

PASCUA YAQUI STATUS CLARIFICATION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
NATIVE AMERICAN AFFAIRS
OF THE
COMMITTEE ON
NATURAL RESOURCES
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 734

TO AMEND THE ACT ENTITLED "AN ACT TO PROVIDE FOR THE EXTENSION OF CERTAIN FEDERAL BENEFITS, SERVICES, AND ASSISTANCE TO THE PASCUA YAQUI INDIANS OF ARIZONA, AND FOR OTHER PURPOSES"

HEARING HELD IN WASHINGTON, DC
APRIL 30, 1993

Serial No. 103-22

Printed for the use of the Committee on Natural Resources



U.S. GOVERNMENT PRINTING OFFICE

69-904

WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-041146-7

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H.R. 734, TO AMEND THE ACT ENTITLED "AN ACT TO PROVIDE FOR THE EXTENSION OF CERTAIN FEDERAL BENEFITS, SERVICES, AND ASSISTANCE TO THE PASCUA YAQUI INDIANS OF ARIZONA, AND FOR OTHER PURPOSES"

FRIDAY, APRIL 30, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,
COMMITTEE ON NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to call, at 10:30 a.m. in Room 1324, Longworth House Office Building, Hon. Bill Richardson (chairman of the subcommittee) presiding.

STATEMENT OF HON. BILL RICHARDSON

Mr. RICHARDSON. The committee will come to order.

Today we will be hearing testimony on H.R. 734, an act to provide for the extension of certain benefits, services, and assistance to the Pascua Yaqui Indians of Arizona and for other purposes.

This measure is sponsored by Representative Pastor and is co-sponsored by Representatives English and Kolbe.

As I have stated before, there are three fundamental maxims of Federal Indian law: first, the Congress has plenary powers over Tribes and all Indian law is Federal; second, State and other governments are excluded from that relationship; and third, Tribes retain all sovereignty not expressly divested by the Congress. It is the third concept that is the subject of today's hearing.

The Bureau of Indian Affairs has established a policy of categorizing how a Tribe is recognized. Specifically, the BIA distinguishes between "historic" Tribes and "nonhistoric" Tribes. These "nonhistoric" or "created" Tribes have apparently not been viewed by the Department of the Interior as having the same sort of inherent sovereignty that historic Tribes possess.

Today the committee will explore the Department's position on the subject, see why these distinctions exist, attempt to ascertain whether the distinction between the historic and nonhistoric Tribes is necessary, and see whether we need to utilize the plenary power of Congress to fix any problems in the existing scheme.

At the heart of this inquiry is the concept of tribal sovereignty. This concept is the heart and soul of the Federal tribal relationship. Sovereignty is something this committee takes extremely seriously. Tribal sovereignty is inherent, and it is the task of the Con-

gress to acknowledge the existing sovereignty Tribes retain, not to delegate these powers.

Again, I ask that all witnesses summarize their statements in five minutes. The statements will be fully entered into the record, and we will utilize a little enforcement mechanism in terms of making sure that we not go over the five minutes as we want to debate this issue in questions and answers.

Again, your full, written statement will be made part of the record. And I would first like to welcome Ms. Carol Bacon, Director of Tribal Services, Bureau of Indian Affairs.

Before we proceed, let me insert in the record a statement by Congressman Ed Pastor, from Arizona's Second District. His statement will be made a full part of the record.

Let me recognize that this hearing is held at his request. And he has asked for expeditious action on this legislation.

[Prepared statement of Representative Pastor follows:]

STATEMENT OF THE HON. ED PASTOR

Mr. Chairman, I would like to take this opportunity to thank you and the other Members of the Subcommittee for holding this hearing today on H.R. 734. Your attention to this very important matter is much appreciated by myself and the Pascua Yaqui Tribe.

The bill, of which I am the primary sponsor, seeks to clarify the status of the Pascua Yaqui Tribe of Arizona and enable the people of the Tribe to receive the full benefits of sovereignty to which they are rightfully entitled. In addition, H.R. 734 opens the enrollment of the Tribe for a period of three years.

As you well know, Mr. Chairman, the Bureau of Indian Affairs (BIA) has created a distinction between "created" Tribes and "historic" Tribes. This distinction, and BIA's insistence that the Pascua Yaquis are a "created" Tribe, have caused numerous hardships for the Tribe, which is currently in the process of revising its Constitution and Bylaws. My bill seeks to rectify this situation by simply declaring that the Pascua Yaqui Tribe is indeed an "historic" Tribe.

The Pascua Yaqui people are an "historic" Tribe in every sense of the word. The Tribe currently enjoys many of the attributes of sovereignty that "historic" Tribes benefit from, and provides a wide array of services to its people across Arizona. In addition, the State has recently recognized the government-to-government relationship with the Tribe. Finally, Mr. Chairman, the Yaqui people have a long and proud history within what is now the United States. It is a history not of individuals, but of clans, villages, and the struggle of a collective people. It is time, Mr. Chairman, that this history be acknowledged by the Federal government.

Mr. Chairman, I do not wish to speak on behalf of the Tribe, for only the Pascua Yaqui people themselves can express the frustration and the indignation that they have experienced. I only ask that you listen to the testimony today and work with me to right this wrong that the Pascua Yaqui people have long suffered from.

Thank you Mr. Chairman.

Mr. RICHARDSON. Also, at this time I request the bill, background, and section-by-section analysis be made part of the record.

[Text of the bill, H.R. 734, and background information follow:]

103D CONGRESS
1ST SESSION

H. R. 734

To amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes."

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 1993

Mr. PASTOR (for himself, Mr. KOLBE, and Ms. ENGLISH of Arizona) introduced the following bill; which was referred to the Committee on Natural Resources

A BILL

To amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes."

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SOVEREIGNTY OF PASCUA YAQUI TRIBE.**

4 (a) IN GENERAL.—Subsection (a) of the first section
5 of the Act entitled "An Act to provide for the extension
6 of certain Federal benefits, services, and assistance to the
7 Pascua Yaqui Indians of Arizona, and for other purposes"
8 (25 U.S.C. 1300f(a)) is amended by inserting after the

1 first sentence the following: “The Pascua Yaqui Tribe, a
2 historic Indian tribe, is acknowledged as a federally recog-
3 nized Indian tribe possessing all the attributes of inherent
4 sovereignty which have not been specifically taken away
5 by Acts of Congress and which are not inconsistent with
6 such tribal status.”.

7 (b) EXTENSION OF ENROLLMENT DEADLINE.—Sec-
8 tion 3 of such Act (25 U.S.C. 1300f-2) is amended—

9 (1) in paragraph (B) by striking “and”; and

10 (2) by redesignating paragraph (C) as para-
11 graph (D) and inserting after paragraph (B) the fol-
12 lowing new paragraph (C):

13 “(C) all those persons of Yaqui blood who are
14 citizens of the United States and who, within three
15 years after the date of enactment of this paragraph,
16 apply for enrollment in the Pascua Yaqui Tribe pur-
17 suant to the membership criteria and procedures
18 provided for in the official governing documents of
19 the Pascua Yaqui Tribe; and”.

BACKGROUND ON H.R. 734

H.R. 734, sponsored by Representatives Pastor, English and Kolbe, clarifies the status of the Pascua Yaqui Tribe of Arizona. Although the tribe was recognized by the Congress on September 18, 1978 through P.L. 95-375, the Bureau of Indian Affairs has consistently taken the position that the tribe does not have all the powers of a sovereign tribal government. Even though regulatory rights are generally viewed as inherent among most federally recognized tribes, the BIA has established a distinction among tribes asserting that some tribes are "historical" and possess all sovereign rights and some tribes are "created" and have limited sovereign rights. The position that the Pascua Yaqui tribe is not a historical tribe is derived from a Solicitor's Opinion from April 13, 1936. This opinion dealt with two Minnesota tribes and asserted that the two tribes do not possess the same powers as other sovereign tribes. H.R. 734 clarifies that the Pascua Yaqui tribe is indeed a "historical" tribe.

The Yaqui Indians are descendants of the ancient Toltecs who ranged from what is now the city of Durango, north to southern Colorado, and west to California. The U.S. boundary line, determined by agreement with Mexico, divided the Indian territories occupied by Pimas, Papagos, Apaches, Yaquis, and other Indians. Between 1880 and 1910, thousands of Yaquis who fled Mexico to escape the Mexican landowners and dictatorial Mexican Government were accepted by the United States and given asylum in the Arizona territory. Many of the Yaquis settled near Tucson in what came to be known as the Pascua Village.

In 1964, the Federal Government conveyed 202 acres of Federal land near Tucson to the Pascua Yaqui Association, a formal governmental organization established at the request of Congress to manage the conveyed land. (Act of October 8, 1964, Private Law 88-350, 78 Stat. 1196). The express major purpose of this Association was to administer the lands granted to it for the collective use and benefit of all its tribal members.

However, the 1964 Act which provided land to the Yaquis prohibited them from receiving services and benefits under other Federal Indian laws. As a result, the Yaquis were unable to participate in economic development or educational programs, and tribal members were denied access to available medical services on nearby Indian reservation. P.L. 95-375 was enacted to make the Yaqui Indians eligible for services provided to other Indians through any agency, including the Bureau of Indian Affairs and the Indian Health Service.

The Conference Report in 1978 indicates Congress' intention with regard to the recognition of Pascua Yaqui and the tribe's status:

"As passed by the Senate, S. 1633 extends Federal recognition to the Pascua Yaqui Indians of Arizona, which includes eligibility for all Federal services and benefits provided to Indians because of their status as Indians; recognition of tribal powers of self-government; reservation status for the Yaqui lands; and provision for tribal authority to assume criminal and civil jurisdiction on such lands on an optional basis.

The amendment to the House eliminated language providing for self-government; reservation status; and criminal and civil jurisdiction.

The conference committee adopted a substitute, by way of compromise. The House agreed to accept the Senate provision with respect to tribal self-government and reservation status. On the question of jurisdiction, the Senate agreed that the State should continue to exercise criminal and civil jurisdiction on the Pascua Yaqui reservation lands as if such jurisdiction had been assumed under Public Law 83-280. Public Law 83-280 authorizes a State to exercise comprehensive civil and criminal jurisdiction over Indian reservations within State boundaries, with specified protections for the trust nature of the land. The State may, at its option, retrocede jurisdiction to the Federal Government on a complete or partial basis by action of the State legislature.

The House amendment limited the membership of the tribe to the present members of the Pascua Yaqui Association. Other persons of Yaqui blood who apply within 1 year and comply with the associations' membership criteria, plus direct lineal descendants. The conference report adopts language to extend the time in which to apply for membership (2 years) and extends membership to the present association, plus those Indians of Yaqui blood who are U.S. citizens, and direct lineal descendants of enrolled members." House Conf. Rept. No. 95-1339.

In addition to clarifying the recognition status of the Pascua Yaqui tribe, H.R. 734 extends the enrollment deadline for membership in the tribe to three years after enactment.

SECTION-BY-SECTION ANALYSIS OF H.R. 734**SECTION 1. SOVEREIGNTY OF THE PASCUA YAQUI TRIBE**

(a) **IN GENERAL.** Subsection (a) provides that the 1978 Act "to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes," is amended by inserting a sentence asserting that the Pascua Yaqui Tribe is an historic tribe and possesses all the attributes of inherent tribal sovereignty which have not been taken away by Acts of Congress.

(b) **EXTENSION OF ENROLLMENT DEADLINE.** Subsection (b) provides for an enrollment extension to all persons of Yaqui blood who are citizens of the U.S. who meet the tribal membership criteria of the Pascua Yaqui Tribe. The provisions allows such persons to be enrolled within 3 years from the date of enactment.

Mr. RICHARDSON. Ms. Bacon, welcome. Please step up to the mike and identify the gentleman with you as we proceed.

STATEMENT OF CAROL BACON, DIRECTOR, DIVISION OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY SCOTT KEEP, ASSISTANT SOLICITOR, DEPARTMENT OF THE INTERIOR

Ms. BACON. Thank you. With me today is Scott Keep. He is the Assistant Solicitor for the Branch of Tribal Government and Alaska, in the Department of the Interior.

Good morning, Mr. Chairman. I am pleased to be here today to present the views of the Department of the Interior on H.R. 734, a bill which would amend the act entitled, "An act to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes."

We oppose enactment of H.R. 734, which would establish the Pascua Yaqui as a historic Tribe and extend the enrollment deadline to allow enrollment of Pascua Yaqui citizens of the United States to become members of the federally recognized Tribe.

H.R. 734 would acknowledge the Pascua Yaqui as a historic Tribe "possessing all the attributes of inherent sovereignty which haven't been specifically taken away by acts of Congress and which are not inconsistent with such status." The Pascua Yaqui Tribe is comprised of members from the Pascua Yaqui Association who are descendants of a group of Yaqui Indians who were granted political asylum by the United States after they fled from Mexico many years ago. Before the 1978 act extended certain Federal benefits and services to the Pascua Yaqui Indians and the provisions of the Indian Reorganization Act of June 18, 1934, the Yaquis never had a Reservation in the United States and had no special relationship with the Federal Government because of their status as Indians.

The Department of the Interior has a longstanding position on historic versus nonhistoric Tribes which is based on the interpretation of law and historical factual differences between groups of Indians and also the policies of the Department.

Since the enactment of the Indian Reorganization Act of June 18, 1934, the Department has held that Adult Indian Communities may not possess all of the same attributes of sovereignty as a historic Tribe. A historic Tribe has existed since time immemorial, and its powers are derived from its inextinguishable and inherent sovereignty.

A historic Tribe has the full range of governmental powers except where it has been removed by Congress in favor of either the United States or the State in which the Tribe is located. By contrast, a community of adult Indians is made up of individual Indian people who reside together on trust land. It is within the community's authority to levy assessments on its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property.

A community may also levy assessments on nonmembers coming or doing business on community lands. So a community of Indians may have a certain status which entitles it to certain privileges and immunities; however, that status is derived from the primary

Federal interest in benefiting Indians, not from the historical status of the Tribe.

In reviewing the proposed Constitution of the Pascua Yaquis in 1987, the Assistant Secretary found the Pascua Yaqui Tribe was a community of adult Indians; and it did not possess all the same attributes of sovereignty as a historic Tribe. The Constitution was approved with this interpretation in 1988. The Department, in its Code of Federal Regulations, Part 83.1(1), describes the definition of historically, historical and history, as "means dating back to the earliest documented contact between the aboriginal Tribes from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory."

While the Pascua Yaqui may have had some status to justify Congress' extension of Federal benefits to them in the exercise of Congress' power over the Indians, the Pascua Yaqui cannot meet the criteria for a historic Tribe.

We see no justification for the change in the status of the Pascua Yaqui Tribe. There are numerous other Indian Tribes that are eligible for Federal services and benefits but like the Pascua Yaqui Indian Tribe, are not historic Tribes with all the attributes of inherent sovereignty. Therefore, we urge the committee to consider the precedent that would be set by enactment of H.R. 734.

H.R. 734 would again open Pascua Yaqui enrollment for an additional three years. The Pascua Yaqui enrollment closed September 18, 1980, pursuant to Public Law 95-375 of 1978.

This 1978 act recognized those Pascua Yaquis who were members of the Pascua Yaqui Association, Incorporated, as of the date of the enactment and who applied for enrollment in the Tribe within one year from the date of enactment. By being members of this group, the Pascua Yaqui were maintaining a bilateral political relationship with their governing body. Opening up enrollment for three more years will encourage those of Yaqui descent who have not been involved in a bilateral political relationship with the governing body to apply. The Federal acknowledgment process (25 C.F.R. 83.7(c)) requires that tribal political influence or other authority over its members be maintained as an autonomous entity throughout history to the present.

It is very possible that the new enrollees may not meet that criteria. In addition, the tribal Constitution, approved by the Assistant Secretary in 1988, provides eligibility criteria for membership that is consistent with the 1978 act.

We firmly believe it would be unfair to other groups who are working diligently to attain historic status to allow the Pascua Yaqui to attain this designation through legislation. We also object to reopening the tribal membership roll to individuals who may not have been previously associated or maintained a bilateral political relationship with the main governing body.

This concludes my prepared statement. I will be happy to answer any questions the committee may have.

[Prepared statement of Ms. Bacon follows:]

STATEMENT OF CAROL A. BACON, DIRECTOR, OFFICE OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS, COMMITTEE OF NATURAL RESOURCES, UNITED STATES HOUSE OF REPRESENTATIVES, ON H.R. 734, A BILL "TO AMEND THE ACT ENTITLED "AN ACT TO PROVIDE FOR THE EXTENSION OF CERTAIN FEDERAL BENEFITS, SERVICES, AND ASSISTANCE TO THE PASCUA YAQUI INDIANS OF ARIZONA, AND FOR OTHER PURPOSES.".

April 30, 1993

Good morning Mr. Chairman and Members of the Committee. I am pleased to be here today to present the views of the Department of the Interior on H.R. 734, a bill which would amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes.

We oppose enactment of H.R. 734, which would establish the Pascua Yaqui as a historic tribe and extend the enrollment deadline to allow enrollment of Pascua Yaqui citizens of the United States to become members of the federally recognized tribe.

H.R. 734 would acknowledge the Pascua Yaqui as a historic tribe "possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such tribal status." The Pascua Yaqui Tribe is comprised of members from the Pascua Yaqui Association who are descendants of a group of Yaqui Indians who were granted political asylum by the United States after they fled from Mexico many years ago. Before the 1978 Act extended certain Federal benefits and services to Pascua Yaqui Indians and the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), the Yaquis never had a reservation in the United States and had no special relationship with the Federal Government because of their status as Indians.

The Department of the Interior has a long-standing position on historic versus non-historic tribes which is based on an interpretation of the law and historical factual differences between groups of Indians and the policies of the Department.

In his Highlights of Yaqui History, Edward H. Spicer, who testified at the hearings on the Pascua Yaqui recognition bill wrote:

By the mid-1890's, more Yaquis began to settle near Nogales and along the Santa Cruz River northward. These were individuals who came as refugees from the Sonora settlements. They were being attacked by Mexican troops as a result of their resistance to the appropriation of their land by the large landowners who controlled the State of Sonora. Hundreds of Yaquis came across the International Boundary during the decade from 1896 to 1907. The United States gave them sanctuary as political refugees. In 1917-18 new persecutions broke out in Mexico and hundreds more Yaquis crossed the border and were given the officially recognized status of political refugees, a status which was officially confirmed by the United States Department of State years later in 1931.

Since the enactment of the Indian Reorganization Act of June 18, 1934, (25 U.S.C. 461) the Department has held that Adult Indian Communities may not possess all of the same attributes of sovereignty as a historic tribe. A historic tribe has existed since time immemorial and its powers are derived from its inextinguishable and inherent sovereignty. A historic tribe has the full range of governmental powers except where it has been removed by Congress in favor of

either the United States or the state in which the tribe is located. By contrast, a community of adult Indians is made up of individual Indian people who reside together on trust land. It is within the community's authority to levy assessments upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. A community may also levy assessments on non-members coming or doing business on community lands. So a community of Indians may have a certain status which entitles it to certain privileges and immunities, however, that status is derived from the primary federal interest in benefiting Indians, not from the historical status of the group.

In reviewing the proposed Constitution of the Pascua Yaqui Tribe, the Assistant Secretary - Indian Affairs in his letter dated October 15, 1987, found that the Pascua Yaqui Tribe was a community of adult Indians and did not possess all the same attributes of sovereignty as a historic tribe. The Constitution of the Pascua Yaqui Tribe as approved by the Assistant Secretary - Indian Affairs on February 8, 1988 is consistent with this interpretation. H.R. 734, if enacted, would alter that interpretation.

In Title 25, Code of Federal Regulations, Part 83.1(1) *Historically, historical or history* "means dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory."

While the Pascua Yaqui may have had some status to justify Congress' extension of Federal Indian benefits to them in the exercise of Congress' power over Indians, the Pascua

Yaqui cannot meet the criteria for a historic tribe. We see no justification for the change in the status of the Pascua Yaqui Tribe. There are numerous other Indian tribes that are eligible for Federal services and benefits but, like the Pascua Yaqui Indian Tribe, are not historic tribes with all the attributes of inherent sovereignty. Therefore, we urge the Committee to consider the precedent that would be set by enactment of H.R. 734.

H.R. 734 would again open Pascua Yaqui enrollment for an additional three years. The Pascua Yaqui enrollment closed September 18, 1980 pursuant to Public Law 95-375 of 1978. (25 U.S.C. 1300f).

The 1978 Act recognized those Pascua Yaqui who were members of the Pascua Yaqui Association, Inc. as of the date of enactment and who applied for enrollment in the tribe within one year from the date of enactment. By being members of this group, the Pascua Yaqui were maintaining a bilateral political relationship with their governing body. Opening up the enrollment for three more years will encourage those of Yaqui descent who have not been involved in a bilateral political relationship with the governing body to apply. The Federal acknowledgment process (25 CFR 83.7(c)) requires that tribal political influence or other authority over its members be maintained as an autonomous entity throughout history to the present. It is very possible that the new enrollees may not meet this criteria. In addition, the tribal Constitution, approved by the Assistant Secretary in 1988, provides eligibility criteria for membership that is consistent with the 1978 Act.

We firmly believe it would be unfair to other groups who are working diligently to attain historic status through the Federal acknowledgment process to allow the Pascua Yaqui to attain this designation through legislation. We also object

to reopening the tribal membership roll to individuals who have not previously associated with nor maintained a bilateral political relationship with the main governing body.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

Mr. RICHARDSON. Thank you very much, Ms. Bacon. And let me say that I am a little troubled by the BIA's position. I am troubled because you seem to be categorizing a number of designations.

For instance: What is a historic Tribe? What is a created Tribe? What is an Adult Indian Community?

Why do we have these distinctions?

Ms. BACON. The distinction is based on interpretation of the Indian Reorganization Act of 1934 which speaks of Tribes or Tribes organizing or residing on a Reservation and also adults residing on the Reservation.

From the interpretation of this law by the Department of the Interior, the distinction has been made between the Tribes as being historic and a group of adults residing on a Reservation as being nonhistoric with different powers.

Mr. RICHARDSON. Well, what exactly can a historic Tribe do that a nonhistoric Tribe can't do?

How are those decisions made?

Ms. BACON. Those are based on the interpretation of the 1934 Act by a solicitor's opinion which we rely on today. They include such things as power to tax, power to condemn land, regulation of inheritance, the regulation of law and order, and the determination of tribal membership, which nonhistoric Tribes do not have.

Mr. RICHARDSON. Well, isn't this the power of the Congress? Are you telling me that the Department of the Interior, through a solicitor's opinion, can determine whether a Tribe is sovereign or historic or not?

Isn't that the power of the Congress and not yours?

Ms. BACON. Since this is a solicitor's interpretation of the law, I need to defer to the solicitor on this issue.

Mr. KEEP. Good morning, Mr. Chairman.

Certainly Congress has a broad latitude to define its relationship with Indian Tribes. The distinction that the Department of the Interior has relied on over a number of years between historic and nonhistoric really has some very fundamental roots in terms of the differences in the historic circumstances of various groups on a Reservation.

In some instances, the group residing on a Reservation was a distinct historical Tribe or Band or segment of a Tribe that had treaty rights and had always dealt with each other and their members as a governmental entity.

In other instances, the Indians on the Reservations were miscellaneous Indians, parts of families, survivors that had been left behind and were simply put on Reservations for the purpose of providing a home for them. The solicitor, at the time of the Indian Reorganization Act, wrote a lengthy opinion describing the origins of the existing powers of Indian Tribes. When that analysis was done, he realized that some groups consisted of Indians on a Reservation that were simply adult Indians and families being reorganized but were not historically a distinct political community. Each had different origins for its self-governing powers. That is the distinction.

Mr. RICHARDSON. The real issue, though, is whether the Department of the Interior can administratively terminate Tribes by limiting sovereignty through your opinions. Only Congress can terminate Tribes. You don't have the authority to do that.

Or is this a new authority that you believe you do have?

Mr. KEEP. No, certainly, we don't. The problem that we are talking about is one that has been practiced since the Indian Reorganization Act was enacted. If Congress changes that, that is a matter for Congress. The opinion to coalesce these ideas is a very brief one. It was written in April of 1936. It has been restated in Cohen's first treatise and has been followed by Congress since then.

If Congress is, now, not satisfied with that and wants to clarify it, then that is for Congress to do. However, until that is done, the Bureau is obligated to follow in the footsteps of that opinion.

Mr. RICHARDSON. Let me ask you what the difference between the Pascua Yaquis and the Micmacs is?

Two years ago President Bush signed into law the Act recognizing the Aroostook Band of the Micmac Indians. As you know, they were part of a larger Tribe in Canada that went into northern Maine. The Micmacs now possess all inherent sovereign authority.

What is the difference between the Pascua Yaqui situation and the Micmacs?

Either one of you?

Mr. KEEP. I would have to look back at what we had done with regard to the Micmacs. My recollection is that we were concerned at the time, at least at the staff level, that the Micmacs were not historically a Tribe. I, frankly, don't recall how it was resolved.

Mr. RICHARDSON. Well, the President signed a law that said they were.

All right. Well, if you could respond in writing to that, because I just don't see the difference here.

[EDITOR'S NOTE.—The information was not received at the time of printing.]

Mr. RICHARDSON. Let's take the State of California. We have several Tribes that you currently view as Adult Indian Communities; is that correct?

Ms. BACON. Yes, sir.

Mr. RICHARDSON. Can these communities exercise all sovereign rights, Ms. Bacon?

Ms. BACON. The nonhistoric Tribes in California have a broad range of self-governing powers, the origin of which is derived from the delegated power of the Secretary as opposed to an inherent power of the sovereign. They include such things as law and order, which is a delegated power and the power to assess members, which is similar to the power of taxation.

However, they cannot regulate inheritance. The determination of membership—or changes in membership—is subject to the approval of the Secretary.

Mr. RICHARDSON. Okay. So you say they have some rights, but not all rights. Let's say your answer was they have no sovereign rights. Can Congress legislate to ensure Tribes, as well as the Pascua Yaqui Indians, be allowed to exercise all rights of sovereignty?

Mr. KEEP. That is a case of first impression. I don't know that they can. I don't know that Congress can. I just don't know the answer to that.

Mr. RICHARDSON. Well, again, I think we are talking about a separation of powers issue. I don't believe you have the authority to make a determination as to how much sovereignty a Tribe has.

Isn't this not a function of the Congress?

Mr. KEEP. I think that the courts have recognized tribal status. We are talking about historic Tribes as those that have historically had tribal status. That is a function of the political branches of government; that is, Congress and the Executive. Through exercising that function, the Executive has established the acknowledgment process to make these determinations.

If Congress makes a declaration that all Tribes shall be treated exactly the same and all should have the same sovereign powers, I doubt that the Department of the Interior is going to take exception to that.

Where the challenge would come is from the judicial branch with someone saying, no, this group of Indians, who have been organized on this ranch in California, cannot tell me who I can and cannot devise my property to. That is where the challenge would come. It won't come from the Executive branch.

Mr. RICHARDSON. Well, is every Adult Indian Community a nonhistoric Tribe?

In other words, can an Adult Indian Community be a historic Tribe, or are all Adult Indian Communities nonhistoric?

Mr. KEEP. I think the latter. The terminology, again, derives from the problem that the Department confronted in the implementation of the Indian Reorganization Act.

If a group on a Reservation was a historic Tribe, all members of that Tribe, whether they were residing on the Reservation or elsewhere, should have the right to vote on the adoption of a constitution and the adoption of basic governing documents that are going to affect their property rights.

The property rights of an individual tribal member are not vested property rights, but they are ones that must be honored by the Secretary in the organic document.

Where the group was being reorganized as an Adult Indian Community based simply on the residence on the Reservation, non-residents were not allowed to vote so that the Adult Indian Community has been the term that has been interchangeably used with an organized group or created Tribe or nonhistoric Tribe.

Probably the most accurate description of it is the reorganized Adult Indian Community.

Mr. RICHARDSON. Okay. Well, let me see if I understand you correctly. Let's take a hypothetical situation.

Under Ms. Bacon's view and your view, then, couldn't you go in and suddenly explore the sovereignty of a currently recognized Tribe and categorize them as nonhistoric?

You can't do that, can you?

Mr. KEEP. No, we can't. When Tribes that have adopted constitutions under the Indian Reorganization Act come to the Department to request amendments to those constitutions, we do review those amendments to ensure that they are consistent with the law as we believe it has evolved. We do not go looking for trouble. We have tried to look back to the Solicitor's Opinion from 1936 to really make some distinctions.

The opinion is very brief. It talks about nonhistoric Tribes not having the authority to tax. We have looked at this and said there are taxes and there are different taxes.

Mr. RICHARDSON. So, basically, what you are saying is, if we in the Congress recognize, by statute, a Tribe as sovereign and that we intend them to have all sovereign powers, you can't come in as a solicitor and say that the Bureau of Indian Affairs suddenly is going to limit that sovereignty?

Mr. KEEP. That is correct. I mean, there are a number of instances, and one in particular that comes to mind in Oklahoma, where the solicitor did, in fact, rule that a particular group of Cherokee descendants was not an Indian Tribe. Congress did, in fact, pass a special statute authorizing them to reorganize.

Mr. RICHARDSON. Ms. Bacon, clarify your opposition to the Pascua Yaqui enrollment. The Tribe is saying that many of their elders didn't get enrolled under the 1978 act.

Why can't we simply open it for three years and then close it?

Ms. BACON. Well, when the Congress recognized the Tribe in 1978, we were dealing with a community that had about 3,000 members, according to our records.

When you open up the enrollment this many years after that recognition act, you are opening it to people who may or may not have maintained a bilateral political relationship with the Pascua Yaqui governing body. We know that there are many Pascua Yaqui descendants in the State of California. What we are saying is, that community would likely be substantially different from the community that was recognized by the Congress in 1978, which is the heart of our argument against opening the enrollment.

Mr. RICHARDSON. How many nonhistoric Tribes are there?

Ms. BACON. I don't think we have an exact number. I know several that we characterize as nonhistoric. I don't have a definite list because the nonhistoric status may not come up until a request for a change in their constitution is received or some other instance brings that status to our attention.

Mr. RICHARDSON. Do you have any idea, approximately, how many? Just a range?

You want to provide that for the record?

Ms. BACON. All right.

[EDITOR'S NOTE.—The information was not received at the time of printing.]

