

# National Indian Gaming Commission

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## NOTICE OF DECISION AND ORDER

**In the Matter of the Seminole Nation of Oklahoma  
NOV-00-06, CO-00-06  
NOV-00-10, CO-00-10  
Docket Nos. NIGC 2000-6 AND 2000-1**

**Seminole Nation – Appellant**

### INTRODUCTION

The question before the National Indian Gaming Commission is whether the games at issue in this case may be properly characterized as amusement devices, and thus not within the ambit of the Indian Gaming Regulatory Act, or gambling devices, the play of which is prohibited unless authorized by a valid tribal-state compact. Having considered the record and all of the facts in evidence in light of applicable case law and precedent, the Commission concludes that the subject devices may not be properly characterized as amusement devices, but instead constitute gambling devices subject to all the conditions and prohibitions set forth in the Indian Gaming Regulatory Act. In light of this determination and given the fact that no tribal-state compact is in place authorizing the play of these games, the National Indian Gaming Commission therefore affirms the recommended decision of the Presiding Official on NOV-00-06; CO-00-06; overrules the decision of the Presiding Official on NOV-0010; and CO-00-10; affirms the decision of the Presiding Official denying Appellant's Motion to Defer Hearing and Stay Proceedings; and, reverses the decision of the Presiding Official to exclude Exhibit 23.

## BACKGROUND

The Seminole Nation of Oklahoma (Tribe or Appellant) appealed the Notice of Violation and Closure Order issued May 30, 2000 (NOV 00-06; CO-00-06) involving operation of electronic video gaming machines, generically referred to as "Red Hot Re-spin" machines, on Tribal lands in Oklahoma. These machines, manufactured by Infinity Group, Inc. under U.S. Patent issued 1/6/98 (Exhibit C 22) include: Lucky Break; Red Hot and Blue; Sovereign Sevens; Red Hot Respin; and, Buffalo Nickels. (Exhibits C 12 - C 13)<sup>1</sup>

The Tribe additionally appealed the Notice of Violation and Closure Order issued September 12, 2000 (NOV 00-10; CO-00-10), involving not only continued and increased operation of the Red Hot Re-Spin machines but also newly installed electronic video gaming machines manufactured and distributed by separate and independent business entities. These machines include: Rainbow Reels; Fantasy Fives; Pot of Gold - a multi game device offering Triple Sevens, Gold Row Bonus, Spinball Bonus, and Respin Seven; and, Lucky Cherries - another multi game device offering Pirate's Gold, Klondike 5, Funny Fruit, and Reel of Fortune. The manufacturer/distributors of this group exclude the Infinity Group. Pretrial stipulation confirms that all machines were operated on Indian lands during the period covered by the NOV's and CO's.

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<sup>1</sup> NOV-00-6 and CO-00-6 were issued on May 30, 2000. Nonetheless, the Respondent's Supplemental Statement was not filed until January 31, 2001, in contravention of the requirement at 25 C.F.R. 577.3 that requires filing of the statement within 10 days of filing the Notice of Appeal (which was filed in June or July of 2000).

These appeals were duly assigned and Respondent's Motion to Defer Hearing and Stay Enforcement Proceedings<sup>2</sup> was denied by order dated January 7, 2002. Hearing on the consolidated causes was held before the Presiding Official in Oklahoma City, Oklahoma, on February 4-5, 2002. Hearing on the proposed civil fine assessment (CFA 00-06; NIGC 2009) was deferred until decision on the merits in the instant cases.

The operative facts are largely undisputed<sup>3</sup> and the principal contention concerns the characterization of the cited games as gambling or skill games. Briefly stated, the Chairman asserted jurisdiction<sup>4</sup> on the grounds that the cited gaming machines are Class III gambling devices, not exempted under a Tribal-State Compact. Appellant contends that these machines are "games of skill", akin to amusement games, and not "games of chance", the latter being Class III gambling and admittedly subject to regulation.

#### THE INDIAN GAMING REGULATORY ACT

The history of Indian gaming under various States' regulatory schemes and the genesis of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et. seq.* are comprehensively and authoritatively set out in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In essence, IGRA divides Indian gaming into three categories: Class I, Class II,

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<sup>2</sup> It is noted in this context that a related action for injunctive relief and appeal therefrom is pending *sub. nom. United States v. Seminole Nation of Oklahoma* CIV-01-035-B (E.D. Okla, 2/27/01).

<sup>3</sup> The testimony and exhibits, detailing the numerous investigations, videotapes, and preliminary notices of the charged offenses, were unchallenged and admitted without objection. (Admin Record NOV 00-06 Tabs 1-7, 16; Admin Record NOV 00-10 Tabs 1-8; Exhibits C 5- C9; Transcript [TR] 124-144, 374-379, Exhibits C 20 and C 21.

