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Via Email Only

Jimmy Whiteshirt, President
Pawnee Business Council
Muriel Robedeaux, Executive Director
Pawnee Nation of Oklahoma
881 Little D Street
Pawnee, OK 74058

Re: Power of Nasharo Council, Opinion 2020-08

Dear President Whiteshirt, Pawnee Business Council, and Executive Director Robedeaux,

On March 6, 2020, the Pawnee Business Council (“PBC”) requested that I provide an opinion regarding the extent of the Nasharo Council’s (“Council”) power after the adoption of the Pawnee Nation’s 1998 Constitution. Providing a thoughtful history of the Pawnee Nation and its treaties with the United States, in a Memorandum dated 9/25/18 for the Nasharo Council members, the renown Pawnee Indian law scholar, Walter Echo-Hawk addressed the extent of the Council’s power after adoption of the Nation’s 1998 Constitution as revised in 2008 (“Echo-Hawk Memo”). *Attached* as Exhibit “A”. Mr. Echo Hawk provided his expertise in editing this opinion which is greatly valued and appreciated.

For purposes of this Opinion, the following Sections of the Echo-Hawk Memo are adopted by reference: I. Introduction; II. Enumerated Constitutional Powers in Articles III, IV, and VIII. Pawnee Treaty Rights, excluding legal analysis or opinions.¹

¹ Particularly excluding, Sec. II, pg. 3 par 6. which states that “the analysis in this (Echo Hawk) memorandum of Pawnee treaty rights shows that many of the seemingly routine PBC acts and activity can in fact directly or indirectly affect, pertain to, or grow out of Pawnee treaty rights and are therefore subject to Nasharo council review...” as well as the treaty analysis.

I. QUESTION

What is the extent of the Council's power after the adoption of the Pawnee Nation's 1998 Constitution?

II. ANSWER

Pursuant to the 1998 Constitution, the Council has power over internal Council governance, and review and disapproval of the PBC's legislative acts regarding membership, and federal treaty claims and rights.

Regarding Council's review of federal treaty claims and rights:

- 1) Any PBC legislative action affecting an enumerated treaty right specified in any of the Nation's treaties is subject to the Council's review and disapproval, including: (1) protection from outsiders, (2) annuities, (3) reservation of hunting rights, or (4) land transfers or encumbrances.
- 2) Any PBC legislative actions affecting the specific nation-to-nation protectorate/trust relationship between the Pawnee Nation and United States established by treaties is subject to Council review and disapproval.
- 3) No PBC legislative action regarding internal self-governance is subject to Council review and disapproval.
- 4) No PBC legislative action exercising a federal statutory right, not based on a specific Pawnee treaty right, pertaining solely to a general federal law or program applicable to all Indian tribes or nations as part of a national federal Indian policy is subject to Council review and disapproval.

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III. DISCUSSION

A. Constitutional grant of power to Council

Unless otherwise noted, the 1998 Pawnee Nation Constitution shall be referred to as the “Constitution” and the 1938 Pawnee Nation Constitution shall be referred to as the “1938 Constitution.”

1. As the Echo-Hawk’s Memo outlines, there are two controlling sources of law prescribing the powers, duties and responsibilities of the Council:

(a) Enumerated powers. (Const. Arts, IV, Sec. 3 and VIII).

(b) Claims or rights growing out of treaties between the Nation and the U.S. (Const. Art. IV, Sec. 3, and Art. VIII, Sec. 1).

2. Changes from the 1938 Constitution

A comparison of the 1998 Constitution with the 1938 Constitution shows several substantial changes other than renumbering the Articles, Sections and syntax. *See* redline comparison of the 1938 and 1998 Constitutions attached as Exhibit “B”. The notable changes regarding the Council’s authority in the 1998 Constitution are listed below:

- The President shall preside over joint meetings with the Council and the PBC. (Const. Art. V, Sec. 1).
- The Council no longer has authority to address allegations or complaints of PBC members’ misconduct in office. (1938 Const. Art VI.)
- Other changes clarify that the Council shall set rules and procedure for its internal governance. (Const. Art. VIII).

