Memorandum

To: George T. Skibine, Chairman (Acting)

To: Norman H. DesRosiers, Vice Chairman

From: Penny J. Coleman, General Counsel (Acting)

Subject: Classification of card games played with technologic aids.

Date: December 17, 2009

On December 21, 2004, the Office of General Counsel issued a game classification opinion for the DigiDeal Digital Card System (DigiDeal). The 2004 opinion concluded that DigiDeal is a Class III game "because the use of technologic aids does not come within the Indian Gaming Regulatory Act's definition of Class II gaming." Upon reconsideration, I have determined that the 2004 opinion's ultimate conclusion was not the best interpretation of IGRA. I have therefore revisited the issue and reached a different, better conclusion.

IGRA's definition of *Class II gaming* includes non-banked card games unless certain exceptions apply, in which case the game is Class III. The use of a technologic aid is not one of the listed exceptions. In spite of this, though, does an otherwise Class II card game become Class III when played with a technologic aid? As will be discussed below, it does not. The definition of *Class II gaming* does not exclude card games played with a technologic aid and, therefore, such games are Class II.

IGRA

There are three classes of gaming under IGRA. Class I, which is not at issue here, means "social games 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 of celebrations." 25 U.S.C. § 2703(6). Class II is defined, in relevant part, as:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(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.

(B) The term "Class II gaming" does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7).

Class III is a catch-all category that includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8).

Though IGRA does not define *technologic aid* or *electronic facsimile*, NIGC regulations clarify that a technologic aid is any device that:

1. assists a player or the playing of a game;
2. is not an electronic or electromechanical facsimile; and
3. is operated in accordance with applicable federal communications law.

25 C.F.R. § 502.7(a). The regulations also define *electronic facsimile*, in relevant part, as "a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game...." 25 C.F.R. § 502.8.

Game and Equipment

As described in the 2004 opinion, DigiDeal is an electronic card table the size and arc shape of any common, felt-covered table used in casinos for games like Pai Gow Poker or Let it Ride Poker. The dealer stands in his or her customary place, and there are six player positions, each with a video screen built in. In lieu of an ordinary deck of cards, those screens display video representations of cards. The dealer shuffles, deals, and controls play hy pressing buttons on a device made to look like a dealer's shoe. There are spots in each player position for placing antes and hets, and the spots are equipped with sensors so that the table can determine the number of players that begin each hand, the number that continue to play or fold, and the amounts wagered.

Technologic Aid to a Class II Card Game

Although this memo disagrees with the 2004 opinion's ultimate resolution, I concur with its analysis concluding that the DigiDeal table constitutes a technologic aid rather than an electronic or electromechanical facsimile.

The DigiDeal table satisfies the first element of a technological aid—that it assists the player or the playing of a game. The table assists play by displaying each player's hand, thus making it easier to decide whether to continue or to fold. The tahle also identifies qualifying hands, hands that were folded, and the amount of the pot won, thus making the play of the game simpler and more accurate.

The table also satisfies the third element, that it "is operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a)(3). The table is not linked with other tables and, in communicating witb the dealer's shoe, apparently meets FCC regulations on radio emissions.

That leaves the second element of the definition, that the table "not be an electronic or electromechanical facsimile of a game of chance." It is not. NIGC regulations define electronic or electromechanical facsimile, in relevant part, as "a game played in an electronic or electromechanical format that replicates a game of chance hy incorporating all of the characteristics of the game...." 25 C.F.R. § 502.8. Though courts have adopted this definition as it reads, *see, e.g., United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 615 (8th Cir. 2003), until the 2004 DigiDeal opinion, no one had tried to make the distinction between a technologic aid and a facsimile for an electronic game of cards. Regardless of the analysis's novelty at tbe time, though, it correctly found the table is not a facsimile because it does not incorporate all of the characteristics of poker. That fact has not changed in the ensuing years.

In *Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994), for example, the Ninth Circuit reviewed a wholly electronic pull-tab game in which the player bought and played pull-tabs generated by computer and displayed on a video screen without producing a traditional paper-pull tab. The court concluded that this was an exact, self-contained copy of paper pull-tabs and thus an electronic facsimile. While we still follow the holding in *Sycuan*, pull-tab machines that merely dispense and display the results of paper pull-tabs are not facsimiles. *Id.* at 542-543.

In *Diamond Game v. Reno*, 230 F.3d 365, (D.C. Cir. 2000), the machine in question, Lucky Tab II, sold and dispensed paper pull-tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device. The "game is in the paper rolls," the court held, and the Lucky Tab II is "little more than a high-tech dealer." *Id.* at 370. Like Lucky Tab II, DigiDeal is a "high tech dealer."

Video Poker machines commonly found in Class III and non-Indian casinos are examples of electronic facsimiles. The typical machine accepts bets, deals a poker hand, evaluates that hand against the standard poker rankings, and pays winning hands according to paytables. Thus, the machine incorporates all of the aspects of the game offered and is an electronic facsimile of a game of chance.

DigiDeal, on the other hand, incorporates some of the aspects of poker—shuffling, dealing, and ranking winning and losing hands—but not others. The placing of antes and wagers and the player's decision to play or fold are made by the players. Put slightly differently, the DigiDeal table is not essential to playing poker. One can play poker with or without the table. The table, therefore, meets all of the criteria for a technologic aid and is not a Class III electronic facsimile.