<sup>4</sup> The respective orders cite 25 U.S.C. §§ 25 U.S.C. 2701 *et. seq.* and 25 C.F.R. §§ 573(a) and (b).

and Class III. Congress defined Class I to include “social games 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 is defined to include “the game of chance commonly known as bingo...and other games similar to bingo, and card games that are explicitly authorized by laws of the State, or are not explicitly prohibited by laws of the State and are played at any location in the State,” excluding “any banking card games ... or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind” 25 U.S.C. §2703(7). Class III is defined as “all forms of gaming that is not Class I or Class II gaming.” 25 U.S.C. § 2703 (8).

Indian Tribes have exclusive jurisdiction over Class I gaming and it is not subject to IGRA. 25 U.S.C. § 2710(a)(1) The Indian Tribes and NIGC have concurrent jurisdiction to regulate Class II gaming. 25 U.S.C. § 2710 (a)(2), (b). Class III gaming “is allowed only where a Tribal-State compact is entered...” and requires a Tribal ordinance approved by the NIGC.<sup>5</sup> By pretrial stipulations, the parties agree that no Tribal-State compact exists in the State of Oklahoma, other than pari-mutual horse racing, and that Respondent Tribe did adopt a gaming ordinance by Resolution 94-2, which was approved by NIGC on May 31, 1994.

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<sup>5</sup> See *United States v. 162 MegaMania Gambling Devices*, 231 F. 3d 713 (10<sup>th</sup> Cir., 2000); *United States v. Absentee Shawnee Tribe of Oklahoma*, CIV 01-175-A (D.C.W.D., Oklahoma, 2001)

## MOTION TO DEFER HEARING AND STAY ENFORCEMENT PROCEEDINGS

The Commission first addresses a procedural issue raised during the course of administrative litigation. In a November 16, 2001, Motion to Defer Hearing and Stay Enforcement Proceedings, the Tribe citing the inequity wrought by the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), sought a stay of the hearing and enforcement proceedings one of four events happens: until thirty days after Congress amends the Act; a Federal appeals court sustains the Secretarial procedures contained in 25 C.F.R. part 291; the Secretary of the Department of the Interior "affirms" the availability of the Secretarial procedures<sup>6</sup>; or the Tribe enters into a tribal-state gaming compact. By Order dated January 7, 2002, the Presiding Official denied this request.

In this case, which involves a closure order, the Commission's regulations expressly require the Presiding Official to act. Subsection (b) of 25 C.F.R. 577.4 provides that "If the subject of an appeal is whether an order of temporary closure should be made permanent or be dissolved, the hearing shall be concluded within 30 days after the Commission receives a timely notice of appeal, unless the respondent waives this requirement. Notwithstanding any other provision of this part, the presiding official shall conduct such a hearing in a manner that will enable him or her to conclude the hearing within the period required by this paragraph, while ensuring due process to all parties." Stated otherwise, the presiding official has a responsibility to reach a recommended decision and the Presiding Official in this case did not err by discharging his responsibility. We affirm the Presiding Official's decision on this matter. There is

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<sup>6</sup> We note that the secretarial procedures are final regulations at 25 C.F.R. part 291. As such, they are part of the law of the Department of the Interior and require no further "affirmation".

simply no authority, implied or explicit, in the appeal regulations suggesting that the Presiding Official is authorized to truncate an enforcement action by staying a decision.<sup>7</sup> While the presiding official is given authority to “[r]egulate the course of the hearing” and to “[d]ispose of procedural requests or similar matters,” there is no apparent authority to simply place the hearing on hold for an undetermined period. 25 C.F.R. § 577(b)(5).

### EXHIBIT 23

In an August 15, 2001, Order, the Tribe was required to submit a report of its expert witness (Exhibit 23). The Tribe’s report authored by Mr. Snyder, dated October 3, 2001, reviews eight games: Re-Spin 777; Triple Sevens; Gold Row Bonus; Spinball Bonus; Reel of Fortune Pirates Gold; Funny Fruit; and Klondike. The Presiding Official excluded that report apparently on the basis that the report was hearsay and the Tribe’s counsel did not have the opportunity to cross-examine the expert.

The general rule is that hearsay is admissible in administrative hearings. We find that the document should not have been excluded under that general rule. The test for admission should be whether the report is relevant and not cumulative with other evidence in the case.

The document is not necessarily hearsay under the Federal Rules. Federal Rule of Evidence 801(d), Statements which are not hearsay, states:

A statement is not hearsay if —

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(2) Admission by a party-opponent. “The statement is offered against a party and is ...

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<sup>7</sup> See 25 C.F.R. § 577.7(a). Once designated by the Commission, the presiding official shall set the case for hearing.

(D) a statement by the Party's agent or servant concerning a matter made within the scope of agency or employment, made during the existence of the relationship[.]

If the statement is hearsay, and Federal Rule of Evidence 802 excluding hearsay is applied, the document is still admissible as an exception to the Rule. Rule 803, Hearsay

Exceptions; Availability of Declarant Immaterial, states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly run business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation...

