OGCRF

National Indian Gaming Commission

NOTICE OF DECISION AND ORDER

In the Matter of the Cherokee Nation of Oklahoma
NOV/CO-5-99
Docket Nos. NIGC 99-1

Cherokee Nation – Appellant

INTRODUCTION

The primary question before the National Indian Gaming Commission (NIGC) is whether machine game Reels and Deals offered for play at the Cherokee Nation facilities located within the boundaries of the State of Oklahoma is an amusement game of skill or a gambling device. If, as Appellant contends, the game is merely an amusement device, it would not fall within the ambit of the Indian Gaming Regulatory Act. If, on the other hand, the game constitutes a gambling device, as the Chairman contends, its play is prohibited in the absence of a valid tribal-state compact.

Two other issues were raised and addressed by the Hearing Officer. The first concerned a request by the manufacturer of the game Reels and Deals to be granted status as an Intervenor. The second issue concerns the standard of proof applicable to Commission proceedings, the Appellant urging a "clear and convincing" standard as opposed to the "preponderance of the evidence" standard customarily applicable in administrative proceedings.

Having considered the record and all of the facts in evidence in light of applicable case law and precedent, the Commission, by majority decision, hereby accepts the recommendations of the Presiding Official on all three issues, affirming the Chairman's

Notice of Violation and making permanent the Chairman's Closure Order, NOV/CO-5-99, with the Chairman concurring in the result.

BACKGROUND

In 1998, the NIGC began an investigation of various games operated by a number of Oklahoma Indian tribes, including the Cherokee Nation of Oklahoma (Tribe), the Comanche Indian Tribe, the Choctaw Nation of Oklahoma, the Ponca Tribe of Oklahoma, and the Kiowa Tribe of Oklahoma.

In January of 1999, the NIGC issued a cautionary letter to the tribes, informing them of its conclusion that certain games, including Version I of a game called Reels and Deals, were Class III gambling devices being offered for play without tribal-state compacts in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA).

On February 8, 1999, the Cherokee Nation notified the NIGC in writing of its determination to offer a modified version of Reels and Deels to customers. The Tribe advised it had determined the modified version was not subject to the IGRA because it was an amusement device requiring significant skill before awarding credits or prizes.

From mid-February through mid-May 1999, the parties negotiated terms of an agreed procedural stipulation. (Agency Record, Exhibit 8). Pursuant to the Stipulation, parties agreed on what was intended to be an orderly NIGC administrative process for resolving the dispute between the Chairman and the tribes regarding play of the devices. The stipulation was implemented as follows: (a) The Chairman issued an Order of Temporary Closure to Respondent on July 8, 1999, directing it to discontinue play of Reels and Deals in its facilities pursuant to 25 C.F.R. § 573.6; (b) The Cherokee Nation

appealed the Order to the NIGC pursuant to 25 C.F.R. §§ 577.1 and 577.3; (c) The Chairman stayed the Order of Temporary Closure pending the outcome of the hearing on appeal and decision by the NIGC; (d) The Respondent continued to operate these games pursuant to the procedural stipulation; and (e) The hearing process went forward.

During extensive pre-hearing proceedings, all respondent tribes except the Cherokee Nation withdrew its appeal. Earlier procedural decisions left attorneys James Trucks and Candace Stewart-McGee in the position of representing the Ponca Tribe while serving as *amicus curia* on behalf of Reels & Deals, Inc. These attorneys requested that Reel & Deals, Inc. be recognized as an Intervenor. Relying on a decision of a previous Presiding Official, this request was denied.

A two-week hearing was conducted at Tulsa, Oklahoma, beginning January 14, 2002. Post-hearing materials were received from the Commission Chairman, the Cherokee Nation, and game manufacturer, Reels & Deals, Inc., filing as *amicus curiae*.

ISSUES BEFORE THE COMMISSION

This matter comes to the full Commission on appeal from the recommended decision of the hearing officer upholding the Chairman's enforcement action on the grounds that the game in question, Reels and Deals, is not a game of skill as asserted by the Appellant, and thus outside the ambit of the IGRA, but is, in fact, a Class III game of chance prohibited by IGRA absent an approved tribal-state gaming compact. Two other collateral issues were raised during the proceeding and addressed by the hearing officer. The first concerned a request by the manufacturer of the game Reels and Deals to be granted status as an Intervenor. The second issue concerns the standard of proof applicable to Commission proceedings, the Appellant urging a "clear and convincing"

standard as opposed to the "preponderance of the evidence" standard customarily applicable in administrative proceedings.