Using Technologic Aids with Card Games

Upon concluding that the DigiDeal table is a technologic aid, the 2004 opinion next considered whether an otherwise Class II card game is Class III when played with a technologic aid. The opinion's analysis begins by asking "whether IGRA allows the use of technologic aids with card games...or, more specifically, whether IGRA places the use of technologic aids with card games within Class II." The opinion concludes that it does not and, accordingly, is Class III. But IGRA's language and legislative history indicate that the proper question is whether IGRA *prohibits* the use of technologic aids with card games or, more specifically, whether IGRA *excludes* the use of technologic aids with card games from Class II. Although a subtle distinction, it leads to a fundamentally different answer.

The 2004 opinion defines the category of Class II card games through reading the definition of Class II bingo. Congress explicitly permits technologic aids to Class II bingo

but is silent regarding technologic aids to Class II card games. The opinion deduces from this that Congress intended that card games played with a technologic aid do not meet the definition of Class II gaming. Such reasoning, however, does not acknowledge a distinction IGRA makes between Class II bingo and card games.

IGRA's definition of *Class II gaming* necessarily frames its descriptions of bingo and card games in fundamentally different ways. Congress defined bingo by describing what it includes and card games by what they exclude. *Class II gaming* includes any card game unless it is banked; an electronic facsimile; explicitly prohibited by the state; or, if neither explicitly prohibited nor permitted by state law, is not played at any location in the state or does not conform state law regarding hours or limitation on wager and pot sizes. If a card game does not run afoul of any of these provisions, it is Class II.

The definition of bingo, by contrast, is essentially a description of the traditional game of bingo, even when played with electronic aids. Because bingo is a game with an established set of rules, it is far simpler to describe precisely what bingo is, rather than what it is not. The same cannot be said for a category as nebulous as "card games." Consequently, Congress defined Class II card games by what that definition excludes. A card game is Class II unless it possesses one of the characteristics listed above, *e.g.* banked or played outside the hours permitted by state regulations. Congress did not include technologic aid in the definition for the same reason it did not list every possible card game that could meet the definition; an exhaustive list is impossible. Rather than try to populate such a list, it is far simpler to detail what is not a Class II card game. This is what Congress did. Because the description of permitted Class II card games does not exclude games played with a technologic aid, such games may qualify as a Class II game.

Although IGRA's Class II definition is clear, the earlier opinion's conclusion was a reasonable, if ultimately incorrect, interpretation of IGRA. These opposing opinions and interpretations of IGRA indicate that IGRA's Class II gaming definition is open to interpretation. Any ambiguity, though, is resolved by the legislative history and other rules of statutory construction. The Senate report and construction of the statute indicate that Class II card games may include card games played with a technologic aid. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) ("We look first, of course, to the statutory language... Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.").

The Senate Report accompanying IGRA indicates Congress's intent to include technologic aids to card games in the Class II gaming definition. The Senate Select Committee on Indian Affairs affirmed in its report that it "intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility." S. Rep. No. 100-446 at p. A-9.

While it is true that this language is found in a paragraph concerned primarily with bingo, pull tabs, etc., there is no evidence to suggest that Congress intended its

policy toward technology to be so limited. When IGRA was drafted, bingo played with electronic equipment was the "modern method" of conducting Class II games. It was an established game, played widely enough to enter Congress's scope of vision when drafting IGRA. *Id.* The same cannot be said of card games played with an electronic aid. DigiDeal, for example did not exist until 1998, and a similar company, PokerTek, did not install an electronic poker table in a casino until May 2005. At the time of IGRA's passage, card games were played as they always had been, with physical cards and a dealer. The fact that Congress did not specifically address a game not in use at the time of IGRA's passage does not lead to the conclusion that Congress intended to exclude it from Class II gaming.

In explaining its policy toward technology, a key distinction for the Committee was that technological aids are "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." *Id.* Congress was not concerned that technologic aids should be used only with bingo; rather, it was concerned that there is a distinction between an aid and a facsimile. Such a distinction can be made for Class II card games as well as bingo, as is demonstrated by both this and the 2004 opinion's finding that the electronic table is not a facsimile.

This policy's application to all Class II games, including card games, is also made evident in the adopted version of IGRA, which specifically excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" from Class II gaming. 25 U.S.C. § 2703(7)(B). This prohibition was not applied to bingo only, but to "all games of chance," indicating that Congress intended to differentiate between technologic aids, which are acceptable for all Class II games of chance, and electronic facsimiles, which are acceptable for none.

Congress's policy toward technology notwithstanding, it was emphatic about restrictions on Class II card games. The Senate Report clarifies that Class II card games is meant to be an inclusive category with specific, narrow exceptions. Class II card games, according to the Committee, are non-banked and should be "operated in conformity with laws of statewide application with respect to hours or periods of operation or limitations on wagers or pot sizes for such games." S. Rep. 100-446 at p. A-9. The report also details that the definition of card games is to be read in conjunction with what was to become sections 2710(a)(2) and 2710(b)(1)(A) of IGRA, which specify that Class II gaming can only occur on Indian lands located in a state that otherwise permits such gaming. *Id.* The Committee specified that "*[n]o additional restrictions are intended by* [2703(7)(A)(ii)(I) & (II)]." S. Rep. No. 100-446 at P. A-9 (emphasis added). Deciding that a technological aid to an otherwise Class II card game makes the game Class III would create a new restriction on Class II gaming in conflict with Congress's clearly stated intent.

