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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 **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Idaho law—both constitutionally and statutorily—narrowly limits the types of gambling permitted in the State. Idaho Const. art. III, § 20; Idaho Code §§ 18-3801 and -3802. It also specifically prohibits other forms of gambling. *Id.* Among those

specifically prohibited gambling activities is poker. These state law restrictions on gambling have been incorporated into the 1992 tribal-state compact negotiated between Plaintiff State of Idaho ("Idaho") and Defendant Coeur d'Alene Tribe ("Tribe") pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 to 2721.

Indeed, the parties litigated the permissible scope of gaming under Idaho law for compact-inclusion purposes before this Court two decades ago. *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir.), *cert. denied*, 516 U.S. 916 (1995). The Court's order left no wiggle-room as to what was permitted and what was not: "[T]he State of Idaho is required to negotiate only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel betting on horse, mule, and dog races." *Id.* at 1283. The order further stated that "Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State." *Id.* Idaho gambling law since then has authorized only one new form of gaming—tribal video gaming machines (Idaho Code §§ 67-429B and -429C)—pursuant to a voter initiative approved in November 2002. *See* Proposition 1 (2002), *available at* http://www.sos.idaho.gov/elect/inits/02init01.htm (last visited Apr. 28, 2014). The Tribe properly amended the compact after voter approval to provide for the newly authorized machine gaming.

The Tribe now is offering or, unless enjoined by this Court, will offer poker gaming at its reservation casino. Because poker constitutes an expressly prohibited form of gambling under Idaho law, offering it to casino patrons will violate the compact. The Court has jurisdiction under IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii), to issue the appropriate injunctive relief against the conduct of gaming in violation of the compact, and no legitimate question exists that it should exercise such jurisdiction and enjoin the poker gaming.

RELEVANT FACTS

I. APPLICABLE FEDERAL AND STATE LAW

A. Federal Law. IGRA governs the legality of gaming on "Indian lands" as defined in 25 U.S.C. § 2703(4). That definition encompasses "all lands within the limits of any Indian reservation." It separates gaming activities into three categories—Class I, Class II and Class III.

- Class I gaming includes only "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" (25 U.S.C. § 2703(6)) and is subject to exclusive tribal jurisdiction (*id.* § 2710(a)(1)). Class II gaming covers a greater amount of gaming, but for present purposes only its coverage of card games is material. IGRA includes within this category of gaming

> 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.

Id. § 2703(7)(A)(ii).

- Unlike the exclusive jurisdiction that tribes possess over Class I gaming, they have qualified jurisdiction over Class II gaming:

> An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--
> **(A)** such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
> **(B)** the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.
> A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

25 U.S.C. § 2710(b)(1).

- Class III gaming is a residual category for all gambling that is not Class I or II. 25 U.S.C. § 2703(8). Like Class II gaming, it can be lawfully undertaken only if authorized by an approved tribal ordinance or resolution (*id.* § 2710(d)(1)(A)) and the gaming activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" (*id.* § 2710(d)(1)(B)). However, unlike Class II gaming, Class III gaming also must be "conducted in conformance with a Tribal-State compact" approved by the Secretary of the Interior and in effect. *Id.* § 2710(d)(1)(C).

Consequently, card games like poker cannot be Class II gaming if specifically prohibited by state law. They instead are Class III gaming and can be conducted on Indian lands only pursuant to an approved, currently effective tribal-state compact. However, because they are specifically prohibited by state law, such games cannot be authorized gaming under a compact.

B. State Law. Article III, Section 20 of the Idaho Constitution, as approved in November 1992, identifies the only forms of gambling permissible in this State. In part, it provides:

> (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
>
> (3) The legislature shall provide by law penalties for violations of this section.

The Idaho Legislature anticipated Article III, Section 20's adoption by enactment of Idaho Code §§ 18-3801 and -3802 effective August 15, 1992. 1992 Idaho Laws 1st Ex. Sess. Ch. 2.

Section 18-3801 defines "gambling" to mean "risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno." Excluded from that definition are:

> (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
> (2) Bona fide business transactions which are valid under the law of contracts; or
> (3) Games that award only additional play; or
> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or
> (5) Other acts or transactions now or hereafter expressly authorized by law.

