BEFORE THE NEUTRAL ARBITRATOR

THE HO-CHUNK NATION AND THE STATE OF WISCONSIN

OPINION

The sole question presented by this case is whether Ho-Chunk Nation, a federally recognized Indian tribe, is permitted to offer non-banking poker[1] at its DeJope Gaming Facility in Madison, Wisconsin.

In 1992, the Nation and the State of Wisconsin entered into a Tribal-State Compact in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq*. The Compact authorizes the

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[1] The Nation offers non-banking, electronic poker at DeJope through a system called PokerPro. "Non-banking" means that the players play against each other, rather than against the house; in "banking" games, the players play against the house and the house acts as banker. The fact that this non-banking poker game is an electronic, rather than a physical, card game is irrelevant. As the parties have stipulated, playing poker on this electronic system is the same as playing with cards.

EXHIBIT C

Nation to conduct "Class III" gaming[2] – which includes the types of games usually associated with Las Vegas-style gambling, such as slot machines and house-banked table games – on specified tribal land, as defined in the Compact. The Compact was amended in 1998 to remove certain restrictions on the Nation's gaming from the Compact and again in 2003 to authorize the Nation to offer both banked and non-banked poker at its Class III facilities. Pursuant to the Compact, the Nation has Class III casinos in Wisconsin Dells, Black River Falls, and Nekoosa, Wisconsin. The Nation also conducts Class III gaming at two ancillary sites in Wittenberg and Tomah, Wisconsin.

DeJope, however, is not governed by the Compact. There is no Class III tribal-state compact that covers this facility. The parties

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[2] Under IGRA, "Class III" gaming covers all forms of gaming that are neither "Class I" nor "Class II." 25 U.S.C. § 2703(8).

"Class I" gaming is limited to social games for nominal prizes and tribal ceremonial games, id. § 2703(6), and is not relevant here.

"Class II" gaming includes non-banking 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), (B)(i).

agree, however, that the Nation is allowed to offer Class II gaming at DeJope.

Therefore, the question in this case is whether the non-banking poker the Nation is offering at DeJope is a Class II game (and is thus permissible) or a Class III game (and is thus not permissible at DeJope, unless the parties enter into a compact that covers that gaming facility). Answering this question, as the parties acknowledge, requires the analysis and interpretation of both federal law (IGRA) and Wisconsin law.

IGRA defines Class II games to include non-banking 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 Wisconsin Constitution – in Article IV, Section 24 ("Gambling"), which was added by constitutional amendment in 1993 –

provides that, except for certain enumerated exceptions, "the legislature may not authorize gambling in any form." The listed exceptions to this prohibition are bingo, certain raffle games, pari-mutuel on-track betting, and the state lottery. Wis. Const. Art. IV § 24, ¶¶ 3-6. This section also specifically prohibits certain games, including "poker," from being conducted by the state as a form of lottery. Id. at ¶ 6(c).

The State argues that non-banking poker does not satisfy IGRA's Class II definition because poker is "explicitly prohibited by the laws of the State" – namely, the Wisconsin Constitution's blanket prohibition on gambling. The State argues the statute is unambiguous and, thus, non-banking poker cannot be played at DeJope.

The Nation, in contrast, argues that non-banking poker falls within Class II because Wisconsin does not explicitly prohibit the playing of poker. The Nation relies upon facts that it alleges shows that poker is being played in Wisconsin, as well as other sections of IGRA that it contends renders the Class II definition ambiguous.

After analyzing the applicable statutory provisions in the context of the parties' arguments, made in both their principal and supplemental briefs and at oral argument, I conclude that in the

absence of a tribal-state compact covering DeJope, the Nation is not permitted to offer non-banking poker at that facility because it is not a Class II game.

IGRA's language is unambiguous. Class II includes non-banking card games that "are not explicitly prohibited by the laws of the State." Given the express prohibition in Wisconsin's Constitution that precludes "the legislature [from] authoriz[ing] gambling in any form," non-banking poker cannot satisfy Class II's requirement that the game is "not explicitly prohibited by the laws of the State." It is explicitly prohibited.

Regarding whether Wisconsin "explicitly prohibits" non-banking poker, the Nation argues that the Wisconsin Constitution does not "explicitly prohibit" poker because it mentions poker by name only in the context of the state lottery. The Constitution specifies "poker" when defining the exception for the state lottery, in which the state is prohibited from conducting "poker" "as a lottery." Wis. Const. Art. IV § 24, ¶ 6. However, there is no authority in IGRA that requires the non-banking card game be specified by name or that a State's blanket prohibition on gambling is insufficient to "explicitly prohibit[]" a

particular game. In addition, the fact that the Wisconsin Constitution, in defining an exception from the gambling prohibition for the state lottery, specifies that the State nonetheless is not permitted to offer games such as poker as part of its lottery underscores that poker is a game subject to Wisconsin's blanket prohibition.

