Joseph H. Webster
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W. Ste. 700
Washington, DC 20037
Telephone: (202) 822-8282
Facsimile: (202) 269-8834
Email: jwebster@hobbsstraus.com

Howard Funke, ISB 2720
Howard Funke & Associates, PC
424 Sherman Ave., #308
Coeur d'Alene, ID 83814-0969
Telephone: (208) 667-5846
Facsimile: (208) 667-4695
Email: hfunke@indian-law.org

F. Michael Willis
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W. Ste. 700
Washington, DC 20037
Telephone: (202) 822-8282
Facsimile: (202) 269-8834
Email: mwillis@hobbsstraus.com

Kinzo Mihara, ISB 7940
Howard Funke & Associates, PC
424 E. Sherman Ave, #308
Coeur d'Alene, ID 83814
Telephone: (208) 667-5846
Facsimile: (208) 667-4695
Email: kmihara@indian-law.org

Attorneys for Coeur d'Alene Tribe, Defendant

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 **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

The State of Idaho's Combined Reply to the Tribe's Motion to Dismiss and Response to the Motion for Temporary Restraining Order and Preliminary Injunction fails to provide adequate support to justify granting the extraordinary injunctive relief requested or that would establish this Court's jurisdiction over the matter in controversy.

Idaho has failed to meet the required showing that it is entitled to injunctive relief under Rule 65. First, the State's likelihood of success on the merits is doubtful as Idaho law contains numerous exceptions that permit the play of Texas Hold'em in Idaho, including, but not limited to, contests of skill (Idaho Code § 18-3801(1)), merchant promotional contests (Idaho Code § 18-3801(4)), the Idaho Lottery (Idaho Const. Art III, § 20(1)(a)), and the "family and friends" exception discussed in *State v. Kasper*, Dist.Ct. of Idaho (4th Dist., Ada County), Case No. CRMD20139859 (May 15, 2014), Dkt. 16-1.[1] Under the IGRA, any one of these exceptions is a sufficient basis to authorize the Tribe to offer the game on its Indian lands as a Class II game.[2] Moreover, Idaho has not offered ***any*** evidence that it would suffer irreparable harm or that the balance of equities and public interest favors granting the injunction.

Finally, the State has not established subject matter jurisdiction in this Court pursuant to Rule 12(b)(1), venue under12(b)(3), or stated a claim under 12(b)(6). Even if the games were considered Class III games, they are not conducted in violation of the Compact and thereby are not within the jurisdiction of this Court pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii). *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997). Should the State wish to pursue dispute resolution with the Tribe, its remedies are set forth in Article 21 of the Compact, which establishes binding arbitration as the exclusive remedy in the absence of any other mutually agreeable method to resolve disputes regarding gaming conducted on the Tribe's Indian lands in Idaho. Further, it has failed to show that the Texas Hold'em games are anything but Class II games under the regulatory authority of the Tribe with oversight by the federal government under the IGRA.

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[1] Indeed, the Latah County Sheriff's Mounted Posse offers a poker tournament ride. *See* Ex. 1.
[2] *See* 25 U.S.C. § 2710(b)(1)(a) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if … such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity.").

DISCUSSION

I. Under the IGRA Tribal Regulators Retain Authority to Make the Initial Determination of Whether a Game Played on Indian Lands is a Class II Game.

Tribal governments, not states or federal courts, retain primary authority for determining whether an activity is a Class II game. The Tribe does not, therefore, "concede[] that this Court possesses the authority to determine *whether* non-banked poker is Class II gaming under Idaho law in the context of addressing the existence of § 2710(d)(7)(A)(ii)-grounded jurisdiction." Dkt. 25, at 2 (emphasis in original). Nor does the Tribe have the authority to, by concession or otherwise, confer subject matter jurisdiction on this Court.

