December 21, 2004

Mr. Kent R. Hagg
Whiting Hagg & Hagg
601 West Boulevard
Rapid City SD 57701

Re: Classification opinion, Trips or Better Poker

Dear Mr. Hagg:

This is in answer to your request on behalf of the DigiDeal Corporation for a determination that DigiDeal's Trips or Better Poker is a Class II game under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), when played in Florida, Idaho, and Washington State. The game is Class II in Florida and Washington. It is not a permitted Class II game in Idaho because of a blanket ban on poker there.

Game

Trips or Better is a version of Five Card Stud and is played with an ordinary deck of cards, plus 2 jokers. Two to 6 players, having purchased chips from the dealer, begin each hand by placing an ante and a wager. The house does not play a hand. Rather, the ante belongs to the house as its fee for providing the game, dealer, and equipment. All wagers go into a common pot on the table, which the highest qualifying poker hand, three of a kind or better, will win. The house never receives any portion of the pot. The requirement of three of a kind or better to win, "trips or better," is a known poker variant.

Following the ante and the first wager, the two cards are dealt to each player. All cards, including these first two cards, are dealt face up. In turn, each player may bet again to receive another card or may fold, simply by withholding the next bet, and the dealer distributes cards to the players who continue. All bets are of a fixed, single size, and neither raising nor bluffing is an element of the game. Rather, each player must decide whether it is worth continuing the attempt to get a qualifying hand given all of the hands dealt. Players continue to bet or fold until all remaining players have five cards. The highest qualifying poker hand wins. As in any poker game, if all players but one fold, the last remaining player wins the pot, regardless of the hand he or she holds. If after five cards are dealt, multiple players remain but none has three of a kind or better, the pot remains or "rolls over," and the players ante and bet again until someone wins. No new players may join the game until someone takes the pot.

DigiDeal represents that given a full table, a player will win the pot once every two hands, on average. In an alternate version of the game, designed to maintain interest and reduce frustration, if no player has three of a kind, the high hand, whatever it may be, takes 20% of the pot, and the remaining 80% rolls over. Play is otherwise identical to that described above.

Analysis

IGRA divides the world of Indian gaming into three classes. Class I, which is not at issue here, encompasses "social games" played "solely 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." 25 U.S.C. § 2703(6). Class II encompasses:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -- ... including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
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> (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 wages or pot sizes in such card games.

25 U.S.C. § 2703(7)(A)(i) - (ii).

Class III is a catchall category and includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Class III also includes any electronic or electro-mechanical facsimiles of any game of chance and any banking card game. 25 U.S.C. § 2703(7)(B)(i)-(ii); 25 C.F.R. § 502.4(b).

A. Florida

Florida law explicitly authorizes Trips or Better, and it is not a banking card game. Assuming, then, that it is played in conformity with Florida's card room laws and regulations concerning hours, wagers, and pot sizes, it is Class II.

Florida, like other states, has a general prohibition on gambling, Fla. Stat. Ann. 849.08, but that prohibition is subject to specific exceptions. Florida specifically authorizes card rooms located at existing, licensed pari-mutuel establishments, Fla. Stat. Ann. 849.068 (1), (3), (7)(a), and makes them subject to licensing and regulation by the Florida Department of

Business and Professional Regulation, Division of Pari-Mutuel Wagering. Fla. Stat. Ann. 849.068(4).

Those card rooms are authorized by statute to offer non-banking poker games. Fla. Stat. Ann. 849.068(2)(a), (3). More specifically, those card rooms are authorized by regulation to play all variants of poker based upon the traditional ranking of poker hands. Though a card room operator must technically submit request for approval of a card game to the Division, the Division provides for the automatic approval of the following:

> All poker games in Gibson, *Hoyle's Modern Encyclopedia of Card Games,* 1st Ed. (Doubleday 1974) "are authorized when played in a non-banking manner and shall be approved by the Division. All other card games playing in a non-banking manner in which the determination of the winner is based upon a traditional poker ranking system as referenced in Hoyle's shall be approved by the Division."
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> Fla. Admin. Code 61D-11.002(1)(b).

Since Trips or Better is a non-banking poker game based upon the traditional poker ranking system, it is specifically authorized by the laws of Florida.

As to traditional poker hands, Trips or Better is a variation of 5 Card Stud and uses the traditional ranking of hands from royal flush down to high card. Again, the highest qualifying poker hand, three-of-a-kind or better, will win the pot. In one variation of the game, if there is no qualifying hand, the highest non-qualifying hand, whatever it is, wins 20% of the pot, and the balance rolls over.

As to banking games, IGRA defines "house banking game" as:

> any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win.
>
> 25 C.F.R. § 502.11

Trips or Better is not a house banking game under this definition, nor is it a game banked by the players.