FACTS

The facts of this matter are largely undisputed and well summarized by the hearing officer in the text of the recommended decision. Briefly stated, the Appellant, Cherokee Nation, at some point prior to January 1, 1999, began offering the machine game Reels and Deals at its gaming facility on tribal lands located within the boundaries of the State of Oklahoma on the theory that the game was one of skill not chance, and thus not subject to the IGRA. By stipulation, the Parties agree that no tribal-state compact is in place authorizing the play of Class III gaming devices and that the elements of reward and consideration are not at issue.[1]

The machine game Reels and Deals is described in substantial detail in the Hearing Officer's Recommended Decision.[2] Neither party challenges the accuracy of the Hearing Officer's description of the game, which we summarize in relevant part in the following section.

DESCRIPTION OF THE GAME

Reels and Deals is housed in an upright cabinet similar in appearance to that of a Las Vegas-type slot machine. The interior components are secured from non-authorized persons with locks on the main service door and on the secondary access door. The game's playing field is displayed within a graphic window of the monitor. The window displays video images by graphically simulating three horizontal spinning reels that stop on one horizontal pay line to determine the results of play.

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[1] Agency Record, Exhibit 8; Recommended Decision, Page 3.
[2] Recommended Decision, page 18.

To play the game, a player inserts money into the bill acceptor located on the front of the machines. The bill acceptor receives $1, $5, $10, and $20 bills. The money is accounted for as credits available to participants to play one or more games. To play, participants must first press either the "PLAY ONE" or "MAX PLAY" button to play one to ten credits. After credit(s) are applied, the player may depress the "SPIN" (kick off) button to begin play.

Once engaged, the three reels begin simulating a vertical rotation or "spin." Each reel continues to spin until the participant pushes the STOP button associated with that particular reel at which time the spin stops immediately on an icon. Each reel strip contains the same number of icons and each rotates at a constant speed although the sequence of the icons on each is different.[3] The player may depress any of the three STOP buttons in any order.

To win, the device must display a winning combination or stop on a specially designated icon.[4] Credits may be accumulated throughout the duration of play. When a player elects to discontinue play, any accumulated credits may be converted into tickets or the device records remaining credits on a receipt that can be redeemed for cash at the gaming facility. Anytime a player elects to "cash-out" some or all available credits, the credits recorded in the device are reduced correspondingly. When winnings are

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[3] On June 11 and 12, 2001, the parties entered into two separate protective stipulations and orders agreeing not to disclose specific information that was deemed to contain sensitive, valuable, proprietary data of the manufacturer and other detailed analysis. Arguably, the speed and number of icons might be included within the information to be protected. Without making an independent determination regarding whether that information should be withheld, we chose to refrain from disclosing the specifics in our decision.

[4] The object of the game is to align three like icons, or a combination of like icons an/or "wild" icons, on the pay-line. Other pay-line combinations, such as selection of even one wild icon, also yield winning results.

redeemed in excess of 12,000 credits, the game will "lock up," requiring an attendant to reset the game and manually pay the prize to the player.

Reels and Deals contains no random number generator or time-out feature programmed into the hardware or software of the device. Each reel spins independently of the other two, thus the player controls the stopping point as well as the amount of time each reel will spin and the length of time between stops. The game has no knock-off meter. Multiple games are not found in the game's software. Reel and Deals has no retention control feature.

ANALYSIS

1. Whether the Reels and Deals Game is one of Chance or Amusement

Appellant contends that the machine game Reels and Deals is not a gambling device, but rather constitutes an amusement device not subject to the provisions of the Indian Gaming Regulatory Act. Were this contention to be deemed correct, the result would be twofold. First, the game would fall outside the scope of IGRA. Second, Appellant would be free to offer the game for play at its gaming facility without first executing a tribal-state compact, in this case with the State of Oklahoma.

