



A. Diane Hammons  
Attorney General

**CHEROKEE NATION**  
**OFFICE OF THE ATTORNEY GENERAL**

P.O. Box 948  
Tahlequah, OK 74465-0948  
918-453-5000  
Fax No. 918-458-5099

Sr. Assistant Attorney General  
Nason Morton

Assistant Attorneys General  
Sara Hill  
Dana Jim  
N. Cheryl Hamby  
Elizabeth Odell  
Brandy Inman  
Chrissi Nimmo

**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** Jamie Hummingbird, Director of the Cherokee Nation Gaming Commission and Robert Huffman, General Counsel for Cherokee Nation Enterprises, on behalf of the Board of Directors, Cherokee Nation Enterprises, (CNE).

**Opinion Number:** 2008-CNAG-03

**Date Decided:** November 19, 2008

**To:** Jamie Hummingbird, Director of the Cherokee Nation Gaming Commission  
Robert Huffman, General Counsel for Cherokee Nation Enterprises

**From:** A. Diane Hammons, Attorney General for the Cherokee Nation

The Cherokee Nation Gaming Commission has requested an opinion, thus:

***“Is there flexibility in Title 4 regarding the minimum age to game at Cherokee Nation and, if so, how might this affect operations at Will Rogers Downs and our obligations under the Tribal-State Compact?”<sup>1</sup> “***

Also, the Board of Directors of Cherokee Nation Enterprises, LLC, has requested an opinion as to whether:

***“Under applicable state and tribal law, may the Board of CNE establish a minimum gaming age of 21 years at its casino properties?”***

On these related questions, the Cherokee Nation Office of the Attorney General presents this Official Opinion pursuant to the 1999 Constitution and LA-12-07 (Effective date March 19, 2007).<sup>2</sup>

The Gaming Commission's question and attachments can be divided into two (2) separate questions as set out below:

- 1. Does the Cherokee Nation Code Annotated, Title 4, Amusement and Sports, Section 33 allow the restriction of patrons at Cherokee Nation Casinos to only persons over the age of twenty-one (21)?**
- 2. Does the Tribal-State Gaming Compact allow the restriction of patrons at Cherokee Nation Casinos to only persons over the age of twenty-one (21)?**

#### ANALYSIS

- 1. Whether the Cherokee Nation Code Annotated, Title 4, Amusement and Sports, Section 33 allows the restriction of patrons at Cherokee Nation Casinos to persons over the age of twenty-one (21)?**

**Answer: Title 4 CNC §33 allows the restriction of patrons at Cherokee Nation Casinos to only those persons over the age of twenty-one (21).**

The Cherokee Nation is a federally recognized tribe. The Nation has the sovereign authority to create and enforce its laws. The Constitution of the Cherokee Nation, ratified July 26, 2003, Article VI, Section 7, provides that the Cherokee Nation Tribal Council "shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution."<sup>3</sup> Pursuant to this Constitutional provision, the Cherokee Nation Tribal Council enacted Title 4 Section 33 of the Cherokee Nation Code.<sup>4</sup> The text of Section 33 provides that:

No person who is under the age of 18 shall operate, engage, or participate in any manner in the operation of any class gaming activity. It shall be the responsibility of the manager of all licensed gaming operations of the Cherokee Nation to insure compliance with this age limit requirement.

This section specifically excludes all persons under the age of eighteen (18) from operating, engaging in or participating in any class of gaming activity. The duty to enforce the restriction is placed with the manager<sup>5</sup> of the licensed gaming operation

It is clear that all persons under the age of eighteen (18) are prohibited from operating, engaging or participating in any class of gaming activity. The issue presented herein is whether Section 33 requires that all persons having attained the age of eighteen (18) must be allowed to operate, engage, or participate in any manner in the operation of any class gaming activity. Section 33 does not create a right to gamble once a tribal or non-tribal member attains the age of eighteen (18) and does not prohibit CNE from limiting participation in the Casinos to persons twenty-one (21) years of age or older.

**2. Whether the Tribal-State Gaming Compact allows the restriction of patrons at Cherokee Nation Casinos to only persons over the age of twenty-one (21)?**

**Answer: The Tribal-State Gaming Compact does not prohibit the restriction of patrons at Cherokee Nation Casinos to only persons over the age of twenty-one (21).**

The Cherokee Nation is a sovereign nation, with an inherent right of self-government. Wheeler v. United States Department of Interior, 811 F.2d 549, 551 (10<sup>th</sup> Cir. 1987); Wheeler v. Swimmer, 835 F.2d 259, 261 (10<sup>th</sup> Cir. 1987). Courts have long recognized that Indian tribes possess common law immunity from lawsuits. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991). In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) the Supreme Court held that "tribes enjoy sovereign immunity from civil suits on contracts, whether the contracts involve governmental or commercial activities and whether they were made on or off a reservation."

