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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STATE OF IDAHO, a sovereign State of the United States, Plaintiff, vs. COEUR D'ALENE TRIBE, a federally recognized Indian tribe, Defendant.	Case No. 2:14-cv-00170-BLW SHOSHONE-BANNOCK TRIBES MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF COEUR D'ALENE TRIBE'S MOTION TO DISMISS AND OPPOSING STATE OF IDAHO'S MOTION FOR TEMPORARY RESTRAINING ORDER

Shoshone-Bannock Tribes moves for leave to file an amicus brief in support of Defendant Coeur D' Alene Tribe's Motion to Dismiss, and in Opposition to Plaintiff State of Idaho's Motion for Temporary Restraining Order, because this court lacks jurisdiction to hear the matter.[1] A copy of the proposed amicus brief is submitted along with this motion.[2]

I. STATEMENT OF INTEREST

The State of Idaho seeks to resolve the issue of whether Texas Hold'em tournaments being offered by the Coeur d'Alene Tribe are "Class II" gaming as that term is defined by the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq. ("IGRA"). If the Court determines the subject gaming is not "Class II", the impact would be to place in serious and immediate jeopardy the scope of Class II games that the Shoshone-Bannock Tribes may offer on its Indian lands. Additionally, taking jurisdiction over the instant lawsuit in the current context will seriously erode the self-governance of the Shoshone-Bannock Tribes because the dispute is

[1] There is no specific rule setting forth the requirements of an amicus motion at the district court level. Shoshone-Bannock Tribes offers this motion using Fed. R. App. P. 29 by analogy.

[2] Shoshone-Bannock Tribes contacted the attorneys for both parties to seek their respective consent to appear as Amicus Curiae. Each party consented to filing the Amicus Brief and the State of Idaho reserves the right to object after reviewing the filed pleading.

beyond Congress' intended limited abrogation of tribal sovereign immunity in actions brought by states in federal court regarding Indian gaming.

Shoshone-Bannock Tribes' Class II and Class III gaming operations allow the Shoshone-Bannock Tribes to provide crucial services for its tribal members. Shoshone-Bannock Tribes' Class II and Class III offerings each respectively provide a stable revenue stream that is critical as a funding source for Shoshone Bannock-Tribes' governmental services. Moreover, the revenues also create a source of economic strength and stability. Shoshone-Bannock Tribes must protect any and all attempts by the State of Idaho to infringe on its sovereignty. Shoshone-Bannock Tribes also must safeguard its regulation over "Class II" gaming, which provides funding for critical community services to the Shoshone-Bannock Tribes.

II. DESIREABILITY AND RELEVANCE OF AMICUS BRIEF

The privilege of being heard amicus rests within the broad discretion of the court, which may grant or refuse leave accordingly if it deems the proffered information timely, useful, or otherwise helpful. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *Green v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). While amici participation on appeal is routinized under FRAP 29, amici participation is commonly allowed at the district court level, subject to the general rule elucidated in *Hoptowit. Green*, at 978; *Community Association for Restoration of the Environment v. DeRuyter Brothers Diary*, 54 F.Supp. 2d 974, 975 (E.D.

Wash. 1999). In this case, Shoshone-Bannock Tribes is uniquely situated to provide critical information and argument to this Court on the matters raised by the Coeur d'Alene Tribe in its motion to dismiss, specifically, the threshold issue of this Court's subject matter jurisdiction. Shoshone-Bannock Tribes is not a party to the Class III gaming compact entered into between the Coeur d'Alene Tribe and the State of Idaho. The State is attempting to frame an issue as to whether Texas Hold'em tournaments are "Class II", (an issue that equally impacts all Idaho Tribes that are subject to the same regulatory oversight by the National Indian Gaming Commission, with criminal jurisdiction exclusively vested in the Department of Justice), as an issue as to whether Texas Hold'em tournaments are "Class III" and lawful under a compact that is critically and disparately different from the Shoshone-Bannock Tribes' compact with Idaho. The State alleges that provisions of the specific Coeur d'Alene compact should be interpreted as conferring this Court jurisdiction to hear this dispute. However, parties may not agree to confer subject matter jurisdiction, or fiat a federal cause of action, when none exists. *Guzman-Andrade v. Gonzales*, 407 F.3d 1073 (9th Cir. 2005); *Kolbe v. Trudel*, 945 F. Supp. 1268, 1270 (D. Ariz. 1996); *Harris v. Sycuan Band of Mission Indians*, 2009 WL 1883674 (S.D. Cal. 2009).

