COLORADO RIVER INDIAN TRIBES

OFFICE OF THE ATTORNEY GENERAL

CHRONY

March 2, 2009

Andrea Lynn Hoch
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, CA 95814

Re: ***Response to letter dated September 12, 2008***

Dear Ms. Hoch:

In your letter dated September 12, 2008, you requested that the Colorado River Indian Tribes ("CRIT" or "Tribes") address the issues of allotment and the termination, or disestablishment, of the Colorado River Indian Reservation ("Reservation"). Specifically, you asked CRIT to analyze the Act of April 21, 1904, 33 Stat. 189, 224 ("1904 Act"), the Act of March 3, 1911, 36 Stat. 1058, 1063 ("1911 Act"), and the Act of April 30, 1964, 78 Stat. 188 ("1964 Act") and to comment on your analysis of these statutes.

The Tribes must respectfully, but emphatically reject the assertion that the Reservation was terminated by the Act of 1904, and the attendant conclusion that "it appears that any CRIT California reservation lands, which were terminated in 1904, have not been restored." Coming from the Office of the Governor of the State of California, such assertions damage the Colorado River Indian Tribes as a sovereign, diminish the social, economic, and national defense contributions made by the members of the Tribes over more than a century of peaceful industry, but most important, they again put at risk the well being of future generations.

Nonetheless, the Tribes appreciate the opportunity to provide the Governor's Office with additional support for the validity of its land holdings within the State of California. What follows is a discussion of the statutory text, legislative history, and case law relevant to the enactments cited in your question to us. We offer as well, a frank discussion of other pertinent factors which, we hope, will settle the question of the existence of the Colorado River Indian Reservation within the State of California, and which will clarify the location and extent of the Reservation boundary that has, as you are aware, been a topic of recurring debate. The Tribes' detailed response follows.

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1. DID THE 1904 ACT TERMINATE THE RESERVATION?

No, the 1904 Act did not terminate the Reservation. The introductory passage of Section 25 of the 1904 Act authorizes the Secretary of the Interior to "utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain . . . ." Essential to the context and applicability of this authority is the phrase "such works." The "works" so identified are reclamation works, a class of public works newly authorized by the Reclamation Act of June 17,1902 (32 Stat. 388). The 1904 Act contemplates disposal to settlers (the public) of reservation lands made irrigable by these new projects, and *only* those newly irrigable lands. The Reclamation Act of 1902 - whether read alone or in combination with the 1904 Act - neither expressly or impliedly states that works undertaken pursuant to that Act upon Indian Reservations, such as those authorized under the 1904 Act, will serve to auto-disestablish such reservations. The assertion, as stated in your letter of September 12, 2008, that this was in fact the outcome of the combined Acts, deeply disturbs the Tribes.

Notably, the language used throughout the 1904 Act is permissive in character: "in carrying out any irrigation enterprise which *may* be undertaken . . . and which *may* make possible . . . reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona, the Secretary of the Interior is hereby authorized to . . . dispose of any lands in said reservations which *may* be made irrigable . . . ." (Emphasis added.) A full and fair reading of the statute reveals that its effects were prospective, and that any disposition of lands under the Act was dependant upon, and could only be executed subsequent to an evaluation to determine irrigability, and the construction of the necessary irrigation infrastructure. At its heart, the 1904 Act authorized a future taking, by eminent domain, of lands Congress believed would be more productive in the hands of white settlers. Your Office may wish to consider the present-day ethical and political ramifications of an attempt to revitalize such a policy.

Further, Section 25 of the 1904 Act is replete with references to the present and continuing existence of the Reservations it impacts. First, it refers exclusively to *"the irrigable lands* on the Yuma and Colorado River Indian Reservations in California and Arizona." (Emphasis added.) It does not generalize. It does not reference any other portion of Reservation lands; only "lands that may be made irrigable" are identified as lands subject to the authority granted under the 1904 Act. Nor does it speak of the Reservations in the past tense. In addition, of those lands made irrigable by works constructed pursuant to the 1904 Act as amended by the Act of March 3, 1911, ten acres were to be "reserved for and allotted to each of the Indians belonging on said reservations . . . ." This construction would be surplusage were it the intent of Congress that "said reservations" would cease to exist under the 1904 Act. Finally, in addition to "charges required to be paid under [the Reclamation] Act," settlers were also required to pay "upon the unallotted Indian lands . . . [a sum which] shall fairly represent the value of the unallotted lands in said reservations before reclamation[.]" This additional sum was to be used to pay the costs of reclamation, and "the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time . . . for their benefit." This is not language of termination; this is language of continuity.

