

SENATE TAXATION COMMITTEE
MEETING OF APRIL 14, 1977

The meeting was called to order by Chairman Bryan. The following members were present:

Senators Gary Sheerin, Norman Ty Hilbrecht, Richard Bryan, Carl Dodge, Norman Glaser and Floyd Lamb.

The following items were discussed and action taken:

AB 100 Places cigarette taxes directly upon the ultimate consumer.

Speaking in support of the bill were:

Mr. Jack Sheehan, Director of the Department of Taxation, reiterated the testimony he gave April 7, 1977. (See April 7, 1977 minutes.)

Senator Sheerin asked Mr. Sheehan to explain how the cigarette use tax pertains to this bill.

Mr. Sheehan said the cigarette use tax is a tax in which if a person purchases unstamped cigarettes, he must pay a use tax. He said he could stand in front of a smoke shop and, as soon as a purchaser leaves the reservation or the colony, he could confiscate the cigarettes unless that person paid the tax on it. It's much like the use tax on a car. The department has not reverted to that policing technique.

Senator Sheerin asked if the federal court prohibits that policing technique.

Mr. Sheehan said it does not.

Senator Hilbrecht stated line 36, on page 7, was criticized in previous testimony to the effect that the definition of who is exempt should be tightened. Is it the intent that any Indian, irrespective of the organization or community of which he belongs, may purchase cigarettes without a levy from any smoke shop? Or is it simply meant selling to the tribe's own people? That language should be more specific.

Mr. Sheehan said he hoped that type of problem would be resolved through the administrative regulation adoption.

Senator Hilbrecht questioned whether that was desirable. It is known this statute will be litigated.

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Mr. Sheehan stated this language merely states to whom the wholesalers can sell.

Senator Hilbrecht asked Mr. Sheehan what he understood the federal law to say.

Mr. Sheehan stated that he felt the federal government has pre-empted the commercial transactions between tribes and members of tribes. He said his position would be that any Indian would be able to purchase.

Senator Hilbrecht asked how is this done?

Mr. Sheehan stated historically the Indians have always said that the law of the U.S. Supreme Court controls Indian situations. They have traditionally said states have limited jurisdiction, if any. The Supreme Court did not say the Department of Taxation in Montana has to make that determination. It said the Indian trader must make that determination. In this case, the tribes in Montana have elected not to follow that dictate of the Supreme Court. Therefore, Montana has been negotiating with the Indians to try to iron out the situation. They tried to come up with a formula based on the population of the Indian reservations and the national consumption of cigarettes which would allow the Indian's to receive "x" amount of cigarettes tax free. There has been no agreement. Montana is anticipating going back to the district court for guidance.

Senator Hilbrecht asked if Nevada will have to go to the court for guidelines too.

Mr. Sheehan said he did not have the answer to the question because he did not believe the smoke shop operators in Nevada will follow the mandate of the U.S. Supreme Court any more than the Indians are in Montana. He said he did not feel this is the panacea for the problem. Smoke shops are here to stay. The only way to eliminate smoke shops would be to eliminate the cigarette tax, which would put everyone on the same economic base.

Senator Sheerin stated the federal law definitely allows Indians to sell to Indians tax free. Has the Committee been presented any material on that?

Mr. Jim Salo, Deputy Attorney General, said the influence of Congress over Indian lands relates to the commerce and treaty clauses of the Federal Constitution. The commerce clause allows Congress to regulate commerce among the states and with the

Indian tribes. The power of Congress over Indian lands is unchallenged. The issue of the Moe case related more to who was the potential law violator. The U.S. Supreme Court concluded that the consumer, who goes on to the reservation to avoid his obligation to pay the state cigarette tax, is the one who is violating the law. If the Indian vendor is allowed to shield himself from his responsibility of assisting the state in collecting the tax simply because he is in a different geographic area, then, in effect, he would be aiding large numbers of non-Indian consumers from paying their rightful share of tax to the state. What Montana officials proposed was that vendors sell only stamped taxed cigarettes. They would be entitled to a refund of the tax revenue to the extent that they could show that they sold cigarettes to resident Indians. Negotiations fell down sometime in October and it has not been resolved.

Senator Sheerin asked if the commerce clause prevented the state from taxing and collecting from out-of-state wholesalers.

Mr. Salo said the commerce clause prohibits the state from taxing directly if there is no local contact. If the wholesaler had a local branch office, there would be taxable jurisdiction. In the case of the Burnstein Brothers, it is in interstate commerce and its flow to the reservations cannot be interrupted. That was one of the holdings of the Sheehan vs. Walker River case.

Senator Sheerin asked what is the effect of the Nevada statute in which Nevada gave up jurisdiction of Indian affairs.

Mr. Salo stated Public Law 280 is a statute passed by Congress in 1953 which authorized many states to assume jurisdiction over the reservations if they wished by legislative act. Nevada had assumed jurisdiction over all Nevada Indian lands with the exception of some areas which, as a matter of local option, were excluded. Thereafter, pursuant to some Congressional action, the Indian tribes were given the option to retrocede back to federal jurisdiction. All but one Indian colony in Nevada retroceded. He said he did not feel that diminishes the impact of the Moe decision in Nevada because the Moe case clearly indicates that, at least in the area of taxation and licensing, the state of Montana had not assumed any jurisdiction and, therefore, remained under federal jurisdiction for those purposes.

