

1 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the
2 “Trustee”). The Defendant/Counter-Plaintiff Gila River Indian Community (“GRIC”) is a
3 federally-recognized Indian Community organized under Section 16 of the Indian
4 Reorganization Act, 25 U.S.C. § 461, *et seq.* GRIC is based on the Gila River Indian
5 Reservation (the “Reservation”), which consists of approximately 372,000 acres in south-
6 central Arizona, and includes members of the federally-recognized Akmil O’odham
7 (“Pima”) and Peeposh (“Maricopa”) Tribes.

8 Between 2001 and 2003, S&T Dairy (the “Dairy”) was constructed on land known
9 as Section 16 of Township 4 South, Range 4 East in Pinal County, Arizona, comprising
10 approximately 657 acres (“Section 16”). In or about September 2003, Michael Schugg
11 and Debra Schugg (the “Schuggs”) acquired title to Section 16. Section 16 is located
12 wholly within the Reservation and is physically accessible by Smith-Enke Road and
13 Murphy Road. In 2004, the Schuggs made a request to amend the Pinal County land use
14 designation from “Rural” to “Transitional” (allowing a higher-density housing
15 development). The GRIC objected to the amendment to the land use designation and
16 Pinal County ultimately rejected the application.

17 In 2004, the Schuggs declared bankruptcy and listed Section 16 as their largest
18 asset. During the bankruptcy proceedings, the GRIC filed a proof of claim asserting that
19 it had an exclusive right to use and occupy Section 16, authority to impose zoning and
20 water use restrictions on Section 16, and a right to injunctive and other relief for trespass
21 on reservation land and lands to which it held aboriginal title. The Trustee then initiated
22 an adversary proceeding seeking a declaratory judgment that the Schuggs’ estate had
23 legal title and access to Section 16. In 2005, Plaintiffs and Defendants stipulated that the
24 reference should be withdrawn to this Court. (Docs. 29, 30).

25 In 2007, this Court presided over a bench trial, where the issues to be resolved by
26 the Court were generally as follows: (1) whether there was an easement or right-of-way
27 via Smith-Enke Road or Murphy Road for access and utilities to Section 16; (2) whether
28 Murphy Road was an Indian Reservation Road that must remain open for public use; (3)

1 whether Smith-Enke Road and/or Murphy Road were public rights-of-way under Revised
2 Statute 2477 that must remain open for public use; (4) whether the easement and/or right-
3 of-way access (if any) to Section 16 included the right to improve the easements or install
4 additional utilities thereon; (5) whether GRIC had the power to regulate zoning on
5 Section 16; and (6) whether the Trustee, the Debtors, representatives of the S & T Dairy
6 and/or their respective invitees, employees, assignees, agents, or representatives
7 trespassed on tribal or allotted lands within the Gila River Indian Community's
8 reservation.

9 At the conclusion of the trial, the Court determined that Plaintiffs were entitled to
10 legal access to Section 16 due to an implied easement over Smith-Enke Road and a right
11 of access over Murphy Road, either because of an implied easement or because the
12 relevant portion of the road was Indian Reservation Road that must remain open for
13 public use, that Defendant is not entitled to exercise zoning authority over Section 16,
14 and that no trespass occurred. The Court also determined that the GRIC's assertion of
15 authority to control the zoning of Section 16 was not ripe for adjudication.

16 The GRIC then appealed to the Ninth Circuit Court of Appeals ("Court of
17 Appeals"). The GRIC appealed the Court's judgment that the United States was not an
18 indispensable party to the action, the Trustee's rights of access to Section 16, and the
19 rejection of the Community's assertions of aboriginal title and zoning authority over
20 Section 16. The Trustee cross-appealed the District Court's finding that Smith-Enke Road
21 and Murphy Road were not public roads under Revised Statute 2477. The Court of
22 Appeals affirmed in part, but remanded for further consideration of whether Murphy
23 Road was a public Road in light of ongoing proceedings before the Bureau of Indian
24 Affairs regarding the issue of whether Murphy Road was an Indian Reservation Road
25 open to the public.

26 After remand, the Parties filed a Joint Status Report (Doc. 314) informing the
27 Court that the Trustee had withdrawn his appeal to the Bureau of Indian Affairs regarding
28 the status of Murphy Road as a public road. The Parties agreed that, in light of this

1 dismissal, the question of whether Murphy Road was an Indian Reservation Road open to
2 the public was no longer subject to dispute in this case. In the Joint Status Report, the
3 Parties represented, “the parties agree that there are no longer any issues to be decided by
4 this Court on remand.” (Doc. 314 at 2).

5 The Court then directed the Parties to jointly submit a proposed form of judgment
6 that “will close this case.” (Doc. 315). When the Parties represented to the Court that they
7 were unable to agree on a proposed form of judgment, the Court ordered that each party
8 should separately file a proposed form of judgment or “motions as to why judgment
9 should not be entered at this time.” (Doc. 319). Thereafter, the GRIC filed its Motion for
10 Entry of Final Judgment with a proposed form of judgment (Doc. 321) and the Trustee
11 filed a Motion to Set Rule 16 Hearing and Postpone Entry of Judgment (Doc. 320).

