

No. CA-11-002

PASCUA YAQUI TRIBE
COURT OF APPEALS

Pascua Yaqui Court of Appeals

FEB 10 2012

Desert Modulares, Inc., Appellant,

ISSUED
CLERK OF COURT

vs.

Pascua Yaqui Tribe, Appellee,

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CV 10-123, the Honorable Melvin Stooft presiding.

James E. Abraham, Esq., 5151 N. Oracle, Tucson AZ, 85704 for the Appellant.

Robert Gillon, Esq., Office of the Attorney General Pascua Yaqui Tribe, Tucson, AZ and Luis A. Ochoa, Esq. and Jeremy A. Lite, Esq., One South Church Avenue, Tucson AZ 85701, for the Appellee.

I. Opinion

¶1 There are two issues before this Court, the first whether the Pascua Yaqui Tribe unequivocally waived its sovereign immunity by signing written leases providing that (1) the lease agreements “in no way” waived the Tribe’s sovereign immunity, and (2) the Tribal Court would be the forum for any disputes concerning the leases, or in the event of a default, an order from the Tribal Court should be obtained for repossession of Appellant’s property. We hold that it did not. The second issue is whether the Pascua Yaqui Tribe violated the PYT Constitution that prohibits the taking of property for governmental use without Due Process and just compensation when they stopped payment to Desert Modules for the modular buildings. We hold that it did not.

II. Background

¶2 The present suit involves five leases that were contracted between Desert Modulares, Inc. (hereafter “Desert Modulares”) and the Pascua Yaqui Tribe (hereafter “Tribe”) for the lease of five modular offices. The Tribe paid for use of five modular offices for several years. According to the lease agreements, the insurance valuation for four of the five modules is \$376,195. (R.108-141) The fifth lease omits an insurance valuation but the other four modules

vary in valuation from \$85,275 to \$99,950. (R. 108-141) The Tribe's lease payments for the five module offices through July 2009 totaled \$839,730. (R.73) Accordingly, the record indicates that the Tribe's total lease payments over time were well in excess of the insurance valuation of the five modules.

In July 2009, the Tribe stopped making lease payments and refused to return the offices. Appellants filed a complaint for monetary damages and requested an order for the Tribe to return the five modular offices to Appellants. The Tribe filed a Motion to Dismiss. The Tribal Court granted the Tribe's Motion to Dismiss, ruling that the Tribe had not waived its sovereign immunity. Appellants filed a Motion to Reconsider or for New Trial, which was denied. Appellants filed this appeal seeking review of the Tribal Court's ruling granting the Motion to Dismiss and denying the Motion to Reconsider and for New Trial. Appellant is also seeking an order for a jury trial on all claims.

The leases in question contain the following language:

1. Lease 1793 - "Lessor may take repossession of the property upon default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court." The lease further provides, "This lease shall be interpreted under the laws of the State of Arizona in and by the Pascua Yaqui Tribal Court, the lessor hereby expressly agreeing to jurisdiction in the Pascua Yaqui Tribal Court. This Agreement in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV – Sovereign Immunity."
2. Lease 1844 - "Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit or damages or specific performance when the nonperformance negatively effects [sic] the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waves [sic] any rights held by the PYT under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity." The lease also provides that "Lessor may take repossession of the property upon default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court."
3. Lease 2022 - "Lessor may take repossession of the property upon default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court." The lease also provides, "Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit or damages or

specific performance when the nonperformance negatively effects [sic] the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waves [sic] any rights held by the PYT under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity.”

4. Lease 2023 - “Lessor may take repossession of the equipment [upon] default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court.” The attachment to this lease provides, “Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit for damages or specific performance when the non-performance negatively effects [sic] the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waves [sic] any rights held by the PYT under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity.”
5. Lease 2163 - “This lease shall be interpreted under the laws of the State of Arizona, and the Pascua Yaqui Tribal Courts shall have exclusive jurisdiction to adjudicate any disputes arising thereunder. This Lease in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV – Sovereign Immunity.”

III. Standard of review

¶3 The appellate court reviews de novo whether an Indian tribe possesses sovereign immunity. *See Demontiney v. U.S.*, 255 F.3d 801, 805 (9th Cir. 2001) (citing *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)).

IV. Sovereign Immunity

¶4 The issue before this Court is whether the Pascua Yaqui Tribe unequivocally waived its sovereign immunity by signing written leases providing that (1) the lease agreements in no way waived the Tribe’s sovereign immunity, and (2) the Tribal Court would be the forum for any disputes concerning the leases, or in the event of a default, an order from the Tribal Court should be obtained for repossession of Appellant’s property.

¶5 The Pascua Yaqui Constitution provides, “The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, unless the Tribal Council enacts an ordinance expressly consenting to suits.” PYT Const. art. XXIV. The immunity of Indian tribes is not absolute. “Either explicit

congressional authority or consent of a tribe is necessary to find a waiver of the immunity.” See *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 560 (App. 1985) (citing *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981)). Waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Val/Del, Inc.*, 145 Ariz. at 564. There is a strong presumption against waiver of tribal sovereign immunity. See *Demontiney v. United States*, 255 F.3d 801 (9th Cir. 2001).

¶6 In *Val/Del, Inc.*, the Pascua Yaqui Tribe entered into an agreement for Val/Del to manage the tribe’s bingo operation. Several months after the agreement between the two parties, the Tribe excluded Val/Del’s employees from the property, alleging Val/Del had defaulted under the agreement.

Section 12 of the contract between the parties provided:

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 the judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

¶7 Val/Del sought enforcement of the arbitration clause. The Pima County Superior Court found the Tribe is a federally recognized tribe entitled to sovereign immunity and could not be sued without waiving such immunity or otherwise granting its consent to suit. The trial court held the arbitration clause in the agreement was not a legally sufficient waiver of sovereign immunity to permit the action in state court and dismissed the complaint. On appeal, the Arizona Court of Appeals found that there was an express waiver of the Tribe’s sovereign immunity by agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction. The arbitration agreement did not specify the Tribal Court system or any other court system but “any court of competent jurisdiction.” Therefore, the State of Arizona would have civil jurisdiction, “notwithstanding the fact that the Pascua Yaqui tribal court may also have jurisdiction.” *Val/Del, Inc.*, 145 Ariz. at 565.

¶8 Similarly, in *C & L Enterprises, Inc. v. Citizen Band Potowatomi Indian Tribe*, 121 Sct. 1589 (2001), a case cited by Appellants, the United States Supreme Court found a clear waiver of tribal sovereign immunity in contract arbitration provisions. That case involved a contract between a tribe and a construction company that contained two important provisions: (1) a clause stating that all contractual disputes should be resolved according to American Arbitration

Association Rules and providing for enforcement of the arbitrator's award "in accordance with applicable law in any court having jurisdiction thereof", and (2) a choice-of-law clause consenting to the law of Oklahoma. *Id.* at 1592-94. The American Arbitration Association Rules provided that parties under the arbitration rules consented to enforcement of the award in federal and state court. *Id.* at 1593. Oklahoma law provided that an agreement calling for arbitration in the state confers jurisdiction on its courts for enforcement. *Id.* The Supreme Court concluded that the arbitration clause was a clear waiver of the tribe's sovereign immunity against suit to enforce the arbitration award.

¶9 Appellant cites *C & L Enterprises* in an attempt to show that the Pascua Yaqui Tribe's agreement to resolve disputes in Pascua Yaqui Tribal Court is similar to *C & L Enterprises* where the parties agreed to resolve disputes through arbitration. *C & L Enterprises*, however, is clearly distinguishable. Both *Val/Del* and *C & L Enterprises* support the argument that including an arbitration agreement in a tribal contract can waive sovereign immunity by giving the American Arbitration Association and state courts enforcement rights regarding contractual disputes. There was no arbitration agreement in this case. More importantly, the Tribe included an explicit provision in each lease agreement stating that the Tribe did not waive its constitutional sovereign immunity from suit. Although the leases contain language regarding resolving disputes in Tribal Court, this court cannot use that language to read an implied waiver when there is an unequivocal explicit retention of sovereign immunity in all of the leases. Specifically, the leases provide that the agreements "in no way" waive any rights held by the Pascua Yaqui Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article XXIV – Sovereign Immunity. There is an unequivocal retention of sovereign immunity in every contract that was signed by both parties. Both parties are experienced commercial actors and were aware of the language contained in the leases. Desert Modulares had the opportunity to read all of the clauses in the contracts and dispute those they deemed unfair or disadvantageous.

¶10 Indian tribes are sovereign nations possessing immunity from suit unless a waiver of sovereign immunity is provided by congressional authority or is explicitly and unequivocally expressed by the Tribe. Contractors should take into account the strong presumption against a waiver of tribal sovereign immunity when conducting business with Indian tribes. In addition,

contractors should be aware of the principles of tribal jurisdiction and federal Indian law that are implicated in commercial transactions with tribes.

¶11 “To the extent possible, all provisions in a contract should be found meaningful.” *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983). Appellant’s argument that the Tribes implicitly waived sovereign immunity fails because an express retention of sovereign immunity in a contract overpowers an implicit waiver. There is no unequivocal waiver of tribal sovereign immunity by the Tribe in the contracts at issue in this case. Specifically, there is an unequivocal statement of retention of sovereign immunity made by the Tribe in each lease, which clearly indicates that the agreement in no way waives the Tribe’s sovereign immunity. Appellant’s assertion that the Tribe waived its sovereign immunity is without merit.

V. Takings Clause

¶12 The second issue in this case is whether the Pascua Yaqui Tribe violated the PYT Constitution that prohibits the taking of property for governmental use without Due Process and just compensation when they stopped payment to Desert Modules for the modular buildings.

VI. Standard of Review

¶13 The Pascua Yaqui Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. *Boone v. Preston*, CA-009, Pascua Yaqui Court of Appeals (2009), p.6. (citing Pascua Yaqui Const., art. VIII §5). The issue of whether there is a constitutional takings clause violation is a question of law.

VII. Takings Clause

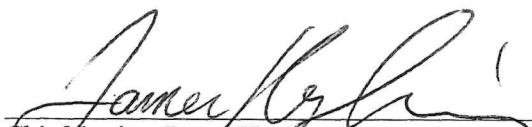
¶14 The Pascua Yaqui Constitution provides that the Tribe shall not “Take any private property for public use without just compensation.” Pascua Yaqui Tribe Constitution, Article I, Sec. 1 (e). The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use without just compensation.” U.S. Const. amend. V. In order to determine whether a taking has occurred, a court must first determine whether the plaintiff possesses a valid property right affected by government interference. If the plaintiff possesses a compensable property right, the court must determine whether the governmental action at issue

constituted a taking of that property. *See Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000). Desert Modulares originally owned the property, which is now in the Pascua Yaqui Tribe's possession. The Tribe, however, has paid Desert Modulares an amount well in excess of the value of the modules. Moreover, the Federal Circuit has held that a takings claim has limited application when the rights and obligations of the parties have been created by contract. *See Consumers Energy Company v. United States*, 84 Fed. Cl. 152, 157 (2008). "The concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual right generally gives rise to a breach claim and not a taking claim." *Consumers Energy Company*, 84 Fed. Cl. at 157 (citing *Hughes Communications Galaxy Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001)). Therefore, Desert Modular's takings claim, which is based upon the contract between Desert Modular and the Tribe, is limited to the remedies available to it through contract. *See also Castle v. United States*, 301 F.3d 1328, 1342 (Fed Cir. 2002). As explained in Part IV, the contract by its own terms affirms the Tribe's sovereign immunity. In any event, even if the lower court had found there was a taking, it appears Desert Modulares has been paid considerably more than the value of the property that is now in possession of the Tribe.

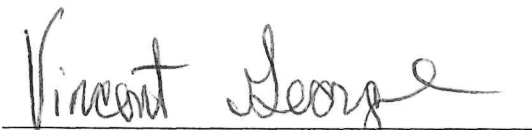
VIII. Conclusion

¶15 For the foregoing reasons, the Court of Appeals affirms the Tribal Court's motion to dismiss in this case.

So ordered on this 2nd day of February 2012.


Chief Justice, James Hopkins


Justice Pro Tem, Barbara Atwood


Justice Pro Tem, Vincent George

PASCUA YAQUI TRIBE COURT OF APPEALS

DESERT MODULARS INC, an Arizona
corporation; LLC CAPITAL.LLC, a
corporation,

Appellant

v.

PASCUA YAQUI TRIBE,

Appellee

NO. CA-11-002



**APPELLANT DESERT MODULARS, INC. & LLC CAPITAL.LLC'S
REPLY BRIEF**

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ARGUMENT

The Response Brief was totally devoid of any legal reasoning or legal analysis to rebut the Appellant's argument that the trial judge failed to apply to our facts the rationale of *C & L Enterprises, Inc., v, Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411; 121 S. Ct. 1589; 149 L. Ed. 2d 623 (U.S. Supreme Court, 2001) which held that tribal sovereign immunity was waived when the Tribe agreed to submit disputes to a "dispute resolution regime." *C & L Enterprises, Inc, supra*. (Appellant's Brief, p. 19)

The Response Brief contained no legal argument or analysis to rebut the Appellant's argument that the Tribe expressly waived its sovereign immunity when the Tribe agreed in the lease contracts to a "dispute resolution regime," since the leases required that all disputes be submitted to the jurisdiction of the Tribal Court or required that the Plaintiffs/Appellants to first obtain an order of repossession from the Tribal Court before attempting to repossess the property in the event of a dispute.

Four of the leases require that the Appellants/Lessors' repossession of the leased property (upon) default may occur "...only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court." (Appendix A, leases # 1793, #2011, #2023, and #1844, not #2163 revised) Four of the leases require that

all disputes arising under the lease shall be submitted to the jurisdiction of the Pascua Yaqui Tribal Court (Appendix A, leases # 1793, #2163 revised, #2022, and #1844, not #2023)

Instead of participating in a legal analysis, the Response Brief repeatedly asserted throughout the brief that “tribal immunity was *not* waived.” There was absolutely no discussion about the Plaintiffs/Appellants’ argument that filing a lawsuit in the tribal court, as required under the five leases, was participating in a “dispute resolution regime.”

The Response Brief did cite to *American Indian Agricultural Credit Union Consortium, Inc. V. Standing Rock Tribe*, 780 F. 2d 1374 (8th Cir, 1985) to bolster its blanket assertion that tribal immunity was not waived. In *American Indian Agricultural Credit Union Consortium, Inc, .supra*, at p. 1377, the Appellate Court stated that the tribe had not waived its sovereign immunity under facts where the tribe had authorized a promissory note to be signed on its behalf and the tribe had received funds.

In *American Indian Agricultural Credit Union Consortium, Inc, .supra.*, the promissory note did *not* contain a clause requiring the parties to submit disputes to the tribal court, and the note did *not* require a party to first obtain an order from the tribal court before taking further action. The Court of Appeals for the Eight Circuit cited to *Ramey Construction Co., v. Apache Tribe*, 673 F. 2d 315, where the

following circumstances also did *not* constitute an waiver of tribal immunity: 1) agreeing to attorney's fees, 2) entering into a loan agreement, 3) submitting a certificate to the United States Economic Development Agency stating that the contract documents were valid, 4) obtaining payment and performance bonds, and 5) consenting to partial summary judgment with respect to retainage (held back money) and 6) including a sue or be sued clause in the corporate charter. *American Indian Agricultural Credit Union Consortium, Inc, supra., at p. 137901389, citing Ramey Construction Co., v. Apache Tribe, supra at 1379-1380.* In *American Indian Agricultural Credit Union Consortium, Inc, .supra,* the Eight Circuit acknowledged, back in 1985, that two new appellate decisions had ruled that a tribe had waived its sovereign immunity by agreeing to a contract clause providing that all disputes be submitted to arbitration *did* constitute an express waiver of sovereign immunity. (*American Indian Agricultural Credit Union Consortium, Inc, .supra,* at p. 1380 citing *Native Village of Eyak v. GC Contractors*, 658 P. 2d 756 (9th Circuit, 1983) and *Val/Del Inc., v. Superior Court*, 145 Ariz. 558, cert. denied 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 257 (1985)

However, the Eight Circuit found no waiver of sovereign immunity because the tribe, the Standing Rock Sioux Tribe, “...*did not explicitly consent to submit any dispute over repayment on the note to a particular forum,* or to be bound by its

judgment.” *American Indian Agricultural Credit Union Consortium, Inc.*, .supra, at p. 1380, (emphasis added)

In our case, since the parties agreed to submit the disputes to the Tribal Court, and the reasoning and rationale set forth in *American Indian Agricultural Credit Union Consortium, Inc.* supports the Appellants’ arguments.

The fact that the Tribe required under the five leases that all disputes be litigated in the tribal court supports waiver since the Tribe controlled the forum for the dispute resolution process (or regime). *American Indian Agricultural Credit Union Consortium, Inc.*, .supra, at p. 1378, citing *Beers v. Arkansas*, 174 U.S. 373 (1857).

The cases cited in the Response Brief in reference to the federal laws about other nations, such as Ireland or China, do not apply to the case at hand, as federal law. *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978) at p. 58.

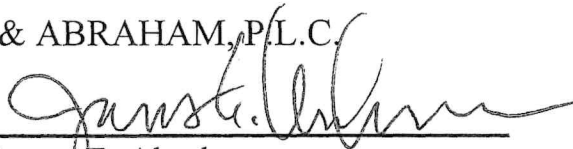
CONCLUSION

Under all cases examined and cited, the facts show that the Tribe expressly waived its sovereign immunity. The case should be remanded back to the trial court for a jury trial on the issues. Appellants request an award of attorneys' fees for this appeal.

RESPECTFULLY SUBMITTED this 16TH day of May, 2011.

CURL & ABRAHAM, P/L.C.

BY:



James E. Abraham

Attorneys for Appellant

Desert Modulars, Inc. and LLC

Capital.LLC

CERTIFICATE OF SERVICE

Original of the foregoing hand delivered and filed this 16th day of May, 2011

with:

Pascua Yaqui Tribe Court of Appeals
4701 W. Calle Tetakusim Bldg. A
Tucson, Arizona 85701-1374

and a copy of the foregoing served by U.S. mail this same date with:

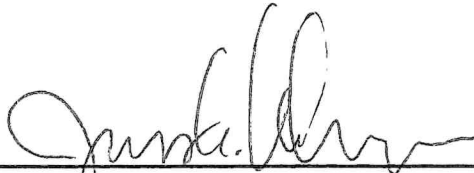
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IN THE PASCUA YAQUI COURT OF APPEALS

NO: CA-11-002

RE: NO. CV-10-123

Before the Pascua Yaqui Tribal Court

Desert Modulares, Inc. an AZ Corp, LLC

Capital LLC, Plaintiffs/Appellants

vs.

Pascua Yaqui Tribe, Defendant/Appellee

RESPONSE BRIEF OF APPELLEE PASCUA YAQUI TRIBE

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I. STATEMENT OF THE ISSUES

1. Whether the tribal court erred in finding it did not have subject matter jurisdiction over the suit and in dismissing the suit based upon the Pascua Yaqui Tribe's ("the Tribe") sovereign immunity.
2. Whether the tribal court erred in not finding an unconstitutional taking of property.

II. STANDARD OF REVIEW

The jurisdiction of the Pascua Yaqui Court of Appeals extends to all appeals from final orders and judgments of the Tribal Court. See Pascua Yaqui Const., art. VIII, §5. The Pascua Yaqui Court of Appeals shall review *de novo* all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. Boone v. Preston, CA-09-005, Pascua Yaqui Court of Appeals (2009), p. 6. Citing Pascua Yaqui Const., art. VIII §5. The issue of whether an Indian Tribe is immune from suit based upon the doctrine of sovereign immunity is a question of law.

III. ARGUMENT

1. The trial court correctly ruled that the Tribe did not waive its sovereign immunity and correctly dismissed Appellant DMI's complaint based on sovereign immunity.

Summary Judgment in favor of the Tribe was correct and the trial court did not rule in error. The Tribe included in each and every lease agreement at issue in this case an express provision indicating that the Tribe did **not** waive its constitutional sovereign immunity from suit. There is no justification for Appellants' continued litigation of this matter, for it is clear that each and every lease at issue in this case contained a provision

indicating that the Tribe expressly did not waive its sovereign immunity. (See Pascua Yaqui Tribe's Statement of Facts in Support of Cross-Motion for Summary Judgment ("PYT-SOF"), at ¶¶ 1-6). Therefore, Appellant's argument that a waiver can nevertheless be implied is frivolous and contrary to the law.

The law is clear: An Indian Tribe is subject to suit only where Congress has authorized the suit or when the Tribe has waived its sovereign immunity from suit. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). Neither of these situations are at issue in this case. Any waiver of sovereign immunity by a Tribe must be "unequivocally expressed, **and may not be implied.**" Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (emphasis added). Accord, e.g., American Indian Agricultural Credit Union Consortium, Inc. v. Standing Rock Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (a waiver of sovereign immunity cannot be by implication but must be express). The Pascua Yaqui Tribe's own Court agrees. As this Court ruled in its Order Granting Defendants' Motion to Dismiss in Frias v. Yucupicio, Case No. CV-08-002 (January 17, 2008)(page 4), "[i]n all circumstances, including contract actions, overwhelming legal precedent provides that the sovereign immunity of an Indian nation may not be waived by implication, but the waiver must be express." The Court there ordered dismissal, noting that "the doctrine of sovereign immunity has been in existence since the inception of the United States." Id., at page 5.

As admitted by Appellants in discovery, each and every modular office lease agreement at issue in this case contained a provision whereby the Tribe expressly

indicated it did not waive its immunity from suit. (See PYT-SOF ¶ 1). It is Appellants' own contention, and therefore not in dispute, that:

Lease No. 1793 expressly included the term: "This Agreement in no way waives any rights held by the Lessee under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article XXIV - Sovereign Immunity." (See PYT-SOF ¶ 2).

Lease No. 1844 expressly included the term: "This Agreement in no way waives any rights held by the Lessee under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article XXIV - Sovereign Immunity." (See PYT-SOF ¶ 3).

Lease No. 2022 expressly included the term: "This contract or agreement in no way waives any rights held by the PYT under the constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity." (See PYT-SOF ¶ 4).

Lease No. 2023 expressly included the term: "This Agreement in no way waives any rights held by the Lessee under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article XXIV - Sovereign Immunity." (See PYT-SOF ¶ 5).

Lease No. 2163 Revised expressly included the term: "This Lease in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article XXIV - Sovereign Immunity." (See PYT-SOF ¶ 6).

In spite of the clarity found in the leases, Appellants continue to assert that the Pascua Yaqui Tribe waived its sovereign immunity by implication in the very leases in which it expressly did not do so. Even though Appellants admit they were aware that the Tribe had no intention to waive its sovereign immunity in connection with any of the modular office leases (See PYT-SOF at ¶¶ 7-8), and even though Appellant admits that

each and every lease contained an express provision indicating that the Tribe did not waive its constitutional sovereign immunity (See PYT-SOF at ¶¶ 1-6), Appellants have taken the position that they may nevertheless assert that sovereign immunity was waived. This position strains credibility.

It is a logical and legal impossibility for Plaintiffs to prevail in their position that a waiver of sovereign immunity was implied in five agreements each stating expressly that sovereign immunity was not waived. For this reason, the facts of this case differ significantly from the facts of C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001). That case did not involve contracts in which the tribe expressly did not waive its sovereign immunity. (“The construction contract’s arbitration provision ... lead[s] to the conclusion that the Tribe in this case has waived its immunity with the requisite clarity.”) Id. at 412. There cannot be such “requisite clarity” in this case given express retention of sovereign immunity in each lease agreement.

2. Appellant Does not Have a Cognizable Takings Claim Against the Tribe.

As an initial matter, the Tribe’s takings clause is substantively identical to the takings clause found in the Fifth Amendment to the United States Constitution. The Tribe’s takings clause provides that the Tribe “shall not . . . [t]ake any private property for public use without just compensation,” while the United States’ takings clause provides: “nor shall private property be taken for public use, without just compensation.” Constitution of the Pascua Yaqui Tribe, Article I, Section 1(e); U.S. Const. Fifth Amendment. While case law construing the United States Constitution is not controlling

with respect to the meaning or proper construction of the Tribe's takings clause, the Court may consider such case law to the extent such case law is helpful. See 5 PYTC § 1-30(D) ("Where a matter is not addressed by Pascua Yaqui law, the Tribal Court shall apply the applicable laws and regulations of the United States, and may apply the laws of Arizona to the extent they do not conflict with the laws or policies of the Tribe.")

The parties are in agreement that the instant dispute arises out of and is governed by the terms of written contract between them. See Plaintiff's Complaint at pp. 2-3; Defendant's Motion to Dismiss at pp. 1-2; Appellant's Brief at pp. 1, 5-6; Defendant's Cross-Motion for Summary Judgment Regarding Sovereign Immunity at p. 2. Under these circumstances, Appellant simply does not have a cause of action against the Tribe for takings without just compensation. Instead, where parties' rights and obligations are set forth in a written contract, it is well-settled that an aggrieved party has a cause of action for breach of contract rather than a takings claim. See, e.g., Niagara Mohawk Power Corp. v. United States, ___ Fed. Cl. ___, 2011 WL 1335807, *3 (Fed. Cl. 2011); Lawndale Restoration Ltd. Partnership v. Boulevard Realty Services Corp., 95 Fed. Cl. 498, 512 (Fed. Cl. 2010) (the general rule is that takings claims do not arise under contracts with the government because remedies are provided by the contract) (citations omitted); Environmental Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77, 100 (Fed. Cl. 2010) ("The government's alleged failure to pay plaintiffs for work they completed on the contracts is a claim for breach of contract and any remedy plaintiffs have is a remedy arising under their contracts with the government, not under the Takings Clause."). This is the case even in instances where the contract remedy does not offer the

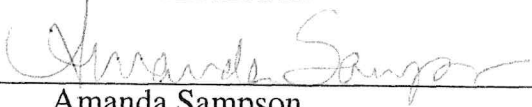
plaintiff a complete remedy. See Niagara Mohawk, ___ Fed. Cl. ___, 2011 WL 1335807,*3 (“the lack of a ‘complete’ contract remedy, either because it would not include interest or because the contract theory does not yield a recovery, does not give life to a takings theory.”) (quoting Home Savings of America, F.S.B. v. United States, 51 Fed. Cl. 487, 495-96 (Fed. Cl. 2002)); Granite Management Corp. v. United States, 55 Fed. Cl. 164, 166 (Fed. Cl. 2003) (holding that unavailability of prejudgment interest on breach of contract claim does not give rise to a takings claim). Under these circumstances, Appellant does not have a takings claim against the Tribe.

