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**UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF CALIFORNIA**

**(FRESNO DIVISION)**

STATE OF CALIFORNIA,

Plaintiff,

v.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS OF CALIFORNIA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Defendant.

Case No. 1:14-cv-01593-LJO-SAB

**OPPOSITION TO TEMPORARY RESTRAINING ORDER**

Date: October 15, 2014
Time: 1:30 p.m.
Courtroom:
Judge: Hon. Lawrence J. O'Neill

## INTRODUCTION

The Picayune Rancheria of the Chukchansi Indians ("Tribe"), by and through the Picayune Tribal Council ("McDonald Council"), opposes the application for temporary restraining order ("TRO") and preliminary injunction filed by the State of California ("State") seeking closure of the Chukchansi Gold Resort and Casino ("Casino") on the grounds that the Court lacks subject matter jurisdiction over the State's suit for breach of the Tribal-State Gaming Compact ("Compact").

The State asserts that the Court has jurisdiction over this breach of contract action pursuant to both §2710(d)(7)(A)(iii) of the Indian Regulatory Gaming Act, 25 U.S.C. §§2701-2721 ("IGRA"), and 28 U.S.C. §1331. In this Opposition, the Tribe demonstrates that the case should be dismissed because: (1) §2710(d)(7)(A)(iii) does not grant the district courts jurisdiction over breach of Compact actions that are tangential to the actual conduct of the playing of a class III game; and (2) there is no

independent federal question jurisdiction over the State's suit. The Tribe further demonstrates that the requirements for a temporary restraining order and preliminary injunction have not been met and that, if the Court issues the TRO, the State should be required to post bond.

In the alternative, the Court should deny the State's application for temporary restraining order and set the matter for briefing and a hearing on the State's request for a preliminary injunction to provide the parties and the Court with the benefit of a full briefing on the jurisdictional issues presented in this case. There is currently no urgency for the Court to issue a temporary restraining order nor preliminary injunction because the National Indian Gaming Commission ("NIGC") has already assumed responsibility for dealing with the potential closure of the Casino by issuing a Notice of Violation and Temporary Closure Order. All matters raised by the State as warranting this Court's involvement are more properly handled by the NIGC, the federal agency responsible for regulating Indian gaming.

## ARGUMENT

### I.

### THE GRANT OF JURISDICTION PROVIDED BY 25 U.S.C. 2710(d)(7)(A)(ii) IS LIMITED TO CLAIMS ARISING FROM THE CONDUCT AND REGULATION OF CLASS III GAMING.

The State argues that the Court has jurisdiction over this matter pursuant to 25 U.S.C. §2710(d)(7)(A)(iii) "because this action is initiated by the State to enjoin **conduct related to** the Tribe's class III gaming activity that violates the Compact." Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order ("State's Brief"), p. 3 (emphasis added). A plain reading of that statute, however, demonstrates that the scope of the jurisdictional grant in §2710(d)(7)(A)(iii) does not provide the district courts with jurisdiction over a state's suit to enjoin conduct that is simply related to a tribe's class III gaming facility. §2710(d)(7)(A)(iii) only provides jurisdiction over a state's suit to enjoin **gaming** that is conducted in violation of a compact.

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Ct. for the So. Dist. of Iowa* , 490 U.S. 296, 301 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enters.* , 489 U.S.

235, 243 (1989).

The IGRA permits tribes to engage in class III gaming through two mechanisms. The first, and by far the more common, is a Tribal–State compact negotiated between a tribe and a state ("Negotiated Compact"). The second is a set of procedures for conducting gaming established by the Secretary of the Interior where the tribal–state negotiation process has failed ("Secretarial Procedures"). Section 2710(d)(7)(A) provides federal district court jurisdiction to enforce these mechanisms.

Section 2710(d)(7)(A) grants district courts jurisdiction over three causes of action arising under the IGRA:

> The United States district courts shall have jurisdiction over–
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (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, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii) .

