June 9, 1995

CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION, Appellee, v. LUMMI INDIAN BUSINESS COUNCIL, Appellant - STATE OF WASHINGTON, Amicus Curiae	:	Docket No. INDIAN 94-1 Indian Gaming Regulatory Act 25 U.S.C. § 2701 *et seq.* Notice of Violation 93-1

DECISION

Appearances: Alan R. Fedman, Esq., Washington, D.C., for Appellee;

George Forman, Esq., Berkeley, California, for Appellant;

Jonathan T. McCoy, Esq., Olympia, Washington, for Amicus Curiae.

This decision arises as a result of an appeal from a Notice of Violation (NOV) issued by the Chairman of the National Indian Gaming Commission (Appellee) to the Lummi Indian Business Council (Appellant) for violations in the conduct of its gambling operations at the Lummi Casino. These violations were alleged by the Appellee pursuant to 25 C.F.R. § 573.3. This decision is issued in accordance with 25 C.F.R. Part 577.

Background

The Lummi Indian Reservation is located near Bellingham, Washington, and is governed by the Appellant. In December 1991, the Appellant established the Lummi Casino to provide an alternate source of employment and income for Tribal members who once depended on the declining Tribal fishing industry for support.

The Lummi Casino is operated without a compact between the State of Washington and the Appellant. In the absence of a compact, all games offered for play by the Lummi Casino must be Class I or Class II, as defined by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*. The Lummi Casino offers bingo, pull-tabs, and a number of card games including, but not limited to, Pai Gow Poker, Texas Hold-em, and 7-Card Stud.

Since July 23, 1993, the Lummi Casino has offered a non-banking version of Pai Gow Poker 24 hours a day, with wager limits of up to $5,000 per player per hand. The Lummi Casino's Texas Hold-em and 7-Card Stud games are "Bad Beat Jackpot" versions, which are played in a similar manner as other Texas Hold-em and 7-Card Stud games. As a variation, the Bad Beat versions offer players the opportunity to win more than the sum of the wagers on a particular hand from pools accumulated from players' wagers in preceding games.

On November 22, 1993, the Appellee issued Notice of Violation 93-1 (NOV 93-1), alleging the Lummi Casino's poker games were Class III gaming activities as defined by the IGRA because they were being offered 24 hours a day and at wager limits higher than allowed by State regulations.

The Appellant could legally offer Class III gaming activities only if conducted in conformity with a Tribal/State compact between the Lummi Tribe and the State. 25 U.S.C. § 2710(d)(1)(C). The Appellant brought these gaming operations at the Lummi Casino into conformity with State laws concerning wagers and hours of operation and no further proceedings were scheduled on the matter at that time.

On December 15, 1993, notice of a second violation was issued by the Appellee under the same number as the first violation (NOV 93-1). The Appellee alleged that the game of Pai Gow Poker being offered at the Lummi Casino was in violation of the IGRA and State regulations. This notice alleged that Pai Gow Poker could not be played legally in Washington State without a compact because it not explicitly authorized by the Washington State Gambling Commission (WSGC) and was therefore a Class III activity. This notice also alleged that the wagering limits and hours of operation for Pai Gow Poker did not conform to the applicable State laws and regulations. This nonconformity would also render it a Class III activity.

The Appellant appealed this asserted violation on the ground that although the State did not expressly authorize the game of Pai Gow Poker, neither did it expressly prohibit the game. Further, the Appellant asserted that because the State permitted it to be played elsewhere in the State of Washington, it was not being played in violation of the IGRA. The Appellant also argued that because Pai Gow Poker was not included in the State's list of permitted games, it was not subject to WSGC limits on hours and wagers. Finally, the Appellant argued that the State's bad faith in attempting to negotiate a Tribal/State compact excused any conduct that might not conform with State laws and regulations.

In February 1994, the State petitioned to participate as party to this proceeding. On February 24, 1994, this case was assigned to Harvey C. Sweitzer, an Administrative Law Judge from the Department of the Interior and assigned Docket No. INDIAN 94-1. After consideration of the State's request to participate as a party, an order denying intervention was issued and the State was granted status as Amicus Curiae (Amicus).

On March 15, 1994, the Appellee issued a Notice of Proposed Civil Fine Assessment concerning Pai Gow Poker operations at the Lummi Casino pursuant to its authority to issue civil fines under 25 U.S.C. § 2713(a). The Appellee took into consideration the economic benefit of noncompliance, seriousness of the violation, history of violation, negligence or willfulness, and good faith of the Appellant, and arrived at a proposed sum of $5,000 per day for each day the noncompliance cited in the NOV continued.

On May 2, 1994, the proceedings were stayed until July 12, 1994, pending an action by the WSGC concerning adoption of proposed changes to the Washington Administrative Code. The parties asserted that the proposed changes, if adopted, could be dispositive of at least certain issues involved in this proceeding. On July 11, 1994, the WSGC adopted several proposed amendments pertinent to the issues in this case and further dates were scheduled to commence this proceeding.

