No. 19-820

In The
Supreme Court of the United States

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

Petitioners,

v.

CHEMEHUEVI INDIAN TRIBE, on Its Own Behalf and on Behalf of Its Members *Parens Patriae*, and CHELSEA LYNN BUNIM, TOMMIE ROBERT OCHOA, JASMINE SANSOUCIE, and NAOMI LOPEZ, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In its Petition for Writ of Certiorari ("Petition"), petitioner ("Sheriff") misstates and fails to acknowledge a number of the essential facts of this case. In order to correct these misstatements and omissions, the Chemehuevi Indian Tribe ("Tribe") and the individual Indian respondents ("Respondents") will set forth the facts that are relevant and necessary for the resolution of the issues before the Court.

1. The Tribe's Aboriginal Territory. Since time immemorial, the Tribe has occupied the lands that presently comprise the Chemehuevi Indian Reservation in the Chemehuevi Valley, California, including Township 5 North, Range 24 East, Section 36, within the San Bernardino Meridian ("Section 36"). *See Chemehuevi Indian Tribe v. United States of America*, 14 Ind. Cl. Com. 651 (1965); ER 241-62; Ind. Cl. Comm. Map; ER 118-20. *See also* Report of Special Agent Kelsey, Letter Dated July 10, 1907 ("this valley is a deep low valley by the Colorado River and has been occupied from time immemorial by the Chemehuevi Indians."). ER 263-66.

2. Non-Intercourse Act Protection. On June 30, 1834, Congress expressly protected all lands under the use and occupation of any Indian tribe from being sold, leased or alienated in any way.

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the

> same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 ("Non-Intercourse Act").

3. 1851 Act, 9 Stat. 631 (March 3, 1851) ("1851 Act"). In order to fulfill its obligations to Mexico under the Treaty of Guadalupe Hidalgo, Congress enacted the 1851 Act. The 1851 Act required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the 1851 Act.

4. Treaties with California Tribes. The United States never entered into any treaty with the Tribe approving any grant or conveyance of Chemehuevi lands to the United States or to California. *See* W.W. Robinson, *Land in California: The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads, University of Calif. Press* (1948), paperback ed. 1979, pp. 15-16.

5. Act of March 3, 1853, 10 Stat. 244 ("1853 Act"). In 1853, Congress passed "An Act to Provide for the Survey of the Public Lands in California, the Granting of Preemption Rights Therein, and for Other Purposes." *Id.* at 246. Under the 1853 Act, the right of preemption (preferential right of purchase) was extended to California and other western states. However, Sections 16 and 36 in California were reserved from preemption. Under Section 6 of the 1853 Act, those sections were:

> . . . granted to the State for the purposes of public schools in each township, **and with the exception of lands appropriated under the authority of this act**, or reserved by competent authority . . . shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, **except as is herein otherwise provided**; . . . **And provided further, that 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**.
>
> * * *

10 Stat. 244, 246-47 (1853) ("Section 6") (emphasis added). ER 269-70.

In Section 6 of the 1853 Act, Congress recognized that the aboriginal occupancy rights of California tribes survived California's admission into the union and protected those occupancy rights from further unauthorized encroachments by white settlers. This intent was expressed by Senator Fletcher, who offered Section 6 as an amendment to the 1853 Act. In July 1852, on the floor of the Senate, he stated:

> **My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians. The way to get rid**

> **of the Indians is not by sending white men to claim rights among them. It is to form treaties with them as the government is heretofore done, according to the provisions of the constitution . . .** I do not apprehend that this provision will embarrass anybody, but, on the other hand, it seems to me to be quite proper that we should give the Indian that security which I desire to give him by this provision.

Congressional Globe, Vol. 24, Part 3, July 1852, p. 1773 (emphasis added). ER 272.

6. California's Survey of Section 36 and Approval by the Surveyor General's Office. Pursuant to the 1853 Act, California caused to be surveyed Section 36 and submitted the survey to the Surveyor General's Office for approval. The Surveyor General's Office approved the survey on July 10, 1895. ER 545-46.

7. Mission Indian Relief Act, 26 Stat. 712 (1891). On January 12, 1891, Congress again sought to protect the lands under the occupation and possession of Indian tribes in Southern California by passing the "Act for the Relief of the Mission Indians in the State of California" ("MIRA"). Under the MIRA, the President was authorized "to select reservations for each band or village of the Mission Indians residing within" the State. *Id.* at 713. The President did not select any lands under the MIRA for the Tribe and eleven other Indian tribes in Southern California. ER 886-90.