The Council’s authority to review membership and treaty claims and rights remained unchanged.

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B. Historic context of the 1938 Constitution

It appears from the historical context of the 1938 and 1998 Constitutions organized under the Oklahoma Indian Welfare Act,² (“OIWA”) that the purpose of the Council is to incorporate traditional governance oversight to protect treaty rights and membership. The “Indian Office” or the Bureau of Indian Affairs (“BIA”) dominated the affairs of the Pawnee tribe from before 1818 (first treaty with the Nation) until the 1970s. Prior to Oklahoma statehood in 1906, the Pawnee tribe had consortium governance of chiefs of bands or villages. The Oklahoma Historical Society reports:

Governing each band or village were four chiefs (a head chief and three subordinate chiefs), who wielded considerable authority. The head chief's position, and that of others, was hereditary, but an individual could achieve chiefly status through success in war. An important symbol of the chief's office, as well as a symbol of the village itself, was the sacred bundle, a religious shrine that represented the history of the band or village. Although the chief owned the bundle, and his wife cared for it, a priest (not the chief) knew its rituals and performed the religious ceremonies associated with it. In secular Pawnee society there were other notable offices. Each chief, for example, was assisted by four warriors who carried out his orders, and he had living in his lodge a crier or herald who made announcements to the village. Chiefs and successful warriors also had living in their lodges one or more young men known as "boys," who were aides to the man of status.³

The Oklahoma Historical Society further reports:

Beginning in 1906 (Oklahoma statehood) the Pawnee no longer had a tribal government, and they remained unorganized politically during the first three decades of the twentieth century. The Pawnee tradition of hereditary chiefs was

² 25 U.S. Code § 5203, (June 26, 1936, ch. 831, § 3, 49 Stat. 1967.)

Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: Provided, however, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 5101 et seq.]: Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

³ <https://www.okhistory.org/publications/enc/entry.php?entry=PA022>

still an honored one, and so the chiefs continued to act for the tribe in dealing with U.S. government officials. In the 1930s the situation changed when the Indian Reorganization Act and the Oklahoma Indian Welfare Act ushered in a non-assimilationist program that sought to give tribes legal status and economic resources to continue their existence. In 1936, the Pawnees adopted a tribal constitution that established two governing bodies: a chiefs' (or *nasharo*) council comprised of eight individuals having hereditary rights to chieftainship, elected every four years; and a business council made up of eight individuals elected every two years. The business council was to act for the tribe and transact its business, but the chiefs' council was largely a symbolic entity.⁴

Felix Cohen, Assistant Solicitor for Department of Interior in his 1934 “Basic Memorandum in Drafting Tribal Constitutions” (“Memorandum”) described the levels of self-government tribes could seek under the Indian Reorganization Act (25 U.S.C. 479) (“IRA”) and OIWA constitutions:⁵

Three levels of self-government may be distinguished. In the first place, the governing body of the Indian tribe may be empowered to act only with the approval of the Indian Office. A more advanced constitution would provide that certain acts of the tribal council should not require such approval. The greatest degree of self-government that could be attained under existing law would give the tribal government complete independence of the Interior Department. Even in this case however, it must be remembered that Congress would retain the power which it now has to nullify any tribal ordinances or resolutions. No constitution or charter could take that power away. Even Congress could not deprive itself of that power. (*Tribal Constitutions* at p. 33.)

Cohen also addressed the role of traditional government:

Where there are a number of recognized chiefs or headmen in a given tribe, these individuals may constitute a second legislative body, coordinate with the regularly elected legislative body

Another possible arrangement would be to establish a council of chiefs with certain specified powers which would not conflict with the powers of the regular tribal governing body. Such a council of chiefs might be given the power to suspend acts of the tribal council that are thought to be detrimental to the best interests of the tribe, and to require that such acts be put to a popular vote of the tribe. (*Tribal Constitutions* at p. 37.)

