

**(6) Final Determination Documents**

- December 20, 1989

Summary Under the Criteria and Evidence for  
Final Determination for Federal Acknowledgment

of the

San Juan Southern Paiute Tribe

Prepared in response to a petition submitted  
to the Assistant Secretary of the Interior  
for Indian Affairs for Federal  
acknowledgment that this group exists as an  
Indian Tribe.

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## INTRODUCTION

### Bases for the Final Determination

This final determination is based on a consideration of new evidence and arguments submitted by the Navajo Tribe in response to the proposed finding and by the San Juan Southern Paiute petitioner in response to the proposed finding and the Navajo Tribe's comments. The extensive evidence and arguments presented for the proposed finding or generated by the Branch of Acknowledgment and Research's (BAR) staff in conducting its own research in preparing the proposed finding were also considered in making this final determination. Therefore this final determination report should be read together with the proposed finding and accompanying technical reports.

### Background

The San Juan Southern Paiute Tribe submitted a letter petition for Federal acknowledgment May 1, 1980. Their documented petition was submitted June 5, 1984. Additional materials were submitted in February and March 1985 in response to the BAR's November 1984 letter of obvious deficiencies based on its preliminary review of the petition under 25 CFR 87.9(b). Active consideration was begun November 1, 1984.

The Navajo Tribe, through its counsel Brown and Bain, submitted a detailed preliminary response to the petition in June 1985, accompanied by documentation. Additional preliminary responses on behalf of the Navajo Tribe were submitted in September 1985 and January and April 1986. Materials in response to the Navajo comments were submitted on behalf of the petitioner in September, October and December 1986. Additional materials were submitted by the petitioner and the Navajo Tribe during the course of active consideration in response to BAR requests.

Because of multiple submissions of comments and the extensiveness of these materials, the period for preparation of the proposed finding was extended several times. The proposed finding was published August 11, 1987. The BAR research staff held separate meetings with the petitioner's researchers and with representatives of the Navajo Tribe in October 1987 in Phoenix to discuss the proposed finding and the research it was based upon. The 120-day period provided in the regulations for comment on the proposed finding was extended for 90 days at the request of the Navajo Tribe's representatives because of unavoidable delays in arranging the meeting with the Branch research staff and to ensure adequate opportunity for all parties to comment on the proposed finding.

The Navajo Tribe's comments were received March 8, 1988. These encompassed more than two linear feet of documentary materials. Under the regulations, section 83.8(d), the petitioner was afforded a period, initially set at 90 days, to respond to the Navajo comments. This was extended until September 1, 1988, at the request of the petitioner because of the extent of comments, the length of time afforded the Navajo Tribe and other parties to comment on the proposed finding itself, and a change of counsel by the petitioner.

Approximately a linear foot of documentary materials, including text, were submitted by the petitioner.

#### Overview of the Proposed Finding

The proposed finding concluded that the San Juan Southern Paiute Tribe met all seven of the Acknowledgment criteria. It concluded that they were a distinct band of Southern Paiutes that could be traced since earliest sustained contact, in 1850. The San Juan Paiute band has been identified by scholars, explorers, government officials and others on a regular basis as a Paiute, Indian entity since that time. A clear line of leaders could be identified throughout the band's history. While the band had been closely associated with and interacting with the increasingly large Navajo presence in their area since the 1860's, the proposed finding concluded that the San Juan Paiutes did not become more than superficially acculturated to Navajo culture. They remained a distinct group, despite some intermarriage, and there was no evidence that the band was under the political influence of historical Navajo leaders.

A portion of the band's territory was set aside as a reservation for them in 1907, but was returned to the public domain in 1922 and subsequently became part of the Western Navajo Reservation. The San Juan Paiutes have received Bureau of Indian Affairs' services through the Western Navajo Agency since the Agency was founded in 1902 and occasionally from other BIA agencies. The Western Navajo Agency was established when the Western Navajo Reservation was created. This reservation included the southern part of the territory in which the San Juan Paiutes resided.

Beginning in the late 1950's, and especially since 1970, the San Juan Paiute were increasingly affected by and required to deal with the governmental and program structure of the Navajo Tribe. That structure grew as the tribe took over most of the functions formerly performed by the BIA. The reservation census roll, and the census numbers originally used by the BIA as a basis for providing services to all Indians on the reservation, eventually came to be used by the Navajo Tribe for membership purposes. The available evidence was that although the Paiutes continued to obtain and use census numbers, they did not do so with the intention of becoming members of the Navajo Tribe but rather because the numbers were necessary to obtain services. There was evidence that officials of the Navajo Tribe were and had been uncertain of the legitimacy of the Paiutes holding census numbers. The Paiutes remained clearly identified as a distinct population from the Navajos within the reservation. The proposed finding concluded that although some of the Paiutes had voted in recent Navajo elections, they had not participated substantially in Navajo political processes, nor had the Navajo Tribe influenced the internal political processes of the San Juan Paiute band.

Although approximately 60 percent of the band's membership hold Navajo census numbers, it was determined by the proposed finding that they were ~~not~~ members of the Navajo Tribe within the meaning of "member of an Indian tribe" as defined in the Acknowledgment regulations (25 CFR 83.1(k)). This determination was made because they were not maintaining a bilateral political relationship with the Navajo Tribe. A further basis for the determination was that the process by which census numbers are issued was not one in which it was established that the Paiutes obtaining the numbers were maintaining

tribal relations with the Navajo Tribe or in which the Navajo Tribal government clearly accepted them as members.

#### Other Comments on the Proposed Finding

The only substantial comments on the proposed finding were those of the petitioner and the Navajo Tribe. These are discussed in the body of this report on the final determination. No comments were received from the Hopi Tribe. Brief comments received from several individuals are discussed below.

A comment was received from Omer Stewart (1987), one of the ethnographers whose work was utilized in preparing the proposed finding. Stewart stated that he had done additional research on the group, in 1933, not cited in the proposed finding. Stewart reiterated his opinion, stated in his works, that the San Juan Paiutes had been a distinct band or tribe since time immemorial.

A brief comment was received from a historian, Robert McPherson, who characterized the proposed finding reports as "excellent." McPherson is the author of an article used in the proposed finding (McPherson 1985) and of a book (McPherson 1988) on the history of the Navajo, Ute and San Juan Paiute Indians in northeastern Arizona and southeastern Utah.

A two-page comment and subsequent one-page supplement and clarification were received from Allen Turner, an anthropologist who was the initial researcher for the San Juan Paiute petition (Turner 1988a, 1988b). Regarding criterion d, Turner commented that San Juan Paiute ancestry was a necessary and sufficient criterion of membership. This was in contradiction to the petition and the proposed finding that social participation was a necessary criterion as well. Turner's statement was based on the rationale that some members living away from the area could not "participate" in "governance." The proposed finding concluded, however, that non-resident members did participate in the community to a significant degree. Turner's supplement clarified a statement in his initial comment concerning participation of non-member spouses by stating that they could participate informally in the social community in the sense of visiting and the like, but could not participate in tribal elections or hold office. He also stated that to be a "formal participant in San Juan tribal affairs," a person had to be known in the San Juan Paiute community to be of San Juan Paiute descent.

Turner also commented that the degree of linguistic differences between the Navajo and Paiute languages should have been more strongly emphasized in the proposed finding, that archaeological data show no discontinuity in the band's heritage since at least 1300 A.D., and that the purported Paiute acculturation to Navajo culture should be minimized because much of Navajo culture was itself borrowed. The proposed finding considered the significant differences between Paiute and Navajo culture. This final determination reviews again the question of San Juan Paiute acculturation to Navajo culture.

## Litigation

The San Juan Southern Paiutes are participating as intervenors in the Sidney v. Haskie (formerly Sidney v. Zah) litigation, authorized by PL 93-351, to determine ownership of a large portion of the Navajo Reservation west of the former 1882 Executive Order Hopi Reservation (see PF:72-76). The act authorized the suit by the Hopi, Navajo and "other tribes." Under a 1983 ruling of the 9th Circuit of the U.S. Court of Appeals, the Paiutes were allowed to participate pending a final determination on the issue of their tribal status. Trial of Sidney v. Haskie commenced in U.S. District Court October 17, 1989.

## Terminology

The official name of the petitioner is the "San Juan Southern Paiute Tribe." In conformance with the standard terminological usage for independent groups, i.e., "tribes," among the Southern Paiute, the term "band" is used for most descriptive references to the petitioner, e.g., San Juan Paiute band. The full official name is used in contexts where the official title is appropriate. For the sake of brevity, San Juan Paiutes or simply Paiutes is used in many contexts, where the context allows.

## SUMMARY CONCLUSIONS UNDER THE CRITERIA

### Criterion A

- 83.7(a) **A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis as "American Indian" or "aboriginal."**

The proposed finding concluded that the San Juan Southern Paiute Tribe had been identified as an Indian entity and as Paiute since earliest sustained contact. In response to the proposed finding, additional historical and ethnographic documents from the 19th and 20th centuries were submitted which identified the group as a distinct Paiute entity. These included a brief ethnographic study at Navajo Mountain in 1933 (Collier 1933-34), the report of an Indian agent investigating Moencopi land problems in the 1890's (McLaughlin 1898), and Indian Agency reports between 1900 and 1925. Also identifying the Paiutes were miscellaneous Federal documents and testimony or other writings of non-Indians who had lived in or studied the area (Bennett 1880, Johnston 189[8], Richardson 1986, Runke 1916, Reebel 1935) between 1880 and the 1930's. No substantial evidence was presented which would change the proposed finding's conclusions.

Almost all of the evidence submitted for the proposed finding and the additional evidence presented in response to the proposed finding or developed by the BAR staff indicates that the San Juan Paiutes continue to be identified by Navajos and others in the local areas where they live as a distinct, Paiute entity. The materials submitted with the Navajo response in support

of its contention that the Paiutes were not distinct were of a general and recent nature and were inconsistent with the large, detailed body of materials used for the proposed finding and this final determination. The Navajo response's assertion that the San Juan band's members have been absorbed into the Navajo Tribe and are no longer distinct from Navajos was not supported by the evidence.

The Navajo Tribe's response argued that the San Juan Paiute did not meet criterion a because they were usually not specifically identified in historical records as "San Juan Paiute," but only as Paiute. Historical identification by the specific tribal name currently used by a petitioner is not required by the regulations. Identification as "San Juan Paiute" appears first in the historical record in 1903 (Jenkins) as well as in Congressional legislation in 1906 appropriating money for the band, Indian Service correspondence (e.g., Janus 1909) and ethnographic works such as Stewart (1941-42) and Kelly (1934 and 1976).

The San Juan Southern Paiute Tribe has been identified as a Paiute tribal entity on a substantially continuous basis since earliest sustained historical contact and continues to be identified as a distinct group at present. We conclude therefore that San Juan Paiute Southern Tribe meets the requirements of criterion 83.7(a).

#### Criterion B

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

The proposed finding concluded that at first sustained contact the San Juan Paiute constituted a single "band" with a clearly defined territory. This "band" was a well-defined social unit consisting of several subgroups which were political units under independent leaders. These subsequently became unified into a single political unit, probably by the 1870's. The band remained a culturally and socially distinct community throughout the 19th and early 20th centuries up until the present. Population decrease and the loss of territory due to the expansion of Navajo population in the San Juan Paiute area led to a reduction to two subgroups by the 1920's. These two groups continue to exist today, at Navajo Mountain and Willow Springs. The band continues to maintain significant internal social and economic relationships within its membership.

The responses to the proposed finding included no significant comment on or new evidence concerning the proposed finding's conclusion that the contemporary San Juan Paiutes maintained significant social contact within the band, including with non-resident members.

No substantial documentary or ethnographic evidence was presented in the responses concerning the proposed finding's conclusion that the present-day San Juan Paiutes are a distinct social group from the Navajos on the reservation, despite some participation in Navajo tribal institutions and close

social interaction with Navajos which dates to the latter half of the 19th century. Documentary materials such as chapter minutes confirmed the proposed finding's conclusion that there was considerable social participation with Navajos in the areas where the Paiutes were living, especially at Navajo Mountain. The newly submitted materials did not contradict the conclusion that the Paiutes were a distinct group and in a few instances provided additional evidence that the Paiutes were distinct. The proposed finding concluded that the Paiutes were not part of the Navajo clan system and were not part of the kin-based Navajo economic units nor had they been so in the past. There was no significant comment concerning this conclusion.

There was significant new evidence concerning the historical existence of the San Juan Paiutes as a community. A brief ethnographic study of the Navajo Mountain Paiutes in 1933 indicated that while the Paiutes at Navajo Mountain were influenced by Navajo culture in some ways, they constituted a distinct group from the Navajos (D. Collier 1933-34). This report was consistent with other data used for the proposed finding, including a more detailed ethnographic study of Navajo Mountain from 1934 (Collier 1966). Other new documentation, from 1906 and the 1930's, also supported this conclusion. Miscellaneous additional documentation concerning historical existence as a community included additional references to the existence of the subgroups at Willow Springs in the 1890's and at Oljeto in the 1920's.

The proposed finding concluded that the San Juan Paiutes were a distinct group from the Weeminuche Utes, even though historically there was some intermarriage between the two, some Weeminuche Ute residence within the San Juan Paiute area and some bands in the late 19th and early 20th centuries which were a mixture of the two. The Navajo response argued that many of the apparent historical references to "Paiutes" or "Pahutes" in the area were actually references to Weeminuche Utes and that therefore there was no good evidence of the historical existence of a San Juan Paiute community. A review of the new information included in the responses, the detailed body of historical documents and other evidence used for the proposed finding, and additional historical studies obtained by the BAR staff confirmed the proposed finding that these were two quite distinct tribes.

The proposed finding concluded that the Paiutes have maintained a distinct culture, uninfluenced by Navajo culture except in nonfundamental areas such as dress, house style and means of subsistence. Key institutions such as political and kinship organization and most of the belief systems were not influenced. The Paiutes' response commented in detail on the proposed finding's conclusions that there had been some degree of acculturation to Navajo culture. The response presented extensive new evidence describing distinct San Juan Paiute beliefs and cultural practices, including ceremonies, that have been maintained. It also confirmed, and described in more detail, the proposed finding's conclusion that Paiutes did not participate in or use Navajo religious ceremonies except for curing ceremonies. The new information indicated that use of curers was reciprocal between Navajos and San Juan Paiutes rather than being limited to Paiute use of Navajo curers. The Paiute response did not comment on the information that some Paiutes had been practitioners of Navajo ceremonies as well as utilizing them. Some of the other observed elements of Navajo culture used by the Paiutes were characterized by the proposed finding as representing acculturation to Navajo culture. They are more accurately characterized as cultural borrowing, i.e.,

the elements from Navajo culture were incorporated into San Juan Paiute culture and society rather than Navajo culture being adopted by the Paiutes.

The Navajo response challenged the proposed finding's conclusion that certain areas were "San Juan Paiute territory" previous to and after sustained non-Indian contact (1850). The response stated that the evidence was weak that the San Juan had been a historical band and had occupied that territory. It also stated that historical Navajo presence in these areas was greater than the proposed finding had concluded.

The Navajo response did not address most of the basic ethnographic sources or the documentary sources which were used to prepare the proposed finding concerning the existence of the band at first sustained contact with non-Indians and the territory it then occupied. It incorrectly characterized this part of the finding as based on the use of one ethnographic source, Kelly (1934, 1976). Kelly's data was, further, more extensive than the response indicated.

None of the cited evidence or arguments provided a basis for changing the proposed finding that the San Juan Paiute band had occupied distinct areas, as a community, since first sustained contact, and that those areas had become reduced as the Navajo population in the area sharply expanded beginning in the 1870's. There was some additional evidence in the responses which supported this conclusion.

A review of the available evidence and additional sources submitted in response to the proposed finding indicates that the basic conclusions concerning the extent and exclusiveness of San Juan Paiute territory at first sustained contact were correct. For the main portion of the territory as defined in the proposed finding, the evidence is that most of the area had been occupied by Paiutes and that up until the point of sustained contact with non-Indians (1850) Navajo usage of the areas was, at most, limited. There was limited additional evidence of Navajo usage of territory near Moencopi and elsewhere before 1850 in addition to use by the San Juan Paiutes, Hopis and Havasupais.

The San Juan Southern Paiute Tribe has existed as a distinct community occupying a specific area from earliest sustained contact until the present. We conclude therefore that it meets the requirements of criterion 83.7(b).

#### Criterion C

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

The proposed finding described leaders and the exercise of tribal political authority within the San Juan Paiute band from earliest sustained contact until the present. The responses to the proposed finding provided limited additional data concerning the historical exercise of tribal political authority by the San Juan Paiute band. Additional documentary evidence, from the Paiute response, provided earlier documentation than previously available of the leadership of Pakai, who was band leader from perhaps as early as the

1870's to 1930. The new documents provided additional evidence to support the proposed finding's conclusion that Pakai was probably chief as early as the 1870's and also provided some supporting evidence of his role as economic intermediary for the band with outsiders in the early part of the 20th century.

The Paiute response challenged the proposed finding's conclusion that after the death of the traditional leader Alfred Lehi in 1969 there was a limited period before the new leader was fully able to fill that office and exercise complete authority. The limited additional information submitted with the Paiute response concerning this leadership transition supported the proposed finding's conclusion.

The majority of the proposed finding's conclusions concerning San Juan Paiute leaders, the historical exercise of tribal political influence, and the large body of documentary, ethnographic and oral history information on which the conclusions were based were not addressed by the Navajo response.

The Navajo response questioned whether the early Paiute leader, Patnish, was in fact a leader or a Paiute. No additional evidence was submitted. A review of the existing evidence concluded, as the proposed finding had, that he had been a San Juan Paiute leader in the 1870's, although it was not certain that he was leader of the entire band.

The Navajo response also argued that there was only limited historic evidence of specific Paiute meetings, which are part of the traditional San Juan Paiute political process. Though evidence of specific historical instances of meetings was limited, there was ethnographic and other evidence that meetings had historically been part of San Juan Paiute political processes. The Navajo response characterized the decision-making and leadership processes within the San Juan Paiutes as only those that might occur within an extended family rather than a tribe. The San Juan political system, although partly kinship-based, is also based on non-kinship factors such as religious knowledge and ability to mobilize support. The type of decisions and authority exercised went beyond those of an extended family.

The primary additional information submitted with the responses relevant to this criterion concerned whether the Paiutes participated in the political system of the Navajo Tribe and whether the Navajo Tribe was involved in the internal political processes of the Paiutes. Substantial new documentary evidence concerning Paiute voting, degree of involvement in local Navajo chapters and tribal programs, and involvement with Navajo Tribal courts were submitted by the Navajo Tribe. These records covered the period of approximately 20 years up to 1986. Some limited additional ethnographic materials were submitted by the San Juan Southern Paiute Tribe in their response.

No significant evidence was submitted to change the proposed finding's conclusion that the Navajo Tribe had not influenced the internal political processes of the San Juan Paiutes. Almost all of the evidence submitted was not valid evidence of such influence. Of the evidence cited by the Navajo response concerning dispute resolution, only one instance involved dispute resolution between two Paiutes. The majority concerned disputes or other matters between Navajos and Paiutes. These occurred in Navajo institutions because the institutions' jurisdiction includes non-Navajos and Paiute

involvement therefore did not indicate Paiute political affiliation with the Navajo Tribe.

There was no indication that Navajo institutions had significantly influenced Paiute economic decisions or the allocation of economic resources within the San Juan Paiute band although the Navajo Tribe effectively controls some of those resources. Navajo Tribal Court records of arrests for minor criminal offenses indicated that some behavioral norms within the band were not always followed. They also indicated a minor role played by Navajo institutions in affecting behavior among the Paiutes but not in the establishment and maintenance of behavioral standards.

A detailed re-analysis was made of the history of Paiute voting and of Paiute voting patterns based on the additional information submitted with the responses together with the evidence available for the proposed finding. The Navajo response submitted records of Paiute voting in three additional Navajo tribal elections in 1986-87. Only a small portion of the resident Paiutes, less than 20 percent, had voted consistently over the six-year span for which there were records. Sixty percent of the resident adult Paiutes, and 73 percent of the adults in the band, had never been registered or had never voted though they were registered. Voting was the only significant evidence of involvement by Paiutes in the Navajo political system, and the most widespread among the band's membership. The proposed finding's conclusion that voting was not intended by the Paiutes to signify political participation in the Navajo Tribe was supported by the reanalysis and also limited additional information submitted with the Paiute response concerning Paiute reasons for voting.

The proposed finding's basic conclusion that the Paiutes had not been involved in Navajo chapter political or decision-making processes was not changed by the additional evidence submitted. Most of the extensive new evidence concerning the chapters did not indicate any political involvement. However, one individual marginal to the Paiute band was nominated to an important chapter office over 15 years ago. Another individual Paiute, not marginal, was elected to a community board office from that chapter 20 years ago but subsequently resigned. His reported reason for resigning, that the Navajos on the board refused to respond to Paiute requests was consistent with Paiute reports in the succeeding 10 years that they were unable to participate in the Navajo political system.

Chapter records confirmed and expanded the proposed finding's conclusion that the Paiutes had received some services and employment through the chapters of a kind usually limited to tribal members. The new evidence indicated these were received infrequently and to a limited degree and did not provide a basis for changing the conclusion that the San Juan Paiutes were not involved in Navajo chapter political or decision-making processes.

Substantial additional records concerning receipt of services were provided in the Navajo response. With some exceptions, these confirmed the proposed finding's conclusions that most of the services received were from programs, previously administered by other Federal or State agencies and now administered by the Navajo Tribe, which were not limited to members of the Navajo Tribe.

Overall, San Juan Paiute participation in the Navajo political system, with the exception of voting, has been occasional and by isolated individuals. It has not been continuous and there is little evidence of any participation at all before 1968. There is no significant evidence that a continuous political affiliation with the Navajo Tribe has existed among the San Juan Paiute membership.

The San Juan Paiutes have maintained tribal political influence within the band since earliest sustained historical contact. This has been, and is, autonomous of influence by the Navajo Tribe. Band members have not significantly participated in or become affiliated with the Navajo political system. We conclude therefore that the San Juan Southern Paiute Tribe meets the requirements of criterion 83.7(c).

#### Criterion D

- 83.7(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

Criterion d requires a copy of a group's governing document or, absent that, a description of how the group is governed and of its membership criteria. The San Juan Paiute Southern Tribe has no written governing document. The proposed finding concluded that the petition's description of the San Juan band's governing processes and its membership criteria was adequately complete and accurate.

The Navajo response contends that the San Juan Paiutes do not meet the requirements of criterion d because its membership criteria are not consistent and coherent. The Navajo response reiterates the comments and analysis in its preliminary response, submitted before the proposed finding. The proposed finding took into account the Paiute testimony cited in the Navajo response as well as the other information available. No new evidence or argument was presented in response to the proposed finding concerning the San Juan Paiute membership criteria.

The Navajo response also argues that the San Juan Paiutes have failed to meet criterion d because they have not maintained tribal political authority over their members and have consistently participated in the Navajo Tribe's political processes. The latter arguments are relevant to criterion c rather than criterion d. Criterion d only requires a description of the petitioning group's governing processes and membership criteria.

The San Juan Southern Paiute petition has presented an adequately complete and accurate description of its present governing practices and membership criteria. We conclude therefore that the San Juan Southern Paiute Tribe meets the requirements of criterion 83.7(d).

Criterion E

- 83.7(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendency from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity.

The proposed finding concluded that the petitioner had submitted a current membership roll which had been prepared in response to Acknowledgment regulations. No former lists were known to exist. Members listed on the current roll were found to meet the tribe's own membership criteria of descent from a San Juan Paiute ancestor and participation in or allegiance to the group as a whole. The Navajo response to the proposed finding provided no evidence to the contrary.

The proposed finding also concluded that the petitioner's membership is composed of individuals, virtually all of whom can trace their tribal ancestry to historic Paiute communities, in or near the area of the present western Navajo reservation and that these communities can be identified as "San Juan Paiute." The finding also pointed out that many of the families identified with the petitioner's historic communities are still present in the group's membership and that their Paiute ancestry in the band can be documented satisfactorily using records which span a period of 100 years.

New materials presented in response to the proposed finding further support the finding that the petitioner's members are Paiute and descend from the historic tribe. The Paiutes presented several new documents from different historical eras to connect present-day members with their historic Paiute communities. The Navajo response contained a large volume of material, much of which duplicated materials previously reviewed for the proposed finding. The findings regarding new Navajo materials reviewed, in particular the general assistance files of nine additional San Juan Paiute members, were essentially consistent with those of the proposed finding showing some identification as "Paiute."

Acceptable evidence of their ancestry as Paiute appears in the historical records of several agencies of the Federal Government; in records of the Navajo, Ute Mountain Ute, and Paiute Indians of Utah Tribes, as well as in the writings and field notes of anthropologists who have worked with the San Juan Paiutes and other Indians in the area. Even San Juan Paiutes who have some Navajo blood can be documented as descendants of historical Paiute communities which have been identified historically as "San Juan" Paiute, distinct from the Navajo. Identification of the San Juan Paiutes as "Indian" has never been an issue.

The San Juan Southern Paiutes provided a list of their current members. These members meet the band's own membership criteria and can establish, using evidence acceptable to the Secretary of the Interior, that they descend from the historic San Juan Paiute band. We therefore conclude that the San Juan Southern Paiute Tribe meets the requirements of criterion 83.7(e).

Criterion F

- 83.7(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

Background

The criterion in section 83.7(f) of the regulations, one of the criteria a successful petitioner must meet, requires that a petitioner be principally composed of persons who are not members of an already recognized tribe. The definition of membership in a recognized tribe (in section 83.1(k)), has two parts, each with two subparts. To meet the definition of "Member of an Indian Tribe," the individual must meet at least one subpart in each of the two halves of the definition, but any combination of one of the subparts of part 1 with one of the subparts of part 2 will suffice. Section 83.1(k) defines a member as follows [number and letter designations have been added to delineate parts and subparts of the definition]:

- "Member of an Indian tribe" means an individual who
- [1] [a] meets the membership requirements of the tribe as set forth in its governing document  
or
  - [b] is recognized collectively by those persons comprising the tribal governing body,
- and
- [2] [a] has continuously maintained tribal relations with the tribe  
or
  - [b] is listed on the tribal rolls of the tribe as a member, if such rolls are kept.

The term "tribal roll" is not defined in the Acknowledgment regulations. A different definition is used for "membership of a petitioning group."

Proposed Finding

The proposed finding was that 165 (88%) of the 188 San Juan Paiutes were not members of any other North American Indian tribe; therefore, the band's membership was composed principally of persons who were not members of an already recognized tribe. Although 119 of the 165 Paiutes have "Navajo census numbers" and are claimed as members by the Navajo Tribe, they were found to be not legitimately members of that Tribe because they did not meet any of the subparts of the definition of "Member of an Indian Tribe" in relation to the Navajo Tribe.

The balance of the San Juan Paiute membership (23 members, 12%) appear on the rolls of one of three other (not Navajo) federally recognized tribes. However, the nature and extent of their involvement with these other tribes was not researched in depth because they would not alone be sufficient in number to justify a negative finding.

Interpretation of Criterion F  
and the Definition of Membership In a Recognized Tribe

Background:

A central question in this determination concerns whether the Paiutes are members of the Navajo Tribe within the meaning of the Acknowledgment regulations and, therefore, are not eligible under 25 CFR 83 for acknowledgment as a separate tribe. The August 11, 1987, proposed finding on this question relied extensively on an April 3, 1987, opinion by the Assistant Solicitor for Tribal Government and Alaska (appendix A). This opinion in particular provided a discussion of the meaning of membership in a recognized tribe, as defined in section 83.1(k) of the regulations, and the term "tribal roll."

Section 83.3(d) of the regulations states, as part of the discussion of the kinds of groups that can be acknowledged under these regulations, that the regulations were not intended to apply to Indian

communities or groups of any character which separate from the main body of a tribe currently acknowledged as being Indian by the Department, unless it can be clearly established that the group has functioned throughout history until the present as an autonomous Indian tribal entity.

Previous to the 1987 opinion, this section had been understood to constitute an exception to the requirement that a petitioner meet the requirements of criterion f (see PF:iii). The BIA had orally advised a number of petitioners, including the present petitioner, of this interpretation, and also suggested it in writing to various petitioners. The 1987 opinion advised that this interpretation was not correct. In a companion opinion of June 5, 1987 (appendix B), the Solicitor reviewed BAR correspondence on this subject and advised that nothing in the correspondence had established an agency interpretation or practice contrary to his April memorandum.

Legal arguments challenging and supporting various parts of the April 1987 opinion were submitted by the Navajo Tribe as part of their overall response to the proposed finding and by the San Juan Southern Paiutes in response to both the finding and the Navajo arguments.

In response, a second Solicitor's opinion was provided by the Associate Solicitor for Indian Affairs on January 27, 1989 (appendix C).

Revised Solicitor's Opinions:

In his 1989 opinion, the Associate Solicitor interpreted the discussion in the 1987 opinion as suggesting that to be a member of an Indian tribe one had to both be on a tribal roll and maintaining tribal relations. He concluded, "[t]here is no need to meet the criteria of both components..."

The 1987 opinion refers to the general principles governing tribal membership as a basis for interpretation of this part of the regulations and held that in order to be a "tribal roll" within the meaning of the regulations, the list of members should be one that was prepared under circumstances indicating strongly that it represents a list of those maintaining tribal relations. The discussion in the Assistant Solicitor's 1987 opinion

concerning maintaining tribal relations is premised on his conviction that "tribal rolls" is not defined in the regulations nor is it a precise term otherwise. The discussion of maintaining tribal relations is aimed at aiding in identifying those rolls which would be tribal rolls of members within the meaning and limited purposes of the Acknowledgment regulations. The Associate Solicitor assumed that "tribal roll" had an "ordinary meaning within the BIA" and that, therefore, to consider the circumstances surrounding the preparation of the roll was, in effect, to add the requirement of maintaining tribal relations to the requirement of being on a tribal roll.

The January 1989 opinion upholds the 1987 opinion's conclusion that section 83.3(d) does not constitute an exception to the requirements of section 83.7(f). In response to an August 25, 1989, BIA request, the Deputy Associate Solicitor, Division of Indian Affairs, reviewed specific arguments submitted by the petitioner in response to the 1987 opinion concerning this question. The Deputy Associate Solicitor, in a November 21, 1989, opinion (appendix E), concluded that the arguments submitted by the petitioner were not sufficient to overturn this portion of the 1987 opinion.

#### Interpretation:

In response to our request, the Deputy Associate Solicitor has reviewed the April 3, 1987, opinion and the January 27, 1989, opinion and determined that there is no conflict between them in the context of this case. This is because this determination's conclusion is based on the unique facts of the case, that the 1940 BIA census roll is not exclusively a roll of tribal members within the meaning and intent of our regulations. A copy of the Deputy Associate Solicitor's opinion of December 8, 1989, is attached as appendix F.

#### Nature of Tribal Membership:

In interpreting the regulations for this final determination, reference has also been made to previous solicitor's opinions which provide more detailed guidance on the nature of tribal membership and to long-standing Bureau interpretations and policies. The Assistant Solicitor, in an opinion of March 2, 1988, concluded that while it is a fundamental principle that a tribe's membership is for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral political relationship (Keep 1988). The opinion goes on to state that a tribe does not have authority, under the guise of determining its own membership, to include as members persons who are not maintaining some meaningful sort of political relationship with the tribal government.

The present circumstances provide weak grounds for viewing purported tribal membership as valid, simply on the basis of being listed on a "tribal roll." Here, the evidence is not only that the persons involved are not maintaining a tribal political relationship but, further, that clearcut tribal governing body action has not taken place to enroll either Paiutes or Navajos under the Navajo Tribal Code or otherwise.

Merely appearing on a list denominated a tribal roll is not sufficient to meet the requirements of 25 CFR 83. Where a roll has been properly prepared and reflects tribal requirements for membership, there is no basis or reason,

absent strong facts to the contrary, to look behind the listing of individuals on a tribal roll to consider whether individuals have sought membership and/or are not maintaining tribal relations. However, where a list has merely been denominated as a roll with no other action by the tribal governing body, contains information which is not consistent with a roll of members, or has been prepared in a manner inconsistent with such a roll, further examination is required in order for a valid determination of the significance of these facts under criterion f.

#### Intent of the Regulations:

Membership in an already recognized tribe was an issue throughout the development of the regulations, in the context of prohibiting groups which were largely composed of members of recognized tribes from being separately acknowledged. The intent of the regulations was to exclude from eligibility for acknowledgment groups which were already maintaining tribal relationships with another, recognized, tribe, i.e., were not politically autonomous (see definition of autonomous in section 83.1(i) of the regulations) while acknowledging groups with a historically autonomous, separate existence. Thus it was appropriate to specify maintenance of tribal relations as part of the definition of membership in a recognized tribe.

