sheriff's Department, he expressed his view to the Sheriff's Department and to two Deputy Sheriffs at a Tribal Council meeting and through phone calls, that Public Law 280 limited the County's jurisdiction over the Tribe. Declaration of Brian McDonald ("McDonald Decl.") ¶¶ 1, 6, 13–19 [Doc. # 28-4]. The Deputy Sheriffs implied that they had a different understanding of the jurisdictional issues. *Id.* ¶ 16. McDonald also never received any responses to his phone calls. *Id.* ¶ 19. The Court fails to see how McDonald's communications with the Sheriff's Department and Defendants' subsequent actions raise the specter of racial animus sufficient to create a triable issue of fact that Defendants violated Plaintiffs' civil rights. Charles Wood's declaration on this issue does nothing more than establish that he was at the Tribal Council

meeting with McDonald and observed McDonald raise his concerns with the Deputies. *See* Declaration of Charles Wood ("Wood Decl.") ¶¶ 9–11 [Doc. # 28-1.

As to the issue raised by Plaintiffs that Defendants engaged in the practice of positioning themselves in areas where only Tribal Members drive in order to issue citations only to Tribal Members, the Court finds Plaintiffs' evidence inadmissible.

Plaintiffs cite to paragraph 15 of the Wood Declaration. Pl. Opp. at 20–21. Wood, who is Chairman of the Tribal Council of the Tribe, states that Defendants have targeted Tribal members for more aggressive enforcement of traffic laws and, as an example, cites to Defendants' "recent practice of pulling off to the side of Lake Havasu Road and concealing their patrol vehicles behind bushes ('stakeout') at a location on the Reservation within Section 30, north of Section 36." Wood Decl. ¶ 15. Defendants object to this sentence as lacking foundation and personal knowledge. The Court **SUSTAINS** the objection. Wood's conclusory statement that he is "well-informed about police practices" and is "familiar with overseeing and disciplining law enforcement officers who exceed the scope of their authority" is not enough to lay a foundation that he has personal knowledge of certain deputies engaging in a "stakeout" and concealing their vehicles for the purpose of then issuing tickets to only Tribal members. *See id.* ¶ 7.

Defendants also object to Wood's statement that he "received at least two different verbal reports that the Deputies are pulling into the private residences of Tribal members living on the Reservation, north of Section 36, and inspecting parked motor vehicles" as

hearsay. The Court **SUSTAINS** Defendants' hearsay objection.

Plaintiffs point to no other evidence in their opposition that "could tend to show a pattern of racial discrimination on the part of the Deputies." *See* Pl. Opp. at 20.

Notably, the Court stated in its August 16, 2016 Order:

> To the extent Plaintiffs base their civil rights claim on Defendants' alleged racial profiling of tribal members, the Court finds that Plaintiffs have failed to raise serious questions or show a likelihood of success on the merits. Their written submissions are entirely devoid of any evidence that Defendants' actions were racially motivated.

Aug. 16, 2016 Order at 13 n.15. Since then, Plaintiffs have not submitted any new evidence related to their section 1983 claim that the Court has not already reviewed, and the time to do so has now passed. The parties' discovery cut-off expired on May 23, 2017. [Doc. # 54-1.]

Because Plaintiffs have not presented any admissible evidence that could raise a triable issue of material fact on their claims of racial discrimination, the Court **GRANTS** Defendants' summary judgment motion as to the section 1983 claim.

V. CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiffs' motion for partial summary judgment on the issue of whether Section 36 is within the boun-

daries of the Reservation or Indian country.[17] The Court **GRANTS** Defendants' summary judgment motion in its entirety. The Court will enter judgment forthwith in favor of Defendants.

IT IS SO ORDERED.

/s/ Dolly M. Gee
United States District Judge

Dated: September 5, 2017

[17] The Court recognizes that Plaintiffs' arguments in this case were heartfelt. It is for this reason that the Court expended much time and effort reviewing the facts in the record to ensure that it understood and took the full measure of Plaintiffs' assertions. Ultimately, as it must in all of its decisions, this Court based its ruling on a dispassionate assessment of the evidentiary record.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 27, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEMEHUEVI INDIAN TRIBE, on its Own Behalf and on Behalf of its Members Parens Patrie [sic]; et al.,

Plaintiffs-Appellants,

v.

JOHN MCMAHON, in His Official Capacity as Sheriff of San Bernardino County;
RONALD SINDELAR, in His Official Capacity as Deputy Sheriff for San Bernardino County,

Defendants-Appellees.

No. 17-56791

D.C. No. 5:15-cv-01538-DMG-FFM
Central District of California, Riverside

Before: WARDLAW and HURWITZ, Circuit Judges, and KORMAN,* District Judge.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

The panel has voted to deny the petition for panel rehearing. Judge Wardlaw and Judge Hurwitz vote to deny the petition for rehearing en banc, and Judge Korman has so recommended.

The full court has been 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 rehearing en banc, Dkt. 47, is DENIED.