The house does not play a hand but rather earns its money by collecting antes, and players compete against one another for the pot created by all of the wagers. The winning player, not the house, collects all losing bets; the house does not pay anything to the winning player; and, without a hand, the house cannot win the pot. Similarly, the players play against one another equally, and none acts as a bank, taking on all comers, paying all winners, or collecting from all losers.

The fact that pots may "roll over" if no player has three of a kind or better does not change any of this. Following a roll over, the pot – albeit a larger one – still must be won by one of the players who began the round. New players cannot join the game until the pot is won, and the pot will be paid to the last remaining player if all others fold. After a roll over, then, players are still playing against one another and not against the house or against a player acting as the house. Further, the rules of entry and of play ensure that though a roll over will increase pot size, it cannot inadvertently create a banked pool against which the players play. This is a feature of same games that were invented recently in an attempt to create non-banking card games by having players wager against a pool funded by losing wagers, and by the house if the pot runs low. This office, however, has found such arrangements are nonetheless banking card games under 25 C.F.R. § 502.11. *See, e.g.* Memorandum re: Player-pooled Blackjack (April 4, 2003); NIGC Bulletin No. 95-1 (August 10, 1995).

I conclude, therefore, that since Trips or Better is explicitly authorized by Florida law, and since it is not a banking game, it is Class II, provided that is played in conformity with Florida law concerning hours of operation and wager and pot limits. Those are as follows.

Florida permits card rooms to be open from noon until midnight. Fla. Stat. Ann. 849.086(7)(b). For poker in Florida card rooms, the maximum bet is $2, and there may not be more than 3 raises in any round of betting. Fla. Stat. Ann. 849.086(8)(b).

B. Washington

Trips or Better is explicitly authorized by Washington law, and it is, again, not a banking game. Assuming then that it is played in conformity with Washington's card room laws and regulations concerning hours and wagers and pot limits, it is Class II.

Washington embodies a general prohibition on gambling in its constitution, Wash. Const. Art. II, § 24. That provision allows for exceptions adopted by super majorities (60%) of both houses of the Legislature or of voters in referendum initiatives. Washington has specifically authorized the play of both non-banking and banking card games, both of which it groups together as "social card games," in licensed card rooms. R.C.W. § 9.46.0282. Regulatory authority over the card rooms and the social card games is vested in the Washington State Gambling Commission. *Ibid.*

The Commission's regulations explicitly authorize eight non-banking card games, including "poker." W.A.C. § 230-40-010(2)(a)-(h). The regulations require all non-banking games to "be played in the manner set forth in *The New Complete Hoyle, Revised; Hoyle's Modern Encyclopedia of Card Games,* or a similar authoritative book on card games approved by the [Commission] director," W.A.C. § 230-40-010(2) Other non-banking card games may be authorized by approval of the Commission Director. W.A.C. § 230-40-010(2)(i).

The Washington State Gambling Commission web site lists Trips or Better as an approved poker game, indicating the Director's approval, and as the game is not a house banking

game, I conclude it is Class II if played in conformity with Washington's laws on hours, wagers, and pots. Those are as follows.

Washington requires its card rooms to close between 2 am and 6 am. W.A.C. 230-40-400(1)(a)-(f). For non-banking poker wagers, Washington sets a maximum of $25 on any single wager. It permits no more than 5 betting rounds in any one game, and it limits the wagers in any betting round to 4 – the initial wager and 3 raises. W.A.C. 230-40-120(1)(a)-(c).

3. Idaho

As poker is both expressly prohibited and not explicitly authorized by Idaho law, Trips or Better is not a permitted Class II game.

Idaho Const. Art. III § 20, subsection 1, provides a blanket prohibition on gambling: "gambling is contrary to public policy and is strictly prohibited." To this general prohibition, the Idaho Constitution creates three limited exceptions: the state lottery, pari-mutuel betting undertaken in conformity with enabling legislation (*e.g.* horseracing), and bingo and raffles operated by qualified charitable organizations for charitable purposes, again pursuant to enabling legislation.

Idaho Const. Art. III § 20, subsection 2, strictly limits the three exceptions created by subsection 1. That limitation unequivocally excludes poker:

> No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

Further, Idaho Code § 18-3802 makes gambling a misdemeanor offense, and its definition of gambling explicitly includes poker:

> "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat or keno....
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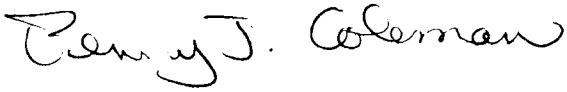
> Idaho Code § 18-3801.

Given all of this, Idaho law does not explicitly authorize but explicitly prohibits poker throughout that State. I conclude, therefore, that Trips or Better poker is not a permitted Class II game in Idaho.

Summary

In sum, Trips or Better Poker is Class II if played in accordance with the card room laws and regulations in Florida and Washington and is not permitted as Class II in Idaho. If you have any questions, please do not hesitate to contact Michael Gross, Staff Attorney, at 202-632-7003.

Very truly yours,



Penny J. Coleman,
Acting General Counsel