NO. 19-_____

In the Supreme Court of the United States

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,

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; NAOMI LOPEZ Individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Under *Barker v. Harvey*, 181 U.S. 481 (1901) and *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), did the Chemehuevi Indian Tribe's failure to file a land claim under the 1851 Act extinguish any of the Tribe's rights as to Section 36 as conveyed to the State of California for school purposes under the Enabling Act of 1853?

2. Given that this Court has found that states take title to property under the Enabling Acts subject to aboriginal title only where a preexisting treaty has preserved the aboriginal title, does the absence of any Chemehuevi Indian Tribe reservation at the time Section 36 was conveyed to the State of California under the Enabling Act of 1853 bar any claim by the Tribe or its members that Section 36 constitutes Indian country?

3. Does the Appropriation Doctrine bar any claim by the Chemehuevi Indian Tribe or its members that the 1907 Secretarial Order could transfer Section 36 to the Tribe after the property had already been conveyed to the State of California for school purposes under the Enabling Act of 1853?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- John McMahon and Ronald Sindelar, individuals, who have been sued in their official capacities as Sheriff and Deputy Sheriff of San Bernardino County respectively, defendants and appellees below, petitioners here.
- Chemehuevi Indian Tribe, a federally recognized Indian Tribe, on its own behalf and on behalf of its members as parens patriae, appellant below and respondent here.
- Chelsea Lynn Bunim, Tommie Robert Ochoa, Jasmine Sansoucie, and Naomi Lopez, individuals, plaintiffs and appellants below, respondents here.

There are no publicly held corporations involved in this proceeding.

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Ninth Circuit (The "Court of Appeals")

Chemehuevi Indian Tribe, on Its Own Behalf and on Behalf of Its Members Parens Patriae, and Chelsea Lynn Bunim, Tommie Robert Ochoa, Jasmine Sansoucie, Naomi Lopez Individually 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

No. 17-56791

Decision Entered on August 19, 2019

Rehearing Denied on September 27, 2019

United States District Court, Central District of California, Eastern Division (The "District Court")

No. 15-Cv-1538-dmg (ffmx)

Chemehuevi Indian Tribe, on Its Own Behalf and on Behalf of Its Members Parens Patriae, and Chelsea Lynn Bunim, Tommie Robert Ochoa, Jasmine Sansoucie, Naomi Lopez Individually 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

Decision Entered on September 5, 2017

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The Ninth Circuit's opinion, the subject of this petition, is reported at 934 F.3d 1076 (9th Cir. 2019) and is reproduced in the Appendix hereto ("Pet.App.") at pages 1a-11a. The Ninth Circuit's order denying rehearing, filed September 27, 2019 is reproduced in the Appendix at pages 43a-44a. The district court's decision granting petitioners' motion for summary judgment and denying plaintiffs' motion for partial summary judgment is not reported and is reproduced in the Appendix at pages 12a-42a.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered its judgment and opinion on August 19, 2019. (Pet.App.1a). Petitioners timely filed a petition for panel and en banc rehearing, and on September 27, 2019, the court denied the petition. (Pet.App.43a-44a).

This Court has jurisdiction to review the Ninth Circuit's August 19, 2019 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents allege petitioners violated the rights secured by the United States Constitution's Fourteenth Amendment and contend that Petitioners' conduct is foreclosed by 18 U.S.C. §§ 1151(a) and 1162(a) and 28 U.S.C. § 1360.

U.S. Const. amend. XIV § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1151

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

18 U.S.C. § 1162

> State jurisdiction over offenses committed by or against Indians in the Indian country
>
> (a) . . . [t]he States or Territories . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

28 U.S.C. § 1360

> State civil jurisdiction in actions to which Indians are parties
>
> (a) . . . [T]he States . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

42 U.S.C. § 1983

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Background of the Action—The Land System of the United States, Section 36 and the Chemehuevi Reservation.

1. The 1851 Act to Settle Land Claims in California.

"The Treaty of Guadalupe Hidalgo, signed on February 2, 1848 and entered into force on May 30, 1848, signaled the formal end of the Mexican-American War." *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641 (9th Cir. 1986). "Under the treaty, Mexico ceded California to the United States." *Id.* On March 3, 1851, shortly after California was admitted into the Union, Congress

passed an act to settle land claims in this newly-acquired territory. *Id.* (citing 9 Stat. 631 (1851)). The 1851 Act created a board of commissioners to determine the validity of claims, and required everyone claiming lands in California to present a claim within two years and failure to do so meant such lands "shall be deemed, held, and considered as part of the public domain of the United States." 9 Stat. at 633.