The 2004 opinion cited to *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003) to support its conclusion that technologic aids to card games are not Class II. The scope of the case was overestimated though, and it does not negate any of the above analysis. In *Seneca-Cayuga*, the 10th

Circuit Court of Appeals discussed the definition of *Class II gaming* and, in doing so, stated:

> [U]nder IGRA, Class II games include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are in used in connection therewith)…including (if played in the same location) *pull-tabs*, lotto, punch boards, tip jars, instant bingo, *and other games similar to bingo*…" 25 U.S.C. § 2703(7)(A) (emphasis supplied). IGRA further provides that "electronic, computer, or other technologic aids to such games are Class II gaming, and therefore permitted in Indian country. *Id.*

Seneca-Cayuga, 327 F.3d at 1032 (emphasis in original).

From this, the 2004 opinion reasoned that "the Court described IGRA as placing within Class II only technologic aids to bingo and like games, not aids to non-banking card games." The opinion put special emphasis on the court's use of the words, "such games" and surmised that because the court concluded that technologic aids to pull-tabs, etc. are Class II, those are the only technologic aids allowed under Class II gaming. But such a broad deduction from the *Seneca-Cayuga* opinion is not warranted. At no point in the *Seneca-Cayuga* opinion does the court discuss Class II card games. In fact, when reciting the definition of Class II games, the court leaves card games out entirely. The 10th Circuit never claims that IGRA excludes technologic aids to non-banking card games from Class II gaming. The court held that technologic aids to "such games" are Class II gaming because those are the games the opinion was concerned with. *Seneca-Cayuga* says nothing of technologic aids to Class II card games.

The language of IGRA, its legislative history, and the rules of statutory construction all champion the inclusion of technologic aids to card games in the Class II gaming definition. Case law cited by the 2004 opinion to support a contrary conclusion does not defeat that analysis.

Technologic Aid v. Electronic Facsimile

As discussed above, I agree with the 2004 DigiDeal opinion's conclusion that DigiDeal is a technologic aid rather than an electronic facsimile. It is important to note, though, that the discussion of the DigiDeal system and its classification is limited to the broader category of technologic aids to Class II games. Each purported aid to a card game must be looked at individually to ascertain whether it is actually an aid or a Class III electronic facsimile.

An electronic facsimile is distinguishable from a technologic aid in that it replicates a game of chance by incorporating all of the characteristics of the game. 25 C.F.R. § 502.7(a). The DigiDeal table, for example, incorporates only some of the characteristics of poker, namely shuffling, dealing, and ranking winning and losing

hands. The player still controls the key aspects of poker, such as whether to ante or place a wager, play a hand or fold, and when and whether to bluff opponents.

If, however, a particular aid to card games becomes a necessity, or encompasses all the aspects of a particular game, it ceases to be a technologic aid and becomes an electronic facsimile. For example, in *Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994)the United State Court of Appeals held that the "Autotab Model 101 electronic pull-tab dispenser" is a class III facsimile of a pull-tab device. The Autotab Model 101 produced only an electronic reproduction of a paper pull-tab ticket on a computer screen. The player electronically picked numbers and, if the player won, the machine would print out a winning ticket or add the winning amount to a credit balance for further play. The game was played entirely on the machine without producing a paper pull-tab. The court found that the machine was a Class III facsimile because "the machine presents self-contained computer games copying the pull-tab principle, and they are played electronically." *Id.* at 542. Autotab was an "exact and detailed copy" of a pull-tab game. *Id.*

In *Sycuan*, the Autotab game was played electronically and encompassed all the aspects of a pull-tab game. It was thus ruled a Class III electronic facsimile. Similarly, should an electronic poker table or other game encompass all of the aspects of poker, it will be ruled a Class III facsimile. Put simply, a technologic aid merely assists the players. It is a way to play the game, not the game itself.

Johnson Act

Although technologic aids to card games are permissible Class II games under IGRA, there is a question as to whether the games are impermissible under the Johnson Act, which prohibits the use of gambling devices in Indian Country. 15 U.S.C. § 1175. They are not. The Johnson Act does not apply to Class II and Class III games played pursuant to IGRA.

The Johnson Act defines *gambling device* as any slot machine and:

> Any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a).

IGRA, enacted long after the Johnson Act, exempts Class III gaming from the application of the Johnson Act but is silent as to Class II gaming. While courts have not directly addressed the Johnson Act and technologic aids to Class II card games, three of

the four circuits that have considered whether IGRA implicitly provides a Johnson Act exemption for class II devices have decided that the Johnson Act is not applicable to technologic aids to bingo or Class II pull tabs, lotto, etc. Although the cases themselves are game-specific, the analysis supporting the decisions centers on reconciling IGRA and the Johnson Act and is equally applicable to technologic aids to card games.

In 2000, the Ninth Circuit Court of Appeals held that the Johnson Act does not apply to an electronic bingo game called Megamania. *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). In reaching its decision, the court first found that Megamania is a technologic aid to bingo rather than an electronic facsimile and, therefore, Class II. *Id.* at 1101. The court then looked to the text of IGRA, noting that it explicitly repealed application of the Johnson Act to Class III gaming devices used pursuant to a tribal-state compact, but did not address the relationship between the two acts as applied to Class II gaming. *Id.* The court recognized the apparent conflict in the two statutes and reconciled it by reading the statutes together to discover "how two enactments by Congress over thirty-five years apart most comfortably coexist, giving each enacting Congress's legislation the greatest continuing effect." *Id.*

With coexistence as its goal, the court found that "IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids." *Id.* Pursuant to IGRA, bingo using "electronic, computer, or other technologic aids" is Class II gaming, and therefore permitted in Indian country. *Id.* If the Johnson Act prohibited such aids, IGRA's Class II gaming definition would be meaningless. *Id.* It made no sense to the court that Congress would "carefully protect such technologic aids…yet leave them to the wolves of a Johnson Act forfeiture action." *Id.* at 1102. The court refused to presume "that in enacting IGRA, Congress performed such a useless act." *Id.*

