NATIONAL
INDIAN
GAMING
COMMISSION

FEB 17 1999

James A. Bransky
Michigan Indian Legal Services
160 E. State Street, Suite 102
Traverse City, MI 49684-2572

Re: The Little Traverse Bay Bands of Odawa Indians' Application for Grandfathered Card Games

Dear Mr. Bransky:

The Little Traverse Bay Bands of Odawa Indians ("Band"), located in the State of Michigan, have requested a determination by the Chairman of the National Indian Gaming Commission ("NIGC"), that the Band be permitted to offer any banking card game as a class II game, pursuant to 25 U.S.C. § 2703(7)(C). After careful review, I have determined that the Band is not entitled to operate banking card games as class II games pursuant to IGRA's grandfather clause, as the Band was not operating banking card games on or before May 1, 1988.

Indian Gaming Regulatory Act

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

25 U.S.C. § 2703(c) (emphasis added). Thus, according to IGRA, in order for a banking card game to qualify as a class II game, the card game must have been "actually operated" by an Indian Tribe prior to May 1, 1988.

The Band does not contend that it operated banking card games on or before May 1, 1988, as is required by IGRA. Instead, the Band claims that "historic circumstances" prevented it from exercising certain powers of self-government, including the power to operate a gaming establishment.[1] The Band further asserts that "[t]here is nothing in the language of § 2703(7)(C) that would deny a tribe that was omitted from the list of federally recognized tribes at the time of IGRA's passage from taking advantage of this provision." (Letter from Bransky to Kevin Meisner of 9/3/97, at 3). However, the decision in this matter does not turn on whether the Band was recognized at the time of IGRA's passage but instead turns on whether the Band actually operated banking card games on or before May 1, 1988.

Statewide Application Of The Grandfather Clause

The Band 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 banking card games were played on or before May 1, 1988 by other Indian Tribes in the State of Michigan. In other words, the Band asserts that as long as "any" Indian Tribe operated banking card games in Michigan within the statutory period, all other Tribes in Michigan should be permitted to operate those games under the grandfather provision. However, such a construction runs contrary to the policy of the grandfather clause and clearly expressed legislative intent.

The plain language of the grandfather provision states that it applies only to those banking 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). 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).

I believe the plain language is conclusive that for banking card games to be grandfathered as

---

[1]The Band argues that it should not be precluded from the benefit of the grandfather provision due to the fact that Congress passed an act reaffirming it as a federally recognized Indian Tribe in 1994, after the passage of IGRA. *See* Pub. L. No. 103-324, 108 Stat. 2156 (1994). The Band seems to argue that it should still be able to benefit from the provision because they never had the opportunity to offer banking card games prior to May 1, 1988.

class II games, the games must have been operated by the Indian tribe seeking to benefit from the grandfather provision. 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 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. 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." S. Rep. No. 446, 100th Cong. 2d Sess. 10 (1988) *reprinted in* 1988 U.S.C.C.A.A.N. 3071. 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.

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 . . . . " *See* S. Rep. No. 446, p. 10 (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. A colloquy between Senator Reid and Senator Inouye provides further evidence supporting the interpretation that the games must have been operated by the Indian tribe seeking to benefit from the grandfather provision:

> 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 benefit of this provision.*

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

The grandfather clause was drafted to protect tribes already operating card games from the prohibition against the operation of those card games without a Tribal/State compact. Congress sought to achieve fairness by allowing pre-existing Indian gaming establishments, in the selected states, to continue operating such card games as class II. The Band does not qualify for the benefit of the grandfather provision because the Band did not operate banking card games on or before May 1, 1988, as is required by 25 U.S.C. § 2703(7)(C).

Determination

I commend the Band for presenting compelling equitable reasons in support of its application for grandfathered card games. As mentioned, however, the decision in this matter turns on whether the Band actually operated the games on or before May 1, 1988. I believe the statute is clear that the card games must have been operated by the Tribe seeking to have its card games grandfathered. By grandfathering certain card games conducted by certain Indian Tribes, it is clear that Congress did not intend to allow other tribes, not qualifying in their own right, to take advantage of the grandfather clause. After careful review and consideration, I have determined that the Band may not offer banking card games as class II games pursuant to the grandfather provision contained in 25 U.S.C. § 2703(7)(C).

Sincerely,

Montie R. Deer
Chairman

cc: Jeff Davis, Assistant United States Attorney, Western District of Michigan
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