The language in the Acknowledgment regulation's definition of membership in a recognized tribe calling for maintenance of tribal relations with the tribe appeared first in a June 1978 version of proposed Acknowledgment regulations (BIA 1978). The definition is otherwise identical to that contained in the final regulations, published September 5, 1978. The June 1978 proposed regulations were substantially similar to the final regulations. The language, "or listed on a tribal roll, if such rolls are kept," was added to the text of the definition in the final regulations.

#### Character of Tribal Rolls:

Not everything termed a "tribal roll" is accurately a listing of individuals who are members of the tribe. Some lists denominated "tribal rolls" are not necessarily of that character, e.g., are unevaluated censuses or contain names of some individuals who are in some way associated with the tribe, but are not in fact members. It is only recently that definitive tribal rolls have been kept by recognized tribes and not all do so today. For instance, it was necessary for tribal membership rolls to be created for many of the Washington State tribes whose treaty fishing rights were affirmed by the 1974 U.S. v. Washington (Boldt) decision.

#### Tribal Determination of Membership:

While a tribe is the sole judge of its membership for its own purposes, it cannot include others in its membership unilaterally, without significant actions. While a fundamental principle is that a tribe's membership is for the tribe to decide, that principle is dependent on and subordinate to the more basic principle that membership in an Indian tribe is a bilateral political relationship (Keep 1988:6).

A tribe's determination of its membership for its own purposes is limited to those matters it controls (Cohen 1934). Where the facts indicate that the

"tribal roll" is not accurately a tribal roll within the meaning of the regulations, something beyond a simple declaration by the tribe that the list is the tribe's roll is necessary for a valid determination of membership for purposes of the Acknowledgment regulations.

Analysis Under Definition of "Member of Indian Tribe"

Subpart 1a - Meets Membership Requirements of Governing Document:

The proposed finding was that the San Juan Paiutes do not meet the Navajo Tribe's membership requirements as set forth in the Navajo Tribal Code because the requirements are vague and unclear and because there was no evidence that the Tribe has ever used its membership requirements to determine the eligibility of Navajos or Paiutes. The primary criterion to be a member is that one must be "of Navajo blood" and on "the official roll...maintained by the BIA" (Navajo Tribe 1978:2:148; 1 N.T.C. § 501).

Although the Navajo Tribe has had a legally adopted enrollment application process and an established Enrollment Screening Committee to review all applications in the first instance (i.e., when first considered) since 1955, there is no evidence to show that the Tribe has ever used the process or the committee. There is also a legally adopted set of standards to be used by the committee when reviewing applications, but there is no evidence to show that these standards have ever been applied to decisions regarding eligibility for membership.

In 1959 the Tribe established a Vital Statistics Department to produce a Navajo Tribal Roll which was to include only those "Navajo persons" who were "entitled" to share in benefits and services provided by the Tribe to its members. In the intervening 30 years, no tribal roll has been produced.

When the Navajo Tribe adopted the BIA's reservation-wide census as its official roll in 1953, it necessarily adopted the census numbering system on which it was based. The numbering system was instituted by the BIA in 1928 to enumerate "Indians" on the reservation in order to determine eligibility for BIA services.

From the time the census numbering system was first started until the early 1970's, census numbers were issued to Paiutes and Navajos alike. The Navajo Tribe questioned the right of Paiutes to have census numbers in the fifties and again in the late sixties, after the Paiutes received distributions from the Southern Paiute Judgment Fund and the Navajo Tribe had begun to take over the provision of services previously provided by the BIA.

When census number verification was denied in the mid-1980's to four Paiute families previously deemed eligible, it was a tribal census office clerk who gave the instructions to do so. The tribal clerk's explanation, which appears in the record, incorrectly states that the Paiutes were "enrolled" in the Navajo Tribe "by mistake" (PF:217). In point of fact, however, the four Paiute families were assigned numbers in 1928-29 as part of the BIA's census of Indians on the reservation. The Navajo Tribe's adoption of the BIA's census roll and its corresponding numbering system cannot change the basis under which these individuals received numbers in previous years. Action to

deny census number verification, in effect, denies benefits and services to persons who received numbers at a time when the census was a BIA process that assigned numbers based on the individual's being an Indian of a local tribe of the reservation.

Recent Public Law 93-638 (Indian Self-Determination Act) contracts between the BIA and the Navajo Tribe provide for the continued maintenance of the BIA's 1940 census and state that the records still belong to the Federal Government (i.e., the Bureau of Indian Affairs). Although census office employees of the Navajo Tribe now administer the census numbering process under a contract, the Tribe's governing body does not appear to be involved in the day-to-day operations of the process, nor does it appear to review decisions made by tribal census office employees.

There is no evidence that the Tribe's established membership criteria and/or enrollment procedures, adopted in the fifties and still legally in force, are being applied to day-to-day census operations. Forms now being provided by the Tribe's Vital Statistics Office to "persons wishing to enroll" (Debowski 1989) are BIA forms which are stipulated in the contract and have been used to collect family information and record census numbers issued at least since the early 1950's. These forms have been virtually unchanged except for title/heading for almost 40 years. The forms provide no space for approval or disapproval by the BIA or the Tribe.

When the Navajo Tribe adopted the BIA's census in 1953, Commissioner Emmons expressed concern over the Tribe's use of the census because it included some Paiutes and other non-Navajo Indians of the reservation (PF:211-13). The Commissioner and other Bureau officials were also concerned because they believed the Tribe's membership criteria to be vague and ambiguous and not specific as to "which" BIA census roll would be used or how blood degree would be determined. The Tribe's governing body was aware of these problems in the fifties. Since that time, the Tribe has expressed concern about the Paiutes having census numbers and being on the roll, but it has not taken action to deal with these problems.

Questions regarding how much Navajo blood is enough to meet Navajo membership requirements exist because Navajo criteria are not specific and because legally in force but unused enrollment procedures suggest that more than a minimal amount of Navajo blood would be required. Ambiguities in the census (in both the original and the updated versions of the 1940 census) and in supporting documents make it virtually impossible for the BIA to reasonably resolve questions regarding the eligibility of individual San Juan Paiutes who appear on the census. The BIA census is not conclusive and, in a number of cases, conflicts with a substantial body of other evidence to the contrary. There is no apparent tribal administrative record of actions by the Navajo Tribe's governing body on similar issues to which to refer.

The proposed finding found Navajo membership criteria, adopted in the fifties and still in force, to be vague and ambiguous. The proposed finding also concluded that the San Juan Paiutes do not meet the requirements of subpart 1a of the definition of membership in a recognized tribe. Nothing has been submitted in response to the proposed findings which would clearly refute these conclusions, let alone compel adopting contrary findings. However, we do not need to resolve these issues finally at this time.

Subpart 1b - Collectively Recognized by the Governing Body:

The proposed finding was that the documentary record showed that the Navajo Tribe's governing body has questioned the legitimacy of Paiutes being on the Tribe's "official roll," but has not acted to resolve these questions. The finding also reported similar questions raised by BIA and tribal employees of the tribal census office as recently as 1983-84.

About 30 percent of the San Juan Paiute band do not live on the Navajo Reservation and nine of the resident Paiutes do not have census numbers. The question of Navajo Tribal government acceptance of the Paiutes is not directly relevant to this portion of the band, even though some of the non-residents have census numbers.

Census number issuance was formerly done by employees of the BIA and has subsequently been done by Navajo Tribal employees without the action of the Navajo Tribal governing body. These actions by BIA and tribal employees in issuing census numbers to Paiutes do not constitute clear recognition by the Navajo Tribal governing body of the membership status of the Paiutes.

The form now given to persons wishing to enroll is a BIA form which has been routinely used by the BIA to record vital statistics information about a family and the census numbers issued them. This form, which is now being used by the Navajo Tribe, does not provide space for recording decisions by the tribe or anyone else to approve or disapprove enrollment. Earlier versions of this form, used while the process of issuing numbers was under BIA control, also did not provide space for recording such decisions. There is no evidence that these forms reflect decisions by the Navajo Tribal governing body under the Navajo Tribal Code or otherwise.

The Navajo Tribe adopted an enrollment process in 1955 wherein the Navajo Tribal governing body, through its appointed Enrollment Screening Committee, would consider all applications made in the first instance. There is no evidence to show that this legally adopted process, or the appointed committee, have ever functioned on membership issues of Navajos or Paiutes. Nor is there any evidence to show that the Tribe's governing body has in fact participated in the recent decisions to deny verification of the census numbers of several Paiutes whose numbers date back to 1928.

The question of the Paiutes' legitimacy as members of the Navajo Tribe has arisen from time to time, beginning in the mid-1950's with the Navajo Tribe's first formulation of a membership system. It arose especially as the modern Navajo Tribal government and its formal institutions developed and took control of functions formerly exercised by the Federal Government. Besides the mid-1950's, questions arose from 1969 to 1972, and in 1977, and 1981. Thus, it is not a new question, but has some continuity, coming to the fore when a particular issue arises. When questions have arisen on the record they have been directly related to the strong, often negative social distinctions the Paiutes and Navajos have made between themselves. That is, they probably reflect underlying community sentiment, which has been uncertain or divided about whether the Paiutes are entitled to be members. Questions have sometimes been related to the claims of the San Juan band specifically, or Southern Paiutes generally, versus those of the Navajo Tribe, i.e., in the Indian Claims Commission in the 1950's, the Southern Paiute Judgment Fund

Award in the late 1960's, and the legislation and litigation concerning the ownership of the western Navajo Reservation in the 1970's and 1980's.

The distinction that the San Juan are Paiutes and not Navajos is rarely at question, consonant with local Navajo community attitudes that the Paiutes are a clearly distinct group and with the history of the San Juan band as a distinct community and political body. With one or two exceptions, the issue is whether or not they, as Paiutes, should or should not be treated as members of the Navajo Tribe.

The Navajo Tribe's allowance of Paiute registration and voting is the strongest, least ambiguous evidence of defacto acceptance of the Paiutes as members by the tribal government. It is the most broadly distributed among the band's membership, although only about 25 percent of the adult members have voted even once. Voting occurs in the context of almost no other evidence of political participation in Navajo political institutions and the evidence of continuing Navajo uncertainty of the legitimacy of Paiutes having Navajo membership rights. Although there is no evidence that Paiutes have ever been refused voter registration, there is some evidence of pressure to register and vote in order to receive services.

The only other important evidence which indicates at least occasional acceptance of Paiutes as members of the Navajo Tribe is that of receipt of services which are limited to tribal members (as opposed to Federal programs administered by the tribe which are by law open to all Indians or all reservation residents). Events between 1969 to 1972 indicate particularly clearly that, in that era, Paiutes in the southern area were sometimes denied services based on a rejection of the legitimacy of their having census numbers (see later discussion). There is at best fragmentary evidence of membership services received before 1969. After 1969, services were received on an occasional basis, rather than regularly or consistently.

There is only fragmentary other evidence. In the Navajo Mountain chapter where Paiute-Navajo relationships have been closest, one individual, marginal to the Paiute band was nominated to a chapter office 15 years ago. Another individual Paiute, not marginal, was elected to a community board office in that chapter 20 years ago. The latter, however, reportedly resigned subsequently because of the refusal of the Navajo board members to consider Paiute requests. In addition, a Navajo leader specifically declined to represent the Paiutes before one of the southern chapters and another southern chapter defined the Paiutes as outsiders to the extent of considering prohibiting the sale of Paiute baskets.

The proposed finding concluded that resolutions denying discrimination and affirming tribal membership for "those individuals enrolled in the Navajo Tribe" (or similar language) from the Navajo Mountain and Tuba City chapters and the Navajo Tribal Council were passed in response to the issues raised by the Paiutes' acknowledgment petition and the Paiutes' attempt to intervene in the Sidney v. Maskie land case and thus did not necessarily represent the previous views of these governing bodies (PF:xv, xvi, 78-9, 90). The term "enrolled in the Navajo Tribe" is not defined in the resolutions nor do the resolutions clearly define to whom they apply.

The Navajo Tribe's response to the proposed finding submitted additional resolutions, more or less similar to the earlier ones, from the Navajo Mountain Chapter (1987), the Bodaway-Gap Chapter (1988), and other chapters outside the areas where the Paiutes live. As recent actions, passed in response to adversarial issues where there is a clear advantage to declaring the Paiutes members, the resolutions are not entitled to the same weight as would resolutions passed in a non-adversarial situation. Given especially the history of past questions about Paiute membership, the lack of a clear-cut enrollment process, and the distinct character of the Paiutes, the resolutions do not provide strong, conclusive evidence of collective acceptance of the Paiutes by the Tribal governing body which meets the requirements of 1b.

The additional resolutions and the other new evidence submitted with the Navajo response are not consistent with the available evidence that the Navajo Tribal Government and the local Navajo communities have at times in the past questioned whether the Paiutes were legitimately members of the Navajo Tribe.

Census numbers were formerly issued by employees of the BIA, and subsequently this process has been continued, without significant change, by Navajo Tribal employees. The process of issuing of numbers has been a routine one, executed as part of the process of maintaining the reservation census list. The process has not had nor required action by the Navajo Tribal governing body to make membership determinations. Thus the process of issuing numbers has not been clear action by the Navajo Tribal governing body to accept the membership status of the Paiutes. There have been some tribal government actions, principally voter registration and voting, which may indicate acceptance, of those Paiutes involved, as members of the Navajo Tribe. Recent council and chapter resolutions are not consistent with past tribal government questions about the status of the Paiutes and were passed in the context of the Paiute petition and the issue of Paiute tribal status in current litigation over the western Navajo Reservation. There has been considerable question since the 1950's over the legitimacy of the Paiutes holding Navajo "census numbers." The proposed finding concluded that the San Juan Paiutes do not meet the requirements of subpart 1b of the definition of membership in a recognized tribe. Nothing has been submitted in response to the proposed finding which would refute this conclusion let alone mandate a contrary finding. What constitutes being "recognized collectively by those persons comprising the tribal governing body" pursuant to 25 CFR 83.1(k) is not defined in the acknowledgment regulations. Where the evidence of government actions is inconsistent and not clearcut, as is the case here, our regulations do not provide specific guidance for resolution of this issue. However, we do not need to resolve finally this issue because of our other findings, discussed below.

Subpart 2a - Continuous Maintenance of Tribal Relations:

A general principle concerning membership in an Indian tribe is that a bilateral political relationship between the members and the tribe is fundamental (Cohen 1934, 1941).

The proposed finding concluded that the San Juan Southern Paiute Tribe had maintained tribal political authority over its membership as an autonomous unit from earliest sustained historical contact until the present. Therefore its members were maintaining a bilateral political relationship with the tribe. The materials and arguments presented in response to the proposed finding did not provide a basis for changing these conclusions. Some additional materials were submitted concerning historical periods which strengthened and supported the proposed finding's description and conclusions that the band had historically had political leaders who exercised tribal political authority. Detailed additional records submitted concerning the period after 1965 provided no significant evidence that the Navajo Tribe or Navajo leaders had exercised influence over internal political processes within the Paiute membership (see detailed discussion in criterion c).

The proposed finding concluded also that individual members of the San Juan Southern Paiute Tribe were not now maintaining a bilateral political relationship with the Navajo Tribe and had not done so in the past. Although some San Juan Paiutes were sometimes present at Navajo chapter meetings and about a third of the Paiute adults resident on the reservation had voted in tribal elections, there was little evidence that they had participated in Navajo decision-making processes. Their occasional involvement in Navajo Tribal political institutions was not of a nature and extent that could be considered substantially "continuous" tribal relations.

The materials submitted in response to the proposed finding did not provide a basis to change these basic conclusions. Chapter records indicated some significant involvement by one individual marginal to the band and limited involvement by one or two individuals in one chapter between 15 and 20 years ago. No other evidence of political participation in chapters was found. A reanalysis of voting, based on previous information and data from three additional elections, indicated that only a small portion of the Paiutes had voted consistently. The proposed finding concluded that the intent and purpose of Paiute voting was to seek to influence the Navajo political system which had taken over many services and functions which were formerly administered by the BIA. There was some limited evidence that the Paiutes also felt constrained to vote in elections, especially in one of the chapters, to avoid problems with the local chapter organization. The limited additional information supported the proposed finding's conclusions concerning Paiute intent.

The proposed finding considered the views of individual Paiutes, based on the Solicitor's opinion that these were relevant because "membership is a bilateral political relationship and an individual is free to terminate his membership at any time" (Keep 1987:5). Little additional information was submitted with the responses which directly concerned the intention and understanding of the Paiutes in obtaining and using the census numbers that have become Navajo membership enrollment numbers. There was no basis to alter the proposed finding's conclusion, based on limited evidence, that the

Paiutes were constrained to continue to get and use the numbers after they became "Navajo Census numbers" because they were the primary means of obtaining vital services. A review of some additional evidence concerning actions by one chapter in 1972 together with the previously available evidence concerning Navajo Tribe and BIA agency actions between 1969 and 1972 supported the conclusion concerning that era that the Paiutes sought the census numbers because they were the primary means of obtaining vital services.

In summary, Navajo political leaders and institutions have not exercised political influence over internal decisions among the San Juan Paiute membership. While there has been some occasional involvement of the Paiutes in Navajo tribal political institutions in the past 15 to 20 years, the available evidence indicates this was not of a nature and extent that could be considered to indicate the continuous maintenance of tribal relations. Acquiring and using census numbers appears to have been viewed by the Paiutes as a means of obtaining vital services, previously provided by the Bureau, rather than as a means of becoming members of the Navajo Tribe.

Therefore, a bilateral political relationship, which is fundamental to tribal membership, does not now exist and has not existed in the past between the San Juan Paiutes and the Navajo Tribe. The Paiutes, however, have maintained such a relationship within themselves as an autonomous political unit. Since "continuous maintenance of tribal relations" with the Navajo Tribe have not existed and do not now exist, the San Juan Paiutes do not meet subpart 2a.

Subpart 2b - Listed on a Tribal Roll as a Member:

The proposed finding concluded that although the names of 119 Paiutes appear on the defacto "Navajo Tribal Roll," these Paiutes were not legitimately members of the Navajo Tribe. This conclusion was based on a number of findings regarding the specific nature of the Tribe's "official roll" and the fact that the Tribe did not appear to be exercising its authority to determine its own membership.

Membership in the Tribe is based primarily on being "of Navajo blood" and on the "official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs" (Navajo Tribe 1978:2:148; 1 N.T.C. § 501). The "official roll" referred to is a BIA census of the Navajo Reservation and, as such, it has always included some Paiutes and other non-Navajo Indians. When the reservation was canvassed by the BIA in 1928-29, all Indians--Navajo and Paiute alike--were enumerated using a census numbering system which assigned numbers to all Indians. This census list determined eligibility for services provided by the BIA to Indians on the reservation. The fact that this was a census enumeration process and not a membership process, is well documented. No applications were taken. Numbers were assigned without regard to tribal heritage. Available evidence suggests that the "census number" has been perceived by Paiutes as a "necessity" for obtaining vital services. There is little evidence that the Paiutes looked upon these numbers as "membership numbers."

Although the BIA's census roll, the census numbers themselves, and the process of obtaining a number were established for all Indians of the Reservation, they have, nonetheless, come to be regarded as "Navajo." This

is believed to result from the fact that it is a census of the "Navajo" Reservation, because the Navajos outnumber the Paiutes by a wide margin, and because the Tribe formally adopted the BIA's census as its "official roll" (i.e., the defacto "Navajo Tribal Roll"). This identification as "Navajo" has been further cemented by Public Law 93-638 contracts in the 1980's under which the Navajo Tribe has contracted to perform census operations formerly carried out by the BIA through its Navajo Area Office and agencies on the reservation.

With respect to the Paiutes on the Tribe's "official roll," there is clear evidence that the Tribe's governing body was well aware that the census included Paiutes when it was adopted in the fifties. The Commissioner and other BIA officials expressed concern at that time that persons who were not eligible for membership would be taken off the roll. The Navajo Area Director confirmed that concern by stating:

That possibility exists, and in reviewing the official roll, persons who are ineligible for Tribal membership but who are erroneously listed as Navajos . . . may be stricken from the roll after due investigation and action by the Advisory Committee or the Tribal Council. (Harper 1954; PF: 213)

Harper went on to say that, "There are also reportedly some Utes and Piutes(sic) carried as Navajos due to errors in former times" (Harper 1954). His statement about "errors in former times" reflects his lack of understanding about the historical development of the BIA's census.

In 1959 the Tribe established a Vital Statistics Office to develop a Navajo Tribal Roll; this also was codified in the Navajo Tribal Code. The language of Code implies that use of the BIA census was an interim measure pending the development of a tribal roll which would include only those "Navajo persons" who were "entitled" to share. No Navajo Tribal Roll has been developed.

The enrollment application process and the Enrollment Screening Committee established in 1955 to consider all applications in the first instance do not appear to have been used to consider any applications, Navajo or Paiute (1 N.T.C. § 551-553). Chairman Zah, in responding to interrogatories in 1985 in Sidney v. Zah (now Sidney v. Haskie), acknowledged that the Tribe was not aware of any formal applications from individuals "petitioning to be included on the initial tribal roll . . . or the census prepared by the Bureau . . . from 1928 through 1940" (PF:215).

In addition to the Tribe's "of Navajo blood" and "on the official roll" membership criteria (1 N.T.C. § 501(1)), the Tribe also codified standards (i.e., the "six-point instruction") to be used by the Enrollment Screening Committee when considering applications (§ 553). (See discussion under "Enrollment Screening Process;" also PF:214-15.) There is, however, no evidence to show that these standards have ever been used by the Navajo Tribe to determine anyone's eligibility for membership, whether Navajo or Paiute. Nor is there any evidence to show that the standards have ever been applied to the census numbering process.

There is some evidence to suggest that the Tribe's membership criteria ("of Navajo blood" and "on the official roll") may have been used by tribal census clerks in the mid-1980's to deny census number verification to four San Juan

Paiute families who were previously deemed eligible. The decisions appear to have been based on their being recorded as "Paiute" on the updated version of the BIA's 1940 census and/or the original 1928-29 census. Denial of census number verification essentially put these families "off the roll."

The denial of census number verification was based on the instructions of a tribal census clerk at the Window Rock Census Office in at least three of the four denials. There is no evidence of action by the Navajo Tribal Council, the Enrollment Screening Committee, or any other part of the Tribe's governing body. No evidence was provided to show that any of the four Paiute families involved were informed of any right to appeal these decisions.

Maintenance of the BIA census appears to have been a routine clerical process. Available evidence shows census numbers, at least until recently, have often been assigned automatically when individuals came to the attention of agency census office personnel or when births were reported to the agency census offices by Indian Health Service (IHS) hospitals. BAR researchers have been informed that IHS stopped automatic reporting of vital statistics around the time when the BIA's custodial and certification responsibilities for the census were contracted to the Tribe (August 1988) (FD2).

The forms now being given out by the Tribe's Vital Statistics Office to "persons wishing to enroll" are BIA information collection forms. These forms have been used by the BIA since at least the early fifties to record information about families and census numbers assigned. Although the forms have been identified by several names ranging from "Family Sheet," "Application for Census Identification Number," "Change Sheet," "Census Enumeration Sheet," and "Application for Enrollment - Navajo Tribe," their overall content remains virtually unchanged. These forms do not resemble application forms whereon an individual makes a clear statement about his intent to apply for membership. In fact, there is no evidence to show that the forms are ever completed by the individual, only the census office clerk. Forms now in use by the Tribe, as well as the earlier versions used by the BIA, do not provide space to record approval or disapproval by the Tribe or the BIA.

Census numbers were assigned from a central point, at the Window Rock Census Office, until the fall of 1960 when blocks of numbers were given to the various agencies of the BIA for use at that agency. Numbers were assigned as individuals came to the attention of census officials, but no real canvassing of the reservation has taken place since the initial enumeration in 1928-29. Based on available evidence, census numbers appear to have been issued to Paiutes without question until the late 1960's and the early 1970's. However, there is evidence of questions arising after some of the San Juan Paiutes received Southern Paiute judgment funds in 1969 and after the Tribe had begun taking over the provision of services to Indians on the reservation in the early 1970's. With the Tribe's assumption of more responsibility for providing services and programs previously provided by the BIA, there is evidence that BIA and Tribal census office personnel working together in the agency census office at Tuba City were beginning to question why the Paiutes were on the roll. Inquiries from the Navajo Area Director in 1977 and 1981 asked for an explanation of "the role of the Paiutes as part of the Navajo Tribe . . ." and what the rationale was for giving Paiutes Navajo census numbers (McBroom 1977; Dodge 1981; PF:218). There is some evidence that these inquiries were in response to requests from the Tribe (FD2).

Although a large percentage of the Paiutes have census numbers and appear on the BIA's reservation-wide census, which was adopted by the Navajo Tribe in 1953, there is little evidence to show that this roll is a tribal roll in the sense that it is exclusively a list of Navajo tribal members within the meaning of the Acknowledgment regulations. Other than the Navajo Tribe's identification of the BIA's census of the reservation as its "official roll" in the fifties, there is virtually no other evidence to show that the Tribe has been exercising its authority to determine its own membership. There is some evidence that the Tribe's governing body questions the legitimacy of Paiutes having census numbers and being on the "official roll," but the Navajo tribal governing body does not appear to have taken action to use enrollment procedures, adopted in the fifties and still in force, to resolve concerns over the presence of Paiutes on the Tribe's "official roll" (i.e., the BIA's census).

The Tribe's participation in the entire census process appears to be devoted primarily to the upkeep of an existing BIA census, rather than the development of a Navajo Tribal Roll consistent with the Tribe's authority to determine its own membership and the governmental structures and procedures incorporated into its Tribal Code.

The Navajo response stated that the proposed finding "improperly disregards the established legal principle that an Indian Tribe has exclusive authority to determine its own membership" (BB 1988a:4). To the contrary, the finding acknowledges a tribe's authority to determine its own membership and enrollment procedures, but points out that available evidence shows that the Navajo Tribe has not carried out procedures to establish the census as a tribal roll under its Code. The Tribe's response did not provide new evidence to show how it exercises authority over the determination of membership.

The Navajo response asserts that how the Navajo Tribe exercises its treaty right to jurisdiction over the Tribe's internal affairs (i.e., the determination of membership) is of no import to the San Juan Paiutes (BB 1988a:8). They go on to state unequivocally that

The only consideration is whether the Navajo Nation considers a person to be a tribal member [and] the only evidence that would contradict such a finding [i.e., whether or not a person was a Navajo tribal member] would be compliance by the individual with the Nation's requirements for abandoning membership status (BB 1988a:8).

Both arguments are unilateral in nature, placing membership decisions solely in the hands of the Navajo Tribe. These arguments contradict the basic interpretation of "Member of an Indian Tribe" which states that tribal membership is

a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances." (Cohen 1941:135)

The Navajo argument regarding the Tribe's authority to determine its own membership suffers because although the Tribe has had legally established membership criteria and an enrollment application process which provides for a formal review by Tribal officials, there is virtually no evidence to show that they have ever been used to determine membership eligibility, Navajo or Paiute. The Navajo Tribe appears to have relied solely on the BIA's census process to identify its membership. This is not to say that Navajos who perceive themselves to be members of the Navajo Tribe are not members, but rather that all persons listed on the BIA's census are not necessarily members, nor are they necessarily perceived to be Navajo even though a version of the 1940 census may identify them as such (see discussion under "Ambiguities in the Records").

The Navajo response implies that "Navajo" census numbers are evidence of membership in the Navajo Tribe. We find that they are the by-product of the census numbering system utilized on the Navajo Reservation by the Bureau of Indian Affairs beginning in 1928. Although the requirement for the Indian agent to take a census of the reservation was discontinued in 1940, the BIA, and more recently the Tribe, has continued to issue census numbers and to post marriages, births, deaths, etc. to the 1940 census of the Navajo Reservation.

The Tribe's response to the proposed finding suggests that "application numbers" noted in the upper right corner of some of the BIA's information collection forms are evidence of a family's intent to enroll in the Navajo Tribe. Available evidence does not support this argument, but rather indicates that these numbers have been used by the Window Rock Census Office for routine filing purposes only.

Recent resolutions of the Navajo Tribal Council and several of its chapters, affirming tribal membership for "those individuals enrolled in the Navajo Tribe" (or similar language) are not entitled to the same weight as evidence of action by the governing body to determine the eligibility of individual Paiutes as actions passed prior to submission of the Paiute's acknowledgment petition or their attempt to intervene in the Sidney v. Haskie land case. This is especially true given the history of past questions regarding Paiute eligibility, the lack of evidence that existing enrollment criteria and procedures are being used, or that the governing body is in fact approving or disapproving the issuance of census numbers which are referred to as "Navajo Enrollment Numbers."

A simple declaration that the BIA's census is the Navajo Tribe's membership roll has not made it a tribal roll within the meaning of the Acknowledgment regulations. The Navajo Tribe's governing body has not acted to determine the Tribe's membership, even Navajo, nor has the Tribe exercised its authority to correct problems with the roll which were present and known when the roll was adopted in the 1950's. Decisions to deny census number verification to four San Juan Paiute families previously deemed eligible have been made by tribal census clerks employed by the Tribe. Evidence is that the Navajo Tribal governing body has not participated in decisions to deny census number verification. Paiutes have applied for census numbers in order to obtain vital services and not to become members in the Navajo Tribe per se. We conclude that the defacto "Navajo Tribal Roll" (i.e., the BIA census) is not a tribal roll of members of the Navajo Tribe as intended by the

Acknowledgment regulations. We therefore conclude that the San Juan Paiutes do not meet subpart 2b of the definition of membership in a recognized tribe.

Summary Conclusion Under Criterion f

The evidence shows that the 119 Paiutes with census numbers did not acquire or use them with the intent and understanding of becoming members of the Navajo Tribe. Census numbers have been issued by BIA or Tribal clerks without action by the tribal governing body as intended by the legally adopted and in force sections of the Navajo Tribal Code. Decisions to deny census number verification in the mid-1980's were made by tribal census clerks without action or approval of the governing body of the Navajo Tribe. The Navajo Tribe has not been exercising its authority to determine its own membership. The defacto "tribal roll" is a reservation-wide census and does not have the character of a tribal roll within the meaning of the regulations.

The San Juan Paiutes have not maintained a continuous bilateral political relationship with the Navajo Tribe. They have maintained such a relationship within their own tribe. The Paiutes have not maintained tribal relations with the Navajo Tribe on a substantially continuous basis, and therefore do not meet that part of the definition of membership in a recognized tribe. They are not listed on a "tribal roll" within the meaning of the Acknowledgment regulations, i.e., a roll of exclusively Navajo tribal members, and therefore do not meet that part of the definition.

The proposed finding concluded that the San Juan Paiutes do not meet the requirements for membership in the Navajo Tribe because the requirements are vague and ambiguous as to the how much Navajo blood is required of persons "on the official roll" as well as which version of the BIA's 1940 censuses of the Navajo Reservation is the "official roll." Further, there was no evidence that the Tribe's legally adopted membership requirements and enrollment procedures have been used by its governing body to determine eligibility for membership for Navajos or Paiutes. There is thus no tribal administrative record of determination of tribal membership to indicate how such issues concerning membership requirements would be decided.

The proposed finding also concluded that the San Juan Paiutes have not met the alternative, collective acceptance by the Navajo Tribal government, because the Navajo Tribe has not acted on applications or otherwise enrolled them either through the existing tribal code procedures or otherwise. While some tribal government actions have implied acceptance of the Paiutes as members, there has been significant question about the legitimacy of their holding census numbers and receiving membership benefits. Recent resolutions do not constitute conclusive evidence of collective recognition by the tribal governing body.

In summary, the proposed finding concluded that the San Juan Paiutes with census numbers did not meet the membership criteria of the Navajo Tribe and that the actions by various Navajo governmental entities did not constitute recognition of the San Juan Paiutes as members of the Navajo Tribe. There was no new, compelling evidence to refute those conclusions, let alone mandate contrary ones. However, it is not necessary to resolve finally, the questions of whether members of the petitioner meet the Navajo membership

criteria. Nor is it necessary for us to resolve with certainty whether the actions of the various Navajo entities, either long past or recent, constitute adequate evidence of collective acceptance of the Paiutes as members by the Navajo tribal governing body.

Since the 1940 census does not constitute a tribal roll within the meaning and intent of the regulations and the petitioners have not been maintaining tribal relations with the Navajo Tribe, the petitioners cannot satisfy, as to the Navajo Tribe, the second element of the definition of tribal member. Thus, whether they meet the membership criteria of the Navajo Tribe or have been recognized as members by the tribal governing body is immaterial since they are not maintaining tribal relations with the Navajo Tribe and are not on a tribal membership list.