Idaho Code § 18-3801(1)-(5). Section 18-3802 imposes criminal liability on individuals engaging in gambling.

Neither Article III, Section 20 nor § 18-3801 has been amended. The expressly prohibited games—which include poker—thus remain unlawful. Idaho tribes, however, were given the option to commence another form of Class III gaming—tribal video gaming machines—through passage of Proposition One in 2002. The Legislature incorporated the initiative into Idaho Code §§ 67-429B and -429C. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1097-98 (9th Cir. 2006) (summarizing proposition).

II. THE COMPACT

The Compact was signed by the parties in December 1992 and approved on February 5, 1993 by the Assistant Secretary-Indian Affairs. Dkt. 3-3. The Assistant Secretary-Indian Affairs' approval became effective on February 12, 1993 upon publication in the Federal Register. 58 Fed. Reg. 5478 (Feb. 12, 1993). The Compact has been effective continuously thereafter. It has been amended once to incorporate tribal

video gaming machines, as described in § 67-429B, as a form of authorized gaming. Dkt. 3-4. The amendment took effect on January 8, 2003. 68 Fed. Reg. 1068 (Jan. 8, 2003).

During the negotiations prior to entry into the Compact, the parties disagreed over the types of Class III gaming that Idaho permitted "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Idaho contended that IGRA "permit[ted] only state lottery, pari-mutuel betting on racing, and the simulcast thereof as authorized Class III games." Dkt. 3-3 at Art. 6.1.1.a. The Tribe contended that IGRA "permitted [it] to engage in all games that contain the elements of chance and or skill, prize and consideration." *Id.* at Art. 6.1.2.a.

The parties responded to this disagreement in two ways. *First*, they included a provision that identified the only forms of permissible Class III gaming under the Compact. Dkt. 3-3 at Art. 6.2.[1] *Second*, they agreed that either party could seek a "judicial remedy" in the form of declaration concerning "the legal issues disputed in this Article 6." Dkt. 3-3 at Art. 6.4.2. The parties further agreed, in relevant part, that "[i]n the event the court(s) determines that no additional types of games are permitted in Idaho under the Act, the Tribe's gaming shall be limited to the gaming authorized in Article 6.2." *Id.* at Art. 6.5.1.

The Tribe, joined by the Kootenai Tribe of Idaho and the Nez Perce Tribe, thereafter filed an action in this Court against Idaho seeking the judicial remedy provided

[1] Article 6.2 states:

> Gaming Authorized. Following approval of this Compact as provided in the Act, the Tribe may operate in its gaming facilities located on Indian lands the following types of games.
>
> .1 Lottery: those lottery games defined as "State lottery" in Article 4.19.
>
> .2 Pari-mutuel betting:
>
> a) on the racing of horses;
> b) on the racing of dogs;
> c) on the racing of mules; and
> d) on the simulcast of a, b, or c.
>
> 3. Any additional type of game involving chance and/or skill, prize and consideration that may hereafter be authorized to be conducted in the State.

under Article 6.4. *Coeur d'Alene Tribe v. State of Idaho*, Civ. No. 92-0437-N (D. Idaho). The Court issued an Order on Cross-Motions for Summary Judgment on January 27, 1994 that, in relevant part, provided "that the State of Idaho is required to negotiate only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel betting on horse, mule, and dog races" and that "Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State." *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1283 (D. Idaho 1994) ("*Coeur d'Alene* I"). The Ninth Circuit Court of Appeals affirmed this Court's judgment, stating "[t]he judgment of the district court is affirmed substantially for the reasoning advanced in its published opinion" and "on our holding in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994)." *Coeur d'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir. 1995) ("*Coeur d'Alene* II").[2] The Tribe's subsequent petition for writ of certiorari was denied. *Coeur d'Alene Tribe v. Idaho*, 516 U.S. 916 (1995). Idaho's position under Article 6.1.1.a with respect to scope of permitted gaming therefore was judicially confirmed.

