



Andreia McMillen, Staff Services Manager
California Bureau of Gambling Control
P.O. Box 18024
Sacramento, CA 95816-8024

October 23, 2023

SENT BY EMAIL ONLY TO: BGC_Regulations@doj.ca.gov

Re: Comments on proposed concept draft player-dealer and Blackjack regulations

Dear Ms. McMillen:

The Federated Indians of Graton Rancheria (the Tribe) is a federally recognized Indian tribe located in Sonoma County which owns and operates the Graton Resort and Casino. As Chairman of the Tribe, I write in response to the proposed concept player-dealer and Blackjack regulations recently issued by the California Department of Justice, Bureau of Gambling Control (the "Bureau"). After reviewing these proposed regulations and California law, we conclude that these proposed regulations would continue the status quo by making inconsequential alterations in existing cardroom practices and would therefore continue to allow cardrooms to operated banking games in violation of the California Constitution, state statutes and judicial decisions. We therefore request that the Bureau withdraw these proposed concept regulations and enforce state law against the illegal operation of banking games.

I. All banking games are illegal under California law.

As you are aware, the operation of Blackjack games is prohibited by California's Constitution and Penal Code.¹ This has been true for most of California's history.² In addition to Blackjack, California law also criminalizes the conduct of all banking games, defined as games

¹ Cal. Const. § 19(e); Cal. Penal Code § 330.

² See *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 21 Cal.4th 585, 592 (1999) (referred to in this letter as "HERE") (holding that initiative which authorized banking card games violated the California constitution and statutes).

“where there is a fund against which everybody has the right to bet, the bank taking all that is lost by the bettors and paying out all that is won by them or all save a percentage which it keeps.” In a banking game the banker or exhibitor pays all the winnings and suffers all the losses; he is the one against the many, which is the supreme test of a banking game.³

Minor rules variations do not change the essential legal analysis:

a game will be determined to be a banking game if under the rules of that game, it is possible that the house, another entity, a player, or an observer can maintain a bank or operate as a bank during the play of the game. . . . [For example,] in *Newjack*, the player-dealer position does not *have* to rotate among the players. If the other players decline to accept the player-dealer position, one player can act as a player-dealer for repeated hands and such a player need not go broke after a few hands. A player with a significant amount of money to bet can hold the position of player-dealer for a long time, and thus keep the inherent playing advantage for him or herself. The effect would be a banked game because it could then be said of such a player that he or she is “taking on all comers, paying all winners, and collecting from all losers.” Because the rules permit such an occurrence, we hold *Newjack* is a banking game and therefore, as presently constituted, prohibited under [Penal Code] section 330.⁴

The California Supreme Court reached the same result one year later when reviewing the tribes’ operation of player-banked games:

That the tribe must “pay[] all winners, and collect[] from all losers” through a fund that is styled a “players’ pool” is immaterial: the players’ pool is a bank in nature if not in name. It is a “fund against which everybody has a right to bet, the bank ... taking all that is won, and paying out all that is lost.” . . . True, the players’ pool is limited in what it pays—but not in what it collects—in that the tribe is prohibited from lending the pool money “to pay prizes previously won”. But, as we explained in *Western Telcon*, the fact that payouts on wagers must be made from a limited fund of money does not transform a banking game into a lottery. Such a banker simply finds itself “in the enviable position of a gambler who has, by law, an upper limit to his losses.”⁵

³ *People v Ambrose*, 122 Cal.App.2d Supp. 966, 970 (1953) (citation omitted).

⁴ *Oliver v. County of Los Angeles*, 66 Cal.App.4th 1397, 1408-9 (1998).

⁵ *HERE*, 21 Cal.4th at 606-7.

The National Indian Gaming Commission (NIGC) reached the same conclusion with respect to tribally-operated player banked versions of Blackjack:

It has been asserted that in player banked blackjack, players are playing against each other. This is incorrect. In player banked blackjack, the players are not playing against each other. They are playing against a banker who happens to be another player. This player banker has a percentage or odds advantage over all other players. This advantage is a fundamental characteristic of a banking game. . . . In the view of the NIGC, the reference to the 'house' is not limited to the gaming operation, but refers to anyone who is a participant in the game, takes on all players, collects from the losers, and pays the winners.⁶

Of course, NIGC regulations and interpretations only apply to tribal gaming operations, but they illustrate the unanimity across the gaming industry that merely using player-dealers to bank a game does not transform a game into a non-banking game simply because the cardroom or gaming operator is not providing the bank. Rather, whether a game is a banking game is determined by reference to one central element, namely, where the dealer takes on all players, pays all winners, and collects from all losers. This is the law in California: "a banking game, within the meaning of Penal Code section 330's prohibition, may be banked by someone other than the owner of the gambling facility."⁷ This is occurring now through the use of Third-Party Proposition Player Services (TPPPS) providers, and the draft proposed concept regulations would continue this practice.

II. The player-dealer regulations would allow cardrooms to continue to operate illegal banking games through the use of TPPPS.

