

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 13-CV-334

HO-CHUNK NATION,

Defendant.

**HO-CHUNK NATION’S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The Ho-Chunk Nation (the “Nation”) has a Class II gaming facility in Madison, Wisconsin, which was formerly known as the DeJope Gaming Facility and is now known as Ho-Chunk Gaming Madison (“HCG Madison”). The Nation has been offering Class II games at HCG Madison in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* (“IGRA”) since before 1992. SOF,¹ ¶¶ 3, 12, 22. The State of Wisconsin (“State”) and the Nation entered into a Tribal-State Class III Gaming Compact (“Compact”) on June 11, 1992, which was subsequently amended on three occasions. SOF, ¶¶ 13-18 and Exs. B-E. No tribal-state compact is required for the Nation to conduct Class II gaming. SOF, ¶¶ 10 and 19. Class II gaming at HCG Madison is not governed by the Compact because the Compact only governs Class III gaming at the Class III facilities identified in the Compact. SOF, ¶ 22 and Exhs. B-E. The Compact does not restrict the ability of the Nation to offer Class II gaming on its trust lands

¹ “SOF” shall mean the Joint Stipulation of Facts filed with the Court on February 12, 2014, DKT No. 17.

and, accordingly, does not prohibit the Nation from offering any games at HCG Madison that meet the definition of Class II gaming under IGRA. SOF, ¶ 19.

In November 2010, the Nation began offering non-banked poker through the PokerPro® table system at HCG Madison.² SOF, ¶ 23. The National Indian Gaming Commission (“NIGC”), which has jurisdiction to seek to enjoin Class III games being played other than at Class III facilities, is aware that e-Poker is being played at HCG Madison, issued an advisory opinion concluding that e-Poker is a Class II game for purposes of IGRA, and has taken no steps to enforce or otherwise enjoin the play of e-Poker at HCG Madison. SOF, ¶¶ 42-43 and Exh. G. Nonetheless, the State has challenged the Nation’s right to offer e-Poker at HCG Madison, claiming it is a Class III game and, therefore, a violation of the Compact to be played at HCG Madison. However, the State is wrong.

As the following discussion demonstrates, e-Poker is a Class II game for purposes of the IGRA. Class II games are defined by IGRA to include non-banked card games that “are explicitly authorized by the laws of the State,” or “are not explicitly prohibited by the laws of the State and are played at any location in the State.” IGRA § 2703(7)(A)(ii)(I) and (II). Whether a card game is “explicitly authorized by the laws of the State” or “not explicitly prohibited by the laws of the State and are played at any location in the State,” IGRA §§ 2703(7)(A)(ii)(I) and (II), however, must be analyzed in conjunction with the requirement that Indian Tribes may engage in Class II gaming if such gaming is “located within a State that permits such gaming for any purpose by any person, organization or entity,” IGRA § 2710(b)(1)(A). *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1023 (10th Cir. 2003); S. Rep. No. 100-

² PokerPro® is an electronic gaming table system that facilitates the play of live, non-banked poker (hereinafter “e-Poker”). SOF, ¶ 24. It is played just like traditional Texas Hold’em poker except that the cards are dealt electronically on monitors. SOF, ¶ 34.

446 at 6 (1988) (hereinafter the “Committee Report”). Analyzing both gaming in general and poker in particular, it is plain that Wisconsin regulates, but does not prohibit, gaming or poker. Gaming and poker are prevalent and being played regularly throughout the State.

FACTS³

I. NON-BANKED POKER IS CONSIDERED A CLASS II GAME IN WISCONSIN FOR PURPOSES OF IGRA.

IGRA defines Class II gaming as including bingo and certain card games, but excluding any banked card games and slot machines:

(7)(A) The term “class II gaming” means —

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) —

* * *

(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 wagers or pot sizes in such card games.

(B) The term “class II gaming” does not include —

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

³ The Compact history, IGRA gaming classifications, the mechanics of e-Poker and a full description of how Texas Hold'em poker is played are detailed in the SOF. SOF, ¶¶ 1-30 and 34. Those facts are summarized, but will not be repeated in whole, in this Brief.

IGRA 25 U.S.C. § 2703(7); SOF, ¶ 5.

Poker may be played in banked and non-banked format, and e-Poker is non-banked Texas Hold'em poker.⁴ SOF, ¶¶ 21 and 34. Both the Wisconsin Legislative Reference Bureau (“LRB”) and the NIGC have concluded that non-banked poker, such as e-Poker, is a Class II game under IGRA. In May 2000, and again in November 2012, the LRB issued a bulletin, titled “The Evolution of Legalized Gambling in Wisconsin,” that provides:

Class II includes bingo or bingo-type games, pull-tabs and punch-boards, and certain non-banking card games, ***such as poker***. (A non-banking game is one in which players compete against one another as opposed to playing against the house.) If bingo or any other Class II game is permitted by a state’s law, then tribes within a state may conduct similar games and may set prize amounts above those specified in state statutes.

SOF, ¶¶ 45-46 and Ex. I at p. 21 and Exh. J at p. 24. (emphasis added). *See also* Ho-Chunk Nation’s Proposed Findings of Additional Facts (“DPFAF”), ¶ 21 (Wisconsin Blue Book at 791 (2013-2014) (containing a map showing the locations of Class III tribal gaming facilities and noting: “An additional Ho-Chunk casino in Madison offers Class II gaming.... Class II includes bingo or bingo-type games, pull tabs and punch-boards, ***and certain non-banking card games, such as poker***.” (Emphasis added.)).

The NIGC has jurisdiction to institute enforcement actions to prohibit Class III gaming activities at a location other than a gaming facility where Class III gaming is authorized by a state-tribal compact. SOF, ¶ 32. E-Poker was first introduced in 2005 at the Seminole Tribe’s Class II Hard Rock Casino in Hollywood, Florida (the “Seminole Casino”). SOF, ¶ 31. The NIGC is aware that e-Poker is being played at the Seminole Casino and has taken no enforcement action to prevent its continuation. SOF, ¶ 32.

⁴ See SOF, ¶¶ 24-30 and 34 for a full description of the non-banked Texas Hold'em e-Poker game offered at HCG Madison.

