

1 **WO**

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

9

10 In re:)
11 Michael Keith Schugg, dba Schuburg)
12 Holsteins,)
13 Debtor.)

No. CV 05-2045-PHX-JAT

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

14 In re:)
15 Debra Schugg,)
16 Debtor.)

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

17 G. Grant Lyon, in his capacity as Chapter)
18 11 Trustee of the bankruptcy estate of)
19 Michael Keith Schugg and Debra Schugg;)
20 Wells Fargo Bank, N.A.,)
21 Plaintiffs,)

22 vs.)
23 Gila River Indian Community,)
24 Defendant.)

25 On September 18, 19, 20, 25, 26, 27, and 28, 2007, the Court presided over a bench
26 trial in this matter. In the Final Pretrial Order (Doc. # 239), G. Grant Lyon, the Chapter 11
27 trustee of the consolidated estates of Michael Keith Schugg and Debra Schugg, and the Gila
28 River Indian Community set forth approximately forty-five (45) issues of fact and law to be
29 tried and determined. Generally, the issues can be summarized as follows: (1) whether there

1 is an easement or right-of-way via Smith-Enke Road or Murphy Road for access and utilities
2 to Section 16 of Township 4 South Range 4 East in Pinal County ("Section 16"); (2) whether
3 Murphy Road is an Indian Reservation Road that must remain open for public use; (3)
4 whether Smith-Enke Road and/or Murphy Road are public rights-of-way under R.S. 2477
5 that must remain open for public use; (4) whether the easement and/or right-of-way access
6 (if any) to Section 16 includes the right to improve the easements or install additional utilities
7 thereon; (5) whether GRIC has the power to regulate zoning on Section 16; and (6) whether
8 the Trustee, the Debtors, representatives of the S & T Dairy and/or their respective invitees,
9 employees, assignees, agents or representatives have trespassed on tribal or allotted lands
10 within the Gila River Indian Community's reservation. Following the bench trial, the Court
11 hereby finds and concludes as follows:

12 **I. Findings of Fact**

13 **Introduction**

- 14 1. This action was filed by G. Grant Lyon acting solely in his capacity as Chapter 11
15 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the
16 "Trustee").
- 17 2. The Defendant/Counter-Plaintiff Gila River Indian Community ("GRIC") is a
18 federally-recognized Indian Community organized under Section 16 of the Indian
19 Reorganization Act, 25 U.S.C. § 461 *et seq.*
- 20 3. GRIC is based on the Gila River Indian Reservation (the "Reservation"), which
21 consists of approximately 372,000 acres in south-central Arizona, and includes
22 members of the federally-recognized Akmil O'odham ("Pima") and Peeposh
23 ("Maricopa") Tribes.
- 24 4. In or about September 2003, Michael Schugg and Debra Schugg (the "Debtors")
25 acquired title to land known as Section 16 of Township 4 South, Range 4 East in Pinal
26 County, Arizona, comprising approximately 657 acres ("Section 16").
- 27 5. On May 22, 2006, the Bankruptcy Court entered an order directing the Trustee to pay
28 Wells Fargo's principal and interest in full.

- 1 6. On March 12, 2007, Wells Fargo, N.A., released its lien on Section 16.
2 7. On June 1, 2007, all claims and counterclaims between Wells Fargo and GRIC were
3 dismissed with prejudice, resulting in the dismissal of Wells Fargo from this case.

4 **Indispensable Party**

- 5 8. On March 9, 2006, the Court denied without prejudice GRIC's Motion to Dismiss, in
6 which GRIC argued, *inter alia*, that the United States is an indispensable party.
7 9. Before the trial of this matter, GRIC filed a brief entitled Gila River Indian
8 Community's Trial Brief Regarding the Lack of Jurisdiction Over the Trustee's Access
9 Claims Due to the Fact that the United States Is an Indispensable Party (Doc. # 218).
10 10. In response, the Trustee filed a Memorandum Regarding the United States Not Being
11 an Indispensable Party to Legal Access Claims (Doc. # 225).
12 11. On January 8, 2008, the Court ordered the parties to file supplemental briefs to
13 address the fact that Smith-Enke Road and Murphy Road cross land owned by or
14 allotted to individuals not made parties to this litigation and the impact thereof on the
15 analysis under Rule 19 of the Federal Rules of Civil Procedure.
16 12. On January 11, 2008, both parties filed their respective briefs.
17 13. There is no pending motion to dismiss for failure to join a party under Rule 19 of the
18 Federal Rules of Civil Procedure.

