



April 7, 2020

Niels Holch  
Holch & Erickson LLP  
40 N. Capitol St. NW, Ste. 585  
Washington, D.C. 20001

**Re: Pari-Mutuel Draw Poker classification opinion**

Dear Mr. Holch:

This letter responds to your request for a legal advisory opinion on whether the game *Pari-Mutuel Draw Poker* constitutes a Class II game under the Indian Gaming Regulatory Act (IGRA) and National Indian Gaming Commission (NIGC) regulations. Your request letter, dated August 20, 2018, specifically requests an opinion only as to whether the game satisfies the non-banked and technologic aids requirements for Class II status. You note in that letter that a state law analysis is not requested, as you have not identified a particular state where Pari-Mutuel Draw Poker would be played. As more fully discussed below, it is my opinion that Pari-Mutuel Draw Poker is Class II.

Pari-Mutuel Poker game description

Pari-Mutuel Draw Poker is an electronic game based on draw poker and played at linked individual player stations. It uses a cashless, account-based wagering system and is played using a pari-mutuel betting format.<sup>1</sup> Players compete against each other for winnings from a wager pool that is created and disbursed through a central computer that interfaces with cashless electronic player stations.<sup>2</sup> These player stations are linked together using a closed, proprietary communications network.<sup>3</sup> These linked player stations can be limited to one gaming facility or can be linked to multiple gaming facilities.<sup>4</sup>

As players decide to enter the next game offered, the central computer creates a collective, pari-mutuel pool of all wagers that have been recorded for that game.<sup>5</sup> Once a game commences, the central computer will deduct a pre-determined takeout amount from the wager pool, which represents the house's commission for hosting that game.<sup>6</sup>

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<sup>1</sup> Letter To Michael Hoenig, General Counsel, National Indian Gaming Commission, from Niels Holch, re: Request for a Game Classification Opinion—Pari-Mutuel Draw Poker, p. 2 (August 20, 2018)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

To accommodate a large number of players, the system generates a 52 card virtual deck for each player.<sup>7</sup> From those individual decks, the system then randomly selects five playing cards per player and displays them on the individual video monitor.<sup>8</sup> The player is provided with a fixed amount of time to hold or discard any or all of these five cards.<sup>9</sup> After the player has made his or her hold/discard decisions, the electronic selection device randomly selects new cards from the individual decks to replace those that have been discarded.<sup>10</sup>

After the draw has occurred and any discarded cards have been replaced, the five cards in the player's hand will be evaluated against the hands presented on other player stations entered in the same game.<sup>11</sup> The entire wager pool (after the set house commission has been taken out) will then be distributed to the player(s) with the best poker hand(s) for that game, using a pari-mutuel payout format.<sup>12</sup>

#### Banked v. non-banked games

Banking card games, as commonly understood and as defined in NIGC regulations, are games in which a banker competes against all players, collects from all losers and pays all winners.<sup>13</sup> Sometimes the bank is an active participant (typically a dealer), playing its own hand of cards. Other times, the bank participates by virtue of game rules that specify a set hand that players must beat to win a payout (a pair of jacks in “Jacks or Better” poker, for example). Regardless of whether the bank receives its own cards, it competes against all players, collects from all losers, and pays all winners based on the winning/losing position of either the cards in its hand, or the hand described by game rules.

A game can be house-banked or player-banked. In the classic example of a player-banked game, *chemin de fer*, a single player agrees to take on all comers and pay all winners from his own pocket (the reward, of course, being that if he wins, he collects from all losers). The players in *chemin de fer* are not playing against each other, but against the single player who has agreed to bank the game. Examples of banked poker games include Caribbean Stud, Let it Ride, Pai-Gow, and Three-Card poker, as played in their traditional format. Banked card games are, by definition, Class III.<sup>14</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Meeting with Niels Holch and Jennifer Lawson, attorney, NIGC, Wednesday, December 12, 2018.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at p. 3

<sup>13</sup> 25 C.F.R. § 502.11, *see also* NIGC Bulletin 1995-1

<sup>14</sup> 25 C.F.R. § 502.4(a)

Conversely, non-banking card games are games where players play against each other, rather than the house or a single player acting as the bank.<sup>15</sup> In a non-banked game, players cannot lose more than their individual bets. Commonly known poker games (*e.g.*, Draw, Stud, Omaha, and Texas Hold ‘Em), as they are traditionally played, are non-banked games. So long as the other Class II requirements are met, non-banked card games are Class II.