The Megamania game once again came under scrutiny a few months later in *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000). This time the Tenth Circuit Court of Appeals examined the Megamania electronic bingo game and, like the Ninth Circuit, concluded that it is not prohibited by the Johnson Act. The court followed an analytical path similar to that of the Ninth Circuit. It first established that Megamania is a Class II technologic aid rather than an electronic facsimile. From there, the court considered the Johnson Act's application and held that "Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game and is played with the use of an electronic aid." *Id.* at 725. For this proposition, the court looked to the earlier Ninth Circuit holding in *103 Electronic Gaming Devices*. It also relied on *103 Gaming Devices* to find that "the Johnson and Gaming Acts are not inconsistent and may be construed together in favor of the Tribes." *Id.* The court explicitly joined the Ninth Circuit in concluding that "MegaMania is not a gambling device contemplated by either [the Johnson Act or IGRA]." *Id.*

Both MegaMania cases are admittedly specific to electronic bingo and rely at least in part on the technologic aid language in IGRA's Class II gaming definition. Other cases, however, have taken the analysis in the MegaMania cases to the next step and found that technologic aids to pull tabs, lotto, etc. are also immune from the Johnson Act.

In *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (2003), the Tenth Circuit Court of Appeals reviewed the Magical Irish Instant Bingo Dispenser System, a pull tab dispenser with electronic elements such as a "verifier" feature that allows players to see the results for a particular pull tab on a video display. The court determined the Magical Irish system is a technologic aid rather than an electronic facsimile. The appellees argued that technologic aids to *all* enumerated Class II games are insulated from the Johnson Act and cited to *103 Electronic Games* in support. *Id.* at 1031 (emphasis added). The Court, however, pointed out that the *103 Electronic Games* ruling was clear that it applied only to MegaMania and that there was no precedent clarifying the relationship between the Johnson Act and technologic aids to Class II games beyond just bingo. *Id.* at 1031. Accordingly, the court had to address for the first time "whether aids to those non-bingo games such as pull-tabs that are enumerated in 25 U.S.C. § 2703(7)(A) are protected from Johnson Act scrutiny...." *Id.*

In spite of the court's limited holding in *103 Electronic Games*, the *Seneca-Cayuga* court applied the supporting analysis of *103 Electronic Games* and found that IGRA's authorization of technologic aids extends to pull-tabs. The court held that although the text of IGRA is ambiguous, the "technologic aids parenthetical" is not limited to bingo, but also refers to "other games of chance authorized as Class II gaming." *Id.* at 1038. As a technologic aid to a pull tab machine is a permitted Class II game, Congress did not intend that it be subject to the restrictions of the Johnson Act. The court held:

> Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.

Id. at 1032.

As *Seneca-Cayuga* applied the underlying analysis in *103 Electronic Games* to electronic bingo, we can apply it to technologic aids to card games. *103 Electronic Gaming* held that the Johnson Act does not apply to technologic aids to bingo because Congress would not permit something in one act only to forbid it through another. This same reasoning was used by the court in *Seneca-Cayuga* to conclude that technologic aids to pull tabs are not prohibited by the Johnson Act. So too can it be applied to a Class II technologic aid to a card game. As established above, an otherwise Class II card game played with a technologic aid is still a Class II game. Congress would not permit such a game through IGRA only to prohibit it through the Johnson Act. Accordingly, the Johnson Act does not apply to Class II card games played with a technologic aid.

Similarly, in *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the D.C. Circuit found that the Johnson Act does not apply to the Lucky Tab II, an electro-mechanical pull tab dispenser. The court cited to its decision in *Cabazon Band of*

Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir. 1994), and held that "this court [has] interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal state compacts." *Id.* at 367. Although the case focuses more on the classification of the game than the application of the Johnson Act, it is clear that the D.C. Circuit has decided that the Johnson Act does not apply to any Class II game. As discussed at length in the preceding section, a technologic aid to an otherwise Class II card game remains a class II game, and according to the D.C. Circuit, the Johnson Act does not apply.

The Eighth Circuit, however, has taken an opposing position. In *United States v. Santee Sioux*, 324 F.3d 607 (8th Cir. 2003), *cert. denied*, 525 U.S. 813 (U.S. Oct. 5, 1998) (No.97-1839), the Circuit rejected the argument that IGRA repealed the Johnson Act by implication. The court pointed to § 2710(h)(1)(A), which permits Class II gaming on Indian lands so long as it is not specifically prohibited on Indian lands by federal law. The court concluded that the Johnson Act must be the federal law implied in this section of IGRA. *Id.* at 611. This, according to the court, clearly indicated that the two statutes are not irreconcilable and must be read together. Therefore, a tribe must adhere to both IGRA and the Johnson Act for its Class II games to be legal. *Id.* at 612.

The Eighth Circuit's ruling in *Santee Sioux*, however reasonable it may be, represents a minority among the circuits. Most, including the District of Columbia, which has jurisdiction over NIGC actions, have decided that the Johnson Act is not applicable to Class II games. The NIGC should therefore adopt a similar interpretation. Because a Class II card game played with a technologic aid remains Class II, the Johnson Act does not apply.

Conclusion

For the above stated reasons, technologic aids to otherwise Class II card games meet IGRA's definition of Class II gaming and do not violate the Johnson Act. Please contact me or Staff Attorney Michael Hoenig with any other questions or comments you may have.