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Mr. Salo read from the district court case on that point: "Montana's limited assumption of civil jurisdiction over the Flathead Reservation Indians includes only the following compulsory school attendance, public welfare, domestic relations except adoptions, mental health, insanity, care of the infirm, aged and afflicted, juvenile delinquency and youth rehabilitation, adoption proceedings with the consent of the tribal court, abandoned, dependent, neglected, orphaned or abused children and operation of motor vehicles upon the public streets, alleys, roads and highways. Clearly the power to impose cigarette and licensing taxes is not among the categories of assumed jurisdiction." Montana, under Public Law 280, only assumes state jurisdiction for certain limited purposes generally relating to welfare types of purposes, streets and roads and schools. They did not attempt to assume tax jurisdiction or licensing jurisdiction. Mr. Salo read that as meaning that Montana was a federal jurisdiction state, just as Nevada is.

Senator Sheerin asked where does the cigarette tax revenue go.

Senator Bryan stated it is allocated to the cities and counties.

Mr. Salo spoke in regard to the question of enforcement. He said the Moe case did not raise the issue. A footnote from the slip note on the case says, "The district court noted that the state's present statutory scheme contemplates advance payment or pre-collection of the sales tax by the retailer when he purchases his inventory from the wholesaler. Recognizing that holding a distinction between sales to Indians and non-Indians would result in 'complicated problems' of enforcement by the state, the district court deferred passing on these problems pending a decision by this court. We, of course, express no opinion on this question." Clearly, the U.S. Supreme Court did not touch the issue because the trial court had chosen to defer action on the enforcement issue until the basic constitutional issue had been considered.

Senator Sheerin asked if Montana, after the Moe decision, is collecting any money.

Mr. Sheehan stated he did not know that they were not collecting money. They have not resolved all the problems. If this is enacted, Mr. Sheehan said, in two years the Committee might ask him how he is doing and he may answer that no progress

has been made. By having this act, the department will have the benefit of the Moe case. That will control, presumably, future litigation. To the extent that there is other litigation involved, to have a law which is compatible to the Moe case seems in the state's best interest.

Senator Hilbrecht asked if there is any difficulty collecting any other kinds of taxes levied on the consumer.

Mr. Sheehan said there wasn't. He stressed the economic incidence of the sales tax is on the retailer.

Senator Hilbrecht asked if the law recommended by Mr. Sheehan with respect to the cigarette tax would be construed the same way.

Mr. Sheehan stated some courts have interpreted laws to mean that the economic burden and legal incidence of the sales tax is in fact on the consumer. There hasn't been a problem with that.

Senator Hilbrecht stated he was trying to anticipate difficulties in this area.

Mr. Salo said California and Nevada have similar sales and use taxes. Both states historically (California through the courts and Nevada administratively) have taken the position that with sales taxes imposed on the retailer, the economic burden is passed on to the consumer. California has never deviated from this approach. Several California court decisions uphold that. Within the last year, the U.S. Supreme Court took the opposite view in interpreting California's sales tax act for the purposes of determining whether a certain federal exemption was applicable. The court said, since the statute requires the burden to be passed on to the consumer, it's really imposed on the consumer, notwithstanding the literal language of the statute.

Senator Hilbrecht asked if that was consistent with the state's policy in which the retailer is paid a premium in exchange for extracting the tax. If there is obligation, why would he be paid a bribe to return it?

Mr. Salo said that is arguable and, therefore, if the line of authority supported by the Moe decision is carried forward, it is possible that the state's existing sales tax act, without amendment, could be interpreted to apply on the reservation to sales to non-Indians.

Senator Sheerin asked if there was problems with the liquor tax being collected on reservations.

Mr. Sheehan stated there are no other problems except with cigarettes. He felt there might be federal laws which prohibit the sale of liquor on reservations. That is not to say that reservation operators have not said that might be next.

Senator Sheerin asked what is done with sales of cars.

Mr. Sheehan said he has advised retailers and the Indian tribes that if tangible personal property is purchased and delivered on the reservation, there is no sales or use tax obligation. If the property is taken off the reservation, there is a use tax obligation on that individual.

Senator Hilbrecht stated this raises the question of taxes which are impossible to be treated as addressed to the consumer, such as the gaming tax. If there were gaming activities on the reservations, it would be impossible to extract that tax because there is no way to levy a gross receipts tax on the consumer.

Mr. Sheehan indicated that was a new ball game and he did not know the answer to it.

Mr. Joe Midmore, representing the Tobacco Tax Council, stated that when talking about the competition the smoke shops offer to the state's wholesalers and retailers, a package of cigarettes today would sell for around 25 cents if there were no taxes. Eight cents federal tax and 12 cents for the state cigarette tax and sales tax takes the price up to 45 cents. The amount that would be paid in a super market is \$4.50 per carton. The smoke shop advertises in Reno for \$3.60. That is cheaper than the state's wholesalers can sell them, let alone the retailers. Anything this Committee and Legislature can do to protect the businessmen who have been in this business for years and want to continue in it would be to the good.

Speaking in opposition to the bill were:

Linda L. Howard, Chairman of the Yerington Paiute Tribe, emphasized points in her written testimony submitted at the April 7, 1977 meeting. (See statement in April 7, 1977 minutes.) The Yerington Tribe is not self-supporting financially. It must secure funds from the federal government. The direction the tribe is taking now is that it would like to self-determine its

own government and develop those enterprises that would financially support the administration. That would lead the tribal government from depending upon the federal government for financial support. She questioned the testimony regarding the intent of this bill because she did not believe it is equal justice under the law. She said the Indians are also citizens of the state of Nevada and, when the tax revenues are distributed to local and city governments, the Indian people should receive some of that tax revenue.