Nor does the Nation's reliance on evidence that poker is being permitted or played in a number of forms throughout Wisconsin alter the Constitution's express prohibition. Even assuming that poker is being played in some form in Wisconsin, that fact is not relevant to answering whether *state law* "explicitly prohibits" the game. To fit within the definition of a Class II game, IGRA requires that the card game be "not explicitly prohibited by the laws of the State *and* are played at any location in the State." 25 U.S.C. § 2703(A)(ii) (emphasis added). Because "not explicitly prohibited by the laws of the State" is unambiguous, there is no need to consider whether poker is being "played at any location in the State." Even if poker was being played in some form in the State, Wisconsin law nevertheless "explicitly prohibit[s]" it.

Nor do the cases the Nation relies upon avoid the express statutory language. The Nation tries to create an ambiguity in the Class II definition by relying upon *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987), in which the Supreme Court held (pre-IGRA) that a state does not have authority to enforce state prohibitions on gaming on Indian lands if it generally permits such gaming within its state. The Nation argues that the "prohibitory/regulatory" distinction that was set forth in *Cabazon* and adopted in IGRA, *see* 25 U.S.C. § 2710(b)(1)(A) (Class II gaming may be conducted only "within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)," means that even if *a* state law prohibits the game, that does not mean "the laws of the State" prohibit the game, where the state's public policy toward gaming is regulatory, rather than prohibitory. [Nation Final Br., p. 5] The Nation contends that because Wisconsin's policy toward gambling and poker specifically is "regulatory" (meaning that it permits gaming), the state does not "explicitly prohibit[]" poker.[3]

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[3] The Nation also relies on *Sycuan Band of Mission Indians v.*

Yet neither the cases the Nation cites, nor its strained statutory interpretation argument, can overcome either IGRA's express language or the express prohibition in the Wisconsin Constitution. As discussed above, the express language of the Class II definition requires an inquiry into whether the game is "explicitly prohibited by the laws of the State" and Wisconsin law contains just such an explicit prohibition. The Nation provides no authority for how the language of Section 2710(b) or *Cabazon*'s analysis alters the express statutory language of the Class II definition in Section 2703(7). The Nation has cited no case that applies *Cabazon*'s analysis to determine whether a game is "explicitly prohibited by the laws of the State." This statutory interpretation argument thus cannot overcome the unambiguous statutory language.

Roache, 54 F.3d 535, 539 (9th Cir. 1994) (Canby, J.), in which the Ninth Circuit held that California lacked jurisdiction to enforce its criminal laws against Class III gaming on tribal lands. *Sycuan*, however, did not address the "explicitly prohibit" language in the Class II gaming definition, nor suggest that the Supreme Court's analysis in *Cabazon* applies here. Indeed, in holding that the game at issue in *Sycuan* was Class III, not Class II, the Ninth Circuit did not look beyond the plain statutory language. *Id.* at 543 (explaining the "language compels our result").

I recognize the significant investment that the Nation has made in the non-banking poker system it is using at DeJope – as well as the fact that the Nation made that investment after it sought the guidance of the National Indian Gaming Commission ("NIGC").[4] Nonetheless, I must conclude the statutory language is clear and unambiguous and, thus, the non-banking poker offered at DeJope is not a Class II game, as it is "expressly prohibited" by Wisconsin law.

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[4] I part company with the NIGC's classification opinion in my analysis. The NIGC concluded that poker is not "explicitly prohibited" by the laws of Wisconsin. Although the NIGC recognized that "[a]n 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 NIGC ultimately concluded that "[u]pon a complete review of Wisconsin law . . . 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." SOF, Ex. F at p. 2. The NIGC relied upon the fact that poker is permitted under tribal-state compacts. *Id.* at pp. 4-6 (discussing *Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1 (2006)). In *Dairyland*, the Wisconsin Supreme Court held the terms of the tribal-state gaming compacts to be valid – notwithstanding the 1993 amendment that added the general prohibition on gambling to the Wisconsin Constitution – as the rights granted therein were protected by the Contracts Clause of Wisconsin and the United States Constitution.

Neither *Dairyland* nor the gaming conducted pursuant to tribal-state compacts alters the fact that the "explicit prohibit[ion]" remains in Wisconsin state law. Even though exceptions to that prohibition have been made or carved out to protect preexisting contract rights, poker remains "explicitly prohibited" by the laws of the state.

Therefore, the Nation is not permitted to offer this non-banking poker system at DeJope, unless the parties enter into a tribal-state compact that specifically allows this game at that facility (which I understand is the only Class III game the Nation is interested in offering at DeJope).

I appreciate that both the Nation and the State have asked me to be their neutral arbitrator in this case, and I thank you.

Should either party wish to file a petition for rehearing, I will consider it if filed within a reasonable period of time, say 30 days.

Respectfully submitted,

William A. Norris
Neutral Arbitrator

May 1, 2012