Mr. RICHARDSON. Now, are we going to have to change all of these? Are we going to have to legislate on all of them? Or are you going to change your policy administratively?

Ms. BACON. I am not sure I understand the question.

Mr. RICHARDSON. Well, let's say we have a disagreement on every one of them. Are you basically saying that in order for them to have full recognition, the Congress is going to have to legislate on every one of them?

Ms. BACON. I think when the Tribes organize under the IRA, I think it is our responsibility to look into the historical facts. There have been Tribes that the Congress has recognized where we have had no differences with the Congress.

Mr. RICHARDSON. Under the Indian Reorganization Act, if a community of adult Indians organize, are they a sovereign Tribe or are they an Adult Indian Community?

Let's just say a group of adult Indians organize.

Ms. BACON. They have powers of self-government, and they have some attributes of sovereignty but not the full range.

Mr. RICHARDSON. Are children enrolled in Adult Indian Communities?

Ms. BACON. Yes.

Mr. RICHARDSON. Where did the Adult Indian Community name originate?

Mr. KEEP. It came from the IRA. It came from the Indian Reorganization Act as they were trying to get the constitutions adopted. I think it is important to remember the name of that act. It is, in some ways, much more instructive than others. That is the Indian Reorganization Act. They realized that there were communities where they had residents of a reservation that were historically a Tribe where the adult Indians voted. That is where that comes from.

Mr. RICHARDSON. Both the Tribe and you folks quoted from this historian, Edward Spicer. Where did Spicer stand on the subject of whether this is a historic or nonhistoric Tribe? Do you know?

Ms. BACON. I'm sorry. I don't know.

Mr. RICHARDSON. Didn't Felix Cohen say that there are a few criteria for establishing what a Tribe is: one, that they have Indian heritage, and two, that they be considered an Indian community by other communities. Aren't we kind of splitting hairs a bit too much on this case? Are they Indian people? What do you think they are? Hispanics?

Ms. BACON. No. They are Indian.

Mr. RICHARDSON. So why are we splitting hairs over this?

Ms. BACON. Well, I don't think the Department and the Bureau of Indian Affairs are splitting hairs because we have a process that has the criteria that Felix Cohen basically used to delineate a Tribe; and we use that criteria when we acknowledge a Tribe.

Based on historical facts of the Pascua Yaqui, they are the historic Yaqui Tribe who came to the United States as a Tribe. History shows that the Yaqui descendants came from Mexico as political refugees. So we view the group of Yaqui Indians, who came from Mexico, as that. That is the reason, historically, we look at all the facts when we view a group's Indian heritage.

Mr. RICHARDSON. But there were Indians in Mexico, weren't there?

Ms. BACON. Yes, sir.

Mr. RICHARDSON. It just seems that this distinction needs to be eliminated. This new administration and this new Secretary of Interior should recognize the importance of Indian sovereignty and the importance of not separating distinctions.

It just seems clear to me that this is a carryover from the old years. I would be pleased to receive all documentary evidence.

But, again, it just seems to the solicitor that this is anachronistic. It doesn't make sense that you can go in and say so-and-so is not a Tribe. I don't think you have that power. You don't have that power. You are saying that they don't have the full sov-

ereignty of any other Tribe. I think that is very clearly the power of the Congress.

Ms. Bacon, go ahead.

Ms. BACON. I don't think we were saying that the Pascua Yaquis are not a Tribe.

But, historically, it depends on whether Tribes have treaties with the United States, and different historical facts are researched before a group is recognized as a historical Tribe. All tribes do not have the same characteristics. It is not just "a Tribe is a Tribe is a Tribe." There are historical differences and there have been different relationships.

I feel that this distinction, while it may seem to be hair splitting to the Congress, is part of our acknowledgment process. If you are just talking about recognizing groups of Indian descendants, there are many groups that may be able to qualify as Indian descendants but don't qualify under the criteria of a Tribe that dates back to the first contact with Europeans.

Therefore, I think it is very dangerous to set a precedent that says that all groups are the same.

Mr. RICHARDSON. But aren't the Pascua Yaquis Indian people?

Ms. BACON. Yes, they are.

Mr. RICHARDSON. So why don't they have the same rights as any other Indian? I mean, you have given the standards and some precedent that is not that compelling.

Ms. BACON. Well, the only thing I can say is that we go back to the 1934 interpretation of the Indian Reorganization Act.

Mr. RICHARDSON. All right. Well, let me thank both of you for appearing. We obviously have some differences. I appreciate both of you coming. I urge you to look at this issue again because it strikes me as a bit incongruous. But, again, I have never been right on everything. Most everything, though. Thank you both.

PANEL CONSISTING OF ALBERT V. GARCIA, CHAIRMAN, PASCUA YAQUI TRIBE, TUCSON, ARIZONA; AND ANSELMO VALENCIA, COUNCIL MEMBER AND SPIRITUAL LEADER, PASCUA YAQUI TRIBE, ACCOMPANIED BY DR. OCTAVIANA V. TRUJILLO, VICE CHAIRWOMAN, AND LUIS GONZALES, OFFICE OF PLANNING/ECONOMIC DEVELOPMENT

Mr. RICHARDSON. I would like to ask the Honorable Albert Garcia, the Chairman of the Pascua Yaqui Tribe of Tucson, Arizona, to come forward.

The Chairman is accompanied by Octaviana Trujillo, Vice Chairwoman; Mr. Anselmo Valencia, Council Member; and Mr. Luis Gonzales, Office of Planning and Economic Development.

Let me welcome Chairman Garcia. Let me state that your statement, Chairman Garcia, is fully incorporated in the record. We look forward to hearing from you. Please adhere to the five-minute rule.

STATEMENT OF ALBERT V. GARCIA

Mr. GARCIA. Mr. Chairman and Members of the committee, good morning.

My name is Albert Garcia. I am the Chairman of the Pascua Yaqui Tribe of Arizona, located at 7474 South Camino de Oeste, just west of Tucson, Arizona.

Accompanying me, as you stated, is Dr. Octaviana V. Trujillo to my right; to my left is Mr. Anselmo Valencia, Council Member, Elder of the Community and our Spiritual Leader. And this is Mr. Luis Gonzales, a member of my staff.

I want to thank you for scheduling this meeting on H.R. 734. I would like to request that my statement be printed in the record. I am also submitting exhibits separately.

H.R. 734 is introduced in order to clarify our Tribe's status as a historical Tribe. The Pascua Yaqui Tribe was recognized by Congress on September 18, 1978, through Public Law 95-375, consistent with the Indian Reorganization Act.

House Resolution 734 is a result of much consternation and frustration we have experienced over time with the Bureau of Indian Affairs. The Bureau of Indian Affairs takes the position that the Pascua Yaqui Tribe is not a historical Tribe. This position is premised on solicitor general Indian affairs opinion, No. 618 on April 15, 1936. This opinion has been used against us by the Bureau of Indian Affairs in their legal review of our application for a secretarial election to amend our constitution.

The Bureau of Indian Affairs has continually maintained that the Pascua Yaqui Tribe, a federally recognized Tribe under the Indian Reorganization Act of 1936, does not have the power to levy a tax, condemn property, or regulate law and order.

The aforementioned 1936 opinion states that the lower Sioux Indian community and the Prairie Island Indian community, who were calling for constitutional elections, were doing so on the basis that they were being organized on the basis of their residence upon reserved land. The Bureau claimed that these two communities may not have all the powers vested to the Tribes under Section 16 of the IRA. Therefore, the solicitor opined that these two Tribes did not have the same powers as other sovereign Tribes.

Further, it is important to note that this 1936 opinion is riddled with the word "may," which indicates that even the writer of this opinion was unsure of its own interpretation of what sovereign capacity rested on the communities in question.

It is clear to us that the Bureau of Indian Affairs has misinterpreted this opinion as it relates to the Pascua Yaqui Tribe. Our Tribe was organized under the Powers of Indian Tribes dated October 25, 1934. Simply put, the Pascua Yaqui Tribe was not organized under the basis of residence on the reservation. In fact, the Pascua Yaqui Tribe provides services such as education, health care, and housing across the State of Arizona, including its six Yaqui traditional communities. We believe it is inappropriate that the Bureau would place such credence on such an antiquated opinion, one that obviously is unclear and does not apply to the Pascua Yaqui Tribe of Arizona.

Nonetheless, the Bureau of Indian Affairs is undaunted in its zeal to continue their attempt to deny and erode the sovereignty of the Indian Tribes at every turn.

The Pascua Yaqui Tribe is organized based on the fact that we have voting members of our tribe who reside outside the Reservation in several traditional communities and villages throughout the State. Yaqui Indians roamed, since pre-Colombian days, what is now known as Arizona, California, New Mexico, Texas, Utah, Ne-

vada, and Colorado. Yaquis established permanent settlements in Arizona as a group, not as individuals. Mr. Valencia, who is here today, has extensive knowledge of the Yaqui communities in Arizona where our people lived in villages many years ago.

According to President Jimmy Carter, the Pascua Yaqui Tribe successfully met the strict application of the Department of the Interior's regulations on Indian tribal recognition. Support for that conclusion can be found in a quote from President Carter where he states that his approval of Federal recognition to the Pascua Yaqui does not signal or imply any relaxation in the strict application of the Department's recently promulgated regulations on Indian tribal recognition.

Mr. Chairman, you have the opportunity to enact H.R. 734 to send a strong message to the BIA that Congress will not stand idly by as they continue to pave a road of destruction against Indian sovereignty.

Mr. Chairman, the paramount issue here is that we need to clarify that the Pascua Yaqui Tribe is, in fact, a historical Tribe, that it has the same powers and sovereignty as afforded any other Tribe under the Indian Reorganization Act. We desperately need this legislation to freely exercise these inherent sovereign powers without the fear of the Bureau of Indian Affairs' harassment.

The Pascua Yaqui Tribe of Arizona today operates its own court system, its own housing authority, over 18 "638" programs including fire services and health care. Our government consists of 11 elected officials. We are a democratic and stable government with a constitution. We recently completed and enacted our newly revised tribal codes that include law and order, tax codes, business codes, judicial codes, building codes, election codes, gaming ordinances and more.

In the exhibits we will be submitting, you will find superior court case *Val/Del Inc. v. Superior Court* of Arizona, January 2, 1985. This court case upheld that the Pascua Yaqui Tribe of Arizona has sovereign immunity from the suit. This case also cited the case of *Atkinson v. Haldane*, in the Supreme Court of Alaska. This case upheld the sovereign immunity of the—I can't pronounce that word—Metlakatla Indian Community even though it had come from British Columbia.

I implore committee members to review this exhibit, as it clearly states the plight of the Pascua Yaqui Tribe.

Mr. Chairman, H.R. 734 also has a provision that would open the Pascua Yaqui base roll for a period of three years. The 1978 Recognition Act opened the rolls for only two years. Many of our people, particularly elders, did not enroll for different reasons. Today, these same people cannot enroll because of limitations of the 1978 act.

Currently, we have 1,700 known Yaqui people who can't enroll into the Tribe because they do not have direct lineal descendants on the base roll. Of these 1,700 pending members, approximately 25 percent are over the age of 60.

In closing, I wish to thank the committee staff for its work on this issue; and I wish to thank Congresswoman English, Congressman Kolbe, and Congressman Pastor, in particular for their interest in this issue critical to my people.

Thank you. And we will be happy to answer any questions that you may have.

[Prepared statement of Mr. Garcia, including exhibits, follows:]

PASCUA YAQUI TRIBE of ARIZONA



Testimony submitted by Mr. Albert V. Garcia,
Chairman of the Pascua Yaqui Tribe of Arizona.

COUNCIL MEMBERS

- ALBERT V. GARCIA
Chairman
- OCTAVIANA V. TRUJILLO
Vice Chairwoman
- SALLY A. GONZALES
Tribal Council Secretary
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- ARCADIO GASTELLUM
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- DAVID RAMIREZ
- CARMEN SILVAS
- PETE E. SOTO
- ANSELMO VALENCIA

MR. ALBERT V. GARCIA
7474 SOUTH CAMINO DE OESTE
TUCSON, ARIZONA 85746
TELEPHONE (602) 883-5000

TOPIC: HOUSE RESOLUTION 734

In support of H.R. 734 to provide for the
extension of benefits to the Pascua Yaqui Tribe of
Arizona.

PASCUA YAQUI TRIBE of ARIZONA



TESTIMONY OF MR. ALBERT V. GARCIA CHAIRMAN OF THE PASCUA YAQUI TRIBE OF ARIZONA TO HOUSE COMMITTEE ON INDIAN AFFAIRS

COUNCIL MEMBERS

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DOLORES LOPEZ
DAVID RAMIREZ
CARMEN SILVAS
PETE E. SOTO
ANSELMO VALENCIA

Mr. Chairman and members of the committee, my name is Albert V. Garcia, I am Chairman of the Pascua Yaqui Tribe of Arizona, located at 7474 S. Camino de Oeste, just West of Tucson, Arizona. Accompanying me are Dr. Octaviana V. Trujillo, Vice-Chairwoman, Mr. Anselmo Valencia, Council member and Mr. Luis A. Gonzales, a member of my staff.

I want to thank you for scheduling this hearing on H.R. 734. I would like to request that my statements be printed in the record. I am also submitting exhibits separately, I understand that these exhibits are not for printing purposes but will be in the committee files for review.

H.R. 734 is introduced in order to clarify our tribes status as a historical tribe. The Pascua Yaqui Tribe was recognized by congress on September 18, 1978 through P.L. 95-375, consistent with the Indian Reorganization Act.

House Resolution 734 is a result of much consternation and frustration we have experienced over time with the Bureau of Indian Affairs. The Bureau of Indian Affairs takes the position that the Pascua Yaqui Tribe is not a historical tribe. This position is premised on Solicitor General on Indian Affairs opinion, No. 618, on April 15, 1936. This opinion has been used against us by the Bureau of Indian Affairs in their legal review of our application for a secretarial election to amend our constitution.

The Bureau of Indian Affairs has continually maintained that the Pascua Yaqui Tribe, a federally recognized tribe under the Indian Reorganization Act, (I.R.A.) does not have the power to levy a tax, condemn property or regulate law and order.

The aforementioned 1936 opinion states that the lower Sioux Indian community and the Prairie Island Indian Community, who were calling for constitutional elections, were doing so on the basis that they were being organized on the basis of their residence upon reserved land. The Bureau claimed that these two communities may not have had all the powers vested to tribes under section 16 of the Indian Re-organization Act. Therefore, the Solicitor opined that these two tribes did not have the same powers as other sovereign tribes.

Further, its important to note that this 1936 opinion (Exhibit A) is riddled with the word "may" which indicates that even the writer of this opinion was unsure of its own interpretation of what sovereign capacity rested on the communities in question.

It is clear to us that the Bureau of Indian Affairs has misinterpreted this opinion as it relates to the Pascua Yaqui Tribe. Our tribe was organized under the Powers of Indian Tribes dated october 25, 1934. Simply put, the Pascua Yaqui Tribe was not organized under the basis of residence on a reservation. In fact, the Pascua Yaqui Tribe provides services such as education, health care and housing across the state of Arizona, including its six Yaqui traditional communities. We believe it inappropriate that the Bureau would place such credence on such an antiquated opinion, one that obviously is unclear and does not apply to the Pascua Yaqui Tribe of Arizona. Non-the-less, the Bureau of Indian Affairs is undaunted in its zeal to continue their attempt to deny and erode the sovereignty of Indian tribes at every turn.

The Pascua Yaqui Tribe is organized based on the fact that we have voting members of our tribe who reside outside the reservation in several traditional communities and villages throughout the state. Yaqui Indians roamed since pre-columbian days what is now known as Arizona, California, New Mexico, Texas, Utah, Nevada and Colorado. Yaquis established permanent settlements in Arizona as a group, not as individuals. Mr. Valencia who is here today has extensive knowledge of Yaqui communities in Arizona where our people lived in villages many years ago.

According to President Jimmy Carter, the Pascua Yaqui Tribe successfully met the strict application of the Department of Interior's regulations on Indian Tribal Recognition. Support for that conclusion can be found in the quote from President Carter where he states that his "approval of Federal Recognition to the Pascua Yaqui does not signal or imply any relaxation in the strict application of the Department's recently promulgated regulations on Indian Tribal Recognition."

Furthermore, the Pascua Yaqui Tribe of Arizona has been listed by the Internal Revenue Service as a Tribe which enjoys tax exempt status under the Indian Tax Status Act and is a recipient and contracting Tribal Government with the Federal Government on various self-determination programs such as law enforcement, social services, judicial services, health, education and welfare programs. Recently, the State of Arizona entered into a proclamation with the Pascua Yaqui Tribe recognizing the government to government relationship with the Tribe.

The United States named and identified Yaquis as "Yaqui Indians" who were also viewed as political refugees as confirmed by the United States Department of State in 1931. Professor Spicer, a University of Arizona anthropologist who studied the Yaqui for forty years, stated in a 1976 letter to Senator Paul J. Fannin in support of the 1978 Recognition Act, that the Yaquis were given sanctuary as political refugees between 1896 and 1907 and that they established "permanent settlements". It is clear they came across intact as communities rather than unrelated individuals without a common language, religion or tribal culture. Interestingly, the Bureau of Indian Affairs notes that Dr. Spicer did not discuss tribal movement or immigration in his testimony in support of the 1978 Yaqui Recognition Bill but the record does not indicate whether or not the question was asked. It can be clearly argued that Yaqui clans and customs would not have survived if only individual Yaquis had crossed the border but did survive because the Tribe came across as villages, clans and as a tribal group.

Bureau of Indian Affairs officials have misquoted or taken entirely out of context the testimony of Dr. Spicer, September 21, 1977. What Dr. Spicer actually said was that his conclusion after 40 years of study of the Yaqui people is that: "...they form a distinct Indian group or Tribe. The language their ancestors spoke, and the present day Pascua Yaquis continue to speak is universally classified by linguists as a member of the Uto-Aztecan family of languages, to which also belong the languages of the ancient and modern Aztecs, and the Papagos (now Tohono O'odham), Pimas, Hopis, and Paiutes of Arizona. This is one of the most widespread and important of North American Indian language stock. The Yaqui language as a member of this group, has its own distinctive Indian grammar and sound system wholly unrelated to any language in any part of the world outside of North America. The present day Yaquis including those of New Pascua Pueblo in Arizona speak the same language.... "Yaquis have resided in Arizona for more than 200 years. They had a role in the development of the area known as Arizona ever since the 1700s. Some Yaquis came with the followers of Father Kino to the first missions established in the upper Santa Cruz Valley. There is documentary record of Yaquis residing in what is now Southern Arizona at Tumacacori, Arizona in 1796." Continuing, Dr Spicer states that the native Indian language continues to be spoken by the Yaquis in Arizona. The distinct Yaqui customs which have been uniquely their own since before the time of European discovery continued to shape and influence their way of life. The central core of Yaqui culture is highly prized by the Yaquis and has been maintained through the whole course of their unique and difficult historical experience." He then goes on to state that the creation of the village of New Pascua Pueblo "gave the Pascua Yaqui the opportunity to perpetuate their way of life as Yaqui Indians."

If one reads Professor Spicer's letter in its entirety, we can see that the Bureau of Indian Affairs has simply excised the part about "political refugees" and used it to support its flimsy argument that the Yaquis are not an historical tribe. Senator Dennis DeConcini's statement in support of the Bill which he introduced (S. 1633) states "...the Yaqui Indians, of Arizona, ... have been identified by every recognized authority as being a major and unique American Indian Tribe. The Pascua Yaquis were included and supported by the American Indian Policy Review Commission. The ancestors of these people have lived in what we call the Southwest, including the area of the Gadsen Purchase, from time immemorial." Continuing Senator DeConcini states "Mr. Chairman, I have grown up in close proximity to the Yaqui villages in Arizona and can personally testify to the sense of pride and strength of culture, language and character, that has carried these people through much adversity. However, while the history of the Yaqui is much documented and well known, it is the relationship of the Yaqui with the United States Government that desperately needs to be clarified. The only avenue to the clarification is legislative action." "...S. 1633 clearly conveys upon members of the Pascua Yaqui Association the status of Indians, and declares them to be eligible for all services and assistance provided to other American Indians because of their status as Indians."

Mr. Chairman, and members, you have the opportunity through the enactment of H.R. 734 to send a strong message to the B.I.A. that Congress will not stand idly by while they continue to pave a road of destruction against Indian sovereignty.

Mr. Chairman, and members of the committee, the paramount issue here is that we need to clarify that the Pascua Yaqui Tribe is in fact a historical tribe, that it has the same powers of sovereignty as afforded any other tribe under the Indian Reorganization Act. We desperately need this legislation to freely exercise these inherent sovereign powers without fear of Bureau of Indian Affairs harassment.

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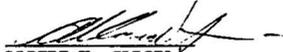
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Currently, we have 1,700 known Yaqui people who can't enroll into the tribe because they do not have a direct lineal descendant on the base roll. Of these 1,700 pending members, approximately 25% are over the age of 60.

In closing, I wish to thank the committee staff for its work on this issue and I wish to thank Congress Woman English, Congressman Kolbe and Congressman Pastor in particular for their interest in this critical issue to my people. Thank you, we will be happy to answer any questions that you may have.



ALBERT V. GARCIA
CHAIRMAN
PASCUA YAQUI TRIBE

PASCUA YAQUI TRIBE of ARIZONA



EXHIBITS H.R.734

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EXHIBIT A

OPINION OF SOLICITOR GENERAL ON INDIAN AFFAIRS

618 - SIOUX ELECTIONS ON CONSTITUTIONS

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MARCH 31, 1936

superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks.
* * * (At page 259.)

The question of navigability of the Missouri River at the point in question is irrelevant to the question of ownership of the river bottom. Clearly neither the State of North Dakota nor any Indian tribe could interfere with commerce on a navigable stream, regardless of the ownership of the land under water. The question of such ownership should be considered in terms of its actual implications. It is well known that the Missouri River in the region of the Fort Berthold Reservation is a river of changing outlines, with banks generally moving in one direction or another and sometimes in both directions at once. Can it be plausibly declared that at the time of setting aside Fort Berthold Reservation the Government intended to recapture islands or strips of land that might be formed from what was at the moment river bottom? Or did the Government simply reserve what it could not in any event alienate, namely, a public highway for navigation under Federal protection and control?

Viewed in this light, the intent of the Government appears clear. I am of the opinion that the river bed, at the point in question, was part of the Fort Berthold Indian Reservation prior to the admission of North Dakota to statehood. The State of North Dakota, on its admission to the Union, expressly disclaimed all right and title to Indian lands. Constitution of North Dakota, Article XVI, section 203. It follows that islands subsequently formed from the river bed, which belonged to the Indians of the Fort Berthold Reservation, retained the original status of the river bed and must now be recognized as part of the Fort Berthold Reservation.

NATHAN R. MARGOLD,
Solicitor.

Approved: March 31, 1936
T. A. WALTERS, *First Assistant Secretary.*

SIoux—ELECTIONS ON CONSTITUTIONS

April 15, 1936.

Memorandum to Mr. Zimmerman
Assistant Commissioner of Indian Affairs.

In connection with the matter of calling elections on the constitutions for the Lower Sioux Indian

Community and the Prairie Island Indian Community under the Pipestone jurisdiction, the two constitutions and the letters addressed to the two constitutional committees have been revised in this office to accord with certain legal principles.

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.

In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits of the powers for such group. These powers were the power to condemn land of members of the community, to regulate the inheritance of the property of members of the community, and to levy taxes upon members of the community. The first two powers were eliminated but the last was modified to restrict it to a permissible scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges. As these assessments would be incidental to the ownership of community property it is considered that the community would be privileged to impose them. The reasons for these changes were reported to the Indians in the letters to the constitutional committees. It is believed that the Indians will have no objections to these changes but if they should have they may seek the postponement of the elections as already suggested in the letters addressed to the committees. The remaining powers were found justified on the bases of one of the above mentioned principles. The power over law and order is made subject to review by the Secretary of the Interior, and may be sustained as a delegation of power.

As these changes were legally necessary and did not involve considerations of policy and as there has been prolonged delay in calling the elections for these two communities, the above changes were made in this office without returning the files to the Indian Office. It is requested that you call this memorandum to the attention of the Organization Division in order that the above stated legal principles may be followed in future cases of organiza-

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tions of Indians upon the basis of residence on a reservation.

Solicitor.

FIVE CIVILIZED TRIBES—ATTORNEY'S FEES

M-28309

April 16, 1936.

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

At the request of the Assistant Commissioner of Indian Affairs, a question relating to the application of F. M. Goodwin and associates, attorneys, of Washington, D.C., for the allowance of a fee for services rendered in representing the petitioner in the Sandy Fox case (*Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418), has been submitted to me for opinion. Before proceeding to a discussion of the immediate problem, however, it is essential that the events leading to and including a certain arrangement between the Department and the applicants, the scope of which is in dispute, be reviewed briefly.

Prior to 1924, the Department had employed Wolf and Company, of Chicago, Illinois, and the F. W. Freeborn Engineering Corporation, of Tulsa, Oklahoma, in behalf of the restricted members of the Five Civilized Tribes, to assist in seeking the abatement or refund of certain Federal income taxes for the years 1917 to 1920, inclusive, under various headings, including depletion, depreciation and discovery allowances. Certain recoveries were thereby effected. The question then arose whether income derived from tax exempt land held by a restricted Indian should be subject to any Federal income tax. With the approval of the Department, a number of Indians thereupon employed Messrs. Robert E. Keenan, of Tulsa, and W. R. Banker, of Muskogee, Oklahoma, to prosecute claims for refunds of income taxes paid during past years, and other Indians employed other attorneys for the same purpose.

On March 15, 1924, the Attorney General rendered an opinion (31 Ops. Atty. Gen. 273) favorable to the Indians' contention and Treasury Decision No. 3570, in pursuance thereof, was issued shortly thereafter. Thereupon, the Superintendent of the Five Civilized Tribes filed refund claims with the Collector of Internal Revenue for the Oklahoma District in behalf of a number of restricted members of the Tribes.

On January 12, 1932, Mr. Goodwin, who with his associates had been active in similar Osage income tax refund cases, addressed a letter to the First Assistant Secretary of the Interior, from which the following is quoted:

"The Superintendent of the Five Civilized Tribes, on behalf of the incompetent members of the said Tribes, has already submitted applications for certain tax refunds. However, the records at the Agency at Muskogee have not been kept so as to reveal the amount which has been sent for the incompetent Indians for taxes. The Superintendent, acting on the best information available to him, submitted his applications on behalf of the Indians, but it is now believed that approximately 1,000 Indians are entitled to refunds of varying amounts which have not been covered by the applications made by the Superintendent. The exact amount of such probable refunds cannot be stated, but from all the information available, they will amount to a substantial sum. * * *

"Mr. Whitney has discussed these cases with me and asked me and my associates to join with him in seeking your approval of our employment to make a thorough check of all the incompetent cases to obtain additional tax refunds. The data for this can only be obtained by an exhaustive examination of the returns and records of the Internal Revenue Bureau in Oklahoma and in Washington, D.C. For this reason, it is impossible for the Superintendent, or his assistants, to function in this matter. The logical and reasonable course would be to employ attorneys and cause a thorough check to be made of the Internal Revenue records so that any refunds to which these Indians are entitled may be obtained.

"I am willing to undertake this work on a *quantum meruit* basis, subject to your approval of such employment and of the fee to be paid on refunds actually obtained. As there will be a mass of details to consider, it will be necessary for me to have associates. * * * In view of the fact that the Osage tax claims have been so recently handled by the Internal Revenue Bureau and that its attorneys and agents are now more familiar with the Indian laws and problems than usual, it is believed that this is a very appropriate time to undertake this work, and it would be to the advantage of the Indians as well as of the Government to expedite the same as much as possible."

On April 18, 1932, the Commissioner of Indian Affairs, after discussing the events hereinbefore

EXHIBIT B

**OPINION SOLICITOR GENERAL
ON INDIAN AFFAIRS NO. 1821**

MARCH 3, 1958

OPINIONS OF THE SOLICITOR

1821

the character of mineral rights, if any, acquired under an Executive order reservation, in other words, whether a right of use and occupancy in reserved lands included the right to the underlying minerals. The 1927 act confirmed that such mineral rights belonged to the Indians.

We will agree that by its clear terms the 1927 act precludes the changing of the boundaries of Executive order reservations, but we believe that section 4 of the act must be read in its proper context as applying to all such reservations where there is an existent Indian title. We believe that section 4 has no application in cases where Indian title, and whatever rights attach thereto, has been extinguished by reason of a merger of the legal and equitable titles in the United States.

EDMUND T. FRITZ,
Deputy Solicitor.

SALES TAX—THREE AFFILIATED TRIBES OF
THE FT. BERTHOLD RESERVATION

M-36448

March 3, 1958

Indian Tribes: Tribal Government—Indians: Taxation: Generally

The governing body of the Three Affiliated Tribes on the Fort Berthold Reservation acted within the scope of the traditional authority of Indian Tribes to tax persons under their jurisdiction and to exercise such other reasonable governmental powers as are necessary to maintain law and order and to provide traditional governmental service except insofar as such functions have been assumed by the paramount government, the United States, when, by Resolution dated March 11, 1948, the Tribal Business Council imposed a sales tax on the gross sales on all cattle and horses sold on or off the reservation, and on sales of crops produced as a result of revolving credit financing.

Indian Tribes: Fiscal Matters—Indians: Taxation: Generally

There is no legal objection to the imposition of the tribal sales tax designated by Tribal Business Council resolution. The tax is enforced against all of a class, namely, those who have produced livestock and crops "as a result of revolving credit financing." The borrowers were or should have been aware of the tax prior to their application for loans.

Memorandum

To: Commissioner of Indian Affairs
From: Solicitor
Subject: Sales tax, Three Affiliated Tribes of the Fort Berthold Reservation

In a memorandum on this subject you requested my opinion as to whether the Tribal Business Council of the Three Affiliated Tribes, Fort Berthold Reservation, acted within the scope of its authority when it adopted the Resolution of March 11, 1948, which provides:

"That the Tribal Business Council of the corporation authorize a sales tax of two percent (2%) on the gross sales return on all cattle and horses sold on or off the reservation. Sales of crops which have been produced as a result of revolving credit financing shall also be taxed two percent (2%). Other crop sales shall not be taxed for the same purpose:

At this late date, nearly ten years after the adoption of the Resolution, we shall give the Tribe the benefit of any doubts, which if presented more seasonably, might have led to corrective suggestions as to the form of the Resolution. The time limit for disapproval in this connection lapsed ninety days after the enactment of the Resolution.