Ms. Yvonne T. Knight, Attorney for the Yerington Paiute Tribe, submitted a supplement to her written testimony given to the Committee on April 7, 1977. (Supplement is attached.) Her previous testimony is attached to the April 7, 1977 minutes. She outlined why the tribe is concerned about AB 100. The tribe has an economic development plan which was developed with the help of the Federal E.D.A. two or three years ago. In the ensuing years, the tribe has attempted to implement this plan. One of the aspects of this long-range development plan is to establish a smoke shop which would sell cigarettes as well as tribal crafts. The tribe seeks to establish itself upon an economic self-sufficiency. One of the ways to do this is to set up its own smoke shop. The tribe understands the problem the state has with regard to the economic advantage of establishing a smoke shop on a reservation, particularly in light of the Moe decision. The tribe would own and operate the smoke shop. It intends to use the majority of the profits to support government services to its members. In effect, the tribe would be imposing a tax upon its own business in order to provide funds for services to tribal members on its reservation. The tribe, like the state, wishes to derive revenue so it may provide services to its members just as the state provides services to its citizens. If and when the tribe establishes a smoke shop and imposes this tax, it intends that the tax will be comparable to the state tax on cigarettes. The tribe, therefore, is concerned that the present language of AB 100 is not clear whether tribally owned and operated smoke shops in which the profits are ear-marked to go to tribal services are exempted from this act. Section 370.075 of the Nevada Statutes says "nothing in this chapter shall operate to abridge the rights of an Indian, individual or tribe, or to infringe upon the sovereignty of any Indian tribe organized under the IRA. The Yerington Paiute Tribe is organized under the IRA and it is not clear whether or not AB 100 would be applicable in forcing the tribe to obtain a state license or whether the economic and criminal penalties are intended to be applicable to tribally owned and operated smoke shops. If the bill is

intended to effect tribally owned and operated smoke shops, there are serious constitutional problems with that attempt. Moe vs. Salish and Kootenai Tribes stands for two basic principles as is stated in the supplemental testimony. Firstly, states may not impose its taxes on Indians within the reservation, and secondly, states may impose taxes on non-Indian consumers on the reservation so long as that does not frustrate tribal self-government. Moe reaffirmed this long-standing principle and found in the case of Moe that tribal self-government was not frustrated. In Moe, the tribe had no taxing statutes; a tribally-owned shop was not involved. It was an individual retail shop. Clearly, in this instance wherein the Yerington Paiute Tribe intends to establish its own smoke shop and use the revenues to provide needed services to its members, there is a serious question as to whether or not the state may impose and force the tribe to collect the tax. The tribe feels this is a direct infringement upon tribal sovereignty and tribal self-government. She suggested it be clarified that the bill does not apply to tribally owned and operated smoke shops, particularly where the revenues are used to benefit the tribal members in terms of government services. There are other problems with the bill, particularly the section (page seven, section 31c) which provides for refunds where cigarettes are sold to members of a recognized tribe. It is unclear as to who is to apply for the refund. She said she thought initially that the members of the tribe would apply. But she believes that Mr. Sheehan interprets it to mean that the retailers would sell cigarettes to tribal members without charging them a tax. Then the retailer would apply for a refund of the tax of cigarettes sold to members. She said she construed it that the members would be charged the tax and then they must apply for the refund. If that is so, then they are taxed in the first instance, which is not permissible under the Moe decision.

Senator Sheerin asked if the word "members" was struck, would that solve the problem. It would apply to a recognized Indian tribe.

Ms. Knight stated if the Indian tribe purchased the cigarettes and applied for the refund, that might present the same problem because the tribe itself would initially pay the tax, which is not permissible under the Moe decision. If any Indian, whether it is an individual or the tribe, pays the tax in the first instance, then they are in effect being taxed.

Senator Dodge asked if the Indians are mandated under this section to buy cigarettes from the State of Nevada.

Ms. Knight stated that Indians aren't mandated to buy from the State but the statute says that any retailer must apply for a license. She did not feel this is legal pertaining to a tribe and there is serious questions with regard to the Moe decision whether that is legal as to an Indian retailer.

Senator Dodge asked Mr. Sheehan if he intended to mandate the Indians to qualify as retailers.

Mr. Sheehan said no. The Moe case specifically said the licensing provisions in the state do not apply.

Senator Dodge suggested that be written in the bill to make it clear the licensing, reporting and criminal provisions do not apply to the tribe unless they choose to become retailers and that they are not mandated to buy cigarettes from Nevada. He asked Ms. Knight if these suggested provisions would give the Indians problems.

Ms. Knight said if the tribe was exempted from the licensing, reporting and penalty provisions, in effect, they would be exempt from the provisions of the act because those are basically its major provisions. That would permit the tribe to set up a tribally owned smoke shop and they would not be forced to pre-collect the tax from a non-Indian consumer.

Senator Dodge stated the thrust of this bill as the Moe decision permits was to enforce the law against the ultimate consumer.

Ms. Knight stated that is what Mr. Sheehan said except she felt the bill provides for penalties being applicable to the retailer, who does not pay the tax.

Mr. Sheehan stated he felt that could be the case. The U.S. Supreme Court said to place the obligation on these retail outlets on the reservation to pre-collect the tax. All this does is make Nevada's law compatible with what the U.S. Supreme Court said they must do. He explained the wholesaler's procedure for selling cigarettes that are not taxed. The wholesaler stamps all his cigarettes and, when he sells to those which are exempt, he notifies the department and is refunded. It is the wholesaler who gets the refund.

Ms. Knight said that the retailer must buy stamped cigarettes just like the wholesaler does. But the act says the tax shall be pre-collected by the wholesaler or retailer.

