April 1, 2002

Henry St. Germaine, Sr., President

Lac du Flambeau Band of Lake Superior Chippewa Indians

PO Box 67

Lac du Flambeau, WI 54538

Dear Mr. Germaine:

This letter is in response to your inquiry into any regulations that would apply to an Indian Tribe that is looking into riverboat gambling. To the extent such gaming may be considered gaming under the Indian Gaming Regulatory Act (IGRA), all of the regulations contained in 25 C.F.R. parts 501-577 apply. If such gaming is not gaming under the IGRA, however, state laws would apply.

One question to be answered, therefore, is whether the waters on which the Lac du Flambeau Band of Lake Superior Chippewa Indians (Tribe) wish to conduct gaming are considered "Indian lands" as defined by IGRA and National Indian Gaming Commission (NIGC) regulations. Absent such a determination, there is a serious question as to whether the IGRA or state gambling laws apply to the gaming activities conducted on such waters. Without more information, we cannot conclude whether the waters on which the Tribe wishes to conduct gaming are to be considered Indian lands over which the Tribe has jurisdiction.

The gaming compact between the Tribe and the State of Wisconsin dated November 27, 1991, defines "Tribal lands" as follows:

1. All lands within the limits of the Lac du Flambeau Band of Lake Superior Chippewa Indians reservation;

2. All lands within the State of Wisconsin held in trust by the United States for the benefit of the Lac du Flambeau Band of Lake Superior Chippewa Indians as of October 17, 1988; and

3. All lands within the State of Wisconsin which may be acquired in trust by the United States for the benefit of the Lac du Flambeau Band of Lake Superior Chippewa Indians after October 17, 1988, over which the Tribe exercises governmental power, and which meet the requirements of § 20 of the Act, 25 U.S.C. § 2719.

The approved ordinance, dated June 23, 1993, defines "reservation" as "the land *and waters* within the exterior boundaries of the Lac du Flambeau Indian Reservation." This is the only information presently available to us.

An Indian tribe may engage in gaming under IGRA only on "Indian lands within such

tribe's jurisdiction," 25 U.S.C. § 2710(b). Moreover, if the proposed lands are trust or restricted lands, rather than land with the limits of an Indian reservation, the tribe may conduct gaming on such lands only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). IGRA explicitly defines "Indian lands" as follows:

(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.

25 U.S.C. § 2703(4).

NIGC regulations have further clarified the Indian lands of definition, providing that:

Indian lands means:

(a) Land within the limits of an Indian reservation; or

(b) Land over which an Indian tribe exercises governmental power and that is either –

(1) Held in trust by the United States for the benefit of any Indian tribe or individual; or

(2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. Generally, lands that do not qualify as Indian Lands under IGRA are subject to state gambling laws. *See National Indian Gaming Commission: Definitions Under the Indian Gaming Regulation Act*, 57 Fed. Reg. 12382, 12388 (1992).

The dual questions under IGRA of whether a tribe "has jurisdiction" and "exercises governmental power" over land on which the tribe proposes to conduct gaming can arise under a variety of circumstances. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994); *Miami Tribe of Oklahoma v. United States,* 5 F. Supp.2d 1213, 1217-18 (D.Kan. 1998)(*Miami II*) (a tribe must have jurisdiction to exercise governmental power); *State ex rel. Graves v. United States*, 86 F. Supp.2d 1094, 1099 (D.Kan. 2000); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan. 1996)(*Miami I*). In this context, the NIGC is charged with the task of ensuring that 1) the tribe has jurisdiction, and 2) if the proposed lands are trust or restricted lands outside the limits of an Indian reservation, that the tribe exercises governmental power over the proposed gaming lands.

Because we do not have sufficient information, we are not able to determine whether the Tribe has jurisdiction over the waters within the boundaries of the reservation. If you seek such a determination, please provide such documentation and legal analysis as may assist us in our determination.

If you should have questions regarding this matter, please contact Heather Hausburg at (202) 632-7003.

Sincerely,

Penny J. Coleman

Deputy General Counsel

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