

MAR 23 1998

Philip Shea, Esq.
Shea & Wilks
200 Wells Fargo Plaza
100 W. Washington Street
Phoenix, AZ 85003-1805

Dear Mr. Shea:

This letter responds to your inquiry as to whether the National Indian Gaming Commission regards non-banked poker games in Arizona as Class II card games under the Indian Gaming Regulatory Act (IGRA). For the reasons outlined below, I conclude that non-banked poker games are Class II card games and therefore subject to tribal and federal regulation only.

I understand that disagreement has arisen in Arizona between gaming tribes and the Arizona Department of Gaming (Department). The Department asserts that poker games played at Arizona reservations are illegal as operated inasmuch as they constitute gambling operated as a "business for benefit" contrary to Arizona law. The Department argues that because Tribal poker games do not comply with this provision of Arizona's gambling laws, that such noncompliance transforms poker into a Class III game that is lawful only if operated pursuant to a tribal-state compact. The Department does not argue that the card games are banked card games, nor does the Department assert that the games are being played contrary to State laws regarding hours or periods of operation or limitations on wagers or pot sizes.

The IGRA provides that Indian tribes have jurisdiction over Class II gaming, subject to oversight regulation by the NIGC. Pursuant to the IGRA, Class II gaming includes non-banking card games, such as poker, if such card games:

(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).

The issue of whether the "business for benefit" provision of state law applies to Indian

tribes in Arizona raises the question of the extent to which the IGRA assimilates state law. It is our view that the IGRA preempts the application of all State law operating requirements save for those specified in the statute---pot size, hours, and wagers. The principle which applies to the issue is that enunciated by the court in United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, (8th Cir. 1990):

“we believe that the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state merely regulated, as opposed to completely barred, that particular gaming activity.”

Id. At 365. Thus the classification of poker depends on whether the game is explicitly authorized or not explicitly prohibited by the laws of Arizona.

Gambling in Arizona is governed by the statutes at Chapter 33, Title 13, Arizona Revised Statutes, §§13-3301 through 13-3312. Arizona permits gambling under several circumstances, such as social, regulated, and charitable gambling. A.R.S. §13-3302. Section 13-3304 prohibits “benefitting from gambling,” but excepts from its provisions “amusement or regulated gambling,” and provides that “benefitting from social gambling as a player is not unlawful under this section.” Section 13-3303 makes it a crime to promote gambling, but excepts from its provisions activities associated with “amusement, regulated, or social gambling.” Neither poker nor any other card game is mentioned in the Arizona statutes. In fact, the statutes do not identify any particular forms of gambling; instead they are aimed at regulating the circumstances under which gambling may legally occur in Arizona. Poker is, therefore, permitted in Arizona.

The next step in the analysis is to determine whether poker is “played at any location in the State,” pursuant to 25 U.S.C. § 2703(7) (A)(ii). Because poker is “not explicitly prohibited by the laws of the State,” poker is a class II game if it is played at any location in the state, subject to limits on hours or periods of operation and wagers or pot sizes. The Gila River Indian Community submitted ample evidence to show that poker is played in Arizona. Such evidence consists primarily of advertisements for charity functions at which poker games were offered, as well as an affidavit from a private investigator who witnessed poker tables at several events around the State. Importantly, The Department does not disagree that poker is played lawfully in the State of Arizona.

The only remaining consideration is whether poker is being “played in conformity with the 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). As indicated above, card games are not specifically mentioned in Arizona’s gambling statutes. There are, therefore, no laws or regulations governing the limitations referred to in the IGRA.

As pointed out by the court in the Sisseton decision, the legislative history of IGRA supports this view, and reveals a Congressional intent to authorize only specific limited state law restrictions on Class II card games. The Senate Report accompanying the bill ultimately enacted as the IGRA, S. 555, discusses the section which requires non-banking card games to conform

with state regulations on periods of operation and wagers or pot sizes:

Subparagraphs (I) and (II) [of 25 U.S.C. § 2703(7)(A)(ii)] are to be read in conjunction with [25 U.S.C. §2710] sections (a)(2) [which provides that class II gaming shall be within the jurisdiction of the Indian tribes] and (b)(1)(A) [which provides that an Indian tribe may engage in class II gaming if it is located within a State that permits such gaming for any purpose] to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs. The Committee notes that, while existing law does not require that Indian card games conform with State law, it agreed to adoption of bill language to provide that these card games 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 card games.

S.Rep. No. 446, 100th Cong., 2nd Sess. at 9 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3079. (Emphasis added). Furthermore, the Senate Report states that:

Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission; card games must be played under state-mandated hour and pot limits, if any.

S.Rep., *supra* at 7. Thus, Congress intended that non-banking card games did not have to conform with state law requirements other than those expressly stated. As long as the card games are explicitly authorized or not explicitly prohibited by the laws of the state, tribes may operate them, subject to the limits on hours and periods of operation, and wagers and pot sizes.

Therefore, because poker is a class II game in Arizona, I conclude that tribes may operate poker subject to Tribal and NIGC regulation and any State regulation concerning hours or periods of operation and pot and wager sizes.

Sincerely,



Penny Coleman
Acting General Counsel

cc: Chairman William Antone, Ak-Chin Indian Community
Chairman Gilbert Jones, Sr., Fort McDowell Mohave-Apache Indian Community
Chairman Benito Valencia, Pascua Yaqui Tribe
Chairman Edward Manuel, Tohono O'odham Nation
Chairman David Kwail, Camp Verde Yavapai-Apache
Chairwoman Vivian Burdette, Tonto Apache Tribe
President Stan Rice, Jr., Yavapai-Prescott Indian Tribe
Chairman Raymond Stanley, San Carlos Apache Tribe
Chairman Ronnie Lupe, White Mountain Apache Tribe
Governor Mary V. Thomas, Gila River Indian Community
President Ivan Makil, Salt River Pima-Maricopa Indian Community
Gary Husk, Director, Arizona Department of Gaming
Arizona Governor Jane D. Hull
Eric Dahlstrom, Esq., Rothstein, Donatelli, Hughes, Dahlstrom, Cron and Schoenberg
Heidi McNeil, Esq., Snell & Wilmer
Janet A. Napolitano, United States Attorney
John Kelly, United States Attorney
Kevin DiGregory, Department of Justice
Jim Simon, Department of Justice