12 In the Motion to Set Rule 16 Hearing, the Trustee argued that entry of final
13 judgment was no longer appropriate in this case because the issue regarding the scope of
14 the easements, which this Court and the Court of Appeals previously ruled was not ripe
15 for adjudication, had recently become ripe for adjudication. (Doc. 320). The Court
16 determined that the issue regarding the scope of the easements was now ripe because the
17 Trustee intended to improve the easements pursuant to a specific development plan and
18 the GRIC had denied the Trustee permission to make those improvements. (Doc. 332).
19 Accordingly, the Court postponed the entry of judgment and set a Rule 16 hearing on the
20 issue of easement scope. The parties have now fully briefed the issue for the Court’s
21 determination.

22 **II. STIPULATION TO SEAL**

23 Before reaching the merits, the Court first addresses the GRIC’s stipulation to file
24 certain documents under seal. *See* (Doc. 394). In the course of this lawsuit, the Schuggs
25 disclosed documents to the GRIC that contained the Schuggs’ personal financial
26 relationships, namely an agreement between MARAZ-2006, LLC and Michael K.
27 Schugg. The parties have stipulated to seal the terms of this agreement and all derivative
28 documents in support of the GRIC’s dispositive motion referencing those terms,

1 including the motion itself. (Doc. 394 at 1).

2 “[T]he courts of this country recognize a general right to inspect and copy public
3 records and documents, including judicial records and documents.” *Nixon v. Warner*
4 *Comm’ns, Inc.*, 435 U.S. 589, 597 (1978). “Unless a particular court record is one
5 ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.”
6 *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). A party
7 “seeking to seal a judicial record” bears the burden of articulating compelling reasons
8 supported by specific factual findings in favor of sealing that “outweigh the general
9 history of access and . . . public policies favoring disclosure.” *Id.* at 1178-79. “In general,
10 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify
11 sealing court records exist when such ‘court files might have become a vehicle for
12 improper purposes,’ such as the use of records to gratify private spite, promote public
13 scandal, circulate libelous statements, or release trade secrets.” *Id.* at 1179. “The mere
14 fact that the production of records may lead to a litigant’s embarrassment . . . or exposure
15 to further litigation will not, without more, compel the court to seal its records.” *Id.* This
16 compelling reasons standard is properly applied to dispositive motions “and related
17 attachments” because “the resolution of a dispute on the merits, whether by trial or
18 summary judgment, is at the heart of the interest in ensuring the ‘public’s understanding
19 of the judicial process and of significant public events.”” *Id.* (citation omitted).

20 Here, the parties have not demonstrated compelling reasons for sealing the terms
21 of the agreement between MARAZ-2006, LLC and Michael K. Schugg. Although one
22 does not ordinarily publicize the details of one’s own personal financial transactions,
23 “mere embarrassment” is insufficient to compel the Court to seal such records. *See id.*
24 Neither party offers specific factual findings in favor of sealing; the parties’ sole basis for
25 sealing is that the agreement is a personal financial relationship and that the Trustee’s
26 counsel has designated evidence relating to that agreement as “confidential.” Although
27 the parties have stipulated to filing under seal, the Court is not bound by a stipulation of
28 law “regardless of what the parties say the law might be.” *U.S. Aluminum Corp./Texas v.*

1 *Alumax, Inc.*, 831 F.2d 878, 880 (9th Cir. 1987).

2 Accordingly, the Court finds the parties have not demonstrated compelling reasons
3 for filing under seal sufficient to overcome the strong presumption in favor of public
4 access to judicial records. The Court will deny the stipulation to file under seal.

5 **III. RIPENESS**

6 The GRIC moves to dismiss the Trustee's complaint pursuant to Federal Rule of
7 Civil Procedure ("Rule") 12(b)(1) for lack of subject-matter jurisdiction. (Doc. 396). The
8 GRIC argues that despite the Court's prior Order determining that the scope of the
9 implied easement was ripe for adjudication, it remains unripe and therefore the Court
10 lacks subject-matter jurisdiction over this issue. (*Id.* at 3-4).

11 In its previous Order on ripeness, the Court determined that the issue of the scope
12 of the implied easement had become ripe because the Trustee had since created a plan for
13 developing Section 16 that required improving the existing easements. (Doc. 332 at 13-
14 14). The GRIC refused (and refuses) to permit the Trustee to pave the implied easements
15 and use them to support the traffic necessary to use the developed Section 16. (*Id.* at 10).
16 Accordingly, the Court noted that "short of beginning to pave the easements or install the
17 utility lines on the easements, the Court can ascertain no next step that the Owners could
18 take before an actual case or controversy exists without potentially infringing the GRIC's
19 rights to the easements." (*Id.* at 11-12).

20 "Under the 'law of the case' doctrine, 'a court is generally precluded from
21 reconsidering an issue that has already been decided by the same court, or a higher court
22 in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)
23 (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). "A court may have
24 discretion to depart from the law of the case where: 1) the first decision was clearly
25 erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is
26 substantially different; 4) other changed circumstances exist; or 5) a manifest injustice
27 would otherwise result." *Id.*

28 The GRIC does not contend that the Court's prior Order was clearly erroneous or

1 that the law regarding ripeness has changed; rather, the GRIC argues that three factual
2 assertions that the Trustee previously made to the Court have since been proven to be
3 inaccurate. (Doc. 396 at 6). The GRIC alleges that because the Court's prior Order
4 depended upon these representations, the Court should conclude the scope of the
5 easement issue remains unripe. (*Id.* at 3, 7).