The NIGC has the authority to commence an enforcement action against the Nation to prevent HCG Madison from conducting e-Poker if it believes that e-Poker is Class III gaming. SOF, ¶ 41. The NIGC is aware that the Nation is offering e-Poker as Class II gaming at HCG Madison. SOF, ¶ 43. On February 26, 2009, the NIGC general counsel issued an advisory opinion that the e-Poker “non-banked poker games such as the Nation proposes to offer [at HCG Madison] are Class II under IGRA when played according to any Wisconsin state rules on hours of operation and the sizes of wagers and pots.” SOF, ¶ 42 and Ex. G. The NIGC has not instituted an enforcement action to prevent the Nation from conducting e-Poker as Class II gaming at HCG Madison. SOF, ¶ 43. The NIGC has indicated that, consistent with its February 26, 2009, advisory opinion, it does not intend to take enforcement action to prevent the playing of e-Poker at HCG Madison.⁵ *Id.*

II. GAMING IN GENERAL, AND POKER IN PARTICULAR, ARE PREVALENT IN WISCONSIN.

Article IV, Section 24 of the Wisconsin Constitution was amended, effective April 1993, to restrict the types of gambling that could be authorized by the State Legislature. SOF, ¶ 15. The amendment changed the title of Section 24, from “Lotteries and Divorce” to “Gambling”, and amended Article IV, Section 24 (6) by adding new subsections (b) and (c) to the existing language of subsection 6 (which was renumbered as subsection (6)(a)). The amendment prohibits: (1) the Legislature from authorizing “gambling in any form;” and (2) the State Lottery from playing “as a lottery” the game of poker, or “simulating” the game of poker (and most other casino and other card games). Art. IV, Secs. 24(1) and 24(6)(c).

⁵ See also Oversight Hearing on the Regulation of Indian Gaming Before the Sen. Comm. on Indian Affairs, 109th Congress, 13 (2005) (statement of Phil Hogen, Chairman, Nat’l Indian Gaming Comm’n) (“IGRA ... created class II gaming, which was bingo and pull-tabs and games of that nature such as poker where you do not play against the house”). DPFAF, ¶ 22.

The 1993 Constitutional amendment did not prohibit all forms of gambling. It did not prohibit the playing of poker generally; it only prohibited the State from offering it (or its simulation) as part of the State Lottery. *Id.* Wisconsin permits pari-mutuel horse and dog race betting. SOF, ¶ 35; Wis. Const. Art. IV, § 24(5). Any bona fide religious, charitable, service, fraternal or veteran organization may apply for and obtain a license from the State to play the game of bingo within the State. SOF, ¶ 35; Wis. Const. Art. IV, § 24(3). Wisconsin also has the State-run lottery. SOF, ¶ 33; Wis. Const. Art. IV, § 24(6). Furthermore, prior to 1993, the State entered into tribal-state Class III gaming compacts with all eleven Wisconsin Indian tribes, including the Compact with the Nation, and extensive gambling, including the playing of poker, occurs at Tribal Casinos located throughout the State. SOF, ¶¶ 15 and 20.

Poker is permitted and played in Wisconsin in many formats by a variety of people. For example, despite the constitutional prohibition against playing poker, or a simulation of poker, as part of the State lottery, since Wisconsin Constitution Article IV Section 24 was amended in 1993, the State lottery has offered a wide variety of scratch-off games simulating poker.

Between 1993 and the present, the State lottery has offered the following scratch-off games:

Game Description	Game Number	Start Date
Five Card Stud	69	12/13/93
3 Of A Kind	109	6/19/95
Straight Poker	225	7/6/98
Wild Draw Poker	261	7/12/99
Royal Flush	127	1/29/96
Poker Night	333	3/16/01
Straight Poker	399	6/3/02

Game Description	Game Number	Start Date
Poker Royale	415	9/13/02
\$50,000 Poker Nights	455	5/30/03
Championship Poker	564	3/14/05
Lucky 10 Casino	590	8/15/05
World Championship Poker	604	10/3/05
\$75,000 Poker	635	3/13/06
Badger Hold 'Em	668	10/30/06
Wisconsin Hold 'Em	701	4/9/07
Casino Royale	698	5/21/07
Championship Hold 'Em	750	12/10/07
Super Vegas Nights	800	1/28/08
Poker Showdown	817	3/28/08
Badger Hold 'Em	854	8/1/08
Super Vegas Nights	850	10/31/08
Vegas Nights	970	9/6/10
Game Book, 5 Card Cash	385	7/19/2013

SOF, ¶ 33 and Ex. F.

The scratch-off games listed above are a simulated form of poker. Indeed, some of the game descriptions closely follow the rules of Texas Hold'em poker. For example, the

Championship Poker, Game No. 564, has the following game description:

1. Scratch the eight PLAYER's HOLE CARDS and the CHAMPION'S HOLE CARDS on each HOLD 'EM TABLE to reveal two card symbols in each area.

2. Scratch the COMMUNITY CARDS (Flop, Turn, River) on each HOLD 'EM TABLE to reveal five card symbols.
3. To create each PLAYER's best five-card hand, use any five-card combination of each PLAYER's two HOLE cards with the five COMMUNITY CARDS. One or both of the PLAYER's HOLE CARDS may be used in making the best five card hand.
4. To create the CHAMPION's best five-card hand, use any five-card combination of the CHAMPION's two HOLE cards with the five COMMUNITY CARDS. One or both of the CHAMPION's HOLE CARDS may be used in making the best five-card hand.
5. If any PLAYER's best five-card hand beats the CHAMPION's best five-card hand, win prize for that same PLAYER.
6. If one or more of the PLAYER's Hands wins a prize, scratch the ALL-IN BONUS box. Multiply the total Prize won by the ALL-IN BONUS number.

Each PLAYER hand is played separately. Each HOLD 'EM TABLE is played separately. Card values in ascending order are 2, 3, 4, 5, 6, 7, 8, 9, 10, J, Q, K, A. There are no wild cards.

SOF, Exh. F at p. 14; *compare with* SOF, ¶ 34 (description of Texas Hold'em e-Poker at HCG Madison).

On October 27, 1999, the State enacted the Biennial State Budget Act, 1999 Wisconsin Act 9 ("Budget Act"). SOF, ¶ 36. Under the Budget Act, the possession and operation of up to five (5) video gambling machines, which include video poker machines, by businesses that hold Class B liquor licenses for the serving of alcohol on premises, such as taverns, was changed from a felony to a civil offense subject to a fine of up to \$500 per machine per incident. *Id.* For each further gambling machine possessed by a licensee up to a total of five, the forfeiture amount increases in increments of \$500. *Id.* Liquor license holders are no longer at risk of having their liquor licenses revoked solely for the possession of five or fewer video gambling machines. SOF, ¶ 37. A Class B tavern license holder may not be enjoined from offering gambling machines or have his/her license revoked for "knowingly permitting 5 or fewer video gambling

machines to be set up, kept, managed, used or conducted upon the licensed premises.” *Id.* and Wis. Stat. § 945.041(11).