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The information and maps provided to your Office perhaps do not clearly convey the fact that approximately fifty (50) percent of the land within the Reservation boundaries is "irrigable" as contemplated by the 1904 Act. The remainder of the lands within the Reservation are mountainous or hilly – unsuited to irrigation as practiced either in 1904, or modernly. Thus, even had there been an effort pursuant to the 1904 Act to reclaim, divest, and redistribute to settlers all irrigable lands within the Colorado River Indian Reservation, this would still leave approximately fifty percent of the Reservation lands (plus 10 acres of the irrigable acreage for "each of the Indians belonging on said reservation" per the 1904 Act as amended by the 1911 Act,) intact. As you are aware, however, no such effort was undertaken. (*See: Part IV, Executive and Departmental Orders Published in the Federal Register*, Vol. 2 – 1937; published March 8, 1937, p. 1402)

In the Northwest Corner Lands, where the Reservation extends deepest into California, the ratio of irrigable to non-irrigable land is significantly lower due to the high mountains, and extensive rocky hills in that region. The irrigable area in the Northwest Corner Lands was estimated by Supreme Court Special Master Rifkind to be approximately 5,933 acres. *(Report of Special Master Rifkind*, at 272 (December 5, 1960). Even using a conservative 50% ratio of irrigable to non-irrigable land, there are 6,000 acres of Reservation land on the California side of the Colorado River which were never within the scope of lands the Secretary "may" have disposed of – just in the Northwest Corner Lands. These are lands indisputably within the Colorado River Indian Reservation.

To be certain, the 1904 Act was intended to authorize a significant taking of Reservation lands in the name of western progress and settlement. The land was to be identified and assessed for its irrigability, and if found ripe for irrigation purposes, it was to be plucked out of the Reservation holdings, and doled out to yeomen settler/farmers. Said yeomen farmers were to pay the constitutionally required "just compensation" for the taking, out of which both the value of the land, and the cost of reclamation (development) was to be recovered by the United States, with the "remainder" to inure to the benefit of "said Indians." While this plan offered some benefit to the Tribes – their allotments would receive water from a U.S. Government-built and maintained irrigation system, and any extra income generated by settler payments might one day be spent "for their benefit." - this boon, would be tempered by the likely loss of more than half of their irrigable land; a bittersweet "benefit" at best.

The Tribes are all too familiar with the 'disestablishment effect' your letter characterizes the 1904 Act as having, but that statute did not, by itself, or in combination with the 1902 Reclamation Act, terminate, disestablish, or even diminish the CRIT Reservation. Reading the 1904 Act in that way ignores both the text of the Act itself, and the relationship CRIT has maintained with the United States throughout the century since that Act was passed. Such a reading also conflicts with United States Supreme Court and other federal court precedent. Again, a century ago, westward expansion and massive takings of Reservation lands in the name of economic development and progress were deemed societal goods which, in some cases, outweighed their costs. The Tribes do not believe we overstate the matter when we say that today, in light of all that has transpired over the intervening decades, these values have changed, and that the Governor's Office will be hard-pressed to justify reliance upon the 1904 Act to

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support a reassertion of takings envisioned by, and authorized therein, but which never actually occurred.

Although initially the allotment program was managed on a national scale under the General Allotment Act of 1887, by the turn of the century Congress handled the surplus land question on a reservation-by-reservation basis. *See Solem v. Bartlett*, 465 U.S. 463, 467 (1984). The 1904 Act is precisely such a statute, the relevant portion providing:

> [T]he Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in [the Reservation] which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the [Reservation] five acres of the irrigable lands. The remainder of the lands irrigable in [the Reservation] shall be disposed of to settlers under the provisions of the reclamation Act.

