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December 3, 1990

BIA.BL.0568

Mr. Donald G. Kittson
Tribal Attorney
The Blackfeet Legal Department
P.O. Box 849
Browning, MT 59417

Dear Mr. Kittson:

Re: Blackfeet Inquiries on Indian Gaming Regulatory Act

Thank you for sending me a copy of your October 2, 1990, letter addressed to Mr. Michael Cox. You have attached copies of two March 12, 1990, letters concerning issues involving interpretation of the Indian Gaming Regulatory Act of 1988.1/

I have discussed these matters with Michael Cox. He is now General Counsel for the Indian Gaming Commission and is no longer a member of the Solicitor's office. He advises that the Solicitor has directed regional and field offices to coordinate legal opinions relating to the Indian Gaming Regulatory Act (Act) with Mr. Cox. Therefore, I have had Mr. Cox review this letter prior to sending it to you, which accounts for some of the time it has taken to respond to your questions. His review does not mean he necessarily agrees or disagrees with this opinion.

Under § 10 of the Act, the Secretary is required to continue to exercise authorities vested in the Secretary before the act "until such time as the Commission is organized and prescribes regulations." He further has the responsibility to provide staff and support assistance for an orderly transition to regulation of Indian gaming by the Commission. In other words, inasmuch as the Commission has not yet promulgated regulations, it is clear that the Secretary has a continuing duty, undefined as it may be, to be involved in Indian gaming matters. That is the reason for our response herein.

You indicate that the Blackfeet Tribe has been negotiating with the State of Montana (State) in an attempt to obtain a tribal/state compact pursuant to the Indian Gaming Regulatory Act. You indicated that a question arose concerning the applicability of the Act to fee lands owned by non-Indians

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1/ I have also received your November 20 inquiry; however, I will address that matter at a later time, if necessary.

located within the exterior boundaries of the Indian reservation. You advised that it is your opinion that the Act applies to all lands within the exterior boundaries of the reservation, irrespective of trust or fee ownership status. By the same token, you acknowledged that the State, through its Deputy Director of the Department of Commerce, Andy Poole, feels that the Act applies essentially to only trust lands (not fee lands) within the exterior boundaries of the reservation. Mr. Poole's position is apparently based on a conjunctive interpretation or reading of the Indian Gaming Regulatory Act of 1988, §§ 4(4)(A) and (B). That section reads as follows:

> "(4) The term "Indian lands" means --
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> > "(A) all lands within the limits of any Indian reservation;
>
> "and
>
> > "(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." (Emphasis added.)

The underlined word "and" is apparently being read by the State to apply the Act to only those lands which are held in trust within that reservation, which would exclude fee lands within the reservation.

I disagree with the State's opinion.

Section 20(a) of the Act, 25 U.S.C. § 2719, undermines the State's argument. Section 20(a) provides that lands acquired by the Secretary in trust for a tribe after the date of the Act cannot have gaming regulated by the Act conducted thereon unless such lands are located within or contiguous to the boundaries of the reservation. Section 20(b)(1) says that 20(a) does not apply when the Secretary, after proper consultation, determines that a gaming establishment would be in the best interests of the tribe, and so on, with the concurrence of the state governor.

Although the definition of Indian lands does not mention the word "boundaries," it does include "all lands within the limits of any Indian reservation," and § 20(a)(1) does allow lands "contiguous to the boundaries of the reservation" to be considered. In other words, the word "limits" may have been further defined by the use of the word "boundaries."

The legislative history for the Act is not very helpful on this issue. See U.S. Code Congressional and Administrative News, 1988, Vol. 5, pp. 3071-3106. The legislative history concentrates on other issues. However, Assistant Attorney General John R. Bolton's letter of January 14, 1988, on behalf of the Office of Legislative and Intergovernmental Affairs for the Department of Justice mentions that "Section four of S. 1303 generally prohibits tribes from running a gaming operation anywhere but within the boundaries of their present reservations." (Emphasis added.)

