



April 7, 2021

***VIA FIRST CLASS MAIL AND EMAIL***

Ms. Mary Prentice, Director  
Red Lake Gaming Commission  
15882 Main Ave.  
PO Box 561  
Red Lake, MN 56671

**Re: Ultimate Texas Hold'Em Poker - Game Classification Opinion**

Dear Ms. Prentice:

On October 8, 2019, you requested an advisory legal opinion concerning whether Ultimate Texas Hold'Em poker (UTH) constitutes a Class II game under the Indian Gaming Regulatory Act when played on Indian lands in Minnesota.<sup>1</sup> Based upon the game description submitted, UTH is a banked card game and, therefore, Class III.

**I. Game Description**

Ultimate Texas Hold'em is a card game based on a version of poker that is played with a single, standard fifty-two card deck.<sup>2</sup> Each player and the dealer try to make the best possible five card poker hand using their initial two card deal, plus five community cards. All players and the dealer may use three, four, or all five of the community cards to make their hand.

Before any cards are dealt, each player must make two equal wagers called the ante and the blind bonus. Each player and the dealer are then dealt two cards face down. Next, each player has the option to either bet four times the player's ante as a raise bet, or check, meaning do nothing. The Dealer then turns over three community cards. At this point, all players that have already raised may not bet again. If a player checked, the player may bet two times the player's ante as a raise bet or check, meaning again do nothing. The Dealer then turns over the final two community cards. Any player who has already raised (4 times or 2 times) may not bet again. All

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<sup>1</sup> Please accept the Office of General Counsel's apologies for the delay in issuing this advisory legal opinion. Such delay was caused by several factors, including the pandemic.

<sup>2</sup> The game description set forth in this section is taken almost verbatim from the game opinion request. *See* Formal Request to add the Class II game of Ultimate Texas Hold'em to the Table Games Pit at Seven Clans Warroad (June 27, 2019) (hereinafter Formal Game Request).

other players must now either bet one times the player's ante as a raise bet or must fold, forfeiting their ante and blind bonus wagers.

The dealer and all players remaining in the game then try to make the best possible five card poker hand using their initial two card deal, plus three, four, or five of community cards. If the dealer's hand does not contain at least a pair, s/he does not qualify and the ante wager is a push.<sup>3</sup> If the dealer qualifies, the players lose their ante wagers. If the dealer's hand and a player's hand tie, all wagers are a push. If the dealer's hand outranks a player's hand, the player loses her blind bonus and raise wagers. If the player's hand outranks the dealer's hand, the player will be paid as follows:

Ante wager - If the dealer has at least a pair, the player is paid even money<sup>4</sup> on this wager. If the dealer does not have a pair, this bet pushes.

Raise wager -The player is paid even money.

Blind Bonus wager - If the player wins with a Three of a Kind or less, this wager is a push. If the player wins with a Straight or better, the player is paid according to the below pay-table, outlining each hand and its pay ratio (not including the return of the original bet).

Royal Flush	500 to 1
Straight Flush	50 to 1
Four of a Kind	10 to 1
Flush	3 to 1
Straight	1 to 1

There is also an optional side-bet that the player may wager on - the trip bonus wager - allowing the player to win an additional payout if their hand is Three of a Kind or better.<sup>5</sup> The player is paid according to the player's final hand, regardless of the dealer's hand and regardless of when the player raises or if the player folds.<sup>6</sup> The pay-tables for this side-bet are:

Royal Flush	50 to 1
Straight Flush	40 to 1
Four of a Kind	30 to 1
Full House	8 to 1
Flush	6 to 1

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<sup>3</sup> When a "push" occurs, the player's bet is returned to the player as if no bet was made.

<sup>4</sup> "In poker, the term 'even money' means that you are getting a 1-1 payout on your money." <https://www.poker-king.com/dictionary/even-money/>

<sup>5</sup> Email from Mary Prentice, Director, Red Lake Gaming Commission, to Jo-Ann M. Shyloski, NIGC Of Counsel (Oct. 29, 2019).

<sup>6</sup> See Formal Game Request at 5.

Straight	5 to 1
Three of a Kind	3 to 1.

In the submission, UTH is described as “a player pool base[d] game,” where “the house collects an ante for each hand played” and the “player pool [is] based on the daily win/loss of the game itself,” meaning “all funds won/los[t] [ ] go towards the player pool balance.”<sup>7</sup> The house edge of 1.9% on the blind bonus and trips bonus wagers and the “overall expected hold” of 27% are deposited into the player pool.<sup>8</sup> Yet beyond paying winners, the player pool “can be used” for paying for game promotions.<sup>9</sup> Though the ante of fifty cents per hand is put in an “ante drop.”<sup>10</sup>

## II. Legal Background

IGRA divides the world of 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>11</sup> Class II gaming includes card games if they:

(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.<sup>12</sup>

Class II gaming also expressly excludes any banking card game.<sup>13</sup> Banking card games, are games in which the banker (usually the house) competes against all players, collecting from losers, paying winners, and potentially winning.<sup>14</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>15</sup> Class III gaming is a catchall category and includes “all forms of gaming that are not Class I gaming or Class II gaming.”<sup>16</sup>

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<sup>7</sup> *Id.* at 1.