IV. CONCLUSION

Plaintiffs seek to construe leases that contain clear provisions retaining the Tribe’s sovereign immunity as a waiver of that same sovereign immunity. The law is clear, waivers of sovereign immunity must be express rather than implied. In the face of a clear retention of sovereign immunity in each and every lease agreement, there can be no waiver implied. The tribal court did not err in dismissing the case based upon sovereign immunity nor in failing to find an unconstitutional taking, and therefore this court should uphold the tribal court’s order of dismissal.

RESPECTFULLY SUBMITTED this 26th day of April, 2011.

PASCUA YAQUI TRIBE OFFICE OF THE
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PASCUA YAQUI TRIBE COURT OF APPEALS



DESERT MODULARS INC, an Arizona
corporation; LLC CAPITAL.LLC, a
corporation,

Appellant

v.

PASCUA YAQUI TRIBE,

Appellee

NO. CA-11-002

**APPELLANT DESERT MODULARS, INC. & LLC CAPITAL.LLC'S
OPENING BRIEF**

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Statement of the Case

Appellants/Lessors entered into five contracts for the lease of modular office buildings which were used by the Tribe on the Pascua Yaqui reservation.

Four leases contained provisions that in the event the Tribe stopped making payments then the Pascua Yaqui Tribal Court (“Tribal Court”) would have exclusive jurisdiction to resolve any dispute.

Some leases contained provisions that in the event of a default, such as failure to pay rent, then the Appellants/Lessors had to obtain an order from the Tribal Court to gain repossession of their property.

The Tribe paid rent for the use of the five modular offices for several years. The Tribe stopped making leases payments, and refused to return the modular offices.

Statement of the Proceedings

In the Tribal Court, the Appellants/Lessors filed a complaint seeking as relief monetary damages and also seeking the equitable relief of an order requiring the Tribe to return the physical possession of the five modular offices to their owner the Appellants/Lessors.

The Tribe filed a Motion to Dismiss on the basis of sovereign immunity. The Appellants/Lessors filed oppositions arguing that the Tribe waived its sovereign immunity and that the actions of the Tribe violated the Pascua Yaqui Constitution's prohibition of a taking of property without due process and just compensation.

The Tribal Court granted the Tribe's Motion to Dismiss on the basis of sovereign immunity.

The Appellants/Lessors filed this appeal to the Pascua Yaqui Tribal Court of Appeals, seeking the reversal of the Tribal Court's ruling granting the Tribe's Motion to Dismiss, and seeking an order for further proceedings including a jury trial on all claims in the complaint.

Statement of Disposition in the Trial Court

The Tribal Court by Judge Stoof granted the Motion to Dismiss.

Statement of Facts

On June 23, 2010, Appellants/Plaintiffs Desert Modular, Inc. and LLC Capital. LLC filed their complaint in the Pascua Yaqui Tribal Court therein alleging that they were corporations authorized to conduct and transact its business of leasing modular offices in the State of Arizona. (Complaint, p. 1, ll. 21-25)

Appellants alleged in their complaint that the Pascua Yaqui Tribe is a federally recognized Indian Tribe organized and existing under *Divine Guidance*, per the Preamble to the Constitution of the Pascua Yaqui Tribe, and the Tribe is also organized and existing pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended. (Complaint, p. 1, ll. 21-25)

Appellants alleged in their complaint that the Pascua Yaqui Tribal Court has jurisdiction over the pending action pursuant to Article II – Jurisdiction, of the Constitution of the Pascua Yaqui Tribe, pursuant to the Pascua Yaqui Tribal Civil Code, Chapter 1, Section 10, Subject Matter Jurisdiction in General (5 PYTC Sec. 1-10) and Section 20, Subject Matter Jurisdiction, Specific Actions, (5 PYTC Sec. 1-20). (Complaint, p. 1, ll. 21-25)

Appellants alleged in their complaint that under Section 20 (A), the Tribal Court shall have subject matter jurisdiction over all real and personal property located on the Reservation to determine the application of such property to the satisfaction of a claim relating to the property. (Complaint, p. 1, ll. 21-25)

Appellants alleged in their complaint that pursuant to the Pascua Yaqui Civil Code, Section 20(B) the Tribal Court shall have subject matter jurisdiction over all civil causes of action, regardless of whether the parties are Indian or non-Indian. (Complaint, p. 2, ll. 13-15)

Appellants alleged in their complaint that under Section 30, Title 3, of the Pascua Yaqui Tribal Code, Part 1, Chapter 1-1, Section 30(B)(6) and (8) and (9) and (10) the Tribal Court has jurisdiction over the parties to this action since the parties entered into contracts for the lease of property, and the performance of the lease (the delivery and use of the subject property under the leases) occurred within the confines of the Pascua Yaqui Reservation in Tucson, Arizona. (Complaint, p. 2, ll. 16-20)

Appellants alleged in their complaint that Plaintiff Desert Modular, Inc. and the Tribe entered into the five written contracts, each called a “lease agreement,” where under Plaintiff Desert Modular, Inc. provided and installed modular offices on the Pascua Yaqui Reservation, for the use of the employees of the Tribe in the administration of the Tribe’s government and business, and the Tribe made money payments (lease payments) to the Plaintiffs Desert Modular, Inc. and also to LLC Capital. LLC, which was an assignee of Plaintiff Desert Modular, Inc. under two of the five leases, as stated below. (Complaint, p. 2, ll. 22-26, p. 3, ll. 1)

Appellants alleged in their complaint that the following five written

contracts were entered into between Plaintiff Desert Modular, Inc. and the Tribe in the form of lease agreements:

1. Lease Agreement No. 1793, dated December 1, 1999, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a 42' by 66' modular office which was located at 7774 S. Camino de Oeste, (now being used as the Procurement Office), and
2. Lease Agreement No. 1844, dated July 19, 2000, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a 36' by 60' modular office which was located at the site for the Information Technology modular location (now being used as Adult Education), and
3. Lease Agreement No. 2022, dated November 7, 2000, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a 42' by 62' modular office which was located at 4725 Calle Tetakusim, (the former Enrollment Office and now is being used as the Attorney General's office), and
4. Lease Agreement No. 2023, dated July 9, 2001, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a

40' by 62' modular office which was located at 4725 Calle Tetakusim, (now is being used as the Prosecutor's office)

5. Lease Agreement No. 2163 (also known as lease No. 1582), dated July 9, 2001, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a 40' by 62' modular office (which was used for the Internal Audit office).

(Complaint, p. 3, ll. 2-25)

Appellants alleged in their complaint that all rights and obligations of the Lessor under Lease Agreements 2022 and 2023 were assigned by Lessor Desert Modular, Inc. to LLC Capital. LLC on August 3, 2001. (Complaint, p. 3, ll. 25-26, p. 4, ll. 1)

Appellants alleged in their complaint that under each of the five written contracts described above, the Tribe, as the Lessee, after the minimum term of the lease had been performed, enjoyed and possessed the contractual right to give 30 days written notice of intent to terminate the lease. The termination of the lease would be effective at the expiration of the 30 days from the date the Lessee mailed its intent to terminate the lease. (Complaint, p. 4, ll. 2-7)

Appellants alleged in their complaint that the Tribe never sent any written notice of intent to terminate any of the written contracts described above as the lease agreements. (Complaint, p. 4, ll. 8-9)

Appellants alleged in their complaint that under each of the five written contract lease agreements described above, after the expiration of the minimum term stated in the lease, if the lease had not been terminated, which none were, then each lease was deemed to be a lease on a month-to-month basis at the one month rate then in effect, with the same terms and conditions provided in the written contracts (in effect). (Complaint, p. 4, ll. 10-15)

Appellants alleged in their complaint that the first written contract described above, lease No. 1793, dated December 1, 1999 contained clauses which stated:

“18. Access to Legal Counsel

This agreement is made and entered into voluntarily by Lessee and Lessor, free and clear from any duress or influence on either party by the other. Lessee and Lessor warrant that each has read this Agreement in its entirety. Lessee and Lessor have been advised fully and adequately by their respective legal counsel, of their own choice, as to the character and legal effect of all terms and covenants contained in this Agreement. Lessee and Lessor further warrant that each fully understands the nature and effect of said terms and covenants prior to the execution of the Agreement.

19. Joint Responsibility For Composition

Lessee and Lessor are willing to and do now assume joint responsibility for the form and composition of each and all of the terms of this Agreement between Lessee and Lessor. Lessee and Lessor further agree that this Agreement shall be interpreted as though the Lessee and Lessor each participated equally in the composition of this Agreement and each and every part thereof, both the Lessee and Lessor waiving any applicable rule of law to the contrary.

20. Knowledge of Financial Consequences

Lessee and Lessor have entered into this Agreement voluntarily and

with full knowledge of the financial consequences to their respective financial status. Lessee and Lessor declare that each believes this Agreement to be fair, just and reasonable, and each signs this agreement freely and voluntarily.”

(Complaint, p. 4, ll. 9-26, p. 5, ll. 1-6)

Appellants alleged in their complaint that the parties performed their respective contractual obligations under the five written contracts, until 2009 when the Tribe stopped making money rent payments owed under the five written contracts described herein. Plaintiffs requested that payments be made current, but the Tribe refused. (Complaint, p. 5, ll. 7-11)

Appellants alleged in their complaint that the Tribe’s refusal and actual failure to make the rent payments owed to the Plaintiffs pursuant to the five written contracts described above constituted material breaches of contract by the Tribe. (Complaint, p. 5, ll. 12-14)

Appellants alleged in their complaint that The Tribe’s actions as described herein also constitute the taking of the Plaintiffs’ private property, the five modular offices leased by the Plaintiffs to the Tribe, and parts thereof, for public use by the Tribe without just compensation, which was done by the Tribe in violation of the Constitution the Pascua Yaqui Tribe, Article I- Bill of Rights, Section 1.e. (Complaint, p. 5, ll. 16-19)

Appellants alleged in their complaint that under the terms of the five written contracts described herein, if Lessee fails to pay rent when rent payments are due

and owed, which Lessee (Defendant Tribe) has failed to do under each written contract lease agreement, then the Lessee (Defendant Tribe) is in default, and the Lessors (Plaintiffs) have the right to recover from the Lessee (Defendant Tribe) the sums owed for back rent, interest thereon until paid, the right to an order of repossession from the Tribal Court for each modular office, and also an award for economic and monetary damages caused by the default by the Tribe, including an award for the costs to remove and transport the five modular offices, as well as damages for incurring other repossession expenses, including charges and fees for disconnection of utilities, and other reasonable expected expense related to the repossession of the five modular offices. (Complaint, p. 5, ll. 20-26, p. 6, ll. 1-4)

Also, upon the Tribe's default and breaches of the five contracts, as alleged herein, the Plaintiffs are entitled under the five written contract lease agreements to recover from the Tribe the Plaintiffs' reasonable attorney's fees and court costs associated with the bringing and prosecution of this action. (Complaint, p. 6, ll. 6-9)

Appellants in their complaint requested the Tribal Court to grant the following relief:

1. For judgment in favor of Plaintiffs and against the Tribe in a sum representing the unpaid and owing lease payments owed by the Tribe to the Plaintiffs from the due date under each lease through the month that the modular

offices are actually removed, plus interest on unpaid rent according to the terms of the contracts, until paid in full; and

2. For orders of repossession allowing the Plaintiffs to remove and take possession of the five modular offices; and

3. For an award and judgment in favor of the Plaintiffs and against the Tribe in a sum representing the reasonable attorney's fees and costs incurred by the Plaintiffs for the bringing and prosecution of this action; and

4. For judgment or order granting such other and further damages and awards as are consistent with the evidence. (Complaint, p. 6, ll. 11-24)

On July 22, 2010, Appellee/Defendant Pascua Yaqui Tribe responded to the Appellants/Plaintiffs complaint by filing a Motion to Dismiss.

On August 4, 2010, Appellants/Plaintiffs filed a Response.

On January 10, 2011, the Tribal Court issued its order granting the Appellee/Defendant's Motion to Dismiss. In its Order, the Tribal Court did not address or rule on the Appellants/Plaintiffs' separate claim that the actions of the Appellee/Defendant Pascua Yaqui Tribe constituted a taking of the Appellee/Defendant's property without just compensation.

On January 20, 2011, the Appellants/Plaintiffs filed a Motion to Reconsider, which stated that: "In the remedies section of the leases, language inserted by the

Tribe to replace standard text in Desert Modulars' pre-printed forms, explicitly gave the Plaintiff Lessors the following rights upon default:

If the Lessee fails to pay rent ... the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment [upon] default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. ... If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitles [sic] to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default. [See paragraph 11 of the accepted lease form.]

Appellants/Plaintiffs' filed their Motion to Reconsider, dated 1/20/11, p. 2, ll. 24-26, p. 3, ll. 1-6)

Statement of Issues Presented for Review

- I. Did the Trial Court err in its ruling that the Tribe had not waived its sovereign immunity by signing a written lease: 1) where the lease stated that if a dispute arose under the lease then the Tribal Court would be the forum where all disputes would be resolved, or 2) where the lease stated that in order to obtain the equitable relief of repossession of their property the Appellants/Lessors must obtain an order from the Tribal Court?

- II. Did the Trial Court err in its ruling that it did not have subject matter jurisdiction over a claim filed by a non-Indian who had alleged that the actions of the Tribe violated the Pascua Yaqui Constitution's prohibition against a taking of property without due process and fair compensation?

Argument

I. Did the Trial Court err in its ruling that the Tribe had not waived its sovereign immunity by signing a written lease: 1) where the lease stated that if a dispute arose under the lease then the Tribal Court would be the forum where all disputes would be resolved, or 2) where the lease stated that in order to obtain the equitable relief of repossession of their property the Appellants/Lessors must obtain an order from the Tribal Court?

Appellants/Lessors filed their complaint in Tribal Court and through this action submitted themselves to the jurisdiction of the Tribal Court and through this filing requested that the Tribal Court take subject matter jurisdiction over their claims for monetary damages and for equitable relief.

Four of the leases require that the Appellants/Lessors' repossession of the leased property (upon) default may occur "*...only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court.*" (Appendix A, leases # 1793, #2011, #2023, and #1844, not #2163 revised) Four of the leases require that *all disputes arising under the lease shall be submitted to the jurisdiction of the Pascua Yaqui Tribal Court* (Appendix A, leases # 1793, #2163 revised, #2022, and #1844, not #2023)

The Appellants/Lessors had asked the Tribe to make payments current and the Tribe refused. (Complaint, p. 5, ll. 10-11) The Tribe still has physical

possession of the five modular offices and the Appellants/Lessors have requested that the Tribal Court issue an order of repossession. This is a dispute which under leases # 1793, #2163 revised, #2022, and #1844, but not lease # 2023, would be required to be submitted to the Tribal Court since all disputes under the lease must be submitted to Tribal Court. (Appendix A, leases # 1793, #2163 revised, #2022, and #1844, not #2023) However, lease #2023 is one of the leases that require that the Appellants/Lessors' may obtain possession of the leased property (upon) default "...only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court." (Appendix A, leases # 1793, #2163 revised, #2022, and #1844, not #2023) Therefore, *all* five leases require that the dispute over the physical possession of the five offices be submitted to the Tribal Court.

The Appellants/Lessors requested relief in their complaint that the Tribal Court order the Tribe to deliver the physical possession of the five modular offices to them. This request is a request for equitable relief. Equitable relief is defined as "That species of relief sought in a court with equity powers, for example, in the case of one seeking an injunction or specific performance instead of money damages." *Black's Law Dictionary, Fifth Edition*, at p. 484.

The Appellants/Lessors filed their complaint in Tribal Court as required under the five leases. Instead of agreeing to resolve disputes over commercial lease contracts performed by Indians and non-Indians within the tribal community, the

Tribe filed a motion to dismiss all claims of Appellants/Lessors' complaint by throwing up the shield of sovereign immunity.

At the hearing on the Motion to Dismiss, after oral arguments, the tribal court trial judge read in open court an order which he had already written. The order dismissed all claims in the Appellants/Lessors' complaint on the basis of tribal immunity. (Tribal Court's Order Granting Tribe's Motion to Dismiss, at pp. 4 and 5) The tribal judge's written order cited to a controlling U.S. Supreme Court case, *C & L Enterprises, Inc., v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411; 121 S. Ct. 1589; 149 L. Ed. 2d 623 (U.S. Supreme Court, 2001). The tribal judge wrote that "The C & L case involved a contract where the Tribe expressly did not waive its sovereign immunity, but the parties did agree to arbitrate." (Tribal Court's Order Granting Tribe's Motion to Dismiss, at p. 4, lines 23-25)

In *C & L Enterprises, supra*, an Indian tribe entered into a contract for the installation of a roof on a commercial building owned by the tribe on off-reservation, nontrust land. The standard form construction contract, which was proposed by the tribe, contained (1) an arbitration clause providing that disputes between the parties would be decided by arbitration, that an award rendered by the arbitrator would be final, and that judgment could be entered upon an arbitral award in accordance with applicable law in any court having requisite jurisdiction,

and (2) a choice-of-law clause providing that the contract would be governed by the law of the place where the project was located. The issue was whether the tribe had waived its sovereign immunity by entering into the arbitration agreement. The Supreme Court reasoned that since the tribe had chosen a means of resolving the dispute that it had made a clear waiver of its sovereign immunity:

Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate. Brief for Respondent 21 ("An arbitration clause is what it is: a clause submitting contractual disputes to arbitration."). The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See Eyak, 658 P.2d at 760 ("We 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 The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed."); Val/Del, 145 Ariz. at 565, 703 P.2d at 509 (because the Tribe has "agreed 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"); cf. Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560, 562 (CA8 1995) (agreement to arbitrate contractual disputes did not contain provision for court enforcement; court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense"). *C & L Enterprises, supra*, at p. 422.

The same reasoning applies to the facts of our case. All five leases required that either: 1) the Tribal Court had exclusive jurisdiction over all disputes arising

under the lease, or, 2) that the Appellants/Lessors had to obtain an order from the Tribal Court in order to obtain the equitable relief of repossession of their property. As discussed above, *all* five leases require that the dispute over the physical possession of the five modular offices be submitted *somewhere*, in our case to the Tribal Court. Instead of submitting the resolution of the dispute over physical possession of the five offices to resolution through arbitration, all five of our leases specifically required and stated in writing that the Tribal Court is the place to resolve the issue of physical possession of the five modular offices.

This rationale of *C & L Enterprises, Inc, supra*, logically applies to the facts in our case. In *C & L Enterprises, Inc, supra*, the parties agreed to resolve disputes through arbitration. In our case, the parties agreed to resolve disputes through the Pascua Yaqui Tribal Court. This includes especially the dispute over physical possession of the five modular offices. The key point of the rationale is not *what kind* of dispute resolution was chosen, but that the Tribe agreed to *some kind* of a “dispute resolution regime,” which was through the Tribal Court.

The rationale of the U.S. Supreme Court that the parties in *C & L Enterprises, Inc, supra*, agreed to submit disputes to *a procedure* was the main point. The Tribe agreed to *some kind* of a “dispute resolution regime.” Under the terms of all five leases, the Tribe no longer had the right of the sovereign to proclaim: “I don’t have to play your dispute resolution game *anywhere*.” Once the

Tribe agreed that all disputes, particularly the dispute of physical possession, would be submitted to the “dispute resolution regime” of the Tribal Court then the sovereign immunity defense was waived.

The tribal judge’s analysis in our case did not even consider that the Tribe agreed to submit any disputes through the “dispute resolution regime” of the Tribal Court. The tribal trial judge for some reason totally ignored the rationale of the U.S. Supreme Court as explained by Justice Ginsburg in *C & L Enterprises, Inc, supra*. Instead of focusing on the key fact that the Tribe had agreed to participate in a “dispute resolution regime” of the Tribal Court, and thereby waiving any sovereign immunity defense, our tribal trial judge apparently distinguished *C & L Enterprises, Inc, supra* by focusing on the insignificant fact that the parties had agreed to arbitration, rather than to another “dispute resolution regime”: “The *C & L* case involved a contract where the Tribe expressly did not waive its sovereign immunity, but the parties did agree to arbitrate. This case does not involve such an arbitration clause that impliedly waives the Tribe’s immunity from suit.” (Tribal Court’s Order Granting Tribe’s Motion to Dismiss, at p. 4, ll. 23-25) Our tribal trial judge overlooked the whole point of *C & L Enterprises, Inc, supra*, that the sovereign immunity was waived when the Tribe agreed to submit disputes to “dispute resolution regime”...which was Tribal Court. *C & L Enterprises, Inc, supra*.

The tribal court trial judge cited to *Demontiney v. U.S.*, 255 F. 3d 801 as authority that “there is a strong presumption against waiver of tribal sovereign immunity.” In *Demontiney, supra*, the plaintiff contractor filed his suit in U.S. District Court which dismissed it. The Ninth Circuit for the U.S. Appellate Court of Appeals affirmed. However, the facts of *Demontiney, supra* are quite different from the facts on our case. In *Demontiney, supra*, the plaintiff filed suit in U.S. District Court, not tribal court. The Ninth Circuit pointed out that the contract provisions that the plaintiff argued waived tribal sovereign immunity did not waive tribal sovereign immunity in U.S. District Court, but the contract provisions “... support a waiver of sovereign immunity only for claims asserted in Tribal Court.” *Demontiney, supra*, at p. 813. *Demontiney, supra*, is authority that the Tribe did waive its sovereign immunity to actions fled in tribal court.

The tribal court trial judge cited to *Demontiney, supra*, which the tribal court trial judge pointed out cited to *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (CA9 1989) (Tribal Court’s Order Granting Tribe’s Motion to Dismiss, at p. 5, lines 7-9) To any extent that our tribal court trial judge was supported by *Pan American Co., supra*, such support must lessened by the fact that Justice Ginsburg made clear that *Pan American Co., supra*, was overruled by *C & L Enterprises, Inc, supra*. Justice Ginsburg explained that prior to *C & L*

Enterprises, Inc, supra, there was a conflict between the federal appellate circuits which was resolved:

Conflicting with the Oklahoma Court of Civil Appeals' current decision, several state and federal courts have held that an arbitration clause, kin to the one now before us, expressly waives tribal immunity from a suit arising out of the contract. See *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 661 (CA7 1996) (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived Tribe's immunity); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (same); *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 703 P.2d 502 (Ct. App. 1985) (same). But cf. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (CA9 1989) (clause requiring arbitration of contractual disputes did not expressly waive Tribe's immunity). **We granted certiorari to resolve this conflict**, 531 U.S. 956, 121 S. Ct. 377, 148 L. Ed. 2d 291 (2000), **and now reverse**. *C & L Enterprises, Inc, supra*, at p. 417. (emphasis added)

Our tribal court trial judge cited to *American Indian Agricultural Credit Union Consortium, Inc. v. Standing Rock Sioux Tribe*, 673 F. 3d 315 for the authority that "...overwhelming legal precedent provides that the sovereign immunity must not be waived by implication, but the waiver must be express." (Tribal Court's Order Granting Tribe's Motion to Dismiss, at p. 5, lines 11-13)

The Eighth Circuit in *Sokaogon Gaming Enterprise Corporation v. Tushie - Montgomery*, 86 F. 3d 656 (1996) described the facts of *American Indian Agricultural Credit Union Consortium, Inc. supra*, as:

The tribe signed a promissory note that mentioned "rights and remedies provided by law," authorized the promisee to recover its attorney's fees in collecting the note, and even contained a choice of

law clause. From all this, consent to be sued could readily be inferred, but it was not explicit, because the *note did not spell out how rights were to be enforced and remedies obtained*. The reader would have had to know or look up some law. *Sokaogon Gaming Enterprise Corporation, supra*, at p. 7.

The facts of the tribal court trial judge's cited case of *American Indian Agricultural Credit Union Consortium, Inc. supra*, are different from our case, in that our five leases expressly stated that the dispute over the physical possession of the five modular offices was expressly stated to be required to be submitted to the Tribal Court.

In *Sokaogon Gaming Enterprise Corporation, supra*, the Eighth Circuit wrote that:

TMI's principal ground for arguing that the tribe waived its sovereign immunity is the arbitration clause itself, which after stating that "claims, disputes or other matters" arising out of or related to the contract "shall be subject to and decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association," adds that the agreement to arbitrate "shall be specifically enforceable in accordance with applicable law in any court having jurisdiction" and that "judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof."

Sokaogon Gaming Enterprise Corporation, supra, at p. 7.

The Eighth Circuit wrote that:

There is nothing ambiguous about this language. The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law.

Sokaogon Gaming Enterprise Corporation, supra, at p. 7.

Likewise, in our case, the agreement to submit the dispute over the physical possession of the five modular offices expressly state that all disputes shall be submitted to the Tribal Court or that an order for repossession must be obtained from the Tribal Court.

