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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 **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

INTRODUCTION

The State of Idaho offers no justifiable reason for the Court to deny the Tribe's request to stay the preliminary injunction pending appeal. Meanwhile, the Tribe has firmly established compelling grounds for the Court to grant the requested stay of the injunction. The standard for granting a stay of a preliminary injunction pending appeal assesses: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The Tribe is likely to succeed on the merits with respect to the interpretation of Compact Article 21, which restricts the Court's jurisdiction to resolve this dispute. The State has failed to answer the Tribe's key point that it has not consented to this suit. Additionally, the Tribe is likely to succeed on the merits regarding the classification of Texas Hold'em as Class II. In the absence of the stay, the injunction will cause immediate and irreparable damage to the Tribe's economy, self-sufficiency, and government, while the Tribe's casino employees will face the elimination of their positions. The State, on the other hand, would not suffer any irreparable harm. Furthermore, the stay would serve the public interest in respecting and implementing bargained-for contractual agreements and the federal policy purposes of the IGRA.

DISCUSSION

The Tribe is Likely to Succeed on the Merits.

Compact Interpretation. This Court has enjoined the Tribe's Texas Hold'em tournaments without addressing the fundamental question of whether the parties have complied with Article 21 of the Compact. *See* Dkt. 35 at 9 ("the Court will STAY this litigation until the parties have complied with Article 21 of the Gaming Compact."). Although the Court has explained the State's interpretation of Article 21 and the Tribe's different interpretation, the Court has not provided its interpretation. *Id.* ("That dispute, however, is for another day.").

A definitive resolution of the meaning of Article 21 is essential to resolving substantial questions as to this Court's jurisdiction. The Court's June 23, 2014, order agreed with the Tribe that Article 21 precluded litigation of this question during the initial 60-day period and

foreclosed litigation upon either party's invocation of binding arbitration after that period. Dkt. 35 at 7-8. The Court reserved judgment as to what happens if binding arbitration is not invoked. *Id.* at 8-9. Instead of resolving the dispute, the Court simply declared, erroneously, that the Tribe had "changed its mind and decided it would prefer to litigate." Dkt. 40 at 1-2.

The State seeks to confuse the record even further by suggesting the Tribe was given the choice of arbitration or litigation and chose litigation. Dkt. 48 at 6. The Tribe, however, was not the aggrieved party in this dispute. *See* Dkt. 3-9 (State notification to the Tribe of non-compliance pursuant to Art. 21.2.1 and conditional notice of intent to arbitrate). Moreover, the State has not shown that the Tribe has taken any action that waives its right to arbitrate. *See Fisher v. A.G. Becker Paribas Incorporation*, 791 F.2d 691, 694 (9th Cir. 1986); *see also Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978). The Tribe did not answer the complaint, has not filed any motions seeking relief other than its motion to dismiss and its motion to increase security, and has not made any statement, orally or in writing, that it wished to litigate this dispute. Additionally, the State, as the party asserting non-compliance, has the Compact's bargained-for arbitration remedy available, as it can be invoked at any time after the 60-day period. Dkt. 3-3 at 35. Moreover, the State could seek other remedies pursuant to Article 21.4 pursuant to agreement with the Tribe. *See id.* at 35-36. The Tribe and State have experience crafting approaches to judicial resolution of disputes under the Compact that respect the sovereignty interests of the parties. *See* Dkt. 3-3 at 18 (declaratory judgment action established in recognition that "The State does not consent to jurisdiction of the federal court over any claim under the [IGRA]").[1]

[1] The State's suggestion that it is the Tribe that is forum-shopping is especially preposterous in light of the State's disregard of the Article 21 process and its choosing to file this suit.