19 **Uncontested History of Section 16 and the Gila River Indian Reservation**

- 20 14. In 1850, the United States Government reserved all sections numbered sixteen and
21 thirty-six in each township of the Territory of New Mexico for the purpose of being
22 applied to schools.
23 15. In 1853, the United States acquired land that later became part of the State of Arizona
24 through the Gadsden Purchase, including land that was later designated as Section 16.
25 16. In 1854, the United States promulgated the Law of July 23, 1854, § 5, which stated,
26 in part: "sections numbered sixteen and thirty-six in each township, in said Territory,
27 shall be, and the same are hereby, reserved for the purpose of being applied to schools
28 in said Territory, and in the States and Territories hereafter to be created out of the

- 1 same."
- 2 17. In 1863, Congress partitioned the Territory of New Mexico to create the Territory of
3 Arizona.
- 4 18. In 1876, a survey of the Territory of Arizona, which included Section 16, was
5 conducted by Theodore White, a United States Deputy Surveyor for Arizona. The
6 survey was filed with the Surveyor General's Office in Tucson, Arizona, the following
7 year.
- 8 19. In 1921, a resurvey of certain parcels surrounding Section 16 was filed.
- 9 20. In 1910, Congress authorized Arizona's statehood by passing the Enabling Act.
- 10 21. Arizona became a state on February 14, 1912.
- 11 22. In 1859, Congress created a reservation for the confederated bands of Pima and
12 Maricopa Indians by enacting sections 3 and 4 of the Act of February 28, 1859, ch.
13 66, 11 Stat. 388, 401.
- 14 23. After 1859, the Reservation's boundaries were revised by seven Executive Orders
15 issued between 1876 and 1915, resulting in its current size of approximately 372,000
16 acres.
- 17 24. The land contiguous to Section 16 was added to the Reservation by two Executive
18 Orders: one dated November 15, 1883 (adding the land immediately north of Section
19 16) and the other dated June 2, 1913 (adding the land immediately to the south, east
20 and west of Section 16).
- 21 25. The Executive Orders that expanded the Reservation lands did not identify any
22 specific easements providing legal access to Section 16.
- 23 26. The 1883 Executive Order, which added to the Reservation land immediately north
24 of Section 16, stated in part:
- 25 [A]ny tract or tracts of lands included within the foregoing-
26 described boundaries [added to the Reservation] the title of
27 which has passed out of the United States Government, or to
28 which valid homestead or pre-emption rights have attached
under the laws of the United States prior to the date of this
order, are hereby excluded from the reservation hereby made.

- 1 27. The 1913 Executive Order, which added to the Reservation land south, east and west
2 of Section 16 (hereinafter referred to as the "Encircling Strip"), stated that the lands
3 "shall be subject to any existing valid rights of any persons to the lands described."
- 4 28. The land surrounding Section 16 includes allotments for individual Indians and GRIC.
5 29. Allotment Deeds for certain allotments in the vicinity of Section 16 were issued in
6 1921.
- 7 30. The Allotment Deeds state that the federal government will hold the land in trust for
8 twenty-five years for the sole use and benefit of the Indian, and when the period
9 expires "the United States will convey the same by patent to said Indian in fee,
10 discharged of said trust and free from all charge and encumbrance whatsoever."
- 11 31. On November 1, 1929, the State of Arizona transferred Section 16 to J. L. Hodges by
12 a patent conveying fee simple ownership "with all the rights, privileges, immunities,
13 and appurtenances of whatsoever nature" and "subject to any and all easements or
14 rights of way heretofore legally obtained."
- 15 32. On January 11, 1944, Mr. Hodges and Grace Atkins Hodges conveyed to H.G.
16 Tiffany and Virginia Tiffany, Frances H. Raymond, and Walter H. Coleman and Pearl
17 F. Coleman title to Section 16 by warranty deed "together with all and singular the
18 rights and appurtenances thereto in anywise belonging unto the said GRANTEES."
19 The warranty deed did not otherwise identify any easement across Indian lands to
20 Section 16.
- 21 33. On March 7, 1946, Mr. and Mrs. Tiffany, Ms. Raymond, and Mr. and Mrs. Coleman
22 conveyed to Charles and Lena Hill title to Section 16 by warranty deed "together with
23 all and singular the rights and appurtenances thereto in anywise belonging unto the
24 said GRANTEES." The warranty deed did not otherwise identify any easement
25 across Indian lands to Section 16.
- 26 34. On July 19, 2001, Wells Fargo loaned S & T Dairy \$500,000 to help purchase Section
27 16 in exchange for a deed of trust on the property.
- 28 35. By warranty deed recorded in Pinal County on July 26, 2001, Charles A. Hill, a

1 descendant of Charles Hill and general partner of Hill Farms, Ltd., an Arizona limited
2 partnership, conveyed to S & T Dairy, L.L.C., an Arizona limited liability company
3 ("S & T Dairy"), title to Section 16 "together with all rights and privileges thereto."
4 The warranty deed did not otherwise identify any easement across Indian lands to
5 Section 16.

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

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

11 The Hill Farm is located within the boundary of the Reservation
12 and access to the property may be restricted. The Seller does
13 not warrant or guarantee access or right-of-ways or easements
14 for access or utilities. The Buyer (Mr. Michael Schugg) has
15 personally researched access to the property and has visited with
16 the Bureau of Indian Affairs and is satisfied with the current
17 access to the property. Mr. Schugg and/or heirs acknowledge
18 the limited access and potential problems of being located with
19 [sic] the Boundary of the Reservation and they will hold the
20 Seller and Broker (Aztec Agricultural Group, Inc. - Melvin D.
21 Young, Broker) harmless for any potential liability or cost that
22 may be incurred due to the location/access of the property.

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

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

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

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

42. In or about September 2003, S & T Dairy conveyed to the Debtors title to Section 16
"together with all rights, easements, benefits and privileges appurtenant to the Subject

1 Real Property on the Effective Date." The document transferring title did not
2 otherwise identify any easement across Indian lands to Section 16.