III. THE POKER GAMBLING DISPUTE

Media reports began appearing in late March 2014 that the Tribe intended to open a "poker room" at the Casino at which "Texas Hold'em" would be played. Dkt. 3-2 ¶ 5. That game is a poker variant. *Id.*[3] In mid-April, a tribal representative was quoted as

[2] The 1994 *Rumsey* opinion was amended in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 94 F.3d 1250 (9th Cir.), *amended on order denying reh'g*, 99 F.3d 321 (9th Cir. 1996), but its relevant reasoning remained unchanged. *Compare id.* at 1258 ("IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . [A] state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."), *with* 41 F.3d at 427 (same).

[3] As explained in the Dictionary of Gambling, http://www.dictionaryofgambling.com/gambling_terms/poker/t/ (last visited Apr. 30, 2014):

> Texas Hold'em (or just "hold'em") is a poker game in which each player gets two pocket cards, while five community cards are dealt face-up on the table. The strength

identifying the start date as May 2. *Id.* Jeffrey R. Anderson, Director of the Idaho State Lottery, advised the Tribe's Chairman on April 18 that any such gaming would violate Idaho constitutional and statutory provisions. *Id.*; Dkt. 3-7.[4] Director Anderson attached May 2013 correspondence to an attorney representing the Tribe that detailed those provisions and a December 2004 classification opinion from the National Indian Gaming Commission's Acting General Counsel that cited the same provisions for the conclusion that "Idaho law does not explicitly authorize but explicitly prohibits poker throughout that State" and that, consequently, another poker variant—"Trips or Better"—was not Class II gaming in this state.

The Tribe responded to Director Anderson's letter on April 28. The response stated that although "the Tribe believes that it has the right to offer a range of poker games based on the State's generally permissive attitude with respect to real money poker games conducted throughout the State[,] . . . the Tribe's Gaming Board has taken a very conservative approach and has authorized only a limited type of poker tournament." Dkt. 3-8 at 1. The Tribe predicated its position that the poker gaming constituted Class II gaming "in the exception to the State's prohibition against gambling for 'bona fide contests of skill'" in § 18-3801(1). *Id.* The response did not address whether the Tribe would delay opening its poker room until final arbitral or judicial resolution of the gaming's legality under IGRA.

Director Anderson spoke with a tribal representative, Helo Hancock, on April 29 concerning the Tribe's intention to commence poker gaming on May 2. Dkt. 3-2 ¶ 7. Mr. Hancock stated that the Tribe would open the poker room as planned. *Id.* The

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> of a player's hand is the best hand that can be made with these seven cards. There is a round of betting after the pocket cards are dealt, after the first three community cards (the flop), after the fourth, or turn card, and after the final, or river card.

Idaho does not know at this time whether the Tribe will offer this traditional form of Texas Hold'em or some variation.

[4] The Idaho Governor has designated the Idaho State Lottery as the "State gaming agency" as that term is defined in Article 4.18 of the Compact. Dkt. 3-2 ¶ 2.

Casino's internet-available event calendar for May 2014 was subsequently posted and "Live Poker Starts" on May 2. *Id.* ¶ 7. Finally, on May 1 Director Anderson sent a letter to Chairman Allan that suggested either binding arbitration or an agreed-upon judicial proceeding to resolve the poker controversy on the condition that the Tribe suspend any ongoing poker gaming or not commence it until completion of either process. Dkt. 3-7. Absent such an agreement, the letter advised the Tribe that "the State must pursue available remedies to preclude the [poker] activity or terminate it as quickly as possible." *Id.* at 2.

FED. R. CIV. P. 65(b) STANDARDS

The Supreme Court has made clear that temporary restraining orders, when issued without a hearing, "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Teamsters Local 70*, 415 U.S. 423, 439 (1974). Where a hearing on the motion occurs, the standards applied are those applicable under Fed. R. Civ. P. 65(a) with recognition that Rule 65(b) restricts the restraining order's duration. *See Stuhlbarg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) ("[b]ecause our analysis is substantially identical for the injunction and the TRO, we do not address the TRO separately"); *accord Maughan v. Vilsack*, No. 4:14-CV-0007-EJL, 2014 WL 201702, at *2 (D. Idaho Jan. 17, 2014).