33 Stat. 224.

Nowhere in the 1904 Act does Congress declare that any CRIT lands lost reservation status or were otherwise divested of Indian interests. In 1911, the 1904 Act was amended in order to double the size of the Indian allotments to ten acres, but again, no changes were made that illustrated an intent by Congress to disestablish or diminish the Reservation. 36 Stat. 1063. The absence of such language is important because although some in Congress may have anticipated the dissolution of Reservations at some future point, the Supreme Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 465 U.S. at 468-69.

Diminishment of a reservation is never "lightly inferred." *Id.* at 470. Once a reservation is created "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." *Id.* (emphasis added); *see generally County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992)(adhering to basic canon of statutory construction that laws are to be construed liberally in favor of Indian tribes). Hence, a 1908 statute authorizing and directing the Secretary of the Interior "to sell and dispose" of portions of the Cheyenne River and Standing Rock Indian Reservations did nothing to diminish the reservations or change their boundaries. *Solem*, 465 U.S. at 472-73. Similarly, a 1906 statute providing for Indian allotments and the settlement and entry, under the homestead laws, of the surplus lands that remained lent "no support" to the argument that the Colville Reservation was terminated. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-55 (1962). Again, an 1892 statute opening "all" of the lands of the Klamath River Indian Reservation to "settlement, entry, and purchase" by non-Indians under the homestead laws did not "even suggest that Congress intended thereby to terminate" that reservation. *Mattz v. Arnett*, 412 U.S. 481, 494-97 (1973). These statutes certainly opened the way for non-Indian settlers to own land within Indian reservations, but that is all they did, and nothing more. *See Id.* at 497.

Furthermore, unless otherwise provided by Congress, the allotments under these surplus land statutes were to be administered under the provisions of the General Allotment Act of 1887,

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25 U.S.C. § 335, the policy of which was to continue the reservation system while allotments remained in trust for a period of at least twenty-five years. *Mattz*, 412 U.S. at 496; 25 U.S.C. § 348. Hence, only after the trust period expired could a reservation have been disestablished. *Mattz*, 412 U.S. at 496. In 1934, however, Congress enacted the Indian Reorganization Act, which repudiated the allotment policy altogether and mandated that allotments would continue to be held in trust until Congress provided otherwise. 25 U.S.C. § 462. Approximately 841 allotments, accounting for 8,410 acres, existed on the Colorado River Indian Reservation at that time (1934), and each of these were to remain in trust indefinitely. *See Allotment Information for Western BIA Region* (Indian Land Tenure Foundation), http://www.indianlandtenure.org/ILTFallotment/specinfo/sd%20Western .pdf. (Accessed 2/05/2009) To date, Congress has not provided otherwise and allotments continue to be held in trust on the Reservation; none of these allotments have ever been alienated to non-Indians.[1] *Id.*

The twin issues of disestablishment and diminishment on the Reservation have, in fact, previously been litigated in federal court. In *Colorado River Indian Tribes v. Town of Parker*, 705 F.Supp 473 (D. Ariz. 1989), the Town of Parker, which is located entirely within the exterior boundaries of the Reservation, asserted that it could enforce its building code on tribally owned lots because the town had been disestablished from the Reservation pursuant to an act of Congress. The Act of April 30, 1908, 35 Stat. 70, 77, provided in relevant part that the Secretary of the Interior was authorized "to reserve and set apart lands for townsite purposes in the . . . Reservation, in California and Arizona, and to survey, plat, and sell the tracts so set apart in such manner as he may prescribe." *Id.* at 474-75. The court, relying almost exclusively on the *Solem*, *Mattz*, and *Seymour* line of cases and their progeny, held that the Town of Parker had not been disestablished from the Reservation, further stating that the tribally owned lots "are, and *always have been* part of the . . . Reservation and that, said lots, are Indian country." *Id.* at 480 (emphasis added). Of particular note, the Town of Parker had argued that the 1904 Act supported disestablishment, but the court flatly rejected this by stating that the statute "fail[ed] to disclose a clear congressional intent to diminish the CRIT reservation" and was not "helpful to Parker's position." *Id.* at 476. Considering this holding that a 1908 statute did not disestablish a portion of the Reservation and that certain tracts of land were *always* part of the Reservation, it is a non sequitur to then conclude that a *prior* law, the 1904 Act, actually terminated the Reservation. Indeed, it is an especially difficult assertion to support when the court flatly rejected the Town of Parker's claim that the 1904 Act supported its disestablishment argument.