3 43. On March 22, 2004, the Debtors fully assumed the obligations of S & T Dairy
4 described in the April 29, 2003, Amended and Restated Deed of Trust.

5 **Access to Section 16**

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

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

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

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

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

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

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

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

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

- 1 53. Casa Blanca Road is a road running east and west approximately two miles north of
2 the northern boundary of Section 16.
- 3 54. Murphy Road abuts or crosses tribal land and land allotted to individual Indians
4 within the Reservation.
- 5 55. Pinal County maintained Murphy Road from Smith-Enke Road south to the
6 Reservation's southern boundary from at least 1996 to at least 2001. The maintenance
7 occurred once every two or three months.
- 8 56. Pinal County maintained Smith-Enke Road from Murphy Road west to Hartman Road
9 (which road runs along the western boundary of Section 16), and sometimes farther
10 west to the University of Arizona agricultural farm land, from at least 1996 to at least
11 2001. The maintenance occurred once every two to three months.
- 12 57. Pinal County no longer maintains the portions of Smith-Enke Road or Murphy Road
13 within the Reservation's boundaries.
- 14 58. The BIA was responsible for maintaining Murphy Road from Casa Blanca Road south
15 to the Reservation's southern boundary until the mid-1990's, at which time GRIC
16 contracted with the BIA to assume maintenance of the BIA roads on the Reservation.
- 17 59. Federal funds have been used to maintain Smith-Enke Road and Murphy Road.
- 18 60. Beginning in 2000, GRIC maintained Murphy Road from Casa Blanca Road south to
19 the Reservation's southern boundary.
- 20 61. Approximately one year before trial, GRIC terminated its maintenance of Murphy
21 Road from Casa Blanca Road south to the Reservation's southern boundary because
22 neither GRIC nor the BIA has a legal right-of-way on that portion of road.
- 23 62. For decades, the owners of Section 16 and other members of the public traveled
24 across the Encircling Strip via Smith-Enke Road and Murphy Road without GRIC's
25 objection.
- 26 63. Trucks used Smith-Enke Road and Murphy Road to complete the dairy construction
27 project.
- 28 64. After the dairy was constructed, trucks used Smith-Enke Road and Murphy Road to

- 1 pick up loads of milk and to deliver feed for the dairy cattle.
- 2 65. GRIC did not object to the construction of the dairy on Section 16 or travel to and
3 from Section 16 until 2003 or 2004.
- 4 66. Portions of Section 16 have been farmed since at least the 1940s.
- 5 67. Dirt wagon trails were the primary roadways in south-central Arizona in the 1800's
6 and early 1900's.
- 7 68. In 1875, there existed a north-south road from the general location of present-day
8 Casa Blanca Road going south to meet the main military road coming up past
9 Picacho.
- 10 69. As of 1885, maps showed the existence of roadways in the township in which Section
11 16 is located.
- 12 70. As GRIC's expert concedes, in 1911, 1912, and 1913, there were roads that provided
13 physical access to Section 16.
- 14 71. Roads existing in 1913 were flexible in their location because of water run-off and
15 flooding, among other reasons.
- 16 72. In 1913, there existed an east-west road from the city of Maricopa to the city of
17 Sacaton. There are indications that the road was graded.
- 18 73. The 1913 east-west road provided a route between the communities of Maricopa and
19 Sacaton.
- 20 74. In 1915, there was a north-south road beginning at Casa Blanca Road and proceeding
21 in a general southerly-southeast direction to the railroad tracks. The road touched the
22 northeast corner of Section 16.
- 23 75. At all relevant times, there have been roadways that touched, provided access to, or
24 physically crossed Section 16.
- 25 76. In 1922, Pinal County declared public roads along all section lines in the "Valley
26 District." The Valley District included Section 16.
- 27 77. Post-1922 maps and aerials show the alignment of Smith-Enke Road and Murphy
28 Road on section lines.

- 1 78. There are no recorded easements or rights-of-way on Murphy Road south of Casa
2 Blanca Road.
- 3 79. There are no recorded easements or rights-of-way on Smith-Enke Road.
- 4 80. No one has ever requested an easement or right-of-way to Section 16.
- 5 81. Other than the installation of the SCIP electricity poles and lines in 2002, there is no
6 record of anyone requesting an easement or right-of-way to Section 16.
- 7 82. The BIA maintains roads that are listed on the BIA road system, which roads are
8 known as Indian Reservation Roads ("IRR").
- 9 83. The BIA only needs a right-of-way for an IRR if the road was constructed, which
10 means a surveyed and engineered road.
- 11 84. The BIA did not construct Murphy Road south of Casa Blanca Road.
- 12 85. To get a road listed on the BIA road system, an Indian tribe must file an application.
- 13 86. The BIA receives federal funds to maintain IRRs and considers the roads to be public
14 roads.
- 15 87. Murphy Road is listed as an IRR and is designated as BIA Route 93.
- 16 88. Murphy Road, north of Casa Blanca Road, is paved.
- 17 89. Murphy Road, from Casa Blanca Road south to the Reservation's southern boundary,
18 was listed in the past as part of BIA Route 93.
- 19 90. BIA Route 93 is listed in GRIC's 1984 General Land Use Plan as being 4.8 miles
20 long.
- 21 91. In 2001, Vernon Palmer, BIA's Western Regional Roads Engineer, wrote: "BIA
22 Route 93, locally known as Murphy Road, is a public roadway extending 1 mile north
23 of Casa Blanca Road and 3 miles south of Casa Blanca Road. This 4 mile roadway
24 section has been constructed and is maintained with public funds."
- 25 92. In 2004, GRIC erected "no trespassing signs" at the Reservation's southern boundary,
26 adjacent to Murphy Road, and at the Reservation's western boundary, adjacent to
27 Smith-Enke Road.
- 28 93. Despite the presence of the "no trespassing" signs, public use of Smith-Enke Road