In November 1999, the LRB published Budget Brief 99-6 explaining the history of, and rationale for, the “Decriminalization of Video Gambling.” SOF, ¶ 44 and Ex. H. The LRB explained that gambling at Indian casinos was believed to have resulted in a decrease of business at taverns, which in turn resulted in many taverns offering illegal gambling opportunities such as video poker in order to compete for business with casinos. SOF, Ex. H. at p. 2. As a result, the Wisconsin Legislature decriminalized the possession of video gambling machines. *Id.* Video gambling machines may include video poker. SOF, ¶¶ 39-40.

For the 2013-14 reporting period, there are 12,698 Class B licensed taverns in Wisconsin and 829 in Dane County, Wisconsin, where HCG Madison is located. SOF, ¶ 38. Under Wisconsin law, those Class B taverns can offer 63,490 video gambling machines State-wide and 4,145 in Dane County without the tavern owners facing criminal sanctions or the risk of license forfeiture. Between January 31 and February 9, 2014, investigators retained by the Nation visited 86 taverns in Dane County. DPFAF, ¶ 15. Of the 86 visited taverns, 74% had 5 or fewer (but at least one) video gambling machines. *Id.* The investigators witnessed many people play the video gambling machines, and they witnessed tavern employees pay out winnings to players of the video gambling machines on several occasions. *Id.*

The State does not actively enforce the civil violation of possession of 5 or fewer video gambling machines. The State of Wisconsin Department of Revenue (“DOR”) has exclusive authority to enforce the non-criminal video gambling laws. *See* Wis. Stat. §§ 73.03(59) & (60), 73.031, 175.38 (1)-(3), and Wis. Stat. § 165.70 (1m). DOR has nine field agents for statewide enforcement of tobacco and alcohol matters in Class “A”, “Class A”, Class “B”, and “Class B”,

and for enforcement regarding video gambling machines (5 machines or less) in Class “B” or “Class B” establishments. Confidential Supplemental Joint Statement Of Stipulated Facts (“Conf. SOF”), ¶ 9.

Wis. Stat. § 73.031 authorizes the DOR to arrest a person if the DOR agent believes, on reasonable grounds, that the person is violating Wis. Stat. §§ 945.03(2m) or 945.04(2m) (video gambling laws). [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

In addition to the State lottery scratch off poker, and video poker played in Class B tavern, traditional Texas Hold'em poker is played openly in Wisconsin. First, poker is played to raise money for nonprofit organizations or charitable purposes in Wisconsin (hereinafter referred to as "Charity Poker"). DPFAF, ¶¶ 1-5. For example, on December 21, 2013, Agrace HospiceCare hosted the fourth annual Texas Hold'em Celebrity Poker Event at the Alliant Energy Center in Madison, Wisconsin. DPFAF, ¶ 2. The event featured Phil Hellmuth, who is a professional poker player. *Id.* Attendees could pay \$250 to play Texas Hold'em poker. *Id.* While all proceeds went to the charity, attendees that paid \$250 to play poker could win the opportunity to play poker with Phil Hellmuth. *Id.* See also DPFAF, ¶ 3 (additional publicly advertised Charity Poker events).

A variety of poker events held throughout Wisconsin are advertised on the State of Wisconsin Department of Tourism website, www.travelwisconsin.com (search "poker"), some of which appear to be Charity Poker and others of which appear to be poker tournaments not played for purposes of raising money for nonprofit organizations or charitable purposes. DPFAF, ¶ 4. The events advertised on the Wisconsin Department of Tourism website include, but are not limited to, motorcycle, snowmobile or ATV "poker runs,"⁶ poker tournaments being held at taverns or restaurants and video poker. DPFAF, ¶ 4. The website even advertises the "electronic

⁶ "A poker run is an organized event where participants, usually using motorcycles, all-terrain vehicles, boats, snowmobiles, horses, or other means of transportation must visit five to seven checkpoints, drawing a playing card at each one. The object is to have the best poker hand at the end of the run." See Poker run, Wikipedia, http://en.wikipedia.org/wiki/Poker_run (last visited Feb. 41, 2013); DPFAF, ¶ 5.

poker tables” at HCG Madison. DPFAF, ¶ 4. Thus, the State through its Department of Tourism encourages people to come to Wisconsin to play poker.

Four poker leagues being operated in south central and south eastern Wisconsin are prevalently advertised online: Badger Poker, Bumble Bee, Double Deuce and Tavern Tourneys (referred to as “Poker Leagues”). DPFAF, ¶ 6. The Poker Leagues involve the play of Texas Hold’em poker and have one or more sponsors, such as Miller and Seagram’s 7. DPFAF, ¶ 7. A Poker League has a league organizer responsible for operating and overseeing a poker “session” running approximately 8-12 weeks. DPFAF, ¶ 8. Local taverns and restaurants host nightly poker games and pay the league organizer a fee of \$3-\$5 per poker player. DPFAF, ¶ 8. A poker game is generally held at a different location every night of the week during the 8-12 week session, although some leagues offer games less frequently. DPFAF, ¶ 8. The league organizer has someone attend each poker game, and that individual is responsible for keeping track of players and winnings. DPFAF, ¶ 9.

The poker games are advertised as “free,” and each player who signs up for a nightly poker game receives the league minimum in poker chips (*e.g.*, 25,000) with each chip representing a single point. DPFAF, ¶ 9. Players may, however, purchase additional chips/points by paying the league organizer a “tip” or buying beverages or food from the host establishment, and the chips are used for betting purposes. DPFAF, ¶ 9. A nightly poker game could have as few as 12, or as many as 60, poker players. DPFAF, ¶ 10. Prizes are awarded to nightly poker tournament winners, generally cash or a gift certificate up to \$50. DPFAF, ¶ 10. The league organizer keeps track of the chip/point count of the winners of the nightly poker games, and the highest chip/point winners over the course of the 8-12 week session are invited to play in a session ending tournament, where the winner receives a more significant cash prize.

DPFAF, ¶ 11. For example, Badger Poker had a session ending tournament on February 8, 2014. Approximately 70 top chip/point winners from the nightly poker tournaments played, and the winner of the session tournament was paid \$1,040. DPFAF, ¶ 12. Some of the poker leagues advertise that they send top annual league winners to poker tournaments outside of Wisconsin, such as the World Series of Poker in Las Vegas. DPFAF, ¶ 13. Badger Poker publishes a flyer which provides that Badger Poker pays out “\$10K in cash and prizes every session.” DPFAF, ¶ 14.

