



MENOMINEE INDIAN TRIBE OF WISCONSIN

CHAIRMAN'S OFFICE
P.O. BOX 910
KESHENA, WI 54135

September 20, 2016

Scott A. Neitzel
Secretary
Wisconsin Department of Administration
P.O. Box 7864
Madison, WI 53707-7864

Re: Legality of Ho-Chunk Nation Wittenberg Facility

Dear Secretary Neitzel:

The Menominee Indian Tribe of Wisconsin believes that the Ho-Chunk Nation's casino located in Wittenberg, Wisconsin ("Wittenberg Facility") as currently operated, and as proposed to be operated pursuant to its recently announced expansion plans, violates the Indian Gaming Regulatory Act and the Ho-Chunk Nation – State of Wisconsin gaming compact ("Gaming Compact") in two ways:

- The land on which the Wittenberg Facility rests was acquired by the United States in trust for the Ho-Chunk Nation in 1993. Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. §2719, and Section IV.B of the Gaming Compact prohibit Class III gaming on any trust lands acquired after October 17, 1988 unless an exception to this prohibition exists. There is no evidence that any such exception to the prohibition exists.
- The Wittenberg Facility as operated currently, and pursuant to its recently announced expansion, does not meet the definition of an "Ancillary Facility" pursuant to the Gaming Compact. It is instead a primary Gaming Facility which is prohibited in Shawano County pursuant to Section XVI.E of the Gaming Compact.

The legitimacy of Tribal Gaming depends upon the enforcement of applicable gaming laws. In regard to Class III gaming, such enforcement is a shared responsibility between the Tribes, the federal government, and the State of Wisconsin. Enclosed please find a copy of a letter sent by the Tribe to the Chairman of the National Indian Gaming Commission urging them to review this matter and perform their duty and take appropriate action.

On behalf of the Menominee Tribe, I request that the State of Wisconsin similarly review this matter, and if the Wittenberg Facility is found not to be compliant with the provisions of the Gaming Compact, to take necessary enforcement actions to ensure compliance. Failure to act does a disservice to Tribes in the State that operate gaming facilities in conformance with federal law and their compacts with the State.

I would be pleased to meet with you as soon as possible to discuss this important and urgent issue. Thank you for your prompt consideration of this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Joan Delabreau".

Joan Delabreau

Chairperson

Menominee Tribal Legislature

c. Governor Scott Walker
Attorney General Brad Schimel



**MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE**

P.O. Box 910
Keshena, WI 54135-0910

September 16, 2016

Chairman Jonodev Chaudhuri
National Indian Gaming Commission
c/o Department of the Interior
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Re: Legality of Ho-Chunk Gaming in Wittenberg Wisconsin

Dear Chairman Chaudhuri:

The Ho-Chunk Nation operates a Class III Gaming Facility in Wittenberg, Wisconsin ("Wittenberg Facility") located approximately 30 miles from the Menominee Indian Tribe's casino in Keshena, Wisconsin. Since the original construction of the Wittenberg Facility there has been a concern that it is operating in violation of: 25 U.S.C. §2710(d)(1)(C) which requires Class III gaming to be conducted in conformance with a State – Tribal Compact; 25 U.S.C. §2710(d)(1)(A) which requires Class III gaming to be conducted in conformance with a Tribal gaming ordinance; and 25 U.S.C. §2719(a) which prohibits gaming on off-reservation lands acquired after October 17, 1988. This concern is based upon the following:

- The Ho-Chunk Nation's gaming compact with the State of Wisconsin and its gaming ordinance – approved by the NIGC in 2008 – only permits the Ho-Chunk Nation to operate a small, "ancillary gaming facility" on its land in Wittenberg, Wisconsin. That facility is supposed to be attached and ancillary to another business, such as a convenience store or gas station. It is not intended to be a stand-alone casino with 500 slot machines much less a full-scale casino resort. The plans recently announced by the Ho-Chunk Nation indicate that its Wittenberg "ancillary facility" will be expanded into one of the largest gaming facilities in northern Wisconsin, with more than 800 slot machines, table games, restaurants and a hotel. The Ho-Chunk Nation has planned an official groundbreaking ceremony for this expansion for September 21, 2016. The Ho-Chunk Nation's current Wittenberg Facility and its announced expansion does not meet the definition of an ancillary facility under its gaming compact or gaming ordinance and therefore violates federal law.
- The public records related to the ownership of the property on which the Wittenberg Facility rests indicate that the land was originally acquired in trust pursuant to a June 28, 1969 quitclaim deed, that deed contained a reversionary clause which stated the transfer was:

"subject to housing construction which must commence within five years
from date of approval of this deed or the land will revert to the grantor."

