

STATEMENT OF BONNIE GARLAND GUSS
ATTORNEY FOR TRIBAL MEMBERS
ANITA V. JACKSON AND BENITA POTTERS
AND TRIBAL MEMBER HEIR MARY JEAN DIAL

AT THE HEARING BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
REGARDING H.R. 700

JULY 8, 1998

Good morning Chairman Campbell and members of the Committee. My name is Bonnie Garland Guss. I have practiced Real Estate Law and Indian Law in the City of Palm Springs, California, for over 15 years. I appear at this hearing as legal counsel to Anita V. Jackson and Benita Potters, enrolled members of the Agua Caliente Band of Cahuilla Indians. I am also representing Mary Jean Dial, heir to the estate of her father, Lee Arenas, a member of the Agua Caliente Band of Cahuilla Indians during his lifetime. Other Tribal members and allottees who oppose H.R. 700 include Larry Olinger and Diane Loeffler. These tribal members have submitted written statements to the Committee in opposition to H.R. 700. Due to the limitation on the number of speakers at today's hearing, my client Benita Potters and I will be the only speakers in opposition to H.R. 700. The testimony I give today has been reviewed by my clients as well as the other opponents to H.R. 700. On behalf of my clients and the other opponents, thank you for giving me the opportunity to express the legal basis for the opposition to H.R. 700 at this hearing.

H.R. 700 has been represented as a bill over which there is a consensus between the Tribe and the allottees. One of the bill's sponsors stated before the House of Representatives that H.R. 700 implements an agreement reached by the Tribal Council and the allottees. There is no consensus within the Tribe regarding H.R. 700, and there is not, and never has been, an agreement between the Tribal Council and the allottees regarding H.R. 700 or the Parcel B issue. Despite numerous offers, the allottees whose rights are extinguished by H.R. 700 were never included in the process of developing an amendment to the Equalization Act.

The opposition of my clients and other allottees to H.R. 700 is well documented in correspondence to this committee. I recently obtained a copy of a proposed amendment to H.R. 700 advanced by the Tribe's lobbyists. Rather than repeating the arguments against H.R. 700 as passed by the House of Representatives, my testimony will focus on the four major concerns of the opponents of H.R. 700 with respect to this new amendment. These concerns are as follows:

First, H.R. 700, as amended, is unconstitutional because it effects a taking without just compensation.

Second, H.R. 700, as amended, allows for the extinguishment of the rights of the allottees and their heirs without requiring an accounting by the Department of the Interior and the Tribe to determine whether the revenue from Parcel B and the revenue from investments of

Parcel B income was expended solely for the administrative expenses of the Tribe in compliance with the Equalization Act.

Third, H.R. 700, as amended, unfairly extinguishes the rights of the heirs of the allottees who cannot be members of the Tribe because they do not meet the Tribal Constitution requirements for membership.

Fourth, H.R. 700, as amended, has no safeguards against possible future discrimination by the Tribe against the allottees.

In addition to explaining these four concerns, I will propose an amendment to H.R. 700 which corrects the bill's legal deficiencies.

In order to understand the position of the opponents of H.R. 700, the history of Parcel B and the Equalization Act of 1959 must be reviewed. The Equalization Act of 1959 was passed in response to a decision by the United States District Court for the Southern District of California, Central Division, in the case of *Segundo v. United States* (Case No. 1182-WM Civ.). In that judgment, the Honorable William C. Mathes held that the plaintiffs in the action were entitled to have allotted to them their just and equal share of tribal lands and that they were entitled to make selections for allotments from any and all lands of said reservation available for allotment. The judgment provided further that the court retain jurisdiction of the action and the parties thereto in all respects including the selections of land for allotment. After the judgment was entered, the defendant, the United States of America, submitted periodic reports to the court to evidence its compliance with the court's judgment.

It was incumbent upon the Department of the Interior and the Tribe to provide for the allotment of reservation land to the allottees or the court would allot all Tribal reservation land. Initially, the Tribe wanted to withhold a substantial amount of property from the allotment process. This position was odds with the court's decision and ultimately the opinion of the Department of the Interior. In the Third Report to Court Re Compliance With Judgment submitted by defendant United States of America on August 13, 1958, a letter was included from the Bureau of Indian Affairs (the "BIA") which indicated that because of the profound inadequacy of the value of tribal land available for allotment, it would be necessary to include the areas of Tribal reserves for allotment which the Tribe wanted to withhold. As stated in the BIA letter, "from the standpoint from the individuals who are entitled to equalization, it does not appear legally justifiable to retain Tribal reserves."

