United States Department of the Interior

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IN REPLY REFER TO:

DEC 22 1999

61-0-D1000

Lawrence F. Snake, President
Delaware Tribe of Western Oklahoma
P.O. Box 825
Anadarko, OK 73005

Dear President Snake:

Barry Brandon, General Counsel, National Indian Gaming Commission (NIGC), has asked me to respond to your January 25, 1999, letter regarding construction of a Class II gaming facility on land yet to be taken into trust by the Secretary. I apologize for the delay in responding.

Your letter asks whether the Delaware Tribe of Western Oklahoma (Tribe) may commence construction of a Class II gaming facility on its 20 acre parcel of land, or whether the Tribe must wait until the land is taken into trust before beginning construction. While it is understandable that the Tribe may wish to begin construction prior to having the land taken into trust, I must alert you to possible risks that may arise by doing so.

Your letter states that the 20 acre parcel was taken out of trust when purchased by a non-Indian. Your letter also states that the Tribe's repurchase of the parcel renders the land restricted and no longer subject to tax. However, the 1998 decision by the United States Supreme Court in Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), indicates that although the 20 acre parcel has been repurchased by the Tribe, its tax exempt status is not necessarily restored because of the Tribe's purchase. In Leech Lake, the Supreme Court held that a tribe's reacquisition of reservation lands that had been conveyed to non-Indians does not render those lands non-taxable by state and local government, and that subsequent repurchase of reservation land by the tribe did not manifest any congressional intent to reassume federal protection of that land. While the Supreme Court did not address the issue of restricted land per se, see 524 U.S. 110 at n. 5, at least one circuit has stated clearly that lands repurchased by a tribe are not restricted. See Lummi Indian Tribe v. Whatcom Co., 5 F.3d 1355 (9th Cir. 1993). Thus, in the Delaware Tribe's case, repurchase of this 20 acre parcel does not necessarily render the land exempt from state taxation.

The possible status of the 20 acre parcel as non-restricted land has implications for gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 - 2721. Under IGRA, Class II gaming may only occur on "Indian lands." 25 U.S.C. § 2710. Further, with regard to lands not within the boundaries of a reservation, only lands that are held in trust or are restricted are "Indian lands" under IGRA. 25 U.S.C. §§ 2703(4). Thus, until the 20 acre parcel is taken into trust by the Secretary, it is likely not "Indian land" and gaming may not be conducted on those lands.

Because the BIA has not reached a decision on the Tribe's trust application, the Tribe risks the possibility that it will construct a gaming facility on land on which it cannot conduct gaming. The

Tribe would be taking a substantial financial risk without assurances that it would ultimately receive permission from the BIA to game on this parcel.

Your letter states that the Tribe's 20 acre parcel is located within former reservation boundaries and is in Oklahoma. Section 2719(a) of IGRA prohibits gaming on lands purchased after October 17, 1988, unless the tribe has no reservation on October 17, 1988, and such lands are in Oklahoma and are within the boundaries of the tribe's former reservation. 2719(a)(2)(A)(i). If the Tribe's 20 acre parcel meets this definition, the Tribe need not seek a two-part best interest determination under § 2719(b)(1)(A) of IGRA even though the parcel was purchased and taken into trust after October 17, 1988.

Finally, the taking of land into trust for gaming purposes will trigger the need for environmental analysis and review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 - 4347 (1969), as well as other applicable environmental laws. Under current procedures, BIA approval of trust land acquisitions, and approval of leases of tribal lands for gaming and other purposes require compliance with NEPA. Failure to comply with NEPA prior to construction where such compliance is required may delay or jeopardize gaming approval on this parcel.

IGRA also requires the governing body of a tribe to adopt an ordinance or resolution which must be approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2710(b)(1)(B).

If you have further questions, please contact Maria Wiseman of my staff at (202) 208-4361.

Sincerely,

Derril B. Jordan
Associate Solicitor
Division of Indian Affairs

cc: General Counsel, NIGC