December 21, 2004

Mr. Kent R. Hagg
Whiting Hagg & Hagg
601 West Boulevard
Rapid City SD 57701

Re: Classification opinion, DigiDeal Digital Card System, Trips or Better Poker

Dear Mr. Hagg:

This is in answer to your request on behalf of the DigiDeal Corporation for a determination that DigiDeal's Digital Card System is a Class II technologic aid under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"). This is also in answer to your request that Trips or Better Poker, played without the Digital Card System, is a Class II poker game when played in Florida, Idaho, and Washington State. My staff and I have attended live and videotaped demonstrations of Trips or Better and the Digital Card System kindly provided by your client, and we have extensively reviewed your written legal opinions. Unfortunately, I must conclude that the Digital Card System is Class III because the use of technologic aids with non-banking card games does not come within IGRA's definition of Class II gaming. Trips or Better Poker, played by itself without the Digital Card System, is a Class II game in Florida and Washington. It is not a permitted Class II game in Idaho because of a blanket ban on poker there.

Game and Equipment

The Digital Card System (alternatively, the "DigiDeal table" or "table") is an electronic card table the size and arc shape of any common, felt-covered table used in casinos for Pai Gow Poker or Let it Ride Poker, for example. The dealer stands in his or her customary place, and there are six player positions, each with a video screen built in. In lieu of an ordinary deck of cards, those screens display video representations of cards. The dealer shuffles, deals, and controls play by pressing buttons on a device made to look like a dealer's shoe. There are spots in each player position for placing antes and bets, and the spots are equipped with sensors so that the table can determine the number of players that begin each hand, the number that continue to play or fold, and the amounts wagered.

Trips or Better is a version of Five Card Stud and is played on the DigiDeal table with an ordinary, if electronic, deck of cards, plus 2 jokers. Two to 6 players, having purchased chips from the dealer, begin each hand by placing an ante and a wager. The house does not play a hand. Rather, the ante belongs to the house as its fee for providing the game, dealer, and

equipment. All wagers go into a common pot on the table, which the highest qualifying poker hand, three of a kind or better, will win. The house never receives any portion of the pot. The requirement of three of a kind or better to win, "trips or better," is a known poker variant.

Following the ante and the first wager, the dealer presses the appropriate button on the "shoe," and the table deals two cards to each player. All cards, including these first two cards, are dealt face up; each player's screen displays his or her hand and all of the other hands dealt.

In turn, each player may bet again to receive another card or may fold, simply by withholding the next bet, and the dealer distributes cards to the players who continue by pressing the appropriate button on the shoe. All bets are of a fixed, single size, and neither raising nor bluffing is an element of the game. Rather, each player must decide whether it is worth continuing the attempt to get a qualifying hand given all of the hands dealt. Players continue to bet or fold until all remaining players have five cards. The highest qualifying poker hand wins, which both the dealer and the table will identify, and the dealer then gives the pot of chips to the winning player. As in any poker game, if all players but one fold, the last remaining player wins the pot, regardless of the hand he or she holds. If after five cards are dealt, multiple players remain but none has three of a kind or better, the pot remains or "rolls over," and the players ante and bet again until someone wins. No new players may join the game until someone takes the pot.

DigiDeal represents that given a full table, a player will win the pot once every two hands, on average. In an alternate version of the game, designed to maintain interest and reduce frustration, if no player has three of a kind, the high hand, whatever it may be, takes 20% of the pot, and the remaining 80% rolls over. Play is otherwise identical to that described above. In short, the Digital Card System allows people to play a known poker variant in a casino, just without a physical deck of cards.

Analysis

IGRA divides the world of Indian gaming into three classes. Class I, 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." 25 U.S.C. § 2703(6). Class II encompasses:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -- ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> (ii) card games that –
> (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.

25 U.S.C. § 2703(7)(A)(i) - (ii).

Class III is a catchall category and includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Class III also includes any electronic or electromechanical facsimiles of any game of chance and any banking card game. 25 U.S.C. § 2703(7)(B)(i)-(ii); 25 C.F.R. § 502.4(b).

Viewed against this statutory background, classification of Trips or Better played on the DigiDeal table presents three separate questions. First, is the table itself, considered apart from the card game played upon it, an electronic facsimile or a technologic aid? If the former, it is Class III by definition. Second, if the table is a technologic aid, does IGRA define as Class II the use of such aids with card games? If no, the table falls within the catchall and is Class III. Third and finally, is Trips or Better Poker, considered by itself, a Class II game?

1. Technologic aid or electronic facsimile

The National Indian Gaming Commission's regulations define a technologic aid as equipment that

(1) assists a player or the playing of a game;
(2) is not an electronic or electromechanical facsimile; and
(3) is operated in accordance with applicable Federal communications law.

25 C.F.R. § 502.7(a).

The table easily satisfies the first element. It assists play by displaying, right in front of each player, all players' hands, thus making it easier to decide whether to continue or to fold. The table also identifies qualifying hands, hands that were folded, and the amount of the jackpot won, thus making the play of the game simpler and more accurate.

Likewise, the table satisfies the third element, meeting FCC requirements when operated. The table is not linked with other tables, and thus the only question is whether it, in its own operation and in communicating with the dealer's shoe (either by radio or infrared) meets FCC regulations on radio emissions, which it apparently does.

In order to be a technologic aid, then, the table must meet the second element, 25 C.F.R. § 502.7(a)(2), and not be an electronic or electromechanical facsimile of a game of chance. The Commission's regulations define electronic or electromechanical facsimile, in relevant part, as "a game played in an electronic or electromechanical format that replicates a game of

chance by incorporating all of the characteristics of the game...." 25 C.F.R. § 502.8. Though courts have adopted this definition as it reads, *see, e.g.*, *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 615 (8th Cir. 2003), its application to the DigiDeal table is novel. No one has tried to make the distinction between a technologic aid and a facsimile for an electronic game of cards. That said, however, the answer is readily apparent. The table is not a facsimile because it does not incorporate all of the characteristics of Trips or Better Poker.