We conclude that the 119 Paiutes with "Navajo census numbers (64%)" do not meet the definition of membership in a recognized tribe set forth in the Acknowledgment regulations. The names of 46 other Paiutes (24%) appeared only on the San Juan Paiute membership roll. With regard to the balance of the San Juan Paiute membership, the names of 23 of them (12%) appear on the rolls of one or three other recognized tribes. Ten of the 23 have confirmed, in writing, their membership in the San Juan Paiute band. Because of the small number, the relationships of the 23 to the three other tribes was not researched in depth under criterion f. They were, however, found to be maintaining tribal relations with the San Juan Paiute band. The possibility of 12 percent being otherwise enrolled was not sufficient in and of itself to affect the determination under criterion f.

Forty-six of the San Juan Paiute members are enrolled only with the San Juan Paiutes and the 119 who have "Navajo census numbers" have been determined to not meet the definition of membership in a recognized tribe set forth in the Acknowledgment regulations. Therefore at least 165 (88%) of the members of the San Juan Southern Paiute Tribe are not members of any other North American Indian tribe. We conclude that the petitioner's membership is composed principally of persons who are not members of any other North American Indian tribe and therefore the San Juan Southern Paiute Tribe meets the requirements of criterion 83.7(f).

#### Criterion G

**83.7(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.**

The proposed finding concluded that the petitioner met criterion g because it was not subject to Congressional legislation which had expressly terminated or forbidden the Federal relationship. The Navajo response (BB 1988a:84) reiterates the contention, also set forth in its preliminary response (Brown and Bain 1985a:65-70), that the Paiutes do not meet criterion g because of executive branch and Congressional actions.

The Navajo response argues that the 1922 executive branch action restoring the reservation established in 1907 for the San Juan Paiutes to the public domain constituted "termination" of them as a tribe. There was no executive branch action taken indicating that the tribe was no longer recognized.

Correspondence immediately subsequent to the 1922 reservation withdrawal clearly indicated that the BIA considered the San Juan Paiutes a tribe under its jurisdiction (PF:49). No later executive branch actions denying recognition were found.

The Navajo response argues that the 1974 Hopi-Navajo Settlement Act (Public Law 93-531), which provides for individual allotments for Paiutes "not now members of the Navajo Tribe," terminates the Paiutes. The response argues that since this act deals only with Paiutes as individuals, Congress intended that the Paiutes on the Navajo Reservation be treated as individuals and not as a tribe (BB 1988a:67). Nothing was found in the background of the inclusion of this language in the act to support this interpretation (U.S. House of Representatives 1972). The act makes no reference to, nor provisions for or against, the San Juan Paiutes as a tribal entity and thus does not forbid their acknowledgment as a tribe.

No legislation terminating the San Juan Paiutes or affecting their ability to be acknowledged as an Indian tribe was found. We conclude therefore that the San Juan Southern Paiute Tribe meets the requirements of criterion 83.7(j).

## SAN JUAN PAIUTE, FIRST CONTACT TO 1969

### Bases of the Historical Findings

The Navajo response to the proposed finding makes some general criticisms of the proposed finding's treatment of the available historical data. It inaccurately characterizes the proposed finding as having accepted the recent Paiute oral history recorded during the process of preparation of the petition over documentary evidence and Navajo oral history (BB 1988a:89-90). The proposed finding concerning the history of the Paiutes was based on extensive documentation, which is cited in the technical reports, as well as recent Navajo oral history and both Navajo and Paiute oral history recorded at various times in the past by various ethnographers and others whose works were cited.

A related critique was that too much reliance was placed on the work of ethnographer Isabel Kelly (BB 1988a:47-50). This material on the San Juan Paiutes, part of a larger study by Kelly of the Southern Paiutes, was based on a few days' field research with two informants. The ethnographic materials used as a basis for the proposed finding included, besides those of Kelly, the work of Omer Stewart, who spent a week in the Paiute camp at Willow Springs (PF:127). Stewart, and also ethnographer Robert Euler (1964), reached similar conclusions to Kelly's concerning Paiute territory, history and social structure. The work of other ethnographers and a large number of documentary sources were also used in the finding. An additional ethnographic source submitted with the Paiute response, the notes of Donald Collier from 1933, is consistent with the other ethnographic data from the same era used in the proposed finding (D. Collier 1933-34).

In addition to a text and the arguments discussed in it, the Navajo response included a detailed, page-by-page review of the history and anthropology reports as they relates to historical questions (BB 1988b). This review consisted of a series of critiques of statements in the text of the proposed finding or of particular sources used, claiming misquotation or misinterpretation, and/or proposing alternative interpretations. This final determination report addresses all points significant to the final determination. The specific objections cannot and need not be reviewed here item by item. However, many of the objections are either related to, or are essentially restatements of, basic arguments in the text of the Navajo response rather than actual critiques or analyses of the particular source or point referenced.

### Historic Exercise of Tribal Political Authority (to 1969)

#### Proposed Finding and Response

The proposed finding described in detail the evidence for historic exercise of tribal authority up to the death of San Juan leader Alfred Lehi in 1969. The Navajo response objected on several specific grounds. Most of the proposed finding's analyses and data concerning the historical existence of local and band leaders were not commented on in the Navajo response. The petitioner provided significant additional historical data concerning the historic tribal leader Pakai.

#### Historical Existence of Tribal Leaders

The proposed finding (PF:112) concluded that the historical figure Patnish was a Paiute leader and was probably the first leader of the entire band. The Navajo response objected that the historical evidence only indicated that Patnish was associated with raiding groups, possibly consisting mostly of Navajos (BB 1988b). The proposed finding's conclusions were based on several documentary sources from the 1870's which indicated he was a Paiute leader at the time (PF:104, 112). The Navajo objection was primarily based on other documentary materials, from the 1860's. These materials, which were also reviewed for the proposed finding, indicate that in the 1860's Patnish was probably involved in or a leader of tribally mixed, "renegade" raiding bands operating from the strip country of northern Arizona.

Additional information submitted with the Paiute response concerning the tribal leader Pakai (also known as Lehi or David Lehi) confirmed the proposed finding's conclusion concerning his status as an important leader. A new documentary source (Runke 1916), lends some support to previous data on his leadership role in dealing with outsiders, as economic intermediary in trading by the band with other Paiutes (PF:130). Two documents from an investigation in the 1890's of Mormon land-holdings in the Tuba City area mention Lehi. Indian Inspector James McLaughlin reported in 1898 on his investigation of claims of a non-Indian at Moencopi and included affidavits from some of the local Paiutes with his report. McLaughlin's report and an affidavit by Lehi refer to him as chief of the Paiutes. The report indicates Pakai was the only Paiute called to testify on the Mormon land question.

These sources are the earliest documentary references to Pakai as a leader. Although oral history sources dated his leadership to as early as the 1870's, the earliest documentary reference previously found was in 1907 (PF:130-31). Documentary sources available for the proposed finding concerning Pakai's age, and hence how early he could have been leader, were contradictory. One indicated his birthdate was in the 1840's, while others indicated the 1860's. The age Pakai gives in his affidavit, 45, tends to support the earlier birthdate and, hence, the conclusion that his leadership could have dated from as early as the 1870's (Lehi 1898).

#### Meetings as Part of the Political Process

The proposed finding concluded that meetings were an important part of the political processes within the San Juan Paiute band and had been so historically. The available ethnographic and oral history materials were of a general nature concerning this, i.e., they did not detail specific meetings which had occurred in the past. The documentary and oral history materials presented with the Paiute petition only provided information on a few specific meetings that had occurred before the 1980's. The Paiute response cites some additional evidence concerning the role of meetings.

The Navajo response argued that the existence of historical political processes within the tribe had not been demonstrated because it had not been shown that specific meetings had occurred with consistency in the past. However, the evidence of specific meetings was only part of the evidence that meetings were a common feature of Paiute political processes. Further, the evidence concerning meetings was only a small portion of the available evidence on the historical exercise of tribal political authority. The Navajo response did not otherwise substantially comment on the proposed finding's conclusions concerning historical exercise of tribal political authority.

## Acculturation

### Proposed Finding

The proposed finding concluded that there was significant San Juan Paiute acculturation to Navajo culture in material culture, dress and means of subsistence and some in religious practices (PF:166-67). It further concluded that the social and political organization, the religious belief system, and much else of the culture remained distinct. The Paiutes did not participate in the important Navajo women's puberty ceremony, or in other Navajo ceremonies except in some of the curing rituals (PF:168-69). The proposed finding concluded there was some limited acculturation in curing practices, but that the San Juan Paiutes were not extensively influenced by Navajo religious beliefs. The proposed finding concluded that Paiute use of Navajo curing ceremonies was common, and also that in a few instances Paiutes had become practitioners as well as utilizors of Navajo curing or diagnostic techniques. It was noted that use of curers of other tribes is common in the Southwest.

The proposed finding's section on acculturation focused on evaluating the degree to which Navajo culture had been borrowed by the San Juan Paiutes or had influenced their culture. The conclusion that the San Juan Paiutes as a whole had not been significantly assimilated culturally was presented in summary statements rather than discussed in detail. Although there were changes in dress, housing styles, and means of subsistence, these were not as significant as the fact that there were no significant changes in basic institutions such as kinship, political organization and religious beliefs.

### Response

The petitioner commented extensively on the sections of the proposed finding concerning acculturation of the San Juan Paiutes to Navajo culture (FB 1988:39-72). Extensive new data was submitted concerning retention by the San Juan Paiutes of traditional Paiute religious and other belief systems and practices. New data was also submitted on the use of the ritual curers of each tribe by members of the other tribe.

The Navajo Tribe's response included some general statements that the Paiutes had become assimilated into Navajo society. It did not specifically address the evidence of continuing cultural differences discussed in the proposed finding.

### Discussion

The petitioner's comments do not quote the overall conclusions of the proposed finding entirely accurately, stressing sentences that, out of context, might indicate that acculturation was more extensive than was the actual conclusion.

Acculturation implies that the group is moving towards becoming participants in another group's culture. By distinction, cultural borrowing refers to a group's using cultural items (from religious ceremonies to hair styles) from another group's culture, adapting them to their own culture. Examples of this are the Western Apache use of masked dancers, borrowed from the Pueblos, and non-Indian use of corn, borrowed from the Indians.

A review of the evidence indicates that some of what was characterized in the proposed finding as acculturation are more accurately be characterized as

cultural borrowing, e.g., subsistence methods. The Paiute use of Navajo styles of housing and dress could not be clearly characterized one way or the other, based on the available information.

The Paiute response included extensive additional information on the continuing performance of Paiute birth, puberty and death rites. Supplementary information on sacred aspects of leadership, including present-day leadership, was also submitted.

The Paiute response included new information that Navajos had made regular use of Paiute healers. The evidence for the proposed finding had only indicated that Paiutes had used Navajo curers but not that the use of curers was somewhat reciprocal between Navajos and Paiutes. References to works describing inter-tribal use of curers in the Southwest were provided with the Paiute response. The materials submitted by the Navajos include mention of the recent use of a Hopi curer by one of the Paiutes (BB 1988m:11886), indicating that the Paiutes used the curers of other tribes besides the Navajo.

The proposed finding concluded that there were no longer any medicine men among the San Juan Paiutes because of acculturation to Navajo ceremonialism (PF:144). The Paiute response commented extensively on these conclusions (FB 1988:39, 55-58). The proposed finding's conclusion was in part based on Paiute statements that the "last medicine man" had died in the early 1900's (PF:169), and similar testimony by one of the petitioner's researchers (Bunte 1984:11219). The Paiute response stated that this referred to one form of curing, that of the sucking shaman, which is no longer practiced. The Paiute response points out that this role has also disappeared in other Southern Paiute groups not affected by the Navajo, and that many of the associated beliefs remain even though the role is not performed. The proposed finding concluded, based on the petition's description, that the other kinds of Paiute healers were essentially secular (PF:169). According to the information in the petitioner's response, there are substantial religious beliefs which form the basis of these other healing practices.

The proposed finding concluded that it was likely that a portion of the membership was more acculturated than the rest to Navajo culture (PF:167). Neither party commented on this conclusion.

Neither response commented on the evidence discussed in the proposed finding that some Paiutes had to some degree become practitioners of Navajo curing practices (PF:169). This, unlike simply utilizing curers from another tribe, indicated either some degree of acculturation to Navajo culture or borrowing of significant cultural elements.

The additional information submitted with the responses, together with the information available for the proposed finding, confirm that the San Juan Paiutes have remained culturally distinct from the neighboring Navajos in most significant ways. Some cultural borrowing and a limited amount of acculturation has occurred, but these do not extend to the key areas of religious beliefs or political and kinship organization.

## San Juan Paiute Territory and Navajo Population Movements

### Proposed Finding

The proposed finding concluded that the territory of the San Juan Paiute band as described by ethnographer Isabel Kelly (1934) was, more or less, the traditional territory of the band at the time of first sustained non-Indian contact in the 1850's. The major ethnographic sources generally agreed on the basic extent of the territory, but varied somewhat in describing the edges of it. Documentary sources from the 1850's and 1860's were generally in accord with the ethnographic evidence (PF:100). The variations included how far it extended south along the Little Colorado River and how far north and east it extended beyond the San Juan River "strip" area (cf. Kelly 1934, 1976, Euler 1964, Stewart 1941-42, PF:Maps 1-2). The proposed finding concluded further that the available historical documentary and ethnographic data showed variations in different historic periods (PF:94).

The proposed finding concluded that after sustained contact began the San Juan band continued to occupy distinct areas as a community. It also concluded that the areas the San Juan band occupied became significantly reduced in the latter part of the 19th century and were further reduced in the 20th century as the Navajo population in the area sharply expanded.

The proposed finding's discussion noted it was not its intent to establish precisely the extent of Navajo use of or permanent settlement in specific areas at particular times (PF:96). The proposed finding noted that the extent of Navajo occupation of land within the territory defined by Kelly and others as the territory of the San Juan band, and the period when Navajos first lived within parts of that area, were frequently debated (PF 93-94). It concluded that there was at best limited or occasional Navajo use or occupation of the lands within the territory ascribed to the San Juan band before 1851. It further concluded that while there had been some increase in Navajo presence immediately before and during the Fort Sumner captivity period, there was a sharp and rapid expansion after 1870. The movement resulted from Anglo-American pressures, which caused the Navajo to move west, as well as a sharp increase in Navajo population. The movement of Navajo populations westward continued during the rest of the 19th century and the first part of the 20th century.

### Navajo Response

The Navajo response argues that the proposed finding was erroneous in concluding that any part of the area of the present-day Western Navajo reservation or nearby regions was aboriginally San Juan Paiute territory. It further argues that the proposed finding had "unfairly discounted" the available evidence of the historical presence of the Navajo Tribe in that area (BB 1988a:35-58, 85-90). In part, the response argued that historically there was no San Juan Paiute band. Additionally, it argued that because of the limited evidence, the Paiutes in the area before sustained contact could not be linked to this particular band. It similarly argued that the evidence might not indicate there was permanent Paiute settlement in the area. The response also argues that there was good evidence that the Navajos were in the area before 1851 and were not later migrants after their captivity at Fort Sumner in the 1860's as the proposed finding concluded. The response examined particularly closely statements in the proposed finding concerning how early Navajos lived in the Moencopi Wash area.

#### Paiute Presence before Sustained Contact with Non-Indians

Only three known documentary historical sources directly pertain to the question of Paiute presence in the area before sustained contact with non-Indians. These sources are discussed at length in the proposed finding (PF:9-12, 98-99). The ethnographer Robert Euler noted that information about Southern Paiute occupation in the San Juan Paiute area before 1851 is primarily reliant on ethnographic sources, i.e., oral history (1964:105-6).

The proposed finding characterized the Paiutes referred to in these sources as the "probable ancestors" of the San Juan. The Navajo response argues that such a link cannot be established (BB 1988a:36-39). While a direct documentary link cannot be established, there is strong ethnographic evidence that the San Juan Paiutes' ancestors were in the area before 1850 (PF:94-95, 111). The ethnographic and documentary evidence concerning the pre-sustained contact period are consistent with that for the decades immediately following 1850.

The earliest documented contact with Europeans was by the 1776 expedition of the Spanish Missionary Father Silvestre Velez de Escalante. Escalante's expedition reported a group they referred to as "Yuta Payuchis" in the Navajo Mountain area (PF:10). The expedition reports explicitly distinguished these people from other Paiute groups north of the San Juan River. Although the Navajo response argues that these might have been other Paiute groups from north of the area that were temporarily south of the river, the account clearly regards them as a distinct group from the others to the north.

The 1823 expedition of New Mexican Governor Jose Antonion Vizcarra into the area encountered Paiutes with goats, which caused Vizcarra to initially mistake the Paiutes for Navajos. The Navajo response argues that Vizcarra's initial conclusion, that these were Navajos, was correct (BB 1988a:38-39). The presence of goats among the Paiutes this early does raise unanswered questions about possible early Navajo cultural influence or Paiute borrowing of Navajo culture (PF:167), but the account indicates that the Spanish were familiar with Paiutes as well as Navajos, and mentions no Navajos in the territory in question. A historian of the Navajo, David Brugge, raises no question about these being Paiutes in his discussion of the expedition, and, further, identifies them as ancestors of the San Juan Paiutes (1964).

The account of the third encounter, by the Spanish explorer Antonio Armijo in 1829, refers specifically to farming areas and waterholes in San Juan territory as those of the Paiutes (PF:12). The Navajo response argues that the account doesn't specifically identify the Indians encountered as Paiutes, even though it identifies the geographical features as Paiute, e.g., "the water hole of the Payuches" (BB 1988b:81-82, Hafen and Hafen 1954:157-160). The context of the statements in the account make it unlikely that these features would have been identified as Paiute if the Indians encountered were Navajos. The account of the expedition, which was traveling west, did not report encountering any Navajos west of Canyon de Chelly, i.e., well east of San Juan territory.

#### Historical Presence of Navajos in the San Juan Paiute Area

Except for the three expeditions discussed above, the area for several hundred miles west and north of the Hopi villages was unexplored before the 1840's, i.e., there was no direct knowledge of the area or its inhabitants. The Navajo response quotes Brugge and Correll (1973) and other works which

cite a number of pre-1800 Spanish maps. On these maps the name "Navajo" extends beyond the core Navajo territory in what is now New Mexico to areas well west of Canyon de Chelly and the Hopi villages. No documentary evidence was cited by the Navajo response to support the conclusion that these notations on the maps were an accurate rendering of Spanish knowledge at the time of areas of Navajo occupation. According to James Hester's review of evidence concerning Navajo territory, other pre-1800 maps do not show the Navajos that far west (1962:84). His review, based on available maps and documentary evidence, concludes that the Navajo territory did not extend west of the Hopi villages before 1800.

The Navajo response included additional historical documentary sources which it interpreted as indicating pre-1860 Navajo occupation of the area claimed as San Juan Paiute territory. Many of these documents were either ambiguous concerning pre-1860 Navajo occupation or presence (e.g., Census Office 1894) or did not refer to the Paiute territory (see below). The response incorrectly characterized the account of the 1859 U.S. Army expedition lead by Captain J.G. Walker as demonstrating Navajo occupation west of Black Mesa in 1859 (Walker and Shepherd 1964).

A significant portion of the evidence and documentation cited by the Navajo response concerning Navajo presence before 1850 refers to areas either beyond or marginal to Kelly's "standard" San Juan Paiute territory (Correll 1971, Husteen Be-Jah et al.1898). These areas include the Coconino Basin west of the Little Colorado River, the southernmost regions along the Little Colorado River (south of present-day Cameron), Monument Valley and areas of southeastern Utah northeast of the San Juan River "strip" itself. Cited at length is J. Lee Correll's (1971:146-49) article which discusses, based largely on oral history, pre-1860 Navajo residence north of the San Juan River beyond San Juan territory and to the south of the Paiutes near Cameron and Grey Hills.

A review of documentary sources in the petition and some additional sources obtained for the final determination (McPherson 1988, Reeve 1974 and Walker and Shepherd 1964) clarified that significant military and white settlement pressures resulted in Navajo population movements westward which predated the Navajo removal to Fort Sumner. Anglo-American attempts to control Navajo raiding began in 1846, with the Mexican War, and included a number of military expeditions into Navajo country in the mountainous areas east of Black Mesa. These had already begun to put pressure on the Navajos before the removal in 1863, and probably caused some movement westward in the 1850's.

A review of the previous and newly available evidence indicates that the period in which close Paiute-Navajo relations began was probably the 1850's rather than 1870's (PF:166). The likelihood of significant Navajo movement westward earlier than the 1870's supports this. McPherson (1988:5-20) concludes that such relationships existed in the 1850's, based in part on Navajo oral history not reviewed for this determination. Other evidence is the frequent Paiute and Navajo stories of Paiute assistance in shielding Navajos from Anglo-American soldiers during the removal and earlier (PF:101, Brugge 1964:226, Jake, James and Bunte 1983:47). Joint Navajo-Paiute or Navajo-Paiute-Ute raiding bands existed in the 1860's (PF:104, McPherson 1988:16).

The proposed finding's conclusions concerning the areas near present-day Tuba City (i.e., near Moencopi) were primarily concerned with describing in detail Paiute presence and social organization in that area before 1900 rather than definitively describing occupation by various tribes. The proposed finding concluded that there were some Navajo bands in the area during the early period of Mormon settlement (i.e., the 1870's) and noted there was some evidence of an earlier Navajo presence, as early as 1820 (PF:96, 105-6).

Some limited additional data was presented in the Navajo response which further supported the likelihood that the proposed finding's tentative conclusion that at least some Navajos were resident in the Moencopi area before the 1860's, and possibly as early as the 1830's, was correct. The evidence did not provide a basis to change the conclusion that permanent Navajo presence was not substantial before the 1870's. The new evidence included affidavits taken from Navajos in the area in the 1890's in connection with the proposed extension of the Navajo Reservation into that area. The review of the available documentation tended to confirm the conclusion in the proposed finding reports that there were several Navajo bands in the immediate area around Tuba City in the 1870's. Other affidavits taken from Paiutes in the same period, submitted with the Paiute response, support early Paiute presence in the area as well (McLaughlin 1898).

The Navajo response cited Shepardson and Hammond's book on Navajo Mountain as concluding that Navajo occupation of that area predated 1850 and predated that of the Paiutes. The published work concluded that only the Paiute and the Navajos of the Paiute Salt Clan (who are part Paiute) were "indigenous" to the Navajo Mountain area. At one point it states that some Navajo families dated from the 1850's (Shepardson and Hammond 1970:39-41, Table D). Some of the oral history in Shepardson's (1960-62) field notes supports the presence of at least a few Navajo families in that area before 1860 as well as Paiutes. The material in the notes was contradictory as far as general statements by Navajos as to who was in the area first (PF:96). Correll's (1971:146-49) article about early Navajo occupation in the north suggested the Navajo Mountain area may have been used as a refuge area, but not a settlement area, in the 1850's and before.

#### Conclusions

The information already considered and the additional evidence and new arguments presented did not provide a basis for changing the conclusion that the San Juan Paiutes primarily occupied most of the territory outlined on Kelly's map before the period of sustained contact and that a substantial Navajo presence in that area did not occur until after the Navajos returned from the captivity at Fort Sumner in 1868. There is some evidence of the presence of a small population of Navajos in this area before the 1850's and for an increase in Navajo population in that territory beginning in the 1850's. There was increased evidence for some Navajo population in the vicinity of Moencopi earlier than the 1870's. The Moencopi area in the decades before 1850 was utilized by several tribes, Paiute, Havasupai, Hopi and probably Navajo, at various times and to different degrees.

The review of the additional evidence and that previously available resulted in some refinement of the proposed finding's conclusions concerning Paiute territory and historical Navajo presence in that area. A detailed determination of territorial issues is not directly pertinent to the determination under the Acknowledgment regulations. The review confirmed the conclusions,

basic to the regulations, that the San Juan Paiute were a distinct band and that they occupied specific territory from first sustained contact until the present.

### Historical Existence as a Community and Identification as Paiute

#### Proposed Finding and Responses

The proposed finding concluded that the San Juan Paiute had existed as a distinct community and had been identified as Paiute, Southern Paiute or San Juan Paiute since earliest historical times. The Navajo Tribe's response contained detailed arguments and a limited amount of new documentation. The Paiute response included significant new documentary information.

#### Discussion

Essentially all of the new documentation indicated that the Paiutes had been a community and a distinct group historically, and had been identified as Paiute, Southern Paiute or San Juan Paiute.

Brinckerhoff (1897) and McLaughlin (1898) identify a Paiute community near Tuba City. The affidavits from some of the local Paiutes included with McLaughlin's report all stated they were residents "of Tuba City and vicinity" and had lived in the county [Coconino] all their lives. McLaughlin (1898) reported that there were "a number of Piute Indians living in the vicinity of Tuba City, many of whom I saw; they live on friendly terms with Navajo's Mogui's and Whites..." McLaughlin identified the Paiutes as led by the chief Lehi (Pakai).

Western Navajo Agency Superintendent Murphy reported in 1905 that the Paiutes robbed the graves of the prehistoric Anasazi Indians of turquoise and other ornaments and sold them. Since Paiute culture does not share the very strong Navajo fear of the dead and things associated with them, this source corroborates the proposed finding's conclusion that the Paiutes in this era were culturally distinct from the Navajos.

The proposed finding describes two subgroups of the San Juan band in the northern area, one at Navajo Mountain and one to the east near Oljeto. The Oljeto, or Douglas Mesa, group continued to exist until the 1920's. New sources included a letter by a Special Indian Agent which identified the two Paiute bands in the northern area in 1913 (Creel). The agent's and other Bureau correspondence between 1913 and 1925 provides specific details confirming the proposed finding's conclusion that there was competition between Navajos and San Juan Paiutes for grazing and watering resources in the Douglas Mesa area (Meritt 1925a, 1925b). It also provided additional evidence concerning Paiute allotments made in the Oljeto area. The new sources supported the proposed finding's conclusion that the cancellation of the San Juan Paiutes' reservation in the strip area in 1922 was based on inaccurate and misleading information that the Paiutes had abandoned the area.

An important new source was ethnographer Donald Collier's (1933-34) report, submitted with the Paiute response. Collier's report is based on interviews taken on a three-day visit in July 1933 in Paiute Canyon while he was there as a member of the Rainbow Bridge-Monument Valley expedition. Collier described the Paiutes in similar terms to that of Malcolm Collier's (his wife) detailed study, begun the following year. Donald Collier described the

Paiutes as a distinct group at Navajo Mountain, although culturally influenced by the Navajos. He identified two Paiute extended family groups, those of Nasja and Kavii (Paiute Dick). Collier noted the Paiutes were bilingual in Paiute and Navajo and gathered considerable information on Paiute culture. This included a description of Paiute territory in 1860 which matched those of ethnographers Kelly and Stewart, who worked in the same decade.

The trader Gladwell Richardson also wrote about the 1930's, particularly about the Navajo Mountain area. He identified the Paiutes as a distinct group from the Navajos and briefly mentioned specific individuals as Paiute, including Nasja and Paiute Dick. Richardson (1986:114) identified the Paiute settlement at Willow Springs as being part of the same band as the Paiutes in the north. He also observed that there was a difference between Paiute and Navajo settlement patterns, stating without elaboration that the "Paiutes lived in groups, whereas the Navajos did not establish anything resembling a community" (Richardson 1986:44). Richardson also noted the Paiutes were known as "grave robbers" among the Navajos, implying the cultural difference between Paiute and Navajo attitudes toward the dead.

In addition to the above sources, a number of other new sources submitted with the responses (and some previously reviewed sources which were resubmitted) identified the Paiutes as a distinct group between 1880 and 1930. Most of these other sources were similar to sources utilized for the proposed finding, e.g., Western Navajo Agency reports and Federal documentation concerning Mormon land claims near Moencopi (e.g., McLaughlin 1899b, Norris 1910, Jeffers 1910). They provided only limited additional details. The Navajo response also included some documents from the 1880-1930 time span, dealing with the Indians of the area, that mentioned the Hopis and the Navajos but did not mention the Paiutes (e.g., Johnston 189[8], Murphy 1907b, Runke 1918, Tipton 1897, Welton 1888c, Larrabee 1898, McLaughlin 1898c).

Also reviewed for the final determination was a recently published study (McPherson 1988) of the Navajo and other Indians of the northern Arizona--southeastern Utah area between the 1850's and 1900. The study utilized oral history and documentary sources which were not reviewed for the proposed finding or this final determination. The study refers specifically to the San Juan Paiute band as existing historically in the region and as distinct from the Navajos moving into the area after Fort Sumner and from the Navajos' sometime enemies, the Weeminuche Utes. The latter are described as in part also living in the area. The San Juan band is described as functioning in an intermediary role between the Navajos and the Weeminuche Utes.

#### Continuity of the Present-Day Tribe with the Historically Named Band

The proposed finding discussed at length the extensive, detailed data by which the contemporary San Juan band can be specifically traced back through different historical eras into the early 19th century. There are numerous references to the band, at frequent intervals, even in the latter decades of the 19th century. Detailed Navajo as well as Paiute oral history obtained in the 1930's and subsequently, until the present (e.g., Shepardson 1960-62, Van Valkenberg 1941) describes the present-day San Juan Paiutes, or the group at the time the oral history was taken, as the same as that in the 19th century and as having existed in the area since then (see PF:127-29).

Documentary sources as early as 1873, used for the proposed finding, identify specific Paiute leaders and other individuals in both the northern and southern areas. These documentary identifications of individuals and families are consistent with the ethnography and oral history of the composition of the band. The previous section discusses new documentary and ethnographic sources which identify individuals, e.g., the Paiute affidavits and associated correspondence from the 1890's, which identify Chief Pakai and three other individuals who can be traced to the present group (cf. also the discussion below of ancestry in the historic tribe). These new sources correspond to the other documentary sources, used in the proposed finding, naming these same individuals as part of the group or in that area as early as 1888 (PF:107), as well as after the 1890's.

Identification of a group under criterion a does not require specific identification of the group by its present name, in this instance, San Juan Southern Paiute, throughout history. There was a distinct group in the area, identified as Paiute, Southern Paiute or San Juan Paiute throughout history, which can be clearly linked by documentary and oral history evidence to the present group. Identification as "San Juan Paiute" appears first in the historical record in 1903 (Jenkins). Other specific identifications include Congressional legislation in 1906 appropriating money for the band, Indian Service correspondence (e.g., Janus 1909) and the ethnographic works of Stewart (1941-42) and Kelly (1934 and 1976).

#### Relationship to Weeminuche Ute

The proposed finding discussed in detail the historical distinctions between the Weeminuche Utes, San Juan Paiutes, and mixed Ute-Paiute bands that existed at various times, and details the relationships between them. The review of data for the proposed finding traced particular families as well as the intermarriage links between various bands (see PF:120-23 and sources referenced there).

The Navajo response argues that many of the references to "Paiutes" or "Pah-Utahs" could as well have been to the Weeminuche Utes, and therefore there was no evidence that the San Juan Paiute were a distinct group historically. Documents submitted with the Navajo response contained a small amount of additional data relevant to this question.

The detailed data available for different groups in the areas involved allowed a clear picture of the relationships and distinctions between them. There is some terminological confusion regarding Paiute, Shoshonean and Ute groups historically (cf. Merriam 1955:149-64, Stewart 1938:272). The terms "Pahute" or similar terms were occasionally used to refer to the Weeminuche Utes, although more commonly referring to Southern Paiutes when used in Utah or northern Arizona (Callaway, Janetsky and Stewart 1986:366-67). Although there is terminological confusion in some historical sources, most used for the proposed finding provided sufficient information to identify the group to which it refers, to distinguish between different groups, and to determine how the terminology was being used. It is unlikely, for example, that the Mormon sources, given the Mormons' detailed knowledge of Southern Paiutes, inaccurately refer to Paiutes where Weeminuche Utes or mixed bands were involved.

Historical references to Utes as well as Paiutes in the San Juan Paiute area are not uncommon. In a number of instances, a historical document or oral

history accounts refer to both Ute and Paiute groups (or sometimes referring to "Paiute" and "Pah-Ute") in the same area or in the same event. These instances make it clear that two distinct groups existed at the same time. For example, the non-Indian Joe Lee, who was well acquainted with the San Juan Paiute in the late 19th and early 20th centuries, described an encounter with the Weeminuche Utes in which both the distinction and the conflicts between the two groups were evident (1974:33-34). A similar distinction is clear in the description of events following the death of the Paiute leader Patnish (Brown 1875-76). A newly submitted documentary source from 1880 distinguishes Utes and Paiutes in the northern area (Bennett). McPherson's study, discussed above, refers to the San Juan Paiute as a distinct group from the Weeminuche and also the mixed Ute-Paiute bands into which the San Juan Paiutes sometimes married.