While not advertised online, a person may learn where poker games are being played merely by talking to tavern employees and patrons. DPFAF, ¶ 16. Such poker games are generally open to anyone willing to pay the buy-in required to play. DPFAF, ¶ 16. At one Middleton, Wisconsin tavern, every Tuesday or Thursday night a Texas Hold'em poker tournament is held. DPFAF, ¶ 17. Poker players pay a \$40 buy-in to the poker tournament. DPFAF, ¶ 17. The players were offered one \$40 re-buy during the poker tournament, and the winner is paid in cash at the end of the tournament. DPFAF, ¶ 17. At one such poker game on February 4, 2014, approximately 40 people played poker in the tournament. DPFAF, ¶ 17. One Saturday a month a larger Texas Hold'em tournament is played at the same establishment. DPFAF, ¶ 18. The buy-in for the Saturday tournament is \$125. DPFAF, ¶ 18. Winnings at the Middleton, Wisconsin establishment were reported to be as large as \$7,000 in a single evening. DPFAF, ¶ 18.

At another establishment in Waunakee, Wisconsin, Texas Hold'em tournaments are held on Wednesday evenings. DPFAF, ¶ 19. Similar to the Middleton Texas Hold'em tournament, poker players paid a \$40 buy-in to the poker tournament. DPFAF, ¶ 19. The players were offered one \$40 re-buy during the poker tournament, and the winner was paid in cash at the end

of the tournament. DPFAF, ¶ 19. At a Wednesday night poker tournament held on February 5, 2014, approximately 30 people played poker in the tournament. DPFAF, ¶ 19. The last Sunday of every month, a larger Texas Hold'em tournament is played at the same establishment. DPFAF, ¶ 20. The buy-in for the Sunday tournament is \$250. DPFAF, ¶ 20.

That poker is publicly advertised online and played openly in public at taverns is not surprising given the lack of enforcement of Wisconsin's gambling laws. The LRB reported in 2000 that private gambling such as "low-stakes poker games" are "common and generally perceived to cause little harm," and, therefore, Wisconsin's "local law enforcement authorities rarely prosecute noncommercial betting activities." SOF, Exh. I at p. 17; DPFAF, ¶¶ 1-20.

Finally, poker is permitted in Wisconsin as a result of the tribal-state compacts with Wisconsin's eleven Indian tribes. The Second Amendment to the Compact expressly authorized the Nation to offer both banked and non-banked poker at its Class III facilities. SOF, ¶ 16 and Ex. D. The Nation has Class III casinos in Wisconsin Dells, Black River Falls and Nekoosa, and it offers both banked and non-banked poker gaming at all three casinos. SOF, ¶ 21. In 2003, in addition to the Compact with the Nation, the State amended various Class III tribal-state compacts with the other ten Wisconsin Indian tribes, which authorized the playing of poker as a Class III game at facilities eligible to conduct Class III gaming. SOF, ¶ 20.

STANDARD OF REVIEW

Issues of statutory interpretation are particularly appropriate for summary judgment, which must be granted when, as here, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *LTV Steel Co. v. Nw. Eng'g & Constr. Co.*, 41 F.3d 332, 334 (7th Cir. 1994) (Where "there are no genuine issues of material fact and the dispute primarily concerns a question of interpreting a statute," summary

judgment is appropriate.) The Court's jurisdiction and the classification of e-Poker under IGRA are statutory construction issues appropriate for summary judgment, as evidenced by the parties' cross-motions. "To survive summary judgment, the nonmoving party must establish some genuine issue for trial such that a reasonable jury could return a verdict in [its] favor." *Gordon v. FedEx Freight, Inc.*, 674 F.3d 769, 772-73 (7th Cir. 2012). That burden cannot be met here, because the State's claims fail as a matter of law.

ARGUMENT

I. INDIAN LAW PRINCIPLES AND THE HISTORY OF IGRA.

Indian tribes enjoy sovereignty. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Therefore, state jurisdiction over affairs on Indian lands is strongly disfavored. *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982). Instead, the federal government has exclusive authority over relations with Indian tribes. U.S. Const. Art. I, § 8, cl. 3; *Blackfeet*, 471 U.S. at 765. The "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Blackfeet*, 471 U.S. at 766 (citation and internal quotations omitted). The "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* Instead, "statutes passed for the benefit of dependent Indian tribes," like IGRA, "are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 392 (1976).

In 1988, Congress enacted IGRA to, among other reasons, promote tribal economic development and self-governance, establish a federal statutory framework for Indian gaming, and create the NIGC to regulate Indian gaming. *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 359 (8th Cir. 1990); IGRA 25 U.S.C. §§ 2701-2702. "[T]he thrust of the IGRA is to promote Indian gaming, not to limit it." *Grand Traverse Band of Ottawa and Chippewa*

Indians v. Office of U.S. Attorney for the W.Dist. of Mich., 369 F.3d 960, 971 (6th Cir. 2004).

“[W]hile ... [IGRA] does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. [Congress] ... expect[ed] that the Federal courts, in any litigation arising out [of] this legislation, would apply the Supreme Court’s time-honor[ed] rule of construction that *any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.*” *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366-67. *See also Artichoke Joe’s Calif. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (“IGRA [was] undoubtedly a statute passed for the benefit of Indian tribes”).

IGRA establishes three classes of gaming, each with differing regulatory roles for tribal, federal and state governments. Class I gaming includes “social games 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.” IGRA 25 U.S.C. § 2703(6). Class I gaming is regulated exclusively by Indian tribes. IGRA 25 U.S.C. § 2710(a)(1); *Sisseton-Wahpeton*, 897 F.2d at 359-60. Class II games include bingo and certain non-banked card games. “Class II games are ‘regulated by the [NIGC],’” not the states. *Seneca-Cayuga Tribe*, 327 F.3d at 1023 (quoting *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000) (citing 25 U.S.C. § 2710(b))). Class III games include all games that are not Class I or II. IGRA 25 U.S.C. § 2703(8); SOF, ¶ 8. Class III gaming is regulated by Indian tribes and states pursuant to tribal-state compacting. IGRA 25 U.S.C. § 2710(d); SOF, ¶ 9. However, “state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts.” *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997). “Outside the express provisions of a compact, the enforcement of IGRA’s prohibitions on [C]lass III gaming remains the exclusive province of the federal government.” *Id.* at 1059.