25 U.S.C. §2710(d)(7)(A) (emphasis added).

Section 2710(d)(7)(A)(ii), the provision at issue in this case, states that federal district courts have jurisdiction over claims by a state "to enjoin *a class III gaming activity ... conducted* in violation of any Tribal–State compact entered into under paragraph (3) that is in effect." The term "class III gaming" is defined by the IGRA as "any banking card games . . . or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind **** [and] all forms of gaming that are not Class I…or Class II gaming." 25 U.S.C. §2703 (7)(B) and (8). Class III gaming includes "all house banking card games, slot machines, and all Las Vegas style gambling such as roulette and craps, parimutuel betting, and lotteries." *See* 25 C.F.R. §502.4.

The words "activity" and "conduct" are not specifically defined in the statute. It is, therefore, appropriate to use the words' ordinary dictionary definition in interpreting the statute. *Rumsey v. Wilson,* 64 F.3d 1250, 1257 (9 th Cir. 1994). The Concise Oxford English Dictionary defines "activity" as "an action taken in pursuit of an objective » a recreational pursuit." Concise Oxford English

Dictionary, 11th Edition, p. 13. Black's Law Dictionary defines "conduct" as "to manage; direct; lead; have direction; carry on; regulate; do business." Black's Law Dictionary, Abridged 6 th Edition, p. 204.

Applying these definitions to Section 2710(d)(7)(A)(ii), the phrase "class III gaming activities…conducted in violation of" a compact means the specific action of conducting or carrying on class III gaming in a manner that violates a compact. Thus, Section 2710(d)(7)(A)(ii) grants federal district courts jurisdiction over states' claims seeking to enjoin class III **gaming** conducted by Indian tribes where that **gaming** is being conducted in a manner that violates those provisions of a tribal–state gaming compact that prescribe how the games are to be conducted.

Examples of matters that would provide a basis for a claim that a class III gaming activity is being conducted in violation of a Compact would be: the playing of class III games that are prohibited by the compact, the playing of class III games at locations not authorized by the compact, the playing of a game in violation of the rules of that game or of the minimum internal control standards agreed to in the compact, the playing of a game outside of the hours of operation, or the placing of a wager that exceeds the betting limits agreed to in the compact.

Under the State's interpretation, any action that potentially violates the Compact —regardless of whether the potential violation relates to the actual playing of a class III game — grants the district courts with jurisdiction pursuant to §2710(d)(7)(A)(ii). The State's reading of §2710(d)(7)(A)(ii) necessarily leads to the absurd result that any minor violation of the Compact simultaneously results in a grant of district court jurisdiction and a waiver of tribal and state sovereign immunity, even if that violation is unrelated to regulating the play of class III games. The only reasonable interpretation of the scope of the jurisdictional grant provided by §2710(d)(7)(A)(ii) is that the gaming activity itself must be conducted in violation of the Compact. Matters unrelated to the playing of a class III game are not within the purview of §2710(d)(7)(A)(ii).

This interpretation of §2710(d)(7)(A)(ii) is consistent with the purposes for which the IGRA was enacted:

> The purpose of this Act is–
>
> (1) 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*

> *governments* ;
>
> (2) to provide a statutory basis for the *regulation of gaming* by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and *to assure that gaming is conducted fairly and honestly by both the operator and players* [.]

25 U.S.C. §2702 (emphasis added). The Congressional purposes of the IGRA are, therefore, focused on the economic and governmental benefits to tribes arising from the operation and regulation of tribal gaming.

To the extent that the stated purposes reflect a concern for any state interest, that interest is limited to the regulation of the gaming to ensure that the gaming is conducted fairly and without the influence of organized crime. The states' acknowledged interests do not include matters peripheral to the conduct of the gaming.