Class II Gaming Under the IGRA. In its September 5, 2014, decision, the Court indicated that an evidentiary hearing was not necessary to determine that Texas Hold'em is prohibited in Idaho. Dkt. 40 at 5, n.2. However, the determination of whether Texas Hold'em is permitted as Class II involves an analysis of the interplay between federal law and state law. 25 U.S.C. § 2703(7); 25 U.S.C. § 2710(b)(1)(a). The fact that a state may generally prohibit card games is not the end of the inquiry. 25 U.S.C. § 2710(b)(1)(a) (Class II gaming permitted if "located within a State that permits such gaming for any purpose by any person, organization or entity …") (emphasis added). Instead, it is necessary to carefully examine any exceptions to that prohibition. *Id*.; Letter from Tracie Stevens, Chairwoman, NIGC to John Meskill at 3-4 (May 29, 2013).[2] Further, if a state generally tolerates a game that is otherwise prohibited, then that can be sufficient to show that the state's public policy (for IGRA purposes) is to permit the game. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 722 (9th Cir. 2003) ("Under *Rumsey*, mere tolerance of class III gaming might be enough to satisfy § 2710(d)(1)(B)'s requirement that a state [permit such gaming]."). In the case of Idaho, there are numerous exceptions that are sufficient to trigger the Tribe's Class II rights, evidence of which would have been presented at an evidentiary hearing.

First, if the State's policy is to recognize a "family and friends" exception, as stated by the prosecutor in the *Kasper* case,[3] then this is enough to allow the Tribe to offer the game. While the State tried to back away from this position in its request for reconsideration in the *Kasper* case, there is a factual question whether the State's pattern of enforcement actually implies such an exception. *See Kasper*, Dkt. 16-1 at 9.

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[2] Available at: http://www.nigc.gov/LinkClick.aspx?fileticket=3tF4Otkkf5c%3D&tabid=789.
[3] *State v. Kasper*, Nos. CRMD20139859 & CRMD20139864 (Idaho 4th Jud. Dist. Ct., Magis. Div., May 15, 2014) (Dkt. 16-1).

Second, the defendants in the *Kasper* case were acquitted of charges that they broke the State's gambling laws by playing Texas Hold'em. Dkt. 16-1 at 9. The magistrate judge held that the State's prohibition could not be constitutionally applied to these two individuals. *Id.* The effect of the decision is that these two individuals were permitted to play Texas Hold'em in Idaho. The IGRA imposes a very lenient "any person" for "any purpose" standard. 25 U.S.C. § 2710(b)(1)(a). If two individuals can play Texas Hold'em in Idaho and be acquitted of violating the State's gambling laws, then the IGRA test is satisfied. *Id.*

Third, whether Texas Hold'em meets Idaho's contest of skill exception is more complicated than suggested by the Court. The Court refused to conduct the inquiry because Texas Hold'em is "at least *partly* [based] upon chance." Dkt. 40 at 8. Idaho's exception for bona fide contests of skill does not, however, require zero chance in the game. Even golf tournaments contain some chance, as noted by the United States Supreme Court in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 (2001).[4] However, the analysis applied by this Court would mean that such golf tournaments are illegal, since "players risk money at least *partly* upon chance." Dkt. 40 at 8.

Further, the Attorney General of Idaho has indicated that it is permissible to pay money to play Texas Hold'em pursuant to the exception for merchant promotional contests. Idaho Code § 18-3801(4); Dkt. 15-6. While he stated that such games cannot be played for monetary prizes, the authorization is a sufficient legal predicate to allow the Tribe to offer at least some types of Texas Hold'em tournaments as Class II. Under the IGRA, once it is determined that a "card game" is permitted, the only state limitations that apply are any limits on "wagers" and "pot

[4] Idaho's bona fide contests of skill exception has been understood as an exception that allows the play of games that would otherwise be prohibited as gambling. *See* Legal Guideline Regarding Calcuttas, Op. Att'y Gen. Idaho (Sept. 17, 1993) (golf tournaments with an entry fee and monetary prizes are contests of skill).

sizes" and hours of operation. 25 U.S.C. § 2703(7)(A)(ii). A Texas Hold'em tournament with an entry fee and played with non-cash value chips would meet this test, even if the Tribe also pays prizes for the highest scores. This is because there is a distinction between a pot limit and a prize, and only limits on the former apply to the Tribe. Thus, at the very least, the Tribe can offer tournaments with prizes if played with non-cash value chips.

