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CA GAMBLING CONTROL
COMMISSION

May 23, 2002

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
(Government Code § 11126, subd. (e)(2)(C)(ii))

Peter Melnicoe, Chief Counsel
California Gambling Control Commission
2399 Gateway Oaks Drive, Suite 100
Sacramento, California 95852-6013

RE: Informal Advice Request - Indian Gaming Special Distribution Trust Fund (WA #383)

Dear Mr. Melnicoe:

By e-mail dated April 25, 2002, on behalf of the California Gambling Control Commission ("the Commission"), you have requested informal advice on the following question:

Does section 5.1(b)¹ of the Tribal-State Gaming Compacts require the first transfers to the Indian Gaming Special Distribution Fund to be made (1) at the conclusion of the calendar quarter that includes the second anniversary date of the effective date of the Compact or (2) at the conclusion of the following calendar quarter?

You have indicated that the effective date of the Tribal-State Gaming Compact ("the Compact"), for tribes subject to making payments to the Indian Gaming Special Distribution Fund, was May 16, 2000, the date notice of approval was published in the Federal Register and, therefore, the "second anniversary date of the effective date of the Compact" is May 16, 2002. (See footnote 1; footnote 4, *infra*.)

CONCLUSION

For the reasons outlined below, we conclude that, pursuant to section 5.1, subdivision (b), the transfers are due at the conclusion of the calendar quarter which includes the second

¹ Further "section" references will be to the Tribal-State Gaming Compact, unless otherwise indicated.

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anniversary date of the effective date of the Compact, i.e., June 30, 2002. However, we further conclude that, pursuant to section 5.3, subdivision (a), a tribe has until the thirtieth (30th) day following the end of each calendar quarter to determine and make the quarterly contribution due, before the penalties provided in Compact section 5.3, subdivisions (b) and (e) take effect.

BACKGROUND

The Preamble of the Compact provides that in recognition of the "unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free from competition" and "[in] consideration for the exclusive rights enjoyed by the tribes, and in further consideration for the State's willingness to enter into the Compact," the tribes have agreed to provide to the State, on a sovereign-to-sovereign basis, a portion of the revenue from gaming devices. (Compact, Preamble, § E.) Section 4.3.2, subdivision (a) (iii) provides: "The Special Distribution Fund is a fund created by the Legislature for the receipt, deposit and distribution of monies paid pursuant to Section 5.0."

Section 5.2 outlines the purposes for which monies from the Special Distribution Fund ("Fund") may be used. These include administrative costs for gambling addiction programs, grants for state and local government agencies impacted by tribal gaming, compensation for regulatory costs incurred by the State Gaming Agency² and the Department of Justice in connection with implementation and administration of the Compacts, payment shortfalls in the Revenue Sharing Trust Fund (see § 4.3.2.2) and "other purposes specified by the Legislature." As you are aware, there is legislation pending in the state Legislature (Sen. Bill No. 1549 (Battin)) which, among other things, is intended to put into statute specified uses for which grants from the Fund may be awarded and to create an independent commission to make determinations from among requests for these grants.³ According to the author's office, the

² Section 2.18 provides: "'State Gaming Agency' means the entities authorized to investigate, approve, and regulate gaming licenses pursuant to the Gambling Control Act (Chapter 5 (commencing with § 19800) of Division 8 of the Business and Professions Code)."

³ Senate Bill No. 1549, as amended April 29, 2002, would, inter alia, add Government Code section 12723, providing:

(a) There is hereby created in state government, the Indian Gaming Improvement Commission.

(b) The Indian Gaming Improvement Commission is responsible for determining the eligibility of requests for appropriations of moneys from the Indian Gaming

make-up of the commission and the purposes and priorities for uses of Fund moneys have yet to be finally determined. Substantial agreement among affected entities is anticipated as a prerequisite to final legislation.

ANALYSIS

It is against this background that we examine the question posed. Section 5.1, subdivision (b) of the Compact provides:

The first transfer to the Special Distribution Fund of its share of the gaming revenue shall made [sic] at the conclusion of the first calendar quarter following the second anniversary date of the effective date of this Compact.

According to the Commission, the effective date of the Compact, for tribes subject to making payments to the Indian Gaming Special Distribution Fund, was May 16, 2000, (see section 11.1⁴) and, therefore, the second anniversary after that date is May 16, 2002.

Reading the language of section 5.1, subdivision (b) in isolation, its ambiguity, as implied in the question posed, is obvious. One could as easily interpret the provision to require the first transfer to take place on June 30, 2002, as to require it to take place on September 30, 2002. If the section had been written to refer to the "first *full* calendar quarter following the second

Special Distribution Fund. The commission shall establish deadlines for the submission of a request for funding for the ensuing fiscal year. The commission shall establish priorities for those requests that will benefit the most residents of communities impacted by tribal gaming.

⁴ Compact section 11.1 provides:

Effective Date. This Gaming Compact shall not be effective unless and until all of the following have occurred:

- (a) The Compact is ratified by statute in accordance with state law;
- (b) Notice of approval or constructive approval is published in the Federal Register as provided in 25 U.S.C. 2710(d)(3)(B); and
- (c) SCA 11 is approved by the California voters in the March 2000 general election.

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anniversary date," there would be no ambiguity. However, as the provision is drafted, it is unclear whether the word "following" modifies "first calendar quarter" or "conclusion of the first calendar quarter." Thus, given the obvious ambiguity of section 5.1, subdivision (b) we must look to principles of statutory construction to answer the question posed.