8. Kelsey Reports. On or about March 3, 1905, C.E. Kelsey, a San Jose attorney and officer of the Northern California Indian Association, was appointed by Congress to act as a special agent to the Commissioner of Indian Affairs for the purpose of reporting to the Commissioner on the condition of Indians within California. *See* Act of March 3, 1905, 33 Stat. 1048, 1058.

On December 27, 1906, and January 31, 1907, Special Agent Kelsey issued his reports on the condition of the Tribe, which resided in the Chemehuevi Valley along the Colorado River. In these reports, Kelsey recommended that the lands occupied by the Tribe be added to the Colorado River Indian Reservation or, in the alternative, be set aside and proclaimed as a separate reservation for the Chemehuevi. In his report, Kelsey 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 Chemehuevi and that "there is no question that they have occupied this land since primeval times." ER 547-50; ER 551-67. *See also* Burlew, E.K., Decisions of the Department of the Interior, 57 I.D. 87 at 89 (1939).

9. Commissioner of Indian Affairs Recommendation. On January 31, 1907, pursuant to Kelsey's reports, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior requesting that he withdraw certain lands from settlement and entry for the use and occupancy of twelve bands of

Indians, including the Tribe, for whom no lands were set apart for under the MIRA. In his letter, the Commissioner wrote:

> Referring to office letter of January 28, transmitting reports of Special Agent C.E. Kelsey on the condition of the Mission Indian Reservations in California, and the draft of a proposed bill for the betterment of their condition [i.e. Act of March 1, 1907 "An Act Amending Section 3 of the Act of January 12, 1891, An Act for the Relief of the Mission Indians in the State of California"], I have the honor to transmit herewith certain descriptions of lands which he recommends be withdrawn from all forms of settlement and entry pending action by Congress whereby they may be added to several reservations. The proposed additions are as follows:
>
> * * *
>
> Chemehuevi Valley. Fractional townships 4 N., R. 25 E., T. 4 N., R. 26 E., T. 5 N., 25 E., 6 N., 25 E.; **the E/2 of 5 N., R. 24 E.**, and Secs. 25, 26, 35 and 36, T. 6 N., R. 24 E., S.B.M.

ER 886-90 (emphasis added).

10. 1907 Secretarial Order Establishing the Boundaries of the Chemehuevi Indian Reservation. On February 2, 1907, the Secretary of the Interior, exercising the inherent authority of the President, pursuant to the Commissioner's recommendation, issued an order to the General Land Office directing that the lands be withdrawn from settlement and entry for

the Chemehuevi ("1907 Order). In his order, the Secretary stated:

> In view of the recommendation of the Indian office, I have to direct that the lands referred to be withdrawn from all form of settlement or entry until further notice, also that the local land officers of the District in which the said lands are located, be advised of such withdrawal. In this connection you are advised that the Department on the 31st ultimo forwarded to Congress, with favorable recommendation, the draft of a bill to authorize the addition of certain lands to the Mission Indian Reservation.

Secretarial Order of February 2, 1907.[1]

The 1907 Order established the exterior boundaries of the Chemehuevi Indian Reservation ("Reservation"), which consists of: Fractional townships 4 N., R. 25 E., T. 4 N., R. 26 E., T. 5 N., 25 E., 6 N., 25 E., the E/2 of T. 5 N., R. 24 E., and Secs. 25, 26, 35, and 36, T. 6 N., R. 24 E. The withdrawal of the Eastern one-half ("E/2") of Township 5 North, Range 24 East of the

[1] "The Chemehuevi Reservation was established by the Secretary of the Interior on February 2, 1907, pending congressional approval." *Arizona v. California*, 373 U.S. 546, at 596 fn. 100 (1963). The Congressional approval came less than a month later when on March 1, 1907, Congress passed the amendments to the Mission Indian Relief Act, *see* Statement of the Case ("SOC"), ¶ 8 above, which expressly authorized the Secretary to "select" and "set apart" the public lands of the United States that had been in the "occupation and possession of the several bands" of Mission Indians. SOC, ¶ 11. The Chemehuevi were determined by the Department of the Interior to be "Mission Indians." SOC, ¶ 16.

San Bernardino Meridian includes the withdrawal of Section 36. ER 875-76. The Reservation consists of approximately 32,487 acres of trust and fee land, including Section 36, adjacent to the Colorado River and Lake Havasu in San Bernardino County, California. ER 578; ER 875-76. Section 36 was included within the boundaries of the Reservation as set forth in the 1907 Order.