The ordinary standards governing issuance of preliminary injunctive relief are settled in this Circuit. "A party seeking a preliminary injunction has the burden to demonstrate that (1) it is likely to succeed on the merits of the claim, (2) it will suffer irreparable harm absent injunctive relief, and (3) the balance of the equities and the public interest favor granting the injunction." *United States v. Arizona*, 641 F.3d 339, 344 n.1 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)), *aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012). The Court of Appeals

continues to recognize a portion of its pre-*Winter* "sliding scale test" and deems preliminary injunctive relief appropriate when "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff" exist, "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

However, two additional rules have play here. The Court of Appeals has instructed that "[i]f the movant 'has a 100% probability of success on the merits,' this alone entitles it to reversal of a district court's denial of a preliminary injunction, without regard to the balance of the hardships." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2007). It also has recognized that, where statutory injunctions are sought, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when asked." *United States v. Odessa Union Warehouse Coop.*, 833 F.2d 172, 175 (9th Cir. 1987); *see Meyer v. Portfolio Recovery Assoc., LLC*, 707 F.3d 1036, 1044 (9th Cir. 2012) (discussing status of statutory injunction decisional authority).

ARGUMENT

I. SUBJECT MATTER JURISDICTION EXISTS UNDER 25 U.S.C. § 2710(d)(7)(A)(ii) THAT BOTH CREATES A SPECIFIC PRIVATE RIGHT OF ACTION AND ABROGRATES TRIBAL SOVEREIGN IMMUNITY

Congress provided a specific remedy under IGRA for disputes over Class III gaming being conducted, or threatened to be conducted, in violation of a tribal-state compact. Section 2710(d)(7)(A) states:

> The United States district courts shall have jurisdiction over— . . .
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

This section is unambiguous. Here, it means that Idaho may seek to enjoin the Tribe from engaging in Class III gaming that is not authorized by the Compact because, unless so authorized, it is prohibited by the Compact. *See* Dkt. 3-3 at Art. 6.2 ("the Tribe may operate in its gaming facilities located on Indian lands the following types of games").

The scope and purpose of § 2710(d)(7)(A)(ii) were discussed in *New York v. Oneida Indian Nation*, 78 F. Supp. 2d 49 (N.D.N.Y. 1999):

> [T]his Court has jurisdiction because the IGRA abrogated the Nation's sovereign immunity where, as here, the State is seeking declaratory or injunctive relief resulting from an alleged violation of an existing Tribal–State compact authorizing Class III gaming. . . . In *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, [758] (1998), the Supreme Court referred to the A(ii) provision as an instance when Congress "has restricted tribal immunity from suit." This statement is supported by not only the plain language of the A(ii) provision, but also by other sections of the IGRA, which provide, for example, that Class III gaming is lawful only if conducted in conformance with a compact.

Id. at 54 (citation omitted). As *Oneida* explained further, other courts had recognized the sovereign immunity abrogation effected by § 2710(d)(7)(A)(ii). 78 F. Supp. 2d at 54-55.

To be sure, the Court of Appeals in *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), held that application of § 2710(d)(7)(A)(ii) extended only to violation of a compact's terms when it rejected an attempt by California to enjoin slot machine gaming on the basis of a compact limited to off-track wagering. *Id*. at 1060 ("[b]ecause the slot machines and other banked and percentage games are not mentioned in the Compact, the Bands have not violated the Compacts"). But here the Compact does expressly limit Class III gaming under it to those gambling activities otherwise lawful under Idaho law; *i.e.*, unlike the *Cabazon* compact that was limited to one form of Class III gaming, the present Compact allows *all* forms of Class III gaming currently permitted under state law and thereby is violated when the Tribe offers Class III gaming that is not permitted. *See Oneida*, 78 F. Supp. 2d at 59-60 (§ 2710(d)(7)(A)(ii) applicable where complaint alleged that tribe violated compact by offering new gaming activity without compliance with amendment process). The negative inference necessarily flowing from

Cabazon is that, had a colorable compact violation actually been alleged, § 2710(d)(7)(A)(ii) jurisdiction would have existed. Otherwise, there would have been no reason to analyze whether the compact was limited to authorizing one specific form of Class III gaming and leaving other forms of such gaming to be dealt with in future compacts. Any doubt on this score, finally, was resolved by the later-decided *Manufacturing Technologies*, 523 U.S. at 758.

