

National Indian Gaming Commission

NOTICE OF DECISION AND ORDER

In the Matter of the Cherokee Nation of Oklahoma
NOV/CO-5-99
Docket Nos. NIGC 99-1

Cherokee Nation – Appellant

INTRODUCTION

The primary question before the National Indian Gaming Commission (NIGC) is whether machine game Reels and Deals offered for play at the Cherokee Nation facilities located within the boundaries of the State of Oklahoma is an amusement game of skill or a gambling device. If, as Appellant contends, the game is merely an amusement device, it would not fall within the ambit of the Indian Gaming Regulatory Act. If, on the other hand, the game constitutes a gambling device, as the Chairman contends, its play is prohibited in the absence of a valid tribal-state compact.

Two other issues were raised and addressed by the Hearing Officer. The first concerned a request by the manufacturer of the game Reels and Deals to be granted status as an Intervenor. The second issue concerns the standard of proof applicable to Commission proceedings, the Appellant urging a “clear and convincing” standard as opposed to the “preponderance of the evidence” standard customarily applicable in administrative proceedings.

Having considered the record and all of the facts in evidence in light of applicable case law and precedent, the Commission, by majority decision, hereby accepts the recommendations of the Presiding Official on all three issues, affirming the Chairman’s

Notice of Violation and making permanent the Chairman's Closure Order, NOV/CO-5-99, with the Chairman concurring in the result.

BACKGROUND

In 1998, the NIGC began an investigation of various games operated by a number of Oklahoma Indian tribes, including the Cherokee Nation of Oklahoma (Tribe), the Comanche Indian Tribe, the Choctaw Nation of Oklahoma, the Ponca Tribe of Oklahoma, and the Kiowa Tribe of Oklahoma.

In January of 1999, the NIGC issued a cautionary letter to the tribes, informing them of its conclusion that certain games, including Version I of a game called Reels and Deals, were Class III gambling devices being offered for play without tribal-state compacts in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA).

On February 8, 1999, the Cherokee Nation notified the NIGC in writing of its determination to offer a modified version of Reels and Deals to customers. The Tribe advised it had determined the modified version was not subject to the IGRA because it was an amusement device requiring significant skill before awarding credits or prizes.

From mid-February through mid-May 1999, the parties negotiated terms of an agreed procedural stipulation. (Agency Record, Exhibit 8). Pursuant to the Stipulation, parties agreed on what was intended to be an orderly NIGC administrative process for resolving the dispute between the Chairman and the tribes regarding play of the devices. The stipulation was implemented as follows: (a) The Chairman issued an Order of Temporary Closure to Respondent on July 8, 1999, directing it to discontinue play of Reels and Deals in its facilities pursuant to 25 C.F.R. § 573.6; (b) The Cherokee Nation

appealed the Order to the NIGC pursuant to 25 C.F.R. §§ 577.1 and 577.3; (c) The Chairman stayed the Order of Temporary Closure pending the outcome of the hearing on appeal and decision by the NIGC; (d) The Respondent continued to operate these games pursuant to the procedural stipulation; and (e) The hearing process went forward.

During extensive pre-hearing proceedings, all respondent tribes except the Cherokee Nation withdrew its appeal. Earlier procedural decisions left attorneys James Trucks and Candace Stewart-McGee in the position of representing the Ponca Tribe while serving as *amicus curia* on behalf of Reels & Deals, Inc. These attorneys requested that Reel & Deals, Inc. be recognized as an Intervenor. Relying on a decision of a previous Presiding Official, this request was denied.

A two-week hearing was conducted at Tulsa, Oklahoma, beginning January 14, 2002. Post-hearing materials were received from the Commission Chairman, the Cherokee Nation, and game manufacturer, Reels & Deals, Inc., filing as *amicus curiae*.

ISSUES BEFORE THE COMMISSION

This matter comes to the full Commission on appeal from the recommended decision of the hearing officer upholding the Chairman's enforcement action on the grounds that the game in question, Reels and Deals, is not a game of skill as asserted by the Appellant, and thus outside the ambit of the IGRA, but is, in fact, a Class III game of chance prohibited by IGRA absent an approved tribal-state gaming compact. Two other collateral issues were raised during the proceeding and addressed by the hearing officer. The first concerned a request by the manufacturer of the game Reels and Deals to be granted status as an Intervenor. The second issue concerns the standard of proof applicable to Commission proceedings, the Appellant urging a "clear and convincing"

standard as opposed to the “preponderance of the evidence” standard customarily applicable in administrative proceedings.

FACTS

The facts of this matter are largely undisputed and well summarized by the hearing officer in the text of the recommended decision. Briefly stated, the Appellant, Cherokee Nation, at some point prior to January 1, 1999, began offering the machine game Reels and Deals at its gaming facility on tribal lands located within the boundaries of the State of Oklahoma on the theory that the game was one of skill not chance, and thus not subject to the IGRA. By stipulation, the Parties agree that no tribal-state compact is in place authorizing the play of Class III gaming devices and that the elements of reward and consideration are not at issue.¹

The machine game Reels and Deals is described in substantial detail in the Hearing Officer’s Recommended Decision.² Neither party challenges the accuracy of the Hearing Officer’s description of the game, which we summarize in relevant part in the following section.

