



May 29, 2013

John B. Meskill, Director  
Mohegan Tribal Gaming Commission  
One Mohegan Sun Boulevard  
Uncasville, CT 06382  
Fax: (860) 862-7392

Re: Request for Game Classification Decision – Non-banked Poker

Dear Mr. Meskill:

This is in response to your June 8, 2011 request for a game classification decision regarding whether non-banked poker games played in Connecticut are Class II card games under the Indian Gaming Regulatory Act (IGRA).<sup>1</sup> According to your letter, the Mohegan Tribe of Connecticut (Tribe) offers a variety of different poker games, including non-banked poker<sup>2</sup> in its poker room and banked<sup>3</sup> versions of the game elsewhere throughout the facility. The Tribe's compact with Connecticut includes "Poker" in the "Authorized Class III Gaming" section, but does not define or limit the meaning of "Poker."<sup>4</sup> Regardless, I must look to IGRA – specifically its definition of Class II gaming – in reaching a decision here. As your letter asks for a decision only as to non-banked poker, this decision is so limited. After careful consideration of IGRA, NIGC regulations, and Connecticut state law, I conclude that non-banked poker is a Class II card game in Connecticut.

### Analysis

IGRA divides Indian gaming into three classes. Class I gaming, which is not at issue here, encompasses "social games" played "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."<sup>5</sup>

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<sup>1</sup> 25 U.S.C. §§ 2701, *et seq.*

<sup>2</sup> The letter of June 8, 2011, represented that the following non-banked poker games are played in the Mohegan Sun's poker room: Seven Card Stud; Seven Card; Hi-Low Split Eight or Better; Seven Card Low (Razz); Five Card Draw; Texas Hold 'Em; Omaha; Omaha High-Low Split Eight or Better; Pineapple Hold 'Em/Crazy Pineapple Hold 'Em; Pot Limit Hold 'Em; No limit Hold 'Em; Five Card Draw; Five Card Draw-Jacks or Better; Five Card Draw-Guts to Open; Badugi; California Lowball; Kansas City Lowball; and, Jacks Back Draw.

<sup>3</sup> The letter of June 8, 2011, represented that the following banked poker games are played in locations within the Mohegan Sun gaming facility other than the poker room: Pai Gow Poker; Caribbean Stud Poker; Three Card Poker; Four Card Poker; and, Texas Hold 'Em Bonus Poker.

<sup>4</sup> Mohegan Tribe – State of Connecticut Gaming Compact § 3(a)(i)(B)

<sup>5</sup> 25 U.S.C. § 2703(6).

Class II gaming includes card games, such as poker, if such card games:

(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 wages or pot sizes in such card games.<sup>6</sup>

Class II gaming also expressly excludes any banking card game.<sup>7</sup> Banking card games, as commonly understood and as defined in NIGC regulations, are games in which the banker (usually the house) competes against all players, collecting from losers and paying winners.<sup>8</sup> Conversely, non-banking card games are games where players play against each other, rather than the house or a single player acting as the bank.<sup>9</sup> Poker, played in its traditional form-players play against one another without a bank -, is the typical example of a non-banked card game.

Finally, Class III is a catchall category and includes “all forms of gaming that are not Class I gaming or Class II gaming.”<sup>10</sup>

Whether a particular card game is Class II or Class III under IGRA requires an analysis of both the game itself – namely, how it is played – and the laws of the state in which it will be played.<sup>11</sup> As your request does not pertain to any specific game, but rather to the more generic category of “non-banked poker games,” the first aspect of that analysis is easily resolved and I can immediately rule out the game falling into the Class III category as a “banking card game.” The classification of non-banked poker as Class II or Class III thus depends on Connecticut laws and regulations.

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<sup>6</sup> 25 U.S.C. § 2703(7)(A)(ii).

<sup>7</sup> 25 U.S.C. § 2703(7)(B)(i); 25 C.F.R. § 502.4(a)(1).

<sup>8</sup> 25 C.F.R. § 502.11.

<sup>9</sup> 25 C.F.R. § 502.3(c).

<sup>10</sup> 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

<sup>11</sup> See 25 U.S.C. § 2710(b)(1)(A) (“An Indian tribe may engage in, license and regulate, class II gaming on Indian lands within such tribe’s jurisdiction if – (A) such gaming is located in a State the permits gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited by Federal law) ...”); *Gaming Corp. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8<sup>th</sup> Cir. 1996) (Indian tribes have the “right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” “States can influence class II gaming within their borders only if they prohibit those games for everyone under all circumstances.”); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8<sup>th</sup> Cir. 1990) (“the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity.”); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312 (10<sup>th</sup> Cir. 2004) (same); see, e.g. *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029 (2d Cir. 1990) (indicating that the district court correctly decided that because Connecticut law permitted “Las Vegas nights,” such gaming was permissible Class III gaming activity by the Tribe.).

The first consideration when examining at state law as it pertains to Class II gaming is whether the state at issue either explicitly authorizes or prohibits the game in question.<sup>12</sup> If the game is specifically prohibited, that is the end of the analysis and the game is Class III. If, on the other hand, the game is explicitly authorized or the state law is silent as to the game, the analysis continues to the next step.