11. Amendments to the Mission Indian Relief Act. On March 1, 1907, Congress enacted "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. The amendments confirmed the Secretary of the Interior's authority to reserve and set aside lands that the Secretary had found "upon investigation to have been in the occupation and possession of the several bands or villages of Mission Indians. . . ." *Id*. at 1022-23. By amending the MIRA, Congress ratified the 1907 Order. ER 337 (referencing ER 333).

12. Title 25 of the United States Code, Section 398(d). On March 3, 1927, Congress enacted Title 25 of the United States Code Section 398(d). That section provides:

> Changes in the boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

13. The Parker Dam Act. On July 8, 1940, Congress passed an "Act for the Acquisition of Indian Lands for the Parker Dam and Reservoir Project, and for Other Purposes", 54 Stat. 744 ("Parker Dam Act"). By enacting the Parker Dam Act, Congress acknowledged and recognized the lawful creation of the Reservation:

> " . . . all the right, title, and interest of the Indians in and to the tribal and allotted lands of the . . . **Chemehuevi Reservation in California** as may be designated by the Secretary of the Interior."

Parker Dam Act, 54 Stat. 744 (emphasis added).[2]

14. Organization of the Chemehuevi Indian Tribe's Tribal Government. In 1976, the Tribe organized a tribal government, under a written constitution, which, as subsequently amended, was approved by the Secretary of the Interior under the provisions of the Indian Reorganization Act, 25 U.S.C. § 5108 *et seq*. ("IRA"). The Chemehuevi Indian Tribe is federally recognized. ER 12.

15. *Arizona v. California*, 373 U.S. 546 (1963). In *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona v. California*"), the State of California challenged the authority of the Secretary of the Interior to issue the

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[2] At the direction of the Department of the Interior, the Metropolitan Water District prepared a map depicting those portions of the Reservation that were designated by the Secretary for taking, pursuant to the Act of July 8, 1940. The map showed Section 36 to be within the boundaries of the Reservation. ER 386-87.

1907 Order creating the Reservation. This Court rejected the State's challenge: "The Chemehuevi Reservation was established by the Secretary of the Interior on February 2, 1907, pending congressional approval." *Id.* at 596 fn. 100. In ruling that the Reservation was created by the 1907 Order, this Court confirmed that the Secretary had the authority to create the boundaries of the Reservation and include all of the lands withdrawn within those boundaries, including Section 36. *Id.*

16. Trust Patent. On June 28, 2010, the Bureau of Land Management issued the Trust Patent for the Reservation requested by the Tribe. ER 480-86. The patent confirmed the boundaries of the Reservation, as established by the 1907 Order.

> "**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 the following land: San Bernardino, 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, and 36 of T. 6 N., R. 24 E. . . ."

ER 480.

17. Recognition of the Chemehuevi Indian Reservation. The creation of the Reservation from the Tribe's aboriginal territory and the establishment of the boundaries of the Reservation has been recognized by this Court, *Arizona v. California*, 373 U.S. 546,

596 fn. 100, 598 (1963); by the Indian Claims Commission, *Chemehuevi Indian Tribe v. United States of America*, 14 Ind. Cl. Com. 651 (1965); and by the United States District Court for the Central District of California, October 10, 1995, Statement of Uncontroverted Facts and Conclusion of Law, *United States v. Ron Jorgenson, et al.*, United States District Court Central District of California, Case No. CV-92-3809-TJH ("*Jorgenson*"). ER 523-33. The establishment of the boundaries of the Reservation was recognized by the Secretary and by a decision of the Department of the Interior (*see* 57 I.D. 87, 89 (1939)[3] and the 1974 Secretarial Restoration Order cited therein); by Secretarial approval of the Tribe's Constitution; Secretarial approvals of leases, loans, and rights of way; and in numerous other ways throughout the years, including requests for congressional appropriations and in maps produced by the Bureau of Indian Affairs.[4]

REASONS FOR DENYING THE PETITION

In vacating the district court's judgment dismissing the complaint as to the individual plaintiffs/

[3] In 1992, the Solicitor's Office in Washington, D.C., also issued a legal opinion concluding that the Secretary had the authority to issue the 1907 order establishing the boundaries of the Reservation. ER 400-02.

[4] In 1931, the BIA produced two maps: (1) a grazing map of the Reservation, ER 137; and (2) a map entitled "Chemehuevi Valley Indian Reservation," which both showed Section 36 within the boundaries of the Reservation as established by the 1907 Order. ER 138.

respondents, the Ninth Circuit ruled that: "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." Pet. App. 11a. At the beginning of its analysis, the panel stated, "[I]t 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**." Pet. App. 5a (emphasis added).