Here, the State has not alleged that the conduct of the playing of a class III game has violated the Compact. The State's allegations that threats to public safety violate the Compact do not grant this Court with jurisdiction by way of §2710(d)(7)(A)(ii). Thus, because the events made reference to by the State do not relate to the actual playing of a class III game, the Court lacks jurisdiction under §2710(d)(7)(A)(ii).[1]

The State will likely argue that the foregoing interpretation is too narrow — that the critical language for interpreting what constitutes a "violation" of a "Tribal–State compact" within the meaning of §2710(d)(7)(A)(ii) is the phrase "entered into under paragraph (3) that is in effect." The manifest purpose of the inclusion of the phrase "entered into under paragraph (3) that is in effect," however, is to distinguish the grant of jurisdiction under §2710(d)(7) (A)(i) and (ii) from the grant of jurisdiction under §2710(d)(7)(A)(iii), not to define the scope of the claims encompassed by the grant of jurisdiction. The juxtaposition of the three grants makes it clear that the reference to "paragraph (3)" in §2710(d)(7)(A)(i) and (ii) was intended to distinguish those provisions' grant of federal court jurisdiction over disputes arising from Negotiated Compacts from §2710(d)(7)(A)(iii)'s grant of federal court jurisdiction over disputes arising from Secretarial Procedures.

[1] This is the reason the Compact provides for state court jurisdiction should federal district court jurisdiction be found wanting.

The inclusion of the phrase "that is in effect" is consistent with this interpretation. It refers to the required approval of Negotiated Compacts by the Secretary of the Interior. Without that approval, the compact would be unenforceable, that is, not "in effect." Thus, the entire phrase "entered into under paragraph (3) that is in effect," refers to all of the elements that are required in order for a Negotiated Compact to be enforceable: it must be entered into by the parties after good faith negotiations, as required by Section 2710(d)(3) and it must then be approved by the Secretary in order to be in effect. Secretarial Procedures prescribed under subparagraph (B)(vii) are not the result of negotiations under Section 2710(d)(3) and do not require separate approval by the Secretary.

The reason that this distinction is necessary is because the scope of the grants of jurisdiction contained in Section 2710(d)(7)(A) is different. The grants in Section 2710(d) (7)(A)(i) and (ii) are narrower and more specific than that in Section 2710(d)(7)(A)(iii).

Section 2710(d)(7)(A)(i)'s grant is restricted to one specific category of claims: that the state failed to negotiate a Negotiated Compact in good faith. Section 2710(d)(7)(A)(ii)'s grant is restricted to claims to enjoin a class III gaming activity conducted in violation of any Tribal–State compact. Section 2710(d)(7)(A)(iii)'s grant is unrestricted. It applies to any cause of action initiated by the Secretary to enforce any provision of a tribe's Secretarial Procedures.

The differences between the grants of jurisdiction reflect the Congressional purposes in enacting the IGRA. Section 2710(d)(7)(A)(i) reflects Congress' desire to ensure that the Tribal–State compact negotiation process be a fair one. Congress expressly acknowledged that there was an "unequal balance" in the power possessed by states as compared with tribes, and that if states were not compelled to negotiate in good faith, many would not do so. Senate Report No. 446, 100 th Cong. 2d Sess., p. 13–14(1988), reprinted at 1988 U.S.C.C.A.N 3071, 3084.

Section 2710(d)(7)(A)(ii) reflects Congress' intention that the gaming be conducted fairly and honestly, and provides states and tribes a mechanism to halt "illegal gaming." Senate Report No. 446, p. 17, 1988 U.S.C.C.A.N. at 3088. This grant of jurisdiction was also narrowly drawn to ensure that states do not have too much power over tribal gaming. It allows states to enforce only those aspects of the compact that the Congress considered legitimate interests of the state–the regulation of the gaming.

The third grant of jurisdiction has no such restrictions because the party granted the authority to

bring the claim, the Secretary of the Interior, is the trustee for Indian tribes. The grant of jurisdiction allows the Secretary to enforce all of the provisions of the Secretarial procedures because Congress had no concern that he would treat the tribes, or the states, unfairly. There was no need to include safeguards in the grant of jurisdiction.