In general there is little doubt but that the governing body of the Three Affiliated Tribes on the Fort Berthold Reservation acted within the scope of the traditional authority of Indian Tribes to tax persons under their jurisdiction and to exercise such other reasonable governmental powers as are necessary to maintain law and order and to provide traditional governmental services except in so far as such functions have been assumed by the paramount government, the United States. *Iron Crow v. Ogala Sioux Tribe*, 231 F. (2d) 89 (1956). Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, under which these historical bands or tribes were constituted into a single statutory tribe can be read to require that their new Constitution shall give the statutory tribe "all powers vested in any Indian tribe or tribal council by existing law" and certain additional powers not theretofore ordinarily exercised by Indian tribes, which are specifically enumerated. Section 3 (d) of Article VI of the Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation provides that subject to the approval of the Secretary of the Interior the Tribal Business Council shall have the power, " * * * to levy taxes or license fees on nonmembers

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MARCH 3, 1956

doing business within the reservation * * * consistent with Federal laws governing trade with Indian tribes." It could hardly be argued that it was only intended that the tribe should have power to tax nonmembers.

In October of 1934 the Assistant Secretary of the Interior approved an opinion of the Solicitor which held that among the "powers vested in any Indian Tribe or Tribal Council by existing law" is the power "To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders." (55 I.D. 14, 16) This principle that an Indian Tribe has the power to tax as a corollary to its government function has been reaffirmed in the recent court case *Iron Crow v. Oglala Sioux Tribe, supra*. Further, it has been held that a tribe has capacity to sue in the Federal District Court for the collection of taxes which the tribe has validly imposed on nonmembers leasing tribal land. *Oglala Sioux Tribe v. Barta, D.C., 146 F. Supp. 917.*

You have asked the further question whether the tribe may impose a sales tax only on sales of livestock by members indebted to the tribe for loans and on sales of crops produced by members who have been financed with loans from the tribe. A valid ordinance enacted to legislate against all members of a large class does not lose its validity because the restrictions or penalties are subsequently enforced against only a segment of the class. Nor can the members who are so taxed be heard to complain when they, as borrowers, were or should have been aware of the tax prior to their application for loans from the tribe and the use of the borrowed fund to raise livestock or crops. The content of the questioned resolution was incorporated into the Bureau of Indian Affairs' approved policies and plans in connection with loan agreements as long ago as 1950. We see no reason to reopen this question administratively at this late date.

Although the Congress by the acts of August 15, 1953, 67 Stat. 590, and July 10, 1957, 71 Stat. 277, has removed the restrictions formerly placed on sales of such property we find no authority to support the theory that Congress intended thereby to extinguish tribal power to control sales of chattels on which they have a lien or to repeal tribal power to tax. We therefore see no legal objection to the continued imposition of the tribal sales tax on the class of persons so designated by the subject Tribal Business Council resolution. The Bureau of Indian Affairs may encourage the tribe to enact a resolution repealing the sales tax and renegotiate their

loan agreement with the United States, but in our opinion that the tribe could continue operating its credit program as at present without breach of its contract or violation of law.

EDMUND T. FRITZ,
Deputy Solicitor

MEMBERSHIP—CONFEDERATED SALISH AND
KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION

65 I.D. 97
M-36476

March 3, 1956

Indian Tribes: Constitutions—Indian Tribes: Membership

Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is consistent with the tribal constitution does not validate the ordinance.

Memorandum

To: Commissioner of Indian Affairs
From: Solicitor
Subject: Membership—Confederated Salish and Kootenai Tribes of the Flathead Reservation

A question has been raised whether this Department will recognize as effective, at least as far as the Department is concerned, ordinances passed by the Tribal Council of the Salish and Kootenai Tribes of the Flathead Reservation in Montana, by which the Council authorizes itself (1) to remove from enrollment members who were previously enrolled in literal compliance with the membership criteria set forth in the tribal constitution and (2) extends future membership to all children or to change the provisions of that constitution which any member of the Tribes "who is a resident of the reservation at the time of the birth of said children * * *," without complying with the constitutional procedure for such action. The Commissioner of Indian Affairs is advised to point out to the Tribal Council that serious doubts as to the legality of the resolution involved prevent him, as representative of the United States in its capacity as guardian of tribal assets, from recognizing the disenrollment of present members and the failure to enroll new members, insofar as such actions are predicated on the authority of the tribal resolutions inconsistent with the tribal constitution.

EXHIBIT C

VAL/DEL, INC. V. ARIZONA SUPERIOR COURT

703 P.2d. - 502 (1985) CERT. DENIED,

474 U.S. 920 (1985)

cert. denied, 474 U.S. 920
(1985)

502 Ariz.

703 PACIFIC REPORTER, 2d SERIES

that those children with narrow set eyes and weak chins would obviously be "incapable" and those with dancing eyes and an apparent good disposition would be "capable." It seems to me that the only way the judge can tell if the child is capable is to ask him or her some preliminary questions and that is what I believe the statute requires. Contrary to the conclusion reached by the majority, the Arizona cases also stand for this proposition. Nevertheless, I would affirm here because any error was waived by failing to object to the testimony and by the fact that the testimony of the children shows they were competent witnesses under the statute. The failure to *sua sponte* examine the children for competency was not fundamental error.



145 Ariz. 558

VAL/DEL, INC., a Delaware
corporation, Petitioner,

v.

SUPERIOR COURT of the State of Arizona,
In and For the COUNTY OF PIMA,
Honorable Lillian S. Fisher, a Judge
thereof, Respondents.

and

PASCUA YAQUI TRIBE, Real
Party in Interest.
No. 2 CA-SA 133.

Court of Appeals of Arizona,
Division 2.

Jan. 2, 1985.

Reconsideration Denied March 1, 1985.

Review Denied May 29, 1985.

Management company brought special action petition from trial court's dismissal of management company's complaint seeking enforcement of arbitration clause in agreement wherein Indian tribe hired

management company to finance and operate tribe's bingo operation. The Court of Appeals, Birdeall, C.J., held that: (1) arbitration clause wherein parties agreed that any dispute would be arbitrated and the result entered as judgment in court of competent jurisdiction was express waiver of tribe's sovereign immunity, and (2) civil jurisdiction properly lay with state, notwithstanding fact that Pascua Yaqui tribal court may also have jurisdiction.

Order vacated and cause remanded.

1. Indians ⇐27(1)

Sovereign immunity of Indian tribes applies regardless of where suit is brought.

2. Indians ⇐27(1)

Sovereign immunity of Indian tribes is not absolute, but exists only at the sufferance of Congress, and is subject to complete defeasance.

3. Indians ⇐27(1)

Either explicit congressional authority or consent of tribe is necessary to find waiver of Indian tribe's sovereign immunity.

4. Indians ⇐27(1)

Congress did not waive the sovereign immunity of the Pascua Yaqui Indian Tribe by granting civil jurisdiction to the state over Pascua Yaqui Indian lands pursuant to 25 U.S.C.A. § 1300f(c), which extended the criminal jurisdiction over offenses committed by or against Indians in Indian country and civil jurisdiction over causes of action arising in Indian country to which Indians are parties previously granted pursuant to 25 U.S.C.A. § 1360(a).

5. Indians ⇐33(1)

State's alleged retrocession of jurisdiction over Pascua Yaqui Indian territory to federal government did not comply with requirements of Civil Rights Act of 1968, § 403(a), 25 U.S.C.A. § 1328(a), which provides that federal government is authorized to accept state's retrocession, absent evidence in the record to show acceptance of retrocession by the Secretary of the Interi-

VAL/DEL, INC. v. SUPERIOR COURT

Ariz. 503

Cite as 703 P.2d 502 (Ariz.App. 1985)

or and published acceptance of same in the Federal Register. Civil Rights Act of 1968, § 403 note, 25 U.S.C.A. § 1323, note.

6. Indians ⇐27(1)

Waiver of sovereign immunity by Indian tribe cannot be implied but must be unequivocally expressed.

7. Indians ⇐27(1)

Arbitration clause wherein parties agreed that any dispute arising out of contract wherein Indian tribe hired management company to finance and operate tribe's bingo operation would be arbitrated and the result entered as judgment in court of competent jurisdiction was express waiver of tribe's sovereign immunity.

8. Indians ⇐27(2)

Civil jurisdiction over dispute arising out of contract wherein Pascua Yaqui Indian tribe hired management company to finance and operate tribe's bingo operation properly lay with the state, where contract arbitration clause in which parties agreed to submit disputes to arbitration with the result to be entered in court of competent jurisdiction did not draw distinction between tribal court system and any other court system, notwithstanding that tribal court may also have jurisdiction. 25 U.S.C.A. § 1300f(c); 28 U.S.C.A. § 1360(a).

9. Appeal and Error ⇐1078(1)

Indian tribe apparently waived alleged error that contract wherein Indian tribe hired management company to finance and operate tribe's bingo operation was not approved or endorsed by Secretary of the Interior and the Commissioner of Indian Affairs and was therefore void, thus precluding consideration of that argument by Court of Appeals to deny relief from what was otherwise an abuse of discretion by trial court in denying enforcement of arbitration clause, where tribe claimed that management company's action pursuant to contract properly belonged before tribal court.

Molloy, Jones, Donahue, Trachta, Childers & Mallamo, P.C. by John F. Molloy and David A. McEvoy, Tucson, for petitioner.

Lansdale & Kneip, P.C. by Jack L. Lansdale, Jr., Tucson, and Ussery & Parrish, P.A. by L. Lamar Parrish, John J. Carmody, Jr., and Catherine Baker Stetson, Albuquerque, for real party in interest.

OPINION

BIRDSALL, Chief Judge.

This special action has been taken from the trial court's dismissal of the petitioner's complaint. We have accepted jurisdiction because the petitioner's remedy by appeal is not adequate and because the question presented is a matter of great significance to those who may desire to do business with the respondent tribe. See *State ex rel. Corbin v. Superior Court of Maricopa County*, 138 Ariz. 500, 675 P.2d 1319 (1984); *University of Arizona Health Sciences Center v. Superior Court of the County of Maricopa*, 136 Ariz. 579, 667 P.2d 1294 (1983).

On January 11, 1984, the real party in interest Pascua Yaqui Tribe and Val/Del, Inc., the petitioner, entered into an agreement whereby Val/Del was to manage the tribe's newly established bingo operation. The agreement called for Val/Del to be retained on an exclusive basis to finance, manage, and operate the bingo operation for the tribe for a seven-year period commencing January 1, 1984. On or about May 13, 1984, the tribe apparently excluded petitioner's employees and managers from the property, alleging the existence of certain defaults by petitioner under the management agreement.

On June 27, 1984, petitioner filed its complaint in the present lawsuit in Pima County Superior Court seeking to have the arbitration clause of the agreement enforced. Service was made upon the tribe on June 27, 1984, and its motion to dismiss was filed July 9 and granted on August 7. The court found that the Pascua Yaqui Indian Tribe is a federally recognized tribe entitled to sovereign immunity and cannot be

sued without having waived such immunity or otherwise granted its consent to suit. Although the trial court found that the tribe had consented to having a lawsuit between the parties tried in its tribal court, it held that the arbitration clause in the subject contract was not a legally sufficient waiver of sovereign immunity to permit the action in state court and dismissed the complaint.

The powers of Indian tribes have been described as "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, *Handbook of Federal Indian Law* 122 (U.N.M. ed. 1971). Before the Europeans arrived, Indian tribes were self-governing sovereign political entities. See *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). One of the inherent powers possessed by Indian tribes like all sovereign bodies, was immunity from suit. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), Justice Marshall stated the basis of this immunity:

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization' the Indian Nations are exempt from suit." 436 U.S. at 53, (citations omitted).

Arizona courts have also recognized the doctrine of tribal sovereign immunity. In *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968), our supreme court held that state courts did not have jurisdiction over an Indian tribe which had allegedly committed a tort while engaging in a business enterprise in the State of Arizona but outside the boundaries of the tribal lands. The court held that the Colorado River Indian Tribe was a sovereign immune from suit and could not be subjected to the jurisdiction of Arizona courts without its consent or the consent of Congress. A similar result was reached in *White Mountain Apache Indian Tribe v.*

Shelley, 107 Ariz. 4, 480 P.2d 654 (1971), and both cases were noted in the recent Division One case of *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (App. 1983).

[1-3] We note here that sovereign immunity as discussed in these cases seems to be limited to decisions wherein jurisdiction of state and federal courts was thwarted. However, since one of the primary purposes of the doctrine of sovereign immunity is to protect tribal trust property from encumbrances, *Atkinson v. Haldane*, 569 P.2d 151 (Alaska, 1977), it must necessarily mean freedom from suit regardless of where the suit is brought. The immunity of Indian tribes, however, is not absolute. *United States v. Oregon*, 657 F.2d 1009 (9th Cir.1981). It exists only at the sufferance of Congress and is subject to complete defeasance. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Either explicit congressional authority or consent of a tribe is necessary to find a waiver of the immunity. *United States v. Oregon*, *supra*.

Petitioner's first point of attack is that the tribe does not enjoy sovereign immunity since it does not possess the requisite characteristics of a sovereign Indian nation as set forth in regulations promulgated by the Department of Interior. See 25 C.F.R. Part 83. The procedures established in those regulations, which petitioner alleges must be met before a tribe will be accorded federal recognition and therefore enjoy immunity from suit, include:

"(a) [T]he petitioner [tribe] has been identified from historical times until the present on a substantially continuous basis, as 'American Indian' or 'aboriginal.'

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe

which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." 25 C.F.R. § 83.7.

Petitioner presented to the trial court two books¹ by Dr. Edward H. Spicer as authority for the proposition that the Pascua Yaqui Tribe would not qualify for federal recognition under the Code of Federal Regulations requirements. Spicer was an acknowledged authority on the history of the Pascua Yaquis, and his books establish that the Yaquis do not have single roots but are a historically mixed-blood people who lived in western Mexico on the Gulf of California from approximately the 1600's to the present. Beginning in the late 1850's, small groups came from time to time across the international border to Arizona and California. Therefore, petitioner argues, since the Pascua Yaquis are not indigenous to this area, but rather are immigrants from Mexico, and because Dr. Spicer's books show that the tribe has not attempted to revive any system of government their predecessors may have established in Mexico, they would not qualify for federal recognition under 25 C.F.R. § 83.7. We cannot fault this conclusion and, in essence, neither does the tribe.

The tribe relies instead on 25 U.S.C. §§ 1300f-1300f(2), which were adopted by Congress in 1978 and in which Congress recognized the Pascua Yaqui Indian people and declared them eligible

"for the services and assistance provided to Indians because of their status as Indians or through any department, agency, or instrumentality of the United States, or under any statute of the United States." 25 U.S.C. § 1300f(a)

Additionally, Congress provided that certain provisions of 25 U.S.C. §§ 461-492 entitled "Protection of Indians and Conservation of Resources," would be extended to

the Pascua Yaqui Indian people. Included in that subchapter is § 473, the definition section, which recognizes the term Indian as referring to all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. The Supreme Court of Alaska, in *Atkinson v. Haldane*, supra, was presented with a similar situation involving the Metlakatla community. The court found that, although the Metlakatla community had come to Alaska from British Columbia, that that was not a significant factor in view of the fact that the community had been recognized by the federal government as an organized tribe and thus should be given the protections accorded other tribes. The court stated:

"[The tribe asks] application of the principle that tribes under the tutelage of the United States are immune from suit in the absence of congressional consent....

Thus, we conclude that the Metlakatla Indian Community, despite its unique history, is entitled to sovereign immunity.... The Community has been recognized by the United States government as an Indian tribe and has been treated accordingly. Once the executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the Community is entitled to all of the benefits of tribal status. The Supreme Court of the United States declared in *U.S. Fidelity [United States v. United States Fidelity & Guaranty Co.]*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) that one of those benefits is tribal sovereign immunity in the absence of congressional waiver. Court decisions from *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) to *McClanahan v. State Tax Commission*, 411 U.S. 164, 170-72, 93 S.Ct. 1257, 1261-62, 36 L.Ed.2d 129, 134-36 (1973) have firmly established plenary congressional power over Indian affairs. Article VI, clause 2

1. E. Spicer, *Pascua, A Yaqui Village in Arizona* (Univ. of Ariz. Press ed., 1984).

E. Spicer, *The Yaquis: A Cultural History* (Univ. of Ariz. Press, 1980).

of the United States Constitution provides:

'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.'

The supremacy of the decisions of the Supreme Court of the United States has been recognized since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1810). Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case." 569 P.2d at 162-3.

Petitioner contends that regardless of the recognition by the federal government of the Pascua Yaqui Indian people in 25 U.S.C. § 1300f, that recognition was conditioned upon the tribe's waiver of sovereign immunity because of the provisions of 25 U.S.C. § 1300f(c):

"Provided, That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)."

The act of August 15, 1953, referred to in subsection (c), commonly known as Public Law 280, extended to certain states criminal jurisdiction over offenses committed by or against Indians in Indian country (18 U.S.C. § 1162) and civil jurisdiction over causes of action arising in Indian country to which Indians are parties (28 U.S.C. § 1360). PL-280 apparently began as an attempt by California to extend criminal jurisdiction to all Indian lands within the state. It has been pointed out that the extension of state criminal jurisdiction was the primary thrust of the legislation and that the civil section was added without

great discussion. *Atkinson v. Haldane*, *supra*. PL-280 automatically transferred the jurisdiction of certain civil and criminal matters involving Indians on Indian lands to five enumerated states—California, Minnesota, Nebraska, Oregon, and Wisconsin—and tendered the same jurisdiction to all others. The statute was amended in 1968 in conjunction with the adoption of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 to require that future assumptions of jurisdiction by a state could be made only with the consent of the tribe in question. 25 U.S.C. §§ 1321(a) and 1322(a). The amendments also authorized the assumption by states of partial subject matter or territorial jurisdiction and permitted states which had previously accepted jurisdiction to retrocede such jurisdiction to the federal government, either in whole or in part. 25 U.S.C. §§ 1321(a) and 1322(a).

Petitioner contends that, by conferring jurisdiction over Pascua Yaqui lands to the Arizona courts pursuant to PL-280, the effect of 25 U.S.C. § 1300f(c) is to waive the tribe's immunity from suit. This contention rests on the resolution of the question of whether Congress intended PL-280 as a waiver of an Indian tribe's sovereign immunity. In *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the Supreme Court emphasized that the granting of state jurisdiction was not intended to "result in the undermining or destruction of such tribal governments as did exist..." and concluded that "[t]he Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, ..." 426 U.S. at 388-389, 96 S.Ct. at 2110-2111. The *Bryan* Court utilized legislative history in the wording of the act itself to determine what Congress expressly intended and decided to go no further. The Court stated:

"Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations.... This omission has significance in the application of the can-

ons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U.S. at 381.

The Court went on to state:

"[T]he consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws ... of general application to private persons or private property,' and 'adjudicat[ion]' in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." 426 U.S. at 385, 96 S.Ct. at 2109.

In *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir.1975), cert. denied, 429 U.S. 1033, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977), the Ninth Circuit Court of Appeals interpreted 28 U.S.C. § 1360 as containing an ambiguity and determined that the rules of construction dictated that all ambiguities be resolved in favor of the Indians. 532 F.2d at 660. Both the *Bryan* and *Santa Rosa Band of Indians* Courts thus adopted a narrow interpretation of the grant of jurisdiction to the states in 28 U.S.C. § 1360(a).

[4.5] These cases were followed by the Alaska Supreme Court in *Atkinson v. Haldane*, supra, where the court concluded that the sovereign immunity of the Indian community therein could be deemed waived only if it were clear from the unambiguous language of 28 U.S.C. § 1360(a) and its legislative history that Congress intended such a waiver. The court noted that the legislative history did not specifically mention any waiver of tribal sovereign immunity and that the ambiguity present in 28 U.S.C. § 1360(a) was not resolved by the legislative history. The court found the absence of any clear waiver of sovereign immunity in the statute of controlling significance and concluded that without such an express congressional waiver of immuni-

ty, one should not be implied. The court noted that the jurisdictional grant in 28 U.S.C. § 1360(a) was limited by 28 U.S.C. § 1360(b), which provides:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The court concluded that the limitation "serves the same interest that the doctrine of sovereign immunity serves, i.e., the preservation of tribal trust property from 'encumbrances.'" 569 P.2d at 167. Therefore, the court theorized, § 1360(b) demonstrated that no waiver of tribal sovereign immunity was intended by § 1360(a).

"If Congress had wanted to waive tribal immunity, it strikes us that it would have allowed execution against purely tribal assets, e.g., tribal real property. Since the underlying reasons for the restrictions in § 1360(b) are similar to the underlying reasons for tribal sovereign immunity, construing the two subsections together, we conclude that § 1360(a) does not constitute a waiver of tribal sovereign immunity." 569 P.2d at 167, n. 59.

We align ourselves with the reasoning of the courts in these cited decisions and hold that Congress, by virtue of its enactment of 25 U.S.C. § 1300f(c), which applied 28 U.S.C. § 1360(a) and its granting of civil jurisdiction to the State of Arizona over Pascua Yaqui Indian lands, did not waive

the sovereign immunity of the Pascua Yaqui Indian Tribe.¹

[6] Having concluded that the Pascua Yaqui Indian Tribe, as a federally recognized tribe, is entitled to sovereign immunity, we must now decide if it waived its immunity by agreeing to arbitrate any dispute arising out of its contract with petitioner. Section 12 of the contract provides:

"Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, supra, quoting *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114

2. The tribe argued below and argues to this court that even if 25 U.S.C. § 1300f(c) had given Arizona civil jurisdiction over Pascua Yaqui Indian territory, a proclamation issued by Arizona Governor Bruce Babbitt, dated February 6, 1984, effectively returned jurisdiction to the federal government. That proclamation stated in part:

"WHEREAS, Public Law 95-375 requires the State of Arizona to exercise criminal and civil jurisdiction over Pascua Yaqui lands as if it had assumed jurisdiction ... and

WHEREAS, the State of Arizona is constitutionally prohibited from claiming jurisdiction over Indian lands pursuant to paragraph four of Article XX of the Arizona Constitution; and

WHEREAS, this constitutional disclaimer impedes the State from exercising criminal and civil jurisdiction over Pascua Yaqui lands, notwithstanding the language in PL 95-375, 25 U.S.C. 1300f(c) [sic] which purports to grant such jurisdiction to Arizona;

I, Bruce Babbitt, Governor of the State of Arizona, ... do hereby retrocede all civil and criminal jurisdiction, or purported jurisdiction, granted to the State of Arizona, pursuant to Public Law 95-375 over that area of land within this State conveyed to the Pascua Yaqui tribe from the United States and held in trust for the Pascua Yaqui tribe by the United States Secretary of the Interior. ..."

We note that the alleged retrocession of jurisdiction does not comply with the requirements of

(1976), which quoted *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). There is only one case cited to us, and our independent research has failed to turn up any other, which has addressed the precise issue of whether an arbitration clause constitutes an explicit waiver of immunity from suit. We agree with the Alaska Supreme Court in its reasoning in *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) wherein it stated:

"[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. *Tucker v. Byler*, 27 Ariz.App. 704, 558 P.2d 732, 735 (Ariz.App.1976); *Quenzer v. Quenzer*, 225 Kan. 83, 587 P.2d 880, 882 (Kan.1978). The arbitration clause ... would be meaningless if it did

25 U.S.C. § 1323(a) which provides that the federal government is authorized to accept a state's retrocession. To effectively retrocede jurisdiction, there must be formal acceptance of the retrocession by the Secretary of the Interior, published in the Federal Register, specifying the date of retrocession. 25 U.S.C. § 1323, note. There is nothing in the record to show acceptance by the Secretary of the Interior nor a published acceptance of same in the Federal Register. Arizona Constitution, Article 20, ¶ 4, alluded to above, provides in part that Indian lands "shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." The real party in interest argues that therefore the Arizona Constitution precludes the state from exercising jurisdiction in this case. However, such an argument was found to be without merit in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837, reh'g denied, — U.S. —, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983) wherein the Supreme Court recognized state jurisdiction, stating: "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands." 103 S.Ct. at 3211. Similarly, it has been held that the language of "absolute jurisdiction and control" means "undiminished, not exclusive" jurisdiction. *Organized Village of Kake v. Egan*, 369 U.S. 60, 71, 82 S.Ct. 562, 568, 7 L.Ed.2d 573, 581 (1962); *Francisco v. State*, 113 Ariz. 427, 556 P.2d 1 (1976).

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Cite as 703 P.2d 502 (Ariz.App. 1985)

not constitute a waiver of whatever immunity [the tribe] possessed. Furthermore, under similar circumstances the Ninth Circuit Court of Appeals has held that a clause in a contract stating that the federal courts would resolve any disputes arising from the contract constituted an express waiver of a tribe's sovereign immunity. *United States v. Oregon*, 657 F.2d 1009, 1016 (9th Cir.1981). There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived." 658 P.2d at 760-61.

The cited case of *United States v. Oregon* referred to *Fonterelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970) wherein the Eighth Circuit found that the adoption by the Omaha Tribe of a "sue and be sued" clause in its corporate charter amounted to an express waiver of sovereign immunity in regard to the quiet title action involved. In *United States v. Oregon*, supra, the Ninth Circuit Court of Appeals found that the tribe, in its contract with the state, had agreed that in the event problems arose that could not be solved by mutual agreement, the parties would submit the issues to federal court for determination. The Ninth Circuit ruled that "the Tribe may not at this stage renege on its earlier agreement." 657 F.2d at 1016.

[7,8] We agree with the reasoning in *Native Village of Eyak*, supra. Before entering into the arbitration agreement, the respondent tribe was free from suit by petitioner. However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity. The tribe argues in its response to the petition for special action that while as an immune sovereign it could not have been sued without its consent, it has given its limited consent to be sued within the jurisdiction of the Pascua Yaqui

Tribal Court. We do not agree. The arbitration agreement did not draw the distinction between the tribal court system and any other court system, but rather provided that any court of competent jurisdiction would suffice. Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona under 25 U.S.C. § 1300f(c) which applied 28 U.S.C. § 1360(a) to Pascua Yaqui Indian lands, notwithstanding the fact that the Pascua Yaqui tribal court may also have jurisdiction.

[9] The tribe argues, and argued to the trial court, that even if the arbitration clause were deemed to be a waiver of the tribe's sovereign immunity, the entire contract including the clause is void, citing 25 U.S.C. § 81. That statute provides, in part:

"No agreement shall be made by any person with any tribe of Indians ... for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands ... unless such contract or agreement be executed and approved as follows:

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

The tribe argues that the agreement between the petitioner and the tribe was not approved or endorsed by the Secretary of the Interior and the Commissioner of Indian Affairs. The record before us is not clear. The signatories to the contract include a Mr. Samuel L. Hilliard, who, it appears, is a representative of the Department of the Interior's Bureau of Indian Affairs. The tribe's motion to dismiss the complaint below did not allude to the allegedly void character of the contract. This argument was raised only in the tribe's response to the petitioner's opposition to the motion. By inference, the trial court discounted the argument since it referred

to the arbitration clause in the contract as not constituting a legally sufficient waiver, thereby implying that the contract itself was to be considered valid. The problem here is that the tribe apparently waived this argument before the trial court and, indeed, before this court by arguing that the controversy over the agreement properly belongs before the tribal court, and not arguing that no agreement existed. On this state of the record we cannot consider this argument in order to deny relief from what we find to be an abuse of discretion by the trial court.

The order of the trial court dismissing petitioner's complaint is vacated and the cause is remanded to the trial court for further proceedings.

HOWARD and HATHAWAY, JJ., concur.



145 Ariz. 566

The STATE of Arizona, Appellee,

v.

Edward Lee ADAMS, Appellant.

No. 2 CA-CR 2786.

Court of Appeals of Arizona,
Division 2, Department A.

March 8, 1985.

Review Denied May 7, 1985.

Defendant was convicted in the Superior Court, Pima County; Cause No. CR-06013. Harry Gin, J., of three counts of child molestation and sentenced to concurrent presumptive sentences of five years' imprisonment, and he appealed. The Court of Appeals, Howard, J., held that: (1) trial court did not err in admitting confession of defendant; (2) refusal to let defendant ask detective whether person convicted of child faced mandatory sentence did not deny de-

fendant his Sixth Amendment rights to confrontation and cross-examination; (3) circumstances did not produce coerced confession; (4) detective's statements, including that everybody had to answer to God, did not render defendant's confession inadmissible; (5) jurors, who made affidavits that they observed what appeared to be signals to children controlling their testimony, were not guilty of any misconduct; and (6) sentencing defendant to prison for 5.25 years, minimum term, with statute mandating defendant serve no less than five years in prison without release on any basis did not constitute cruel and unusual punishment.

Affirmed.

1. Criminal Law \S 531(1)

Confessions are presumed to be involuntary, for purposes of determining their admissibility in criminal prosecutions.

2. Criminal Law \S 531(3)

Burden is on state to demonstrate by preponderance of the evidence that confession was freely and voluntarily made and not product of physical or psychological coercion, for purposes of determining its admissibility in criminal prosecution.

3. Criminal Law \S 519(1)

In determining whether confession is involuntary, for purposes of its admissibility in criminal prosecution, trial court must examine totality of the circumstances.

4. Criminal Law \S 1158(4)

Trial court's determination regarding voluntariness of confession will not be upset on appeal absent clear and manifest error.

5. Criminal Law \S 525

Low intelligence of defendant, in itself, will not invalidate otherwise knowing and intelligent waiver, for purposes of making confession admissible in criminal prosecution. U.S.C.A. Const. Amend. 5.

6. Criminal Law \S 525

Trial court did not err in admitting taped confession of defendant with below-

EXHIBIT D

ATKINSON V. HALDANE - SUPREME COURT OF ALASKA

(SELECTED PAGES) 569 P. 2d. 151

ATKINSON v. HALDANE
Cite as, Alaska, 589 P.2d 151

Alaska 151

Earl S. ATKINSON et al., Petitioners,
v.

George Edward HALDANE and Romey
Jones Williams, Respondents.

No. 2981.

Supreme Court of Alaska.

Sept. 16, 1977.