The law governing gaming activities on Indian lands is set forth in the Indian Gaming Regulatory Act of 1988[5] and the Commission's regulations adopted pursuant to the Act.[6] The Act divides Indian gaming into three categories with significant legal distinctions adhering to each class. Class I games, for example, are within the exclusive regulatory jurisdiction of tribal governments and include social games conducted solely

[5] 25 U.S.C. §§ 2701 *et. seq.* See also, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[6] 25 C.F.R. Part 502

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.[7]

Class II games include bingo and games similar to bingo as well as card games that are explicitly authorized by laws of the State or those not explicitly prohibited by the laws of a State are played at any location in the State.[8] House banked card games, electronic or electromechanical facsimiles of any game of chance, and slot machines of any kind are specifically excluded from Class II and, thus, fall into the third category.[9]

Class III gaming includes all forms of gaming that do not fall under either Class I or II.[10] This, obviously, includes those games specifically excluded from Class II designation in the Act, as well as games typically associated with full-scale casino-style gambling.[11]

In exercising enforcement authority in this matter, the Chairman determined that the game Reels and Deals constitutes a Class III gambling device. If Reels and Deals indeed is a gambling device, the Chairman's enforcement action is well within the Commission's enforcement jurisdiction since no tribal-state compact authorizing the play of the game is in place.

In order to classify a machine game as a gambling device, three elements must be present: chance, consideration, and reward.[12] These elements are historically well-

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[7] 25 U.S.C. § 2703(6)
[8] 25 U.S.C. §2703(7)
[9] *Id.*
[10] 25 U.S.C. § 2703(8)
[11] 25 C.F.R. § 502.4(b)
[12] 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, ie: whether the elements of the game include consideration, chance, and reward.

established in case law and statutorily embodied in the Johnson Act, a criminal statute enacted in 1951.[13] In order to determine whether play of the Reels and Deals constitutes gambling in the first instance, it is instructive to review the elements set forth in the Johnson Act.[14] The Johnson Act basically contains a two-prong test. First, was the device designed and manufactured primarily for use in connection with gambling, and second, does the device fall within one of two possible categories with regard to its operation. Since Reels and Deals does not dispense money or property, but rather tickets or a paper receipt redeemable for a prize, the second part of the analysis would fall under sub-section (B) of the Act: is it a device (designed primarily for gambling) that 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]

For purposes of this analysis, we dispense with any further discussion of the reward and consideration elements. Both parties have agreed that the relevant element in this matter is that of chance. Appellant urges that the Reels and Deals game is one of skill or amusement and not a gambling device.

The Commission has deliberated on a number of cases involving games offered on the same grounds as those offered here. In the Reels of Skill decision, the Commission adopted an approach used by the Federal District Court for the Western District of Pennsylvania, which held that in determining if a game has a substantial

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[13] The Johnson Act defines a gambling device as: [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.

[14] 15 U.S.C. § 1171(a)(2)

[15] See, *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.*

element of chance, it must first be determined whether the device in question is designed and manufactured primarily for use in connection with gambling.[16] The court noted that the first step is the examination of the objective physical and functional characteristics of the device.[17]

In applying this analytical approach in a previous decision involving a game called Reels of Skill, the Commission found the game to be one of chance.[18] The outward appearance of this game was similar to that of a slot machine. The game was contained in a closed cabinet box with a video monitor which, when operated, simulated spinning reels similar to those on a slot machine. As with a slot machine, the reels contained various icons. There were buttons on the machine that when depressed stopped the rotation of the reels. If, upon stopping, the icons aligned in a winning combination, the player would be entitled to a prize. Since courts have held that appearance is indicative of the intent prong of the analysis, the next question was whether the game involved a substantial element of chance. Among the important factors in the Reels of Skill device was the presence of an "anomaly"[19] that introduced a substantial element of

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[16] *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).

[17] 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) affd' 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).

[18] 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).