More conclusive is the colloquy on the Senate floor concerning this very question as follows:

> Mr. EVANS. It is my understanding that the references in the bill to "Indian lands," "Indian lands of the Indian tribe," "Indian lands over which the tribe has jurisdiction," and "lands owned by the Indian tribes" are meant to be interpreted the same way to apply to all lands within reservation boundaries and trust lands outside the reservations. Is my understanding correct?
>
> Mr. INOUYE. The Senator from Washington is correct. These references throughout the bill must be looked upon with reference to the definition of "Indian lands" on pages 43 and 44 of the bill which includes all lands within the limits of any reservation and those trust or restricted lands outside the reservations.
>
> Mr. EVANS. It is my understanding that the bill leaves undisturbed the tribe's right to totally prohibit certain form of gambling within an Indian reservation or upon trust lands outside the reservation should the tribe so choose.
>
> Mr. INOUYE. That is correct, the bill is intended to leave intact the tribe's regulatory authority over all lands within the reservation boundaries and upon trust or restricted lands outside the boundaries. The provisions of section 11(d)(2)(D) authorize a tribe to completely prohibit all or certain forms of gaming if they so desire.

See "Proceedings in the Senate" on S. 555 on September 15, 1988, p. A116 of Congressional Record.

In addition, the plain reading of §§ 4(4)(A) and (B), in my view, is inconsistent with the State's argument. The phrase "all lands" means all lands. The word "and" between (A) and (B) adds trust lands outside the reservation; it does not limit "all lands."

Therefore, it is my opinion that the Act covers Indian gaming within the exterior boundaries of Indian reservations, regardless of whether lands therein are held in trust or in fee status.

The State still is able to protect its interests under the Act for many different situations. For instance, individually owned Class II games other than tribally-owned gaming must be operated under State law. The legislative history explains:

> "**Individually owned class II games.** -- Section 11(b)(4)(A) and (B) deal with the issue of individually owned and operated class II bingo and card games. It is the Committee's intent that all gaming, other than tribally-owned gaming, on Indian lands be operated under State law. The Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services. In contrast, while income may accrue to a tribe through taxation or other assessments on an individually owned bingo or card game, the purpose of an individually-owned enterprise is profit to the individual owner(s) of Indian trust lands. While a tribe should license such enterprises as part of its governmental function, the Committee has determind [sic] that State law (such as purpose, entity, pot limits, hours, or operation, etc.) should apply to such enterprises. These games are not to be confused with units of a tribe or tribal social or charitable organizations that operate gaming to support their charitable purposes; such games are not covered by this paragraph but rather will come under tribal gaming. Those individual games operated prior to September 1, 1986, may continue to operate under tribal ordinance and without regard to State purpose or hour and pot limits if such games provide 60 percent of net revenues to the tribe and the owner pays as assessment to the Commission under 18(a)(1). . . ."

Further, the State can regulate class III gaming through the tribal/state compact to the extent that it can negotiate such with the tribe.

The Committee noted that since there is no tribal or federal regulatory system in place, it desired to adopt state law for the purposes of regulation, however cautioning that the adoption of

state regulations was not an accession to state jurisdiction. See pp. 3083-3084, U.S. Code Congressional and Administrative News.2/

You asked whether the Brendale decision is applicable to this issue. Although there is more than one view of what that case said, the case of Yakima Indian Tribe v. Whiteside, 16 I.L.R. 1084 (U.S. S. Ct. 1989) (Brendale) held that there may be concurrent jurisdiction in the state and the tribe for zoning the "open area." Only in the "closed" area could the tribe exclusively zone non-Indian fee land. The authority of the tribe to civilly regulate non-Indian gaming within the reservation is an issue that neither the Act nor its legislative history fully answer. As I have already mentioned, a state can clearly civilly regulate non-tribal gaming within the reservation.

The question is whether the tribe has the authority under the Act to exclude all but tribally owned gaming within the reservation leaving only the tribe to regulate tribal gaming. It is certainly clear that if the tribe and state wish to clarify these issues through negotiations in a compact, that compact will settle later disputes, a commendable goal. However, not all questions may be answered now or in a compact if the two parties are unable to agree on certain issues. It is certainly clear that the Act is pervasive as to Indian gaming on Indian reservations and likely preempts any inconsistent state law, except as agreed to in compacts by the parties. Regulations to be promulgated pursuant to the Act may further clarify the application of the Act.