In one instance, a reexamination of documents used for the proposed finding indicated that in a particular document the reference may, in part, have been to a Ute group rather than only to the San Juan Paiutes. The report of the Walker military expedition of 1859 makes reference to areas on and east of Black Mesa as having been "abandoned" by the Navajos because they were afraid of the "Pah-Utans" upon whose territory it bordered (PF:16, 99-100, Walker and Shepherd 1964:89). It is more likely that Navajo movements in this era resulted from the actions of the aggressive Utes rather than the Paiutes. According to Schroeder (1965:69), however, the Navajos were under heavy pressure from the Capote Utes at this time. This is a different group than the Weeminuche, whose relations with the Navajos in the 1850's were relatively peaceful (Schroeder 1965:67). However, the Walker report clearly refers to the area west of Black Mesa as Paiute rather than Navajo territory. McPherson (1988) concluded that both San Juan Paiutes and Weeminuche Utes were living in the area west and north of Black Mesa in the 1850's.

## ANCESTRY IN THE HISTORIC TRIBE

### Proposed Finding

The proposed finding was that the present membership of the San Juan Paiute band could trace its ancestry to the historic band and its communities in specific areas. The proposed finding discussed the wide variety of records--mostly Federal, but some public, private, and tribal--which were utilized and relied upon in research to determine whether the ancestry of members of the petitioning group could be traced to the historic tribe (PF:189-206). The finding was that there was much documentary material in these records to corroborate the ancestry of the petitioner's membership, both as Paiute and as descendants of the San Juan band of Southern Paiutes.

### Paiute Response

The Paiute response contained a number of documents from different historical eras which presented new evidence to connect present-day individuals by name with members of the northern and southern Paiute communities of the petitioner.

### Navajo Response

The Navajo response provided eight volumes consisting primarily of general assistance files, but also some family charts and other related documentation (BB 1988e). A large portion of this material exactly or very nearly duplicated materials which had been reviewed for the proposed finding.

The new documentation further corroborates the proposed finding that the members of the San Juan Paiute petitioner have Paiute ancestry and descend from the historic San Juan Paiute band.

### Discussion of New Evidence

#### Historical Evidence

The earliest new documentation received includes seven affidavits taken from Paiutes in 1898 (an eighth was cited but not provided) (McLaughlin 1898; Lehi et al. 1898). The affidavits were part of an August 9, 1898, report by Indian Inspector James McLaughlin regarding his "investigation of the claims of Ashton Nebeker to certain Indian Homestead Allotments at Moencopie, Coconino County, Arizona . . ." (FB 1988:5, Exh 3). All seven of the Paiute affiants stated they were residents "of Tuba City and vicinity" and had lived in the county [Coconino] all their lives. Three of the Paiute affiants can be identified by name with the petitioner's southern community at Willow Springs (near Tuba City): "Lehi/ Leheigh . . . Chief of Paiute Indians" (age 45 years); "One Eye" (age ca. 25); and "Togah (Whiskers)" (age ca. 70) (McLaughlin 1898; FB 1988:5, Exh 3). Lehi and Whiskers (above) are two of the same Paiutes whom Special Agent Welton had visited at Willow Springs and nearby Paiute Springs ten years earlier and recommended they be allotted the lands they were then cultivating (PF:28, 189; Welton 1888b).

Other new evidence provided in the Paiute response included an unpublished 1934 report by anthropologist Donald Collier (D. Collier 1933-34). (Also see discussion under "Historical Existence as a Community and Identification as Paiute.") Collier identified his chief informant as "an old Paiute named Nasjia(sic)" who "spoke in Navaho." Collier also identified Paiute Dick as head of another Paiute "outfit." Nasja and Paiute Dick are historical San Juan Paiute figures. Nasja was a leader and many of his descendants appear in the petitioner's membership today (particularly in the Owl family) (PF:112-13). Although no descendants of Paiute Dick appear on the San Juan Paiutes' membership list, his sisters and their descendants (Mercy Whiskers, Bessie Owl, and Curtis Lehi families) are present.

Other new evidence includes a 1916 letter from Walter Runke, Western Navajo School Superintendent, to Joseph E. Murrell, then Superintendent of Kaibab [Paiute] Indian School (Runke 1916c). Runke writes on behalf of Alfred Lehi of Willow Springs (Runke's jurisdiction) regarding a trade Lehi had arranged with a Paiute of Murrell's jurisdiction. Runke identifies Alfred Lehi with the Paiute community at Willow Springs.

The Paiute response also included materials by the anthropologist Richard Van Valkenburgh which identify Noo-Mootz (or Numutz) as leader of a band of Paiute Indians at Gap/Cedar Ridge in 1937 (Van Valkenburgh n.d.). The Paiute response identifies Noo-Mootz/Noo-Mutz as Joe Francis (father of present-day band member Frances Norman). Although Van Valkenburgh's material does not specifically identify his informant Noo-Mootz as Joe Francis, such an identification can be substantiated using Omer Stewart's Culture Elements Distribution (1941-42:239) wherein Stewart identified his San Juan informant Joe Francis as "Nomo'-maots," whom he had interviewed at a camp near Gap Trading Post.

Further corroboration of Lehi as a San Juan Paiute chief was found in a 1907 report by Indian Inspector Frank C. Churchill (1907). This source was inadvertently omitted from the proposed finding's discussion of "Specific Identification as 'San Juan' Paiute" (PF:187-88). In his 1907 report to the Secretary of the Interior regarding the use of funds appropriated for the "San Juan Piute Indians," Churchill reports that he met with "Lehi, their [i.e., the 'San Juan Piutes'] so-called chief . . . ." He also says that after meeting with Lehi he traveled "100 miles north of Tuba to the Utah line, and there met a considerable number of the principal San Juan Piutes at a point known as Oljato, or Moonlight Canon . . . ." (For additional discussion of Churchill's report, see PF:131.)

#### Identification in General Assistance Files

The Navajo response included the general assistance files of nine Paiute individuals and/or families that had not previously been reviewed (BB 1988m, vols. 3-10). The content of the new files was essentially the same as that of files reviewed for the proposed finding (Western Navajo Agency 1957-84). Quotations and observations discussed in the proposed finding are representative of all files reviewed (PF:203-04).

#### Family Charts, et al.

Some additional documentation, consisting of family charts (aka "Family Sheet," "Change Sheet," "Application for Census Identification Number," "Application for Enrollment - Navajo Tribe"), census number issuing sheets.

family and individual cards, and other census office records, was also provided (BB 1988m, vols. 1,2,11). A large portion of this documentation was found to exactly or very nearly duplicate materials previously reviewed for the proposed finding and, therefore, provided nothing new of major importance.

#### Southern Paiute Judgment Fund Applications

##### Proposed Finding

The proposed finding stated that the bulk of the applications submitted by members of the San Juan Paiute band applying to share in the Southern Paiute judgment award had been prepared for them by one of several other San Juan members (PF:200-01; BIA 1969b). The finding noted that "Kaibab" Paiute had been checked on a majority of the applications of San Juan members as the roll to which they could trace and on which they wished to be enrolled (PF:200). No official explanation was found to explain why "Kaibab" had been entered instead of "San Juan." Possible explanations offered for this identification included the fact that the Kaibabs are the only federally recognized Southern Paiute tribe in Arizona, that they were geographically closest and had been helpful to the group in the past, the claimed kinship between the two Paiute groups, and the failed attempt in 1942 of some of the San Juan Paiutes to move to and enroll at Kaibab (PF:58).

##### Responses

The Navajo response commented on the fact that none of the petitioner's members had identified themselves as "San Juan" Paiute when they applied in the 1960's to share in the award (BB 1988a:45). The Paiute response provided additional background information from recent interviews with individual Paiutes and others who helped the Paiutes sign up for the award. However, no new information was provided by the Paiutes or the Navajos to clarify why Kaibab had been checked or why "San Juan" Paiute had not been written in.

## CONTEMPORARY SAN JUAN PAIUTE SOCIAL ORGANIZATION

### Leadership After 1969

#### Proposed Finding and Response

The proposed finding concluded that after the death of traditional leader Alfred Lehi in 1969, the leadership passed to Anna Whiskers and subsequently to her daughter, Evelyn James. The Paiute response provides additional data concerning Paiute leadership and political processes after Lehi's death (FB 1988:36-38).

#### Discussion

The information in the Paiute response did not substantially change the proposed finding concerning recent leadership. Further evidence of Whiskers' role as spokesman in meetings during this era was supplied. The Paiute response disagreed with the proposed finding's conclusion (PF:149) that the transition from Alfred Lehi was gradual rather than immediate. The new information, quoted from interviews, was consistent with previous data which indicated that Whiskers' leadership was not immediately of the same strength and character as that of previous leaders and that she "grew" into the role (PF:149, FB 1988:32). The limited additional data on Evelyn James' role and transition was consistent with the data used for the proposed finding. It indicated that James first assisted her mother and eventually succeeded her, in part because James could read and speak English.

### Contemporary Paiute Political Processes

The proposed finding concluded that significant authority and decision-making existed within the contemporary San Juan Paiute band. No significant new evidence was provided to show that the description of the contemporary political processes was incorrect.

The Navajo Tribe argues, and argued in their preliminary response to the Paiute petition submitted before the proposed finding, that the kinds of decision-making and leadership activities cited by the Paiutes were characteristic of those made within an extended family rather than a tribe (BB 1988a:60). Although kinship-based, the band is not equivalent to an extended family. Political processes included allocation and protection of resources, control of behavior and mediating relationships with outsiders beyond the family level. The petition's description indicates that while kinship is fundamental, kinship relations do not in themselves fully describe the political system. Leadership has been based on leader's knowledge, status, religious ability and other factors as well as kinship ties (PF:146). Most traditional Indian tribal political systems were to an important degree based on kinship, and were especially so among Southern Paiutes and other Shoshoneans.

The Navajo Tribe's response to the proposed finding, and its preliminary response to the petition, argued that the Paiutes had explicitly stated that they had not "provided governmental services" (BB 1988a:61). The Acknowledgment regulations require the exercise of political authority rather than the provision of services in the manner of a modern tribal or other government. The San Juan Paiute political system does, however, exercise some

partially equivalent functions, e.g., making sure the elderly get assistance.

The Navajo response asserts that no current or recent Paiute leader stepped forward in court cases and events at chapter meetings involving Paiutes. These cases and events are discussed in detail in subsequent sections concerning dispute resolution and Paiute involvement in Navajo courts. The Navajo response asserts that current and recent Paiute leaders did not play the kind of role in these cases that past leader Alfred Lehi played in disputes or as mediator for the group with outsiders. The Paiute response provides evidence of group decision-making processes in relation to a few of the cases. The data provided gave some indication that Jack Owl, who is one of the more important elders at Navajo Mountain, played at least a spokesman role in each of three events where the Paiutes came before the Navajo Mountain chapter. The petitioner provided no data or response concerning a role being played by a leader in most of the particular instances.

#### Navajo-Paiute Distinctions and Relationships

The proposed finding concluded that the Paiutes were a clearly identified, socially distinct group, although having close social relationships with the Navajos (PF:162-65). Only scattered additional data or arguments directly relevant to this question were included in the responses. The additional data did not provide a basis for changing the proposed finding's conclusion.

The proposed finding concluded that it was unusual for Paiute relationships with their Navajo relatives to be close or significant (PF:ix, 156-57). Included in the newly submitted chapter minutes was the description of a dispute at a Navajo Mountain chapter meeting on September 23, 1975, which describes a closer character to the Paiute-Navajo kinship relationships in that instance (Navajo Mountain Chapter 1965-88). The description in the chapter minutes indicates that the Navajo relatives of a Paiute woman charged with killing a horse maintained a significant relationship with her. The Paiute woman complained that "her relatives" (apparently her Navajo relatives) had spoken against her rather than coming to her house and discussing the matter. Further, in the meeting her Navajo father took a specific role in helping "his daughter" in reaching a settlement.

Elsewhere in the discussion of the dispute at this meeting, there is some indication that the chapter president refers to the Paiutes as a distinct group. Referring to his own family, the chapter president stated that they "live among them peacefully" and also is recorded as saying that he "farms right in the center of the ----- [blank space]." The final word is omitted in the available copies of the minutes. In 1987, this same individual, at a special chapter meeting called concerning the Paiute petition, distinguished the Paiutes from the Navajos in the area (Navajo Mountain Chapter 1987) and apparently did so at the 1975 chapter meeting as well.

The Navajo response included several recent resolutions and minutes from chapter meetings concerning the Paiutes' membership in the Navajo Tribe and whether they were distinct from Navajos or treated differently. The resolutions, from the Gap, Tuba City and Navajo Mountain Chapters declared that the members of Evelyn James group were "full members" without distinctions. Submitted with the Navajo responses were minutes of an October 19, 1985,

Bodaway-Gap Chapter meeting in connection with a resolution passed against the Paiute suit. The minutes refer to the Paiutes at Hidden Springs (i.e., the Willow Springs community) as having "sold their land and become Navajos during the course of their lives" (Bodaway-Gap Chapter 1965-86). The reference to the Paiutes having sold their land is a reference to their having received payments from the Southern Paiute Judgement Fund in 1971 (PF:129, 163). The actual resolution for this date was not submitted. These resolutions and related materials are of a general and recent nature and are inconsistent with the larger body of materials used for the proposed finding and this final determination indicating the Paiutes are regarded by the Navajos as distinct. This evidence includes materials submitted by the Navajos and Paiutes and materials developed by the BAR staff.

Minutes of a special Navajo Mountain chapter meeting on November 27, 1987, in connection with that chapter's 1987 resolution include general statements by local Navajos to the effect that they make no distinction in treatment. However, these minutes also quote statements by individual Navajos which are consistent with the proposed finding's description of the Paiutes' position within that community insofar as the Paiutes being a clearly distinguished body of people with close relationships with the Navajos.

The proposed finding concluded that Paiutes were not included in the kinship-based economic units which were key to traditional Navajo society (PF:156-57). One 1970 Navajo estate probate case decided in the Navajo Tribal Court was cited by the Navajo response as counter-evidence to this (BB 1988a:52-53). In this instance, part of a Navajo's estate passed to his Paiute wife. The court record indicates this followed the requirements of Navajo tribal law (TCDC 1962-87). It does not indicate that, previously, the Paiute and Navajo families had been organized into a single economic unit. Further, it was partially opposed by the Paiute's Navajo in-laws. This was the only example cited in the Navajo response concerning Paiute participation in Navajo kinship groups.

## PAIUTE RELATIONSHIPS TO THE NAVAJO TRIBE AND GOVERNMENT

### Overall Proposed Finding

The proposed finding concluded that the Paiutes had not participated in the political structure of the Navajo tribal government except that a portion of the membership had voted. They were not found to have participated in local chapter political processes in a significant way. The proposed finding concluded that neither past Navajo leaders nor the institutions of the modern Navajo tribal government had played a role in San Juan Paiute political activities such as dispute resolution, allocation of land, organization of economic activities and maintenance of behavior standards. The Navajo tribal government began to function significantly in the 1950's. Its growth accelerated in the 1970's as it took over functions previously carried out by the Federal Government. The proposed finding concluded that much of the services received by Paiutes were through Navajo tribal programs which were Federal programs, formerly administered by the BIA, open to any Indian resident on the reservation.

## Extent of Navajo Involvement in Paiute Political Processes

### Responses

The Navajo response, besides submitting additional evidence, also stated that the proposed finding ignored previously submitted evidence that the Navajo Tribe is and has been actively involved in such internal political roles among the Paiutes as resolving disputes, providing economic assistance, and maintaining behavioral standards (BB 1988a:61-74). The response cites previously submitted fieldnotes from 1960's research at Navajo Mountain as well as information in newly submitted Navajo chapter minutes, and civil and criminal records from Navajo courts.

### Economic Influence

The proposed finding, in discussing the absence of involvement by the Navajo Tribe in San Juan Paiute economic relationships, referred to internal political processes such as deciding who would utilize Paiute land and ensuring that labor and other resources were mobilized in utilizing that land (PF:87). The proposed finding discussed in detail the operation of the grazing and land permit systems and the fact that these are not exclusively Navajo institutions and did not deal solely with Navajos (PF:174-75). There was no evidence that Navajo institutions played a role in internal Paiute disputes or in Paiute decisions concerning economic resources, with one possible, unconfirmed, exception (PF:174). No further information concerning the possible exception was provided by the Paiutes or the Navajos in their responses.

The Navajo Tribe administers a number of programs which amount to economic assistance to the Paiutes or which otherwise influence their economic situation. Particularly important were social service programs, especially Federal programs such as General Assistance. These programs were taken over relatively recently by the Navajo Tribe from the BIA and are administered under the same guidelines, which do not limit them to tribal members.

The Navajo response provides new and considerably more detailed information concerning Paiute participation in services controlled by the Navajo Tribe, whether limited to members or not. A detailed review of this additional evidence is presented separately below. The review of the newly submitted materials indicated some additional Paiute participation in programs limited to Navajo tribal members, beyond that indicated by the data available for the proposed finding. No additional information was submitted concerning the grazing and agricultural permit systems.

Participation in the service programs and permit systems was not in itself equivalent to political influence within the Paiute group, nor was it part of a bilateral political relationship between the Paiutes and the Navajos. The more extensive data regarding program participation did not provide additional descriptions of internal Paiute political processes concerning economic matters in relation to these programs.

### Dispute Resolution

The Navajo response cites a number of cases which it characterizes as involvement by the Navajo Tribe in resolution of Paiute disputes. Because of the importance of the question of exercise of political authority in dispute resolution, the examples are examined individually below.

Two cases were cited by the Navajos from the fieldnotes of anthropologist Mary Shepardson's (1960-62) research at Navajo Mountain. Both cases were from materials submitted by the Navajo Tribe in its preliminary response before the proposed finding. Both were reviewed for the proposed finding but not discussed in the technical reports. The materials in both cases are very brief. No additional data was provided by either the Navajos or the Paiutes.

The notes in the first case consist of two or three lines which appear to refer to a 1962 grazing dispute between Blanche Owl and Mercy Whiskers, both Paiutes. Nothing is stated about the case except that Mercy Whiskers told the chairman of the local Navajo grazing committee about it but "didn't ask (him) to do anything." The information is extremely limited and there is no information in the notes to indicate that any chapter official played a role in settling the dispute.

The second case from Shepardson's notes involved the killing of a Navajo's sheep by a Paiute man. The notes do not give a date for the killing. One of the local Paiute women paid back the damages after talking with one of the aggrieved parties and possibly with an influential local Navajo. This case is a Paiute-Navajo dispute, in which it is unclear whether chapter officers played any role other than possibly discussing it.

The Navajo response cites three events from minutes of chapter meetings, all from Navajo Mountain. Judged by the chapter minutes submitted, disputes or other matters similar to these rarely come before chapter meetings, or at least were rarely recorded in the minutes.

The first event occurred at a March 26, 1983, chapter meeting, where a Navajo requested that she be issued a new farmland permit on a Paiute Canyon field (Navajo Mountain Chapter 1965-86). The Navajo stated she had held the field under a verbal lease with a Paiute, Grace Nelson, then deceased. The request was tabled, apparently because initiating it with the chapter was not the correct procedure. It was unclear if any Paiutes were present at this meeting, although the minutes state that two of the Owl family claimed the field. According to the Paiute response, the Paiutes held a meeting, decided who among the Paiutes was to get the field, and told the Navajo woman to get off the field (FB 1988:88). The available evidence is that this was not an internal Paiute dispute and that the Navajo chapter did not handle it. In addition, the Paiutes took action within their group and as a group to resolve the question.

The second example at Navajo Mountain, also in 1983, is a brief mention in the minutes of May 21 concerning the land use permit of Sid and Mercy Whiskers, a Navajo-Paiute couple (Navajo Mountain Chapter 1965-86). The minutes indicate only that Jack Owl had requested the permit be transferred to the couple's Paiute son, Clyde Whiskers. This would have been the normal procedure. The matter was tabled till the next meeting but subsequent chapter minutes did not mention it. The Paiute response states that initially the Navajos had planned to give the permit to a Navajo, but the Paiutes heard about it and, presumably, came to the meeting to protest (FB 1988:88-89). This example is not an internal Paiute dispute. It is part of the functioning of the system governing permits, which are not limited to Navajos. The petitioner's data indicates that some action was taken by the Paiutes as a group, at least by the local Navajo Mountain Paiutes.

The third Navajo Mountain example concerns the shooting of a horse, belonging to a Navajo, by Edith Greymountain, a Paiute. This appears to have been an exceptionally acrimonious affair. It is reported at length in the minutes of the September 23, 1975, chapter meeting, although the minutes specify that "arguments during the meeting were not written in the minutes (Navajo Mountain 1965-86)." The meeting concerned whether a settlement should be made in payment for the horse, which Greymountain stated she had only intended to chase away because it was destroying her cornfield. Paiutes Ezra and Jack Owl both spoke at the meeting. The chapter president urged that the matter be settled peaceably, without it being referred to higher authorities, and an agreement to pay for the horse was eventually reached. The Navajo response provides no additional information beyond that in the minutes themselves. The Paiute response stated that the matter was brought to the chapter meeting by the Navajo grazing committee (which was the normal forum for initially considering such a matter) (FB 1988:87-88). The Paiute response also claimed that the "grazing committee always agreed with the Navajo side."

This conflict was between a Navajo and a Paiute, i.e., was not an internal Paiute dispute. A role by the other Paiutes of the area in handling it is indicated by the two Owls' participation in the meeting on the Paiute's side. However, the dispute settlement process in this case also included the Navajo leaders and the Paiute's Navajo father as well.

The final example of dispute resolution cited by the Navajo response is a 1983 civil suit for a tort claim filed in the Navajo Tribe's Tuba City District Court (TCDC 1962-1987) (see also discussion of courts below). Isabel Secody, a Paiute, filed suit against Grace Lehi, another Paiute, over alleged damage to her sheep by Lehi's dogs. The court records indicate that the local grazing committee member investigated the matter and told Lehi to pay restitution, which she evidently refused. The suit was subsequently dismissed after an offer of settlement of \$100 was apparently accepted. The settlement documents indicate that settlement was drawn up after discussion with Lehi and "her relative, Evelyn James." Neither the petitioner nor the Navajo Tribe provided information on this event beyond what was in the court record.

This is the one clear instance where an internal Paiute dispute was taken to a Navajo tribal forum for settlement. There is some indication that the band leader, Evelyn James, played a role in the eventual settlement. More generally, there were continuing conflicts between Secody and the other southern area Paiutes which the Paiutes had difficulty in resolving (Bunte and Franklin 1984-86). Evidently quite litigious, this woman also accounts for most of the other Paiute involvement in the courts for significant dispute settlement. The records of the probate of her mother's estate indicate that this woman disputed with her sisters over the estate. This dispute, however, was apparently resolved out of court, by unknown means. The court records included with the Navajo response indicate that this individual has also initiated two other court suits, against her Navajo in-laws.

Other Paiute involvement with Navajo courts in civil and criminal cases is analyzed separately in detail below. Paiutes were involved in a number of civil court cases concerning estates, divorce, child custody, and civil damages or restitution. A large number of individuals from a wide variety of families appear in the criminal court dockets as allegedly committing a

variety of minor criminal offenses. Except for the case discussed above, the civil cases were between Paiutes and Navajos rather than internal Paiute matters, or were formal actions in which the court's jurisdiction was not limited to members of the Navajo Tribe, e.g., the probate of estates. In the criminal offense cases, the Navajo Tribe was involved to a limited degree in attempting to enforce a narrow area of behavioral standards, with unknown success.

#### Conclusions

These events do not provide substantial evidence that the Navajo Tribe plays a role in internal Paiute political processes. The economic effects of Navajo programs is incidental and not part of a bilateral political relationship. With one exception, all of the examples of dispute resolution concerned disputes between Navajos and Paiutes rather than internal Paiute ones. Three of the cases were brought to the chapter by the Navajo party, where Navajo law required them to be brought regardless of whether only Navajos were involved or not.

#### Paiute Voting in Navajo Tribal Elections

##### Proposed Finding

The proposed finding concluded that some Paiute voting in Navajo tribal elections had occurred since about 1970. Registration information was available from 1974, but detailed voting records were only available for three elections: the chapter, primary and general elections in 1982 and 1983.

The proposed finding concluded that voting had begun in the 1970's, probably in the context of attempting to gain services from the Navajo Tribe. This was the result of a more active approach by the Paiutes following the death of the traditionalist leader Alfred Lehi and the shift around the same time of control and provision of services from the BIA to the Navajo Tribe. The proposed finding also was that the Paiutes concluded that the Navajo tribal government had not been responsive to these attempts to be represented in it.

The proposed finding concluded voting was the only significant evidence of Paiute participation in the Navajo political system (PF:xi, 89, 176-77), i.e., there was little evidence of other kinds of involvement. A significant number of adult Paiutes resident on the reservation (about one-third) had voted in local and tribal-wide Navajo elections in 1982 or 1983. The available evidence on Paiute understanding and intent in voting was limited, but the intent appeared to be to influence the political system which had replaced the Federal Government in controlling land and access to services and not an acquiescence to membership in the Navajo Tribe per se. There was some evidence of constraint to vote.

##### Response

As part of their response, the Navajo Tribe submitted voting records for the primary, general (chairman) and chapter elections in 1986 and 1987, as well as more recent information on registration of Paiutes as voters (Navajo Board of Election Commission 1985-86, 1986-87). No information was submitted from one of the chapters, Red Lake, where a few adult Paiutes live. Voting information was lacking for five individuals for whom there were current registration cards in 1985. No additional data on voting before 1982 was submitted.

The Paiute response contained limited additional interview data concerning voting and registration (FB 1988:97-98).

Registration

Under the Navajo Tribal Code (11 N.T.C. §6-7), to be eligible to vote and register, an individual must be a member of the Navajo Tribe who is "enrolled on the Agency census roll of the Bureau of Indian Affairs." The instruction manual for chapter registrars emphasizes the importance of verifying the registrant's census number, stating that a "BIA/Navajo Tribal Family card" is needed (Navajo Board of Election Commission 1985). The tribal code calls for a list of voters to be prepared for each election and certified by the Board of Election supervisors.

There was little information available concerning the actual circumstances of registration. It is usually done by registrars at the chapter level, as a routine process if a person has a census number, though it at least nominally represents acceptance as a member of the Navajo Tribe by an official of the tribal government. Many of the Paiute registration cards were not signed (or thumbprinted, in the case of illiterate individuals) by the person who was registered, but had been simply filled out by a chapter official (Navajo Board of Election Commission 1985, 1985-86). Such a procedure by the chapter registrars was not unusual (FD). The voter registration cards contain the phrase "...I further swear that I am...a member of the Navajo Tribe" (Navajo Board of Election Commission 1985-86). It is unknown if this is usually read to or by the individual when registering. Those Paiutes with unsigned cards at least were presumably unaware of this language.

New data submitted with the response indicated that since 1983, five additional members of the San Juan Southern Paiute Tribe have registered to vote, and one re-registered. These came from the same families that tended to have many voters registered in the past. At least three previous registrants, and possibly two others, were purged from the list since 1983 for not voting (BB 1988e).

Voting Patterns

Paiute voting patterns were reanalyzed for the final determination, using the additional data on voting in 1986-87, together with the previously available data for 1982-83.

Summary of Paiute Voting in Navajo Tribal Elections:

Resident Adults:

Never Voted:

No census number	9
Census number, never registered to vote	19
Registered, never voted	12
(includes 3 with no data)	
Total:	<u>40</u>

Voting:	
Voted 1982-83 but not 1986-87	8
Voted at least once in 1986-87 but not in 1982-83 (includes new registrants)	5
Voted consistently (at least once in 1982-83 and at least once in 1986-87)	<u>12</u>
Total:	25
 Total Resident Adults:	 65
 Non-Resident Adults (includes seasonal residents at Navajo Mountain)	
Never Voted:	
Census number, neither registered nor voted	10
Enrolled elsewhere	14
No census number, not enrolled in any recognized tribe	5
Total Non-Resident Adults:	<u>29</u>
 Total Adults	 94

The percentage of adult Paiutes resident on the reservation and holding census numbers that voted at least once between 1982 and 1987 was 45 percent, with 21 percent voting consistently (defined as voting at least once in each of the two voting data periods, 1982-83 and 1986-87). Of the total resident adult Paiutes with or without census numbers, the percentages are 38 percent and 18 percent, and of the total adult Paiutes, both resident and non--resident, 26 percent and 13 percent. About two-thirds of the adult San Juan Paiutes are resident on the reservation.

Based on the dates of the registration cards, which indicate fewer Paiutes were registered in the 1970's, the nature of the earlier adult population and limited data available concerning voting in the 1970's, it is likely the percentage of Paiutes voting in Navajo tribal elections before 1982 was somewhat less than between 1982 and 1987. The initial voting in the early 1970's by the families resident at Willow Springs, the extent of which is unknown, appears to have ceased quickly, consistent with Paiute complaints that their voting had not evoked the desired response from the Navajo tribal government for them to be represented in it (PF:176).

The voting records show that there was some decrease, from 38 to 29 percent, in the percentage voting in at least one of the elections in the first versus the second voting data period. In contrast, the Navajo response concluded that the percentage of Paiutes voting dropped off sharply from what it had been, as a result of increased Paiute awareness of the significance of voting to the acknowledgment determination. The petitioner's response, which does not challenge the Navajo response's figures, indicates such awareness on the part of the Paiutes (FB:98).

Figures on consistency of voting by Navajo voters, comparable to the Paiute figures above, were not available.

The Navajo response calculated that the percentage of registered Paiutes voting in the 1982 general election was 70 percent, while in the 1986 general

election the percent had dropped to 29 percent. The comparable Navajo voter percentage was 70 percent in each of the two general elections (BB 1988a:79-80). By comparison, in the 1986 primary election, 54 percent of the registered (resident and nonresident) Navajos voted (Begay 1986), compared with 31 percent of registered Paiute adults. Thus the percentage of registered Paiutes voting was much less than that of the Navajos in two 1986 elections but apparently not in 1982. However, the Navajo and Paiute figures are not entirely comparable, since a higher percentage of Navajos than Paiutes are registered. In 1986, approximately 75 percent of resident Navajos were registered (Begay 1986, Bureau of Indian Affairs 1987) versus 43 percent of the resident Paiutes. As a percentage of resident adults, approximately 53 percent of the Navajos voted in the 1986 general election versus 30 percent of the Paiutes. Figures for the total adult populations are likely to contrast more sharply, since none of the non-resident Paiutes (30 percent of the band's adults) is registered, while an unknown percentage of the non-resident Navajos are. Navajo law permits non-resident members to return and vote.

A comparison between the northern (Navajo Mountain Chapter) and southern (Tuba City and Bodaway-Gap Chapters) residence areas confirms the conclusion in the proposed finding that Paiute voting in the south was much less frequent than in the north. In the south, 47 percent of the resident adults were registered, with 33 percent having voted at least once and 12 percent voting consistently. In the north, excluding seasonal residents, 71 percent were registered, 57 percent had voted at least once, and 29 percent had voted consistently.

There were considerable differences in voting patterns between different Paiute family lines. These differences were consistent with differences, based on other evidence, of the family line's degree of involvement with Navajo society and government, as well as other north-south differences in participation (see PF:86, 161, 165-66, and discussion of employment and chapter participation below).

In the south, the Whiskers kin group, which includes the leadership line, had only one voter, no consistent voters, and many with no census number at all. In contrast, the Chee Toney line, which is relatively heavily intermarried with Navajos and appears to be relatively more acculturated to Navajo culture than some of the other families, had six consistent voters, five other voters, four others registered and only four unregistered. All of this family group had census numbers.

The Owl family at Navajo Mountain had two consistent voters, four other voters (three voting only in 1982-83) and four registered non-voters. All had census numbers. The family's relatively great amount of voting is consistent with their past statements that they had voted and past and present statements that there had been Navajo pressure at Navajo Mountain to vote (PF:177, FB:97-98). The degree of voting is also consistent with the greater involvement of the northern than the southern Paiutes in local Navajo community affairs. The San Juan petition (Bunte and Franklin 1984) characterized this involvement as defensive in character.

Only three of the Greymountain-King group were of voting age. Of these, two were consistent voters while the third voted only in 1982-83. This is

consistent with their somewhat marginal status in relation to the Paiutes and relatively active involvement in the Navajo Mountain chapter.

The other family lines were too small to calculate meaningfully or were largely resident off-reservation and generally non-voters.

#### Motivation for Voting

The proposed finding concluded that the limited evidence concerning the understanding and intent of the Paiutes in voting did not support, in itself, an interpretation that political affiliation with the Navajo tribe is intended (PF:xvii, 176). The limited data available for the proposed finding on the intent and purpose of the Paiutes in voting supported the conclusion that the motivations were constraint and pragmatism, at least in the north.

The Navajo response argues that the intent of "any voter is to influence the political system," and that voting shows active participation in a tribal government (BB 1988a:79). The petitioner's response regarding voting was that voting has been for pragmatic, economic reasons rather than true political participation (FB 1988a:97).