The Coeur d'Alene Tribe argues that the action should be dismissed for lack of subject matter jurisdiction because the Tribe has not consented to suit in state or

federal court, but also argues in the alternative that if subject matter does exists, the instant action should be submitted to arbitration per the express provisions of the Coeur d'Alene Compact. Although the Shoshone-Bannock Tribes does not take issue with the Coeur d'Alene Tribe's position regarding how proper disputes are to be addressed under the terms of its compact, the Shoshone-Bannock Tribes does take issue with the dispute over the proper scope of Class II gaming in Idaho being resolved in any forum where the State of Idaho is improperly a party, and the National Indian Gaming Commission and the Shoshone-Bannock Tribes are improperly not parties. It is in this respect that the Coeur d'Alene Tribe's and Shoshone-Bannock Tribes' interests may diverge. The Shoshone-Bannock Tribes is seriously prejudiced if this Court allows the matter to be resolved in any forum where the State is a party, whether it be in litigation or arbitration.

The Coeur d'Alene/State of Idaho Class III Gaming Compact differs greatly from the Shoshone-Bannock/State of Idaho Class III Gaming Compact[3]. To resolve a dispute that is not the proper subject matter of the Coeur d'Alene/Sate of Idaho Compact, and by doing so, to seriously impact the rights of a Tribe whose own compact with the State is radically different in many material respects, is

[3] The full text of the Shoshone- Bannock Tribes/ State of Idaho Class III Gaming Compact can be found on the National Indian Gaming Commission's official web page at: http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Shoshone-%20Bannock%20Tribe/shoshonebannock082400.pdf

inappropriate. Because the two Tribes are not identically situated, the Coeur d'Alene Tribe is not in a position to adequately represent the interests of the Shoshone-Bannock Tribes.

This is a dangerous path to tread upon. As demonstrated in the Amicus brief, the State of Idaho's exclusive remedy for its grievance is to notify the United States Department of Justice and the National Indian Gaming Commission of its concerns, which the State has done. To allow this matter to go forward, or to make a determinatuon that the matter should proceed to arbitration, would disturb the delicate balance between tribal, federal and state interests that Congress intended in the passage of IGRA, including the interests of the Shoshone-Bannock Tribes.

The analysis in the proposed *Amicus* is intended to bring the Court's attention to particulars of the correspondence submitted as evidence in support of the State's motion, and provide recent case law not cited by the Coeur d'Alene Tribe, all of which support dismissal of the case for lack of federal jurisdiction/cause of action. The discussion includes the Supreme Court decision in *Michigan v. Bay Mills Indian Community,* _____S.Ct._____, 572 U.S. _____, No, 12-515 (May 27, 2014), which was just issued yesterday morning and provides important direction to this Court's disposition of the pending motions.

RESPECTFULLY SUBMITTED

Dated this 28th day of June, 2014.

/s/ William Bacon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of June, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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IN THE UNITED STATES DISTRICT COURT
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STATE OF IDAHO, a sovereign State of the United States, Plaintiff, vs. COEUR D'ALENE TRIBE, a federally recognized Indian tribe, Defendant.	Case No. 2:14-cv-00170-BLW AMICUS BRIEF OF THE SHOSHONE-BANNOCK TRIBES IN SUPPORT OF COEUR D'ALENE TRIBE'S MOTION TO DISMISS AND OPPOSING STATE OF IDAHO'S MOTION FOR TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

Plaintiff State of Idaho's Complaint for Injunctive Relief seeks to enjoin the Coeur d'Alene Tribe from offering Texas Hold'em poker tournaments on the Tribe's trust lands in Worley, Idaho. The State manufactures a dispute that does not exist to justify a federal cause of action that does not lie. The State disputes whether the form of poker being offered by the Coeur d'Alene Tribe is a "Class II" game. The governance of Class II gaming is reserved by the Indian Gaming Regulatory Act to the Tribe and the United States, to the exclusion of the State. The remedy for the State is to complain to the United States Department of Justice and/or the National Indian Gaming Commission, each of which is vested with enforcement authority if the game at issue is indeed not an authorized form of Class II gaming.