[19] The feature described as "anomaly" in the Reels of Skill game is referred to as "morphing" in the Seminole Commission Decision. This describes a feature in which the icon changes into a different icon after the play has stopped.

chance into its play sufficient to foreclose any meaningful possibility that skill was a determinative factor in the outcome of the game.[20]

Most recently, the Commission reviewed a matter involving numerous machine devices offered for play at a tribal gaming facility on the theory that each constituted mere were amusement devices.[21] The Commission found that none of the games subject to review in the Seminole matter could be characterized as amusement devices: all constituted Class III games of chance.[22]

Again, the Commission first considered the outward appearance of the games to determine whether the intent element was sufficiently present to trigger the second prong of the analysis. Each game both looked and operated with enough similarity to a classic slot machine to proceed to the second prong of the analysis. As with the Reels of Skill game, each of the games in question exhibited at least one or more features that introduced a substantial element of chance in the play of the games sufficient to foreclose any meaningful possibility that skill was a determinative factor in the outcome of the game. These included features such as the presence of random number generators, reels that morph, reels with exceedingly rapid spin, reels that continue to spin after the stop button is depressed, predetermined retention or award ratios, all stop buttons, inconsistent spin rates, distorting icons, and non-repeating icon patterns, among others.[23]

The Reels and Deals device, however, differs substantially from the machine games at issue in the two previous Commission decisions discussed above and presents a

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[20] 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).

[21] See Notice of Decision and Order in the Matter of: Seminole Nation of Oklahoma, NOV-00-06; CO-00-06; NOV-00-10; CO-00-10; (May, 7 2002).

[22] *Id.* at 24

[23] *Id.*

much closer question as to its proper characterization. As set out previously in the description of the game, the Reels and Deals game has the outward appearance of a slot machine analogous to the games in previous Commission decisions. Simply put the device looks and operates in a manner strikingly similar to that of a classic slot machine. As emphasized in the Seminole decision, however, outward appearance in itself is not determinative of whether the machine game constitutes a gambling device. To fall within the definition of gambling device, the chance element must be satisfied.

The Fourth Circuit has held that where a substantial element of chance is involved in the play of a game, the device falls within the Johnson Act definition.[24] In most cases involving machines games, the call is not close as the standard is not particularly high. The federal courts have ruled that the expression "by application of the element of chance" does not require that the element of chance predominate over the element of skill.[25] Another court held that where a substantial element of chance is involved, the fact that skill in operating the particular machine is helpful in attaining the end sought and does not take the machine out of the type defined by the Johnson Act. [26]

Unlike other so-called skill or amusement devices that have come to the attention of the Commission, Reels and Deals, while similar in appearance, does not exhibit many of the characteristics that we have previously held to be strong indicators of chance. Perhaps most significantly, Reels and Deals does not have a random number generator. This factor alone presents a significant difference between the game and most slot machines. Moreover, neither a retention or award ratio is programmed into either hardware or software of the device nor is there a time-out feature. It is also notable that

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[24] *U.S. v. 20 Dealer's Choice Machines*, 483 F.2d 474 (4th Cir. 1973)
[25] *Tooley v. United* States, 134 F. Supp. 162, 167 (D. Nev. 1955)
[26] *U.S. v. 24 Digger Merchandising Machines*, 202 F.2d 647, 650 (1953)

each reel spins independently of the other two, and stop immediately when the button is depressed. The game has no knock-off meter. Multiple games are not found in the game's software. In Reel and Deals there is no retention control feature, the icons do not morph, the game is not predetermined, and there is no all stop button.

The Presiding Official, in recommending that the Commission determine Reels and Deals to be a Class III device, ultimately based the recommendation on a determination that Reels and Deals is an electronic facsimile of a game of chance; to wit: a slot machine. While this may, in fact, be the correct conclusion, the Commission is concerned that further analysis of the chance element is warranted given the unique character of the game. It is not sufficient to conclude that a device is a game of chance simply because of superficial similarities to a slot machine or any other game of chance for that matter.[27] Chance must be a substantial element in the outcome of the game before a game is properly characterized as one of chance. Conversely, chance need not be eliminated altogether in order to establish that a game is one of skill or amusement. Were the standard so high, midways and arcades would be emptied of games. On the other hand, the fact that skill may be a factor in the outcome of a game does not necessarily mean that it is not a gambling device.

Whether a game is properly characterized as one of skill or chance may best be viewed along a skill-chance continuum, one end representing 100% skill; the other 100% chance. A slot machine occupies the extreme end of the continuum. It contains a random number generator that determines the outcome of each play. A winning outcome on a slot machine is the product of pure chance; skill is not a factor. At the opposite end of the

[27] See, *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. Courts of Appeals; *United States v. 103 Electronic Gambling Devices* 223 F.3d 1091 (9th Cir. 2000); *Diamond Game Enterprises v. Reno*, 230 F.3d 367 (D.C. Cir 2000).

continuum is a pure skill game, though it is doubtful that the element of chance could ever be eliminated in any human activity no matter how skillful the person. Somewhere along this continuum, as the element of chance becomes an increasing factor in the outcome of the game and the element of skill decreases as a factor in the outcome of the game exists the line.