2. THE 1964 ACT DID NOT "RESTORE" THE RESERVATION

The position taken in your letter mischaracterizes the 1964 Act by imputing meaning that does not exist, overlooking text that does exist, and ignoring prior legislation that the 1964 Act responded to. For example, you state that the 1964 Act "restored the unsold and unallotted land in Arizona to the reservation" but that "unallotted lands in California would be restored only 'when and if determined to be within the [R]eservation.'" In fact, neither the word "restore," nor the concept of restoration, is found anywhere in the 1964 Act. The underlying reason for this absence is simply that the Reservation had never been disestablished to begin with, so there was

[1] The decline in the number of allotments between 1935 and 1986 is attributable to both: (1) individuals exchanging their allotments with the Tribes for land assignments; and (2) the repurchase of allotments by CRIT.

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no need for a subsequent restoration; the second, more overt reason for its absence is that the sole purpose of the 1964 Act was to fix "beneficial ownership" of Reservation lands with the Tribes. Also, as explored more fully below, you misapply the phrase "when and if determined to be within the [R]eservation" to *all* of CRIT's land in California.

The concept of "restoration" *does* appear in the record, as cited above, in the Departmental Order issued by Secretary of the Interior Harold Ickes, published in the Federal Register on March 8, 1937. That Order confirms the character and intent of the 1904 Act as previously described herein, and states in pertinent part:

> Whereas, no reclamation project was undertaken on the Colorado River Reservation under the Reclamation Act of June 17, 1902 (32 Stat. 388), authorized by section 25 of the Act of April 21, 1904, supra, and no part of the lands of said reservation (except a small area in the townsite of Parker), has been opened to settlement and sale or other form of disposition under any of the public land laws of the United States, and such lands have always been regarded as constituting a part of the Colorado River Reservation, . . .
>
> Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stats. 984), I hereby find that restoration to undoubted tribal ownership of all undisposed of lands within the Colorado River Indian Reservation, including any vacant townsite lots within said reservation, will be in the public interest, and the said lands are hereby restored to such tribal ownership and are added to and made a part of the existing Colorado River Indian Reservation, subject to any valid existing rights, for the use and benefit of the Indians of that reservation and such other Indians as may be entitled to rights thereon.
> (*Colorado River Indian Reservation, Arizona and California, Order of Restoration*, Part IV, Executive and Departmental Orders Federal Register, Vol. 2 – 1937; published March 8, 1937, p. 1402)

You will note that this Order was issued some twenty-seven years prior to the 1964 Act. Secretary Ickes sought to confirm by this Order that the intentions of the Department of the Interior, and presumably those of the Federal Government at large, had changed regarding the "open" status of reclamation projects and subsequent land divestment on the Colorado River Indian Reservation. By 1937, the United States had had fifty years to consider the effectiveness and wisdom of the General Allotment Act of 1887, and efforts were already underway to undo some of the damage. The Secretary apparently also sought to fix "beneficial" ownership status in the Tribes, however, as discussed below, he was not entirely successful, and it was in the 1964 Act that Congress finally confirmed and codified the Tribes' beneficial ownership status in all of its Reservation lands.

Beneficial ownership was at issue due to the language used by Congress when it created the Reservation. To explain, the Act of March 3, 1865 (13 Stat. 559) stated that the Reservation was established for the "Indians of said [Colorado] River and its tributaries," making it unclear whether there was an open-ended offer to any Indian along the Colorado River to settle there, or

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whether the Indians already settled on the Reservation were the exclusive owners.[2] S. Rep. No. 88-585, at 2 (1963); *Hearing on H.R. 8027 Before the Subcommittee on Indian Affairs,* 88th Cong. 9 (Feb. 6, 1964)(statement of Morris Udall, U.S. Representative and author of H.R. 8027, a companion bill to S. 2111). Until this question was resolved, only the Secretary of the Interior, not CRIT, could lease Reservation lands. Act of August 9, 1955, 69 Stat. 539; Act of June 11, 1960, 74 Stat. 199 ("1960 Act"); Act of September 5, 1962, 78 Stat. 428 ("1962 Act"). The 1964 Act was passed for the sole purpose of answering the ownership question in favor of the Tribes, thereby amending the 1960 Act to allow CRIT, not the Secretary of the Interior, to lease its land in Arizona and California. 78 Stat. 188-89.