The Ninth Circuit's decision was based on its conclusions that the Reservation was validly established by the Secretary's 1907 Order, that the 1907 Order included Section 36 within the boundaries of the Reservation, that the establishment of the Reservation and its boundaries have been recognized by Congress and this Court, that the boundaries of the Reservation cannot be changed or the Reservation diminished except by act of Congress, and that Congress has not enacted any such act. The Sheriff's Petition does not challenge any of those conclusions.

The Sheriff's Petition is based exclusively on arguments asserting that the Tribe was not granted title to Section 36, an issue never addressed by the Ninth Circuit because title is irrelevant to the issue of whether Section 36 is Indian country, 18 U.S.C. § 1151; *Solem v. Bartlett*, 465 U.S. 463, 466-68 (1984) ("*Solem*"); *Seymour v. Superintendent*, 368 U.S. 351, 357-58 (1962).

Moreover, the Sheriff's Petition addresses only one of the criteria for granting a petition for a writ of certiorari identified in the Rules of the Supreme Court of the United States, Rule 10: "The Ninth Circuit's decision flatly departs from the decisions of this Court. . . ." Pet. 12. In this opposition, the Tribe and the Respondents will demonstrate that the Ninth Circuit's decision is consistent with this Court's decisions, does not raise an issue of national significance, and is not in conflict with the decisions of other federal circuits.

For these reasons, the Tribe and Respondents respectfully request that the Court deny the County's Petition for Writ of Certiorari.

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS AND DOES NOT RAISE AN ISSUE OF NATIONAL SIGNIFICANCE.

A. The Ninth Circuit's Decision Is Consistent with this Court's Decisions Relating to the 1851 Act.

The Sheriff fails to recognize that "adjudicating reservation boundaries is conceptually and quite distinct from adjudicating title to the same lands." *See* Pet. App. 5a (internal citations omitted). Despite the Ninth Circuit holding limiting its decision to a determination of jurisdiction, the Sheriff wrongfully asserts that the Ninth Circuit's inquiry should have begun with the 1851 Act, which addressed the determination of title.

In order to fulfill its obligations to Mexico under the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (February 2, 1848), Congress enacted the 1851 Act, 9 Stat. 631 (1851) ("Act"), which required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the Act.

> [E]ach and every person **claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government**, shall present the same to [the land claims commission] . . . .

Section 8 of the Act, at 632 (emphasis added).

The cases cited by the Sheriff, *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924); and *Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986), have no application to the issues before the Ninth Circuit because they dealt with claims of title to land based on a patent issued in confirmation of grants made by the Mexican government. Unlike the cases cited by the Sheriff, this case does not involve *any* claim asserted by the Tribe or anyone else to Section 36 derived from the Spanish or Mexican governments. The Sheriff has not identified any evidence in the record that the Tribe or anyone else was required to file a claim to Section 36 under the 1851 Act.

In *Cramer v. United States*, 261 U.S. 219 (1923), this Court found that the 1851 Act "plainly ha[d] no application" because the Indians' "claims were in no

way derived from the Spanish or Mexican governments." 261 U.S. at 231. It is the same here. The Tribe was not required to file a claim under the 1851 Act because its claims were not derived from the Spanish or Mexican governments.

The Ninth Circuit's decision does not create any controversy regarding the 1851 Act.

B. The Ninth Circuit's Decision is Consistent with this Court's Decisions Relating to Enabling Acts and Tribal Land Rights.

The Sheriff argues that the Ninth Circuit's decision must be reviewed by this Court because it is inconsistent with decisions of this Court relating to Enabling Acts and tribal land rights. The Ninth Circuit, the Sheriff argues, "inexplicably fails to address its prior decision in *Lyon* [*v. Gila River Indian Cmty.*, 626 F.3d 1059 (9th Cir. 2010)], or any of the decisions of this Court on which *Lyon* relies," *United States v. Thomas*, 151 U.S. 577 (1894), *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906), and *Beecher v. Wetherby*, 95 U.S. 517 (1877). There is, in fact, nothing inexplicable about the Ninth Circuit's decision not to address *Lyon* and the related cases of this Court cited by the Sheriff.

Lyon arose from a claim by the Gila River Indian Community ("Gila River") that it retained aboriginal title to a Section 16 after the enactment of the Arizona Enabling Act. The central issue in *Lyon* was whether Gila River's aboriginal title to Section 16 was

extinguished when it was conveyed to Arizona through the Arizona Enabling Act. When title to the Section 16 was granted to Arizona, the section was not located within the boundaries of the Gila River Reservation and did not abut the reservation. After the section was granted to Arizona, it was sold to private parties. As a result of executive orders issued subsequent to the enactment of the Enabling Act that took land into trust for Gila River, the Section 16 eventually came to be surrounded by Gila River's reservation lands. The section was never made part of Gila River's reservation. Because no treaty right or other form of recognized title predated the Arizona Enabling Act, the court concluded that "the conveyance extinguished the [Gila River] Community's aboriginal title to Section 16." *Lyon*, 626 F.3d at 1079.