Mr. Snyder prepared a report in the normal course of that business for Respondent, providing facts and an opinion that results from games played on each of the machines he evaluated were determined by an element of chance. Respondent produced this report during the discovery phase of this case. Even if the Federal Rule of Evidence 802 were applied, Mr. Snyder's report is admissible either as a document that was not hearsay (as an admission by a party-opponent, made by the party's servant) or because it falls within a recognized exception to the Hearsay Rule (reporting facts and an opinion made in the regular course of business, etc.). The report also meets a trustworthiness standard were that to be part of the admissibility decision. Mr. Snyder's report is consistent with the findings and conclusions of Mr. Sertell and Mr. Farley who evaluated the gaming devices at issue in the case, and thus the report can be considered trustworthy.<sup>8</sup>

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<sup>8</sup> There was no challenge to the authenticity of the Snyder Report.

The report was the Tribe's; the Tribe included the expert on its witness list and the Tribe could have cross-examined the expert or submitted a different report if it was not of acceptable quality. Consequently, we conclude that the report should be included in the administrative record as relevant evidence.

**ENFORCEMENT AUTHORITY AFTER THE ELEVENTH CIRCUIT'S  
ELEVENTH AMENDMENT DECISION**

The Tribe's argument that the NIGC lacks enforcement authority after *Seminole* fails. (See *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). The Eleventh Amendment prohibits Congress from making the states capable of being sued in federal court.)

We find that the Commission lacks authority to enter the decision the Tribe seeks; i.e., to conclude either that IGRA is no longer functional or to sever any portion of it that has not specifically been held unconstitutional. As part of the Executive Branch of government, the Commission's responsibility is to uphold and enforce the laws passed by Congress unless and until it is informed by the Federal courts that a particular law is invalid, or that specific provisions of the law cannot be enforced. Thus, unless and until the Federal courts define the parameters of what is left of IGRA after *Seminole*, or Congress amends the act to take that holding into account, the Commission must enforce all of the act except the Federal court enforcement provisions—a part of the act which did not fall under the Commission's jurisdiction in the first instance. Therefore, for Commission purposes, only the Federal court enforcement provisions of IGRA, 25 U.S.C. 2710(d)(7)(A)(i) and parts of 25 U.S.C. 2710(d)(7)(B), are unconstitutional. All other provisions, including the compacting process set out in 25 U.S.C. 2710(d)(3), remain in full force and effect.

*In the Matter of the Santee Sioux Tribe of Nebraska*, NOV-96-01; CO-96-01 (July 31, 1996), pp. 10-11. As the Commission has previously decided, absent a definitive statement from the courts to the contrary, the remainder of the IGRA is in full force and effect.



## DESCRIPTION OF THE GAMES

There are a number of machines subject to the two notices of violation and closure orders. They are most easily divided into two groups. The first group consists of a series of games manufactured by Infinity. The second group consists of games very similar to the first but is manufactured by other companies.

### **1. The Infinity Group Machines<sup>9</sup>.**

While the Infinity Group machines differ in graphics, themes, and cabinetry, they use essentially the same software<sup>10</sup>. TR 215. The games are video reel games that are graphically represented by 9 independent reels, arranged in “tic-tac-toe” fashion, which permit a maximum bet of 32 credits on 8 lines. TR 216-224. There are 6 symbols or icons which follow a repeating pattern of 26 icons on each of the 9 reel strip and that are unique to each game. Exhibit C 12 and C 13 Appendices A. The player initiates the game by inserting paper currency<sup>11</sup> and either playing the maximum bet or pushing a button or a video touch screen to start an initial spin of all 9 reels. The reels may be stopped individually by touching the screen or by pushing a button. When all nine reels

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<sup>9</sup> Lucky Break, Red Hot and Blue, Sovereign Sevens, Red Hot Respin, and Buffalo Nickels are reported in Exhibits C12 and C 13 and corresponding Appendices. Cf. TR 202, 215-216.

<sup>10</sup> Noting some differences in software the Chairman’s expert, Mr. Farley, testified: “It seemed that the software used in the Red Hot and Blue, Sovereign Sevens, Lucky Break and Red Hot Respin [Skill Stop Version 4.41] was an updated version of the software utilized in Buffalo Nickels [Version 4.38]. It was just a progression. It seemed like the only difference between the two versions was the 9 of a Kind jackpot, from what I could see.” TR 217. Respecting Red Hot Respin report [Exhibit C 12] there are different functions, such as the absence of a Set Up Menu [Exhibit C12 p.4], and in addition there are some questions as to the source code [Exhibit C 12 p. 11] since it was not the same source code as the one presented on the video tapes [Exhibit C 12 p. 14].

<sup>11</sup> Red Hot Respin report suggests that there is programming in that particular game for “Coins In, Coins Out”. Exhibit C 12 p.4

have stopped and a winning combination is not obtained, the player has an option to select one of the nine reels to respin. TR 220-221; also Exhibit C 12 p. 2. “The players’ stopping the spinning reels has no effect on the icon that is going to appear.” TR 447.