The Tribe remained steadfast in its resistance to including its Tribal reserves to the property available for allotment. Parcel B referred to in the Equalization Act, and the subject of H.R. 700, was one of the parcels which the Tribe did not want to allot despite the judgment in *Segundo v. United States* and the opinion of the BIA. Shortly after the letter from the BIA indicating that the Tribal reserves would have to be allotted, the Tribe leased six acres of commercial property included within its Tribal reserves to a non-Indian real estate developer. The lease divided the six acres into two parcels: Parcel A, consisting of approximately 1.8 acres; and Parcel B, consisting of approximately 4.2 acres. Parcel A had natural hot water springs and was considered a sacred site to the Tribe.

Parcel B had no religious significance to the Tribe. The lease allowed for the development of a bath house on Parcel A, and a hotel on Parcel B.

Around this time, the Department of the Interior and the Tribe worked to develop a bill which would satisfy the requirements of the court's judgment in *Segundo v. United States*. A major obstacle to the passage of an Equalization Act in compliance with the court's judgment was the Tribe's continued resistance to the allotment of Parcel B. The Department of the Interior felt strongly that in order to achieve the greatest degree of equalization possible, Parcel B should be allotted. If Congress had followed the recommendation of the Department of the Interior and included Parcel B in the allotment process, the controversy over Parcel B and H.R. 700 would have been avoided.

Early attempts at crafting an Equalization Act included Senate Bill 2396 introduced on June 26, 1957, House of Representatives Bill 2564 introduced on January 15, 1959, and House of Representatives Bill 5557 introduced on March 11, 1959. These bills did not include allotment of Parcel B and were never passed. Finally, a fourth bill, H.R. 8587, was introduced which contained a compromise on the Parcel B issue. H.R. 8587 allowed Parcel B to be withheld from allotment, however, it required that the unequalized allottees and their heirs have the exclusive right to income distributions from Parcel B revenue. This legislative history is critical to understanding how H.R. 700 and its proposed amendment violate both the purpose and intent of the Equalization Act and the judgment in *Segundo v. United States*. Only when a bill was introduced which granted rights to the allottees in Parcel B was legislation passed which prescribed the equalization of the allottees. It is this exclusive right to distributions of Parcel B income which H.R. 700 deletes from the Equalization Act.

H.R. 8587 (Public Law 86-339) was enacted on September 21, 1959. The purpose of the Act was to provide equalization of allotments to members of the Agua Caliente Band of Cahuilla Indians as required in *Segundo v. United States*. At the time that the Equalization Act was enacted, it was acknowledged that the value of unallotted Tribal land was insufficient to achieve full equalization. Allottees alive in 1959 had received allotments which ranged in value from \$74,500 to \$629,000. Remaining unallotted Tribal property was valued at \$12,800,000. Even if all of the Tribal land other than sacred sites were allotted, equalization to a value of only \$350,000 could be achieved.

The Equalization Act closed the allotment rolls of the Tribe. The allotment of all properties contemplated under the Act was completed in 1961. There are no future rights or contingencies under the Act. All of the rights of the allottees, including the exclusive right to income distributions from Parcel B revenue, are fully vested.

The Fifth Amendment to the United States Constitution provides that a vested property right cannot be extinguished without the payment of just compensation. H.R. 700 fails to provide just compensation to the allottees. I recognize that the Department of the Interior and the Department of Justice are of the opinion that the rights of the allottees under the Allotment Act are inchoate rather than vested. In developing their opinions, they appear to rely

solely on legal analysis supplied to them by the Tribe's lobbyists. The basis for their conclusion that the rights of the allottees are inchoate is that the Tribe never made any income distributions to the allottees from Parcel B.

Neither the bill's sponsors, nor the Department of Justice, nor the Department of the Interior ever inquired as to whether there should have been distributions by the Tribe to the allottees from Parcel B revenue. As I will discuss next, the Tribe indeed should have made income distributions to the allottees from 1959 to today, to the extent that Parcel B revenue exceeded the administrative expenses of the Tribe. The Tribe should not be rewarded for its illegal withholding of distributions of income from Parcel B to the allottees, by using the failure of payment by the Tribe as a premise for concluding that the rights of the allottees are inchoate.