Under the IGRA, any one of these exceptions is a sufficient basis to authorize the Tribe to offer Texas Hold'em on its Indian lands as a Class II game. 25 U.S.C. § 2710(b)(1)(a).[5] Indeed, the Compact affirms the Tribe's civil jurisdiction over matters raised in the compact, "to the fullest extent permitted by federal law." Dkt. 3-3 at 32, ¶ 18.2. Here, the Tribe has determined its Texas Hold'em games are Class II. *See* Dkt. 15-2 at 3, ¶ 4.

Irreparable Harm to the Tribe is Manifest.

It is not disputed that Texas Hold'em tournaments contribute significantly to the Tribe's ability to fund critical Tribal government programs. *See* Dkt. 43 (Decl. of D. Matheson). The IGRA states that its purposes include providing a basis for the operation of gaming by tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Tribe's current gaming operations fulfill these purposes. If the preliminary injunction is not stayed, there will be immediate and irreparable damage to the Tribe's economy, self-sufficiency, and government. *See* Dkt. 43.

The Tribe currently employs 16 dealers and 33 other persons in support of the Tribe's Texas Hold'em tournament operations, 19 of whom are tribal members. *Id*. at 2, ¶ 5. Mr.

[5] The Court suggests that Idaho's inconsistent enforcement of illegal gambling does not override the State law gambling prohibition any more than unenforced incidents of speeding would erase laws against speeding. Dkt. 40 at 10. The Court's analogy is inapposite. Under the IGRA, federal law provides that when Class II card games are being played in a state by any person for any purpose, an Indian tribe may offer such games. 25 U.S.C. § 2710(b)(1)(a).

Matheson avers that, if the Tribe's Texas Hold'em tournaments are enjoined, the Tribe's ability to continue to employ those individuals will be jeopardized. *Id*. at 3, ¶ 10. Not only would that result cause harm to the Tribe's employees, but if the Tribe ultimately prevails on the merits the Tribe would have lost those skilled employees. *Id*. To the extent that those employees do not find other employment, they are likely to be forced to apply for unemployment benefits. *Id*.

Further, the loss of patrons for Texas Hold'em tournaments would impact the overall success of the Tribe's Casino & Resort operations. As the Tribe uses proceeds from Texas Hold'em tournament and other casino revenues to fund Tribal government programs (including job training, education, police, and social services), the loss of these revenues will cause irreparable harm to the Tribe's ability, as a sovereign government, to provide those services on an ongoing basis and at the current level. *Id*. at 2, ¶¶ 6-7. There would be reverberating effects on the tribal and non-Indian communities that rely on those services, and whose economies also rely on the continued operation of the Tribe's governmental programs and Casino as employers.

The State asserts the Tribe has "unclean hands," since it began offering Texas Hold'em notwithstanding an admonishment from a State official. Dkt. 48 at 11-12. However, such an admonishment rings hollow when Texas Hold'em is widely and openly played throughout the State, including by members of the law enforcement community.[6] Further, pre-approval by the State is not required for games offered as Class II. *See* 25 U.S.C. § 2710(b)(1)(a); *see also* Dkt. 3-3 at 32, ¶ 18.2. Finally, the State's claim that the Tribe has unclean hands solely because it did not agree with the position advanced by a State official is ironic, in that tribal gaming rights have

[6] *See, e.g.*, Dkt. 16-1 at 7 (explicit judicial admission, on the record, of police officer's play of Texas Hold'em); Dkt. 34 at 5 (letter from Latah County Prosecutor's Office noting the Sheriff's Mounted Posse poker ride "*likely* constitutes illegal gambling" and that "this is not the first time such an event has occurred").

generally been advanced when tribes have asserted rights over the objection of state officials. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Granting a Stay Will Cause No Irreparable Injury to the State.

After identifying irreparable harm as "perhaps the single most important prerequisite for the issuance of a permanent injunction," Dkt. 40 at 19, the Court acknowledged that the State has chosen to rely upon prudential presumptions of irreparable harm and that "the State has not directly argued it has suffered irreparable injury."[7] Dkt. 40 at 22. Without citation to any reference of alleged harm to the State, however, the Court asserts that "the record reveals that the State will suffer irreparable injury in the absence of the injunction." *Id*. Rather than identifying any suggestion by the State of what irreparable injury it might suffer, the Court offers a *sua sponte* suggestion that tribal sovereign immunity would impede the State's ability to recover monetary damages and leave the State without any effective remedy. *Id*.