- 1 and Murphy Road continues.
- 2 94. The Gila River Police Department has not attempted to block use of Smith-Enke Road
3 or Murphy Road near Section 16.
- 4 95. In 2002, Michael Schugg spoke with Fred Ringlero, at the time the Director of Land
5 Use Planning and Zoning for GRIC, concerning Mr. Schugg's request for the San
6 Carlos Irrigation Project ("SCIP") to bring electric power to Section 16.
- 7 96. Mr. Schugg worked with the Bureau of Indian Affairs ("BIA") and GRIC to obtain
8 a utility easement for the construction of an electric line to Section 16 in 2002, which
9 was granted.
- 10 97. Mr. Ringlero told Mr. Schugg that there was no legal access to Section 16 and helped
11 Mr. Schugg get the utility easement because it was for a dairy, which was consistent
12 with the use of the surrounding land.
- 13 98. There are electricity poles and lines adjacent to Smith-Enke Road, serviced by
14 Arizona Public Service Company ("APS"), that extend across the Encircling Strip and
15 provide electricity to Section 16.
- 16 99. There is an underground gas line adjacent to Smith-Enke Road, serviced by Southwest
17 Gas Corporation, that extends across the Encircling Strip and provides gas services
18 to Section 16.
- 19 100. There are electricity poles and lines adjacent to Murphy Road, installed by the San
20 Carlos Irrigation Project ("SCIP"), a division of the Bureau of Indian Affairs ("BIA"),
21 that extend across the Reservation and provide electricity to Section 16.
- 22 101. At the Debtors' request, SCIP installed the electricity poles and lines in 2002.
- 23 102. When the Debtors sought installation of the SCIP poles and lines, GRIC participated
24 in the process and did not object to the installation.
- 25 103. There are telephone lines adjacent to Smith-Enke Road that extend across the
26 Encircling Strip and provide telephone service to Section 16.

27 **Zoning**

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

- 1 105. In the past, GRIC primarily had an agricultural-based economy, but has since
2 diversified. The major economic engine in the diversification are the three casinos:
3 the Wild Horse Pass Casino and Resort, Vee Quiva Casino and Lone Butte Casino.
4 106. The casinos account for approximately 80% of GRIC's total income.
5 107. From 2003 to 2006, casino revenue increased.
6 108. From 2000 to 2006, casinos were the largest employers on the Reservation.
7 109. In 2003, GRIC had a budget of approximately \$100 million. In 2006, the budget was
8 about \$110 million.
9 110. The Reservation contains remnants of the Japanese Internment Camps from World
10 War II nearby Section 16. During World War II, approximately 13,000 Japanese
11 individuals were interned at the camps.
12 111. Section 16, while located within District 5 of the Reservation, was never a part of the
13 Reservation.
14 112. GRIC has developed several casinos, a resort hotel with two eighteen-hole golf
15 courses, a race track, a Western-themed attraction (Rawhide), two operating industrial
16 parks, and other commercial development on the northern part of the Reservation.
17 113. Gila River Farms, Inc., an entity owned and operated by GRIC, leases and farms
18 certain lands within Districts 3 and 5 of the Reservation, including the land to the
19 south and west of Section 16.
20 114. Gila River Farms currently leases 957 acres to the south and west of Section 16 from
21 GRIC and the individual allottees. The collection of these leases is referred to as the
22 "960 Lease."
23 115. Gila River Farms grows or crops about 12,000 acres per year.
24 116. The 2004 Water Settlement Act, which provides GRIC with more than 600,000 acre-
25 feet of new water, will allow for additional acres to be farmed.
26 117. While the Gila River Farms manager is concerned that the residential development
27 of Section 16 would hinder farming on the 960 Lease because of groundwater issues,
28 no independent research has been done to support such a concern.