Under the IGRA, tribal regulatory agencies, such as the Coeur d'Alene Charitable Gaming Board, hold the power to regulate Class II gaming pursuant to tribal authority. The IGRA explicitly recognizes tribes retain their inherent authority to regulate Class II gaming, stating "[a]ny class II gaming on Indian lands ***shall continue to be*** within the jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a)(2) (emphasis added); *see also* Dkt. 3-3, at 37 ("Nothing in this Compact shall be deemed to affect the operation by the Tribe of any Class II gaming as defined in the Act."). There is no question that under the IGRA, tribes are the primary regulators of Class II gaming. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 n.1 (1996) ("Regulation of class II gaming contemplates a federal role, but places primary emphasis on tribal self-regulation."); N.I.G.C., FREQUENTLY ASKED QUESTIONS at §2, Q.3, June 3, 2013 ("Indian tribes are the primary regulators of Class II gaming.").[3]

Although the NIGC retains oversight of Class II gaming, the initial game classification is up to the primary regulator: the tribe. *See, e.g.*, N.I.G.C., FREQUENTLY ASKED QUESTIONS at §2, Q.4 ("The ***tribe*** must determine whether the state in which the gaming facility is to be located

[3] Available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/aboutus/FAQ06032013vs2.pdf.

permits such gaming." (emphasis added)). *See also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1026 (2d Cir. 1990) ("Class II gaming is generally not subject to state regulation, but is subject to some federal oversight by the [NIGC], in addition to tribal regulation." (citations omitted)); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1200 (D. Kan. 2006) ("Class II gaming, [] is within the jurisdiction of Indian tribes if the tribe's governing body has adopted a resolution or ordinance … which the Chairman of the NIGC has approved."). The Tribe's gaming ordinance has been approved by the NIGC, and the Tribe has jurisdiction over Class II gaming on its lands, subject to federal oversight with no role for state jurisdiction. *See United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990).[4]

The U.S. Department of Justice (DOJ) describes the balance that the IGRA struck: "The states were offered a voice in determining the scope and extent of Tribal gaming by requiring Tribal-State compacts for Class III gaming, but Tribal regulatory authority over Class II gaming was ***preserved in full***. The Act further provided for general regulatory oversight at the federal level and created the National Indian Gaming Commission as the responsible agency." JUSTICE.GOV, *Gaming* (emphasis added), http://www.justice.gov/otj/gaming.htm. In S. 555, the final version of the legislation that became the IGRA, Congress "recognize[d] primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers

[4] While the NIGC Office of General Counsel may offer advisory opinions to tribes on the classification of specific games, the NIGC has not established any pre-approval process regarding tribal determinations of the card games they may offer as Class II games. Previously, the NIGC considered a process of pre-approval for electronic and technological aides used in the play of Class II bingo, but these proposed rules were withdrawn and never implemented in final form. *See* 71 Fed. Reg. 30238 ("This new part also establishes a process for assuring that such games are Class II before placement of the games in a Class II tribal gaming operation"); *see also* 71 Fed. Reg. at 30241 ("These standards apply only in bingo, lotto, other games similar to bingo, pull-tabs, and instant bingo played primarily through an electronic medium."); *and* 72 Fed. Reg. 7359 (NIGC notice of withdrawal of proposed game classification regulations). An earlier proposed NIGC process for pre-approval of Class II games was similarly withdrawn. *See* 64 Fed. Reg. 61234 (Nov. 10, 1999) (*withdrawn by* 67 Fed. Reg. 46134 (Jul. 12, 2002)).

are vested in a federally established [NIGC]." *Sisseton Wahpeton Sioux Tribe*, 897 F.2d at 365 (quoting S. REP. NO. 100-446, at 3 (1988)).[5]

If the NIGC and the Tribe were to disagree on the Tribe's determination of a particular Class II game, the NIGC may bring an enforcement action or the matter may be litigated in federal court in a suit between the Tribe and the NIGC. *See, e.g.*, *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 798 F. Supp. 1399 (D. Minn. 1992); *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155 (N.D. Okla. 2002).[6]

II. The Federal Government Retains Exclusive Authority to Enforce Prohibitions on Class III Gaming Outside the Express Provisions of a Compact.

This Court also lacks jurisdiction over state challenges to Class III games that are not the subject of a Tribal-State Compact. While the Tribe's position is that Texas Hold'em is not a Class III game as offered in its casino, the lack of jurisdiction would not be overcome even if it were assumed that the State is correct in its view that the game is Class III. As the Ninth Circuit concluded in *Cabazon Band of Mission Indians v. Wilson*, the State "has no jurisdiction over gaming activities that are not the subject of a Tribal-State compact." 124 F.3d at 1059. Because the federal government retains exclusive authority to enforce prohibitions of Class III gaming not expressly covered by a Tribal-State compact on Indian lands, here the State of Idaho is incorrect when it asserts that "the jurisdictional issue turns on whether poker constitutes Class III gaming."

