

NATIONAL
INDIAN
GAMING
COMMISSION

FEB - 2 1995

Steve M. Titla, Esquire
245 South Hill Street
P.O. Box 701
Globe, Arizona 85503

Dear Mr. Titla:

By letter dated May 6, 1994, you advised Lisa Hauser, formerly of the Arizona Gaming Commission, that the San Carlos Apache Tribe was interested in offering a class II card game called "Apache 21." In turn, Ms. Hauser wrote to the Chairman of the National Indian Gaming Commission (NIGC) on May 17, 1994, requesting that the NIGC determine whether "Apache 21" is a class II or class III game under the Indian Gaming Regulatory Act (IGRA). We apologize for the delay in our response.

"Apache 21", like "Arizona 21", is a player banked version of blackjack (21). In player banked blackjack (21), players are not playing against a house bank. They are, however, all playing against a player bank. The banker/player has the mathematical percentage advantage that the house would have in traditional blackjack. The tribal casino does not participate in, or have any interest in, the outcome of the game. The house makes money by collecting an ante from each player per hand. A player takes on the role of banker, collecting all losses and paying all winnings.

In blackjack (21), as traditionally played, the gaming enterprise (hereinafter the "house") acts as the bank or banker. Apparently, the Tribe is of the view that if the house is no longer the banker, the game is a nonbanking card game and thus falls within class II gaming. This argument is based on an interpretation of the NIGC definition of "class III gaming" read in conjunction with both the "house banking" definition and the preamble to the NIGC definition regulations.

All banking card games, including three which are specifically enumerated, are excluded from class II gaming in the IGRA. Specifically identified card games are baccarat, chemin de fer, and blackjack (21). See 25 U.S.C. § 2703(7)(B)(i). Baccarat and blackjack (21) are house banked card games, whereas chemin de fer is a player banked version of baccarat.

games. See 25 C.F.R. § 502.3(c). Class III games are defined as all games which are not class I or class II and includes house banked baccarat, chemin de fer, and blackjack (21). See 25 C.F.R. § 502.4.

Baccarat and chemin de fer are the games most often played for high stakes in the French casinos. See John Scarne, Scarne's New Complete Guide to Gambling 459 (1986). "Regardless of where it is played and what it is called, baccarat is essentially the same simple card game. The major differences are in who deals the cards and who bets against whom." Albert H. Morehead, et al, The New Complete Hoyle 541 (1991). Baccarat is traditionally a house banked game as played in most major casinos in Europe, Latin America, Nevada, and New Jersey. Scarne at 459; Hoyle at 541. The bank has an advantage of 1.34%. Id.; Scarne at 473. A 5% commission is extracted from winning bets to pay the house. Id. at 542; Scarne at 473. The house deals. Id. There are different versions of baccarat, of which chemin de fer is one. Hoyle at 547. The rules and objectives are virtually the same as baccarat, with the exception that the right to bank moves from player to player. Scarne at 460; Hoyle at 547. Therefore, the advantage also moves from player to player. The house makes money by taking a 5% commission on the player banked winning hand. Scarne at 560; Hoyle at 548.

Blackjack is a house banked game, and the house has a considerable mathematical advantage of roughly 5.8%. Hoyle at 513; Scarne at 366.

Banking card games are classified as class III in the IGRA. The IGRA states that "[t]he term class II gaming does not include any banking card games, including baccarat, chemin de fer, or blackjack (21) ..." 25 U.S.C. § 2703(7)(B)(i). The term class III gaming means "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8).

By excluding banking card games from class II gaming, the only card games Congress intended to fall within class II are nonbanking card games. As was previously discussed, chemin de fer is a player banked game, whereas baccarat and blackjack (21) are house banked games. Therefore, by enumerating these specific card games, Congress clearly intended to exclude both player and house banked games from class II gaming.

Because the statutory language is clear and unambiguous, there is no need to look to the legislative history of the IGRA. United States v. Taylor, 487 U.S. 326, 344-346 (1988). However, assuming arguendo that the IGRA is ambiguous, the legislative history does not support a definition of banking limited to house banking games.