On October 17, 1994, the Appellee filed an amendment to the first asserted violation (NOV 93-1, dated November 22, 1993). This amendment addressed card games other than Pai Gow Poker and alleged violations of State wager limits by allowing more than three raises per betting round, by offering wager limits of up to $20 per player, and by offering "progressive" jackpots allegedly paid from funds accumulated by retaining a percentage of the wagers on previous games.

The Appellant appealed this amendment to the first asserted violation on the ground that wagers for poker games being offered at the Lummi Casino were the same as those authorized by the State on Indian lands elsewhere in the State, and, therefore, that there was no violation. The Appellant also contended that bad faith on the part of the State respecting attempts to reach a compact agreement excused any violation found to exist.

An evidentiary hearing was conducted on December 6, 1994, in Bellingham, Washington, at which the parties presented evidence in support of their respective positions.

On February 22, 1995, the parties reached a settlement concerning the Appellee's proposed civil fines. The settlement agreement establishes civil fines applicable to each violation with respect to the period of time from the beginning date of each violation until a final decision is issued by the Commission. This decision therefore does not address any issues concerning civil fines.

The Appellee, Appellant, and Amicus, briefed the issues extensively. Both parties have also submitted proposed findings of fact and conclusions of law. Portions of the briefs and proposed findings and conclusions may be incorporated herein verbatim without attribution. This decision is based upon the whole record and includes findings of fact and conclusions of law as directed by 25 C.F.R. § 577.14.

On May 22, 1995, the State of Washington submitted objections to the May 10, 1995, recommended decision of Administrative Law Judge Sweitzer pursuant to 25 C.F.R. § 577.14(b). Section 577.14(b) provides, however, that objections may be filed by the parties. Since the State was not granted the opportunity to intervene, and instead participated as Amicus, the State's objections were not considered.

Statement of Issues

There are several issues for determination in this case. The first issue is whether the game of Pai Gow Poker, as played at the Lummi Casino, is a Class II or Class III gaming activity. Resolution of this issue depends upon whether Pai Gow Poker is played in conformity with applicable State regulations concerning wager and hour limitations. The second issue is whether Texas Hold-em and 7-Card Stud, as played at the Lummi Casino, are Class II or Class III gaming activities. Resolution of this issue also depends upon whether the games in question are played in conformity with applicable State laws and regulations concerning limitations on wagers. The third and final issue is whether the "Bad Beat Jackpot" versions of Texas Hold-em and 7-Card Stud offered at the Lummi Casino are Class II gaming activities. Resolution of this issue depends upon whether Bad Beat is expressly authorized or not expressly prohibited and played legally anywhere in the State and whether it is played in conformity with applicable State laws and regulations concerning limitations on hours and wagers.

Applicable Law

The IGRA separates gambling activities into three classes. "Class I" activities are social games 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. § 2307(6). "Class I" activities are under the exclusive jurisdiction of the Indian tribes. 25 U.S.C. § 2710(a)(1). States may neither prohibit nor regulate "Class I" gaming activities.

"Class II" activities include bingo and its variations, and certain card games. 25 U.S.C. § 2307(7). Class II activities are operated with joint oversight of the tribe and the Commission. 25 U.S.C. § 2710(a)(2). The only application of state law to Class II card games in that state is that such gaming must be consistent with state prescribed hours of operation and limits on wagers and pot sizes.

To determine whether an activity falls within the Class II category, the IGRA directs us to look to the laws of the state wherein the tribe is located:

> (1) An Indian tribe may engage in, or license and regulate Class II gaming on Indian lands within such tribe's jurisdiction if--
>
> (A) such Indian gaming is located within a state that permits such gaming for any purpose by any person, organization or entity.

25 U.S.C. § 2710(b).[1]

The phrase "for any purpose by any person, organization or entity" makes no distinction between state laws that allow Class II gaming for charitable, commercial, or governmental

---

[1] With the wide variety of state authorized card games, including poker, there can be no question that such gaming is permitted in the State of Washington.

purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the state in which tribes are located, then tribes, as governments, are free to engage in such gaming. 134 Cong. Rec. 3071, 3082 (1988).

Class II card games are those nonbanking card 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)(I-II).

"Class III" activities are all those which do not fit into Class I or Class II. 25 U.S.C. § 2307(8). Class III activities may be conducted only under a Tribal/State compact providing for joint Tribal/State oversight of these operations. 25 U.S.C. § 2710(d)(1)(c).

Washington law declares that raising funds for charitable or nonprofit organizations is authorized and that bingo, raffles, and amusement games and the operation of punch board, pull-tabs, card games and other social pastimes, when conducted pursuant to State rules and regulations, are authorized. Wash. Rev. Code § 9.46.010. Washington allows parimutuel wagering in relation to horse racing events (Wash. Rev. Code § 67.16), a State lottery (Wash. Rev. Code § 67.70), bingo, raffles, fund raising events (casino nights),

punchboards and pull tabs, and low-stakes non-banked card rooms (Wash. Rev. Code § 9.46).