A second area of great concern to the opponents of H.R. 700 is the failure of the Tribe to make any distributions of Parcel B revenue to the unequalized allottees from the date of the enactment of the Equalization Act in 1959 to present day. The rights of the allottees relative to distributions of revenue from Parcel B is found in section 953(b) of the Equalization Act. The critical language is as follows:

In no event shall the following tribal lands be subject to allotment, and they shall henceforth be set apart and designated as tribal reserves for the benefit and use of the band... Mineral Springs, lots 3a, 4a, 13, and 14, section 14, township 4 south, range 4 east [Parcel A and Parcel B]: Provided, that no distribution to member of the band of the net rents, profits, and other revenues derived from that portion of these lands which is designated as "parcel b" in the supplement dated September 8, 1958, to the lease by and between the Agua Caliente Band of Mission Indians and Palm Springs Spa dated January 21, 1959, or of the net income derived from the investment of such net rents, profits, and other revenues or from the sale of said lands or of assets purchased with the net rents, profits, and other revenue aforesaid or with the net income from the investment thereof shall be made except to those enrolled members who are entitled to an equalization allotment or to a cash payment in satisfaction thereof under this Act or, in the case of such a member who died after the enactment of this Act, to those entitled to participate in his estate, and any such distribution shall be per capita to living enrolled members and per stirpes to participants in the estate of a deceased member.

It is clear from the express language of this section, and from the legislative history of the Equalization Act, that Congress intended that the Tribe make income distributions from Parcel B revenue to the unequalized allottees. The language is extremely detailed, covering every possible scenario including the investment of Parcel B funds and distributions to heirs of the allottees. The exclusive right to income distributions guaranteed by this section is of unlimited duration, and of unlimited amount. Despite the unequivocal language of the statute, no payments were ever made by the Tribe to the allottees.

The only legal use the Tribe could make of Parcel B revenue was for administrative expenses, as was

set forth in section 124.9 of Title 25 of the Code of Federal Regulations promulgated to implement the Equalization Act. Since 1963, Parcel B has been operated as a hotel. In 1995, a gambling casino was added to Parcel B. It is inconceivable that all of the revenue from Parcel B is needed for administrative expenses of the Tribe when the commercial use of Parcel B is so lucrative, and the

Tribe has only approximately 325 members. Indeed, a Memorandum from the Tribal Council to the Tribal members dated April 3, 1997, indicates that only 10% of Parcel B revenue was needed for Tribal Government Operations in 1996. The Memorandum also provides that 18% of Parcel B revenue is available for distribution to the members per capita once H.R. 700 is passed. It should be noted that the withholding of Parcel B distributions accrued prior to the passage of H.R. 700 violates the Equalization Act. The unequalized allottees have the exclusive right to the distribution of Parcel B revenue accrued prior to the passage of H.R. 700.

Prior to amending the Equalization Act to eliminate the exclusive right to income distributions from Parcel B to the allottees, the Tribe should be required to submit an accounting to Congress which documents how the Parcel B revenue was spent since 1959. If such accounting shows that the revenue was used for purposes other than the administrative expenses of the Tribe, those sums must be distributed to the allottees, including any income from Parcel B which is currently being withheld from distribution.

The Equalization Act also restricts the distribution of the net income of Parcel B derived from the investment of such net rents, profits, and other revenues or from the sale of such lands or assets purchased with the net rents, profits, and other revenues or with the net income from the investment thereof. It is believed that the Tribe has invested the revenue from Parcel B in real estate or other commercial ventures. Prior to any amendment of the Equalization Act that deletes the exclusive rights of the unequalized allottees to Parcel B revenue, the Tribe must account for the extent to which Parcel B income was invested. The income derived from such investments must be distributed to the allottees. An appraisal would need to be made to determine the fair market of value of any such investments, and such value would need to be paid by the Tribe to the unequalized allottees, along with the income from such investments.

The third area of concern to the opponents of H.R. 700 is the adverse effect of the bill on the rights of the heirs of the unequalized allottees. Section 953(b) provides that income distributions from Parcel B shall be made to the unequalized allottees "or, in the case of such a member who died after the enactment of this act to those entitled to participate in his estate, and any such distribution shall be per capita to living enrolled members and per stirpes to participants in the estate of a deceased member." If H.R. 700 is passed, future income distributions from the gambling casino operated on Parcel B will be made per capita pursuant to the Tribe's Constitution. The Tribal Constitution does not allow children of an allottee to be Tribal members if the children do not have at least 1/8 degree of Indian blood.