The copy of the U.S. Patent indicates that “one or more random numbers are generated in the slot machine’s microprocessor...” on both the initial spin and on the respin. (Exhibit C 22, p. 1, pp. 2-3 items 1 and 14, p. 5 “Summary”, p. 8 3<sup>rd</sup> paragraph). Mr. Dietz, the patent holder and designer of the Infinity games, corroborated that “[T]he appearance of an icon in each of the nine windows on the initial phase is controlled by a random number generator . . .” TR 442, also TR 445, 447. Likewise, the respin is the “product of random generation.” TR 454, 463.

The Presiding Official recommended that the violations cited in NOV 00-06 and CO-00-06, which pertain to all the games in this group be sustained by the Commission and that the Respondent be ordered to cease and desist the operation of these games.

## **2. The Non-Infinity Group Machines<sup>12</sup>**

Although there are a number of different machines in this group, they are all the same reel type of gambling machines as the Infinity machines. Source codes were not provided for any of these machines to the Chairman’s experts or to the Tribe’s expert, Mr. Snyder. TR 193-195; Exhibit 23. Therefore, no source codes were used to analyze

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<sup>12</sup> These machines include: Rainbow Reels; Fantasy Fives; Pot of Gold - a multi game device offering Triple Sevens, Gold Row Bonus, Spinball Bonus, and Respin Seven; and, Lucky Cherries - another multi game device offering Pirate’s Gold, Klondike 5, Funny Fruit, and Reel of Fortune. The record is not always clear as to the identity of the manufacturer/distributor; but for purposes of this decision it excludes the Infinity Group, Inc.

these latter machines.<sup>13</sup> However, while the source code would have had some evidentiary weight, its absence is not dispositive as to the central question of whether the game is a gambling game. The important element to prove in this case is not the location of a random number generator in the source code for the machine. The important element to prove is whether by application of an element of chance, a player becomes entitled to the reward when she operates the machine.

The games in this group range from 3 reel-3 line nickel machines with maximum bet of 15 credits (Gold Row Bonus) to 9 reel-8 line nickel machines with respin features and a maximum bet of 40 credits (Triple Sevens) comparable to the Infinity Group machines. TR 258-308. Most of the games were the common 5 reel-5 line. TR 259. Likewise, the icons varied in number and the reel strips in some games exceeded 400 symbols (Respin 777) most of which did not follow any discernable sequence. TR 273, 283. To play the game, the player inserts money into a bill acceptor on the machine. C 14-19, page 1 on each exhibit. The player receives credits that can be wagered to buy pay lines. C 14-19, page 1 on each exhibit. The icons on the reels rotate extremely quickly through the video window. Video Recordings at Rivermist Gaming Center and

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<sup>13</sup> The Chairman's First Request for Discovery, dated February 16, 2001, requested the source codes, as well as outlines and annotations describing the location of the software and execution and locations of various routines in the source code. In an April 4, 2001, letter, Chairman's counsel indicated that the Tribe had still not provided the requested source codes. In July 24, 2001, the Tribe filed Respondent Seminole Nation of Oklahoma's Brief in Opposition to the Chairman's Motion to Compel Discovery that indicated that the Tribe that it could not provide all of the requested information but also indicated that it provided a source code. Apparently, despite the Tribe's assertions of compliance with the discovery requests, as reflected in the Presiding Official's, April 8, 2002, recommended decision, the Tribe failed to provide all of the requested source codes.

Travel Plaza, Seminole Nation of Oklahoma, September 5, 2000, Item 7 of the Agency Record, NOV-00-10, CO-00-10, TR 259.

There are five games played on the Pot O Gold machines, the Respin 777, Spin Ball Bonus, Triple Sevens and Gold Row Bonus. TR 270, C 15. The Respin 777 contained 16 different icons but after viewing 150 of the icons pass through the video window, no repeating sequence could be identified. TR 273. The Spin Ball Bonus used 14 different icons with not detectable repeating sequence. TR 276. Triple Sevens played 12 different icons with no apparent repeating sequence after viewing 150 icons. TR 278. The Gold Row Bonus used 13 different icons and no repeating sequence was discernible after viewing 150 icons. TR 281.

The games have buttons on the cabinets that allow the player to stop each reel individually. TR 261. Touching the reel can also stop some of the games. C 271- 272, C 15. The first four games have a button on the cabinet that is an all stop feature that stops all of the video reels at the same time. TR 263, 274, 277 - 278, 292. These games have preset retention ratios – the percentage amount of win established and kept by the house. TR 293, 295. Further, when a player pushes a stop button, the reels do not immediately come to a stop; they continue to scroll through the video window. TR 282.