The Presiding Official clearly recognized that some degree of skill is a factor in Reels and Deals. Although the record reflects some inconsistencies in the testimony, the Commission will defer to the Presiding Official on this point as he is in a much better position to evaluate the evidence presented during the hearing and the weight the testimony. It is thus evident that Reels and Deals is a game containing elements of both chance and skill and the task of the Commission to articulate a proper standard for review when presented with a game of this nature.

Degree of difficulty is certainly a key influence on the degree to which chance is a factor in the outcome of any game. The simplest game would be one where the level of skill needed to affect consistently the outcome of the game is within the physical or mental capacity most people. In this instance, chance may still be a factor, but a very minor one, easily outweighed by the element of skill. As difficulty increases, the importance of the skill element in the outcome also increases, and, relatively speaking, so increases the element of chance. At a certain level of difficulty only the most skilled individuals have the aptitude to affect consistently the outcome of the game. For all others, the outcome is a function of the element of chance. At some point the degree of difficulty may be increased to the point that even the most highly skilled individuals are without the ability to affect consistently the game's outcome. At such point the outcome

of our hypothetical skill game becomes as much a factor of chance as a slot machine with its random number generator and pre-programmed retention and award ratios.

The record reflects inconsistent testimony on the issue of the level of difficulty associated with Reels and Deals. Mr. Phillips indicates that the size of the reels and speed at which they spin is too great for the average person to become proficient at stopping the reel on a chosen icon. Accordingly, he concludes that that Reels & Deals falls overwhelmingly on the chance end of the spectrum. TR 406. Dr. Bertram, by contrast, is of the view that Reels and Deals is a hand-eye-coordination skill game, and testified that the rate of spin, even given the number of icons and patterns was within human reaction time.

The record indicates that in blind play of Reels and Deals, the game would return 81 to 85% of every dollar spent playing the game. TR 154, 596. There is also testimony indicating that mathematically speaking, a theoretical highly motivated player equipped with a stopwatch and a penchant for memorizing the reel pattern could obtain a payback of approximately 111%. TR 664, 676-678.

Jerry Giles, Jr., and Gregory Giles testified that they have acquired skill in the play of Reels and Deals as a result of their specialized knowledge of the game and long experience playing the game. The two participated in a demonstration at the hearing during which each player enjoyed a certain amount of success with the game. Assuming, for purposes of discussion, that each man has achieved a level of proficiency sufficient to influence the outcome of the game at least some of the time, the Commission is not persuaded that the average player could ever achieve a similar level of proficiency. Jerry and Wade Giles are employees of the manufacturer of Reels and Deals and have

unlimited access to the games. They are intimately familiar with the game by virtue of their job experience assembling and maintaining it. While the degree to which chance affects the outcome of a game is measured by the interplay between skill and degree of difficulty, we cannot conclude that the measurement should be from the perspective of the most highly or uniquely skilled expert. The correct perspective is more properly akin to that of the average player. See *Tooley*, 134 F.Supp at 166, 167.

The Presiding Official parenthetically notes on Page 8 of the recommended decision in his discussion of Mr. Phillip's testimony, that the testimony of other witnesses is consistent with Phillip's view that the number of icons on the reels, combined with the the speed at which they pass through the pay line, the varying distribution of the icons on each wheel and the number of possible combinations is such that even if a player could play skillfully, he or she would still be playing a game of chance, only with better odds. TR. 416-417. He noted that the testimony of other witnesses indicates that at the game's current wheel spin, no human can react quickly enough to see an individual icon and react quickly enough to push a stop button and catch it.

The Commission having examined the record, including testimony and exhibits, concurs with the Presiding Official's recommended decision to find that the game Reels and Deals is a game of chance notwithstanding the fact that a highly skilled and motivated player may be able to develop a sufficient degree of skill or proficiency to influence the outcome of the game at least some of the time. The key factor in this determination is the degree of difficulty presented by the game due to the speed at which the reels spin, the number of icons on the reels, the speed at which they pass through the pay line, the varying distribution of the icons on each wheel and the large number of

possible combinations. When taken together these factors introduce a substantial element of chance into the play of the game.

