United States Department of the Interior

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IN REPLY REFER TO:

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NATIONAL INDIAN
GAMING COMMISSION
97 JUL 21 AM 10: 27

July 7, 1997

Acting Chairperson
National Indian Gaming Commission
1850 M Street, N.W.
Suite 250
Washington, D.C. 20036

Re: Request by Pawhuska Indian Village, Pawhuska, Oklahoma, to Conduct Gaming Operations

Dear Chairperson:

This letter is in response to the request of the Pawhuska Indian Village to conduct bingo games at their village. While this office has not ever received an official request for an opinion from your office, we have been contacted directly by the Pawhuska Indian Village and we hope to clarify several issues regarding this matter.

Congress set aside and reserved three Indian villages in the Act of June 28, 1906, 34 Stat. 539, ("1906 Act") also known as the Osage Allotment Act, for the exclusive use of Osage Indians for dwelling purposes for a period of 25 years from January 19, 1907. Through subsequent acts, the period has been extended indefinitely. *See* Act of October 21, 1978, P.L. 95-496, 92 Stat. 1660. The regulations at 25 C.F.R. Part 91 provide policies and procedures for governing the villages. Pursuant to § 91.6, village committees were organized to provide for the health, safety and welfare of its inhabitants, for the maintenance of tribal property, and to serve as custodian and manager of tribal property and improvements located within the villages. Section 91.5 reserved certain tracts in the villages from selection by individuals and set them aside for sepultural or for public use by tribal members.

The regulations at § 91.12 limit the activities of the villages by prohibiting the conduct of any activity classified as a permanent business enterprise. In 1993, the Area Director, Muskogee Area Office, BIA, ("Area Director") issued a decision that the Hominy Indian Village's operation of bingo games constituted a permanent business enterprise in violation of 25 C.F.R. § 91.12. The Hominy Indian Village appealed the Area Director's decision in the attached case, *Hominy Indian Village Committee v. Muskogee Area Director*, No. IBIA 94-79-A (Interior Board of Indian Appeals, March 15, 1994). Thereafter, the Interior Board of Indian Appeals dismissed the case because the village failed to show that its notice of appeal was timely filed.

It is our understanding that your office has approved a gaming ordinance submitted by the Osage National Council, the legislative branch created by the Constitution adopted by the Osage people in 1994. Additionally, the Osage Tribal Council, the governing body created by the 1906 Act, had submitted a proposed Class II Gaming Ordinance to the Area Director. This office reviewed the proposed ordinance and expressed concerns about threshold requirements such as proposed jurisdiction, the entity that had the authority to conduct gaming business for the Osage Nation, and pending litigation in *Fletcher v. United States*, No. 90-C-248-E (N.D. Okla., October 28, 1992). A copy of our opinion is attached. Thus, the Osage Tribal Council's gaming ordinance was not approved by this office.

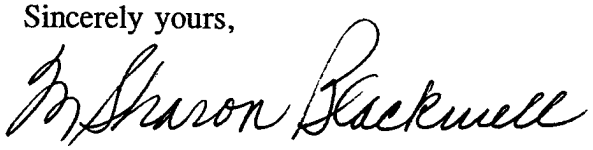
On June 10, 1997, the Tenth Circuit Court of Appeals issued the attached decision in *Fletcher v. United States*, No. 95-5208 (10th Cir. 1997) which held that 1994 Constitution was invalid as the district court erred in ordering and presiding over the constitutional change of the Tribe's form of government. The Court found that Congress had prescribed the form of tribal government for the Osage Tribe in the 1906 Act and that the district court erred in failing to timely rule on the Tribal Defendant's (Osage Tribal Council) motion to dismiss on the ground of sovereign immunity. The Tenth Circuit held that only Congress has the power to permit alteration of the form of the Osage Tribal government.

Prior to this decision, the authority of the Osage Tribal Council to regulate gaming operations was in question. However, the Tenth Circuit clarified the powers of the Osage Tribal Council and held that the Osage Tribal Council has "general governmental authority over the affairs of the Osage Tribe." *Fletcher*, at 24-26 (citing *Logan v. Andrus*, 640 F.2d 269, 270-71 (10th Cir. 1981)). Thus, we believe that the Osage Tribal Council can regulate of gaming activities.

In summary, our opinion is that any gaming activities conducted by the Pawhuska Indian Village would violate 25 C.F.R. § 91.12 in the absence of a waiver of regulations by the Secretary. However, if the regulations are waived, we find no legal impediment to the operation of gaming activities in the villages by the Osage Tribal Council.

Please contact me at (918) 669-7730, ext. 226, if we can be of further assistance to you in this matter.

Sincerely yours,



M. Sharon Blackwell
Field Solicitor

Enclosures

cc: w/o enclosures

cc: w/o enclosures
Associate Solicitor--Indian Affairs, DIA, Washington, D.C.
Area Director, Muskogee Area Office, BIA
Superintendent, Osage Agency, BIA