Petition was filed seeking review of an order of the Superior Court, First Judicial District, Ketchikan, Thomas E. Schulz, J., denying the Metlakatla Indian Community's motion for summary judgment in an action brought against them for the wrongful death of two Indian residents killed in an automobile accident on the reservation. The Supreme Court, Rabinowitz, J., held that: (1) the Metlakatla Indian Community should be accorded the same treatment as Indian tribes in other states, (2) the Community possessed sovereign immunity, (3) the statute establishing state civil service jurisdiction over actions involving Indians did not constitute a waiver of the community's sovereign immunity, (4) the Community's purchase of liability insurance did not waive its sovereign immunity, and (5) the "sue and be sued" clause in the corporate charter of the community had no effect on the suit.

Reversed and remanded with directions.

1. Indians ⇌ 2

Reservation status of Metlakatla Indian Community sets them apart from other Alaska natives and such community should be accorded same treatment as Indian tribes in other states.

2. Indians ⇌ 2

Metlakatla Indian Community is entitled to sovereign immunity; Community has been recognized by United States Government as Indian tribe, which is non-justiciable political question, and is entitled to all benefits of tribal status including sovereign immunity in absence of congressional waiver. U.S.C.A. Const. art. 6, cl. 2.

3. Indians ⇌ 27(1)

Whether or not tort actions should be allowed against recognized Indian tribes is not question for state courts to decide; it is question reserved to plenary powers of Congress and unless there has been valid waiver of tribe's sovereign immunity, tribal community is immune from suit. U.S.C.A. Const. art. 6, cl. 2.

4. Indians ⇌ 27(1)

Sovereign immunity of Metlakatla Indian Community was not waived by congressional enactment of statute providing for state civil jurisdiction in actions to which Indians are parties. 28 U.S.C.A. § 1360(a).

5. Indians ⇌ 27(7)

Property which is immune from state judgment execution in action brought pursuant to statute providing for state civil jurisdiction in actions to which Indians are parties includes allotted real property; statute serves same interest that doctrine of sovereign immunity serves. i. e., preservation of tribal trust property from encumbrances. 28 U.S.C.A. § 1360(a, b).

6. Indians ⇌ 27(1)

Metlakatla Indian Community, by purchasing liability insurance to protect tribal resources, did not thereby waive its sovereign immunity.

7. Indians ⇌ 2

Governmental unit created pursuant to section of Indian Reorganization Act providing for organization of Indian tribes and their adoption of constitutions, and corporate unit created pursuant to section of Act providing for incorporation of Indian tribes and adoption of charters, are distinct legal entities. Indian Reorganization Act, §§ 16, 17, 25 U.S.C.A. §§ 476, 477.

8. Indians ⇌ 27(1)

"Sue and be sued" clause contained in charter adopted by Metlakatla Indian Community pursuant to section of Indian Reorganization Act providing for incorporation

of Indian tribes, did not waive community's sovereign immunity and had no effect on action brought against tribe for wrongful death of two resident Indians killed in automobile accident on reservation where acts alleged in complaint related to tribe's governmental functions rather than its corporate functions. Indian Reorganization Act, §§ 16, 17, 25 U.S.C.A. §§ 476, 477.

Steven S. Anderson, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle, Wash., for petitioners.

W. Clark Stump, Ketchikan, Stump & Stump, for respondents.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, ERWIN and BURKE, JJ.

RABINOWITZ, Justice.

The case comes before us on a petition for review from the superior court's denial of petitioners' motion for summary judgment. This litigation involves the deaths of two Metlakatla Indians, Marilyn Alice Haldane and Romey Ervin Williams, residents of the Metlakatla Indian Community, resulting from injuries incurred in an automobile accident May 12, 1974, on the reservation. Their personal representatives filed suit in the superior court for the State of Alaska, at Ketchikan, against the Community of Metlakatla, certain Community officials, and four police officers employed by the Community. The complaint alleged that the defendant police officers recklessly and negligently operated their vehicle, thereby causing the accident from which the deaths resulted (count I); the police officers negligently failed to render aid and assistance to the victims of the accident (count II); the police officers conspired to violate the civil

1. Jurisdiction was also asserted to lie under the provisions of AS 09.65.070 which provides, where relevant:

Suits against incorporated units of local government. (a) An action may be maintained against an incorporated borough, city,

rights of the decedents, accorded pursuant to 25 U.S.C. §§ 1301-03, the Indian Civil Rights Act of 1968 (count III); and the defendant Community of Metlakatla and the defendant officials of the Community of Metlakatla negligently trained the police officers involved (counts I-III). The complaint also sought punitive damages (count IV). Jurisdiction was alleged pursuant to 28 U.S.C. § 1360(a) which provides, in relevant part:¹

Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory

Subsequent to the filing of the complaint, petitioners, defendants below, moved for summary judgment on the grounds that the complaint failed to state a claim upon which relief could be granted and the superior court lacked both subject matter and personal jurisdiction. The motion was grounded on the principles that the Indian tribes, as a matter of federal law, enjoy sovereign immunity from suit; jurisdiction under the Indian Civil Rights Act of 1968 was vested exclusively in the federal courts; and in any event, the claim of punitive damages should be dismissed as violative of public policy. The superior court, in denying the motion for summary judgment inso-

or other public corporation of like character in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of the unit of local government,

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nooke, 246 F.2d 293 (4th Cir. 1957), is the most germane to the instant case. There, plaintiffs sued the individual Indian proprietors of a tourist attraction, the Eastern Band of Cherokee Indians, and the United States in its official governmental capacity and as trustee for the Indians, for personal injuries sustained when a swinging bridge collapsed. The injuries occurred on the Cherokee Reservation. The Court of Appeals affirmed the lower court's dismissal of the suit against the Eastern Band of Cherokee Indians and the United States as trustee. The court traced the history of the Eastern Band³⁰ through the time, after 1835, when their connection with the Cherokee Nation was severed until their recognition as a tribe by congressional act in 1868. The court pointed to the guardianship that the United States had exercised over the Band and reaffirmed its prior holdings that the facts that the Band had lost their tribal lands, had separated from their tribe and had been subjected to the laws of North Carolina had not destroyed the right or the duty of guardianship. Thus, the court reaffirmed that the Eastern Band was an Indian tribe within the meaning of the Constitution and laws of the United States. Having thus found tribal status, the court stated:

1962); *Salamanca v. Seneca Nation of Indians*, 47 F.Supp. 939 (W.D.N.Y.1942); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (Ariz.1968); and *Employment Security Dept. v. Cheyenne River Sioux Tribe*, 80 S.U. 79, 119 N.W.2d 285 (1963).

30. In 1817 the Cherokee Nation was divided into two bodies, one which remained east of the Mississippi and the other which resettled along the Arkansas and White Rivers. Cohen, *supra* note 9, at 33-54 n. 343.

After Jackson was elected president in 1828, he made it clear that the Indians must move west. Georgia enacted the harassing laws which were the subject of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 6 L.Ed. 25 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 463 (1832). After numerous attempts to coerce the tribe into moving west, the New Echota Treaty of 1835 was signed. This treaty ceded all Cherokee land east of the Mississippi. It also provided reservations of 160 acres for

The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument.³¹

From this analysis in *Haile*, it is clear that the court was looking to tribal status as recognized by the executive branch of government as a sole condition precedent to judicial recognition of tribal sovereign immunity. The Band's tribal property had been lost. They had been separated from the claim to sovereignty of the Cherokee Nation. They were even a North Carolina corporate entity. Yet, since the government recognized the Band as a "tribe," the court ruled in favor of sovereign immunity.³²

The doctrine of tribal sovereign immunity was most recently reaffirmed by the United States Supreme Court in *Puyallup Tribe, Inc. v. Department of Game*, — U.S. —, 97 S.Ct. 2616, 58 L.Ed.2d 667 (June 23, 1977). In that case, the Court held that the on-reservation netting of steelhead salmon by individual members of the Puyallup Tribe could be regulated by the State of Washington. Nevertheless, the Court vacated those portions of the state court order which involved relief against the Tribe itself. With reference to the Tribe's attack on the order as an infringe-

those who wanted to remain in the East. Those who chose to remain dissolved their connection with the Cherokee Nation, but were not made citizens of the United States or North Carolina. Cohen, *supra* note 9, at 54-56.

31. *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957). The court also noted that the Supreme Court of North Carolina had held that the Eastern Band of Cherokee Indians was immune from suit in *Rollins v. Eastern Band of Cherokee Indians*, 87 N.C. 229.

32. We note that the question of Indian sovereignty is one in which the commentators find vast areas of disagreement. Compare Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 Notre Dame Law. 600 (1976), with Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.Dak.L.Rev. 267 (1973), and Johnson, *Sovereignty, Citizenship and the Indian*, 13 Ariz.L.Rev. 773 (1973).

EXHIBIT E

P.L. 95-375

Public Law 95-375
95th Congress

An Act

Sept. 18, 1978
[S. 1633]

To provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes.

Pascua Yaqui
Indians, Ariz.,
extension of
Federal benefits.
25 USC 1300f.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Pascua Yaqui Indian people who are members of the Pascua Yaqui Association, Incorporated, an Arizona corporation, or who hereafter become members of the Pascua Yaqui Tribe in accordance with section 3 of this Act, are recognized as, and declared to be, eligible, on and after the date of the enactment of this Act, for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States, or under any statute of the United States. For the purposes of section 2 of the Act of August 16, 1957 (71 Stat. 371; 42 U.S.C. 2005a), the Pascua Yaqui Indians are to be considered as if they were being provided hospital and medical care by or at the expense of the Public Health Service on August 16, 1957.

25 USC 461 et
seq.

(b) The provisions of the Act of June 18, 1934 (48 Stat. 484), as amended, are extended to such members described in subsection (a).

(c) The Secretary of the Interior is directed, upon request of the Pascua Yaqui Association, Incorporated, and without monetary consideration, to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property conveyed by the United States to such association under the Act of October 8, 1964 (78 Stat. 1197), and such lands shall be held as Indian lands are held: *Provided*, That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79).

25 USC 1323.
Repeal.

(d) Section 4 of the Act of October 8, 1964 (78 Stat. 1197), is hereby repealed.

25 USC 1300f-1.

Publication in
Federal Register.

SEC. 2. Within thirty months after the date of enactment of this Act, the Pascua Yaqui Tribe shall adopt a constitution and bylaws or other governing documents and a membership roll. The Secretary of the Interior shall review such documents to insure that they comply with the provisions of this Act and shall publish such documents and membership roll in the Federal Register. Publication of such roll shall not affect or delay the immediate eligibility of the members of the Association under section 1 of this Act.

25 USC 1300f-2.

SEC. 3. For the purposes of section 1 of this Act, membership of the Pascua Yaqui Tribe shall consist of—

(A) the members of the Pascua Yaqui Association, Incorporated, as of the date of the enactment of this Act, who apply for enrollment in the Pascua Yaqui Tribe within one year from the date of enactment of this Act pursuant to the membership criteria and procedures provided for in the official governing documents of the Pascua Yaqui Tribe;

(B) all those persons of Yaqui blood who are citizens of the United States and who, within two years from the date of enactment of this Act, apply for, and are admitted to, membership in the Association pursuant to article VII of the Articles of Incorporation of the Association; and

(C) direct lineal descendants of such persons, subject to any further qualifications as may be provided by the Tribe in its constitution and bylaws or other governing documents.

Approved September 18, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORTS No. 95-1021 accompanying H.R. 6612 (Comm. on Interior and Insular Affairs) and No. 95-1339 (Comm. of Conference).

SENATE REPORT No. 95-719 (Comm. on Indian Affairs).

CONGRESSIONAL RECORD, Vol. 124 (1978):

Apr. 5, considered and passed Senate.

Apr. 17, H.R. 6612 considered and passed House; passage vacated and S. 1633, amended, passed in lieu.

May 2, Senate disagreed to House amendment.

Aug. 16, House agreed to conference report.

Aug. 25, Senate agreed to conference report.

EXHIBIT F

HOUSE OF REPRESENTATIVES REPORT NO. 95-1021
EXTENSION OF CERTAIN FEDERAL BENEFITS TO THE
PASCUA YAQUI INDIANS OF ARIZONA

PROVIDING FOR THE EXTENSION OF CERTAIN FEDERAL BENEFITS,
BENEFITS, SERVICES, AND ASSISTANCE TO THE PASCUA YAQUI IN-
DIANS OF ARIZONA, AND FOR OTHER PURPOSES

MARCH 30, 1978.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs,
submitted the following

REPORT

[To accompany H.R. 6612]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 6612) to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, beginning on line 3, strike out all after the enacting clause and insert in lieu thereof the following:

That (a) the Pascua Yaqui Tribe and its members, as determined pursuant to section 2 of this Act, are hereby recognized as eligible for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States or under any statute of the United States. For purposes of section 2 of the Act of August 16, 1957 (71 Stat. 371; 42 U.S.C. 2005a), the Pascua Yaqui Indians are to be considered as if they were being provided hospital and medical care by or at the expenses of the Public Health Service on August 16, 1957.

(b) Section 4 of the Act of October 8, 1961 (78 Stat. 1197), is hereby repealed.

Sec. 2. (a) For the purposes of section 1 of this Act, membership of the Pascua Yaqui Tribe shall consist of—

(A) the members of the Pascua Yaqui Association, Inc., an Arizona corporation, as of the date of the enactment of this Act;

(B) all those persons of Yaqui Indian blood who, within one year from the date of enactment of this Act, apply for, and are admitted to, membership in the Association pursuant to article VII of the Articles of Incorporation of the Association; and

(C) direct lineal descendants of such persons, subject to any further qualifications as may be adopted by the Association.

(b) Within eighteen months after the date of enactment of this Act, the Secretary of the Interior, in cooperation with the Association, shall compile a membership roll pursuant to the terms of subsection (a) of this section and shall publish such roll in the Federal Register. Publication of such roll shall not affect

or delay the immediate eligibility of the members of the Association under section 1 of this Act.

Sec. 3. Solely for the purposes of this Act, the Pascua Yaqui Association shall be deemed an Indian tribe recognized by the United States and the lands conveyed to the Association by the Act of October 8, 1964 (78 Stat. 1196), subject to a restriction against alienation imposed by the United States, shall be deemed a Federal Indian reservation.

PURPOSE

The purpose of H.R. 6612, introduced by Mr. Udall, is to make available to the Pascua Yaqui Indians of Arizona various Federal services and benefits made available to Indians because of their status as Indians.

BACKGROUND

The ancestors of the Pascua Yaqui historically resided on lands in what is now the State of Sonora in Mexico. During the turbulent days of the Mexican dictator, Diaz, the Yaqui Tribe was subjected to oppression and persecution. To avoid this persecution, the Yaqui, as a tribe, fled to the United States in the late 19th century. The Yaqui settled in the Tucson, Ariz., area around 1904 in what became known as the Old Pascua Village.

Until 1964, the Yaqui lived in the Old Pascua Village in a state of poverty and economic depression. However, they continued to maintain their tribal identity, language, and culture while adjusting to non-Indian life. Beginning in the 1950's, the tribal leaders became alarmed by the encroachment of the city of Tucson on their village and the threat that represented to the cohesiveness of their tribal structure.

In addition, the small 40-acre tract of land became unable to support the members of the tribe. The leadership began efforts to obtain a new village site to accommodate their increased membership and to counter the threat to their tribal identity. The tribe secured the introduction of legislation, H.R. 6233, in the 88th Congress. The bill provided for the transfer of 202.76 acres of Federal lands adjacent to Tucson, Ariz., to the Pascua Yaqui. The lands were to be held in fee subject to a restriction against alienation. Section 4 of the bill provided that the Yaqui would not be eligible for any Federal services or benefits made available to Indians because of their status as Indians.

The bill was enacted into law as the act of October 8, 1964 (78 Stat. 1196). Under the terms of the act, the tribe organized, under State articles of incorporation, as the Pascua Yaqui Association. Most of the members of the tribe moved to the new location which became known as the New Pascua Village.

To some extent, the tribe bettered their economic condition at the new location; however, many of the housing and other social programs of the Federal Government were denied to the tribe and its members because of section 4 of the act and because their lands were not held in trust by the United States.

Enactment of the present bill (H.R. 6612), as amended, will eliminate the obstacles which are now preventing the tribe from participating in, and taking advantage of, programs available to Indian people designed to better their economic and social condition and to strengthen the stability and cohesiveness of the tribal structure and identity.

COMMITTEE AMENDMENT

The committee adopted an amendment in the nature of a substitute.

H.R. 6612, as introduced, while extending to the Pascua Yaqui the various Federal programs and benefits made available to Indians because of their status as Indians, excluded from such eligibility the programs and benefits provided by the Indian Health Service. In addition, the bill made the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 481), applicable to the Pascua Yaqui and provided that the lands held by the Pascua Yaqui Association, including any minerals reserved by the United States, would be taken by the United States in trust for the Pascua Yaqui Tribe. The effect of the last provisions would have been to establish an Indian reservation for the tribe and to extend Federal recognition of powers of tribal self-government.

The committee amendment deletes language excluding the Yaqui from eligibility for Indian Health Service benefits. The Pascua Yaqui have a critical need for improved health care and there is no reason to specifically exclude them from such benefits. In addition, the amendment makes clear that the Pascua Yaqui are to be eligible for the sanitation assistance provided by the Indian Health Service pursuant to the act of August 16, 1957 (71 Stat. 371).

The committee amendment eliminates all language which would have recognized the Pascua Yaqui as having powers of tribal self-government, including civil and criminal jurisdiction, and which would have created an Indian reservation for the tribe. The amendment makes it clear, however, that none of the Federal programs and services made available to other Indian tribes shall be denied to the Pascua Yaqui solely on the grounds that they have no governing power or reservation. For the purposes of providing such programs and services, the Pascua Yaqui Association is to be deemed a Federally recognized Indian tribe and the lands conveyed to the association pursuant to the act of October 8, 1961 shall be deemed a Federal Indian reservation.

Finally, the committee amendment defines who shall be members of the Pascua Yaqui Tribe for purposes of the Federal programs and services. All persons who are members of the Pascua Yaqui Association on the date of enactment are to be considered as members of the tribe. In addition, any person of Yaqui blood who applies for and is admitted to membership in the association within 1 year of enactment under the terms of the membership requirements in the Articles of Association are to be deemed members of the tribe. Lineal descendants of such members may be admitted to membership in the tribe, subject to any further criteria or qualification adopted by the tribe, and shall be eligible for the Federal services.

SECTION-BY-SECTION ANALYSIS

Section 1 of the substitute provides that the members of the Pascua Yaqui Tribe, as defined in section 2, shall be eligible for Federal services and assistance provided to Indians because of their status as Indians and specifically make them eligible for services provided under the act of August 16, 1957 (71 Stat. 371). Subsection (b) repeals section 4 of the act of October 8, 1961 (78 Stat. 1197), which prohibits the extension of such services to the Pascua Yaqui.

Section 2 defines the members of the Pascua Yaqui Tribe who would be eligible for these services as: (1) members of the Pascua Yaqui Association on the date of enactment of the bill; (2) other persons of Yaqui blood who apply for and are admitted to membership in the association within 1 year after enactment; and (3) lineal descendants of such members. Subsection (b) requires the Secretary of the Interior to compile a tribal roll, based upon that criteria, and publish it in the Federal Register 18 months after enactment. The time allowed for compiling and publishing the roll is not to affect the immediate availability of appropriate services to the tribe and its members.

Section 3 provides that, solely for the purposes of receiving the services and benefits authorized in section 1, the Pascua Yaqui Association is to be deemed a federally recognized Indian tribe and its lands are to be considered a Federal Indian reservation.

COST AND BUDGET ACT COMPLIANCE

Although H.R. 6612 authorizes no direct expenditures, it will enable the Pascua Yaqui Association to participate in existing Federal programs otherwise available to Indian tribes. The analysis of H.R. 6612 by the Congressional Budget Office follows:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS.

Washington, D.C., March 30, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 6612, a bill to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes, as ordered reported by the House Committee on Interior and Insular Affairs, March 22, 1978.

Based on this review, it appears that no additional cost to the Government would be incurred as a direct result of this bill. The bill, however, provides for the extension of certain benefits and services to the Pascua Yaqui Indians through a number of discretionary Federal programs. Thus, while no additional expenditures are mandated by the bill, the relevant Federal agencies can be expected to seek additional funds in order to provide such benefits.

Sincerely,

ALICE M. RIVLIN, *Director.*

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 6612 will have no significant inflationary impact. At most, it will enable the Pascua Yaqui Indians to use their lands more effectively and permit them to participate in programs available to other Indians. Hopefully, enactment of the legislation will enhance economic opportunities and improve the health and living conditions of this relatively small group of Indians.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunction with these legislative operations, no specific oversight hearings were conducted by the committee and no recommendations were submitted to the committee pursuant to rule X, clause 2(b) (2).

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote, recommends that the bill, as amended, be enacted.

DEPARTMENTAL REPORTS

The reports of the Department of the Interior, dated March 20, 1978, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 20, 1978.

HON. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on H.R. 6612, a bill to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes.

We recommend against enactment of H.R. 6612 in its present form.

H.R. 6612 would extend to the Indians who are members of the Pascua Yaqui Association, Inc., eligibility for services and assistance that the United States provides to Indians because of their status as Indians.

The bill would also direct the Secretary of the Interior to accept from the Pascua Yaqui Association, Inc., a conveyance of real property which it presently holds in order that the Secretary might hold that land in trust as a reservation for the Pascua Yaqui.

There are currently no statutory or regulatory guidelines governing the extension of Federal Indian services and benefits to groups not served by the Bureau of Indian Affairs. In the past, extension of such services has been on an ad hoc basis. However, on June 16, 1977, this Department published for comment a proposed rule making which would establish "Procedures Governing the Determination that an Indian Group is a Federally Recognized Indian Tribe".

Based on the comments received on that proposal, the staff of the Bureau of Indian Affairs has developed a revised draft which is under review within this Department. The proposed changes to that are such that another publication for public comment is likely to be necessary or desirable.

In addition, the Senate Select Committee on Indian Affairs has scheduled hearings for April 18, 1978 and April 20, 1978 on S. 2375, a bill which would establish by statute the procedure and guidelines for the extension of Federal services and benefits to additional Indian groups. Further, a meeting of leaders of the Indian tribes now served

by the Bureau of Indian Affairs and of Indian groups seeking such services is being planned in an attempt to develop a unified Indian position as to the criteria and procedure for the extension of Federal Indian services to additional groups.

In view of the foregoing, the Administration recommends that the questions of extension of services to the Pascua Yaqui not be decided until after either this Department's final regulations have been issued or general legislation has been enacted governing such extensions. This would permit an even handed approach to the requests of the Pascua Yaqui and other groups seeking eligibility for Federal Indian services.

Instead of H.R. 6612 as introduced, the Administration would support a bill which would amend section 4 of the act of October 8, 1964, (78 Stat. 1196) to remove a portion of that section which now precludes any possibility of extension of services to the Pascua Yaqui under administrative regulations. The language which we would support deleting from that section states that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Yaqui Indians".

As the Committee is aware, that 1964 act donated a certain 202 acre tract of Federally owned land to the Pascua Yaqui Association, Inc. for the benefit of the members of the Association. As stated in the Senate Report on the bill which became that law (S. Rept. 88-1530), section 4 was added "to make certain that the members of the Pascua Yaqui Association, Inc. shall not be considered as eligible for the same benefits and services that now are bestowed on recognized and existing Indian tribes and individuals through the Bureau of Indian Affairs".

We believe that the Pascua Yaqui should be afforded the same opportunity to apply for the extension of benefits and services as any other group of Indians seeking such services now has.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

FORREST J. GERARD, *Assistant Secretary.*

U.S. DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SECRETARY,

Washington, D.C., March 20, 1978.

HON. MORRIS K. UDALL,

Chairman, Indian Affairs and Public Lands, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This supplements the Interior Department's report on H.R. 6612, a bill to provide for the extension of certain benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes.

The mineral conveyance authorized by subsection (d) of H.R. 6612 is unnecessary. Section 3 of the act of October 8, 1964 (78 Stat. 1196) provided that any patent issued under that act shall reserve to the United States certain named minerals for which the land is deemed by the Secretary of the Interior to be valuable or prospectively valu-

able as of the date of issuance of the patent. Since the U.S. Geological Survey had indicated that the lands were not valuable or prospectively valuable for any of said minerals, the patent issued on October 30, 1964, conveying the land to the Pascua Yaqui did not reserve any minerals to the United States.

Sincerely,

FORREST J. GERARD,
Assistant Secretary, Indian Affairs.

CHANGES IN EXISTING LAW

In compliance, with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

ACT OF OCTOBER 8, 1964 (78 STAT. 1197)

* * * * *

[SEC. 4. Nothing contained in this act shall make such Yaqui Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Yaqui Indians.]

○

EXHIBIT G**SENATE REPORT NO. 95-719****PASCUA YAQUI INDIANS - ARIZONA****FEDERAL BENEFITS EXTENSION**

PASCUA YAQUI INDIANS
P.L. 95-375

**PASCUA YAQUI INDIANS—ARIZONA—FEDERAL
BENEFITS EXTENSION**

P.L. 95-375, see page 92 Stat. 718

Senate Report (Indian Affairs Committee) No. 95-719,
Mar. 22, 1978 [To accompany S. 1633]

House Report (Interior and Insular Affairs Committee)
No. 95-1021, Mar. 30, 1978 [To accompany H.R. 6612]

House Conference Report No. 95-1339, July 11, 1978
[To accompany S. 1633]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate April 5, August 25, 1978

House April 17, August 16, 1978

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) and the House Conference Report (p. 1767) are set out.

SENATE REPORT NO. 95-719

[page 1]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1633) to provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

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[page 2]

PURPOSE OF THE MEASURE

The purpose of S. 1633 is to extend congressional recognition to the Pascua Yaqui Tribe of Indians in Arizona. This bill also directs the Secretary of the Interior to accept on behalf of the United States, and in trust for the members of the Pascua Yaqui Tribe, approximately 203 acres which were conveyed by the United States to the Pascua Yaqui Association by act of Congress in 1961. S. 1633 also repeals section (4) of the Act of October 8, 1964, which has prevented the Pascua Yaqui Indians from being eligible for certain benefits, services, and assistance provided to Indians because of their status as Indians.

LEGISLATIVE HISTORY

P.L. 95-375

[page 3]

BACKGROUND

The Yaqui Indians are descendants of the ancient Toltecs who ranged from what is now the city of Durango, north to southern Colorado, and west to California. The U.S. boundary line, determined by agreement with Mexico, divided the Indian territories occupied by Pimas, Papagos, Apaches, Yaquis, and other Indians. Between 1880 and 1910, thousands of Yaquis who fled Mexico to escape the Mexican landowners and dictatorial Mexican Government were accepted by the United States and given asylum in the Arizona territory. Many of the Yaquis settled near Tucson in what came to be known as the Pascua Village.

In 1964, the Federal Government conveyed 202 acres of Federal land near Tucson to the Pascua Yaqui Association, a formal governmental organization established at the request of Congress to manage the conveyed land. (Act of October 8, 1964, Private Law 88-350, 78 Stat. 1106). The express major purpose of this Association is to administer the lands granted to it for the collective use and benefit of all its tribal members.

However, section 4 of the Federal act which provided land to the Yaquis restricted them from receiving services and benefits under other Federal Indian laws. As a result, the Yaquis have been unable to participate in economic development or educational programs, and tribal members are denied access to available medical services on nearby Indian reservation. S. 1633 would make the Yaqui Indians eligible for all services provided to other Indians through any agency, including the Bureau of Indian Affairs and the Indian Health Service.

NEED

The introduction of S. 1633 coincided with the Secretary of the Interior's publication of proposed new Federal regulations that would establish procedures for governing the determination that an Indian group is a federally recognized tribe (42 Fed. Reg. 30647 (June 16, 1977)). While the Pascua Yaqui Tribe of Indians may meet many of the proposed criteria set out at section 54.7(c)(1)-(10), the Solicitor's Office of the Interior Department has indicated in an informal opinion that the Secretary would nevertheless be barred from recognizing the Pascua Yaqui Tribe. The basis for this position is section 4 of the Federal act (78 Stat. 1106) which transferred 202 acres of land to the Pascua Yaqui Indians. As mentioned earlier, this section renders Federal statutes that apply to Indians because of their status as Indians inapplicable to the Pascua Yaquis. Therefore, even if the proposed regulations were enacted, the Pascua Yaquis would be ineligible for administrative recognition.

Federal recognition would also assist the Pascua Yaqui Tribe of Indians in the development of their land in order to create a secure, permanent homeland where the living conditions of its members would be improved and tribal culture would be preserved. In pursuance of this goal, the Yaquis have attempted to improve the substandard and crowded housing conditions existent on their land.

PASCUA YAQUI INDIANS

P.L. 95-375

(page 4)

Beginning in 1973, the tribal members formed their own construction company and built their own homes at the rate of one new home a month, the most recent being financed by the Farmers Home Administration. The construction work was subject to on site inspection by Federal inspectors to insure compliance with the Federal Minimum Property Standards (Department of Housing and Urban Development), "Minimum Property Standards," 4900.1, 1973 ed., volume 1, page 1.

However, in the spring of 1976, the Pima County building inspector "red tagged" the homes under construction because of alleged violations of the county building code. Despite an opinion from the Solicitor's Office which held that Pima County had no legal authority to enforce its building codes on the Federal reserved lands occupied by the Yaquis, Pima County refused to allow them to continue construction. Enactment of S. 1633 would place the Yaquis' land in trust and would relieve Pima County from enforcing its building codes on the Yaquis' land.

LEGISLATIVE HISTORY

S. 1633 was introduced by Senators DeConcini and Abourezk on June 7, 1977. A hearing was held before the Senate Select Committee on Indian Affairs on September 27, 1977.

A companion measure, H.R. 6612, was introduced by Congressman Udall on April 25, 1977. A hearing was held before the Interior Subcommittee on Indian Affairs and Public Lands on February 16, 1978. The subcommittee voted in favor of the bill which will be considered by the full committee in the near future.

S. 1633 was supported by former Governor Bolin of the State of Arizona.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Select Committee on Indian Affairs, in open business session on March 9, 1978, with a quorum present unanimously recommended that the Senate adopt S. 1633, if amended, as described herein.

COMMITTEE AMENDMENTS

There were several amendments to S. 1633, none of which changed the substance of the bill.

Section (a) was amended for clarification purposes. In addition, new language was added to enable the Pascua Yaqui Indians to qualify under the Act of August 16, 1957, which has to do with the Public Health Service sharing the cost of constructing health facilities that serve Indians and non-Indians.