There are four games played on the Lucky Cherries machines, the Pirate's Gold, Klondike, Funny Fruit, and Reel Fortune. On Pirate's Gold, there were 8 different icons with a repeating sequence of 101 icons. TR 297. On Klondike 5, there was a repeating series in 100 icons. TR 297. On Funny Fruit there were 8 different icons and a repeating series in 100 icons. TR 302. On Reel Fortune, there were 8 icons in a repeating sequence of 100 icons. TR 307. In all of the games, when the player pressed the stop button, the

last five symbols did not follow the repeating sequence. TR 307. All of the games also had a preset retention ratio. TR 299; See also C 16, 17, 18 and 19.

The Tribe's report, dated October 3, 2001, reviews the Pot O Gold and Lucky Cherries games. The report describes them as eight games including: Re-Spin 777; Triple Sevens; Gold Row Bonus; Spinball Bonus; Reel of Fortune, Pirates Gold; Funny Fruit; and Klondike. It states that the outcome of spinning the wheels is one of "luck" or "hazard." It further states that the respin option available on the machines might result in a greater number of winning outcomes but that the stopping position of the spinning wheels on the respin is one of luck. C 23.

Rainbow Reels is a five-reel, five-line machine. TR 50. When the player presses the start button the five video reels begin to rotate. TR 52. The player stops each reel individually by pressing a button. There are 8 different icons in the reel rotation. In a sequence of over 380 icons, no repeating pattern could be identified. Furthermore, as the icons rotate through the video window, individual icons change into other icons, referred to as "morphing" by the Chairman's expert. C 4 and C 14; TR 48-53. Finally, the operator can establish the pay level – the retention ratio. TR 51-52.

Fantasy 5 is also a five-reel, five-line machine manufactured by the same company as Rainbow Reels, Bestco Games Company. TR 54. It is operated in a similar manner to Rainbow Reels. TR 54. In addition, it has a graphic on the bottom of the video screen that is a bonus round. The operator controls the bonus percentages. TR 53 and 55. C 4.

## APPLICABLE LAW

### 1. **Statutory framework and applicable case law.**

The question raised by the notices of violation and closure orders is whether the machine games at issue constitute gambling and are thus Class III or whether the games are skill games and thus amusement devices.

Under the IGRA, Class III gaming is defined as “all forms of gaming that are not Class I or Class II gaming.” 25 U.S.C. § 2703(8). NIGC regulations define class III gaming to include, among other things, “any slot machines as defined in [the Johnson Act at] 15 U.S.C. § 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance.” 25 C.F.R. § 502.4(b). NIGC regulations further define electronic or electromechanical facsimiles as “any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3).” Therefore, the Chairman’s Notice of Violation raises the question of whether the machine games are a Class III gambling device. To be a Class III gambling device under the NIGC regulations depends on whether they fit within one of the three categories of gambling devices identified by the Johnson Act. The definition of a gambling device relevant to this appeal is as follows:

[A]ny other machine [other than a slot 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 an 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)(2). Because the games at issue do not dispense money or property, but dispenses a paper receipt redeemable for a prize, we must analyze the games under (B) above. These elements of (B) are commonly referred to as consideration, chance, and reward.<sup>14</sup> *In re Gaming Devices Seized at American Legion Post No. 109*, 176 A.2d 115, 122 (1961). See also 38 *Corpus Juris* 286, *et seq.*

There is no dispute between the parties regarding whether the games at issue meet the consideration and reward elements since the player must pay to use the machines and, if successful, will redeem a receipt for prize or reward. The Tribe instead argues that the Johnson Act requires that the result of the game be “totally from chance”. TR 482.

Under controlling case law, there need be only a substantial element of chance involved in the play of the game on the device to bring the device within the Johnson Act definition. *Tooley v. United States*, 134 F. Supp. 162, 167 (D. Nev. 1955); *U.S. v. 20 Dealer’s Choice Machines*, 483 F.2d 474 (4<sup>th</sup> Cir. 1973).

The degree of chance required under the Johnson Act is:

Where a substantial element of chance is involved, it appears to us that the fact that skill in operating the particular machine is helpful in attaining the end sought does not take the machine out of the type defined by the [Johnson Act]. With regard to the machines herein [so-called “digger” machines] there is at least an element of chance involved . . .

*U.S. v. 24 Digger Merchandising Machines*, 202 F.2d 647, 650 (1953).

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<sup>14</sup> We note that the Commission has proposed a new definition of the electronic or electronic mechanical facsimile that eliminates the Johnson Act as part of the definitions [67 Fed. Reg. 56,13296 (March 22, 2002)] (to be codified at 25 CFR Part 502). Our analysis would not differ however, under the new definition since there is no question that these machine games are not Class I or II. Rather the distinction between Class III gaming machines and skill machines remains whether the games constitute gambling, in other words ie: whether the elements of the game include consideration, chance, and reward.