The Connecticut criminal code generally prohibits gambling with certain exceptions.<sup>13</sup> “Gambling” is defined as “risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device, including the playing of a casino gambling game such as blackjack, *poker*, craps, roulette or a slot machine....”<sup>14</sup> Under Connecticut law, “[a]ny person who engages in gambling, or solicits or induces another to engage in gambling, or is present when another person or persons are engaged in gambling, shall be guilty of a class B misdemeanor....”<sup>15</sup> Connecticut makes an exception to its prohibition, however, for social games. Section (a) of the gambling prohibition goes on to say that “natural persons shall be exempt from prosecution and punishment under this subsection for any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only and in which no person is participating, directly or indirectly, in professional gambling.”<sup>16</sup>

Thus, the determining question is whether Connecticut law prohibits the play of poker. The social exception to the prohibition indicates that poker, in all of its forms, is not explicitly prohibited by Connecticut law. It is not a criminal violation if played socially.<sup>17</sup>

Because poker is neither explicitly authorized nor prohibited by Connecticut, the next step of the analysis is to determine whether non-banked poker is actually played at any location in the state.<sup>18</sup> Aside from the poker being conducted by both the Mohegan and Mashantucket Pequot Tribes pursuant to their compacts, social poker games are advertised as regularly occurring throughout the state. For example, a search of the web-site *homepoker.com* advertised several “social” poker games.<sup>19</sup> Some of these games are played in private homes, while others are played at clubs that charge a membership fee. The games include both straight poker, where each player takes his winnings at the end of the game, and tournaments, in which the top three players win a pre-determined prize. Based on the brief and varying descriptions on the web-site, the social poker games are variations on the traditional game of non-banked poker, with set buy-in amounts and players playing against one another rather than the house or a single player. The advertisements and descriptions of the games are clear evidence that non-banked poker is played in Connecticut.

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<sup>12</sup> 25 U.S.C. § 2703(7)(A)(ii).

<sup>13</sup> “Gambling” does not include, among other things any lottery conducted by a State. Conn. Gen. Stat. § 53-278a(2).

<sup>14</sup> Conn. Gen. Stat. § 53-278a(2) (emphasis added).

<sup>15</sup> Conn. Gen. Stat. § 53-278b(a).

<sup>16</sup> *Id.*

<sup>17</sup> Letter from Penny Coleman, NIGC Acting General Counsel, to Philip Shea, Shea & Wilks, March 23, 1998; Letter from Penny Coleman, NIGC Deputy General Counsel, to Dave Maloney, Harrah’s Phoenix, Sept. 9, 1999

<sup>18</sup> 25 U.S.C. § 2703(7)(A)(ii).

<sup>19</sup> <http://www.homepokergames.com/connecticut.php>



The final element of this analysis requires review of any Connecticut laws or rules that may regulate certain aspects of how non-banked poker is played. Class II card games must be “played in conformity with the 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.”<sup>20</sup> As discussed above, Connecticut law, with a few key exceptions, generally prohibits gambling, including poker. Presumably due to this general prohibition, there is no Connecticut law or regulation regarding hours of operation or wager and pot sizes.<sup>21</sup> As such, there is no law or regulation for the Tribe to follow for those purposes.

Further, that poker is a Class II game in Connecticut is not changed by the fact that the Tribe’s compact with Connecticut includes poker in its “Authorized Class III Gaming” section. Class II gaming is defined by federal legislation<sup>22</sup> and cannot be changed by a tribal–state agreement.<sup>23</sup> Therefore, regardless of the dictates of the compact, so long as poker meets the definition of *Class II gaming* found in IGRA, it is a Class II game.

In sum, non-banked poker in Connecticut is a Class II game. It is not explicitly prohibited by Connecticut law, played at locations throughout the State, and there is no law or regulation relating to hours of operation or limits on pot and wager sizes for the Tribe to follow. The game therefore meets IGRA’s definition of Class II gaming.

I trust this decision fulfills your request for review of non-banked poker in Connecticut. If you should have any further questions, though, please contact NIGC Senior Attorney Michael Hoenig at (202) 632-7003.

Sincerely,



Tracie L. Stevens  
Chairwoman

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<sup>20</sup> 25 U.S.C. § 2703(7)(A)(ii)(II).

<sup>21</sup> Connecticut permitted charitable gaming until January of 2003, at which time all of its charitable gaming statutes were repealed. Conn. Gen. Stat. §§ 7-186a - 7-186q. Although the statutes themselves were repealed, the regulations implementing those acts were not. One of those orphaned regulation established limits on wagers in Connecticut. *Regs., Conn. State Agencies* § 7-186k-11. However, “[a]n administrative regulation can have no authority beyond the statute it purports to implement.” *Ward v. Goldberg*, 1994 Conn. Super. LEXIS 636, \*6 (Conn. Super. Ct. 1997). Because the statute permitting charitable gaming was repealed, the regulation implementing that statute and its limit on wager or pot sizes has no effect.

<sup>22</sup> 25 U.S.C. § 2703(7).

<sup>23</sup> The amendment of federal legislation by the States is inconsistent with the Supremacy Clause of the Constitution. *See Cipollene v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 107-108 (1992).