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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CROSBY LODGE, INC., a Nevada corporation, **Plaintiff,** **v.** **NATIONAL INDIAN GAMING COMMISSION, et al,** **Defendants.**	**Civil Action No. 3: 06-CV-00657-LRH-RAM** **MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case concerns a National Indian Gaming Commission ("NIGC" and "Commission") regulation that requires "not less than 60 percent" of a Class III, non-tribal, individually owned gaming operation's net revenue "be income to the Tribe." 25 C.F.R. § 522.10(c). Plaintiff Crosby Lodge, Inc., is a non-tribal, individually owned gaming operation engaged in Class III gaming which, under the challenged regulation, must pay the Pyramid Lake Paiute Tribe 60% of its net revenue derived from Class III gaming. The Plaintiff's Class III gaming activities are authorized by a tribal ordinance. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA" or the "Act"), describes the requirements a tribal ordinance must satisfy before Class III gaming may take place, including that "not less than 60 percent of the net revenues is income to the Indian tribe . . . ." 25 U.S.C. § 2710(b)(4)(B)(i)(III).

All Class III gaming activities, including those undertaken by the Plaintiff, must be authorized by a tribal ordinance that "meets the requirements of subsection (b) of [25 U.S.C. § 2710(b)]." 25 U.S.C. § 2710(d)(1)(A)(ii); see also § 2710(d)(2)(A) ("If any Indian tribe proposes to . . . authorize any person or entity to engage in, a class III gaming activity . . . the Indian tribe shall adopt and submit . . . an ordinance or resolution that meets the requirements of subsection (b) of this section [§ 2710]."). The subsection referenced by the statute, § 2710(b), requires that tribal ordinances authorizing gaming operations "owned by a person or entity other than the Indian tribe and conducted on Indian lands," § 2710(b)(4)(A), must include a requirement that "not less than 60 percent of the net revenues" be paid as "income to the Indian tribe . . . ." § 2710(b)(4)(B)(i)(III). Plaintiff disputes the NIGC's authority to issue a regulation to the same effect.

NIGC's regulation is a permissible interpretation of IGRA because it is consistent with the Act's plain language, it is a reasonable interpretation thereof, and consistent with Congress's intent. The plain language of IGRA provides that a tribal ordinance authorizing Class III gaming must meet the same requirements applied to Class II gaming ordinances. §§ 2710(d)(1)(A)(ii), (d)(2)(A). The requirements for Class II gaming include a mandate that non-tribal, individually owned gaming operations pay Tribes not less than 60% of net revenues. § 2710(b)(4)(B)(i)(III). Because the requirements for Class III ordinances are inclusive of those for Class II ordinances, they necessarily include the requirement that individually owned gaming operations on tribal land pay Tribes nothing less than 60% of net revenues. Likewise, the regulation challenged by the Plaintiff, 25 C.F.R. § 522.10(c), requires "not less than 60% of the net revenues be income to the Tribe," a mandate consistent with Congress's purpose in enacting IGRA, "to ensure that the Indian tribe is the *primary* beneficiary of the gaming operation . . . ." § 2702(2) (emphasis added). On these and the other grounds enumerated below, Defendant National Indian Gaming Commission respectfully requests that the Court grant its motion for summary judgment and deny the Plaintiff's motion for summary judgment.[1]

BACKGROUND

Plaintiff operates fifteen slot machines within a larger business on lands owned by Fred and Judy Crosby, within the boundaries of the Pyramid Lake Reservation. They are licensed by the Pyramid Lake Paiute Tribe to conduct Class III gaming on the Reservation but are not members of the Paiute Tribe.

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[1] Nothing in this memorandum waives or abandons any prior arguments made by Defendant NIGC.