There is no evidence that housing construction took place on the property and therefore the land reverted to the grantor in 1974. In 1993, the original grantor issued a new quitclaim deed to the United States.

Thus the United States current interest in the land was acquired in 1993 and therefore the land is ineligible for the conduct of gaming pursuant to 25 U.S.C. §2719(a). Gaming on such land violates the terms of the Ho-Chunk Nation gaming compact, its gaming ordinance, and federal law.


In 2008, the State of Wisconsin expressed the same concern related to the timing of the acquisition of the Wittenberg Facility land. (See the attached May 15, 2008 letter from Mike McClure, Legal Counsel, Wisconsin Department of Administration, Division of Gaming to Diane Rosen, Midwest Regional Director, Bureau of Indian Affairs). In 2015 the Tribe requested all documents from the National Indian Gaming Commission related to this issue. (See the attached July 7, 2015 letter from John Wilhelmi, Tribal Attorney – Gaming, Menominee Indian Tribe of Wisconsin to National Indian Gaming Commission FOIA Officer). To date, neither the Bureau of Indian Affairs nor the National Indian Gaming Commission has provided a legal analysis explaining how the Wittenberg Facility was placed into trust status before the enactment of IGRA; or, how the property is otherwise eligible for gaming under IGRA.

Menominee believes that the health and legitimacy of the Indian gaming industry depends upon Tribes operating gaming in conformance with the provisions of the Indian Gaming Regulatory Act. In order to ensure such conformance the National Indian Gaming Commission must fulfill its responsibility to enforce applicable federal law. If the Ho-Chunk Nation wishes to operate a gaming facility on lands acquired after October 17, 1988 it may do so legally by seeking to apply an exception to the rule found in 25 U.S.C. §2719.

We ask that you take all necessary action as soon as possible to investigate whether the Ho-Chunk Wittenberg Facility is operating in violation of the above referenced provisions of the Indian Gaming Regulatory Act, and to take appropriate enforcement action if your investigation determines that such violations are occurring.

I would be pleased to meet with you as soon as possible to discuss this important and urgent issue. Thank you for your prompt consideration of this matter. Please do not hesitate to contact me if you have any questions.

Respectfully,


Joan R. Delabreau, Tribal Chairwoman
Menominee Tribal Legislature



**MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE**

P.O. Box 910
Keshena, WI 54135-0910

JUL 17 2015

FOIA Request 2015-033

71715-21

July 7, 2015

VIA FEDERAL EXPRESS

FOIA Officer National Indian Gaming Commission
1849 C Street NW Mailstop #1621
Washington, DC 20240

Re: Eligibility of Ho-Chunk Nation to Conduct Gaming in Wittenberg, Wisconsin

Pursuant to the Freedom of Information Act ("FOIA") 5 U.S.C. §552 *et seq.* and the National Indian Gaming Commission ("NIGC") FOIA regulations at 25 CFR Part 17, I am writing to request all information in the possession of the NIGC regarding the eligibility of the Ho-Chunk Nation to conduct gaming at their casino facility on lands located at N7198, USH 45, Wittenberg, Wisconsin ("Wittenberg Facility"). According to public records, the land on which the Wittenberg facility rests was originally acquired by the United States of America in trust for the Ho-Chunk Nation pursuant to a June 28, 1969 quitclaim deed from the Native American Church, Half Moon Fire - Place, Inc. That deed contained a reversionary clause which stated:

"also subject to housing construction which must commence within five years from date of approval of this deed or the land will revert to the grantor."

Subsequently, in 1993 the Native American Church, Half Moon Fire - Place, Inc. executed a new quitclaim deed to the United States deeding:

"All right, title and interest, it may have under the reversionary clause in Warranty Deed dated June 28, 1969. . ."


These deeds appear to show that the United States acquired the Wittenberg Facility land in trust for the Ho-Chunk Nation in 1993. Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. §2719, generally prohibits gaming on lands acquired in trust after enactment of the Indian Gaming Regulatory Act on October 17, 1988.

I am seeking all documents pertaining to the eligibility to conduct gaming at the Wittenberg facility including, but not limited to any documents related to a determination by the Bureau of Indian Affairs, Department of Interior Office of the Solicitor, National Indian Gaming Commission, or any other federal agency regarding the date the Wittenberg Facility was acquired in trust for the Ho-Chunk Nation; the effect of the reversionary clause in the 1969 deed referenced above; and any determination regarding the eligibility of gaming at the Wittenberg Facility pursuant to federal law.