No additional data was provided by the Navajo Tribe on this question. Only a small amount of additional data was provided by the petitioner.

The petitioner's response provides a summary statement, based on interviews from individuals in both the northern and southern areas, that Navajos had told them that "unless they registered and/or voted they would not receive housing, employment, social welfare or other badly needed services" (FB 1988:97). The petitioner argues that because of the poverty of many of the Paiutes this had a coercive effect.

#### Conclusions

The evidence does not clearly demonstrate that San Juan Paiute voting in Navajo tribal elections has represented a consistent involvement in the Navajo political system going back into the 1970's when Paiutes first began to vote. While there is a significant portion of the adult Paiutes who have voted in at least one Navajo election, there is a larger portion of the group (64 percent) which has not, as far as is known, voted at all. This includes the large number of non-voters (19) (mostly not registered) among resident Paiutes who hold census numbers, the significant number of resident Paiutes (9) who do not have census numbers and the 30 percent of the adults (29) not resident on the reservation (none of whom were voters, even though some have census numbers).

Voting was more common among the smaller northern group and within one large family line in the south. The northern group was especially subject to constraint to vote and also includes one family line relatively marginal to the San Juan Paiute band.

The percentage of Paiutes voting consistently was quite low, 18 percent of the total resident adults. Further, the definition used to measure consistency, only one vote in three opportunities in each "span," maximizes the degree of consistency indicated.

The earliest Paiute voting of any kind was no earlier than 1970 and probably involved only a few individuals in the 1970's. Even if Paiute voting were

more consistent and widespread among the band than it is, the time span for which there is detailed information, 1982-87 is too short for voting by itself to indicate consistent political affiliation with the Navajo Tribe. There is little other data supporting political affiliation.

The responses contained little additional data bearing on the intent and understanding of the Paiutes in voting. What additional data there was supported the conclusions in the proposed finding that the Paiutes voted in order to obtain services and because they were constrained to do so rather than because they were maintaining a political affiliation with the Navajo Tribe.

### Paiute Political Participation in Navajo Chapters

#### Proposed Finding

The proposed finding concluded that the Paiutes did not participate in the decision-making processes of local chapters, although they sometimes attended chapter meetings as a means of finding out the kinds of actions and projects planned by the chapter that might affect them (PF:176-77). There was no systematic data available on attendance at chapter meetings and little information concerning participation prior to the 1980's.

#### Response

In its response, the Navajo Tribe provided copies of selected minutes of chapter meetings from the Tuba City (for 1976-87) and Bodaway-Gap (1965-86) chapters, which together include the southern area San Juan Paiutes, the Navajo Mountain Chapter (1965-86), which covers the northern group and the Red Lake Chapter (1978-87), where one San Juan Paiute family is resident. No additional data was provided beyond the minutes themselves, which are usually quite abbreviated, or about the actions of chapter officials outside of meetings. No information was included on attendance of individual Paiutes, or Navajos, at these meetings except where an action was initiated by or specifically concerned them. The petitioner's response included data concerning most, but not all, of the instances where Paiutes appeared in the minutes.

#### Description

Information in the minutes pertaining to possible political participation by the Paiutes is discussed in this section of the report. Information concerning receipt of Navajo Tribal services is discussed separately, in a subsequent section. In reviewing the minutes, instances where an individual was incorrectly cited by the Navajo response as Paiute have been excluded from consideration. Similarly excluded are chapter actions cited by the Navajo response which relate generally to one of the areas where Paiutes were resident, e.g., Hidden Springs, since there is no basis to consider that these actions related specifically to the Paiutes as opposed to the population of the area as a whole, most of whom were Navajos.

A review of the chapter minutes for the southern two chapters in the years between 1965 and 1987 indicates there was no San Juan Paiute participation in chapter decision-making, as far as could be determined from this body of information. Exceptions to this are a motion and the seconding of another motion at one 1983 meeting by a younger member of the Chee Toney family group. This person has also received services from the chapter more frequently than most and has been employed by the Navajo Tribe (see discussion

below). Also, the names of Evelyn James and Anna Whiskers are on a list attached to a petition supporting a Bodaway-Gap Chapter action in 1981. This was explained by the Paiute response as the result of chapter officials gathering signatures and promising the Paiutes benefits in return for signing. According to the Paiutes they did not receive any benefits and therefore ceased what had been a brief practice of signing petitions (FB 1988:93).

In the Navajo Mountain Chapter, the evidence concerning participation was less clear-cut, particularly because there were several occurrences of office-holding in the past, all over 15 years ago. The chapter minutes indicate that one individual was quite active in the chapter in the past. The minutes indicate he was elected as time-keeper for a non-chapter project in 1965 and nominated for chapter secretary in 1967. Although not elected to the latter office, he received a considerable number of votes. He was also made a member of the Community Action Council (CAC), secretary to the Navajo Works Project Board and Secretary of the CAC. All of these required chapter meeting votes. His recorded activity after 1973 was limited to seconding a motion in 1981. This individual is one of the individuals the proposed finding concluded was marginal to the band (PF:165). The Paiute response agreed he had been nominated for chapter secretary but denied that he had held the two CAC offices listed (FB 1988:95-96). It also argued that the timekeeper job was with an organization not part of the Navajo Tribe. The response contained no details or explanation beyond the denial itself.

In addition to this individual, Jack Owl, an important Paiute elder, was a member of the CAC in 1968, and Richard Greymountain was a health representative in 1969, both apparently through some kind of community vote or action, though not by a chapter meeting vote recorded in the minutes supplied. The only other instances of "participation" reported in the minutes are the several instances of disputes brought to the chapter which were discussed above, and one inquiry by a Paiute about a road. The Paiute response acknowledged Owl had held a "temporary" CAC position, but stated that when he presented Paiute needs in this role, the Navajos took him off (FB 1988:96). The response denied that Richard Greymountain had held the position which the minutes record him as having held.

This somewhat greater evidence of Paiute political "participation" in the north, as compared with its total absence in the south, is consistent with the overall evidence that the Navajo Mountain area is and has been in the past a smaller, isolated and more closely knit community than in the south, and that the Paiutes at Navajo Mountain have had closer relationships with the Navajos there and been more active in voting and receiving services. This is also the area where informants indicated that they frequently attended meetings to keep informed and felt constrained to vote because of pressure from Navajo leaders (see discussion of voting above, PF:176-77).

In conclusion, the additional evidence provided in response to the proposed finding does not indicate that consistent San Juan Paiute participation in chapter political affairs occurred, even at Navajo Mountain where Paiute involvement in the chapter organization and the community was the greatest. There was little new evidence of participation except for several instances of apparent office-holding at Navajo Mountain over 15 years ago. Most of this involved an individual marginal to the band. One other instance, that of Jack Owl, is consistent with the unsuccessful attempts by the Paiutes

after 1969 to be represented within the Navajo Tribal government (see section below, "Navajo Tribal Government Questions...").

### Navajo Tribal Courts

#### Proposed Finding

The proposed finding concluded that the San Juan Paiutes had at times been involved in cases within the Navajo Tribal Court system, with a tribal judge reporting their involvement was "frequent" (PF:174). It noted that some cases were matters automatically within the court's jurisdiction, i.e., not limited to Navajo tribal members. Among these were inheritance of agricultural and grazing permits and minor criminal offenses. Child custody cases were also known to have come before the court. There was an undocumented report of the use of the court in about 1975 for a case which, in part, involved a dispute between two Paiutes over inheritance of an agricultural area. There was little documentation or detailed information available for the proposed finding concerning San Juan Paiute involvement in the courts.

#### Responses

The Navajo response to the proposed finding provided copies of court records for 31 civil cases before the Tuba City District Court of the Navajo Tribe which involved Paiutes (TCDC 1962-87). It also provided materials concerning alleged criminal offenses by San Juan Paiute band members from the records of the court between 1975 and 1988 (BB 1988k, TCDC 1976, 1977-80). These materials gave the name, date, and offense charged, but little other information.

The San Juan Paiute response included a legal analysis taking the position that the Navajo Tribal courts had exercised jurisdiction which was not limited to members of the Navajo Tribe (Gottschalk and Peregoy 1988). The response also offered examples of court records of non-Navajos, i.e., Hopis, who had been tried in the Navajo court system. Additional data was provided concerning two of the court cases submitted with the Navajo response, one involving a dispute between two Paiutes (discussed above) and the other several Paiutes' pursuit of civil damages from a Navajo as the result of an auto accident. Interview or other information in addition to the court record was not supplied by either the Paiutes or the Navajos concerning other than the latter two cases. With the exception of these two cases, the Paiute response did not provide background data concerning the circumstances of the civil or criminal cases, nor what role San Juan Paiute leaders or internal Paiute decision-making or support processes may have played.

#### Jurisdiction

The Navajo Court system became a tribal court system in 1958. Previously it was a Court of Indian Offenses under the BIA. The Tuba City District Court was established in 1962.

The jurisdiction asserted by the Navajo Tribal court is not limited to tribal members. According to the pertinent section of the Navajo Tribal Code, as amended in 1980, the court asserts jurisdiction over violations of the Law and Order Code committed by any person within the reservation or other areas controlled by the Navajo Tribe, all civil actions in which the defendant is an Indian and within the court's territorial jurisdiction, and all civil actions in which the defendant (not otherwise qualified) is a resident of the

court's territorial jurisdiction (7 NTC § 253). Jurisdiction also includes cases involving estates of deceased Indians, whether members of the Navajo Tribe or not, regarding property within the court's jurisdiction.

#### Criminal Cases

The Navajo response includes information from Tuba City District Court which lists a total of 52 different Paiutes alleged to have committed what were almost exclusively minor criminal offenses (BB 1988e). Those listed are drawn from a wide variety of Paiute families. One or two of the most important Paiute elders were involved in a few cases. A disproportionate number of these alleged offenses were charged against nine or ten individuals.

The Navajo Tribe's response argues that the significance of the court cases, particularly the criminal ones, is that they indicate that the Navajo Tribe rather than the Paiutes are setting and maintaining Paiute behavioral standards (i.e., a political function) (BB 1988a:61-63). The response also argues that this illustrates that the Paiutes were not able to maintain such standards. With regard to the criminal offenses, the Navajo Tribe is in this sense attempting to enforce behavioral standards on the reservation, the effect of which on Paiute behavior is unknown. There was no indication it was the main determinant of Paiute behavior, since the Paiutes clearly had behavioral standards not resulting from the criminal justice system. No new data was provided in the Paiute response concerning the criminal cases in particular or the maintenance of behavior standards in general.

#### Civil Cases

All of the 31 civil cases occurred between 1962 and 1987, with one exception which occurred earlier. Six of the cases concerned probate of Paiute estates and one the estate of a Navajo with a Paiute wife. There were nine cases involving child custody and related matters such as name changes, seven of them involving the children of one individual Paiute. Five divorce-related cases were filed and two paternity cases. The remaining eight were primarily civil restitution cases.

There was no means to determine whether the records of all of the cases before the Tuba City District Court involving Paiutes were included and whether the records were complete for those cases submitted. At least one Paiute estate probated in the Court, that of leader Alfred Lehi, was not included in the records submitted (Harter 1973).

One case of a dispute between two Paiutes being taken to court was included in the court data. This was discussed in detail above, in the section concerning dispute resolution. The Paiute woman who brought the case also accounts for most of the other Paiute involvement in the courts for significant dispute settlement. The records of the probate of her mother's estate indicate that this woman disputed with her sisters over the estate, sued to prevent part of the inheritance from her Navajo husband from going to her Navajo sister-in-law and also sued to recover a bracelet allegedly "stolen" by a Navajo relative of her husband.

The Navajo response characterizes the civil court cases as demonstrating that the San Juan Paiutes as a tribe took no role, and that the Navajo Tribe did (BB 1988a:63). Many of these cases, however, involved actions in which the court was the required forum regardless of whether the parties were Navajo Tribal members, involved disputes between Navajos and Paiutes which were

usually brought in the tribal court by a Navajo, or were formal actions required by outside agencies and not limited to Navajo tribal members.

The estate and divorce cases were required by Navajo law to be tried before the tribal court, whose jurisdiction was not limited to tribal members. In some instances, formal court actions were required in order for individuals to receive their inheritance. The child custody and guardianship cases were in part dictated by institutions, e.g., BIA or Navajo Tribal social service agencies (FD2).

In part, the set of seven related cases concerning formal guardianship of the children of one family appears to have involved more than automatic agency actions. The cases involved neglect which brought the local social service agency into play. In addition, the BIA required a formal declaration of guardianship in order for minors' funds under the Southern Paiute Judgment Fund to be distributed. The San Juan Paiute response provided no specific information concerning this set of cases. The court records indicate, however, that at least some non-formal arrangements for child custody and support were made by other Paiute family members well prior to the cases coming to the attention of the social service agencies.

With the exception of the one dispute case and the estate probates, all of the civil cases were between Paiutes and Navajos or between Paiutes and a Navajo social agency. Most of the cases between individuals were brought by the Navajo party, although in one recent instance several Willow Springs Paiutes sought restitution from Navajos for damages from an auto accident. A disproportionate number of cases involved individuals from the Chee Toney group of families, in part because seven of the court cases were related actions concerning the guardianship of a single set of children from one of these families.

#### Evidence of Tribal Identification

The Navajo response cites court pleadings and similar documents introduced in the civil cases as evidence of declarations by the Paiutes as being Navajo Indians (BB 1988c). Documents in some of the cases include language identifying the Paiutes involved as "Navajo Indians and residing on the reservation" or similar language in statements asserting that the Navajo Tribal court had jurisdiction.

In about two-thirds of the cases where the language appears, it is only claimed in the plea of the Navajo plaintiff and not by the Paiute. The language does appear in some briefs filed on behalf of Paiutes, especially in the child custody related cases, and in two cases brought by the woman who brought the internal Paiute dispute to court. It is unclear, even in those cases where the "declaration" is by a Paiute, that this is validly the expression of tribal identification by the individual named or was done automatically by the legal representatives involved. There is little evidence of Paiute self-identification as Navajo.

In two cases, the internal dispute case and the Paiutes' auto accident damage case, the Paiutes' brief specifically declared them to be Paiutes. Both of these cases occurred in the past few years.

#### Summary

Much more detailed information concerning San Juan Paiute involvement with Navajo courts was provided with the response than had been available for the proposed finding. The information amplified and provided more detail concerning Paiute involvement, but largely confirmed the conclusions in the proposed finding that that involvement did not affect Paiute political processes and did not occur because the Paiutes were members of the Navajo Tribe.

#### Grazing and Agricultural Permits

The proposed finding concluded that the grazing and agricultural permit systems, although at present largely controlled by the Navajo Tribe, are still partially controlled by the BIA (PF:175). It also concluded that the system still includes non-Navajos (Hopis as well as Paiutes), as it did when originally established in the 1930's. No significant new information concerning grazing and agricultural permits and their handling was submitted except for the materials already discussed under chapter and tribal court records. These do not contradict the conclusion in the proposed finding that the grazing and agricultural permit systems were a carryover from the Bureau-developed system.

#### Provision of Services Through Chapters and Tribal Government

##### Proposed Finding and Responses

The proposed finding stated that a detailed examination was not made of the records of the Navajo Tribe concerning provision of services to Paiutes with census numbers (PF:174). The proposed finding concluded that at least some Paiutes participated at times in Federal programs administered by the Navajo Tribe such as social services. The proposed finding also concluded that, "based on the limited available data, in a few cases Paiutes have gotten services which appear to be limited to Navajo tribal members, such as home-site leases, housing," and the chapter program of employment for a limited number of days (PF:1974). It noted that some services may have been received indirectly, through Navajo spouses. It was not determined if the Paiutes had participated at a different rate than the Navajos.

Considerably more detailed records were supplied by the Navajo Tribe as part of their response, covering, with varying degree of completeness, the 20 year period between 1967 and 1987 (BB 1988f, 1988g, 1988h, 1988i, 1988j, 1988m, Division of Child Development 1983-87, Navajo Mountain Senior Citizen's Center n.d. see also chapter minutes). The Paiute response provided some information concerning these records, based on interviews (FB 1988:89-94).

The review below primarily focuses on the receipt of services which are limited to members of the Navajo Tribe as opposed to those Federal programs administered by the Navajo Tribe which are open either to any resident Indian regardless of tribal affiliation or resident individual. The latter include General Assistance, Women and Infant Children (WIC), and Headstart.

##### Benefits Received Through Local Chapters

The chapter minutes list some individual Paiutes as included in actions where it was voted to provide assistance and benefits to specific chapter members.

These services are distinguished here from other instances of chapter--connected services because they are more clearly based on apparent acceptance of individual Paiutes as chapter members, by virtue of the chapter voting them services generally limited to chapter members.

Additional data on receipt of services through chapters was provided by the Navajo response from miscellaneous records other than chapter minutes (BB 1988f, 1988g, 1988j, 1988m). These records are mixed, do not cover all years, and vary between chapters. The basis for providing the service is not stated, nor is it indicated whether a community vote was involved. These records were reviewed for information on services and benefits generally limited to chapter members and therefore most relevant to the question of acceptance of Paiutes as members of the Navajo Tribe, regardless of whether the source of funds was tribal, Federal or other. Comparisons between chapters are only approximate because of differences in the extent of records submitted for different chapters.

In the Navajo Mountain Chapter minutes, most instances of voting services and benefits for Paiutes were between 1968 and 1972 and between 1983 and 1986 (Navajo Mountain Chapter 1965-86). Between 1968 and 1983, the minutes show Jack Owl as being voted assistance or a job position (or nominated for one) three times, Richard Greymountain six times (four in 1980), Mercy Whiskers twice and Bessie Owl once. From 1983 to 1986, six or seven Paiutes are listed for items such as emergency payments for hay, house wiring and the like. Ned and Edith King are listed for new housing and a homesite lease, and one other Paiute is listed for a homesite lease.

The only Navajo Mountain Chapter benefits and services on record other than in chapter minutes were in materials submitted previous to the proposed finding (Shepardson 1960-62). These show regular inclusion of two of the Owls in hiring for road work in 1960 and 1961, apparently through the chapter.

The Paiutes in the southern two chapters, a larger group than in the north, received considerably less assistance and benefits, consistent with their overall lesser amount of involvement of any kind. Chapter minutes listed home improvements for five individuals or couples (one a Paiute-Navajo marriage) between 1976 and 1980, food, coal or wood assistance to two individuals in 1980 and a community health representative job to one individual in 1978 (Bodaway-Gap Chapter 1965-86, Tuba City Chapter 1976-87). These services were provided to members of both major Paiute family groups in the south.

In the south, the other records show three additional individuals beyond those listed in the chapter minutes as having received chapter services. Grace Lehi, who has no census number, participated in the chapter 10-days work program in 1964 and two other Paiutes participated in the 1970's (BB 1988f, 1988g, 1988m:10729). Three of the elder individuals from the Chee Tony line were listed as receiving wood (for fuel) from the chapter in 1986 and again in 1987, with one other individual receiving this in 1986 (BB 1988g). In addition, records of the Tuba City Chapter Support Services Department (which apparently assists with employment, social services, and the like) show one individual utilizing the department regularly between 1986 and 1988, and single inquiries from one or two other individuals during that

interval (BB 1988j). There was no equivalent data for the other chapters, which may not have this program.

There is only one Paiute family group at Red Lake Chapter, and chapter minutes were only provided for 1978 to 1987 (Red Lake Chapter 1978-87). There was no information other than from the minutes. Three individuals were included in chapter work projects or were nominated for jobs of one kind or another. Money was provided for a Navajo curing ceremony for one and note taken of his subsequent death. The funeral expenses for another Paiute were also paid. No offices were held or meeting participation shown, although a Navajo-Paiute couple signed two petitions.

The Paiutes responded to this material in some detail, although a few specific items were not commented upon (FB 1988:89-96). The response, based on interviews with individual Paiutes, denies the correctness of many of the actions listed in the chapter minutes and states that in other instances benefits voted were never received.

Concerning employment, the response stated that the Paiutes "take what they can get to survive." According to the response, the Paiutes at Navajo Mountain denied that Ned King had held two of the offices listed, and that Jack Owl had been a foreman. The response contained no details or explanation beyond the denials themselves. The response also stated that Richard Greymountain's family had denied that he had held the employment positions the chapter minutes showed him as holding. Regarding housing and other benefits listed in the north and south, the Paiutes denied receiving it in most instances, though, according to their statements, the Navajos on the same assistance lists did receive it. The petitioner's response did not deny that the chapters had voted for assistance in these various instances, however. There was no way to clarify the differences between the chapter records and the Paiutes' responses to them. The information in the chapter records concerning receipt of assistance has been treated here as essentially correct.

#### Tribal Homesite Leases

Homesite leases require chapter approval as well as approval by the Navajo Tribal government. The Navajo Tribal code (16 NTC § 854) allows leases to non-members only if there is a determination that there is some special benefit to the tribe or the reservation. Materials submitted by the Navajo Tribe in response to the San Juan petition before the proposed finding listed three homesite lease approvals, all in the south (BB 1988a:23). All, however, were families in which the spouse was Navajo. Although not commented on by the present Navajo response, the records submitted by the Navajo Tribe in response to the proposed finding indicate that two Paiute families (in which the spouse was not Navajo) received homesite lease approvals in 1986 from the Navajo Mountain chapter (Navajo Mountain Chapter 1965-86).

#### Tribal Employment

The Navajo response provided particularly detailed information concerning employment of individuals who were San Juan Paiutes in various programs. A large number of individuals were listed (BB 1988f, 1988g, 1988m).

Most individuals were participating in programs which were part of the General Assistance program. This is a social service program which was administered by the BIA until 1981. Although now administered by the Navajo

Tribe, it is still carried out under Bureau guidelines which provide for it to be offered to any resident Indian who is enrolled in a recognized tribe. Most Paiutes worked for TWEP (Tribal Work Experience Program), which functioned between 1973 to 1977, and TAPP (Tribal Assistance and Projects Program), which apparently functioned from 1978 to 1980. To receive general assistance, able-bodied individuals had to regularly seek work experience through these programs (13 NTC § 3901) (BB 1988m).

Eleven Paiutes, including two without census numbers, participated in these programs (BB 1988f, 1988m). A couple of jobs in these or the other programs were with the chapter organizations or other Navajo tribal offices.

TWEP, according to the Navajo Tribal Code (13 NTC § 3901), was to "provide meaningful work or employment experience for unemployed-employable heads of households" who were eligible for General Assistance. To be included, an individual had to be "an enrolled Indian," not limited as to tribe, resident on the Navajo Reservation. A similar program in which Paiutes participated was JTPA (Job Training Partnership Act of 1982), for which six Paiutes were listed as having participated between 1984 and 1987. Several other apparently similar Federal programs for employment assistance, for which little information was provided, employed one or two Paiutes each between 1965 and 1987. These were Public Works, PEP, Office of Navajo Economic Opportunity (OEO), Navajo Youth Opportunity Program (NYOP) and Navajo Department of Labor (NDOL).

There were two San Juan Paiutes who at one time were permanently employed with the Navajo Tribe, i.e., not through an employment assistance program or in temporary employment. The proposed finding had concluded only one Paiute had been permanently employed by the Navajo Tribe (PF:175). The additional records show this individual has also held several other permanent positions (Tuba City Chapter Minutes 1976-87). From the Chee Toney family line, she was also the only Paiute recorded as participating at a chapter meeting in the south. Another individual, also from the Chee Toney group, was appointed community health representative by the Tuba City Chapter in 1978.

Overall, there were only a few instances, involving two individuals, of employment by the Navajo Tribe (outside of chapter 10-day work programs) of a sort which might indicate tribal membership status. It could not be confirmed, however, that the jobs were provided because the individuals were considered tribal members. All of the other employment listed was in connection with Federal social service programs, administered in part or, in later years, wholly, by the Navajo Tribe. However, given the scarcity of jobs in this area, and the low social status of the Paiutes, it is unlikely that many of them would have received permanent tribal jobs regardless of whether they were viewed as members or not.

#### Miscellaneous Tribal Programs

Materials were submitted on several other programs, which appeared to be Federal programs administered by the Navajo Tribe. The Navajo response resubmitted previously submitted materials showing three Paiutes served by the WIC (Women and Infant Children) program. The Navajo Tribe administers this Federal program and states that it is open to all women, infants and children (meeting age and need guidelines) resident on or adjacent to the Navajo Reservation (BB 1988m:12393). Also resubmitted without significant change was a list of those receiving donated roods in 1984, three of whom were

Paiutes. This also appears to be a tribally-administered Federal program not limited to tribal members.

Two individuals were on the Navajo Tribal Clothing list, which appears to be the same program as the earlier General Assistance School Clothing Allowance program administered through BIA Social Services (BB 1988h, 1988m:12565). These two, plus three other Paiute children, were also listed as being served in 1986 by the Navajo Division of Child Development which operates as the equivalent of, and under the guidelines of, the Federal Headstart Program (Division of Navajo Child Development 1983-87).

One individual (who was also receiving other chapter services) held a card to gather coal. There was no information on the basis for receiving these cards (BB 1988i).

San Juan Paiutes were on lists (dating approximately 1984-6) of eligible clients for senior citizens programs at both the Tuba City and Navajo Mountain chapters. The Navajo response included some materials which had been previously submitted, along with some additional documents (BB 1985b:Exh. O, Navajo Mountain Senior Citizens Center n.d.). No information was provided concerning who was actually served, and "ethnic" categories on one list indicate that non-Indians were included. Previous Paiute responses (to materials submitted by the Navajo Tribe before the proposed finding) have claimed that the Paiutes were turned away from the Tuba City Senior Citizens Center.

#### Services Summary and Overview

Some services of a kind normally limited to tribal members have been received by the San Juan Paiutes over an approximately 20-year span up to 1986, which is essentially the latest date for which information was available. Although the records are limited, the information in them indicates there has been some receipt of membership services by the Paiutes through the chapters, though infrequently and not consistently. These have been received more in recent years and much more by some families than by others. A comparison with the rates of receipt by Navajos was not possible (cf. below). Periods of time with no recorded member services for any Paiute in a given chapter are as long as five years.

There was little recorded participation in chapter services in the south. Services in the south were infrequent and bunched in a small interval of years. No services are recorded for the Paiutes from the Bodaway-Gap Chapter between 1965 and 1975 in the minutes submitted with the Navajo response (no records were submitted for the Tuba City chapter in this period). All of the services recorded in chapter minutes, resulting from a chapter meeting vote, were between 1976 and 1980. Other records show services in 1986 and 1987 (BB 1988f, 1988g). Much of the services consisted of food, coal and wood provided by chapters to the poorest families.

Relatively more services were received by Paiute residents of the Navajo Mountain community than by the Paiutes resident in the southern two chapters. However, even at Navajo Mountain, with the exception of one individual, there were no services recorded between 1974 and 1983. Several individuals there are shown in the records as receiving one or another service in the years previous to 1974 and many between 1983 and 1986 (Navajo Mountain Chapter 1965-86). The largest amount was in 1985-6.

Several members of the one San Juan Paiute family at Red Lake have received several items of service, between 1978 and 1980 and in 1986-7 (Red Lake Chapter Minutes 1978-87).

From 1969 to 1972, when there was particular controversy over San Juan Paiute membership and services (see discussion below), there is no record of services received in the south. However, records for only one of the two southern chapters were submitted for this period. At Navajo Mountain there were a few instances of being voted services in 1969 and two or three in 1970 to 1972.

Only the Paiutes permanently resident on the Navajo Reservation received any services. Approximately 30 percent of the band is resident elsewhere. The northern group is significantly smaller than the southern one, with about 40 resident Paiutes. Two of the family groups there are largely non-resident or only seasonally resident during the farming season. About 60 to 70 people are resident in the south. The one family at Red Lake Chapter consists of about 11 people.

It is not possible to accurately compare San Juan Paiute rates of receiving services with those of the local Navajos. Comparable data on numbers and economic circumstances of local Navajos were not available, nor were there records on how many Navajos had received what services. Further, the records were not complete, since only selected chapter minutes were submitted and no chapter minutes for Tuba City Chapter were submitted for the years prior to 1975.

It is further not entirely clear that the basis of voting some services was entirely that of tribal membership as opposed to residence in a small rural community where the Paiutes have a long history and often some kinship ties. At least one individual who participated in the 10-day work program did not have a census number (see above). In another instance, an individual was reportedly waiting to see if the "Navajos" would allow him to participate in this program (BB 1988m).

Overall, member services have not been regularly or consistently received by Paiutes. The available record does not clearly indicate either that the Paiutes have been treated as members of the Navajo Tribe for these purposes or that they have been completely rejected. In part this is because even when they have gotten services, it has occurred in a context where the Paiutes have clearly been socially distinguished, their legitimacy as members has been questioned and where there has been considerable local opinion questioning whether they should get services (PF:163). Statements in the Paiute response (FB 1988:82-86) and elsewhere that the Paiutes had been discriminated against in receiving services could not be verified.

### Conclusions Concerning Participation in the Navajo Tribe

#### General Conclusions

There is little evidence of significant Navajo influence on internal political processes of the San Juan Paiutes and the Paiutes have remained a distinct social group.

There is little evidence of significant political participation by the San Juan Paiutes in the Navajo Tribe. There has been some voting in Navajo elections after 1970, but 60 percent of the resident Paiutes have not voted, and only 20 percent voted consistently during the six-year period for which detailed records were available. Consistent political participation, e.g., in chapter political affairs, has not occurred.

While there has been some participation of a significant kind by San Juan Paiutes in Navajo tribal institutions, this has been only to a very limited degree, not consistent, and largely very recent. Historically, what involvement there has been has occurred only in the past 10 to 20 years. During that time there has been a significant question by the Navajos concerning the legitimacy of that participation and of Paiute legitimacy as members of the Navajo Tribe in a political sense. There is considerable indication that Paiute participation has been the result of the pressure of circumstances and necessity rather than being viewed by the Paiutes as a means of becoming part of the Navajo Tribe. Much of what involvement there has been is accounted for by limited portions of the band, i.e., the band's membership is not uniformly involved. While some Paiutes have received some services limited to Navajo tribal members, this has been infrequent and inconsistent. The record is mixed and does not clearly indicate that the Paiute have been treated as members nor that they have been completely rejected as members. This, in part, is because even when services have been received, it has been in a context where the Paiutes have clearly been socially distinguished and their legitimacy as members and eligibility for services has been questioned. Many of the San Juan Paiutes, about 35 percent, are not permanently resident on-reservation and are not involved at all in Navajo Tribal institutions.

#### Discussion

Paiute receipt of services of a kind normally limited to tribal members over the approximately 20-year span up to 1986 has been infrequent rather than regular or consistent. These services have largely been through the chapters. More have been received in recent years than previously and much more by some families than others. A comparison with the rates of receipt by Navajos was not possible. Services in the south were infrequent and bunched in two small intervals of years within the 20-year span. Services at Navajo Mountain were a little more frequent than in the south, though with the exception of one individual, there were no services recorded between 1974 and 1983.

Consistent political participation, e.g., in chapter political affairs, has not occurred. This is true even at Navajo Mountain where Paiute voting and other kinds of involvement with the chapter was greater than in the southern area.

Sixty percent of the resident Paiutes and 73 percent of the overall band did not vote during the six-year period (1982-87) for which detailed records were available. Only a small portion of the resident Paiutes, less than 20 percent, and a smaller portion of the overall group, have voted consistently. Paiute voting occurred no earlier than 1970 and probably involved only a few individuals in the 1970's. Voting is the most broadly distributed as well as the strongest, least ambiguous evidence of defacto Navajo Tribal acceptance of the Paiutes members.

Voting occurs in the context of almost no other evidence of political participation in Navajo political institutions and evidence of continuing uncertainty of the legitimacy of Paiutes having Navajo membership rights. The limited available evidence indicates that Paiutes have to some extent voted because of local community pressures, rather than an intent to affiliate politically. It has been viewed by them at times as an attempt, unsuccessfully, to be represented in the Navajo system. The Paiutes argue that, given especially the history of their relations with the Navajo Tribal government, voting represents a pragmatic action, resulting at least in part from constraint, such as threat of loss of services.

There were some differences within the Paiute membership as to the degree of participation in Navajo tribal institutions. The smaller northern group at Navajo Mountain has had some degree of participation and acceptance, though by no means complete or consistent. The larger southern group has had no more than occasional participation or acceptance. The resident population in the south constitutes about 40 percent of the band, versus about 20 percent in the north. About 35 percent of the band is not permanently resident on-reservation and not involved at all in Navajo Tribal institutions.

Overall, the Navajo Mountain area has had more numerous and more consistent services than the south, and also has had a small amount of political participation (excluding the one marginal individual) where the south has had none.

A relatively high percentage in the south have not been registered or voted in Navajo elections, and very few have received membership services. Most of the voting and services are accounted for by one family group which is relatively acculturated to Navajo culture and apparently has more active kinship ties with local Navajos. Even this group has not participated very much, although they vote more frequently than most of the Paiutes. There was no evidence that this family group was otherwise any more politically involved with the Navajo Tribe than the rest of the Paiutes in the south.