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[5] *See also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997) ("To preserve the long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands absent the consent of the tribes, tribal consent was a key component of IGRA.") (internal citations omitted).

[6] The DOJ also has a key role through the criminal prosecution of unlawful gaming in Indian Country. 18 U.S.C. § 1166(d). Moreover, were this Court to rule on whether Texas Hold'em is Class II, it could result in inconsistent results, since the NIGC and the DOJ retain their authority to reach their own conclusions on how the game should be classified under the IGRA. Such a ruling would also prejudice arbitration, *passim*.

Dkt. 25, at 3. Rather, the Court should dismiss the case even if Texas Hold'em tournaments are, as the State contends, Class III gaming that is not covered by the Compact.

The IGRA provides a waiver of tribal sovereign immunity in the limited circumstance of State action "to enjoin a class III gaming activity located on Indian lands ***and*** conducted in ***violation of any Tribal-State compact***…." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). The federal government, not the State of Idaho, retains exclusive authority to enforce prohibitions on Class III gaming that is not subject to the express provisions of a compact. *Cabazon*, 124 F.3d at 1059 ("Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government."); *Cachil Dehe Band of Wintun Indians v. California*, 629 F. Supp. 2d 1091, 1106 (E.D. Cal. 2009) ("[S]tate authority over class III gaming is limited by the explicit terms of the applicable Tribal-State compact.").

Thus, when a compact authorizes some Class III games but not others, as in the compact between Idaho and the Coeur d'Alene Tribe, the State may only regulate the Class III games included in the express terms of the compact, leaving the regulation of all other Class III games to the federal government. *Cabazon*, 124 F.3d at 1059-60; *see also Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1141-42 (D. Or. 2005). The IGRA's prohibition on state regulation outside the express provisions of a compact ensures the "long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands absent the consent of the tribes." *Cabazon*, 124 F.3d at 1060.

Article 6.2 of the Compact identifies the specific types of Class III games that the Tribe is authorized to operate on its Indian lands within the state. *See* Dkt. 3-3, at 17 (authorizing the play of lottery games, pari-mutuel betting and any additional games they may be subsequently authorized to be conducted in the state). In *Cabazon*, the court refused to find an implied

promise not to engage in Class III gaming outside what was authorized by the compact simply because unauthorized Class III gaming violates IGRA.[7] *Cabazon*, 124 F.3d at 1059-60. As in *Cabazon*, this Court should "decline to conclude that the [Tribe has] impliedly consented to the extension of state regulatory authority to their tribal lands, beyond the express provisions of the Compact[], simply by entering into the Compact[]." *Id*. at 1060. Thus, even if Texas Hold'em tournaments are Class III, any enforcement action must be brought by federal authorities. This enforcement scheme does not open up any unintended jurisdictional holes, but is the intended framework Congress established to balance the interests of the federal government, tribes and states regarding gaming activities on Indian lands. This Court, therefore, should dismiss this case for lack of subject matter jurisdiction.

III. The Compact's Arbitration Clause is Binding and Any Ambiguity Should be Construed in Favor of Arbitration.

A. Compact Article 21 Controls This Dispute, Requiring Arbitration.

Binding arbitration is the only method of dispute resolution that the parties agreed upon in the Compact itself and hence the only forum for dispute resolution in the absence of the other party's express consent. *See* Dkt. 3-3, at 35 ("[B]oth parties consent to binding arbitration as provided herein."). The State focuses on one sentence of the arbitration clause, takes it out of context of the other terms in Article 21, and wholly mischaracterizes its meaning. Dkt. 25, at 9-10. In so doing, the State urges this Court to ignore the express terms of the Compact and the Supreme Court's direction that arbitration clauses must be read "to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

[7] Similarly, Section 6.5.1 limits the games available to the Tribe under the Compact to those set forth in Section 6.2, but does not expressly prohibit other Class III games. Dkt. 3-3, at 19.

The Compact unequivocally states that the procedure set forth in Article 21 "controls the resolution of ***all disputes*** other than those expressly provided for in Article 6." Dkt. 3-3, at 35 (emphasis added). It goes on to state that "if either party believes that the other party has failed to comply with any requirement of this Compact, it ***shall*** invoke the following procedure…." *Id.* (emphasis added). That procedure is clear and unambiguous. The only way that either party may deviate from that procedure is by mutual consent. *Id.* at 36-37.