⁴ *Id.*

⁵ “On Drafting of Tribal Constitutions” edited by David Wilkins, O.U. Press, 2006. (“Tribal Constitutions”).

The 1938 Constitution was drafted in accordance with the guidelines that Cohen provided the BIA and tribes in his Memorandum. The purpose of the 1938 Constitution's grant to the Council of "review and disapprove claims and rights growing out of treaties" between the Nation and the United States, as Cohen suggested, was to "suspend acts of the tribal council that are thought to be detrimental to the best interests of the tribe." The 1938 Constitution Article VIII, Section 1 (ii) provision, "Where such (PBC legislative acts) are disapproved by the Nasharo Council, the Pawnee Business Council may submit them to a referendum of the Pawnee Nation of Oklahoma and they shall be valid and effective if approved by a majority vote" reflects Cohen's recommendation that acts suspended by the Council of chiefs "be put to a popular vote of the tribe."

It appears the purpose of the Council's review and disapproval power over federal treaty claims and rights was to protect the best interests of the Nation when dealing with the U.S. and Cohen's Memorandum suggests that those powers should be construed to the greatest extent possible as "not to conflict with the powers of the regular tribal body." *Id.* pg. 37.

C. Current power of the Council

1. The Council's power over internal governance is clear.

The Council's constitutional power over the election of its members and internal government is clear and is consistent between the 1938 and 1998 Constitutions. (Const. Art. VIII).

2. The Council's power over Pawnee membership issues is clear.

The Council's constitutional power to review membership matters is clear and is consistent between the 1938 and 1998 Constitutions. The Council has the power to review

membership policy changes by the PBC and approval of individual membership applications and relinquishments. (Const. Art. III, Sec. 3; Art. IV, Sec. 3; and Art. VIII).

3. Principles to interpret the Constitution’s meaning of “claims of rights growing out of treaties” between the Nation and the U.S.

The Constitution grants the Council review and disapproval power over “Pawnee Nation of Oklahoma claims or rights growing out of treaties between the Pawnee Nation of Oklahoma and the United States.” (“Treaty Rights”). (Const. Art. VIII, Sec. 1 and Art. IV, Sec. 3).

Many, if not most, federal laws affecting the Nation are based upon the government to government relationship of the Nation with the U.S.⁶ that was established by entering into treaties in accordance with Congress’ plenary power over Indian tribes found in the Commerce Clause of the U.S. Constitution (Art. 1, Sec. 8, Cl. 3). Thus programs created by those laws, as well as the Nation’s and individual Indian participation in them,⁷ are tied to treaties.

⁶ 26 CFR § 305.7701-1 - Definition of Indian tribal government.

(a) *Definition.* A governing body of a tribe, band, pueblo, community, village, or group of native American Indians, or Alaska Natives, qualifies as an Indian tribal government upon determination by the Internal Revenue Service that the governing body exercises governmental functions. Designation of a governing body as an Indian tribal government will be by revenue procedure. If a governing body is not currently designated by the applicable revenue procedure as an Indian tribal government, and such governing body believes that it qualifies for such designation, the governing body may apply for a ruling from Internal Revenue Service. In order to qualify as an Indian tribal government, for purposes of section 7701(a)(40) and this section, such governing body must receive a favorable ruling from the Internal Revenue Service.

25 CFR § 273.2

§ 273.2 Definitions.

(g) “Indian tribe” means any Indian tribe, band, nation, rancheria, pueblo, colony or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is federally recognized as eligible by the U.S. Government through the Secretary for the special programs and services provided by the Secretary to Indians because of their status as Indians.

⁷ 25 U.S.C. § 450b

(e) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

25 U.S. Code § 2201

For the purpose of this chapter—

(1)

“Indian tribe” or “tribe” means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2)“Indian” means—

The federal government's authority over tribes and to enter into treaties with them comes from the plenary power in the Commerce Clause. In *Lonewolf v Hitchcock*, 187 U.S. 553 (1903), the U.S. Supreme Court held that Congress' plenary power arises out of its guardianship relationship with Indian tribes. The Nation's authority for self-governance and to enter into treaties with the federal government comes from the Nation's inherent power – it is not a grant from the United States.