As you know, California law allows cardrooms to enter into contracts with TPPPS providers. In addition to hiring players to stimulate play or to keep games active during periods where there are a small number of players at the table, TPPPS licensees can also bank card games, by allowing their employees to play card games using funds provided by the TPPPS provider. While the player-dealer regulations appear to be intended to further regulate TPPPS players' activity when they occupy the player-dealer position, in reality they merely continue to allow banking games prohibited by Section 330 of the Penal Code.

The proposed concept regulation provides that each player must be offered the chance to serve as dealer before each hand, continuing the practice established in the now-discredited 2007

⁶ NIGC Bulletin 95-1 (April 10, 1995).

⁷ *HERE*, 21 Cal.4th at 608 (citing *Oliver*).

“Lytle Letter.”⁸ The proposed regulations also require that the deal must rotate to at least two other players in each 40-minute period and that if it does not rotate within that time period, the game ends. In actuality, these proposed regulations allow a TPPPS player-dealer to swap positions with another TPPPS player-dealer at another table every 40 minutes. These proposed regulations would provide legal sanction to the unlawful conduct of banking games at California cardrooms because nothing in these proposed concept player-dealer regulations changes the banking feature of the use of TPPPS providers. The other proposed draft regulation shares the same defect.

III. The Blackjack regulations would allow cardrooms to continue to operate illegal banking games.

Nothing in these proposed concept Blackjack regulations changes the fact that cardrooms would be able to continue operating banking games. Blackjack is a classic example of a banking card game, in which each player is competing with, and can win from, the dealer (or “bank”), rather than the other players. In Blackjack, each player competes against the dealer/banker to try to build a hand which, based on the point totals assigned to each card, adds up to but do not exceed a target value (in Blackjack, the target value is 21 points). The point total of every player’s hand is compared with that of the dealer, and not the other players’ hands. A successful player is paid from the dealer, not from the other players. A losing player pays the dealer, not the other players.

The proposed concept regulations prohibit games called “Blackjack.”⁹ But while the proposed regulations take away with one hand, they give back with the other, by allowing Blackjack under certain minor rules variations:

- The game cannot be called “Blackjack;”
- The target point total cannot be 21;
- A “push” (*i.e.*, a tie between the player and the dealer) must result in a win for the player;

⁸ Letter from Gambling Control Bureau Chief Robert Lytle to Southern California Cardroom Association and Golden State Gaming Association (Dec. 20, 2007) (opining that the requirement for the “continuous and systematic” rotation of the dealer position in player-dealer games was satisfied by ensuring that every player was offered the deal, but that actual rotation was not necessary). *See also* Letter from Agua Caliente, Barona, Viejas, Yocha Dehe, Table Mountain, Sycuan and Pechanga to Wayne Quint Jr., Chief of Gambling Control Bureau (April 15, 2016) at 4 (“Second, the Lytle letter was, from the day it was issued, an obvious fraud. As the Bureau detailed in its December 2014 formal accusation against Lytle, ‘prior to December 4, 2007’ – that is, a few days before he sent the ‘offer’ letter to the presidents of two cardroom associations – he entered into ‘negotiations with [a San Jose cardroom] concerning prospective engagement as its compliance director.’ Then, ‘on December 30, 2007, [Lytle] retired from state service’ and the next day ‘entered into the agreement that had been negotiated since before December 4, 2007.’ Thus, reduced to its essence, it appears Lytle negotiated for employment at a cardroom while still the Bureau Chief, then issued the letter providing cardrooms the ability to skirt the law on game rotation, and a few days later left to work at a cardroom. We think little more needs to be said about that situation.”)

⁹ Draft Proposed Concept Regulation, Section 2073(a).

- The game cannot contain the automatic win feature contained in traditional Blackjack (*i.e.*, when a player gets a 10-point card and an ace in the initial two-card deal, they automatically win from the dealer); and
- The game cannot contain the “bust” feature, in which a player that goes over the target point value automatically loses to the dealer.¹⁰

These rules changes are not only minor, they are legally inconsequential because by whatever name a cardroom refers to a game in which players compete against, and either pay losses to or recover winnings from, the dealer rather than against all other players, California law still classifies such a game as a banking game which is criminally prohibited by Section 330 of the Penal Code.

IV. Conclusion.

We are disappointed that nothing in these proposed concept regulations changes the essential reason that California Tribes have long sought action by the California Department of Justice to shut down illegal banked card games. This illegal practice undermines the class III gaming exclusivity to which California Tribes are guaranteed under their tribal-state gaming compacts entered into in good faith. We therefore request that the Bureau withdraw these proposed concept regulations and instead focus its efforts on the enforcement of California law. Doing so will ensure that the State of California lives up to its obligations under the compacts with California Tribes.

Sincerely yours,

Greg Sarris
Chairman, Federated Indians of Graton Rancheria

¹⁰ Draft Proposed Concept Regulation, Section 2073(b).