The Navajo Mountain Paiutes have had a significantly higher percentage of voting than in the south and overall a greater likelihood of being voted services. Some, but not all of the important services were accounted for by one individual marginal to the band. This difference from the south is consistent with the closer ties that the Navajo Mountain group appears to have maintained with the local Navajos. Navajo Mountain is, nonetheless, the area of greater Navajo-Paiute conflict over resources.

A major portion of the "participation" cited in the Navajo Tribe's response to the proposed finding referred to services through programs which were administered by the tribe but were not limited to tribal members or to civil or criminal actions in Navajo Tribal Court in matters in which the court has jurisdiction over Indians or other residents, regardless of tribal membership. Many of the court actions were not brought by the Paiutes but by individual Navajos or were required by the actions of BIA or tribal agencies. Similarly, some of the chapter actions cited in the Navajo response were brought by Navajos in forums controlled by the Navajo Tribe but on matters not exclusive to tribal members (e.g., grazing permits).

To a significant degree, the Paiute and Navajo responses lacked detailed data to fully describe the nature and circumstances of the Paiute involvement with

Navajo tribal institutions indicated by the written record. By and large, only written records were provided with the Navajo response. Chapter minutes by their nature provided limited information. The completeness of the selected tribal court and chapter records provided could not be determined. Voting records were the most complete. No records were submitted of grazing and land boards, which would be the first level of dispute resolution hjoj these matters in the present system. In addition, no interview information with chapter or other tribal officials or influential Navajo chapter members was presented to add to or more clearly explain the information in court and chapter records. The Paiute response included some, though limited, information from interviews with Paiutes concerning the participation or the lack of it indicated in the records, and the circumstances of it.

### Navajo Chapter and Tribal Resolutions

#### Proposed Finding

Before the proposed finding, resolutions denying discrimination and affirming tribal membership for "those individuals enrolled in the Navajo Tribe" (or similar language) were received from the Navajo Mountain and Tuba City Chapters and the Navajo Tribal Council. The proposed finding concluded that these resolutions were passed in response to the issues raised by the San Juan Paiutes acknowledgment petition and the Paiutes' attempt to intervene in the Sidney v. Zah (now Sidney v. Haskie) litigation case and thus did not necessarily represent the previous views of these governing bodies (PF:xv, xvi, 78-9, 90).

#### Response

Additional resolutions, similar to the earlier ones, were submitted with the Navajo Tribe's response. These were a second resolution from the Navajo Mountain Chapter, passed in 1987, and a resolution from the Bodaway-Gap chapter, passed in 1988, as well as 1987 resolutions from the District Two Council and the Cameron and Tonalea Chapters.

The 1985 Navajo Tribal Council resolution "reaffirms that all individuals named in the Evelyn James petition who are enrolled in the Navajo Tribe have the same rights and responsibilities as all other Tribal members." No discussion or definition of what "enrolled" meant or who was not included as enrolled was provided. Similar language appears in the 1985 Navajo Mountain and 1982 Tuba City Chapter resolutions. The Bodaway-Gap Chapter resolution declares that the members of the "Evelyn James group" are Navajo Indians. The 1987 Navajo Mountain resolution does not mention tribal membership but declares that all members of the community receive equal consideration without regard to the "origin, race and descendent (sic) of the individual..."

The additional resolutions and other, related new evidence submitted with the Navajo response are not consistent with the available evidence that the Navajo tribal government and the local Navajo communities have in the past questioned whether the Paiutes were legitimately members of the Navajo Tribe. They do not provide strong evidence of collective acceptance of the Paiutes by the Tribal governing body. They were passed in response to the Paiutes' acknowledgment petition and intervention in the Sidney v. Haskie litigation, where there is a clear advantage to declaring the Paiutes

members. They are not entitled to conclusive weight, given the past history of questions about Paiute membership, the lack of a clear-cut enrollment process, and the distinct character of the Paiutes.

The resolutions and the descriptive characterizations of the Paiutes in them are not consistent with the overwhelming evidence that the Paiutes were considered socially distinct from Navajos (see section above on Navajo-Paiute distinctions). The minutes of a special Navajo Mountain Chapter (1987) meeting in connection with that chapter's second resolution are consistent with the proposed finding's description of the Paiutes' position within that community insofar as their being a clearly distinguished body of people with close relationships with the Navajos. Considerable specific detail is given. Statements of individuals reported in the minutes denied that services had been refused the Paiutes, however.

#### Navajo Tribal Government Questions Concerning Legitimacy of the Paiutes as Members

Questions have been raised at various times by the Navajo Tribal government or tribal officials concerning the presence of Paiutes on the "Navajo Roll." These began as early as 1953 when the Navajo Tribe was first adopting legislation concerning tribal membership and occurred as late as 1984. Navajo government actions can be divided into actions directly relating to the census and the issuance of census numbers and other tribal government actions related to tribal membership. Actions directly relating to the roll, etc., e.g., disenrollment of some Paiutes, are discussed in the sections describing the Navajo roll and how census numbers are issued.

The questions raised in 1953-4, when a system of tribal membership was first begun, are described in detail in the subsequent section on the "Navajo Tribal Roll," as well as having been discussed in the proposed finding (PF:171, 211-13). There is no evidence concerning whether questions were raised between 1955 and 1969. A reference by the Navajo Mountain school teacher, Eubanks, in 1960 to her concern that the Navajo Tribe wanted the Paiutes "off the roll" appears to refer to 1954, when the "Tallsalt census" of Paiutes was made at Navajo Mountain (Shepardson 1960-62, PF:197). It cannot be specifically dated, and may refer to 1960 as well (see PF:62).

Questions were raised between 1969 and 1972 about the Paiutes having census numbers and receiving services. Specific factors which led to these questions being raised were the passage of legislation in 1968 authorizing payment of the Southern Paiute Judgment Fund, Hopi-Navajo conflict over the ownership of the Western Navajo reservation, and the death of the traditional San Juan leader Alfred Lehi in April 1969. The general growth of Navajo Tribal government institutions and the tribe's increased control of Federal programs formerly administered by the BIA provided a different context to holding Navajo "census numbers" in 1969 than there had been 15 years before.

Legislative authorization for payment of the Southern Paiute Judgment Fund was passed in October 1968. First actions to contact the San Juan Paiutes concerning their possible eligibility, probably through the Kaibab Tribe, were as early as November 1968. DNA-Peoples Legal Services at Tuba City became involved in the case in 1969. Several meetings were held, including a

public one at Tuba City in October 1969 called by the BIA where the Kaibabs helped identify the San Juan as eligible for the payment (PF:68-70).

At the same time, the San Juan Paiutes also asserted that the Navajos were taking their historic land (Pikyavit 1969). The claims of the Paiutes to land, the assertion of themselves as Paiutes, and the likelihood that they would receive substantial payment which the local Navajos would not receive raised among the local Navajos the issue of the legitimacy of the Paiutes (Mowrer 1971). This issue is still cited by local Navajos (FD). The land issue was a sensitive one because of the on-going Navajo dispute with the Hopis over ownership of the land in the Western Navajo Reservation area (PF:70-75). In October 1969, a lawyer involved in the Southern Paiute claims case noted that "there may be some dispute regarding the rights of the Paiutes at Willow Springs to their land" (Stewart 1969). The Navajos evidently contacted leader Alfred Lehi (who died in April 1969) concerning inclusion of Paiute funds from the judgment with Navajo Tribal funds. Lehi rejected this (FB 1988:30).

San Juan Paiute contact with DNA because of the the Southern Paiute Judgment Fund apparently led to an awareness that DNA could also serve as a vehicle to greater access to services (FB 1988:32, Bunte and Franklin 1987:202-3, 206-7). At more or less the same time, the Paiute leaders who succeeded traditionalist leader Alfred Lehi took a more activist approach to relationships with the Navajo tribal government and non-Indians (PF:150).

Apparently triggered by the anticipated Southern Paiute Judgment Fund payments, considerable question was raised between 1969 and 1972 concerning the Paiutes. The proposed finding discusses these events in detail (PF:69, 130). In December 1969, DNA became involved with the Paiutes on this issue because the Paiutes were reportedly being denied tribal welfare services (which included surplus commodities). The reported reason was "because few had census numbers" according to one Paiute at the time (Withers 1969). In February 1970, Ralph Castro, a Kaibab Paiute who was helping the San Juan Paiutes get commodities, reported that the Navajo Tribe told him that because the Paiutes had no census numbers it would not help them (Castro 1970). It was not possible from the available data to determine if the Paiutes were denied any tribal services in the years immediately preceding 1969 because they were not Navajos and not considered members of the Navajo Tribe. There is scattered evidence of them receiving some tribal services (see discussion services below).

"Commodities" here refers to the surplus commodities program, first established as a Navajo Tribal program in 1957, but in fact a Federal (Department of Agriculture) program to the states, operated by the Navajo Tribe under Arizona State standards (Young 1961:227, 341-43). It nonetheless appears to have been treated by the Navajo Tribe as a tribal program rather than a Federal or State program operated by the Tribe. DNA subsequently arranged for the Paiutes to get commodities at nearby Moencopi Pueblo, through the Hopi Tribe (Ward 1971).

Contrary to the statements made at the time, a review of the available evidence indicates that most of the Paiutes at Willow Springs at the time did have census numbers. At least two of the Willow Springs Paiutes, Anna Whiskers (with a census number) and her sister Grace Lehi (without a census number) had been receiving surplus commodities for an indeterminate

time before December 1969 (BB 1988m). The records available for the final determination did not allow a determination whether other Willow Springs Paiutes had been receiving surplus commodities up to that time.

It appears, therefore, that the Navajo Tribe at this point, late 1969 through 1971, denied the eligibility of the Paiutes to receive tribal services even though they had census numbers and had previously been receiving some services. The references to Paiutes "not having census numbers" appears to be a blanket denial of legitimacy which encompassed those who had census numbers as well as those who did not. This was also probably related to the question of their right to Agency as well as tribal services. The Agency Superintendent in 1971 is quoted as saying "The Navajo tribe is no longer issuing census numbers to the Paiutes," as if the tribe had decided that the Paiutes should not have been issued the ones in the past. One of the DNA attorneys involved with the commodities question recently commented that she believed that the denial was because the people were Paiutes, that the "census number thing was thrown up as a ruse," and that she did not think the people with census numbers had gotten commodities (FB 1988:34).

The Tuba City Agency's position in this era (1969-72) is less clear. The Paiute response claims that before 1971 the Paiutes were unable to get services from the BIA Social Services Office. There is no indication in the General Assistance (BIA Social Services) records that Paiutes were denied services because of their status or assumed status (BB 1988m). The records submitted with the Navajo response only show one family receiving General Assistance before 1969. The records available for this early period, however, may not be complete. Except for one individual, all of the records pertain to the period from late 1969 up to 1984. The State welfare system had primary responsibility for welfare benefits in this era, i.e., BIA General Assistance was only available if the person was ineligible for State benefits (Young 1961:341-43). The BIA Social Services records, the main source of information available, indicate that in the years after 1969 a number of Paiutes were receiving benefits through the State system before they began to get General Assistance from the BIA. These records also indicate that the State Welfare system workers were directly involved with the Paiutes in 1969 (see also FB 1988:30-31).

Beginning several years previous to 1969, Paiutes without census numbers were assigned "temporary numbers" by the Agency so that they could receive services (FD2). The BIA Social Service records in subsequent years frequently, though not universally, noted even those with regular census numbers as Paiute.

Though there is no good evidence that Paiutes began to be denied services on the basis that they were not members of the Navajo Tribe, the records of the conflict over commodities indicates some confusion on the Agency's part in 1969 as to the eligibility of the Paiutes. The agency superintendent stated in 1971 that he had a "tendency to overlook these individuals' status as Paiutes and gave them the same help he gave a Navajo" (Mowrer 1971). This supports the likelihood that their eligibility had been in question on the Agency's part as well as the Navajo Tribe's and that service eligibility was now to some degree being viewed as based on membership in the Navajo Tribe, and the Paiutes were no longer viewed as an Agency tribe (Withers 1969, Ward 1971).

Indirect evidence of the Navajo Tribe's position was the Paiute leader's statement in 1971 that even though they voted the Navajo Tribe "[doesn't] include us in their tribal government" (Mowrer 1971).

The chapter minutes supplied with the Navajo response added some significant new information on these questions. In February 1972, Paiute Indians were "presented" to a Bodaway-Gap Chapter meeting and a resolution "for these Indians to have and have a right to the Census Numbers" was passed by a vote of 40 to 7 (Bodaway-Gap Chapter 1972). The opposition was noted as "because if the Navajos start giving out the census numbers to other Indians (sic) tribes," all other tribes would ask for them. Bodaway-Gap Chapter minutes from 1984 identified these as "Hidden Springs" (i.e., Willow Springs) Paiutes, stating that they had come to the chapter asking "to become members of the Navajo Tribe and to have census numbers" (Bodaway-Gap Chapter 1965-86). Since most of the Paiutes had census numbers in 1972, the wording of the 1972 resolution appears to relate to the legitimacy of the Paiutes' already having numbers as much as to legitimizing issuance of census numbers to additional Paiutes.

This information is consistent with the proposed finding's conclusion concerning this era that the Paiutes were considered distinct and there was some question whether they should have the numbers. It also indicates, as does other evidence, that there was community support, if somewhat divided, for them to have the numbers. The 1972 minutes do not indicate that the Paiutes wanted to be members of the Navajo Tribe per se nor that the chapter passed the resolution because they considered the Paiutes to be members.

The San Juan Paiutes were again brought to the attention of the Navajo Tribal government in late 1971 or early 1972, with the introduction of the proposed Hopi-Navajo Settlement Act, legislation to settle the Hopi-Navajo land dispute. This legislation, primarily concerned with division of land on the former Hopi Executive Order Reservation, also contained language allowing for the filing of litigation concerning the ownership of much of the Western Navajo reservation area (PF:73-74). Included in the proposed legislation was a provision for individual allotments on the reservation to Paiutes not then members of the Navajo Tribe (PF:71). The exact history of this clause could not be determined, but it was supported by the attorney for the Hopi Tribe whose firm had previously represented the Southern Paiutes in pursuit of the Southern Paiute claim before the Indian Claims Commission. The Hopis' attorney stated at a Congressional hearing in April 1972 that the provision was in the bill because "the Willow Springs Paiutes were in there ahead of the Navajos," and that the Paiutes were included under the language in the 1934 Navajo Reservation Act establishing the reservation for the Navajo and "other Indians" (U.S. House of Representatives 1972:148-49).

The Navajo Chairman Peter McDonald, at the April 1972 hearing, strongly objected to the inclusion of the Paiute allotment language in the proposed act (U.S. House of Representatives 1972:70-71, PF:71). The proposed finding characterized these remarks as indicating that McDonald did not view the Paiutes as members of the Navajo Tribe (PF:71, 90). The Navajo response comments on McDonald's 1972 remarks, suggesting that the chairman was not referring to Paiutes with census numbers (BB 1988b:75). A review of the testimony and the circumstances around it indicates that the Chairman may not have been aware there were Paiutes who had census numbers or even that there

were Paiutes resident on the reservation. There is no indication from the testimony, and from a subsequent inquiry (see below), that the Chairman was aware of the controversy that had occurred in the Tuba City area the preceding three years. Thus while it is clear that he sharply distinguished Paiutes from Navajos, he does not appear to have been commenting on the eligibility of Paiutes with census numbers to have them.

The Navajo Tribal leadership, apparently on May 5, i.e., subsequent to and presumably the result of the April hearing, obtained data on "Paiutes and Navajo-Paiutes" from the Navajo Census Office. The data from the Census Office concerned "Paiutes" and "Paiute-Navajo" on the reservation in 1931 and on the updated 1940 census. Draft testimony prepared for Navajo Vice-Chairman Wilson Skeet, dated May 6, concerned potential allottees under the proposed legislation (Skeet 1972). The testimony reiterated the census office figures and some other data but stated only that it was necessary to ascertain the current status of the Paiutes enumerated in 1931. It also stated that "further studies were necessary," although "according to verbal inquiry," most had become "completely 'Navajoized.'" This material also indicates the Navajo leadership at Window Rock was not acquainted with the Paiutes at the time. They were probably advised, however, by the individuals who had prepared the briefs before the Claims Commission, who were acquainted with the Paiutes. No record was found that the May 5 testimony was actually delivered or that a Congressional hearing was held on that date.

In 1974 and 1977, the Paiutes voiced similar complaints to those in 1971, that even though they had census numbers the Navajo Tribe did not treat them as members. In 1974, the Paiutes stated that "they were tired of being pushed around by the Navajos" and that even though they followed the required procedure, their applications for housing from the tribe were never accepted (Qatocqti 1974, Bunte and Franklin 1984:219-20). According to the Paiutes, they got a supporting resolution from the Tuba City Chapter but not from the Bodaway-Gap chapter, and housing was never provided. The chapter records supplied with the Navajo response do not cover the Tuba City Chapter for this period and do not include consideration of a Paiute housing request by the Bodaway-Gap Chapter between 1974 and 1977.

Allen Turner (1982) notes that the San Juan Paiutes in meetings in 1977 complained of "the lack of power to influence the Navajo political system." The Paiutes at the same or similar meetings in 1977 stated that they could not get housing assistance or work done on the springs or the land, and that they were "ignored by the Navajo Tribe (Jake 1977)." No additional data was submitted with the responses concerning any of these occurrences.

The complaints of 1974 and 1977 are consistent with those of the previous years, but do not constitute a detailed body of information concerning Navajo Tribal government actions or opinions in that era. There was little additional data with the responses to verify or disprove the statements made by the Paiutes in those years that the Navajo Tribe did not treat them as members. The Paiutes were registered to vote in this era, but there were no voting records for the period available for the proposed finding. An examination of the limited available information on receipt of strictly tribal services in this period indicates Paiutes received them in one or two instances.

Two other important instances of rejection of the Paiutes as legitimate members of the Navajo Tribe were discussed in the proposed finding. These are the proposed chapter action to prohibit Paiute sale of their baskets (Bunte and Franklin 1984:316-17) and refusal of a Navajo leader to represent them before the chapter because he felt they were not entitled to share in Navajo funds (PF:177). These events could not be dated precisely, although they evidently occurred between 1980 and 1985. The responses presented no additional evidence concerning them.

No actions, outside of the census or enrollment operations (see discussion in the following section), which questioned Paiute membership in general were found after 1980. However, in 1977 and again in 1981, the Window Rock Area Office wrote to the BIA Central Office, stating that they were experiencing questions re the "role of the Paiutes as part of the Navajo Tribe" (McBroom 1977, Dodge 1981). These inquiries, according to a former BIA official with the Census Office, apparently resulted from inquiries to the Area Office from the Navajo Tribe (FD2).

#### Summary

Questions have been raised from time to time by the Navajo Tribal government or tribal officials concerning the legitimacy of the San Juan Paiutes holding census numbers and thus receiving benefits limited to tribal members or seen as limited to tribal members. Such questions arose during the initial formulation of a membership system by the emerging Navajo Tribal government structure in the mid-1950's. They also arose subsequently from 1969 to 1972, and in 1977 and 1981, as well as possibly in 1974. The questions have sometimes come to the fore in connection with, issues which have arisen affecting the claims of the San Juan band versus the Navajo Tribe, i.e., in the Indian Claims Commission in the 1950's, the Southern Paiute Judgment Fund Award in the late 1960's and early 1970's, and the legislation and litigation concerning the ownership of the Western Navajo reservation in the 1970's and 1980's.

## PAIUTES LISTED ON THE "NAVAJO TRIBAL ROLL"

### Overall Proposed Finding

The proposed finding concluded that the San Juan Paiute membership was not substantially enrolled in another North American Indian tribe even though a large percentage of the band's membership have "Navajo census numbers" which the Navajo Tribe claims are evidence of tribal membership (PF:xiii-xix). Paiutes with census numbers were found not legitimately members of the Navajo Tribe because they did not have a bilateral political relationship with the Navajo Tribe and did not meet the definition of "member of an Indian tribe" with respect to the Navajo Tribe.

The definition of "member of an Indian Tribe" contained in the Acknowledgment regulations (25 CFR 83.1(k)) states:

- "Member of an Indian tribe" means an individual who
- o meets the membership requirements of the tribe as set forth in the governing document  
or
  - o is recognized collectively by those persons comprising the tribal governing body,  
and
  - o has continuously maintained tribal relations with the tribe  
or
  - o is listed on the tribal rolls of the tribe as a member, if such rolls are kept (emphasis added).

The proposed finding notes that the definition has two parts, each of which has two subparts, and that to meet the definition an individual must meet at least one element (subpart) of each part of the definition (PF:219-23). The finding concluded that the 119 San Juan Paiutes who have "Navajo census numbers" did not meet any of the subparts of the definition of "Member of an Indian Tribe" and therefore were not considered to legitimately be members of the Navajo Tribe.

### History and Character of the Roll

#### Proposed Finding

The proposed finding concluded that Paiutes appear on what has come to be known as the "Navajo Tribal Roll" because in 1953, the Navajo Tribal Council adopted as its official "tribal roll" a reservation-wide census prepared by the BIA of Indians living on the Navajo Reservation (PF:212; 1 N.T.C. § 501). The requirement for this annual census grew out of an 1884 Act of Congress designed to generate appropriations to cover the expenses of the Indian Department (PF:190-91). By Office of Indian Affairs Circular #148, each Indian agent was directed to take an annual "census of Indians at his agency or upon the reservation under his charge" (PF:233, appendix D).

The first enumeration of the Navajo Reservation to be conducted in accordance with the act was done in 1885; the next was done in 1928-29 (PF:191-95). Population figures for the intervening years (1885-1928) were estimated. The only real canvassing of the Navajo Reservation was done for the 1928-29

census, thus it is this census that is the first complete enumeration (PF:195). Censuses after that appear to either enlarge upon an earlier schedule or be supplemental rolls, consisting of additions and deletions (births and deaths) only.

The proposed finding found that in 1939-40, the 1928-29 census was retyped to incorporate known additions and deletions and that this retyped version is what is now referred to as the BIA's "1940 census" of the Navajo Reservation (PF:195, 208). The finding also found that agencies of the BIA on the reservation have continued to maintain and update a copy of the original 1940 census even though the requirement for an annual census was dropped in 1940. The annotated version of the census is referred to as the "updated 1940 census" to distinguish it from the original typescript prepared in 1939-40.

Census schedules for the 12-year period from 1928 to 1940 consistently identified the same block of 26 individuals in 12 households as Paiute (PF:195-96). The proposed finding concluded that at least 5 of these 12 households are represented in the present-day San Juan band and that 4 of the individual Paiutes enumerated in the block from 1928-40 are alive and enrolled with the San Juan petitioner. Several other important Paiute families (Owl, Nelson, Whiskers, and Toney) not represented in the above-mentioned block of Paiutes appear elsewhere in the census identified as Navajo or Navajo-Paiute and, in various other official records, as Paiute or of mixed Navajo and Paiute ancestry (see chart at PF:231, appendix C).

The proposed finding concluded that when the Navajo Tribal Council adopted the EIA's reservation-wide census as the Tribe's "official Roll" in the mid-fifties, it did so knowing that Paiutes appeared on the roll and that the Commissioner and other BIA officials were concerned for the eventual handling of Indians (specifically Paiutes) who might be taken off at some later date (PF:212-13; Emmons 1953; Harper 1954). A later (1959) resolution of the Council implies that the Tribe's use of the BIA's census was an interim measure pending the establishment of regulations which would develop a Navajo Tribal Roll which would "clearly designate and identify all Navajo persons entitled to share . . ." in tribal benefits and services (PF:213-14).

The finding also concluded (1) that the section of the Navajo Tribal Code requiring preparation of a tribal roll and the accompanying regulations were still in force; (2) that the Navajo Tribe had not prepared a tribal roll in the 30 years since the resolution requiring the roll was adopted; (3) that the Tribe was still using and citing the BIA's reservation-wide census as its "official roll;" and (4) that the Tribe's participation in the BIA's census process and the maintenance of the census roll was limited to routine clerical duties performed by tribal employees under the direction of BIA employees (PF:xiv-xv).

#### Overall Response

Responses to the proposed finding did not take issue with the finding's characterization of the history of the defacto "Navajo Tribal Roll" or the mechanics of the census numbering process. The Paiutes provided additional interview data regarding Paiute efforts to obtain census numbers and/or verification that they [Paiutes] had numbers. Navajo comment focused on other related issues having to do with a purported application process, how census numbers are assigned, whether Paiutes actually applied, what services Paiutes received, and whether the Paiutes exercised membership privileges.

## Navajo Criteria for Membership

### Proposed Finding

The proposed finding was that the Navajo Tribe took steps to define criteria for membership in the Tribe in the early 1950's in an attempt to deal with applications for membership generated by the discovery of minerals on the reservation (PF:211-13). Although proposed constitutions had been drafted earlier, none had been presented to or adopted by the Tribe. In 1953, the Navajo Tribal Council resolved to define membership using a reservation-wide census prepared and maintained by the BIA which included a small number of Paiutes and other non-Navajo Indians. BIA Commissioner Glenn L. Emmons expressed concern at that time over the membership status of these Indians and the fact that they might not meet the requirement of Navajo blood and therefore might not be included on a Navajo tribal roll developed at a later date (PF:212).

The proposed finding was that the BIA census referred to in Navajo membership criteria is not a tribal roll within the meaning of the Acknowledgment regulations because it is not exclusively a listing of persons who are members of the Navajo Tribe. Further, that although a Navajo Tribal Roll is contemplated in the Navajo Tribal Code (2 N.T.C. § 2201(1959)), 2203(1982)), the Tribe has not developed such a roll.

The finding discussed ambiguities found in Navajo membership criteria and in procedures and standards adopted but apparently never used by the Tribe to implement enrollment under Navajo criteria (PF:214-16). The finding concluded that it would be virtually impossible to determine whether members of the San Juan Paiute band who appeared on the Tribe's official roll (i.e., the BIA's reservation-wide census) would actually meet Navajo membership criteria because the criteria are vague and unclear.

### Membership Criteria

Navajo membership criteria, as spelled out in the Navajo Tribal Code, identify members as "all persons of Navajo blood whose names appear on the official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs" (PF:212; 1 N.T.C. § 501(1)). Children born to "enrolled members" automatically become members and "shall be enrolled" if they are of "at least one-fourth degree Navajo blood" (1 N.T.C. § 501(3)). Any other person who has not previously been "enrolled" but is of "at least one-fourth degree Navajo blood" is said to be eligible for membership and enrollment (1 N.T.C. § 501(2)), presumably subject to other criteria (i.e., the "six-point instruction" standards set down for the Enrollment Screening Committee in 1 N.T.C. § 553(2)).

### Blood Degree

Navajo criteria are vague with regard to how much Navajo blood (i.e., full-, half-, quarter-, or simply of any Navajo blood because the person's name is on the "official roll") is enough. The question of how much Navajo blood is enough to meet the Tribe's "of Navajo blood" criterion for persons on the census at the time it was adopted (§ 501(1), see above) is particularly important because the Navajo Tribal Code provides for the development of a Navajo Tribal Roll to include only those "Navajo persons" who are "entitled" to membership. The requirement that individuals not previously enrolled in the Tribe (§ 501(2)) as well as children born to members (§ 501(3)) be of "at least one-fourth degree Navajo blood" suggests that more than a minimal

amount of Navajo blood would be required. However, the one-fourth degree Navajo blood requirement, at least on the face of it, does not appear to apply to persons contemplated in section 501(1) of the criteria, i.e., to persons who were on the census when it was adopted. Although most San Juan Paiutes have some Navajo blood (see discussion at PF:156-64), past history surrounding the adoption of Navajo criteria and enrollment procedures, difficulties in obtaining some services administered by the Tribe, and the denial of census number verification for some Paiutes with Navajo blood in the mid-1980's suggest that many Paiutes might not qualify as members if the roll provided for in the Code is prepared by the Tribe.

The Navajo response contained no further clarification regarding how much or what degree "of Navajo blood" persons already on the Tribe's "official roll" (i.e., the BIA's 1940 census) would need to meet the Tribe's "of Navajo blood" criteria.

The absence of any evidence of past decisions by the Navajo Tribe's governing body on blood degree questions makes it virtually impossible to predict whether members of the San Juan band would be included if the Navajo Tribal Roll contemplated by the Navajo Tribal Code is prepared.

#### Which "Official Roll"

Ambiguity also surrounds what is meant by "the official roll" as defined in the Navajo membership criteria (PF:213-14). As far back as 1953, BIA officials, including the Commissioner, expressed concern over the fact that the Tribe's membership criteria were not more specific about "which" BIA roll. The BIA prepared a census of Indians on the Navajo Reservation from 1928-29 until 1940, when the requirement for the census was dropped. Since that time, however, a copy of the 1940 census has been maintained and updated by the BIA on a regular basis. Thus there are now two versions of the 1940 census, the original version and an annotated/updated version. The Navajo criteria as written identify the BIA census simply as "the official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs"--they do not specify which version of the BIA's 1940 census is to be used.

Ambiguities in the Tribe's definition of the roll exist because

1. The BIA does not maintain a membership roll of the Navajo Tribe as that is the responsibility and the right of the Tribe itself.
2. The BIA maintains a census of the Navajo Reservation which, although overwhelmingly of Navajo, does enumerate Paiutes. The composition of the census was known to the Navajo Tribal Council at the time it was adopted as the Tribe's official roll.
3. The language of the membership criteria--"official roll...maintained by the Bureau of Indian Affairs"--appears to refer to the BIA's annotated/updated version of the 1940 census. However, it could also be interpreted to refer to the 1940 census as it was originally prepared (i.e., prior to updating) because the period of maintenance is not stated.

Former Navajo Chairman Zah attempted to clarify "which roll" in 1985 when he identified the Tribe's "official roll" as the updated version of the 1940 census in his response to interrogatories propounded by Paiute

attorneys in Sidney v. Zah (Zah 1985a:8). However, the Tribe appears to have taken no formal action to amend the Navajo Tribal Code to this effect.

#### Questions of Interpretation

Other specific questions, not mentioned in the proposed finding, also exist having to do with how the Navajo Tribe will interpret its membership criteria when a Navajo Tribal Roll is developed. The following questions arise because of the ambiguities in the Tribe's criteria and because the Tribe does not appear to have acted to resolve similar questions in the past, thus there is no apparent tribal administrative record to turn to for guidance:

1. How will persons who are of known and accepted Paiute ancestry (i.e., persons who are perceived socially as "Paiute") be handled when they appear on the "official roll" as Navajo?
2. Will persons on the existing "official roll" (i.e., the BIA's updated 1940 census) be afforded an opportunity to appeal if they are not included in the tribal roll when it is prepared?
3. In instances where the original and the updated versions of the 1940 census do not agree, will the BIA's 1928-29 and/or intervening censuses be consulted to resolve inconsistencies?
4. If other censuses do not resolve inconsistencies--and some will not--will other records be consulted? If so, which ones?
5. Who will make the final determination regarding an individual's tribal blood and its degree when available records provide conflicting data?

The above questions are important because no administrative record exists of Navajo tribal actions based on the Tribe's membership criteria and enrollment procedures, although the Tribe has technically had membership criteria and an enrollment process in place for 30 years or more, and because the Tribe apparently still plans to prepare a tribal roll. Evidence to suggest that a tribal roll is still planned appears in the 1982-83 revision of the Navajo Tribal Code (Navajo Tribe 1982-83) and the census contract signed in August 1988 (BIA-Navajo Area Office 1988) (see discussion below).

The 1982 revision of the Code takes care of a few organizational name changes and establishes a "Navajo Office of Census and Vital Statistics" to be responsible for producing a Navajo Tribal Roll. This office is assigned responsibility for developing and maintaining "an accurate and current record of individual Navajo Tribal members and families for purposes of vital statistics..." (2 N.T.C. § 2222(b)). Additionally this office is to provide

such assistance and maintain such current records as may be required by the Advisory Committee of the Navajo Tribal Council and the Enrollment Screening Committee, pertaining to their duties and authority (1 N.T.C. Chapter 7) for establishing eligibility for membership, enrollment, renunciation and reinstatement of enrollment in the Navajo Tribe, in connection with or in addition to the development of an official Navajo Tribal Roll as prescribed by 2 N.T.C. § 2203. (2 N.T.C. § 2222(c))

Under the current census contract, the contractor (the Navajo Tribe) has agreed to work with the "original" version of the 1940 census of the reservation "until such time as a base roll is designated in the Navajo Tribal Code." The Tribe also agrees to update the original version using the membership criteria established in Section 501 of Title 1 of the Code (BIA-Navajo Area Office 1988:8). The statement of work provides that one of the ways in which the contractor will update the roll will be by

removing from the roll, names of individuals who have not met membership criteria pursuant to Navajo Tribal Code, tribal ordinances or official documents. Removal of the names shall be in accordance with established Navajo tribal procedures governing eligibility criteria . . . (BIA-Navajo Area Office 1988:8)

Thus, it would appear that if the contract proceeds as agreed upon, a Navajo tribal roll may yet be prepared using the BIA's original 1940 census of the Navajo Reservation as a basis and removing the names of individuals "who have not met membership criteria pursuant to Navajo Tribal Code."