II. E-POKER IS A CLASS II GAME UNDER IGRA.

A. General Rules Of Statutory Construction.

“We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will.” *Artichoke Joe’s*, 353 F.3d at 720 (citation and internal quotations omitted). “[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” *In re Chapman*, 166 U.S. 661, 680 (1897). “Where the language is not dispositive, we look to the congressional intent revealed in the history and purposes of the statutory scheme.” *Artichoke Joe’s*, 353 F.3d at 720 (citations and internal quotations omitted).

It would be error to interpret IGRA devoid of statutory and historical context:

Were the Court to start and end with the ordinary and common meaning of the terms employed in section 20 [of IGRA], devoid of statutory and historical context, it might arrive at the reading advanced by the SNI. However, as the SNI has urged throughout its brief, issues relating to Indian law cannot be considered without historical context.

Citizens Against Casino Gambling in Erie Cnty. v. Hogen, 2008 WL 2746566, *53 (W.D. N.Y. July 8, 2008).

Even when interpreting statutes unrelated to Indian law, “the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). Interpretation “must not be guided by a single sentence or member of a sentence, but ... to the provisions of the whole law, and to its object and policy.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and internal quotations omitted). Even if a statute appears to be unambiguous, failure to consider legislative history is judicial error when the legislative history shows that the “plain meaning” interpretation adopted by a court is contrary to the legislative intent shown by the legislative history:

To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.” ... In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.

Train v. Colo. Pub. Interest Research Grp., Inc., 426 U.S. 1, 9-10 (1976) (internal citations omitted). *See also Klaus v. Eau Claire Area Sch. Dist.*, 2010 WL 2517564 at *4 (W.D. Wis.) (“the legislative history may be consulted regarding an unambiguous statute to confirm or verify a plain-meaning interpretation”); *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 361 (“There are situations, however, when ‘reliance on the plain language ... alone is not entirely satisfactory’ ... and an examination of legislative history can shed light on the intent of Congress in enacting the statutory provision in issue here.”) (internal citation omitted)); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976).

B. Legislative Intent And History Require That The *Cabazon* Regulatory/Prohibitory Test Be Used To Determine Whether Wisconsin Permits Gaming In General, And Poke Specifically, For The Class II Gaming Definition.

IGRA was enacted in response to the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Cabazon* is “the seminal Indian gaming case that ultimately led to the passage of IGRA.” *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1254 (9th Cir. 1994). *See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991). In *Cabazon*, the Supreme Court concluded that whether gaming may be conducted by an Indian tribe turns on whether the state’s

general policy towards gambling is regulatory or prohibitory (hereinafter referred to as the “*Cabazon* regulatory/prohibitory test”). *Cabazon Band*, 480 U.S. at 224 n.1.⁷

Class II games include non-banked card games that “are explicitly authorized by the laws of the State,” or “are not explicitly prohibited by the laws of the State and are played at any location in the State.” IGRA § 2703(7)(A)(ii)(I) and (II). Whether a card game is “explicitly authorized by the laws of the State” or “not explicitly prohibited by the laws of the State and are played at any location in the State,” IGRA §§ 2703(7)(A)(ii)(I) and (II), however, must be analyzed in conjunction with the requirement that Indian Tribes may engage in Class II gaming if such gaming is “located within a State that permits such gaming for any purpose by any person, organization or entity,” IGRA § 2710(b)(1)(A). *Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023.

In the Statement of Policy to the Committee Report that accompanied S. 555, which became IGRA, Congress made it plain that the *Cabazon* regulatory/prohibitory test was to be used by Federal courts to determine whether Class II games are allowed (*i.e.*, “not explicitly prohibited”) in a state:

Finally, *the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States.* This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*. Under Public Law 83–280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from

⁷ In *Cabazon*, Riverside County sought to prohibit the play of poker on the Tribe’s land as a violation of a County ordinance prohibiting poker. Because California law and the Riverside ordinance merely regulated poker, they did not prohibit the play of poker, and thus poker was permitted on the Tribe’s land. *Id.*

the application of the distinction in the context of Public Law 83–280. *Here, the courts will consider the distinction between a State’s civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.*

Committee Report at 6 (emphases added). *See also Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366 (quoting the same and applying the regulatory/prohibitory test to determine whether a card game was a Class II game).

Consistent with Congress’s general Statement of Policy, in its explanatory notes to the definition of Class II gaming, Congress explained that it intended the definition of Class II card games in IGRA § 2703(7)(A)(ii)(I) and (II) to be read in conjunction with the “permits” language set forth in IGRA § 2710(b)(1)(A):

Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). ***Subparagraphs (I) and (II) [§ 2703(7)(A)(ii)(I) and (II)] are to be read in conjunction with sections 11(a)(2) and (b)(1)(A) [§ 2710(a)(2) and (b)(1)(A)] to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs.*** The Committee notes that, while existing law does not require that Indian card games conform with State law, it agreed to adoption of bill language to provide that these card games be operated in conformity with laws of statewide application with respect to hours or periods of operation, or limitations on wagers or pot sizes for such card games.

Committee Report at 9 (emphases added).

The legislative history of IGRA, and in particular the Committee Report, is routinely consulted, relied on and quoted by federal courts when interpreting IGRA. *See, e.g., United*

States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1099-1100 (9th Cir. 2000) (relying on the Committee Report to decide whether MegaMania was a Class II bingo game); *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 798 F. Supp. 1399, 1406-1408 (D. Minn 1992) (relying on the Committee Report to determine whether keno was a Class III game); *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029-30 (2nd Cir. 1990) (relying on the Committee Report to conclude that the *Cabazon* regulatory/prohibitory test was to be used to determine whether state had obligation to negotiate a compact); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 803 F.Supp.2d 1198, 1205 (D. Nev. 2011) (relying on Committee Report to determine the scope of NIGC authority and further holding: “We will resort to legislative history, even where the plain language is unambiguous, ‘where the legislative history clearly indicates that Congress meant something other than what it said.’” (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001))). As the Committee Report, *supra*, shows, the *Cabazon* regulatory/prohibitory test is to be used to determine whether a state permits gaming for purposes of the IGRA Class II definition.