Section (c) was amended by adding a provision governing jurisdiction of the land to be held in trust by the United States for the Pascua Yaqui Tribe. This provision provides for a 2-year period after enactment of this Act during which time the State of Arizona would have criminal and civil jurisdiction over the land to be held in trust, with the Tribe having the option to assume jurisdiction within the two year probationary period.

Section (d) has been deleted from the bill. Section 3 of the Act of October 8, 1964, reserved ownership of certain specified minerals to the United States. It has subsequently been determined that none of

LEGISLATIVE HISTORY

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[page 5]

the specified minerals exist on the land conveyed by that act. Therefore, because no minerals were withheld from the tribe when the land was conveyed, this provision is not necessary.

Section (e) was changed to section (d) and a new section (e) was added to the bill. This new section requires the tribe to adopt organized governing documents and a membership role within 1 year from the date of enactment of this act. Membership in the Pascua Yaqui Tribe will be limited to those people who can demonstrate a significant relationship with the tribe in their application for membership.

SECTION-BY-SECTION ANALYSIS

Section (a) of this proposed bill provides that the Pascua Yaqui people who are currently members of the Pascua Yaqui Association, Inc., or who shall hereafter become members, shall be entitled to services and assistance available to other Indians because of their status as Indians under Federal law.

The new paragraph added to this section allows the Pascua Yaqui Indians to qualify under the Act of August 16, 1957, which has to do with the Public Health Service sharing the cost of constructing health facilities that serve Indians and non-Indians.

Section (b) extends the provisions of the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 484) to the Pascua Yaqui Tribe of Indians. This Act would afford certain protections and benefits to these Indians.

Section (c) of the bill directs the Secretary of the Interior to accept, as trustee, the title to 202 acres of land conveyed by the United States to the Pascua Yaqui Association under the Act of October 8, 1964 (78 Stat. 1196). This land would constitute the reservation of the Pascua Yaqui Indians.

The new language added to this section governs jurisdiction of the land to be held in trust by the United States for the Pascua Yaqui Tribe.

Section (d) repeals section 4 of the Act of October 8, 1964, which has prevented the Pascua Yaqui Tribe from receiving benefits and services from the Federal Government.

Section (e) requires the Pascua Yaqui Tribe to adopt organized governing documents and a membership role within 1 year from the date of enactment of this act. This section also limits membership in the Pascua Yaqui Tribe to those people who can demonstrate a significant relationship with the tribe.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

CONGRESSIONAL BUDGET OFFICE,

Washington, D.C., March 14, 1978.

HON. JAMES AROUREZK,
*Chairman, Select Committee on Indian Affairs, U.S. Senate, Dirksen
Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1633, a bill to provide for the extension of certain federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes, as ordered reported by the Senate Select Committee on Indian Affairs, March 9, 1978.

PASCUA YAQUI INDIANS

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[page 6]

Based on this review, it appears that no additional cost to the government would be incurred as a direct result of this bill. The bill, however, provides for the extension of certain benefits and services to the Pascua Yaqui Indians through a number of discretionary federal programs. Thus, while no additional expenditures are mandated by the bill, the relevant federal agencies can be expected to seek additional funds in order to provide such benefits.

Sincerely,

ALICE M. RIVLIN, *Director.*

EXECUTIVE COMMUNICATIONS

The pertinent legislative report from the Department of the Interior is set forth below.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 20, 1978.

HON. JAMES ABUREZK,
*Chairman, Senate Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This supplements the Interior Department's report on S. 1633, a bill "To provide for the extension of certain Federal benefits, services, and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes."

The mineral conveyance authorized by subsection (d) of S. 1633 is unnecessary. Section 3 of the Act of October 8, 1964 (78 Stat. 1196) provided that any patent issued under that Act shall reserve to the United States certain named minerals for which the land is deemed by the Secretary of the Interior to be valuable or prospectively valuable as of the date of issuance of the patent. Since the U.S. Geological Survey had indicated that the lands were not valuable or prospectively valuable for any of said minerals, the patent issued on October 30, 1964 conveying the land to the Pascua Yaqui did not reserve any minerals to the United States.

Sincerely,

FORREST,
Assistant Secretary—Indian Affairs.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 20, 1978.

HON. JAMES ABUREZK,
*Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 1633, a bill "To provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes."

We recommend against enactment of S. 1633 in its present form.

S. 1633 would extend to the Indians who are members of the Pascua Yaqui Association, Inc., eligibility for services and assistance that the United States provides to Indians because of their status as Indians.

The bill would also direct the Secretary of the Interior to accept from the Pascua Yaqui Association, Inc., a conveyance of real property

LEGISLATIVE HISTORY

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which it presently holds in order that the Secretary might hold that land in trust as a reservation for the Pascua Yaqui.

There are currently no statutory or regulatory guidelines governing the extension of Federal Indian services and benefits to groups not served by the Bureau of Indian Affairs. In the past, extension of such services has been on an ad hoc basis. However, on June 16, 1977, the Department published for comment a proposed rule making which would establish "Procedures Governing the Determination that an Indian Group is a Federally Recognized Indian Tribe."

Based on the comments received on that proposal, the staff of the Bureau of Indian Affairs has developed a revised draft which is under review within this Department. The proposed changes to that are such that another publication for public comment is likely to be necessary or desirable.

In addition, your committee has scheduled hearings for April 18, 1978 and April 20, 1978 on S. 2375, a bill which would establish by statute the procedure and guidelines for the extension of Federal services and benefits to additional Indian groups. Further, a meeting of leaders of the Indian tribes now served by the Bureau of Indian Affairs and of Indian groups seeking such services is being planned in an attempt to develop a unified Indian position as to the criteria and procedure for the extension of Federal Indian services to additional groups.

In view of the foregoing, the Administration recommends that the questions of extension of services to the Pascua Yaqui not be decided until after either this Department's final regulations have been issued or general legislation has been enacted governing such extensions. This would permit an even handed approach to the requests of the Pascua Yaqui and other groups seeking eligibility for Federal Indian services.

Instead of S. 1633 as introduced, the Administration would support a bill which would amend section 4 of the Act of October 8, 1964, (78 Stat. 1196) to remove a portion of that section which now precludes any possibility of extension of services to the Pascua Yaqui under administrative regulations. The language which we would support deleting from that section states that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Yaqui Indians".

As the Committee is aware, that 1964 Act donated a certain 202 acre tract of Federally owned land to the Pascua Yaqui Association, Inc. for the benefit of the members of the Association. As stated in the Senate Report on the bill which became that law (S. Rept. 88-1530), section 4 was added "to make certain that the members of the Pascua Yaqui Association, Inc. shall not be considered as eligible for the same benefits and services that now are bestowed on recognized and existing Indian tribes and individuals through the Bureau of Indian Affairs".

We believe that the Pascua Yaqui should be afforded the same opportunity to apply for the extension of benefits and services as any other group of Indians seeking such services now has.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Forrest,
Assistant Secretary.

* * * * *

PASCUA YAQUI INDIANS
P.L. 95-375

HOUSE CONFERENCE REPORT NO. 95-1339

* * * * *

[page 3]

JOINT EXPLANATORY STATEMENT OF THE
COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill S. 1633, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House to the bill as passed by the Senate and agrees to the same with a further amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are also noted below.

As passed by the Senate, S. 1633 extends Federal recognition to the Pascua Yaqui Indians of Arizona, which includes eligibility for all Federal services and benefits provided to Indians because of their status as Indians; recognition of tribal powers of self-government; reservation status for the Yaqui lands; and provision for tribal authority to assume criminal and civil jurisdiction on such lands on an optional basis.

The amendment of the House eliminated language providing for self-government; reservation status; and criminal and civil jurisdiction.

The conference committee adopted a substitute, by way of compromise. The House agreed to accept the Senate provision with respect to tribal self-government and reservation status. On the

[page 4]

question of jurisdiction, the Senate agreed that the State should continue to exercise criminal and civil jurisdiction on the Pascua Yaqui reservation lands as if such jurisdiction had been assumed under Public Law 83-280. Public Law 83-280 authorizes a State to exercise comprehensive civil and criminal jurisdiction over Indian reservations within State boundaries, with specified protections for the trust nature of the land. The State may, at its option, retrocede jurisdiction to the Federal Government on a complete or partial basis by action of the State legislature.

The House amendment limited the membership of the tribe to the present members of the Pascua Yaqui Association, other persons of Yaqui blood who apply within 1 year and comply with the association's membership criteria, plus direct lineal descendants. The conference report adopts language to extend the time in which to apply for membership (2 years) and extends membership to the present

LEGISLATIVE HISTORY

P.L. 95-375

association, plus those Indians of Yaqui blood who are U.S. citizens, and direct lineal descendants of enrolled members.

TENO RONCALIO,
MO UDALL,
TED RISENHOOVER,
Managers on the Part of the House.

JAMES ABOUREZK,
HOWARD M. METZENBAUM,
JOHN MELCHER,
DEWEY F. BARTLETT,
MARK O. HATFIELD,
DENNIS DECONCINI,
Managers on the Part of the Senate.

FISHERMEN'S PROTECTIVE ACT OF 1967

P.L. 95-376, see page 92 Stat. 714

House Report (Merchant Marine and Fisheries Committee)
No. 95-1029, Mar. 31, 1978 [To accompany H.R. 10878]

Senate Report (Commerce, Science, and Transportation Committee)
No. 95-816, May 12, 1978 [To accompany H.R. 10878]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

House April 10, August 10, 17, 1978

Senate May 22, August 17, 1978

The House Report is set out.

HOUSE REPORT NO. 95-1029

[page 1]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 10878) to extend until October 1, 1981, the voluntary insurance program provided by section 7 of the Fishermen's Protective Act of 1967, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

[page 4]

PURPOSE OF THE LEGISLATION

The purposes of the legislation are threefold: to extend the cooperative insurance program carried out under section 7 of the Fishermen's

EXHIBIT II

25 U.S.C.S. 1300 F

PASCUA YAQUI TRIBE

§ 1300f. Status of Pascua Yaqui Indian people

(a) **Eligibility for services and assistance.** The Pascua Yaqui Indian people who are members of the Pascua Yaqui Association, Incorporated, an Arizona corporation, or who hereafter become members of the Pascua Yaqui Tribe in accordance with section 3 of this Act [25 USCS § 1300f-2], are recognized as, and declared to be, eligible, on and after the date of the enactment of this Act [enacted Sept. 18, 1978], for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States, or under any statute of the United States. For the purposes of section 2 of the Act of August 16, 1957 (71 Stat. 371; 42 U.S.C. 2005a) [42 USCS § 2005a], the Pascua Yaqui Indians are to be considered as if they were being provided hospital and medical care by or at the expense of the Public Health Service on August 16, 1957.

(b) **Administration of lands; application of other laws.** The provisions of the Act of June 18, 1934 (48 Stat. 484) as amended, are extended to such members described in subsection (a).

(c) **Receipt in trust by United States of land for Pascua Yaqui Tribe; criminal and civil jurisdiction.** The Secretary of the Interior is directed, upon request of the Pascua Yaqui Association, Incorporated, and without monetary consideration, to accept on behalf of the United States and in trust for the Pascua Yaqui Tribe, the title to the real property conveyed by the United States to such association under the Act of October 8, 1964 (78 Stat. 1197) [unclassified] and such lands shall be held as Indian lands are held: *Provided*, That the State of Arizona shall exercise criminal and civil jurisdiction over such lands as if it had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79).

(Sept. 18, 1978. P. L. 95-375, § 1(a)-(c), 92 Stat. 712.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Act of June 18, 1934 (48 Stat. 484), as amended", referred to in this section, is probably intended to be a reference to Act June 18, 1934, ch 576, 48 Stat. 984, which appears generally as 25 USCS §§ 461 et seq. For full classification of this Act, consult USCS Tables volumes.

"The Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79)", referred to in this section, is Act Aug. 15, 1953, ch 505, 67 Stat. 588, as amended by Act Apr. 11, 1968, P. L. 90-248, Title IV, § 403, 82 Stat. 79. For full classification of such Acts, consult USCS Tables volumes.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 1300f-1, 1300f-2.

§ 1300f-1. Tribal constitution and bylaws; review by Secretary; publication of documents and membership roll in Federal Register

Within thirty months after the date of enactment of this Act [enacted Sept. 18, 1978], the Pascua Yaqui Tribe shall adopt a constitution and bylaws or other governing documents and a membership roll. The Secretary of the Interior shall review such documents to insure that they comply with the provisions of this Act [25 USCS §§ 1300f et seq.] and shall publish such documents and membership roll in the Federal Register. Publication of such roll shall not affect or delay the immediate eligibility of the members of the Association under section 1 of this Act [25 USCS § 1300f]. (Sept. 18, 1978, P. L. 95-375, § 2, 92 Stat. 712.)

§ 1300f-2. Membership of Tribe

For the purposes of section 1 of this Act [25 USCS § 1300f], membership of the Pascua Yaqui Tribe shall consist of—

(A) the members of the Pascua Yaqui Association, Incorporated, as of the date of the enactment of this Act [enacted Sept. 18, 1978], who apply for enrollment in the Pascua Yaqui Tribe within one year from the date of enactment of this Act [enacted Sept. 18, 1978] pursuant to the membership criteria and procedures provided for in the official governing documents of the Pascua Yaqui Tribe;

(B) all those persons of Yaqui blood who are citizens of the United States and who, within two years from the date of enactment of this Act [enacted Sept. 18, 1978], apply for, and are admitted to, membership in the Association pursuant to article VII of the Articles of Incorporation of the Association; and

(C) direct lineal descendants of such persons, subject to any further qualifications as may be provided by the Tribe in its constitution and bylaws or other governing documents.

(Sept. 18, 1978, P. L. 95-375, § 3, 92 Stat. 712.)

CROSS REFERENCES

This section is referred to in 25 USCS § 1300f.

CH. 14 MISCELLANEOUS

25 § 1300f-2

(B) all those persons of Yaqui blood who are citizens of the United States and who, within two years from September 18, 1978, apply for, and are admitted to, membership in the Association pursuant to article VII of the Articles of Incorporation of the Association; and

(C) direct lineal descendants of such persons, subject to any further qualifications as may be provided by the Tribe in its constitution and bylaws or other governing documents.

(Pub.L. 95-375, § 3, Sept. 18, 1978, 92 Stat. 712.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 95-375, see 1978 U.S. Code Cong. and Adm. News, p. 1761.

EXHIBIT I

**LETTER FROM EDWARD H. SPICER TO
SENATOR PAUL J. FANNIN - JANUARY 9, 1976**



THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

COLLEGE OF LIBERAL ARTS
DEPARTMENT OF ANTHROPOLOGY

January 9, 1976

The Honorable Paul J. Fannin
United States Senate
Washington, D.C. 20510

Dear Senator Fannin:

I have been asked to write you on behalf of the Pascua Yaqui Association. I have been associated with Yaquis for forty years, having lived among them in their communities in both Arizona and Sonora. I have made studies of their history and culture and published in books and articles the results of those studies. During the period 1966-69 I was director of a federal project set up to improve Yaqui housing; this was the program which gave impetus to the development of the settlement now called New Pascua.

In connection with the current effort of the Yaquis of New Pascua to obtain federal recognition as Indians the following facts about them and their situation in Arizona appear to be relevant.

There is no question about there being Indians in the same sense that the Navajos, the Papagos, the Apaches, and other people of Arizona are Indians. The language that their ancestors in North America spoke and that they continue to speak is universally classified by linguists as a member of the Uto-Aztecan family of languages, to which also belong the languages of the ancient and modern Aztecs, and the Papagos, Pimas, Hopis, and Paiutes of Arizona (A. L. Kroeber, Uto-Aztecan Languages of Mexico, University of California Press, 1934). This is one of the most widespread and important of North American Indian language stocks. The Yaqui language, as a member of this group, has its own distinctive Indian grammar and sound system wholly unrelated to any language in any part of the world outside of North America.

Present day Yaquis, such as those of New Pascua in Arizona, speak this as the language of the home, although they also speak other languages such as English and Spanish as do their neighbors and schoolmates. In at least one public school system (at Marana, Arizona) the Yaqui language is being taught by Yaqui speakers as part of the cultural heritage of the schoolchildren, as Navajo, Hopi, and Papago are being taught in the universities of the state. Yaqui has maintained its own distinctive characteristics

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ever since the early Spanish missionaries went among the Yaquis in 1617, as we know from a grammar and vocabulary which was written by Father Juan de Velasco in the 1600's (E. Buelna, Arte de la Lengua Cahira. Mexico, 1891).

Yaquis have resided in Arizona for nearly 100 years, first becoming permanent residents of the Territory of Arizona in about 1882. They have had a role in the development of Arizona, however, ever since the 1700's. Some came with followers of Father Kino to the first missions established in the upper Santa Cruz valley and played an important part in that effort. A Yaqui miner and prospector in 1769 discovered the virgin silver that led to the mining operation at Arizonaac from which our state derives its name.

During the late nineteenth century the large landowners of Sonora tried to appropriate the rich land of the Yaquis southeast of Guaymas and convert it into haciendas as greater holdings for themselves. The Yaquis resisted most effectively for some fifty years. They fought for continued control of both their lands and the thriving towns which they had developed. They fought the state troops to a standstill, but when the Mexican federal government intervened in the 1880's, Yaquis were driven from their land.

It was at this time that they began coming to the United States where they established permanent settlements around Tucson and Tempe where they have lived ever since. Several hundred Yaquis entered the United States just after 1900 when the Mexican government began a ruthless program of deportation of Yaquis to work as forced peon labor on the sugar and henequen plantations of southern Mexico. Those who escaped alive were admitted to the United States as political refugees. It is their descendants, citizens of the United States by virtue of birth in this country, who make up the bulk of the present Yaqui population of Arizona.

In 1930 there were approximately 2500 Yaquis in Arizona living in four settlements in the vicinity of Tucson, two communities near Tempe, and a small settlement near Yuma (E. R. Spicer, Pascua Yaqui Village in Arizona. University of Chicago Press, 1940). Yaquis played an important part during their earliest years in the United States in building the Southern Pacific railroad and smaller spur lines to various mining areas in southern Arizona. They also had a considerable role in the labor force at smelters and mines such as the Sasco operation near Red Rock. Later they moved into agricultural labor. Their role was significant also in that important Arizona development, the Pima long staple cotton industry. It may be said that Yaqui labor was a major factor in Arizona's economic growth during the 1930's and 1940's. By 1970 the Yaqui population of the state had grown to between 5,000 and 6,000, the whole increase being due to natural growth of the original refugee families.

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The major Yaqui communities in Arizona at present are Guadalupe (recently incorporated) near Tempe and New Pascua and Old Pascua near Tucson. There is also a third center of Yaqui life in South Tucson in the form of a chapel, but the population surrounding this center has been scattered by a freeway. The Yaqui communities maintain a distinctive way of life. Not only is the native Indian language spoken in them, but also the Yaqui customs which have been uniquely their own ever since first reported by Europeans, continue to shape their lives. They appear to some neighbors to have merged their way of life with that of Mexican Americans, but this is a very superficial judgment. They have been forced, as a result of their migrations to escape deportation and death, to mingle with Mexicans and others. For a period from about 1890 until 1910 it was dangerous to reveal their identity as Yaquis; to do so risked being picked up for deportation to Yucatan. Consequently Yaquis learned how to get along with Mexicans, speaking Spanish and not overtly carrying on their basic customs. This kind of adaptation also took place in the United States, where at first they did not realize their freedom to practice their own religion and to maintain their own native ways.

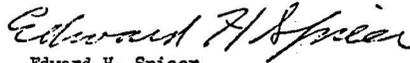
Steadily, since becoming aware of the freedoms of life in the United States, they have redeveloped most of the longstanding forms of family custom, community life, and organization, and religious devotion. Their community life centers especially about the forms of worship which they first borrowed from the Spanish missionaries and then made distinctively their own. Their colorful ceremonies, which contain elements of both the religions of sixteenth century Europeans and the native religions which they practiced before the missionaries arrived, have become especially well-known to and greatly appreciated by their Anglo and other neighbors. There is a continuing core of Yaqui culture much prized by Yaquis and which they seek, like other Indians of the state, to maintain as their own basis of identity. It rests as much on their unique and difficult historical experience as on any particular customs. They are extremely conscious of their history and preserve the memory of the determined struggle which they waged for independence on their own land.

The community of New Pascua came into existence as a result of the initiative of Yaquis. It was a group of determined Yaquis of Old Pascua in the early 1960's who had a dream of a new community outside the slum area which had engulfed the Old Pascua area. Seeking a way to improve their houses they persuaded the United States Congress to grant them land as a non-profit cooperation--the Pascua Yaqui Association--in 1964. From that time forward the community of New Pascua has been a place of progressive ideas and new kinds of organization among Yaquis. An active Board of Directors has stimulated private enterprise in building construction and many other ways. The

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present attempt to obtain recognition as Indians is part of this active initiative for developing their community. It is part of the effort which Congress effectively stimulated by granting the land to the new Yaqui association. The objectives stated so clearly in the wording of the Congressional Act of 1964 are being vigorously pursued by Yaquis of New Pascua in their present effort.

Sincerely,



Edward H. Spicer
Professor

EHS/baf

cc: Congressman Morris K. Udall

Pascua Yaqui Association

EXHIBIT J

U.S. DEPARTMENT OF INTERIOR - BUREAU OF INDIAN AFFAIRS

LEGAL REVIEW OF PROPOSAL

CONSTITUTIONAL AMENDMENTS

TO THE PASCUA YAQUI TRIBAL CONSTITUTION

DECEMBER, 1991



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240



IN REPLY REFER TO:

Tribal Government Services - TR DEC 3 1991



Honorable Arcadio Gastelum
Chairman, Pascua Yaqui Tribal Council
7474 South Camino De Oeste
Tucson, Arizona 85745

Dear Chairman Gastelum:

We have completed our legal and technical review of the proposed revised Constitution of the Pascua Yaqui Tribe submitted by the Phoenix Area Director by memorandum of October 9, 1991. The proposed constitution was accompanied by Resclusion No. C8-49-91 adopted by the Pascua Yaqui Tribal Council on August 22, 1991, requesting that the Secretary of the Interior (Secretary) authorize and conduct an election to permit the qualified voters of the tribe to vote on the adoption or rejection of the proposed document.

We agree that the proposed changes to the constitution are substantive in nature, rather than simply amendatory, and constitute a revision to the tribe's constitution requiring submission to the Central Office for action. (See Memorandum of August 19, 1986, from Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) to Muskogee Area Director re "clarification of Distinctions between Amendments and Constitutional Revisions" and "Developing and Reviewing Tribal Constitutions and Amendments: A Handbook for BIA Personnel; U.S. Department of the Interior, June 1987.") Consequently, the document must be presented to the voters in the form of a revised constitution rather than in the form of amendments. As a result of our review, we offer the following comments and recommendations to make the proposed document legally and technically sufficient, that is, not contrary to applicable law.

We note that the tribe proposes to make several significant revisions to its constitution, among others, in the belief that by revising its constitution it can designate itself a historic tribe with all the sovereign attributes usually associated with such status. Apparently, the tribe believes that by revising the preamble and the powers article and inserting words like "being a sovereign nation" and "in addition to its inherent sovereign powers" it will in effect become a historic, sovereign tribe. Such is not the case.

This is significant since the origin of the Pascua Yaqui Tribe is somewhat different from that of a historic tribe. The term "tribe" as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty. When such a tribe is organized under the

Indian Reorganization Act (IRA), its governing authority is derived from acknowledgment of the fact that as a single identifiable group, they have historically governed themselves. By adopting an approved IRA constitution, the historic tribe enters into a government-to-government relationship with the United States whereby the Federal Government agrees to acknowledge that the tribe possesses inherent powers of self-government as modified by applicable law.

Before organizing into a single entity under the IRA constitution adopted and approved in 1988, the Assistant Secretary - Indian Affairs in his letters of January 23, 1983, and October 15, 1987, found that the Pascua Yaqui Tribe was a community of adult Indians and did not possess all of the same attributes of sovereignty as a historic tribe. The Constitution of the Pascua Yaqui Tribe as approved by the Assistant Secretary - Indian Affairs in 1988 is consistent with this interpretation.

The Department of the Interior's (Department) position on historic tribes versus adult Indian communities represents a long-standing interpretation of the law and historical factual differences between groups of Indians and the policies of the Department. Since passage of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), the Department has held that adult Indian communities may not possess all of the same attributes of sovereignty as a historic tribe. See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979) (note: the same opinion appears but with a different heading and bearing a date of April 15, 1938, at 1 Op. Sol. on Indian Affairs 813). A historic tribe has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been removed by Federal law in favor of either the United States or the state in which the tribe is located. By contrast, a community of adult Indians is composed simply of Indian people who reside together on trust land. A community of adult Indians may have a certain status which entitles it to certain privileges and immunities. See United States v. John, 437 U.S. 634 (1978). However, that status is derived as a necessary scheme to benefit Indians, not from some historical inherent sovereignty.

The authority of a community of Indians residing on the same reservation has been held generally not to include the power to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxes upon community member or others, and the regulation of law and order. It is within the community's authority to levy assessments upon its members of the use of community property and privileges as these assessments would be incidental to the ownership of the property. A community may also levy assessments on non-members coming or doing business on community lands. However, such assessments would be levied in its exercise of the community's power as a land owner not some historical, inherent power to tax.

On December 13, 1934, by memorandum M-27810 the Solicitor advised the Secretary that Section 16 of the Indian Reorganization Act contemplated two distinct and alternative types of tribal organizations. These were explained and defined by the Solicitor as follows:

In the first place, it authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of this act) under Section 16 to organize without regard to past tribal affiliation.

The Solicitor explained further that when Indians organized under Section 16 as members of a tribe or tribes their constitution and bylaws must be ratified by a majority vote of the adult members, whether residents or nonresidents of the reservation. On the other hand, if the Indians were organized as residents of a single reservation, ratification of their constitution and bylaws could be accomplished only by a majority vote of the adult Indians residing on such reservation.

The Solicitor's views were embodied in Amended Rules and Regulations for the Holding of Elections under the Indian Reorganization Act on October 18, 1935. See 55 I.D. 355. The Department's interpretation of Section 16 as providing for two types of tribal organizations with different voting rights for nonresidents is currently codified in Title 25 of the Code of Federal Regulations, Part 81.

While we understand there is a belief that Pascua Yaqui is a historic tribe, the Assistant Secretary - Indian Affairs did not feel this belief was supported by the available historical evidence. Designation of Pascua Yaqui as a historic tribe is inconsistent with prior reports made on the tribe in S. Rep. No. 95-719, 95th Cong., 2d Sess. 1762 (1978); S. Rep. No. 1530, 88th Cong., 2d Sess. 2 (1964); H.R. Rep. No. 1805, 88th Cong., 2d Sess. 2 (1964); H.R. Rep. No. 95-1021, 95th Cong. 2d Sess. 2 (1978), when it was seeking Federal recognition.

In his Highlights of Yaqui History, Edward H. Spicer, who testified at hearings on the Pascua Yaqui recognition bill wrote:

"Despite all-out efforts by the Diaz government of Mexico to dominate their communities before 1910, Yaquis fought for self-determination in their own country. They outlasted the landlord government of Mexico and made their cause an important theme of the 1910 Revolution. In the United States, where many Yaquis sought political refuge during the long years of persecution in Mexico, they have made it clear to churches and other agencies that they will continue to guide their religious and community life in their own way There are between 25,000 and 30,000 Yaquis today; 20,000 living in Sonora and 5,000 to 6,000 in Arizona and California ... their status is simply that of immigrants from Mexico or citizens by virtue of birth in the United States.

By the mid-1890's more Yaquis began to settle near Nogales and along the Santa Cruz River northward. These were individuals who came as refugees from the Sonora settlements. They were being attacked by Mexican troops as a result of their resistance to the appropriation of their land by the large landowners who controlled the State of Sonora. Hundreds of Yaquis came across the International Boundary during the decade from 1896 to 1907. The United States gave them sanctuary as political refugees, a status which was officially confirmed by the United States Department of State years later in 1931. By that time, 2,000 or more Yaquis had come to the United States and established permanent settlements not only in Nogales and Tumacacori, but also more widely in the state around Tucson and Scottsdale. In 1917-18, new persecutions broke out under the revolutionary government of General Alvaro Obregon. Hundreds more Yaquis crossed the border and were given the officially recognized status of political refugees." (Emphasis added)

This led the Department to believe that the Pascua Yaqui did not enter the country as a historic tribal unit. (See also hearings before the Senate Select Committee on Indian Affairs on S. 1633, dated September 27, 1977, and House Report No. 1530, dated September 8, 1964, on H.R. 6233 and S. 3015). While Dr. Spicer testified in support of the bill to recognize the Pascua Yaquis and indicated that individual Yaquis had come into the United States earlier, he did not discuss tribal movement or immigration.

In a September 18, 1978, letter to Cecil Andrus, then Secretary of the Interior, former President Jimmy Carter upon signing S. 1633, "Extension of Federal Benefits to Pascua Yaqui Indians in Arizona", wrote that he was disturbed with the precedent the bill may establish.

In addition, President Carter stated:

"As your department begins its process of reviewing petitions from Indian groups seeking Federal recognition, I expect that high standards will be applied to their evaluation. My approval of Federal recognition to the Pascua Yaqui does not signal or imply any relaxation in the strict application of the Department's recently promulgated regulations on Indian tribal recognition. Each petition should be reviewed bearing in mind that Federal recognition brings with it a perpetual relationship of one group of citizens, and their descendants, to our government. Federal recognition and the special benefits that accompany it should be granted only when an Indian group clearly meets the criteria for recognition." (Emphasis underscored.)

While the Pascua Yaqui were finally successful in obtaining Federal recognition, the Act did not convey historic status with inherent sovereign powers. Moreover, the tribe has on several occasions sought support to amend the Act of September 18, 1978, to legislatively designate the Pascua Yaqui Tribe as a historic tribe. To date, those efforts have been unsuccessful. The tribe cannot as a matter of law unilaterally amend its constitution and declare itself a historic tribe. Since the historical record does not support the tribe's contention, we cannot agree to such a change. Consequently, we would find any efforts to amend the Constitution of the Pascua Yaqui Tribe to include assertions of inherent sovereign status with attendant powers as contrary to applicable law and, if adopted, would disapprove the same.