II. IDAHO HAS CERTAIN LIKELIHOOD OF SUCCESS ON THE MERITS

A. Poker In All Of Its Variants, Including Texas Hold'em, Is Unlawful In Idaho And Does Not Constitute Class II Gaming

Idaho does not contend that the poker gambling offered by the Tribe is *unlawful* Class II gaming. Idaho contends that the poker gambling is not Class II gaming at all. Because it is not Class II gaming and because no non-frivolous claim exists that it qualifies as Class I gaming, the poker room activities fall into the residual Class III gaming category. The threshold question is thus whether poker, which includes the Texas Hold'em variant, constitutes Class II gaming. It does not.

1. State Law. Article III, Section 20 could not be plainer with respect to what types of gambling may be lawfully undertaken in Idaho. Subsection (1) prohibits all gambling in Idaho except for the State Lottery, pari-mutuel betting, and certain bingo and raffle games. Subsection (2) does modify the broad prohibitory scope of subsection (1) but instead precludes the use of "casino gambling" in connection with three gambling activities authorized in subsection (1). Because poker (or any card game) is not one of the three permitted forms of gambling, it is specifically prohibited by the Idaho Constitution. The Legislature may not modify that prohibition; it instead must "provide by law penalties" for engaging in that and other types of gambling falling outside the reach of subsection (1).

Section 18-3801 is no less plain. It defines gambling with reference to, *inter alia*, "risking any money, credit, deposit or other thing of value for gain contingent in whole or

part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, . . . [and] the operation of casino gambling." Consequently, gambling exists where "any . . . thing of value" is "risk[ed]" where the "gain" sought is "contingent in whole or part upon . . . chance." Poker is specifically identified as a form of proscribed gaming but, even were this particularized reference omitted, would be prohibited by the more general "contingent *in whole or part* upon . . . chance" phrase. Simply put, some poker players may be more skilled than others in exploiting the opportunity for "gain" over the long or short term, but all players are subject to the "chance" attendant to a hand drawn randomly from the distribution of cards from a 52-member standard deck.

2. NIGC Classification Opinion. It comes as no surprise that the NIGC acting general counsel concluded in 2004 that, in contrast to Florida and Washington, poker is not a Class II gaming activity in Idaho. The specific poker variant at issue—"Trips or Better"—was a version of Five Card Stud and involved use of a 52-card deck and two jokers. The classification opinion deemed the game Class II in Florida because that State authorized poker and "'[a]ll other card games playing in a non-banking manner in which the determination of the winner is based upon a traditional poker ranking system as referenced in [Hoyle's Modern Encyclopedia of Card Games, 1st ed. (Doubleday 1974)]'" were required to be approved by the state Division of Pari-Mutuel Wagering. Dkt. 3-7 at 10. The same result obtained in Washington State because it had legalized both banking and non-banking card games in licensed card rooms to the extent authorized by the State Gambling Commission. *Id.* at 11. Poker was one of the authorized forms of non-banking card games, and Trips or Better was identified by Commission as an approved poker game. *Id.* at 11-12. The opposite conclusion was reached as to this State because "poker is both expressly prohibited and not explicitly authorized by Idaho law." *Id.* at 12. In so concluding, the acting general counsel relied upon Article III, Section 20 and the fact that its subsection (2) "strictly limits the three exceptions created by subsection 1" and "unequivocally excludes poker." *Id.* The

classification opinion further reasoned that the definition of gambling in § 18-3801 "explicitly includes poker." *Id.*

3. The *Coeur d'Alene* Article 6.4 Litigation. Although this Court's 1994 decision in *Coeur d'Alene* I arose in the context of declaratory judgment proceeding directed at determining the scope of Idaho's obligation to negotiate over gaming activities for purposes of a Class III compact, it effectively decided the question whether poker is a Class II game. Both require gaming pursuant to a Class II gaming ordinance or a Class III tribal-state compact be "located within a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. §§ 2710(b)(1)(a) and 2710(d)(1)(B). The different formulation of the Class II definition for card games in § 2703(7)(A)(ii)(II) accomplishes the same end.

