February 26, 2009

Via U.S. Mail and facsimile

Wilfrid Cleveland, President
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Re: Classification of poker in Wisconsin

Dear President Cleveland:

On January 22, 2008, your attorney requested a classification opinion under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, for poker in Wisconsin. I understand that the Ho-Chunk Nation wishes to operate a poker room at its Class II DeJope facility in Madison, Wisconsin, and offer non-banked poker games such as Texas Hold 'Em. I apologize for the delay, but this was a difficult question. After careful consideration of the matter, including Mr. Marston's submissions, it is my opinion that non-banked poker games in Wisconsin are Class II if they are played according to Wisconsin rules on wagers or pot sizes (if any).

There are two questions here. The first is a threshold question – whether under IGRA poker is a permitted Class II game in Wisconsin. IGRA states that tribes may engage in Class II gaming on Indian lands within their jurisdiction if "such ... 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)(A). Given the decision of the Wisconsin Supreme Court in *Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1 (2006), poker is permitted to those Indian tribes that compacted with the state prior to the 1993 amendment of the state constitution. Accordingly, poker is permitted for "any purpose" and by "any person" in Wisconsin and is therefore a permissible game in the state.

The second question is whether non-banked poker meets the definition of a Class II card game. IGRA defines as Class II any card games that

> are explicitly authorized by the laws of the State, or ... 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)(i)-(ii). IGRA excludes from this definition, however, "any banking card games, including baccarat, chemin de fer, or blackjack (21). . . ." 25 U.S.C. § 2703(7)(B)(i). Given both the *Dairyland* decision and tribal-state compacts that contemplate poker, the game is not explicitly prohibited by Wisconsin law and is played within the state. Provided, then, that poker is played in a non-banked format and according to Wisconsin rules on hours, wagers, or pot sizes, if any, it is my opinion that poker is a Class II game.

<u>Analysis</u>

An initial review appears to indicate that Wisconsin state law contains a blanket prohibition on poker, and that would make the game Class III under IGRA. The Wisconsin constitution prohibits gambling generally: "Except as provided in this section, the legislature may not authorize gambling in any form." WISC. CONST. ART. IV § 24, ¶ 1 (2007). "This section" provides only four express exceptions to the general prohibition, and poker is not among them. The exceptions are bingo, raffles, pari-mutuel wagering, and the state lottery. WISC. CONST. ART. IV § 24, ¶¶ 3 - 6 (2007). Upon a complete review of Wisconsin law, however, poker is not, in fact, prohibited to all persons for all purposes in the state, and thus there is no blanket prohibition on the game.

Prior to 1993, the Wisconsin constitution did not contain the same general prohibition against gambling it does now. Instead it said, "Except as provided in this section, the legislature shall never authorize any lottery. . . ." WISC. CONST. ART. IV, § 24, ¶ 1 (1987). As now, bingo, raffles, pari-mutuel wagering, and the state lottery were specifically authorized. WISC. CONST. ART. IV § 24, ¶¶ 3 – 6 (1987). Absent the general prohibition on gambling, there was an open question about the scope of gaming permitted by the term *lottery*. Under a narrow interpretation, one suggested by the constitution itself, *lottery* referred only to what is commonly understood to be a state lottery.

> The legislature may authorize the creation of a lottery to be operated by the state as provided by law. The expenditure of public funds or of revenues derived from lottery operations to engage in promotional advertising of the Wisconsin state lottery is prohibited. Any advertising of the state lottery shall indicate the odds of a specific lottery ticket to be selected as the winning ticket for the prize amount offered. The net proceeds of the state lottery shall be deposited in the treasury of the state, to be used for property tax relief as provided by law.

WISC. CONST. ART. IV § 24, ¶ 6 (1987). Another interpretation equated *lottery* with gambling generally – any game characterized by the three elements of prize, chance, and consideration. *See, e.g.*, 79 Op. Atty. Gen. Wis. 14, 17 (1990).

In 1990, the Wisconsin Attorney General gave *lottery* the former meaning and rejected the latter. Reviewing the term through the history of Wisconsin constitution and legislation, the Attorney General found that *lottery* was consistently used to mean one particular form of gambling, one of many prohibited by law.

> [T]he Legislature has recognized the distinctions between the several forms of gambling and has accorded them separate and distinct treatment in the criminal statutes prohibiting gambling in this state. Neither the legislature nor the courts have ever equated lotteries with all other forms of gambling in the sense of finding and concluding that all types of gambling constitute "lotteries" as used in our constitution and statutes.

79 Op. Atty. Gen. Wis. 14, 18 (1990).

One year later, a federal district court in Wisconsin reached the opposite conclusion. After reviewing much the same constitutional history as did the Attorney General, the court found that the constitutional authorization of the state lottery "removed any constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F. Supp. 480, 486 (W. D. Wis. 1991). Accordingly, the court concluded that the state had to negotiate tribal-state compacts with the plaintiff tribes that included "any activity" with "the elements of prize, chance and consideration ... not prohibited expressly by the Wisconsin Constitution or state law." *Id.* at 488.