No term in Article 21 provides the State with support for its assertion that the "parties plainly gave either party the option of proceeding through available judicial remedies or arbitration." Dkt. 25, at 10. The only place litigation is mentioned is to make clear that "once a party has given notice of intent to pursue binding arbitration . . . the matter in controversy ***may not*** be litigated in court proceedings." Dkt. 3-3, at 35-36 (Art. 21.3) (emphasis added). The State reads the inverse of this statement together with the inverse of the language in Article 21.2.1 ("if the dispute is not resolved . . . within sixty (60) days after service of the notice . . . either party may pursue binding arbitration") to argue that the parties impliedly built a backdoor through which the state has sixty days to run to the courthouse rather than engage in good-faith alternative dispute resolution. Dkt. 25, at 9-10. This reading cannot be sustained. The required procedures establish a 60-day period after written notice of non-compliance for the parties either to resolve the dispute outright or to establish a mutually agreeable procedure whereby the controversy will be resolved. Dkt. 3-3, at 35-37. If either party is dissatisfied at the close of the 60-day period, it "may pursue binding arbitration" without obtaining any further consent of the other party, as such consent was bargained for and explicitly provided for in the Compact. *Id.* at 35. In fact, the Tribe, itself, could invoke arbitration at the end of the 60-day period.

B. Any Ambiguity Should be Construed in Favor of Arbitration.

Although the plain language of the arbitration clause is clear, were any ambiguity to exist, "[i]t is well-settled that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 652 (9th Cir. 2009) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Supreme Court has stated that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; s*ee also Mitsubishi Motors Corps. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

The State's interpretation of Article 21 contravenes the federal policy favoring arbitration and is inconsistent with the fact that "the intention behind [arbitration] clauses, and the reason for judicial enforcement of them, are not to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums." *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995). To interpret this language in the way the State argues would be tantamount to acknowledging that, by implication and in the face of express language to the contrary, either party could side-step the arbitration clause and engage immediately in litigation. Article 6 exemplifies that the parties were aware of how to expressly build in a judicial remedy when they wanted one and that their practice was to *expressly* build in such remedies.

IV. Neither Claim Preclusion nor Issue Preclusion Apply to this Case.

Finally, for the doctrine of claim preclusion to apply, the two suits must "arise out of the same transactional nucleus of facts." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (internal quotation and citation omitted). The "nucleus of facts" in this case cannot be the same as in *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994). The "nucleus of facts" giving rise to this case did not begin until May of 2014, when the Tribe began offering Texas Hold'em tournaments as a Class II game. The State also may not argue *issue* preclusion because the issue in this action is not "identical to the issue for which preclusion is sought." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988). The issue here is whether Idaho permits Texas Hold'em tournaments under various exceptions to its general gambling prohibition sufficient to serve as the legal predicate for the Tribe to offer the game as a Class II game, which was not addressed by the prior litigation.

CONCLUSION

For the reasons set forth above and in the memorandum accompanying the Tribe's Motion to Dismiss, this case must be dismissed.

Respectfully submitted this 9th day of June, 2014,

/S/ Joseph H. Webster

Local Counsel
HOWARD FUNKE
HOWARD FUNKE & ASSOCIATES PC
Howard Funke & Associates, PC
424 E. Sherman Ave, #308
Coeur d'Alene, ID 83814
Telephone: (208)667-5846
hfunke@indian-law.org

JOSEPH H. WEBSTER
F. MICHAEL WILLIS
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W. Ste. 700
Washington, DC 20037
Telephone: (202) 822-8282
Facsimile: (208) 269-8834
jwebster@hobbsstraus.com
mwillis@hobbsstraus.com

CERTIFICATE OF SERVICE

I hereby certify that on the 9th 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 in the Notice of Electronic Filings:

Clay R. Smith, Deputy Attorneys General
clay.smith@ag.idaho.gov

Tim A. Davis, Deputy Attorneys General
tim.davis@ag.idaho.gov

Bruce Didesch
Attorney for Shoshone-Bannock Tribes
bruce@dideschlaw.com

William F. Bacon
Attorney for Shoshone-Bannock Tribes
bbacon@sbtribes.com

Scott D. Crowell
Attorney for Shoshone-Bannock Tribes
scottcrowell@hotmail.com

By: /s/ Kinzo H. Mihara
Kinzo H. Mihara, Attorney for Defendant