One form of gambling specifically authorized in the State of Washington is "social card games." Wash. Rev. Code § 9.46.0325. The State's definition of "social card games" contains six requirements:

> (1) There must be two or more participants and each of them are players;
>
> (2) A player's chance at winning in the long run is determined by skill;
>
> (3) No organization collects or obtains or charges any percentage of the money or thing of value wagered or won by any player;
>
> (4) No organization collects or obtains any money or thing of value from, or charges or imposes any fee upon, any person which either enables him to play or results in or from his or her playing in excess of three dollars per half hour of playing time;[2]
>
> (5) The type of card game is specifically approved by the commission; and
>
> (6) Wagers do not exceed the amount or value specified by the commission.

Wash. Rev. Code § 9.46.0281.

The WSGC lists several card games by name, including poker, as card games authorized to be played in the State and sets forth specific rules to be followed. Poker is further described in the regulation as:

---

[2] Prior to amendment of July 16, 1994, this amount was $2 per half hour.

> Any poker game described in *Hoyle's Modern Encyclopedia of Card Games,* by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974, 1st edition, pages 219-277 provided that only a maximum of five betting rounds per hand are permitted.

Wash. Admin. Code § 230-40-010(1) (1994). Entities which are conducting these games can make "immaterial modifications to the rules of each authorized game set out in [*Hoyle's*]" Wash. Admin. Code § 230-40-015(1).

The IGRA only requires compliance with State laws regarding wagers and hours of operation (and pot limits where applicable). 25 U.S.C. § 2703(7)(A)(ii)(II). The State's limits on wagers in card games are set forth at Wash. Admin. Code § 230-40-120:

> (1) the maximum number of any wagers in any betting round is three wagers comprised of the original wager and two raises;
>
> (2) the maximum value of a wager in any betting round is:
> (a) ten dollars for games with a single betting round;
> (b) for games with two betting round, wagers for the first and second round are limited to ten dollars;
> (c) for games with three betting rounds, wagers for the first two rounds are limited to five dollars and wagers for third round are limited to ten dollars;
> (d) for four betting round games, wagers are established by house rule provided that total wagers cannot exceed twenty five dollars and a single wager is limited to ten dollars;
> (e) for five betting round games, wagers are established by house rule, provided that total wagers cannot exceed thirty dollars and a single wager is limited to ten dollars.

> The wagering limits provided in the regulations are not to be exceeded in any social card game.[3]

Wash. Admin. Code § 230-40-120 (1994).

The State does not have any regulation concerning the amount of money which may be in the pot of these card games. The WSGC does, however, address hours of operation by prohibiting the operation of card games between the hours of 2:00 a.m. and 6:00 a.m. Wash. Admin. Code § 230-40-400 (1994).

In taking the preceding applicable laws and regulations into consideration, it must be determined whether the poker games at issue, Pai Gow Poker, 7-Card Stud, Texas Hold-em, and Bad Beat, as played at the Lummi Casino, violate the IGRA or applicable State laws and regulations. It must be kept in mind that, for Class II card games, the only state laws or regulations which may be applied to that activity on Indian lands are those concerning hours of operation and limitations on wager and pot sizes.

---

[3] Prior to July 16, 1994, the WSGC regulations provided that wagers on social card games may exceed $5 but in no case could exceed $10. Wash. Admin. Code § 230-40-120.

Summary of the Evidence

I. National Indian Gaming Commission

By the close of the record in this case, taking into consideration the entire administrative record, the evidence presented at the hearing, and the Appellee's post hearing briefs, the Appellee established the facts below in regard to the playing of Pai Gow Poker. Pai Gow Poker is played at the Lummi Casino with a single betting round. Since July 23, 1993, Pai Gow Poker has been offered at the Lummi Casino 24 hours a day and with wager limits of up to $5,000 per hand. The Lummi Casino receives compensation from players in the amount of $1 for each $100, or portion thereof, that a player wagers. This compensation is unrelated to the amount of time a participant plays the game.

Effective July 16, 1994, the WSGC amended its regulations to include Pai Gow Poker as an authorized social card game. During the period following the July 16, 1994, amendment, WSGC regulations provided that in card games with one betting round, wagers could not exceed $10 per player. The WSGC had no knowledge of Pai Gow Poker being offered on a "for profit" basis in the State on non-Indian lands prior to these amendments.

Regarding Texas Hold-em and 7-Card Stud wagering limits at the Lummi Casino, the Appellee established the following facts. Texas Hold-em and 7-Card Stud are authorized social card games in the State. Under WSGC regulations, the maximum number of raises permitted in a single betting round is two. At the Lummi Casino, Texas Hold-em and 7-Card Stud are offered with an initial wager and up to three raises per betting round.