The tribe proposes to amend Article II - Jurisdiction by inserting the word "exterior" to delineate the outer boundaries of the reservation and by deleting the phrase "provided the state, county, city or other political subdivision where such land is located has retroceded to the United States Federal Government all civil and criminal jurisdiction." We have no objection to these changes since civil and criminal jurisdiction over the Pascua Yaqui Reservation was retroceded to the United States on August 27, 1985.

Article III - Membership. We have no objection to the inclusion of the words "all of" in Section 1 although we believe it serves no useful purpose. However, we do object to the proposed revised language in Section 1(a). As proposed, the inclusion in subsection (a) of the language "and all descendants of all eligible persons" would in effect reopen the base roll, would provide an open-ended eligibility, and would expand membership to include all descendants of the persons listed on the base roll. Furthermore, inclusion of descendants on the base roll is clearly contrary to Congressional intent. The Act of September 18, 1978, limited membership to direct lineal descendants of persons named on the base roll. While technical corrections might need to be made to the information shown for individuals on the base roll, no additional names may be added to the base roll. The tribe's proposed language in subsection (a) is contrary to applicable Federal law and if adopted we would disapprove the constitution or any amendment that contained such language or intent. Any departure from the limitations imposed by the Act could jeopardize the tribe's right to Federal recognition and the rights of its members to Federal benefits and services. Accordingly, we recommend you continue with the language as it now appears in the tribe's existing constitution. That language was developed specifically to comply with the law.

We note that the tribe also proposes to delete the requirement of Secretarial approval of such corrections, additions or deletions to the base roll as well as Secretarial approval of membership ordinances governing future membership and loss of membership in Section 2. This would also be contrary to applicable law and if adopted we would disapprove the constitution or any amendment that eliminated Secretarial approval. Congress required that the base membership roll be approved by the Secretary and any changes thereto

would require his consent. Moreover, as a created tribe, the Pascua Yaqui Tribe does not have the authority to alter its membership provisions without the consent of the Secretary and we could not agree to the elimination of Secretarial approval as proposed in subsection (a) or Section 2. Enrollment ordinances are subject to Secretarial approval because loss of membership and adoptions into membership involve the trust estate and could expand membership beyond those persons who the Secretary on behalf of the United States has recognized as the tribal membership. Loss of membership or disenrollment involves loss of a substantial Federal right to participate in Federal benefits. Because a tribal entity may substantially affect its makeup through the adoption process or may retaliate against members with opposing viewpoints through the termination of membership, the Secretary must exercise his responsibility to approve such an ordinance since the use of Federal dollars for contracts and grants for tribal government purposes are involved. Further, if Secretarial approval of tribal rolls is eliminated, the Secretary is not bound to accept as Indians those persons whose names appear on the roll. As previously indicated, the Pascua Yaqui Tribe is not a historic Indian tribe with inherent sovereign powers. Rather, it is a created tribe whose powers have been delegated to it, and, thus, does not have the inherent right or authority to alter its membership absent the consent of the Secretary. In the case of the Pascua Yaqui, the adoption of members into the tribe is beyond the scope and authority of what the Act of September 18, 1978, permits. The Pascua Yaqui Tribe has no authority to adopt members into the tribe. We, therefore, recommend that Section 2 remain as it now appears in the tribe's existing constitution. Otherwise, if adopted, we would disapprove as contrary to Federal law.

The tribe proposes to revise subsection (b) by deleting the words "children born to" and replacing it with "descendants of" and by lowering the blood quantum from one-quarter to one-eighth degree Pascua Yaqui blood. We have no objection to the substitution of "descendants of" for "children born to." However, the qualifying words "direct lineal" must be inserted before "descendants." This limitation is contained in the Act and its inclusion will assure that the tribe's Federal recognition is not jeopardized by the admission of ineligible persons.

We do object to the lowering of the blood quantum from one-fourth to one-eighth degree for the same reasons discussed above, that is, as a created tribe, the Pascua Yaqui do not have the authority to alter their membership provisions without the consent of the Secretary. We recommend the blood quantum remain at one-fourth degree as it now appears in the tribe's existing constitution. The 1978 Act adopted by incorporation the one-quarter blood quantum requirement in Article VII of the Articles of Incorporation of the Pascua Yaqui Association for eligibility on the base roll. We do not believe the lowering of the blood quantum is consistent with the intent of the 1978 Act. Otherwise, if adopted, we would disapprove as contrary to Federal law.

Article V - Legislative Branch. The tribe proposes to revise Section 2 to provide that the chairman and vice chairman are part of the tribal council and will be elected at large rather than from within the council. We have no objection to this proposal.

Section 3 is being revised in its entirety to provide for primary and general elections. While we have no objection to the concept, we believe some of the language is unclear. In Subsection (a), we recommend that the first sentence be changed for clarity to read: "There shall be a primary election for chairman and vice-chairman on the last Monday in April of every fourth year."

Subsection (b) provides for a sixty day notice designating the officers for which candidates are to be nominated at the primary election. Since there are only two officers, we believe the appropriate language is "office" or "position." Further, the purpose of a primary election is to reduce the number of candidates down to two. Nominations of candidates running in the primary should be selected well in advance of the primary election itself. It is not clear whether nominations are made by the general membership at a public meeting or whether candidates file for office. Section 3 needs to be clarified accordingly. We recommend the following alternatives:

Section . Any qualified member of the Pascua Yaqui Tribe who desires that his/her name be placed on the ballot as a candidate for the office of chairman, vice-chairman or council member in the primary election shall file with the tribal secretary a statement of intention showing said name and the office for which he/she desires to become a candidate. Such statement shall be filed not less than thirty (30) days preceding the primary election.

OR

Section . Nominations. At least thirty (30) days before the primary election is to be held, candidates for the office of chairman and vice chairman shall be nominated at a general community meeting called for that purpose.

Also, we would point out that any additional requirements provided for in an ordinance can only be procedural in nature. An ordinance can not impose substantive requirements above those contained in the constitution. Rather than say the chairman and council members have the power to enact ordinances, it would be more appropriate to say the tribal council since the legislative powers of the tribe rest with the tribal council.

While Section 5 is entitled "staggered terms" the content of the section does not establish a staggered term for the chairman and vice chairman. Is it the tribe's intent that these two officers serve standard four year terms? Since the terms established by Section 5 are not true staggered terms but are set terms, perhaps a more descriptive title would be "terms of office."

Section 5(b) likewise does not establish a staggered term of office. While Section 5(b) could be read to imply that the intent is to establish a staggered term, it appears that appropriate language is missing. Is it the tribe's intent that thereafter they serve four years? If so, it should be so specified. Generally, in establishing staggered terms of office, a specified number of persons receiving the highest number of votes serve for the longest terms while those receiving the next highest number of votes serve for the lesser terms. Thereafter, they each serve the same length of term, it just occurs at a different time. If you would convey to us the tribe's intent and how often they want to hold elections, we will be glad to suggest appropriate language.

Section 5(c), we believe the tribe inadvertently omitted a sentence. We recommend the following sentence be added: "Thereafter, they shall be elected every four (4) years."

Section 5(g) contemplates that if there are insufficient candidates in the 1992 election to fill the vacant seats a special election will be held. However, it makes no further provision should there also be insufficient candidates for the special election. We would recommend that should that happen provision be made for the tribal council to appoint to fill the vacancy(s). Suggest language could read: "in the event there still remains insufficient candidates to fill the existing vacancies, the tribal council shall fill the vacancies by appointment."

Further, the tribe only contemplates this insufficiency could occur in the June 1992 election. Since the tribe is concerned about this insufficiency, we believe it could occur at other elections as well. We would recommend that the words "the June 1992" be deleted and replaced by "tribal elections." We also recommend the second paragraph of subsection (g) be deleted for the reasons discussed and because it can be interpreted to mean that the entire Section 5 becomes invalid after the initial election. We do not believe that is the intent. The constitutional provisions for general elections should be specifically set out in the constitution and remain in effect until amended at some future date.

The tribe proposes to revise Section 7 that would not preclude council members from serving on such other boards and commissions that the tribal council deems appropriate. While we have no major objection to this provision, we believe there would be occasions when this might not be appropriate. We would suggest this be covered in an ordinance. We would suggest the following language be added to Section 7 as drafted: "The tribal council may adopt ordinances prohibiting or regulating the right of any tribal council member to hold office as an employee of a business or other enterprise owned by the Pascua Yaqui Tribe."

In adding new sections to Article V, the remaining sections need to be renumbered accordingly.

Article VI - Powers of the Tribal Council. The tribe proposes to revise Section 1 by adding language that the tribal council possesses inherent sovereign powers and by deleting reference to the fact that the tribe's powers are limited by Federal law. The tribal council has no inherent sovereign powers. Such powers, where they exist, generally rest with the tribe. We have already advised you that the Pascua Yaqui Tribe does not possess inherent sovereign powers, that we cannot agree to such a change, and would find such assertions of inherent sovereign status with attendant powers as contrary to applicable law and, if adopted, would disapprove same. We strongly recommend the language not be included.

We also strongly recommend against the deletion of the language which dictates that the tribe's powers are limited by Federal law. Notwithstanding the tribe's status as a community of adult Indians, the fact remains that all Federally recognized Indian tribes are subject to Federal law. Such recognition conveys not only the immunities but the responsibilities as well. The absence of such limiting language from the constitution implies that the tribe is not subject to Federal law and we believe the absence of such language is misleading and could subject the tribe to serious jeopardy in the future. New members to the tribal council may not be familiar with the law and may take actions that could imperil the tribe for years to come. As a matter of historical record, we would strongly advise the tribe to retain such language.

The tribe proposes to revise Section 1(f) by adding the power to tax provided that no tax will be imposed on real property assigned to enrolled tribal members. Again, the power to tax is an inherent power and the Pascua Yaqui Tribe does not possess the power to tax. Our position has not changed from that articulated by the Deputy Assistant Secretary - Indian Affairs (Operations) in his letter of January 27, 1983, and by the Assistant Secretary - Indian Affairs in his letter of October 15, 1987. That is:

The Pascua Yaqui Tribe, as a created tribe, does not possess the same attributes of sovereignty as a historic tribe. It has long been held by the Department that a group of Indians which is organized on the basis of residents on a reservation and which is not a historic tribe may not have all the powers enumerated in the Solicitor's Opinion M-27781 on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated to it by the Secretary of the Interior. Those powers not within the inherent powers of non-historic tribes include the power to condemn land of its members, the regulation of inheritance of property of tribal members, levying of taxes upon tribal members, and the regulation of law and order. It is within the Pascua Yaqui Tribe's scope of authority to levy assessments upon its members for the use of community property and privileges as these assessments would be

incidental to the ownership of tribal property. Taxation of members is not permissible. The Solicitor's Opinions of April 9, 1936 and April 15, 1938, on the powers of Indian groups organized under the Indian Reorganization Act of 1934 but not historic tribes indicate that the power over law and order matters for groups which are not historical tribes is justified only as a delegation of power from the Secretary of the Interior. However, the Act of September 18, 1978, conveys to the State of Arizona the authority to exercise criminal and civil jurisdiction over reservation lands thereby pre-emptive any desires of the Secretary. This does not preclude the tribe from establishing a tribal police department for purposes of enforcing tribal law among tribal members. If the tribe chooses to do so, the tribe will have to pay for it as the Bureau cannot provide funds to enforce State law. Cross deputization will be a matter of tribal and State government determination.

Again, we find the tribe's assertion that it has the authority to tax misleading and contrary to applicable law.

The tribe proposes to revise Section 1(m) dealing with exclusion from the reservation by deleting the exception that it does not apply to Federal and state officials. We recommend the tribe not change this subsection. As a practical matter, the tribe cannot exclude Federal officials in the performance of their duties from a Federal reservation. While we would not find the elimination of this provision contrary to applicable law, it would be misleading.

The tribe proposes to revise Section 1(o) by substituting the words "law enforcement agencies" for the words "tribal police agency." While we do not fully understand the distinctions between the present and proposed language, we have no serious objections pending clarification of the tribe's intent provided you understand that as a created tribe, the Pascua Yaqui Tribe does not possess the inherent sovereign power to regulate law and order. The addition of the revised wording is misleading and could be construed to infer that the tribe has the authority to regulate law and order. However, as previously indicated, the only law and order authority the tribe has is that delegated to it by the Secretary. Such delegation is demonstrated by the Secretary's acceptance of civil and criminal jurisdiction over the Pascua Yaqui Reservation on August 27, 1985, and the Law Enforcement Agreement between the tribe and the Bureau of Indian Affairs (BIA) dated July 18, 1991. Such acceptance of the retrocession and acquiescence to the provisions contained in Section 1(o) of the Pascua Yaqui Constitution was construed as a delegation of power from the Secretary over law and order matters to the Pascua Yaqui Tribe. Thus, the Secretary of the Interior has delegated to the tribe some law and order authority. We note that while Congress has recently enacted legislation authorizing tribes to exercise criminal jurisdiction over non-member Indians, neither a tribe nor a community of adult Indians residing on the reservation has criminal jurisdiction over non-Indians. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

The tribe proposes to revise Section 1(t) to give the tribe authority to regulate domestic relations, probate and devise and personal and real property. Again, these are powers of a historic tribe with inherent sovereign powers and as a created tribe, the Pascua Yaqui Tribe does not possess the powers. Consequently, we would find this provision contrary to applicable law and would not approve a document containing such language.

In Article VII - The Executive Branch, Sections 1, 3 and 5, the tribe proposes to eliminate the position of the treasurer. Since we understand the tribe has a Department of Finance, we have no objection to this deletion.

The tribe proposes to revise Section 2 by including reference to Sections 4 and 5. We have no objection.

The tribe proposes to revise Section 4 by eliminating the requirement of a two-thirds majority vote and substituting a majority vote of the tribal council "members present and voting. It further proposes to add language that upon the death, resignation or removal of an appointed tribal officer, that position shall automatically be declared vacant. We have no objection to this proposal but would suggest the addition of the words "at a regular meeting of the tribal council" after the words "members present and voting."

The tribe proposes to further revise Section 5 by substituting "that person" for "he or she." We have no objection.

Article VIII - The Judiciary. The tribe proposes to revise Section 4 to eliminate the requirement that two-thirds majority vote is necessary to approve the nomination of tribal judges. While Section 4 also provides for a two-thirds majority vote of the tribal council for chief judge, we understand the tribe wishes to retain this requirement. We have no objection to the proposal.

The tribe proposes to revise Section 5 by deleting the last sentence, which reads "such appellate review shall not include trial de novo in any civil matter but trial de novo shall be provided in any criminal matter upon the request of any defendant." We have no objection provided the tribe has a court of record since appeals in civil matters will be considered by using the tape and transcript of the trial.

The tribe proposes to revise Section 6 by substituting non-general language for his or her and by substituting a majority vote in place of a two-thirds majority vote. We have no objection to these changes. However, the word "persons" should be changed to "person's" and the word "judges" to "judge's."

The tribe proposes to amend Section 7 to provide that the chief judge must be a "native American of a recognized Indian tribe as provided for in the Indian Reorganization Act of June 18, 1934, as amended; and be given Yaqui preference." We assume you have reference to the definition of tribe in Section 19 of the IRA which reads "The term tribe wherever used in this Act

shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." We note that all Indian tribes recognized by the Secretary as eligible to receive services from the United States Bureau of Indian Affairs, and which list appears in the Federal Register, may not have a reservation and would not be included within that definition thereby diminishing the pool of eligible candidates. Further, we understand the intent of "Yaqui preference" is to give qualified Pascua Yaquis the opportunity of being selected first for the position. For clarity, we suggest Section 7 be modified to read:

Section 7. The Chief Judge of the Pascua Yaqui Tribal Court shall be a member of a Federally recognized Indian tribe; Provided, That preference shall be given to enrolled members of the Pascua Yaqui Tribe.

The tribe proposes to add a new Section 8 which is composed primarily of the qualifications previously contained in Section 7. Proposed Section 8 would require five (5) years of experience as a tribal court judge or a graduate of an accredited law school and would give first preference to Pascua Yaquis. For purposes of clarity, we recommend Section 8 be modified to read:

Section 8. The Chief Judge of the Pascua Yaqui Tribal Court and any other judge shall have had (1) at least five (5) years experience as a tribal court judge, or (2) be a graduate of an accredited law school and have had at least one (1) years of experience as either a tribal court advocate or tribal judge. Any member of a Federally recognized Indian tribe shall be qualified to serve as a tribal court judge, Provided, That preference shall be given to an enrolled member of the Pascua Yaqui Tribe.

Article IX - Tribal Elections. The tribe proposes to revise Section 1 by eliminating the timeframe within which to adopt an election ordinance. We have no objection provided that an election ordinance is already in place. Further, in Sections 1 and 2 the tribe proposes to substitute the voter registration requirement for simple eligibility. We are somewhat mystified at this change since Section 1 already provides for proof of voting eligibility and voter eligibility is defined in Section 2 as an enrolled member 18 years of age. An ordinance cannot impose higher standards than that provided in the constitution. We believe it is unwise to eliminate the requirement for voter registration. Voter eligibility provides the basis for determining whether a petition is valid. In its absence it also requires a higher percentage of voter participation. We would strongly recommend the tribe not eliminate voter registration for tribal elections.

Article X - Removal, Recall and Resignation from Office. The tribe proposes to revise Section 1 by using non-gender identifying language; by deleting the second sentence which provides that the two-thirds vote required by this section does not abridge the council's right to select a different chairman or vice-chairman as provided in Article V. We assume that this sentence is

being removed because with the election of the chairman and vice-chairman at large it is no longer the tribe's intent to select a different chairman and vice-chairman as previously provided in Section 3 of Article V and not because of the two-thirds majority vote requirement. We understand that the tribe wishes to retain the two-thirds majority vote requirement for removal. If our understanding is incorrect, the tribe would need to delete reference to "two-thirds" for consistency with the proposed changes elsewhere in the document. Also, we note that the substitution of the word "that persons" in the next to the last sentence for "his or her" should read "that person's." We have no objections to the proposed changes.

Section 2 would be revised by eliminating the requirement for registration; by imposing a thirty percent requirement of the total number of ballots cast in the last tribal general election rather than thirty percent of the registered voters; and by increasing the timeframe within which to hold a special election to 45 days. Again, we believe voter registration is preferable and easier to determine but we have no serious objection to petition sufficiency. We do, however, believe the voter sufficiency language should be modified for clarity. We recommend Section 2 read as follows:

Section 2. The eligible voters of the Pascua Yaqui Tribe shall have the right to recall any elected officer of the Pascua Yaqui Tribe by filing a petition with the secretary of the tribe or other designated tribal official signed by a number of voters equal to at least thirty percent (30%) of the voters casting ballots in the last tribal general election. Upon receipt of a valid petition, it shall be the duty of the tribal council to call a special election within forty-five (45) days. In the event that a majority of those voting in such election vote to recall the elected official, the office shall be immediately declared vacant.

The tribe proposes to amend Section 3 by eliminating the automatic declaration requirement for vacancies and substituting the requirement that the tribal council declare the seats vacant and that they be filed in accordance with Article XI. While we have no objection to the proposed amendment, we recommend the tribe modify Section 3 by including that vacancies that occur through removal or recall will also be the subject of tribal council declaration. We recommend Section 3 be modified to read as follows:

Section 3. In the event of the death, resignation, removal or recall of an elected official, the said seat in question shall be declared vacant by the tribal council and shall be filled as provided for in Article XI of the constitution.

Article XI - Vacancies. The tribe proposes to amend Section 1 by making the filling of vacancies applicable to the tribal secretary; by eliminating reference to recall, and by changing the timeframe within which vacancies shall be filled from 45 days to 90 days. While we have no objection to the proposed changes, we do believe it is a mistake to eliminate recall and recommend it be left in. It leaves a void because the filling of vacancies by recall is not dealt with elsewhere in the constitution. Section 1 should read:

Section 1. All vacancies which occur on the Pascua Yaqui Tribal Council, the office of chairman, vice-chairman, tribal secretary, or with the judiciary as a result of recall, removal, death or resignation shall be filled within ninety (90) days in the manner provided in sections two (2) through five (5) of this article.

The tribe proposes to amend Section 2 in its entirety by clarifying the assumption to the chairmanship by the vice-chairman and by providing that the secretary will assume the office of the vice-chairman in case of vacancies to those offices. It further provides that a successor will be chosen by tribal council to fill the office vacated by the secretary. We have no objection to the proposed change. -

The tribe proposes to amend Section 3 by substituting the word "may" for "shall" thereby making it discretionary for the tribal council to fill a vacancy on the tribal council. While the tribe has inserted the word "a" to infer that there would only be one vacancy, as a practical matter that may not always be the case and circumstances could occur where the council would encounter quorum problems. We strongly recommend that the tribe retain the mandatory "shall" in filling vacancies.

The tribe proposes to add a new Section 4 by separating out of Section 3 the requirement that if more than six months remain in an unexpired term, a special election will be held within 90 days (rather than 45) of the date of the vacancy. We have no objection to the proposed change other than to say the subsection "A" designation is not necessary or appropriate.

Article XII - Initiative or Referendum. The tribe proposes to amend Section 2 of Article XII by eliminating the requirement that the sufficiency of a petition be based on the number of registered voters and by substituting the requirement that the thirty percent be based on the total number of ballots cast in the last general tribal election and by substituting 45 days for the 30 day timeframe within which to call and conduct an election. Again, as discussed with reference to Article X, Section 2, for purposes of clarity, we recommend Section 2 be modified as follows:

Section 2. Upon receipt by the secretary of the tribe or the secretary's designee, of a petition signed by a number of voters equal to at least thirty percent (30%) of the voters casting ballots in the last tribal general election requesting an election on any initiative or referendum issue, the tribal council shall call and conduct an election within forty-five (45) days of the petition's receipt pursuant to the procedures set forth in the election ordinance.

Section 3 would eliminate the voter registration requirement and the thirty percent participation requirement in favor of a simple majority vote of the eligible voters of the tribe. Again, we would encourage the tribe to retain voter registration but will not seriously object to its omission.

Section XV - Duties of Executive Officers. While we generally have no objection to the proposed modification of Article XV, we believe it is a mistake to delegate authority orally to the vice-chairman or the secretary to sign documents. It has been our experience that written delegations are in the best interest of all concerned. When delegations are written and specific, no question exists concerning a valid delegation.

The tribe proposes to revise Article XVI - Duties of Secretary and Treasurer by eliminating all references to the office of treasurer and the requirement that the Secretary of the Interior may direct audits as appropriate. We have no objection to this proposal. However, such omission will not alter any requirement for audits of Federal programs that the Secretary may require.

The tribe proposes to revise Article XVII - Oath of Office by deleting the requirement that tribal officials will support and defend the Constitution and Laws of the United States and by inserting a reference to God. In view of the fact that the United States granted political asylum, provided a land base, and Federal recognition with attendant monetary benefits to the Pascua Yaqui, we find it incongruous that the tribe not take an oath to support and defend the Constitution and laws of the United States.

Article XVIII - Meetings and Votes. The Tribe proposes to revise Section 2 to provide that the special meetings may be called by the chairman or the tribal council. We recommend the word "shall" be substituted for the word "may" to make the calling of a meeting mandatory particularly if a majority of the tribal council requests one. Section 2 could read:

Section 2. Special meetings of the tribal may be called by the chairman for any reason. Special meetings of the tribal council shall also be called upon the written request of a majority of the tribal council. Vacant tribal council seats shall not be counted towards the establishment of a majority.

We note that the two-thirds majority vote requirement remains in Section 4. Since we understand the tribe wishes to retain this requirement in some instances, it would not be an inconsistency if this is the case.

Article XX - Amendments. The tribe proposes to revise this article by eliminating the requirement that thirty percent of those entitled to vote must vote in order for the election to be valid. It further reduces the petition requirement from thirty percent to fifteen percent of the eligible rather than registered voters. The tribe's proposal to eliminate the thirty percent requirement in the first instance is contrary to applicable law and, if adopted, the Secretary would disapprove any document or amendment that contained such language. The Indian Reorganization Act of 1934, as amended by the Act of June 15, 1935, provides:

That in any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: Provided, however, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote. (Emphasis supplied)

While the tribe's desire to lower the percentage for the sufficiency of a petition to fifteen percent of the eligible voters is not contrary to Federal law, we believe fifteen percent is much too low a figure and could subject the constitution to frequent and inappropriate amendment efforts. We strongly recommend the tribe reconsider the lowering of this figure.

The tribe proposes to delete in its entirety Article XXI - Savings Clause. We recommend the tribe reconsider this proposal. This provision saves all tribal legislation enacted under a previous constitution or interim government from going out of existence to the extent that previous enactments are consistent with the new constitution and eliminates uncertainty about the validity of such documents. Since the tribe's proposed modifications constitute a constitutional revision, we would recommend Article XXI be modified to read:

Any resolution or ordinance adopted before the effective date of this constitution shall continue in effect except to the extent that they are inconsistent with this constitution.

The tribe proposes to amend Article XXIII - Adoption by substituting the word "eligible" for "registered" voters and by eliminating the thirty percent voter participation requirement. As we previously noted, the elimination of this requirement is contrary to applicable law and, if adopted, the Secretary would disapprove any document or amendment that contained such language. Moreover, the Secretary's regulations found at Title 25 of the Code of Federal Regulations, Part 81, require registration by eligible tribal members if they wish to vote. Thus, the substitution of the word "eligible" for "registration" is technically incorrect.

We note the tribe also proposes to alter Article XXV - Certificate of Results of Election by eliminating the thirty percent voter participation requirement. As we have previously indicated, this is a requirement of Federal law and cannot be eliminated. The Secretary would find such elimination contrary to Federal law and, if adopted, would not approve any document of amendment that contained such language. Moreover, it is not appropriate to make the Certificate of Results of Election and Approval numbered articles of the constitution. The BIA's longstanding original practice of having these unnumbered paragraphs attached once the voters have adopted the substance of the document will be adhered to should the proposed revised constitution be adopted.

This concludes our technical comments. Please review and consider them and advise us accordingly. Should the tribe have any questions about our comments or recommended modifications, we will be glad to discuss them with you in order to resolve any differences prior to the election. Should the tribal council agree with our recommendations, in accordance with Part III of the Secretary's Revised Guidelines for the Review of Proposed Constitutions, Revisions and Amendments dated March 4, 1988, please make a final written request accompanied by a resolution and the Secretary will issue an authorization letter to the Superintendent, Salt River Agency, to call and conduct an election consistent with the Secretary's election regulations found in Title 25 of the Code of Federal Regulations, Part 81.

Should the tribal council decide not to adopt any or all of the BIA's modifications, the tribal council should submit a final written request accompanied by an appropriate resolution together with a copy of the document upon which the Secretarial election shall be called and an explanation as to why our modifications were not accepted. Such submission will ensure that all parties are agreed upon the document that is the subject of the Secretarial election. The council's final request for a Secretarial election should be made directly to the BIA's Washington Office, Division of Tribal Government Services, MIB-2612, 1849 C Street, N.W., Washington, D.C. 20240, to expedite action.

Upon receipt of the tribal council's final request for a Secretarial election, the Director, Office of Tribal Services, will authorize the election without delay. However, such authorization does not carry with it the presumption of Secretarial approval should the constitution be adopted. Further, if adopted, it will not be effective under Federal law until it is approved by the Secretary. Copies of the tribal council's final request should be furnished to the Superintendent, Salt River Agency, and to the Phoenix Area Director.

Sincerely,

Carol A. Bacon

Acting Director, Office of Tribal Services

EXHIBIT K

**RESPONSE FROM PASCUA YAQUI TRIBE TO LEGAL
REVIEW OF PROPOSAL CONSTITUTIONAL AMENDMENTS
FEBRUARY, 1992**

PASCUA YAQUI TRIBE of ARIZONA



February 21, 1992

COUNCIL MEMBERS

ARCADIO GASTELUM
Chairman

ALBERT V GARCIA
Vice Chairman

ALMA LESPRON
Tribal Council Secretary

FERNANDO ESCALANTE

JUSTO ESTRELLA

CARLOS JAMEZ

MANUELA SANCHEZ

RACE SILVA SR.

BENITO VALENCIA

ESPERANZA VALENZUELA

MONICA WALTERS

Ms. Carol A. Bacon
Acting Director, Office of Tribal Services
United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20240

Dear Ms. Bacon,

Enclosed you will find the response to your legal and technical review of our proposed constitutional amendments. You will also find additional commentary on our view disputing the Bureau's view of our Tribes sovereign status. We are also including a revised constitution entitled "FINAL DRAFT" that incorporates the new changes we have accepted and the proposed changes that were rejected and consequently retained.

Please be advised that the Pascua Yaqui Tribe is hereby requesting that your office cause the conduct of a secretarial election to amend the Pascua Yaqui Indian constitution in accordance with 25 C.F.R. Part 81 - Tribal Reorganization under a Federal Statute.

Resolution No. C2-19-92 is hereby attached requesting the Bureau to conduct a constitutional election to amend the Pascua Yaqui constitution. We trust that the secretarial election will be conducted as soon as possible.

Sincerely,

LUIS A. GONZALES
EXECUTIVE ASSISTANT
PASCUA YAQUI TRIBE

LAG/gmc

Enclosures

PASCUA YAQUI TRIBE of ARIZONA

February 19, 1992



Ms. Carol A. Bacon
Acting Director, Office of Tribal Services
United States Department of the Interior
Bureau of Indian Affairs
Washington, D. C. 20240

SUBJECT: B.I.A. LEGAL/TECHNICAL REVIEW PASCUA
YAQUI CONSTITUTION.

COUNCIL MEMBERS
ARCADIO GASTELAN
Chairman

ALBERT V. GARCIA
Vice Chairman

ALBA LESPIGON
Tribal Council Secretary

FERNANDO ESCALANTE

JISITO ESTRELLA

CARLOS JABREZ

MARIELA SANCHEZ

RAUL SILVAS, SR.

SENATO F. VALENCIA

ESPERANZA V. VALENZUELA

MONICA WALTERS

Ms. Bacon,

The following responds to the Department of Interior's legal and technical review of the Pascua Yaqui Tribe's proposed revised Constitution. The response follows the same order as the Bureau's review. The latest draft of the proposed constitution reflects agreement with some of the Bureau's comments and disagreement with others.

PAGES ONE THROUGH FIVE

On page 1, the Bureau concludes that the proposed Constitution, being substantive in nature, must be presented to the Tribal voters in the form of a revised Constitution rather than in the form of amendments. Is it your view that the entire Constitution as proposed must be approved or may parts be approved and other part disapproved. In other words, if the voters disapprove one part of the revised Constitution does that mean that the whole proposed Constitution fails? We feel that the Constitution should be voted upon in parts and approved or disapproved separately, please clarify.

