

SEP 9 1999

Eddie Srichayaporn
Executive Director
Maverick Gaming Enterprises
886 West Galveston, #116
Chandler, Arizona 85224

Re: Game Classification Opinion - "Double Hand High-Low"

Dear Mr. Srichayaporn:

The purpose of this letter is to respond to your request of January 12, 1998, in which you ask the National Indian Gaming Commission ("NIGC") to issue an advisory opinion on whether Double Hand High-Low¹ constitutes a class II or class III game in the state of Arizona as defined by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.* For the reasons outlined below, we conclude that Double Hand High-Low is a class II card game in the state of Arizona and therefore is subject to tribal and federal regulation only.

The Indian Gaming Regulatory Act

IGRA creates three classes of gaming which differ in the degree of tribal, state, and federal oversight. Class I gaming consists of "social games [played] solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo, related activities, and certain non-banking card games. 25 U.S.C. § 2703(7)(A). IGRA specifically excludes any banking card games from classification as a class II game. 25 U.S.C. § 2703(7)(B). Class III gaming is defined residually; it includes "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8).

Indian tribes have jurisdiction over class II gaming. 25 U.S.C. § 2710(a)(2). Class II gaming is generally not subject to state regulation, but is subject to federal oversight by the NIGC. 25 U.S.C. § 2710(b), (c). Class II gaming includes non-banking card games if such card games:

(I) are explicitly authorized by the laws of the State, or

¹On January 29, 1999, the NIGC received correspondence from Maverick Gaming Enterprises indicating that it had changed the name of its game from "Red Dragon High-Low" to "Double Hand High-Low."

(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.

25 U.S.C. § 2703(7)(A)(ii). Therefore, for Double Hand High-Low to qualify as class II gaming, Arizona state law must either explicitly authorize its play or not explicitly prohibit its play and the game must be played legally somewhere in the state. Further, the game must be played in a non-banking format. See 25 C.F.R. § 502.3(c).

Game Description

As described, Double Hand High-Low is a poker style game.² The game is played with a standard deck consisting of fifty-two (52) cards, plus a Joker. Each player will be dealt or receive seven (7) cards. The object of the game is to create two (2) poker ranking hands. The front hand consists of two (2) cards and the back hand consists of five (5) cards. All players' front hands compete against all other players' front hands. All players' back hands compete against all other players' back hands. Bets for each hand are placed by the participants. After all hands are set, the dealer will start in front of the dealer button exposing all front hands first to locate the winning hands for each circle. The dealer will then pay off the winners. The dealer will then repeat the same procedure when finding the winning back hands.

As mentioned above, IGRA specifically excludes any banking card games from classification as a class II game. Therefore, the first inquiry centers around whether Double Hand High-Low is a non-banking card game. 25 C.F.R. § 502.3(c). Banking games, as commonly understood and as defined in NIGC regulations, are games in which the banker (usually the house) takes on, that is, competes against, all players, collecting from losers and paying winners. 25 C.F.R. § 502.11. Conversely, non-banking card games are games where players play against each other. Poker is the typical example of a non-banking card game.

As proposed, the players in Double Hand High-Low would play against each other in a non-banking format, not against the house or other banker. The casino operation and its dealers would not have an interest, financial or otherwise, in the outcome of the game. Revenue to the casino is in the form of an ante or a percentage of the pot. Thus, Double Hand High-Low qualifies as a non-banking card game.

State Law

States can influence class II gaming on Indian lands within their borders only if they *prohibit* those games for everyone under all circumstances. See *Gaming Corp. of America v. Dorsey &*

²Double Hand High-Low possesses the common elements of poker. See JOHN SCARNE, SCARNE'S NEW COMPLETE GUIDE TO GAMBLING 671- 672 (Simon & Schuster, Inc., 1986).

Whitney, 88 F.3d 536, 544 (8th Cir. 1996) (citing 25 U.S.C. § 2710(b)(1)(A)). It is important to note the congressional finding set forth in IGRA that “Indian tribes have the exclusive 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.” 25 U.S.C. § 2710(5). As a result, we must review Arizona’s gambling statutes to determine whether Arizona explicitly authorizes or does not explicitly prohibit the play of Double Hand High-Low.

The Arizona State Legislature has not enacted any specific statutory provision authorizing the play of Double Hand High-Low or poker in general. In the absence of express approval to the playing of Double Hand High-Low, the crucial determination becomes whether Arizona explicitly prohibits its play.

Arizona statutes prohibit gambling in general, but specifically exempt amusement, regulated, and social gambling. *See* ARIZ. REV. STAT. ANN. § 13-3302. More specifically, section 13-3303 prohibits the “promotion of gambling,” but excepts from its provisions amusement, regulated, or social gambling. *See State v. Takacs*, 819 P.2d 978, 980 (Ariz.App.Div.1991). Section 13-3304 prohibits “benefitting from gambling,” but excepts from its provisions “amusement or regulated gambling,” and provides that “[b]enefitting from social gambling as a player is not unlawful under this section.”

Card games are not specifically mentioned in the Arizona statutes. In fact, the Arizona statutes do not identify any particular forms of gambling; instead they set forth the circumstances under which gambling may legally occur in Arizona. Arizona “regulates” rather than “prohibits” gambling in general. Whether a card game is offered as a “business for benefit” contrary to Arizona state law is of no consequence to the legality of the game if operated by an Indian tribe and played on Indian lands. *See United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (“the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state merely regulated, as opposed to completely barred, that particular gaming activity.”). Therefore, poker and thus Double Hand High-Low, is permitted in Arizona.

We make a reasonable assumption that poker games, including games similar in all substantive respects to Double Hand High-Low, are played at locations in the State of Arizona and therefore conclude that the requirement contained in section 2703(7)(A)(ii), for the game to be “played at any location in the state,” is also satisfied.

CONCLUSION

Double Hand High-Low is not prohibited by the laws of the state of Arizona and is legally played within the State. Therefore, Double Hand High-Low qualifies as a class II card game in

Arizona, under IGRA. See 25 U.S.C. § 2710(b)(1)(A).³

As a final matter, Arizona Indian tribes may offer non-banking Double Hand High-Low as class II gaming, so long as it is “played in conformity with the laws and regulations (if any) of . . . [Arizona] State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.” 25 U.S.C. § 2703(7)(A)(ii). Since specific card games are presently not regulated in Arizona, there are no rules on hours, periods of operation, wagers or pot sizes.

If you have any questions or concerns, please feel free to contact Todd J. Araujo, Staff Attorney, at (202)632-7003.

Sincerely,



Penny J. Coleman
Deputy General Counsel

cc: Dave Maloney
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³This opinion does not discuss the version of the Double Hand High-Low game which uses 32 pai gow (domino) tiles rather than 52 cards and a joker (the Chinese version of the game).