- 1 118. While the Gila River Farms manager is concerned that the residential development
2 of Section 16 would hinder farming on the 960 Lease by increasing traffic and
3 limiting the spraying of insecticides, other residential developments in or around the
4 Reservation are located near farming operations and such farming operations, other
5 than issues of garbage, broken canals and trespassers, have not been adversely
6 impacted.
- 7 119. From 2003 to 2006, no farm had to shut down because of residential developments
8 on the Reservation's border.
- 9 120. The city of Sacaton is a good example of farms and residential housing right next to
10 or adjacent to one another.
- 11 121. In 2004, GRIC became aware that a request was being made to amend the Pinal
12 County land use designation for Section 16 from "Rural" (allowing 1.25 houses per
13 acre) to "Transitional" (allowing a higher-density housing development).
- 14 122. Developers interested in purchasing Section 16 intended to develop it.
- 15 123. With a density of 3.5 homes per acre, a developer could build approximately 2,250
16 homes on Section 16.
- 17 124. For a developer to get a recorded plat for a subdivision, major cities and counties
18 require two ingress and egress areas for police and fire.
- 19 125. On July 26, 2004, GRIC submitted an objection to Pinal County regarding the
20 application to amend the County's land-use designation for Section 16.
- 21 126. Pinal County ultimately rejected the application to amend the land-use designation for
22 Section 16.
- 23 127. The Pinal County Sheriff's Department provides law enforcement services to the City
24 of Maricopa.
- 25 128. The owners of Section 16 have over 2,000 acre-feet of water rights.
- 26 129. The nearby City of Maricopa, Arizona, is undergoing rapid development, and real
27 estate developers are seeking land in the vicinity of the city for the purpose of
28 residential and commercial development.

- 1 130. The City of Maricopa is separated from Section 16 by approximately one-half mile
2 of Indian lands the majority of which consist of Indian allotments.
- 3 131. In 1984, GRIC created and adopted a General Land Use Plan (the "Plan") for the
4 entire Reservation.
- 5 132. The general goal of the Plan is to accommodate GRIC's cultural values by creating
6 more agricultural areas and protecting open spaces.
- 7 133. The Plan attempts to limit industrial and commercial development to the "north
8 central planning area."
- 9 134. The Plan is not a detailed plan for any land use or particular parcel of land.
- 10 135. After adoption of the Plan, a Reservation-wide zoning ordinance was to be created.
11 However, no such zoning ordinance was ever created.
- 12 136. Only one area of the Reservation, near the Wild Horse Pass Casino and Resort, is
13 zoned.
- 14 137. In contrast to the Plan's projections, there has been significant residential and
15 commercial development north, south and east of the Reservation.
- 16 138. Some of the land on which the Wild Horse Pass Casino and Resort is located was
17 under agricultural use prior to construction.
- 18 139. There are residential communities, both on and off the Reservation, that are located
19 near farms.
- 20 140. While GRIC is concerned that residential development on Section 16 would have an
21 adverse impact on agricultural operations on land surrounding Section 16, no actual
22 studies were performed to explain such impact.
- 23 141. While GRIC is concerned about water supplies and waste water disposal should
24 residential development on Section 16 occur, there is no indication why such
25 residential water use and disposal is unacceptable or would adversely impact GRIC's
26 water resources.
- 27 142. While GRIC is concerned about the lack of a storm water plan and about ground
28 contaminants (from the dairy operation) being forced into the groundwater, no actual

- 1 studies were performed to support such concerns.
- 2 143. Gila River Emergency Medical Services ("GREMS") employs 40 full-time and 20
3 part-time employees.
- 4 144. During a typical 24-hour shift, GREMS has six emergency medical technicians, six
5 paramedics and one supervisor on duty, and has six ambulances in use.
- 6 145. GREMS cannot differentiate between an emergency call from a GRIC member and
7 an emergency call from a non-member.
- 8 146. GREMS has one ambulance stationed in District 5, the district in which Section 16
9 is located.
- 10 147. There are 82 sworn officers employed by the Gila River Police Department
11 ("GRPD").
- 12 148. The GRPD employs rangers who protect the exterior boundaries of the Reservation.
- 13 149. During a typical shift, there are four patrol officers, one supervisor and one to two
14 rangers on duty.
- 15 150. Seven officers are assigned to school campuses on the Reservation as school resource
16 officers.
- 17 151. The GRPD's jurisdiction includes the Reservation surrounding Section 16 but does
18 not include Section 16.
- 19 152. There has been an increase in the frequency of non-resident trespassers on the
20 Reservation, which is attributed to the residential development around the
21 Reservation.
- 22 153. The GRPD has seen an increase in traffic on Reservation roads, and increased
23 complaints about drivers and traffic congestion, due to residential development south
24 of Section 16 and the Reservation.
- 25 154. According to GRIC's estimates, if residential development of Section 16 were to
26 occur, an estimated peak hour could have 850 vehicles using the roads in the vicinity
27 of Section 16.
- 28 155. The GRPD does not have the resources to handle the increased traffic.