6 First, the GRIC argues that contrary to the Trustee's prior statement that he had
7 obtained an agreement from Johnson Utilities to provide water and sewer service to
8 Section 16, the Trustee has since admitted that there is no such written agreement. (*Id.* at
9 7). Second, the GRIC contends that a preliminary lotting diagram for Section 16 prepared
10 by a planning firm at the Trustee's direction inaccurately depicted access points to
11 Section 16 and continued to inaccurately depict access points even after a subsequent
12 revision. (*Id.*) Third, the GRIC alleges that discovery has now revealed numerous steps in
13 the development process that the Trustee could undertake to develop Section 16 before
14 resolving the issue of the scope of the easement, including completing the steps necessary
15 for a tentative plat application to Pinal County. (*Id.* at 7-8).

16 None of these three points, however, show changed circumstances justifying a
17 readjudication of ripeness. As the Court explained in its prior Order, the Trustee cannot
18 obtain a development permit and a subdivision plat from Pinal County unless the
19 subdivision has paved access and additional utility lines installed along the implied
20 easements. (Doc. 332 at 9-10). Similarly, the Trustee also cannot submit even a *tentative*
21 plat application to Pinal County unless there are established paved access rights and
22 adequate utility lines to the proposed subdivision. (Doc. 402-1 at 3). The GRIC's
23 arguments concern additional steps in the development process that are necessary to
24 obtain final approval for the planned development; however, the GRIC ignores that
25 expanding the existing easement into paved access is also necessary to obtain Pinal
26 County approval. The GRIC has unequivocally refused to permit the Trustee to pave the
27 existing easements, (Doc. 332 at 13), and offers no new evidence that they are now
28 willing to permit improvement of the easements.

1 Therefore, although the GRIC is correct that a resolution of the scope of the
2 implied easements is not itself sufficient to permit development of Section 16, the Trustee
3 aptly points out that under the GRIC’s argument, the Trustee could *never* obtain an
4 adjudication on the scope of the easements because completing the subdivision approval
5 process requires the Trustee to establish paved access and utilities.¹ (Doc. 401 at 6).
6 Accordingly, the GRIC has not shown changed circumstances such that the issue of the
7 scope of the easements is no longer ripe. The GRIC’s extensive arguments to the contrary
8 are in the nature of a motion for reconsideration, and are not persuasive. The Court will
9 deny the GRIC’s motion to dismiss for lack of subject-matter jurisdiction.

10 **IV. SCOPE OF THE EASEMENTS**

11 The Trustee moves for summary judgment on its declaratory judgment claim
12 against the GRIC as to the rights of Section 16 with respect to the implied easement along
13 Murphy Road. (Doc. 392 at 1). Specifically, the Trustee asks the Court to declare that he
14 has the right to construct a two-lane, 40-foot wide paved roadway on Murphy Road from
15 the southern boundary of the Reservation to Casa Blanca Road as well as the right to
16 install utility lines underneath Murphy Road from the southern border of the Reservation
17 to the southeast corner of Section 16. (*Id.*)

18 **A. Background**

19 The Court of Appeals has summarized the relevant facts concerning the creation of
20 the implied easement in favor of Section 16 as follows:

21 Through the 1853 Gadsden Purchase, the United States
22 acquired title to land from Mexico, including what is now
23 Section 16. The following year, Congress adopted a law
24 providing that when a survey was completed of the lands
25 within the purchased territory, “sections numbered sixteen
and thirty-six in each township, in said Territory, shall be, and
the same are hereby, reserved for the purpose of being applied
to schools in said Territory, and in the States and Territories
hereafter to be created out of the same.” The lands were not

26
27 ¹ The evidence shows that utility providers, for example, will not commit to
28 provide utilities unless there exists a right to install utility lines. (Doc. 402-1 at 5).
Similarly, a professional engineer has testified that a tentative plat cannot be prepared
without having first established the rights for paved access and utilities. (Doc. 402-3 at 3-
4).

1 literally meant to be sites for school buildings. Instead, the
2 state was able to sell and lease them to produce funds
3 supporting its schools. In 1863, Congress partitioned the
4 Territory of New Mexico to create the Territory of Arizona.
5 Section 16 became property of Arizona when a survey of the
6 land was filed in 1877.

7 *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1065-66 (9th Cir. 2010) (citations
8 omitted). Thus, the Court of Appeals held that the United States’ grant to Arizona of
9 Section 16 in 1877 at that time created an implied easement for the benefit of Section 16.
10 *Id.* at 1073-74. This easement was “effectively conveyed to each subsequent purchaser.”
11 *Id.* at 1074.

12 Murphy Road, the access route at issue, is a north-south dirt road running adjacent
13 to the eastern boundary of Section 16. (Doc. 278 at 7; Doc. 393 at 2). From the northeast
14 corner of Section 16, Murphy Road extends two miles through the Reservation before
15 intersecting with another road. (Doc. 278 at 7; Doc. 393 at 2). From the southeast corner
16 of Section 16, Murphy Road extends approximately one-half mile through the
17 Reservation before reaching the City of Maricopa. (Doc. 278 at 7; Doc. 393 at 2).

