

**NATIONAL
INDIAN
GAMING
COMMISSION**

JUL 17 1998

Scott Crowell
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Kirkland, WA 98033

Re: Shoalwater Bay Indian Tribe's Application for Grandfathered Blackjack

Dear Mr. Crowell:

The Shoalwater Bay Indian Tribe ("Tribe"), located in the State of Washington, has requested a determination by the Chairman of the National Indian Gaming Commission ("NIGC"), that the house banked blackjack games it alleges were operated by the Tribe prior to May 1, 1988, be considered class II games pursuant to 25 U.S.C. § 2703(7)(C). In support of its request, the Tribe provided me with various letter briefs, including witness statements and declarations. Additionally, I held a fact finding hearing on April 23, 1998, on the Shoalwater Bay Indian Reservation, at which a number of witnesses provided testimony. After careful review of the record, I have determined that the Tribe was not operating the game of blackjack, on or before May 1, 1988, and accordingly, is not entitled to operate blackjack as a class II game pursuant to IGRA's grandfather clause.

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. *Id.* § 2703(7)(A). IGRA specifically excludes blackjack from classification as a class II game. *Id.* § 2703(7)(B). Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8). IGRA requires that the operation of class III games be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1)(C). No such Tribal-State compact is required for the operation of class II games.

Grandfather Clause

IGRA provides that in some instances blackjack may be considered a class II game, and not subject to a Tribal-State compact. A grandfather clause in Section 2703(7)(C) applies to card games operated by an Indian tribe in certain states, including the State of Washington, on or before May 1, 1988. The grandfather clause provides:

Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota,

the State of South Dakota, or the State of Washington, that were *actually operated in such State by an Indian tribe* on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

Id. § 2703(C) (emphasis added). Thus, according to IGRA, there are two statutory requirements that must be satisfied for a house banked card game to qualify as a class II game: (1) the card game must have been “actually operated” prior to May 1, 1988; and (2) the card game must have been operated by “an Indian Tribe.” Both of these requirements will be addressed below.

The Games Must Have Been Actually Operated On Or Before May 1, 1988

The Tribe provided the NIGC with various documents, including witness statements and declarations, in support of its application for grandfathered blackjack. Additionally, a fact finding hearing was held on April 23, 1998, at the Shoalwater Bay Indian Reservation, at which a number of witnesses provided testimony. Based upon my review of the matters submitted, I have determined that the record supports the Tribe’s contention that house banked blackjack games were operated by individual operators on Tribal lands, on or before May 1, 1988. Thus, the first requirement of the grandfather clause - the “actual operation” of blackjack prior to May 1, 1988 - has been satisfied.

The Games Must Have Been Actually Operated By An Indian Tribe

The Tribe argues that the operation of blackjack by individual tribal members suffices to meet the statutory requirement of having been “actually operated by an Indian tribe.” The Tribe further contends that tribal regulation of individually operated games is the equivalent of having the Tribe operate the game. However, the Tribe’s contentions are not supported by IGRA or its legislative history.

The plain language of the grandfather provision states that it applies only to those house banked card games “actually operated” by an “Indian tribe” on or before May 1, 1988. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (the starting point in cases involving statutory interpretation is the language employed by Congress); *see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (in the absence of a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive). I believe the plain language is conclusive that for blackjack to be grandfathered as a class II game, it must have been operated by an Indian tribe.

Notwithstanding the plain language of the statute, an examination of the legislative history also sheds light on the intent of Congress in enacting the grandfather clause. The grandfather clause’s requirement of “actual operation by an Indian tribe” was addressed in the legislative history numerous times. In the Senate Report, the Committee stated that “card games *actually operated by tribes* in certain states on or before May 1, 1988, will continue to operate under tribal/Commission jurisdiction as class II games” S. Rep. No. 446, 100th Cong. 2d Sess. 10 (1988) *reprinted in* 1988 U.S.C.C.A.A.N. 3071 (emphasis added). Additionally, the Committee stated:

To come within the grandfather clause, the Committee intends to include all games

in which an investment is made and the games were actually operated on or before May 1, 1988. Games are often closed temporarily for a variety of reasons such as contract disputes, renovations, and collateral legal disputes, among others. Such closures are not meant to preclude a *tribe's game* from being included in this section.

S. Rep. No. 446, p.10 (emphasis added). A colloquy between Senator Reid and Senator Inouye provides further evidence of the requirement of "actual operation by an Indian tribe":

Mr. Reid. It has been this Senator's understanding that this provision was adopted *to protect tribes with existing investments in such games* from hardships associated with changes in the law brought about by this legislation. This Senator also understands that the committee intended that the grandfather clause should not serve as the basis for expansion of existing gaming operations to new locations not in operation as of May 1, 1988. Would the chairman confirm that this provision does not provide authority for the establishment of new banking card game operations or the institution of new games in existing operations?

Mr. Inouye. The Senator is correct. The grandfather clause is intended merely *to protect tribes from hardship due to this change in the law*. While the bill may permit the expansion of particular operations which were in existence as of May 1, 1988, for example, by the addition of gaming tables or seats in an existing establishment, it does not authorize the expansion of such operations to new locations, the establishment of new operations, or the institution of new games at existing operations. In other words, both the gambling operation and the particular games played in that operation must have been in place on or before May 1, 1988 in order to have the benefit of this provision.