- 1 156. An increase in traffic in the vicinity of Section 16 would require improvements to
2 Smith-Enke Road, Murphy Road and Casa Blanca Road.
- 3 157. The majority of the dirt section line roads within the Reservation, including Smith-
4 Enke Road and Murphy Road, are in use.
- 5 158. When the GRPD gets an emergency call, they must determine if the emergency is on
6 the Reservation before responding; however, if it is a life-threatening emergency, the
7 GRPD will respond regardless of the location.
- 8 159. Smith-Enke Road and Murphy Road are periodically patrolled; they are not regularly
9 patrolled because the GRPD lacks the personnel.
- 10 160. Other law enforcement agencies and emergency services (other than GRIC) would be
11 allowed to access Section 16 to render services.
- 12 161. The development of the Wild Horse Pass Casino and Resort has led to increased calls
13 of criminal conduct.
- 14 162. The presence of the Vee Quiva Casino and Lone Butte Casino has increased GRPD
15 service calls in those areas.
- 16 163. The casinos on the Reservation employ private security; no GRPD officers are
17 stationed at the casinos as part of a regular shift.
- 18 164. Casinos and other businesses bring thousands of non-GRIC members onto the
19 Reservation every day.
- 20 165. Employees of GRIC's Cultural Resource Management Program ("CRMP") have
21 surveyed 42% of the Reservation resulting in the discovery of approximately 1,150
22 cultural resource sites.
- 23 166. There are numerous cultural resource sites off the Reservation.
- 24 167. The CRMP has never surveyed Section 16.
- 25 168. There are extensive cultural resource sites within a five mile radius of Section 16.
- 26 169. Development around the Reservation has negatively impacted cultural resource sites.
- 27 170. There has been a negative impact on cultural resource sites around the Wild Horse
28 Pass Casino and Resort and Vee Quiva Casino.

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

4 **II. Conclusions of Law**

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

6 **Indispensable Party**

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

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

12 4. Alternatively, a party is "required" if it claims an interest in the subject of the action
13 such that a decision in its absence will impair or impede its ability to protect that
14 interest or expose an existing party to a risk of multiple or inconsistent obligations.
15 Fed. R. Civ. P. 19(a)(1)(B)(i) and (ii).

16 5. If a party is required, the Court must order that the party be joined. Fed. R. Civ. P.
17 19(a)(2). However, if the party cannot be joined, the Court "must determine whether,
18 in equity and good conscience, the action should proceed among the existing parties
19 or should be dismissed." Fed. R. Civ. P. 19(b).

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

26 7. Following the reasoning set forth in the Court's March 9, 2006 Order, the Court
27 concludes that the United States, with respect to GRIC's counterclaim disputing legal
28 access across its tribal land, is a required party, but is not an indispensable party

1 requiring dismissal of this action in its absence. *See Puyallup Indian Tribe v. Port of*
2 *Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) ("[I]n a suit by an Indian tribe to protect
3 its interest in tribal lands, regardless of whether the United States is a necessary party
4 under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot
5 proceed under Rule 19(b).").

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

12 9. The Court further concludes that the United States cannot be joined because it has not
13 waived sovereign immunity in actions to establish an easement across trust or
14 restricted Indian lands. *See State of Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir.
15 1994) (concluding that "both the [Quiet Title Act's] general waiver of sovereign
16 immunity, as well as its exception for Indian lands, apply to cases involving claims
17 for less than fee simple title interests to disputed property.").

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

22 11. First, a judgment rendered in the United State's absence will not prejudice the United
23

24 ¹The Court recognizes that, in the cases GRIC cites, the Ninth Circuit concluded that
25 the United States, in actions involving title to Indian land, is a required party under Rule 19
26 and, because joinder is not feasible, an indispensable party requiring dismissal of the action.
27 *See Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991);
28 *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975). However, in
neither case did the Ninth Circuit discuss the "equity and good conscience" prong of Rule
19 and its impact on the analysis.

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

6 12. Second, while a judgment rendered in the United State's absence may be prejudicial
7 to and inadequate for the Trustee, insofar as any legal access will be clouded by the
8 risk that the United States will hereafter contest such access, the Trustee has
9 acknowledged that potential and urges the Court to proceed nonetheless. *See* Doc. #
10 277, p. 8 ("While it may be that the United States will not be bound by a decision of
11 this Court in this matter, it is nonetheless important for this Court to determine the
12 rights of the Trustee with regard to GRIC.").

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

16 14. The Court also concludes that GRIC has failed to show that the individual Indian
17 allottees are required parties under Rule 19.² GRIC has offered only conclusory
18 statements concerning the individual allottees' interest in this action. GRIC has failed
19 to present any evidence tending to show that the individual allottees' interest in the
20 allotted land, in light of the United States holding the land in trust for their benefit,
21 makes them required parties under Rule 19. *See Imperial v. Castruita*, 418 F. Supp.
22 2d 1174, 1178 (C.D. Cal. 2006) (finding conclusory statements, without evidence
23 showing absent parties are indispensable, to be insufficient to support dismissal under
24

25
26 ²While GRIC has not filed a motion seeking dismissal of this action for failure to join
27 a person under Rule 19, GRIC has filed briefs in which it argues that dismissal under Rule
28 19 is appropriate. Accordingly, the Court concludes that GRIC bears the burden of showing
that the individual Indian allottees are required parties under Rule 19. *See Clinton v. Babbitt*,
180 F.3d 1081, 1088 (9th Cir. 1999) (citations omitted).

1 Rule 19).³

2 **Access to Section 16**

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

4 16. Murphy Road, north of Casa Blanca Road, is an Indian Reservation Road ("IRR")
5 identified as BIA Route 93.

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

13 18. The owner of property abutting a public road has the right to use the road and to
14 access the road from his property. *See State of Arizona v. Thelberg*, 350 P.2d 988,
15 991 (Ariz. 1960) (citations omitted) (stating that the "owner of property abutting on
16 a public highway possesses, as a matter of law, not only the right to the use of the
17 highway . . . , but also a private right or easement for the purpose of ingress and egress
18 to and from his property."

