No. 14-2529

In the
United States Court of Appeals
for the Seventh Circuit

STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

HO-CHUNK NATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:13-cv-00334.
The Honorable **Barbara B. Crabb**, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2529

Short Caption: State of Wisconsin v. Ho-Chunk Nation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Ho-Chunk Nation, an Indian tribe.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Whyte Hirschboeck Dudek, S.C.

Ho-Chunk Nation

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: s/ Thomas M. Pyper Date: 7/16/2014

Attorney's Printed Name: THOMAS M. PYPER

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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None.

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None.

Attorney's Signature: s/ Cynthia L. Buchko Date: 7/16/2014

Attorney's Printed Name: CYNTHIA L. BUCHKO

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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None.

Attorney's Signature: s/ Sheila D. Corbine Date: 7/16/2014

Attorney's Printed Name: SHEILA D. CORBINE

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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None.

Attorney's Signature: s/ Michael P. Murphy Date: 7/16/2014

Attorney's Printed Name: MICHAEL P. MURPHY

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin ("District Court") had jurisdiction as this is a civil action arising under the laws of the United States, pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii). This Court has jurisdiction to decide this case pursuant to 28 U.S.C. §§ 1291 and 1294. This appeal is taken from the final Opinion and Order entered on June 12, 2014, a Judgment entered on June 13, 2014, and an Order correcting the Opinion and Order entered on June 18, 2014. A-1-17. The Nation timely filed a Notice of Appeal on July 11, 2014, within thirty days after entry of the June 13, 2014 Judgment, as required by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Must the definition of Class II gaming in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") be interpreted consistently with Congressional intent that the *Cabazon* regulatory/prohibitory test be used to determine whether a particular game is Class II gaming?

Answered by the District Court: No.

2. Is poker "explicitly authorized by the laws of the State" or "not explicitly prohibited by the laws of the State and [] played at any location in the State" for purposes of IGRA § 2703(7)(A)(ii)?

Answered by the District Court: No.

3. Is the non-banked electronic poker that is offered by the Ho-Chunk Nation ("Nation") at its Class II gaming facility in Madison, Wisconsin Class II gaming under IGRA?

Answered by the District Court: No.

STATEMENT OF THE CASE

I. Nature Of The Case.

IGRA created three classes of gaming with varying regulatory oversight: 1) Class I gaming includes social games and traditional Indian gaming conducted at tribal ceremonies or celebrations and is regulated exclusively by Indian tribes, IGRA §§ 2703(6) and 2710(a)(1); 2) Class II gaming includes bingo and certain non-banked card games that are "explicitly authorized" or "not explicitly prohibited" by the laws of the State, and Class II gaming is enforced exclusively by tribes and the National Indian Gaming Commission ("NIGC"), IGRA §§ 2703(7), 2710(b) and 2713; and 3) Class III gaming includes all gaming that is not Class I or II, and Class III gaming is regulated by Indian tribes and states pursuant to tribal-state compacting, IGRA §§ 2703(8) and 2710(d).

The Nation operates a Class II gaming facility in Madison, Wisconsin, which was formerly known as DeJope and is now known as Ho-Chunk Gaming Madison ("HCG

Madison"). ECF No.[1] 17, ¶ 12. The Nation has been offering Class II gaming at HCG Madison since before 1992. ECF No. 17, ¶¶ 3, 12, 22. The State of Wisconsin ("State") and the Nation entered into a tribal-state Class III Gaming Compact ("Compact") on June 11, 1992, which was subsequently amended on three occasions. ECF No. 17, ¶¶ 13-18 and Exs. B-E. No tribal-state compact is required for the Nation to conduct Class II gaming. ECF No. 17, ¶¶ 10 and 19. Class II gaming at HCG Madison is not governed by the Compact because the Compact only governs Class III gaming at the Class III facilities identified in the Compact. ECF No. 17, ¶ 22 and Exhs. B-E. The Compact does not restrict the ability of the Nation to offer Class II gaming on its trust lands and, accordingly, does not prohibit the Nation from offering any games at HCG Madison that meet the definition of Class II gaming under IGRA. ECF No. 17, ¶ 19.

The specific question to be answered in this case is whether a non-banked poker game facilitated through the electronic PokerPro® table system ("e-Poker") is Class II gaming that may be offered at HCG Madison.