Other cross-references to §2710(d)(3) in §2710 provide further support for this interpretation. See §2710(d)(1)(C), (d)(2)(C), (d)(2)(D)(iii)(I), (d)(4), (d)(5), (d)(6), (d)(7) (A)(i), (d)(7)(B) (i), (d)(7)(B)(ii)(I), and (d)(7)(B)(vi). The reference to §2710(d)(3) in §2710(d)(7)(B)(vi) is particularly revealing of Congress' intent to distinguish between Negotiated Compacts and Secretarial Procedures:

> If a State consents to a proposed compact during the 60–day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

25 U.S.C. §2710(d)(7)(B)(vi) (emphasis added).

Had Congress intended the phrase "entered into under paragraph (3)" in Section 2710(d)(7)(A)(ii) to be a specific reference to the proper subjects of negotiation, it would have included a specific citation to the subparagraph in which those subjects are listed, (Section 2710(d)(3)(C)), rather than a general reference to the entire subsection. Congress did that in other subsections of §2710. See, for example, §2710(d)(4), ("Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection . . .") The general reference to the entire subsection relating to negotiation of gaming compacts is more consistent with an intention to distinguish between Negotiated Compacts and Secretarial Procedures.

The legislative history of the IGRA also supports the Tribe's interpretation. The Senate Report on the IGRA states: "(7)(A) Grants United States district courts jurisdiction over actions by: A tribe against a State for failure to enter into negotiations or to negotiate in good faith a tribe or state to enjoin illegal gaming on Indians lands; and by the Secretary to enforce procedures prescribed in (7)(B)." Senate Report No. 446, 100 th Cong. 2d Sess., p. 18 (1988), reprinted at 1988 U.S.C.C.A.N. 3071, 3088. Nothing in this statement suggests that the references to Section 2710(d)(3) were intended to provide a basis for interpreting the scope of the district court's grant of jurisdiction. There is, thus, nothing in the text or the legislative history of the IGRA that suggests that Congress intended the

reference to §2710(d)(3) in §2710(d)(7)(A)(ii) to provide a definition of the matters that constitute a violation of a compact in the IGRA's grant of district court jurisdiction.

25 U.S.C. §2710(d)(7)(A)(ii) does not, therefore, provide the Court with jurisdiction over the State's breach of compact action against the Tribe because the Complaint does not allege that the Tribe has conducted a class III gaming activity in a manner that violates the Compact. Moreover, because this Court is not a court of competent jurisdiction, the waivers of sovereign immunity provisions provided in Section 9.4 of the Compact do not apply with regard to this action: "*In the event that* a dispute is to be resolved in federal court…of competent jurisdiction as provided in this Section 9.0, [*then*] the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom." Compact, Section 9.4 (emphasis added). The Tribe's sovereign immunity from suit remains intact.

## II.

## EVEN IF THE COURT FINDS §2710(d)(7)(A)(ii) TO BE AMBIGUOUS WITH REGARD TO THE SCOPE OF ITS JURISDICTIONAL GRANT, THE COURT IS REQUIRED TO APPLY THE CANONS OF CONSTRUCTION APPLICABLE TO STATUTES PASSED FOR THE BENEFIT OF INDIANS.

a. *Ambiguities In Statutes Enacted For The Benefit Of Indians Must Be Resolved In Favor Of The Indians.*

If §2710(d)(7)(A)(ii) is subject to more than one interpretation, the Court is required by the decisions of the Supreme Court and the federal district courts relating to the interpretation of statutes passed for the benefit of Indians to interpret the statute in favor of the Tribe. "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992), citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The Court is required to apply these canons of construction even if it finds that the interpretation favoring the Indians is not the best interpretation. "We adopt Defendants' construction [of the IGRA], not because it is necessarily the better reading, but because it favors Indian tribes and

the statute at issue is both ambiguous and intended to benefit those tribes." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (holding that ambiguous provisions in the IGRA should be construed in favor of tribes). Courts are required to adopt the interpretation that is most favorable to tribes because of the importance of tribal sovereignty: "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache v. Braker*, 448 U.S. 136, 143-144 (1980).

