

**NATIONAL
INDIAN
GAMING
COMMISSION**

JUN 17 1999

Markham C. Erickson
McGuinness & Holch Law Offices
400 N. Capitol Street, NW
Hall of States Bldg., Suite 585
Washington, D.C. 20001

Re: Game Classification Opinion - "Poker Club"

Dear Mr. Erickson:

The purpose of this letter is to respond to your request of March 30, 1998, on behalf of the Oneida Indian Nation ("Nation"), in which you ask the National Indian Gaming Commission ("NIGC") to issue an advisory opinion on whether "Poker Club"¹ constitutes a class II or class III game in the state of New York as defined by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.* For the reasons outlined below, we conclude that non-banked poker games are class II card games in the state of New York and therefore are subject to tribal and federal regulation only.

Background

The Nation is considering establishing a poker club within its Turning Stone Casino. The Turning Stone Poker Club ("Club") would be established for social purposes and as a convenience to its Casino customers. As described in the submission documents, the Club would be a non-profit membership organization, open to all patrons of the Turning Stone Casino. To join, patrons would be required to complete a membership application and pay annual dues. As a privilege of joining the Club, members would be permitted to play various forms of poker against other Club members for stakes in a room designated for this purpose within the Casino. In turn, the Club would supply a dealer at each poker table to facilitate the game, with players paying a fixed fee to the Club based on the amount of time spent playing at each table. As proposed, Turning Stone and its dealers would not have an interest, financial or otherwise, in the outcome of any poker game. Club members would play only against each other and all wagering would be entirely at the discretion of each player.

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,

¹The NIGC is issuing this advisory opinion on whether the proposed forms of poker to be played at the "Poker Club" constitute class II games.

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 as “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

(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 poker to qualify as class II gaming, New York state law must explicitly authorize or not explicitly prohibit its play, and it must be played legally somewhere in the state. *See* 25 C.F.R. § 502.3(c)(1).

As mentioned above, IGRA specifically excludes any banking card games from classification as a class II game. Therefore, the first inquiry centers around whether poker is a non-banking card game. *See* 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. *See* 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 the Nation’s Club would play against each other in a non-banking format, not against the house or other banker. Turning Stone and its dealers would not have an interest, financial or otherwise, in the outcome of any poker game. Thus, the poker games to be played at the Club qualify as non-banking card games.

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 & 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 New York’s gambling statutes to determine whether New York explicitly authorizes or does not explicitly prohibit the play of poker.

The New York State Constitution provides, in pertinent part, that “no . . . gambling . . . shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.” N.Y. CONST., art. I, § 9, cl. 1. Despite the ominous tone of this constitutional provision, in fact the state legislature has created a number of “exceptions” and has established a Racing and Wagering Board. The legislature has addressed the play of various games of chance but it has not enacted any specific statutory provision authorizing the play of poker.² In the absence of express approval to the playing of poker, the crucial determination becomes whether New York explicitly prohibits its play.

New York’s constitutional provision relating to gambling is not self-executing. *See People v. Wilkerson*, 342 N.Y.S.2d 936, 942 (N.Y.Co.Ct. 1973). The New York constitution directs the Legislature to “pass appropriate laws to prevent offenses against any of the provisions of this section.” N.Y. CONST., art. I, § 9, cl. 1. The constitutional provision “requires enforcement by the Legislature.” *Wilkerson*, 342 N.Y.S.2d at 942 (citations omitted). Therefore, gambling is not a crime unless made so by statute. *People ex rel. Collins v. McLaughlin*, 113 N.Y.S. 188, 197 (N.Y.A.D. 1 Dept. 1908), *appeal dismissed*, 194 N.Y. 556 (N.Y. 1909).

As directed, the State Legislature “has legislated in the field of gambling and by the Penal Law, delineated the conduct to be prohibited throughout the state.” *Wilkerson*, 342 N.Y.S.2d at 942. Significantly, “[t]he only gambling activities which are prohibited are promoting gambling (PL §§ 225.05 and 225.10), possession of gambling records (PL §§ 225.15 and 225.20) and possession of a gambling device (PL § 225.30).” *People v. Melton*, 578 N.Y.S.2d 377, 378 (N.Y.Sup. 1991). Therefore, playing or engaging in its play are not explicitly prohibited by New York penal laws.