The issues before the Ninth Circuit did not relate to title to Section 36. "[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*, 465 U.S. at 466-68. The issues before the Ninth Circuit were whether Section 36, regardless of the ownership and fee status of the land, constitutes Indian Country pursuant to 18 U.S.C. § 1151 and, therefore, whether the Sheriff is prohibited from exercising civil regulatory jurisdiction over Chemehuevi tribal members

within Section 36. The question of whether a state can exercise jurisdiction over fee land located within the boundaries of a reservation was "squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . .'" *Seymour v. Superintendent*, 368 U.S. 351, 357-58 (1962). The Ninth Circuit concluded that Section 36 is within the boundaries of the Reservation, based on the 1907 Executive Order, which established the Reservation and defined its boundaries, and Congress's and this Court's recognition of the establishment of the Reservation and its boundaries.[5] On that basis, the Ninth Circuit concluded that Section 36 constitutes Indian Country, 18 U.S.C. § 1151.

Whether the Section 16 constituted "Indian country," pursuant to Section 1151, was not at issue in *Lyon*. Whether the State of Arizona could exercise civil regulatory jurisdiction over tribal members within the Section 16 in question was not at issue in *Lyon*. Whether the Executive Branch had the authority to issue the executive order establishing the Gila River Reservation was not at issue in *Lyon*. The Ninth Circuit's decision not to address *Lyon* was entirely justified.

The Sheriff's assertion that the Ninth Circuit erred in not addressing *Thomas*, *Hitchcock*, and

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[5] *See* Parker Dam Act, 54 Stat. at 744; *Arizona v. California*, 373 U.S. at 596 fn. 100, 598.

Beecher is also groundless. Like *Lyon*, those cases focused on the issue of title to land based on a claim of aboriginal title. Unlike *Lyon*, this Court in those cases concluded that the tribes in question retained aboriginal title because their aboriginal title was recognized in treaties with each of the tribes. The Tribe does not claim aboriginal title to Section 36, nor does it claim that it has entered into a treaty with the United States. *Thomas*, *Hitchcock*, and *Beecher* are irrelevant to the issues before the Ninth Circuit.

Moreover, the Sheriff's characterization of the law relating to Enabling Acts and aboriginal title is demonstrably incorrect. "The Ninth Circuit decision departs from the decisions of this Court holding that states take title to property under the Enabling Acts subject to aboriginal title *only where* a preexisting treaty has preserved the aboriginal title." Pet. 12 (emphasis added). On the contrary, federal courts have consistently concluded that tribal occupancy rights and aboriginal title can be reserved by statute as well as treaty: "Congress can create a reservation, reserve rights to the Indians, and dispose of lands of the United States by statute as well as by treaty." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). None of the decisions cited by the Sheriff, furthermore, stand for the proposition that aboriginal title can *only* be preserved by a treaty. *Thomas*, *Hitchcock*, and *Beecher* did not address whether aboriginal title could be preserved by a mechanism other than a treaty.

Thus, to the degree that the Court might consider addressing the question of whether title granted under

the California Enabling Act is relevant to the issues in this case, the California Enabling Act itself rebuts the Sheriff's position. "The 1853 Act excluded any land 'in the occupation or possession of any Indian tribe,' 10 Stat. at 246-47,[6] and the Kelsey survey of the Chemehuevis' land, adopted by the Secretary, documents that Section 36 falls in that exception." Pet. App. 8A.

To the degree that the Court would consider *Thomas*, *Hitchcock*, and *Beecher* to be relevant to the issues in this case, they support the Ninth Circuit's conclusion that Section 36 is within the boundaries of the Reservation. *Thomas*, *Hitchcock*, and *Beecher* concluded that each tribe's aboriginal title was not extinguished by the Enabling Act, because treaties recognized the tribes' aboriginal title. *See*, *e.g.*, *Thomas*, 151 U.S. at 584 ("[B]y virtue of the treaty . . . the title and right which the state may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians."). The 1853 Act, like the treaties in *Thomas*, *Hitchcock*, and *Beecher*, recognized the Indian's right of occupancy.[7]

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[6] "[T]his 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." 10 Stat. at 246-47. The Sheriff does not, at any point in his Petition, acknowledge the existence or address the effect of this provision of the Enabling Act.