In determining if a game has substantial element of chance, we must first determine whether the device in question is designed and manufactured primarily for use in connection with gambling. Whether a device is a gambling device may be determined, first, by examining the objective physical and functional characteristics of the device. *U.S. v. 294 Various Gambling Devices*, 718 F. Supp. 1236, 1243-46 (W.D. Pa. 1989). See also *U.S. v. Conley*, 859 F.Supp. 864, 875 (W.D. Pa. 1994). Among the characteristics of a device that federal courts consider to be strong indicia that the device is designed and manufactured primarily for use in gaming are the following: (1) multiple coin feature<sup>15</sup>; (2) brevity of play of an individual game; and (3) the potential for inordinate numbers of free games along with the presence of a knock-off meter.<sup>16</sup>

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<sup>15</sup> Federal courts have considered a multiple bill feature as strong evidence that a machine was designed and intended for gambling, and this seemed the controlling question. "Multi-coin insertion and wagering allow a machine to make considerably more money in the same period of time . . . Such a feature is unusual in amusement devices and many courts have considered the presence of a multi-coin feature to be strong evidence that a machine was designed and intended for gambling." *United States v. 294 Gambling Devices* 718 F. Supp. at 1244 (citing *United States v. 137 Draw Poker-Type Machines*, 606 F. Supp. 747 (N.D. Ohio, 1984) *aff'd* 765 F.2d 147 (6th Cir. 1985); *United States v. Sixteen Electronic Gambling Devices*, 603 F. Supp. 32 (D.C. Hawaii 1984); *United States v. Various Gambling Devices*, 368 F. Supp. 661 (N.D. Miss. 1973).

<sup>16</sup> Unlike most amusement devices that do not involve gambling, the machines at issue in this case offer the potential to win large numbers of free games, or credits, which may then be redeemed for cash. In *U.S. v. 137 Draw Poker-Type Machines*, the court concluded that machines with some similar features were gambling devices within the meaning of 15 U. S.C. § 1171 (a). "The great number of free games which can be achieved by players . . . the facility with which free plays can be eliminated from the free play register and the ease by which free plays so eliminated can be counted renders these devices peculiarly and uniquely suited for gambling purposes." *United States v. 137 Draw Poker-Type Machines*, 606 F. Supp. at 754 (citing *United States v. Two Coin-Operated Pinball Machines*, 241 F. Supp 57 (W.D. Ky. 1965) *aff'd sub nom United States v. M. Branson Distribut. Co.*, 398 F.2d 929 (6th Cir. 1968)).



## 2. Commission Precedent.

The NIGC was faced with similar issues in administrative litigation pertaining to a game called "Reels of Skill". See Notice of Decision and Order in the Matter of: Choctaw Nation of Oklahoma, et al., NOV-98-09; CO-98-09; NOV-98-08; CO-98-08; NOV-98-07; CO-98-07; NOV-98-06; CO-98-06; NOV-98-01; CO-98-01 (July 24, 1998). In Reels of Skill, the Commission found that the game was one of chance and therefore a class III gaming device pursuant to NIGC regulations.<sup>17</sup>

As the devices subject to this Decision, Reels of Skill is similar in outward appearance to a traditional slot machine. The machine consists of a white cabinet with a video screen with nine (9) windows arranged in a 3 X 3 pattern, and has a dollar bill acceptor and a ticket printer which dispenses credits via a paper receipt. The front of the machine has a start/play points button and four "skill buttons" which are used to play the game, including a "hold all stop button," a "stop left" button, a "stop center" button, and a "stop right" button. There is a sequence of 27 icons of various shapes and colors (10 symbols, including a gold bell, a purple plum, a red cherry, a green watermelon) which appear in each of the nine (9) windows and when the game is in play they simulate three (3) rapidly spinning reels. The rate of simulated rotation is 1.5 seconds for completion of the 27 icon sequence through the window. The "all stop button" was intended to be used to stop the movement of the icons in all nine (9) windows simultaneously. Each of the other three (3) skill buttons was used to stop the icons located in the three window in one of the three (3) vertical rows or columns. Once the play is started the reels do not stop

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<sup>17</sup> The Tribe appealed this decision to the United States District Court for the District of Columbia but voluntarily dismissed their appeal after the Court denied their Motion for a Temporary Restraining Order. *Choctaw Nation of Oklahoma, et.al. v. Janet Reno, et.al.*, Civ No. 98-1862 (D.D.C. 1998).

spinning until the player pushes a button. On the left side of the screen is a menu indicating how the player may obtain “bonus” play on the machine. The player may wager on multiple lines (from 1 to 8 lines, including 3 horizontal, 3 vertical and 2 diagonal lines) and receives credits for lining up winning patterns of symbols on these lines and loses credits when the winning symbols do not line up in a winning pattern. The device also has a hold feature which can be utilized to “hold” two similar symbols in one line for replay during the next spin.

In the Reels of Skill decision, the Commission found that because the game exhibited features which were deemed indicia of an intent to design and manufacture a machine primarily intended for use in connection with gambling and that the game had an “anomaly”<sup>18</sup> found to exist in the Reels of Skill machines operated in Oklahoma, the machine was a game of chance. Based upon the physical evidence and the expert testimony, the Commission found that in the Reels of Skill machine, there is a substantial element of chance involved in the operation of the game even when played by the most skilled and experienced players.