The NIGC is authorized to promulgate rules implementing IGRA. 25 U.S.C. § 2706(b)(10). To that end, in 1993, NIGC adopted a regulation governing the submission of tribal gaming ordinances. See 25 C.F.R. § 522 (2008). Tribal gaming ordinances govern the conduct and regulation of gaming on Indian lands, and no Class II or Class III gaming can take place until an ordinance is adopted. 25 U.S.C. §§ 2710(b)(2), (b)(4), (d)(1)(A), (d)(2)(A). The corresponding notice of proposed rulemaking was published in the Federal Register on July 8, 1992. Administrative Record ("AR") at 48-62; 57 Fed. Reg. 30346 (July 8, 1992). One commenter suggested "limiting authority to engage in class III gaming to Indian tribes under § 522.10." AR at 5. NIGC disagreed, finding that the clear language of § 2710(d)(A) allowed for non-tribal entities to engage in class III gaming. See § 2710(d)(A) "[i]f any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity . . . ."). The final rule was published on January 22, 1993. 58 Fed. Reg. 5811 (Jan. 22, 1993).

The challenged regulation, 25 C.F.R. § 522.10, sets forth the requirements for tribal gaming ordinances. It includes a requirement that "[f]or licensing of individually owned gaming operations other than those operating on September 1, 1986 . . . a tribal ordinance shall require: . . . (c) [t]hat not less than 60 percent of the net revenues be income to the Tribe; . . . ." 25 C.F.R. § 522.10.

STANDARD OF REVIEW

Summary judgment is designed "to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). The Supreme Court has held that "summary judgment is proper" if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Id. at 322 (quoting FED. R. CIV. P. 56). All reasonable inferences must be drawn in favor of the non-moving party. Triton Energy Corp. v. Square D. Co., 68 F.3d 1216, 1220 (9th Cir. 1995).

ARGUMENT

I. IGRA'S PLAIN LANGUAGE DIRECTS THAT A TRIBE MUST RECEIVE NO LESS THAN 60 PERCENT OF THE NET GAMING REVENUE

Where the intention of Congress is clear, "that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). Here, IGRA expresses, through its plain and unambiguous language, the intent of Congress. The challenged regulation mirrors Congress's statutory language.

Congress has explicitly stated that NIGC may regulate Class II and Class III gaming: "[t]he Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter." 25 U.S.C. § 2706(b)(10). This language does not imply that NIGC shall only regulate Class II gaming; it states that NIGC shall "implement the provisions of this chapter," which includes Class III gaming. Id. The word "shall" is "ordinarily 'the language of command.'" Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 (1935)); see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion."). The Plaintiff's assertion that "Tribal-State compacts, and tribal governing body adopted and Chairman-approved tribal ordinances or resolutions" are the "sole source of Indian lands class III gaming regulation" is thus, incomplete. Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for Summ. J. at 19, Docket No. 67; discussed further,

infra Section III. That interpretation ignores Congress's unambiguous command that NIGC promulgate regulations consistent with the statute governing Class III gaming. See MCI Telecomms. Corp. v. AT & T, 512 U.S. 218, 231 n.4 (1994) (Agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.").

The challenged regulation, 25 C.F.R. § 522.10, is consistent with an explicit statutory mandate. A tribal ordinance may provide for the licensing of non-tribally operated gaming, so long as it meets the requirements listed in § 2710(b)(4)(A). See also 25 U.S.C. §§ 2710(b)(4)(B)(i)(I)-(IV), (d)(1)(A)(ii). To allow for Class III gaming by a non-tribal entity on tribal land, a tribal ordinance must establish licensing requirements that: 1) "are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located," § 2710(b)(4)(A);[2] 2) prohibit anyone from receiving a license "if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State," Id.; and 3) meet the requirements

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[2] 25 U.S.C. § 2710(b)(4)(A) states that:

> A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

of § 2710(b)(4)(B)(i)." Id. Those requirements include that "not less than 60 percent of the net revenues is income to the Indian tribe . . . ." § 2710(b)(4)(B)(i)(III).