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

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

23 21. The term "'public authority' means a Federal, State, county, town, or township, Indian
24

25
26 ³Tempering the potential prejudicial impact on the individual Indian allottees is the
27 principle that, "[a]s a general rule, one is not bound by a judgment *in personam* in a litigation
28 in which he is not designated as a party or to which he has not been made a party by service
of process." *Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp.*, 428
F.3d 831, 848-49 (9th Cir. 2005) (citations and internal quotations omitted).

1 tribe, municipal or other local government or instrumentality with authority to
2 finance, build, operate, or maintain toll or toll-free facilities." 23 U.S.C. § 101(a)(23).

3
4 22. Murphy Road is located within the Gila River Indian Reservation.

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

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

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

11 26. The doctrine of laches applies against Indian tribes. *See City of Sherrill v. Oneida*
12 *Indian Nation of New York*, 544 U.S. 197, 221 (2005). The doctrine of laches also
13 applies to cases involving possessory Indian land claims. *See Cayuga Indian Nation*
14 *of New York v. Pataki*, 413 F.3d 266, 273-78 (2nd Cir. 2005).

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

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

- 1 been terminated.
- 2 29. As a result, the Court concludes that the Trustee has shown that Murphy Road, from
3 Casa Blanca Road south to the Reservation's southern boundary, is an Indian
4 Reservation Road, as defined above, that is "open and available for public use." 25
5 C.F.R. § 170.120.
- 6 30. The Trustee next claims that both Smith-Enke Road and Murphy Road are public
7 roads pursuant to Revised Statute § 2477.
- 8 31. R.S. § 2477, 43 U.S.C. § 932 (1976) (repealed), provided that "the right of way for
9 the construction of highways over public lands, not reserved for public uses, is hereby
10 granted."
- 11 32. R.S. § 2477 establishes rights-of-way for highways constructed before its passage in
12 1866, *see Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 473 (1932),
13 and also "operates prospectively to grant rights of way for highways constructed after
14 its enactment," *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732
15 F.2d 1411, 1413, n.3 (9th Cir. 1984).
- 16 33. The repeal of R.S. § 2477 did not apply retroactively; thus, R.S. § 2477 was a
17 congressional offer to construct roads over public lands that remained open until
18 1976. *See* 43 U.S.C. § 1769(a). Any rights-of-way that had existed prior to the date
19 of the repeal were preserved. *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir.
20 1993).
- 21 34. To determine whether an R.S. § 2477 right-of-way exists, the Court looks to the law
22 of the state in which the right-of-way purportedly exists in order to determine whether
23 the federal grant was accepted. *See Standage Ventures, Inc. v. Arizona*, 499 F.2d 248,
24 250 (9th Cir. 1974).
- 25 35. Arizona cases analyzing R.S. § 2477 require "strict compliance with the provisions
26 of Arizona law" for an R.S. § 2477 right-of-way to exist. *State v. Crawford*, 441 P.2d
27 586, 590 (Ariz. Ct. App. 1968).
- 28 36. The *Crawford* court explained:

1 Cases decided under 43 U.S.C.A. § 932 hold that it constitutes an offer
2 on the part of the federal government to dedicate unreserved lands for
3 highway purposes, which offer must be accepted by the public in order
4 to become effective. Whether the offer to dedicate which is made
5 under the federal act is accepted by the establishment of a public
6 highway is an issue to be determined under the law of the state where
7 the highway is located. The federal statute does not of itself operate to
8 grant right-of-ways and establish highways contrary to the local laws.
9 The latter case makes it clear that, in order for there to be a public
10 highway, the right-of-way for which is granted by the federal act, the
11 highway must be established in strict compliance with the provisions
12 of the Arizona law. And, just as the local state law is determinative of
13 the issue of whether or not a public highway exists at all, it is also
14 determinative of the issue of the width and extent of the public right-of-
15 way.

16 *Id.* (citations omitted).

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

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

26 39. The Trustee has made no showing that the State of Arizona established any rights-of-
27 way for public highway purposes in the vicinity of Section 16 prior to 1883 and/or
28 1913, when the land surrounding Section 16 lost its public character by virtue of the
creation and additions to the Reservation.

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

1 the rights-of-way prior to the land losing its public character.

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

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

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

10 44. In granting school trust lands to the states, the federal government intended for the
11 school sections, through the sale thereof, to provide a revenue base to support public
12 education. *Id.* at 1002.

13 45. *Andrus* further provides:

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

19 *Id.*

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

23 47. The Court also concludes that the implied easement to Section 16 has been conveyed

24 _____

25 ⁴The Court concludes that Section 16 was conveyed to the Territory of Arizona in
26 1877, when the survey of Section 16 was filed. While GRIC cites *United States v. Southern*
27 *Pacific Transp. Co.*, 601 F.2d 1059, 1066 (9th Cir. 1979), to support its argument that the re-
28 survey of parcels surrounding Section 16, filed in 1921, supersedes the original survey filed
in 1877, the Court is not persuaded that such an effect results in the reversal of the prior
conveyance of Section 16 to Arizona.

