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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Jamie Hummingbird, Cherokee Nation Gaming Commission

Opinion Number: 2013-CNAG-01

Date Decided: January 28, 2013

This office has been asked for an opinion answering the following:

I. Can an entity licensed¹ by the Cherokee Nation Tax Commission to serve alcoholic beverages serve 3.2 beer as a complimentary item?

As a matter of federal law, possession and sales of alcoholic beverages are generally illegal in Indian country. 18 U.S.C. § 1154. Congress did, however, create a significant exemption for liquor sales on Indian country when it became clear in 1953 that “federal law curtailing liquor traffic with the Indians came to be “viewed as discriminatory.” (internal citations omitted) Rice v. Rehner, 463 U.S. 713, 726, 103 S. Ct. 3291, 3299-300, 77 L. Ed. 2d 961 (1983).

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such

¹ For purposes of this opinion, the term ‘licensee’ refers to an entity licensed by the Cherokee Nation Tax Commission to serve alcoholic beverages. It does not address or purport to address any entity in its capacity as a licensee of the Cherokee Nation Gaming Commission, which may have other rules or restrictions on the use of ‘comps’ in a casino.

act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161.

This statute and subsequent U.S. Supreme Court opinions have established that Congress intended to enact a system of dual tribal/state jurisdiction over sales of alcoholic beverages in Indian country. See Rice, 463 U.S., 728. The issue of whether Oklahoma maintains its dual jurisdiction over “non-intoxicating” low point beer sold in Indian country was addressed by the Tenth Circuit which held that, “regardless of what Oklahoma calls it, 3.2 beer is beer and may be regulated by Oklahoma within the authority jointly conferred to the Tribe and the State under 18 U.S.C.A. § 1161.” Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm'n, 975 F.2d 1459, 1463-64 (10th Cir. 1992).

Due to this dual jurisdiction, an entity wishing to sell alcoholic beverages within the Cherokee Nation must maintain a valid license from the necessary Oklahoma regulatory bodies and the Cherokee Nation Tax Commission. The licensee must also fully comply with all applicable Cherokee Nation and Oklahoma laws.

It has been established that Oklahoma law prohibits a licensee from giving away alcoholic beverages as complimentary items. The Oklahoma Attorney General has already issued an opinion which states that, “licensees of the ABLE Commission, including casinos, are prohibited from engaging in certain “per se” violations of Section 537(B)(4) of the Act, including the transfer or offer to transfer alcoholic beverages for “free” or as “complimentary” to any person or group of persons. Okla. Att'y Gen. Op. No. 07-2 (Feb. 7, 2007). However, the Oklahoma Attorney General specifically noted

that the opinion was not meant to address sales of low-point beer as defined in 37 O.S. 2001, § 163.2 (1)².

Cherokee Nation's current alcohol law does not contain any provisions that would prohibit the licensee from giving away either alcoholic beverages or low-point beer. It does not recognize any regulatory difference between the two, defining liquor and alcohol as any beverage that contains more than one-half of one percent alcohol. See LA #09-04, amending LA #41-03. It is the opinion of the Cherokee Nation Attorney General, that as a matter of Cherokee Nation law, licensees are not prohibited from giving away low point beer.

However, under the dual jurisdiction system enacted by Congress low point beer cannot be given away as a complimentary item unless such a transaction is authorized under both tribal and state law. Since it is up to the Oklahoma Attorney General or an Oklahoma court to issue an authoritative interpretation of Oklahoma law, a determination of whether such a transaction would be legal in Oklahoma is beyond the reach of this opinion.



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² Low-point beer is regulated differently under Oklahoma law than alcoholic beverages See that M & W Restaurants, Inc. v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n, 2003 OK CIV APP 12, 63 P.3d 559.