



**RESOLUTION OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION**

**(Authorizing legal strategy and actions related to the federal Pension Protection Act)**

- WHEREAS,** pursuant to Article IV, Section 1(a) of the Constitution of the White Mountain Apache Tribe, *inter alia*, the Tribal Council has the authority to represent the Tribe and act in all matters that concern the welfare of the Tribe; and
- WHEREAS,** on August 17, 2006, the federal Pension Protection Act (“PPA”) was signed into law; and
- WHEREAS,** in order to maintain government plan status, the PPA now requires the Tribe to divide its employee 401(k) plan into two separate and distinct plans with mirrored provisions – one for the tribal government and one for the Tribe’s “commercial” enterprises, and such distinction is preempted by other federal statutes, such as the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), despite rulings by the Court of Appeals for the Ninth Circuit and other Circuits (see *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9<sup>th</sup> Cir. 1985), citing *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *San Manuel v. NLRB*, --- F.3d ---, 2007 WL 420116 (C.A.D.C 2007); and
- WHEREAS,** the PPA places an undue cost and administrative burden on Indian tribal governments that is not placed on state or local governments; and
- WHEREAS,** the PPA creates a significant hardship on tribal governments by requiring compliance as early as December 31, 2007, despite the fact that the PPA does not define what is “commercial” or what is an “essential government function”; and
- WHEREAS,** pursuant to Resolution No. 12-2006-418, “Approving a Compliance for the Purposes of the Pension Protection Act,” the Tribal Council did approve a Pension Plan (the “Plan”) for the purposes of administering a pension system for employees of the Tribe, which includes subsidiary economic development enterprises; and
- WHEREAS,** the Tribe’s pension attorney, Robert Yoder, addressed the Tribal Council at its June and October Council Meetings and informed them of the required changes and the difficulties associated with making the changes; and
- WHEREAS,** the Council directed the Tribe’s Pension and Investment Committee to meet on this issue and make recommendations back to the Council; and
- WHEREAS,** the Tribe’s Pension and Investment Committee met on this and issued two separate memorandums to the Tribal Council with its recommendations; and
- WHEREAS,** the Committee now recommends the following legal strategy for the Tribal Council’s review and approval:



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- WHEREAS,** the Council directed the Tribe's Pension and Investment Committee to meet on this issue and make recommendations back to the Council; and
- WHEREAS,** the Tribe's Pension and Investment Committee met on this and issued two separate memorandums to the Tribal Council with its recommendations; and
- WHEREAS,** the Committee now recommends the following legal strategy for the Tribal Council's review and approval:

**Resolution No. 10-2007-425**

1. Draft amendment to Plan documents and service contracts to implement those changes, under a reservation of rights, required for good faith compliance under IRS Notice 2006-89, provided that no such action shall be deemed a waiver of the Tribe's right to assert government status for any tribal entity;
2. File a request with the IRS for a waiver or other relief available under Executive Order 13175 for any requirements that the Tribe treat its enterprises as "commercial" or non-essential government entities until all government-to-government consultation rights and pending legislative efforts to clarify the Tribe's government status have been exhausted or until final regulations, after consultation, have been issued on this matter;
3. In the event that the IRS does not respond to the Tribe's request for a waiver pursuant to EO 13175 by December 31, 2007, the Tribe's Legal Department should be authorized to bring an action in federal court seeking declaratory and injunctive relief for the purpose of an Order clarifying the PPA's requirements and/or to enforce Executive Order 13175, with a strong commitment to defending tribal sovereignty;
4. Draft resolutions seeking the assistance of the National Congress of American Indians, the Inter Tribal Council of Arizona and the Arizona Indian Gaming Association to seek appropriate legislative remedies from the U.S. Congress to address the PPA and to develop a coalition of Tribes to address this sole issue; and
5. The Tribe's Legal Department should draft a tribal Ordinance(s), to take advantage of the Tribe's consultation rights under Executive Order 13175, for presentation to the Tribal Council for its review and consideration.

**WHEREAS**, the Council finds that it is in the best interest of the Tribe to follow the Committee's recommendations described above.

**BE IT RESOLVED** by the Tribal Council of the White Mountain Apache Tribe that it hereby directs:


1. The Tribe's Legal Department is hereby directed to:
  - a. Draft amendments to Plan documents and service contracts to implement those changes, under a reservation of rights, required for good faith compliance under IRS Notice 2006-89, provided that no such action shall be deemed a waiver of the Tribe's right to assert government status for any subsidiary economic development enterprise or entity.
  - b. File a request with the IRS for a waiver or other relief available under Executive Order 13175 for any requirements that the Tribe treat its enterprises as "commercial" or non-essential government entities, until such time as all government-to-government consultation rights and pending legislative efforts to clarify the Tribe's government status have been exhausted or until final regulations, after consultation, have been issued on this matter.

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- c. In the event that the IRS does not respond to the Tribe's request for a waiver pursuant to EO 13175 by December 31, 2007, the Tribe's Legal Department is hereby authorized to bring an action in federal court for declaratory and injunctive relief for an Order clarifying the PPA's requirements and/or to enforce Executive Order 13175, with a strong commitment to defending tribal sovereignty.
  - d. Draft resolutions seeking the assistance of the National Congress of American Indians, the Inter Tribal Council of Arizona and the Arizona Indian Gaming Association to seek appropriate legislative remedies from the U.S. Congress to address the PPA and to develop a coalition of Tribes to address this sole issue.
  - e. Draft a tribal Ordinance(s), to take advantage of the Tribe's consultation rights under Executive Order 13175, for presentation to the Tribal Council for its review and consideration.
2. The Chairman, or in his absence the Vice-Chairwoman or other designated members of the Tribal Council or representative(s) are hereby directed to seek assistance from the National Congress of American Indians, the Inter Tribal Council of Arizona and the Arizona Indian Gaming Association to seek appropriate legislative remedies to address the PPA and develop a coalition of Tribes to address this sole issue.

**BE IT FURTHER RESOLVED** by the Tribal Council of the White Mountain Apache Tribe that the Chairman, or in his absence, the Vice Chairwoman, is hereby authorized to execute any and all document necessary to effectuate the intent of this Resolution.

The foregoing resolution was on October 11, 2007, duly adopted by a vote of NINE for and ZERO against by the Tribal Council of the White Mountain Apache Tribe, pursuant to the authority vested in it by Article IV, Section 1 (a), (b), (d), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

  
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Chairman of the Tribal Council

  
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Secretary of the Tribal Council