#### Navajo Enrollment Processes

In 1954, the Navajo Tribal Council directed its Advisory Committee to establish an enrollment process. The Advisory Committee was authorized (1) to prepare the necessary rules and regulations to establish "eligibility for membership and enrollment in the Tribe;" (2) to set the standards of proof required; and (3) to prescribe whatever forms are needed to make application for enrollment. These tasks were accomplished in September of 1955 with the appointment of an Enrollment Screening Committee (ESC) to "consider all applications in the first instance" (PF:214-16). BAR interprets "in the first instance" to mean when the applicant's name is first considered. At that time, the Enrollment Screening Committee was provided with a set of instructions (referred to as the "six point instruction" in the proposed finding) to resolve "all cases" where Navajo agency records do not show the applicant to be "of at least one-fourth degree Navajo blood" and the applicant is not on the 1940 census and has not established the required blood degree by some other documentary means.

#### Enrollment Screening Committee (ESC)

##### Proposed Finding and Response

The proposed finding found that the Navajo Tribal Code had provided for the establishment of an Enrollment Screening Committee (ESC) to be composed of the Tribal Chairman, the Vice-Chairman, the Director of Land Investigations, the Agency Census Clerk, and the Tribal Legal Advisor (PF:214). The committee was to be responsible for considering all applications "in the first instance" and resolving questionable applications. The finding concluded that there was no evidence to show that the ESC was now functioning--or had ever functioned in the past--to consider Navajo or Paiute applications or to resolve questionable applications.

The Navajo response to the proposed finding did not comment on the finding's conclusion regarding the status of the Enrollment Screening Committee, nor

did it provide new evidence to show that the committee had ever functioned as intended under regulations set forth in the Navajo Tribal Code. A BIA employee close to the census process states that the Enrollment Screening Committee may not be in use by the Navajo Tribe (FD2).

### Enrollment Screening Process

#### Proposed Finding

The proposed finding was that enrollment procedures had been established by the Navajo Tribal Council in 1955, but that there was no evidence to show that these procedures had ever been used to enroll Navajos or Paiutes (PF:214-16). Although the process includes a four-page application form and specific instructions regarding standards to be used by the Enrollment Screening Committee (ESC) when considering applications for enrollment, there was no evidence to show that either the form or the instructions for review had ever been used. The finding noted that the standards set forth in the Navajo Tribal Code as guidance to the ESC were unclear and consequently raised numerous questions regarding how they would be interpreted (PF:215-16).

#### Discussion

The Enrollment Screening Committee was instructed to follow specific standards when reviewing applications for enrollment (PF:214-16; 1 N.T.C. § 553). These standards instructed the committee to approve the application in cases where the applicant appeared to be a full-blood Navajo. However, where the applicant appeared to be less than a full-blood but more than a quarter-blood Navajo, they were instructed to investigate and base their determination on six points (dubbed the "six-point instruction" in the proposed finding) (1 N.T.C. § 553).

The proposed finding raised several questions as to how the standards would be interpreted and how or whether they would apply to Paiutes, if the Navajo Tribe should prepare the tribal roll envisioned in the Code using these standards (PF:215-16). Areas of concern discussed in the proposed finding dealt with how the phrase "living among the Navajo people" would be interpreted; how conflicting records of blood degree would be handled; and whether the fact that Paiutes were not members of Navajo clans would be an automatic bar to their being included on a Navajo Tribal Roll. The Navajo response to the proposed finding did not address these questions.

Additional questions have also been raised by BAR staff as a result of their review of comments and materials submitted in the overall response to the proposed finding. These questions have to do with the applicant's language and whether or not "Navajo" must be applicant's primary language; how marriage to an "enrolled Navajo" would be interpreted, and whether a prior spouse would qualify; whether an individual who has a census number, is named on the "official roll" as Navajo, but is perceived by Navajos to be "Paiute" would qualify as an "enrolled Navajo" spouse.

#### Lack of Navajo Tribal Administrative Record

The proposed finding noted that no evidence had been found to show that the Navajo Tribe's governing body had ever acted upon or approved the issuance of census numbers to individuals (PF:208, 223). The finding also quoted former Chairman Zah as stating that the Tribe was "not aware of any formal appli-

cation submitted by any person petitioning to be included on the initial tribal roll . . . or the [BIA's] census . . . from 1928 through 1940" (Zah 1985a:9; PF:215).

The Navajo Tribe governs its affairs and its members by means of tribal laws and resolutions which have been codified in the Navajo Tribal Code. Sections of the Code which are particularly relevant to tribal membership determinations are listed below.

Navajo Tribal Code:

Membership Criteria 1 N.T.C. § 501 (adopted 1953)	Title 1, Chapter 7, Subchapter 1 (includes the "of Navajo blood" and "on the official roll" language).
Enrollment Procedures 1 N.T.C. § 551-560 (adopted 1955)	Title 1, Chapter 7, Subchapter 3 (includes the application form, the establishment of the Enrollment Screening Committee, and the six-point instructions for reviewing applications, and the handling of appeals).
Vital Statistics Dept. 2 N.T.C. § 2201 (adopted 1959)	Title 2, Chapter 5, Subchapter 47 (includes establishment of the Department to produce a Navajo Tribal Roll);
2 N.T.C. § 2203, and 2221-2227 (adopted 1982)	formerly § 2201, renamed "Navajo Tribal Roll;" Title 2, Chapter 5, Subchapter 48 (establishes "Navajo Office of Census and Vital Statistics" to produce a Navajo Tribal Roll; also adds two additional duties: (1) to develop and maintain accurate and current vital statistics record of Navajo members; (2) to provide support to Advisory and Enrollment Screening Committees "in connection with or in addition to the development of an official Navajo Tribal Roll as prescribed by 2 N.T.C. § 2203."

These sections of the Code have been amended to reflect minor organizational changes as recently as 1982 (Navajo Tribe 1982-83). One such change established a "Navajo Office of Census and Vital Statistics within the Information Services Department." The basic requirement to produce a Navajo Tribal Roll was unchanged. However, additional responsibilities for developing and maintaining vital statistics records of Navajo members and providing support to the Tribe's Advisory and Enrollment Screening Committees were added (see list above). The Code was previously amended in 1978 to change the name of the Vital Statistics Department to Information Services Department.

Notwithstanding the continued updating/amendment of the Navajo Tribal Code, there is still no evidence to show that these sections of the Code are or have been used by the Tribe to determine membership. Little if any evidence was provided or found to show that the Tribe's governing body has made any decisions regarding the membership of individual members, Navajo or Paiute;

thus, there is no tribal administrative record against which to evaluate whether Paiutes would be eligible for membership in the Navajo Tribe if they applied today.

#### Ambiguities in the Records

Ambiguities and inconsistencies in available records add confusion to the question of whether Paiutes would be included in a "Navajo Tribal Roll." One example of confusion generated by ambiguities in the records and the membership criteria relates to one Dora Nelson, a Paiute with a census number, who was identified as full Paiute on the 1928 census (BIA 1928). Dora appears progressively more Navajo in succeeding censuses until in the original 1940 census, she is identified as full Navajo (BIA 1930-39; 1940). However, the updated 1940 census has been annotated to show her as full Paiute (BB 1988d:vol. 1, Exh. 10) Based solely on available census records, an argument could be made for or against Dora Nelson's eligibility under the Navajo membership criterion of "of Navajo blood" and "on the official roll." However, notwithstanding this argument for eligibility for Navajo Tribal membership based on the printed record, there appears to be little question as to the family's ineligibility from a "social" perspective inasmuch as the family was identified as Paiute by Navajo Tribal Councilman Bert Tallsalt (and Wilbur Morgan, head of the BIA Census Office at Window Rock) in 1954, and was identified as Paiute in the 1973 list of Paiutes prepared by Rosie G. Hemstreet (a Navajo, then a BIA employee but formerly a Tribal employee of the Census Office at Tuba City). Dora's family was denied census number verification in 1983 because Dora, then deceased (d. 1944), was "verified as full Paiute." [For a more detailed discussion of Tallsalt's Paiute census and the Hemstreet list, see PF:197-98, 202-03.]

Another example of confusion can be found in the Owl family. An Owl with a census number is identified as a mixed blood (presumably Navajo and Paiute) in 1928, full Navajo in 1930, Navajo-Paiute in 1931-34, and full Navajo in 1937 and on both the original and the updated 1940 census (BIA 1928; 1930-39; 1940). The individual is identified as full Paiute in Tallsalt's 1954 census of Paiutes at Navajo Mountain; was said to be of "good Paiute lineage" by Navajo Mountain Boarding School Principal Lisbeth Eubank in 1960 (Shepardson 1960-62); and was identified by Hemstreet as Paiute in 1973. Although the individual appears to be regarded socially as "Paiute," census number verification does not appear to have been denied.

#### Enrollment Application Process

##### Proposed Finding

The proposed finding was that the enrollment process, adopted by the Navajo Tribal Council in 1955 and subsequently codified in the Navajo Tribal Code, contains a formal application process wherein persons unequivocally apply for membership in the Navajo Tribe (PF:214-15). The finding concluded that there was no evidence that the "application process" described in the Navajo Tribal Code had ever been used to enroll anyone--Navajo or Paiute--and that persons applying for census numbers do not appear to have unequivocally made application for membership in the Navajo Tribe.

Some explanation is needed here to distinguish between the Tribe's and the BIA's application processes and their related "application forms." The

Navajo Tribe's application process, herein referred to, is the enrollment process described in Sections 551-560 of Title 1 of the Navajo Tribal Code (PF:214-15). This process includes a four-page application form which unequivocally states the applicant's intent to apply for membership in the Navajo Tribe, and establishes an Enrollment Screening Committee (ESC) to review applications using a six-point instruction standard. The proposed finding reported that no evidence was found that the committee had functioned or that the application form or the six-point instruction standard had been used to determine anyone's eligibility for membership in the Tribe.

The BIA's application process is essentially the census numbering system which has been in continuous use since 1928 when it was first used to enumerate Indians (albeit mostly Navajo, but some Paiutes and other non-Navajo Indians) living on the Navajo Reservation who were eligible for services provided by the BIA to Indians of the reservation (PF:208-11). Although the form used to record information about a family has undergone several name changes over the years ("Family Sheet," "Application for Census Identification Number," "Change Sheet," "Application for Enrollment - Navajo Tribe"), it has, nonetheless, remained essentially unchanged in other respects. The vast majority of persons recorded on these forms are Navajo. When the Navajo Tribe adopted the BIA census as its "official roll," census numbers and other aspects of the BIA's census numbering process became known as "Navajo." This identification was further assured in August 1988, when the Navajo Tribe assumed all of the BIA's duties related to the continuing maintenance of the census under a Public Law 93-638 (Indian Self-Determination Act) contract (BIA-Navajo Area Office 1988). The BIA's "form" is the one reportedly being given out "by the [Tribe's] Vital Statistics/Census Office to those wishing to enroll in the Navajo Tribe" (Debowski 1989). No information was provided to indicate whether this form has been adopted by the Navajo Tribe's governing body to replace the form described in the Code (1 N.T.C. § 560). This is, however, the same form that was specified for use in the recent census contract negotiated between the BIA-Navajo Area Office (1988) and the Navajo Tribe. It bears a Government Printing Office number in the lower right corner (see appendix D). A comparison of the current form with earlier BIA/agency forms (appendices F-1 through F-4 of the proposed finding) shows the forms to have changed very little over the years.

#### "Application Numbers" and the "NTCR"

This section discusses the Navajo Tribe's apparent use and interpretation of the BIA's form (discussed above), as a so-called "application form." This is not a discussion of the Tribe's "application form" which is described in the Navajo Tribal Code.

The Navajo response provided information which appears to imply, by reference to family "application numbers" that appear on some of the so-called BIA "application forms," that specific San Juan Paiute families formally and intentionally applied for membership in the Navajo Tribe when these forms were prepared or information regarding census numbers issued was recorded. This implication comes from "application numbers" cited on what appears to be selected pages from a typescript "Navajo Tribal Census Roll" (hereinafter "NTCR") submitted in the Navajo response to the proposed finding (BB 1988d:vol. 1, Exh. 10). The Navajo response provides no information as to the origin, use, or possible significance to be applied to the NTCR itself.

Such reference to family "application numbers" conflicts with former Chairman Zah's answer to interrogatories wherein he states that the Navajo Tribe

. . . is not now aware of any formal application submitted by any person petitioning to be included on the initial tribal roll of the Navajo Tribe or the census prepared by the Bureau of Indian Affairs and its predecessor agency from 1928 through 1940. (Zah 1985a:9)

An investigation into the origin and use of the "application numbers" cited on the "Navajo Tribal Census Roll" shows them to be numbers which appear in the upper right corner of the BIA's so-called "application forms" (PF:237-40, appendix F; see also appendix D this report). The form appears to have typically originated at the agency level, where it was filed "alphabetically by name of the family head" (Henrikson 1962). The form was also copied and sent to the Census Office at Window Rock (aka Window Rock Census Office or "WRCO") which has historically served as the central repository for statistical information regarding the reservation. At WRCO it was assigned a number (i.e., the "application number") and filed numerically with forms from other sections of the reservation. The application number assigned by WRCO (for filing purposes) does not appear to have been communicated back to the originating agency, nor does it appear to have been used for anything other than routine filing purposes at WRCO.

#### So-called "Application Forms"

In conjunction with the BIA's review of materials received during the comment period, the Navajo Tribe was asked to provide copies of numbered "applications" cited on the "Navajo Tribal Census Roll" (BB 1988d:Vol. 1, Exh. 10; Vital Statistics 1989). A subsequent analysis of all available numbered "applications" (not all were numbered) shows the so-called "applications" to be the BIA's form. Individual forms do not provide evidence that persons recorded thereon have "applied for membership" in the Navajo Tribe. Nor do the forms provide evidence of how persons listed perceived the process of obtaining a census number which would entitle them to services provided by the BIA and later by the Tribe after the provision of such services was contracted to the Tribe.

The proposed finding was that these forms have been a part of the BIA's census numbering system on the Reservation since at least the early 1950's (PF:208). Available evidence strongly suggests that these forms were used by the Agency merely as information collection forms, to gather and preserve genealogical data about a family and to make an historical record of census numbers issued to family members.

The form contains no space to suggest that any action to approve or disapprove the form, the individual applicant, or the applicant family was contemplated when the form was designed. The form does not seek the information that would be needed by the Navajo Enrollment Screening Committee were it functioning--to properly evaluate the validity of the applicant's claim to membership under the standards set forth in the Navajo Tribal Code (1 N.T.C. § 560). Two of the standard's "six-points" are not addressed by this or any known prior form; namely, whether the applicant is a member of a Navajo clan and his/her ability to speak the Navajo language. Information regarding an individual's degree of Navajo blood, whether married to an enrolled Navajo,

and residence among the Navajo people for how long and where, can usually be obtained, directly or indirectly, from all versions of the form.

The so-called "application form" has been used to record information on Navajos and Paiutes alike. The form is never physically completed by the individual concerned. It records routine family events such as birth, death, marriage, divorce, adoption, etc., and the issuance/assignment of census numbers. The current form (appendix D) has no real title, but rather uses a multiple-use heading which requires the clerk who completes the form to check whether the form is being used as a "Census Enumeration Sheet," a "Change Sheet" (presumably for updating earlier family sheets), or an "Application for Enrollment Sheet." It should be noted that none of the headings is specific as to tribe. Based on available information, this version of the BIA form (i.e., in a "multiple-use heading" format) appears to have been in use by the BIA since at least early 1962. No training manual or similar documentation explaining the form's various uses or its proper preparation and handling was provided. No information was provided to indicate what criteria, if any, were to be used by census clerks when census numbers were issued and recorded on the form.

#### Tribal Government Action

The Navajo response provided no information to show any action by the Navajo Tribal Council or other tribal governing body officials to approve or disapprove these so-called "application forms," the "application numbers" assigned to the forms for filing purposes, or the actual census numbers which were recorded on these forms at the time they were assigned.

#### Conclusion re "Application Forms" and "Application Numbers"

The so-called "application forms" were developed by the Bureau of Indian Affairs to collect information in its census numbering process. These forms, in essentially the same format, have been--and still are--used to gather and preserve genealogical data about a family and to make an historical record of census numbers issued to family members. Their format does not contemplate approval or disapproval by the Tribe or the BIA. There is no evidence to show that the Navajo Tribal Council has reviewed or taken action of any kind to approve or disapprove the forms or the information recorded thereon. The forms themselves do not provide evidence that the family or its members knowingly applied for membership in the Navajo Tribe. Available information about the so-called "application numbers" related to these forms shows the numbers to have been assigned by the Window Rock Census Office for routine filing purposes, thus they are not valid evidence that San Juan Paiutes applied for membership in the Navajo Tribe.

### How are Census Numbers Actually Assigned

#### Proposed Finding and Response

The proposed finding reported that available evidence supported a conclusion that a significant number of census numbers have been issued as a result of school censuses taken annually by the BIA, the routine registration of births at Indian Health Service (IHS) hospitals on or near the Reservation, and at Indian Health Service (IHS) hospitals on or near the Reservation, and individual applications for census numbers in order to obtain social security benefits, legal documents and licenses (PF:208-11). No new evidence was submitted to refute this finding.

### Discussion

Numbers appear to have been issued routinely to persons applying for census number verification in order to obtain general assistance, food stamps, educational benefits, social security numbers and/or benefits, marriage licenses, and miscellaneous other benefits and services. Prior to the fall of 1960, census numbers were assigned individually by BIA census office personnel in the BIA central office at Window Rock (PF:194). Since that time, however, numbers have been assigned by census clerks employed by the BIA and the Tribe in agency census offices on the Reservation.

Available information also shows that until recently numbers were routinely assigned by BIA agencies when they automatically received notification of births occurring in Indian Health Service hospitals on or near the Reservation (PF:209). Information obtained by the Acknowledgment staff since the proposed finding was published indicates that IHS hospitals are no longer providing automatic notification of births and deaths (FD2). This change from prior notification practices appears to coincide with the August 1988 signing of the Navajo census contract whereby certification and custodial responsibilities for Federal records pertaining to the BIA's updated 1940 census (i.e., the defacto "Navajo Tribal Roll") were placed in the hands of the Navajo Tribe. Prior to August 1988, the Bureau of Indian Affairs served as custodian of the Federal records and as such was responsible for certifying information extracted from the records.

### Evidence of Paiute Intent to Enroll as Members

#### Proposed Finding and Response

With regard to evidence of Paiute intent to enroll as members of the Navajo Tribe, the proposed finding noted that a review of Privacy Act Disclosure forms produced only nine Paiutes who were purportedly issued census numbers for "tribal enrollment" purposes (PF:211). The finding also noted that five of the nine were the children of one Paiute woman who reportedly requested enrollment by letter in 1971, but that the letter had not been available for review. The finding went on to point out that when the Agency census clerk prepared the necessary paperwork in 1971, she identified the transaction as a "change" rather than an "Application for Enrollment" which had been an available option on the form (see appendix D). Further investigation since publication of the proposed finding suggests that the census clerk was an employee of the Tribe rather than the Agency (FD2). Responses to the proposed finding did not produce a copy of the 1971 letter.

#### Navajo Analysis of Individual Paiutes Enrolled

The Navajo response to the proposed finding claims that Navajo-enrolled Paiutes continue "to show their allegiance to the Navajo Nation" because they (i.e., members of the petitioning group with "Navajo census numbers") continue to enroll their minor children in the Tribe (BB 1988a:Exh. 11). The response provides a list of 19 individuals who have been issued census numbers since the Paiute acknowledgment petition was submitted. The Navajo response cites "Navajo Enrollment Numbers" (i.e., BIA census numbers) for each of the individuals and asserts they are enrolled in the Navajo Tribe. All are children who were born after May 1, 1980, when the petition was submitted. Six of the 19 children listed do not appear on the Paiute membership list. Three of the six were infants in December 1985 when the

most recent supplement to the San Juan Paiutes' membership list was submitted; three were not yet born (SJSP 1985d). No information was provided as to why these three children, who were alive in December 1985, were not included in the Paiutes' supplemental roll. Also with regard to the six, available information does not indicate why these children were issued census numbers or "how" their parents perceived the importance of having a census number.

### Analysis of Who Has Been Making Decisions

#### Introduction

Of equal importance to issues regarding what the Navajo membership criteria are, how the criteria are being applied, and whether the Paiutes meet them, are issues regarding what decisions have been made and by whom. Available evidence about decision-making is very limited and less clear than that surrounding Navajo membership criteria and standards, and how they are being applied.

#### History of BIA and Navajo Tribe Control of the Process

The census numbering process now in use on the Navajo Reservation was begun in 1928 by the Bureau of Indian Affairs. It was designed to take a reservation-wide census of all Indians under the agent's jurisdiction and was to be used for budgeting purposes by the Indian Department (PF:190-93). Although the requirement for a census was dropped in 1940, agencies on the Reservation continued to maintain the last census (i.e., the 1940). In 1953 the Navajo Tribal Council adopted membership criteria which incorporated the BIA's 1940 census as its tribal roll (PF:211-13). The membership criteria did not specify whether the 1940 census as it was originally prepared or the updated and annotated version was to be used as the Tribe's "official roll." The Tribe and the BIA both expressed concern about Paiutes and other non-Navajo Indians who were on the roll at the time it was adopted (PF:212-13). These concerns were raised again by the Tribe from 1969 to 1972, after the Paiutes had shared in the Southern Paiute Judgment Fund and the Tribe had begun to assume responsibility for providing services to Indians on the reservation (see previous discussion). Prior to the late 1960's and early 1970's, however, there is no apparent evidence of tribal control of the census numbering process. What little evidence is available is described in the sections which follow.

#### 1928 to Early 1950's

Paiutes appear to have obtained census numbers without question as Indians of the reservation for the period from 1928, when the census numbering process was first initiated by the BIA, until the early 1950's, when the Navajo Tribe began to address the question of the Tribe's membership criteria. During this period there is no evidence that administration of the census numbering process was anything but a "BIA process" under the control of agencies of the BIA.

#### 1950's to Early 1960's

Paiutes appear to have continued to request and obtain census numbers without a problem into the 1960's even though questions concerning their eligibility had been raised in the 1950's, when the Navajo Tribe was in the process of adopting membership criteria and enrollment processes.

In the summer of 1957, Wilbur Morgan, supervisor of the Navajo Agency Census Office in Window Rock, is reported to have stated that being included on the census of the Navajo Reservation did "not legally constitute membership in the Navaho(sic) tribe" (Johnston 1966:9).

Some question about Paiute eligibility is also implied in the Navajo Tribe's establishment of a Vital Statistics Department in 1959 to produce a Navajo Tribal Roll (PF:213-14). However, the fact that the Council did not act to resolve the Paiute presence on the Tribe's defacto "roll," nor did it develop the "Navajo Tribal Roll" required under Navajo Tribal Code, indicates that the Tribe was not in control of the census numbering process during this period.

The 1962 field notes of William H. Kelly, who was then doing a preliminary study of the "Navajo" census, describe the BIA census as "jointly maintained" by the Navajo Tribe and the BIA, but otherwise "essentially a vital statistics record" (Kelly 1962).

#### Late 1960's to Early 1970's

Evidence surrounding the period from the late 1960's into the early 1970's is also limited. To obtain social services on the Reservation, Indians had to have census numbers. Available information shows that Navajos who came to the BIA Social Services office to request services and did not have a number were sent to the Census Office to get one. Paiutes on the other hand were issued temporary numbers ("T" numbers, also known as "Paiute numbers") by the Social Services office to accommodate the computer. Although we have specific numbers for only four Paiutes, reports are that 99 percent of the "T numbers" issued were given to Paiutes, the balance to other non-Navajo Indians (FD2).

An unpublished report of an anthropology student in the fall of 1971 provides the report that Willow Springs Paiutes had confirmed information "obtained at the Agency office: that the Navajo Tribe is no longer issuing census numbers to Paiutes" (Mowrer 1971).

The only evidence of action by an arm of the Navajo governing body at this time is a 1972 resolution from the Tribe's Bodaway-Gap Chapter which favors Paiutes having census numbers as well as the "right" to have numbers (Bodaway-Gap Chapter 1972). Although the resolution endorses the Paiutes' "right" to have numbers, its very language sets them apart as not members of the Navajo Tribe. No similar resolutions by other chapters were provided. The Bodaway-Gap resolution is, however, not directly germane to who controls the actual census number issuing process.

#### Mid-1970's to 1980's

Evidence of some Tribal control can be seen in actions of the 1970's. In 1977 the Navajo Area Director wrote to the BIA Central Office in Washington asking for an explanation as to how the Paiutes got on the "Navajo Tribal Roll" (McBroom 1977). No response was provided by the BIA. Information received subsequent to publication of the proposed finding characterizes this inquiry--and an identical one written in 1981 (Dodge 1981)--as sent in response to requests from the Tribe (FD2).

In June of 1978 the Director of the Tribe's Information Services Department wrote to the Department of the Interior's Field Solicitor at Window Rock to inquire as to the "effect of the Privacy Act on the release of vital statistics information" (Back 1978a). When a brief investigation showed "no maintenance or control of the records," the Field Solicitor urged that "some provision be made for federal control" because they were Federal records and the Federal Government would be liable for damages if they were lost or stolen (Back 1978a). Following a subsequent inquiry from the Navajo Area Office regarding the feasibility of the Tribe's contracting for the "operation of the Navajo Tribal Roll," the Field Solicitor replied that

It is within the parameters of Public Law 93-638 for the Tribe to contract the clerical responsibilities related to the operation of the roll, however, management and supervision of the existing federal records must be maintained by Bureau of Indian Affairs. (Back 1978b)

#### Contracted Census Operations (1980's)

The Navajo response to the proposed finding points to its duties in conjunction with the current and previous census contracts, authorized under Public Law 93-638 (Indian Self-Determination Act), as evidence of its active role in the decision-making process surrounding census number issuance and verification (BB 1988a:28).

On October 1, 1982, the clerical operation of maintaining the BIA census roll was formally contracted to the Navajo Tribe under a three-year Public Law 93-638 contract (BIA-Navajo Area Office 1982). Under this contract, the Navajo Tribe was to assume the "contractible Tribal enrollment functions" while the BIA retained the "non-contractible certification and reporting functions." The contract's Scope of Work provided for a three-phase program with long range goals. The first phase was designed to correct, update and microfilm old records; the second phase involved "substantial revisions of the Tribal Code and enrollment procedures in coordination and cooperation with the Navajo Department of Justice, the Advisory Committee and the Navajo Tribal Council;" the third phase was the automation of the heretofore manual enrollment system (Elbert 1987; Bush 1987). Thus the routine maintenance of the BIA's census operation was contracted out to the Navajo Tribe for the period October 1982 to September 1985, while the "non-contractible certification and reporting functions" continued to be handled by Agency personnel.

When the Tribe applied in 1985 to the BIA to recontract for the "operation and administration of the census program," their request was denied for lack of available funds (Barber 1985). The Tribe ultimately appealed the denial to the U.S. District Court of the District of New Mexico. In 1987 the Court found that

the agency (BIA) failed to develop an adequate administrative record to support its decision not to recontract because of lack of sufficient funds, and as a result, such a decision was 'without observance of procedure required by law.' (Vollmann 1987)

The Court remanded the case back to the BIA to recontract with the Tribe to develop a "proper record" and provide the required "technical assistance and

procedural safeguards" under the Indian Self-Determination Act, Public Law 93-638 (Vollmann 1987). The Court did not rule on the underlying questions of whether the BIA's census roll was in fact the Tribe's official roll, or who (the Tribe or the BIA) is responsible for maintaining a tribal membership roll.

A new contract was signed on August 31, 1988, which states that the contractor (the Navajo Tribe) will "provide tribal enrollment and vital record services, including activities involved in compilation and documentation of tribal membership" (BIA-Navajo Area Office 1988). Custodianship of the records and responsibility for certification as to information provided therein (formerly not contractible duties) have been contracted to the Tribe. Thus, the Tribe now has full responsibility for maintaining the BIA's census and, in fact, the contract states that the "original 1940 census of the Navajo Reservation prepared by the BIA shall be duplicated . . . and used until such time as a base roll is designated in the Navajo Tribal Code [emphasis added]" (BIA-Navajo Area Office 1988).

#### Denial of Census Number Verification (1983-85)

The proposed finding discussed four separate notations found in files at the Western Navajo Agency Census Office in Tuba City (PF:217-18). These notations, made between October 1983 and March 1984, denied census number verification to certain members of the Whiskers, Lehi, Norman, and Nelson families who have census numbers. The proposed finding credited these notations to actions of BIA (Agency) personnel which led the Navajo response to criticize the finding as improperly relying on the unauthorized statements of BIA personnel (BB 1988a:16, 18-21).

The proposed finding also discussed a February 1984 letter from Agency Superintendent Irving Billy to DNA-Peoples' Legal Services attorney Irene Barrow which refused agency verification of census numbers (PF:218). Billy referred Barrow to Ms. Sylvia Barton, manager of the Tribe's Census and Statistical Services office, for "further information concerning Navajo membership and/or enrollment of the subject Paiute Indians" (PF:218). Billy's referral to the Tribe was made at a time when verification/certification was still considered a non-contractible agency function.

Subsequent staff research on comments submitted in response to the proposed finding shows these notations to have been written by the BIA employee in charge of the BIA's Western Navajo Agency Census Office to document instructions to deny census number verification which had been received from the assistant manager of the Window Rock Census Office--then a Tribal employee (FD2). Thus the denials in 1983-84 (during the period of the first census contract) appear to be the first clear evidence of actions taken by census office clerks who were employees of the Navajo Tribe. There is, however, no evidence connected with these denials that shows any action on the part of the Navajo Tribal governing body, nor is there any evidence of "Navajo enrollment processes" at work.

Based on the language of the notations (PF:217), decisions to deny census number verification appear to have been based on information obtained from the BIA's census, probably the updated version of the 1940 census and/or the

1928 census. The following table shows how the central figures in each of the notations were recorded in three of the available census schedules:

Tribal Ancestry as Recorded in BIA Censuses  
(F stands for Full blood)

	1928 <sup>1</sup>	1940 Orig <sup>2</sup>	1940 Updated <sup>3</sup>
Anna Lehi Whiskers	Paiute F	Paiute F	<del>Navajo</del> ? Paiute F(sic)* Paiute F*
Marie Lehi	" "	" "	Paiute F
Joe Norman	" "	" "	" "
Dora Nelson (decd)	" "	Navajo F	" "

\* Two separate pages were provided for Anna Lehi Whiskers, both of which appear to be from the 1940 updated census.

<sup>1</sup> (BIA 1928-29)

<sup>2</sup> (BIA 1940)

<sup>3</sup> (BB 1988n)

Another denial occurred in 1985, when Anna Lehi Whiskers, who had been listed as "Enrolled in the Navajo Tribe" in the Navajo's Initial Response to Interrogatories in November, 1984 (Zah 1984:6A-H), was omitted from the Tribe's Amended Response in January, 1985 (Zah 1985:6A-H). Anna Whiskers was issued a census number in 1928. Three other San Juan Paiutes (Marie Lehi, Joe Norman and his wife Frances) were omitted from both the Initial Response and the Amended Response, despite the fact that they have had "census numbers" since 1928. The Tribe's Second Supplemental Response to the Paiute petition includes a late 1985 affidavit by Sylvia Barton, Director of the Navajo Census and Statistical Services Office at Window Rock, in which she states that part of her duties are "to certify whether or not a given individual is duly enrolled as a member of the Navajo Tribe" (BB 1986: Exh. III). Her affidavit goes on to certify an annotated list entitled "Individuals Enrolled in Navajo Tribe" (BB 1986: Exh. II). This list does not include the same four Paiutes who have census numbers (Anna Lehi Whiskers, Marie Lehi, Joe and Frances Norman). While there is no clear evidence regarding who made the decision to omit these individuals, Ms. Barton's affidavit, coupled with Superintendent Billy's deferral to Ms. Barton, and the instructions of tribal census clerks to deny census verification to the four families in 1983-84, strongly suggest that these decisions have been made by census office clerks who are employees of the Tribe and not by the Tribe's governing body as specified in the Navajo Tribal Code.