The exception for individual, non-tribally operated gaming on tribal land applies both to Class III and Class II gaming. Section 2710(d)(1) states that "Class III gaming activities shall be lawful on Indian lands only if such activities are [ ] authorized by an ordinance or resolution that . . . meets the requirements of subsection (b) of this section . . . ." Likewise, § 2710(d)(2)(A) states that the "Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section." The referenced "subsection (b)" is § 2710(b), which includes the following requirements that must be met by non-tribally owned Class II and III gaming operations:

> (I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 [of IGRA];
>
> (II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection;
>
> **(III) not less than 60 percent of the net revenues is income to the Indian tribe; and**
>
> (IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

25 U.S.C. § 2710(b)(4)(B)(i)(I)-(IV) (emphasis added); see also (d)(1)(A)(ii) and (2)(A).

The regulation challenged by Plaintiff simply mimics the language of the statute. Specifically, the regulation provides:

> For licensing of individually owned gaming operations other than those operating on September 1, 1986 (addressed under § 522.11 of this part), a tribal ordinance shall require:
> ***
> (c) **That not less than 60 percent of the net revenues be income to the Tribe.**

25 C.F.R. § 522.10 (emphasis added).

IGRA vests NIGC with broad authority to "promulgate such regulations and guidelines as it deems appropriate . . . ." 25 U.S.C. § 2706(10). When Congress grants an agency authority to promulgate regulations it deems necessary to implement the provisions of an act, it necessarily grants the agency broad discretion. See Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 365 (1973); California v. Block, 663 F.2d 855, 860 (9th Cir. 1981). Here, IGRA has promulgated a regulation that mimics the actual language of the statute itself.

NIGC's regulation is consistent with the language of the statute itself, which requires that tribal ordinances meet the requirements of § 2710(b). The starting point for any question of statutory interpretation is "the language itself." Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). Here, the statute states, two times, that tribal ordinances must "meet the requirements of" § 2710(b). Plaintiff suggests that this does not include § 2710(b)(4). But Congress did not make that distinction. Put strongly, "the expressio unius . . . principle is that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312-13 (9th Cir. 1992); (quoting Raleigh & Gaston R.R. Co. v. Reid, 80 U.S. (13 Wall.) 269, 270 (1871)). Here, Congress chose to include the whole of § 2710(b). It did not exclude the part which requires Plaintiff to pay 60% of its net gaming revenues to the Tribe.

Nor does this regulation undermine any tribal-state compacts which govern Class III activities. No matter what is included in a tribal-state compact, Class III gaming activities are unlawful unless those activities are "authorized by an ordinance or resolution that . . . meets the requirements of subsection (b) of this section." §§ 2710(d)(1)(A); (d)(2)(A). The principle that one thing excludes the other, is properly applied only when it makes sense as a matter of

legislative purpose and statutory text. Alcaraz v. Block, 746 F.2d 593, 607-08 (9th Cir. 1984). Here, Congress unambiguously concluded that a Tribal-State compact could impose certain gaming regulations, and that on top of that, any tribal ordinance must also include the requirements set forth in §2710(b). Both commands must be given effect. The two commands are made consistent by § 2710(b)(4)(A)'s requirement that "[n]o person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands. . . if such person *would not be eligible to receive a State license to conduct the same activity* . . . ." (emphasis added). Therefore, § 2710(b)(4)(A) does not preclude additional state requirements, as might be found in a Tribal-State compact.

Just the same, the provisions authorizing Tribal-State compacts do not exclude the requirements set forth in § 2710(b) and made applicable to Class III gaming by § 2710(d)(1)(A)(iii) and § 2710(d)(2)(A). Infra Section III; Keweenaw Bay Indian Cmty v. United States, 136 F.3d 469, 475 (6th Cir. 1998), cert denied, 525 U.S. 929 (1998) ("[t]o find that the existence of a valid, approved tribal-state compact somehow eliminates other IGRA provisions would obviate the plain language of the statute and its establishment of a federal regulatory regime through statutory standards and the National Indian Gaming Commission."). The Plaintiff implies that the authorization of Tribal-State compacts precludes NIGC from implementing § 2710(b). In other words, Plaintiff argues that the authority of the Indian tribe to tax under a tribal state compact, § 2710(d)(3)(C)(iv), precludes application of §2710(b)(4)(B)(i)(III)'s requirement that 60 percent of the net revenues belong to the tribe. For all that, there is no evidence or language to suggest that the statute's two prior commands, §§ 2710(d)(1)(A)(iii), (d)(2)(A), that tribal ordinances must "meet the requirements of" § 2710(b)(2), are nullities. Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United States, 179

F.3d 630, 634 (9th Cir. 1999) ("This court generally refuses to interpret a statute in a way that renders a provision superfluous."). By way of example, "get milk, bread, peanut butter and eggs at the grocery store' probably does not mean 'do not get ice cream,'" Longview Fibre, 980 F.2d at 1313, especially if the speaker already commanded "get grape jelly and some ice cream, too." And here, IGRA issues two commands, demanding that NIGC ensure that the requirements of both § 2710(b) and any tribal-state compacts are satisfied. By promulgating these regulations, the NIGC was simply requiring tribes to codify an express Congressional mandate in tribal gaming ordinances.