The rules for construing federal statutes dealing with Indians and Indian tribes are variously phrased in different contexts, but, generally, they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (narrowly construing waiver of sovereign immunity in Indian Civil Rights Act, 25 U.S.C. §1301, et seq., to limit jurisdiction of federal courts to habeas corpus review of tribal action); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (narrowly construing 28 U.S.C. §1360 by refusing to find Congressional abrogation of Indian immunity from state taxation); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195–1196 (10th Cir. 2002) ("[W]e . . . do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress had made its intent clear that we do so"); *Maryland Cas. Co. v. Citizens Nat'l Bank,* 361 F.2d 517, 521 (5 th Cir.), *cert denied*, 385 U.S. 918 (1966) (Congressional abrogations of tribal sovereign immunity must be clearly expressed and strictly construed); *Colorado River Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 146 (D.D.C. 2005) (ambiguous statutes, such as the IGRA, should be interpreted to preserve "tribal independence or sovereignty").

The Supreme Court precedent requiring that ambiguities in statutes enacted for the benefit of Indians be resolved in favor of Indians is long standing and extensive. *County of Yakima*, *supra*; *Montana v. Blackfeet Tribe, supra*; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982); *White Mountain Apache v. Braker*, 448 U.S. 136, 143–144 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973); *Alaska Pacific Fisheries Co. v. United* States, 248 U.S. 78, 89 (1918).

There is no question that these canons of construction apply to the IGRA. *Artichoke Joe's*, 353

F.3d at 731 (9th Cir. 2003). It is self–evident that the statute was passed for the benefit of Indians, given that the purpose of the statute was to ensure that Indian tribes' right to engage in gaming was protected and tribal interests promoted. 25 U.S.C. § 2702. The Senate, furthermore, expressly recognized the applicability of these canons of construction to the IGRA. The Senate Report states, with reference to 25 U.S.C. § 2710(d)(7): "The [Senate] Committee [on Indian Affairs] . . . trusts that courts will interpret any ambiguities on these issues in a manner that **will be most favorable to tribal interests** consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." Senate Report No. 446, 100th Cong. 2d Sess., p. 15 (1988), reprinted at 1988 U.S.C.C.A.N. 3071, 3085 (emphasis added).

b. *The Tribe's Interpretation of §2710(d)(7)(A)(ii) Is Consistent with the Decisions of the Supreme Court and Lower Federal Courts with Regard to Abrogations of Tribal Sovereign Immunity.*

In the specific context of interpreting asserted Congressional abrogations of tribal sovereign immunity, rules of construction are particularly strict. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59-60; *Maryland Cas. Co. v. Citizens Nat'l Bank,* 361 F.2d at 521-522.

The IGRA contains no explicit abrogation of tribal sovereign immunity. Federal courts have, however, concluded that the IGRA abrogated tribal sovereign immunity, even though it does not include an expressly stated abrogation, because it authorized states to sue tribes under §2710(d)(7(A)(ii). *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). In reaching this conclusion, however, the Eleventh Circuit was careful to state that Section 2710(d)(7)(A)(ii)'s abrogation of tribal sovereign immunity must be construed narrowly and in conformity with the rules of construction for legislation passed for the benefit of Indians:

> [T]he State's argument in favor of a broad reading of section 2710(d)(7)(A)(ii)—directly contradicts two well–established principles of statutory construction: that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor.

*Id.*

Thus, Section 2710(d)(7)(A)(ii)'s abrogation must be construed as narrowly as possible. *Santa Clara Pueblo* 436 U.S. at 59-60; *Maryland Cas. Co.,* 361 F.2d at 521-522. The statute should be

construed to abrogate only as much of the Tribe's immunity from suit as is necessary to carry out the purposes of the IGRA as it pertains to class III gaming. Such an interpretation would limit the abrogation of sovereign immunity and, because they are coextensive, the grant of jurisdiction in Section 2710(d)(7)(A)(ii), to ensuring that the games themselves are not played illegally. 25 U.S.C. §2702(2).

As a result of the forgoing analysis, the Court is wholly without jurisdiction over the State's causes of action because the State's claims are not related to the actual playing of a class III game in violation of the Compact. The State's claims relate to matters over which §2710(d)(7)(A)(ii) simply does provide jurisdiction and the Court, therefore, must dismiss.