To what extent does the Nation's internal self-governance grow out of federal treaties? One argument is that all the rights and claims of the Nation are based on its federal recognition as a result of entering into treaties; therefore, all legislative actions by the PBC are subject to review and disapproval by the Council. On the other hand, it is beyond dispute that the Nation's internal self-governance is an inherent power that is not derived from treaties and, as such, only in very limited situations does the Council have power to review and disapprove PBC legislative action.

The following principles are to be applied in deciding the extent of the Council's power to review and disapprove PBC legislative actions over treaty rights.

D. Criteria to interpret Council's power to review and disapprove treaty rights.

1. The first principle is that the Nation has an inherent right of internal self-government.

In *U.S. v. Kagama*, 118 U.S. 375, 381, the U.S. Supreme Court recognized that tribes have always possessed the power to regulate their internal and social relations. The U.S. Supreme Court found:

A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;
(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) [1] and the regulations promulgated thereunder; . . .

With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided.

The Nation's right of internal self-government is inherent existing beyond the memory of man and needs need no authorization from the federal government.

2. The second principle is that the Nation reserved its rights in its treaties with the U.S.

Treaties were not a grant of rights to tribes by the U.S., but rather a grant of rights from tribes, with the tribes retaining all of the powers and rights of sovereign nations. Any rights that are not specifically addressed in a treaty are reserved to the tribe. Treaties outline the specific rights that the tribes gave up, not those that they retained. In other words, unless a tribe has specifically negotiated away some right, it still retains those rights of government that all governments of the world fundamentally possess.

See *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, (1905).

Internal self-government is a valued inherent and reserved right recognized by the U.S. Supreme Court. In *Talton v. Mayes*, 163 U.S. 376, the U.S. Supreme Court affirmed that tribes had the power of local self-government before there ever was a United States.

The numerous treaties made with them (Cherokee Nation) by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.

But the existence of the right in congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. *It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon*

by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government. (Emphasis added).

Also see *Merrion v. Jicarilla Apache Tribe*, 450 U.S. 130, 141 (1982); *Williams v. Lee*, 358 U.S. 217 (1959). *Ex Parte Crow Dog*, 109 U.S. 556, 568-69 (1883). For purposes of determining the Council's power of review and disapproval of the PBC's legislative enactments, internal self-governance is an inherent and reserved right that does not grow out of treaties between the Nation and the U.S.

3. The third principle is Treaty making between the United States and tribes ended in 1887 by federal law.

Many treaty rights have been abrogated or superseded by federal law. In *The Cherokee Tobacco Case*, 78 U.S. 616 (1870), the U.S. Supreme Court held, "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." In 1871, Congress passed 25 U.S.C.A. 71 which ended treaty making between tribes and the U.S.⁹

Currently, most of the interactions and relationships between the Nation and U.S. are directed by federal statute, rule or regulation. Title 25 United States Code (federal statutes) is devoted strictly to Indians and has 48 chapters of statutes involving education, finance, natural resources and housing. There are scores of other general federal laws that congress has applied to tribes that are codified under different titles. The Code of Federal Regulations Title 25, devoted to Indians, has 299 rules.

⁹ 25 U.S.C.A. 71. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income.

The vast majority of the Nation's interactions with the U.S. grows out of federal statutes, rules and regulations rather than specific treaty rights.

4. Specific treaty rights subject to Council's review.

One way to identify claims and rights growing out of treaties between the Nation and the U.S. is to examine the respective treaties for issues not involving internal self-governance or federal statutes, rules or regulations independent of the Nation's specific treaty rights.