Mr. Sheehan explained that means the retailer must collect it from the consumer.

Ms. Knight stated that is not clear in the act. If, in section 31c, a member of a recognized tribe is being talked about, who is a retailer, or is a member of a recognized tribe who is a consumer being talked about?

Mr. Sheehan said he interpreted that to allow the Nevada wholesalers to sell cigarettes unstamped to Indian tribes.

Ms. Knight said that means wholesalers can sell cigarettes without the stamp attached. That is not clear here.

Senator Dodge stated it is not clear because it talks about a refund.

Ms. Knight said it is not clear that tribes are exempt from the many provisions of this act which would directly interfere with their self-government and their right to license, sell and regulate themselves. In the Moe decision, the court carefully pointed out that the penalties of the Montana act fell directly upon the consumer. The consumer was the person who would be guilty of a misdemeanor in the event that the tax was not paid, and not the retailer. This act obviously puts penalties upon the person who must pre-collect the tax.

Senator Dodge asked Mr. Sheehan what was the Indian obligation in regard to pre-collecting the tax.

Mr. Salo said part of the Moe case on the slip opinion stated that "the state's requirement that the Indian tribal seller collect the tax imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence the non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language dealing with the special area of state taxation. We see nothing in this burden that frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. Enactment of the federal government passed to protect and guard its Indian laws only affect the operation within the colony of such state laws as conflict with federal enactments." Clearly, in the Moe case, it did contemplate what the Supreme Court calls the minimal burden imposed upon the

Indian retailer, requiring him to pre-collect the tax from the consumer was a violation of Indian sovereignty or other tribal rights.

Senator Sheerin stated he could understand that the Indians don't like the idea of collecting the sales tax and cigarette tax to give it to the state in order for the state to distribute it to the cities. He suggested solving the problem by having the Indians tax Indians as well as non-Indians and when the state redistributes the cigarette tax it will distribute it back to Indian tribes as well as to the cities.

Ms. Knight said that was a possibility. The tribe was considering a similar possibility whereby the state and the tribe would enter into a tax sharing agreement. The tribe would agree to collect taxes on reservations from both Indians and non-Indians and share with the state a certain portion of that. There's serious question as to whether the state can force the tribe to collect any taxes at all, or it certainly cannot tax the tribe itself. As to their own Indian people, the Yerington tribe knows and sees the value of taxing its own people. It wishes to derive revenue to provide services and it sees the problem of undercutting competition and realizes that can present more problems to the tribe in its efforts to be economically self-sufficient. The Attorney General says there was no interference in tribal self-government in Moe. There wasn't because the tribe had not acted at all. This was an individual Indian retailer who was simply selling and passing on the benefit to the non-Indian consumer.

Senator Sheerin stated what was being talked about here was not the profits, but the taxes on top of the profits. Why should the tribe have the advantage over some other retailer of not having to collect that tax? Yet a retailer does. It's an unequal situation.

Ms. Knight said it was no more unequal than the state of California not collecting Nevada's taxes. The tribe is a government just like the state of Nevada is. It has its own obligations to its own area. It is simply attempting to meet those obligations by making profit on its smoke shop and, by effect, providing its own tribal tax on top of that. The tribe intends to impose a tax which is comparable to Nevada's tax so that there would not be the economic advantage.

Senator Bryan asked Ms. Knight to respond to Mr. Sheehan's statement that, in theory, it would be possible to station persons to examine customers outside the colony or reservation to

see if the cigarettes are stamped and, if they are not, either confiscate or require some kind of a use tax. Is that legal?

Ms. Knight stated it would be, assuming the criminal and due process requirements were met in terms of probable cause.

Senator Bryan stated that would not be an Indian problem. It would be a claim or privilege which must be asserted by the individuals who would be stopped.

Ms. Knight said that's what Moe says.

Senator Bryan asked if, indirectly, the state would be accomplishing the same thing by what is trying to be done in AB 100.

Ms. Knight answered in the affirmative. But a burden upon the Indian retailer or tribal retail outlet would not be imposed. Moe permits the state to require a retailer on the reservation to collect tax because it is a minimal burden. Why it is minimal is not exactly explained, but looking at all the penalties which AB 100 imposes on retailers who do not abide by its provisions, there is a serious question as to whether or not that burden is minimal. Moe did not address the situation being considered today, which is what about a tribally owned and operated smoke shop. Again, Moe very carefully qualified its holding by saying as long as the state does not frustrate tribal self-government. The tribe feels that by applying the provisions to tribes and their smoke shops where they are using the money for their own government services, that would be a direct interference with tribal self-government not permitted by Moe.

Senator Bryan asked if the retrocession provision was present in Moe.

Ms. Knight said she didn't believe it was. She was not sure that Public Law 280 really affects the taxing question that much. Indian tribes under Public Law 280 still have the same tax exemptions as any other tribe not under Public Law 280.

Senator Sheerin asked if presently, when an Indian tribe sells cigarettes to an Indian or non-Indian customer, does it collect a tax?

Ms. Knight said the Yerington tribe has not opened its shop. It is in the process of opening it.

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Senator Sheerin asked if the King shop is paying a tax back to Schurz, for instance, when he sells cigarettes.

Ms. Knight said she did not believe any tribe in Nevada imposes a tribal tax. The Yerington tribe does intend to impose a tax when it opens shop.

Senator Sheerin asked if that tax will be imposed on Indians also.

Ms. Knight answered in the affirmative.

Senator Dodge asked if all the smoke shops are operated as concessions.