The facts of the tribal court trial judge's cited case of *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (1982) are different from our case, in that none of the facts that were claimed, but failed, to have constituted a waiver of sovereign immunity in *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, *supra*, have been asserted as a basis for waiver of sovereign immunity in our case:

(1) agreeing to an attorneys' fees clause in the contract; (2) entering into a loan agreement with the Bank of New Mexico obligating the Tribe to "duly pay and discharge ... all claims of any kind ..."; (3) submitting a certificate to the United States Economic Development Agency stating that the contract documents "constitute valid and legally binding obligations upon the parties ..."; (4) obtaining payment and performance bonds from a surety; (5) consenting to partial summary judgment with respect to the contract retainage; and (6) including a "sue and be sued" clause in its tribal corporate charter. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, *supra*, at p. 319.

Our five leases expressly stated that the dispute over the physical possession of the five modular offices was required to be submitted to a dispute resolution process, the Tribal Court. The Tribe's sovereign immunity was waived.

II. Did the Trial Court err in its ruling that it did not have subject matter jurisdiction over a claim filed by a non-Indian which alleged that the actions of the Tribe violated the Pascua Yaqui Constitution's prohibition against a taking of property without due process and without just compensation? The Constitution of the Pascua Yaqui Tribe, Article I – Bill of Rights, Section 1. e. states that “Consistent with the provisions of this Constitution, the Pascua Yaqui Tribe in exercising its powers of self-government shall not: (e.) Take any private property for public use without just compensation.”

Appellants alleged in their complaint that under Section 20 (A), the Tribal Court shall have subject matter jurisdiction over all real and personal property located on the Reservation to determine the application of such property to the satisfaction of a claim relating to the property. (Complaint, p. 1, ll. 21-25)

Appellants alleged in their complaint that pursuant to the Pascua Yaqui Civil Code, Section 20(B), the Tribal Court shall have subject matter jurisdiction over all civil causes of action, regardless of whether the parties are Indian or non-Indian. (Complaint, p. 2, ll. 13-15)

Appellants alleged in their complaint that under Section 30, Title 3, of the Pascua Yaqui Tribal Code, Part 1, Chapter 1-1, Section 30(B)(6) and (8) and (9) and (10) the Tribal Court has jurisdiction over the parties to this action since the parties entered into contracts for the lease of property, and the performance of the

lease (the delivery and use of the subject property under the leases) occurred within the confines of the Pascua Yaqui Reservation in Tucson, Arizona. (Complaint, p. 2, ll. 16-20)

Appellants alleged in their complaint that Plaintiff Desert Modular, Inc. and the Tribe entered into the five written contracts, each called a “lease agreement,” where under Plaintiff Desert Modular, Inc. provided and installed modular offices on the Pascua Yaqui Reservation, for the use of the employees of the Tribe in the administration of the Tribe’s government and business, and the Tribe made money payments (lease payments) to the Plaintiff Desert Modular, Inc. and also to LLC Capital. LLC, which was an assignee of Plaintiff Desert Modular, Inc. under two of the five leases. (Complaint, p. 2, ll. 22-26, p. 3, ll. 1)

Appellants alleged in their complaint that the parties performed their respective contractual obligations under the five written contracts, until 2009 when the Tribe stopped making money rent payments owed under the five written contracts described herein. Plaintiffs requested that payments be made current, but the Tribe refused. (Complaint, p. 5, ll. 7-11)

Appellants alleged in their complaint that The Tribe’s actions as described herein also constitute the taking of the Plaintiffs’ private property, the five modular offices leased by the Plaintiffs to the Tribe, and parts thereof, for public use by the Tribe without just compensation, which was done by the Tribe in violation of the

Constitution the Pascua Yaqui Tribe, Article I- Bill of Rights, Section 1.e. (Complaint, p. 5, ll. 16-19)

Appellants in their complaint requested the Tribal Court to grant the following relief: 2. For orders of repossession allowing the Plaintiffs to remove and take possession of the five modular offices. Complaint, p. 6, ll. 11-24)

The tribal court trial judge totally ignored the Appellants/Lessors' separate claim that the alleged actions of the Pascua Yaqui Tribe constituted a taking of the Appellants/Lessors' property without just compensation. The tribal court trial judge's order of January 10, 2011 is totally devoid of any reference, mention, hint or inkling about the Appellants/Lessors' taking claim. The order simply dismissed the entire complaint citing to the sovereign immunity defense with no mention of the taking claim under the Pascua Yaqui Constitution.

The Appellants/Lessors agree with the general ideas set forth in the tribal court trial judge's order of January 10, 2011, at page 2, lines 3-22, that the federal body of law encourages and supports tribal self government and that claims and disputes with tribes should be submitted to tribal courts, as the Appellants/Lessors have attempted to do by filing their action in Tribal Court. It is ironic that in many of the reported cases involving the question of jurisdiction of tribal courts over non-Indians the appellants were in federal courts trying to escape the jurisdiction of the tribal court. See, for example, *A & A Concrete, Inc. v. White Mountain*

Apache Tribe, 781 F.2d 1411 (1986) and *Elliott v. White Mountain Apache Tribal Court*, 566 F. 3d 842 (2009). However, in our case the Appellants/Lessors have had the door of the tribal court slammed shut in their face for the wrong reason (sovereign immunity) and no stated reason (the failure to even acknowledge the taking claim).

The prevailing federal law requires that the Appellants/Lessors urge the Pascua Yaqui Tribe's Court of Appeals to reverse the rulings of the tribal court trial judge and allow the Appellants/Lessors their basic right to due process as guaranteed by the Pascua Yaqui Tribe Constitution. The U.S. Supreme Court explained that claims like the Appellants/Lessors should be brought in tribal court:

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.²⁰ That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.²¹ Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.²² The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction²³ and to rectify any errors it may have made.²⁴ Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.²⁵ *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, at p. 856-857.

The Appellants/Lessors are exhausting their remedies in the tribal court system through this appeal. Thus far, it seems that under the Pascua Yaqui Tribal Court system if an employee of the Tribe while acting within the scope of his or her job duties on the reservation seized a motor vehicle to deliver the mail then there would be nothing that the auto owner could do about the taking of his or her private property. If the auto owner filed a complaint against the Tribe in the Tribal Court alleging conversion and seeking the equitable relief of an order of possession of the stolen automobile then the Tribal Court would dismiss the complaint on the basis of the Tribe's sovereign immunity, despite the prohibition in the Pascua Yaqui Tribe Constitution against such a taking without just compensation.

However, "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under §1331." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, at p. 855. The U.S. Supreme Court considered whether an aggrieved party could go directly to U.S. District Court for relief, particularly for an injunction, which is equitable relief, as would be an order for possession of personal property such as modular offices. The Court stated that:

We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is

conducted in bad faith.” cf. *Juidice v. Vail*, 430 U.S. 327, 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of a lack of an adequate opportunity to challenge the court’s jurisdiction.

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, at p. 857.

A reasonable person who has walked in the shoes of the Appellants/Lessors thus far might feel as though they had been dealt with unfairly where a tribal court trial judge dismissed their complaint and failed to explain why a separate taking claim was denied, in the context of a pre-written order that discussed sovereign immunity for over five pages therein citing to and relying upon outdated and overruled cases, ignoring the rationale of the U.S. Supreme Court, and also failing to notice any factual distinctions in the unfavorable cases, and also failing to notice factual similarities between key facts in reported case law and the facts of the case at issue.

- Some reasonable people similarly situated as the Appellants/Lessors might have reacted by filing an action in U.S. District Court alleging that further proceedings in the Tribal Court would be futile and alleging a federal claim based on the denial of due process for the taking of the modular offices in violation of the Pascua Yaqui Constitution and the Fifth Amendment to the U.S. Constitution. Instead, the Appellants/Lessors have followed the federal law that encourages parties to have faith in the tribal court system and the Appellants/Lessors have filed this appeal.

The doctrine of sovereign immunity cannot trump the clause in the Pascua Yaqui Tribe Constitution prohibiting the taking of property for governmental use without due process and just compensation. The Tribe should not be allowed to wrongfully and illegally take property without due process and without just compensation and then try to hide behind the shield of sovereign immunity.

CONCLUSION

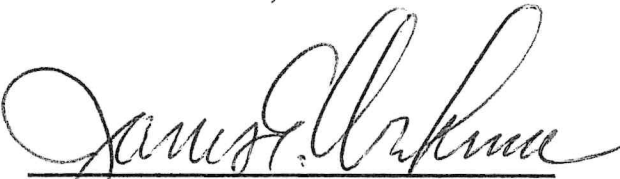
The Tribe waived sovereign immunity. *C & L Enterprises, Inc, supra.*

The doctrine of sovereign immunity cannot trump the Pascua Yaqui Tribe Constitution prohibiting the taking of property for governmental use without due process and just compensation.

Appellants/Lessors request that the order dismissing the complaint be reversed, and the Tribal Court ordered to conduct further proceeding upon the complaint, including the conducting of a jury trial to resolve all pending issues.

RESPECTFULLY SUBMITTED this 24th day of March, 2011.

CURL & ABRAHAM, P.L.C.

BY: 

James E. Abraham
485 S. Main Avenue
Tucson, Arizona 85701-2227
Attorneys for Appellant
Desert Modulares, Inc. and LLC
Capital.LLC

APPENDIX A

During the course of the briefing of the Motion to Dismiss, the Tribal Court reviewed the five leases which leases contain the following written provisions:

LEASE AGREEMENT NO. 1793:

This equipment will be located at 7474 S. Camino de Oeste.

LEASED EQUIPMENT

DESCRIPTION – 42' X 66 Modular Office

The equipment shall remain personal property regardless of its use or manner of attachment to the ground.

7. Inspection by Lessor: The Lessor has the right to enter upon the Pascua Yaqui Reservation for the purposes of delivery, setup, maintenance and repair of the unit.

11. Default by Lessor: If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment (upon) (sic) default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including

damages charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitles to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

The equipment shall remain personal property regardless of its use or manner of attachment to the ground.

7. Inspection by Lessor: The Lessor has the right to enter upon the Pascua Yaqui Reservation for the purposes of delivery, set-up, maintenance and repair of the unit and for the purposes of repossession of the unit in the event of default or upon the termination of the Lease Agreement.

11. Default by Lessee: If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee or take possession of the equipment by giving written notice to the Lessee. The equipment shall be surrendered to the Lessor and the Lessee authorizes the Lessor to enter any premises of the Lessee without notice to repossess the equipment. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages, charges as provided for in

Paragraph (5). If the Lessee defaults, in addition to rental, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

12. Miscellaneous: This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona in and by the Pascua Yaqui tribal Court, the lessor hereby expressly agreeing to jurisdiction in the Pascua Yaqui Court. This Agreement in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV – Sovereign Immunity.

LEASE AGREEMENT NO. 2163 Revised

The equipment will be located at Internal Audit.

LEASED EQUIPMENT

SERIAL NO: UM 1927 Description: 40' X 62' Modular

7. Inspection by Lessor: Lessor has the right to enter upon the Pascua Yaqui Reservation ("Reservation") for the purposes of delivery, set-up, maintenance, repair of the unit, and for the purposes of repossession

of the unit in the event of default or upon the termination of the Lease Agreement.

11. Default by Lessee: If Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of the Lease, Lessee shall be in default. If Lessee is in default, Lessor may terminate the Lease and demand that Lessee return the equipment by providing Lessee with seventy-two (72) hours written advance notice. Starting on the day Lessee receives such notice, Lessee shall subsequently have fourteen (14) days to cure the alleged default. If Lessee fails to cure the alleged default within fourteen (14) days after receiving notice, the equipment shall be surrendered to Lessor, and Lessee authorizes Lessor to enter the Reservation to repossess the equipment. Repossession of the equipment does not relieve Lessee from its obligation to pay all rent and other charges, including damages pursuant to Paragraph 5. In addition, if Lessee defaults, Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as a result of Lessee's default.
13. Miscellaneous: This agreement represents the entire understanding between the parties. Any change or modification must be in writing.

This Lease shall be interpreted under the laws of the State of Arizona, and the Pascua Yaqui Tribal Courts shall have exclusive jurisdiction to adjudicate any disputes arising hereunder. This Lease in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV – Sovereign Immunity.

LEASE AGREEMENT NO. 2022

The equipment will be located at 4725 Calle Tetakusim

LEASED EQUIPMENT

DESCRIPTION – new 42' X 62' Modular Office

The equipment shall remain personal property regardless of its use or manner of attachment to the ground.

7. Inspection by Lessor: The Lessor has the right to enter upon the PASCUA YAQUI Reservation for the purposes of delivery, setup, maintenance and repair of the unit.

11. Default by Lessee: If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the

equipment default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages, charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit for damages or specific performance when the non-performance negatively effects the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waves any rights held by the PYT under the constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity.

LEASE AGREEMENT NO. 2023

The equipment will be located at 4725 Calle Tetakusim.

LEASED EQUIPMENT

DESCRIPTION – New 42' X 62' Modular Office

The equipment shall remain personal property regardless of its use or manner of attachment to the ground.

7. Inspection by Lessor: The Lessor has the right to enter upon the PASCUA YAQUI Reservation for the purposes of delivery, setup, maintenance and repair of the unit.

11. Default by Lessee: If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages, charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

LEASE AGREEMENT NO. 1844

This equipment will be located at Information Technology

LEASED EQUIPMENT

DESCRIPTION – 36' X 60' modular building

LEASE AGREEMENT NO. 1844 Dated 1 Dec 1999 (COPY ATTACHED)

hereby incorporated and made part of this P.O. 36' X 80' MODULAR
OFFICE

The Purchase Order appearing on the face of this page along with all terms and conditions set forth herein represents an offer to purchase the goods or services described from the named vendor within the terms and conditions specified. Upon presentation of this Purchase order to the named vendor, acceptance of this offer to purchase will be implied and a contract for specific performance will result unless said vendor notified the Pascua Yaqui Tribe (PYT) of their nonacceptance or requests a modification within five working days.

The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order.

The equipment shall remain personal property regardless of its use or manner of attachment to the ground.

7. Inspection by Lessor: The Lessor has the right to enter upon the PASCUA YAQUI Reservation for the purposes of delivery, setup,

maintenance and repair of the unit.

11. Default by Lessee: If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages, charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

CERTIFICATE OF SERVICE

Original of the foregoing hand delivered and filed this 24th day of March,
2011 with:

Pascua Yaqui Tribe Court of Appeals
4701 W. Calle Tetakusim Bldg. A
Tucson, Arizona 85701-1374

and a copy of the foregoing served by U.S. mail this same date with:

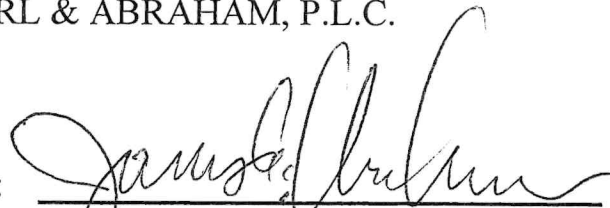
Robert Gillon, Esq.
Office of the Attorney General, Pascua Yaqui Tribe
4725 W. Calle Tetakusim
Tucson, AZ 85757
Attorneys for Appellee Pascua Yaqui Tribe

Luis A. Ochoa
Jeremy A. Lite
QUARLES & BRADY, LLP
One South Church Avenue
Tucson, AZ 85701-1621
Co-Counsel for Appellee Pascua Yaqui Tribe

Dated this 24th day of March, 2011.

CURL & ABRAHAM, P.L.C.

BY:



James E. Abraham
485 S. Main Avenue
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*Attorneys for Appellant
Desert Modulares, Inc. and LLC
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8 Attorney for Plaintiffs

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IN THE PASCUA YAQUI TRIBE

COURT OF APPEALS

DESERT MODULARS INC, an Arizona
corporation; LLC CAPITAL, LLC, a
corporation,

No.

Plaintiffs/Appellants,

NOTICE OF APPEAL

v.

Trial Court No. CV-10-123
(Hon. Melvin Stoof)

PASCUA YAQUI TRIBE,

Defendant/Appellee.

Plaintiffs/Appellants DESIGN MODULARS, INC., formerly known as Desert Modulars, Inc., and LLC CAPITAL, LLC, by undersigned counsel, respectfully submit this Notice of Appeal from the Order Granting Motion to Dismiss entered January 10, 2011 and Order Denying Motion to Reconsider or for New Trial entered January 31, 2011. Copies of the orders appealed from are attached.

Dated this 4th day of FEBRUARY, 2011.

BARASSI, CURL & ABRAHAM, P.L.C.

By: 
James E. Abraham

Law Offices of
BARASSI, CURL & ABRAHAM, P.L.C.
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ORIGINAL AND Five (5) copies of the foregoing filed with the Court and a COPY served via hand delivery on the following on this the 4th day of February, 2011:

Hon. Melvin Stoof
PASCUA YAQUI TRIBAL COURT
7474 S Camino De Oeste
Tucson, AZ 85757

Robert Gillon, Esq.
Office of the Attorney General, Pascua Yaqui Tribe
4725 W. Calle Tetakusim
Tucson, AZ 85757
Attorneys for Defendant Pascua Yaqui Tribe

And by mail this same date to:

Luis A. Ochoa
Jeremy A. Lite
QUARLES & BRADY, LLP
One South Church Avenue
Tucson, AZ 85701-1621
Co-Counsel for Defendants Pascua Yaqui Tribe



JAN 11 2011

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

DESERT MODULARS, an Arizona Corporation, LLC CAPITAL, LLC, A corporation,)	CASE NO. CV-10-123
Plaintiff,)	
VS.)	ORDER GRANTING TRIBE'S MOTION TO DISMISS
PASCUA YAQUI TRIBE,)	
Defendant.)	

On December 27, 2010, this matter came before the court on a Motion to Dismiss Action for Lack of Subject Matter Jurisdiction, filed by and through the Attorney General's office, on behalf of the Pascua Yaqui Tribe. Appearing for hearing were Jeremy A. Lite and W. Robert Gillon, for the movant, and James E. Abraham and Greg Lance, for the respondent.

Before the court addresses the issue of whether sovereign immunity applies to bar a suit against the Tribe in tribal court, it must determine the extent of its jurisdiction to do so. The Pascua Yaqui Constitution, Art. VIII establishes the judiciary of the Tribe and provides that the court has jurisdiction over all cases in law and equity arising under the Tribe's constitution and the laws, traditions and enactments of the Pascua Yaqui Tribe, and the court exercises jurisdiction over all persons who are parties, whether member or non-member, unless prohibited by tribal or federal law. Pascua Yaqui Tribal Code Title 20, "Civil Actions" provides that the Court has subject matter jurisdiction on any basis consistent with the inherent sovereignty of the Tribe, and the court has subject matter jurisdiction over all personal property on the reservation, pursuant to section D. Part of the court's authority derives from the constitution Art. VIII and pursuant to Title 20, Rule 101 (J) which provides that the tribal court has exclusive original jurisdiction to construe the meaning of tribal laws and to determine the legality under the Constitution and laws of the Pascua Yaqui Tribe and the Indian Civil Rights Act, or any action or enactment of the Tribal Council, and the application of any such action or enactment to any person or situation.

This court has jurisdiction to hear disputes arising out of contracts between parties doing business on the reservation, or where the parties are entering into contracts, or where a contract is to be performed within the reservation. Id., at Sec. 101(6). The civil jurisdiction

1 statute allows the court to extend its jurisdiction to corporations, partnerships, associations,
2 and governmental entities. Id., at 101(C).

3 The U.S. Supreme Court has noted under its Abstention Doctrine that it will not
4 interfere with the ability of a tribal court to determine its own jurisdiction to hear cases filed
5 in a tribal court:

6 . . . [T]he existence and extent of a tribal court's jurisdiction will require careful
7 examination of tribal sovereignty, the extent to which the sovereignty has been altered,
8 divested, or diminished, as well as a detailed study of relevant statutes, Executive
9 Branch policy as embodied in treaties and elsewhere, and administrative of judicial
10 decisions. We believe that examination should be conducted in the first instance in the
11 Tribal Court itself. Our cases have often recognized that Congress is committed to a
12 policy of supporting tribal self-government and self-determination. That policy favors
13 a rule that will provide the forum whose jurisdiction is being challenged the first
14 opportunity to evaluate the factual and legal bases for the challenge.

15 *National Farmers v. Crow Tribe*, 471 U.S. 845, 856-857 (1985).

16 In *Iowa Mutual v. Laplante*, the U.S. Supreme court found that the "federal policy
17 supporting tribal self government directs a federal court to stay its hand in order to give the
18 tribal court full opportunity to determine its own jurisdiction . . .because tribal courts are best
19 qualified to interpret and apply tribal law." 480 U.S. 9, 16 (1987).

20 In *Santa Clara v. Martinez*, the U.S. Supreme Court in holding that the Indian Civil
21 Rights Act does not act as a waiver of a Tribe's sovereign immunity to be sued in federal
22 court, the court noted:

23 Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive
24 adjudication of disputes affecting important personal and property interests of both
25 Indians and non-Indians. [citations omitted].

26 436 U.S.49, 64 (1978).

27 Sovereign immunity is jurisdictional. It automatically raises the question about a
28 tribal court's jurisdiction over the Tribe, its employees, and its entities. A claim of sovereign
immunity is a "jurisdictional prerequisite, which may be asserted at any state of the
proceedings." *U.S. v. Sherwood*, 312 U.S 584, 586-587, (1941); *Ramey Construction Co. v.*
Apache Tribe of Mescalero Reservation, 673 F.2d 315, 318 (10th Cir. 1982); *California v.*
Quechan Tribe of Indians, 595 F.2d 1153, 1154 n.1 (9th Cir.,1979); *Bank One, Texas, N.A. v.*

1 *Taylor*, 970 f2d 16, 34 (5th Cir. 1992) cert denied, 508 U.S. 906, 113 S. Ct. 2331, 124 L. Ed.,
2 2d 243 (1993).

3 *Santa Clara v. Martinez* held that a Tribe's sovereign immunity bars it from being
4 sued in federal court, and the Supreme Court held in *Kiowa Tribe v. Manufacturing*
5 *Technologies*, that Tribes are immune from suit in state courts, absent an explicit waiver of
6 sovereign immunity by either Congress or a Tribe itself. 523 U.S. 751 (1998).

7 An example of Congress waiving a Tribe's immunity may be found at 25 U.S.C.
8 450f(c), which provides that Tribes who receive federal funding under the Indian Self
9 Determination Act must provide for a limited waiver of sovereign immunity in such federally
10 funded programs to cover any potential tort claims filed against such federally funded
11 program employees, and the insurer of such a tribal entity may not assert sovereign immunity
12 of the Tribe as a defense. 25 U.S.C. 450(f)(c)(3)(A). See also §2710(d)(7)(A)(ii) (gaming
activities).

13 Additionally, Tribes may waive their own immunity to subject themselves to suits in
14 federal courts. *U.S. v. Oregon*, 657 F.2d 1009 (9th Cir.). Tribes may waive their immunity on
15 a case-by-case basis and negotiate limited waivers suitable to all contracting parties. Another
16 example of a limited waiver of sovereign immunity in tribal courts can be found at the Pascua
17 Yaqui statute entitled Tort Remedies for Tribe's Class III Gaming Facilities. 2 PYTC § 3-1-
18 250 (Tribe's agreement pursuant to State-Tribal Agreement not to assert sovereign immunity
defense in Casino tort cases).

19 The court in determining whether the Tribe is immune from suit in tribal court looks to
20 the Pascua Yaqui Constitution and tribal ordinances as to waiver of sovereign immunity. The
21 Pascua Yaqui Constitution provides, in pertinent part as follows:

22 The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity
23 as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, unless
the Tribal Council enacts an ordinance expressly consenting to suits.

24
25 **PYT Const. Art XXIV, SOVEREIGN IMMUNITY.**

26 This constitutional provision is consistent with the rule established by federal case law that a
27 sovereign's express consent will give jurisdiction to a court over the sovereign, *U.S. v. King*,
28 395 U.S. 1 (1969); *U.S. V. Testan*, 424 U.S. 392 (1976). In addition, the provision above is in

1 harmony with the rule that an Indian Tribe may consent to suit. *U.S. v. Oregon*, 657 F.2d.
2 1009 (9th Cir. 1981).

3 The Court's general civil jurisdiction statutes provide:

4 Nothing in this Title shall be construed to affect a waiver of sovereign immunity
5 of the Pascua Yaqui Tribe, its enterprises, division, or other entities, or its employees'
or officials.

6 PYTC Tile 20 – Civil Actions, Jurisdiction, Sec. 101(k).

7
8 The court finds that the Pascua Yaqui Constitution, general civil jurisdiction statutes,
9 and the present lease agreements do not waive the Tribe's immunity from suit in cases other
10 than tort claims.

11 The Supreme Court has ruled that when a Tribe consents to binding arbitration under
12 state law, where an arbitration award may be enforced in a court of competent jurisdiction, as
13 defined by state law and a uniform arbitration law, as a state district court, that a Tribe has
14 waived its sovereign immunity and consents to be sued in a state court for purposes of
15 enforcing the binding arbitration decision. *C. & L. Enterprises, Inc. v. Citizen Band
Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

16 By analogy, the respondent argued that by entering into the contract and agreeing to
17 allow the tribal court to decide disputes arising out of the contract, the Tribe thereby
18 consented to a limited waiver of sovereign immunity, or alternatively, impliedly waived its
19 sovereign immunity. Def. Response to Default p. 3. The respondent argues that by providing
20 a default provision and remedies for disputes clause in the contract, the Court should maintain
21 jurisdiction, because the intent of the parties was for the Tribe to waive their immunity.
22 Respondent believes that by entering into a contract provision that requires the choice of law
23 (Arizona) to be applied in the Pascua Yaqui court, (choice of forum) the Tribe impliedly
24 waived its immunity. The *C & L* case involved a contract where the Tribe expressly did not
25 waive its sovereign immunity, but the parties did agree to arbitrate. This case does not
involve such an arbitration clause that impliedly waives the Tribe's immunity from suit.

