VOLUME NO. 37 OPINION NO. 21

INDIAN TRIBES - Federal Land and Water Conservation Fund Act, appropriate public agency; PUBLIC AGENCY - Indian tribes, Federal Land and Water Conservation Fund Act; RECREATION - Federal funding, Indian tribes, appropriate public agency; REVISED CODES OF MONTANA, 1947 - Sections 62-491, 62-402.

HELD: An Indian tribe located within the territorial boundaries of the State of Montana which exercies the powers of local self-government is an "appropriate public agency" to be eligible to receive funds for projects under the Federal Land and Water Conservation Fund Act of 1965, 16 U.S.C section 460L, et seq.

6 May 1977

Dr. Robert Wambach, Director
Department of Fish and Game
1420 E. Sixth Avenue
Helena, Montana 59601

Dear Dr. Wambach:

You have requested my opinion on the following question:

> Is an Indian tribe, located within the territorial boundaries of the State of Montana an "appropriate public agency" to be an eligible participant to receive funds for appropriate projects under the provisions of the Federal "Land and Water Conservation Fund Act of 1965" (16 U.S.C. section 469L)?

The Land Water Conservation Fund Act (16 U.S.C. sections 460L-4 through 460L-11) was enacted in part to provide federal funds and assistance "to the States" for planning, acquisition and development of land and water areas and facilities for outdoor recreational purposes (16 U.S.C section 460L-4). The Secretary of the Interior is authorized to provide financial assistance "to the States" from money available "for State purposes" (16 U.S.C section 460L-8). Payments may be made "to any State" for up to 50% of the costs of projects "undertaken by the State," and the additional funds are to be "borne by the State" (16 U.S.C. section 460L-8(c)).

The Secretary is required to withhold any payments until he receives:

> ...appropriate written assurance from the State that the State has the ability and intention to finance its share of the cost of the particular project, and to operate and maintain by acceptable standards, at State expense, the particular properties or facilities acquired or developed for public outdoor recreation use. (16 U.S.C. section 460L-8(f).)

Fund payments are to be made to the "Governor or to a State official or agency" designated to receive funds. In Montana, that agency is the Fish and Game Commission (section 62-402, R.C.M. 1947). The state is required to

provide such information as the secretary may require and to provide adequate "fiscal control and fund accounting procedures" as may be necessary to assure "proper disbursement and accounting for Federal funds paid to the State... ." (16 U.S.C. section 460l-8(f).)

If the state meets these requirements it may then receive the federal funds which "may be transferred by the state to a political subdivision or other appropriate public agency" (16 U.S.C. section 460L-8(f)). Thus, the ultimate question is whether an Indian tribe is an "other appropriate public agency" since it is not a political subdivision of the State. Neither the federal act nor its legislative history define the term "other appropriate public agency." The legislative history of the act is ambiguous on the present issue, as evidenced by the following language (Sen. Rep. 1364, 1964 U.S. Code Cong. & Admin. News 3634):

> The purpose of H.R. 3846 (Land and Water Conservation Fund Act of 1965) is to help the States and Federal agencies meet the ever increasing needs and demands present and future, of the American people for lands and facilities for outdoor recreation. The bill would accomplish this purpose by establishing a fund from which grants would be made to the states for planning and acquisition of land and water areas, and for construction of facilities on them, for outdoor recreation.

Congress was silent as to whether it intended Indian tribes to be considered as other appropriate agencies under the Act.

In 1967, however, the Department of the Interior, which administers the Act for the federal government, specifically determined that an Indian tribe would qualify as a "public agency" under the Act if it has powers of local self-government, is organized to govern itself, and carries on the functions of a municipal government (Solicitor's Opinion M-36709, August 1, 1967).

While the Act mentions "states" a number of times, its overriding purpose is to promote and encourage development of recreational facilities. In 16 U.S.C section 460L, Congress declared its policy:

> The Congress finds and declares it to be desirable that all American people of present and future generations be assured adequate outdoor recreation resources, and that it is desirable for all levels of government and private interests to take prompt and coordinated action to the extent practicable without diminishing or affecting their respective powers and functions to conserve, develop, and utilize such resources for the benefit and enjoyment of the American people.