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

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

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

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

20 51. "With the existence of a statutory right of access, no necessity exists for a common
21 law easement." *Fitzgerald v. United States*, 932 F. Supp. 1195, 1203 n.3 (D. Ariz.
22 1996).

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

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

28 54. The Court concludes that until the Trustee applies for a right of access pursuant to 25

1 C.F.R. § 169.1, *et seq.*, and such right of access is denied, no necessity exists for a
2 common law easement. The Court also concludes that no necessity exists for a
3 common law easement because the Court already has concluded that Murphy Road,
4 from Casa Blanca Road south to the Reservation's southern boundary, is an Indian
5 Reservation Road, and that an implied easement exists over Smith-Enke Road and,
6 in the alternative, Murphy Road.

7 55. While the Trustee is seeking to have the Court rule on the scope of the easements, for
8 current and future owners, the Court concludes that there is no actual case or
9 controversy such that any ruling would be an improper advisory opinion. *See*
10 *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007) (stating that
11 courts may adjudicate only actual cases or controversies; otherwise, a judgment would
12 be an unconstitutional advisory opinion). There has been no showing that the
13 easements, as configured, are insufficient to support the current use of Section 16.
14 Any ruling on the scope of the easements, based on possible future use or
15 development of Section 16, would be speculative at best and would constitute an
16 advisory opinion.

17 **Zoning**

18 56. GRIC seeks a ruling from the Court that it has the right to regulate the conduct of non-
19 members on Section 16 by controlling the zoning of Section 16.

20 57. GRIC may "retain inherent power to exercise civil authority over the conduct of non-
21 Indians on fee lands within its reservation when that conduct threatens or has some
22 direct effect on the political integrity, the economic security, or the health or welfare
23 of the tribe." *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,
24 492 U.S. 408, 428 (1989), *quoting Montana v. United States*, 450 U.S. 544, 566
25 (1981).

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

28 59. At trial, it became clear that there are no current plans to sell Section 16 to a

- 1 developer and no current plans to construct residential homes on Section 16.
- 2 60. To the extent GRIC seeks, if at all, the right to control the zoning over Section 16 as
3 it presently is being used, the Court concludes that GRIC has failed to show that the
4 present use has a demonstrably serious impact and imperils the political integrity,
5 economic security, or health and welfare of the tribe.
- 6 61. To the extent GRIC seeks the right to control the zoning over Section 16 based on the
7 potential sale of Section 16 to a developer and the developer's potential plans for
8 Section 16, the Court concludes, like the Trustee's claim seeking a ruling on the scope
9 of the easements, there is no actual case or controversy and any such ruling would
10 constitute an improper advisory opinion.
- 11 62. In the alternative, if there is an actual case or controversy, then the Court concludes
12 that speculation concerning the potential impacts of a potential sale and development
13 of Section 16 is insufficient to show a demonstrably serious impact that imperils
14 GRIC's political integrity, economic security, or health and welfare. *See Yellowstone*
15 *County v. Pease*, 96 F.3d 1169, 1177 (9th Cir. 1996) (concluding that speculation
16 concerning possible results is insufficient to show the necessary imperilment).
- 17 63. In the further alternative, if potential impacts can be found sufficient, then the Court
18 concludes that the evidence GRIC presented at trial fails to show that the development
19 of Section 16 will have a demonstrably serious impact and will imperil GRIC's
20 political integrity, economic security, or health and welfare. Section 16 is located
21 near the border of the Reservation and is close to the City of Maricopa, which is
22 undergoing rapid residential and commercial development significant. While the
23 development of Section 16 will bring additional people onto the Reservation, GRIC
24 has failed to show that the impact on its police department, emergency medical
25 responders, water resources, farming operations, and cultural resources will be
26 demonstrably serious and will imperil GRIC's political integrity, economic security,
27 or health and welfare.
- 28

1 Trespass

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

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

7 66. Further, the Court notes that GRIC, during the trial, failed to put on any evidence of
8 damages related to the alleged trespass. While GRIC states in its proposed
9 conclusions of law that it is entitled to damages, the amount of which shall be
10 determined in a subsequent hearing, no such subsequent hearing was contemplated.
11 Accordingly, even if GRIC had proven that the Debtors and their invitees trespassed
12 on GRIC's tribal and allotted lands, GRIC would not be entitled to any damages.

13 **III. Judgment**

14 Based on the foregoing,

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

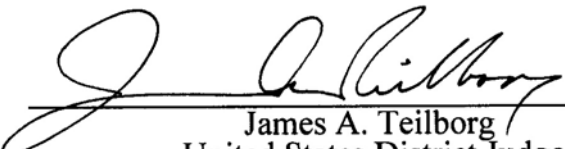
20 **IT IS FURTHER ORDERED** that the Motion to Quash Subpoena to William
21 Rhodes (Doc. # 231) is DENIED as moot; and

22
23
24
25
26 _____
27 ⁵Because of the limitations of this judgment as discussed in the indispensable party
28 section, and questions the Court has concerning GRIC's authority to prosecute a claim of
trespassing on land allotted to individual Indians, the Court limits its conclusion on trespass
to GRIC and its tribal and allotted lands.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

DATED this 12th day of February, 2008.



James A. Teilborg
United States District Judge