The 1960 and 1962 Acts provide additional evidence of the Reservation's existence, and dispel assertions that it had been terminated in 1904. For example, the 1960 Act states:

> That, until a determination has been made of the beneficial ownership of the lands on the Colorado River Indian Reservation, Arizona and California, that were set apart by the United States for the Indians of the Colorado River and its tributaries, the Secretary of the Interior is authorized to lease any unassigned lands on the [R]eservation which are located within Arizona. . . . Income received from such leases of unassigned lands may be expended or advanced by the Secretary for the benefit of the Colorado River Indian [T]ribes and their members.

Here, notwithstanding the question of beneficial ownership, Congress clearly recognized the Reservation's existence (as well as its existence in both "Arizona and California"). Thus, the argument that the reservation was terminated at the same time that Congress was authorizing the Secretary of the Interior to lease land on that reservation for the benefit of the Tribes and their members residing thereon, strains logic. The 1962 Act contained language nearly identical to that found in the 1960 Act, but it also authorized the leasing of certain lands in California.[3] Again, the 1964 Act was a direct response to these special leasing statutes which recognized the Reservation's existence but left open the question of beneficial ownership; and for all the reasons stated above, the assertion that the 1964 Act somehow "restored" the Reservation is simply unfounded in either the legislative history or the law.

3. THE RESERVATION EXTENDS INTO CALIFORNIA

You also stated:

> As you know, the boundaries of CRIT Reservation lands in California, if any, have not been resolved and are still subject to dispute. Consequently, the pre-condition in the 1964 Act to restoration of any California lands has not been satisfied. Thus, it appears that any CRIT California reservation lands, which were terminated in 1904, have not been restored.

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[2] This question alone recognizes the existence of the Reservation, even if beneficial ownership was at issue. Nothing in the 1964 Act's legislative history indicates a dispute about whether the Reservation existed. In fact, even a cursory review of the history reveals that the Reservation's actual existence was, if anything, simply taken for granted. S. Rep. No. 88-585 (1963); H.R. Rep. No. 88-1304 (1964); Hearing on H.R. 8027 Before the Subcommittee on Indian Affairs, 88th Cong. (Feb. 6, 1964); 109 Cong. Rec. 20,072-73 (1963).

[3] In CRIT's letter to you dated June 4, 2008, these lands in California were referred to as the "Northwest Corner Lands."

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Having addressed the "termination" and "restoration" issues above, the Tribes respond, again, to the assertion that the Reservation does not extend into California and to the assertion that a genuine dispute over this fact still exists. In our letter to you dated June 4, 2008, the Tribes covered this issue in detail, so here, pursuant to your limited request, the Tribes focus primarily on the 1960, 1962, and 1964 Acts.

To recap, the 1960 Act provided that the Secretary was authorized to lease land on the Reservation, but only in Arizona. The 1962 Act authorized the Secretary to lease land on the Reservation in Arizona *and* California, but not land positioned "south of Section 25 of Township 2 South, Range 23 East, San Bernardino Base and Meridian, California." [For ease of reference, this land is the portion of the Reservation that lies along the California side of the Colorado River, comprises approximately the lower one-half of the length of the Reservation border in California, and forms what is commonly referred to as the "Western Boundary."] At that time, the status of the land described above - and *only* that land - was disputed, and Congress chose not to resolve the issue by way of the 1962 Act.