**ANALYSIS – REEL GAMES INVOLVE A SUBSTANTIAL  
ELEMENT OF CHANCE**

We see no principled difference between the games at issue and the “Reels of Skill” game subject to an earlier Commission decision. The instant games involve icons spinning at a fast rate of speed and a player relying on chance rather than “skill” to obtain a winning combination.

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<sup>18</sup> The feature described as “anomaly” in the Reels of Skill game is referred to as “morphing” in the games at issue.

**1. The machines resemble gambling devices.**

First, the devices look and act like classic slot machines. The devices are housed in cabinets that are the same size as slot machines or other video gambling devices. The devices accept paper money. Further, the video screens on the devices have icons on the reels that rotate extremely quickly through the video window. Finally, if a player wins, he or she can redeem money.

The outward appearance of a device, though relevant, is not necessarily dispositive of the issue of whether it may be properly characterized as a gambling device. Further inquiry is needed to determine whether or not the successful play of such device involves a substantial element of chance.

**2. The machines exhibit “morphing” – an indicator of chance.**

Machine games of chance possess certain characteristics that when taken together with the outward appearance of the device will inevitably lead to a conclusion that a substantial element of chance is involved in order for a player to win the game. In this case, the machine games at issue possess a combination of characteristics that foreclose a determination that skill is a meaningful component in a win.

After reviewing the machines at issue in this case, Mr. Farley, the Chairman’s expert, noted that when a player “stops” the reels after either the initial spin or the respin, the reels do not follow the ongoing sequence of icons. Instead, there is a jump out of sequence. In other words, the icons can randomly change. Mr. Farley testified that this phenomenon that he called “morphing” can occur in two ways: a random number generator or a “lookup” table, where stop values were stored in memory and then recalled, producing the result. (TR 226-227, 289-291). Regardless of the source of the

“morphing”, ultimately this means that when a player pushes a stop button, the reels do not immediately come to a stop but instead, the reels continue to scroll through the video window. In those circumstances, the player has no control over the outcome of the game. The outcome of the game is thus unpredictable. We conclude that when morphing occurs, there is a substantial element of chance in the play of that game.

**3. The machines have fast spinning reels with a large number of icons that often lack a repeating sequence.**

Even without morphing, there is sufficient additional evidence in the record to indicate that there is a substantial element of chance in the operation of all of the games. Importantly, one must look at how the game is displayed on the video screen. While a game may have a small number of icons, for example eight or ten, these symbols are programmed in such a way that precludes a human from developing the skill of memorizing or deciphering the pattern of the icons, thus being able to predict the appropriate time to attempt to “stop” the games by touching the screen. The number and pattern of icons vary from game to game; however, all of the games had icons arranged in complicated pattern and were rotated on the video screen extremely quickly. For example, in Respin 777, the reel strips exceeded 400 symbols most of which did not follow any discernable sequence. In another example, the game Rainbow Reels had eight different icons in the reel rotation. In a sequence of over 380 icons, no repeating pattern could be identified. Chairman’s Exhibit C 4 and C 14; TR 48-53. Such an arrangement of the icons precludes a person from stopping on the precise icon he or she wants. Some players may have the illusion that he or she is selecting the icon; however, the player is left mostly, if not completely to chance.

**4. The machines have retention ratios – an indicator of chance.**

Additional evidence that proves a game is one of chance is whether that game has “retention ratios” or “award ratios”. These ratios indicate that the game has a predetermined outcome. If the games have a predetermined outcome, the machine is determining the outcome of the game, not the player. When “retention ratios” are being utilized, the player pressing the stop button for the reels is just telling the machine to display the result that it has already selected. TR 293-294. The game’s computer, not the player determines the result of the game. The evidence reflects that the following games have retention ratios: Lucky Cherries (Pirate’s Gold, Klondike, Funny Fruit, and Reel Fortune) and Rainbow Reels. TR 51-52, 284-309; Chairman’s Exhibits C 16, 17, 18 and 19.

**5. The machines have “all-stop” buttons.**

Another factor indicating that a game has substantial elements of chance is the presence of an “all-stop” button that brings all the reels to a stop with one push of a button. As in “Reels of Skill”, the “all-stop” button allows a player to stop one of the spinning reels but has no control over the other reels. This feature indicates that the player can play the machine without the application of any “skill” and have the result determined solely by the game itself. There remains an element of chance in when and how a player might win an individual game. The evidence reflects that Spin Ball Bonus, Triple Sevens, and four out of five of the games within Pot O Gold have “all stop” buttons. (TR 274, 275)

**6. The Tribe fails to contradict the expert testimony.**

Finally, when reviewing the record as a whole, it is important to point out that the Tribe offered no evidence that contradicts the testimony of gambling expert Mr. Sertell who observed each of the games and testified that the result of the games played on each device was through application of chance. TR 53 as to Rainbow Reels, TR 55-56 as to Fantasy Five, TR 56-59 as to Lucky Cherries, and TR 60-63 as to Pot O Gold. Further, no evidence contradicts Mr. Farley's reports and testimony that establishes that an application of chance likely controls the result in each game he reviewed and that each of the devices he evaluated is a gambling device. He testified that he was familiar with play of Rainbow Reels, Pot O Gold (including the games played thereon), and Lucky Cherries (including the games played thereon) from his review of videotapes made at the Tribe's gaming facilities and concluded that all games were entirely a game of chance. TR 259-305 and Chairman's Exhibits 14 – 19.