26 The court agrees with the movant that such contract provisions for types of claims
27 allowed, remedies on default, choice of law, and choice of forum, do not serve as a waiver of
28 the Tribe's immunity, in light of the Tribe's contract provision explicitly not waiving their
immunity from suit. When read in harmony with a similar contract provision found in all of

1 the five contracts that read “This (contract or) Agreement, in no way waives any rights held
2 by Tribe (lessee) under the Constitution of the Pascua Yaqui Tribe, including but not limited
3 to, Article XXIV, Sovereign Immunity.” Lease No. 1793, 1844, 2022, 2023, 2163, PYT
4 Statement of Facts Par. 2-5, the terms were a clear assertion of the Tribe’s intent to not waive
5 its immunity, and such a express *retention* of sovereign immunity cannot be interpreted as a
6 waiver by the Tribe.

7 There is a strong presumption against waiver of tribal sovereign immunity.
8 *Demontiney v. U.S.*, 255 F.3d 801, 812 (9th Cir. 2001) (citing *Pan American Co. v. Sycuan*
9 *Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1985). Waivers are “interpreted liberally
10 in favor of the Tribe and restrictively against the claimant.” *Maryland Casualty Co. v.*
11 *Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (1966). In all circumstances,
12 including contract actions, overwhelming legal precedent provides that the sovereign
13 immunity of an Indian nation may not be waived by implication, but the waiver must be
14 express. *American Indian Agricultural Credit Union Consortium, Inc. v. Standing Rock*
15 *Tribe*, 780 F.2d 1374, 1378 (8th Cir. N.D. 1985). Courts generally will not infer a waiver from
16 contract terms, however detailed. *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero*
Reservation, 673 F. 2d 315, 319 (10th Cir. 1982).

17 The broad interpretation of tribal sovereign immunity can trace its origins to
18 “Congress’ desire to promote the ‘goal of Indian self-government, including its “overriding
19 goal” of encouraging tribal self-sufficiency and economic development,” *Citizens Band of*
20 *Potawatomi Indian Tribe*, 498 U.S. at 510 (quoting *California v. Cabezon Band of Mission*
21 *Indians*, 480 U.S. 202, 216 (1987) as well as to “Executive Branch policies, and judicial
22 opinions,” *Prairie Band of Potawatomi Nation v. Wagon*, 476 F.3d 818, 824 n.9 (10th Cir.
2007).

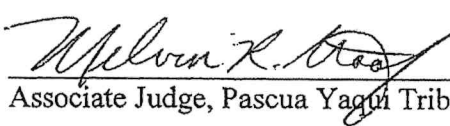
23 The Tribal Council has the power to enact ordinances subject to applicable federal law
24 and the Constitution to regulate activities including civil actions and gambling and gaming. It
25 may choose to waive its immunity when it negotiates contracts with entities or individuals
26 doing business with the Tribe. In this case it chose not to, and there has been no action by the
27 Tribe to waive its immunity from suit. Based on the Tribe’s sovereign immunity, the
28 plaintiff’s contract claim filed against the Tribe should be dismissed.

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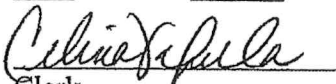
While this result may strike some as unfair, the Court notes that the doctrine of sovereign immunity has been in existence since the inception of the United States. The Court further points out that the parties entered an arm's length transaction to which both may have negotiated that the Tribe make a limited waiver of its immunity as a condition of entering their business relationship. In this case, as a party who may negotiate terms and conditions of a contract, the plaintiffs were in as good a position as most to recognize and take action to reduce the risks associated with doing business with a tribal sovereign.

IT IS ORDERED that the Tribe's request to dismiss the complaint based on its sovereign immunity shall be granted, for good cause shown.

SO ORDERED THIS 10th DAY OF JANUARY, 2011.


Associate Judge, Pascua Yagu Tribal Court

CC: Date: 01/10/11
 Plaintiff Defendant


Clerk

DESERT MODULARS INC v PASCUA YAQUI TRIBE

CA-11-002

Miscellaneous documents. Not clear if they were intended to be exhibits attached to briefs or if they were part of the trial court record.

Scanned.



January 15, 2008

John Jensen
Pascua Yaqui Tribe
7474 S. Camino De Oeste
Tucson, AZ 85757

Dear John:


As you requested, we have revised our quote to include financing options for the modular buildings on lease. The 48-month renewal column is your new rate for a straight lease with no buy down of the principal. The 48-month finance column is for 48 equal payments with a \$1 buyout after 48 months. The 4-year finance column allows for 4 equal payments, the first of which is in advance.

Renewal Options, Finance Options, and Buyouts

Original Tenant	Current Rate	48 Mo. Renewal	48 Mo. Finance	4 Year Finance	Current Buyout
Audit	\$ 1,595.00	\$ 1,355.75	\$ 1,952.04	\$ 23,735.00	\$ 79,500.00
Procurement	\$ 1,695.00	\$ 1,440.75	\$ 1,896.00	\$ 22,031.00	\$ 76,926.00
IT	\$ 1,575.00	\$ 1,338.75	\$ 1,647.00	\$ 19,138.00	\$ 66,715.00
Prosecutor	\$ 1,985.00	\$ 1,687.25	\$ 2,414.00	\$ 28,048.00	\$ 98,163.00
Enrollment	\$ 1,985.00	\$ 1,687.25	\$ 2,414.00	\$ 28,048.00	\$ 98,163.00

Although the transaction will not be complete until all payments are made, ownership transfers with the contract so service will not be provided during the course of the finance lease. Finance leases will be "as is" without warranty.

Sincerely,


Knute C. Knutson

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1 James E. Abraham
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3 485 South Main Avenue, Bldg 01
4 Tucson, Arizona 85701-2227
5 (520) 884-7777 • Fax (520) 620-0921
6 Email: jimabraham@bcatriallaw.com
7 PCC No.: 0368 • State Bar No.: 006752
8 Attorney for Plaintiffs

PASCUA YAQUI TRIBAL COURT
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IN THE PASCUA YAQUI TRIBAL COURT
PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

DESERT MODULARS INC, an Arizona
corporation; LLC CAPITAL.LLC, a
corporation,

Plaintiffs,

v.

PASCUA YAQUI TRIBE

Defendant.

No. CV-10-123
COMPLAINT
(Breach of Contract)
Assigned to:

Plaintiffs, through counsel, complain of Defendant, and alleges as follows:

STATEMENT OF CLAIM

1. Plaintiff Desert Modular, Inc. is a corporation authorized to conduct and transact its business of leasing modular offices in the State of Arizona. Plaintiff LLC Capital. LLC is a corporation authorized to conduct and transact its business of leasing modular offices in the State of Arizona.
2. The Pascua Yaqui Tribe, hereinafter referred to as "the Tribe", is a federally recognized Indian

1 Tribe organized and existing under *Divine Guidance*, per the Preamble to the Constitution of the
2 Pascua Yaqui Tribe, and the Tribe is also organized and existing pursuant to the Indian
3 Reorganization Act of June 18, 1934 (48 Stat. 984) as amended.

4
5 3. The Pascua Yaqui Tribal Court has jurisdiction over this action pursuant to Article II –
6 Jurisdiction, of the Constitution of the Pascua Yaqui Tribe, pursuant to the Pascua Yaqui Tribal
7 Civil Code, Chapter 1, Section 10, Subject Matter Jurisdiction in General (5 PYTC Sec. 1-10)
8 and Section 20, Subject Matter Jurisdiction, Specific Actions, (5 PYTC Sec. 1-20).

9 Specifically, under Section 20 (A), the Tribal Court shall have subject matter jurisdiction
10 over all real and personal property located on the Reservation to determine the application of
11 such property to the satisfaction of a claim relating to the property.

12 Pursuant to the Pascua Yaqui Civil Code, Section 20(B) the Tribal Court shall have
13 subject matter jurisdiction over all civil causes of action, regardless of whether the parties are
14 Indian or non-Indian.

15 Under Section 30, Title 3, of the Pascua Yaqui Tribal Code, Part 1, Chapter 1-1, Section
16 30(B)(6) and (8) and (9) and (10) the Tribal Court has jurisdiction over the parties to this action
17 since the parties entered into contracts for the lease of property, and the performance of the lease
18 (the delivery and use of the subject property under the leases) occurred within the confines of the
19 Pascua Yaqui Reservation in Tucson, Arizona.

20
21
22 4. Plaintiff Desert Modular, Inc. and the Tribe entered into the five written contracts, each
23 called a “lease agreement”, where under Plaintiff Desert Modular, Inc. provided and installed
24 modular offices on the Pascua Yaqui Reservation, for the use of the employees of the Tribe in
25 the administration of the Tribe’s government and business, and the Tribe made money payments
26 (lease payments) to the Plaintiffs Desert Modular, Inc. and also to LLC Capital.LLC, which was

1 an assignee of Plaintiff Desert Modular, Inc. under two of the five leases, as stated below.

2 The following five written contracts were entered into between Plaintiff Desert Modular,
3 Inc. and the Tribe in the form of lease agreements:

4 1. Lease Agreement No. 1793, dated December 1, 1999, between the Pascua
5 Yaqui Tribe and Desert Modular, Inc., for the lease of a 42' by 66' modular office
6 which was located at 7774 S. Camino de Oeste, (now being used as the
7 Procurement Office), and

8 2. Lease Agreement No. 1844, dated July 19, 2000, between the Pascua
9 Yaqui Tribe and Desert Modular, Inc., for the lease of a 36' by 60' modular office
10 which was located at the site for the Information Technology modular location
11 (now being used as Adult Education), and

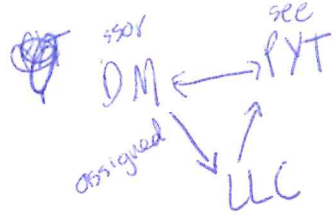
12 * 3. Lease Agreement No. 2022, dated November 7, 2000, between the Pascua
13 Yaqui Tribe and Desert Modular, Inc., for the lease of a 42' by 62' modular office
14 which was located at 4725 Calle Tetakusim, (the former Enrollment Office and
15 now is being used as the Attorney General's office), and

16 * 4. Lease Agreement No. 2023, dated July 9, 2001, between the Pascua Yaqui
17 Tribe and Desert Modular, Inc., for the lease of a 40' by 62' modular office which
18 was located at 4725 Calle Tetakusim, (now is being used as the Prosecutor's
19 office)

20 5. Lease Agreement No. 2163 (also known as lease No. 1582), dated July 9,
21 2001, between the Pascua Yaqui Tribe and Desert Modular, Inc., for the lease of a
22 40' by 62' modular office (which was used for the Internal Audit office).

23
24
25
26 5. All rights and obligations of the Lessor under Lease Agreements 2022 and 2023 were

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1 assigned by Lessor Desert Modular, Inc. to LLC Capital. LLC on August 3, 2001.

2 6. Under each of the five written contracts described above, the Tribe, as the Lessee, after
3 the minimum term of the lease had been performed, enjoyed and possessed the contractual right
4 to give 30 days written notice of intent to terminate the lease. The termination of the lease would
5 be effective at the expiration of the 30 days from the date the Lessee mailed its intent to
6 terminate the lease.

7
8 7. The Defendant Tribe never sent any written notice of intent to terminate any of the
9 written contracts described above as the lease agreements.

10 8. Under each of the five written contract lease agreements described above, after the
11 expiration of the minimum term stated in the lease, if the lease had not been terminated, which
12 none were, then each lease was deemed to be a lease on a month-to-month basis at the one month
13 rate then in effect, with the same terms and conditions provided in the written contracts (in
14 effect).

15
16 9. The first written contract described above, lease No. 1793, dated December 1, 1999
17 contained clauses which stated:

18 "18. Access to Legal Counsel

19 This agreement is made and entered into voluntarily by Lessee and Lessor, free
20 and clear from any duress or influence on either party by the other. Lessee and Lessor
21 warrant that each has read this Agreement in its entirety. Lessee and Lessor have been
22 advised fully and adequately by their respective legal counsel, of their own choice, as to
23 the character and legal effect of all terms and covenants contained in this Agreement.
24 Lessee and Lessor further warrant that each fully understands the nature and effect of said
25 terms and covenants prior to the execution of the Agreement.

26 19. Joint Responsibility For Composition

Lessee and Lessor are willing to and do now assume joint responsibility for the
form and composition of each and all of the terms of this Agreement between Lessee and
Lessor. Lessee and Lessor further agree that this Agreement shall be interpreted as

1 though the Lessee and Lessor each participated equally in the composition of this
2 Agreement and each and every part thereof, both the Lessee and Lessor waiving any
3 applicable rule of law to the contrary.

4 20. Knowledge of Financial Consequences

5 Lessee and Lessor have entered into this Agreement voluntarily and with full
6 knowledge of the financial consequences to their respective financial status. Lessee and
7 Lessor declare that each believes this Agreement to be fair, just and reasonable, and each
8 signs this agreement freely and voluntarily.”

9 10. The parties performed their respective contractual obligations under the five written
10 contracts, until 2009 when the Tribe stopped making money rent payments owed under the five
11 written contracts described herein. Plaintiffs requested that payments be made current, but the
12 Tribe refused.

13 11. The Tribe’s refusal and actual failure to make the rent payments owed to the Plaintiffs
14 pursuant to the five written contracts described above constituted material breaches of contract
15 by the Tribe.

16 12. The Tribe’s actions as described herein also constitute the taking of the Plaintiffs’ private
17 property, the five modular offices leased by the Plaintiffs to the Tribe, and parts thereof, for
18 public use by the Tribe without just compensation, which was done by the Tribe in violation of
19 the Constitution the Pascua Yaqui Tribe, Article I- Bill f Rights, Section 1.e.

20 13. Under the terms of the five written contracts described herein, if Lessee fails to pay rent
21 when rent payments are due and owed, which Lessee (Defendant Tribe) has failed to do under
22 each written contract lease agreement, then the Lessee (Defendant Tribe) is in default, and the
23 Lessors (Plaintiffs) have the right to recover from the Lessee (Defendant Tribe) the sums owed
24 for back rent, interest thereon until paid, the right to an order of repossession from the Tribal
25 Court for each modular office, and also an award for economic and monetary damages caused by
26

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the default by the Tribe, including an award for the costs to remove and transport the five modular offices, as well as damages for incurring other repossession expenses, including charges and fees for disconnection of utilities, and other reasonable expected expense related to the repossession of the five modular offices.

Also, upon the Tribe's default and breaches of the five contracts, as alleged herein, the Plaintiffs are entitled under the five written contract lease agreements to recover from the Tribe the Plaintiffs' reasonable attorney's fees and court costs associated with the bringing and prosecution of this action.

WHEREFORE, Plaintiffs pray for judgment in their favor and against the Tribe which contains the following awards and orders, and other requested relief:

1. For judgment in favor of Plaintiffs and against the Tribe in a sum representing the unpaid and owing lease payments owed by the Tribe to the Plaintiffs from the due date under each lease through the month that the modular offices are actually removed, plus interest on unpaid rent according to the terms of the contracts, until paid in full; and
2. For orders of repossession allowing the Plaintiffs to remove and take possession of the five modular offices; and
3. For an award and judgment in favor of the Plaintiffs and against the Tribe in a sum representing the reasonable attorney's fees and costs incurred by the Plaintiffs for the bringing and prosecution of this action; and
4. For judgment or order granting such other and further damages and awards as are consistent with the evidence.

COMPLAINT - DESERT MODULARS INC V. PASCUA YAQUI TRIBE

Dated this 23rd day of June, 2010.

BARASSI, CURL & ABRAHAM, P.L.C.

By: James E. Abraham

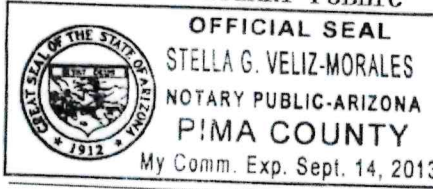
James E. Abraham
Attorney for Plaintiffs

SUBSCRIBED AND SWORN TO BEFORE ME THIS 23rd DAY OF JUNE, 2010,

BY James E. Abraham

Stella G. Veliz-Morales

NOTARY PUBLIC



MY COMMISSION EXPIRES:

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1 Office of the Attorney General, Pascua Yaqui Tribe
2 4725 W. Calle Tetakusim
3 Tucson, Arizona 85757, Telephone 520-883-5106
4 R. Rolando Flores
5 Interim Attorney General
6 State Bar No. 023866
7 Robert Gillon
8 Assistant Attorney General
9 State Bar No. 022169
10 Kimberly Van Amburg
11 Assistant Attorney General
12 State Bar No. 022736

10 JUN 22 11 53 AM
CLERK *CW*

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

10 DESERT MODULARS, INC., an § Case No. CV10-123
11 Arizona Corporation, LLC CAPITAL
12 LLC, a Corporation
13 Plaintiffs Answer
14 vs. Defendant
15 Pascua Yaqui Tribe

16 COMES NOW the Pascua Yaqui Tribe ("Tribe") and files this Answer to Plaintiffs'
17 DESERT MODULARS, INC. ("Desert") and LLC CAPITAL LLC ("Capital") Complaint filed
18 on June 23, 2010.

19 1. Plaintiffs alleged that either directly (Desert), or as assignee (Capital), they have a lease
20 relationship with the Tribe (Complaint, Paragraph 4) for separate leases of five modular
21 structures of which the Plaintiffs are the lessors, and the Defendant is the lessee. Plaintiffs'
22 complaint does not attach copies of those alleged leases, but instead makes reference to them.
23 To assist the Court, the Tribe hereby attaches, as exhibits to this motion, copies of the leases in
24 question as they now exist in the Tribe's Procurement Department records as follows:

- 25 Defendants Exhibit 1, Lease No. 1793.
- 26 Defendants Exhibit 2, Lease No. 1844.
- 27 Defendants Exhibit 3, Lease No. 2022.
- 28 Defendants Exhibit 4, Lease No. 2023.

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Defendants Exhibit 5, Lease No. 2163.

Notes on Exhibits:

- a. With regard to the Tribe’s Exhibits 1 and 2, the Tribe believes they originally had attachments similar to Pages 3-5 of Exhibit 3.
- b. With regard to Tribe’s Exhibits 1, 2, 3, the Tribe’s copies of each such lease are only of the front side of those leases. The Tribe alleges, upon information and belief, that the document attached as page 2 of each those Exhibits is identical to the original of those leases.
- c. With regard to Pages 4 and 5 of Exhibit 3, the Tribe’s copy of these two pages does not have a signature by either of the Plaintiffs. The Tribe is without knowledge or belief as to whether this exhibit was ever signed by Plaintiff DMI.
- d. With regard to Paragraph 14 on Page 5 of Exhibit 3, the Tribe could not locate the attached “paragraphs” referenced therein. However, the Tribe alleges, upon information and belief, that those “attached paragraphs” are identical to Page 2 of Exhibit 4.
- e. With regard to Exhibits 4 and 5, the Tribe alleges, upon information and belief, that there is a reverse side of Page 1 of each of those Exhibits, but is not sure whether that is the same as the page that the Tribe has attached as Page 2 to Exhibits 1,2, and 3.
- f. The Court should be aware that it is possible the Tribe could discover other copies of the leases in other records, but has made a diligent search of its records.

2. The Tribe admits the lease relationships alleged by Plaintiffs with regard to leases 1793, 1844, 2022, 2023, and 2163, subject to applicable law and the terms and conditions of the leases themselves.

3. The Tribe denies the allegations of Paragraph 3 of the Complaint that the Pascua Yaqui Tribal Court has jurisdiction over the Pascua Yaqui Tribe under the Pascua Yaqui Tribal Code, or any other law purporting to confer jurisdiction over the Tribe in the Tribal Court, without

1 compliance with Article XXIV of the Pascua Yaqui Constitution.

2 4. The Tribe is without information and belief to affirm or deny the allegations of
3 Paragraph 9 of the Complaint, and on that basis, denies the allegations therein.

4 5. The allegations of Paragraph 11 of the Complaint contain conclusions of law that can
5 only be determined by the Court and, on that basis, the Tribe denies the allegations therein.

6 6. The Tribe denies the allegations of Paragraph 12 of the Complaint.

7 7. The Tribe denies the allegations commencing at Line 6 of Page 6 (Paragraph 13) that
8 "upon the Tribe's default" Plaintiff's are entitled to monetary damages against the Tribe.

9 8. First Affirmative Defense. Sovereign Immunity. Under applicable
10 law, no Court has subject matter jurisdiction over an Indian tribe unless there is an applicable
11 federal statute that confers that jurisdiction, or the tribe itself has specifically consented in
12 writing, in accordance with its laws, that a Court will have jurisdiction over the Tribe. No such
13 consent exists with regard to any of the leases that are the subject of this action. Therefore the
14 Court does not have subject matter jurisdiction over the Pascua Yaqui Tribe in this action, and
15 the matter must be dismissed.

16 9. Second Affirmative Defense. Unconscionable Contract. Each of the leases
17 that Plaintiffs allege exist between the Plaintiffs and the Defendant is unconscionable, and
18 therefore should not be enforced by the Court.

19 10. Third Affirmative Defense. Payment. If, and only if, the
20 Court finds it has jurisdiction over the Tribe, which is disputed by the Tribe, the Tribe
21 affirmatively alleges that the Tribe has already paid "just compensation" to the Plaintiffs for
22 their interests in the modular structures that are the subject of this lawsuit and the leases listed
23 above.

24 Wherefore, the Defendant prays as follows:

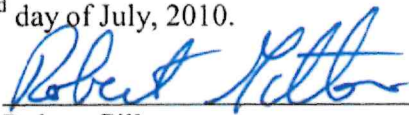
25 1. That the complaint, in its entirety, be dismissed, based upon the provisions of
26 Article XXIV of the Constitution of the Pascua Yaqui Tribe that the Tribe is "immune from
27 suit" unless the conditions of waiver of that immunity contained therein are proven to have
28 been met.

1 2. That the complaint, in its entirety, be dismissed for failure of the Plaintiffs to
2 prove losses.

3 3. That the portion of the complaint alleging a taking under Article 1, Section 1.e.
4 of the Constitution of the Pascua Yaqui Tribe be dismissed upon showing by the Defendant that
5 the Defendant has, in fact, paid just compensation for the property in question.

6 4. For such other and further relief as the Court deems appropriate in the
7 circumstances.

8
9 **Respectfully submitted** this, the 22nd day of July, 2010.



10 _____
11 Robert Gillon
12 Office of the Attorney General
13 Pascua Yaqui Tribe

14
15
16 ORIGINAL of the foregoing filed with
17 the Court and a COPY served via regular
18 U.S. Mail on the following on this the
19 22nd day of July, 2010:

20 James E. Abraham, Esq.
21 BARRASSI, CURL & ABRAHAM, P.L.C.
22 485 South Main Avenue, Bldg. 01
23 Tucson, AZ 85701-2227

Law Offices of
BARASSI, CURL & ABRAHAM, P.L.C.
485 SOUTH MAIN AVENUE, BLDG 01
TUCSON, ARIZONA 85701-2227
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1 James E. Abraham/acm
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7 PCC No.: 0368 · State Bar No.: 006752
8 Attorney for Plaintiffs

CV-10-123
CW

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IN THE PASCUA YAQUI TRIBAL COURT
PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

DESERT MODULARS INC, an Arizona
corporation; LLC CAPITAL, LLC, a
corporation,

No. CV-10-123

Plaintiffs,

PLAINTIFFS' MOTION TO RECONSIDER
ORDER OF JANUARY 10, 2011 AND
FOR NEW TRIAL

v.

PASCUA YAQUI TRIBE,

Assigned to Hon. Melvin Stoof:

Defendant.

Plaintiffs respectively move this Court pursuant to Rule 21, 3 PYT R.Civ.P., to
reconsider its Order Granting Motion to Dismiss entered January 10, 2011 and to grant Plaintiffs
a new trial for the reasons stated in the following Memorandum.

Dated this 20th day of January, 2011.

BARASSI, CURL & ABRAHAM, P.L.C.

By: 

James E. Abraham

Attorneys for Plaintiffs

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MEMORANDUM

The Court's order granting the Pascua Yaqui Tribe's motion to dismiss found that the Tribe did not waive its sovereign immunity so as to allow this action to proceed. Plaintiffs respectfully submit that the Court has misread the contract language at issue, and has erred in application of the law.

The Order takes the position that a waiver of sovereign immunity must be explicit, and that this standard can only be met by the words "waive" and "immunity." This is not required by the law. In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 149 L.Ed.2d 623, 121 S.Ct. 1589 (2001) the Supreme Court found a waiver without specific language. A contract need not use the terms "waive" or "immunity" to be an effective waiver of sovereign immunity where the contract provides a specific remedy inconsistent with immunity. *C&L Enterprises* found a waiver of immunity with "requisite clarity" in an arbitration clause which submitted disputes to arbitration subject to AAA rules, where those rules provided for judicial enforcement. See also *Sokaogon Gaming Enterprise Corporation v. Tushie-Montgomery Assoc. Inc.*, 86 F.3d 656 (7th Cir. 1996), which stated:

The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words "sovereign immunity." No case has ever held that." *Id.* at 660.

Writing for the 7th Circuit in *Sokaogon Gaming Enterprises*, Judge Posner found an explicit waiver in an arbitration clause which provided for judicial enforcement, without reference to external arbitration rules.