18 The Reservation district surrounding Section 16 encompasses 100 square miles
19 and has 2,222 enrolled tribal members. (Doc. 400-1 Ex. 3). The area surrounding Section
20 16 is currently undeveloped and is planned for agricultural development, but the GRIC
21 has no intention to ever change the land designations surrounding Section 16 from “open
22 space” or “agricultural.” (*Id.*) However, the City of Maricopa is separated from Section
23 16 by approximately a half-mile of Reservation and the City of Maricopa is undergoing
24 rapid development. (Doc. 278 at 13-14).

25 The Trustee’s current plan for developing Section 16 depicts 437 lots at a density
26 of one house per 1.25 acres. (Doc. 396-2 Ex. 23). Section 16 is currently zoned by Pinal
27 County as rural land, supporting a maximum development density of one house per 1.25
28 acres. (Doc. 393-1 Ex. 1 at 2-3).

B. Legal Standard

 In the absence of contrary precedent, Arizona follows the Restatement (Third) of

1 Property: Servitudes (the “Restatement”) with respect to the law of easements. *See Scalia*
2 *v. Green*, 271 P.3d 479, 481 ¶ 9 n.1 (Ariz. Ct. App. 2011); *Paxson v. Glovitz*, 50 P.3d
3 420, 424 ¶ 21 n.3 (Ariz. Ct. App. 2002).

4 “[A]n implied easement is based on the theory that whenever one conveys
5 property he includes or intends to include in the conveyance whatever is necessary for its
6 beneficial use and enjoyment. The creation of easements by implication is an attempt to
7 infer the intention of the parties to a conveyance of land. . . .” *Koestel v. Buena Vista*
8 *Public Service Corp.*, 676 P.2d 6, 8 (Ariz. Ct. App. 1984); *see also* Restatement (Third)
9 of Property: Servitudes § 4.1(1) (2000) [hereinafter Restatement] (“A servitude should be
10 interpreted to give effect to . . . the circumstances surrounding creation of the servitude,
11 and to carry out the purpose for which it was created.”).

12 “The holder of an easement is entitled to use it ‘in a manner that is reasonably
13 necessary for the convenient enjoyment’ of the easement or servitude.” *Paxton*, 50 P.3d
14 at 427 ¶ 36 (quoting Restatement § 4.10). “[T]he manner, frequency, and intensity of the
15 use may change over time to take advantage of developments in technology and to
16 accommodate normal development of the dominant estate or enterprise benefitted by the
17 servitude.” *Id.* (quoting Restatement § 4.10). The holder “is not entitled to cause
18 unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”
19 Restatement § 4.10.

20 When “the manner of the use” of an easement is changed, “or the intensity, or
21 frequency of the use is increased, the change is permissible . . . only if the change is
22 reasonably necessary to accommodate *normal development* of the dominant estate.” *Id.*
23 cmt. f (emphasis added). The manner in which the easement was created is relevant to
24 determining whether the manner of use has changed. *See id.* As the Restatement explains,
25 what constitutes normal development depends, at least in part, on the prior use of the
26 dominant estate:

27 Since land use normally evolves, what may be abnormal
28 development at one time may become normal at a later time.
The degree and abruptness of transition may be relevant
factors in determining whether the dominant owner may

1 continue using an easement after changing use of the
2 dominant estate. A gradual transition from wilderness to
3 agricultural to suburban subdivision might be considered
4 normal, where an abrupt transition from wilderness to
5 subdivision would not. In one case, a roadway easement
6 could continue to be used by the dominant estate through all
7 phases of its development, while, in the other, it could not be
8 used to serve the subdivision.

9 *Id.* The nature of the easement is another factor in determining whether particular
10 development of the dominant estate is normal development:

11 Although generally easements are permitted to evolve along
12 with the properties they serve, the outcome in individual
13 cases may depend on how fast the transition is taking place in
14 the area and whether the easement was created by grant or
15 prescription. The degree of change permitted for a
16 prescriptive easement is generally less than that for an
17 expressly created easement. In balancing the interests of the
18 dominant-and servient-estate holders, conservation and
19 neighborhood preservation concerns should be relevant as
20 well as developmental concerns.

21 *Id.* cmt. h.

22 **C. Analysis**

23 Because the Court of Appeals held that the United States implied an easement in
24 its 1877 grant of Section 16 to Arizona, *Lyon*, 626 F.3d at 1073-74, the Court must
25 determine the scope of the easement from the circumstances surrounding that grant, *see*
26 Restatement § 4.1(1). At the outset, the Court notes the practical difficulty and
27 uncertainty of divining the intent of Congress in 1877. Nevertheless, the Court will apply
28 the Restatement, guided by decisions of other jurisdictions, to determine Congress's
intent.

29 **1. Current Zoning**

30 The Trustee first argues that because Congress granted Section 16 to Arizona for
31 Arizona to use or sell to raise money for public schools, Congress intended that Section
32 16 be capable of its full economic development. (Doc. 392 at 10-11). Thus, the Trustee
33 contends, Congress intended that Section 16 could be used in ways other than merely
34 agricultural, including residential use to the extent permitted by zoning. (*Id.* at 11).