C. Wisconsin Regulates And Does Not Prohibit Gaming In General And Poker In Particular.

The phrase “permits such gaming for any purpose by any person, organization or entity” appears in IGRA with respect to Class III gaming as well as Class II gaming. *Compare* IGRA 25 U.S.C. § 2710(d)(1) (Class III) *with* § 2710(b)(1) (Class II);⁸ *Lac du Flambeau*, 770 F. Supp. at 485-85 (holding it is a settled principle of statutory construction that the same words and phrases are to be construed to have the same meaning). “States can influence class II gaming on Indian lands within their borders only if they *prohibit* those games for everyone under all

⁸ The other two requirements set forth in IGRA 25 U.S.C. § 2710(b)(1) have also been met. First, the parties have stipulated that the Nation has a Gaming Ordinance authorizing the playing of all forms of Class I and Class II gaming on the Nation’s lands. SOF, ¶ 3 and Ex. A. Secondly, no federal law prohibits the playing of poker generally, or e-Poker in particular, on Indian lands.

circumstances.” *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (emphasis added). “Short of a complete ban, states have virtually no regulatory role in class II gaming.” *Id.* “At no point does IGRA give a state the right to make particularized decisions regarding a specific class II gaming operation.” *Id.*

In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), the Ninth Circuit analyzed the *Cabazon* decision and its applicability to Class II gaming under IGRA.

In [*Cabazon Band*], the Supreme Court made it clear that state law ... may be excluded from Indian country as “regulatory” even though the regulatory aspects of the law are enforced by criminal penalties. The key is ‘whether the conduct at issue violates the State’s public policy.’ In *Cabazon Band*, the Supreme Court undertook this inquiry in regard to California’s attempt to ban high-stakes bingo and [poker] games in Indian country, and concluded that the State had no public policy against the gambling: it simply regulated it. Accordingly, California could not prohibit the games in issue, carried on by the Bands in Indian country.

* * *

We express no opinion concerning Class III, but at least insofar as the State’s argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in *Cabazon Band* [*i.e.*, poker], the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees. *Cabazon Band* addressed the problem at a higher level of generality than that. The essence of the Supreme Court’s holding in *Cabazon Band* was distinctly set forth by the Court:

In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular [Accordingly], ... California [may not] enforce its gambling laws against Indian tribes.

Id. at 539 (internal citations omitted). Thus, even though a particular California statute prohibited high-stakes bingo and a county ordinance prohibited poker, the overall body of

California law demonstrated that California merely regulated rather than prohibited gaming and, accordingly, the statute and ordinance were regulatory in nature and could not be enforced on Indian land.

This Court has already found that Wisconsin is a *Cabazon* regulatory state. In *Lac du Flambeau*, Wisconsin claimed that it did not have to negotiate with Wisconsin's Indian tribes for a compact involving games other than lotteries and on-track pari-mutuel betting because those were the only two types of games permissible under Wisconsin law. *Lac du Flambeau*, 770 F.Supp. at 483. This Court disagreed, holding that under the Supreme Court's analysis in *Cabazon*, the proper inquiry is not whether Wisconsin allows a specific game to be played but whether Wisconsin's general policy towards gambling is regulatory or prohibitory (*i.e.*, the “*Cabazon* regulatory/prohibitory test”):

[T]he initial question in determining whether Wisconsin “permits” the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory.

Lac du Flambeau, 770 F. Supp. at 486.

Applying the *Cabazon* regulatory/prohibitory test to the history of gambling regulation in Wisconsin, this Court concluded that even a blanket prohibition on commercial gambling in Wisconsin does not render gaming prohibitory rather than regulatory for purposes of the *Cabazon* test. *Lac du Flambeau*, 770 F. Supp. at 486-87. Instead, the inquiry requires that a state's overall policy towards gaming be examined. *Id.* When examining the Wisconsin policy toward gambling, this Court found that Wisconsin is a regulatory, not prohibitory, state.

The original Wisconsin Constitution provided that “except as provided in this section, the legislature shall never authorize any lottery, or grant any divorce.” For more than a century, this prohibition against “any lottery” was interpreted as prohibiting the

operation or playing of any game, scheme or plan involving the elements of prize, chance and consideration.

* * *

In 1965, however, the constitution was amended to allow Wisconsin citizens to participate in promotional sweepstakes (by defining “consideration” as not including listening to or watching a radio or television program or visiting a store or other place without being required to make a purchase or pay a fee). The constitution was amended again in 1973 to authorize bingo when played by charitable organizations, and in 1977 to allow raffles for charitable organizations. In 1987 the electorate approved two constitutional amendments: one authorized the state to operate a lottery, with the proceeds going to property tax relief, *Wis. Const. Art. 4, § 24(6)*; the second removed any prohibition on pari-mutuel on-track betting. *Art. 4, § 24(5)*.

When the voters authorized a state-operated “lottery,” they removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration, with minor exceptions.

* * *

The amendments to the Wisconsin Constitution evidence a state policy toward gaming that is now regulatory rather than prohibitory in nature.

770 F. Supp. at 486 (emphasis added).⁹

⁹ In determining whether a state’s policy toward gaming is prohibitory or regulatory, the fact that gambling law violations are enforceable by criminal as well as civil penalties is not dispositive. *Cabazon*, 480 U.S. at 211 (even though, “unregulated bingo, the conduct which attracts organized crime, is a misdemeanor in California,” gambling is still regulatory rather than prohibitory due to other permitted forms of bingo and the state lottery) (emphasis in original). See also *Mashantucket Pequot Tribe*, 913 F.2d at 1029, (state-operated lottery, bingo, jai alai and pari-mutuel betting evidence a regulatory rather than a prohibitory policy toward gaming even though state outlawed casino games except for fundraising purposes by non-profit organizations). Further, a state may “permit” gaming “within the meaning of IGRA even if it ‘acquiesces, by failure to prevent.’” *Artichoke Joe’s Calif. Grand Casino*, 353 F.3d at 722 (citation omitted) (also holding gaming conducted pursuant to a tribal-state compact could satisfy the IGRA requirement that a state “permit” Class III gaming “for any purpose by any entity” even if Class III gaming were prohibited with respect to all non-Indians). See also *McCracken and Amick, Inc. v. Perdue*, 687 S.E.2d 690, 693 (Ct. App. N.C. 2009) (holding a state statute authorizing video poker machines only for Tribes with a tribal-state compact met IGRA’s requirement that Class III gaming be in a state that “permits such gaming for any purpose by any person”).

The Wisconsin Constitution was again amended in 1993. After the amendments, it continues to authorize a variety of Class II and Class III gaming. Bingo and raffle games, which are Class II games for purposes of IGRA 25 U.S.C. § 2703(7)(A)(i), may be offered by charitable, religious, service, fraternal or veterans organizations. *See* Wis. Const. Art. IV, §§ 24(3) and (4). Pari-mutuel on-track betting and a state-operated lottery, which are Class III games for purposes of IGRA, are also permitted. *See* Wis. Const. Art. IV, §§ 24(5) and (6). While Wis. Const. Art. IV, § 24(6)(c) prohibits the State from authorizing “poker” or games simulating poker as a lottery, it does not prohibit poker from being played in Wisconsin.

