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March 10, 2016

Tyler Riley
Star Lake Property Owners Association
P.O. Box 155
Dent, MN 56528

RE: Star Lake Property Owners Association
Our File No.: 16-045.001

Dear Mr. Riley:

I am writing to follow up on the questions that the SLPOA set forth in the correspondence from you dated February 10, 2016. This letter seeks to provide the SLPOA with a comprehensive understanding of the mixing between tribal law, federal law, and county ordinances that are in play with respect to the White Earth Nation's proposed casino on trust property on Star Lake.

FACTS

Here are some assumptions to carry through the remainder of this letter. First, it is my understanding that the White Earth Nation of Ojibwe, whose principal reservation is the White Earth reservation of Mahnomen County, Minnesota, owns 14.5 acres "in trust" on the south west corner of Star Lake, Minnesota. I have reviewed the Otter Tail County online records, and I have visited with the Otter Tail County Attorney, David Hauser, regarding this issue, and he has represented to me that he has reviewed the title of the 14.5 acres at issue and has determined that it is trust land that is prior to 1988.

Additionally, it is my understanding that a group affiliated with the White Earth Nation (Central Minnesota Land Company, LLC) has purchased another approximately 218 acres of real property that is apparently situated contiguous to the trust land discussed in the preceding paragraph. Again, like the trust land deeds, I have not personally reviewed any abstracts or deed work, but based on the Otter Tail County attorney's representations and the representations that I

have reviewed in the media, I am pretty convinced that you do not need me to spend any time reviewing the chain of title.

Moreover, it is my understanding that the White Earth Nation has not yet made any application to the United States for the 218 acres held by the Central Minnesota Land Company, LLC, to be converted into trust property.

Furthermore, it is my understanding that the White Earth Nation proposes to build a casino and hotel/convention center on the trust land and on the contiguous land. I have not visited with any representatives of the White Earth Nation, but again, as I have reviewed the foregoing claims through the media, I do not believe it is necessary to further verify this issue.

Finally, it is my understanding that the White Earth Nation has not sought any permits from the County, as of yet. However, as will be discussed further below, it is also my understanding that the White Earth Nation has been working in tandem with Otter Tail County to have a "Star Lake Area Comprehensive Plan." I do not know whether that plan includes a environmental impact survey (EIS) or whether there is any analysis of traffic patterns or other issues. However, I have further been informed that upon completion of the "Star Lake Area Comprehensive Plan", the White Earth Nation and County plan on jointly releasing the plan to the public and that there will be a later opportunity for public comment, even independent of any future permitting that the White Earth Nation may seek, either from the County or the State of Minnesota.

LAW AND FURTHER ANALYSIS

You set forth seven separate questions in your letter to me dated February 10, 2016. I will seek to respond to the questions in turn.

1. Can The White Earth Nation legally build the casino on trust land? and is there anything we can do to stop it?

In short, no. Under the inherent tribal sovereignty enjoyed by the White Earth Nation, it has the ability to build a casino on the 14.5 acres held in trust. See e.g., Worcester v. Georgia, 6 Pet. 515 (1832); Cherokee Nation v. Georgia, 30 Pet. 1 (1831). The tribal trust property is not subject to the jurisdiction of the Otter Tail County Commission, its' ordinances, or any other county regulation in terms of building permits, etc. The only issue is whether or not the tribe is acting consistently with the gaming compacts it has with the State of Minnesota. The Indian Gaming Regulatory Act provides tribes with the authority to conduct gaming activities (to be defined below), assuming that the tribe has negotiated a compact with the State in which the tribal land resides. See e.g., 25 U.S.C. 2710 (providing that Indian tribes retain exclusive jurisdiction on

Class I gaming, Class II gaming, and Class III gaming (subject to compacts with the State)). In this instance, there are multiple compacts between the State of Minnesota and the White Earth Nation that permit Class III gaming to occur.

Any gaming done on an Indian reservation must be in accordance with the Indian Gaming Regulatory Act (as discussed briefly, above). In addition, however, gaming conducted on Indian trust land must be on trust land acquired prior to October 17, 1988 must be land taken into trust that is part of "settlement of a land claim." See 25 U.S.C. Section 2719(a) and Section 2719(b)(1)(B)(i). In this case, it is our understanding that the 14.5 acres of trust land at issue were acquired by the tribe and placed into trust sometime in the 1920s, so there is no issue with gaming activities conducted on the 14.5 acre parcel.

The tribe would need, however, to follow its own tribal ordinances with respect to the building and development of casinos. E.g., see White Earth Nation Gaming Ordinance Section XV providing for the Tribal Gaming Commission to determine licensure for gaming facilities. Section IX of the Gaming Ordinance sets forth the specific parameters of the Tribal Gaming Commission as a regulatory body. Subsection (e)(10) of Section IX provides that the Tribal Gaming Commission is to

> insure [sic] that facilities where gaming occurs are properly constructed and maintained and that the operation of the game is conducted in a manner which adequately protects **the environment** and the public health and safety.

Id. (emphasis added).

However, a review of the Gaming Ordinance and the other tribal code does not provide that there the meetings of the Tribal Gaming Commission are necessarily public, nor does the Ordinance require any public input. The point is that the Tribal Gaming Commission does have the final say with respect to gaming issues, but it appears to me that the meeting structure of the Tribal Gaming Commission is rather vague. I have attached a copy of the Tribal Gaming Ordinance for your convenience and reference.

To sum up, even though the Tribal Gaming Commission may proceed with respect to building a casino on the 14.5 acres of trust property, the remaining property may be subject to county regulation, depending upon what is built and where it is built.

2. If the Environmental Impact Statement (EIS) comes back with negative results, and the county approves, is there an appeal process?