Senator Bryan stated there was testimony in the last hearing indicating that the concession agreement with Mr. Steve King on one of these locations had terminated.

Mr. Dell Steve, Chairman of the ITC of Nevada, stated Walker River's lease has terminated and it plans to take over its own shop. The Fallon tribe has a lease with Mr. King, but it will run its own smoke shop as soon as the lease expires. Reno-Sparks is an independent, tribally-owned smoke shop. There are only two smoke shops left in which Mr. King has a lease agreement. That's Las Vegas and Fallon. The intention is to eventually have tribal control over all the smoke shops.

Senator Hilbrecht stated the difficulty is not in attempting to impress a tax where one is already being collected, but to allow the other factors that would ordinarily operate in the market to work. It might be reasonable to come to a different result if the Yerington Tribe was collecting a tax equal to or greater than the state tax. If that was the case, the state wouldn't really be as interested in enforcing the tax because the competitive factor would be the same. Has that ever been considered?

Ms. Knight stated that she did not believe this has been considered. That's because the areas of tribal self-determination and exercising its own taxing authority has only recently come to the front. The amendment suggested by Senator Hilbrecht is a reasonable one.

Mr. Sheehan stated if the tribe put a tax on cigarettes, the economic advantage is gone and there wouldn't be much incentive to go to the smoke shops. He said he would be surprised if the Indians imposed a tax because that would, in effect, eliminate the smoke shops.

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Senator Sheerin asked if it would be possible to solve this problem by amending the multi-state tax compact to get to the wholesaler in Oregon.

Mr. Salo said that would be impossible because the wholesaler has no physical presence with Nevada. The multi-state tax compact agreed that the parties to the compact are states. There is no provision for reservations or tribes to become parties. There have been efforts to encourage the Oregon authorities to change their law, but they have not cooperated.

Ms. Janet B. Allen, Commissioner of the Nevada Indian Commission, referred to a written statement submitted at the April 7, 1977 meeting and read from a prepared statement. (The written statement is attached to the April 7, 1977 minutes. The prepared statement is attached to these minutes.)

Mr. Norman Allen, Executive Director of the Nevada Indian Commission, stated AB 100 is not the solution to the particular problem of cigarette taxes. It addresses only one aspect of the problem. He urged the Committee to determine how this bill will be enforced. Don't run the risk of turning Nevada into the same type of situation which exists in the Northwest where armed riot squads attempted to confiscate cigarettes on the reservations. The tribes are willing to sit down with the Committee and try to iron out these problems. If they had been approached, the problems might already have been resolved.

Senator Sheerin suggested that an interim sub-committee be formed, which included the Indians and the Tax Commission, to formulate a bill to settle this problem.

Several Indian leaders indicated they would make themselves available for such a meeting.

Mr. Steve submitted a statement telling how the state benefits from the smoke shops. The statement is attached.

Mr. Hy Forgeron, representing the Battle Mountain Smoke Shop, stated there is one overwhelming problem with the provisions of AB 100. That is jurisdiction. The state has no jurisdiction of any nature on the reservation property. Regardless of what measure is passed, no Nevada Tax Commission agent or officer and no agent or officer of the State of Nevada is allowed to go upon reservation property for the purpose of enforcing any Nevada statute, or for the purpose of informing

themselves as to the compliance on the reservation of any Nevada statute, or for any purpose whatsoever. Therefore, the only enforcement procedure that can occur is off the reservation property. And that perforce must be against the consumer. That poses the problem of the Tax Commission trying to collect from the consumer as he leaves the reservation. Mr. Forgeron said he serves as Deputy District Attorney in Lander County. He said he did not purport to speak officially for the office or for the county, but he related that, after the Indian colony in Battle Mountain voted to retrocede, a policy decision was made by the Lander County Sheriff which is enforced today and which he has informed Mr. Forgeron will remain in force as long as he is Sheriff. That policy is that he will refuse to make an arrest for violation of a law which occurs on the Indian reservation. He would consider the violation of an act such as AB 100 to be a law that was violated on the Indian reservation regardless of where the consumer would be located. He has consistently refused to exercise law enforcement authority at the reservation and he has even refused to allow his deputies to become deputized BIA officers to allow them to go on the reservation. The District Attorney has indicated that he will refuse to prosecute cases which arise out of the Indian reservation, that he will yield only to federal jurisdiction and will assume no state or county jurisdiction. There will be no effective means of enforcing this law within the confines of Lander County.

He continued saying there is a terrible probable cause problem. If a person goes upon the reservation property and buys a carton of cigarettes, he is not going to tape it to the top of his car or put in on the dash board where it can be seen. Mr. Forgeron said he does not smoke, but he does have legitimate reason to go on the reservation. If he entered the smoke shop and left the reservation property and Mr. Sheehan or his agents stopped him, they had better have a search warrant or they will have a lawsuit. The same goes for any number of consumers. There had better be probable cause to get the issuance of that search warrant and he said he could guarantee the district courts in the State of Nevada would consider entry and exit in a smoke shop not to be probable cause to obtain a search warrant. It requires something more sufficient than that. One of the things that must be considered before passing any legislation is what does the law do after it is passed. Mr. Sheehan stated in the previous hearing that he did not know how this was going to be enforced. This is the man who is going to have to enforce the law and the man who has proposed this legislation. Even the Deputy Attorney General has testified that he doesn't know how the enforcement will work. At the very best, this bill is buying a lawsuit.