1 In support of his expansive view of Congressional intent, the Trustee relies upon
2 the Court of Appeals' statement in this case that land grants designed to aid state schools
3 are to "be construed liberally." (*Id.* at 11) (quoting *Lyon*, 626 F.3d at 1072)). The Trustee
4 also quotes this Court's prior Order, in which the Court remarked that access to Section
5 16 "cannot be 'so narrowly restrictive as to render the lands incapable of their full
6 economic development.'" (Doc. 278 at 25) (quoting *Utah v. Andrus*, 486 F. Supp. 995,
7 1009 (D. Utah 1979)). Contrary to the Trustee's conclusion, however, neither the Court
8 of Appeals' interpretation of school land grants nor this Court's prior statements support
9 the conclusion that the scope of the easement necessarily grows to encompass current
10 zoning restrictions.

11 The Court of Appeals discussed the liberal construction of land grants in the
12 context of distinguishing grants intended to aid schools from federal land grants in
13 general, noting that "[c]ourts normally construe federal land grants narrowly, under a
14 longstanding rule that unless the language in a land grant is clear and explicit, the grant
15 will be construed to favor the [granting] government so that nothing passes by
16 implication." *Lyon*, 626 F.3d at 1072 (internal quotation marks omitted). Although the
17 court then noted the exception that lands grants are to be liberally construed when "the
18 land grant at issue was made pursuant to legislation of Congress designed to aid the
19 common schools of the states," *id.* (internal quotation marks omitted), it did so only for
20 the purpose of determining "whether the federal government's conveyance of Section 16
21 to Arizona, as part of a school land grant, included an implied easement," *id.* The liberal
22 construction of land grants applied only in determining whether an implied easement
23 existed, not its scope. *See id.* at 1074 (declining to opine on the scope of the easement).

24 Nor does *Andrus*, quoted in the Court's prior Order, link the scope of an easement
25 to zoning permissions. In *Andrus*, the putative dominant estate had been the subject of a
26 school land grant to the state and was surrounded by federal land. 486 F. Supp. at 1000,
27 1002. The court found an implied easement existed in favor of the school-grant land, *id.*
28 at 1002, and noted that because Congress intended that the land be used to raise state

1 revenue, “the access rights of the state cannot be so restricted as to destroy the lands’
2 economic value. That is, the state must be allowed access which is not so narrowly
3 restrictive as to render the lands incapable of their full economic development.” *Id.* at
4 1009.

5 The Trustee asks the Court to read *Andrus* no further and conclude that full
6 economic development means any development permitted by current zoning. But the
7 *Andrus* court also held that “it is consistent with common law property principles to find
8 that the United States, as the holder of the servient tenement, has the right to limit the
9 location and use of Utah’s easement of access to that which is necessary for the state’s
10 reasonable enjoyment of its right.” *Id.* The court concluded that the federal government
11 could regulate the manner of access to the dominant estate. *Id.* Thus *Andrus* does not
12 stand for the proposition that the owner of the dominant estate may develop his land to
13 the extent permitted under the zoning laws; rather, *Andrus* merely provides that the land
14 may be reasonably enjoyed pursuant to its full economic *development*. Read in
15 conjunction with the Restatement’s emphasis upon normal development, it is clear that
16 development means normal change-of-use patterns and zoning restrictions are not
17 dispositive (although zoning may be evidence of what is considered normal
18 development). *See* Restatement § 4.10 cmt. f.

19 **2. Residential Use**

20 Having established that the scope of the easement does not depend upon the
21 current zoning of Section 16, the Court turns to the issue of whether residential use is a
22 permissible use of the easement. *See* Restatement § 4.10 cmt. d (“The first step in
23 determining whether the holder of an easement is entitled to make a particular use
24 challenged by the owner of the servient estate is to determine whether the use falls within
25 the purposes for which the servitude was created.”). The GRIC contends that Congress
26 intended Section 16 to be used for only agricultural purposes and therefore the easement
27 is limited to uses necessary to support such agricultural use. (Doc. 399 at 8-10).

28 The GRIC’s argument is both muddled and unpersuasive. Essentially, the GRIC

1 argues that because the Enabling Act (which allowed Arizona to become a state)
2 permitted Arizona to lease school sections “in such manner as the legislature of the state
3 of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes,”
4 and Arizona subsequently decided that land leased for one purpose could not be used by
5 the lessee for another purpose, Congress intended that Section 16 be used only for
6 continuing agricultural purposes as it was in 1877. (Doc. 8-10). This argument fails for
7 several reasons.

8 First, there is no evidence that Section 16 was used for agricultural purposes in
9 1877. The only evidence shows that portions of Section 16 have been farmed “since at
10 least the 1940s.” (Doc. 278 at 9). Thus, to the extent agricultural use of Section 16 is a
11 use not existing in 1877, this evidence supports the proposition that Section 16 may
12 develop from one land use to another. Second, although the GRIC is correct that a lessee
13 of Arizona trust land may use the land for only the purpose for which the land was leased,
14 *see* A.R.S. § 37-281, the subsequent actions of the Arizona legislature in restricting the
15 leased use of state trust land bear no relationship to the intent of Congress in conveying
16 that land thirty-five years prior to statehood. Third, although the Enabling Act was
17 enacted in 1910 (thirty-three years after Section 16 was granted to Arizona), it provided
18 that state trust land could be sold, which implies that the purchaser would have
19 unrestricted use of the land. *See* Enabling Act, ch. 310, § 28, 36 Stat. 568 (1910). To the
20 contrary, the Enabling Act demonstrates that Congress, at least in 1910, wanted to
21 maximize the value of school sections by ensuring that they were sold to the “highest and
22 best bidder.” *Id.*

23 Thus, nothing in either the Enabling Act or the Arizona legislature’s subsequent
24 acts establishes that Congress’s intent in 1877 was to restrict the future use of Section 16
25 to agricultural uses. The reasonable inference from Congress’s grant of Section 16 is that
26 Congress intended Section 16 to enjoy an easement commensurate with the most
27 productive use of the property as it developed. This comports with the law of easements.