**III.**

**28 U.S.C. §1331 DOES NOT GRANT THE COURT JURISDICTION OVER THE STATE'S BREACH OF CONTRACT ACTION.**

The State claims that the Court has jurisdiction over its suit pursuant to 28 U.S.C. §1331 "because the State's claim arises under federal statutes and the federal common law," Complaint, p. 2, while simultaneously arguing that "[t]he State's lone claim for relief is breach of the Compact. A compact is a contract." State's Brief, p. 4. The issue of whether the breach of a Compact entered into pursuant to the IGRA, without any other legitimate basis for jurisdiction, grants the district courts with jurisdiction over a state's suit against an Indian tribe was definitively addressed in the negative in *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006)("*Ho-Chunk I*"):

> To determine whether subject matter jurisdiction exists, we look first to the complaint filed by Wisconsin because "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (citation omitted). Wisconsin claims that subject matter jurisdiction exists because the case arises from federal law. 28 U.S.C. § 1331. To arise under federal law, the law must "'create[] the cause of action.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-51, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987 (1916)). In the complaint, the State brings exactly one cause of action: it seeks an order compelling arbitration under the FAA. The complaint also states that the parties negotiated the compact that provides for arbitration pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA") and lists IGRA as a basis for jurisdiction. As we explain below, neither the FAA nor the IGRA creates a cause of action that confers subject matter jurisdiction over this dispute.

The *Ho-Chunk I* court continued:

> The IGRA confers jurisdiction on the district court in three instances: (1) for "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe . . . or to conduct such negotiations in good faith," (2) for "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," or (3) for "any cause of action initiated by the Secretary to enforce the procedures" prescribed in the IGRA. 25 U.S.C. § 2710(d)(7)(A)(i)-(iii). This case does not fall within any of these three options…Nonetheless, Wisconsin argues that this case arises out of a compact, and since a compact is a creation of federal law and since IGRA governs the scope of the compact, Wisconsin claims that this case arises under federal law. Thus, even without reliance on the Nation's complaint in arbitration, Wisconsin argues that its complaint sets forth a federal question.
>
> ***
>
> The question here is: since the IGRA enables and regulates contracts between tribes and the states, does any dispute arising from the resulting compact present a question under the IGRA? We think not.

*Id.* at 659-661.

Here, the State's sole cause of action is breach of contract. The State has not asserted a single violation of federal law. The fact that the Compact is authorized pursuant to the IGRA does not present this Court with a federal question. Thus, 28 U.S.C. §1331 does not provide this Court with federal question jurisdiction and the Court must dismiss.

## IV.
## THE REQUIREMENTS FOR A TEMPORARY RESTRAINING ORDER HAVE NOT BEEN MET.

*a. Legal Standard.*

Fed. R. Civ. P. 65 provides authority to issue either preliminary injunctions or temporary restraining orders. The requirements for a temporary restraining order are largely the same as for a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 (9th Cir. 2001); see also Wright and Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (2d ed.). A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (internal citation omitted). When a court considers whether to grant a motion for a preliminary injunction, it balances "the competing claims of injury, . . . the effect on each party of the granting or withholding of the requested relief, . . . the public consequences in employing the

extraordinary remedy of injunction," and plaintiff's likelihood of success. *Id*. at 20, 24 (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). In order to succeed on a motion for a preliminary injunction, the plaintiff must establish that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

Courts apply a more stringent standard where an adverse party has not received notice of a motion for a TRO. Specifically, courts may only "issue a temporary restraining order without written or oral notice to the adverse party or its attorney if: [¶] (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and [¶] (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1).

b. *Likelihood Of Success On The Merits, Irreparable Injury, Balance Of Equities, And The Public Interest.*

The State argues that it is likely to succeed on the merits because "the elements of the Tribe's breach of Compact are clear." State's Brief, p. 4. This argument, however, presupposes that this Court has jurisdiction over the State's cause of action. As demonstrated above, the Court does not have jurisdiction pursuant to either 28 U.S.C. §1331 or 25 U.S.C. §2710(d)(7)(A)(ii). Therefore, the State is unlikely to succeed on the merits because the Court is without jurisdiction.