NIGC's regulations codifying the plain language of a statute are not arbitrary and capricious. Where Congress has given an agency rulemaking authority in an area, the agency's regulations are valid as long as they are not arbitrary and capricious and do not conflict with the provisions of the statute itself. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Plaintiff argues that the challenged regulations fail this test because IGRA specifically precludes the NIGC from regulating Class III gaming. Yet, such an interpretation would nullify § 2710(d)(1)(A)(ii) and § 2710(d)(2)(A) and ignore the fact that NIGC is charged with, among other regulatory tasks, ensuring that tribal ordinances comply with § 2710(b). See Gov't of Guam, 179 F.3d 630, 634 (9th Cir. 1999) ("This court generally refuses to interpret a statute in a way that renders a provision superfluous.").

When reviewing an agency's interpretation of a statute Congress charged it to administer, a court asks two questions. First, "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43; see also Donchev v. Mukasey, 553 F.3d 1206, 1216

(9th Cir. 2009) (in applying Chevron, "first apply the normal rules of statutory construction"). Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. Where Congress has explicitly or implicitly delegated authority to an agency, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." Id. at 844.

In this case, there is no need to proceed beyond the first step in the Chevron analysis because Congress has spoken to the question at issue. Spry v. Thompson, 487 F.3d 1272, 1276 (9th Cir. 2007) ("[t]he statute speaks unambiguously, so we do not reach Chevron deference"). IGRA states that before Class III gaming activities can begin, a tribe must adopt a tribal ordinance that meets specific requirements. 25 U.S.C. § 2710(d)(1)(A)(ii) ("Class III gaming activities shall be lawful on Indian lands only if such activities are – (A) authorized by an ordinance or resolution that . . .(ii) meets the requirements of subsection (b) [Class II ordinance requirements]") and (d)(2)(A) ("If any Indian tribe proposes to engage in, or to authorize any person to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) [Class II ordinance requirements] of this section."). Accordingly, NIGC respectfully requests that the Court grant its motion for summary judgment.

II. IF THE STATUTE IS AMBIGUOUS, THE NIGC'S INTERPRETATION IS REASONABLE AND NOT ARBITRARY AND CAPRICIOUS

If the Court finds that the IGRA is ambiguous, then the regulations promulgated by NIGC are reasonable interpretations of IGRA and NIGC's interpretation is entitled to deference under Chevron. 467 U.S. at 843-44. The second part of the Chevron analysis is whether the

agency's answer is based on a permissible construction of the statute. Id. If Congress has explicitly or implicitly delegated authority to an agency, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute . . . ." Newman v. Apfel, 223 F.3d 937, 945-46 (9th Cir. 2000) (quoting Chevron, 467 U.S. at 842-44). If the agency's construction is reasonable, a court may not substitute its own construction of the statutory provision. Fernandez v. Brock, 840 F.2d 622, 631 (9th Cir. 1988). Even if there are other possible interpretations, the agency's reasonable interpretation is the one which governs. McLean v. Crabtree, 173 F.3d 1176, 1181 (9th Cir. 1999).

IGRA expresses Congress' overriding intent that the Class III ordinances contain the same requirements as Class II ordinances. IGRA exists "to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . ." § 2702(2). NIGC's decision to ensure that Indian tribes are the primary recipient of the net revenues produced by Class III gaming is consistent with that principle. To accomplish this goal, among other things, IGRA requires that tribes must have the sole proprietary interest in the gaming activity conducted on its lands. § 2710(b)(2)(A). This provision goes to the heart of the statute and gives life to one of IGRA's purposes, which is to provide for the "operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . . ." § 2702(1).