Eleven years after the 1993 amendments to the Wisconsin Constitution Art. IV, § 24 (Gambling), in 2004, the Seventh Circuit examined Wisconsin’s policy towards gambling in deciding whether IGRA’s gubernatorial concurrence provision was constitutional. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 664 (7th Cir. 2004). The Seventh Circuit agreed with, and relied on, the *Lac du Flambeau* decision:

The establishment of a state lottery signals Wisconsin’s broader public policy of tolerating gaming on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed. 2d 244 (1987). In *Cabazon*, the Supreme Court held that a state has no authority to enforce its gaming laws on Indian lands if it permits **any gaming activity** under state law. *Id.* at 211, 107 S.Ct. 1083. Further, because IGRA permits gaming on Indian lands only if they are “located in a State that permits such gaming for any purpose by any person, organization or entity,” 25 U.S.C. § 2710(d)(1)(B), **the lottery’s continued existence demonstrates Wisconsin’s amenability to Indian gaming.** Although Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(B) to prohibit gambling on Indian lands, Wisconsin once sought (albeit unsuccessfully) to limit Indian gaming to the “identical types of games” authorized for the Wisconsin State Lottery. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 487 (W.D. Wis. 1991) *appeal dismissed for want of jurisdiction*, 957 F.2d 515 (7th Cir. 1992).

Id. at 664 (emphases added). *See also Sisseton-Wahpeton*, 897 F.2d at 367-68 (concluding South Dakota’s policy toward gaming in general and black jack in particular was regulatory given the variety of gaming permitted in the state); *Mashantucket Pequot Tribe*, 913 F.2d at 1031-32 (upholding the district court’s conclusion that Connecticut’s policy towards gaming was regulatory as a result of a statute authorizing nonprofits to have “Las Vegas nights,” together with other state-sanctioned gambling such as lottery, bingo and pari-mutuel betting).

Both this Court and the Seventh Circuit Court of Appeals have already concluded that the *Cabazon* regulatory/prohibitory test may not to be applied on a game-by-game basis and that Wisconsin’s policy towards gaming is regulatory rather than prohibitory. *Lac Courte Oreilles*, 367 F.3d at 664; *Lac du Flambeau*, 770 F. Supp. at 487. Thus, it is already a matter of well-settled law that Wisconsin merely regulates and does not prohibit gaming in Wisconsin, meaning that Wisconsin does not explicitly prohibit the playing of poker, which makes poker a permissible Class II game for purposes of IGRA 25 U.S.C. § 2710(b)(1).

D. Wisconsin Does Not Explicitly Prohibit And Instead Explicitly Permits Poker And Poker Is Played In Wisconsin.

Even if reexamination of Wisconsin’s policy towards gaming were warranted, or a specific examination of poker were required, the stipulated and additional proposed indisputable facts prove that gaming in general and poker in particular are permitted, are not explicitly prohibited and are being conducted in Wisconsin for any purposes by any person. IGRA 25 U.S.C. § 2710(b)(1)(A). The LRB has described the evolution of gaming in Wisconsin: “Legalized gambling in Wisconsin has evolved over more than 150 years from an absolute constitutional prohibition of any gaming activity to *the present situation in which the state and certain entities, including charitable organizations and Indian tribes, conduct a variety of gaming activities.*” SOF, Ex. I at p. 1. Pari-mutuel on-track betting and a state-operated lottery

are permitted. Wis. Const. Art. IV, §§ 24(5) and (6); Wis. Stat. chs. 562 and 565. Bingo and raffles can be offered by charitable, religious, service, fraternal or veterans organizations. Wis. Const. Art. IV, §§ 24(3) and (4); Wis. Stat. ch. 563. Charity Poker is being offered and played in Wisconsin. DPAFF, ¶¶ 1-5. Allowing charitable and other organizations to conduct non-banked poker is an explicit authorization by Wisconsin for the playing of non-banked poker.

Section 2710(b)(1)(A) permits a tribe to engage in class II gaming if “such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity.”

* * *

The statutory language in issue first appeared in H.R. 1920, which, as previously discussed, was the principal Indian gaming legislation considered by the 99th Congress. The Senate Report on this earlier measure noted that if state law completely barred class II gaming, then the Act would also bar such gaming. S. Rep. No. 99-493, *supra*, at 14. If the state permitted some form of class II gaming, however, then a tribe could engage in such gaming subject to the Act’s requirements. *Id.* ‘[T]ribes may conduct certain defined games (bingo, lotto and cards) under the Federal regulatory frame-work, provided the laws of the state allow such games *to be played at all.*’ *Id.* at 2.

The Senate Report accompanying the bill ultimately enacted, S. 555, also discussed the difference between a state prohibiting, as opposed to merely regulating, a particular gaming activity:

The phrase “for any purpose by any person, organization or entity” makes *no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.*

S. Rep. No. 100-446, *supra*, at 12, 1988 U.S. Code Cong. & Admin. News 3082 (emphasis added).

Sisseton-Wahpeton Sioux Tribe, 897 F.2d at 365. *See also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) (Tribe allowed to conduct casino type gaming because charitable organizations allowed to do so).

Moreover, despite the constitutional prohibition against the State offering poker, or a game simulating poker, as a lottery, Wis. Const. Art. IV, § 24(6)(c), the State has offered at least 23 scratch-off lottery games that are forms of poker, including Five Card Stud, Straight Poker, Badger Hold'em and a variety of other poker games. SOF, Exh. F. The game descriptions provided by the State also demonstrate that the lottery games are simulations of poker. SOF, Exh. F. For example, the description of Championship Poker lottery scratch off is much like Texas Hold'em poker played at HCG Madison. *See* SOF, ¶ 34. Just like poker offered at HCG Madison, Championship Poker uses two "hole cards" and five "community cards" displayed on the "flop," "turn" and "river." Just like poker offered at HCG Madison, Championship Poker allows players to create their best five-card hand. Just like poker offered at HCG Madison, Championship Poker utilizes traditional poker hands to determine winning players. *Id.* The State's offering of poker scratch-off lottery tickets demonstrates that it is "not ... willing to sacrifice its lucrative lottery ... in order to obtain authority under *Cabazon*" to prohibit Class II gaming on Indian lands. *Lac Courte Oreilles*, 367 F.3d at 664.¹⁰

In addition to poker being offered as part of the State lottery, video poker is also commonly played in taverns throughout Wisconsin. Possession of five or fewer video gambling machine in Class B taverns, including video poker, is not a crime. SOF, ¶¶ 36-39. Video gambling machines, including video poker, may be used by players for amusement purposes

¹⁰ The fact that the State is offering simulated poker games as part of the State lottery despite the constitutional prohibition against it doing so just further demonstrates the State's lax regulatory public policy of permitting poker in Wisconsin.

under certain circumstances without violating any criminal laws.¹¹ *See State v. Hahn*, 203 Wis. 2d 450, 553 N.W.2d 292 (Ct. App. 1996). Video gambling machines are prevalent, regularly being played and winnings are routinely paid out, meaning that the machines are not used solely for entertainment purposes. DPFAF, ¶15.