South of Section 25 of Township 2 South, Range 23 East, the question at the heart of the boundary dispute involves the interpretation of the 'call' of the boundary along the lower section of the Reservation on the California side of the Colorado River. The Executive Order of May 15, 1876 in which the call was stated uses the description: [From "the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . ." In 1876, when the call of the Reservation boundary was drafted, the common understanding and usage of the term "bank" when employed as a call in legal boundary descriptions indicated the permanent high-water mark. It is this interpretation of the call that the Tribes assert is the correct one - relying on boundary surveys conducted by the United States at the time the Reservation was created, and which have been confirmed by resurvey numerous times since - <u>fixing the boundary at the permanent high-water mark</u>. However, in modern usage, a call to the "bank" of a river is often employed, or interpreted, to indicate the water's edge. The difference between these interpretations is the difference between those bottomlands that lie along the river's edge, within California, being included or excluded from the Reservation. This is not, as you are aware, an inconsiderable amount of land, comprising lowlands along some 25 miles of the River/Reservation Boundary. It was the uncertain status of <u>only</u> this land that caused the U.S. Supreme Court in *Arizona v. California*, 376 U.S. 340 (1964) to hold in abeyance a final determination of the amount of Colorado River water the Tribes would be entitled to, until the disputed boundaries were finally determined. If these bottomlands were included in the Reservation, the Tribes were likely entitled to additional water, if they were excluded, the entitlements would stand as then determined. The Tribes thereafter entered into a settlement agreement pursuant to which it accepted a fixed entitlement of water, without adjudication of the boundary issue. (See attached copy, *Arizona v. California*, 530 U.S. 392 (2000), at pg. 4 for discussion of litigation history, at pg. 17 for discussion of settlement adopted.) Thus, since 1964, the Tribes have borne the burden of rebuffing challengers to its beneficial ownership of these lands, each of whom cites the phrase "when and if determined to be within the [R]eservation" as evidence of their wearisome claims.

Congress expressly authorized the Secretary of the Interior to lease lands in California that were *not* disputed, however. Those lands form the northwestern part of the Reservation and are unambiguously contained within the boundary permanently marked by two California mountaintops. Two years later, Congress declared CRIT to be the beneficial owner of Reservation lands in Arizona *and* California, and so, from that point forward it could lease the same land in Arizona *and* California that the Secretary of the Interior was authorized to lease under the 1962 Act. Again, Congress chose not to resolve the dispute over certain California lands, but CRIT was expressly authorized by Congress to lease its northern California lands. Furthermore, the Reservation was defined by the 1964 Act as follows:

> "Colorado River Reservation" means the reservation for Indian use established by the Act of March 3, 1865 (13 Stat. 559), as modified and further defined by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915, *all of which area shall be deemed to constitute said [R]eservation*. (emphasis added).

As described previously here, and in CRIT's letter dated June 4, 2008, the above-cited Executive Orders placed the Reservation's northwest and northeast boundaries in California and atop permanent mountains. Congress, through the 1964 Act, recognized that these boundaries were unambiguous and indisputable; thus, again, CRIT was expressly authorized to lease these lands in California. Your letter makes a sweeping assertion about *all* of CRIT's land in California that fails to acknowledge the express language of the 1964 Act. Unfortunately, your letter *does* acknowledge the often – and often intentionally - misquoted phrase in the 1964 Act: "when and if determined to be within the [R]eservation." Whether carelessly cited as a standalone provision, or purposely misquoted by those who would deprive the Tribes of their lands for personal gain, as a matter of law and fact, the provision clearly refers to the California lands "south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian," not the California lands *north* of this area. As you are aware, Congress has plenary power over Indian affairs, U.S. Const. Art. I, § 8, cl. 3; *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (plenary power of Congress over Indian affairs drawn from U.S. Constitution), and in this instance Congress has clearly spoken. Hence, despite claims to the contrary by residents, departments, organizations, or individuals in your State or elsewhere, since 1876, no genuine dispute has existed, nor can a cognizable claim be raised or supported, over whether the Reservation extends into California in the area bounded by permanent mountaintops.[4] This was not settled by the 1964 Act, but merely confirmed.

Finally, the Supreme Court awarded water rights to CRIT for the land it *indisputably* owned in California. *Arizona v. California*, 376 U.S. 340, 345 (1964) (CRIT received a maximum of 717,148 acre-feet of water for its lands, *including in California*, and the Court set priority dates for lands reserved by the 1874 Executive Order of November 16, 1874, except as later modified, and lands reserved by the 1876 Executive Order of May 15, 1876); *Arizona v. California*, 439 U.S. 419, 428 (1979) (slightly expanded CRIT's water rights and specified how many acre-feet of water was awarded pursuant to each Executive Order, totaling over 54,000

[4] As described in CRIT's letter dated June 4, 2008, the Tribal government and the Federal government regard the dispute over the southwestern boundary in California as having been resolved by the Secretary of the Interior's 1969 Order.