II. Statement Of Facts

A. Gaming In Wisconsin.

Wisconsin law permits pari-mutuel horse and dog race betting. Wis. Const. Art. IV, § 24(5); ECF No. 17, ¶ 35. Any bona fide religious, charitable, service, fraternal or veteran organization may apply for and obtain a license from the State to play the

[1] The "ECF No." is the document number assigned by the District Court.

game of bingo or conduct raffles. ECF No. 17, ¶ 35; Wis. Const. Art. IV, §§ 24(3)-(4). Wisconsin also has a State-run lottery. ECF No. 17, ¶ 33; Wis. Const. Art. IV, § 24(6).

Between 1993 and the present, the State lottery has offered at least twenty-three poker scratch-off games. ECF No. 17, ¶ 33 and Ex. F. Some of the game descriptions closely follow the rules of traditional Texas Hold'em poker. *See, e.g.,* ECF No. 17, Exh. F at p. 14; *compare with* ECF No. 17, ¶ 34 (description of Texas Hold'em e-Poker at HCG Madison).

On October 27, 1999, the State enacted the Biennial State Budget Act, 1999 Wisconsin Act 9 ("Budget Act"). ECF No. 17, ¶ 36. Under the Budget Act, the possession and operation of up to five (5) video gambling machines, which include video poker machines, by businesses that hold Class B liquor licenses for the serving of alcohol on premises, such as taverns, was changed from a felony to a civil offense subject to a fine of up to $500 per machine per incident. *Id.* For each further gambling machine possessed by a licensee up to a total of five, the forfeiture amount increases in increments of $500. *Id.* Liquor license holders are no longer at risk of having their liquor licenses revoked solely for the possession of five or fewer video gambling machines. ECF No. 17, ¶ 37. A Class B tavern license holder may not be enjoined from offering gambling machines or have his/her license revoked for "knowingly permitting 5 or fewer video gambling machines to be set up, kept, managed, used or conducted upon the licensed premises." *Id.* and Wis. Stat. § 945.041(11).

In November 1999, the Wisconsin Legislative Reference Bureau ("LRB") published Budget Brief 99-6 explaining the history of, and rationale for, the "Decriminalization of Video Gambling." ECF No. 17, ¶ 44 and Ex. H. The LRB explained that gambling at Indian casinos was believed to have resulted in a decrease of business at taverns, which in turn resulted in many taverns offering illegal gambling opportunities such as video poker in order to compete for business with casinos. ECF No. 17, Ex. H. at p. 2. As a result, the Wisconsin Legislature decriminalized the possession of video gambling machines, including video poker. *Id.*; *see also* ECF No. 17, ¶¶ 39-40.

For the 2013-14 reporting period, there were 12,698 Class B licensed taverns in Wisconsin and 829 in Dane County, Wisconsin, where HCG Madison is located. ECF No. 17, ¶ 38. Under Wisconsin law allowing five or fewer video gambling machines, those Class B taverns can offer 63,490 video gambling machines State-wide and 4,145 in Dane County without the tavern owners facing criminal sanctions or the risk of license forfeiture. Between January 31 and February 9, 2014, investigators retained by the Nation visited 86 taverns in Dane County. EFC No. 24, ¶ 15; ECF No. 28, ¶ 8. Of the 86 visited taverns, 74% had 5 or fewer (but at least one) video gambling machines. *Id.* The investigators witnessed many people play the video gambling machines, and they witnessed tavern employees pay out winnings to players of the video gambling machines on several occasions. *Id.*

The State of Wisconsin Department of Revenue ("DOR") has exclusive authority to enforce the non-criminal video gambling laws. *See* Wis. Stat. §§ 73.03(59) & (60), 73.031, 175.38 (1)-(3), and 165.70 (1m). [redacted]

Wis. Stat. § 73.031 authorizes the DOR to arrest a person if the DOR agent believes, on reasonable grounds, that the person is violating Wis. Stat. §§ 945.03(2m) or 945.04(2m) (video gambling laws). [redacted]

[redacted]

Traditional Texas Hold'em poker is played in Wisconsin. First, poker is played to raise money for nonprofit organizations or charitable purposes in Wisconsin (hereinafter referred to as "Charity Poker"). ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶¶ 4-5 and Exs. 1-3. For example, on December 21, 2013, Agrace HospiceCare hosted the fourth annual Texas Hold'em Celebrity Poker Event at the Alliant Energy Center in Madison, Wisconsin. ECF No. 28, ¶ 2 and Ex. 1. The event featured Phil Hellmuth, who is a professional poker player. *Id.* Attendees could pay $250 to play Texas Hold'em poker. *Id.* While all proceeds went to the charity, attendees that paid $250 to play poker could

win the opportunity to play poker with Phil Hellmuth. *Id.* *See also* ECF No. 28, ¶ 4 and Ex. 2 (additional publicly advertised Charity Poker events).