The Tribal Gaming Compact between the Cherokee Nation and the State of Oklahoma, (hereinafter "Compact"), reiterates the inherent sovereignty and the right of self-government of the Cherokee Nation and recognizes the mutual benefit to the Cherokee Nation and the State of Oklahoma to increase tourism and economic development as well as to provide services including "health care, housing, sewer and water projects, police, corrections, fire, judicial services, highway and bridge construction, general assistance for tribal elders, day care for the children, economic development, educational opportunities and other typical and valuable governmental services and programs for tribal members." Compact, Part 2, Sections 1, 5 and 6. The Cherokee Nation did not alter or waive any tribal jurisdiction, neither civil nor criminal, in the compact. Compact, Part 9. The Compact regulates "covered games" as defined in Part 3, (5), which provides:

"Covered game" means the following games conducted in accordance with the standards, as applicable, set forth in Sections 11 through 18 of the State-Tribal Gaming Act: an electronic bonanza-style bingo game, an electronic amusement game, an electronic instant bingo game, nonhouse-banked card games; any other game, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act;"

Covered games do not include Class II Games. (Compact Part 4 (A).)

The Compact also has an age restriction in addition to the restriction found in Title 4 CNC § 33. The Compact, Part 5, J., Age Restrictions, provides that,

No person who would not be eligible to be a patron of a pari-mutuel system of wagering pursuant to the provisions of subsection B of Section 208.4 of Title 3A of the Oklahoma Statutes shall be admitted into any area in a facility where covered games are played, nor be permitted to operate, or obtain a prize from or in connection with the operation of, any covered game, directly or indirectly. (emphasis added)

Title 3A O.S. § 208.4(B) provides that,

No organization licensee shall knowingly permit any minor to be a patron of the pari-mutuel system of wagering conducted by the organization licensee. Any person convicted of violating any provision of this subsection shall be guilty of a misdemeanor. (emphasis added)

A minor is defined in 3A O.S. § 200.1(6) as any individual under eighteen (18) years of age.

The language contained in Part 5, J. of the Compact is similar to the language of Section 33 and is also designed to prohibit persons under the age of eighteen (18) from “operating or obtaining a prize from or in connection with the operation of, any covered game, directly or indirectly.” The section is also silent as to persons between the ages of eighteen (18) and twenty-one (21). CNE’s decision to exclude all persons under the age of twenty-one (21) does not violate the Compact provision Part 5, J., Age Restrictions.

**3. “Under applicable state and tribal law, may the Board of CNE establish a minimum gaming age of 21 years at its casino properties?” (Question requested by CNE)**

**Answer: There is nothing in the applicable state and tribal law that prohibits the Board of Directors of CNE from establishing a minimum gaming age.**

As set out above, there is nothing in the Cherokee Nation Constitution nor the Cherokee Nation statutes that specifically prohibits CNE from establishing a minimum gaming age. The laws of the state of Oklahoma do not apply to the Cherokee Nation nor its tribally owned entities unless the Cherokee Nation has specifically and explicitly agreed to be bound by the applicable law by waiver or agreement/Compact (Congressional abrogation is not at issue in this opinion).

The Cherokee Nation Gaming Commission is authorized to regulate tribal gaming pursuant to Cherokee Nation statutes and is designated as the compliance agency for the Cherokee Nation in the Compact. Under Title 4 of the Cherokee Nation Code, the Cherokee Nation Gaming Commission was established as a part of the Executive Branch of the Cherokee Nation in order to carry out the Nations' responsibilities under IGRA and the NIGC's regulations as well as:

any laws and/or regulations or regulating agencies established by the State of Oklahoma either: 1 ) pursuant to a compact on lands other than the lands defined in Section 4 (C) and (D) of this Title; or 2) applicable to facilities operating: a) under the jurisdiction of the Oklahoma Horse Racing Act, Okla. Stat, tit. 3A. § 200 *et. seq.*; or h) in connection with horse racing facility under a license granted under the authority of Okla. Stat. tit. 3A,

The Cherokee Nation Gaming Commission is the "Tribal Compliance Agency" set out in the Compact and has the authority to regulate and oversee the responsibilities of the tribe. Compact, Part 3 (26). The Commission implements the provisions of the Cherokee Nation Tribal Gaming Act and insures consistency with the constitution of the Cherokee Nation, other laws of the Cherokee Nation, laws of Oklahoma, and if applicable, the regulations of the Oklahoma Horseracing Commission. Cherokee Nation Legislative Act 20-06. The Commission has the power to oversee "the conduct of such operations in order to ensure compliance with this Act." Cherokee Nation Legislative Act 20-06. The Compact also references out a state compliance agency but specifically provides that the "Oklahoma Horseracing Commission and the Oklahoma Tax Commission shall have no role in regulating or oversight of any gaming conducted by a tribe." Compact, Part 3, 25.