This the state did, and in 1991 and 1992, the governor and eleven tribes, including the Ho-Chunk Nation, negotiated essentially uniform Class III gaming compacts that permitted the play of electronic games of chance such as slot machines, blackjack, and pull-tabs or "break-open" tickets not played in the same location as bingo. Wisconsin Winnebago Tribe and the State of Wisconsin Gaming Compact of 1992 at § IV(A); *see also, e.g.*, Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 at § IV(A); Oneida Tribe of Indians of Wisconsin and the State of Wisconsin Gaming Compact of 1991 at § IV(A).

In 1993, voters passed a constitutional amendment and settled the question of the meaning of *lottery*. The 1993 amendment introduced the general prohibition on gambling: "Except as provided in this section, the legislature may not authorize gambling in any form." WISC. CONST. ART. IV § 24, ¶ 1 (1993). It also explained that the lottery authorized as a form of gambling meant only the state lottery, which could offer instant scratch games or number-matching games such as Pick 3, Pick 4, or Pick 6:

> The lottery authorized ... shall be an enterprise that entitles the player, by purchasing a ticket, to participate in a game of chance if:
>
> 1. The winning tickets are randomly predetermined and the player reveals preprinted numbers or symbols from which it can be

immediately determined whether the ticket is a winning ticket entitling the player to win a prize ....

2. The winning ticket is evidence of the numbers or symbols selected by the player or, at the player's option, selected by a computer, and the player becomes entitled to a prize ... if some or all of the player's symbols or numbers are selected in a chance drawing ....

WISC. CONST. ART. IV § 24, ¶ 6(b) (1993). Finally, the 1993 amendment enumerated a series of games that "may not be conducted by the state as a lottery," and among them was poker. WISC. CONST. ART. IV § 24, ¶ 6(c)(3).

In 2003, however, the governor and the tribes, including the Ho-Chunk Nation, amended their existing Class III gaming compacts and expanded considerably the number of Class III games that tribes could offer. Again, though the compacts may have called for different payments to the state from different tribes, the substance of the amendments was essentially uniform. The expanded offerings included craps, roulette, keno, baccarat, and "all forms of Poker." Second Amendment to the Wisconsin Winnebago Tribe, Now Known as the Ho-Chunk Nation, and the State of Wisconsin Gaming Compact of 1992, at ¶ 2 (2003); *see also, e.g.*, Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 at ¶ 2 (2003); Second Amendment to the Oneida Tribe of Indians of Wisconsin and the State of Wisconsin Gaming Compact of 1991 at ¶ 4 (2003).

In settling the question of the meaning of *lottery*, then, the 1993 amendment raised another question, namely whether the 1991 and 1992 compacts and their amendments were valid since they permitted games like slot machines and poker that were, apparently, prohibited. The Wisconsin Supreme Court resolved the question in *Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1 (2006), and held that the compacts, both as originally adopted and as amended, were valid:

> We conclude that the 1993 Amendment to Article IV, Section 24 of the Wisconsin Constitution does not invalidate the Original Compacts . . . and that amendments to the Original Compacts that expand the scope of gaming are likewise constitutionally protected by the Contracts Clauses of the Wisconsin and United States Constitutions.

Id. at 17.

In interpreting the amendment, the Court was guided by the intent of the framers and the people who adopted it and found that no one, neither the legislature nor the voting public, intended to invalidate the 1991 and 1992 compacts. *Id.* at 19. The amendment was to operate prospectively. *Id.* at 30-41.

The drafting files for the amendment, for example, indicated that legislators were informed that the amendment would not invalidate the compacts. *Id.* at 35-7. Wisconsin Legislative Counsel concluded, in a letter to a state representative, that the "amendment

would not prohibit ... gambling under the ... compacts." *Id.* at 36 (internal citations omitted). In a letter to another representative, the Attorney General "stated that because the amendment was presumed to be prospective and because the compacts did not have a provision that made the compacts ineffective upon a change in state law, the proposed amendment would not affect compacts which already exist." *Id.* at 36-7 (internal citations omitted). The Deputy Director for the Assembly Democratic caucus agreed with this view in his memorandum to membership. *Id.* at 37.

In addition, public statements to voters indicated that the amendment would not invalidate the compacts. *Id.* at 38-9. For example, the Milwaukee Sentinel reported that the Attorney General believed that the amendment would not affect "gambling compacts signed in 1991 and 1992." *Id.* at 38. The Milwaukee Journal also printed letters from lawmakers stating that the amendment would not affect Indian casinos. *Id.* at 39. Editorials in the Green Bay Press Gazette echoed these sentiments. *Id.*

Further, the Court noted that the 1993 state budget relied on compact fees, and thus subsequent legislative action indicated that the compacts remained valid *Id.* at 40-1. The budget appropriated "moneys received by the state from Indian tribes as reimbursement for state costs of regulation of Indian gaming under the Indian gaming compacts." *Id.* (internal citations omitted). Further, the legislature passed 1993 Wisconsin Act 406 a year after the amendment. *Id.* at 41. This act explicitly validated all contracts between the tribes and the state "entered into prior to May 6, 1994." *Id.* Thus, subsequent legislative action indicated "approval of the original compacts." *Id.* (internal citations omitted).