As the California Supreme Court has pointed out, if language is unambiguous, there is no need for judicial construction. (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 777-778.) However, if there is ambiguity and construction is necessary, "[t]he starting point of any analysis is the language of the statutes themselves." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31.) A court's first step in construing a statute is to give the actual words of the statute their plain, commonsense meaning. (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990, citing, inter alia, *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.) The words of statutes must be interpreted in context. "'The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.'" (*Id.* at pp. 657-658, dis. opn., (on other grounds) of Chin, J., quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Additionally, "[S]tatutes must be construed so as to give a reasonable and common-sense construction consistent with the apparent intention of the law-makers--a construction that is practical rather than technical . . ." [Citation.]" (*People v. Turner* (1993) 15 Cal.App.4th 1690, 1696; quoting *People v. Martinsen* (1987) 193 Cal.App.3d 843, 848.)

Since, as noted, the words of subsection (b) are themselves the source of the ambiguity, we look to the context in which they are found. Section 5.1, subdivision (a) immediately preceding the transfer requirement, provides a schedule for determining contributions based on the number of gaming devices operated by each gaming tribe on September 1, 1999. The

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schedule assigns a "percentage of average gaming device net win" based on the "number of terminals in the quarterly device base."⁵

Section 5.3, subdivision (a) defines how the contributions shall be calculated:

The quarterly contributions due under Section 5.1 shall be determined and made not later than the thirtieth (30th) day following the end of each calendar quarter by first determining the total number of all Gaming Devices operated by a Tribe during a given quarter ('Quarterly Device Base'). The 'Average Device Net Win' is calculated by dividing the total Net Win from all terminals during the quarter by the Quarterly Terminal Base.

Again, the drafting is less than precise, but it is reasonable to conclude, based on the schedule provided in section 5.1, subdivision (a) that "Quarterly Terminal Base" as used in section 5.3, subdivision (a) was intended to have the same meaning as the term "Quarterly Device Base," used in that section as well as in the schedule provided in section 5.1, subdivision (a). (See footnote 5.)

⁵ The schedule found in section 5.1, subdivision (a), provides:

<u>Number of Terminals in Quarterly Device Base</u>	<u>Percent of Average Gaming Device Net Win</u>
1 - 200	0%
201 - 500	7%
501 - 1000	7% applied to the excess over 200 terminals, up to 500 terminals, plus 10% applied to terminals over 500 terminals, up to 1000 terminals.
1000 +	7% applied to excess over 200, up to 500 terminals, plus 10% applied to terminals over 500, up to 1000 terminals, plus 13% applied to the excess above 1000 terminals.

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Reading section 5.3, subdivision (a) as a whole, we conclude that the drafters intended the quarterly contributions due from a Tribe to be determined by gaming device activity during the whole of the immediately preceding quarter. Further, it is clear that the drafters could not have anticipated the precise date that the Compact would become effective (see footnote 4, *supra*) and, through the provisions of Compact section 5.1, subdivision (b) provided a calendar-quarter reference and a two-year grace period.

Since the Tribes had no responsibilities under the Compact prior to its effective date, including keeping the records necessary to the calculations anticipated in Compact section 5.3, subdivision (a), had the Compact provided that the first transfer was due at the conclusion of the first calendar quarter following the effective date of the Compact, for example, we might well have concluded that the first contributions to the Special Distribution Fund were not due until the conclusion of the first *full* quarter following the effective date of the Compact. This interpretation would have been based on the commonsense interpretation of Compact section 5.1, subdivision (b) that the drafters intended to allow a full calendar quarter of gambling device operations, *under the Compact*, for purposes of calculating contributions due pursuant to Compact section 5.1.

However, given the apparent intent of the drafters to allow a full two-year grace period from the effective date of the Compact provided in Compact section 5.1, subdivision (b) and the concomitant time for Tribes to put into place procedures to accomplish the calculations necessary to compute their contribution, we conclude that the language of Compact section 5.1, subdivision (b) should be interpreted to mean that the first transfers shall be made based on the "Average Device Net Win" during the calendar quarter in which the second anniversary date of the effective date of the Compact falls, i.e. (for tribes subject to making payments), the calendar quarter ending June 30, 2002; that date marking "the conclusion of the first calendar quarter following the second anniversary date of the effective date of this Compact." (Compact section 5.1, subdivision (b).)

Although not specifically raised in your request, we note a further ambiguity in the Compact language regarding the due date of the contribution. Compact section 5.1, subdivision (b) provides that the first transfer "shall be made at the conclusion of the first calendar quarter following the second anniversary date of the effective date of this Compact." Compact section 5.3, subdivision (a) provides that "[t]he quarterly contributions due under Section 5.1 shall be determined and made not later than the thirtieth (30th) day following the end of each calendar quarter" The common sense way to harmonize these sections is to conclude that while the transfer is due at the end of the calendar quarter, i.e., June 30, 2002, the Tribe has up to 30 days following that date to make the calculations required by Compact section 5.3, subdivision (a) and to effect the actual transfer.

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Quarterly contributions not made by the latter date subject the Tribe to the penalties provided in Compact section 5.3, subdivisions (b) and (e).⁶

Sincerely,



CYRUS J. RICKARDS
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: Robert Mukai
Sara Drake

⁶ Section 5.3, subdivision (b) provides:

Any quarterly contribution not paid on or before the date on which such amount is due shall be deemed overdue. If any quarterly contribution under Section 5.1 is overdue to the Special Distribution Fund, the Tribe shall pay to the Special Distribution Fund, in addition to the overdue quarterly contribution, interest on such amount from the date the quarterly contribution was due until the date such quarterly contribution (together with interest thereon) was actually paid at the rate of 1.0% per month or the maximum rate permitted by state law, whichever is less. Entitlement to such interest shall be in addition to any other remedies the State may have.

Section 5.3, subdivision (e) provides:

The Tribe shall not conduct Class III gaming if more than two quarterly contributions to the Special Distribution Fund are overdue.