He said another serious problem is the proposal to exempt the sale of cigarettes to an Indian on an Indian reservation from the provisions of the act. He recalled a district court case which arose on the Walker River reservation. It arose from a highway patrolman stopping a car for speeding in which there was evidence of some controlled substance in the vehicle. The driver happened to be a Negro. He did not appear to be an Indian but part of Judge Young's decision in dismissing the matter was that it would be unfair to require the highway patrolman, at his risk, to identify whether or not the people he was arresting within the confines of the reservation were Indians because it simply can't be done by looking at a person. Indian tribes themselves have difficulties in determining who is an Indian and who is not. Using that district court decision as a basis, it would be unfair to require an Indian retailer to identify at his peril, under these regulations, who is an Indian and who is not.

With regard to the Moe case, just because something is done in Montana is not a reason for the Nevada Legislature to act. The Moe case arose under the situation where the Sheriff arrested the dealer on reservation property because Montana was a Public Law 280 state. Nevada is not. There is no Sheriff in the State of Nevada, unless he is an authorized federal officer, who has the right to arrest anyone on an Indian reservation. Moe will not work in the State of Nevada. It is not precedent for this bill and is wrongly cited by the Tax Commission as being such. Mr. Forgeron offered some suggestions to the bill. The provision in AB 100 for the refund of monies to wholesalers who sell and deliver on these reservations should be elaborated upon. It should be a blanket authorization to sell without collecting any tax, buying any stamps or affixing any stamps to an Indian dealer within the State of Nevada. This would eliminate the out-of-state advantage.

Senator Dodge stated that was not the main thrust of the bill. The main thrust is the competitive situation in which the smoke shops, which do not have to pay taxes, can sell cigarettes cheaper than the non-Indian retailers can buy cigarettes from the wholesaler.

Mr. Forgeron stated that was correct and that he did not have an answer for that. He suggested a study during the interim to get input on both sides to resolve this situation.

Senator Bryan asked Mr. Forgeron if he or any other Indian representative indicated to the Assembly Taxation Committee a willingness to meet in an attempt to reach a compromise.

Mr. Forgeron said a number of those suggestions were made. It was the opinion of the chair that a sub-committee should be appointed. However, a vote was taken before any sub-committee meetings could be scheduled.

Mr. Elmer D. Miller, of the Inter-tribal Council of Nevada, told the problems of the Indians and why he could not support AB 100.

S.B. 456 Enacts excise tax on aviation jet fuel, provides for distribution of tax and replacement of certain revenue received by cities from public utilities.

Testifying in favor of the bill was:

Senator William Hernstadt, the bill's introducer, stated his basic concern was the franchise tax on utilities within certain jurisdictions. He had earlier proposed SB 303, which eradicated the franchise tax on utilities. All the testimony before the Committee was negative. The cities charged they could not afford to lose the revenue without some compensation. Out of this arose SB 456. The thrust of this bill is to take the tax off of utilities which are necessities of life. This tax amounts to approximately \$50 or more a year on an average family. The secret of low taxes in this state is that the tax burden is paid by non-residents. This aviation jet fuel tax would offset the losses incurred in eliminating the utility franchise fee. This state has a tax on aviation gasoline, but has never taxed jet fuel. That seems unfair. He doubted that airplanes would load up with fuel in another state to avoid buying fuel in Nevada because of weight specifications with planes on landings and take-offs. This is not that heavy of a tax, considering airlines use the Nevada's air facilities, police service, fire equipment, make noise, burn the state's oxygen and pollute the air. The research department indicates there are 21 states which exempt taxes on airplane and jet fuel. Four others have refunds for fuels not used on highways and four others tax jet fuel but exempt common carriers. Twenty-one states tax jet fuel at rates from .5 cents to 9 cents per gallon. The average tax is 2.7 cents per gallon. McCarran Airport officials indicated approximately 150 million gallons of jet fuel was sold last year. Reno Airport officials would not disclose the amount sold.

Senator Dodge asked what this tax would cost to the airlines.

Senator Hernstadt estimated it would cost \$3.6 million in taxes. He foresaw that some business would be lost but did not expect a plane or a franchise landing right route would be cancelled.

Senator Dodge stated that later this month the Carter Administration will present its energy program. That may or may not include tax increases on all types of fuels. He suggested the Committee learn the impact of President Carter's plans before passing any legislation.

Senator Hernstadt stated that the two things are totally irrelevant.

Senator Bryan asked Senator Hernstadt for his figures again on how much the tax would raise.

Senator Hernstadt estimated \$3.6 million. Assuming there would be shrinkage, he felt at least \$3 million would be raised.

Senator Bryan asked what is the total amount derived from the cities in Nevada from the franchise tax.

Mr. Jim Lien, Deputy Director of the Department of Taxation, stated it was \$3.9 million. He said \$3.4 million was anticipated from the jet fuel tax.

Senator Hilbrecht questioned page nine, line nine which refers to a refund. Aviation fuel is subject to refund. The tax on it is the sales tax on motor vehicles, which is refunded if an application is filed under certain circumstances. Therefore, it is incorrect to say there is a levy on aviation fuel. There is a levy but it is subject to full rebate.

Those speaking in opposition to the bill were:

Mr. Robert Hayes, representing the Air Transport Association and an employee of Hughes Air West, who stated 9.2 million passengers were enplaned and deplaned at Las Vegas and Reno Airports in 1976. Approximately 40 million pounds of cargo were enplaned and deplaned at these two airports. He was contacted by the Legislative Council Research Division to provide fuel usage figures. He gave ATA figures of 150 million gallons per year from a 1977 forecast of scheduled airlines. That is a state-wide figure. The average cost per gallon in February 1977 was 33.8 cents. That is a 53.6 per cent increase over November 1974.