As in *Sokaogon Gaming*, the contracts at issue here provided for a judicial remedy. In the remedies section of the leases, language inserted by the Tribe to replace standard text in Desert Modulares' pre-printed forms, explicitly gave the Plaintiff Lessors the following rights upon

1 default:

2 If the Lessee fails to pay rent ... the Lessee shall be in default and the Lessor may
3 terminate the Lease and demand the equipment be returned by the Lessee. Lessor may
4 take repossession of the equipment [upon] default only pursuant to an order of
5 possession granted by the Pascua Yaqui Tribal Court. ... If the Lessee defaults, in
6 addition to rentals, damages, repossession expenses, and other applicable charges, the
7 Lessor shall be entitles [sic] to recover from Lessee all legal fees and court costs
8 incurred as result of the Lessee's default. [See paragraph 11 of the accepted lease
9 form.]

10 This text clearly provides that Lessor may seek an order of possession in the Tribal Court, relief
11 that the Plaintiffs here are seeking. In addition, the last sentence says that Plaintiffs, upon the
12 Tribe's default, can recover their legal fees and court costs among other damages. These
13 remedies, upon which Plaintiffs relied, are meaningless unless construed as waivers of immunity
14 within the narrow parameters of the contracts.

15 The Tribe's standard purchase order terms and conditions inserted a forum clause into the
16 lease contracts stating:

17 The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and
18 under the laws of the Pascua Yaqui Tribe in *resolving any disputes* concerning this
19 Purchase Order. (Emphasis added.)

20 This compels the present action be brought in this very court; it clearly says *any disputes* under
21 the contract are within the jurisdiction of this Court. Plaintiffs accepted this provision with the
22 understanding it would be given effect. The Order suggests that Plaintiffs could have negotiated
23 a waiver of immunity. See Order page 6. However, that comment misses the point that, by
24 dismissing their claim, the Court has deprived Plaintiffs of the bargain they made to limit the
25 extent of the Tribe's sovereign immunity,

26 It is obvious that this contract language gives Plaintiffs a judicial remedy. By providing a
judicial remedy, the leases meet the Supreme Court's criterion of "requisite clarity" for a waiver.

1 Otherwise, this contract language is meaningless, and a deceptive manipulation of the Lessor.¹

2 Furthermore, this judicial relief is consistent with the Tribe's other language reserving its
3 immunity from suit. This is not a suit in state or federal court unfamiliar with or hostile to the
4 Tribe, nor is it a suit for any relief beyond that which the Tribe agreed to. The contract provides
5 a limited waiver, and directs the Lessor to seek in this Court precisely the relief Plaintiffs are
6 asking for.

7
8 As a matter of policy, depriving Plaintiffs of a remedy they bargained for does not serve
9 the interests of the Pascua Yaqui Tribe. If a party dealing with the Tribe knows the Tribe can
10 avoid any responsibility for its contracts, fewer bidders will be interested and those who remain
11 will require higher prices than the Tribe could otherwise negotiate. As Judge Posner commented
12 in *Sokaogon*, "the harder it is for a tribe to waive its sovereign immunity the harder it is for it to
13 make advantageous business transactions." *Id.* at 660.

14
15 The Court also erred in failing to address Plaintiffs' takings argument. The Order
16 contravenes the Pascua Yaqui Constitution, Article I, Section 1(e), and the Indian Civil Rights
17 Act, 25 USC Section 1303(2), in that it sanctions a taking of private property without just
18 compensation.² Without any way of compelling the Tribe to pay just compensation, the Tribe's
19 refusal to return possession of the buildings to Plaintiffs amounts to conversion or even theft.
20 Nothing in the Constitutions of the Tribe or the United States, or the ICRA, or Supreme Court
21 jurisprudence including *Santa Clara Pueblo v. Martinez* gives the Tribe sanction to commit torts
22
23

24
25 ¹ Knute Knutson, President of DMI, testified at his deposition December 30, 2010 that he
26 understood the Tribe's reservation of sovereign immunity was in the context of "Clause 11 as to
my remedy."

² There is no question that the modular buildings at issue are being put to public use.

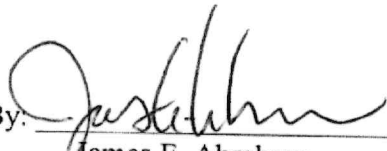
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(520) 884-7777 • FAX NO. (520) 620-0921

1 or crimes or other constitutional violations without consequence. *Santa Clara Pueblo* merely
2 held that the ICRA did not provide jurisdiction to the Federal Courts. It cannot be read as
3 barring this action by a non-member seeking redress in the Tribe's own court system.
4

5 For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its
6 Order, deny the motion to dismiss and set this matter for trial on the merits.

7 Dated this 20th day of January, 2011.

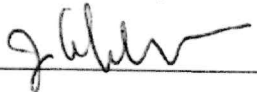
8 BARASSI, CURL & ABRAHAM, P.L.C.

9
10
11 By: 
12 James E. Abraham
13 Attorneys for Plaintiffs

14 ORIGINAL AND 1 of the foregoing filed with
15 the Court and a COPY served via ^{mail} hand delivery on
16 the following on this the 20 day of January, 2011:

17 Robert Gillon, Esq.
18 Office of the Attorney General, Pascua Yaqui Tribe
19 4725 W. Calle Tetakusim
20 Tucson, AZ 85757
21 *Attorneys for Defendant Pascua Yaqui Tribe*

22 Luis A. Ochoa
23 Jeremy A. Lite
24 QUARLES & BRADY, LLP
25 One South Church Avenue
26 Tucson, AZ 85701-1621
Co-Counsel for Defendants Pascua Yaqui Tribe



FEB 02 2011

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

DESERT MODULARS, INC, An Arizona)
 corporation; LLC CAPITAL LLC, a)
 corporation,)
 Plaintiffs,)
 vs.)
 PASCUA YAQUI TRIBE,)
 Defendant.)

Case No. CV-08-027

ORDER DENYING MOTION FOR RECONSIDERATION

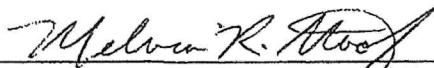
On January 20, 2011, the plaintiffs filed a motion to reconsider the court's final order of January 10, 2011. 3 PYT R.Civ.P. Rule 21(A), Proceedings after Judgment. On January 31, 2011, the Defendant filed its response to the motion.


The plaintiffs have failed to provide proof sufficient under Civil Procedure Rule 21 that the judgment was reached based on fraud or mistake of law, or that there was newly discovered evidence which probably would have affected the outcome of the case and which could not with reasonable effort have been discovered in time for the hearing of the case. The plaintiff also failed to show that the Court had proper personal and subject matter jurisdiction, based on the defendant's sovereign immunity. The Court has already determined that it does not have personal and subject matter jurisdiction over the contract giving rise to this case, based on the Tribe's sovereign immunity.

The court should deny the motion to reconsider its judgment, and the January 20, 2011 ruling should remain in effect, because the plaintiffs have failed to show that the judgment was reached as a matter of fraud or mistake, that there is no newly discovered evidence, and the plaintiffs have failed to show the court has jurisdiction when the Tribe expressly retained their sovereign immunity when it entered into the four leases in this case.

IT IS ORDERED that plaintiff's motion to reconsider shall be denied, for lack of evidence that meets the requirements of the statute, pursuant to the civil code provisions related to proceedings after judgment. 3 PYT R.Civ.P. Rule 21(A).

SO ORDERED THIS 31st DAY OF JANUARY, 2011.


 Associate Judge, Pascua Yaqui Tribal Court

Date 02/01/11
 cc: Plaintiff Defendant

 Clerk



PASCUA YAQUI TRIBE OF ARIZONA
PURCHASE ORDER # PYT010156

VENDOR

Billing Instructions - Mail all invoices to: Pascua Yaqui Tribe - Attn: Finance
 Department P.O. Box 11815 Tucson, AZ 85734-1815, (520) 879-5092

DATE ISSUED 11/7/2000 DATE NEEDED 90 DAYS ARO TERMS: NET 30 BID / QUOTE #
 VENDOR 747-7870 FAX 747-8701 F.O.B. SHIP TO ADDRESS
 DESERT MODULARS INC. DEPT PROSECUTOR'S OFFICE
 Attn. KNUTE REF. Attn. C/O PROCUREMENT RECEIVING
 3980 E. ILLINOIS PASCUA YAQUI TRIBE
 TUCSON AZ 85714 7474 S. CAMINO DE OESTE
 TUCSON, AZ 85746

PYT NO.	ITEM DESCRIPTION	BRAND / MODEL NO.	QNT.	UNIT PRICE @	TOTALS
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LEASE AGREEMENT NO: 2023
 DATED: 7 NOV 2000 (Copy attached) which is hereby incorporated and made part of this P.O.
 42' X 62 MODULAR OFFICE Commence upon completion at site 12 MTH \$1985.00 \$23820.00
 MONTHLY (COMMENCE UPON MOVE IN WHICH IS ESTIMATED TO BE MAR 2001)

DELIVERY: CHARGE (ONE TIME CHG) 1 LOT 1200.00 \$1200.00

BLOCK AND LEVEL (GROUND LEVEL) 1 LOT 5575.00 \$5575.00

SKIRTING (PRICE INCLUDED IN ITEM #3)

Item #1 payment commence upon completion of site at a monthly rate of \$1985.00. Items #s 2, 3 and 4 are due upon completion of site. All other Terms & Conditions are as delineated herein and the attachments hereunder.

- Attachments:
- 1) DMI Lease Agreement No. 2023
 - 2) DMI Modular Drawings & Specifications Plus Cost Data.
 - 3) Inspection Record
 - 4) PYT Bldg Plan/Permit Application
 - 5) TERO Requirements
 - 6) Purchase Order Terms and Conditions

COPY
Vendor

Please check appropriate box: CONFIRMING PURCHASE ORDER DO NOT DUPLICATE PLEASE ACKNOWLEDGE RECEIPT OF PURCHASE ORDER
 Invoices submitted by vendor for payment must reflect this purchase order number PYT010156 and must not exceed the amount allocated for this purchase order. No payment will be authorized unless invoice is properly documented.

inquiries - Procurement (520) 883-5088 Fax (520) 883-5133 SUB-TOTAL = \$30595.00

BUDGET CODE 001-006-12.	FEDERAL ID # 86-0203228	SALES TAX % =	
OBLIGATION #:	BIA TRIBE # 694	FREIGHT COST =	
JR		P.O. TOTAL COST =	\$30,595.00

PROCUREMENT: _____ EXECUTIVE APPROVAL: _____ DATE: _____

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

10 SEP 10 PM 3:13

TICKET NO. _____
REFK _____

1 Office of the Attorney General, Pascua Yaqui Tribe
2 4725 W. Calle Tetakusim
3 Tucson, Arizona 85757, Telephone 520-883-5106
4 R. Rolando Flores
5 Interim Attorney General
6 State Bar No. 023866
7 Robert Gillon
8 Assistant Attorney General
9 State Bar No. 022169
10 Kimberly Van Amburg
11 Assistant Attorney General
12 State Bar No. 022736

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

10 DESERT MODULARS, INC., an §
11 Arizona Corporation, LLC CAPITAL §
12 LLC, a Corporation

Case No. CV10-123

12 Plaintiff

Defendant's Reply to Plaintiff's
Response to Motion to Dismiss

13 vs.
14 Pascua Yaqui Tribe

14 Defendant

15 _____
16 COMES NOW the Pascua Yaqui Tribe ("Tribe") and files this Reply to Plaintiff's
17 Response to Defendant's Motion to Dismiss.

18 I. INTRODUCTION AND SUMMARY OF REPLY

19 Plaintiff recognizes that any waiver of a Tribe's sovereign immunity must be "clear,"
20 but argues that the Tribe impliedly waived its sovereign immunity in the leases at issue (the
21 "Leases");¹ (a) by referring to the resolution of disputes in Tribal court and the recovery of
22 attorneys' fees in Tribal court; and (b) on the basis that, by disputing what is owed under the
23 leases, the Tribe has "taken private property of the Plaintiff without just compensation." See
24 Plaintiff's Response at pp. 3-4. Plaintiff is wrong. The reference to Tribal court and the
25 recovery of attorneys' fees, together with the clear statements in the leases that the Tribe does
26 not waive its sovereign immunity, do not constitute a waiver of the Tribe's sovereign immunity.
27 In addition, there has been no taking of Plaintiff's property without just compensation. The

28 _____
¹ Copies of the Leases are attached to the Tribe's answer.

1 Tribe respectfully requests that the Court dismiss Plaintiff's Complaint in its entirety.

2 **II. ARGUMENTS AND AUTHORITIES**

3 **A. Plaintiff's Reliance on C & L Enterprises is Misplaced.**

4 Plaintiff argues that statements in the leases that refer to Tribal court jurisdiction
5 constitute an implied waiver of the Tribe's sovereign immunity. In support of that argument,
6 Plaintiff relies on C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of
7 Oklahoma, 532 U.S. 411 (2001). However, C & L Enterprises is not controlling, as the
8 underlying facts and the contractual terms in this case are materially different from those in C &
9 L Enterprises.

10 The C & L Enterprises case involved the impact of an arbitration agreement on a tribe's
11 assertion of sovereign immunity. Id. at 414. The contract at issue was a standard form
12 construction contract signed by the parties to govern the installation of a foam roof on an **off-**
13 **reservation building**, the First Oklahoma Bank, in Shawnee, Oklahoma. Id. (emphasis added).
14 The building and land were owned by the Citizen Potawatomi Nation, but the building and the
15 land on which it was built were off-reservation, non-trust property. Id. The contract at issue
16 contained the following arbitration clause:

17 All claims or disputes between the Contractor [C & L] and the Owner [the
18 Citizen Potawatomi Nation] arising out of or relating to the Contract, or breach
19 thereof, shall be decided by arbitration in accordance with the Construction
20 [I]ndustry Arbitration Rules of the American Arbitration Association currently
21 in effect unless the parties mutually agree otherwise . . . The award rendered by
the arbitrator or arbitrators shall be final, and judgment may be entered upon it in
accordance with applicable law in any court having jurisdiction hereof.

22 Id. at 415. The American Arbitration Rules to which this clause refers provide: "Parties to these
23 rules shall be deemed to have consented that judgment upon the arbitration award may be
24 entered in any federal or state court having jurisdiction thereof." Id. (citing American
25 Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept.
26 1, 2000)). The arbitration clause in C & L Enterprises, read together with the applicable
27 American Arbitration Association Rule, makes it clear that the Citizen Potawatomi Nation was
28 consenting to the jurisdiction of "any court" when it signed the agreement. Importantly, there

1 was no statement in the contract at issue in the C & L Enterprises case to the effect that the
2 Tribe did not agree to waive its sovereign immunity. Under these circumstances, the Supreme
3 Court held that the Nation “clearly consented to arbitration and to the enforcement of arbitral
4 awards in Oklahoma state court.” Id. at 423. The Supreme Court in C & L Enterprises discussed
5 (and did not overrule) an earlier Supreme Court case, Kiowa Tribe of Oklahoma v.
6 Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In Kiowa, the tribe at issue signed a
7 promissory note agreeing to pay the seller \$285,000 plus interest. The note provided: “Nothing
8 in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.” Id. at 753-
9 54. Id. at 754. The Supreme Court in Kiowa held that there had not been a waiver of the Kiowa
10 Tribe’s sovereign immunity. Because the Supreme Court did not overturn Kiowa in C & L
11 Enterprises, a waiver of sovereign immunity in this case should not be found unless the alleged
12 consent to suit is as clear as the waiver in C & L Enterprises.

13 In the instant case, the facts are distinguishable from those in C & L Enterprises in that
14 the property at issue in this case is located on the reservation and is used for governmental
15 purposes (rather than off reservation and for commercial use, which was the case in C & L
16 Enterprises). In addition, the contractual provisions at issue are significantly different than those
17 in C & L Enterprises in that the Tribe in this case did not in any way consent to be sued for
18 damages, and in fact some of the Leases specifically state that the Tribe is not waiving its
19 sovereign immunity.

20 Lease Agreement No. 1793 does not contain an express waiver of sovereign immunity.
21 It does provide for the application of Arizona law (see paragraph 15) but it does not include an
22 arbitration or a consent to jurisdiction provision. The Tribe believes, but would need to conduct
23 discovery in order to determine, that a “Conditions of Lease” document may exist with respect
24 to Lease No. 1793 that provides in relevant part that if the Tribe defaults under the Lease, the
25 Lessor may terminate the Lease and demand the equipment back “pursuant to an order of
26 possession granted by the Pascua Yaqui Tribal Court.” If such a document exists, the Tribe
27 does not believe that this would constitute a waiver of sovereign immunity for any suit. Instead,
28 if the Tribe is able to confirm that the Conditions of Lease document exists, and the Court

1 determines that this language constitutes a limited waiver, it is clear that the waiver would be
2 for the limited purpose of suing for an “order of possession” and would not include a waiver of
3 sovereign immunity to consent to a suit for monetary damages.

4 Lease Agreement No. 1844 does not contain an express waiver of sovereign immunity.
5 It does provide for the application of Arizona law (see paragraph 15) but it does not include an
6 arbitration or a consent to jurisdiction provision. The Tribe believes, but would need to conduct
7 discovery in order to determine, that a “Conditions of Lease” document may exist with respect
8 to Lease No. 1844 that provides in relevant part that if the Tribe defaults under the Lease, the
9 Lessor may terminate the Lease and demand the equipment back “pursuant to an order of
10 possession granted by the Pascua Yaqui Tribal Court.” If such a document exists, the Tribe
11 does not believe that this would constitute a waiver of sovereign immunity for any suit. Instead,
12 if the Tribe is able to confirm that the Conditions of Lease document exists, and the Court
13 determines that this language constitutes a limited waiver, it is clear that the waiver would be
14 for the limited purpose of suing for an “order of possession” and would not include a waiver of
15 sovereign immunity to consent to a suit for monetary damages.

16 Lease Agreement No. 2022 does not contain an express waiver of sovereign immunity.
17 It does provide for the application of Arizona law (see paragraph 15) but it does not include an
18 arbitration or a consent to jurisdiction provision. Paragraph 11 of the Conditions of Lease
19 Agreement for Lease No. 2022 provides in relevant part that if the Tribe defaults under the
20 Lease, the Lessor may terminate the Lease and demand the equipment back “pursuant to an
21 order of possession granted by the Pascua Yaqui Tribal Court.” The Tribe does not believe that
22 this constitutes a waiver of sovereign immunity for any suit. However, in the event the Court
23 determines there has been a limited waiver, it is clear that the waiver would be for the limited
24 purpose of suing for an “order of possession” and would not include a waiver of sovereign
25 immunity to consent to a suit for monetary damages.

26 Lease Agreement No. 2023 contains the following language: “The vendor agrees to the
27 jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui
28 Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in

1 no way wa[i]ves any rights held by the PYT under the constitution of the Pascua Yaqui Tribe of
2 Arizona, including, but not limited to, Sovereign Immunity.” This language indicates that
3 Plaintiff consented to suit in Tribal court, but the Tribe did not. See Lease No. 2023 Additional
4 Terms and Conditions. The Tribe did not waive its sovereign immunity.

5 Lease Agreement No. 2163 provides that Plaintiff is entitled to recover from the Tribe
6 “all legal fees and court costs incurred as a result of Lessee’s default,” but it also clearly states
7 that “[t]his Lease in no way waives any rights held by the Tribe under the Constitution of the
8 Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV – Sovereign
9 Immunity. See Lease Agreement Special Conditions, paragraphs 11 and 13. The Tribe clearly
10 and unequivocally stated that it was not waiving its sovereign immunity.

11 In this case, both the factual background and the contractual provisions at issue are
12 materially different from those in C & L Enterprises. In this case, the Tribe did not clearly and
13 unequivocally consent to a suit for damages or waive its sovereign immunity, and as set forth
14 above, in two of the Leases it explicitly stated that it was not waiving its sovereign immunity.
15 Because the Tribe neither expressly nor impliedly waived its sovereign immunity in the Leases,
16 its Motion to Dismiss based upon the Tribe’s sovereign immunity should be granted. See
17 Kiowa, 523 U.S. at 754-760.

18 **B. There has not Been a Taking of Plaintiff’s Property Without Just Compensation.**

19 Plaintiff alleges that Article I, Section 1(e) of the Pascua Yaqui Tribe’s Constitution
20 gives to them the right to assert a cause of action for inverse condemnation based upon their
21 allegation that the Tribe has deprived them of the leased property.

22 1. A Breach of Contract Does not Constitute a Taking.

23 Case law construing the United States takings clause establishes that when the alleged
24 taking is based upon a contract right, the plaintiff has a contract action rather than a takings
25 claim. See Castle v. United States, 301 F.3d 1328, 1342 (Fed. Cir. 2002); Consumers Energy
26 Co. v. United States, 84 Fed. Cl. 152, 156 (Ct. Cl. 2008) (failure of government to perform
27 standard contract for disposal of spent nuclear fuel did not effect a taking of utility’s vested
28 contract rights); Buse Timber & Sales, Inc. v. United States, 45 Fed. Cl. 258, 263 (Ct. Cl. 1999)

1 (Court held that purchaser's allegation that the government indefinitely suspended timber
2 purchase contract, in violation of contract, failed to state a takings claim, noting that the
3 question was "a contracts law question rather than a constitutional question.")¹

4 In addition, the cases relied upon by Plaintiff in support of its takings claim do not
5 support that claim. Importantly, Juda v. United States, 6 Cl. Ct. 441 (1984), involved the United
6 States Constitution, which does not contain a provision similar to that found in Article XXIV of
7 the Tribe's Constitution. That provision specifically states that the Pascua Yaqui Tribe, and all
8 of its officers and employees while acting in the course and scope of their employment by the
9 Tribe, "...shall be immune from suit, unless the tribal council enacts an ordinance expressly
10 consenting to suit." No similar provision appears in the U.S. Constitution. Thus, while the
11 Tribe's Constitution gives a right to "just compensation," it also provides that in order for the
12 Tribe to be sued for that just compensation, the Tribal Council must pass an ordinance to that
13 effect. No such ordinance has been passed in this case. Plaintiff also relies on Texas Parks and
14 Wildlife Department, Appellant v. W.M. Callaway, Jr., 971 S.W.2d 145 (1998). to support the
15 proposition that the "just compensation" provision of the Pascua Yaqui Constitution requires
16 that Plaintiff have a cause of action against the Defendant for its alleged inverse condemnation
17 of the modular structures that are the subject matter of this action. As with the United States
18 Constitution, the Texas Constitution does not specifically address the issue of sovereign
19 immunity.² So again this case is neither on point nor helpful.

20 Under these circumstances, Plaintiff has failed to state a claim that the Tribe's actions
21 amount of a taking of personal property without just compensation.

22 III. CONCLUSION

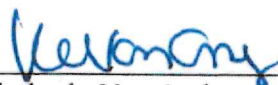
23 For each of the reasons set forth herein and in the Tribe's Motion to Dismiss, the Tribe
24 respectfully requests that the Court dismiss Plaintiff's Complaint in its entirety on the basis that

25 ¹ Although the issue addressed in this section involves the interpretation of the takings clause in the
26 Tribe's Constitution rather than the United States Constitution, this Court may look to state or federal
27 case law for guidance to the extent such case law does not conflict with laws or policies of the Tribe. 5
PYTC § 1-30(D).

28 ² The Texas Constitution is lengthy. In lieu of submitting a copy, the following link is submitted which
will access that Constitution: <http://www.statutes.legis.state.tx.us/LinksFAQ.aspx>

1 the Tribe has not waived its sovereign immunity with respect to the claims Plaintiff asserted in
2 its Complaint, and thus the Court lacks subject matter over Plaintiff's claims in this case. In the
3 alternative, the Tribe respectfully requests that the Court issue an order: (a) dismissing
4 Plaintiff's claims with respect to Lease Nos. 2023 and 2163 in their entirety; (b) dismissing
5 Plaintiff's takings claims with respect to Lease Nos. 1793, 1844, and 2022 in their entirety; and
6 (c) providing that any discovery the Tribe conducts with respect to the contract terms governing
7 Lease Nos. 1793, 1844, and 2022, shall not be construed as a consent to the Tribal Court's
8 jurisdiction and that discovery at this time should be limited to the issue of Tribe's sovereign
9 immunity with respect to claims made pursuant to those Leases.

10 **Respectfully submitted** this the 10th day of September, 2010.

11
12 
13 _____
14 Kimberly Van Amburg
15 Office of the Attorney General
16 Pascua Yaqui Tribe
17

18 ORIGINAL of the foregoing filed with
19 the Court and a COPY served via regular
20 U.S. Mail on the following on this the
10th day of September, 2010:

21 James E. Abraham, Esq.
22 BARRASSI, CURL & ABRAHAM, P.L.C.
23 485 South Main Avenue, Bldg. 01
24 Tucson, AZ 85701-2227

25 
26 _____
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- Defendants Exhibit 1, Lease No. 1793.
- Defendants Exhibit 2, Lease No. 1844.
- Defendants Exhibit 3, Lease No. 2022.
- Defendants Exhibit 4, Lease No. 2023.
- Defendants Exhibit 5, Lease No. 2163.

Notes on Exhibits:

- a. With regard to the Tribe's Exhibits 1 and 2, the Tribe believes they originally had attachments similar to Pages 3-5 of Exhibit 3.
- b. With regard to Tribe's Exhibits 1, 2, 3, the Tribe's copies of each such lease are only of the front side of those leases. The Tribe alleges, upon information and belief, that the document attached as page 2 of each those Exhibits is identical to the original of those leases.
- c. With regard to Pages 4 and 5 of Exhibit 3, the Tribe's copy of these two pages does not have a signature by either of the Plaintiffs. The Tribe is without knowledge or belief as to whether this exhibit was ever signed by Plaintiff DMI.
- d. With regard to Paragraph 14 on Page 5 of Exhibit 3, the Tribe could not locate the attached "paragraphs" referenced therein. However, the Tribe alleges, upon information and belief, that those "attached paragraphs" are identical to Page 2 of Exhibit 4.
- e. With regard to Exhibits 4 and 5, the Tribe alleges, upon information and belief, that there is a reverse side of Page 1 of each of those exhibits, but is not sure whether that is the same as the page that the Tribe has attached as Page 2 to Exhibits 1, 2, and 3.
- f. The Court should be aware that it is possible the Tribe could discover other copies of the leases in other records, but has made a diligent search of its records.