It depends. First of all, with respect to building anything on the 14.5 acres of "trust land", there really is no check or balance by the County. As noted above, the tribe retains sovereignty over the trust property. Unless there is some part of the building process that involves the lakeshore itself, the "trust land" is not subject to any oversight from the County.

If, however, the tribe seeks to further develop the 218 acres contiguous property, County regulation may arise. The Otter Tail County Shoreline Ordinance governs all non-trust property that is within 1,000 feet of lakeshores in the County. Accordingly, if the tribe seeks to develop any of the contiguous property that is within 1,000 feet of lakeshore, then the tribe/property owner /developer/ will have to seek permits from Otter Tail County.

If Otter Tail County approves the proposal from the Tribe, but members of the SLPOA (or anyone, for that matter) has problems with the County's approval of a zoning decision, the matter can be appealed by commencing suit against the County Board in the Otter Tail County District Court. The Plaintiff would have to show, by the greater weight of the evidence, that the Otter Tail County Board acted in an "arbitrary and capricious" manner by approving the proposal.

3. What process would the White Earth Nation have to go through for fee to trust transition of land?

The fee to trust issue is ultimately governed by the federal government. There is no vote by the State, the County, or anyone else.

The tribe has to make an application process with the United States Department of the Interior. I am attaching a document to this letter that further discusses the "fee to trust" transition briefly. The fee to trust issue is a very complicated process in and of itself. In the event that the tribe sought "fee to trust" transition, they would have to provide notice to Otter Tail County, as the "fee to trust" transition would ultimately eliminate the County's ability to regulate a particular tract of property. There is an opportunity for the public to comment on the proposed transition of fee to trust, and the decision ultimately lies with representatives of the Secretary of the Interior. Fee to trust is a semi-public process, but there is not a public vote on the issue or anything along those lines.

4. Can The White Earth Nation consolidate all newly acquired parcels of land into one large parcel? If so, what changes?

Theoretically, yes. But I don't think that would benefit the tribe. The Nation could petition the United States Department of the Interior to have the 218 acres of recently acquired property put into trust. However, based on the length of time of the process for application and approval of real proeperty being converted into trust, I do not see that as an issue that really is implicated in this instance.

There are problems with consolidating all property into one parcel. As noted above, tribal land placed into trust may only be used for gaming if it was either 1) acquired prior to October 17, 1988 or 2) was after acquired and part of a "land claim." Land claim is not defined in the Act and is therefore subject to years of litigation. Accordingly, since the tribe has property in trust that is already prior to 1988, it is my opinion that the tribe would simply use the 14.5 acres already held in trust for any gaming activities.

5. What happens if they choose to change or add roadways? Who pays for it?

It depends. It first depends upon whether we are talking about "public" or "private" roadways. If there is a private roadway on tribal property, obviously, the tribe would bear the expense of its construction and maintenance. If the property is not trust land, I expect that it would still be subject to Otter Tail County ordinances, at least if it is within 1,000 feet of the shoreline (as that term is understood in the Shoreline Ordinance).

If we are talking about a public road, then it would depend upon whether the road was a county road, a township road, or a state road. I am not going to go through the entire appropriation process for various hypotheticals, but I can say that it really depends on what unit of government seeks construction of the road. Obviously, roads can be paid for in many different ways, whether they be by property taxes, income taxes, and the like.

6. If the development negatively impacts the environment, could the developer be held liable?

Same answer as the previous question- it depends. If there is an instance where the environment is negatively impacted, it really depends upon what type of impact. For example, the common manner in which environmental impact is sued out is under the theory of "nuisance." A "public nuisance" is a nuisance that impacts a right conferred upon the general public. A "private nuisance" is a nuisance that impacts an individual's right to enjoy property, but not necessarily the public as a whole.

Under Minnesota law, a private "nuisance" is defined as "injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." See e.g., Minn. Stat. Section 561.01.

Liability really depends upon the type of environmental impact and who exactly caused the environmental impact. For example, if the developer prepares a plan and that plan includes a subset that causes an adverse environmental impact, it depends upon who is being damaged by the environmental impact. It is really difficult to answer this question without a more specific hypothetical situation.

7. What is the definition of a casino? Pertaining to connecting to other structures.

Ultimately, the issue that arises regarding a "casino" is where the "gaming" activity occurs. If the "gaming activity" occurs within the 14.5 acres of the trust property, then that issue answers itself. Gaming activity is divided, under federal law into three different classifications.

> **(6)** The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
>
> **(7)**
>
> **(A)**The term "class II gaming" means—
>
> **(i)**the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> **(I)** which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> **(II)** in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> **(III)** in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
>
> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> **(ii)**card games that—
>
> **(I)** are explicitly authorized by the laws of the State, or
>
> **(II)** are not explicitly prohibited by the laws of the State and are played at any location in the State,

> but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.
>
> **(B)**The term "class II gaming" does not include—
>
> **(i)** any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> **(ii)** electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
>
> * * * * * * * * * *
>
> **[*omitted subsections not relevant to the instant analysis]***
>
> **(8)** The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

See 25 U.S.C. Section 2703.

The point is that if there is "gaming activity" that is taking place that meets the categories of gaming as set forth above, the "gaming activity" may only take place on trust land. If there is "gaming activity" that is occurring on real property other than trust land, it is in violation of the Indian Gaming Regulatory Act.

CONCLUSION

Mr. Riley, I hope that this letter finds you well and is helpful in answering the questions raised by your members. I also sincerely hope that if there are further questions from you or your members, I can endeavor myself to be of any assistance to the SLPOA. Thank you for requesting my office to be of assistance.

Regards,

/S/ *Mark R. Western*

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/rdh