The Court has repeatedly recognized that a tribe's failure to make a claim under the 1851 Act resulted in a loss of any rights as to the land. *See Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472 (1924); *Chunie*, 788 F.2d at 645. As the Court observed in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 350 (1941), "the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy." Consistent with this Court's decisions, in *Chunie*, the Ninth Circuit "conclude[d] that the district court correctly held that the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the land when they failed to present a claim to the commissioners." 788 F.2d at 646.

The Chemehuevi Indians likewise did not present any claims to the commissioners under the Act of 1851.

2. The 1853 Act Granting Section 36 to California.

"The Enabling Act of each of the public-land States admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools." *Andrus v. Utah*, 446 U.S. 500, 506 (1980). "Between the years 1802 and 1846 the grants were of every section sixteen, and, thereafter,

of sections sixteen and thirty-six." *Id.* at 506-07 n.7. "The lands were not literally meant to be sites for school buildings." *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1066 (9th Cir. 2010). "Instead, the state was able to sell and lease them to produce funds supporting its schools." *Id.*

"[T]he school land grant was a 'solemn agreement'" between the United States and the States, and a State's title to sections sixteen and thirty-six vested upon "completion of an official survey" of the sections. *Andrus*, 446 U.S. at 507. As this Court noted, while "the Federal Government retained the power to appropriate public lands embraced within school grants for other purposes if it acted in a timely fashion"—*i.e.*, before the school sections were officially surveyed—"the States' title to unappropriated land in designated sections could not be defeated after survey." *Id.* at 510-11.

On March 3, 1853, Congress granted sections sixteen and thirty-six in every township in California to the State of California "for the purposes of public schools in each township." 10 Stat. 245, 246 (1853). On July 10, 1895, the Surveyor General's Office officially approved the survey containing Section 36 (3 ER 545-46)[1], thereby vesting title in California. *Andrus*, 446 U.S. at 507.

3. The 1891 Mission Indians Relief Act (MIRA).

"In 1864, Congress empowered the President to set apart land in California 'to be retained by the United States for the purposes of Indian Reservations.'"

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[1] "ER" denotes the Excerpt of Record filed in the Ninth Circuit.

Pechanga Band of Mission Indians v. Kacor Realty, Inc., 680 F.2d 71, 72 (9th Cir. 1982) (quoting 13 Stat. 39, 40 (1864)). "In general, reservations created by Executive Order were temporary, and their boundaries changed frequently." *Id.* at 72-73 n.1 (internal citations omitted). "Because the constantly-changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act, ch. 65, 26 Stat. 712 (1891)." *Id.* at 73. It provides:

> That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.
>
> That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State . . . which selection shall be valid when approved by the President and Secretary of the Interior. . . .
>
> That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations. . . . Provided, *That no 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*. . . .

26 Stat. 712 (1891) (emphasis added).

"The Act instructed the Secretary that 'if no valid objection exists, (he) shall cause a patent to issue for each of the reservations selected by the commission.'" *Pechanga*, 680 F.2d at 74. Under MIRA, "the Secretary had to issue a patent to the land in order to include it in the reservation." *Id.* at 75. "An explicit constraint on this consummating act was that 'no 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.'" *Id.* at 74.

Although the Chemehuevi may not ethnically be Mission Indians, Congress and the Department of the Interior treated the Chemehuevi as Mission Indians for purposes of MIRA. (1 ER 103.)

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 (1905). Special Agent C.E. Kelsey was then dispatched to visit the Chemehuevi Tribe and identify territory for a reservation.

On January 3, 1907, Kelsey recommended to the Commissioner of Indian Affairs that land in the Chemehuevi Valley "be added to the Colorado River reservation or that whatever action is appropriate be taken." (3 ER 586.) Included among Kelsey's recommendations was "the E. 1/2 of T. 5.N. R. 24 E.," which contained Section 36 at the very edge of a southern border. (*Id.*; 2 ER 148.) Even though the land had already been surveyed and the survey officially approved by the Surveyor General's Office (3 ER 545-46), Kelsey mista-

kenly reported that the townships that he was recommending be set aside in the Chemehuevi Valley had "not been surveyed" (3 ER 586). Kelsey reported that he had been told that the tribe had occupied the area "since primeval times." (Pet.App.6a).

