



NOV 30 2004

Rachel Romo, Chairperson
Tribal Gaming Commission
Kickapoo Traditional Tribe of Texas
Rt. 1, Box 9748
Eagle Pass, TX 78852

Re: Kickapoo Lucky Eagle Casino K-21 (Blackjack)

Dear Chairperson Romo:

This responds to your letter dated January 28, 2004, requesting an advisory game classification opinion for Kickapoo Lucky Eagle Casino K-21 (Blackjack). You enclosed a copy of the applicable rules and procedures for the game with your letter. On October 28, 2004, we received a letter from Attorney Joseph Webster presenting a legal argument for play of K-21 Blackjack as a Class II game under the Indian Gaming Regulatory Act (IGRA). After careful consideration of these materials we conclude that K-21 Blackjack is not a Class II game under IGRA and National Indian Gaming Commission (NIGC) regulations but is a Class III gaming activity to be played, if at all, pursuant to a Tribal-State Compact, or Procedures issued by the Secretary of the Interior in lieu of such a compact.

Game Description

In K-21 Blackjack, players buy chips from a cashier or the dealer and place bets on individual hands using the chips. Each player also pays an "ante" to the house based on the amount wagered (\$.50 per each 25.00 bet or part thereof). The house keeps the ante to cover its expenses. Players compete against the dealer's hand. Players beat the dealer by forming a hand that totals 21, or as close to 21 without going over. If a player beats the dealer he is awarded an amount of chips equal to the amount risked with a higher payout for obtaining a "Kickapoo 21" blackjack. If a player loses the bet or "busts" that amount is removed from his betting area and placed in the dealer rack. Every hand results in either a win for the player or a win for the dealer. The dealer pays each winning hand. According to Mr. Webster's letter, certain hands obtained by a player may result in additional prizes, such as obtaining a score of 21 with three 7s. A winning player may redeem chips for their designated cash value from the cashier. The rules of this blackjack game are fundamentally the same as traditional blackjack. See Walter B Gibson, *Hoyle's Modern Encyclopedia of Card Games* (1974) 32-35, 371. See also

Richard L. Frey, *According to Hoyle*, 205-206 (1970)(setting forth rules for blackjack or “21”).

The casino attempts to separate itself from the game by including a statement in the rules for the game that “the Kickapoo Lucky Eagle Casino does not participate in the actual play of the game and has no interest in the outcome of the play. No player(s) ever play against or makes a wager against the Kickapoo Lucky Eagle Casino.” All wins and losses for Kickapoo 21 are distributed through the Kickapoo 21 Player Promotional Fund. However, this is an account owned and maintained by the tribal casino.

Statutes and Regulations

The Indian Gaming Regulatory Act (IGRA) creates three classes of gaming, each of which is regulated with a different 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 card games. 25 U.S.C. § 2703(7)(A). Class III gaming is defined residually; it includes “all forms of gaming that are not class I gaming or class II gaming.” 25 U.S.C. § 2703(8).

We are asked to determine whether the K-21 Blackjack game meets the definition of Class II gaming.¹ Accordingly, we focus on specific provisions in the definition. Under 25 U.S.C. § 2703(7)(A), class II gaming includes only those 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.

25 U.S.C. § 2703(7)(A)(ii). In addition, the term “class II gaming” explicitly does not include “any banking card games, including baccarat, chemin de fer, or blackjack (21)[.]” 25 U.S.C. § 2703(7)(B)(i).

NIGC Regulations track the statutory definitions. The Commission defines Class II gaming to include:

¹ This game does not meet the definition of Class I gaming because it is neither a social game played for prizes of minimal value, nor a traditional form of Indian gaming engaged in as part of a tribal ceremony.

(c) Nonbanking card games that

(1) State law explicitly authorizes, or does not explicitly prohibit, and are played legally anywhere in the state; and

(2) Players play in conformity with state laws and regulations concerning hours, periods of operation, and limitations on wagers and pot sizes.

25 C.F.R. § 502.3. Commission regulations define Class III gaming to include:

(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);

(2) Casino games such as roulette, craps, and keno;

25 C.F.R. § 502.4

Finally, the NIGC regulations define a “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.

Discussion

We do not determine whether K-21 Blackjack is explicitly authorized by Texas State law or not explicitly prohibited and played legally in the State.² Rather we conclude that because K-21 Blackjack is a banking card game, it cannot meet the definition of Class II gaming established by IGRA and NIGC regulatory provisions.