The legislative history supports NIGC's regulation. Congress's primary goal and intention was to make Tribes the primary beneficiaries of gaming on Indian lands. In that regard, Senate Report No. 100-446 states: "[t]he Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." S. REP. No. 100-446, at 12 (1988) reprinted in 1988 U.S.C.C.A.N. 3071, 3082. Since Congress did not impose

any limitation, the sole proprietary requirement applies regardless of the nature of a tribal-state compact.

All gaming on Indian lands is for the benefit of the Tribe. Contrary to this, Plaintiff argues that Congress intended there to be a distinction between tribal governmental gaming which would raise revenues for the Tribe and non-tribally operated gaming whose purpose is to profit the individual owner. (Pl.'s Br. at 14). IGRA does not make such a distinction. Under IGRA, all gaming on Indian lands is tribal governmental gaming. 25 U.S.C. §§ 2701-2702. In this regard, IGRA requires that Tribes regulate all gaming on their Indian lands. § 2710. Furthermore, IGRA makes clear that Tribes must have "the sole proprietary interest in and responsibility for the conduct of any gaming activity." §§ 2710(b)(2)(A), (d)(1)(A)(ii). Individually owned gaming operations are excepted from that provision but only if they satisfy requirements established by Congress. Congress made explicit that Tribes would remain the primary beneficiaries of gaming on their Indian lands by requiring that not less than 60% of net revenue from individually owned gaming operations be income to the Tribes. §§ 2710(b)(4)(B)(i)(III); (d)(1)(A)(ii) and (d)(2)(A). As noted previously, the legislative history makes this clear: "[t]he Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." S. REP. No. 100-446, at 12 (1988).

Plaintiff also argues that the "Indian canon of construction" should work against the NIGC, contending that the regulation puts Tribes at a competitive disadvantage. Plaintiff is mistaken. The Indian canon of statutory construction states that "statutes are to be construed liberally in favor of the Indians," Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985), and "assumes Congress intends its statutes to benefit the tribes . . . ." Chickasaw Nation v. United States, 534 U.S. 84, 93-95 (2001). Because IGRA was enacted for the benefit of

Indian tribes, the canon should be, and has been, used to uphold the statute. The court in Shakopee Mdewakanton Sioux Cmty. v. Hope, noted that "to the extent that the [NIGC's] rule protects the integrity of Indian gaming, it must be seen to advance and not hinder tribal interests." 798 F. Supp. 1399, 1408 (D. Minn. 1992). The NIGC's regulations require the Tribe to receive the lion's share of the profit and, therefore, the Indian canon of construction must favor NIGC's regulation. Accordingly, NIGC respectfully requests that the Court grant its motion for summary judgment.

III. COURTS HAVE INTERPRETED IGRA TO ALLOW FOR CONCURRENT FEDERAL AND STATE REGULATION OF CLASS III GAMING

Class III gaming may be regulated concurrently by both federal and state governments. Plaintiff argues that since Congress authorized tribal-state compacts to address what they have termed "impositions" that it thereby restricted the NIGC from adding additional requirements on Class III gaming. However, courts that have examined the IGRA have read the tribal-state compact requirement for Class III gaming as a method of allowing states concurrent authority with the NIGC for regulation of the covered gaming. See Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), aff'd 353 F.3d 712 (9th Cir. 2003).

The appellate court in Artichoke Joe's concurred with the district court, noting that "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." 353 F.3d at 715. The court correctly interpreted IGRA as a Congressional reaction to California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which divested Public Law 280 states of civil jurisdiction over Indian gaming: "IGRA responded by creating a statutory basis for gaming regulation that introduced the compacting

process as a means of sharing with the states the federal government's regulatory authority over class III gaming." Artichoke Joe's, 353 F.3d at 722.

