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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Robert A. Huffman, Jr., General Counsel for Cherokee Nation Businesses and Cherokee Nation Enterprises

Opinion Number: 2016-CNAG-02

Date Decided: July 15, 2016

QUESTIONS

1. Does the Cherokee Nation Gaming Commission have jurisdiction over Will Rogers Downs Gaming Operations?
2. Does Cherokee Nation Gaming Commission have jurisdiction over Will Rogers Downs Racing Operations?
3. Should Mark Enterline, Consulting Manager over racing issues, be required to obtain a license from the Cherokee Nation Gaming Commission due to the fact that his duties are not gaming-related?

SHORT ANSWER

No, laws and regulations granting the Gaming Commission jurisdiction over Will Rogers Downs gaming and racing operations were repealed and prohibited by LA-07-14 and LA-17-14, codified as 4 C.N.C.A. 22 § (C) because said laws and regulations exceed or conflict with the requirements of the Cherokee Nation - State of Oklahoma Gaming Compact and National Indian Gaming Commission regulations and federal statutes. The exercise of jurisdiction over Will Rogers Downs exceeds the authority granted to the Gaming Commission by the Tribal Council in the most recent amendment to the Gaming Act.

ANSWER

AG Opinion

Per the Cherokee Nation Attorney General Act, it is the duty of the Attorney General "to give an official opinion upon all questions of law submitted to the Attorney General by any member of the Tribal Council, the Principal Chief, the Deputy Principal Chief, or by the Group Leader or

equivalent of any Cherokee Nation board, commission, or executive branch department, and only upon matters in which the requesting party is officially interested. Said opinions shall have the force of law in the Cherokee Nation until a differing opinion or order is entered by a Cherokee Nation court." 51 C.N.C.A § 105(B)(4).

Background

On October 13, 2015, this Office issued an Opinion that "the promulgation and enforcement of non-gaming vendor and non-gaming employee licensing regulations exceed the authority granted to the Gaming Commission by the Tribal Council in the most recent amendments to the Cherokee Nation Gaming Act." 25-CNAG-06. In that Opinion, this Office stated: "It is clear that in the recent amendments to the Gaming Act, Tribal Council intended the Compact to be a constraint on the types of regulations the Gaming Commission could enact." *Id.* The current question asks whether that recent amendment repealed the Gaming Commission's jurisdiction over Will Roger's Downs; it did.

Racinos

Will Rogers Downs ("WRD") (along with Remington Park which is owned and operated by the Chickasaw Nation) is a state licensed and regulated gaming facility under the jurisdiction of the Oklahoma Horse Racing Commission. In 2004, when the Tribal Gaming Act was put to a vote of Oklahoma citizens, a compromise in the Act allowed live horse racing facilities to offer electronic games similar to those that would be available in future tribal casinos. 3A O.S. § 262. The intent of allowing electronic games at existing racing facilities was to "encourage the growth, sustenance and development of live horse racing in this state and of the state's agricultural and horse industries." *Id.* The gaming facilities connected to live horse racing facilities ("Racinos" – a combination race track and casino) would be licensed and regulated by the Oklahoma Horse Racing Commission and be able to offer the same types of games as future tribal casinos, with a limit on the number of machines at each facility. *Id.* The owners or "organization licensees" of these Racinos were not required to be tribal entities. *Id.* Cherokee Nation purchased Will Rogers Downs in 2004. From that time until the present all gaming and racing employees and vendors are subject to the licensing regulations of the Oklahoma Horse Racing Commission. (Licensing requirements available here: http://www.ohrc.org/).[1]

Regulation of gaming on non-Indian lands

On August 14, 2006, the Cherokee Nation Tribal Council amended the Cherokee Nation Gaming Code to

> Authorize and regulate gaming on lands other than [Restricted Individual Lands or Indian Lands] for which the Nation has compacted with the State of Oklahoma or the State has authorized by enactment. PROVIDED, however, that license

[1] The current regulation of WRD by CNGC is duplicative as all activities are, by state law, regulated by the Oklahoma Horse Racing Commission. This is the type of waste that Tribal Council complained of when discussing the most recent amendments to the Gaming Act. See FN 4. This "double" regulation unnecessarily uses the resources of both the business and the CNGC because the business is "double regulated" by the Oklahoma Horse Racing Commission and CNGC.

> requirements and regulations promulgated by the Cherokee Nation Gaming Commission shall be in addition to and shall not conflict with any and all regulations issued by the Oklahoma Horse Racing Commission

Id. The amendment to the Code expanded "jurisdiction" to include "all lands owned by the tribe over which the Nation exercises commercial and/or governmental jurisdiction, regardless of whether title is held in fee-simple or trust or restricted status." *Id.* During Rules Committee discussion of this amendment, AAG Nason Morton stated the Act was to "increase jurisdiction oversight of the Gaming Commission for those lands which fall into their jurisdiction within the 14 county area that are not currently trust land." It is clear that at the time Tribal Council made this amendment it intended CNGC to regulate gaming and other activity on non-Indian lands, which the CNGC has done since at least 2008. There was no specific mention of WRD in the Gaming Amendment of 2006 although that would have been the only non-Indian land facility offering gaming at that time. It is undisputed that as of August 14, 2006, CNGC had the authority to regulate gaming at WRD.