The State does not actively enforce the statutes that make possession of 5 or fewer video gambling machines subject to civil forfeiture. Conf. SOF, ¶¶ 1-10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ There is also no prohibition in Wisconsin law on social games of poker, *i.e.*, games that do not involve betting, gambling or prizes.

[REDACTED]

[REDACTED]¹²

Poker Leagues are advertised online and league organizers are operating games on a nightly basis in south central and south eastern Wisconsin. DPFAF, ¶¶ 6-14. The Poker Leagues award cash prizes to winners, publicly boast that thousands of dollars are paid out, and send winners to out-state poker tournaments such as the World Series of Poker as a prize to top winners. DPFAF, ¶¶ 6-14. Cash poker tournaments are also common and played openly in establishments serving the public. DPFAF, ¶¶ 16-20. Even if the Poker Leagues and cash poker tournaments are illegal under Wisconsin's gambling laws, such open and public play of poker demonstrates a complete lack of enforcement. With little effort, the Nation's investigator located such prevalently played poker tournaments, and Wisconsin law enforcement officers could do likewise. But, as the LRB reported, private gambling such as "low-stakes poker games" are "common and generally perceived to cause little harm," and therefore "local law enforcement authorities rarely prosecute noncommercial betting activities." SOF, Ex. I at p. 17. *See Lac du Flambeau*, 770 F. Supp. at 488 ("[a] state might not prohibit a particular Class III gaming activity, but simply allow it to be conducted, without taking any steps to restrict it in any way..." thereby permitting it for IGRA purposes).

Both banked and non-banked poker are permitted in Wisconsin on tribes' Class III gaming properties pursuant to the tribal-state compacts. SOF, ¶¶ 20-21. In *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 22-49, 295 Wis. 2d 1, 719 N.W.2d 408, the question before the Court was whether the 1993 Wisconsin Constitutional Amendment

¹² The Nation does not fault DOR for lack of enforcement of Wisconsin's video gambling laws. DOR has only nine field agents for statewide enforcement of all tobacco and alcohol matters. Conf. SOF, ¶ 9. But, the limited capacity of DOR to enforce Wisconsin's video gambling laws underscores the fact that Wisconsin has a lax, regulatory policy toward its video gambling laws as opposed to a prohibitory policy.

prohibited the expansion of gaming at Class III facilities. The Court ruled that expanded gaming was permitted under the terms of the Compact and, therefore, protected by the Commerce Clause. *Id.*, ¶¶ 81-95. However, the Compact did not require the State to permit expanded gaming but rather allowed expansion of gaming to take place if both the State and the Nation agreed. *Id.*, ¶¶ 82-83. The Governor was given the authority to negotiate the terms of the Compact with the Nation under Wis. Stat. § 14.035. It was within the Governor's authority, acting on behalf of the State, to decide whether to permit or not to permit poker to be played at Class III facilities. The *Dairyland* Court found only that the Governor's authority to permit poker under the Compacts was protected by the Contract Clause, not that he was required to permit poker. When the Governor chose to agree to expanded gaming to include poker at Class III facilities, he was acting on behalf of the State to "permit" such play to take place. The Governor chose on behalf of the State of Wisconsin to permit people to play poker in Wisconsin at Indian gaming facilities when there was no requirement for him to do so under the Contract Clause nor under any other body of law. Wisconsin therefore "permits" the play of poker for "any purpose by any person" within the meaning of IGRA 25 U.S.C. § 2710(b). *See also Artichoke Joe's Calif. Grand Casino*, 353 F.3d at 722.

Finally, the State, on its official Department of Tourism website, advertises where tourists can find poker games if they come to Wisconsin. It even directs them to the "electronic poker tables" at the HCG Madison Class II facility. DPFAF, ¶ 4. For the State to argue that it does not "explicitly permit" and instead that it "explicitly prohibits" gaming in general, and poker specifically, to be played in Wisconsin is disingenuous since it is recruiting people to do that very thing when they visit Wisconsin.

In its February 26, 2009, advisory opinion to the Nation concerning the play of poker at HCG Madison, the NIGC analyzed Wisconsin's history of gaming regulation and applied the *Cabazon* regulatory/prohibitory test. SOF, Exh. G at p. 6. The NIGC also carefully analyzed the *Dairyland* decision. *Id.* The NIGC concluded that "because poker is permitted under the Wisconsin tribal-state compacts, it is permitted in Wisconsin for 'any purpose by any person,' [IGRA] 25 U.S.C. § 2710(b)(1)(A), and is a permissible game in Wisconsin." *Id.* at p. 6. NIGC also concluded that non-banked poker falls within IGRA's definition of Class II gaming because Wisconsin does not "wholly prohibit[]" the play of poker. *Id.*

There can be no doubt that poker is "not explicitly prohibited," that it is "explicitly permitted" and that it is "played at any location in the State." IGRA § 2703(7)(A)(ii)(II). For the reasons set forth above, Wisconsin's public policy towards gaming in general and poker in particular is regulatory, not prohibitory, within the *Cabazon* test. A variety of Class II and Class III games, including pari-mutuel betting, Charity Poker, the State simulated poker lottery games, video poker and banked (Class III) and non-banked (Class II) poker, are permitted, and indeed encouraged by the State Department of Tourism, to be played in Wisconsin. The State has widely opened the door to gambling in general and poker in particular and cannot now slam that door shut at Class II Indian gaming facilities, including HCG Madison. The State, therefore, cannot, as a matter of law, prohibit the play of e-Poker at HCG Madison. To do so would unlawfully infringe on the Nation's sovereign rights guaranteed by IGRA.

CONCLUSION

For the foregoing reasons, the Ho-Chunk Nation respectfully requests that the Court enter summary judgment dismissing the Complaint on the grounds that e-Poker is appropriately being

played as a Class II game at HCG Madison, and grant such other and further relief as the Court deems just.

Dated this 17th day of February, 2014.

WHYTE HIRSCHBOECK DUDEK S.C.

s/ Thomas M. Pyper

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