By way of analogy, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542-543 (9th Cir. 1994) reviewed a wholly-electronic pull tab game, one in which the player bought and played pull tabs generated by computer and displayed on a video screen. The Ninth Circuit concluded that this was an exact, self-contained copy of paper pull tabs and thus an electronic facsimile. *Accord, Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 304 F.3d. 633, 636 (D.C. Cir. 1994). Pull tab machines, however, that merely dispense, and display the results of, paper pull tabs are of a different sort.

In *Diamond Game v. Reno*, 230 F.3d 365, 370 (D.C. Cir. 2000), the machine in question, the Lucky Tab II, sold and dispensed paper pull tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device, no matter how many bells and whistles it might have. The "game is in the paper rolls," the Court held, and the Lucky Tab II is "little more than a high-tech dealer." In this, then, Lucky Tab II resembles the DigiDeal table, which is precisely a high-tech dealer.

By way of further contrast, the video poker games common in Class III and non-Indian casinos are electronic facsimiles under the definition in §502.8. The typical machine accepts bets, deals a poker hand, evaluates that hand against the standard poker rankings, and pays winning hands according to paytables. Thus, such a machine incorporates all of the aspects of the game offered.

Unlike a video poker machine, the DigiDeal table incorporates some of the characteristics of poker – shuffling, dealing, and ranking winning and losing hands – but not others. The placing of antes and wagers, and thus the players' decisions to continue to play or fold, are done or made manually, by the players using chips and not by the table. Put slightly differently, then, DigiDeal table is not essential to playing Trips or Better Poker. One can play the game in a casino with or without it. The table, therefore, meets all of the criteria for a technologic aid and is not a Class III electronic facsimile.

2. Using technologic aids with card games

Concluding that the DigiDeal table is a technologic aid does not end the inquiry. Such analysis begs the question whether IGRA allows the use of technologic aids with card games in the first place or, more specifically, whether IGRA places the use of technologic aids with card games within Class II. It does not.

Though novel, the answer to this question begins and ends with IGRA's statutory language. While IGRA defines bingo played with technologic aids as Class II, there is no such definition for card games played with technologic aids. Again, IGRA defines Class II, in relevant part, as encompassing

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -- ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> (ii) card games that –
> (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 ....
>
> 25 U.S.C. § 2703(7)(A)(i) – (ii).

It is true that the report of the Senate Select Committee on Indian Affairs that accompanied IGRA, S. Rep. No. 100-446 (1988), can be read to allow technologic aids with card games. For example, it suggests that the widest possible use of technology be available to the Tribes:

> The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.
>
> S. Rep. 100-446 at p. A-9.

It is equally true that a fundamental canon of statutory interpretation in Indian law holds that Federal statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *See, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Neither the legislative history nor this canon of interpretation are applicable here, however, because, on this point, IGRA is unambiguous. The Supreme Court holds that only when a statute is silent or ambiguous on a question, *i.e.* susceptible to two or more possible meanings, *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001), will its legislative history or the canons of interpretation bear upon its meaning. *See, e.g., Desert Palace Inc. v. Costa*, 539 U.S. 90, 93-94 (2003)("the starting point for our analysis is the statutory text... and where ... the words of the statute are unambiguous, the judicial inquiry is complete"); *accord*, *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *In Re Venture Mortgage Fund*, 282

F.3d 185, 188 (2nd Cir. 2002)("legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous").

Here, Congress explicitly made bingo played with technologic aids Class II by defining it as such: Class II includes "the game of chance commonly known as bingo, (whether or not electronic, computer, or other technologic aids are used in connection therewith)..." 25 U.S.C. § 2703(7)(A)(i). However, as illustrated in the quotation from IGRA, above, Congress just as explicitly omitted any such qualification from the definition of Class II card games, which are the subject of a different subsection of the statute, 25 U.S.C. § 2703(7)(A)(ii). Therefore, by IGRA's plain terms, card games, even non-banking games such as poker, when played with technologic aids, are outside of the definition of Class II and are thus Class III.[1]

Over and above this, even if one were to give weight to the Committee Report, it confirms this result rather than suggest a different one, to the extent that it says anything at all. While isolated sections can be read to support the use of technologic aids with cards games, the Report, read in its entirety, reveals that the Committee did not consider the use of aids with card games.

In the same paragraph in which the Committee states that the Tribes should be allowed maximum flexibility in their use of technology, it went on to illustrate:

> Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology so long as the use of such technology does not change the fundamental characteristics *of the bingo or lotto games* and as long as such games are otherwise operated in accordance with applicable Federal communications law.
>
> S. Rep. 100-446 at p. A-9. (Emphasis added.)