The Bureau makes the assumption that the Tribe believes that by revising its Preamble and the Powers Article and by inserting words like "being a sovereign nation", it will in effect become an historic sovereign tribe rather than a created tribe. We disagree with this assumption. The Tribe adopted this wording to correct previous misconceptions about the Tribe's historical status and to insert appropriate language reflective of the Tribe's occupation of Mexico and that part of the United States known as the Gadsen Purchase since time immemorial.

The Tribe intends to employ an anthropologist familiar with the Yaquis who will testify with Tribal members in Congress on the pending amendment to the Recognition Bill to establish the Tribe as an historical tribe. Furthermore, the "historical versus created" distinction is one that does not enjoy universal favor even within the solicitor's office.

COMMENTARIES ON PASCUA YAQUI TRIBES
HISTORICAL STATUS

The quote attributed to Dr. Spicer on page 3 of the Secretary's legal review is taken entirely out of context. But even the quote attributed to Professor Spicer states that the Yaquis "made it clear to churches and other agencies that they will continue to guide their religious and community life in their own way..." He then states that their "status is simply that of immigrants from Mexico or citizens by virtue of birth in the United States." This does not mean and cannot be interpreted to mean that the Yaqui are not a historical tribe. A tribe as well as an individual can be a political refugee. The important thing is that the United States named them and identified them as "Yaqui Indians" who were also viewed as political refugees as confirmed by the United States Department of State in 1931. No one referred to them as "Mexican refugees" since it was the Mexican government in the exercise of genocide policies which forced the Yaqui Tribe into Arizona. On page 4 Professor Spicer observed that the Yaquis were again given sanctuary as political refugees between 1896 and 1907 and that they established "permanent settlements." They came across intact as communities rather than unrelated individuals without a common language, religion or tribal culture. The Bureau notes that Dr. Spicer did not discuss tribal movement or immigration in his testimony in support of the Yaqui Recognition Bill. The record does not indicate whether or not he was even asked that question. The Tribe will verify that the Tribe moved across the border in the form of tribal clans which have remained intact to this very day. These clans and customs would not have survived if only individual Yaquis had crossed the border, but survived because the Tribe came across as villages, clans and as a tribal group.

It is important to note that Yaqui Indians traveled into and settled in what is now Arizona, New Mexico, California, Nevada, Texas and Colorado since Pre-Columbian days.

The Pascua Yaqui Tribe successfully met the strict application of the Department of Interior's regulations on Indian Tribal Recognition. Support for that conclusion can be found in the quote from President Carter where he states that his "approval of Federal recognition to the Pascua Yaqui does not signal or imply any relaxation in the strict application of the Department's recently promulgated regulations on Indian Tribal Recognition."

Furthermore, the Pascua Yaqui Tribe of Arizona has been listed by the Internal Revenue Service as a Tribe which enjoys tax exempt status under the Indian Tax Status Act and is a recipient and contracting Tribal Government with the Federal Government on various self-determination programs such as law enforcement, social services, judicial services and health, education and welfare programs. Recently, the State of Arizona entered into a proclamation with the Pascua Yaqui Tribe recognizing the government to government relationship with the Tribe.

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Although the Bureau quotes Edward H. Spicer to support its conclusion that the Pascua Yaqui is not an historic tribe, we do not read the quotes from Professor Spicer's book with the same meaning as the Bureau.¹

In conclusion, the Bureau states that as a matter of law the Tribe cannot unilaterally amend its Constitution and declare itself an historic tribe and that the historical record does not support the Tribe's contention. The Tribe intends to pursue recognition as a historical tribe and establish in the record before Congress its status. We will not delete the "inherent sovereign" or historical tribe language from the proposed Constitution but will proceed with an election leaving the language "as is". We are prepared to challenge the B.I.A.'s disapproval based with expert testimony and historical fact.²

PAGE FIVE, ARTICLE II

The Bureau had no objection to inserting the word "exterior" and deleting the phrase "pertaining to retrocession to the United States of civil and criminal jurisdiction" and therefore that language is retained in the proposed constitution.

ARTICLE III - MEMBERSHIP SECTION ONE

We agree with the Secretary's observation that the words "all of" in Section One serves no useful purpose and have deleted the phrase.

ARTICLE III, SUBSECTION (a)

The Bureau objects to language in the proposed Constitution because it opines that it would reopen the base roll to include all descendants of persons listed on the base roll. The Bureau again raises the "created" versus "historical Tribe" distinction as a basis for concluding that the Tribe does not have the inherent sovereign right to change its membership qualifications.³

¹ See our comments on this issue attached hereto.

² See comments attached.

³ See comments attached.

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Aside from the "historical" versus "created tribe" argument, the Bureau objects to the phrase "and all descendants of all eligible persons." We agree that this would in fact increase the base membership of the Tribe.

Although we do not concede this point, it could be argued that such a change could violate 25 U.S.C. Sec. 1300 f - 2 which limits the base roll to members of the Pascua Yaqui Association who applied for enrollment in the Tribe by September 18, 1979 and those persons of Yaqui blood (no blood quantum specified in the Act) who by September 18, 1980 applied for and were admitted to membership in the Association pursuant to Article VII of the Articles of Incorporation of the Association. Article VII at the time this Act was passed, September 18, 1978, required one-half Yaqui blood but this was changed August 14, 1979 to one-quarter Yaqui blood. The Bureau contends that constitutes the base roll and that the base roll cannot be changed without an Act of Congress.

However, we point out that although 25 U.S.C. Sec. 1300 f-2 (c) states "direct lineal descendants of persons on the base roll" the act does not specify the blood quantum that those direct lineal descendants must possess. Therefore, although the Bureau may be correct that the Tribe cannot change its base roll without an Act of Congress, we see no reason why the Tribe cannot change the blood quantum pursuant to 25 U.S.C. 1300 f-2 (c). Because that section did not identify blood quantum.

The Bureau may be correct in, its objection to Article III, Section 1 (b) where the proposed constitution states descendants of members rather than direct lineal descendants. However, the Tribe will retain the language "descendants of members." The Tribe has an effective argument to justify a change in the blood quantum to one-eighth and we disagree with the Bureau's assumption that the descendants must also be the same blood quantum as set forth in Article VII of the Articles of Incorporation in force September 18, 1978 when 25 U.S.C. 1300 f-2 was passed.⁴

In respect to Bureau approval of corrections, additions or deletions to the base membership and Secretarial approval of ordinances, please advise where it requires an historical tribe to obtain Secretarial approval. We understand that except for technical corrections to the base roll, the Secretary has the

⁴ Article VII of the Association Articles of Incorporation specified 1/2 Yaqui blood on September 18, 1978 when 25 U.S.C. 1300 f-2 was passed. This article was amended August 14, 1979 before base roll closed to require 1/4 Yaqui blood.

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authority to approve any changes to the base roll, especially when the base roll has been established by an Act of Congress but that Secretarial approval of enrollment ordinances, as long as they comply with the Constitution of the Tribe, may not be necessary for an historical tribe. Please clarify as we are submitting the attached constitution as an historical tribe.⁵

ARTICLE V - LEGISLATIVE BRANCH

The Bureau has no objection to the revision of Section 2 of Article V. We do not agree with the Bureau's suggestion to rewrite Section 3 in the form they suggest as the suggested wording does not clarify the proposed language. We have amended Section 3, A after the word Vice-Chairman to read as follows: "is held as provided for in this Article" and have deleted the earlier proposed language: "shall be held as provided for in this Article."

In regards to subsection B, we agree that this section should be rewritten but not as the Bureau suggests. Since the primary election is only for the offices of Chairman and Vice-Chairman and not council members, the first alternative suggested by the bureau is not appropriate nor can we agree with the second suggestion that candidates for Chairman and Vice-Chairman be nominated at a general committee meeting called for that purpose.

We have instead added the following language for Section 3. B:

"Any eligible member of the Pascua Yaqui Tribe who desires to be placed on the ballot as a candidate for the office of Chairman or Vice-Chairman in the primary election shall file with the Tribal Secretary a statement of intention showing said members's name and the office for which the member desires to become a candidate. Such statement shall be filed not less than thirty (30) days preceding the primary election."

In respect to election ordinances, we agree with the Bureau's suggestion that instead of stating that the Chairman and Council members have the power to enact ordinances that the term Tribal Council be used instead. The Tribal Council, of course, includes the Chairman and the Vice-Chairman and the collective word "Tribal Council" having the legislative power is more clear than mentioning the office of Tribal Chairman specifically, as that usually represents the executive branch.

⁵ In other words, is it the Bureau's position that secretarial approval of enrollment ordinances is required of both historical Tribes and created Tribes.

ARTICLE V, SECTION 5, PAGE 7

The Bureau makes worthwhile comments in respect to Sections 5A, B, and C.

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We have clarified the language in this section as follows: In Section 5C we have added: "thereafter, they shall be elected every four (4) years" as the Bureau suggested.

In Section 5G, we have specified appointment by the Tribal Council to fill any vacancies to avoid the cost of another election. We concur in the Bureau's recommendation that the words "the June 1992" be deleted and be replaced by "Tribal elections." We have also deleted the second paragraph of Section 5G.

After Section 5G, the next section is numbered 4, 5, 6, and 7. These have been renumbered as 6, 7, 8, and 9 as the Bureau suggested.

In respect to Article V, Section 7, we agree with the Bureau's recommendation that this be accomplished by ordinance but we have rewritten the provision as follows:

"The Tribal Council may adopt ordinances prohibiting or regulating the right of any Tribal Council member to hold office while he or she is an employee of a business or other enterprise owned by the Pascua Yaqui Tribe."

ARTICLE VI

We have retained the language "in addition to its inherent sovereign powers" as we believe we have substantial and uncontroversial proof that we are an historical tribe. Also deleting the reference that the Tribe's powers are limited by federal law does not alter the fact that tribes, be they historical or created, are always limited by federal law in the exercise of their powers. To state it is unnecessary. Therefore, we have kept the deletion.

SECTION 1F, PAGE 9 OF BUREAU'S COMMENTARY

We disagree with the Bureau's assertion that the Tribe does not have the power to levy and collect taxes. If the Bureau's "created tribe" argument fails, then its objection must also fail. The Bureau cites on page 9 and 10 of its commentary the views of the Deputy Assistant Secretary to support its position that the Tribe is not historic and does not have the power to tax. First of all, the April 15, 1938 Solicitor's opinion refers to groups of Indians organized on the basis of a reservation and not as an

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historical tribe. The Pascua Yaqui Tribe is not organized based upon residency on its reservation, as voting members of the Tribe reside outside the reservation in several traditional communities and villages throughout the state. We refute the Bureau's characterization of our Tribe as "created" and not "historical."

ARTICLE VI, SECTION 1M

We have retained the deletion in respect to federal and state officials. The Bureau only states that the Tribe cannot exclude federal officials and that is understood in respect to carrying out official responsibilities but we do not want to retain language allowing state officials to enter the reservation in performance of official duty. We do not believe it is misleading and do not believe every exception to the general rule has to be stated in a tribal constitution. Since the Bureau will not disapprove the proposed constitution if the language remains deleted, we have left it as the Tribe has proposed.

ARTICLE VI, SECTION O

There is an obvious distinction between Tribal Police Agency and "law enforcement agencies" which the Tribe has proposed in the revised Constitution. Law enforcement agencies as the term is used, is much broader than "Tribal Police Agency." Under the term law enforcement agency, one might include customs branch, police officers, game rangers, boundary patrol, truant officers, agricultural inspectors, and any number of personnel which might have law enforcement or police powers. We disagree with the Bureau that the Tribe lacks inherent sovereign power to regulate law and order. The Tribe's 1988 Constitution approved by the Secretary specifically recognized the Tribe's right to develop and adopt ordinances to protect and promote the peace, health, safety and general welfare of the Pascua Yaqui people and to establish a Tribal Police Agency. It also approved the Tribe's Constitutional provisions set forth in Article VI, Section 1(t) to enact ordinances relating to civil actions, crimes, and law enforcement. In respect to the Bureau's disapproval of Section 1(t), we will challenge the Bureau in respect to same and have retained the proposed language.

ARTICLE VII, EXECUTIVE BRANCH

The Bureau has no objections to changes to Section 1, 3, and 6 nor to the revision of Article VII, Section 2 by including references to Sections 4 and 5. The Bureau also has no objection to eliminating the two-thirds majority vote but suggests that the words "at a regular meeting of the Tribal Council" be inserted after the words "members present and voting": "We have instead

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adopted the following language in Article VII, Section 4 after the words "members present and voting" to read, "At a regular or special meeting of the Tribal Council."

ARTICLE VIII - JUDICIARY

In Section 4, the revised Constitution eliminates a two-thirds majority vote for nomination of judges but retains the two-thirds majority vote for approval of a Chief Judge. We have retained this provision. Some other changes as suggested by the Bureau to this article are incorporated in the attached constitution.

SECTION 6

We agree with the Bureau's suggestion that "persons" be changed to "person's" and "judges" be changed, to "judge's" and have so amended the proposed draft.

SECTION 7

The Tribe has adopted the Bureau's suggested revision of Section 7.

SECTION 8

The Tribe has adopted the language proposed by the Bureau with the exception that in the fourth line where it states: "at least one (1) years"; we have deleted the "s" in the word "years."

ARTICLE IX, SECTION 1

We have restored the word "registration" after the word "voter" in the fourth line. In Article 9, Section 2 we have deleted the words "eligibility and" so that it will read "tribal voter election ordinance" we have also added: "such ordinance shall provide for, but not be limited to provisions for voter registration, eligibility, etc."

ARTICLE X REMOVAL, RECALL AND RESIGNATION FROM OFFICE

No change is necessary in Section 1 as it is clear to us that because the Chairman and Vice-Chairman are elected at large, the two-thirds vote provision may be deleted. On the other hand, the Tribal Council still wants to require a two-thirds majority vote to the council prior to removal for cause and have retained that language.

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SECTION 2

We have adopted the language in this section suggested by the Bureau for Section 2 as it clarifies the meaning.

ARTICLE X, SECTION 3

We have adopted the language suggested by the Bureau for Section 3.

ARTICLE XI - VACANCIES

We have adopted the language suggested by the Bureau for Article XI, Section 1 to include Recall.

ARTICLE XI - SECTION 3

We have made the following modification to Section 3 to meet Bureau concerns and to make it more clear:

"in the event of vacancies for any cause on the Tribal Council, said vacancies shall be filled by a special election provided that, should any vacancy occur within six (6) months of the next election, the council shall have the discretion to decline to hold a special election and to leave any such office vacant."

We have also eliminated Section 4 and have made Section 4A the next sentence in Section 3 and have eliminated A. The new Section 5 pertaining to a vacant judge's position has become Section 4.

ARTICLE XII - INITIATIVE OR REFERENDUM

We have adopted the Bureau's suggested language for Article XII, Section 2.

SECTION 3

The Bureau encourages the Tribe to retain voter registration as the standard for approval of initiative and referendums. The Tribe is aware of the issues raised pertaining to recall. The Tribe will retain the proposed Constitutional language basing referendum and initiative on the percentage of voters and majority vote of the voters.

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ARTICLE XV - DUTIES OF EXECUTIVE OFFICERS

SECTION 3

The Bureau objects to the oral delegation of power. We have modified the proposed constitution to require written delegation.

ARTICLE XVII - OATH OF OFFICE

The tribe wishes to restore the language to support and defend the Constitution and laws of the United States as a matter of public relations.

ARTICLE XVIII - MEETINGS & VOTES

We have adopted the Bureau's suggested language in this Section.

ARTICLE XX - AMENDMENTS

We are advised that the Indian Reorganization Act requires thirty (30) percent of those entitled to vote to amend the Constitution. Therefore, we must abide by that requirement. The Bureau makes a good point about the fifteen (15%) percent petition requirement and we have modified that requirement accordingly to avoid constant amendments to the Constitution. The Tribe has adopted the following language:

"Provided that the minimum percentage required by the Indian Reorganization Act of those entitled to vote, shall vote in such election."

ARTICLE XXI - SAVINGS CLAUSE

We have adopted the language suggested by the Bureau.

ADOPTION

We have adopted the Indian Reorganization Act requirement of thirty (30%) percent of those registered to vote to amend the Constitution.

CERTIFICATE OF RESULTS OF ELECTIONS

We have restored the thirty (30%) percent requirement or have substituted language making reference to the minimum percentage required by Section 16 of the Indian Reorganization Act of June 18, 1934, as amended.

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The commentaries attached to this letter briefly discuss the issue of "historical" versus "created" tribes and provides you with some of our thoughts on that issue.

The attached constitution incorporates this premise and we are prepared to press our point in Congress or in the courts to rectify the unfortunate misperception initiated a decade ago by Bureau employees and perpetuated as a "fact" ever since. Other technical suggestions made by the Bureau are appreciated and we have incorporated them into the final draft to be considered by the Tribal electorate.

Sincerely,

ARCADIO GASTELUM
CHAIRMAN
PASCUA YAQUI TRIBE OF ARIZONA

AG/gmc

Enclosure

EXHIBIT L

**RESPONSE TO THE PASCUA YAQUI TRIBE FROM THE
BUREAU OF INDIAN AFFAIRS REGARDING THE
LEGAL REVIEW OF PROPOSED AMENDMENT TO THE
PASCUA YAQUI CONSTITUTION**

JANUARY, 1992



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240



IN REPLY REFER TO:

Tribal Government Services - TR
2612 MS/MIB

MAR 23 1992

Honorable Arcadio Gastelum
Chairman, Pascua Yaqui Tribal Council
7474 S. Camino De Oeste
Tucson, Arizona 85745

Dear Chairman Gastelum:

Thank you for your letter of February 19, 1992, responding to the Department of the Interior's (Department) December 3, 1991, legal and technical review of the proposed revised constitution of the Pascua Yaqui Tribe. You indicated in your letter that the tribe reviewed our technical comments of December 3, 1991, and while some were accepted, others were not. The tribe's final version of the proposed revised constitution accompanied by Resolution No. C2-19-92, adopted by the Pascua Yaqui Tribal Council on February 20, 1992, was submitted with the request that the Secretary of the Interior (Secretary) hold an election to permit the qualified voters of the tribe to vote on the adoption or rejection of the proposed revised constitution.

In our December 3, 1991, letter to you offering technical comments on the tribe's proposed constitution, we pointed out that the proposed changes were substantive in nature, rather than simply amendatory, and constituted a revision to the tribe's constitution. In light of that determination, you request clarification, to wit: "is it your view that the entire constitution as proposed must be approved or may parts be approved and other part part disapproved. In other words, if the voters disapprove one part of the revised constitution does that mean that the whole proposed constitution fails?" The revised constitution will be presented to the voters as a single unit, not as separate questions. The ballot will contain a single question, i.e., shall the revised constitution be adopted, yes or no. If the revised constitution is adopted by the voters and if the document voted upon contains any provision that is contrary to Federal law, the Secretary will disapprove the entire constitution. We trust this clarifies your question. We might point out that should this scenario occur, the existing constitution approved by the Secretary on February 8, 1988, will continue in effect.

We noted in our December 3, 1991, letter that the tribe erroneously believed that by revising the preamble and the powers article of its constitution by inserting such words as "being a sovereign nation" and "in addition to its inherent sovereign powers", it could unilaterally designate itself an historical tribe with all the sovereign attributes usually associated with such status. You indicate that this is not the case and that the tribe merely "adopted this wording to correct previous misconceptions about the tribe's historical status and to insert appropriate language reflective of

The tribe rejected our advice that these provisions were also contrary to applicable law and insists on including the violative language. Briefly synopsised, Congress required that the base membership roll be approved by the Secretary and any changes thereto would require his consent. Thus, the Secretary will find subsection 1(a) and Section 2 contrary to applicable law and, if adopted, will disapprove the constitution.

The tribe also rejected our recommended language in Section 1(b). The tribe proposes to amend subsection (b) by deleting the words "children born to" and replacing it with "descendants of" and by lowering the blood quantum from one-quarter to one-eighth degree Pascua Yaqui blood. We indicated that we had no objection to the substitution of "descendants of" for "children born to" but that the qualifying words "direct lineal" must be inserted before "descendants" since this limitation is contained in the Act. Its inclusion will assure that the tribe's Federal recognition is not jeopardized by the admission of ineligible persons. Since the tribe declined to include the qualifying words "direct lineal" descendants as mandated by the 1978 Act, subsection (b) is misleading and implies that descendants do not have to be direct descendants. Accordingly, the Secretary will find this provision contrary to applicable law and, if adopted, will disapprove the constitution.

The tribe also rejected our recommendation against lowering the blood quantum from one-fourth to one-eighth degree and insists upon retaining the one-eighth degree language. As we discussed in our December 3, 1991, letter, the Pascua Yaqui Tribe, as a created tribe, does not have the authority to alter their membership provisions absent the consent of the Secretary. More importantly, however, the 1978 Act adopted by incorporation the one-quarter blood quantum requirement in Article VII of the Articles of Incorporation of the Pascua Yaqui Association for eligibility on the base roll. The lowering of the blood quantum is therefore contrary to the intent of the 1978 Act and, if adopted, the Secretary will disapprove the constitution as contrary to Federal law.

You have also asked if it is the Bureau of Indian Affairs's (BIA) position that Secretarial approval of enrollment ordinances is required of both historical and created tribes. The answer is in the affirmative. See the foregoing discussion relative to membership involving a substantial Federal right to participate in Federal benefits.

The tribe rejected our recommended language in Section 3 of Article V - Legislative Branch but revised the language for clarity. While we still feel Section 3(b) is technically grammatically incorrect, you place the name of a candidate, not the candidate, on the ballot, we will offer no serious objection to the language. The tribe has also clarified the language in Sections 5 and 7. We have no objection to the language.

The tribe rejected our recommendation in Article VI - Powers of the Tribal Council and has retained the language "in addition to its inherent sovereign powers" claiming that it has "substantial and uncontroversial proof that we are an historical tribe." While we have not yet seen the tribe's documentary

evidence to support its claim, we would welcome the opportunity. In the meantime, we have no alternative but to reiterate our position as expressed in our December 3, 1991, letter:

The tribal council has no inherent sovereign powers. Such powers, where they exist, generally rest with the tribe. We have already advised you that the Pascua Yaqui Tribe does not possess inherent sovereign powers, that we cannot agree to such a change, and would find such assertions of inherent sovereign status with attendant powers as contrary to applicable law and, if adopted, would disapprove same. . . .

Accordingly, the Secretary will find this provision contrary to applicable law and, if adopted, will disapprove the constitution.

The tribe also rejected our recommendation against the deletion of the language in Article V which dictates that the tribe's powers are limited by Federal law. We again recite our concern. Regardless of the tribe's status, federally recognized Indian tribes are subject to Federal law. Such recognition conveys not only the immunities but the responsibilities as well. The absence of such limiting language from the constitution implies that the tribe is not subject to Federal law. We believe the absence of such limiting language from the constitution is misleading and could subject the tribe to serious jeopardy in the future. New members to the tribal council may not be familiar with the law and may take actions that could imperil the tribe. As a matter of historical record as well as Departmental policy, we strongly recommend the tribe retain this language for its own protection.

The tribe rejected our recommendation to delete that part of Section 1(f) which would authorize the tribe to levy taxes. Our position that the power to tax is an inherent power and the Pascua Yaqui Tribe does not possess the power to tax remains unchanged from that articulated in our December 3, 1991, letter and those of January 27, 1983, and October 15, 1987. It is within the community's authority to levy assessments upon its members of the use of community property and privileges as these assessments would be incidental to the ownership of the property. A community may also levy assessments on non-members coming or doing business on community lands. However, such assessments would be levied in its exercise of the community's power as a land owner not some historical, inherent power to tax. Accordingly, the tribe's assertion that it has the authority to tax is misleading and the Secretary will find this provision contrary to applicable law and, if adopted, will disapprove the constitution.

The tribe rejected our recommendation with respect to Section 1(m). The tribe proposes to revise this section dealing with exclusion from the reservation by deleting the exception that it does not apply to Federal and state officials. While the Secretary will not find this provision contrary to applicable law although it is misleading, we caution the tribe that it cannot exclude Federal officials in the performance of their duties from a Federal reservation.

The tribe proposes to revise Section 1(o) by substituting the words "law enforcement agencies" for the words "tribal police agency." We indicated in our December 3, 1992, letter that:

we have no serious objection pending clarification of the tribe's intent provided you understand that as a created tribe, the Pascua Yaqui Tribe does not possess the inherent sovereign power to regulate law and order. The addition of the revised wording is misleading and could be construed to infer that the tribe has the authority to regulate law and order. However, as previously indicated, the only law and order authority the tribe has is that delegated to it by the Secretary. Such delegation is demonstrated by the Secretary's acceptance of civil and criminal jurisdiction over the Pascua Yaqui Reservation on August 27, 1985, and the Law Enforcement Agreement between the tribe and the Bureau of Indian Affairs (BIA) dated July 18, 1991. Such acceptance of the retrocession and acquiescence to the provisions contained in Section 1(o) of the Pascua Yaqui Constitution was construed as a delegation of power from the Secretary over law and order matters to the Pascua Yaqui Tribe. Thus, the Secretary of the Interior has delegated to the tribe some law and order authority. We note that while Congress has recently enacted legislation authorizing tribes to exercise criminal jurisdiction over non-member Indians, neither a tribe nor a community of adult Indians residing on the reservation has criminal jurisdiction over non-Indians. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Since the Secretary has previously delegated to the tribe some law and order authority, the Secretary will consent to delegate to the tribe such further law and order authority as is envisioned in Section 1(o). However, let it be understood that such action represents a clear delegation of authority from the Secretary to the tribe and not recognition by the Secretary that the tribe has any inherent right to regulate law and order.

The tribe rejected our recommendation with respect to Section 1(t) which the tribe proposes to amend to give the tribe authority to regulate domestic relations, probate and devise and personal and real property. Again, these are powers of a historic tribe with inherent sovereign powers. As a created tribe, the Pascua Yaqui Tribe does not possess these powers. Accordingly, the Secretary will find this provision contrary to applicable law and, if adopted, will disapprove the constitution. Of course to the extent the Indian Child Welfare Act is a delegation of power, the tribe would still have those domestic relations type powers it has under the Act.

The tribe has revised Section 4 of Article VII - Executive Branch to include special meetings. We have no objection to its inclusion.

The tribe accepted our recommendations concerning Article VIII - Judiciary; Article IX - Tribal Elections; Article X - Removal, Recall and Resignation From Office; Article XI - Vacancies; Article XII - Initiative or Referendum; Article XV - Duties of Executive Officers; Article XVII - Oath of Office and Article XVIII - Meetings and Votes.

In Article XX - Amendments the tribe has accepted our recommendation to bring the article into compliance with Federal law by reinstating the requirement that thirty percent of those entitled to vote must vote in order for the election to be valid.

The tribe accepted our recommendation to reinstate Article XXI - Savings Clause.

The tribe accepted our recommendation to bring Article XXIII - Adoption into compliance with the law by reinstating the thirty percent voter participation requirement.

The tribe also restored the thirty percent voter participation requirement to the Certificate of Results of Election. We might point out for the record that it is not necessary for a tribe to include the certificate as part of its draft constitution. The certificate is something that is added to the constitution by the Secretary to reflect the election results.

We read with interest the commentaries attached to your letter which briefly discuss the issue of "historical" versus "created" tribes. While we appreciate receiving your views on this matter, we are not persuaded by them to change our position.

We must also point out that the commentaries contain inaccurate assumptions. The tribe states that it "successfully met the strict application of the Department of Interior's regulations on Indian Tribal Recognition. Support for that conclusion can be found in the quote from President Carter where he states that his approval of Federal recognition to the Pascua Yaqui does not signal or imply any relaxation in the strict application of the Department's recently promulgated regulations on Indian Tribal Recognition." On the contrary, President Carter's quote is not an affirmation of the tribe's status as a historic tribe but rather stems from his concern that the Pascua Yaqui Tribe did not meet the recognition criteria and he did not want Congressional action to recognize the Pascua Yaqui to circumvent the strict application of the Department's recognition regulations.

Further, the tribe's inclusion on the list by the Internal Revenue Service of those tribes who qualify for tax exempt status under the Indian Tribal Governmental Tax Status Act does not convey or imply any historical status. It simply implies that the tribe qualifies for such listing because it meets the definition of the Act, i.e., it exercises governmental authority over its members. The Department is well versed with that Act by virtue of the fact that the Secretary was charged with the responsibility of recommending to the

Secretary of the Treasury those Indian tribes who met that Act's definition for inclusion. Those tribes recommended by the Secretary for inclusion on the original list included both historic and created tribes. Moreover, the requirements of the Indian Self-determination Act do not specify that you must be an historic tribe to qualify for self-determination contracts and programs. It simply requires that you be a federally recognized Indian tribe.

We have no doubt that the actions of the State of Arizona in entering into a proclamation with the Pascua Yaqui Tribe recognizing the government-to-government relationship with the tribe is based on the Federal Government's recognition of the Pascua Yaqui Tribe.

In summary, the proposed constitution contains various provisions enumerated above which the Secretary will find contrary to applicable law and, if adopted, will disapprove the constitution in its entirety. Since the 1988 Indian Reorganization Act (IRA) amendments (Public Law 100-581, 102 Stat. 2938, November 1, 1988) require the Secretary to notify a tribe in writing 30 days in advance of the calling of an election whether and in what manner he finds the proposed constitution or amendment to be contrary to applicable law, this letter constitutes notice that we have completed our review and have found the proposed constitution to be contrary to applicable law and of his intention to disapprove the constitution if adopted.

In accordance with the provisions in the 1988 IRA amendments to call and conduct an election on any valid tribal request, we are this date directing the Superintendent, Salt River Agency, to proceed to call and conduct a Secretarial election on the proposed revised constitution although the Secretary will not approve the constitution if adopted. However, because the proposed constitution is contrary to Federal law, we want to give the tribe an opportunity to reflect on our comments and determine whether it wishes to modify the proposed document to bring it in compliance with the law. We believe 30 days will give the tribe sufficient time to consider our position. If we have not heard from the tribe within 30 days from the date of this letter, the Superintendent, Salt River Agency, will proceed with the election although the Secretary will not approve the constitution if adopted.