Finally, the Court noted that prior to amending the constitution, the legislature crafted Wis. Stat. § 565.01(6m) to define *lottery*. *Id.* at 31. The definition is identical to the 1993 amendment but adds the caveat: "This subsection shall not affect the provisions of any Indian gaming compact entered into before January 1, 1993, under s. 14.035." WIS. STAT. § 565.01(6m). The Court concluded that this also showed that the 1993 amendment was never intended to affect the gaming compacts. *Id.* at 34.

As to the 2003 amendments to the compacts, the Court found these to be valid as well because the amendments were continuations of the 1991 and 1992 compacts, not new agreements that would have been precluded by the 1993 constitutional amendment.

> We therefore conclude that "renewals" constitute continuations of the Original Compacts and do not constitute new, independent contracts. Because the 1993 Amendment did not apply to the Original Compacts, the Amendment does not apply to continuations or extensions of the Original Compacts.

Id. at 52. In reaching this conclusion, the Court noted that the terms of the original compacts would control in the event of a conflict with tribal ordinances or state law, "or any amendments thereto ...." *Id.* at 50. Accordingly, the Court concluded:

> The parties clearly intended to preserve the law as it existed in 1991-92, and to prevent the application of changes to the State's or Tribe's laws to the Original Compacts.

Id. at 63. It is this last statement that is dispositive here.

The Court insisted that for purposes of interpreting the validity of any compact provisions, 1991-2 state laws would control: "the law at the time the Original Compacts were entered into controls the compacts." *Id.* at 71. As the Wisconsin tribal-state gaming compacts continue in operation today, the laws of 1991- 2 still control them, and the 1993 amendment does not prohibit any games approved under them. Therefore, because poker is permitted under the Wisconsin tribal-state compacts, it is permitted in Wisconsin for "any purpose by any person," 25 U.S.C. § 2710(b)(1)(A), and is a permissible game in Wisconsin.

That said, to be a Class II game under IGRA, poker must still meet IGRA's definition of a Class II card game. Again, IGRA requires that such games be "explicitly authorized" by state law or "not explicitly prohibited" and played at any location in the state according to state rules on hours, wagers, and pot sizes. 25 U.S.C. § 2703(7)(A)(ii). And while no state laws contain plain language permitting poker, it is also not wholly prohibited in the state, given the discussion above.

Further, poker is played around the state at Indian casinos and in accordance with gaming compacts, apparently both in banked and non-banked forms. The list of authorized games in the compact amendments includes:

> 5. All other banking, percentage, and pari-mutuel card games; [and] 6. All forms of Poker, to the extent that these games are not included in the previous subsection.

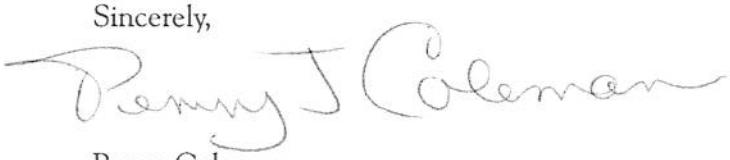
See generally Second Amendment to the Wisconsin Winnebago Tribe, Now Known as the Ho-Chunk Nation, and the State of Wisconsin Gaming Compact of 1992 at ¶ 2 (2003); Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 at ¶ 2 (2003); Second Amendment to the Oneida Tribe of Indians of Wisconsin and the State of Wisconsin Gaming Compact of 1991 at ¶ 4 (2003). NIGC is aware that some Indian tribes in Wisconsin operate poker rooms where non-banking versions of the game are offered for play, just as the Ho-Chunk Nation is proposing here.

Finally, to be a Class II game, the version of poker conducted must be a non-banked game and must observe state rules on hours, wagers, and pots sizes, if there are any. The game must not permit a "banker" to take on all players, collect from all losers, and pay all winners. 25 C.F.R. § 502.11. To invite the house, or any player, to act in that capacity makes poker a Class III card game. 25 C.F.R. § 502.4(a)(1). Similarly, the game must not be played outside of any state laws or regulations limiting hours of operation and the sizes of wagers and pots. If, as played, poker satisfies these conditions, it meets IGRA's definition for a Class II card game.

Conclusion

It is my opinion that non-banked poker games such as the Nation proposes to offer are Class II under IGRA when played according to any Wisconsin state rules on hours of operation and the sizes of wagers and pots. This is an advisory opinion and does not constitute final agency action or a decision of the Chairman or Commission. I wish you every success in this new endeavor.

Sincerely,



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