

April 17, 2007

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Pender, NE. 68047
U.S. E.P.A.

U.S. Environmental Pro. Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

2007 APR 25 PM 1:42

ENVIR. APPEALS BOARD

RE: NPDES Appeal No. 07-05
NPDES Permit No. NE0040908
Village of Pender, Nebraska

Dear Ms. Durr:

Recently we received copies of correspondence from Jane Kloeckner, EPA in Kansas City, KS. addressed to you and dated Apr. 11, 2007. Acknowledging our erroneous decision in submitting a petition, we do, however hereby forward pertinent copies of current documents pertaining to and necessary for the decision-making process of the Federal Government with regard to Nebraska and specifically Thurston Co.

We are sending them directly to you and the Board since previous personal correspondence to Ms. Kloeckner in Kansas City has unappreciateley found it's way expressly in the hands of the Native American tribe of our questionable opposition. Our business, as recalled, also was NOT listed on the petition; yet astonishingly appears in her Motion to Dismiss.

Ms. Kloeckner cited the Gas Tax Agreement between our Governor and the Omaha Tribe, Macy, (Thurston Co.) NE. as one reason for her Motion. Another reason was that Pender is considered "Indian Country" to which our State Attorney General and Governor disagree. We say also, that if Pender (which does little business with the Native Americans) is considered "Indian Country", then what of those towns closer to them such as Homer, NE., Lyons, NE., South Sioux City NE. and Sioux City, IA (to name some)? Why then are they not also disembodied of their privileges of carrying on business as citizens in their respective St

The Federal Government seems always to want to take the word of the Indians who assume continually to circumvent subsequent treaties and Acts of Congress profoundly changing the status of the American Indians in Thurston Co. today.

It was our intention to submit herewith a copy of the letter from Gov. Dave Heineman rescinding all fuel taxes from Pender, NE. to the Omaha Tribe as of March 1, 2007; however, unfortunately that letter is presently in the hands of our attorneys in Lincoln, NE. We estimate, to date, though that the Tribe has already erroneously accumulated approximately one-half million dollars from Oct, 2005 to March, 2007--monies that should have been allocated to the State of NE. for the maintenance of roads on which the tribes also drive but pay no taxes! Thank you, the Board members for reading; these copies entirely thus acquiring more knowledge for determinations in these serious matters.

Respectfully


Patrick L. & Joanne Hoyt

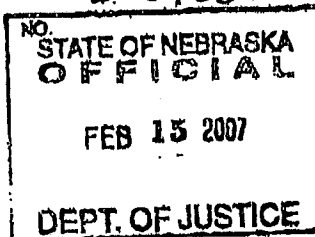
Enc: Copy of Opinion of NE. Atty. Gen., Jon Bruning in which he states Pender is NOT on the Reservation and on pg 4, "area west of the right-of-way" (of the railroad) "has lost it's Indian character". Also enclosed is the Omaha World Herald Injuncion Decision of April 17, 2007 by U.S. District Judge Richard Kopf barring the Omaha Tribe from enforcing their attempted liquor tax and license to sell liquor in Pender, NE.



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JON BRUNING
 ATTORNEY GENERAL

SUBJECT: Whether the Omaha Tribe's Alcoholic Beverage Control Title, Title 8 of the Omaha Tribal Code, impairs the power of the Nebraska Liquor Control Commission to regulate the sale and distribution of alcohol on tribal lands; Whether the City of Pender and certain land near Pender are part of the Omaha Indian Reservation.

REQUESTED BY: Hobert Rupe, Executive Director
 Nebraska Liquor Control Commission

WRITTEN BY: Jon Bruning, Attorney General
 Milissa Johnson-Wiles, Assistant Attorney General
 Jodi Fenner, Assistant Attorney General

Mr. Hobert Rupe
 Executive Director
 Nebraska Liquor Control Commission
 301 Centennial Mall South, 5th Floor
 Lincoln, NE 68509-5046

Dear Mr. Rupe:

This is in response to your correspondence of December 22, 2006 and February 5, 2007, in which you requested an opinion of this office regarding the Omaha Tribe's regulation and taxation of alcohol sales on the Omaha Indian Reservation, pursuant to the Omaha Tribe's Alcoholic Beverage Control Title, Title 8 of the Omaha Tribal Code, and whether the City of Pender and certain land near Pender are within the boundaries of the Omaha Indian Reservation.

The Omaha Tribe's Alcoholic Beverage Control Title has various provisions regulating the manufacture and sale of alcohol within the reservation. It is our understanding that the Omaha Tribe has notified manufacturers, importers, wholesalers and retailers that beginning January 1, 2007, said persons must have the appropriate

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liquor license from the Omaha Tribal Council in order to conduct business on the Omaha tribal reservation. The Title further requires a 10 percent sales tax on retail purchases.