DESCRIPTION OF THE GAME

Reels and Deals is housed in an upright cabinet similar in appearance to that of a Las Vegas-type slot machine. The interior components are secured from non-authorized persons with locks on the main service door and on the secondary access door. The game’s playing field is displayed within a graphic window of the monitor. The window displays video images by graphically simulating three horizontal spinning reels that stop on one horizontal pay line to determine the results of play.

¹ Agency Record, Exhibit 8; Recommended Decision, Page 3.

² Recommended Decision, page 18.

To play the game, a player inserts money into the bill acceptor located on the front of the machines. The bill acceptor receives \$1, \$5, \$10, and \$20 bills. The money is accounted for as credits available to participants to play one or more games. To play, participants must first press either the "PLAY ONE" or "MAX PLAY" button to play one to ten credits. After credit(s) are applied, the player may depress the "SPIN" (kick off) button to begin play.

Once engaged, the three reels begin simulating a vertical rotation or "spin." Each reel continues to spin until the participant pushes the STOP button associated with that particular reel at which time the spin stops immediately on an icon. Each reel strip contains the same number of icons and each rotates at a constant speed although the sequence of the icons on each is different.³ The player may depress any of the three STOP buttons in any order.

To win, the device must display a winning combination or stop on a specially designated icon.⁴ Credits may be accumulated throughout the duration of play. When a player elects to discontinue play, any accumulated credits may be converted into tickets or the device records remaining credits on a receipt that can be redeemed for cash at the gaming facility. Anytime a player elects to "cash-out" some or all available credits, the credits recorded in the device are reduced correspondingly. When winnings are

³ On June 11 and 12, 2001, the parties entered into two separate protective stipulations and orders agreeing not to disclose specific information that was deemed to contain sensitive, valuable, proprietary data of the manufacturer and other detailed analysis. Arguably, the speed and number of icons might be included within the information to be protected. Without making an independent determination regarding whether that information should be withheld, we chose to refrain from disclosing the specifics in our decision.

⁴ The object of the game is to align three like icons, or a combination of like icons and/or "wild" icons, on the pay-line. Other pay-line combinations, such as selection of even one wild icon, also yield winning results.

redeemed in excess of 12,000 credits, the game will “lock up,” requiring an attendant to reset the game and manually pay the prize to the player.

Reels and Deals contains no random number generator or time-out feature programmed into the hardware or software of the device. Each reel spins independently of the other two, thus the player controls the stopping point as well as the amount of time each reel will spin and the length of time between stops. The game has no knock-off meter. Multiple games are not found in the game’s software. Reel and Deals has no retention control feature.

ANALYSIS

1. Whether the Reels and Deals Game is one of Chance or Amusement

Appellant contends that the machine game Reels and Deals is not a gambling device, but rather constitutes an amusement device not subject to the provisions of the Indian Gaming Regulatory Act. Were this contention to be deemed correct, the result would be twofold. First, the game would fall outside the scope of IGRA. Second, Appellant would be free to offer the game for play at its gaming facility without first executing a tribal-state compact, in this case with the State of Oklahoma.

The law governing gaming activities on Indian lands is set forth in the Indian Gaming Regulatory Act of 1988⁵ and the Commission’s regulations adopted pursuant to the Act.⁶ The Act divides Indian gaming into three categories with significant legal distinctions adhering to each class. Class I games, for example, are within the exclusive regulatory jurisdiction of tribal governments and include social games conducted solely

⁵ 25 U.S.C. §§ 2701 *et. seq.* See also, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁶ 25 C.F.R. Part 502

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

Class II games include bingo and games similar to bingo as well as card games that are explicitly authorized by laws of the State or those not explicitly prohibited by the laws of a State are played at any location in the State.⁸ House banked card games, electronic or electromechanical facsimiles of any game of chance, and slot machines of any kind are specifically excluded from Class II and, thus, fall into the third category.⁹

Class III gaming includes all forms of gaming that do not fall under either Class I or II.¹⁰ This, obviously, includes those games specifically excluded from Class II designation in the Act, as well as games typically associated with full-scale casino-style gambling.¹¹

In exercising enforcement authority in this matter, the Chairman determined that the game Reels and Deals constitutes a Class III gambling device. If Reels and Deals indeed is a gambling device, the Chairman's enforcement action is well within the Commission's enforcement jurisdiction since no tribal-state compact authorizing the play of the game is in place.

In order to classify a machine game as a gambling device, three elements must be present: chance, consideration, and reward.¹² These elements are historically well-

⁷ 25 U.S.C. § 2703(6)

⁸ 25 U.S.C. §2703(7)

⁹ *Id.*

¹⁰ 25 U.S.C. § 2703(8)

¹¹ 25 C.F.R. § 502.4(b)

¹² We note that the Commission has proposed a new definition of the electronic or electronic mechanical facsimile that eliminates the Johnson Act as part of the definitions [67 Fed. Reg. 56,13296 (March 22, 2002)] (to be codified at 25 CFR Part 502). Our analysis would not differ however, under the new definition since there is no question that these machine games are not Class I or II. Rather the distinction between Class III gaming machines and skill machines remains whether the games constitute gambling, ie: whether the elements of the game include consideration, chance, and reward.