<sup>8</sup> Email from Mary Prentice, Director, Red Lake Gaming Commission, to Jo-Ann M. Shyloski, NIGC Of Counsel (Oct. 29, 2019).

<sup>9</sup> *See* Formal Game Request at 1.

<sup>10</sup> *Id.*

<sup>11</sup> 25 U.S.C. § 2703(6).

<sup>12</sup> 25 U.S.C. § 2703(7)(A)(ii); *See also* 25 C.F.R. § 502.3(c).

<sup>13</sup> 25 U.S.C. § 2703(7)(B)(i); 25 C.F.R. § 502.4(a)(1).

<sup>14</sup> 25 C.F.R. § 502.11.

<sup>15</sup> *Id.*; 25 C.F.R. § 502.3(c).

<sup>16</sup> 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

The classification of a card game as either Class II or Class III depends upon the game itself – primarily, how it is played – and the laws of the state in which it will be played.<sup>17</sup>

### **III. Analysis**

The Red Lake Nation’s gaming operation seeks a Class II game classification for UTH, contending that the house/dealer “has no interest in the outcome of the hand” because the funds won and lost from the raise, blind bonus, and trips bonus wagers are put into the player pool.<sup>18</sup> But such assertion is belied by the gaming operation’s actions, as explained at length below. In short, the dealer competes against all players, collects from all losers, pays all winners, and potentially wins. The ability to win demonstrates an “interest in the outcome of the hand[s].” And despite the fact that the raise, blind bonus, and trips bonus wagers are put into a so-called player pool, they “can be used to pay for the game promotions”<sup>19</sup> and to pay winning players.<sup>20</sup> The ante wager, as noted above, is put into an “ante drop” and used for “game expenses.”<sup>21</sup>

To begin the classification analysis, the initial question is: is UTH a card game? If so, is it banked or non-banked? The former results in a Class III designation, the latter, a review of state law to discern whether the card game is explicitly authorized or not explicitly prohibited and played in the state. Also, the play of the game must conform with state law requirements of hours, periods of operation, and wager and pot sizes for such card games.

#### **a. Is the game a “card game”?**

Because IGRA includes certain card games in its definition of Class II, the initial question is whether UTH is a card game. As described above, the game is played with a deck of cards with the ultimate objective of making the best five card poker hand. UTH, therefore, qualifies as a card game.

#### **b. Is the game “banked”?**

The next inquiry is whether UTH is a banked or non-banked card game. IGRA excludes “any banking card games” from its definition of Class II. As previously explained, banking games are “played with the house as a participant in the game, where the house takes on all

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<sup>17</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) ...”).

<sup>18</sup> Email from Mary Prentice, Director, Red Lake Gaming Commission, to Jo-Ann M. Shyloski, NIGC Of Counsel (Oct. 29, 2019).

<sup>19</sup> See Formal Game Request at 1.

<sup>20</sup> Email from Mary Prentice, Director, Red Lake Gaming Commission, to Jo-Ann M. Shyloski, NIGC Of Counsel (Oct. 29, 2019) (“the players are trying to win the money from the players pool”).

<sup>21</sup> Formal Game Request, *supra* at 2.

players, collects from all losers, and pays all winners, and the house can win.”<sup>22</sup> In non-banking games, the players play against each other. Typically, poker is a non-banking card game.

Here, the submitted game description explicitly states that UTH “features head-to-head play against the player-dealer . . . .” The players in UTH bet and play against only the dealer, not one another. The dealer plays every hand, taking on all players, collecting from all losers, paying all winners, and potentially winning. UTH thus meets every aspect of a house banked game under NIGC regulations.<sup>23</sup>

Also the dealer acts as the banker—depositing all the bets (but the ante) into the “player pool” when forfeited or lost against the dealer or paying winners out of it.<sup>24</sup> And the pool serves as the bank. The gaming operation controls the pool, maintains it, owns it, and appears to partially fund it in light of the fact that winning payouts are based on a fixed pay table. Players have no control over disbursements from the pool and may only assert claims for their wins.<sup>25</sup> It also appears that the winning payments are guaranteed by the gaming operation, not varied by—or dependent on—player contributions to the “pool.”<sup>26</sup> Put another way, regardless of how much money is in the pool, the gaming operation pays wins according to a fixed pay table, unlike in truly player-pooled poker where the amount won depends on the amount wagered by all players.

Additionally, the gaming operation has a financial interest in the outcome of the game and the money in the pool. If a player loses, the pool—meaning the gaming operation—wins,

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<sup>22</sup> 25 C.F.R. § 502.11; *see also* John Scarne, *Scarne’s Encyclopedia of Card Games*, 278 (2001) (“so-called banking games are games in which the gambling establishment or one player is continually opposed to all other players.”).