The Defendant admits this relationship, subject to applicable law and the terms and conditions of the leases themselves.

1 By a review of the leases, the Court will see that with regard to the two leases for which
2 there is no attachment, the lease is silent as to whether the Defendant, a sovereign Indian tribe,
3 has waived its sovereign immunity.

4 By a review of the leases that do have attachments, the Court will see that each such
5 lease attachment specifically states that "This lease in no way waives any rights held by the
6 Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to
7 Article XXIV-Sovereign Immunity."

8 Under applicable law, no Court has subject matter jurisdiction over an Indian tribe
9 unless there is an applicable federal statute that confers that jurisdiction, or the tribe itself has
10 specifically consented in writing, in accordance with its laws, that a Court will have jurisdiction
11 over the Tribe. This type of specific consent is commonly referred to as a "Waiver of
12 Sovereign Immunity." No such waiver exists with regard to any of the leases that are the
13 subject of this action. Therefore the Court does not have subject matter over the Pascua Yaqui
14 Tribe in this action, and the matter must be dismissed. Put in the common vocabulary,
15 Plaintiffs' claims against the Tribe are barred by the Tribe's sovereign immunity.

16 **B. Arguments and Authorities.**

17 Plaintiffs' Claims against the Tribe are Barred by Sovereign Immunity.

18 The status of Indian tribes in the scheme of governmental entities in the United States is
19 that tribes are, as stated by Chief Justice John Marshall, "domestic dependent nations" within
20 the United States. See *Cherokee Nation v Georgia* 30 U.S. (5 Pct.) 1, 16 (1831). In his work
21 entitled "*American Indian Law in a Nutshell*", Thompson West, 4th (2004) at Pg. 75, Senior 9th
22 Circuit Judge William C. Canby Jr. states that:

23 "Thus a tribe's right to establish a court or levy a tax is not subject to attack on the
24 ground that Congress has not authorized the tribe to take these actions; the tribe is
25 sovereign and needs no authority from the federal government. *Iron Crow v Oglala*
26 *Sioux Tribe*, 231 F.2d 89 (8th Cir.1956); *Merrion v Jicarella Apache Tribe*, 455 U.S.
27 130, 149 (1982)." Underlining added.

28 Under *Iron Crow*, and numerous similar cases, Indian tribes are sovereigns, and can act

1 as a sovereign, again subject to the jurisdiction of the United States.

2 As sovereigns, Indian tribes enjoy all the rights and privileges of a sovereign. Included
3 in those rights and privileges is the fact that Indian tribes, like other sovereigns, have the
4 common law immunity from suit traditionally enjoyed by other sovereign powers. See *Santa*
5 *Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).¹ Thus, an Indian tribe is subject to suit only
6 where Congress has authorized the suit or the tribe has waived its immunity. See *Kiowa Tribe*
7 *of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Frias v.*
8 *Yucupicio et al.*, Case No. CV-08-002, Order Granting Defendants' Motion to Dismiss, at p. 3.²

9 A tribe's sovereign immunity extends to agencies of the tribe and tribal officials acting
10 within the scope of their authority. See *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,
11 479-80 (9th Cir. 1985).

12 Any waiver of immunity must be "unequivocally expressed, and may not be implied."
13 *Santa Clara Pueblo* (Id) at 58.³

14 Under the Constitution of the Pascua Yaqui Tribe, the Tribe has confirmed to itself its
15 sovereign powers, and has also stated a mechanism (the only mechanism) under which it may
16 be deemed to have waived its sovereignty. Specifically, Article XXIV of the *Constitution of the*
17 *Pascua Yaqui Tribe* provides that:

18 "The Pascua Yaqui Tribe and any person acting within the scope of his or her
19 capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune
20 from suit, unless the tribal council enacts an ordinance expressly consenting to
21 suit."

22
23 ¹ Although the issues addressed herein are matters of Tribal law and sovereignty, this Court may look to
24 state or federal case law for guidance to the extent such case law does not conflict with laws or policies
of the Tribe. 5 PYTC § 1-30(D). Thus, the Tribe cites and relies on federal and state case law herein to
the extent such case law is helpful in analyzing the issues before the Court.

25 ² Copy attached as Defendant's Exhibit 6.

26 ³ Importantly, there is a strong presumption against finding a waiver of sovereign immunity. See
27 *Demontiney v. United States*, 255 F.3d 801, 812 (9th Cir. 2001) (citation omitted); *Frias v. Yucupicio et*
al., Order Granting Defendants' Motion to Dismiss, at p. 4. Waivers are "interpreted liberally in favor
28 of the Tribe, and restrictively against the claimant." *Frias v. Yucupicio et al.*, Order Granting
Defendants' Motion to Dismiss, at p. 4 (quoting *Maryland Casualty Co. v. Citizens Nat. Bank of West*
Hollywood, 361 F.2d 517, 521 (1966)).

1 And, as relates to suits against an Indian tribe are concerned, the issue of whether there
2 has been a waiver of the tribe's sovereignty is jurisdictional. This is clearly stated by this Court
3 in its Order of Dismissal in *Frias v. Yucupicio, et.al.*, (Id.) at Pg. 2, L. 21.

4 "Sovereign Immunity is jurisdictional. It automatically raises the question about a tribal
5 court's jurisdiction over the Tribe, its employees, and its entities. A claim of sovereign
6 immunity is a "jurisdictional prerequisite which may be asserted at any state of the
7 proceedings." *U.S. v. Sherwood*, 312 U.S. 584, 586-587, (1941); *Ramey Construction*
8 *Co. v. Apache Tribe of Mescalero Reservation*, 673 G.2d 315, 318 (10th Cir. 1982);
9 *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154n.1 (9th Cir., 1979)."

10 When a Tribe that has been sued raises the issue of lack of subject matter jurisdiction
11 due to the Tribe's sovereign immunity, the only way for the Plaintiff to show the Court that the
12 Court has subject matter jurisdiction is to show either that jurisdiction has been bestowed upon
13 the Court by an act of Congress, or by the Tribe itself through a waiver of its sovereign
14 immunity. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998).

15 In this case there is no act of Congress that would implicate the Plaintiffs' claim or
16 constitute a forced waiver of the Tribe's sovereign immunity through such act.

17 Therefore, for the Plaintiffs to defeat the Tribe's assertion of sovereign immunity
18 against this claim, the Plaintiffs must show a waiver of sovereign immunity by the Tribe itself
19 in the matter which is the subject of the Plaintiffs' litigation. And, such a waiver may not be by
20 implication, but rather the waiver must be express. *American Indian Agricultural Credit Union*
21 *Consortium, Inc. v. Standing Rock Tribe*, 780 F.2d 1374, 1378 (8th Cir. N.D. 1985).

22 In this case, in Leases No. 2022, 2023, and 2163, not only is there no express waiver,
23 but instead the lease itself states expressly that it "in no way waives any rights held by the
24 Tribe...including, but not limited to Article XXIV – Sovereign Immunity." So as to those three
25 leases, the leases themselves make clear that they do not constitute a waiver of the Tribe's
26 sovereign immunity. As to those leases, there are no other known waivers of the Tribe's
27 sovereign immunity, whether express or otherwise. And, as Section 13 of the Special
28 Conditions of Lease 2163 make clear, all changes to the Lease must be in writing. As to these

1 three leases then, there is no question that the Tribe retained, and did not waive, its right to
2 assert its sovereign immunity in this matter.

3 In the case of Leases No. 1793 and 1844 the Tribe does not now have evidence that
4 there was an attachment to those leases similar to the attachments to Leases No. 2022, 2023,
5 and 2163, although it believes there may have been similar attachments. However, Lease No.
6 2163 was a renewal of a previous lease of the same modular building. That previous lease was
7 Desert's Lease No. 1582 of January 14, 1999. A copy of that lease is attached as Exhibit
8 hereto. While the copy of that lease now in the Tribe's possession is not signed, there is an
9 attachment to that lease, entitled "Conditions of Lease Agreement between the Pascua Yaqui
10 Tribe of Arizona an Desert Modulares, Inc." That attachment is signed by Teresa Stovall of
11 Desert. Section 13 of that attachment recites, in part, that "This agreement in no way waives
12 any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona,
13 including, but not limited to, Article XXIV - Sovereign Immunity." Therefore, since
14 approximately January 19, 1999 at the latest, Desert had actual notice that the Tribe enjoyed
15 sovereign immunity, and was not waiving its sovereign immunity with regard to the leases
16 between Desert and the Tribe.

17 The law that is applicable with regard to each of the Desert/Capital leases is the same.
18 For there to be a waiver of the Tribe's sovereign immunity regarding the claims surrounding
19 those leases, that waiver must have been express. A review of both those leases shows that
20 there is no waiver of sovereign immunity within the lease itself. And Plaintiff is not aware of
21 any waiver having been given.

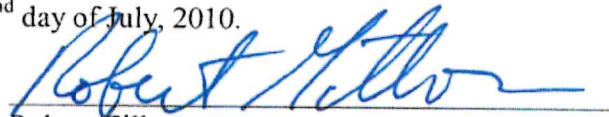
22 Finally, under Tribal law, for a waiver of sovereign immunity to be effective it must be
23 approved by the Tribal Council of the Pascua Yaqui Tribe enacting an ordinance to that effect.
24 *Constitution, Article XXIV* (Id.). That Constitution has been a matter of public record since its
25 approval by the U.S. Department of Interior, Bureau of Indian Affairs, on February 8, 1988. As
26 discussed above, the Plaintiffs have had actual knowledge of the existence of the Tribe's
27 Constitutional provisions dealing with waivers of sovereign immunity by virtue of the fact that
28 these provisions have been specifically called out in the leases themselves. The Tribal Council

1 of the Pascua Yaqui Tribe never passed any ordinance granting a waiver of sovereign immunity
2 in the case of any of the Plaintiffs' leases.

3 **C. Conclusion**

4 Plaintiffs' claims are claims against a sovereign Indian tribe. The Pascua Yaqui Tribe
5 has not waived its right to assert lack of subject matter jurisdiction due to the Tribe's
6 sovereignty, and has, in fact, now asserted that its sovereignty, and its sovereign immunity, act
7 as a bar to this Court asserting subject matter jurisdiction in this case. There is no express
8 waiver by the Tribe of that sovereign immunity in this case. Therefore, this Court is without
9 subject matter jurisdiction to hear this case, and the case must be dismissed due to that lack of
10 subject matter jurisdiction.

11
12 **Respectfully submitted** this, the 22nd day of July, 2010.

13 
14 Robert Gillon
15 Office of the Attorney General
16 Pascua Yaqui Tribe
17
18

19 ORIGINAL of the foregoing filed with
20 the Court and a COPY served via regular
21 U.S. Mail on the following on this the
22nd day of July, 2010:

22 James E. Abraham, Esq.
23 BARRASSI, CURL & ABRAHAM, P.L.C.
24 485 South Main Avenue, Bldg. 01
25 Tucson, AZ 85701-2227
26
27
28

DMI Desert
Modulars
Inc.
Arizona Department of Building and Fire Safety License #66121

LEASE AGREEMENT

PROSECUTOR

LEASE AGREEMENT NO: 2023
CUSTOMER PO: _____

3960 E. Illinois St. Tucson, AZ 85714
520-747-7870 Fax 520-747-6701

Single Unit Lease Multi-Unit Lease - See Attached Schedule

This Lease Agreement is made this 7 day of Nov, 2000, by and between Desert Modulars, Inc., an Arizona corporation (Lessor) and the following (Lessee):

NAME(Lessee) Pascua Yaqui Tribe of Arizona CONTACT Harvey Thompson
ADDRESS 7474 S. Camino de Oeste CITY Tucson
STATE AZ ZIP 85746 PHONE 879-5140 FAX _____

Subject to the terms and provisions set forth in this Lease Agreement, Lessor hereby leases to Lessee the equipment described below. The term of this Lease shall commence on ** and shall continue for a minimum of sixty (60) months. Lessee agrees to pay the following Monthly Rental and Other Charges plus all applicable sales, use and property taxes. Monthly Rentals shall be paid without demand and in advance on the ** () day of each calendar month. Payments of monthly rental or other charges that are not made within twenty (20) days of due date are subject to finance charge of eighteen (18%) percent per annum interest from the date due until paid in full.

MONTHLY RENTAL \$1,985 DELIVERY * BLOCK & LEVEL *
TIEDOWNS _____ STEPS _____ OTHER _____
RETURN DELIVERY prev TAKE DOWN prev / (*) amount to be assessed at time of return.

As provided for on the reverse side hereof, Lessee shall be responsible for all damages to the Equipment. Lessee shall pay all cleaning charges, including the minimum cleaning charge, and Lessee must provide Lessor with a Certificate of Insurance.

The equipment will be located at 4725 Calle Tetakusim

SERIAL NO:	LEASED EQUIPMENT DESCRIPTION	INSURANCE VALUATION
	New 42' x 62' Modular Office	\$99,950

SPECIAL CONDITIONS AND INSTRUCTIONS

- * Delivery, set-up, skirt at \$9,075.
- ** Lease commences upon completion at site.
- Teardown and return at cost plus 10%.

NEW UNIT LIKE NEW EXCEPT AS NOTED BELOW INSPECTION REPORT ATTACHED

CONDITION NOTES:

Signed by duly authorized agents subject to the terms and conditions on both sides of this Lease Agreement this 7 day of Nov, 2000.

LESSOR: Desert Modulars, Inc.

By: [Signature]
Its: Pres.

LESSEE:
By: [Signature]
Its: VIC [Signature]

EQUIPMENT ACCEPTANCE: Lessee or authorized agent acknowledges receipt of the Equipment according to Paragraph 2 on the reverse.
Received and accepted by: _____
Its: _____ Date Received: _____

Δ's Ex. 4, Pg. 1

Purchase Order :PYT092395

**Pascua Yaqui Tribe of Arizona
or
Casino of the Sun
Addition Terms and Conditions**

The Purchase Order appearing on the face of this page along with all terms and conditions set forth herein represents an offer to purchase the goods or services described from the named vendor within the terms and conditions specified. Upon presentation of this Purchase Order to the named vendor, acceptance of this offer to purchase will be implied and a contract for specific performance will result unless said vendor notifies the Pascua Yaqui Tribe (PYT) of their nonacceptance or requests a modification within five working days. Unless otherwise noted, the PYT promises to honor valid claims for payment for the specified goods or services delivered. No other agreement except as those stated on this Purchase Order or additional referenced Contractual Agreements shall be implied or approved except with written acknowledgement by the signer of this Purchase Order or a duly appointed representative. Substitutions of goods or services must likewise be approved in writing by an authorized agent of the PYT. The PYT may terminate this contract at any time if the goods, or services provided are not satisfactory.

Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit for damages or specific performance when the non-performance negatively affects the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waves any rights held by the PYT under the constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity.

The contractor agrees to hold harmless and indemnify the PYT against any and all losses, costs, damages, claims expenses or other liability whatsoever arising out of or connected with the contractor's work/services under this contract including, but not limited to, any accident or injury to personnel or property.

It is mutually understood and agreed that the vendor named shall not assign, transfer, convey, sublet, or otherwise dispose of the purchase order, contract, or their right, title, or interest therein, or power to execute such purchase order or contract to any other person, company, or corporation without the previous written consent of the PYT.

The PYT payment policy is net thirty (30) days from receipt of goods or completion of service. Partial payments for incomplete purchase orders will be made at the discretion of the PYT and may be withheld as performance assurance.

The PYT cannot accept any C.O.D. charges on deliveries. Unless noted otherwise when purchase orders are issued, all items are to be delivered Monday through Friday (except holidays) between 8:00 a.m. and 4:00 p.m.. The PYT assumes no liability for costs incurred by vendors due to attempted deliveries at other than regular PYT working days and operation hours. The PYT does not have a loading dock available for drop shipments. The vendor must assume responsibility for unloading trucked items.

Please note if there are extended lead times needed for any particular item on the Purchase Order. The PYT expects delivery on or before the needed delivery date unless special circumstances are noted. Please Provide notification of deliveries date and time at least 24 hours prior to delivery.

The PYT reserves the right to return any equipment or product which does not meet specifications indicated at the vendor's expense. The vendor guarantees that all product delivered is standard first quality, new, and regular stock. The PYT must be notified of changes in any items specifications before delivery occurs. Sufficient time must be allowed for PYT approval prior to delivery of changed items. The vendor may be held responsible for obtaining specified items if available or PYT approved alternatives at the bidders expense if notice and approval is not requested in a timely manner.

Where applicable, current OSHA material safety data sheets must be provided for each item delivered against this purchase order. Complete descriptive literature, instructions and warranty data should be submitted with this order as well.

Δ's Ex. 4, Pg 2

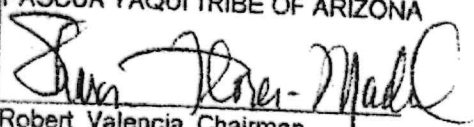
PASCUA YAQUI TRIBE OF ARIZONA
PURCHASE ORDER # PYT010151

(Page 3)

CONDITIONS OF LEASE AGREEMENT

9. **Holdover:** With consent of the Lessor, any holdover after the expiration of the minimum term shall be deemed to be a lease on a month-to-month basis at the one month rate then in effect with the same terms and conditions provided herein. Anytime after the expiration of the minimum lease term, the Lessor may terminate the lease by giving Lessee 30 days written notice.
10. **Lawful Use, Assignment, and Subletting:** Lessee shall use the equipment only for lawful purposes and in accordance with the laws of the applicable jurisdictions. Unless specifically stated otherwise herein, Lessee is responsible for all permits and licenses for the occupancy and operation of the equipment. Lessee shall not assign, transfer, or sublet the equipment.
11. **Default by Lessee:** If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.
12. **Default by Lessor:** Lessor shall not be in default under this lease unless Lessor fails to perform any obligations required by Lessor within a reasonable time, but in no event later than thirty (30) days after written notice by Lessee, specifying Lessor's failure to perform. Notwithstanding the foregoing, if the nature of Lessor's obligation is such that more than thirty (30) days are required for performance, then Lessor shall not be in default if Lessor diligently commences performance. In the event of default by Lessor, Lessee' sole remedy shall be to terminate this Lease and to require Lessor to remove the Equipment from the location indicated on the reverse side of this Lease.
13. Price includes all tribal inspection fees if applicable.
14. See attached paragraphs

PASCUA YAQUI TRIBE OF ARIZONA


Robert Valencia, Chairman

DESERT, MODULARS,

Authorized Representative

Δ5
Ex. 3
Pg. 5

1 **Non-Uniform Interrogatory No. 2:**

2 Describe the relationship between Desert Modulares, Inc., and LLC Capital LLC,
3 including the history of assignments between them of any of the leases at issue in this
4 litigation.

5
6 Design Modulares, Inc. [DMI] is a small business that sells
7 and leases all types of mobile and modular buildings. As a
8 small business, DMI has limited sources of capital. Some
9 larger lease transactions are sold to third parties like
10 LLC Capital, some leases are funded internally and
11 some are funded through conventional financial institutions.

12 There is no unity or overlap of ownership or management
13 of DMI and LLC Capital, LLC.

14 Lease 2163 Revised was funded by DMI; leases 1793, 1844,
15 202 and 2023 were funded by LLC Capital. In all subject
16 leases, DMI performed as contractor, dealer and leasing
17 agent.

18 Lease rates and costs associated with installation were
19 negotiated and incorporated into lease documents. DMI's
20 standard agreement was the core lease document, modified
21 by terms and conditions requested by the Pascua Yaqui Tribe.

22 DMI purchased the modular buildings from a licensed provider
23 based upon design specifications requested by PYT. In some
24 cases, DMI in turn sold the building at market value to LLC
25 Capital with an expected stream of lease payments. At the
26 time of sale, title would be transferred from DMI to LLC
Capital. By agreement between them, DMI was to bill,
collect and remit the lease payments to LLC Capital. In
November of 2004, DMI and LLC Capital agreed that DMI
would retain 10% of the lease revenues for continued
management of the accounts.

1 **Request for Admission No. 1:**

2 ADMIT that neither Desert Modulares, Inc. nor LLC Capital LLC paid for the
3 installation, maintenance, and upkeep of the five modular offices at issue in this litigation
4 once they came to be located on the land of the Pascua Yaqui Tribe.

5 Admit _____ Deny DENY (check one)

6
7 **Request for Admission No. 2:**

8 ADMIT that the Pascua Yaqui Tribe paid for the installation, maintenance, and
9 upkeep of the five modular offices at issue in this litigation once they came to be located
10 on the land of the Pascua Yaqui Tribe.

11 Admit ADMIT Deny _____ (check one)

12
13 **Non-Uniform Interrogatory No. 3:**

14 If your answer to any of the above Requests for Admissions Nos. 1 and 2 is
15 anything other than an unqualified admission, describe in detail what installation,
16 maintenance, and upkeep costs you claim were paid by either one or both of the Plaintiffs,
17 and identify any documentation of these costs and expenditures.

18 DMI paid for the purchase of the modular units from the
19 manufacturer or provider, and paid for the installation and
20 set up of the units at the Pascua Yaqui headquarters through
21 payments to subcontractors and DMI's own employees. These
22 installation and set up costs were billed to and paid by PYT
23 as up-front installation costs. After installation, DMI
24 performed some warranty and maintenance work on the units
25 (e.g., replacing door knobs); however, this work was not
26 substantial and DMI admits that PYT maintained the buildings
once installed.

1 **Request for Admission No. 3:**

2 ADMIT that Lease No. 1793, dated December 1, 1999, indicates an original
3 purchase option price of "\$85,295 less 25% of all paid rents during the first 12 months of
4 the lease."

5 Admit ADMIT Deny _____ (check one)

6
7
8 **Request for Admission No. 4:**

9 ADMIT that the Pascua Yaqui Tribe has paid more than \$85,295 for the modular
10 office specified in Lease No. 1793.

11 Admit ADMIT* Deny _____ (check one)

12 * WITH CLARIFICATION

13
14 **Request for Admission No. 5:**

15 ADMIT that the Pascua Yaqui Tribe has paid more than \$170,000 for the modular
16 office specified in Lease No. 1793.

17 Admit _____ Deny DENY (check one)

18
19
20 **Request for Admission No. 6:**

21 ADMIT that the Pascua Yaqui Tribe has paid, in the aggregate, more than
22 \$900,000 to the Plaintiffs for the five modular offices at issue in the above-captioned
23 litigation.

24 Admit _____ Deny DENY (check one)

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Request for Admission No. 7:

ADMIT that the amount of money the Pascua Yaqui Tribe has paid to the Plaintiffs exceeds the value of the five modular offices at issue in this litigation.

Admit _____ Deny DENY (check one)

Request for Admission No. 8:

ADMIT that the amount of money the Pascua Yaqui Tribe has paid to the Plaintiffs exceeds by at least *two times* the value of the five modular offices at issue in this litigation.

Admit _____ Deny DENY (check one)

Request for Admission No. 9:

ADMIT that the amount of money the Pascua Yaqui Tribe has paid to the Plaintiffs exceeds by at least *three times* the value of the five modular offices at issue in this litigation.

Admit _____ Deny DENY (check one)

1 Non-Uniform Interrogatory No. 4:

2 If your response to any of the above Requests for Admission Nos. 3-9 is anything
3 other than an unqualified admission, describe in detail the reason for your refusal to admit,
4 including an indication of what you believe to be the amount of money paid to you by the
5 Pascua Yaqui Tribe and the value of the modular offices at issue in this litigation.

6
7 Request #4: PYT made lease payments under Lease 1793 which
8 total more than \$85,295. By the nature of this operating
9 lease, these payments were for the privilege of use of the
10 modular unit. No portion of those lease payments was
11 intended as a capital payment toward purchase except as
12 provided for purchase within the first year.

13
14 Request #5: PYT's lease payments through July 2009 total
15 \$157,100, which is less than \$170,000.

16
17 Request #6: PYT's lease payments for the five modular
18 offices through July 2009 total \$839,730, which is less
19 than \$900,000.

20
21 Requests ##7, 8 and 9:

22
23 A. By the nature of these operating leases,
24 these payments were for the privilege of use of the
25 modular units. No portion of those lease payments was
26 intended as a capital payment toward purchase except as
provided for purchase within the first year.

27
28 B. Plaintiffs have not received the report of their
29 expert on valuation and cannot at this time confirm the
30 of the units at issue.

what is FMV?

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Request for Admission No. 10:

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ADMIT that in the letter dated December 7, 1998, attached hereto as Exhibit A, Paula J. Perrera of the Pascua Yaqui Tribe advised Teresa Stovall of Desert Modulares, Inc., that the Tribe would "in no way" waive any of its Constitutional rights in connection with the lease of a modular office.

Admit ADMIT Deny _____ (check one)

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Request for Admission No. 11:

ADMIT that the Lease Agreement Special Conditions for Lease No. 2163 Revised, a copy of which is attached hereto as Exhibit B, and which bears a signature on behalf of Desert Modulares, Inc., states that the lease "in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV - Sovereign Immunity."