At the Lummi Casino, Texas Hold-em is offered with four betting rounds and permissible wagers of $5/$10 and $10/$20. Under WSGC regulations, the maximum total of initial wagers permitted in a four round betting game is $25. At the Lummi Casino, the total initial wagers on a $5/$10 game is $30 and the total of the initial wagers on a $10/$20 game can reach as high as $60.

At the Lummi Casino, 7-Card Stud is offered with five betting rounds and permissible wagers between $2 and $10. Under WSGC regulations, the maximum total of initial wagers permitted in a five round betting game is $30. The Lummi Casino permits initial wagers which exceed the $30 limit.

Regarding Progressive or Bad Beat card games as played at the Lummi Casino, the Appellee established the following facts. A portion of each pot in a Texas Hold-em or 7-Card Stud game is collected by the Casino and set aside as a progressive jackpot fund. If a player is dealt a certain pre-determined hand, and still loses, the jackpot is won. The jackpot is shared with all of those in the card room actively participating in a card game

of the same type at the time the jackpot is won. A player need not be playing at the same game as the winner, only playing the same type of card game as the winner. In the State, licensed card room operators (non-Indian) have been subjected to prosecution for operation of progressive card games. In determining whether to prosecute, the WSGC takes into consideration whether or not the operator of progressive games retains a portion of the jackpot.

Gaming activities which would be classified as Class III under the IGRA are conducted on other Indian lands in the State of Washington. These gaming activities are conducted under individual Tribal/State compacts negotiated with the State.

Lummi Indian Business Council

By the close of the record in this case, taking into consideration the entire administrative record, the evidence presented at the hearing, and the Appellant's post hearing briefs, the Appellant established the facts below regarding the playing of Pai Gow Poker at the Lummi Casino. The Casino offers Pai Gow Poker 24 hours per day. Players are allowed to wager up to $5,000 per hand. The Casino is compensated by a service fee of $1 for every $100, or portion thereof, that a player wagers. This compensation is collected separate from the wager itself at the time the cards are dealt to a player. This method of collection is an allowable method of collection in states that prohibit percentage games.

Other tribes in the State of Washington offer versions of Pai Gow Poker at higher than the $10 wager limit imposed by the WSGC regulations. All of these other facilities are operated under individual Tribal/State compacts.

Concerning games of Texas Hold-em and 7-Card Stud, the Appellant established that these games are offered only during the hours authorized by the WSGC's regulations for non-Indian card rooms. Other tribal gaming facilities in the State offer poker games at wagering limits higher than those set for non-Indian card rooms and with up to four raises per round. These tribal gaming activities are all conducted under individual Tribal/State compacts.

Concerning Bad Beat Jackpot offered at the Lummi Casino, Appellant established that participants in poker games of Texas Hold-em and 7-card Stud have had the opportunity to win more than the sum of the wagers on a particular hand from Bad Beat Jackpot pools accumulated from players' wagers in preceding games.

These games are played in exactly the same manner as other Texas Hold-em and 7-Card Stud games, with the same limits on wagers and number of betting rounds. The jackpot feature has no affect on the actual wagers made or cost of participation in the games. The existence of the jackpot affects the strategy that a player employs. Using strategy, a skilled player may improve prospects for creating conditions under which a jackpot may be won.

The Lummi Casino creates Bad Beat pools with a $1 collection from each hand that is played. The poker department separates the collections from the Bad Beat Texas Hold-em games into three jackpot funds and does likewise with the collections from the Bad Beat 7-Card Stud games. Multiple jackpot funds are created to ensure that there will always be a jackpot fund from which jackpots can be paid.

Players are apprised of the existence of the jackpot funds and the Lummi Casino receives no portion of the money in the funds. The only benefit that the Casino receives is the stimulation of business. A jackpot is won when a player holding a specified strong hand is beaten by a stronger hand. When a jackpot is won, all of the players in the poker room who are playing the same kind of game participate in the distribution of the jackpot.

Activities which would be classified as Class III under the IGRA are conducted on other Indian lands in the State. These other Indian gaming operations are conducted under individual Tribal/State compacts negotiated with the State.

Discussion

I. Tribal/State Compacts

Throughout this proceeding, the Appellant has asserted that because other tribal gaming facilities in the State are allowed by Tribal/State compacts to operate activities in a certain

manner, the Lummi Casino should be able to so operate, despite the absence of a Tribal/State compact specifically allowing such activities on the Lummi Reservation. Rather than addressing this assertion with respect to each violation separately, it can be resolved in one analysis. Under the IGRA, the regulatory scheme contained in an individual Tribal/State compact applies only on the Indian lands of that particular Indian tribe. This is a matter of Federal law, not State law.