#### Pari-Mutuel Draw Poker as a non-banked game

As described in the August 20, 2018 opinion request letter, Pari-Mutuel Draw Poker is a game in which the players play against each other and compete for winnings in a common wager pot. The house is not a player in the game, the electronic system does not generate a dealer hand, and the rules do not require a minimum hand for payout.<sup>16</sup> The house takes a fixed percentage commission from the wager pot of each game and has no interest in the outcome of the game. After collecting the house commission, the remaining pot is fully paid out to the player(s) with the best hand(s) using a pari-mutuel format.<sup>17</sup> The pot is not seeded, does not accrue from hand to hand, and cannot run a negative balance.

Without a dealer hand or house rules requiring a minimum hand to win, the only participants in the game are the individual players who may come and go from hand to hand. No house or player pool bank participate in the game. Nor is the game banked by any player. No single player in Pari-Mutuel Draw Poker is responsible for collecting from losing hands or paying all winners. Under the betting structure of Pari-Mutuel Draw Poker, a player’s loss is limited to their bet. And, as discussed above, the players in Pari-Mutuel Draw Poker compete against each other. Therefore, Pari-Mutuel Draw Poker is a non-banked game.

#### Technologic Aid v. Electronic Facsimile

NIGC’s regulations define *electronic, computer or other technologic aid*, in relevant part, as any machine or device that:

- (1) Assists a player or the playing of a game;
- (2) Is not an electronic or electromechanical facsimile; and
- (3) Is operated in accordance with applicable Federal communications law.<sup>18</sup>

Additionally, the regulation provides examples of the functions served by technological aids:

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<sup>15</sup> 25 C.F.R. § 502.3(c)

<sup>16</sup> Letter To Michael Hoenig, General Counsel, National Indian Gaming Commission, from Niels Holch, re: Request for a Game Classification Opinion—Pari-Mutuel Draw Poker, Game Specifications attachment, p. 3 (August 20, 2018)

<sup>17</sup> *Id.*

<sup>18</sup> 25 C.F.R. § 502.7(a)

Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

- (1) Broaden the participation levels in a common game;
- (2) Facilitate communication between and among gaming sites; or
- (3) Allow a player to play a game with or against other players rather than with or against a machine.<sup>19</sup>

Although technologic aids are permissible in the play of Class II bingo and card games,<sup>20</sup> similar “electronic or electromechanical facsimiles of any game of chance” are necessarily Class III gaming devices.<sup>21</sup> The Commission’s regulations define *electronic or electromechanical facsimile*, in relevant part, as “a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game....”<sup>22</sup> Courts have adopted a plain meaning interpretation of the term *facsimile* and recognize a facsimile as a game that electronically replicates the characteristics of the underlying game.<sup>23</sup>

A 2009 NIGC Memorandum determined that an electronic card table called the DigiDeal Digital Card System (DigiDeal) was a technologic aid to the game of poker rather than a facsimile.<sup>24</sup> Although each purported aid to a class II game must be reviewed individually to ascertain whether it is a mere technologic aid or a facsimile, the 2007 DigiDeal memo does offer guidance on the subject. The DigiDeal table, incorporates only some of the characteristics of poker, namely shuffling, dealing, and ranking winning and losing hands. The player still controls the key aspects of poker, such as whether to ante or place a wager, play a hand or fold, and when and whether to bluff opponents.

If, however, a particular aid to card games becomes a necessity, or encompasses all the aspects of a particular game, it ceases to be a technologic aid and becomes an electronic facsimile. For example, in *Sycuan Band of Mission Indians v. Roache*,<sup>25</sup> the United States Court

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<sup>19</sup> 25 C.F.R. § 502.7(b)

<sup>20</sup> See NIGC Memorandum to George Skibine, Acting Chairman, and Norm DesRosiers, Vice Chairman, from Penny J. Coleman, Acting General Counsel, re: Classification of card games played with technologic aids, December 17, 2009. (“*DigiDeal Opinion*”). NIGC Opinion to Mr. Kent R. Hagg, Whiting Hagg & Hagg, from Penny J. Coleman, Acting General Counsel, re: Classification opinion, DigiDeal Digital Card System, Trips or Better Poker, December 21, 2004.

<sup>21</sup> 25 U.S.C. §2703(7)(B)(ii)

<sup>22</sup> 25 C.F.R. §502.8

<sup>23</sup> *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9<sup>th</sup> Cir. 1994) (“the first dictionary definition of ‘facsimile’ is ‘an exact and detailed copy of something’”), *cert. denied*, 516 U.S. 912 (1995); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994)(“[a]s commonly understood, facsimiles are exact copies, or duplicates”).

<sup>24</sup> See NIGC Memorandum to George Skibine, Acting Chairman, and Norm DesRosiers, Vice Chairman, from Penny J. Coleman, Acting General Counsel, re: Classification of card games played with technologic aids, December 17, 2009. (“*DigiDeal Opinion*”) (“The definition of Class II gaming does not exclude card games played with a technologic aid and, therefore, such games are Class II.”)