Absent any compact, although some of the fundamental principles enunciated in Brendale could be considered by the Supreme Court in a case involving non-Indians on fee land that are being regulated by substantive tribal law, the tribe may be utilizing

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2/ One case that interprets the Indian Gaming Regulatory Act is the Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al., CV 90-C-408-C filed July 18, 1990, wherein the U.S. District Court for the Western District of Wisconsin held that the state lacked authority to prosecute violations of the state's gambling laws on the named plaintiff reservation and the Sokaogon Chippewa Community Reservation under either P.L. 83-280 incorporated into 18 U.S.C. § 1162 or pursuant to the Indian Gaming Regulatory Act and 18 U.S.C. § 1166. The court basically treats the issues as on-reservation versus off-reservation, and does not distinguish between trust and fee land on the reservation. See p. 11, Slip Opinion. This is in part due to the Indian country definition of 18 U.S.C. § 1151. See p. 13, Slip Opinion. (Copy of decision enclosed for your convenience.)

state substantive law (in the absence of their own comprehensive regulatory system) thereby obviating the fundamental due process objection raised by non-Indians in the Brendale case.

As to the issue you raised in your other March letter, you inquire as to whether the Act limits the taxing authority of a state in such a way that a state may only assess amounts which defray the cost of regulation. You explained that the State currently taxes non-member owners of gaming machines operating on the Blackfeet Reservation at the rate of 15 percent of gross revenues, one-third of which goes to the State and two-thirds to the local government where the machine is located. You assert that the Tribe is a proper taxing authority, based on §§ 11(d)(3)(C)(iii) and 11(d)(4). You indicate the State has conceded it is only interested in regulating non-Indian owned interests on non-Indian fee lands.

It appears that you have cited the relevant provisions in the Act. Section 11(d)(3)(C)(iii) allows the State to assess an amount necessary to defray the cost of regulating activity if agreed upon in the tribal/state compact. On the other hand, under 11(d)(3)(C)(iv) an Indian tribe may tax the activity in an amount comparable to that assessed by the state. Section 11(d)(4) precludes any state taxation, fee, charge or other assessment other than that discussed above in (iii). It is clear that the Act allows the authority of taxation by a tribe whereas it only allows a state to assess an amount necessary to defray the administrative cost for a state. This would lead one to the conclusion that the State has no authority to tax but only to charge an administrative fee necessary to pay the costs of administrating the regulations of the State, as agreed to under any tribal/state compact.

As to whether 15 percent of the gross revenues is a tax rather than an assessment as contemplated by the Act is unknown to me. One would have to undertake an economic study as to the relative administrative costs of regulating the activity. If 15 per cent exceeds that administrative cost, it may be an illegal tax as prohibited by the Act.

However, it may not be illegal if the State is taxing non-Indian owned interests as your letter indicates. If those interests fall under the individually owned Indian gaming subject to state regulation, it is possible to argue that those interests are not the "activities" contemplated by 11(d)(3)(C)(iii) in the Act.

The responsive argument by the Tribe may be that if the tribe has the authority to regulate all Indian gaming on the reservation as a sovereign government and thereby preclude all non-Indian or Indian individually owned gaming, except for that which is tribally owned and which meets the 60 percent profits test mentioned in the legislative history, then the State's assessment

or tax may be illegal. So the Tribe has a fundamental decision to make here on whether individually-owned gaming is going to be allowed on the reservation.

It is possible that Congress contemplated that the costs of state regulation of such activity if agreed upon in a tribal/state compact could be liberally construed to be more rather than less. The legislative history notes as follows:

> "a State's governmental interest with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens."

See U.S. Code Congressional and Administrative News, p. 3083. However, the legislative history also notes that where there are ambiguities on this issue that they are likely to be interpreted most favorably to the tribal interests. Id. p. 3085.

If you have further questions or comments, please do not hesitate to contact our office.

Sincerely,

Roger W. Thomas
For the Field Solicitor

Enclosure

cc:
Michael Cox, General Counsel, Indian Gaming Commission, c/o Office of the Solicitor, Division of Indian Affairs, Mail Stop Room 6456, Main Interior Building, Washington, D.C. 20240 (w/cy enc.)