² Even if it were not a banked card game, the K-21 Blackjack game may fail to satisfy the criteria set out in IGRA for permissible class II gaming. As stated above, a card game may be classified as Class II only if it is either explicitly authorized by the state, or it is not explicitly prohibited and played legally somewhere in the state. Section 47.02 of the Texas Penal Code expressly provides that a person commits a criminal offense if he “plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.” Exceptions for gaming conducted as a “carnival contest” under Section 47.01(1)(C) or in a “private place” under Section 47.01(8) do not necessarily mean that the game is not expressly prohibited and played lawfully in the State. K-21 Blackjack awards money as a prize not “merchandise, with a value less than \$25” as contemplated by the “carnival contest” exception. Furthermore, the Lucky Eagle Casino cannot meet the definition of “private place,” as that term is defined. The Secretary of the Interior, through her Office of the Solicitor, is considering similar questions related to the scope of gaming that might be allowed based on the Tribe’s pending request for Class III Gaming Procedures in lieu of a tribal-state compact

As previously noted, the K-21 Blackjack game is fundamentally identical to traditional blackjack. Each player plays individually against the dealer only. Players do not play against each other. The object of the game is to beat the dealer's hand without exceeding twenty-one. A hand of K-21 Blackjack, which is an initial deal of an ace and a card valued at ten, is an automatic winner unless the dealer obtains a similar hand. Like traditional blackjack, "[e]ach player bets only with the dealer" or the house which is the banker. See Albert H. Morehead, Richard L. Frey, Geoffrey Mott-Smith, *The New Complete Hoyle Revised*, 492 (1991). The house, through its dealer takes on all players; players do not compete against one another.

The Kickapoo 21 Player Promotional Fund, used as a daily depository for amounts won in the blackjack game by the house and the source of funds for prizes paid to players, does not serve to remove the game from being considered a banking card game or, using the NIGC regulatory definitions, a house-banking game. In fact, this fund is the bank. The Casino established and initially seeded the fund and maintains exclusive control of the fund at all times. It controls all disbursements to and from the fund. Players have no voice in distribution of funds other than to claim an individual win. If the fund is depleted, the Casino will "lend" money to the fund on the condition that the loan will be repaid. While Mr. Webster's letter asserts that the Casino is under no obligation to see that players in the game are paid, in practice the Casino would find it difficult if not impossible to tell a winning player that his win would not be paid because the fund was out of money. The fund is an accounting mechanism without legal significance in the determination of whether the game is considered Class II. The fund is banking the game by participating in the game through its dealer, paying all winners, collecting from all losers, and having an interest in the outcome of the game. If the player loses, the "fund" wins.

The common thread in Class II card games is that players participate against each other and not against the house. Poker is an example. The house provides the cards and may employ a dealer to distribute the cards, but the dealer does not play a hand. The only participants are the players. In blackjack, including K-21 Blackjack, the dealer is a participant: she wins or loses each game against each player. Players at the table do not play for a better hand than that held by another player. They play only to obtain a better hand than the dealer. K-21 Blackjack remains a house-banking game, even though the house may employ a creative accounting tool in an attempt to show otherwise.

This analysis finds support in the legislative history for IGRA. The Senate Report on S.555 which became IGRA explained the difference between banking and non-banking card games:

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) [codified as 25 U.S.C § 2710(d)]. The

Rachel Romo, Tribal Gaming Commission Chairperson
Re: Kickapoo Lucky Eagle Casino K-21 (Blackjack)
Page 5 of 5

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, and are subject to the regulatory provisions pursuant to section 11(a)(2) [codified as 25 U.S.C. § 2710(a)(2)].

S. Rep. No. 446, 100th Cong. 2d Sess. 9 (1988) (emphasis added). This passage of the Committee Report is instructive in understanding what the Committee meant by "non-banking." In the view of the Committee, non-banking card games are games where players play against each other. As noted above, the game of poker would be the typical example.

Conclusion

We conclude that Kickapoo 21 Blackjack as described in the material presented to us does not qualify as Class II gaming under IGRA. Play should be suspended immediately. Please contact our Region V office for further discussions on a process to dissolve the player Kickapoo 21 Player Promotional Fund, if assistance is required.

IGRA requires that tribes operate Class III games under a tribal-state compact or Class III Procedures issued by the Secretary of the Interior in lieu of a compact. In the absence of a compact or Secretarial Procedures, tribes may operate only Class I or Class II games. At this time, we do not present an opinion on whether or not the game would fit within the permissible scope of gaming under a compact with the State of Texas or under Secretarial Procedures issued in lieu of a compact.

Finally, Mr. Webster's letter indicated that the Tribe would like to meet with us if we concluded the game is Class III. If you would still like to meet with us, please contact Senior Attorney Bill Grant to arrange a meeting.

Sincerely,



Penny J. Coleman
Acting General Counsel

Cc:
Joseph Webster, Esq.