This amicus brief is submitted in support of Defendant Coeur d'Alene Tribe's motion to dismiss the State of Idaho's Complaint for lack of federal jurisdiction/cause of action and in Opposition to Plaintiff State of Idaho's Motion for Temporary Restraining Order. The Shoshone-Bannock Tribes are impacted by any determination as to the scope of Class II games in the State of Idaho, including Texas Hold'em tournaments. The Shoshone-Bannock Tribes have a Class III Gaming Compact with the State of Idaho that differs markedly from the Coeur d'Alene Compact. Accordingly, the Shoshone-Bannock Tribes does not opine on

those particular compact provisions of the Coeur d'Alene Compact the State attempts to bring into issue. Because the court lacks federal jurisdiction to hear the dispute, it should never reach those issues. The Shoshone-Bannock Tribes does endorse the reasoning of the Coeur d'Alene Tribe as to the threshold jurisdictional/cause of action issue, incorporates it herein, and attempts to minimize repetition of the Coeur d'Alene analysis. The analysis below is intended to bring the Court's attention to particulars of the correspondence submitted as evidence in support of the State's Motion, and bring recent case law not cited by the Coeur d'Alene Tribe to the Court's attention, all of which support dismissal of the case for lack of federal jurisdiction/cause of action.

Timely to the motions before this Court, just yesterday morning the Supreme Court issued it's opinion in *Michigan v. Bay Mills,* _____S.Ct._____, 572 U.S. _____, No, 12-515 (May 27, 2014), which affirmed that the abrogation of tribal immunity contained in IGRA is to be narrowly construed and accordingly, that the State can only bring unconsented suit against a Tribe under IGRA for injunctive relief to require compliance with a Tribal-State compact in effect.

II. LEGAL BACKGROUND

A. Indian Regulatory Gaming Act: Classification of Games.

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. § 1166(c), (d), to provide a statutory basis for

the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." *See* 25 U.S.C. § 2702(1). IGRA permits gaming on tribal trust lands and divides gaming into three classes, each of which is regulated differently. *See* 25 U.S.C. § 2703(6)–(8).

Class I gaming is defined as traditional Indian gaming, which may be part of tribal ceremonies and celebrations, or social gaming for minimal prizes. *See* 25 U.S.C. § 2703(6). Regulatory authority over Class I gaming is vested exclusively in tribal governments and is not subject to IGRA's requirements. *See* 25 U.S.C. § 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and certain non-banked card games. *See* 25 U.S.C. § 2703(7). The dispute between the State and the Coeur d'Alene Tribe is whether the Texas Hold'em tournaments are such a non-banked card game. Tribes maintain regulatory jurisdiction over Class II gaming, subject to the supervision of the National Indian Gaming Commission ("NIGC"). *See* 25 U.S.C. §§ 2704 and 2710(a)(2). An Indian Tribe may engage in Class II gaming on Indian lands within such Tribe's jurisdiction, if: (1) such gaming is located within a state that "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the NIGC. *See* 25 U.S.C. § 2710(b).

Class III gaming is gaming that does not fall within Class I or Class II, and includes banked card games, casino games, and slot machines. *See* 25 U.S.C. 2703(8). IGRA authorizes Class III gaming activities on Indian trust lands if certain conditions are met, including that the activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." *See* 25 U.S.C. § 2710(d)(1)(C). IGRA authorizes judicial review of disputes between Indian tribes and states regarding the enforcement of Tribal-State compacts. *Id.;* 25 U.S.C. § 2710(d)(7)(A).

B. Indian Regulatory Gaming Act: Limited Abrogation of Tribal Sovereign Immunity.

The Supreme Court's jurisprudence regarding Indian sovereignty is governed by the "policy of leaving Indians free from state jurisdiction and control . . . ." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The Supreme Court has viewed tribal sovereign immunity as a considerable shield against intrusions of state law into Indian country. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the Tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754 (1998). This immunity applies to the Tribe's commercial as well as governmental activities. *Id.* at 754-55.

As restated in yesterday's *Bay Mills* decision:

> Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and "[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U. S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U. S., at 58). That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government. See, e.g., *id.*, at 58–60; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U. S. 9, 18 (1987); *United States v. Dion*, 476 U. S. 734, 738–739 (1986).