28

1 **3. Normal Development**

2 The scope of an easement is not static but rather changes as “reasonably necessary
3 to accommodate normal development of the dominant estate.” Restatement § 4.10 cmt. f.
4 Thus, although an easement may initially be used for agricultural use, it is not limited to
5 that use if normal development results in a residential use of the dominant estate. *See id.*
6 (“A gradual transition from wilderness to agricultural to suburban subdivision might be
7 considered normal, where an abrupt transition from wilderness to subdivision would
8 not.”).

9 The parties dispute whether a change in use of Section 16 from agricultural to
10 residential constitutes “normal development.” (Doc. 392 at 13; Doc. 399 at 10). The
11 GRIC contends that because it intends to maintain the surrounding Reservation land as
12 open or agricultural, the development of Section 16 at one house per 1.25 acres is
13 abnormal and “an abrupt and drastic departure from the longstanding pastoral nature” of
14 the area. (Doc. 399 at 14). The GRIC estimates that the proposed 440 homes in Section
15 16 will add more than 1,000 residents to the area; it asserts this is abnormal because only
16 approximately 2,222 tribal members live in the surrounding 100 square miles of
17 Reservation. (*Id.* at 13-14).

18 The GRIC’s emphasis on its use of Reservation land misstates the test for
19 determining the scope of an easement. The issue is whether the scope of the easement is
20 reasonably necessary to “accommodate normal development *of the dominant estate.*” *See*
21 Restatement § 4.10 (emphasis added). Here, the evidence shows the use of Section 16 has
22 transitioned since 1877 from open space (“wilderness”) to agricultural in the 1940s to
23 dairy operations (a more industrial agricultural use than simple farming). The transition
24 from agricultural dairy use to rural housing is not only normal development but
25 abnormally *slow* development. The City of Maricopa is located approximately one-half
26 mile away and has undergone rapid development. The Court cannot imagine a smaller
27 developmental step than the transition from a dairy farm to rural housing with one house
28 per 1.25 acres. Although Section 16 could conceivably be subdivided into still fewer lots

1 than the 437 planned, the existing Pinal County rural zoning appears to contain the
2 planned development to a normal pace.²

3 The GRIC is correct that the Trustee's proposed development of Section 16 is
4 abrupt and abnormal compared to the surrounding Reservation. *See* (Doc. 399 at 14). But
5 there are two critical flaws in the GRIC's conclusion; first, development is measured by
6 the dominant and not the servient estate. *See* Restatement § 4.10. Second, the GRIC's use
7 of the surrounding Reservation constitutes abnormally slow development. The GRIC
8 admits that it intends to stagnate development by always maintaining the surrounding
9 land as open or agricultural in nature. Although the GRIC has the sovereign right to
10 develop or not develop its land as it best sees fit, it cannot use its abnormal lack of
11 development as justification for mischaracterizing normal development as "abrupt." To
12 hold otherwise would permit the servient estate holder to undermine the easement
13 holder's rights created at the time of the conveyance simply by choosing to forego normal
14 development on its property.³

15 ² Illustration 14 to Restatement § 4.10 is particularly illustrative:

16 O, the owner of Blackacre, conveyed a 60-foot-wide
17 easement to Able, the owner of Whiteacre, a 40-acre parcel of
18 undeveloped property in a rural area close to the suburbs of a
19 major city. Ten years later Whiteacre was subdivided into 160
20 lots. The developer plans to improve the easement to provide
21 primary access to the subdivision. In the absence of other
22 facts or circumstances, the easement can be improved to serve
23 the subdivision because the change from rural to suburban is
24 normal development, and the width of the easement suggests
25 that a substantial increase in use was contemplated by the
26 parties.

23 Restatement § 4.10 illus. 14. Although in this illustration the easement is express, in the
24 present case Congress intended the scope of the implied easement to accommodate
25 normal development.

26 ³ Under the GRIC's view, for example, if a neighboring dominant and servient
27 estate in New York's Times Square were both single-family residences that had never
28 been further developed, the owner of the dominant estate could never develop the
property commercially regardless of the surrounding environment simply because the
owner of the servient estate refused to develop his property. Such a result would be
absurd.

1 Accordingly, the Trustee’s proposed use of the easement for the development of
2 Section 16 for rural residential use with one house per 1.25 acres is a manner reasonably
3 necessary for its convenient enjoyment. This finding is not sufficient to grant the
4 Trustee’s requested relief, however.