134 Cong. Rec. S12,643-01 (daily ed. Sept. 15, 1988) (emphasis added).

The Tribe further contends that the *Order Granting Plaintiff's Motion For Preliminary Injunction* in a case involving the Spokane Tribe of Indians, supports its contention that the operation of blackjack by individual tribal members suffices to satisfy the grandfather clause. The Tribe relies on the following language from the Order:

The U.S. questions whether certain card games conducted by the Tribe qualify for exemption under the IGRA grand-father clause. Apparently, individual Tribe members have operated the pre-1988 games under a licensing arrangement with the Tribe. The legislative history of IGRA addresses this issue, and concludes that "individually owned class II games licensed by tribes will also be grandfathered." S.Rep. 100-446, 1988 U.S.C.A.N. at 3077. . . . This injunction does not apply to enjoin those house-bank card games actually operated by the Spokane Tribe of Indians on or before May 1, 1988, and defined as class II gaming under 25 U.S.C. § 2703(7)(C), *including individually owned card games licensed by the Tribe*.

United States vs. Spokane Tribe of Indians, No. CS-94-104-FVS (E.D. WA. May 20, 1994) (order granting plaintiff's motion for preliminary injunction) (emphasis added). However, the Tribe's

argument fails here as well because the Tribe did not provide any evidence which showed that the Tribe *licensed* any blackjack operations to individual Tribal members on the Shoalwater Bay Indian reservation on or before May 1, 1988.¹

Additionally, the Tribe argues that blackjack was “actually operated” by the Tribe through the licensing, regulation and taxation of individual tribal entrepreneurs. As stated above, no evidence was presented to support the Tribe’s position that it licensed the blackjack games. Additionally, the Tribe did not provide any evidence establishing the collection of taxes. Although the Tribe had a gaming code in place prior to May 1, 1988, the Tribe did not provide evidence establishing that these individually owned operations conducted blackjack in compliance with Tribal law or with any Tribal regulatory oversight.

My conclusion is that the blackjack games were not operated by the Tribe, either directly or indirectly, through its licensing and regulation of the individually operated establishments. As a result, the Tribe has not satisfied the second requirement of the grandfather clause, namely, actual operation by “an Indian Tribe.”

Statewide Application Of The Grandfather Clause

As an alternative argument, the Tribe requests a determination by the Chairman that grandfathered card games be authorized on a “statewide” basis pursuant to 25 U.S.C. § 2703(7)(C), as house banked blackjack was played on or before May 1, 1988 by other Indian Tribes in the State of Washington. However, such a construction runs contrary to the policy of the grandfather clause and clearly expressed legislative intent.

The statute and Senate Report 446 refer to Section 2703(7)(C) as a “grandfather clause.” A grandfather clause is defined as a “[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.” *Black’s Law Dictionary* 699, (6th ed. 1990).

The grandfather provision classifies as class II games, all “*card games* played in the . . . State of Washington that were *actually operated* in such State by *an* Indian tribe on or before May 1, 1988” 25 U.S.C. § 2703(7)(C) (emphasis added). The Tribe argues that the term “an Indian tribe” is unambiguous and was intended to mean “any Indian tribe.” As such, the Tribe believes that a blackjack game grandfathered to *any* tribe in the State of Washington allows *all* tribes to operate grandfathered blackjack.

I believe the statute is clear that the card games must have been operated by the Tribe seeking to have its card games grandfathered. In fact, if Congress had intended the provision to apply to *any* tribe, it could have simply said so. Additionally, the legislative history supports my construction of

¹I note that it is arguable whether Section 2703(7)(C) serves to grandfather individually owned card games licensed by the Tribe, as the *Spokane* Court so held.

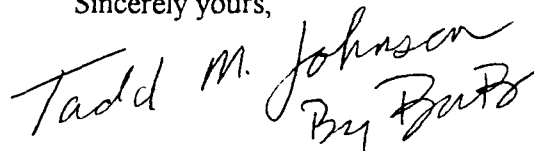
the statute.

The Congressional Record provides that the grandfather clause is intended "merely to protect tribes with *existing* operations from hardship due to this change in the law." 134 Cong. Rec. S12,643-01 (daily ed. Sept. 15, 1988) (emphasis added). IGRA requires that "both the gambling operation and the particular games played in that operation must have been in place on or before May 1, 1988, in order to have the benefit of this provision." 134 Cong. Rec. S12,643-01 (daily ed. Sept. 15, 1988). Also, the Senate Report specifically refers to the grandfathering of the Lummi Tribe's gaming operation: "the Committee specifically intends that the card room operated by the Lummi tribe in Washington State be included in this grandfather provision." See S. Rep. No. 446, p. 10. If Congress intended for the grandfather clause to have statewide application, there would have been no reason to single out the Lummi Tribe's card room for mention in the Senate Report, as Congress would have grandfathered "all" card rooms within the State of Washington simultaneously.

Determination

I commend the Tribe for presenting compelling equitable reasons in support of its application for grandfathered blackjack. However, I have been unable to find a sufficient legal or factual basis for concluding that these card games were actually operated by the Tribe on or before May 1, 1988, as required by IGRA. After careful review and consideration, I have determined that the Tribe may not offer blackjack as class II games pursuant to the grandfather provision contained in 25 U.S.C. § 2703(7)(C).

Sincerely yours,

Handwritten signature of Tadd M. Johnson in cursive script. The signature is written in dark ink and includes the name "Tadd M. Johnson" followed by a stylized signature that appears to be "By Barb".

Tadd Johnson
Chairman

cc: Ben Bishop, Executive Director, State of Washington Gambling Commission
Jonathon T. McCoy, Assistant Attorney General, State of Washington
Katrina C. Pflaumer, United States Attorney, Western District of Washington
Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice
Jim Simon, Deputy Assistant Attorney General, Environmental and Natural Resources Section, United States Department of Justice