For purposes of this request, the term documents should be construed in the broadest sense to include letters, memoranda, facsimiles and facsimile cover sheets, telephone message logs, emails, calendar entries, meeting note, and any other responsive materials. Such documents should be included regardless of their source. In the event that you believe any of the documents requested in this letter may not be disclosed in their entirety, we request that you release any disclosable material that can be reasonably segregated. In addition, please state with specificity the legal and factual grounds for withholding any document or portion of any document, including a reasonably detailed description of the material being held.

This request falls under the category of “all other requesters” and I am willing to pay a fee in excess of \$25.00 pursuant to 25 C.F.R. §517.9(d)(4). If you have any questions regarding this request, please feel free to contact me at jwilhelmi@mitw.org.

Sincerely,


John R. Wilhelm

Tribal Attorney – Gaming

Menominee Indian Tribe of Wisconsin



WISCONSIN DEPARTMENT OF
ADMINISTRATION

JIM DOYLE
GOVERNOR
MICHAEL L. MORGAN
SECRETARY
ROBERT W. SLOEY
ADMINISTRATOR
DIVISION OF GAMING
3319 W. Beltline Hwy., 1st Floor
Post Office Box 8979
Madison, WI 53708-8979
Voice (608) 270-2555 - Fax (608) 270-2564

May 15, 2008

Diane Rosen, Superintendent
Bureau of Indian Affairs, Great Lakes Agency
916 W. Lakeshore Drive
Ashland, WI 54806

SENT VIA FACSIMILE
AND US MAIL

Dear Superintendent Rosen:

Pursuant to a conversation with the Deputy Superintendent of the Ashland office of the Bureau of Indian Affairs, I am writing to obtain a determination regarding the history of the trust status of a parcel of land in the town of Wittenberg, Wisconsin. This matter involves land on which the Ho-Chunk Nation, formally Wisconsin Winnebago Tribe, has begun construction of a class III gaming facility. It is our understanding that the Nation intends to conduct gaming on land, designated as parcel 050041100020 by Shawano County, which is more specifically described in the deeds discussed below, copies of which are attached to this correspondence. It is our understanding that the construction is to commence soon, and be completed by approximately October of this year.

It has been our understanding, based on communications with the Nation and representatives of the county, that the land has been in trust since 1969. However, certain facts discussed below have recently been brought to our attention which create uncertainty regarding the trust status of the land after the 1969 transfer, specifically the status of the land as of October 17, 1988.

The deed dated June 28, 1969 contains a clause which states the grant is "...also subject to Housing construction which must commence within 5 years from date of approval of this deed or the land will revert to the grantor." This deed also contains an approval by the Bureau of Indian Affairs dated October 3, 1969, and an acknowledgement of filing in the BIA Minneapolis Area Office. The deed indicates it was prepared by BIA Ashland Office.

There is also a second deed, dated April 15, 1993, which transfers "[a]ll right, title and interest, it may have under the reversionary clause in Warranty Deed dated June 28, 1969...." The grantor in each deed is the same, although the latter deed also appears to be executed by a representative of the Nation in his official capacity as Area III representative on the Wisconsin Winnebago Business Committee. There appears to be no record of acknowledgement or approval of this deed by the Bureau of Indian Affairs.

A question is created by the reversionary clause in the 1969 deed, and how the clause operates given the restrictions against alienation which apply to Tribal trust land. If this clause is interpreted to create a fee simple determinable with a possibility of reverter, the effect would be to automatically revert title to the grantor upon the happening of the

Superintendent Diane Rosen
May 15, 2008
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limitation in the deed (the failure to commence construction of the required housing within five years). See 28 Am Jur 2d Estates § 26, Saletri v. Clark, (Wis. Sup. Ct. 1961) 13 Wis. 2d 325, 108 N.W.2d 548, 1961 Wisc. LEXIS 450. It would appear that the possibility of reversion of the title to the grantor is what motivated the execution of the 1993 deed.

Since the deed containing the reversionary clause was both prepared and approved by the BIA it would seem that the possibility of a subsequent transfer of title under the reversionary clause was contemplated, and therefore not viewed as violating restrictions against alienation of land subsequent to being taken into trust. The foregoing creates an uncertainty as to whether the parcel was held in trust for the benefit of the Ho-Chunk Nation as of October 17, 1988. This is relevant under the definitions of Indian lands at 25 U.S.C 2703 (4), as well as Section IV.B. of the Tribal-State gaming compact.

The purpose of this letter is to determine the position of the Bureau regarding the ownership of the land, and status as trust land or land subject to restrictions against alienation, as of October 17, 1988. Please contact me as soon as possible if you feel this inquiry is properly directed to another office, or if you wish to further discuss this matter. I may be reached at 608-270-2538, or 608-334-1301. Thank you in advance for your prompt attention to this request.

Sincerely,



Michael McClure
Legal Counsel