Mr. Ed Hall, Hughes Air West Director of Taxes, stated this would not be a popular tax for airlines in the State of Nevada. The airlines and other aircraft operators pay for the use of airports through landing fees, rentals and other agreed local charges. In addition, aviation is subject to the same general business taxes as are ordinarily assessed to all industry. Having paid reasonable airport charges and appropriate customary taxes, air transportation has fully paid its way. This is one reason why all aviation opposes and objects strenuously to paying a state tax on fuel loaded. These state fuel taxes represent a serious financial burden which hampers the normal development of all segments of aviation. He stated Senator Hernstadt was correct when he said there would be some shrinkage in the purchase of fuel. The 15 states which have neither an excise tax or sales tax on fuel load 30 per cent of all aviation fuel. Nineteen states with the sales tax only load 56 per cent of the fuel. Twelve states with an excise tax only load 10 per cent of the fuel.

Senator Hilbrecht said those statistics are assuming the population of New York and Nevada are the same.

Mr. Hall said there are alternative sources of fuel boardings. More fuel can be boarded in Los Angeles, San Francisco, Arizona and other states which have a lower nozzle price of fuel. When this is done, a city like Las Vegas would lose its importance as a hub city with Hughes Air West. That would in turn reduce the airline's flight property tax which is partially time based and would reduce employment.

Senator Hilbrecht stated he doubted minor incidence of a two cent tax would be the basis for determining a hub city. The airline's certificate of convenience and necessity with the CAB requires schedules to be serviced into Las Vegas. If the airline wanted to abandon the city, it would have to petition.

Mr. Hall stated he did not feel removal of service would happen. The airlines would probably increase fares which would have to be petitioned and approved.

Senator Bryan asked what this tax would cause the additional cost to Hughes Air West.

Mr. Hall said, based on 1976 figures, it cost \$460,000. In 1977, it was anticipated to cost at least \$500,000.

Mr. Hall stated Senator Hernstadt was incorrect when he said that airlines owed an additional tax because they use fire

and police services. Landing fees paid to the airport pay for its own on-site fire department and police protection.

Senator Dodge asked how much Hughes Air West pays in user fees at McCarran Airport.

Mr. Hall said Hughes Air West, as of September 1976, paid over \$1 million per year. A flight property tax is paid in addition. The airlines had an assessed valuation in 1976 and 1977 of \$18.3 million dollars. Airlines also pay sales taxes for purchases within the state.

Mr. Hayes said Hughes Air West paid \$59,000 in flight property taxes to Clark County in 1976.

Mr. Bob Mandeville, Director of Airports for the City of Reno, stated most airport authorities would like to run a self-sufficient, self-sustaining operation. When revenues of airports go to other portions of the community, the airport is losing revenues which could help it to be self-sustaining. McCarran International is the only Nevada airport operating in the black. Reno and most of the other airports in the state have not been able to operate in the black, primarily because of a lack of revenues. They have had to resort to municipal assistance through general obligation bonds or through general funds. It is important that airports be self-sufficient and not be a tax drain on the community. The City of Reno recently got the airport in the black by major negotiations with the carriers and landing fees. The bond requirements and capital improvements in the future are going to require major revenue bonding capabilities. Therefore, any revenues that can be generated at the airport will only serve to eliminate the tax drain on the County of Washoe, if it is the authority, or on the general fund if it remains with the city. While the State of Nevada does not charge a tax on jet fuel, the federal government charges a seven cents per gallon tax. The money generated is reverted back to the aviation community.

In regard to Senator Hernstadt's statement that Reno refused to make the figures of fuel flowage available, if he was referring to the City of Reno and the airport, it was not the intent to make him feel the figures were being refused. The City of Reno through the airport does not receive reports from the scheduled airlines in terms of gallonage and flowage. There is no charge to the City of Reno to the scheduled carriers for flowage fees and, therefore, it is irrelevant to keep those figures. He stated section 10 in the bill, which amends 365.210,

would keep the City of Reno from collecting a three cents per gallon fuel flowage fee charged to non-scheduled, chartered and general aviation field which is charged in lieu of a landing fee.

Senator Dodge asked, if Nevada should impose this fee, is there any way this tax will affect the user fee?

Mr. Mandeville said the landing fee agreements would be affected because the concept of the agreement is based upon a single cash-register approach. That is to say that all the revenues go into cash drawer. The expenses are added up and the carriers pick up the difference between the two in the form of a landing fee. If revenues are lost in one area, the carriers are committed to picking it up.

Mr. Larry Larson, Business Manager of the McCarran Airport, stated the arguments which have been proposed in opposition to the bill should be reiterated. There will be some shrinkage of fuel loaded at McCarran and other locations. This would be detrimental to the local field supplier. McCarran is a tourist oriented airport. An imposition of a tax, which is a further effort to milk the tourist, is opposed. It would be detrimental to the aviation segment of the Clark County economy. It would tend to discourage development of new markets and new carriers.

Mr. Jim Brown, General Manager of Hughes Aviation Services and representing the National Air Transportation Association, said this tax will have an effect on the amount of fuel sold. As such, it is a tax which will have a diminishing return. The basic cost of fuel is higher in Nevada than in the surrounding states because of increased transportation costs. It becomes a factor which must be faced all the time. An additional fuel tax will cause people to buy less and less. Negotiations are in progress with two airlines which are supplemental carriers. They wish to base with Hughes Aviation. These negotiations will be affected by increasing the fuel tax. The upcoming Carter Energy Plan could have a disastrous effect on aviation. Another load, like SB 456, on the airline's back will further hinder the business. Mr. Brown was told by the Chamber of Commerce to relate to the Committee that it has been overwhelmed by calls from travel agents, hotel people and others from transportation on this issue.