The Senate Report on S.555 explained the Committee's

understanding of nonbanking card games as follows:

Section 4(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games

S. Rep. No. 446, 100th Cong. 2d Sess. 9 (1988).

The above-quoted passage of the Senate Report focuses on what constitutes nonbanking card games and makes clear that only nonbanking card games fall within class II gaming. Thus, the Senate Report states: "Section 4(8)(A)(ii) provides that certain card games [nonbanking] are regulated as class II games, with the rest set apart and defined as class III games...." *Id.* (emphasis added). The reference to house banking games is illustrative only; it is an example of a category of banking card games that fall within class III gaming. The Senate Report neither states nor suggests that the example mentioned in the above-quoted passage, *i.e.*, card games where players are playing against the house and the house acts as banker, is the only type of card games that constitute a banking game.

A similar argument in the context of electronic facsimiles was rejected by the court of appeals in Cabazon Band of Mission Indians v. National Indian Gaming Commission, 14 F.3d 633 (D.C. Cir. 1994). There, the tribes argued that a passage in the Committee Report on the use of permissible communications technology in class II was intended to limit the meaning of electronic facsimile. "In other words, such technology would merely broaden the potential participation levels and is 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." S. Rep. No. 446 at 9. The court of appeals rejected this argument stating:

But the Tribes are wrong to suppose that the example mentioned in this passage must be the only type of electronic copies Congress meant to include under § 2703(7)(B)(ii). The Report says nothing of the sort and neither does the statute. An illustration given in one sentence of a committee report scarcely excludes the possibility of other examples. Still less does it, rather than the language of the statute, express the will of Congress.

14 F.3d at 637. As in Cabazon, the will of Congress on the meaning of "banking" is expressed in the language of the statute which clearly includes both house and player banked card games.

In the view of the Committee, non-banking card games are games where players play against each other. The game of poker would be the typical example. It has been asserted that in player banked blackjack, players are playing against each other. This is simply wrong. In player banked blackjack, the players are not playing against each other. They are playing against a banker who happens to be another player. This player banker has a percentage or odds advantage over all other players. This advantage is a fundamental characteristic of a banking game.

Congress excluded from class II gaming banking card games and slot machines because it believed such games required more stringent regulation. The Senate Report states that "[t]he Committee's intent in this instance is to acknowledge the important difference in regulation that [banking card] games and machines require and to acknowledge that a tribal-State compact for regulation of such games is preferable to Commission regulation." S. Rep. No. 446 at 10.

The tribes offering player banked card games find support for their argument that such games fall within class II gaming in the regulations of the NIGC. Although unintended, the NIGC definitions of "class II gaming" and "house banking" as they pertain to card games may be confusing and misleading.

"House banking" is defined in the NIGC regulations to mean "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. The NIGC believed that definition adopted the commonly understood format for playing a banking card game. The NIGC simply did not envision the playing of blackjack in a player banked format. Moreover, at that time, the NIGC was not aware that chemin de fer is a player banked version of baccarat. Thus, the "house banking game" definition erroneously suggests that player banked card games are not banking games.

The NIGC definition of "class III gaming" compounds the confusion. The NIGC's definition of class III gaming reads in pertinent part:

all forms of gaming that are not class I gaming or class II gaming, including but not limited to (a) any house banking game, including but not limited to (1) card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games)...

25 C.F.R. § 502.4. The parenthetical incorrectly suggests that

the enumerated games fall outside of class III gaming if played in a non-house banking format. Even if intentional, the NIGC, of course, cannot by regulation include games within class II that IGRA specifically excludes from class II gaming. The NIGC intends to propose amendments to the definition regulations to clarify the regulations consistent with the intent of Congress with respect to banking games.

Thank you for your interest in this matter. If you have any questions, please do not hesitate to contact Michael Cox, General Counsel, at (202) 632-7003.

Sincerely,

A handwritten signature in cursive script, appearing to read "H.A. Monteau".

Harold A. Monteau
Chairman

cc: San Carlos Apache Tribal Gaming Commission
Arizona State Gaming Commission