Specifically, you have asked three questions regarding the Omaha Tribe's intention to regulate the sale and distribution of alcohol on the reservation beginning January 1, 2007:

- 1) What are the Tribe's rights and abilities to regulate alcohol sales?
- 2) Do the Tribe's actions conflict with Neb. Rev. Stat. § 53-116 and the Twenty-First Amendment of the United States Constitution?
- 3) Are the City of Pender and certain land near Pender part of the Omaha Indian Reservation?

With respect to these first two questions, since our office cannot give legal advice to private individuals or entities, the scope of this opinion is limited to the effect the tribal ordinance may have on the Liquor Control Commission's ability to regulate the sale and distribution of alcohol on tribal land. As such, this opinion will not provide a legal interpretation of the Omaha Tribe's Alcoholic Beverage Control Title, or express an opinion regarding its validity.

You have asked whether the tribe's intention to enforce Title 8 conflicts with Neb. Rev. Stat. § 53-116 (Reissue 2004) and the Twenty-First Amendment. Section 53-116 provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic of alcoholic liquor, except as specifically delegated in the Nebraska Liquor Control Act, is vested exclusively in the commission."

The Twenty-First Amendment repealed Prohibition and returned power to the states to regulate the sale and distribution of alcohol. U.S. Const. Amend. XXI. With respect to the grant of power to the states to regulate alcohol, the Twenty-first Amendment states: "The transportation or importation into any State, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Amend. XXI Section 2. X

There is nothing specific in either §53-116 or the Twenty-First Amendment which purports to limit the Omaha Tribe from enacting its own tribal ordinance regulating the sale and manufacture of alcohol on the reservation. Indeed, Congress has specifically granted the tribes the authority to regulate liquor transactions in Indian country. §18 U.S.C. 1161. In City of Timber Lake, et. al. v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993), the court analyzed relevant case law as well as 18 U.S.C. §1161 and held that said section grants tribes, in addition to the states, the authority to regulate liquor traffic. The court therein stated: "By passing the law codified at 18 U.S.C. §1161 Congress 'delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country.'" City of Timberlake.

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2.3100b AMOL
2.3110b PHLL

BLEND-G

JUL 91
2.5567b TEXO
2.5570 GWEL

DSL #2 L

DSL #1 L

ETHANOL

USD
2.3758b AMOL
2.4125 FANL

XXC MILFORD
2.3035b PHLL

2.5185b PHLL

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XOD OSCEOLA
2.2767 SRPL
2.2785 STNL
2.2825 GROL
2.2850 WEST
2.2975 FANL
2.3260b PHLL

2.4517 SRPL
2.4685 STNL
2.4690 GROL
2.4775 FANL
2.5560b PHLL
2.5850 WEST

2.4010 WEST
2.4740 GROL
2.4830 STNL
2.5270b PHLL
2.5525 FANL
9.9999 SRPL

2.2500 FANL
2.3361 SRPL
2.3390 GROL
2.3530 STNL
2.3610 WEST
2.3770b PHLL
2.4125 FANL

ERIC → LARRY BARGEMAN

XOM MCPHERSON
2.2275 GROL
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Sapp Bros Petroleum Inc.

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2.2770b PHLL
2.2794 SRPL
2.2800b AMOL
2.2825b PHLL
2.2835 GROL
2.2845 GWEL

2.2980 GROL
2.3040b PHLL
2.3110b PHLL
2.3150b AMOL

2.4504 SRPL
2.4600b AMOL
2.4655 STNL
2.4770 GROL
2.4970b PHLL
2.5125b PHLL
2.5570 GWEL

2.3338 SRPL
2.3500 GROL
2.3695b PHLL
2.4090b AMOL

2.1530b AMOL
2.4435 GROL
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2.5085b PHLL
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supra at 556 (citing Rice v. Rehner, 463 U.S. 713, 715 (1983)). The ordinance adopted by the Omaha Tribe is in addition to, and does not supersede, Nebraska's liquor control laws. This is in accord with 18 U.S.C. §1161, which provides that liquor transactions on tribal lands must comply with both state laws and tribal ordinances. See generally, City of Timberlake, supra. As a result, the ordinance does not impair the Commission's ability to regulate alcohol.

You have further requested that we address the dispute regarding whether the City of Pender and certain land near Pender are part of the Omaha Indian Reservation. As addressed in Attorney General's Opinion 1026, dated July 23, 2001, it is the opinion of this office that the Omaha Reservation was diminished, either expressly or de facto, by the United States Congressional Acts of August 7, 1882, 22 Stat. 341 ("1882 Act"), February 28, 1899, 30 Stat. 912 ("1899 Act"), May 11, 1912, 37 Stat. 111 ("1912 Act"), and the subsequent treatment and character of the disputed territory.