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acre-feet for CRIT's land in California). Clearly, the Supreme Court would not have awarded water rights to CRIT for its California lands if it believed the Reservation did not legally extend into California, and neither would it have set the priority dates when it did if the Reservation had only recently been restored.

4. CONCLUSION

Contrary to the assertion stated in your letter, the 1904 Act did not terminate, or disestablish, the Reservation. Neither did that Act diminish the Reservation. These facts are established by the plain text of the 1904 Act, by examination of the purpose of the Reclamation Act of 1902, by the subsequent actions of Congress and the Secretary of the Interior recognizing the continuity and vitality of the Reservation, and by clear United States Supreme Court precedent. Furthermore, as noted in *Colorado River Indian Tribes v. Town of Parker*, a federal District Court concluded that the Reservation was not disestablished by the 1904 Act, or a 1908 statute similar in purpose to the 1904 Act, finding that the tracts of land within Parker townsite had always been part of the Reservation. *See* Act of April 30, 1908, ch.153, 35 Stat. 70. As a result, the suggestion that the 1964 Act served to "restore" the Reservation is neither logical nor grounded in the plain statutory language.

The Tribes also do not agree with your analysis that the 1904 act had any effect on CRIT lands within California, or that the fixed boundary between Black Mountain, in Arizona, across the Colorado River to Monument Peak in California, to Riverside Mountain in California, to the west bank of the Colorado River in California, is in dispute, or that it reasonably could be disputed. The boundary simply *is* in California. Congress has expressly rejected the claim that the Reservation does not extend into California, reiterating its existence there in every enactment since its boundaries were clarified in 1876. Such claims frequently arouse the concern of Legislators and other State officers, both in California and Arizona, prompting them to demand that the Tribes answer these same questions with grim regularity. As for that, it is a tried and true strategy to curry temporary support for the proponent who has some interest in either forestalling a legal action being pursued by the Tribes, or delaying fulfillment of a legal obligation due the Tribes. As for a valid, honest, or legally sufficient strategy, based as it is on misleading citations and negligent or willful misinterpretations of fact and law, it is a tired, and untrue one.

Thank you, Ms. Hoch, for providing the Tribes with the opportunity to respond to your questions. These are neither unfamiliar questions, nor, as you have just seen, do they raise legal issues or factual challenges which are especially difficult to address, and to dispel. They are, however, a recurring source of concern for the Tribes. When an Officer of your stature, from a State as important to the Tribes enterprises as California is, expresses doubt as to the very existence of the Reservation – even if only to test the validity of arguments raised by third parties, as appears to be the case here – the Tribes are compelled to expend resources to respond with appropriate vigor. While this is a "cost of doing business," it is a cost that goes much deeper than the hours it has taken to prepare this memorandum. Each round of inquiries that receives the attention – even passing attention – of State or Federal officials becomes fuel for further delay and legal costs related to the exercise or enforcement of the Tribes leasing rights, and other endeavors or enterprises. We therefore urge your Office to refrain from, and reject with like vigor, any repetition of the factually incorrect, legally insupportable assertions as expressed in your letter of September 12, 2008. Your comments or questions are welcome, and may be

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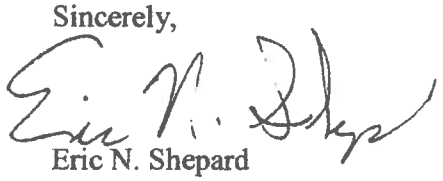
addressed to Tribes' Office of the Attorney General, or you may reach the Office of the Attorney General by phone at: (928) 669-1271.

Sincerely,



Eric N. Shepard
Attorney General,
Colorado River Indian Tribes.

Enclosures: *Arizona v. California*, 530 U.S. 392 (2000)
Colorado River Indian Tribes v. Town of Parker, 705 F. Supp. 473 (1989)
Colorado River Indian Reservation, Arizona and California, Order of Restoration, Part IV, Executive and Departmental Orders, Published in the Federal Register, Vol. 2, March 8, 1937

CC: Eldred Enas
Tribal Council Chairman
Colorado River Indian Tribes

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