The Tribe's own report, dated October 3, 2001, authored by Mr. Snyder who reviewed the Pot O Gold and Lucky Cherries games which included eight games including: Re-Spin 777; Triple Sevens; Gold Row Bonus; Spinball Bonus; Reel of Fortune, Pirates Gold; Funny Fruit; and Klondike states that the outcome of spinning the wheels is one of "luck" or "hazard." Further evidencing the element of chance, the report states that the respin option available on the machines might result in a greater number of winning outcomes but that the stopping position of the spinning wheels on the respin is one of luck. Chairman's Exhibit C 23.

**7. Presiding Official erred in requiring source codes.**

The presiding official recommended that absent source codes, the Chairman did not prove that all of the devices were games of chance. While source codes provide

strong evidence as to how random number generation is manifested in each of the devices and knowledge of such may supplement an expert's opinion that the play of the games exhibits a substantial element of chance, the unavailability of the source code is not fatal, provided there is other evidence sufficient to establish by a preponderance that a particular device constitutes a game of chance. In fact, many other jurisdictions have relied on expert witness evaluation of game features in establishing that slot-machines-like devices were gambling devices under federal or state law without using source codes as evidence.<sup>19</sup>

### CONCLUSION

Consistent with the traditional standard of proof in administrative adjudications, the Chairman must prove his case by a "preponderance of the evidence". See *In the Matter of JPW Consultants, Inc.*, Docket Nos. NIGC 97-4, 98-8. The Chairman met this burden with respect to the Infinity group games because both the initial spin and the respin are the products of random generation or "chance," and the game's payoff can only be delivered "as the result of the application of the element of chance." Likewise, we conclude that the Chairman met his burden as to the Non-Infinity Group games. Not only do the games look and act like classic slot machines, the successful play of the

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<sup>19</sup> See *U. S. v 108 Electronic Gambling Devices* (U.S. D.C. W.D. of WA)(Case # 098-05321R) (*Order* directing seizure of 108 gaming devices from an Indian gaming facility). See also the following state court cases: *Cowboy's Lounge v James Hayes*, Circuit Court of Etowah County, Alabama (Case # CV-01-1142) *Order* dated March 22, 2002, finding various video slot machines to be gambling devices under Alabama law based on testimony of expert who had not evaluated source code; *State of Alabama v. \$1895 U.S. Currency and 32 Video Gambling Devices*, Circuit Court of Jefferson County, Alabama (Case # CV. 1999-7032) *Order* dated July 6, 2001, finding various video slot machines to be gambling devices under Alabama law; *Broward Vending v. State of Florida*, Florida Seventeenth Judicial Dist. (Case # 96-02816(13)); *State of Florida v. Slichter*, Florida Seventeenth Judicial Dist. (Case # 001797CF-10A).

games involves a substantial element of chance. Each of these games exhibit combinations of characteristics that are indicia of chance, including reels that morph, reels that spin rapidly, reels that contain a large number of icons that tend to blur, games that are predetermined and contain retention or award ratios, and devices that contain an all stop button. As a result, these machines cannot be characterized as amusement devices, but rather as Class III games of chance, prohibited in the absence of an approved tribal-state compact.



**NOTICE AND ORDER**

Please take notice that it is the decision of the National Indian Gaming Commission, by unanimous vote, that the games described herein are Class III gambling machines and that operation of the games constitute Class III gaming activity. Class III gaming activity on Indian lands is not lawful under 25 U.S.C. 2710(d) unless conducted in conformance with a tribal-state compact. Inasmuch that Appellant tribe does not have a compact with the State of Oklahoma that would permit operation of such gaming, such operation constitutes a violation of the Indian Gaming Regulatory Act.

**Now, therefore, the National Indian Gaming Commission orders:**

That Appellant shall cease and desist from operation of the games described herein, and the following orders of temporary closure issued by the Chairman of the National Indian Gaming Commission shall become permanent as of the date hereof:

CO-00-06 (Seminole Nation of Oklahoma)

CO-00-10 (Seminole Nation of Oklahoma)

FOR THE NATIONAL INDIAN GAMING COMMISSION

Date: May 7, 2002



Montie Deer  
Chairman



Elizabeth Homer  
Vice Chairman



Teresa Poust  
Commissioner