4. The 1907 Secretarial Order and Amendment to MIRA.

On February 2, 1907, the Secretary of the Interior directed that land in the Chemehuevi Valley "be withdrawn from all forms of settlement or entry until further notice" (3 ER 578), including "the E. 1/2 of T. 5. N. R. 24 E.," which contained Section 36 at the very edge of a southern border (2 ER 148; 3 ER 599). This direction was based on Kelsey's mistaken assumption that the townships that he was recommending be set aside "have not been surveyed." (3 ER 586.)

On March 1, 1907, Congress 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 the 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 the several bands or villages of Mission Indians, and are now required and needed by them, and which were not selected for them by the Commission as contemplated by section two of said Act. . . .

34 Stat. 1015, 1022-23 (1907).

As before, "no patent issued under the provisions of this Act shall embrace 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." *Id.* at 1023.

The trust patent required by MIRA was not issued until June 28, 2010. (3 ER 480-86.) The patent specifically excludes "[t]hose 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." (3 ER 480.)

B. Respondents File Suit and the District Court Grants Summary Judgment to Petitioners.

Respondents filed suit under 42 U.S.C. § 1983 against Petitioners County of San Bernardino Sherriff John McMahon, and Deputy Sheriff Ronald Sindelar. The First Amended Complaint sought damages and 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 California Vehicle Code citations on the Reservation; (2) Defendants interfered with tribal self-government; (3) state authority is preempted; and (4) Defendants violated their civil rights through racial profiling. (Pet.App.12a-13a).

The central dispute between the parties was whether Section 36 was Indian country, which would foreclose enforcement of state regulatory traffic laws. The parties filed cross-motions for summary judgment/ partial summary judgment on the issue. (Pet.App.13a-14a). Respondents argued that Section 36 was Indian country pursuant to the 1907 Secretarial Order, and that the 1853 Enabling Act did not convey land for school purposes that was occupied or possessed by an

Indian Tribe, and Agent Kelsey's report indicated that the tribe had occupied the land well before the Act. (Pet.App.27a-28a). Petitioners contended that title had passed to the State of California under the Enabling Act when the survey was complete in 1895, and hence the Secretary had no power to take Section 36 as part of any Chemehuevi Reservation. (Pet.App.27a-29a).

The district court granted petitioners motion for summary judgment, agreeing with petitioners' argument on Section 36, and finding that Kelsey's report lacked any foundation and was inadmissible hearsay. (Pet.App.29a-32a).[2]

C. The Ninth Circuit Reverses.

Following briefing and argument, on August 19, 2019, the Ninth Circuit issued an opinion affirming in part and vacating and remanding in part. The court held that the district court properly granted summary judgment as to the Tribe, as it could not assert section 1983 claims on behalf of tribe members. (Pet.App.11a). It also noted respondents had abandoned any racial profiling claim. (Pet.App.4a n.1.) However, it reversed and vacated the judgment as to the Section 36 claim, concluding that the district court erred by failing to consider the Kelsey report, and finding it admissible under the Ancient Document exception of Fed. R. Evid. 803(16). (Pet.App.8a). The court noted it supported respondents' argument that no transfer to the State could be affected by the Enabling Act, because the property was occupied by the tribe and hence could

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[2] The district court also found that the individual respondents had failed to present any evidence to establish their racial profiling claim. (Pet.App.39a-42a.)

properly be taken as part of the Chemehuevi Reservation by the 1907 Secretarial Order. (*Id.*)

Petitioners sought panel and en banc rehearing on September 3, 2019, but the petition was denied on September 27, 2019. (Pet.App.43a-44a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision flatly departs from the decisions of this Court, and indeed conflicts with the Circuit's own prior decisions concerning core issues of allocation of land between the states and Indian Tribes in general, and in the state of California in particular. The panel's opinion has upended existing law in three fundamental areas that this Court has repeatedly recognized as significant in assuring clear definition of property rights for a vast portion of this country.

- The panel opinion has departed from a rule articulated by this Court over a century ago, that failure to submit a claim under the 1851 Act extinguished Indian Tribe property rights as to property conveyed by the Treaty of Guadalupe Hidalgo.
- 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.
- The Ninth Circuit opinion departs from this Court's decisions holding that once property is

> conveyed by the federal government to a state, the Appropriation Doctrine bars the federal government from later appropriating that property for other purposes.

I. REVIEW IS NECESSARY TO SECURE COMPLIANCE WITH, AND IF NECESSARY, CLARIFY, THE COURT'S DECISIONS CONCERNING CORE PROPERTY ISSUES AS BETWEEN THE STATES AND INDIAN TRIBES UNDER THE 1851 ACT, THE ENABLING ACTS, AND THE APPROPRIATION DOCTRINE.