Similarly, the court in Keweenaw Bay Indian Cmty v. United States, 136 F.3d 469, 474-75 (6th Cir. 1998), cert denied, 525 U.S. 929 (1998), rejected the Keweenaw Bay Indian Community's assertion that Class III gaming is regulated only under a tribal-state compact, and that § 2719 of the IGRA did not apply. The court noted that the Keweenaw Bay Indian Community's interpretation "is undermined by the fact that any gaming subject to a tribal-state compact is necessarily regulated by the IGRA because (1) the compact mechanism is created and governed by the IGRA, see 25 U.S.C. § 2710(d); and (2) provisions of the IGRA other than the compact provisions regulate compact-authorizing gaming . . . ." Id. at 475. The court relied on §§ 2712 and 2713 of IGRA, the NIGC Chairman's approval power over pre-1988 ordinances and the Commission's enforcement powers, to conclude that "it is clear that compact-authorized gaming is regulated by the IGRA." Id. The Court held that "[t]o find that the existence of a valid, approved tribal-state compact somehow eliminates other IGRA provisions would obviate the plain language of the statute and its establishment of a federal regulatory regime through statutory standards and the National Indian Gaming Commission." Id. It reasoned, "[l]ike § 2719(b)(1)(A)'s requirement that a state's governor concur in the waiver of the general gaming prohibition for a gaming proposal, the compact process simply *adds* a local governmental component to the regulation of Class III Indian gaming." Id.

Other courts have also concluded that a tribal-state compact preserves a regulatory role for the federal government, albeit a lesser one than is preserved for the states. See Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996). One court noted that the requirements

for Class III gaming were identical to Class II gaming, but for the additional authority of the tribal-state compact:

> [t]he requirements for Class III gaming are essentially identical to those for Class II gaming, but the Act imposes an additional requirement for Class III gaming which dictates that such gaming be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the State that is in effect . . . .The additional requirement shows that Congress was more concerned with negative consequences associated with high stakes Class III gaming and thus allowed states to have more involvement in such gaming activities in order to protect tribes and other state residents.

Id. at 1292.

The courts have read IGRA as allowing more federal involvement with Class II gaming and less Federal involvement with the Class III gaming wherever the compact transfers some regulatory functions to the State. Nevertheless, "it is clear that compact-authorized gaming is regulated by the IGRA." Keweenaw, 136 F.3d at 475. The emphasis in the Federal role of regulating Class II gaming does not negate Federal regulation and oversight of Class III gaming.

A. Congress Identified the Need for Federal Standards and Regulations to Govern Indian Gaming

Plaintiff argues that the language of § 2710(d)(3)(C), stating that a tribal-state compact to allow Class III gaming is to include "standards for the operation of [Class III gaming activity]" precludes any other standards. (Pl.'s Br. at 15-16). The statutory language belies this constrictive reading. Nothing in IGRA's provision that vests the NIGC with broad authority to "promulgate such regulations and guidelines as it deems appropriate" to implement the Act limits its rulemaking authority to Class I and II gaming. § 2706(b)(10). Had Congress intended to limit the NIGC's rulemaking authority in the manner that Plaintiff suggest, presumably Congress would have so indicated in the provision of IGRA that actually addresses the NIGC's rule-making authority.

In fact, in this instance, Congress clearly set forth the standards to apply to individually-owned gaming operations on Indian lands and the requirement that all such gaming operations – Class II and Class III – must pay Tribes 60 percent of their net gaming revenues. § 2710((d)(1)(A)(ii).

B. The NIGC Has an Important Role in the Regulation of Class III Gaming

Throughout its brief, Plaintiff has attempted to erroneously characterize the NIGC as having virtually no role in the regulation of Class III gaming. This fiction created by the Plaintiff ignores numerous provisions of the IGRA related to NIGC's regulation of Class III gaming. The Plaintiff argues that the court's holding in Colorado River Indian Tribes v. NIGC (CRIT), 383 F. Supp. 2d 123 (D.D.C. 2005), aff'd 466 F.3d 134 (D.C. Cir. 2006), supports its position that the NIGC does not have the authority to promulgate any regulations related to Class III gaming. This is an incorrect and overbroad reading of the holding in CRIT.