5 **4. Unreasonable Damage or Interference to the Reservation**

6 The holder of an easement, although entitled to use the easement as reasonably
7 necessary for the convenient enjoyment of the dominant estate, “is not entitled to cause
8 unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”
9 Restatement § 4.10. This principle is at the core of GRIC’s complaint regarding the
10 proposed improvements to Murphy Road. The GRIC implies that the increase in
11 population and traffic would have detrimental effects to the surrounding Reservation
12 roads and property, (Doc. 399 at 13-14), although it offers no specific argument on this
13 point.

14 The Court cannot conclude on the present record whether use of the easement
15 consistent with development of Section 16 at one house per 1.25 acres would cause
16 unreasonable damage to the Reservation or interfere unreasonably with its enjoyment.
17 This is a factual question requiring the Court to consider the increased traffic to the
18 surrounding roads, vehicle noise, aesthetics of the area, and the character of the
19 surrounding property, among other considerations. *See* Restatement § 4.10 cmt. h (“What
20 constitutes unreasonable interference will depend largely on the circumstances . . .”).
21 Although the Court has previously issued factual findings concerning the increased traffic
22 and issues with the Gila River Police Department’s ability to handle such traffic, these
23 facts assume a 3.5 house per acre density, which is over four times as many houses as the
24 Trustee now proposes to construct. *See* (Doc. 278 at 13, 15). Thus, these findings do not
25 aid the Court in its present analysis.

26 The Court will deny summary judgment on this issue. At trial, the Trustee must
27 show that the traffic and other effects associated with an increased number of vehicles
28 using Murphy Road does not unreasonably interfere with the GRIC’s enjoyment of its

1 Reservation or cause unreasonable damage to the Reservation.

2 **5. Other Issues**

3 Although the Court declines to rule at this time on the ultimate issue of whether
4 the scope of the easement includes a paved 40-foot wide access road with underground
5 utilities carrying the daily traffic of a 437 lot residential development, the Court may
6 properly decide narrower issues related to the easement’s scope, such as the installation
7 of underground utilities as well as the size and type of the roadway.

8 **a. Underground Utilities**

9 The Trustee seeks to install underground utilities in the easement underneath
10 Murphy Road. The GRIC does not dispute that the easement may be used for ingress and
11 egress, but asserts that the Trustee has not presented sufficient evidence that the easement
12 was created to support the installation of underground utilities or of the precise location
13 of such utilities. (Doc. 399 at 11 n.11; Doc. 396 at 16).

14 Courts have regularly upheld the rights of holders of implied easements to install
15 underground utilities in their easements. *See, e.g., Reece v. Smith*, 594 S.E.2d 654, 657-
16 58 (Ga. Ct. App. 2004) (“The implied easement . . . was not strictly limited to [the]
17 original use of the easement for ingress and egress, but is available for uses that are
18 necessary to the reasonable enjoyment of any lawful development of the land, and that do
19 not unreasonably burden” the rights of the owners of the servient estate). *United States v.*
20 *176.10 Acres of Land*, 558 F. Supp. 1379 (D. Mass. 1983) is particularly illustrative.
21 There, the issue was whether an implied easement created in 1852 permitted the
22 construction of a driveway and underground utilities for use by a new residential
23 dwelling. 558 F. Supp. at 1380. The court concluded that it was “reasonable to assume
24 that the parties foresaw residential use of the landlocked parcel as a probable use and that
25 use would today include utilities as well as a driveway.” *Id.* at 1382. Thus, because
26 residential use was foreseeable to the parties in 1852, “use of the easement appropriate to
27 permit residential use of the dominant estate is, therefore, appropriate today.” *Id.* at 1381.

28 Similarly, the Trustee is entitled to use the easement for the reasonable enjoyment

1 of Section 16 so long as his use does not unreasonably burden the Reservation. Because
2 Section 16's normal development includes residential use, and residential use now
3 involves utility service, the Trustee is entitled to use the easement for installation of
4 utility lines so long as this use does not unreasonably burden the Reservation. The Court
5 concludes that the installation of utility lines, regardless of their size or number, will not
6 unreasonably burden the Reservation because the lines will not be visible and will occupy
7 otherwise unused underground space within the easement under Murphy Road.
8 Consequently, the easement permits the Trustee to install underground utility lines under
9 the boundaries of Murphy Road.

10 **b. Dimensions and Paving of the Easement**

11 The GRIC argues that the Trustee's proposed dimensions for the Murphy Road
12 easement, 40-foot in width, would "drastically alter the current width of the road." (Doc.
13 399 at 13). The evidence shows that the traveled surface of Murphy Road varies between
14 17 and 29.5 feet in width, excluding shoulder areas. (Doc. 393-4 Ex 4 Ex. A at 2 n.2;
15 400-1 Ex. 1 at 49:21-23). The shoulder area varies between 6 to 12 feet, thus adding
16 between 12 to 24 feet to the road's width. (Doc. 404-1 Ex. 1 at 2-3).

17 The permissible dimensions of an easement "are those reasonably necessary" for
18 its enjoyment:

19 If the dimensions are not specified, the owner of the servitude
20 may use so much of the servient estate as reasonably
21 necessary to carry out the intended purpose. The dimensions
22 of the servitude may change over time as reasonably needed
23 to accommodate changing needs of the servitude owner and
changes in technology, limited by the proviso, however, that
changes that would unreasonably increase the burden on the
servient estate are not permitted.