Similarly, in section 62-401, R.C.M. 1947, the Montana Legislature declared:

> Montana is uniquely endowed with scenic landscapes and areas rich in recreational value. This outdoor heritage enriches the lives of citizens, attracts new residents and businesses to the state, and is of major significance to the expanding tourist industry. It is the purpose of this act to give authority to the Montana state fish and game commission to plan and develop outdoor recreational resources in the state which authority shall permit receiving and expending funds including federal grants for this purpose.

These legislative pronouncements are clearly expansive and not limiting. They reveal an intent to develop recreational facilities wherever located for the benefit of all citizens. In this regard, the Act requires that no recreational facilities developed with federal funds may be converted from public outdoor recreation uses (16 U.S.C section 460L-8). The Solicitor's Opinion, supra, specifically considered this provision and determined that it requires a public "dedication for an infinite time" of any tribal lands developed under the Act. Thus any on-reservation project is required by federal law to be "public." The state and the Tribes will mutually benefit from development of on-reservation public recreational facilities and the resulting necessary State-Tribal cooperation.

I am aware that the Attorneys General of Idaho and Arizona have issued opinions which hold that an Indian tribe is not an "appropriate public agency" under the Act, and which disagree with the Solicitor's opinion, supra. These opinions recognize the ambiguous wording of the statute itself but conclude that Indian tribes are not public because their membership is restricted to persons who are born into

the race. Questions and claims of sovereignty aside, it is clear that most Indian tribes do exert some degree of governmental control over their respective reservations. The Supreme Court has noted on many occasions the tribes' rights to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217 (1959). To this extent, at least, the tribes are public, and that status should be sufficient to satisfy the Act.

The other major point made by the Idaho and Arizona opinions concerns the practical problems the states would encounter with projects located on the reservations. While these problems must necessarily concern the State of Montana, they need not bar application of the Act on Montana's reservations. The state must, however, adequately protect itself when it acts essentially as an intermediary for federal funding to the tribes. This protection is required as a practical matter by the federal act and regulations. In short, if the state channels funds to a tribe and the funds are mismanaged, the federal government will seek reimbursement from the state and not from the tribe. Tribes wishing to deal with the state under the Act must recognize this fact as well as their responsibility to the state.

In addition to the requirements of the Act outlined above, Interior's regulations require, in part, that the state must:

(a) Monitor the project and submit performance reports as to the progress of the project;

(b) Adhere to the Property Management Standards prescribed by Attachment M of OMB Circular No. A-102;

(c) Adhere to the statutory requirements of the Land and Water Conservation Fund Act of 1965, as amended;

(d) Prepare a comprehensive outdoor recreation plan for the entire state:

(1) The manual (part 635.1.9) suggests an acknowledgment form for financial assistance to these plans which provides "It (Land and Water Conservation Fund) assists the states and their political subdivisions in planning, acquiring, and developing outdoor recreation areas and facilities."

(e) Before approval of projects, under 460L8(f) of the Act, give written assurance "that the State has the ability and intention to finance its share of the particular project, and to operate and maintain by acceptable standards, at State expense, the particular properties or facilities acquired or developed for public outdoor recreation use."

While these requirements may impose upon the state some practical problems in light of state-tribal jurisdictional disputes, these problems can be alleviated by contract and cooperation between the state and the tribe. This has in fact already been done in Montana to finance a project on the Blackfoot reservation. Potentially serious problems were encountered during that project, but the state and the tribes recognize that mutual cooperation is required to achieve the ultimate goal of improved outdoor recreation.

Any state-tribal agreement in this area must provide specific adequate assurances that the state will be allowed to carry out the responsibilities imposed by the federal government. The agreement must also include specific adequate indemnification assurances for any losses the state may suffer as a result of tribal action in executing the project.

Nothing in this opinion should be construed to require the Fish and Game Commission to participate in all proposed on-reservation projects under any conditions. To the contrary, this opinion simply holds that Indian tribes may be public agencies under the Act, and that the Commission may cooperate with tribes under the Act if there are sufficient safeguards by agreement, federal regulation or otherwise to ensure that the state will be able to meet its obligations as to on-reservation projects to the same degree that it does on off-reservation projects.

THEREFORE, IT IS MY OPINION:

An Indian tribe located within the territorial boundaries of the State of Montana which exercises the powers of local self-government is an "appropriate public agency" to be eligible to receive funds for projects under the Federal Land and Water Conservation Fund Act of 1965, 16 U.S.C., sections 460L, et seq.

Very truly yours,

MIKE GREELY
Attorney General