The State also argues that it is likely to suffer irreparable harm in the absence of relief, that an injunction is in the public interest, and that the equities tip in the State's favor. None of these arguments hold water.

First, the Court can readily dismiss the State's arguments regarding irreparable harm and the pubic interest because the NIGC has already issued a Notice of Violation and Temporary Closure Order. A copy of the NIGC's Order is hereby incorporated by this reference and attached hereto as **Exhibit A**. These concerns are being addressed by the NIGC (which issued its orders prior to this Court's temporary restraining order) and no action is necessary by this Court. The irreparable harm and

public interest matters are now moot as a result of the NIGC's closure order and public safety is not at risk. A temporary restraining order or preliminary injunction would serve no purpose that is not already being addressed by the NIGC.

Second, the equities do not tip in the State's favor. As discussed above, the State's concern for the safety of its citizens, while of paramount importance, is no longer at issue because the NIGC has issued a Temporary Closure Order. No citizen of the State of California is in danger of harm. On the other hand, the issuance of an unnecessary temporary restraining order and/or preliminary injunction would harm the Tribe and its members, be financially disastrous to the Casino, needlessly tangle the Tribe in further litigation, directly interfere with the NICG's jurisdiction in this case, and put the Tribe further away from a final resolution to the intratribal dispute. The principles of tribal sovereignty and right to self-governance further weigh the equities in the Tribe's favor.

Thus, the State has not demonstrated that the requirements for a temporary restraining order nor preliminary injunction have been met.

## V.
## THE RULE 65(c) BOND REQUIREMENT SHOULD NOT BE WAIVED IN THIS CASE.

Rule 65(c) permits the district to issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In *Jorgensen v. Cassiday*, 320 F.3d 906 (9th Cir. 2003), the Ninth Circuit ruled that "the district court may dispense with the filing of a bond when it concludes that there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Id.* at 919, citing *Barahona-Gomez v. Reno*, 167 F.4d 1227, 1337 (9th Cir. 1999). *See also Friends of the Earth, Inc. v. Claude S. Brinegar, et al.*, 518 F.2d 322, 322 (9th Cir. 1975)["[T]he State of California…has ample resources to post bond…"].

The extreme likelihood of harm to the Tribe caused by the temporary restraining order and proposed preliminary injunction compels the imposition of a bond in this case. At this point, the Casino is the sole source of revenue for the Tribe. Without the funds generated from the Casino, the Tribe will have no money to fund and provide essential government services to its members including,

but not limited to, higher education grants for college students, housing and meals for the elderly, and payments to members for everyday living expenses. In addition, the Tribe will not have the funds to make its loan payments to the hundreds of bondholders who financed the planning and construction of the Casino. Clearly, if the Casino remains closed, the Tribe and its members will suffer irreparable harm. Bond is, therefore, warranted in this case.

**CONCLUSION**

As demonstrated by the forgoing analysis, neither 28 U.S.C. §1331 nor 25 U.S.C. §2710(d)(7)(A)(ii) provide the Court with jurisdiction over the State's breach of Compact action. As a result of the State's suit, the Tribe is likely to continue losing millions of dollars of revenue and thousands of jobs are placed in further jeopardy. For these reasons, the State should be required to post security. There is, moreover, no urgent matter necessitating the Court's involvement in the operation of the Tribe's Casino. The NIGC has already issued a Notice of Violation and Temporary Closure Order directing the Tribe to cease and desist from all gaming activity in the Casino. The NIGC is fully capable of ensuring that, and determining when, the Casino is operating pursuant to federal law and is safe for patrons and employees.

Thus, because this Court lacks jurisdiction, it should dismiss this action. In the alternative, the Court should deny the State's application for temporary restraining order and set the State's request for preliminary injunction for briefing and a hearing to provide the parties and the Court with the benefit of a thorough analysis of the jurisdictional issues presented by this case.

DATED: October 14, 2014

Respectfully Submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
LESTER J. MARSTON
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**PROOF OF SERVICE**

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Eastern District of California by using the CM/ECF system on October 14, 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on October 14, 2014, at Ukiah, California.

*/s/ Brissa De La Herran*
Brissa De La Herran