The Court's concern with the State's inability to collect monetary damages ignores the fact that there is no economic harm to the State from the operation of these games and there is no basis for the State to be awarded monetary damages. Moreover, the State has full availability of an effective remedy: its bargained-for remedy under the Compact – binding arbitration.[8] Indeed, in its June 23, 2014, Memorandum Decision and Order, the Court stated: "At the conclusion of the 60 day period, ***either side may force a binding arbitration*** – to the exclusion of a lawsuit." Dkt. 35 at 5 (emphasis added).

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[7] The Court concluded as a matter of law that the IGRA does not authorize injunctions to be issued without a showing of irreparable harm and thereby rejected the State's reliance on the IGRA's injunctive relief provisions as grounds for presuming irreparable harm. Dkt. 40 at 19-21.

[8] Dkt. 3-3 at 35, ¶ 21.2.2 ("If the dispute is not resolved to the satisfaction of the parties within sixty (60) days after service of the notice … either party may pursue binding arbitration to enforce or resolve disputes concerning the provisions of this Compact").

The State and the Tribe are sovereign entities that bargained for the Article 21 dispute resolution mechanisms, which respect the sovereign immunity of the other by relying upon mutually-agreeable approaches for resolving their disputes. Their agreement provided one unilateral remedy as the means to resolve those disputes in which no other agreed upon process can be established: binding arbitration. Where a judicial remedy was necessary, the parties have shown their capacity to negotiate and reach agreement as to its scope and application. *See* Dkt. 3-3 at 18-21. The State could have invoked Article 21 arbitration at any point after June 30, 2014, to resolve this dispute. *See* Dkt. 35 at 5, 7. Indeed, the State could still invoke its Article 21 arbitration rights today. *See* Dkt 3-3 at 35. Additionally, the State could pursue other remedies "by mutual agreement" under Article 21.4. *Id* at 36-37.

Granting the Stay Serves the Public Interest.

Undoubtedly the public interest lies with respecting and implementing bargained-for contractual agreements,[9] particularly when the contract at issue, the Tribe-State Gaming Compact, lies at the center of Congress' effort to balance the interests of tribes, states, and the federal government with respect to gaming on Indian lands.[10] S. Rep. No. 100-446, at 5-6 (1988). Further, the issue here is not to "uphold state law." Dkt. 40 at 23. State gambling laws do not apply to the Tribe on the Tribe's reservation. Only federal and tribal law applies.[11] *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

[9] *See, e.g., Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007) ("Enforcement of contractual duties is in the public interest.").
[10] The federal policy favoring arbitration is also a matter of public interest affected here. *See Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).
[11] In the case of Class II card games, the IGRA balances federal, tribal and state interests by applying as federal law only very limited aspects of state gaming law and regulations. S. Rep. No. 100-446, at 5-6 (1988).

[NIGC], in addition to tribal regulation.") (citations omitted). The federal policy objectives expressed in the IGRA are intended to promote tribal economic development, tribal self-sufficiency, and strong tribal governments while balancing the respective interests of the states. The Court's order impermissibly tips the balance toward the State in a manner not permitted by that public policy. By offering Texas Hold'em tournaments, the Tribe sustains jobs as well as government programs with its gaming revenue. The public interest is not served by laying off workers and burdening already overtaxed tribal, state, and local government social welfare assistance programs. Additionally, the revenue generated by its casino funds government programs serving its members and the broader community. Sustaining this revenue serves a broad public interest. Even an alleged violation of federal law does not overcome the public interest in continuing to maintain tribal jobs. *United States v. 1020 Elec. Gambling Machs.*, 38 F. Supp. 2d 1213, 1219 (E.D. Wash. 1998).

CONCLUSION

For the reasons set forth above, the Tribe has satisfied the requirements to receive a stay of the preliminary injunction pending appeal.

Respectfully submitted this 11th day of September, 2014.

/S/ Joseph H. Webster

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that sent a Notice of Electronic Filing to the following Persons:

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