The Appellant argues that once an activity is permitted under a Tribal/State compact, then it is "played at any location in the State" for purposes of 25 U.S.C. § 2703(7)(A) and such an activity then becomes a Class II activity. This is an erroneous interpretation of the IGRA. "In interpreting the IGRA, we use our traditional tools of statutory construction. 'Interpretation of a statute must begin with the statute's language.'" *Rumsey Indian Rancheria of Wintun Indian v. California*, 41 F.3d 421, 426 (9th Cir. 1994) (citing *Mallard v. United States Dist. Ct. for the So. Dist of Iowa,* 490 U.S. 296, 301 (1989)). The plain language of the IGRA gives a much narrower scope of application for a Tribal/State compact. "Class III gaming activities shall be lawful on Indian lands only if such activities are conducted in conformance with a Tribal/State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2719(d)(1)(C). The IGRA further limits application of a compact in that "any Indian tribe may enter into a Tribal/State compact governing gaming activities <u>on the Indian lands of the Indian tribe</u>." 25 U.S.C. § 2710(d)(3)(B) (emphasis added). The wording clearly indicates that activities negotiated in a compact are exclusive to the compacting tribe.

An examination of the IGRA's legislative history further supports this interpretation. In compacting with a state, an Indian tribe is giving up its exclusive power to govern the gaming activities on its land and is allowing the state concurrent powers to regulate these gaming activities on its land. "To the extent tribal governments elect to relinquish rights in a Tribal/State compact that they might have otherwise reserved, the relinquishment of such right shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes." 134 Cong. Rec. 3071, 3076 (1988). The legislative history reinforces the position that the IGRA "does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a Tribal/State compact." *Id.*

It has been established by both parties in this case that tribal gaming facilities are operated in the State of Washington by the Nooksack, Swinomish, and Tulalip Tribes (Tr. II 209-211). In these other facilities, activities are offered which exceed the wager and hours of operation limits set forth by the WSGC. The operation of activities beyond the State limits renders the activities Class III under the IGRA. These tribes are allowed to operate outside of the limits of State regulation for one very important reason. They have each negotiated individual Tribal/State compacts with the State of Washington (Tr. II 217), pursuant to Federal law, IGRA. In return for this sharing of power, the tribe may conduct activities in a manner which otherwise would not be legal under IGRA on that tribe's land or anywhere else in the state.

Adopting the Appellant's interpretation of the role of compacts would lead to absurd results. If activities permitted only under Tribal/State compacts were viewed as fitting the Class II requirement of being "played at any location in the State," all that would be necessary would be for the tribe to wait until the State entered into a compact agreement with another tribe in the State authorizing the Class III activity. Then the claim could be made that the compact modified State law, making this once Class III activity, a Class II activity. This would eliminate the need for a Tribal/State compact for all but the very first tribe and render entire sections of the IGRA meaningless and unnecessary.

The plain language of the IGRA and legislative history support the analysis of the Appellee that Tribal/State compacts are exclusive to the tribe making them and are not a modification of State law. An activity that is Class III under the IGRA, whether it be because of the hours of operation, wagering limitations, or the activity itself, does not become Class II because it is allowed under another tribe's individual compact with the State.

II. Pai Gow Poker

Turning to the issue of whether Pai Gow Poker, as played at the Lummi Casino, is a Class II or Class III activity, the governing law provides in pertinent part that Class II gaming means:

(ii) card 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). The implementing regulations interpreted that language by defining Class II card games as:

(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(c).

Under this law and the facts of this case, two subissues arise. First, is Pai Gow Poker a card game that is either explicitly authorized by the laws of the State of Washington, or not explicitly prohibited and played legally anywhere in the State?[4] Second, if the first subissue is answered in the affirmative, is Pai Gow Poker played at the Lummi Casino in

---

[4] The parties below stipulated that Pai Gow Poker is a nonbanking card game. As a result, the record is not sufficiently developed for the Commission to reach a conclusion on the status of Pai Gow Poker as a banking or nonbanking card game. However, in June 2, 1995, letters to the tribes in California, the Chairman of the Commission concluded that Pai Gow Poker if played using the betting format described in *City of Bell Gardens v. County of Los Angeles*, 231 Cal. App. 3d 1563, 1566 (1991), is not a banking game. Therefore, we will assume that Pai Gow Poker as played at the Lummi Casino is played using this or a similar nonbanking format.

conformity with the State of Washington's laws and regulations regarding hours of operation and limits on wagers and pot sizes?

The first subissue was answered in the affirmative when the State changed its regulations in July of 1994 and expressly listed Pai Gow Poker as one of the games authorized to be played as a social card game. Although the parties also briefed the question of whether Pai Gow Poker could be classified as a Class II game prior to the State regulatory change, the need to decide that issue was mooted by the State's change in its law.

Nevertheless, Appellee asserted that the State still prohibits Pai Gow Poker as played at the Lummi Casino because State law does not allow games where an organization "collects or obtains any money or thing of value from, or charges or imposes any fee upon, any person which enable him or her to play or results in or from his playing in excess of three dollars per half hour of playing time by that person collected in advance." Wash. Rev. Code § 9.46.0281(4). Testimony from John Richlin for the Appellee, and Chuck White for the Appellant, revealed that the Lummi Casino receives compensation from players in Pai Gow Poker based on the amount the player wagers. The Lummi Casino receives $1 for each $100 bet, or portion thereof, and this $1 fee is collected separate from the wager (Tr. I 39, 133).