Conclusion

It appears from the little information that is available that tribal census office employees may have begun making determinations as to who would be issued census numbers in the late 1960's and early 1970's. However, the only real evidence regarding decisions to deny census number verification appears in 1983, 1984, and 1985 (Jimmie 1983, 1984a, b; Zah 1985:6A-H). There is

virtually no information to show the basis for decisions to issue or deny census numbers (i.e., using what criteria or standard and what evidence). There is no evidence to show that the Tribe's codified membership criteria or its established enrollment and appeals procedures were utilized in making these decisions. In all instances since 1983 for which there is information (probably since October 1982 when the first census contract was signed), these decisions appear to have been made by tribal employees without input from or action by the governing body of the Navajo Tribe. The net result is that Paiutes who acquired their census numbers through a BIA census enumeration process have been denied the benefit of their numbers due to clerical decisions by Navajo Tribal census office employees and not through any tribally-established enrollment process. Available evidence supports the conclusion that the Navajo Tribe's role has been played out by Tribal census office employees who have been caretakers and maintainers of a census numbering system established by the Federal Government (BIA) to enumerate Indians of the reservation and that the Tribe's governing body has not exercised its responsibility and power to determine the Tribe's membership.

#### General Conclusion Regarding Paiutes as Members of the Navajo Tribe

Paiutes who appear on the BIA's census of the Navajo Reservation are perceived to be members of the Navajo Tribe primarily because they have census numbers and their names appear on a reservation-wide census which has been maintained since 1940 by the BIA and, more recently, by the Tribe. The Navajo Tribal Council adopted the BIA's census in 1953 (along with the census numbering system on which it operates) as the Tribe's "official roll." Over the intervening years, the roll and its corresponding census numbers have come to be perceived as evidence of membership in the Navajo Tribe. There is little evidence to indicate that any members of the San Juan band consciously applied for membership in the Navajo Tribe.

In conjunction with the Tribe's adoption of the census, it also established a formal application process and an Enrollment Screening Committee to review all applications in the first instance. Standards to be used by the committee when reviewing applications were developed and codified in the Code. There is no evidence to show that the Enrollment Screening Committee has ever functioned. Nor is there evidence to show that the standards set down for the Committee have ever been used to determine the eligibility of Paiutes or Navajos for membership or census numbers. There is, in fact, no evidence to show that the Tribe's formal application process has ever been used to enroll anyone.

The Tribal Council established a Vital Statistics Department in 1959 to organize and produce a Navajo Tribal Roll of all Navajo persons who were entitled to share in tribal benefits. The Tribe has not produced a tribal roll, nor is it known to have developed the regulations required to produce such a roll. The current Navajo census contract suggests that preparation of a Navajo Tribal Roll is still contemplated.

The census numbering system was instituted by the BIA in 1928 as a means of determining eligibility for services provided by the BIA to Indians on the reservation. Several San Juan Paiute families received census numbers in the 1920's at a time when the process assigned numbers to "Indians" without

regard to tribal ancestry. Number assignment was part of a reservation-wide census enumeration and individuals were not asked if they wanted to be members of the Navajo Tribe. Census numbers were for use in obtaining vital services. Notwithstanding the Tribe's adoption of the BIA's census as its "official roll," the census operation was a "BIA" process until the early 1980's when maintenance of the census was contracted out to the Navajo Tribe under a Public Law 93-638 contract.

There is essentially no evidence that the governing body of the Navajo Tribe has been making decisions regarding the eligibility of individuals, whether Navajo or Paiute. The few decisions that were made in 1983-85 to deny verification of census numbers to four families, who are members of the San Juan Paiute band and were previously deemed eligible, appear to have been made by tribal census clerks with no apparent input from the governing body of the Tribe.

The only suggestion of possible governing body involvement is the 1972 resolution of the Bodaway-Gap chapter which allowed Paiutes to have census numbers. While the resolution acknowledges their "right" to have census numbers, it also clearly identifies the Paiutes as distinct from the Navajo Tribe.

Based on available evidence, we conclude that the Navajo Tribe does not maintain a tribal roll of its members within the meaning of the Acknowledgment regulations (25 CFR 83.1(k)). Thus, the San Juan Paiutes are not listed on a Navajo Tribal Roll within the meaning of the Acknowledgment regulations and, therefore, are not legitimately members of the Navajo Tribe.

#### ASSOCIATION WITH OTHER RECOGNIZED TRIBES

The finding pointed out that the names of 23 additional San Juan Paiutes (12%) appeared on the membership rolls of three other federally recognized tribes. However, the issue regarding the 23 had not been researched in depth because the decision on the Paiutes' petition turned on the 119 Paiutes with "Navajo census numbers" and whether they were, in fact, members of the Navajo Tribe as the Tribe claims. The decision not to research the 23 in depth was made in the interest of the best utilization of staff time. If the 119 San Juan Paiute members who appeared on the defacto "Navajo Tribal Roll" were determined not to be members of the Navajo Tribe, the 12 percent who appeared on the rolls of other recognized tribes would not, by itself, be of sufficient proportion to deny the group acknowledgment under criterion 83.7(f).

#### FEDERAL ACTIONS TERMINATING OR FORBIDDING THE FEDERAL RELATIONSHIP

The proposed finding concluded that the petitioner met criterion g because it was not subject to Congressional legislation which expressly terminated or forbade the Federal relationship (PF:xix). The Navajo response reiterates the contention, set forth in its preliminary response, that the Paiutes do not meet criterion g because of executive branch and Congressional actions (BB 1988a:84, 1985a:65-70). These arguments and the actions cited in the Navajo response were examined in preparing the proposed finding, but not explicitly commented upon.

The Navajo response argues that the executive branch action in 1922 restoring the reservation established in 1907 for the San Juan Paiutes constituted "termination" of them as a tribe. The reservation was restored to public domain on the basis of inaccurate information at the time that the Paiutes were not occupying it (PF:43-44, 49). There was no executive branch action taken indicating that the Tribe was no longer recognized. Correspondence immediately subsequent to the 1922 reservation withdrawal clearly indicated that the BIA, through either the Western Navajo or Consolidated Ute Agencies, considered the San Juan Paiutes a tribe under its jurisdiction (PF:49, Zeh 1930, Merrit 1925, 1925b). No later executive branch actions denying recognition were found.

No legislation terminating the San Juan Paiutes or forbidding them from being acknowledged as an Indian tribe was found. The Navajo response cites Public Law 93-351, the 1974 Hopi-Navajo Settlement Act (88 Stat. 1171), which provides for allotments for Paiutes "not now members of the Navajo Tribe." The response argues that since this act deals only with the Paiutes as individuals, Congress intended that the Paiutes on the Navajo Reservation be treated as individuals and not as a tribe (BB 1988a:67). Nothing was found in the background of the inclusion of this language in the act or in the language of the act itself to support this interpretation (House of Representatives 1972). The act makes no reference to or provisions for or against the San Juan Paiutes as a tribal entity, and thus does not forbid their acknowledgment as a tribe.



United States Department of the Interior



OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

APR 3 1987

In reply, please address to:  
Main Interior, Room 6456

BIA.IA.0779

Memorandum

To: Deputy to the Assistant Secretary--Indian Affairs  
(Tribal Services)

From: Assistant Solicitor, Branch of Tribal Government and  
Alaska

Subject: Issues pertaining to acknowledgment of San Juan  
Southern Paiutes and relationship of 25 CFR §§83.1(k),  
83.3(d) and 83.7(c) and (f).

Your draft proposed findings on the petition for acknowledgment submitted by descendants of the San Juan Southern Paiutes has raised questions as to the relationship between 25 CFR §§ 83.3(d) and 83.7(c) and (f) and the definition of "Member of an Indian tribe", 25 CFR §83.1(k). You have requested an opinion on those questions.

You have inquired whether Section 83.3(d) can be considered an exception to the requirements of Section 83.7(f). For the reasons discussed below, the better interpretation is that Section 83.3(d) is not an exception to the requirements of Section 83.7(f). Further, since Section 83.3(d) is not an exception to the requirements in Section 83.7(f), it cannot obviate the need to comply with the requirements of Section 83.7(f), all of which are mandatory.

Your regulations provide in part:

83.3 Scope.

...

(d) Nor is this part intended to apply to splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department, unless it can be clearly

established that the group has functioned throughout history until the present as an autonomous Indian tribal entity. (Emphasis added.)

and

83.7 Form and content of the petition.

... All the criteria in paragraphs (a)-(g) of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

...

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

...

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

First, the plain language of Section 83.7(f) gives no indication of any possible exceptions. In fact, the contrary is true since the language of the section plainly states the criteria in subsections (a)-(g) are "mandatory". The plain meaning of "mandatory" is that there are no exceptions.

Second, Section 83.3 is a general provision relating to the scope of the regulations. Section 83.7 is of a different nature. It is a very specific section enumerating the mandatory criteria for being acknowledged. As a simple rule of regulatory interpretation, specific provisions must control general ones in the event of an apparent conflict. Thus, the more specific provisions of Section 83.7(f) should control here.

Third, the qualifying language of Section 83.3(d) emphasized above is actually a repetition of the separate requirement in 83.7(c) that the petitioner have been "an autonomous entity throughout history until the present." What the emphasized language says is that if groups can clearly meet the requirements of Section 83.7(c), they can be acknowledged to exist as tribes under the regulations even though some persons may have viewed them as "splinter groups, political factions, communities or groups of any character" which have separated from the main body of the tribe.

The emphasized language of Section 83.3(d) merely qualifies the general rule that the regulations are not intended to apply to splinter groups, political factions, communities or groups of any character which have separated from the main body of the tribe. Words and groups of words that are related in thought should be kept together and will be construed in relationship to each other. Therefore, as a matter of both grammar and organizational structure of the regulations, the emphasized language should be interpreted as a qualification of more proximate language of the general rule and not as an exception to the more removed specific requirements of Section 83.7(f).

The real issue raised by your draft proposed findings, however, is not whether Section 83.3(d) is an exception to Section 83.7(f). The real issue is whether the membership of the petitioner is principally composed of "members" of another tribe. On page xii of the draft summary, you state that "the determination of enrollment in a recognized tribe has been based solely on the individual's having a 'Navajo Census Number'." Given the unique origins and history of the Navajo Reservation census which your technical reports describe in considerable detail, you are not justified in relying solely on the assignment of BIA and "Navajo Census Numbers" to prove the petitioner is principally composed of "members" of the Navajo Nation. Section 83.7(f) is not framed in terms of "enrollment" as your draft implies but rather it is framed in terms of "membership". Further, there is nothing in the plain language of the regulations which requires that you give such a conclusive effect to the assignment of the census numbers.

"Member of an Indian tribe" is defined in Section 83.1(k) as:

"Member of an Indian tribe" means an individual who meets the membership requirements of the tribe as set forth in its governing document or is recognized collectively by those persons comprising the tribal governing body, and has continuously maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

There appear to be two elements to membership as it is defined in the regulations. Each element has two alternatives. Thus, a member of an Indian tribe is an individual who: 1) meets the procedural and substantive requirements for membership in the tribe as described in the tribe's governing document or is recognized by the tribal governing body; and 2) has continuously maintained tribal relations with the tribe or is on the rolls. By providing alternatives, the regulations have created the possibility of apparent conflict between the facts supporting each of the alternatives within in an element. In resolving any such apparent conflicts, you should apply general principles governing tribal membership.

Thus, as to the first element for example, a tribe's governing document may describe its membership in very broad terms. However, if the tribe has as a matter of practice interpreted and applied the terms of that document in a more limited sense, it is the document as it has been applied which will govern whether an individual satisfied the first element of the definition of member in your regulations.

In assessing whether an individual has been recognized as a member by the tribal governing body, you should give great weight to the views of the governing body. The views of the tribal governing body may not be conclusive, however, since membership in an Indian tribe is a bilateral, political relationship. See, F. Cohen, Handbook of Federal Indian Law 135-136 (1942 ed.); see also, Solicitor's Opinion, 55 I.D. 14, 1 Op. Sol. on Indian Affairs 445, at 459 (U.S.D.I. 1979).

The fundamental importance of the bilateral nature of membership cannot be underestimated. The constitutionality of many of the laws which relate to Indians depends on the fact that membership in an Indian tribe is a political relationship, not a racial one. See Morton v. Mancari, 417 U.S. 535 (1974). Thus, the Bureau has asserted for many years that automatic membership in Indian tribes should be limited by tribal constitutional provisions which are reasonably designed by the tribes to restrict the privilege of membership to those individuals who by virtue of a particular blood quantum or being born while their parents resided on the reservation could offer objective evidence of maintaining tribal relations. See, J. Collier, Membership in Indian Tribes - Circular No. 3128, November 18, 1935.

While there may be all sorts of facts which evidence maintenance of tribal relations, the most obvious is probably the fact that an individual's name appears on a tribal roll. Thus, tribal rolls are a short-hand alternative to a finding of the maintenance of tribal relations as the second element in the definition of "member" in your regulations.

Unfortunately, while the regulations refer to "tribal rolls", that is not a precise term. Tribes develop lists of members in an almost infinite number of ways. Some are complex and comprehensive and others are more casual. The nature of any given list of members and the circumstances under which it was prepared must be considered before determining the list of members in question is in fact a "tribal roll" within the meaning of the regulations.

Obviously, if the list of members was prepared as a result of a formal tribal process whereby individuals made application, were reviewed by an independent tribal enrollment committee and granted appeal rights, the inclusion of an individual's name on the list would be the strongest evidence of maintaining tribal relations. However, a list of members which was casually created or simply an adaptation by the tribe of a list originated or

prepared by the BIA either as a census or for some other purpose, such as eligibility for BIA or other Federal programs, would be of limited value, if any, as evidence of the maintenance of tribal relations. To be a "tribal roll" within the meaning of the regulations, the list of members should be one which was prepared under circumstances indicating strongly that it represents a list of those maintaining tribal relations.

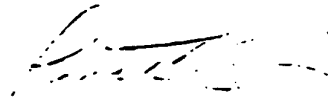
In making your determinations, you may give weight to the views of individuals to the extent you may have such evidence, which is not to say that you must or even should solicit individual views. The views of individuals are relevant, however, because, as already noted, membership is a bilateral relationship and an individual is free to terminate his membership at any time. See, Solicitor's Opinion, 55 I.D. 14, 1 Op. Sol. on Indian Affairs 445, at 459 (U.S.D.I. 1979). If an individual's name appears on a BIA service list for a particular tribe yet the individual indicates that he has always thought that meant he was a member of the tribe, you are justified in giving the individual's views some weight. Conversely, if the individual's name appears on what appears to be a tribal roll but the individual has indicated that he thought the list was merely for purposes of establishing eligibility for Federal programs, you may also consider such views.

In summary, in making a determination as to whether a petitioner has avoided the prohibition of Section 83.7(f), you must make a determination as to whether the petitioner is principally composed of members of another tribe. In making that determination, you must evaluate carefully all the facts presented by the petitioner and developed by your staff and be guided by the essential principles of tribal membership in reconciling seemingly inconsistent or ambiguous facts.

Your request for an opinion also asks the related question of whether a petitioner which meets all of the acknowledgment criteria except Section 83.7(f) may qualify for acknowledgment if the persons composing it relinquish their membership in the recognized tribe or tribes. What is relevant for the purposes of Section 83.7(f) is whether the petitioner is composed of members of another, federally acknowledged tribe at the time of acknowledgment. As already noted, an individual can terminate his membership in a tribe at any time. Thus, those composing the membership of the petitioner may resolve any doubts concerning whether they have maintained membership in or some degree of affiliation with another tribe at some time previously by providing evidence of relinquishment of their membership in the other, federally acknowledged tribe or a disclaimer of any affiliation with such a tribe. A petitioner which can provide such evidence would then be acknowledgeable, provided, of course, that additional evidence did not come to light which would lead to a reversal of the proposed finding that the petitioner met all of the other criteria.

Another related question which you have not asked but which is suggested by the facts of this particular case concerns the effect of a prohibition on dual enrollment. Although there is no general prohibition against membership in more than one tribe (F. Cohen, Handbook of Federal Indian Law 137 (1942)), the Navajo Nation does have such a prohibition. However, since the Navajo Nation does not recognize the San Juan Southern Paiutes as a tribe, it cannot invoke its dual membership prohibition to disenroll members of the petitioners. Thus, this prohibition does not now create a problem and any attempt to analyze its effect would be premature.

I hope that these comments have been of help. Please let me know if you have any questions.



Scott Keep



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

JUN 5 1987

In reply, please address to:  
Main Interior, Room 6456

BIA.IA.0779

Memorandum

To: Deputy to the Assistant Secretary--Indian Affairs  
(Tribal Services)

From: Assistant Solicitor, Branch of Tribal Government and  
Alaska

Subject: Additional issues pertaining to acknowledgment of San  
Juan Southern Paiutes.

In my memorandum to you of April 3, 1987, I addressed the major issues raised by your draft proposed findings on the petition for acknowledgment submitted by descendants of the San Juan Southern Paiutes. There is one additional issue which is indirectly suggested by our review and analysis of the regulations.

Apparently, our analysis of the regulations and conclusions was different from that of some of your staff. When I initially discussed the relationship of Sections 83.3(d) and 83.7(f) with some of your staff, they advised me orally that their past practice had been to treat Section 83.3(d) as an exception to Section 83.7(f). They indicated further that they had advised other petitioners orally and in writing of their views. Since agency practice may have some relevance in interpreting regulations, I asked for copies of the correspondence.

I have reviewed the correspondence, and, while there may have been some confusion or uncertainty as to the relationship between the two provisions of the regulations, I found nothing which established an agency interpretation or practice contrary to or inconsistent with my earlier memorandum. There is nothing which would require treating Section 83.3(d) as an exception to the requirements of Section 83.7(f).

I hope that these comments have been of help. Please let me know if you have any questions.

  
Scott Keep



# United States Department of the Interior



OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

JAN 27 1989

BIA.IA.0779

To: Deputy to the Assistant Secretary - Indian Affairs  
(Tribal Services)

From: Associate Solicitor, Division of Indian Affairs

Subject: San Juan Southern Paiute Final Determination

In response to your memorandum of October 14, 1988, to the Assistant Solicitor for Tribal Government & Alaska, I have reviewed the legal opinion of April 3, 1987, concerning tribal membership, which the petitioner and the intervenor, the Navajo Nation, addressed in their comments upon the proposed finding published in the Federal Register (August 11, 1987). The Assistant Solicitor's conclusion that 25 CFR §83.3(d) is not an exception to the requirements of §83.7(f) is a sound interpretation of Part 83. Compliance with all of the requirements of §83.7, including §83.7(f), accordingly is necessary.

I do not find there to be adequate support, however, for the prior opinion's interpretation of the definition of "Member of an Indian tribe", in §83.1(k), which is determinative of the application of §83.7(f). A fundamental principle of statutory construction requires that the starting point of interpretation be the language of the statute itself. Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 919 (2d Cir. 1987), citing American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). Here, we start with the language of the regulation itself.

There is no need to resolve "apparent conflicts" between the alternative criteria as stated in the April, 1987, opinion, because unless the context or legislative intent indicates otherwise, the use of the disjunctive in statutes and regulations indicates that alternatives were intended. Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343, 1349 (10th Cir. 1987). Normally, "and" and "or" are not interchangeable. Nichols v. Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 890, n.79 (D.C. Cir. 1987).

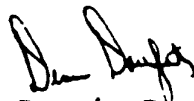
There is nothing in the legislative history of §83.1(b) to indicate that other than the stated combinations of alternatives are required to define membership in an Indian tribe. See, 43 Fed. Reg. 39,361; 43 Fed. Reg. 23,743; 42 Fed. Reg. 30,647. In §83.1(k), any stated combination of the following components will suffice to fulfill the definition of membership: 1) meeting the

membership requirements of the tribe as set forth in its governing document, or 2) being recognized collectively by those persons comprising the tribal governing body, and 3) having continuously maintained tribal relations with the tribe, or 4) being listed on the tribal rolls of that tribe as a member, if such rolls are kept.

There is no need to meet the criteria of both components 3) and 4); as alternatives, either will suffice to combine with components 1) or 2) to meet the membership criteria of §83.1(k). Nor do I find anything in the regulations that would give the term "tribal roll" any meaning other than that ordinarily applied by the BIA and the tribe in question. Specifically, nothing in the history of this regulation suggests there is a need to consult component 3 in order to divine the meaning of component 4. The existence of a roll and its use by the tribe as a membership listing device are the essence of component 4). While the circumstances of its compilation may be relevant in determining the tribe's view of the roll, those circumstances do not justify the Department in substituting its judgment as to what constitutes a tribal roll for that of a tribe already acknowledged by the Department.

This opinion reexamining the definition of "Member of an Indian tribe" would not, assuming the correctness of your finding that a majority of the petitioners meet neither component 1) nor 2) of §83.1(k), require a reversal of your proposed finding on criterion 83.7(f). The petitioning group would still not be principally composed of members of other tribes given your findings as to components 1) and 2), as I understand them. Since all interested parties seem to have fully briefed all components of definition 83.1(k), only minimal additional opportunity for further comment need be afforded to interested parties if this revised legal interpretation does not change the result of the proposed finding.

This memorandum concerns only the legal question previously addressed April 3, 1987 and does not address the findings of fact. Given the probability of legal challenges to the result of your determination, regardless of the outcome, I would recommend that you review your draft final determination with the staff of the Branch of Tribal Government and Alaska.



Dennis Daugherty





# United States Department of the Interior



OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

NOV 21 1989

In reply, please address to:  
Main Interior, Room 6456

BIA. IA. 0779

Memorandum

To: Deputy to the Assistant Secretary--Indian Affairs  
(Tribal Services)

From: Deputy Associate Solicitor, Division of Indian Affairs

Subject: Response to comments of applicant for federal  
recognition of the San Juan Southern Paiute Tribe  
concerning 25 C.F.R. § 83.3(d)

This responds to your memorandum dated August 25, 1989, requesting our review of arguments submitted by the petitioner for federal recognition of the San Juan Southern Paiute Tribe in response to the conclusion in our opinions dated April 3, 1987, and January 27, 1989, that 25 C.F.R. § 83.3(d) does not constitute an exception to the requirement of 25 C.F.R. § 83.7(f) that the membership of a petitioning group be composed principally of persons who are not members of any other North American Indian tribe.

Section 83.3(d) provides:

Nor is this part intended to apply to splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department, unless it can be clearly established that the group has functioned throughout history until the present as an autonomous Indian tribal entity.

Our 1987 memorandum concluded that neither § 83.3(d) nor § 83.7(f) contain any language that can be construed as establishing that the former was intended as an exception to the latter. That memorandum construed the language at the end of § 83.3(d) as meaning that if groups can clearly establish that they have functioned throughout history until the present as an autonomous Indian tribal entity, they can be acknowledged to exist as a tribe under the regulations even though some persons may have viewed them as "splinter groups, political factions, communities or groups of any character which have separated from the main body of the tribe."

As is clear both from the title of § 83.3 and the specific language in § 83.3(d), that section describes the scope of the regulations. That section provides that some groups are outside the scope of Part 83 and, therefore, may not obtain federal acknowledgement, and that any other groups are within the scope of Part 83 and may be able to obtain acknowledgement if they meet the criteria specified in Part 83. Nothing in § 83.3 provides for any groups to be acknowledged without compliance with Part 83.

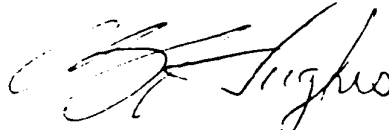
The petitioning group, on pages 6-8 of its response to the comments of the Navajo Tribe, argues that the persons involved with the day-to-day application of regulations have consistently viewed § 83.3(d) as an exception to § 83.7(f). In footnote 5 the petitioner quotes language from the proposed finding stating that § 83.3(d) "...had been understood to describe a possible exception to criterion 83.7(f)..." and attaches three letters dated May 6, 1980, August 11, 1981, and December 18, 1985, from the BIA that it believes documents that understanding. The quoted language in the proposed finding does not assert that the staff's understanding has been either consistent or longstanding. All three of the attached letters simply state that a group that separates from, or is currently part of, a recognized tribe may be recognized only if it can show it has functioned autonomously throughout its history. None of those letters asserts that a group, even if it has functioned autonomously throughout its history, may be acknowledged without complying with § 83.7(f).

In footnote 6 the petitioning group argues that even if it were a "splinter group" of the Navajo Tribe, it could not be denied acknowledgement so long as the Paiute Tribe had not abandoned its tribal government citing The Kansas Indians, 72 U.S. (5 Wall,) 737 (1867), and Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976). Under § 83.7(c) and (f), however, a group must have both an unbroken history of tribal autonomy and a membership composed principally of persons who are not members of any other North American Indian tribe.

On pages 2-4 the petitioners argue by analogy that, since integration of tribal members into the United States does not deprive a tribe of its tribal status (citing The Kansas Indians, Moe, and Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979)), integration into another Indian tribe should not prevent a group from being acknowledged as an Indian tribe. Those cases were decided, however, against a background of a clear federal policy that U.S. citizenship and tribal status are not mutually exclusive. The decision in The Kansas Indians was explicitly based, in part, on the fact that the Shawnee tribal organization was recognized by the Executive Branch. The Kansas Indians at 755-756. Long before either Moe or Mashpee were decided Congress has had enacted the Citizenship Act of 1924 providing both that Indians born in the United States are citizens and that their citizenship does not impair their tribal rights. Ch. 233, 43 Stat. 253, codified at 8 U.S.C. § 1401(b). There is no such

statutory federal policy with respect to membership in more than one Indian tribe. As far as the Executive Branch is concerned, the federal policy with respect to acknowledgement of groups not previously acknowledged is the one set out in § 83.7(f).

Accordingly, it is our view that the arguments submitted by the petitioner for federal recognition of the San Juan Southern Paiute Tribe are not sufficient to overturn our April 3, 1987, opinion, confirmed on January 27, 1989, to the effect, inter alia, that 25 C.F.R. § 83.7 limits federal acknowledgement to those groups composed principally of persons who are not members of any other North American Indian tribe.



Charles B. Hughes



# United States Department of the Interior



OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

In reply, please address to:  
Main Interior, Room 6456

BIA. IA. 0779

Memorandum

DEC - 8 1989

To: Assistant Secretary - Indian Affairs  
From: Deputy Associate Solicitor, Indian Affairs  
Subject: Interpretation and application of Acknowledgment  
Regulations to San Juan Southern Paiute Petition

This is in response to your request of September 14, 1989, concerning possible conflicts between prior memoranda from this office. The Acting Solicitor has agreed that I respond since the Associate Solicitor has recused himself from any participation in the decisions relating to the San Juan petition.

I have reviewed the April 3, 1987, memorandum of the Assistant Solicitor, Branch of Tribal Government and Alaska, and the subsequent memorandum of January 27, 1989, of the Associate Solicitor. The first memorandum discussed the possibility of an apparent conflict within parts of the definition of "member of an Indian tribe" in Section 83.1(k) and attempted to resolve it. The Associate Solicitor interpreted the discussion in the earlier memorandum as suggesting that, to be a member of an Indian tribe, one had to be both on a tribal roll and maintaining tribal relations. He concluded, "[t]here is no need to meet the criteria of both components...." The Associate Solicitor was correct in his conclusion that an individual need not be both listed on a tribal roll and maintaining tribal relations to be a member of a tribe within the meaning of the regulations. However, I interpret the discussion in the Assistant Solicitor's earlier memorandum concerning the maintenance of tribal relations as being intended to aid in identifying those rolls which would be tribal rolls of members within the meaning and limited purposes of the acknowledgment regulations.

The discussion in the Assistant Solicitor's memorandum of maintaining tribal relations is premised on his conviction, as he has explained it to me, that "tribal rolls" is not defined in the regulations nor is it a precise term otherwise. The Associate Solicitor, in his 1989 opinion, applied straightforward rules of statutory construction solely to the legal question of how to interpret 25 CFR 83.1(k). That later opinion assumed that "tribal roll" had a meaning "ordinarily applied by the BIA"

and that, therefore, to look behind the roll to ascertain the tribal intent for the roll was, in effect, to add the other requirement under the regulations of maintaining tribal relations to the requirement of being on a tribal roll. The 1989 opinion concludes that the section 83.1(k) definition of "Member of an Indian Tribe" is, in part, satisfied by being listed on the tribal rolls of that tribe as a member, if such rolls are kept, and that the Bureau should not look behind a roll to question whether listed persons are members -- i.e., "... circumstances do not justify the Department in substituting its judgment as to what constitutes a tribal roll for that of a tribe already acknowledged by the Department."

I do not believe it is necessary, however, to resolve the theoretical differences, if any, between the two memoranda. First of all, the 1989 opinion states, "This memorandum concerns only the legal question previously addressed ... and does not address the finding of fact ...." (Emphasis added.) The opinion urges that BIA review its draft determination with our Division and acknowledges that "... circumstances of [a roll's] compilation may be relevant in determining the tribe's view of the roll ...." This opinion presupposes, of course, a roll which is intended to be, and on its face shows that it is, a list of tribal members. We believe that, for a tribal roll of members to be given the weight accorded in the 1989 opinion, the roll should, both on its face and in the circumstances of its preparation and administration, list only those persons who satisfy tribal membership requirements. Any ongoing additions and deletions by a tribe should be consistent with normal and routine updating of such a list.

We have now had an opportunity to review the draft final determination by the BIA. Section 501 of the Navajo Tribal Code states:

The membership of the Navajo Tribe shall consist of the following persons:

- (1) All persons of Navajo blood whose names appear on the official roll of the Navajo Tribe maintained by the Bureau of Indian Affairs ....

Emphasis added.


Although the Navajo Tribal Code appears to at least require both being on the "roll" and being "of Navajo blood", the BIA report points up significant questions as to the meaning of the phrase "of Navajo blood" and which roll is being referred to if the Tribal Code were actually to be applied. In any event, the BIA materials indicate that the roll, denominated as a BIA "Census of the Navajo Reservation" (also known as the "Navajo Census Roll") and subsequently adopted by the Navajo Tribe as the "Navajo Tribal Roll", because of the historical

circumstances of its preparation and maintenance, is clearly not a list which only includes those who satisfy tribal membership requirements. The Navajo roll presents questions which require looking beyond the roll for answers.

The roll provided to us included names of persons with no apparent indication of Navajo blood and other notations, for example, indicating "not enrolled" or persons with other non-Navajo tribal blood degrees without reference to possible Navajo blood. The fact that the roll on its face includes persons who are "not enrolled" and who have no indication of Navajo blood is consistent with its character as a census roll but totally inconsistent with a tribal roll exclusively of tribal members all of whom must be "of Navajo blood." The factual findings in the technical reports are adequate to justify the Bureau's conclusion that the particular roll presently at issue, the 1940 Navajo census roll, could reasonably be interpreted as not being a tribal roll within the meaning of the acknowledgment regulations, i.e., for the purposes of determining whether members of a petitioning group are members of another, recognized tribe as defined in 25 CFR § 83.1(k). The roll appears to include not only Navajos but also other Indians residing on the Navajo reservation who might be entitled to services from the BIA. In looking further to determine whether the roll is intended to be conclusive as to the tribal membership of every name appearing, we have to take into account the fact that the roll was first prepared as a census of Indians living on the reservation, the fact that the Navajo Tribal Code has established separate procedures for developing a roll that would be exclusively a list of tribal members and the fact that the procedures in the Code have not been utilized to maintain the roll.

The fact that the "Navajo Tribal Roll" is not a tribal roll of members of the Navajo Tribe within the meaning of the acknowledgment regulations does not by itself provide definitive evidence of separate Paiute tribal status because of the necessity to evaluate the petitioner's membership under other elements of 25 CFR § 83.1(k). We conclude merely that the Bureau's findings and conclusions of fact concerning the character of the "Navajo Tribal Roll" and the listing of Paiutes on it require further inquiry into possible San Juan Paiute membership in the Navajo Tribe based on the other factors set forth in 25 CFR § 83.1(k). There is nothing inconsistent between this conclusion and the 1989 opinion, and we find no reason to reconsider that opinion further at this time.

If you have any further questions, please don't hesitate to call on us.

  
Charles B. Hughes

## SOURCE MATERIALS

### Introduction

Listed in this section are additional source materials utilized for this final determination beyond those cited in the report accompanying the proposed finding. The reader should consult the section on Source Materials found on pages 247-76 of that report for materials not cited below.

### Abbreviations

BAR	Branch of Acknowledgment and Research
BB	Brown and Bain, various documents prepared by Brown and Bain, attorneys for the Navajo Tribe.
FD	Field data. Information developed as a result of field research in 1985 for the proposed finding.
FD2	Additional information gathered by interview during the preparation of the final determination.
LR	Letters Received
N	Document appears as exhibit in Navajo Tribe response to petition.
P	Materials submitted by the San Juan Southern Paiute Tribe as part of its petition.
PF	Proposed finding of August 11, 1987, to acknowledge the San Juan Southern Paiutes as an Indian tribe.

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