There are recurring subjects in the Nation's treaties with the U. S.:

- **Peace, under the protection, or determination of allies** - addresses the character of the relationship between the Nation and the U.S. *See* "Four Peace and Friendship Treaties of 1818", ("1818 Treaty"); "Peace and Trade Treaty of 1825 - Council Bluffs", 7 Stat. 279 ("1825 Treaty"); "Treaty of 1833" 7 Stat. 448, (Oct. 9, 1833) ("1833 Treaty"); and "Treaty of 1857- Table Creek" (Sept. 24, 1857) ("1857 Treaty").
- **Trade and intercourse** - addresses external trade of the tribe licensed and control by the U.S. *See* the 1825 Treaty.
- **Protection from outsiders** - addresses restoration and indemnity of property, and the trust and guardianship relationship offered by the U.S. to the tribe. *See* the 1825 Treaty, 1833 Treaty, and 1857 Treaty.
- **Land cession** - addresses selling or trading land. *See* the 1833 Treaty, and 1857 Treaty.
- **Annuity** - addressed annual payments. *See* the 1857 Treaty.
- **Facilities** - addresses dwelling, facilities and programs. *See* the 1833 Treaty, and 1857 Treaty.
- **Membership** - addresses half-breeds. *See* 1857 Treaty.
- **Payments** - addresses restitution. *See* 1825 Treaty, 1833 Treaty and 1857 Treaty.

A number of the obligations of the above four treaties between the Nation and U.S. have been performed and are moot such as facilities and payments. Other issues have been superseded or pre-empted by federal law such aspects of trade and intercourse, and government relationships. For example, the federal Indian Gaming Regulatory Act, (IGRA) (Public Law 100-497) Oct. 17, 1988, 25 U.S.C. Sec. 2701 *et seq.*, has pre-empted gaming regulation. The Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638), 25, U.S.C. 5301 *et seq.* has, to a great degree, defined the interactions and relationship of tribes with the federal government.

Most of the Nation's interactions and relationships with the U.S. grow out of federal statutes, rules and regulations – not U.S. treaties with the Nation; however, most federal laws are enacted in furtherance of treaty rights and relationships and such laws should not be read to supersede or replace treaty rights, but merely to effectuate those rights

5. Cannons of construction of treaties¹⁰

- a. Treaty rights are construed liberally and broadly in the first instance, and not narrowly.
- b. The canons of treaty construction require treaty rights to be broadly construed in favor of the Tribes, including the scope of those rights.
- c. Federal Indian law discourages treaty abrogation by implication. Only Congress can abrogate a treaty right by expressing a clear intent to do so and federal regulations cannot abrogate treaties.
- d. Many federal Indian laws arise from the treaty relationship between the U.S. and Indian tribes. Underpinning the constitutionality of each and every law in Title 25 U.S.C.

¹⁰ This Section of Cannons of Construction of Treaties was provided by Walter Echo-Hawk.

is the plenary power of Congress to enact Indian legislation based upon a political, not racial, classification. *Morton v. Mancari*, 417 U.S. 535 (1974).

6. The Nation’s relationship with the U.S. is based on its treaties.

Although the federal government can recognize a tribe in several ways¹¹ the Nation’s trust relationship is based on its treaties.¹²

E. Application of the above Criteria to Council’s power to review and disapprove PBC legislative acts.

1. Federal law and programs that grow from treaty rights.

Federal recognition of an Indian tribe or nation is not a treaty right or a right at all; it is a federal discretionary act to recognize a dependent domestic nation under the law pronounced by the U.S. Supreme Court in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In and of itself, the fact that the U.S. entered into a treaty with the Nation creates no claims or rights for claims.

However, the U.S. and the Nation negotiated a trust relationship through their treaties- (“*under the protection of the United States of America*” (1818 Treaty Art. III, 1825 Treaty Art. 2); “*renews fidelity to the United States*” (1834 Treaty Art. 9); *acknowledged its dependence on the Government of the United States* (1957 Treaty). See also , *Cherokee Nation, United States v.*

¹¹ BIA, 25 C.F.R. 83, 44

¹² **Article II.** There shall be *perpetual peace and friendship* between all the citizens of the United States of America, and all the individuals composing the said Grand Pawnee tribe.