This Court could have been no more clear about the types of gambling lawful in Idaho:

> The Idaho Constitution expressly declares that all gambling is contrary to public policy and is strictly prohibited, except for three carefully limited exceptions: the state lottery, pari-mutuel betting if conducted in conformity with enabling legislation, and bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes. In addition, the Idaho Constitution expressly forbids those engaging in the three carefully limited exceptions from employing any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or from employing any electrical or electromechanical imitation or simulation of any form of casino gambling. . . . [¶] Based on the preceding discussion, the court finds that under the combined IGRA and *Cabazon* analysis, the State must negotiate with the Tribes only as to the conduct of a lottery and pari-mutuel betting on horse, mule, and dog races.

842 F. Supp. at 1280; *see also id.* at 1283 ("[t]he State is required to negotiate only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel betting on horse, mule, and dog races"); *id.* ("[T]he court hereby specifically DECLARES that the State of Idaho is required to negotiate with the plaintiff Tribes only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel

betting on horse, mule, and dog races. Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State.").

The order in *Coeur d'Alene* II affirmed not only this Court's judgment but also its underlying reasoning. The intervening decision in *Rumsey* had placed its imprimatur on the Court's determination that Class III compacts could not encompass gaming not permitted in a State and, therefore, that the Tribe "has no rights to engage in [otherwise unpermitted] activities." 51 F.3d at 876.[5]

B. Because Poker In Idaho Is Class III Gaming, The Judgment In The Coeur d'Alene Litigation Binds The Tribe

The parties did not engage in the earlier litigation over the scope of permissible Class III gaming for academic purposes. They predicated the scope of authorized compact gaming on its outcome. Had the Tribe prevailed in its position, for example, the parties would have engaged in further negotiations over additional gaming consistent with the declaratory judgment and in binding arbitration to resolve any outstanding

[5] The Tribe's reliance on the September 17, 1993 Legal Guideline (Dkt. 3-10) in its April 28, 2014 letter to Administrator Anderson adds nothing to the Class II analysis concerning poker. Dkt. 3-10 at 1. The Guideline responded to the question whether calcutta wagering by sporting event tournament participants constituted "gambling" under state law. It relied upon the skill exception in § 18-3802(1) for the conclusion that subsection (2) permits participants to pay a fee to enter a contest, such as a golf tournament, and gain a prize or award depending on the participant's performance." Dkt. 3-10 at 4. The Tribe apparently construes the Guideline to mean that any "tournament" in which participants participate for some prize—here a Texas Hold'em pot—and involves an element of skill falls within the subsection (2) exclusion. The core flaw in analogizing poker to sporting or other events—such as dog shows—is that prizes or awards are based solely upon skill with the participants' performance within their control. A golfer's tee shot may hit a tree and bounce onto the fairway or out of bounds, but the fact remains that the shot hit the tree precisely because the golfer struck it there. A poker player has no such control; she must make the best out of a hand determined exclusively by chance. Making the best may involve the exercise of judgment and experience—*i.e.*, skill—but that exercise is constrained within a playing field created by luck of the draw, not the player's skill. The outcome thus is "contingent in whole or in part upon lot, chance" within the reach of subsection (1) of § 18-3801. Idaho requests that this Court take judicial notice of the Guideline pursuant to Fed. R. Evid. 201(b)(2).

issues. Dkt. 3-3 at Art. 6.6.1. As it turned out, the Tribe lost, and its "gaming [is] limited to the gaming authorized in Article 6.2." *Id.* at Art. 6.5.1. This Court's declaratory judgment in *Coeur d'Alene* I thus left in place as the only forms of Class III gaming authorized by the Compact to be the two then authorized under Idaho law: State lottery games and pari-mutuel betting. Article 6.2.3 allowed new gaming activities "involving chance and/or skill, prize and consideration that may *hereafter* be authorized to be conducted in the State." [Emphasis added.] Poker—in contrast to tribal video machine gaming approved through Proposition One in 2002 and added under Article 6.8—has never been "hereafter" authorized.