Admit ADMIT Deny _____ (check one)

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Request for Admission No. 12:

ADMIT that on or about October 7, 2002, Desert Modulares, Inc. sent a fax to "Bertha", a copy of which is attached hereto as Exhibit C, containing a copy of Lease No. 2023 including among its additional terms and conditions a statement that the lease agreement "in no way waves [sic] any rights held by the PYT under the constitution of the Pascua Yaqui Tribe, including, but not limited to, Sovereign Immunity."

Admit ADMIT Deny _____ (check one)

1 **Request for Admission No. 13:**

2 ADMIT that Lease Agreement No. 2022, a copy of which is attached hereto as
3 Exhibit D, included among its additional terms and conditions a statement that the lease
4 agreement "in no way waves [sic] any rights held by the PYT under the constitution of the
5 Pascua Yaqui Tribe, including, but not limited to, Sovereign Immunity."

6 Admit ADMIT Deny _____ (check one)

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8
9 **Request for Admission No. 14:**

10 ADMIT that during negotiations over the lease agreements at issue in this
11 litigation, Desert Modulars, Inc. was made aware that the Pascua Yaqui Tribe would not
12 agree to waive its sovereign immunity in connection with any of the modular office lease
13 agreements at issue in this litigation.

14 Admit _____ Deny DENY (check one)

15 DMI was aware of the PYT's statements to this effect, but the
16 terms and conditions added by PYT to the written contracts are
not consistent with full immunity.

17 **Request for Admission No. 15:**

18 ADMIT that the Tribal Council of the Pascua Yaqui Tribe has passed no resolution
19 approving a waiver of the Tribe's sovereign immunity in connection with the lease
20 agreements at issue in this litigation.

21 Admit _____ Deny DENY (check one)

22 Plaintiffs are not aware of any Council resolution approving
23 a waiver of sovereign immunity in connection with the lease
24 agreements at issue, but Plaintiffs do not have access to all
25 records of the Council.
26

1 **Request for Admission No. 16:**

2 ADMIT that Lease Agreement No. 1793 between Desert Modulares, Inc. and the
3 Pascua Yaqui Tribe originally included an attachment indicating that, among other terms
4 of the Lease, the Tribe did not waive its Constitutional sovereign immunity from suit.

5 Admit ADMIT* Deny _____ (check one)

6 *See Notes of Explanation attached hereto.

7
8 **Request for Admission No. 17:**

9 ADMIT that Lease Agreement No. 1844 between Desert Modulares, Inc. and the
10 Pascua Yaqui Tribe originally included an attachment indicating that, among other terms
11 of the Lease, the Tribe did not waive its Constitutional sovereign immunity from suit.

12 Admit ADMIT* Deny _____ (check one)

13 *See Notes of Explanation attached hereto.

14
15 **Request for Admission No. 18:**

16 ADMIT that Lease Agreement No. 2022 between Desert Modulares, Inc. and the
17 Pascua Yaqui Tribe originally included an attachment indicating that, among other terms
18 of the Lease, the Tribe did not waive its Constitutional sovereign immunity from suit.

19 Admit ADMIT* Deny _____ (check one)

20 *See Notes of Explanation attached hereto.

21
22 **Request for Admission No. 19:**

23 ADMIT that Lease Agreement No. 2023 between Desert Modulares, Inc. and the
24 Pascua Yaqui Tribe originally included an attachment indicating that, among other terms
25 of the Lease, the Tribe did not waive its Constitutional sovereign immunity from suit.

26 Admit ADMIT* Deny _____ (check one)

*See Notes of Explanation attached hereto.

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Request for Admission No. 20:

ADMIT that Lease Agreement No. 2163 Revised between Desert Modulares, Inc. and the Pascua Yaqui Tribe originally included an attachment indicating that, among other terms of the Lease, the Tribe did not waive its Constitutional sovereign immunity from suit.

Admit ADMIT* Deny _____ (check one)

*See Notes of explanation attached hereto.

Request for Admission No. 21:

ADMIT that you cannot produce complete copies of all contracts or agreements that you claim to be enforcing in this litigation.

Admit _____ Deny DENY (check one)

Request for Admission No. 22:

ADMIT that you have destroyed or lost documents or portions of documents that, if found and produced, would be adverse to your position in this litigation.

Admit _____ Deny DENY (check one)

1 **Non-Uniform Interrogatory No. 5:**

2 Identify by name, employer, and title any and all witnesses you intend to call to
3 testify on behalf of Desert Modulares, Inc. and/or LLC Capital LLC in this litigation,
4 including a fair description of the substance of each witnesses' expected testimony and
5 their present address and telephone number.

6
7 Knute Knutson, President of Design Modulares, Inc.
8 Will testify as to the negotiations with representatives of
9 PYT toward the leasing of the five modular units at issue
10 in this action. He will testify that the PYT also purchased
11 outright several other modular units contemporaneously with
12 these leases, that PYT was aware that these leases were
13 operating leases, and not financing leases, that is, the
14 agreements did not call for transfer of title to the units
15 to Lessee upon termination, but rather for use only for the
16 minimum term and any period of extension, and that lease
17 payments did not apply toward purchase except for the credit
18 for purchase within the first 12 months. He will testify to
19 as to PYT's default in August 2009 and the amount owed on
20 the five leases after that time. He will discuss his
21 communications with PYT recommending that PYT exercise its
22 rights to terminate the leases after the minimum term and
23 purchase the units to keep from paying rent, and the PYT's
24 rejection of those proposals.

19 Gary Lamb, Managing Member of LLC Capital, LLC
20 Will testify as to LLC Capital's ownership of four of the
21 leases at issue, and the terms of the leases and PYT's default

22 Jeffrey C. Patch, President of Tucson Real Estate Appraisal,
23 Inc. will testify to the fair market value of the modular units
24 at issue.

25 W. Robert Gillon, Attorney General for PYT, may be called to
26 testify to his participation in the negotiations of the terms
of the leases at issue, his drafting of terms and
conditions of the leases, and his review of the documents.

Notes of explanation of Requests for Admissions

Request #16:

Lease 1793 includes Purchase Order PYT000437 and attached Conditions of Lease Agreement prepared by "Tribal Legal." These Conditions include the following provision:

11. Default by Lessee: If Lessee fails to pay rent or any other payables, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment upon default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges, including damages charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled (sic) to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

Also attached to Lease 1793 are CONDITIONS OF LEASE AGREEMENT between the Pascua Yaqui Tribe of Arizona and Desert Modulares, Inc. which includes the following provisions:

13. Miscellaneous: This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona in and by the Pascua Yaqui Tribal Court, the lessor hereby agreeing to jurisdiction in the Pascua Yaqui Court. This Lease in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV - Sovereign Immunity.

15. Severability

Notwithstanding the declaration by any court that any term or provision of this Agreement is void or unenforceable, the remaining terms and provisions of this Agreement shall remain in full force and effect in the same manner as if the invalid or illegal provision had not been in the Agreement

16. Jurisdiction and Sovereign Immunity.

The governing law for this Agreement shall be Pascua Yaqui Tribal Law. Lessor, by its signature below, consents to the exclusive jurisdiction of the Pascua Yaqui Tribal Court over all disputes regarding this Agreement. This Agreement in no way waives any rights held by the Lessee under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Article. XXIV - Sovereign Immunity.

17. Attorney's Fees

In any action to enforce the terms of this Agreement, the prevailing party shall be entitled to an award for its reasonable attorney's fee, subject to Lessee's defense of Sovereign Immunity.

Request #17:

Lease 1844 includes Purchase Order PYT002385 and attached Conditions of Lease Agreement. These Conditions include the following paragraph:

11. Default by Lessee: If Lessee fails to pay rent or any other payables, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee. Lessor may take repossession of the equipment default only pursuant to an order of possession granted by the Pascua Yaqui Tribal Court. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges, including damages charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled [sic] to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.

Paragraph 13 of these Conditions refers to attached paragraphs. Plaintiffs believe this refers to the three-page "CONDITIONS OF LEASE AGREEMENT between the Pascua Yaqui Tribe of Arizona and Desert Modulares, Inc." prepared by tribal counsel and containing provisions set out above in explanation of Request #16.

Request #18:

Lease 2022 includes Purchase Order PYT010151 and two attached pages (page 2 is duplicated to include signatures of both parties) of "CONDITIONS OF LEASE AGREEMENT between the Pascua Yaqui Tribe of Arizona and Desert Modulares, Inc." including paragraph 11 set out above in Item 17. In addition, there is a one-page attachment entitled "*Pascua Yaqui Tribe of Arizona or Casino of the Sun Additional Terms and Conditions.*" This page includes the following text:

Acceptance of this Purchase Order by the Vendor and subsequent failure to perform all specified items can result in suit for damages or specific performance when the non-performance negatively effects the PYT. The vendor agrees to the jurisdiction of the Courts of the Pascua Yaqui Tribe and under the laws of the Pascua Yaqui Tribe in resolving any disputes concerning this Purchase Order. This contract or agreement in no way waives any rights held by the PYT under the constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to, Sovereign Immunity.

Request #19:

Lease 2023 includes Purchase Order PYT010156 and two attached pages of "CONDITIONS OF LEASE AGREEMENT between the Pascua Yaqui Tribe of Arizona and Desert Modulares, Inc." including paragraph 11 set out above in Item 17.

DMI Desert
Modulars
Inc.

[Arizona Department of Building and Fire Safety License #0512]

3960 E. Illinois St. Tucson, AZ 85714
520-747-7870 Fax 520-747-8701

LEASE AGREEMENT

LEASE AGREEMENT NO: 1844
CUSTOMER PO: _____

Single Unit Lease Multi-Unit Lease - See Attached Schedule

This Lease Agreement is made this 19 day of July, 2000, by and between **Desert Modulars, Inc.**, an Arizona corporation (Lessor) and the following (Lessee):

NAME(Lessee) Pascua Yaqui Tribe of Arizona CONTACT Diaz Oei
ADDRESS P.O. Box 11815 CITY Tucson
STATE AZ ZIP 85734-18 PHONE 883-5000 FAX _____

Subject to the terms and provisions set forth in this Lease Agreement, Lessor hereby leases to Lessee the equipment described below. The term of this Lease shall commence on _____ and shall continue for a minimum of twelve (12) months. Lessee agrees to pay the following Monthly Rental and Other Charges plus all applicable sales, use and property taxes. Monthly Rentals shall be paid without demand and in advance on the first (1) day of each calendar month. Payments of monthly rental or other charges that are not made within twenty (20) days of due date are subject to finance charge of eighteen (18%) percent per annum interest from the date due until paid in full.

MONTHLY RENTAL \$1,575 DELIVERY \$1,200 BLOCK & LEVEL \$3,950

TIEDOWNS _____ STEPS _____ OTHER skirting \$2,300

RETURN DELIVERY * _____ TAKE DOWN * _____ If(*), amount to be assessed at time of return.

As provided for on the reverse side hereof, Lessee shall be responsible for all damages to the Equipment; Lessee shall pay all cleaning charges, including the minimum cleaning charge, and Lessee must provide Lessor with a Certificate of Insurance.

The equipment will be located at Information Technology

LEASED EQUIPMENT		
SERIAL NO:	DESCRIPTION	INSURANCE VALUATION
	36' x 60' modular building	

SPECIAL CONDITIONS AND INSTRUCTIONS

- Window guards included in lease rate

NEW UNIT LIKE NEW EXCEPT AS NOTED BELOW INSPECTION REPORT ATTACHED

CONDITION NOTES: _____

Signed by duly authorized agents subject to the terms and conditions on both sides of this Lease Agreement this _____ day of _____, 2000.

LESSOR: Desert Modulars, Inc.

By: [Signature]
Its: [Title]

LESSEE: _____

By: _____
Its: _____

EQUIPMENT ACCEPTANCE: Lessee or authorized agent acknowledges receipt of the Equipment according to Paragraph 2 on the reverse.

Received and accepted by: _____
Its: _____ Date Received _____

As Ex 2 Pg 1

CONDITIONS OF LEASE AGREEMENT

In addition to the conditions and payment of rentals and charges on the reverse side, the following is agreed to:

1. **Taxes, Fees, and Expenses:** Lessor shall pay all sale and use taxes including personal property taxes for the period the equipment is on lease. Lessee shall pay all assessments and fees for the use and or transportation of the equipment. Lessor to pay all licensing and registration fees.
2. **Delivery and Acceptance:** The Parties acknowledge that Lessee has taken the equipment for a commercial or business purpose and not for personal, family or household purpose and that this Lease shall not be deemed a "Consumer Lease" within the meaning of A.R.S. 47-2A103(A)(5) or any similar statute or court decision. Lessor shall not be liable to Lessee for any failure or delay in delivering the equipment. Lessee shall not move the equipment from the location indicated on the reverse side without the consent of the Lessor. The equipment shall remain personal property regardless of its use or manner of attachment to the ground.
3. **DISCLAIMER OF WARRANTIES:** UPON THE ACCEPTANCE OF THE EQUIPMENT AS PROVIDED FOR IN PARAGRAPH 2, LESSEE HEREBY WAIVES AND RELEASES ALL WARRANTIES, OBLIGATIONS AND LIABILITIES OF LESSOR AND ANY RIGHTS, CLAIMS AND REMEDIES OF LESSEE AGAINST LESSOR, ITS OWNERS, OFFICERS, OR EMPLOYEES, EXPRESSED OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH RESPECT TO ANY AND ALL EQUIPMENT OR OTHER TANGIBLE OR INTANGIBLE ITEMS OR SERVICES PROVIDED UNDER THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO: (I) ANY IMPLIED WARRANTY OR MERCHANTABILITY OR FITNESS FOR A SPECIFIC PURPOSE; (II) ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE, AND (III) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, AND WHETHER FOR INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, REVENUE, PROFIT, OR DATA).
4. **Indemnity:** For the term of the lease and/or while the equipment is in the possession of the Lessee, the Lessee holds the Lessor, its agents and employees harmless from any losses, claims, damages, or liabilities including legal fees arising from the use, condition, or operation of the equipment.
5. **Insurance:** Lessee shall procure and keep in full force and effect insurance and provide Lessor with a Certificate of Insurance as evidence thereof. The limit for casualty coverage shall be equal to its replacement value and shall be afforded under an All Risk form. Lessee shall obtain a Comprehensive General Liability Policy with limits not less than \$1,000,000 for bodily injury and property damage combined. Desert Modulars, Inc. shall be named as additional insured for liability coverage and loss payee with respect to physical damage coverage. A 30 day notice of cancellation will be provided to the Lessor.
6. **Maintenance and Damage:** Lessee agrees to keep to keep the equipment in good repair and operating condition and to return the equipment to the Lessor in same condition and state of repair as delivered as indicated on the reverse and/or on the INSPECTION REPORT, ordinary wear and tear excepted. Lessee shall not modify the equipment without the written consent of the Lessor. Any damages not repaired by the Lessee prior to the return of the equipment shall be repaired by the Lessor at the Lessee's expense.
7. **Accidents and Claims:** As soon as possible after the event, the Lessee shall notify the Lessor of any casualty involving the equipment including the nature of the casualty and the name(s) of any person(s) injured.
8. **Inspection by Lessor:** The Lessor may inspect the equipment at any reasonable time subject to the security regulations of any agency of the United States and shall have the right to post any notice protecting the Lessor's interest.
9. **Termination:** The term of the lease is for a minimum period as set forth on the reverse side. If the equipment is returned prior to the last month of the minimum period, an early termination charge of 50% of all rentals due for unused portion of the lease will be due and payable. The Lessor may lease or sell the returned equipment without effecting the Lessee's obligation to the termination charge. Lessee shall give 30 day written notice of intent to terminate the lease. Termination of the lease shall not become effective until the Lessee has paid all rents and charges allocable to the equipment.
10. **Holdover:** With consent of the Lessor, any holdover after the expiration of the minimum term shall be deemed to be a lease on a month-to-month basis at the one month rate then in effect with the same terms and conditions provided herein. Anytime after the expiration of the minimum lease term, the Lessor may terminate the lease by giving Lessee 30 days written notice.
11. **Lawful Use, Assignment, and Subletting:** Lessee shall use the equipment only for lawful purposes and in accordance with the laws of the applicable jurisdictions. Unless specifically stated otherwise herein, Lessee is responsible for all permits and licenses for the occupancy and operation of the equipment. Lessee shall not assign, transfer, or sublet the equipment.
12. **Default by Lessee:** If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee or take possession of the equipment by giving written notice to the Lessee. The equipment shall be surrendered to the Lessor and the Lessee authorizes the Lessor to enter any premises of the Lessee without notice to repossess the equipment. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages charges as provided for in Paragraph (3). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.
13. **Default by Lessor:** Lessor shall not be in default under this lease unless Lessor fails to perform any obligations required of Lessor within a reasonable time, but in no event later than thirty (30) days after written notice by Lessee, specifying Lessor's failure to perform. Notwithstanding the foregoing, if the nature of Lessor's obligation is such that more than thirty (30) days are required for performance, then Lessor shall not be in default if Lessor diligently commences performance. In the event of default by Lessor, Lessee's sole remedy shall be to terminate this Lease and to require Lessor to remove the Equipment from the location indicated on the reverse side of this Lease.
14. **Estoppel:** The Lessee acknowledges that the unit and equipment which are subject to this Lease are encumbered by a security interest given by the Lessor to the Arizona Bank, to which security interest or any extensions or renewals thereof the Lessee acknowledges and agrees that this lease and all its provisions are expressly made subject and subordinate. The Lessee acknowledges that the Lessee's possession and enjoyment of the unit and equipment which are subject of this Lease are subject and subordinate to the security interest or any extension or renewals thereof in favor of the Arizona Bank. In this regard, The Lessee promises and agrees that the Lessee shall take no action which in any way challenges the security interest of the Arizona Bank in the subject unit and equipment, and further acknowledges and agrees that by executing this document the Lessee is specifically acknowledging that the interest of the Arizona Bank under its security interest in the subject unit and equipment is superior in all respects to the interest of the Lessee under this Lease.
15. **Miscellaneous:** This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona.

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Fx 2
P 2

DMI Desert
Modulars
Inc.

(Arizona Department of Building and Fire Safety License #0812)

3960 E. Illinois St. Tucson, AZ 85714
520-747-7870 Fax 520-747-8701

LEASE AGREEMENT

LEASE AGREEMENT NO: 2163 Revised

CUSTOMER PO: 5610

Single Unit Lease Multi-Unit Lease - See Attached Schedule

This Lease Agreement is made this 9 day of July, 2001, by and between Desert Modulars, Inc., an Arizona corporation (Lessor) and the following (Lessee):

NAME(Lessee) Pascua Yaqui Tribe of Arizona CONTACT Lori Cox
ADDRESS 7474 S. Camino de Oeste CITY Tucson
STATE AZ ZIP 85746 PHONE 879-5409 FAX 879-5410

Subject to the terms and provisions set forth in this Lease Agreement, Lessor hereby leases to Lessee the equipment described below. The term of this Lease shall commence on ** and shall continue for a minimum of Sixty (60) months. Lessee agrees to pay the following Monthly Rental and Other Charges plus all applicable sales, use and property taxes. Monthly Rentals shall be paid without demand and in advance on the first (1) day of each calendar month. Payments of monthly rental or other charges that are not made within twenty (20) days of due date are subject to finance charge of eighteen (18%) percent per annum interest from the date due until paid in full.

MONTHLY RENTAL \$1,595 DELIVERY \$1,200 BLOCK & LEVEL \$3,750
TIEDOWNS _____ STEPS Inc. Ramp & Step OTHER skirt \$2,100
RETURN DELIVERY * TAKE DOWN * If(*), amount to be assessed at time of return.

As provided for on the reverse side hereof, Lessee shall be responsible for all damages to the Equipment; Lessee shall pay all cleaning charges, including the minimum cleaning charge, and Lessee must provide Lessor with a Certificate of Insurance.

The equipment will be located at See Above Internal Audit

SERIAL NO:	LEASED EQUIPMENT DESCRIPTION	INSURANCE VALUATION
UM 1927	40' x 60' Modular <i>Along 7/10/01</i>	\$91,000

SPECIAL CONDITIONS AND INSTRUCTIONS

** Lease commences upon delivery & set-up.

Back of the form lease is void & replaced with special conditions attached.

NEW UNIT LIKE NEW EXCEPT AS NOTED BELOW INSPECTION REPORT ATTACHED
CONDITION NOTES: _____

Signed by duly authorized agents subject to the terms and conditions on both sides of this Lease Agreement this 9 day of July, 2001.

LESSOR: Desert Modulars, Inc.

By: [Signature]
Its: [Signature]

LESSEE:

By: [Signature]
Its: _____

EQUIPMENT ACCEPTANCE: Lessee or authorized agent acknowledges receipt of the Equipment according to Paragraph 2 on the reverse.

Received and accepted by: _____
Its: _____ Date Received _____

Δ's Ex. S. P. 1

LEASE AGREEMENT SPECIAL CONDITIONS

The following terms and conditions are agreed to and hereby incorporated into Lease Agreement No. 2163 Revised ("Lease") between Desert Modulares Inc. ("Lessor") and the Pascua Yaqui Tribe ("Lessee"):

1. **Taxes:** This Lease is exempt from all taxes.
2. **Delivery and Acceptance:** The Parties acknowledge that Lessee has taken the equipment for a commercial or business purpose and not for a personal, family, or household purpose, and that this Lease shall not be deemed a "Consumer Lease" within the meaning of A.R.S. 47-2A103(A)(5) or any similar statute or court decision. Lessor shall not be liable to Lessee for any failure or delay in delivering the equipment. Lessee shall not move the equipment from the location indicated on the Lease without consent of Lessor. The equipment shall remain personal property regardless of its use or manner of attachment to the ground.
3. **Indemnity:** Unless Lessor is proven to be negligent or otherwise at fault, Lessee holds Lessor, its agents, and employees harmless from any losses, claims, damages, and liabilities (including legal fees) which may arise from the use, condition, or operation of the equipment.
4. **Insurance:** Lessee shall procure and keep in full force and effect insurance and shall provide Lessor with a certificate of insurance as evidence thereof. The limit for casualty coverage shall be \$91,000.00 and shall be afforded under an All Risk form. Lessee shall obtain a Comprehensive General Liability Policy with limits not less than \$1,000,000.00 for bodily injury and property damage combined. Lessor shall be named as additional insured for liability coverage and as loss payee with respect to physical damage coverage. Lessee shall provide Lessor with thirty (30) days advance notice prior to canceling the insurance required under this section.
5. **Maintenance and Damage:** Lessor agrees to keep the equipment in good operating condition except where caused by damage or neglect by third parties, in which case Lessor will not hold Lessee liable for such damages. All routine maintenance will be performed by Lessee. Lessee agrees to return the equipment to Lessor in the same condition and state of repair as delivered as indicated on the Lease and/or the INSPECTION REPORT, ordinary wear and tear excepted. Lessee shall not modify the equipment without written consent of Lessor. Any damages caused by lessee, excluding ordinary wear and tear, shall be repaired by Lessor at Lessee's expense.
6. **Accidents and Claims:** As soon as possible after the occurrence of any event relating to the equipment where such event involves damage to the equipment and/or injury to any person, Lessee shall notify Lessor of the nature of the event and the name(s) of any person(s) injured.

1 Δ's Ex. 5, Pg. 2

7. **Inspection by Lessor:** Lessor has the right to enter upon the Pascua Yaqui Reservation ("Reservation") for the purposes of delivery, set-up, maintenance, repair of the unit, and for the purposes of repossession of the unit in the event of default or upon the termination of the Lease Agreement.
8. **Termination:** The minimum term of the Lease is sixty (60) months. If the equipment is returned prior to the last month of the minimum period, an early termination charge of all rent due for the unused portion of the Lease will be due and payable, provided however, that nothing herein will release Lessor from its obligation under Arizona law to mitigate damages, and to apply any lease amounts received as a result of mitigation against the amount owed by Lessee. Lessor may lease or sell the returned equipment without effecting Lessee's obligation to pay the termination charge. Except in case of default by Lessor as provided in Paragraph 12, lessee shall give thirty (30) days written notice of intent to terminate the Lease. Termination of the Lease shall not become effective until Lessee has paid all required rent and charges.
9. **Holdover:** With consent of Lessor, any holdover after the expiration of the minimum term shall be deemed to be a month-to-month lease at the rental rate then in effect with the same terms and conditions provided herein. Lessor may terminate the Lease anytime after the expiration of the minimum term by providing Lessee with thirty (30) days written notice.
10. **Lawful Use, Assignment, and Subletting:** Lessee shall use the equipment only for lawful purposes. Unless specifically stated otherwise herein, Lessee is responsible for all permits and licenses required for the occupancy and operation of the equipment. Lessee shall not assign, transfer, or sublet the equipment without Lessor's consent, which consent will not be unreasonably withheld.
11. **Default by Lessee:** If Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of the Lease, Lessee shall be in default. If Lessee is in default, Lessor may terminate the Lease and demand that Lessee return the equipment by providing Lessee with seventy-two (72) hours written advance notice. Starting on the day Lessee receives such notice, Lessee shall subsequently have fourteen (14) days to cure the alleged default. If Lessee fails to cure the alleged default within fourteen (14) days after receiving notice, the equipment shall be surrendered to Lessor, and Lessee authorizes Lessor to enter the Reservation to repossess the equipment. Repossession of the equipment does not relieve Lessee from its obligation to pay all rent and other charges, including damages pursuant to Paragraph 5. In addition, if Lessee defaults, Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as a result of Lessee's default.
12. **Default by Lessor:** If Lessor fails to comply with any term or condition of the Lease, Lessor shall be in default. In the event of default by Lessor, Lessee may

terminate the Lease by providing Lessor with seventy-two (72) hours written advance notice. Starting on the day Lessor receives such notice, Lessor shall subsequently have fourteen (14) days to cure the alleged default. If Lessor fails to cure the alleged default within fourteen (14) days after receiving notice, the Lease, and all Lessee's obligations hereunder, shall terminate. In addition, if Lessor defaults, Lessee shall be entitled to recover from Lessor all expenses, legal fees and court costs incurred as a result of Lessee's default.