The Oklahoma Horseracing Commission (“OHRC”) does, however, issue licenses to organizations on property located on fee land pursuant to the Tribal-State Gaming Act.” 3A O.S. § 261 et seq., and the Compact. The OHRC issues organizational licenses to conduct authorized gaming and promulgates rules to regulate, implement and enforce the provisions of the Tribal-State Gaming Act. The OHRC rules and regulations are limited, however, when the organizational licensee is issued to a tribal entity. The regulation and oversight of the games covered by a compact and operated by an Indian Tribe are conducted “solely pursuant to the requirements of the compact.” 3A O.S. § 262(A) and (F).

Will Rogers Downs is licensed by both the OHRC and the Cherokee Nation Gaming Commission. The physical location of the facility is within the territorial boundary of the Cherokee Nation and located on fee land. The Cherokee Nation Gaming Commission regulates the facility pursuant to Title 4 CNC § 2 and § 11 and OHRC licenses the facility subject to the limitations set out in the compact.

Cherokee Nation Enterprises (CNE) can change the age limit to twenty-one (21) years of age without affecting our obligations under the Compact because this does not violate any provisions of the Compact, Tribal Laws, etc. The Cherokee Nation Gaming Commission can only interfere in the operations of the gaming facilities if the actions or policies of CNE violate a provision of the Compact, Tribal Laws, or other laws applicable to the operation of the gaming facility. The Cherokee Nation Gaming Commission cannot require CNE to allow persons under the age of twenty-one (21) to participate in the gaming activities of the gaming facilities.

Respectfully Submitted by:

/s/ Nason Morton (by add)  
Nason Morton

Senior Assistant Attorney General

Elizabeth Odell  
Elizabeth Odell

Assistant Attorney General

A. Diane Hammons  
A. Diane Hammons

Attorney General for the Cherokee Nation

<sup>1</sup> The Gaming Commission referenced and attached six (6) attachments: A-1. a copy of Title 4 CNC § 33, A-2. General Commission Policy-Access to Gaming Facility, B. Compact, Part 5, J., (one page), C. unofficial text of Title 3A O.S. § 208.4, D. unofficial text of § 15-13, E. LA-20-06

<sup>2</sup> Article VII. Section 13. of the 1999 Constitution created the office of Attorney General. Pursuant to Section 13, the “Attorney General shall represent the Nation in all criminal cases in the courts of the Nation, and in all civil actions wherein the Cherokee Nation is named as a party, and shall have such other duties as the Council may prescribe by law.” LA-12-07. Effective date March 19, 2007, sets out the Attorney General’s other duties, including 51 CNC Section 104(B) (4). “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.”

<sup>3</sup> Article V, Section 7 of the 1976 Constitution was renumbered as Article VI., Section 7, in the 1999 Constitution. The language was altered as set out below. The 1999 Cherokee Nation Constitution was adopted by the Delegates of the 1999 Constitution Convention on March 6, 1999; approved for release by the Constitution Convention Style Committee on July 30, 1999; approved for referendum by resolution passed by the Council of the Cherokee Nation on May 15, 2000, and signed by Principal Chief Chadwick Smith on May 24, 2000 (Resolution #31-00); approved by vote of the citizens of the Cherokee Nation on July 26, 2003 and certified by the Cherokee Nation Election Commission on August 7, 2003; ruled effective and ordered implemented by the Cherokee Nation Judicial Appeals Tribunal (now Supreme Court) on June 7, 2006 in Case # JAT-05-04.

The text of the 1976 Constitution is similar to the 1999 Constitutions and is found in Article V, Section 7. The full text of both Sections are set out below.

**1976 Constitution**

**Section 7.** The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution. Laws or enactments which are required by Federal statutes to be approved shall be transmitted immediately upon enactment as provided by Section 11 of this Article to the President of the United States or his authorized representative. The style of all bills shall be: “Be It Enacted By The Cherokee Nation”. The style of all resolutions shall be “Be It Resolved By The Cherokee Nation”.



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## 1999 Constitution

**Section 7.** The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution. The style of all bills shall be: "Be It Enacted By The Cherokee Nation". The style of all resolutions shall be "Be It Resolved By The Cherokee Nation".

- B. 3. "Primary Management Official" means:
1. The person having management responsibility for a management contract;
  2. Any person who has authority:
    - a. To hire and fire employees;
    - b. To set up working policy for the gaming operation; or
  3. The chief financial officer or other person who has financial management responsibility.

<sup>4</sup> The 1976 Constitution, Article V, Section 7 provided the exact language and Title 4 Section 33 was enacted pursuant to the 1976 Constitution in LA-30-89, eff. April 8, 1989 and amended by LA 1-94, eff. April 11, 1994.

<sup>5</sup> . There is no specific definition of a manager in Title 4. A manager could be the same as a "primary management official" pursuant to Title 4 CNC § 42(B)(1)-(3). Primary management officials include any person who has authority to hire and fire employees, set up working policy for the gaming operation or the chief financial officer or other person who has financial management responsibility. 4 CNC § 42(B). Manager may also refer to a floor manager pursuant to 42(A)(1)(e).