572 U.S. at _____, slip. Op. at p. 7. *Turner v. United States*, 248 U.S. 354, 358 (1919). Under IGRA, Congress' abrogation of tribal sovereign immunity allowing an action to be filed by a state against a Tribe is limited to an action "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact" and this abrogation applies only in narrow circumstances in which a Tribe conducts Class III gaming in violation of an existing Tribal State Compact. 25 U.S.C. § 2710(d)(7)(A)(i). See also, *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005), citing *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997).

Even if the untrue allegations of the State that the Coeur d'Alene Tribe agreed in its Compact that this dispute could be resolved under the Compact's dispute resolution provisions, and even if this Court were to construe such an agreement as a waiver of the Coeur d'Alene Tribe's sovereign immunity, such an agreement does not vest this Court with a federal cause of action. The parties may

not agree to create[1] a federal cause of action when none exists. *Guzman-Andrade v. Gonzales*, 407 F.3d 1073 (9th Cir. 2005); *Kolbe v. Trudel*, 945 F. Supp. 1268, 1270 (D. Ariz. 1996); *Harris v. Sycuan Band of Mission Indians,* 2009 WL 1883674 (S.D. Cal. 2009).

III. FACTUAL BACKGROUND: THIS IS A DISPUTE OVER WHETHER THE TEXAS HOLD-EM TOURNAMENTS ARE CLASS II GAMING: THIS IS NOT A DISPUTE OVER WHETHER SUCH GAMES ARE NON-COMPACTED CLASS III GAMES.

The Court's role in deciding a Rule 12(b)(1) motion as opposed to a 12(b)(6) motion is dramatically different. While it is true that under Rule 12(b)(6), the court is required to accept the allegations of the complaint as true, this is not the case when the movant presents a factual attack on the court's jurisdiction under Rule 12(b)(1). According to a leading treatise:

> When the attack is factual, however, the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56. Because a factual Rule 12(b)(1) motion involves the court's very power to hear the case, the court may weigh the evidence to confirm its jurisdiction. No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

[1] A nuance of this argument may occur if the Coeur d'Alene Tribe had waived its sovereign tribal immunity from suit, and the Court otherwise possessed federal subject matter jurisdiction. See, *Bay Mills,* 572 U.S. at ____, n.2, slip op at p.4, n.2. That is not the case here, however, where the Coeur d'Alene Tribe's compact expressly reserves tribal sovereign immunity. See Compact §at 22.1.

See 2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.30(4) (Matthew Bender 3d Ed. 2012) (internal quotations and footnotes omitted).

The materials submitted by the State in support of its Motion for Temporary Restraining Order include an extensive exchange of correspondence between the Coeur d'Alene Tribe and the State. It is significant that nowhere within that correspondence is an allegation by the Tribe that the subject game is a form of C*lass III* gaming. That bears repeating: nowhere within that correspondence is an allegation by the Tribe that the subject game is a form of C*lass III* gaming. Indeed, time and again, the correspondence (properly) frames the dispute as to whether the subject game is a form of *Class II* gaming:

> ". . . the Coeur d'Alene Tribe has determined that non-house banked poker games constitute ***class II*** gaming in the State of Idaho. . . "

(emphasis added). See DK# 3-5. Exhibit 3 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically the attachment to the April 16, 2013 letter from William Roden to Jeffrey Anderson:

> "***The State understands*** that the Tribe intends to offer nonbanking poker at its casino as a form of ***Class II*** gaming under the Indian Gaming Regulatory Act"

(emphasis added). See DK# 3-6, Exhibit 4 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically May 7, 2013 letter from Jeffrey Anderson to William Roden:

> "For your further reference, I enclose an opinion letter dated December 21, 2004 issued by then Acting General Counsel of the National Indian Gaming Commission. The letter, consistent with analysis in the letter to Mr. Roden, concluded that poker is not ***class II*** gaming in Idaho.

(emphasis added). See DK# 3-7, Exhibit 5 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically April 18, 2014 letter from Jeffrey Anderson to Hon. Chief Allan:

> " The Tribe's Gaming Board mandated . . . that the tournaments be played in strict compliance with standards adopted by the Gaming Board, as well as the ***applicable regulations of the National Indian Gaming Commission***[2]."