<sup>23</sup> *See* 25 C.F.R. § 502.11; *see also* NIGC Bulletin No. 95-1, *All Banking Card Games Fall Within Class III Gaming* at 2 (Apr. 10, 1995); Letter to Chairman John C. Houle, Chippewa Cree Tribe, from Penny J. Coleman, NIGC Acting General Counsel, re: Player Pool Blackjack at 2 (Aug. 10, 2007) (banked card game despite player-pooled format because players played against dealer, who plays hands, takes on all players, collects from all losers, pays all winners, and can win).

<sup>24</sup> *See* Letter to Chairman John C. Houle, Chippewa Cree Tribe, from Penny J. Coleman, NIGC Acting General Counsel, re: Player Pool Blackjack, *supra* at 2; *Compare United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1099 (9th Cir. 2000) (holding game non-banked because house was not a participant in game and success of the players did not depend on success of house); Letter to Larry I. DeRycke, Research, Development, Acquisitions and Marketing Co., from Barry W. Brandon, NIGC General Counsel at 1 (Aug. 11, 1999) (non-banked - the house was not a participant in the game, though provided the facility and dealer and accepted a commission from the winning pot); Letter to Mr. Frank Banyai and Mr. Mike Macke, Cadillac Jack, Inc., from Kevin K. Washburn, NIGC General Counsel, re: Will Ball Bingo (electronic version) at 3 & 7 (Mar. 22, 2001) (non-banked - house does not participate in the game and simply collects a fee); Letter to Mr. Charles LaBoy, Pokagon Band Gaming Commission Executive Director, from Michael C. Hoenig, NIGC General Counsel, re: Gamblit Poker LIVE! V1.0 at 10 (Jan. 23, 2018) (non-banked since players play one another rather than house and house takes a commission).

<sup>25</sup> *See* Letter to Rachel Romo, Tribal Gaming Commission Chair, Kickapoo Traditional Tribe of Texas, from Penny J. Coleman, NIGC Acting General Counsel re: K-21 Blackjack at 4 (the fund “used as a daily depository for amounts won in the blackjack game by the house and the source of funds for prizes paid to players, does not serve to remove the game from being considered a banking card game . . . . In fact, this fund is the bank.”).

<sup>26</sup> *See, e.g.,* Letter to Larry I. DeRycke, Research, Development, Acquisitions and Marketing Co., from Barry W. Brandon, NIGC General Counsel, *supra* at 2.

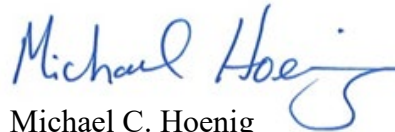
making money from its participation in the game<sup>27</sup> and demonstrating its financial interest in the game's outcome.<sup>28</sup> The house edge of 1.9% on the blind bonus and trips bonus bets is also deposited into the pool. That house edge, as a "percentage or odds advantage over all other players," is "a fundamental characteristic of a banking game."<sup>29</sup> Plainly put, banking games are those that "have a mathematical advantage for the bank."<sup>30</sup> Lastly, the money in the pool may be used to pay winners or to pay game promotions. Thus, the gaming operation uses the pool for purposes other than paying winners, also showing its financial interest in it.

Given all the above, UTH is a banked card game and Class III.

#### **IV. Conclusion**

UTH is a Class III game because it is a banked card game. If you have any further questions, please contact NIGC Of Counsel, Jo-Ann M. Shyloski at (202) 632-7003.

Sincerely,



Michael C. Hoenig  
General Counsel

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<sup>27</sup> Compare Letter to Tom Foley, Foley Law PLC, from Tracie L. Stevens, NIGC Chair, re: Net Poker 4 at (July 3, 2013) (non-banked because, among other things, "[t]he house makes its money from the fee systems . . . and not from the pot."); cf. Letter to Charles Enyart, Chief, Eastern Shawnee Tribe of Oklahoma, from Penny J. Coleman, NIGC Acting General Counsel, re: Blackjack in Oklahoma at 2 (Jan. 15, 2003) (opining that the play of the game did not qualify as a tournament because the gaming operation earned revenue not only from a commission on bets but also from its own participation in the game: "[m]erely because the house's winnings are kept in an 'escrow' account separate from other revenues and used for specific purposes including the payment of player prizes does not change the fact that the house is a participant in the game and can and does 'win.'").

<sup>28</sup> Compare Letter to Markham C. Erickson, McGuiness & Holch Law Offices, from Barry W. Brandon, NIGC General Counsel, re: Poker Club at 2 (June 17, 1999) (non-banked because the casino "and its dealers would not have an interest, financial or otherwise, in the outcome of any poker game.").

<sup>29</sup> See Letter to Steve M. Titla, Esq. from NIGC Chair Harold A. Monteau, re: Apache 21 at 4 (Feb. 2, 1995); see also NIGC Bulletin 95-1, *supra* at 2; Letter to Chairman John C. Houle, Chippewa Cree Tribe, from Penny J. Coleman, NIGC Acting General Counsel, re: Player Pool Blackjack, *supra* at 2.

<sup>30</sup> See John Scarne, *Scarne's Encyclopedia of Card Games*, *supra* at 278.