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February 27, 1985

The Honorable Frank McElhaney  
State Capitol, House Wing  
1700 West Washington  
Phoenix, Arizona 85007

The Honorable Jones Osborn  
State Capitol, Senate Wing  
1700 West Washington  
Phoenix, Arizona 85007

Re: I85-029 (R84-213)

Dear Representative McElhaney and Senator Osborn:

Each of you has asked whether an Indian tribal member who serves as a member of a tribal council may, at the same time, serve as a member of the board of supervisors of the county in which the tribe's reservation lies. Your inquiry arises from this factual setting: a member of the La Paz County Board of Supervisors successfully ran for reelection in November, 1984, for a term commencing January, 1985. Subsequently, this person was elected to the Tribal Council of the Colorado River Indian Tribes (Tribal Council) in December, 1984. Part of the Colorado River Indian Reservation is situated in La Paz County.

Ariz.Const., art. XXII, § 18 (art. XXII) provides, in pertinent part, as follows:

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Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

See also A.R.S. § 38-296. Such a provision "advances substantial and important state interests" and "represents a reasonable compromise between the not unusual desire of an office holder to seek a higher office and the substantial and legitimate interest of the state." Joyner v. Mofford, 706 F.2d 1523, 1531-32 (9th Cir. 1983) cert. denied, 104 S.Ct. 509 (1983).<sup>1/</sup>

The La Paz County Supervisor at issue was serving in the last year of her term as county supervisor when she ran for election to the Tribal Council.<sup>2/</sup> Therefore, she did not violate Article XXII or A.R.S. § 38-296 in running for membership on the Tribal Council.<sup>3/</sup>

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1. In Joyner, the Ninth Circuit Court of Appeals addressed the constitutionality of art. XXII. While he was a member of the Pima County Board of Supervisors, Conrad Joyner campaigned for nomination as a candidate for the United States House of Representatives before the final year of his term as county supervisor. Joyner contended that art. XXII violated the qualifications clause and Fourteenth Amendment equal protection provisions of the United States Constitution. The court disagreed, holding that art. XXII was a permissible regulation of the conduct of state officeholders.

2. The term to which this supervisor was reelected did not commence until January, 1985.

3. Thus, for purposes of this opinion, we do not need to determine whether membership on the Tribal Council qualifies as a "salaried local, state or federal office" within the purview of art. XXII and its statutory counterpart, A.R.S. § 38-296.

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Likewise, this individual did not violate these "resign to run"<sup>4</sup> provisions after commencing her term as a member of the Tribal Council since she did not run for office after being elected to the council. Even if she had run for another office at that time, these provisions would have been inapplicable because Article XXII and A.R.S. § 38-296 regulate only the activities of officeholders of the state or its political subdivisions. Joyner; Shirley v. Superior Court In and For Apache County, 109 Ariz. 510, 513 P.2d 939 (1973), cert. denied, 415 U.S. 917 (1974).

Thus, neither art. XXII nor A.R.S. § 38-296<sup>5</sup> precludes a member of a reservation's tribal council from serving as a member of the Board of Supervisors of the county in which the reservation lies.<sup>6</sup>

We must also address whether, under the facts posed by your inquiry, the common law doctrine of incompatibility of public offices precludes a member of the Indian tribal council from serving on the County Board of Supervisors. We have previously stated that there are two situations under this doctrine which would preclude a person from holding public office:

- (1) When the duties of two positions are in conflict and (2) when it is physically impossible that two positions be held

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4. These laws were characterized as such by the Ninth Circuit in Joyner.

5. Our conclusion is buttressed by the general principle that there is a presumption in favor of one who has been elected or appointed to public office. Shirley v. Superior Court In and For Apache County, 109 Ariz. 510, 513 P.2d 939 (1973), cert. denied, 415 U.S. 917 (1974).

6. We note also that A.R.S. § 11-211 provides that "no person holding any other county or precinct office is eligible for the office of supervisor." However, that provision is inapplicable because a member of the tribal council is not a county or precinct officer. Compare McCarthy v. State of Arizona, 55 Ariz. 328, 101 P.2d 449 (1940).

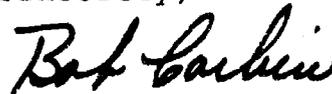
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simultaneously by one person.  
Perkins v. Manning, 59 Ariz. 60, 122  
P.2d 60 (1942); Colman v. Lee, 58 Ariz.  
506, 121 P.2d 433 (1943).

Ariz. Atty. Gen. Op. I80-061. The determination of whether two positions are incompatible rests upon the individual duties required of each position. We do not have sufficient information at this time to determine whether the duties of the two positions at issue in your inquiry would, in fact, pose such a conflict that the two offices would be incompatible or whether it would be physically impossible for the two positions to be held simultaneously by one person.<sup>7</sup> As we noted in Ariz. Atty. Gen. Op. I80-061, to determine whether two positions are incompatible, each situation must be examined individually.

Finally, we note that, under general principles of federal Indian jurisprudence and tribal self-government set forth in the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 through 479, the fact that an Indian tribal member may at the same time seek to serve the governmental interests of both his tribe and the county coinciding with his reservation is unlikely to disqualify him from either post. See generally, F. Cohen, Handbook of Federal Indian Law (1982 ed.), 645-646.

Sincerely,



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7. The physical impossibility aspect of the incompatibility can involve several factors such as time, location, physical and mental capacity.