In Solem v. Bartlett, 465 U.S. 463 (1984), the United States Supreme Court set forth several factors to be considered in determining whether Congressional language caused the diminishment of a reservation, but the Court also recognized that de facto diminishment of a reservation may exist regardless of Congress's language or intent. See Solem, 465 U.S. at 472 ("Where non-Indian settlers flooded into the opened portion of the reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred.") Additional considerations in determining whether the Reservation has been diminished are stated in Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), cert. denied 530 U.S. 1261 (2000). In Yankton, the Eighth Circuit Court of Appeals found that when determining whether a reservation has been diminished, it should look to the full historical context of the Congressional acts at issue to determine Congress's intent (and not limit itself to the express language of the acts). Id. The Court further considered, as provided for in Solem, the treatment of the Yankton Sioux Reservation area in the years following the passage of the act, such as the fact that the State had assumed primary jurisdiction over unallotted lands that had passed out of trust status. Id.

In the 1865 Treaty with the Omaha Tribe, the United States Congress provided for the assignment of property to Omaha Tribal members and the discontinuation of the tenancy in common by which the Omaha Tribe was then holding their land. The 1882 Act approved an agreement between the Omaha Tribe and the Secretary of the Interior made in 1880 that authorized the sale to settlers of that portion of the Omaha Reservation to the west of the Sioux City and Nebraska Railroad right-of-way (now the Chicago, St. Paul, Minneapolis, & Omaha Railroad ("the right-of-way")).

Thereafter, the 1899 Act authorized the construction and operation of the railroad, and included specific language regarding reversion of the land upon abandonment of the right-of-way. On June 20, 1989, Marcia M. Kimball, for the Field

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Solicitor of the United States Department of the Interior, interpreted the date of the right-of-way and the language of the reversion to conclude that the right-of-way strip would revert to the adjacent landowner, and not the Tribe, upon abandonment. See Letter to Jerry Jaeger, Area Director, Bureau of Indian Affairs dated June 20, 1989.

Subsequently, the 1912 Act authorized the Secretary of the Interior to sell all unallotted land within the Reservation to the highest bidder. C. 121, 37 Stat. 111. In Chase, Jr. v. United States, 258 U.S. 1 (1920), the United States Supreme Court held that the 1912 Act repealed the 1882 Act (and its 1893 amendment) to the extent that they provided that the trust land that was to be held for the tribe would pass in allotments to children who were born during the trust period. The 1912 Act is particularly significant, because it expressly provided that the laws of the United States prohibiting the introduction of intoxicants into the Indian country would be applicable to the affected land for a period of twenty-five years. Ch. 121, 37 Stat. 111, §2. Congress did not need to include this provision in the Act if the affected land was to remain within the Omaha Reservation. Thus, their inclusion of this provision in the 1912 Act indicates that it was indeed the intent of Congress to diminish the boundary.

In a detailed analysis of the Omaha Reservation history, Marcia M. Kimball, for the Field Solicitor of the United States Department of the Interior, in her June 20, 1989 letter to Jerry Jaeger, Area Director, Bureau of Indian Affairs, stated that "the land to the west of the right of way went out of Indian control when it was opened for settlement." She further opined that the most probable location for the Omaha Reservation boundary was center of the right-of-way.

The District Court of Thurston County found that the Omaha Reservation has been diminished in its opinion dated August 21, 2000, in State v. Picotte, CR 00-6. Specifically, the Court found that: "the lands lying east of the railroad right-of-way were treated differently from lands lying west of the right-of-way" (Journal 32, p. 366); "The Omaha Tribe did not retain an interest in the lands opened for settlement west of the railroad right-of-way" (Jml. 32, p. 366); "the legislative history regarding the passage of [the 1882 Act] demonstrates that Congress intended to diminish the Omaha Indian Reservation west of the railroad right-of-way" (Jml. 32, p. 367); "Congress declared in an 1888 Act, that any homestead defaults on land west of the right-of-way would not revert to the Omaha Tribe but be sold at public auction" (Jml. 32, p. 367); "the current demographics of the lands west of the right-of-way confirm that the reservation has been diminished. . . [the lands] were settled by non-Native Americans and are currently owned by non-Indians" (Jml. 32, p. 367); and the area "is routinely patrolled by State and Village of Pender officers; neither officers of the Tribe nor Bureau of Indian Affairs have provided a law enforcement presence in the opened lands" (Jml. 32, p. 368). The Court concluded that the "area west of the railroad right-of-way has lost its Indian character." (Jml. 32, p. 368.)