[7] The *Lyon* court acknowledged that, where a tribal right of occupancy is recognized, a claim of title under an Enabling Act did not defeat that right of occupancy. "In this case, at the time that Section 16 was conveyed to Arizona, the Community had no

Finally, it is important to recognize that the Ninth Circuit's decision is also consistent with other decisions of this Court. In *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) ("*Hitchcock*"), Congress enacted a statute in 1849 reserving title to Sections 16 and 36 to the State of Minnesota for school purposes. At the time, those sections were under the use and occupancy of the Red Lake and Pembina Bands of Chippewa Indians. After the United States reserved the sections for the State, the United States entered into a treaty with the Red Lake Tribe and included the sections within the boundaries of the Red Lake Reservation. The State later asserted that the tribe did not receive title to the sections under the treaty because the sections had been previously reserved to the State for school purposes. This Court found that the treaty recognized the tribe's occupancy rights, that the State's title to the land was subject to the tribe's continued use and occupancy, and that the tribe's right to use and occupancy could only be extinguished by the United States.

Here, as in *Hitchcock*, the Chemehuevi used and occupied Section 36 prior to the issuance of the patent to Section 36 to the State of California. Like the Red Lake Tribe in *Hitchcock*, the Chemehuevis' right of use and occupancy was expressly recognized—by Congress in Section 6 of the 1853 Act. Whatever title California received as a result of the issuance of the patent by the United States to the State for Section 36, that title was

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such *recognized* right of possession." *Lyon*, 626 F.3d at 1078-79 (distinguishing *Thomas*, *Hitchcock*, and *Beecher* (emphasis original)).

subject to the Chemehuevis' right of use and occupancy.

The Ninth Circuit's decision does not depart from the decisions of this Court addressing the interplay between Enabling Acts and Indian land rights. Its decision not to address *Lyon*, *Thomas*, *Hitchcock*, and *Beecher* is not "extraordinary and unsupported" and it does not require "the Court to intervene and provide guidance in this critical area of the law." Pet. 18. The issues raised in this case have nothing to do with title to Section 36 and, therefore, do not require this Court to set down "clear guidelines concerning the grant of land for schools under the Enabling Acts, and the interplay with tribal land rights." *Id.*

C. The Ninth Circuit's Decision is Consistent with this Court's Decision in *Arizona v. California*.

This Court's decision in *Arizona v. California*, 373 U.S. 546 (1963) is directly relevant to the issues raised in this case. The decision of the Court of Appeals is not in conflict with, but in fact, is consistent with this decision.

In *Arizona v. California*, California asserted that the Secretary did not have the authority to issue the 1907 Order creating the Reservation, establishing its boundaries and thereby reserving enough water from the Colorado River as was necessary to fulfill the purposes for which the Reservation was created. In rejecting California's argument, this Court stated:

> Congress and the Executive have ever since [the establishment of the reservation at issue by Executive Order] recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. 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 either of land or water are invalid because they were originally set apart by the Executive**.

Id. at 596, citing *United States v. Midwest Oil Co.*, 236 U.S. 459-75 (1915) (emphasis added).

These decisions by this Court leave no doubt that the Chemehuevi Reservation was lawfully created by the Secretary's 1907 Order and that the recognition of the Chemehuevi's occupancy of Section 36 in the 1853 Act and the inclusion of Section 36 within the boundaries of the Reservation did not affect whatever title California received to Section 36 under the 1853 Act.[8]

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[8] The Sheriff, as an official of the County of San Bernardino, is in privity with the State of California and therefore, this Court's holding in *Arizona v. California*, pertaining to the authority of the Secretary to issue the 1907 Order establishing the boundaries of the Reservation, is *res judicata* and binding on the Sheriff. *Ute*, 790 F.3d at 1007 ("It's not just parties who are bound by prior decisions: those in privity with them often are too, and counties are usually thought to be in privity with their states for preclusion purposes when the state has lost an earlier suit.").

The Court of Appeals decision holding that it was not deciding "who holds title to Section 36" and limiting its holding to whether Section 36 was "Indian country," as defined by 18 U.S.C. § 1151, is, therefore, not in conflict with the prior decision of this Court in *Arizona v. California*, but is in fact consistent with that decision.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS RELATING TO THE APPROPRIATION DOCTRINE.

The Sheriff argues that the Appropriation Doctrine barred the Secretary from withdrawing Section 36 and including it within the boundaries of the Reservation because the 1853 Act had previously conveyed that section to California for school purposes. Pet. p. 19. In support of his argument, the Sheriff cites *Beecher v. Wetherby*, 95 U.S. 517 (1877) and *Hastings & Dakota Railroad Co. v. Whitney*, 132 U.S. 357, 360-61 (1889) (" . . . that a tract of land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it . . . "). In fact, the Appropriation Doctrine supports the Ninth Circuit's conclusion that Section 36 was properly included within the boundaries of the Reservation.

