

## Memorandum

To: Jean Coughlin - MIC:57  
Environmental Fees Division

Date: January 8, 1996

From: Janet Vining  
Legal Division

Subject: Applicability of Occupational Lead Poisoning Prevention Fee to Indian Casinos  
Operating on Indian Land

I am writing in response to your May 15, 1995 memorandum concerning the applicability of the Occupational Lead Poisoning Prevention Fee imposed by Health and Safety Code Section 429.14 to Indian casinos operating on Indian land. For the reasons set forth below, we conclude that the Occupational Lead Poisoning Prevention Fee does not apply to such casinos.

You have received inquiries from both the [redacted] (operated by the [redacted] Indian tribe) and the [redacted] (operated by the [redacted] Indians) concerning their liability for the Occupational Lead Poisoning Prevention Fee. Both casinos have been issued Standard Industrial Classification Code 7999, which is listed in Health and Safety Code Section 429.15(a). Both tribes assert that they are exempt from the fee because they are Indian tribes operating casinos on Indian reservations, and Indian tribes enjoy broad immunity from state action. Additionally, you have been informed that, pursuant to Health and Safety Code Section 429.15, the Department of Health Services (DOHS) has granted permanent fee waivers to two other casinos operated by Indians on Indian land, finding that lead use and lead exposure no longer exist in those operations.

The determination of whether an Indian tribe is subject to a particular state requirement involves a complicated analysis.

Generally, a state may not tax tribes or tribal members absent congressional consent. California v. Cabazon Band of Indians (1987) 480 U.S. 202; Montana v. Blackfeet Tribe (1985) 471 U.S. 759; McClanahan v. Arizona State Tax Comm'n. (1973) 411 U.S. 164; Mesacalero Apache Tribe v. Jones (1973) 411 U.S. 145. No statute or caselaw clearly classifies the Occupational Lead Fee as a tax or a fee. The Board is currently involved in litigation concerning the Childhood Lead Poisoning Prevention Fee, an imposition which is similar, but not identical, to the Occupational Lead Fee. In that case, a Superior Court

judge ruled that the Childhood Lead Fee is a tax and did not pass the Legislature with a sufficient number of votes. The Board has appealed that ruling, and we hope that the Court of Appeal will provide some guidance on the question of what is a tax and what is a fee. If the Occupational Lead Poisoning Prevention Fee is a tax, the state may not impose it on Indians without congressional consent, and Congress has not granted such consent.

If the Occupational Lead Fee is a fee, there is still doubt as to whether it can be imposed on the activities of Indians on Indian land. In 1953, Congress enacted Public Law 280 (Title 28 U.S.C. Section 1360), which gives six states, including California, jurisdiction over civil causes of action involving Indians that arise in Indian lands to the same extent as those states have jurisdiction over other civil causes of action. Public Law 280 also provides that the states' civil laws of general application to private persons or property have the same force and effect within Indian lands as they have elsewhere in the state. However, in Bryan v. Itasca County (1976) 426 U.S. 373, the U.S. Supreme Court held that the primary purpose of Public Law 280 was to grant the states jurisdiction over private civil litigation involving reservation Indians in state court, and that it did not grant the states general civil regulatory authority over Indian lands.

State law may be applied to Indian land when the conduct of non-Indians is involved, unless such application would impair a right granted or reserved by federal law or would infringe on the right of reservation Indians to make their own laws and be ruled by them (Segundo v. City of Rancho Mirage (9th Cir. 1987) 813 F.2d 1387). In Segundo, members of the Agua Caliente Band of Cahuilla Indians argued that the city could not apply rent control ordinances to a mobile home park operated by a non-Indian entity on Indian land. The court agreed, noting that the trend has been to rely on federal preemption of state regulation, using notions of Indian self-government as a backdrop against which assertions of state regulatory authority must be assessed. The court found that the comprehensive federal regulatory scheme covering the leasing of Indian lands preempted the application of state and local laws to the mobile home park.

In The People ex rel Department of Transportation v. Naegele Outdoor Advertising Co. of California (1985) 38 Cal.3d 509, the court held that California could not regulate billboards on Indian reservations. The court found that there was no clear expression of Congressional intent that the state be allowed to regulate such billboards and, in addition, the state's regulatory program was preempted by the operation of the federal Highway Beautification Act.

State of Washington, Department of Ecology v. U.S. Environmental Protection Agency, (9th Cir. 1985) 752 F.2d 1465, involved the application of a state hazardous waste regulatory program to Indian property. In that case, Washington sought to apply its state hazardous waste regulations to the activities of all persons, Indian and non-Indian, on Indian lands. The U.S. EPA approved the state's application for interim authorization to administer

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the federal hazardous waste regulatory program in the state, except as to the Indian lands. The EPA argued that the Resource Conservation and Recovery Act (Title 42 U.S.C. Section 6901, et seq.) applied to Indians, and that state regulation of hazardous waste activities on Indian property was preempted.

The court agreed, holding that RCRA does not authorize the states to regulate Indians on Indian lands. The court found that Congress had not clearly expressed an intention to permit such state regulation, and that there was a long-standing tradition of tribal sovereignty, as well as a federal policy of encouraging tribal self-government in environmental affairs. The court reached this result even though Indian tribes were clearly regulated under RCRA, and RCRA authorized the state to regulate hazardous waste activities in lieu of the federal program.

Given the lack of a clear grant of authority from Congress, as well as the possibility of preemption based on federal law (Titles 15 and 42 of the United States Code contain federal law addressing the problems of lead-based paints and lead in drinking water), there is a significant question concerning whether the state can impose the Occupational Lead Poisoning Prevention Fee on casinos operated by Indians on Indian land even if it is a fee rather than a tax. I would, therefore, conclude that casinos operating on Indian land are not subject to the Occupational Lead Poisoning Prevention Fee.

Please call me if you have any questions or wish to discuss this opinion.



JV/wk

cc: Stephen Rudd  
Terry Grubbs  
Mary Armstrong