Second, four poker leagues being operated in south central and southeastern Wisconsin are advertised online: Badger Poker, Bumble Bee, Double Deuce and Tavern Tourneys (referred to as "Poker Leagues").[2] ECF No. 24, ¶ 6; ECF No. 28, ¶ 6 and Exs. 4-7. The Poker Leagues involve the play of Texas Hold'em poker. ECF No. 24, ¶ 7; ECF No. 28, ¶ 6. A Poker League has a league organizer responsible for operating and overseeing a poker "session" running approximately 8-12 weeks. ECF No. 24, ¶¶ 8-9; ECF No. 28, ¶ 6. A nightly poker game could have as few as 12, or as many as 60, poker players, with the awarding of nightly prizes. ECF No. 24, ¶ 10; ECF No. 28, ¶ 6. The league organizer keeps track of the chip/point count of the winners of the nightly poker games, and the highest chip/point winners over the course of the 8-12 week session are invited to play in a session ending tournament, where the winner receives a more significant cash prize. ECF No. 24, ¶¶ 11-14; ECF No. 28, ¶¶ 6-7 and Exs. 4-8.

Third, while not advertised online, a person may learn where poker games are being played merely by talking to tavern employees and patrons. ECF No. 24, ¶ 16; ECF No. 28, ¶¶ 9-11. Such poker games are generally open to anyone willing to pay the

[2] The LRB reported in 2000 that private gambling such as "low-stakes poker games" are "common and generally perceived to cause little harm," and, therefore, Wisconsin's "local law enforcement authorities rarely prosecute noncommercial betting activities." ECF No. 17-9, Exh. I at p. 17; ECF No. 28, ¶¶ 6-11.

buy-in required to play, and the winner of the poker game receives cash, sometimes in the thousands of dollars. ECF No. 24, ¶¶ 16-20; ECF No. 28, ¶¶ 9-11.

Finally, pursuant to Wis. Stat. § 14.035, the State entered into tribal-state Class III gaming compacts with all eleven Wisconsin Indian tribes, including the Compact with the Nation. ECF No. 17, ¶¶ 15 and 20. Pursuant to the compacts, extensive gambling, including the playing of banked and non-banked poker, occurs at Tribal Casinos located throughout the State. ECF No. 17, ¶¶ 16 and 21.

A variety of poker events held throughout Wisconsin are advertised on the State of Wisconsin Department of Tourism website, www.travelwisconsin.com (search "poker"), some of which appear to be Charity Poker and others of which appear to be poker tournaments not played for purposes of raising money for nonprofit organizations or charitable purposes. ECF No. 24, ¶ 4; ECF No. 28, ¶ 5 and Ex. 3. The events advertised on the Wisconsin Department of Tourism website include, but are not limited to, motorcycle, snowmobile or ATV "poker runs," poker tournaments being held at taverns or restaurants and video poker. *Id*. The website even advertises the "electronic poker tables" at HCG Madison. *Id*.

B. e-Poker at HCG Madison.

Poker may be played in banked and non-banked format, and e-Poker is non-banked Texas Hold'em poker. ECF No. 17, ¶¶ 21 and 34. Both the LRB and the NIGC have concluded that non-banked poker, such as e-Poker, is a Class II game under IGRA

in Wisconsin. ECF No. 17, ¶ 42. In May 2000, and again in November 2012, the LRB issued a bulletin, titled "The Evolution of Legalized Gambling in Wisconsin," that provides:

> Class II includes bingo or bingo-type games, pull-tabs and punch-boards, and certain non-banking card games, such as poker. (A non-banking game is one in which players compete against one another as opposed to playing against the house.) If bingo or any other Class II game is permitted by a state's law, then tribes within a state may conduct similar games and may set prize amounts above those specified in state statutes.

ECF No. 17, ¶¶ 45-46 and Ex. I at p. 21 and Exh. J at p. 24. *See also* ECF No. 24, ¶ 21 and ECF No. 27, ¶ 2 and Ex. 1 (Wisconsin Blue Book at 791 (2013-2014)) (containing a map showing the locations of Class III tribal gaming facilities and noting: "An additional Ho-Chunk casino in Madison offers Class II gaming….Class II includes bingo or bingo-type games, pull tabs and punch-boards, and certain non-banking card games, such as poker.")