As noted at the beginning of our discussion, Reels and Deals presents a closer call than previously presented because it does not contain many of the features most commonly found in gambling devices. If the record had supported the proposition that an average player could develop sufficient skill to affect consistently the outcome of the game so as to win at an appreciable level above blind play, we would be more favorably inclined to Appellant's proposition. In the final analysis, however, we are left to conclude that the outward appearance, as well as the operation of the machine game presents sufficient indicia that it is designed or manufactured primarily for use in gambling and by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, any money or property.

2. Motion to Intervene.

On October 6, 2001, Presiding Official Parrett denied the Reels & Deals Games Inc. request for intervention. In the alternative, Reels & Deals Games, Inc. asked to participate as *amicus curiae* pursuant to 25 C.F.R. § 577.12(f). Presiding Official Parrett authorized attorneys James Trucks and Candace Stewart-Magee to participate in the capacity of *amicus curiae* on behalf of the company. Trucks and Stewart-Magee also represented the Ponca Tribe prior to the settlement of that Tribe's appeal. After the settlement, and immediately prior to the hearing, the attorneys renewed Reels & Deals Games, Inc.'s request for Intervenor status.

Presiding Official Reeh determined that their motion was not timely. Additionally, Presiding Official Reeh determined that because Reels & Deals Games, Inc.

was able to meaningfully participate in this process as *amicus curiae,* it was not necessary to permit its participation as an Intervenor. Assuming, but not deciding the question as to whether the company has standing as an Intervenor, we find that the Presiding Official's decision to deny the company's request was proper. The motion was not timely; the company had the opportunity to participate as *amicus curiae;* and its attorneys were present at counsel table during the hearing.

3. Preponderance of the Evidence.

Prior to the hearing, the Cherokee Nation filed a motion urging the Presiding Official to apply the "clear and convincing" evidentiary standard rather than the lower "preponderance of the evidence" standard traditionally used in administrative proceedings on the grounds that due to the unique trust relationship between the United States and Indian tribes, the canons of construction require that that statutes affecting Indians should be construed liberally in favor of the Indians.[28] Appellants asserted that this principle should be interpreted to elevate the government's standard of proof to "clear and convincing." In denying Appellant's motion, the Presiding Official noted that he found no legal precedent under the IGRA, Administrative Procedures Act, or other comparable statute that supports Appellant's position.

The Commission concurs with the recommended decision of the Presiding Official on this issue and takes this opportunity to emphasize through reiteration that for all present and future administrative appeals of enforcement actions taken pursuant to 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is preponderance of the evidence. Preponderance of the evidence is the degree that a

[28] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 766, 105 S.Ct. 2399, 2403 (1985); *United States v. 162 MegaMania Gambling Devices,* 231 F.3d 713, 718 (1oth Cir. 2000).

reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[29]

CONCLUSION

For all the reasons set forth herein, the Commission, by majority vote, accepts the recommendation of the Presiding Official to the extent that the underlying reasoning and basis for said recommendations are consistent with that set forth herein. Accordingly, it is the decision of the majority that the evidence shows, by a preponderance, that the game Reels and Deals constitutes a Class III gaming device, the play of which is prohibited by the Indian Gaming Regulatory Act in gaming operations on Indian lands in the absence of an approved tribal-state compact. Since no such tribal-state compact exists with regard to this matter, the underlying Notice of Violation and Closure Order must be sustained.

[29] *In the Matter of JPW Consultants, Inc.*, Docket Nos. NIGC 97-4, 98-8, *Notice of Decision and Order in the Matter of JPW Consultants, Inc.*

NOTICE AND ORDER

Please take notice that it is the decision of the National Indian Gaming Commission, by majority vote, that the game described herein is a Class III gambling machine and that operation of the game constitutes 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 game, 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:

NOV/CO-5-99

FOR THE NATIONAL INDIAN GAMING COMMISSION

Date: May 24, 2002

Elizabeth Homer
Vice Chairman

Teresa Poust by DRJ
Teresa Poust
Commissioner