While the State may regulate the methods of compensation for gaming activities on non-Indian lands, the only State regulations incorporated into Federal law by IGRA for

determining the class of the games on Indian lands are those concerning hours, periods of operation, pot limits and wagers. Because the method of compensation for Pai Gow Poker is separate from the wager and does not affect the amount of the wager, the State's law on compensation does not govern the Tribe's game.

Still to be determined is the second subissue as to whether Pai Gow Poker is played at the Lummi Casino in conformity with "state laws and regulations concerning hours, periods of operation, and limitations on wagers and pot sizes." 25 U.S.C. § 2703(7)(A). The WSGC limits the amount that a player may bet on a single round betting game to a $10.00 initial bet. Wash. Admin. Code § 230-40-120(2)(a). It also mandates the closure of card games between the hours of 2:00 a.m. and 6:00 a.m. Wash. Admin. Code § 230-40-400.

It is uncontested that Pai Gow Poker has been offered 24 hours a day with betting limits of $5,000 per game at the Lummi Casino since July 23, 1993. (*Administrative Record,* Tab 44 at 1-2). Therefore, Pai Gow Poker as played at the Lummi Casino is not played consistent with the definition of Class II gaming. The game thus falls within the definition of Class III for which a Tribal-State Compact is required. Since the Tribe and State have no compact authorizing Pai Gow Poker, the Appellant violated IGRA by allowing the play of Pai Gow Poker.

Appellant asserted throughout this proceeding that because Pai Gow Poker was not listed by the WSGC as an authorized card game it therefore was not within the ambit of the

State limits on hours and wagers. As mentioned above, however, this defense is no longer relevant now that the State has specifically listed Pai Gow Poker as an authorized game.

III. Texas Hold-em and 7-Card Stud

The next issue is whether Texas Hold-em and 7-Card Stud, as played at the Lummi Casino, are Class II or Class III gaming activities. Texas Hold-em and 7-Card Stud are games explicitly authorized by the laws of the State of Washington in Wash. Admin. Code § 23-40-010, as required by 25 U.S.C. § 2703(7)(A)(ii) in order to be categorized as Class II activities. However, to remain Class II activities, they must be "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." 25 U.S.C. § 2703(7)(A).

The Appellant contends that the wager and hour limits authorized by the WSGC on Indian lands elsewhere in the State pursuant to Tribal/State compacts constitute laws or regulations of the State within the meaning of 25 U.S.C. § 2703 (7)(A)(ii). This assertion is incorrect and has already been addressed earlier in the discussion. Provisions of a Tribal/State compact apply only to the Indian lands of the compacting Indian tribe. 25 U.S.C.§ 2710(d)(1)(C).

The applicable regulations relating to wagers and hours of operation are those established by the WSGC. The Appellant established that the Lummi Casino conducted the two games in accordance with the applicable State laws governing hours of operation.

Under the regulations adopted by the WSGC, the maximum number of raises permitted in a single betting round is two. Wash. Admin. Code § 230-40-010 (1994). The maximum amount for initial wagers in a four betting round game is $25.00 and in a five betting round game is $30.00. Wash. Admin. Code § 230-40-120 (1994).

The Lummi Casino offers Texas Hold-em and 7-Card Stud with an initial wager and up to three raises per betting round. The Lummi Casino offers Texas Hold-em as a four betting round game with permissible initial wagers of $5/$10 and $10/$20. The total of the permissible initial wagers for the $5/$10 game is $30 and for the $10/$20 game is $60. Both of these totals exceed the $25 maximum allowed under Wash. Admin. Code § 230-40-120. The Lummi Casino offers 7-Card Stud as a five betting round game with permissible initial wagers between $2 and $10 per round, for a possible total of $60 in initial wagers. This total exceeds the $30 maximum allowed under Wash. Admin. Code § 230-40-120.

Texas Hold-em and 7-Card Stud card games offered at the Lummi Casino violate the laws and regulations of the State because they permit initial wagers which exceed the regulatory limits established by the WSGC. If an otherwise Class II game is not conducted within

applicable wager limits, it then becomes a Class III activity. Therefore, Texas Hold-em and 7-Card Stud, as played at the Lummi Casino, are Class III activities.

IV. Bad Beat Jackpot

The final issue is whether the Bad Beat Jackpot versions of Texas Hold-em and 7-Card Stud played at the Lummi Casino are nonbanking Class II gaming activities. The Appellee argued that these games are not Class II activities because the games purportedly violate various provisions of State law. The short answer to this argument is that a game like Bad Beat, while not specifically listed in *Hoyle's*, is a version of poker and poker is expressly authorized under State law.

