

Pension Benefit Guaranty Corporation

89-9

November 28, 1989

REFERENCE:

[*1] 4021 Plans Covered
4021(b) Plans Covered. Exclusions from Coverage.

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether the Amended Pension Plan for Employees of * * * * * Company, a defined benefit plan maintained by the * * * * * Indian Community of the * * * * * Reservation in * * * * *, is covered by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). The facts as you have represented them in connection with your request are as follows.

The Tribe is a native American Indian tribe. It has no treaty with the United States; the reservation was established by a series of Executive Orders. The Tribe recently bought a factory located outside the tribal reservation (but within the same state). It has continued to operate the factory and directly employs the factory's employees. Most of these employees are non-Indians. The employees are represented by a union. The factory's customers, at least some of which are in other states, are non-Indian, and the factory is run simply to make money for the Tribe.

When the Tribe bought the factory, [*2] it assumed sponsorship of the plan, which is a qualified defined benefit pension plan. The Tribe intends to keep the plan qualified. The Tribe has no tribal rules or laws governing pension plans. It has acquiesced in the jurisdiction over the factory of the National Labor Relations Board and the Mine Safety and Health Administration.

It is well-settled that "a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S.Ct. 543, 553 (1960); accord, *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360 (1896); cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973) (state tax law held applicable to a tribal ski resort business located outside the tribal reservation). In general, exceptions to this principle are made only where --

(1) the law touches "exclusive rights of self-government in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their [*3] reservations"

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (citation omitted); accord, *Smart v. State Farm Insurance Company*, 10 E.B.C. 2060 (7th Cir. 1989) (applying ERISA to a group insurance plan maintained by an Indian tribe for employees of a tribal health center).

Under section 4021 of ERISA, Title IV applies generally to any tax-qualified defined benefit plan. Section 4021(b) lists exceptions to this general rule, but none of those exceptions applies to the plan in question here. Nor is there any indication in ERISA's legislative history that Congress intended to exclude Indian tribal plans from ERISA coverage. Furthermore, the Tribe has no treaty with which ERISA coverage would conflict, and nothing in the Executive Orders establishing the reservation forecloses ERISA coverage. Finally, the factory is an off-reservation operation, most of whose employees, and all of whose customers, are non-Indian; the factory is operated simply to generate income for the Tribe. In these circumstances, the operation of the factory and the maintenance of the pension plan for employees of the factory are not aspects of tribal self-government, and ERISA coverage [*4] will not interfere with tribal sovereignty. Accordingly, the PBGC has concluded that, in the circumstances presented by this case, Title IV of ERISA applies to the plan.

This case is significantly different from that presented in Opinion Letter 81-3, where the PBGC concluded that Title IV did not govern a pension plan for employees of a corporate council of elected governmental officials of several Indian

tribes that was established to coordinate the distribution on Indian reservations of federal (and, to some degree, state and private charitable) funds. In Opinion Letter 81-3, for example, the activities covered by the plan were characteristically governmental, non-profit activities focused within the reservation. Here, in contrast, the operations of the factory are off-reservation commercial activities carried on to make a profit.

This letter constitutes an initial determination by the PBGC that is subject to reconsideration under the PBGC's regulation on Rules for Administrative Review of Agency Decisions, 29 CFR Part 2606. A copy of that regulation is enclosed for your information. Any request for reconsideration must be filed with Carol Connor Flowe, General Counsel, PBGC, [*5] 2020 K Street, N.W., Washington, DC 20006, within 30 days after the date of this letter.

We note that this letter is not a determination as to the applicability of Title II of ERISA to the subject plan or the situation described. Any inquiry relating to such a determination should be directed to the Internal Revenue Service.

If you have any further questions about this matter, you may call Deborah C. Murphy of this office at 202-778-8820.

Jeanne K. Beck
Deputy General Counsel