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March 15, 1954  
Letter Opinion  
No. 54-63-L

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ARIZONA ATTORNEY GENERAL**

The Honorable Kel M. Fox  
State Senator, Yavapai County  
Capitol Building  
Phoenix, Arizona

- Re: (1) Would the Superintendent of the Department of Liquor License and Control have supervisory powers over the sale of spirituous liquors on the Indian reservations in the event of an amendment to the Constitution of the State of Arizona as it relates to sales of intoxicating liquor to Indians.
- (2) In the event of such amendment would the provisions of the spirituous liquor laws dealing with quotas of licenses as measured by population be applicable?
- (3) In the event of such amendment may the State of Arizona tax the sales of spirituous liquors on Indian reservations?

Dear Senator Fox:

In August of 1953, the Congress of the United States passed the following law:

"CHAPTER 502 -- PUBLIC LAW 277

(H. R. 1055)

An Act to eliminate certain discriminatory legislation against Indians in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

'1161. Application of Indian liquor laws.'

Sec. 2. Title 18, United States Code, is hereby further amended by inserting in chapter 53 thereof immediately after section 1160 a new section, to be designated as section 1161, as follows:

'§ 1161. Application of Indian liquor laws

'The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.'

Sec. 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New Mexico shall adopt constitutional amendments to accomplish such repeal.

Sec. 4. Section 9 of the Act of June 4, 1920, An Act to provide for allotment of lands of the Crow Tribe, for the distribution of tribal funds and for other purposes (41 Stat. 751), is hereby repealed.

Approved August 15, 1953." (*Italics underscored*)

From the foregoing it can be seen that the permission of the Federal Government is predicated on two conditions; (1) the repeal of the prohibition against the sale of spirituous liquors to Indians as it exists in the Constitution of Arizona; (2) an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country certified by the Secretary of the Interior and published in the Federal Register.

House Concurrent Resolution 17 provides that Paragraphs 3 and 11, Article 20, Constitution of Arizona are repealed. These paragraphs are as follows:

"Third (Sale of intoxicants to Indians.)--  
The sale, barter, or giving of intoxicating  
liquors to Indians and the introduction of  
liquors into Indian country are forever  
prohibited within this state.

\* \* \* \* \*

Eleventh. (Liquor regulations on Indian  
lands.)--Whenever hereafter any of the lands  
contained within Indian reservations or allot-  
ments in this state shall be allotted, sold,  
reserved, or otherwise disposed of, they shall  
be subject, for a period of twenty-five years  
after such allotment, sale, reservation, or  
other disposal, to all the laws of the United  
States prohibiting the introduction of liquor  
into the Indian country."

The question has arisen as to jurisdiction of the Superintendent of Liquor Licenses and Control to enforce the laws relative to liquor on Indian country, presuming that the people of Arizona approve the Amendment to the Constitution and the Tribal Councils duly adopt an ordinance as provided in Public Law 277. As this is federal legislation and the interpretation placed on it by those charged with its enforcement are the best means available to determine the intention, the first question above was referred to the solicitor for the Department of Interior for his opinion. There follows below his telegram in reply to the inquiry:

"INCOMING TELETYPE

Mar. 11, 1954

W. J. Truswell

Re phone call to Bengé. Public Law 277 not intended as affirmative extension of state jurisdiction to Indian reservations and did not repeal federal Indian Liquor Laws. Assuming appropriate ordinances are enacted by tribes, acts or transactions constituting violations of state law including required license fees and taxes on purveyors would be punishable under 18 USC 1154 or 1156. Non-Indians on Indian reservations continue amendable to state laws.

Burke-Solicitor for Dept. of Interior"

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The thoughts expressed in the above telegram were confirmed by a telephone conversation with The Honorable Orme Lewis, Assistant Secretary of the Interior on March 15, 1954.

In the absence of any Court decision, and in view of the judicially uninterpreted language of Public Law 277, supra, the Department of Law is of the opinion that the interpretation placed upon said law by the legal advisors to the Department of Interior is the interpretation that would be adopted by the authorities having jurisdiction over Indian country. In other words, there has been no affirmative extension of the jurisdiction of the state over Indian country by virtue of Public Law 277.

The force and effect of Public Law 277 is to require that the tribe adopt an ordinance permitting the sale of liquor on Indian country in conformity with the laws of the State but, thereafter, the enforcement of such conformity remains in the Federal Government and the tribal council. That is, the provisions of Sections 1154, 1156, 3113, 3488 and 3618 of Title 18, United States Code, shall not apply as to those transactions within Indian country if the act or transaction is in conformity with the laws of the state. However, if such act or transaction is not in conformity with the laws of the state, then the above named United States Code provisions shall apply and the act or transaction, if contrary to state law, would be punishable under those federal provisions.