Article III. The undersigned chiefs and warriors, for themselves and their said tribe, *do hereby acknowledge themselves to be under the protection of the United States of America*, and of no other nation, power, or sovereign, whatsoever.

TREATY OF 1825 -7 Stat. 279, September 3, 1825, Proclaimed February 6, 1826

Article 2. The United States agree to receive the Pawnee tribe of Indians into *their friendship, and under their protection*, and to extend to them, from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States.

TREATY OF 1834- 7 Stat. 448, October 8, 1833, Proclaimed April 12, 1834

Article 9. The Pawnee nation *renews their assurance of friendship for the white men, their fidelity to the United States*, and their desire for peace with all neighboring tribes of red men.

TREATY OF 1857 -September 24, 1857

Article 5. The Pawnees *acknowledge their dependence on the Government of the United States*, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens, nor on that of any other person belonging to any tribe or nation at peace with the United States.

Mitchell, 463 U.S. 206 (1983), *Seminole Nation v. U.S.*, 316 U.S. 286 (1942) and *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).

Consequently, any PBC legislative action that materially pertains to or alters the trust relationship with the U.S. is subject to the Council's review and disapproval. However, simple participation in federal programs or pursuing a federal *legislative* right is not subject to Council review and disapproval, because those statutory rights are provided to *all* federally recognized tribes resulting from federal policy, not just to the Nation because of its treaty terms.

A number of the Nation's treaty rights are arguably furthered or affected by federal legislation and programs that are available to all federally recognized tribes as a class. For example, the following federal laws and programs arguably address certain treaty obligations: "protect the Nation from outsiders" (Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, Violence Against Women Reauthorization Act of 2013, (VAWA) S. 47, 113th Congress, 2013-2015, Native American Graves Protection and Repatriation Act (NAGPARA) (Public Law 101-601; 25 U.S.C. 3001-3013); "regulated commerce, (Indian Arts and Crafts Act of 1990 (P.L.101-644), Indian Gaming Regulatory Act (IGRA); and "benefits and acts of kindness" (Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (P.L. 104-330), Indian Health Service; U.S. Department of Agriculture donated food, and other social welfare and education programs).

However, the Nation's 1825 Treaty Article 2 indicates federal assistance programs are discretionary with the federal government - "to extend to them (Pawnees), from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper to the President of the United States." While nothing in the Nation's treaties addressed internal self-

government,¹³ the U.S. limited tribal self-government by its passage of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1304, IRA and OIWA.

The above laws and programs for the benefit of the Nation and its members are more properly viewed as part of an overall Indian federal policy applicable to all Indian nations, not based on any particular Pawnee Nation treaty right; therefore, PBC actions pertaining to those laws and programs are not “claims and rights growing out of treaties” *between the Nation and the United States*.

2. One test for the Council’s review and disapproval

To better understand the phrase, “claims and rights growing out of treaties between the Nation and the United States,” we can substitute the definitions for operative words - claim, right, growing, and treaty. The phrase then reads the Council may review and disapprove PBC legislative action addressing “a right to something”¹⁴ (claim) and “the power or privilege to which the Nation is justly entitled”¹⁵ (right) “springing up and developing to maturity” (growing out) from a “contract in writing”¹⁶ (treaty) between the Nation and from the United States.

A test for the Council’s review and disapproval power is whether a PBC legislative action affects the Nation’s ability to enforce a treaty right against the federal government. Many or most of the federal statutes and programs will not sustain a treaty cause of action by the Nation against the federal government.

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¹³ With the exception of 1857 Treaty which addressed the membership of half-breeds. *See* 1857 Treaty Art. 9.

¹⁴ <https://www.merriam-webster.com/dictionary/claim>

¹⁵ <https://www.merriam-webster.com/dictionary/right>

¹⁶ <https://www.merriam-webster.com/dictionary/treaty>

3. Practical impact of the Council’s power to review and approve PBC legislative acts.

A review of the 479 PNC resolutions enacted since 2015 show that the vast majority address internal self-governance issues. Of those 479 resolutions, the Council could assert its review and disapproval power over ninety-eight (98) resolutions including those resolutions that addressed twelve (12) land leases and easements, seventy-eight (78) membership decisions, seven (7) Table Creek annuity authorizations, and one (1) waiver of sovereign immunity. *See* Exhibit “C,” Table of Resolutions. None of the PBC resolutions since 2015 addresses treaty rights or change of status of the U.S. protectorate and trust relationship with the Pawnee Nation.