2014 Gaming Act Amendment

On April 14, 2014 the Cherokee Nation Tribal Council amended the Cherokee Nation Gaming Act to restrict the regulatory authority of the CNGC, specifically; the amendment added the following emphasized language:

> It shall be the responsibility of the Commission to promulgate regulations necessary to administer the relevant provisions of this Act, <u>provided that rules and regulations promulgated or created by the Cherokee Nation Gaming Commission shall not exceed or conflict with the regulations issued by the National Indian Gaming Commission, including but not limited to the National Indian Gaming Commission Minimum Internal Control Standards or the provisions of the Indian Gaming Regulatory Act, as applicable, unless specifically outlined by law; nor shall the regulations promulgated exceed or conflict what is required under any Cherokee Nation-State of Oklahoma Gaming Compact.</u>

§ 22(C). (emphasis added). As discussed in 15-CNAG-06 this amendment was intended to limit the regulatory authority of the CNGC to those requirements specifically provided for by federal Indian gaming law or Oklahoma Gaming Compacts to which the Nation was a party. Because Tribal Council restricted the authority of the CNGC to those areas of regulation specifically provided for under federal Indian gaming law or state compacts, the question becomes whether there is any such authority for the CNGC to regulate electronic gaming, horse racing and other activity in facilities located on non-Indian land.

Indian Gaming Regulatory Act and Nation Indian Gaming Commission

The Indian Gaming Regulatory Act ("IGRA") applies to tribal gaming that occurs on "Indian lands." 25 U.S.C.A. §§ 2701, *et seq.* ("numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands;" "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;" "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a

matter of criminal law and public policy, prohibit such gaming activity;" "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands," etc.)

The National Indian Gaming Commission ("NIGC"), which is established by the Indian Gaming Regulatory Act, was created to "monitor class II gaming conducted on *Indian lands* on a continuing basis" and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions." 25 U.S.C. §§ 2701 (emphasis added). A recent U.S. Supreme Court case regarding "non-Indian land" tribal gaming supported the proposition that neither the NIGC authority or the IGRA apply to tribally owned or operated gaming facilities that operate on "non-Indian" lands. *Michigan v. Bay Mills Indian Community*, et al. 572 U.S. ____ (2014).

Neither the IGRA nor NIGC regulations authorize or require tribes to regulate gaming or other activity located on non-Indian lands.

Oklahoma Gaming Compacts

Cherokee Nation is a party to two Gaming Compacts with the State of Oklahoma. The first, the "Tribal Gaming Compact Between the Cherokee Nation and the State of Oklahoma" specifically covers "the operation of covered games on the *tribe's Indian lands*." (emphasis added). Again, it is clear that this Compact does not authorize or require the tribe to regulate gaming on non-Indian lands. The second Compact to which Cherokee Nation is a party, "State of Oklahoma Cherokee Nation Off-Track Wagering Compact" covers the "licensing, regulation, and operation of [off-track betting] which gaming shall be conducted by the Nation on Nation's lands[2] located within the state." The Compact further lists the locations to which it applies: Catoosa Casino, Roland Casino, Cherokee Casino Sallisaw, West Siloam Springs Casino, Outpost 2 Fort Gibson and Cherokee Casino Tahlequah.[3] Neither of these Compacts authorize or require CNGC to regulate gaming or other activity located on non-Indian lands.

Conflict Between Gaming Act and Current CNGC Regulations

It is clear from the above interpretation that the current Gaming Act conflicts with current CNGC regulations purporting to regulate gaming and other activity on non-Indian land.

There is no question that the Tribal Council has the ability to pass gaming regulations that exceed those required by the IGRA, NIGC, or tribal-state Compacts. In fact, it did so in 2006 when it added the jurisdictional provisions that increased CNGC jurisdictional authority over gaming on non-Indian lands. However, in its most recent amendments to the Gaming Act, the Tribal Council specifically prohibited the Commission from promulgating regulations that "exceed or conflict what is required under any" NIGC regulations, the IGRA or the Cherokee Nation-State of Oklahoma Gaming Compact."

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[2] The Compact goes on to define "Cherokee Nation Indian Country" as those trust and restricted lands defined in 18 U.S.C. § 1151 and/or 25 U.S.C. § 2703.

[3] This Opinion does not affect the CNGC's authority to promulgate off-track betting regulations pursuant to the State of Oklahoma Cherokee Nation Off-Track Wagering Compact at casinos located on Cherokee Nation Indian land.