(emphasis added). See DK# 3-8, Exhibit 6 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically April 28, 2014 letter from Hon. Chief Allan to Jeffrey Anderson:

> "As the April 18 letter and its attachments explain, poker in Idaho does not constitute ***Class II*** gaming under the Indian Gaming Regulatory Act."

(emphasis added). See DK# 3-9, Exhibit 7 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically May 1, 2014 letter from Jeffrey Anderson to Hon. Chief Allan.

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[2] Regulations of the National Indian Gaming Commission regarding the conduct of games only apply to forms of Class II games and not to forms of Class III games. See *Colorado River Indian Tribes v. National Indian Gaming Commission* 466 F.3d 134 (D.C. Cir. 2006).

Such correspondence also reveals an understanding by the State that the issue of whether the game is a Class II game is the province of the Tribe and the United States to the exclusion of the State:

> ". . . the Idaho State Lottery (the State agency responsible for compact compliance) has ***no responsibility*** for gaming the type that the Coeur d'Alene Tribe seeks to undertake". . . .
>
> " ***The National Indian Gaming Commission has monitoring and enforcement authority with respect to Class II*** gaming under 25 U.S.C. § 2706(b). See also, 25 C.F.R. Pts. 571, 573. I have forwarded this letter, together with yours, under separate cover[3] to NIGC Chairwoman Traci Stevens and United States Attorney Wendy J. Olson."

(emphasis added). See DK 3-6, Exhibit 4 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically May 7, 2013 letter from Jeffrey Anderson to William Roden:

> ". . . the State will exercise all available remedies to end such gambling. They include. . . ***a request for civil and/or administrative enforcement proceedings by the National Indian Gaming Commission; and/or a request for criminal proceedings under 25 U.S.C. § 1166 by the United States Attorney for the District of Idaho***. . . "

[3] It is interesting to note that the State does not include the "separate cover" to the NIGC as part of its evidence in support of its Motion for Temporary Restraining Order. Amicus Shoshone-Bannock Tribes suspects the omission is deliberate as it further evidences the correctness that this dispute is not a compact dispute.

(emphasis added). See DK# 3-7, Exhibit 5 to Lottery Director Jeffrey Andersons Declaration in Support of State's Motion for Temporary Restraining Order, specifically April 18, 2014 letter[4] from Jeffrey Anderson to Hon. Chief Allan.

IV. ARGUMENT: THE COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR THE INSTANT DISPUTE.

Pursuant to the Constitution, Congress has plenary authority over Indian affairs. U.S. Const. art. I, § 8, cl. 3; *United States v. Hellard*, 322 U.S. 363, 367 (1944). "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, not with the States." *Id.*; *see also Oklahoma Tax Comm'n*, 498 U.S. at 509, 511. Hence, the State must establish that IGRA or another federal statute abrogated the Tribe's sovereign immunity to provide a federal cause of action to take the proposed enforcement action.

As demonstrated above, the dispute between the Coeur d'Alene Tribe and the State of Idaho is a dispute over whether Texas Hold'em tournaments are a legal form of Class II gaming. As demonstrated above, IGRA's abrogation of tribal sovereign immunity is limited to actions to force compliance with Class III gaming compacts. It is the province of the Tribal Gaming Commission and the United States, to the exclusion of the states, to take enforcement action against unlawful

[4] Significantly, the State copied the letter to Eric Shepard, Acting General Counsel, NIGC, and Wendy J. Olson, United States Attorney

Class II gaming. The Department of Justice has the exclusive authority to take criminal enforcement against a Tribe for unlawful Class II gaming. 18 U.S.C. § 1166(d). The Department of Justice and the National Indian Gaming Commission have joint authority to take civil enforcement action against a Tribe for unlawful Class II gaming. See, 25 U.S.C. § 2706(b); 25 C.F.R. Parts 571, 573; *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1506–07 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994); *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558 (8th Cir. 1998); *United Keetoowah Band of Cherokee Indians v. State of Oklahoma ex rel Moss*, 927 F.2d 1170 (10th Cir. 1991). See also, *Alabama v. PCI Gaming Authority*, 2:13-CV-178-WKW, 2014 WL 1400232 (M.D. Ala. Apr. 10, 2014) *appeal pending* (11th Cir). In both *Sycuan* and *PCI Gaming Authority,* the court rebuked efforts by the State to exert jurisdiction where no compact was in place. In *PCI Gaming Authority,* the State sought to enjoin activity that the Tribe claims to qualify as Class II gaming. The existence of a compact is not relevant, however, because Tribal-State compacts cannot extend state jurisdiction to Class II gaming. This position was very recently restated by the Department of the Interior in a formal letter to the Mashpee Wampanoag Tribe and the State of Massachusetts explaining why the compact was being "deemed approved", rather than formally approved:

> The IGRA draws a bright line providing that ***only tribes and the National Indian Gaming Commission may regulate class II gaming***.