Assuming that Arizona amends its Constitution and the tribal authorities enact the ordinance required by Public Law 277, such ordinance would be insubstantially the same form as that adopted by the Blackfeet Tribe of Montana which appears in Volume 19, Federal Register 1049, (February 24, 1954) reading as follows:

**"OFFICE OF THE SECRETARY  
Blackfeet Tribe of Montana  
Federal Indian Liquor Laws**

Pursuant to the act of August 15, 1953 (Pub. Law 277, 83d Cong., 1st Sess.), I certify that the following ordinance relating to the application of the Federal Indian liquor laws on the Blackfeet Indian Reservation was duly adopted by the Blackfeet Tribe of Montana which has jurisdiction over the area of Indian country included in the resolution:

1. That section 18 of the Code of Laws of the Blackfeet Tribe be and the same is hereby repealed and is of no force and effect from this date henceforth. Section 18 of the

Code of Laws of the Blackfeet Tribe which is hereby repealed prohibits the possession, use and transportation of intoxicating liquor, malt beverages and wines within the boundaries of the Blackfeet Indian Reservation.

2. It shall be legal and permissible from this date henceforth to possess, transport and use intoxicating liquors, beer, and other malt beverages and wine within the boundaries of the Blackfeet Indian Reservation subject to such restrictions as may be provided by Tribal ordinances and the laws of the State of Montana.

3. That the laws of the State of Montana and the regulations of the Montana Liquor Control Board in regard to the retail sale of liquor and beer within the boundaries of the State of Montana are hereby adopted and made applicable to the territory within the boundaries of the Blackfeet Indian Reservation with the further provision that anyone wishing to engage in the retail sale of liquor and beer within the boundaries of the Blackfeet Indian Reservation must first make application to the Blackfeet Tribal Business Council and pay a fee which may not be greater than one-fourth of the fee charged by the State of Montana for such licenses and the Blackfeet Tribal Business Council must approve such applicant as to character and proposed location and issue a permit to such applicant to engage in the business of the retail sale of liquor and/or beer within the boundaries of the reservation before he may engage in said business or receive a license to do so from the State of Montana. All persons receiving permits or licenses to engage in the retail liquor and beer business within the boundaries of the Blackfeet Indian Reservation shall at their own expense engage some suitable person to maintain law and order in and about said premises which person shall be approved by the Blackfeet Tribal Business Council as a person of good moral character to be deputized and appointed an Indian policeman and shall also be approved by the governing body of the incorporated city or town in which said

retail liquor business may be located so that he might be appointed as such policeman by said city or town and if such retail liquor and beer establishment is outside of the boundaries of an incorporated city or town, then in lieu of approval by the city or town, such person must be approved by the Sheriffs of the county in which such retail liquor and beer establishment is located to be appointed a deputy sheriff. Failure to furnish such suitable person for the maintenance of law and order shall be grounds and reason for revocation of the permit or license to engage in the retail liquor and beer business within the boundaries of the Blackfeet Indian Reservation. Once a permit or license is granted by the Blackfeet Tribal Business Council, such permit or license may only be revoked for cause and upon a hearing with notice being mailed by registered mail to the owner of such permit or license ten days prior to such hearing. Cause shall mean the violation of tribal ordinances duly passed or the laws of the State of Montana as adopted in this ordinance. The Blackfeet Tribal Business Council may adopt such ordinances for the maintenance of law and order on the Blackfeet Indian Reservation and regulations of the retail liquor and beer business conducted on said reservation not inconsistent with the laws of the State of Montana and rules and regulations of the Montana Liquor Control Board but such ordinance shall not become effective until thirty days after their passage and the mailing of a copy of such ordinance by registered mail to each permittee or licensee engaged in the retail liquor and beer business, on the Blackfeet Indian Reservation.

Orme Lewis,  
Assistant Secretary of the Interior.  
February 17, 1954." (italics underscored)

In answering your second question, it is necessary to consider Section 72-107, A.C.A. 1939, as amended, (the so-called quota allowance system for the issuance of spirituous liquors) which provides in part as follows:

"72-107. Restrictions on issuance of licenses.--(a) The total number of spirituous

Liquor Licenses issued within a single county shall not exceed:

1. On-sale retailers' licenses providing for consumption on the premises of all spirituous liquors: la. in a county having a population of one hundred thousand (100,000) or more, one (1) license for each two thousand five hundred (2,500) inhabitants; lb. in a county having a population of twenty-five thousand (25,000) or more but less than one hundred thousand (100,000), one (1) license for each two thousand (2,000) inhabitants; lc. in a county having a population of less than twenty-five thousand (25,000), one (1) license for each one thousand (1,000) inhabitants.

2. On-sale retailers' licenses providing for consumption on the premises of beer and wine, one (1) license for each five hundred (500) inhabitants, including licenses permitting the sale of beer and wine as provided in subsection 1. hereof.