13. Miscellaneous: This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona, and the Pascua Yaqui Tribal Courts shall have exclusive jurisdiction to adjudicate any disputes arising hereunder. This Lease in no way waives any rights held by the Tribe under the Constitution of the Pascua Yaqui Tribe of Arizona, including, but not limited to Article XXIV - Sovereign Immunity.

14. Prior Performance: Both parties acknowledge that this contract may have been partially performed prior to the date that this contract was signed by the parties. This contract and all of the provisions therein are ratified back to July 9, 2001, and shall remain in full force and effect.

For Desert Modulares Inc.

[Signature]
Pres. 10/1/01

For the Pascua Yaqui Tribe

[Signature] 10-9-01

Δ's Ex. 5, Pg. 4

DMI Desert Modular, Inc.

Arizona Department of Building and Fire Safety License #0012

3960 E. Illinois St. Tucson, AZ 85714
520-747-7870 Fax 520-747-8701

LEASE AGREEMENT

LEASE AGREEMENT NO: 1793
CUSTOMER PO: PO PYT 000437

Single Unit Lease Multi Unit Lease - See Attached Schedule

This Lease Agreement is made this 1st day of Dec, 1999, by and between Desert Modular, Inc., an Arizona corporation (Lessor) and the following (Lessee):

NAME(Lessee) Pascua Yaqui Tribe of Arizona CONTACT Harvey Thompson
ADDRESS 7474 S. Camino de Oeste CITY Tucson
STATE AZ ZIP 85746 PHONE 883-5088 FAX _____

Subject to the terms and provisions set forth in this Lease Agreement, Lessor hereby leases to Lessee the equipment described below. The term of this Lease shall commence on ** and shall continue for a minimum of 60 (60) months. Lessee agrees to pay the following Monthly Rental and Other Charges plus all applicable sales, use and property taxes. Monthly Rentals shall be paid without demand and in advance on the ** () day of each calendar month. Payments of monthly rental or other charges that are not made within twenty (20) days of due date are subject to finance charge of eighteen (18%) percent per annum interest from the date due until paid in full.

MONTHLY RENTAL \$1,495 DELIVERY \$1,275 BLOCK & LEVEL \$4,000

MODIFICATIONS _____ OTHER _____ OTHER _____

RETURN DELIVERY Prevalit TAKE DOWN Prev. If (*) amount to be assessed at time of return.

As provided for on the reverse side hereof, Lessee shall be responsible for all damages to the Equipment; Lessee shall pay all cleaning charges, including the minimum cleaning charge, if the Equipment is not returned in a clean condition; and Lessee must provide Lessor with a Certificate of Insurance.

The equipment will be located at 7474 S. Camino de Oeste

LEASED EQUIPMENT

SERIAL NO:	DESCRIPTION	INSURANCE VALUATION
	42'x66 Modular Office	\$85,295

SPECIAL CONDITIONS AND INSTRUCTIONS
Special Conditions of the Lease are attached and agreed to previously by Tribal Legal.

Lessee can purchase the building for \$85,295 less 25% of all paid rents during the first 12 months of the lease. Price negotiated thereafter.

NEW UNIT LIKE NEW EXCEPT AS NOTED BELOW INSPECTION REPORT ATTACHED

CONDITION NOTES: _____

Signed by duly authorized agents subject to the terms and conditions on both sides of this Lease Agreement this 1st day of Dec, 1999.

LESSOR: Desert Modular, Inc.
By: [Signature]
Its: _____

LESSEE: PASCUA YAQUI TRIBE
By: [Signature]
Its: [Signature]

EQUIPMENT ACCEPTANCE: Lessee or authorized agent acknowledges receipt of the Equipment according to Paragraph 2 on the reverse.

Received and accepted by: _____
Its: _____ Date Received _____

Provenance Ex 1, Pg 1

CONDITIONS OF LEASE AGREEMENT

In addition to the conditions and payment of rentals and charges on the reverse side, the following is agreed to:

1. **Taxes, Fees, and Expenses:** Lessor shall pay all state and use taxes including personal property taxes for the period the equipment is on lease. Lessee shall pay all assessments and fees for the use and/or transportation of the equipment. Lessor to pay all licensing and registration fees.
2. **Delivery and Acceptance:** The Parties acknowledge that Lessee has taken the equipment for a commercial or business purpose and not for personal, family or household purpose and that this Lease shall not be deemed a "Consumer Lease" within the meaning of A.R.S. 47-2A103(A)(3) or any similar statute or court decision. Lessor shall not be liable to Lessee for any failure or delay in delivering the equipment. Lessee shall not move the equipment from the location indicated on the reverse side without the consent of the Lessor. The equipment shall remain personal property regardless of its use or manner of attachment to the ground.
3. **DISCLAIMER OF WARRANTIES:** UPON THE ACCEPTANCE OF THE EQUIPMENT AS PROVIDED FOR IN PARAGRAPH 2, LESSEE HEREBY WAIVES AND RELEASES ALL WARRANTIES, OBLIGATIONS AND LIABILITIES OF LESSOR AND ANY RIGHTS, CLAIMS AND REMEDIES OF LESSEE AGAINST LESSOR, ITS OWNERS, OFFICERS, OR EMPLOYEES, EXPRESSED OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH RESPECT TO ANY AND ALL EQUIPMENT OR OTHER TANGIBLE OR INTANGIBLE ITEMS OR SERVICES PROVIDED UNDER THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO: (I) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A SPECIFIC PURPOSE; (II) ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE, AND (III) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, AND WHETHER FOR INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, REVENUE, PROFIT, OR DATA).
4. **Indemnity:** For the term of the lease and/or while the equipment is in the possession of the Lessee, the Lessee holds the Lessor, its agents and employees harmless from any losses, claims, damages, or liabilities including legal fees arising from the use, condition, or operation of the equipment.
5. **Insurance:** Lessee shall procure and keep in full force and effect insurance and provide Lessor with a Certificate of Insurance as evidence thereof. The limit for casualty coverage shall be equal to its replacement value and shall be afforded under an All Risk form. Lessee shall obtain a Comprehensive General Liability Policy with limits not less than \$1,000,000 for bodily injury and property damage combined. Desert Modulars, Inc. shall be named as additional insured for liability coverage and loss payee with respect to physical damage coverage. A 30 day notice of cancellation will be provided to the Lessor.
6. **Maintenance and Damage:** Lessee agrees to keep to keep the equipment in good repair and operating condition and to return the equipment to the Lessor in same condition and state of repair as delivered as indicated on the reverse and/or on the INSPECTION REPORT, ordinary wear and tear excepted. Lessee shall not modify the equipment without the written consent of the Lessor. Any damages not repaired by the Lessee prior to the return of the equipment shall be repaired by the Lessor at the Lessee's expense.
7. **Accidents and Claims:** As soon as possible after the event, the Lessee shall notify the Lessor of any casualty involving the equipment including the nature of the casualty and the name(s) of any person(s) injured.
8. **Inspection by Lessor:** The Lessor may inspect the equipment at any reasonable time subject to the security regulations of any agency of the United States and shall have the right to post any notice protecting the Lessor's interest.
9. **Termination:** The term of the lease is for a minimum period as set forth on the reverse side. If the equipment is returned prior to the last month of the minimum period, an early termination charge of 50% of all rentals due for unused portion of the lease will be due and payable. The Lessor may lease or sell the returned equipment without effecting the Lessee's obligation to the termination charge. Lessee shall give 30 day written notice of intent to terminate the lease. Termination of the lease shall not become effective until the Lessee has paid all rents and charges allocable to the equipment.
10. **Holdover:** With consent of the Lessor, any holdover after the expiration of the minimum term shall be deemed to be a lease on a month-to-month basis at the one month rate then in effect with the same terms and conditions provided herein. Anytime after the expiration of the minimum lease term, the Lessor may terminate the lease by giving Lessee 30 days written notice.
11. **Lawful Use, Assignment, and Subletting:** Lessee shall use the equipment only for lawful purposes and in accordance with the laws of the applicable jurisdictions. Unless specifically stated otherwise herein, Lessee is responsible for all permits and licenses for the occupancy and operation of the equipment. Lessee shall not assign, transfer, or sublet the equipment.
12. **Default by Lessee:** If the Lessee fails to pay rent or any other payments specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee or take possession of the equipment by giving written notice to the Lessee. The equipment shall be surrendered to the Lessor and the Lessee authorizes the Lessor to enter any premises of the Lessee without notice to repossess the equipment. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damage charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.
13. **Default by Lessor:** Lessor shall not be in default under this lease unless Lessor fails to perform any obligations required of Lessor within a reasonable time, but in no event later than thirty (30) days after written notice by Lessee, specifying Lessor's failure to perform. Notwithstanding the foregoing, if the nature of Lessor's obligation is such that more than thirty (30) days are required for performance, then Lessor shall not be in default if Lessor diligently commences performance. In the event of default by Lessor, Lessee's sole remedy shall be to terminate this Lease and to require Lessor to remove the Equipment from the location indicated on the reverse side of this Lease.
14. **Estoppel:** The Lessee acknowledges that the unit and equipment which are subject to this Lease are encumbered by a security interest given by the Lessor to the Arizona Bank, to which security interest or any extensions or renewals thereof the Lessee acknowledges and agrees that this lease and all its provisions are expressly made subject and subordinate. The Lessee acknowledges that the Lessee's possession and enjoyment of the unit and equipment which are subject of this Lease are subject and subordinate to the security interest or any extension or renewals thereof of the Arizona Bank. In this regard, The Lessee promises and agrees that the Lessee shall take no action which in any way challenges the security interest of the Arizona Bank in the subject unit and equipment, and further acknowledges and agrees that by executing this document the Lessee is specifically acknowledging that the interest of the Arizona Bank under its security interest in the subject unit and equipment is superior in all respects to the interest of the Lessee under this Lease.
15. **Miscellaneous:** This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona.

AS
Ex 1
D 7

DMI Desert Modulares Inc.

[Arizona Department of Building and Fire Safety License #6612]

3960 E. Illinois St. Tucson, AZ 85714
520-747-7870 Fax 520-747-8701

LEASE AGREEMENT

ENROLLMENT
LEASE AGREEMENT NO: 2022
CUSTOMER PO: _____

Single Unit Lease Multi-Unit Lease - See Attached Schedule

This Lease Agreement is made this 7 day of Nov, 2000, by and between Desert Modulares, Inc., an Arizona corporation (Lessor) and the following (Lessee):

NAME(Lessee) Pascua Yaqui tribe of Arizona CONTACT Harvey Thompson
ADDRESS 474 S. Camino de Oeste CITY Tucson
STATE AZ ZIP 85746 PHONE 879-5140 FAX _____

Subject to the terms and provisions set forth in this Lease Agreement, Lessor hereby leases to Lessee the equipment described below. The term of this Lease shall commence on ** and shall continue for a minimum of sixty (60) months. Lessee agrees to pay the following Monthly Rental and Other Charges plus all applicable sales, use and property taxes. Monthly Rentals shall be paid without demand and in advance on the ** () day of each calendar month. Payments of monthly rental or other charges that are not made within twenty (20) days of due date are subject to finance charge of eighteen (18%) percent per annum interest from the date due until paid in full.

MONTHLY RENTAL \$1,985 DELIVERY * BLOCK & LEVEL *

TIEDOWNS _____ STEPS _____ OTHER _____

RETURN DELIVERY Prev. TAKE DOWN Prev. If(*), amount to be assessed at time of return.

As provided for on the reverse side hereof, Lessee shall be responsible for all damages to the Equipment; Lessee shall pay all cleaning charges, including the minimum cleaning charge, and Lessee must provide Lessor with a Certificate of Insurance.

The equipment will be located at 4725 Calle Tetakusim

LEASED EQUIPMENT		
SERIAL NO:	DESCRIPTION	INSURANCE VALUATION
	<u>new 42' x 62' Modular Office</u>	<u>\$99,950</u>

* Delievry, set-up, skirt at \$9.075

** Lease commences upon completion at site.

NEW UNIT LIKE NEW EXCEPT AS NOTED BELOW INSPECTION REPORT ATTACHED
CONDITION NOTES: _____

Signed by duly authorized agents subject to the terms and conditions on both sides of this Lease Agreement this 7 day of Nov, 2000.

LESSOR: Desert Modulares, Inc.
By: [Signature]
Its: Pres.

LESSEE: [Signature]
By: _____
Its: _____

EQUIPMENT ACCEPTANCE: Lessee or authorized agent acknowledges receipt of the Equipment according to Paragraph 2 on the reverse.

Received and accepted by: _____
Its: _____ Date Received _____

AS Ex. 3, Pg. 1

CONDITIONS OF LEASE AGREEMENT

In addition to the conditions and payment of rentals and charges on the reverse side, the following is agreed to:

1. **Taxes, Fees, and Expenses:** Lessor shall pay all sale and use taxes including personal property taxes for the period the equipment is on lease. Lessee shall pay all assessments and fees for the use and or transportation of the equipment. Lessor to pay all licensing and registration fees.
2. **Delivery and Acceptance:** The Parties acknowledge that Lessor has taken the equipment for a commercial or business purpose and not for personal, family or household purpose and that this Lease shall not be deemed a "Consumer Lease" within the meaning of A.R.S. 47-2A103(A)(5) or any similar statute or court decision. Lessor shall not be liable to Lessee for any failure or delay in delivering the equipment. Lessee shall not move the equipment from the location indicated on the reverse side without the consent of the Lessor. The equipment shall remain personal property regardless of its use or manner of attachment to the ground.
3. **DISCLAIMER OF WARRANTIES:** UPON THE ACCEPTANCE OF THE EQUIPMENT AS PROVIDED FOR IN PARAGRAPH 2, LESSEE HEREBY WAIVES AND RELEASES ALL WARRANTIES, OBLIGATIONS AND LIABILITIES OF LESSOR AND ANY RIGHTS, CLAIMS AND REMEDIES OF LESSEE AGAINST LESSOR, ITS OWNERS, OFFICERS, OR EMPLOYEES, EXPRESSED OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH RESPECT TO ANY AND ALL EQUIPMENT OR OTHER TANGIBLE OR INTANGIBLE ITEMS OR SERVICES PROVIDED UNDER THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO: (I) ANY IMPLIED WARRANTY OR MERCHANTABILITY OR FITNESS FOR A SPECIFIC PURPOSE; (II) ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE, AND (III) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY, WHETHER IN TORT, CONTRACT, OR OTHERWISE, AND WHETHER FOR INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, REVENUE, PROFIT, OR DATA).
4. **Indemnity:** For the term of the lease and/or while the equipment is in the possession of the Lessee, the Lessee holds the Lessor, its agents and employees harmless from any losses, claims, damages, or liabilities including legal fees arising from the use, condition, or operation of the equipment.
5. **Insurance:** Lessee shall procure and keep in full force and effect insurance and provide Lessor with a Certificate of Insurance as evidence thereof. The limit for casualty coverage shall be equal to its replacement value and shall be afforded under an All Risk form. Lessee shall obtain a Comprehensive General Liability Policy with limits not less than \$1,000,000 for bodily injury and property damage combined. Desert Modulars, Inc. shall be named as additional insured for liability coverage and loss payee with respect to physical damage coverage. A 30 day notice of cancellation will be provided to the Lessor.
6. **Maintenance and Damage:** Lessee agrees to keep to keep the equipment in good repair and operating condition and to return the equipment to the Lessor in same condition and state of repair as delivered as indicated on the reverse and/or on the INSPECTION REPORT, ordinary wear and tear excepted. Lessee shall not modify the equipment without the written consent of the Lessor. Any damages not repaired by the Lessee prior to the return of the equipment shall be repaired by the Lessor at the Lessee's expense.
7. **Accidents and Claims:** As soon as possible after the event, the Lessee shall notify the Lessor of any casualty involving the equipment including the nature of the casualty and the name(s) of any person(s) injured.
8. **Inspection by Lessor:** The Lessor may inspect the equipment at any reasonable time subject to the security regulations of any agency of the United States and shall have the right to post any notice protecting the Lessor's interest.
9. **Termination:** The term of the lease is for a minimum period as set forth on the reverse side. If the equipment is returned prior to the last month of the minimum period, an early termination charge of 50% of all rentals due for unused portion of the lease will be due and payable. The Lessor may lease or sell the returned equipment without affecting the Lessee's obligation to the termination charge. Lessee shall give 30 day written notice of intent to terminate the lease. Termination of the lease shall not become effective until the Lessee has paid all rents and charges allocable to the equipment.
10. **Holdover:** With consent of the Lessor, any holdover after the expiration of the minimum term shall be deemed to be a lease on a month-to-month basis at the one month rate then in effect with the same terms and conditions provided herein. Anytime after the expiration of the minimum lease term, the Lessor may terminate the lease by giving Lessee 30 days written notice.
11. **Lawful Use, Assignment, and Subletting:** Lessee shall use the equipment only for lawful purposes and in accordance with the laws of the applicable jurisdictions. Unless specifically stated otherwise herein, Lessee is responsible for all permits and licenses for the occupancy and operation of the equipment. Lessee shall not assign, transfer, or sublet the equipment.
12. **Default by Lessee:** If the Lessee fails to pay rent or any other payables specified herein, or if Lessee fails to comply with any other term or condition of this Lease, the Lessee shall be in default and the Lessor may terminate the Lease and demand the equipment be returned by the Lessee or take possession of the equipment by giving written notice to the Lessee. The equipment shall be surrendered to the Lessor and the Lessee authorizes the Lessor to enter any premises of the Lessee without notice to repossess the equipment. Repossession of the equipment does not relieve the Lessee from its obligation to pay rentals and other charges including damages charges as provided for in Paragraph (5). If the Lessee defaults, in addition to rentals, damages, repossession expenses, and other applicable charges, the Lessor shall be entitled to recover from Lessee all legal fees and court costs incurred as result of the Lessee's default.
13. **Default by Lessor:** Lessor shall not be in default under this lease unless Lessor fails to perform any obligations required of Lessor within a reasonable time, but in no event later than thirty (30) days after written notice by Lessee, specifying Lessor's failure to perform. Notwithstanding the foregoing, if the nature of Lessor's obligation is such that more than thirty (30) days are required for performance, then Lessor shall not be in default if Lessor diligently commences performance. In the event of default by Lessor, Lessee's sole remedy shall be to terminate this Lease and to require Lessor to remove the Equipment from the location indicated on the reverse side of this Lease.
14. **Estoppel:** The Lessee acknowledges that the unit and equipment which are subject to this Lease are encumbered by a security interest given by the Lessor to the Arizona Bank, to which security interest or any extensions or renewals thereof the Lessee acknowledges and agrees that this lease and all its provisions are expressly made subject and subordinate. The Lessee acknowledges that the Lessee's possession and enjoyment of the unit and equipment which are subject of this Lease are subject and subordinate to the security interest or any extension or renewals thereof in favor of the Arizona Bank. In this regard, The Lessee promises and agrees that the Lessee shall take no action which in any way challenges the security interest of the Arizona Bank in the subject unit and equipment, and further acknowledges and agrees that by executing this document the Lessee is specifically acknowledging that the interest of the Arizona Bank under its security interest in the subject unit and equipment is superior in all respects to the interest of the Lessee under this Lease.
15. **Miscellaneous:** This agreement represents the entire understanding between the parties. Any change or modification must be in writing. This Lease shall be interpreted under the laws of the State of Arizona.



PASCUA YAQUI TRIBE OF ARIZONA
PURCHASE ORDER # PYT010151

Billing Instructions - Mail all Invoices to: Pascua Yaqui Tribe - Attn: Finance

Department P.O. Box 11815 Tucson, AZ 85734-1815, (520) 879-5092

DATE ISSUED 11/6/2000

DATE NEEDED 90 DAYS ARO

TERMS: NET 30

BID / QUOTE #

VENDOR

747-7870

FAX 747-8701

F.O.B. SHIP TO ADDRESS

DESERT MODULARS INC.

DEPT ENROLLMENT DEPARTMENT

Attn: KNUTE

REF.

Attn: C/O PROCUREMENT RECEIVING

3960 E ILLINOIS

PASCUA YAQUI TRIBE

TUCSON

AZ

85714

7474 S. CAMINO DE OESTE
TUCSON, AZ 85746

PYT NO.	ITEM DESCRIPTION	BRAND / MODEL NO.	QNT.	UNIT PRICE @	TOTALS
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LEASE AGREEMENT NO: 2022

DATED: 7 NOV 2000 (Copy attached) which is herby incorporated and made part of this P.O.

42' X 62 MODULAR OFFICE

MONTHLY (COMMENCE UPON MOVE IN WHICH IS ESTIMATED TO BE MAR 2001)

Commence upon completion at site 12 MTH \$1985.00 \$23820.00

DELIVERY: CHARGE (ONE TIME CHG)

1 LOT 1200.00 \$1200.00

BLOCK AND LEVEL (GROUND LEVEL)

1 LOT 5575.00 \$5575.00

SKIRTING (PRICE INCLUDED IN ITEM #3)

Item #1 payment commence upon completion of site at a monthly rate of \$1985.00. Items #s 2, 3 and 4 are due upon completion of site. All other Terms & Conditions are as delineated herein and the attachments hereunder.

Attachments:

- 1) DMI Lease Agreement No. 2022
- 2) DMI Modular Drawings & Specifications Plus Cost Data.
- 3) Inspection Record
- 4) PYT Bldg Plan/Permit Application
- 5) TERO Requirements
- 6) Purchase Order Terms and Conditions

Please check appropriate box !

CONFIRMING PURCHASE ORDER DO NOT DUPLICATE PLEASE ACKNOWLEDGE RECEIPT OF PURCHASE ORDER
Invoices submitted by vendor for payment must reflect this purchase order number PYT010151 and must not exceed the amount allocated for this purchase order. No payment will be authorized unless invoice is properly documented.

Inquiries - Procurement (520) 883-5088 Fax (520) 883-5133

SUB-TOTAL = \$30595.00

BUDGET CODE 001-006-12-8508-00

FEDERAL ID # 86-0203228

SALES TAX % =

OBLIGATION #: 117419

BIA TRIBE # 694

FREIGHT COST =

PROCUREMENT: *[Signature]* EXECUTIVE APPROVAL: *[Signature]*

P.O. TOTAL COST = \$30,595.00

Δ5
EX-3
D 2

PASCUA YAQUI TRIBE OF ARIZONA

PURCHASE ORDER # PYT010151

(Second Page)

CONDITIONS OF LEASE AGREEMENT

between the PASCUA YAQUI Tribe of Arizona and Desert Modular, Inc.

In addition to the conditions and payment of rentals and charges as delineated within page one (1) of Desert Modelers Lease Agreement No. 2022, dated 7 Nov 2000, the following is agreed to:

1. **Taxes, Fees, and Expenses:** Lessee is exempt from all taxes
2. **Delivery and Acceptance:** The Parties acknowledges that Lessee has taken the equipment for a commercial or business purpose and not for personal, family or household purpose and that this Lease shall not be deemed a "Consumer Lease" within the meaning of 47-2A103(A)(5) or any similar statute or court decision. Lessor shall not be liable to Lessee for any failure or delay in delivering the equipment. Lessee shall not move the equipment from the location indicated within page one (1) of Lease Agreement No. 2022 without the consent of the Lessor. The equipment shall remain personal property regardless of its use or manner of attachment to the ground
3. **Indemnity:** For the term of the lease and/or while the equipment is in possession of the Lessee, the Lessee holds the Lessor, its agents and employees harmless, unless where the Lessor is proven to be negligent or otherwise at fault, from any losses, claims, damages, or liabilities including legal fees arising from the use, condition, or operation of the equipment
4. **Insurance:** Lessee shall procure and keep in full force and effect insurance and provide Lessor with a Certificate of Insurance as evidence thereof. The limit for casualty coverage shall be equal to its replacement value and shall be afforded under an All Risk form. Lessee shall obtain a Comprehensive General Liability Policy with limits not less than \$1,000,000 for bodily injury and property damage combined. Desert Modulares, Inc. shall be named as additional insured for liability coverage and loss payee with respect to physical damage coverage. A thirty (30) day notice of cancellation will be provided to the Lessor.
5. **Maintenance and damage:** Lessor agrees to keep to keep the equipment in good operating condition except where caused by damage or neglect by others. All routine maintenance will be provided by the Lessee. Lessee agrees to return the equipment to the Lessor in same condition and state of repair as delivered as indicated on the INSPECTION REPORT, ordinary wear and tear excepted. Lessee shall not modify the equipment without the written consent of the Lessor. Any damages not repaired by the Lessee prior to the return of the equipment shall be repaired by the Lessor at the Lessee's expense.
6. **Accidents and Claims:** As soon as possible after the event, the Lessee shall notify the Lessor of any casualty involving the equipment including the nature of the casualty and the name(s) of any person(s) injured.
7. **Inspection by Lessor:** The Lessor has the right to enter upon the PASCUA YAQUI Reservation for the purposes of delivery, setup, maintenance and repair of the unit.
8. **Termination:** The term of the lease is for a minimum period as set forth on the reverse side. If the equipment is returned prior to the last month of the minimum period, an early termination charge of 100% of all rentals due for unused portion of the lease will be due and payable. Lessee shall give 30 days written notice of intent to terminate the lease. Termination of the lease shall become effective at the expiration of the 30 days from the date lease mails its intent to terminate lease. Lease shall be granted an offset against the 100% termination charges of all rentals due if Lessor receive lease or resale proceeds.

ΔS Ex. 3, Pg 4