24 Restatement § 4.8 & cmt. d.

25 In this case, the GRIC fails to point to any evidence other than its bare assertion
26 that the width of Murphy Road would be "drastically alter[ed]" that supports the
27 conclusion that a 40-foot wide easement is either not reasonable in light of the normal
28 development of Section 16 or would unreasonably increase the burden on the servient

1 estate.⁴ Because Murphy Road presently approximates forty feet in width including the
2 traveled surface and shoulder areas, it would not unreasonably increase the burden on the
3 Reservation to fix the road's width at forty feet including shoulders, as the Trustee has
4 requested. Moreover, the Trustee has presented uncontroverted evidence that such a
5 width is necessary for the development of Section 16 at one house per 1.25 acres. The
6 GRIC even asserts that the Trustee may need a significantly wider easement to
7 accommodate Pinal County requirements. (Doc. 399 at 2).

8 Similarly, the Trustee may pave Murphy Road. "Frequently, reasonably necessary
9 uses [of an easement] will also include making improvements or constructing
10 improvements for use of the easement." Restatement § 4.10 cmt. c. Congress intended
11 that Section 16 would undergo normal development, and such development includes the
12 improvements of roads. Paving a roadway is a reasonable improvement. *See Hayes v.*
13 *Aquia Marina, Inc.*, 414 S.E.2d 820, 823 (Va. 1992).

14 The Court emphasizes that its determinations regarding paving and the width of
15 Murphy Road are not themselves dispositive of the Trustee's requested relief. In other
16 words, although a road is often paved for the purpose of supporting increased traffic, the
17 Court is not in this Order declaring that the easement supports increased traffic. Indeed,
18 unless the Court concludes at trial that the easement supports increased traffic, paving a
19 40-foot wide Murphy Road would provide negative utility to the Trustee because he
20 would expend money to do so but he could not use the road to support his desired level of
21 traffic. The Court believes a showing of the level of traffic on Murphy Road and its
22 attendant effects under the Trustee's proposed development is dispositive as to the
23 ultimate relief sought: a declaration that the easement supports a paved, 40-foot wide
24 Murphy Road with underground utilities carrying the traffic of development of Section
25 16 at a density of one house per 1.25 acres. This depends upon the Trustee's success at

26
27 ⁴ The GRIC also asserts that the "location of the proposed paved road is
28 unknown." (Doc. 396 at 16). But the evidence clearly shows that the Trustee intends to
improve Murphy Road, and the location of Murphy Road is known. (Doc. 396-1 Ex. 14
at 2-3).

1 trial.

2 **V. RETAINED JURISDICTION**

3 The Trustee asks the Court to retain jurisdiction after entering judgment in this
4 case “in case Pinal County determines that any additional improvements are necessary.”
5 (Doc. 392 at 1). The Trustee offers no authority supporting the proposition that the Court
6 may retain jurisdiction subsequent to entry of a final judgment. To the contrary, Rules 59
7 and 60 provide narrow mechanisms by which a party may move to alter or set aside a
8 judgment within a limited time period following its entry. *See* Fed. R. Civ. P. 59(e), 60.
9 Retaining jurisdiction after entry of final judgment would be inconsistent with these rules
10 and principles regarding the finality of judgments. The Court denies the Trustee’s
11 request.

12 **VI. CONCLUSION**

13 Congress intended at the time of granting Section 16 to Arizona to permit the
14 owner of Section 16 to access the property in a manner commensurate with its normal
15 economic development. Because a transition from an agricultural farm use to rural
16 residential is normal development, the Trustee is entitled to improve the easement along
17 Murphy Road to a 40-foot wide paved roadway.

18 However, the Court cannot determine on the present factual record whether the
19 Trustee may use such a roadway for the purpose of supporting a residential development
20 with one house per 1.25 acres. At a bench trial, the Trustee must prove that the traffic and
21 other attendant effects from such a use will not cause unreasonable damage to the
22 Reservation or interfere unreasonably with the GRIC’s enjoyment of the Reservation.

23 For the foregoing reasons,

24 **IT IS ORDERED** that the Stipulation to File Select Summary Judgment Exhibits
25 and Accompanying References Under Seal (Doc. 394) is denied. The lodged sealed filing
26 (Doc. 395) is stricken but shall remain under seal. The Court has not considered the
27 sealed filing (Doc. 395) in making its determination.

28 **IT IS FURTHER ORDERED** that Gila River Indian Community’s Motion to

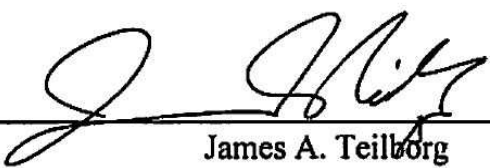
1 Dismiss (Doc. 396) is denied.

2 **IT IS FURTHER ORDERED** that Gila River Indian Community's Motion for
3 Summary Judgment (Doc. 396) is denied.

4 **IT IS FURTHER ORDERED** that the Trustee's Motion for Summary Judgment
5 Regarding Scope of Implied Easement (Doc. 392) is granted in part and denied in part.

6 Dated this 15th day of May, 2014.

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James A. Teilborg
Senior United States District Judge