4. Criteria to determine if PBC is subject to Council review

a. Council internal governance

The Council has the power to establish its own Council governance.

b. Membership

The Council has the power to review and disapprovd all PBC legislative actions involving membership policy or individual membership.

c. Treaty Rights

i) Any PBC legislative action affecting an enumerated treaty right specified in any of the Nation’s treaties is subject to the Council’s review and disapproval, including: (1) protection from outsiders, (2) annuities, (3) reservation of hunting rights, or (4) land transfers or encumbrances. For example, if the U.S. proposed converting the Table Creek annuity into a lump sum payment, or the U.S. condemned Pawnee land for a public purpose, then any PBC legislative action in response would be subject to Council’s review and disapproval.

ii) Any PBC legislative action affecting the specific nation-to-nation protectorate/trust relationship between the Pawnee Nation and United States established by

treaties is subject to Council review and disapproval. For example, PBC approval of a Self-Governance Compact or PBC legislative action if the U.S. proposed termination, then Council may review and disapprove any PBC legislative action.

iii) No PBC legislative action regarding internal self-governance is subject to Council review and disapproval. For example, the adoption of personnel policies, accounting procedures, and appointment of members for commissions or committees, application for federal programs, judicial and law enforcement acts are not subject to Council review and disapproval.

iv) No PBC legislative action exercising a federal statutory right, not based on a specific Pawnee treaty right, pertaining solely to a general federal law or program applicable to all Indian tribes or nations as part of a national federal Indian policy is subject to Council review and disapproval. For example, application for federal grants and contracts with Indian Health Service, U.S. Department of Interior, U.S. Department of Education or U.S. Department of Housing and Urban Development.

IV. CONCLUSION

The Nation's right of self-governance is an inherent right held prior to the existence of the United States. The Nation is a domestic dependent sovereign. Both the Nation and the United States had a right to enter into treaties. The Nation negotiated treaties that placed the Nation under the protection of the United States from non-Pawnees. This political relationship of protection is deemed as a trust relationship similar to a ward and guardian relationship.

The 1998 Constitution granted the Council power over internal Council governance, and review and disapproval of the PBC's legislative acts regarding membership and federal treaty rights and claims.

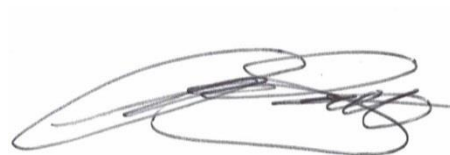
Any PBC act or resolution addressing membership requirements or individual approval or relinquishment of membership must be submitted to the Council for review and disapproval.

The Council's power to review and disapprove is limited by the tribe's inherent right of self-governance, reservation of rights in treaties, abrogation, superseding, or preemption of treaty provisions by federal law, historical context, and tribal/federal interactions and relationships being based primarily on federal law, rules and regulation rather than treaty. The scope of the Council's review and disapproval of PBC's legislative acts, with the exception of membership issues, is limited to those specifically identified and surviving treaty rights such as protection from outsiders, annuities, land, and reservation of hunting rights or those legislative acts affecting the terms of the treaty relationship between the Nation and the U.S.

It may be helpful for the PBC and Nasharo Council to review the above guidelines and determine the best ways to implement and institutionalize them in the day-to-day governance to ensure that both bodies are performing their duties in accordance with the Constitution. For example, one measure the PBC could take is to add a standard certification to each resolution indicating whether Nasharo Council review is required or not and the reason review is required or not.

If you have any questions, please advise me.

Yours,

A handwritten signature in black ink, consisting of several overlapping loops and lines, positioned below the text "Yours,".