Section 6 of the 1853 Act appropriated Section 36 for the use and occupation of the Indian tribes then occupying that section, " . . . this act shall not be

constructed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe. . . ." 10 Stat. at 246-47. Because of this prior appropriation, the 1853 Act required California to select in lieu lands[9] in place of the Indian occupied Section 36. The Appropriation Doctrine, thus, would not permit Section 36 to be reappropriated for use by the State of California. As a result, the 1853 Act did not prohibit the Secretary from withdrawing and including Section 36 within the boundaries of the Reservation. Section 36 is "Indian country."[10]

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH CONGRESS'S INTENT TO PREVENT CHANGES IN THE BOUNDARIES OF INDIAN RESERVATIONS CREATED BY A SECRETARIAL ORDER.

In challenging the inclusion of Section 36 within the boundaries of the Reservation the Sheriff argues, in effect, that the boundaries as established by the 1907 Order have been diminished. The Ninth Circuit

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[9] Section 7 of the 1853 Act provides: "where any settlement . . . shall be made upon the . . . thirty-sixth sections . . . or where such sections may be reserved for public purposes . . . other land shall be selected by the . . . State in lieu thereof. . . ."

[10] Even if the 1853 Act conveyed title to Section 36 to California, moreover, the underlying title California received, as set forth above, was subject to the Tribe's right of use and occupancy, which could only be extinguished by the United States. 25 U.S.C. § 177, *see Cramer v. United States*, 261 U.S. at 228-29; *Minnesota v. Hitchcock*, 185 U.S. at 389-90; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

rejected that assertion, ruling that it could not 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.

Pet. App. 9a.

Title 25 of the United States Code § 389d provides:

> Changes in the boundaries of a reservation created by Executive Order, proclamation, or otherwise for the use and occupation of Indians **shall not be made except by Act of Congress**.

25 U.S.C. § 398d (emphasis added). *See also* ER 850-56.

Section 398d is unambiguous. It evidences a clear congressional intent to prevent the alteration or changes in the boundaries of Indian reservations created by Executive Order, such as the 1907 Order, except by a later Act of Congress. This is true, even if a parcel of land within those boundaries are or once were in non-Indian ownership.

> [O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation **and no matter what happens to the title of individual plots within the area**, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem, at 470 (emphasis added); *see* Opinion of the Solicitor, Authority of Secretary to Determine Equitable Title to Indian Lands, 1974 DOINA LEXIS 47. ER 394-99.

Congress has not diminished the boundaries of the Reservation. Pursuant to 25 U.S.C. § 398d, and *Solem*, Section 36 is Indian country.

IV. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS.[11]

The Ninth Circuit's decision is a narrow decision based on the specific history of the Tribe's occupation of lands, the lack of any treaty regarding the cession of the Tribe's lands, and the interplay of laws protecting the Tribe's occupation and those establishing the official boundaries of the Reservation. Additionally, the Ninth Circuit's decision does not address title to Section 36. Yet, pursuant to well settled principles of Indian law, the Ninth Circuit's decision is consistent with

[11] The Sheriff cites to no split in the circuit courts or includes in his Petition a discussion of the other Circuit Court of Appeals decisions that are relevant to the issues on this case.

both the Sixth Circuit and Tenth Circuit Court of Appeals decisions that are relevant to the issues raised in this case.

A. The Ninth Circuit's Decision Is Not in Conflict with this Court's or the Sixth Circuit's Analysis of 18 U.S.C. § 1151.

The Ninth Circuit addressed the issue of whether Section 36 is Indian country without addressing the issue of title: "We therefore conclude that Section 36 is within the Chemehuevi Reservation and hence 'Indian country' under 18 U.S.C. § 1151(a)." Pet. App. 9a. The Sheriff challenges the decision by alleging that Section 36 had been patented to the State prior to the creation of the Reservation. Even *if* that allegation was true, the Ninth Circuit's decision about jurisdiction would still be consistent with this Court's decisions and the Sixth Circuit's analysis regarding the construction of 18 U.S.C. § 1151.