Final judicial judgments have consequences. One of which is claim preclusion. Under federal common law principles, such preclusion, also known as res judicata, applies "where there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2012) (internal quotation marks omitted). Those elements indisputably exist here. The second and third elements are indisputably present. Identity of claims exists because the treatment of poker, and card games generally, under Idaho law has not changed. This Court's declaratory judgment in *Coeur d'Alene* I thus foreclosed any assertion that poker somehow embodied permissible Class III gaming. *See, e.g., United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) ("[r]es judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits"). No less significant, the claim that poker is permissible Class III gaming, if not Class II gaming, *was* necessarily encompassed within the Tribe's assertion that under Article III, Section 20 it was permitted "to engage in all games that contain the elements of chance or skill, prize and consideration." Dkt. 3-3 at Art. 6.1.2.a.

III. THE HARDSHIP FACTORS NEED NOT BE CONSIDERED BUT, IN ANY EVENT, WARRANT ISSUANCE OF IMMEDIATE INJUNCTIVE RELIEF

The Tribe has declined to delay commencement of its poker room activities notwithstanding being advised its contractual default and IGRA-based illegality. Dkt. 3-2 ¶¶ 6-7. It thus has chosen to engage in gaming plainly prohibited by the Compact. As explained above, 100 percent certainty of a favorable outcome on the merits negates the need to consider the remaining, or "hardship," factors ordinarily attendant to determining whether interlocutory injunctive relief should issue. Application of this general rule is even more appropriate here because Congress has directed entry of injunctive relief under § 2710(d)(7)(A)(ii) where Class III gaming is being, or is threatened to be, conducted in violation of effective tribal-state compact. But even were Idaho's likelihood of success less than 100 percent and the presumption of irreparable harm in a statutory injunction that exists in this Circuit, the hardship factors militate strongly in favor of injunctive relief.

First, what is at issue presently is conduct that violates not only the Compact but also federal criminal law. *See* 18 U.S.C. § 1166 (applying to Indian country state laws pertaining to, *inter alia*, prohibition of gambling, but excluding "class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect"). Federal courts have exclusive jurisdiction over alleged unlawful gaming in Indian country (*United States v. E.C. Investments*, 77 F.3d 327, 330-31 (9th Cir. 1998)), but Idaho has a keen sovereign interest both in the benefit of its compact bargain and in preventing lawless activity within its borders. Congress, again, has recognized that interest in § 2710(d)(7)(A)(ii). Nothing can undo the injury to those interests because they are not mathematically calculable and because the Tribe would possess immunity from suit for retroactive relief under any circumstances. *See Wisconsin v. Stockbridge-Munsee Cmty.*, 87 F. Supp. 2d 990, 1019-20 (E.D. Wis. 1999) (declining to apply statutory injunction

principles where relief sought under § 2710(d)(7)(A)(ii), but finding that "the fact that the Tribe has sovereign immunity, when considered in conjunction with the nature of the plaintiff's interests, and given the plaintiff's reasonable likelihood of success on the merits, the plaintiff has established that it will suffer irreparable harm if the preliminary injunction is not issued").

Second, the balance of equities and the public interest factors point in only one direction. The Compact has existed for over 21 years, and yet the Tribe waited 20 years before ever suggesting that poker was a permissible form of gaming as Class II or Class III. This newly-discovered gaming entitlement has as its roots not a change in the law but the Tribe's pursuit of revenue. Idaho does not begrudge the Tribe's attempting to maximize the Casino's economic benefit; it does object to any gaming activity that violates the Compact. The only relevant "equity" here is ensuring that the parties discharge their rights and duties under the Compact and otherwise comply with lawful obligations. The public interest, finally, rests squarely on the same principles: Parties to contracts ought honor their promises and adhere to the law.

CONCLUSION

Idaho's motion for a temporary restraining order should be granted.

DATED this 2nd day of May 2014.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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