New York state penal law follows the policy of penalizing only the promoter and not the player. *See Watts v. Malatesta*, 262 N.Y. 80, 82 (N.Y. 1933) (casual betting or gaming by individuals as distinguished from betting or gambling as a business or profession, is not a crime). New York has not treated individual participants in gambling games as criminals. *Melton*, 578

²Since the passage of the Constitution in 1894, the Legislature has amended the Constitution numerous times and authorized the following forms of gambling: (1) pari-mutuel wagering on horse racing, N.Y. CONST., art. I, § 9, cl. 1 (amended 1939); (2) bingo for certain religious, charitable or non-profit organizations, N.Y. CONST., art. I, § 9, cl. 2[a] (amended 1957); State operated lotteries, N.Y. CONST., art. I, § 9, cl. 1 (amended 1966); and (4) games of chance run by certain religious, charitable or non-profit organizations. N.Y. CONST., art. I, § 9, cl. 2[b] (amended 1966). However, none of these constitutional authorizations are relevant to this matter.

N.Y.S.2d at 378. Participating in gambling games on the same terms as other players for amusement or recreation is lawful. *See Wilkerson*, 342 N.Y.S.2d at 940. More specifically, the "Legislature . . . has excluded the 'player' from the reach of the Penal Law." *Id.*

New York gambling laws are "intended and designed to sanction and facilitate the prosecution of the professional book-maker and other professional operators and promoters of unlawful gambling activity. The individual player or bettor is excluded from its prohibitions. *People v. DiCarlo*, 309 N.Y.S.2d 791, 792 (N.Y.Co.Ct. 1970). Although "promoting" the play of poker may be unlawful, participating in gambling games on the same terms as other players for amusement or recreation is lawful. *See Wilkerson*, 342 N.Y.S.2d at 940.

The fact that New York's penal code prohibits the promotion of gambling is not the significant factor. The determining question is whether the state criminal laws prohibit the play of the game, in this case poker. As we have seen, the penal code does not make the play of poker a criminal violation.

New York "regulates" rather than "prohibits" gambling in general. Therefore, the play of poker is not seen as totally repugnant to the State's public policy. *See Mashantucket Peqout Tribe v. State of Connecticut*, 913 F.2d 1024, 1021 (2nd Cir. 1990) (Connecticut law applicable to class III gaming is regulatory rather than prohibitive; thus, under IGRA, Connecticut was required to enter into good-faith negotiations with Indian tribe for purpose of formulating tribal-state compact).

There is no serious dispute that poker is played within private homes and public locations throughout the State of New York. We conclude, therefore, 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.³

CONCLUSION

The types of poker the Nation wishes to operate at its Club are not prohibited by the penal laws of the state of New York and are legally played within the State. Therefore, poker qualifies as a class II card game in New York, under IGRA. *See* 25 U.S.C. § 2710(b)(1)(A).

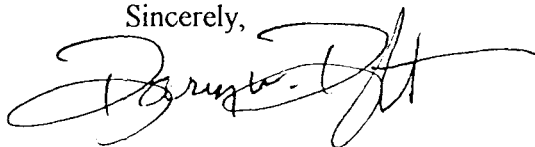
As a final matter, the Oneida Indian Nation may offer non-banking poker at its Club as

³The Oneida Indian Nation submitted evidence to show that poker clubs are operated in the State of New York. According to the submission documents, in New York City, there are dozens of private clubs that offer poker games. *See* Francis X. Clines, *Tell A Lie? No. But Gambling? Count Him In?*, N.Y. Times, February 20, 1994 at Sec. 1, pg. 39, Column 1. Another recent *New York Times* article stated, "New Yorkers can play poker . . . in joints around Manhattan that require a membership fee and charge for rent for occupying a chair." Walter Goodman, *My New York; Where Your Destiny Is in Your Hands and the Pot's the Limit*, N.Y. Times, Sept. 26, 1997 at Sec. E, Part 2, Page 45.

class II gaming, so long as it is being “played in conformity with the laws and regulations (if any) of . . . [New York] 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 social poker games are presently not regulated in New York, 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,

A handwritten signature in black ink, appearing to read "Barry W. Brandon". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Barry W. Brandon
General Counsel

cc: Alan Fedman, Director of Enforcement, NIGC

State of New York Racing
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