My client Mary Jean Dial is an heir to her father Lee Arenas, who was entitled to equalization under the Equalization Act. If H.R. 700 is passed either in its present form or pursuant to the amendment developed by the Tribe's lobbyists, she will lose forever her right to receive income distributions from Parcel B. In the case of Mrs. Jackson, Mrs. Potters, and other allottees, their children will not be entitled to income distributions from Parcel B if H.R. 700 is passed, because their children do not have the requisite degree of Indian blood and cannot be members of the Tribe. If section 953(b) were not amended, both the unequalized allottees and their heirs, regardless of Tribal of membership, would be entitled to income distributions from Parcel B. Given the fact that Parcel B is improved with a highly lucrative gambling casino, this change created by H.R. 700 is extremely unfair and a major departure from the current law.

The fourth area of concern of the opponents of H.R. 700 is the possibility of future discrimination by the Tribe against the allottees. This discrimination could take the form of a reduction in the amount of future distributions from Parcel B after H.R. 700 is passed. Any amendment of the Equalization Act must ensure that the Tribe will be prevented from discriminating against the allottees.

In addition to the foregoing conceptual concerns, the language of the proposed amendment is often inaccurate, misleading, unsupported, and patently false. The amendment's specific failings are as follows:

1. Findings at page 1, lines 5 through 10, and page 2, lines 1 through 4. The amendment states that Congress finds that the Equalization Act was intended to provide for a reasonable degree of equalization of allotments. This is contrary to the purpose of the Act as described in the Report to accompany H.R. 8587 (enacted as the Equalization Act) which states the purpose of the bill was "to provide equalized allotments of land on the Agua Caliente Reservation."
2. Findings at page 2, lines 20 through 24. The amendment states that section 3 of the Act restricts the distribution of any net rents, profits, or other revenues derived from parcel B to members of the Band entitled to equalization to the value of the allotments of those members. This statement is incomplete. The language of section 3 set forth on page four of this statement shows that the exclusive right to income distributions is in favor of both the allottees and their heirs. This distinction is significant because heirs who cannot be Tribal members will forever lose their right to share the revenue derived from parcel B because they are ineligible for per capita distributions.
3. Findings at page 3, lines 1 through 5. The amendment provides that from 1959 through 1984, each annual budget provided for expenditure of all revenues from parcel A and parcel B solely for tribal governmental purposes. My clients Anita Jackson and Benita Potters requested that the Tribe provide an audit to the allottees which sets forth how the revenue from parcel B was expended and invested. The request was denied by Richard Milanovich, Tribal Chairman. Without an audit of Parcel B revenue, it is impossible to determine whether this finding is true. In addition, there is no explanation as to why the cutoff date for compliance with the Equalization Act with respect to the use of Parcel B funds by the Tribe is 1984. Section 3

of the Equalization Act is in full force and effect, and the audit of Parcel B revenue must be from the date of enactment of the Equalization Act to the date of an amendment of the act which alters the allottees' and heirs' rights to Parcel B income.

4. Findings at page 3, lines 6 through 10. Without the audit referred to above, it is impossible to determine whether this finding is true.
5. Findings at page 3, lines 11 through 22. The amendment refers to a letter of December 6, 1961 wherein the Director of the Sacramento Area Office of the BIA states that equalization is complete and appropriate trust patents have been issued. The Tribe's lobbyists interpret this letter to mean that once the properties available for allotment were allotted, as confirmed in the BIA's letter, the other sections of the Equalization Act including section 953(b) which guarantees the exclusive right to income distributions from parcel B are unenforceable. This superficial and self-serving interpretation is inconsistent with the express language of the Act. Section 3 of the Act sets forth the rights and procedures relative to equalization. Under paragraph (a), the Secretary of the Interior was determine the value of all unallotted tribal land. Paragraph (b) sets forth the land not subject to allotment, and includes the grant of the exclusive right to income distributions from parcel B. Paragraph (c) sets forth how the unallotted tribal land will be allotted, and paragraph (d) governs land in the airport subject to allotment.