Sincerely,



Director, Office of Tribal Services

Triplicate Original

PROCLAMATION

PASCUA YAQUI INDIANS-ARIZONA-RETROCESSION PROCLAMATION
OF CIVIL AND CRIMINAL JURISDICTION

WHEREAS, on September 18, 1978, the Pascua Yaqui Indians - Arizona - Federal Benefits Extension Act (Public Law 95-375, 92 Stat. 712, 25 U.S.C. § 1300 (f) et seq.) granted to the Pascua Yaqui Indians of Arizona the status of a federally-recognized, sovereign Indian tribe, and;

WHEREAS, Public Law 95-375 provides trust status for tribal lands and makes tribal members eligible for the services and assistance provided other Indian tribes by the United States; and

WHEREAS, on December 23, 1982, the Lands Held in Trust for the Pascua Yaqui Tribe Act (Public Law 97-386, 96 Stat. 1946) declared that certain additional described lands were thereafter to be held in trust by the United States for the Pascua Yaqui tribe of Arizona as a part of the reservation lands of such tribe; and

WHEREAS, Public Law 95-375 and Public Law 97-386 require the State of Arizona to exercise criminal and civil jurisdiction over Pascua Yaqui lands as if Arizona had assumed jurisdiction pursuant to the Act of August 15, 1953, (67 Stat. 588) as amended by the Act of April 11, 1968, (82 Stat. 79); and

WHEREAS, the State of Arizona prefers not to exercise the civil and criminal jurisdiction over Pascua Yaqui reservation lands granted by Public Law 95-375 and Public Law 97-386; and

WHEREAS, the Joint Explanatory Statement of the Committee of Conference on Senate Bill 1633 (Public Law 95-375), House Conference Report No. 95-1339, acknowledges the right of the State of Arizona to retrocede jurisdiction under the provision of 25 U.S.C. § 1323 (a); and

WHEREAS, the Secretary of the U.S. Department of Interior recommends, and the Pascua Yaqui tribe supports, an official state retrocession of jurisdiction to the United States government by Arizona under provisions of 25 U.S.C. § 1323 (a).

NOW, THEREFORE, I, Bruce Babbitt, Governor of the State of Arizona, pursuant to the authority vested in me as Chief Executive Officer of the State of Arizona, and under the provisions of 25 U.S.C. § 1323 (a) do hereby retrocede civil and criminal jurisdiction provided to the State of Arizona under Public Law 95-375 and Public Law 97-386 over that area of land within this State described in Public Law 95-375 and Public Law 97-386 held in trust for the Pascua Yaqui tribe by the United States, Department of the Interior; except, however, that this retrocession shall not be construed to include the exercise of civil and criminal jurisdiction otherwise existing apart from the provisions of Public Law 95-375 and Public Law 97-386 over non-members of the Pascua Yaqui tribe within that part of Arizona which coincides with the areas of the Pascua Yaqui reservation nor shall this retrocession be construed to include the exercise of other civil and criminal jurisdiction existing separate and apart from jurisdiction contemplated under Public Law 95-375 and Public Law 97-386.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona



Bruce Babbitt
GOVERNOR

DONE at the Capitol in Phoenix on this fourth day of October in the Year of Our Lord One Thousand Nine Hundred and Eighty-four and of the Independence of the United States of America the Two Hundred and Eighth.

ATTEST:

Rose Moffatt
Secretary of State

Mr. RICHARDSON. Preliminary, you are descended from the Yaqui Indians of Mexico, right?

Mr. GARCIA. Yes, sir.

Mr. RICHARDSON. Is it correct that under Mexican law, the Yaqui are nothing except Indians?

Mr. GARCIA. Yes, sir.

Mr. RICHARDSON. Now, how did this man, Mr. Spicer, view the history of the Pascua Yaqui Tribe? Did he see you as a historic tribe?

Mr. GARCIA. I will allow Mr. Valencia to answer the question for you, Mr. Chairman.

Mr. VALENCIA. Mr. Spicer made many errors in concluding that the Yaquis of Arizona were descendants of the Yaquis of Mexico.

At the time he was writing about the Yaqui, as a very young man, I was reading every word. At the time, a lot of things went by. Mr. Spicer states that in Mexico the Yaquis are known as "Indios," Indians, only. And, therefore, the Yaquis that are now called Pascua Yaqui of Arizona are, of course, Indians of the United States by the mere fact that they were born in the State of Arizona, within the State of Arizona. And the regulation-part of the regulation stated that the citizens of the United States, Yaqui Indian citizens of the United States would compose the Pascua Yaqui Tribe.

If you would permit me, I would like to read my statement to you, Mr. Chairman and Committee Members.

Mr. RICHARDSON. Go ahead.

STATEMENT OF ANSELMO VALENCIA

Mr. VALENCIA. Chairman and Members of the committee, my name is Anselmo Valencia Tori. Tori is my Indian name. I am a council member of the Pascua Yaqui Tribe of Arizona located at 7474 South Camino del Oeste, outside of Tucson, Arizona. Although the following statements have not officially been documented, they come from reliable sources; the memories of our forefathers passed on from generation to generation of Yaqui Indian people.

The Yaquis, as other Indians of the Southwest, have existed in this part of the continent, now known as Arizona, since time immemorial. They have existed in what is now known as Northern Sinaloa, Mexico. All of what is now the State of Sonora, Mexico; California; New Mexico; Texas; Utah; Colorado; and Arizona. The Jiaki, now known as Yaqui Nation, had land bases in and around modern Tumacacori, Arizona; Va-Gojoria, just Northwest of Tucson, Arizona, later to be known as Alaguna; and finally known as Jaynes Station. Also, land bases in Toltec, Arizona, and in Siva Koviku, close to Somerton, Arizona.

When the Southwest was finally exposed to the non-Indians in the 1500s, the Yaquis, having been for many centuries a warring Tribe, chose to remain secretive and anonymous for fear of further persecution by non-Indian invading forces. Because of their secretive ways of life and fear of suppression of their culture, they chose not to reveal their land-base establishments and geographic locations to investigators and to anthropologists.

In my capacity and position as a Spiritual Leader and Traditional Chief of my community, I was taught from a very early age

about our people's history and ancestral land upon this continent. I inherited such position at the age of five years old and was made to learn our history in depth.

Ladies and gentlemen of the Congress, permit me to give you my humble *Tua Lios Em Chiokue Utesia*, thank you very much. I would request that my comments be inserted in the record, and I will be happy to answer any questions you may have.

[Affidavit submitted by Mr. Valencia follows:]

Affidavit

I, Anselmo Valencia, being first duly sworn, state the following as true fact, to the best of my knowledge, information and belief.

I am the Traditional Chief and Spiritual Leader of the Pascua Yaqui Tribe. I inherited this position and shortly after my birth I was dedicated to the Yaqui People. As early as 5 years old I was taken to sit with the Elders of our Tribe and listen over and over to the stories of our beginnings and many challenges through time. I am familiar with the true story of the "Beginning" as passed down through the generations and I have personal knowledge of the locations and life style of the Yaqui Indian People long before the White Settlers came.

It is told by my Ancestors that the Yaqui Indians, among other Tribes, existed on this continent from the beginning of time. We were given this garden to live in and protect. Our garden was of great distance and we roamed freely over it's full extent. The aboriginal boundaries of the Yoem People (presently known as Yaqui Indians) stretched from north as far as Durango, Colorado; west as far as Yuma, Arizona and some parts of California; east through New Mexico and Arizona and south as far as the southern tip of Sonora, Mexico.

For the last hundreds of years, before this area became Spanish, Mexican or American property, the Yaqui Indians had permanent settlements around what is now know as Tumacacuri, Arizona, Va-Gojorid, N.W. of Tucson, for a long time known as Alaguna, today known as Jaynes, Arizona. Also, Toltec, Arizona and Siva Koviku, close to Somerton, Arizona. There are many other known settlements that can be documented to this date.

When our original homes were finally exposed to non-Yaqui invading forces in the early 1500's, the Yaqui Nation became secretive and anonymous. The Yaquis were a strong fierce People who were being warred upon and persecuted for no reason. It was the strategy of the Yaqui People to disguise their heritage in order to avoid further persecution by these invading forces. It is true that there was an influx into the northern base land locations during the Mexican-Spanish attempted genocide of the Yaqui People. These Yaqui People were nor refugees and did not travel to avoid conflict or seek shelter. They traveled to other established Yaqui land base settlements, away from the war, in order to work and buy ammunition, food, and needed supplies to further the cause of the Yaqui people being persecuted in the warring area. They traveled frequently back and forth from community to community during these many warring years.

Because of this secretive way of life and deliberate suppression of their cultural differences, they were successful at hiding their traditional land bases from enemies and later on in history, from investigators and anthropologists. At this date, we have been able to verify many Yaqui land base establishments long before the non-Yaqui appeared on the continent, long before the Spanish and Mexican wars on the Yaqui and long before the country boundaries of Mexico and the United States existed. The habits of suppression of Yaqui Indian land base locations and Culture being practiced only during secretive ceremonies continued as late as 1926 due to continued war and threat of persecution. Thereafter Yaqui historic land base has changed and has been documented.

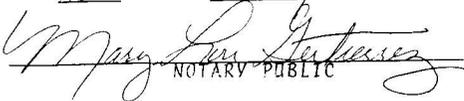
I am now 73 years old and continue to document and record my Peoples locations, language, culture and history. I am known as the Spiritual Leader and a most knowledgeable and reliable Historian of our Yaqui Indian Tribe.

Further Affiant sayeth naught.



Anselmo Valencia
7631 S. Camino Tetaviecti, Tucson, AZ

SUBMITTED BEFORE ME THIS 13th DAY OF May 1993.



NOTARY PUBLIC

Mr. RICHARDSON. Thank you very much.

Mr. Chairman, in the 1978 legislation, was it your view that Congress was acknowledging your preexisting sovereign authority?

Mr. GARCIA. Yes, sir.

Mr. RICHARDSON. In the conference report published in the background that the subcommittee has provided, it is clear that the conference committee intended the equivalent of Public Law 93-280, which was the act itself, to apply to the Pascua Yaqui Tribe.

Did the state change these authorities back to the Federal Government? Is that what happened?

Mr. GARCIA. Yes, sir.

Mr. RICHARDSON. Doesn't that then mean you are supposed to have full civil and criminal jurisdiction?

Mr. GARCIA. Supposedly; yes, sir.

Mr. RICHARDSON. So why do we need to amend the statute with regard to enrollment? Why didn't you make sure everyone was enrolled under the 1978 Act?

Mr. GARCIA. Mr. Chairman and members of the Committee, I can only answer from my particular parents. At the time the Act came into play, the majority of our elders were elected to enroll as members of the tribe.

In my particular case, my parents were fearful that by doing so they would be confined into a Reservation. This is why they did not want to sign. I have no knowledge about the other people, but the majority of the elders had a variety of reasons why they were not going to sign up.

Mr. TRUJILLO. Mr. Chairman, I am from the Yaqui Community of Guadalupe, which is outside the Phoenix area. When this issue was brought before the Yaqui people of Guadalupe, they too were very concerned about what this meant to them. We all know that the historical history of the Bureau of Indian Affairs has not been very positive to Native American people.

When the issue was before them that the Bureau of Indian Affairs would be part of this Federal recognition legislation, they were very fearful. They believed that if they became enrolled that they would have to move onto a Reservation, be forced to move from the Yaqui community that was theirs and they were very close to; especially the elders, but other people were very fearful of what this meant.

They had images of Reservations being totally patrolled, day and night, barbed wire totally encompassing the Reservation. They feared they would be forced to relocate to a Reservation, that they could not leave unless they had permission. Therefore, many of the elders were very resistant to becoming enrolled members.

Mr. RICHARDSON. What other sovereign rights are you being denied, Mr. Chairman? What are some of the other advantages you don't have now because of this designation?

Mr. GARCIA. The power to regulate ourselves—we are trying to amend our constitution. It has too many restrictions. Basically we have to go back to the Secretary of Interior to get approval to do anything on the Reservation. We have everything established on the Reservation giving us sovereign authority, but the Bureau is a hindrance to all this.

Mr. RICHARDSON. Do you view yourselves as an Indian Tribe or as political refugees?

Mr. GARCIA. As an Indian Tribe, sir.

Mr. RICHARDSON. Would you say everybody in the Pascua Yaqui community would agree with you that you are an Indian Tribe?

Mr. GARCIA. Yes, not only in our community, but other Yaqui communities throughout the State of Arizona.

Mr. RICHARDSON. What is the population, Mr. Chairman, of the Pascua Yaquis?

Mr. GARCIA. The information we have is that there are approximately 8,077.

Mr. RICHARDSON. What is the unemployment rate on the Reservation?

Mr. GARCIA. The most recent count is about 62 percent.

Mr. RICHARDSON. What is the main source of revenue and income for the Tribe?

Mr. GARCIA. We don't have any to speak of at this point.

Mr. RICHARDSON. No energy base, no agricultural base?

Mr. GARCIA. We don't have any of the natural resources that other Indian Tribes have throughout the United States.

Mr. RICHARDSON. Would recognition by the BIA allow you to economically better yourselves since you could then better provide for your people?

Mr. GARCIA. Yes, it will Mr. Chairman.

Mr. RICHARDSON. What is the primary language of the Tribe?

Mr. GARCIA. It is Yaqui.

Mr. RICHARDSON. Would you call yourselves a traditional Indian Tribe?

Mr. GARCIA. I would definitely say that, yes.

Mr. RICHARDSON. Do you have traditional religious ceremonies?

Mr. GARCIA. Yes, we do. Mr. Valencia is a primary figure in that. I am also a member of the Cultural Society, if you will.

Mr. RICHARDSON. Mr. Valencia, do you want to describe the limits of your religious practices?

Mr. VALENCIA. We just finished the passion of Christ ceremony which is from Ash Wednesday to Easter Sunday or 11 April. Throughout the year, we have other cultural festivities or activities like the Day of the Dead in October, and we celebrate other Indian religious days in our community.

We have done this since the 1500s, since we let the white man's religion into our religion. We have quite a unique way of worship with our own Indian denzas. It is going very strong.

Young children from seven to whatever age are constantly joining the ceremonies. It is quite an event in the community. All the Yaqui communities hold these ceremonies on their respective days of celebration, but the passion of Christ is held from northern Sinaloa up to Guadalupe, Arizona, every year, without missing for over 450 years.

We have our own language. Our ceremonies can only be conducted in the Yaqui language because it is very hard to translate our ceremonial activities into Spanish or English. So we have to teach our young leaders Yaqui so they will continue the cultural activities.

Mr. RICHARDSON. Your secondary language would be Yaqui as opposed to Spanish?

Mr. VALENCIA. The secondary language is Spanish and the third language would be English. Most of us that were born in the United States are trilingual. Most of the people born in Mexico are bilingual, Spanish and Yaqui.

Mr. RICHARDSON. Well, you have made a convincing case with me and I am going to help you and I thank you for appearing. I wish you the best.

I know Congressmen Pastor, Kolbe and Karan English have spoken to me about this issue, and as a result of this hearing and your compelling and clear and sincere testimony, we are going to try to help you.

Mr. GARCIA. Thank you, Mr. Chairman.

Mr. RICHARDSON. This hearing is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

APPENDIX

FRIDAY, APRIL 30, 1993

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

Office of Indian Programs

THE UNIVERSITY OF
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TUCSON ARIZONA

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FAX (602) 791-3735

May 13, 1993

Ms. Barbara Robles
Subcommittee on Native American Affairs
1522 Longworth House Office Building
Washington, D.C. 20515-6201

Dear Chairman and Members of the Committee:

Our office has been requested by the Pascua Yaqui Tribe to comment upon H.R. 734. We have reviewed and analyzed the following exhibits submitted on April 30, 1993, to the Subcommittee on Native American Affairs:

- EXHIBIT A: OPINION OF SOLICITOR GENERAL ON INDIAN AFFAIRS NO. 618 SIOUX -- ELECTIONS ON CONSTITUTION
- EXHIBIT B: OPINION OF SOLICITOR GENERAL ON INDIAN AFFAIRS NO. 1821
- EXHIBIT C: VAL/DEL, INC. V. ARIZONA SUPERIOR COURT, 703 P.2d (1985), CERT. DENIED, 474 U.S. 920 (1985)
- EXHIBIT D: ATKINSON V. HALDANE, SUPREME COURT OF ALASKA 569 P.2d 151 (SELECTED PAGES)
- EXHIBIT E: P.L. 95 - 375
- EXHIBIT F: HOUSE OF REPRESENTATIVES REPORT NO. 95-1021 EXTENSION OF CERTAIN FEDERAL BENEFITS TO THE PASCUA YAQUI INDIANS OF ARIZONA
- EXHIBIT G: SENATE REPORT NO. 95-719 PASCUA YAQUI INDIANS OR ARIZONA FEDERAL BENEFITS EXTENSION
- EXHIBIT H: 25 U.S.C. Section 1300 f.



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- EXHIBIT I: LETTER FROM EDWARD H. SPICER TO SENATOR
 PAUL J. FANNIN JAN. 9, 1976
- EXHIBIT J: U.S. DEPT. OF INTERIOR -- BUREAU OF
 INDIAN AFFAIRS LEGAL REVIEW OF PROPOSED
 CONSTITUTIONAL AMENDMENTS TO THE PASCUA
 YAQUI TRIBAL CONSTITUTION -- DEC. 1991
- EXHIBIT K: RESPONSE FROM P.Y.T. TO LEGAL REVIEW OF
 PROPOSED CONSTITUTIONAL AMENDMENTS --
 FEB. 1992
- EXHIBIT L: RESPONSE TO P.Y.T. FROM B.I.A. REGARDING
 THE P.Y.T. RESPONSE TO THE B.I.A. LEGAL
 REVIEW -- JAN. 1992

Additionally, we have read the statement of the Honorable Ed Pastor, Congressman from Arizona's Second District, the statement of Carol A. Bacon, the Director of the Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, and have examined the Pascua Yaqui Indians-Arizona-Retrocession Proclamation of Civil and Criminal Jurisdiction.

The Office of Indian Programs has also coordinated a response to the proposed legislation from faculty scholars in the Departments of American Indian Studies, Linguistics, Anthropology, and Law.

We are fully aware that the Pascua Yaqui Tribe has its own distinct language, maintains the power to tax, power to exclude, power to maintain law and order through its own tribal court system, and generally enjoys all the inherent attributes of a sovereign nation except those that have been specifically divested by the United States Congress under its plenary authority.

The Pascua Yaqui Tribe is a federally recognized tribe by virtue of P.L. 95-375 which, by its terms, places the Tribe on a par with those tribes coalescing their legal status pursuant to the Indian Reorganization Act of 1934 (48 Stat. 484). The Bureau of Indian Affairs has sought to distinguish the Pascua Yaqui Nation from other tribes under the legal fiction that it is a "created" and not a "historic" tribe. Yet the Indian Reorganization Act makes no such distinction. The Bureau's actions really seek to isolate the Yaqui people from their historical communion. The anthropological evidence is clear that the Pascua Yaqui are not merely an aggregation of adult Indians living on the same reservation. They form a unique American Indian community with historic antecedents

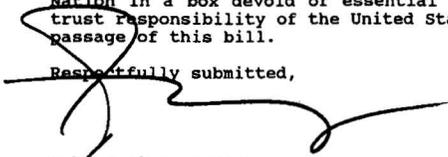
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in both the United States and Mexico. Their tribal identity is no mere recent creation.

Many of our history's past legal justifications for removing Indian peoples from their lands rested upon the doctrine that the indigenous aggregations of individuals were "wandering hordes" not entitled to possess all the land they saw from horseback. Thus, all native groups were treated as having simply a right of occupancy. Indeed, the dispossession of land and relocation of Indians occurred often without regard to preserving their continuity to an original homeland. But, as with most tribes in the southwestern United States, the Pascua Yaqui have maintained a close connection to their ancestral territory.

Therefore, it is the position of this office that there is no legal or anthropological justification for sequestering the Pascua Yaqui Nation in a box devoid of essential governmental services. The trust responsibility of the United States government requires the passage of this bill.

~~Respectfully submitted,~~



Robert Alan Hershey
Adjunct Professor of Indian Law
Special Projects Coordinator
Office of Indian Programs
University of Arizona

RAH:cen

Office of Indian Programs

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May 14, 1993

Ms. Barbara Robles
 Subcommittee on Native American Affairs
 1522 Longworth House Office Building
 Washington, D.C. 20515-6201

Dear Chairman and Members of the Committee:

Our office has been approached by the Pascua Yaqui Tribe for our comments regarding H.R. 734. I fully support the efforts of the Pascua Yaqui people in the passage of this bill.

The anthropological evidence is clear that the Pascua Yaqui are a people not merely an aggregation of adult Indians living on the same reservation. They form a distinct American Indian community with historic antecedents in Mexico. It cannot be said in the plain sense of the words that their tribal identity or peoplehood was a recent creation. They are a tribe of American Indians.

The Pascua Yaqui are a Federally recognized tribe. Congress has previously spoken on the issue of Federal recognition of this tribe.

The Pasqua Yaqui Indian people [] are recognized as, and declared eligible, on and after the date of the enactment of this Act [], for the services and assistance provided to Indians because of their status as Indians by or through any department, agency, or instrumentality of the United States or under any statute of the United States.

25 U.S.C. 1300f(a) The Bureau's distinction between historic and created tribes is a created regulatory barrier to the tribe's eligibility for services and assistance inconsistent with Congress' recognition.

The Bureau's distinction is rooted in Section 16 of the Indian Reorganization Act of 1934 (IRA). 48 Stat. 984. The IRA makes no express distinction between historic and created tribes. Rather, section 16 states: "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, . . ." The IRA was expressly amended to extend its provisions to the Pasqua Yaqui tribe. 25 U.S.C. 1300f(b). Thus, the Pasqua Yaqui are "any tribe" within the meaning of section 16. Section 16 does not state that only those tribes which are deemed "historic" will be eligible for Federal services or recognized as having the sovereign attributes of American Indian tribes.



Ms. Barbara Robles letter
May 14, 1993
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The Pascua Yaqui are an American Indian tribe who are recognized by Congress. The Bureau of Indian Affairs has opposed the pending bill upon a legal inference which is not directly expressed in the IRA. Nor, is the inference necessarily warranted by a plain reading of the IRA. The recognition of the Pascua Yaqui as a historic tribe will provide the tribe with needed services on their reservation.

Sincerely,

Fred Lomayeva

Fred Lomayeva
Assistant Director
Office of Indian Programs

FKL:MHW

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May 21, 1993

Comments of the Pascua Yaqui Tribe
in Support of H.R. 734

Dear Chairman Richardson:

On behalf of the Pascua Yaqui Tribe of Arizona, I write to support strongly the passage of H.R. 734, which is essential to clarify the legal status of the Pascua Yaqui Tribe for purposes of its administration by the Bureau of Indian Affairs (BIA).

As you know, H.R. 734 would (i) reaffirm the status of the Pascua Yaqui Tribe as a historic tribe, retaining all attributes of its inherent sovereignty which have not been limited by federal legislation, and (ii) extend the enrollment deadline to apply for membership in the Pascua Yaqui Tribe for an additional three year period, in accordance with the need of the Tribe to determine its own membership. Furthermore, H.R. 734 provides moral acknowledgment of the status of the Pascua Yaqui Tribe as a distinct group of people indigenous to the Southwest, who have a separate identity as "Yoeme," the People, that predates European contact, and who continue to possess a sacred body of tribal knowledge regarding what is now Southern Arizona and Northern Mexico. Importantly, H.R. 734 is supported by settled principles of Indian Law and coincides with the long-stated federal policy to promote tribal self-government.

1. Reaffirm Status as "Historic Tribe"

By reaffirming the Pascua Yaqui Tribe's status as a "historic tribe," H.R. 734 would dispel the misconception perpetuated by the BIA that the Pascua Yaqui Tribe is a "created tribe" with limited powers of self-government delegated by the federal government. This misconception has interfered with the sovereign right of the Pascua Yaqui Tribe to govern itself according to the mandate of federal law, including the Indian Reorganization Act (25 U.S.C. § § 461-479, hereinafter "IRA") and the Indian Self-Determination Act.

Importantly, H.R. 734 would recognize the inherent sovereign status of the Pascua Yaqui Tribe. This result is compelled by the fact that there does not appear to be any legal support for the BIA's "created" versus "historic" tribe distinction in the

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Mr. Bill Richardson

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May 21, 1993

current law, and even if such support could be shown, the "created tribe" categorization is clearly not applicable to the Pascua Yaqui Tribe.

The BIA interprets a 1934 Solicitor's opinion dealing with the voting rights of Indian people on different types of reservations and a 1936 Solicitor's memorandum on the disparate sovereign capacities of different tribal groups, as establishing two types of tribal organizations--"historic" and "created"--that have different powers and rights under the law. These old Solicitor's opinions were based on the 1934 version of § 16 of the IRA (codified at 25 U.S.C. §476), which provided at that time that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare," and that such a tribe could adopt its own Constitution and bylaws, to become effective when ratified by "a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation." Although § 16 has never contained language supporting a "created" versus "historic" tribe distinction or recognized different rights and privileges among tribes, the BIA administratively created such a distinction. The BIA now argues that a "created tribe" is merely a "community of adult Indians" who reside together on trust land and have a limited entitlement to certain "privileges and immunities" that derives from the federal interest in "benefiting Indians," rather than the historical status of the group. See BIA Legal Review of Proposed Constitutional Amendments to the Pascua Yaqui Tribal Constitution, December 1991 (hereinafter "BIA Legal Review") at 2. The BIA argues against passage of H.R. 734 on the basis that the Pascua Yaqui Tribe constitutes such a community of "adult Indians" devoid of inherent governmental authority.

In 1988, however, Congress amended that portion of § 16 upon which the BIA had relied. That section now reads: "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate Constitution and bylaws . . . which shall become effective when ratified by a majority vote of the adult members of the tribe or tribes. . ." 25 U.S.C. § 476(a). The legislative history behind this amendment clarifies that it was intended to delete the reference to residence on a reservation. Section 479 of the IRA considers "the Indians residing on one reservation" as a "tribe," and thus § 476(a), as amended, clarifies that any tribe within the meaning of the IRA is entitled to equal treatment for purposes of that Act. See 1988 U.S. Code Cong. & Adm. News at 3908. Thus, the old Solicitor's opinions have no meaningful basis given the current language of § 16 of the IRA.

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Mr. Bill Richardson

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It is true, of course, that under § 479 of the IRA, an individual may be considered an "Indian" if the person has no affiliation with a tribe but is of at least one-half degree of Indian blood. See F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 23. This definition was sustained by the Supreme Court in United States v. John, 437 U.S. 634, 649-50 (1978), a case that the BIA now points to in support of its "created" versus "historic" tribe distinction. See BIA Legal Review at 2. United States v. John dealt with the legal status of an individual of Choctaw blood who resided on trust land of a splinter group of the Choctaw tribe that had remained in Mississippi as individual land owners rather than as a formal tribal unit, and had not had continuous relations with the federal government as a tribe.

The Pascua Yaqui Tribe is a federally-recognized sovereign entity that has existed as a formal tribal government since "time immemorial." Both tribal tradition and anthropological evidence prove that while Yaqui people, like many other Southwestern tribes, have historically settled on both sides of what is now the United States-Mexico border, they are a group of native people indigenous to the Southwest, including southern Arizona. It is true that much of the "recent" (i.e., 20th century) movement of the Yaqui people to the areas around Tucson, Phoenix and Yuma was necessitated by the genocidal campaign of the Mexican government against the Yaqui people in the late 19th and early 20th century. However, this does not render the Pascua Yaqui Tribe a group of individual "Mexican immigrants," as the BIA would argue. Rather, the Pascua Yaqui Tribe has always maintained the historical characteristics of its indigenous roots, including a traditional language, religion, clan structure and community political structure, and those roots are deeply embedded in the history of this region, existing long before European contact and long before the United States government.

The BIA's designation of the Pascua Yaqui Tribe as a "community of adult Indians" that possesses only limited powers of governance delegated by the federal government seriously infringes upon the inherent sovereignty of the Pascua Yaqui Tribe, and undermines the Congressional Act of 1978 that conferred federal recognition to the Pascua Yaqui Tribe and thus recognized their sovereign status. Nor is there any reason for the BIA to argue that the Pascua Yaqui Tribe cannot meet the designation of "historic" tribe set forth in the federal "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." See 25 C.F.R. Part 83. These regulations specifically exempt tribes and communities that are "already acknowledged as such and are receiving services from the Bureau of Indian Affairs." See 25 C.F.R. § 83.3(b).

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By conferring federal recognition, Congress implicitly found the Pascua Yaqui Tribe to be a historic tribe entitled to exercise all the rights and privileges of such a tribe. The BIA is required to conform its actions to the Congressional mandate. It may not "reconsider" the recognized status of the Pascua Yaqui Tribe. H.R. 734 merely clarifies the sovereign status of the Pascua Yaqui Tribe and requires the BIA to treat the Pascua Yaqui Tribe on the same basis as other federally-recognized tribes. H.R. 734 is essential to the self-government of the Pascua Yaqui Tribe.

In summary, it is clear that the Pascua Yaqui Tribe is--and has been--a "historic tribe" in every sense of the term. The Pascua Yaqui Tribe has existed since "time immemorial" and its powers derive from its inherent sovereignty, not from delegations of federal authority. See United States v. Wheeler, 435 U.S. 313, 322-23 (1978) ("[t]he powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished'" and are not powers delegated by express Acts of Congress). The Pascua Yaqui Tribe currently exercises all functions of a sovereign tribal government, including the power to tax and otherwise regulate on its reservation, the power to establish tribal courts to govern tribal members and civil governance of non-members engaging in activities on the reservation, the power to contract with the federal government to assume primary responsibility under various health, education and welfare programs, and the power to establish its own government, Constitution, by-laws and tribal codes. The BIA's resistance to the Pascua Yaqui Tribe's exercise of its inherent tribal powers has created numerous problems and simply must not be tolerated.

2. Extend Membership Deadline.

H.R. 734 would serve the added purpose of allowing the Pascua Yaqui Tribe to define its own membership for an additional three year period. As the Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978), "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

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Mr. Bill Richardson

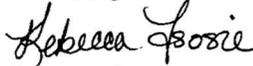
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I appreciate the opportunity to express these comments regarding H.R. 734. The relevant legal analysis compels passage of this important legislation, and the Pascua Yaqui Tribe of Arizona strongly encourages the Committee to pass H.R. 734.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Rebecca Tsosie

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ISBN 0-16-041146-7



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