By its very language, the paragraph speaks only to bingo, pull tabs, tip jars, etc. – to the games defined as Class II in § 2703(7)(A)(i) and not to the card games defined as Class II

---

[1] It is true that the application of the technologic aids parenthetical within subsection 2703(7)(A)(i) is ambiguous. Courts have read it to apply both to bingo alone and to bingo and pull tabs, lotto, tip jars, together. *Compare*, *Diamond Game*, 230 F.3d at 367 (aids may be used with bingo and its cousins) with *Santee Sioux*, 324 *F.*3d at 613 (aids may be used only with bingo). That ambiguity, however, turns on how one reads the text within 25 U.S.C. § 2703 § (7)(A)(i)(III) – "whether [the] 'technologic aids' parenthetical refers only to bingo, or also refers to the other games of chance authorized as Class II gaming" in that subsection, *e.g.*, pull tabs, tip jars, and games similar to bingo. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1038 (10th Cir. 2003). Neither possible reading, however, says anything about the separate subsection on Class II card games.

in § 2703(7)(A)(ii). So too does a subsequent discussion about the section of IGRA limiting the application of the Johnson Act, 15 U.S.C. § 1171 *et seq.*:

> That section [15 U.S.C. § 1175] prohibits gambling devices on Indian lands but does not apply to devices used in connection with ***bingo and lotto***. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below [including the Johnson Act] will preclude the use of otherwise legal devices used solely in aid of or ***in conjunction with bingo or lotto or other such gaming*** on or off Indian lands.
>
> S. Rep. 100-446 at p. A-12. (Emphasis added.)

The reference to "other such gaming" at the end of this quote is not to all Class II gaming, which would include non-banking card games, but again only to "other such" games like bingo or lotto, *i.e.* games enumerated in 2703(7)(A)(i)(III) – pull tabs, tip jars, punch board, and other games similar to bingo.

As an interpretive aid, then, to the question here, the Committee Report is of limited use. The most that it says about the use of technologic aids with card games is nothing, and to the extent that it does address the use of aids with Class II games generally, that use is limited to bingo and games similar to bingo.

Lastly, while reported court opinions do not address the question of technologic aids and card games, such dicta as does exist is consistent with the readings of IGRA and the Committee Report here. In *Seneca-Cayuga*, above, the Tenth Circuit was faced with the task, among others, of reading and reconciling IGRA with the Johnson Act. In so doing, that Court reviewed the definition of Class II gaming and, in concluding that the Johnson Act does not reach technologic aids to Class II games, stated the following about the use of technologic aids within Class II:

> [W]e note that under IGRA, Class II games include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo...." 25 U.S.C. § 2703(7)(A).... IGRA further provides that "electronic, computer, or other technologic aids" *to such games* are Class II gaming and therefore permitted in Indian country. Id.
>
> *Seneca-Cayuga*, 327 F.3d at 1032. (Emphasis added.)

In short, the Court described IGRA as placing within Class II only technologic aids to bingo and like games, not aids to non-banking card games.

For all of the foregoing reasons, therefore, I conclude that technologic aids to card games are not Class II. As "all forms of gaming that are not Class I gaming or Class II gaming" are Class III, 25 U.S.C. § 2703(8), the DigiDeal table falls into that category.

3. Trips or Better

The last remaining question is the proper classification of Trips or Better Poker, separate and apart from the DigiDeal table, in the three States you requested, Florida, Idaho, and Washington. Given the laws of those States, Trips or Better is Class II in Florida and Washington and Class III in Idaho.

A. Florida

IGRA defines as Class II those card games that are:

1. explicitly authorized by the laws of the state, 25 U.S.C. § 2703(7)(A)(ii)(I), or
2. not explicitly prohibited by the laws of the state and played at any location in the state, 25 U.S.C. § 2703(7)(A)(ii)(II), and
3. played in conformity with the laws or regulations regarding hours or periods of operation and wager and pot sizes, 25 U.S.C. § 2703(7)(A)(ii), and not
4. banking card games. 25 U.S.C. § 2703(7)(B)(i).

Florida law explicitly authorizes Trips or Better, and it is not a banking card game. Assuming, then, that it is played in conformity with Florida's card room laws and regulations concerning hours, wagers, and pot sizes, it is Class II.

Florida, like other states, has a general prohibition on gambling, Fla. Stat. Ann. 849.08, but that prohibition is subject to specific exceptions. Florida specifically authorizes card rooms located at existing, licensed pari-mutuel establishments, Fla. Stat. Ann. 849.068 (1), (3), (7)(a), and makes them subject to licensing and regulation by the Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering. Fla. Stat. Ann. 849.068(4).

Those card rooms are authorized by statute to offer non-banking poker games. *Fla. Stat. Ann.* 849.068(2)(a), (3). More specifically, those card rooms are authorized by regulation to play all variants of poker based upon the traditional ranking of poker hands. Though a card room operator must technically submit request for approval of a card game to the Division, the Division provides for the automatic approval of the following:

> All poker games in Gibson, *Hoyle's Modern Encyclopedia of Card Games,* 1st Ed. (Doubleday 1974) "are authorized when played in a non-banking manner and shall be approved by the Division. All other

> card games playing in a non-banking manner in which the determination of the winner is based upon a traditional poker ranking system as referenced in Hoyle's shall be approved by the Division."
>
> Fla. Admin. Code 61D-11.002(1)(b).

Since Trips or Better is a non-banking poker game based upon the traditional poker ranking system, it is specifically authorized by the laws of Florida.

As to traditional poker hands, Trips or Better is a variation of 5 Card Stud and uses the traditional ranking of hands from royal flush down to high card. Again, the highest qualifying poker hand, three-of-a-kind or better, will win the pot. In one variation of the game, if there is no qualifying hand, the highest non-qualifying hand, whatever it is, wins 20% of the pot, and the balance rolls over.

As to banking games, IGRA defines "house banking game" as:

> any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win.
>
> 25 C.F.R. § 502.11

Trips or Better is not a house banking game under this definition, nor is it a game banked by the players.

The house does not play a hand but rather earns its money by collecting antes, and players compete against one another for the pot created by all of the wagers. The winning player, not the house, collects all losing bets; the house does not pay anything to the winning player; and, without a hand, the house cannot win the pot. Similarly, the players play against one another equally, and none acts as a bank, taking on all comers, paying all winners, or collecting from all losers.