Mr. Carl Farr, Vice President of Marketing for Scenic Airlines, gave the Committee the view of the small businessman who would also be affected by this tax. During 1977, Scenic Airlines, which primarily caters to the tourism trade, will be

using approximately 600,000 gallons of jet fuel. Simple mathematics tells the company this tax will be an extra burden of approximately \$12,000 for this year. It would eventually have to be passed on to the consumer.

Mr. Jerry Fuller, of the Reno Flying Service, said the net fuel price at Reno delivered to the Fixed Base Operator is higher than the cost to the FBO in California. As a small businessman, Mr. Fuller said he felt the impact upon an area such as Reno, which is just beginning to get into a tourism and charter businesses, would hinder viable community development. Reno Flying Service serves only the charter business. The corporate companies flying in Reno have options on where to buy fuel. They could buy fuel in California. Without the fuel business, the FBO, who has to support the basic functions of an airport, cannot survive.

Mr. Lien stated the Department of Taxation has some technical problems with the bill beside conceptual ones. The bill is not going to do what was really intended--reimbursing the entities. It will fall \$500,000 per year short. This does not take into account shrinkage. A source is being taxed at which time in the future may be utilized for airport development. Section 10 on page three causes problems for airports which now charge flowage fees. On page six, because of how the bill is written, AB 102 is repealed. The department went through great lengths to get AB 102 passed. Section 27 also conflicts with AB 102. There are also questions regarding that section. On page nine, lines 12-13, it refers to chapter .364 when it should refer to .268. Line 13 does not specify as to whose revenues are being referred to. This bill repeals what can be done under .268 and gives no relief. He questioned line 19 which says the distribution shall be made on a yearly basis. This will impact cash flow for cities. It would be more appropriate to distribute it on a monthly basis. Line 20-21 on page nine is a problem. It has removed, when it should have retained, the language "motor vehicle fuel used and aircraft" instead of saying aviation fuel. Page 12, in section 32, the repealers do away with AB 102. He requested extensive amendments to the bill if there is going to be serious consideration given to it.

Senator Hernstadt agreed with Mr. Lien's comments on the problems of the bill. He rebutted comments made by those appearing in opposition to the bill. SB 303 had total shrinkage. This has less. He disputed that airlines would avoid fueling in Nevada. Regarding the cost of the Clark County Airport, there is a Clark County sub-station there. The metro police is 50 per cent funded under AB 17, which was just passed, by the City of

Las Vegas. He said he was shocked that airports charge a discretionary fuel tax. According to the constitution, taxes have to be levied evenly. That they levy landing fees on some and flow fees on others is disturbing.

AB 100 Places cigarette taxes directly upon ultimate consumer.

Senator Bryan asked if there was appetite to process the bill. He said he did not think, in fairness to the Indians, that there was time to negotiate a settlement this late in the session.

Senator Dodge stated, when considering the legal problems involved, even if the Moe decision would stand up, it will be a real enforcement problem.

Mr. Lien stated he felt there was an enforcement problem. It is a step only. The department will have to see what will happen with the two cases in Washington, which address the next step.

Senator Sheerin stated he thought the Committee ought to do what is right irrespective of what the Indians threaten to do or not to do.

Senator Dodge said one of the reasons the Indians have been on weak ground in the past is that, rather than operate the shops themselves and put a charge that constitutes an Indian nation tax, they are leasing the shops out to an operator who isn't paying them much money. If they operated it themselves and if they were to under the law, impose a tax at least equal to the state tax, they wouldn't have the advantage.

Senator Sheerin stated he felt the Moe decision and AB 100 were in line with each other. That will get at Mr. King. The next thing is will the Moe decision get at the tribes. If that gets litigated, he thought it would. Tribes aren't sovereign like states are. Counties aren't sovereign. Moe will be extended to the tribal situation, but that still leaves an enforcement problem. The Department of Taxation must still be given the ability to try to work forward rather than staying in the status quo for two or three more years.

Senator Dodge suggested writing a provision in the bill which says if the Indians levy the tax within their own jurisdiction, at least in the amount of the state tax, that none would be due to the state.

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AB 348 Provides standard for determining assess value of improvements under construction and clarifies which standards may be used in assessing agricultural land.

Senator Bryan asked the Committee to read the proposed amendment on this bill, which says assessment will begin upon completion of major improvement and be prorated, to see if it was satisfactory.

Senator Dodge moved to Do Pass as Amended. It was seconded by Senator Sheerin and passed unanimously with Senators Glaser and Lamb absent.

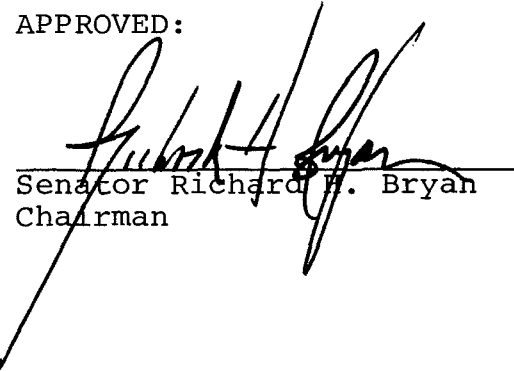
There being no further business, the meeting was adjourned.

Respectfully submitted,

Colleen Crum

Colleen Crum, Secretary

APPROVED:



Senator Richard H. Bryan
Chairman