CRIT stemmed from the NIGC's attempt to enforce, at the casino owned and operated by the Colorado River Indian Tribes (Tribes), regulations that required tribal casinos to meet minimum internal control standards. See 25 C.F.R. § 542. When the NIGC attempted an audit consistent with its regulations, the Tribes refused access to the necessary records. The NIGC Chairman then issued a Notice of Violation, which the Tribes appealed to the full Commission and then to federal district court, challenging the NIGC's authority to issue and enforce the regulations on Class III gaming. The district court ruled in favor of the Tribes, CRIT, 383 F. Supp. 2d 123 (D.D.C. 2005), and the government appealed. The D.C. Circuit affirmed the district court's decision. Colorado River Indian Tribes v. NIGC, 466 F.3d 134 (D.C. Cir. 2006). It is true that the CRIT district court, in applying the principles of Chevron v. National Res. Def. Council Inc., 467 U.S. 837 (1984), found that Congress "plainly did not intend to give the NIGC

the authority to issue [minimum internal control standards] for Class III gaming." 383 F. Supp.. 2d 123, 132 (D.D.C. 2005). However, the issue in the case was limited to whether the NIGC had the authority to promulgate internal control standards for Class III gaming operations. It did not strip the NIGC of the power to regulate Class III gaming generally, and the NIGC has continued to regulate the industry consistent with IGRA's provisions.

IGRA contains several provisions granting the Commission (or the Commission's Chairman) explicit authority over either Indian gaming in general, or Class III gaming specifically. The Chairman reviews tribal gaming ordinances for Class III gaming operations to ensure that they contain required provisions. §§ 2705(a)(3), 2710(b), (d)(1)(A). The Chairman reviews and approves management contracts with outside companies for the operation of Class III gaming facilities, §§ 2705(a)(4), 2710(d)(9), 2711(b), and may require contract modifications or void contracts if he determines that any provisions of § 2711 have been violated. §§ 2711(f), 2710(d)(9). The Commission reviews gaming licenses issued by tribes, § 2710(c), and collects fees from Class III gaming facilities. § 2717.

The Commission has issued regulations implementing many of these statutory authorities. See, e.g., 25 C.F.R. § 514 (regulating the payment of fees pursuant to § 2717); 25 C.F.R. § 522 (regulating the submission of gaming tribal ordinances and resolutions pursuant to § 2710(b), (d)(1)(A)); 25 C.F.R. § 531 (regulating the content of management contracts pursuant to §§ 2710(d)(9), 2711(b)); 25 C.F.R. § 556 (regulating background investigations for key employees and primary management officials pursuant to §§ 2710(b)(2)(F), (d)(1)(A)); 25 C.F.R. § 558 (regulating gaming licenses for key employees and primary management officials pursuant to § 2710(c)); 25 C.F.R. § 571 (regulating audits of gaming operations pursuant to §§ 2710(b)(2)(C), (d)(1)(A)(ii)).

Most importantly, IGRA gives the Chairman authority to enforce all violations of IGRA, its implementing regulations, or gaming ordinance provisions by levying and collecting civil fines and by ordering the closure of both Class II and Class III gaming operations. § 2713. In furtherance of that enforcement power, the Commission may authorize subpoenas of documents and other items material or relevant to any matter under consideration or investigation by the Commission. § 2715.

These authorities that IGRA explicitly grants to the Commission, and the agency's enforcement powers vis-à-vis these authorities, make clear that Congress established a role for the Commission in the regulation of Class III gaming. Thus, as detailed above, the scope of the NIGC's authority and duties regarding Class III gaming remains quite broad after the CRIT decision, which only eliminated the imposition of regulations regarding Class III minimum internal control standards and the Chairman's enforcement powers of those regulations when a tribal-state compact is in effect. Arguing that CRIT deprives the NIGC of the authority to make the most basic of decisions under the IGRA — such as promulgating regulations requiring tribes to codify congressional mandates in tribal gaming ordinances — ignores an entire body of cases and the limits of CRIT itself.

When Congress enacted IGRA it observed the problem that "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands." § 2701(3). This observation was not limited to Class I and Class II gaming, and indicates that Congress saw a general need for Federal standards or regulations for the conduct of Indian gaming. Precluding the NIGC from regulating Class III gaming would undermine Congress' intent and prevent the NIGC from fulfilling one of IGRA's stated purposes.

CONCLUSION

For the foregoing reasons Plaintiff's motion for summary judgment should be denied and Defendant's cross-motion be granted and the action be dismissed with prejudice.

Respectfully submitted this 30th day of March, 2010,

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