<sup>25</sup> 54 F. 3d 535 (9<sup>th</sup> Cir. 1994)

of Appeals held that the “Autotab Model 101 electronic pull-tab dispenser” is a class III facsimile of a pull-tab device. The Autotab Model 101 produced only an electronic reproduction of a paper pull-tab ticket on a computer screen. The player electronically picked numbers and, if the player won, the machine would print out a winning ticket or add the winning amount to a credit balance for further play. The game was played entirely on the machine without producing a paper pull-tab. The court found that the machine was a Class III facsimile because “the machine presents self-contained computer games copying the pull-tab principle, and they are played electronically.”<sup>26</sup> Autotab was an “exact and detailed copy” of a pull-tab game.<sup>27</sup>

In *Sycuan*, the Autotab game was played electronically and encompassed all the aspects of a pull-tab game. It was thus ruled a Class III electronic facsimile. Similarly, should an electronic poker table or other game encompass all of the aspects of poker, it is a Class III facsimile.<sup>28</sup> Put simply, a technologic aid merely assists the players. It is a way to play the game, not the game itself.

#### Pari-Mutuel Draw Poker as a Technologic Aid

Pari-Mutuel Draw Poker incorporates many features similar to those of DigiDeal Tables into individual player stations that are connected by a closed proprietary communications network. The interconnected player stations allow players to compete in a common game against others who may not be physically located in the same room or gaming establishment.

The system unquestionably satisfies two of the three regulatory elements of a technologic aid. It assists the playing of the game by connecting willing players with competition, accepting electronic wagers, shuffling, dealing, determining winning hands, and paying out winnings. It also operates on a closed proprietary communications network, which NIGC has previously opined complies with Federal communications law.<sup>29</sup> The remaining question, therefore, is whether it is a facsimile of a game of chance, specifically, whether it replicates a game of chance by incorporating all of the characteristics of the game.<sup>30</sup>

Although it aids players in many of the same ways as the DigiDeal Tables, Pari-Mutuel Draw Poker may also eliminate or replicate some of the key elements of the game of draw poker. The rules of a particular Pari-Mutuel Draw game may provide no

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<sup>26</sup> *Id.* at 542

<sup>27</sup> *Id.*

<sup>28</sup> *DigiDeal Opinion.*

<sup>29</sup> See Letter from Tracie L. Stevens, Chairwoman, NIGC, to Tom Foley, Foley Law, PLC, at 5 (July 3, 2013), *citing* NIGC Bulletin 2009-03, at 3 (Mar. 9, 2009); and Letter from Penny J. Coleman, Acting General Counsel, NIGC, to Donald Bailey, President, Atlantis Internet Group Corp., at 2 (Sept. 24, 2009).

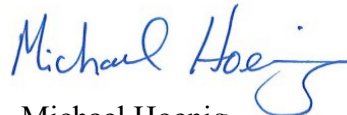
<sup>30</sup> 25 C.F.R. § 502.8

opportunity to place a second bet or fold.<sup>31</sup> In such games, the only decision necessarily being made by the players would be whether to place the initial wager to enter the game. The system does not replace the player actions to bet, bluff, or fold, it merely eliminates them from some of its games. The players simultaneously choose whether and which cards to replace in the draw within a set amount of time. If a player fails to make a selection in the allotted time, all cards which have been affirmatively discarded cards will be replaced and all other cards will be deemed to be held by the player.<sup>32</sup> Automatic selection is a necessary element to keep the game moving for all players. Despite eliminating or replicating some aspects of draw poker, the game does not perform these functions for the player, it merely eliminates them from the game as opposed to incorporating them into the electronic play. Accordingly, the game is not a facsimile of a Class II game.

### Conclusion

After careful review, I have determined that Pari-Mutuel Draw Poker is a non-banked card game, played with an electronic device that aids play and broadens participation in compliance with federal communication laws. It does not replicate all elements of a game of chance, and is, therefore, not a Class III facsimile. So long as it is played in conformity with state laws and regulations concerning hours, periods of operation, and limitations on wagers and pot sizes, Pari-Mutuel Draw Poker is a Class II game. If you have any questions, please contact Jennifer Lawson, Senior Attorney, at 202-632-7003.

Sincerely,



Michael Hoenig  
General Counsel

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<sup>31</sup> Letter To Michael Hoenig, General Counsel, National Indian Gaming Commission, from Niels Holch, re: Request for a Game Classification Opinion—Pari-Mutuel Draw Poker, Game Specifications attachment, p. 3 (August 20, 2018)

<sup>32</sup> *Id.* at 2.