The fact that pots may "roll over" if no player has three of a kind or better does not change any of this. Following a roll over, the pot – albeit a larger one – still must be won by one of the players who began the round. New players cannot join the game until the pot is won, and the pot will be paid to the last remaining player if all others fold. After a roll over, then, players are still playing against one another and not against the house or against a player acting as the house. Further, the rules of entry and of play ensure that though a roll over will increase pot size, it cannot inadvertently create a banked pool against which the players play. This is a feature of some games that were invented recently in an attempt to create non-banking card games by having players wager against a pool funded by losing wagers, and by the house if the pot runs low. This office, however, has found such arrangements are nonetheless banking card games under 25 C.F.R. § 502.11. *See, e.g.* Memorandum re: Player-pooled Blackjack (April 4, 2003); NIGC Bulletin No. 95-1 (August 10, 1995).

I conclude, therefore, that since Trips or Better is explicitly authorized by Florida law, and since it is not a banking game, it is Class II, provided that is played in conformity with Florida law concerning hours of operation and wager and pot limits. Those are as follows.

Florida permits card rooms to be open from noon until midnight. Fla. Stat. Ann. 849.086(7)(b). For poker in Florida card rooms, the maximum bet is $2, and there may not be more than 3 raises in any round of betting. Fla. Stat. Ann. 849.086(8)(b).

B. Washington

Trips or Better is explicitly authorized by Washington law, and it is, again, not a banking game. Assuming then that it is played in conformity with Washington's card room laws and regulations concerning hours and wagers and pot limits, it is Class II.

Washington embodies a general prohibition on gambling in its constitution, Wash. Const Art. II, § 24. That provision allows for exceptions adopted by super majorities (60%) of both houses of the Legislature or of voters in referendum initiatives. Washington has specifically authorized the play of both non-banking and banking card games, both of which it groups together as "social card games," in licensed card rooms. R.C.W. § 9.46.0282. Regulatory authority over the card rooms and the social card games is vested in the Washington State Gambling Commission. *Ibid.*

The Commission's regulations explicitly authorize eight non-banking card games, including "poker." W.A.C. § 230-40-010(2)(a)-(h). The regulations require all non-banking games to "be played in the manner set forth in *The New Complete Hoyle, Revised; Hoyle's Modern Encyclopedia of Card Games,* or a similar authoritative book on card games approved by the [Commission] director," W.A.C. § 230-40-010(2). Other non-banking card games may be authorized by approval of the Commission Director. W.A.C. § 230-40-010(2)(i).

The Washington State Gambling Commission web site lists Trips or Better as an approved poker game, indicating the Director's approval, and as the game is not a house banking game, I conclude it is Class II if played in conformity with Washington's laws on hours, wagers, and pots. Those are as follows.

Washington requires its card rooms to close between 2 am and 6 am. W.A.C. 230-40-400(1)(a)-(f). For non-banking poker wagers, Washington sets a maximum of $25 on any single wager. It permits no more than 5 betting rounds in any one game, and it limits the wagers in any betting round to 4 – the initial wager and 3 raises. W.A.C. 230-40-120(1)(a)-(c).

3. Idaho

As poker is both expressly prohibited and not explicitly authorized by Idaho law, Trips or Better is not a permitted Class II game.

Idaho Const. Art. III § 20, subsection 1, provides a blanket prohibition on gambling: "gambling is contrary to public policy and is strictly prohibited." To this general prohibition, the Idaho Constitution creates three limited exceptions: the state lottery, pari-mutuel betting undertaken in conformity with enabling legislation (*e.g.* horseracing), and bingo and raffles operated by qualified charitable organizations for charitable purposes, again pursuant to enabling legislation.

Idaho Const. Art. III § 20, subsection 2, limits the three exceptions created by subsection 1. That limitation unequivocally excludes poker:

> No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

Further, Idaho Code § 18-3802 makes gambling a misdemeanor offense, and its definition of gambling explicitly includes poker:

> "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat or keno....
>
> Idaho Code § 18-3801.

Given all of this, Idaho law does not explicitly authorize but explicitly prohibits poker throughout that State. I conclude, therefore, that Trips or Better Poker is not permitted as a Class II game in Idaho.

Summary and administrative procedure

In sum, though a technologic aid, the DigiDeal Digital Card System is Class III because IGRA has not placed technologic aids to card games within the definition of Class II. Considered separately and apart from the DigiDeal table, Trips or Better Poker is Class II if played in accordance with the card room laws and regulations in Florida and Washington and is not permitted as Class II in Idaho.

This letter is an advisory opinion of the Office of General Counsel, National Indian Gaming Commission. As an advisory opinion, it is not a final agency action and therefore not subject to judicial review. IGRA permits judicial review only in limited circumstances, 25 U.S.C.

§ 2714, and then only after the exhaustion of administrative remedies before the full Commission.

The Commission Chairman is, for example, authorized to levy civil fines for IGRA violations, 25 U.S.C. 2713(a)(1), and a tribe so assessed may challenge the violation and the fine on appeal to the full Commission. 25 U.S.C. § 2713(a)(2); 25 C.F.R. §§ 573.3, 575 4, 577.1 *et seq*. The decision of the full Commission on appeal is reviewable in the District Court. 25 U.S.C. § 2713(c).

If you have any questions, please do not hesitate to contact Michael Gross, Staff Attorney, at 202-632-7003.

Very truly yours,

Penny J. Coleman

Penny J. Coleman,
Acting General Counsel