In addition to the plain language of the law and legislative history,[4] the rules of statutory interpretation and conflict must guide the interpretation of Tribal Council's intent. Normally, a

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[4] After reviewing several hours of debate surrounding the passage of the Act from both Rules Committee and the Tribal Council meeting where the amendments were passed, it is clear that although Tribal Council did not explicitly repeal any portion of the law that exceeded or conflicted with the Compact or NIGC regulations, the Council intended the amendments to the Act to function as an implied repeal of any conflicting provisions contained in the Act. The following comments are paraphrased from the debate:

Council Attorney, Diane Barker Harold: the goal of these amendments are to clearly define and separate the roles and responsibilities of the Gaming Commission and CNB; [Act] gives the Gaming Commission authority over gaming and keeps non-gaming issues with CNB; Commission should be focused on gaming, not retail and restaurants; non-gaming activities will fall under supervision and control of business

Speaker Jordan: Commission should not exceed requirements of NIGC and Compact because it puts the business arm at a competitive disadvantage in the market; Council can't tie their [CNB] arms behind their back and then tell them to increase their bottom line; by going beyond the minimum standards we are putting ourselves at a competitive disadvantage in one of the most competitive industries; we have the right to pass laws and draw a line in the sand and tell the Commission they cannot cross it

Councilor Thornton, co-sponsor of Act: We have let the Gaming Commission go for over 15 years; [regulations]are costing us four million dollars that could have been used by our people; we are not taking care of business

Councilor Fishinghawk, co-sponsor of Act: More regulation equals more cost to industry, which affects dividend, which affects services; if [regulations] are costing the business arm money, I have to step in; 95% of tribes adopt the MICS and don't go any further; regulatory authority should have no involvement in the operation or management of the business and the Commission has expanded to include non-gaming regulation [Act will prohibit]; many current Commission requirements go beyond gaming and into areas of management and non-gaming

Councilor Watts: [If passed] who will no longer have to be licensed? [If passed] the Act will lessen the regulatory role of the Commission in the gaming environment; do not support because all aspects of the business should be regulated and [if passed] would limit Commission to gaming regulation. [Will not support passage] because the Act alienates gaming from non-gaming, including business and employees, and takes authority away from the Commission to regulate those non-gaming businesses and employees

Councilor Fullbright: well protected from abuse by following [NIGC and Compact minimums]; going beyond [NIGC and Compact minimums] cost the tribe money

Councilor Buzzard: Why would we exceed minimum standards?

Councilor Hargis: Do any of the [regulations beyond Compact or NIGC minimums] generate money for the Commission?

more specific section of a statue is said to control over more general sections: *Generalia specialibus non derogant* (the general does not detract from the specific). Under that cannon, the specific statutory language on regulating gaming and other activity on non-Indian land would control over the general provision that the Commission may not promulgate regulations that exceed federal laws or state compacts. That would be especially true if the different sections of the Gaming Act had been passed at the same time.

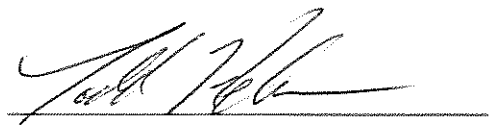
However, a more important cannon of statutory construction is "recency" or *Leges posteriores priores contrarias abrogant* (later laws abrogate earlier, contrary ones). This cannon of statutory construction is also sometimes called "implied repeal." It assumes that when passing a new law, the law making body, here Tribal Council, is aware of the current law and any conflict between old and new law is resolved in favor of the most recent.

It must be assumed that when Tribal Council made the most recent amendment to the Gaming Act, specifically including the language in Section 22 that prohibits the Commission from promulgating regulations that exceed or conflict with federal laws or state compacts; that they understood there were provisions of the Act that would allow the Commission to exceed or conflict with the Compact and those provisions were impliedly repealed. Interestingly, Council chose to allow the Commission to exceed or conflict with NIGC minimum standards if "specifically outlined by law." There are no new provisions "specifically outlined by law" that would allow the CNGC to regulate gaming or other activities on non-Indian land. Therefore, the most recent expression of Tribal Council must be interpreted as repealing the provisions of the Gaming Act that allow the Commission to promulgate regulations that exceed or conflict with compacts or NIGC regulations, specifically including those that require regulation of gaming and other activity on non-Indian land.

CONCLUSION

It is clear that in recent amendments to the Gaming Act, Tribal Council intended the Compact and federal law and regulations to be controlling on the types of regulations the Gaming Commission could enact. Therefore, it is the Official Opinion of the Office of the Attorney General that the Cherokee Nation Gaming Commission does not have the authority to regulate gaming and other activity on non-Indian lands because said regulations are specifically prohibited by LA-17-14, codified as 4 C.N.C.A. 22(C) since they exceed or conflict with the requirements of the Cherokee Nation - State of Oklahoma Gaming Compact, the IGRA and NIGC regulations. The promulgation and enforcement regulations on non-Indian land exceed the authority granted to the Gaming Commission by the Tribal Council in the most recent amendments to the Cherokee Nation Gaming Act. Finally, practically, there is no realistic need for WRD to be "double regulated" by both the CNGC and the Oklahoma Horseracing Commission, by law, the Oklahoma Horseracing Commission must regulate all aspects of WRD. To continue duplicative regulations by CNGC is a waste of the Nation's resources.

Councilor Walkingstick: [proposed amendments] will allow CNB to get every penny possible and still stay in compliance with NIGC and Compact. When Commission exceeds [NIGC and Compact minimums] it cuts into profits, dividends and returns to the community



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