3. Off-sale retailers' licenses providing for the sale of spirituous liquors, wines and beer only in the original packages to be taken from and consumed off the premises: 3a. in a county having a population of one hundred thousand (100,000) or more, one (1) license for each two thousand five hundred (2,500) inhabitants; 3b. in a county having a population of twenty-five thousand (25,000) or more but less than one hundred thousand (100,000), one (1) license for each two thousand (2,000) inhabitants; 3c. in a county having a population of less than twenty-five thousand (25,000), one (1) license for each one thousand (1,000) inhabitants.

\* \* \* \* \*

(c) The population of a county shall be deemed to be its population at (as) last determined by the bureau of the census, less the number of Indian wards of the United States residing therein, as shown by such census."

Subsection (c) of Section 72-107, supra, expressly states that the population of a county for the purposes of issuing spirituous liquor licenses shall not include the number of Indian wards of the United States residing therein. Thus, it is the opinion of this

department that unless and until such time as Section 72-107 (c), supra, is amended to remove such restriction, the Indian population residing in a county would not be considered in determining the population for purposes of issuance of such licenses.

With reference to your third question, the taxability under the Excise Revenue Act of 1935 (73-1301, et seq., A.C.A. 1939, as amended) and the Luxury and Privilege Tax Act (73-1401, et seq., A.C.A. 1939) of sales of liquor to Indians.

The answer to this question is dependent upon the circumstances of each particular sale or transaction. The possible situations that could arise are: (1) Sales by Indians to Indians within the reservation either at wholesale or at retail, and (2) Sales by non-Indians to Indians within the reservation either at wholesale or at retail, and (3) Sales made off the reservation.

Having determined that the laws of the State of Arizona as to sales of liquor to Indians do not extend to the Indian reservation neither would the state tax laws. "To the extent that Indians in Indian property within an Indian reservation are not subject to state laws, they are not subject to state tax laws." SURPLUS TRADING CO. v. COOK, (1930) 281 U.S. 647. Therefore, any sale made by an Indian either at wholesale or at retail within an Indian reservation is not subject to a state tax.

A different problem is presented with respect to sales made by non-Indians either at wholesale or retail to Indians within the Indian reservation. Recognizing that the United States Supreme Court has declared that the jurisdiction of the state over the reservation is full and complete except as to Indians and their property (SURPLUS TRADING COMPANY v. COOK, (1930) 281 U.S. 647) and that both taxes are privilege taxes imposed for the privilege of doing business, nevertheless, there is the problem of whether the inclusion of sales to Indians in the "measure" of the "privilege" tax of a non-Indian trader would unduly burden "commerce with Indian tribes" when (1) the tax is passed on, or (2) absorbed by the trader.

The question of whether a particular state imposition "burdens" commerce in an unconstitutional manner is one for the Federal courts. In dealing with a tax on gross receipts or gross income, the problem is particularly complex. In 27 Am. Jur., Income Tax, § 25, the rule is stated:

"§25.--Tax on Gross Receipts or Gross Income--Considerable difficulty has been encountered in determining whether a state tax upon, or measured by, gross receipts or gross income is an unconstitutional burden on

interstate or foreign commerce. It has been stated broadly that a state tax on gross receipts, as distinguished from net income, is unconstitutional as applied to receipts from transactions in interstate or foreign commerce, and various gross receipts taxes, or taxes measured by gross receipts, have been held unconstitutional in so far as they applied to receipts from such commerce. Such taxes have been particularly condemned as a burden on interstate and foreign commerce, where they were imposed on the entire gross income or receipts of a domestic corporation, without limitation to its business done within the state. However, not every state tax upon gross receipts derived from participation in interstate commerce is forbidden and various taxes merely measured by gross receipts have been sustained."

The particular section quoted deals with interstate and foreign commerce over which the Constitution gives the Federal Government exclusive control, and as the Federal Government has exclusive jurisdiction over commerce with Indian Tribes, the same prohibitions are applicable.

In view of the Federal constitutional questions involved, a ruling by the state court that the tax was not a burden on commerce with the Indian tribes would not be controlling, the problem being one of Federal jurisdiction exclusively, remains for Federal determination.

There being no exemption set out in the Excise Revenue Act of 1935 and the Luxury and Privilege Tax Act with respect to sales to Indians, therefore if an Indian chooses to engage in a business outside the reservation, such person must comply with the terms of Excise Revenue Act of 1935 and the Luxury and Privilege Tax Act.

We, therefore, conclude that (1) sales of liquor made by an Indian wholesaler or retailer within an Indian reservation are not taxable, (2) that sales of liquor made by a non-Indian either at wholesale or at retail to an Indian within the reservation under the Excise Revenue Act of 1935 and the Luxury and Privilege Tax Act is a question for federal determination, and (3) that all sales of liquor made outside an Indian reservation are subject to the tax imposed under the Excise Revenue Act of 1935 and the Luxury and Privilege Tax Act.

The Honorable Kel M. Fox  
State Senator, Yavapai County

March 15, 1954  
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Yours very truly,

JOHN M. MC GOWAN  
Chief Assistant  
Attorney General

JMM/JPB:jlb

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Special Assistant to  
The Attorney General

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