Land within the limits of any Indian reservation, " . . . notwithstanding the issuance of any patent . . . " is Indian country for purposes of determining federal, state and tribal jurisdiction. 18 U.S.C. § 1151(a). In fact, Indian country frequently includes non-Indian land within the exterior boundaries of an Indian reservation. *See Hagen v. Utah*, 510 U.S. 399, 425-26 (1994) ["Reservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction"]; *United States v. Crowe*, 563 F.3d 969, 971 fn. 1 (9th Cir. 2009) [Montana town is "located within the exterior

boundaries of the Fort Peck Indian Reservation and thus is 'Indian country' within the meaning of 18 U.S.C. § 1151(a)"]; *Alexander Bird in the Ground v. District Court of Thirteenth Judicial Dist.*, 239 F. Supp. 981, 983-84 (D.C. Mont. 1965), citing *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962) [" 'Indian country' includes private lands located within the exterior boundaries of an Indian reservation"].

The Sheriff's position is contrary to this Court's decision in *Seymour*. In *Seymour*, this Court rejected the construction of § 1151 based " . . . upon the ownership of particular parcels of land. . . ." 368 U.S. at 358. The rationale of *Seymour* applies equally as well here to reject the Sheriff's argument:

> Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

Id. at 358.

There is no basis for limiting the application of § 1151 and *Seymour* to situations in which disputed land was patented after an Indian reservation had been created. Finding otherwise would constitute an unwarranted construction of § 1151. The result would be to recreate the confusion (i.e., checkerboard

jurisdiction) that Congress and this Court specifically sought to avoid.

The Sixth Circuit has also recognized that adopting the Sheriff's position would require narrowly construing this Court's holding regarding checkerboard jurisdiction. In *Cardinal v. United States*, 954 F.2d 359 (6th Cir. 1992) ("*Cardinal*"), the Sixth Circuit also considered an assertion that certain property was not within "Indian country" as defined by § 1151 because it was granted to a state prior to the creation of an Indian reservation. Noting that "the district court [] concluded that, to the extent that the [] lands were sold before the [] treaty became effective, that fact did not impact upon whether the lands were 'Indian country' for the purposes of federal subject matter jurisdiction." The Sixth Circuit went on to acknowledge that reading "the *Seymour* decision as extending federal jurisdiction over land patented to non-Indians only when that land is patented *subsequent* to the establishment of the Indian reservation . . . " would mean that this Court's "concerns with checkerboard jurisdiction are to be construed narrowly. . . ." *Id.* at 363 (emphasis in original).[12]

The Sheriff argues that this Court's holding with respect to checkerboard jurisdiction should be narrowly construed but fails to point to any language in

[12] The *Cardinal* court did not resolve whether such a narrow construction was proper, as it would not have altered the court's finding of jurisdiction based on determining that the attempts to transfer the disputed property "did not operate to exclude it from the land set apart for Indian use under the treaty." *Id.*

§ 1151's definition to support its position. This Court should not abandon its own precedent by adopting such an unwarranted construction. Such an interpretation would recreate the confusion that Congress specifically sought to avoid. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976) ["Congress by its more modern legislation has evinced a clear intent to eschew any checkerboard approach within an existing Indian reservation."]; *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 466 (1975) ["[C]razy quilt pattern" or "'checkerboard' jurisdiction defeats the right of tribal self-government" (Douglas, J., dissenting).]

The Ninth Circuit's decision is consistent with the Sixth Circuit's decision in *Cardinal* and this Court's decisions pertaining to checkerboard jurisdiction.

B. The Ninth Circuit's Decision Is Not in Conflict with the Tenth Circuit's Decision Regarding the Enforcement of State Traffic Laws Against Indians in Indian Country.

The Ninth Circuit's decision that "[i]t is undisputed that the Sheriff cannot enforce regulatory traffic laws in 'Indian country' " is consistent with the Tenth Circuit's decision in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) ("*Ute*"). In *Ute*, the Tenth Circuit held that the Ute tribe was entitled to enjoin state and county

officials from prosecuting Indians for traffic violations allegedly committed on Indian land because the officials had no civil regulatory authority to do so. *Id.*

The facts in *Ute* are similar to those here: An enrolled member of a tribe was stopped by a state/county local official and cited for committing a traffic offense in an area recognized as Indian country. *Ute*, 790 F.3d at 1006. The Tenth Circuit cited to 18 U.S.C. § 1151 and found that local officials of a state political subdivision could not prosecute an enrolled member of a tribe for alleged offenses that took place within reservation boundaries. *Id.* The Ninth Circuit also cited to 18 U.S.C. § 1151 in concluding that Section 36 was within the Tribe's reservation boundaries. Like the Tenth Circuit in *Ute*, the Ninth Circuit concluded that the Sheriff does not have jurisdiction to enforce traffic offenses against Indians in Section 36 since it is Indian country.

CONCLUSION

For the foregoing reasons, the Tribe and Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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