> Nothing in IGRA or its legislative history indicates that Congress intended to allow gaming compacts to be used to expand state regulatory authority over tribal activities that are not directly related to the conduct of class III gaming. ***To the extent the parties implement this compact at some undefined point in the future in a manner to grant the state authority over class II gaming, such action would not be lawful***.

(emphasis added). January 6, 2014 letter from Kevin Washburn, ASIA, to Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe. The full text can be found on the Department of the Interior's official web page at http://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-025901.pdf.

In the instant case, Idaho was aware of the NIGC's authority and since May of 2013, routinely copied both the NIGC and the United States Attorney on all correspondence. Neither the NIGC nor the Department of Justice has commenced any proceedings against the Coeur d'Alene Tribe, so the State has attempted to take this matter into its own unauthorized hands by manufacturing a dispute that does not exists. Even if the Coeur d'Alene Tribe asserted, in the alternative, that its Compact allows it to offer Texas Hold'em tournaments as a compacted Class III game, which it has not asserted, such a dispute would only be ripe if the Class II issue had been resolved between the Coeur d'Alene Tribe and the United States, to the Tribe's detriment.

The State's instant lawsuit places the cart before the horse, infringes on the sovereignty of the Tribe, and seeks to set a dangerous precedent. Allowing the

instant lawsuit to continue would create a paradox: The State could abolish the Tribe's sovereignty only to later determine that the offering is Class II gaming subject to Tribal and federal regulation to the exclusion of the State. At that point the damage to the Tribe's sovereignty will have already been done.

Before taking the drastic step of destroying a Tribe's sovereignty, the agency responsible for supervising Class II gaming should be tasked with determining whether or not the offering is indeed Class II. If it is Class II, the NIGC can exercise its supervision over the Tribe's offering. If the NIGC determines that the offering is Class III, it can issue an official decision to that effect. The Coeur d'Alene Tribe can then decide whether to cease the operation of the game, pursue a Compact amendment to allow for the game, or make a determination that it is a Class III game authorized under the Compact and, as it has done with the determination that it is a Class II game, inform the State. If the State disputes that action in that context, it can pursue the remedial provisions of the compact for unauthorized Class III games (concurrent jurisdiction with the United States). This paradigm protects tribal sovereignty and places the issues before the appropriate regulatory bodies.

Yesterday's decision in *Bay Mills* underscores the correctness of the Tribes' argument. The Supreme Court pointed directly to several remedies available to the State of Michigan to redress its grievance with the Bay Mills Indian Community.

572 U.S. at _____, slip op. at pp. 12 – 14. Here, the State's own evidence establishes that not only does the State have the ability to complain to both the Department of Justice and the National Indian Gaming Commission, it has in fact done so. Applying the *Bay Mills* reasoning, this Court should not expand IGRA's limited abrogation of tribal sovereign immunity to reach the question of whether Texas Hold'em tournaments are "Class II" games. It is pure and unsubstantiated conjecture on the part of the State that the Coeur d'Alene Tribe would claim the game to be a compacted Class III game if the Department of Justice and/or the NIGC took the position that the game is not "Class II."

V. CONCLUSION

For the reasons set forth herein, and the reasons set forth in the Coeur d'Alene Tribe's Motion to Dismiss and Opposition to the State of Idaho's Motion for Temporary Restraining Order, the instant lawsuit should be dismissed for lack of jurisdiction.

Dated this 28th Day of June, 2014.

/s/ William Bacon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of June, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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AND I FURTHER CERTIFY that although, not formally noted as counsel of record on PACER, the following attorney has been noted on documents filed with this Court, and as such an electronic courtesy copy of this document has been sent to said attorney at her email addresses noted below:

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By: /s/ William Bacon
WILLIAM BACON