The letter from the BIA stating that equalization had occurred referred to the completion of allotment of land by the BIA as required under paragraphs (a), (c) and (d) of the Act. The satisfaction of those sections of the Act does not somehow relieve the Tribe from complying with paragraph (b) with respect to Parcel B income. The right of the allottees and their heirs with respect to parcel B income is critical to the equalization of the allottees. If paragraph (b) is eliminated or violated, the allottees are rendered unequalized.

6. Findings at page 3, lines 23 through 25 and page 4 at lines 1 and 2. The amendment provides that the case file in *Segundo v. United States* was destroyed. This is false. The case file is located at the National Archives in Laguna Niguel, California. On June 4, 1998, I sent a letter to your committee setting forth my conclusions regarding the pleadings found in that case file. Included with my letter were copies of records in the case file. Those records clearly demonstrate that the court intended that the unequalized tribal members be equalized to the fullest extent possible which included the allotment of parcel B. H.R. 700 and as amended deletes this critical language from the Act, leaving the allottees unequalized.
7. Findings at page 4, lines 3 through 6. The amendment refers to the rescission of the regulations promulgated to implement the Equalization Act and states that the rescission notice recites that equalization within the meaning of section 7 of the act has been achieved. This is false. The rescission notice never mentions section 7 of the Act. The rescission notice states as follows: "In line with 25 U.S.C. 953(c), the purpose of the act was achieved on October 5, 1961, when Secretarial approval was granted to the schedule of equalization of allotments. For this reason these regulations are no longer needed." As set forth above, section 953(c) governed the allotment of land made available for allotment. Satisfaction of

section 953(c) does not abrogate the exclusive rights of the allottees and their heirs to income distributions from Parcel B which is set forth in section 953(b) of the Act.

Moreover, it appears that the rescission of the regulations implementing the Agua Caliente Equalization Act was part of a larger "housekeeping" effort by the Department of the Interior wherein regulations regarding allotment of various Indian reservation property were rescinded. The rescission of regulations regarding allotment of tribal land located on the Cabazon and Augustine Indian Reservations, as well as rescission of regulations regarding allotment of tribal land located on the Torres-Martinez Reservation are included on the same page in the Federal Register as the rescission of the regulations regarding allotment on the Agua Caliente reservation.

There is no indication in the rescission notice or anywhere else which suggests that the rescission of the regulations was meant to undermine the enforce ability of the Equalization Act in general or section (b) relative to parcel B rights in particular.

8. Finding at page 4, lines 7 through 10. The amendment recites a portion of section 7 of the Act. This partial quote is misleading. The full section 7 provides as follows: "Allotments in accordance with the provisions of this Act shall be deemed complete and full equalization on the Agua Caliente Reservation." The rights of the allottees and the heirs to parcel B income are set forth in section 953(b) of the Act. To comply with section 7 of the Act, allotments must be made in accordance with the provisions of the Act of the Act, including section 953(b). Equalization cannot be achieved if section 953(b) is eliminated.

The next section of the Tribe's lobbyists' proposed amendment to H.R. 700 sets forth the revisions to the Equalization Act. For the reasons set forth on pages one through six of this statement, the opponents of H.R. 700 object to the amendment proposed by the Tribe.

At the request of Mrs. Jackson and Mrs. Potters, I have drafted an amendment to H.R. 700 which corrects all of H.R.700's illegalities and inequalities. A copy of the amendment to H.R. 700 is attached hereto as Exhibit "A." The amendment calls for all of the following:

1. A current appraisal of Parcel B which shall serve as the basis for the distributions to be made to the unequalized allottees in exchange for the relinquishment of their rights guaranteed under section 953(b). The amendment provides that the cost of the appraisal shall be borne by the Tribe. This is appropriate because it is the Tribal Council which seeks to amend section 953(b), rather than the unequalized allottees.
2. Responsibility by the Tribe for any and all federal or state taxes which are imposed on the distributions made to the allottees.
3. Protection of the heirs of the unequalized allottees and protection against future discrimination against the allottees.
4. Assurance that the Tribe shall not use income from Parcel B to fund the payment of consideration for the extinguishment of the rights guaranteed under section 953(b).

5. Distribution of Parcel B income from 1959 to present in accordance with the requirements of the Equalization Act.

On behalf of Anita Jackson, Belinda Potters, and Mary Jean Dial, I urge you to support the attached amendment to H.R. 700, which is fair to the allottees and achieves the goal of the Tribal Council to control Parcel B revenue without restriction. I would be happy to answer your questions at this time.