A. The Ninth Circuit's Decision Cannot Be Reconciled with the Decisions of This Court, or the Circuit's Prior Case Law, Recognizing That a Tribe's Failure to Submit a Land Claim Pursuant to the 1851 Act Settling Land Claims Following the Treaty of Guadalupe Hidalgo, Results in the Loss of Tribal Land Rights.

In *Barker v. Harvey*, 181 U.S. 481, the Court expressly held that after enactment of the 1851 Act, Indian Tribes, like other landowners, were required to submit a land claim to the Commission within two years, in order to avoid conversion of the land to public lands. The Court observed:

> As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land, within the language of the statute, "part of the public domain of the United States."

Id. at 490.

The Court reaffirmed *Barker* in *United States v. Title Insurance & Trust Co.*, 265 U.S. 472. In *Title Insurance & Trust Co.*, the Court rejected an action by the federal government to quite title on behalf of a California tribe based on occupancy of land that defendant had procured pursuant to a patent issued by the Commission. The Court declined to overrule *Barker*'s holding that tribes were required to submit land claims to the Commission pursuant to the Act in order to preserve any interest in the land. 265 U.S. at 485-87. The Court found that overruling *Barker* was particularly unwarranted given that it concerned the significant issue of land ownership, and that many land titles might be impacted by reconsideration of the underlying issue. *Id.* at 486-87.

In *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, the federal government brought an action on behalf of the Walapai (Hualpai) Tribe in Arizona, to enjoin the defendant from interfering with the Tribe's possession and occupancy of land it had occupied for many years. The Court was careful to draw a distinction between the operative statutes concerning Arizona land claims, and the 1851 Act, expressly noting that "the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy." *Id.* at 350.

The Ninth Circuit followed *Barker* and *Title Insurance & Trust Co.* in *Chunie v. Ringrose*, 788 F.2d 638. There, Chumash Indians filed suit to establish their entitlement to an interest in two of the Channel Islands off of the California coast, as well as adjacent channel beds. *Id.* at 641. The Ninth Circuit affirmed the dismissal of their claims, noting that the land in

question was subject to the Treaty of Guadalupe Hidalgo, the Chumash had not filed claims pursuant to the Act of 1851 and hence had no lawful interest in the land. *Id.* at 645-46. The court stated:

> Given the line of Supreme Court decisions recognizing the extensive reach of the Act of 1851, we conclude that the district court correctly held that the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the land when they failed to present a claim to the commissioners.

Id. at 646.

The court further observed that "[t]his result comports with the overriding purpose of the Act of 1851 'to place the titles to land in California upon a stable foundation . . . in a manner and form that will prevent future controversy.'" *Id.* (citing *Fremont v. United States*, 58 U.S. 542, 553-54 (1854)).

Here, the Ninth Circuit's decision creates the very sort of controversy that the Act of 1851 was designed to avoid. It has determined that a large parcel of land, including a public highway, that was not previously regarded, nor properly taken as Indian country, may suddenly potentially be transformed into Indian country, subject to limited civil regulatory power by State or local authorities. This is why the panel's observation that title is not dispositive of whether a parcel is Indian country (Pet.App.5a) is irrelevant to the present case. This Court has indeed recognized that when Congress has established a reservation, and then opened portions of it for homesteading, transfer of title, in the absence of express congressional intention, does not alter the status of property as Indian country. *Solem v. Bartlett*,

465 U.S. 463, 470 (1984). But the point here is that, as established by this Court's decisions, once the Tribe failed to file a claim under the 1851 Act, it had no rights in Section 36, and acceptance of the survey of Section 36 in 1895 vested all land rights in the State. Section 36 was never Indian country.

The opinion conspicuously fails to address, let alone distinguish this Court's decisions in *Barker* and *Title Insurance & Trust Co.*, or even the Circuit's prior decision in *Chunie*, yet all make it clear that respondents had no interest in Section 36 after failing to file claims under the Act of 1851. While the panel's overt failure to adhere to *stare decisis* alone warrants the intervention of this Court, as the Court has recognized, the need for review is underscored by "the importance of the problems raised in the administration of the Indian laws and the land grants." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 344. Clear rules concerning possession and ownership of Indian lands are essential, especially in the context of claims subject to the Act of 1851, which affects the title and land interest of thousands of parcels. *Title Ins. & Tr. Co.*, 265 U.S. at 486-87.