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Based on the foregoing, it is our opinion that the property west of the center of the right of way described in the 1882 Act went out of Indian control when it was opened for settlement, and should not be considered part of the Omaha Reservation. We understand, however, that despite the opinion given by Ms. Kimball in her letter dated June 20, 1989, the current United States Department of Interior Superintendent, as well as the Omaha Tribe, may disagree with our opinion regarding the diminishment of the Omaha Reservation. As the determination of reservation boundaries is a federal matter, despite our opinion on this issue, individuals and businesses declining to abide by the Tribe's ordinance or other regulatory efforts in the disputed territory may face personal legal consequences. Thus, in the event that you are contacted by individuals or businesses regarding this Title, you should advise them to seek private legal advice.

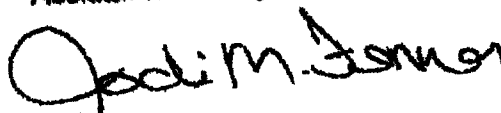
In conclusion, in our opinion, the Omaha Tribe's Alcoholic Beverage Control Title does not affect the Liquor Control Commission's ability to regulate the manufacture, traffic, sale and distribution of alcohol on the Omaha reservation. The Commission retains its current regulatory authority to grant or deny liquor licenses and enforce all provisions of the Liquor Control Act on the Omaha reservation. Further, it is the opinion of this office that the property west of the center of the right-of-way described in the 1882 Act should not be considered part of the Omaha Reservation. Since this is an issue of federal law, however, in the event that you are contacted by individuals and businesses in Pender, you should advise them to seek private legal advice.

Sincerely,

JON BRUNING
Attorney General

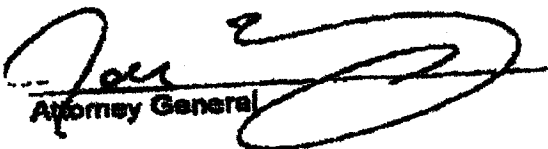


Melissa Johnson-Wiles
Assistant Attorney General



Jodi Fenner
Assistant Attorney General

Approved:



Attorney General

16-881-12

TOTAL P. 05

LINCOLN — A federal judge granted a temporary restraining order Tuesday, barring for now the Omaha Indian Tribe from enforcing a recently enacted liquor tax on taverns and other alcohol outlets in Pender, Neb.

The injunction, granted by U.S. District Judge Richard Kopf, sets the stage for a legal ruling on a larger debate over the boundary of the Omaha Indian Reservation, said Lincoln attorney Gene Summerlin, who represents 10 Pender bar operators.

The operators maintain that Pender, the Thurston County seat, and the western end of the county were removed from the reservation decades ago and thus are not subject to tribal regulations — a claim the Omaha Tribe rejects.

"Through this litigation, one way or another, the federal court will be called upon to decide where the boundary lies," Summerlin said Tuesday.

In their request for the injunction, the operators of seven liquor establishments cited several rulings, including an 1882 Act of Congress, which opened 50,000 acres of land in southwest Thurston County, including Pender, to white settlers.

That "disputed territory," they maintain, is outside the reservation and not subject to the tribe's liquor laws that went into effect on Jan. 1.

To rule otherwise, the bar operators said in a court brief, would "seriously disrupt" the nontribal members living in Pender and the rest of the "disputed territory."

Omaha tribal officials have maintained that the reservation has not been legally diminished and recently sent letters to the taverns and liquor outlets in Pender warning that they were out of

See Bars: Page 2

Injunction latest step in liquor tax battle

■ A judge halts the Omaha Indian Tribe's collection of taxes on Pender, Neb., alcohol sales.

By PAUL HANMEL
WORLD HERALD BUREAU

April 18, 2007

Bars: Judge halts collection of tax in Pender by Omaha tribe

Continued from Page 1
compliance with tribal liquor laws and subject to \$10,000 fines.

The tribal laws include a 10 percent tribal liquor tax and requirements for a tribal license to sell liquor — requirements that bar owners say amount to double taxation and put them at a competitive disadvantage against other establishments.

Tribal officials have said the laws are an attempt to control liquor sales on the reservation and raise money for tribal substance abuse programs.

Phone messages left Tuesday with tribal attorneys and council members were not immediately returned.

Meanwhile, three taverns in Walthill, on the east end of Thurston County, recently agreed to obtain tribal licenses and pay the tax.

It is unclear if the liquor outlets in Rosalia, also on the east end of the county, plan to comply.

Tuesday's injunction does not pertain to liquor establishments outside of Pender.