The analysis of Bad Beat starts with the actual language of IGRA and its implementing regulations. Although the parties thoroughly briefed the issues relating to the distinction between criminal prohibitory and civil regulatory laws, Congress did not require resort to the pre-IGRA caselaw. Congress instead incorporated the concepts of the case law in unique statutory language. The statutory definition of Class II games and the language of the implementing regulations thus becomes the starting point of our analysis. Therefore, we must determine whether Bad Beat as played falls within the Class II definition.

Once again then, to be a Class II card game, a game must be:

> (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(c).

First, the Appellee contends that the Bad Beat poker versions offered at the Lummi Casino are banking card games which are not allowed under the IGRA. The Appellee asserts that since a portion of each pot is collected by the Casino and set aside as a jackpot fund, that this involves the Casino in a banking game. The Commission defines a banking game as one where "[t]he house as a participant * * * takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11. Regardless of whether the Casino or one of the players acts as the house, at no time is there any person or entity which takes on all players, collects from all losers, pays all winners and can win. Specifically, with respect to the Casino, the record demonstrates that none of the jackpot funds are retained by the house; therefore, the house will never win. Thus, Bad Beat poker games at the Lummi Casino are not banking games.

Second, Washington's regulations expressly authorize, rather than prohibit, poker to be played in the State. Wash. Admin. Code § 230-40-010(1). Indeed, the State acknowledges that "poker is a specifically authorized Class II activity, subject to State regulation." (*Administrative Record,* Tab 48 at 10).

The regulations characterize poker as:

> Any poker game described in *Hoyle's Modern Encyclopedia of Card Games,* by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974, 1st edition, pages 219-277 provided that only a maximum of five betting rounds per hand are permitted.

Wash. Admin. Code § 230-40-010(1). The regulations further provide that:

> [c]ard games authorized by the commission shall be played only in the manner set out for that game in *Hoyle's Modern Encyclopedia of Card Games,* by Walter B. Gibson, published by Doubleday and Company, Inc., April 1974 1st Edition: *Provided,* That each licensee may make immaterial modifications to the rules of each authorized game set out in that publication.

Wash. Admin. Code § 230-40-015(1) (emphasis added).

Neither the regulations nor *Hoyle's* intends its list of over 200 poker variations to be exhaustive. Both contemplate the creation or existence of additional variations. For instance, *Hoyle's* describes poker as a game with innumerable offshoots, ranging from standard types to "dealer's-choice" in which almost anything goes.

> Generally, poker is played with a fifty-two-card pack, ranking A,K,Q,J,10,9,8,7,6,5,4,3,2,A, the ace sometimes being low instead of high. Suits are important but none takes precedence over the other. Players, usually from three to seven but in some games more, are dealt hands that are customarily reduced to five cards each. Betting and sometimes bluffing are followed by a showdown in which all hands are fully revealed; and the one with the best combination becomes the winner.

Hoyle's, supra, at 219.

Hoyle's then sets forth simple rules for many variations. It sets out the rules for variations which go against nearly every one of the preceding general characteristics. "These games run the gamut from mere variants of standard games to those that are wild beyond belief." *Id.* at 241. Just a few of the over 200 variations show what diversity from the general characteristics are allowed by *Hoyle's*. Some of these include:

> High-Low Seven-Card Stud - where each player may use any five of his seven cards to form a high hand and/or any five for a low hand and then bet on getting either or both the high hand and low hand. *Id.* at 234-236.
>
> Double-Handed High-Low - where each player plays with two hands and can bet on getting either the high or low hand. *Id.* at 248.
>
> One-Card Poker - where each player is dealt one card and the highest wins. *Id.* at 258.
>
> Ten Card Poker - where each player is dealt 10 cards. *Id.* at 270.
>
> Pinochle Poker - where a Pinochle deck rather than a poker deck is used. *Id.* at 259.
>
> Zebra Poker - where traditional poker hands are not used at all, instead the only hands that count are 5 cards in descending order alternating colors from red to black. *Id.* at 275.
>
> Omaha - where up to 23 people play at once. *Id.* at 257.

Under Washington law, authorization is given to play poker in general and, more specifically, poker variations in *Hoyle's*. Bad Beat is clearly recognized as a form of poker. Mr. Tindall of the WSGC testified that Bad Beat poker is not a distinct game but a variation on other poker games (Tr. I 27). Although Bad Beat is not specifically listed in *Hoyle's*, it only slightly varies two common poker games, Texas Hold'em and 7-Card

Stud by compensating the players in an unusual way. Such a change is an immaterial modification of the poker games. Therefore, Bad Beat meets the requirement that the card game must be expressly authorized. Thus, Bad Beat may be played as a version of poker on Indian lands in the State of Washington as a Class II game if it meets the requirements of the applicable State laws.

IGRA did not apply all State law to Class II card games. Bad Beat may be played on Indian lands in a manner inconsistent with State laws, except those regulating hours, periods of operation, wager limits, and pot sizes. Therefore, all of the State laws purportedly violated by the Bad Beat games which do not relate to hours, periods of operation, wager limits, or pot sizes do not affect the Class II status of Bad Beat.