B. The Ninth Circuit's Decision Is Inconsistent with the Decisions of This Court, and the Ninth Circuit's Prior Decision Concerning Indian Land Rights and the Enabling Acts Granting Land to States for School Use.

In *Lyon v. Gila River Community*, 626 F.3d 1059, Section 16 in Arizona was conveyed by the federal government to the state for school purposes. *Id.* at 1065-66. At the time of the conveyance, members of the Gila River Tribe occupied the area, but it was only later that the federal government established a

formal reservation surrounding Section 16. *Id.* at 1066-67. Section 16 was eventually sold to various successive owners, one of whom declared bankruptcy, triggering a claim by the Gila River Community that the Enabling Act was silent on the issue of aboriginal title to Section 16 and hence did not extinguish such rights. *Id.* at 1078.

The Ninth Circuit affirmed the district court's rejection of the claim. As the court observed:

> The Community cites cases in which the Supreme Court has held that school land conveyances vest the fee in the state *subject to* any aboriginal title. These cases are distinguishable because they involved situations where a preexisting *treaty* had preserved the aboriginal title.

Id. (citing *United States v. Thomas*, 151 U.S. 577, 584 (1894), *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-15 (1906) and *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)).

The court further noted:

> [T]he rationale in those cases is that the Indian tribe's right of possession gained by treaty is akin to a contract right negotiated in exchange for some valuable consideration and not subject to unilateral revocation by the federal government. Here there was no such right of possession when Section 16 was conveyed to Arizona in exchange for some valuable consideration. In this case, at the time that Section 16 was conveyed to Arizona,

> the Community had no such *recognized* right of possession.

Id. at 1078-79.

The same is true here. When the Enabling Act gave land to the State of California for school use in 1853, the Chemehuevi Tribe had no interest in Section 36, as any had been extinguished by failure to file a claim under the Act of 1851, and neither then, nor in 1895 when the survey was approved and title vested, or at any other date, did the Tribe obtain any such interest for "some valuable consideration" or by treaty. *Lyon*, 626 F.3d at 1078-79.

The Ninth Circuit's opinion, again, inexplicably fails to address its prior decision in *Lyon*, or any of the decisions of this Court on which Lyon relies. This is understandable as it is impossible to reconcile the panel decision here with those authorities. As noted, the Court has repeatedly recognized the importance of setting down clear guidelines concerning the grant of land for schools under the Enabling Acts, and the interplay with tribal land rights. *See, e.g.*, *Thomas*, 151 U.S. 577; *Hitchcock*, 201 U.S. 202, and *Beecher*, 95 U.S. 517. The extraordinary and unsupported decision of the Ninth Circuit again requires the Court to intervene and provide guidance in this critical area of the law.

C. The Ninth Circuit's Conclusion That Section 36 Was Subject to the Secretarial Order of 1907, Is Contrary to the Decisions of This Court Holding That the Appropriation Doctrine Bars Federal Appropriation of Land Already Appropriated for Another Purpose.

It has long been established that once the federal government appropriates land for a particular purpose, it cannot subsequently re-appropriate the land. As the Court observed in *Hastings & Dakota Railroad Co. v. Whitney*, 132 U.S. 357, 360-61 (1889), "[t]he doctrine first announced in *Wilcox v. Jackson*, 13 Pet. 498 [1839], 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 or to operate upon it, although no exception be made of it, ha[d] been reaffirmed and applied by" the Court "in such a great number and variety of cases that" by 1889 it was already "regarded as one of the fundamental principles underlying the land system of this country." *Accord*, *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114, 119 (1894) ("a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and . . . no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it").

In *Beecher*, 95 U.S. 517 the Court expressly held that a congressional act that purported to authorize the sale of land that had already been allocated to the state for school purposes under an Enabling Act, was invalid:

> The act of Congress of Feb. 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of sections 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.

Id. at 527.

As the district court correctly held, once Section 36 passed to the State upon approval of the survey in 1895, the land could not then be reallocated to the Tribe by the Secretarial Order. (Pet.App.28a). The Ninth Circuit's opinion again fails to address the controlling decisions of this Court, a particularly egregious omission given the Court's observation that the Appropriation Doctrine is "one of the fundamental principles underlying the land system of this country." *Hastings & Dakota R.R. Co.*, 132 U.S. at 361. That "land system" has now been thrown into uncertainty by the Ninth Circuits decision, and requires intervention and correction by this Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 23, 2019