Moreover, the purported violations are not, in fact, violations. The Appellee first argued that the Bad Beat games are violative of State law because a player's chance of winning is not determined by the skill of the player as required by Wash. Rev. Code § 9.46.0281. However, the Appellant established that skill is a factor in winning the jackpot (Tr. II 212-215; Ex. B).

The Appellee also asserted that Bad Beat versions of poker violate the Washington statute prohibiting any organization or person from collecting or obtaining any portion of the money wagered or won. Wash. Rev. Code § 9.46.0281(3). It has been shown that the Lummi Casino does not take any of the jackpot for itself, it merely maintains it until

someone wins and then disburses it to the players. For this reason, it is not in violation of Wash. Rev. Code § 9.46.0281(3).

The Appellee also claimed that the sharing of winnings between players is prohibited under Wash. Rev. Code § 9.46.0281(3). The language of the statute is, at best, ambiguous as to whether it precludes players who do not have the best hand from sharing in the winnings or being treated as a winner. Looking to the regulations for instruction, they reference *Hoyle's* for guidance and *Hoyle's* contains variations of poker wherein players playing the same game share in the winnings. Place and Show is a variation of poker where the second-best and third-best hands split the pot. *Hoyle's, supra,* at 260. In light of the foregoing, it cannot be found that the Bad Beat games violate Wash. Rev. Code § 9.46.0281(3).

Additionally, the Appellee asserted that Bad Beat versions of poker at the Lummi Casino do not conform with the wager limits imposed on such games by the State of Washington because the high amount of money in the jackpot assertedly violates the State regulatory wager limit on the game of poker (Tr. I 18). The fatal flaw in this argument is that the Appellee uses the words "winnings" and "wagers" interchangeably. Each jackpot, as its name implies, is a pot. Each pot is built from wagers within the limits of State law. While the IGRA makes State laws and regulations concerning pot sizes ("winnings") applicable to Class II games, the State of Washington simply has no such laws or

regulations. Therefore, the size of the jackpot is not and cannot be violative of any State law.

The record establishes that Bad Beat is played during the same hours that Texas Hold'em and 7-Card Stud is played. Since we have previously concluded that these two games were played during hours which were consistent with applicable State law, we also conclude that Bad Beat as played did not violate the applicable State rules on hours of operation.

Conclusion

The version of Pai Gow Poker played at the Lummi Casino is expressly authorized by the State of Washington as of July 1994 after being specifically identified on the list of authorized games. To be classified as a Class II game, it must conform to the State's regulations with respect to hours of operation, limits on wagers, and pot size. With respect to hours of operation and the size of the wagers accepted, Pai Gow Poker as played at the Lummi Casino, is in violation of the IGRA. For this reason, the NOV is sustained with respect to this portion of the cited violation.

The games of Texas Hold-em and 7-Card Stud are also subject to the State's regulation concerning hours of operation and limitations on wagers. The fact that other tribes are authorized to exceed those limitations pursuant to exclusive Tribal/State compacts does not

constitute authorization for the Lummi Tribe to exceed those limitations, because the exclusive Tribal/State compacts are not generally applicable state law - each compact applies only on the Indian lands of the compacting Indian tribe. The NOV is also sustained with respect to that portion which alleges that these games have not been played in conformity with the State's regulation concerning wager limitations.

The Bad Beat Jackpot version of Texas Hold-em and 7-Card Stud does not violate the applicable State regulations. Because the Bad Beat Jackpot at the Lummi Casino is an immaterial modification of a specifically authorized Class II game, Bad Beat may be played at the Lummi Casino so long as it meets the only applicable State regulatory requirements concerning hours, wager, and pot size limitations. The amount taken to put in the jackpots does not affect the amount wagered in a game and no State regulation limits the amount of pot sizes.

Harold A. Monteau
Chairman
National Indian Gaming Commission

Jana McKeag
Commissioner
National Indian Gaming Commission

CERTIFICATE OF SERVICE

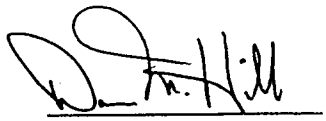
I certify that on this 9th day of June, 1995, I caused the original Decision of the National Indian Gaming Commission to be sent by certified mail addressed to:

George Forman, Esq.
ALEXANDER & KARSHMER
Attorneys at Law
2150 Shattuck Ave., Ste. 725
Berkeley, California 94704

and a copy was sent by certified mailed to:

Jonathon T. McCoy, Esq.
Assistant Attorney General
Office of the Attorney General
905 Plum St., Bldg. 3
P.O. Box 40100
Olympia, Washington 98504-0100

Byron S. Georgiou, Esq.
Georgiou & Tosdal
Attorneys at Law
600 B St., Suite 2300
San Diego, California 92101



Danna Hill