The NIGC has the authority to commence an enforcement action against the Nation to prevent HCG Madison from conducting e-Poker if it believes that e-Poker is Class III gaming. ECF No 17, ¶ 41. On February 26, 2009, the NIGC general counsel issued an advisory opinion that the e-Poker "non-banked poker games such as the Nation proposes to offer [at HCG Madison] are Class II under IGRA…." ECF No. 17, ¶ 42 and Ex. G. The NIGC is aware that the Nation offers e-Poker and has not instituted an enforcement action to prevent the Nation from conducting e-Poker as Class II

gaming at HCG Madison. ECF no. 17, ¶ 43. The NIGC has indicated that, consistent with its February 26, 2009, advisory opinion, it does not intend to take enforcement action to prevent the playing of e-Poker at HCG Madison. *Id.*

III. Course Of The Proceedings And Disposition Of The District Court.

On May 14, 2013, the State filed a Complaint in the United States District Court for the Western District of Wisconsin alleging that e-Poker is a Class III game, and the play of e-Poker is a violation of the Compact because HCG Madison is not a Class III gaming facility covered by the Compact. ECF No. 1. The parties stipulated to the vast majority of facts and filed cross motions for summary judgment. ECF Nos. 16-28. The District Court issued an Opinion and Order on June 12, 2014, granting the State's motion for summary judgment, denying the Nation's motion for summary judgment, entering a permanent injunction prohibiting the play of e-Poker at HCG Madison and staying entry of the injunction pending the expiration of the time to appeal or final disposition on appeal, whichever is later. A-1-15. The district court made a minor correction to the Opinion and Order, by Order entered June 18, 2014. A-17.

The District Court concluded that the definition of Class II gaming, IGRA § 2703(7): a) is unambiguous, thereby precluding reference to legislative history; b) must be interpreted and applied in isolation from the Class II gaming provisions of IGRA § 2710(b); and c) had no connection to the regulatory/prohibitory test articulated in *Cabazon*, 480 U.S. at 202 (1987). A-4-10. The District Court concluded that Article IV,

§ 24 of the Wisconsin Constitution prohibits all gambling unless specifically listed in Article IV, § 24. A-11. Therefore, the District Court concluded poker is explicitly prohibited by the laws of the State and is not Class II gaming for purposes of IGRA § 2703(7)(A)(ii). A-11. Finally, the District Court failed to consider legal poker play in Wisconsin, such as poker as a lottery and Charity Poker in its analysis, concluding that poker played pursuant to tribal-state compacts is not poker "authorized by the laws of the State" for purposes of IGRA § 2703(7)(A)(ii)(I), and concluded that allegedly illegal but unenforced poker play, such as video poker, publicly available tournaments and cash games at taverns, is irrelevant to whether e-Poker is Class II gaming under IGRA. A-12-14.

Judgment was entered on June 13, 2013. A-16. The Nation timely filed a Notice of Appeal on July 11, 2014. ECF No. 40.

SUMMARY OF ARGUMENT

Class II games are defined by IGRA to include non-banked card games that "are explicitly authorized by the laws of the State," or "are not explicitly prohibited by the laws of the State and are played at any location in the State" and non-banked card games that are "located within a State that permits such gaming for any purpose by any person, organization or entity." IGRA §§ 2703(7)(A)(ii)(I) and (II) and 2710(b)1)(A). According to the District Court, poker is "explicitly prohibited" under the purportedly unambiguous provisions of the Wisconsin Constitution, and, therefore, the

Court's analysis ends and e-Poker must be declared to be a Class III game. A-App. 4-12. The argument suffers fatal legal and factual errors. The District Court's interpretation and application of the definition of Class II games in IGRA §§ 2703(7)(A)(ii)(I) and (II) in insolation from, and devoid of reference to, IGRA § 2710(b)(1)(A) and other IGRA provisions is contrary to well-established principles of Indian law statutory construction, federal case law, administrative decisions of the NIGC concerning classification of games, and, most importantly, Congressional history and intent. *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003); S. Rep. No. 100-446 at 6 (1988). The determination of what constitutes a Class II game must be based on the regulatory/prohibitory test defined in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The District Court's finding that *Cabazon* is inapplicable to the Class II definition constitutes legal error. Applying the *Cabazon* regulatory/prohibitory test, it is plain Wisconsin regulates, and does not explicitly prohibit, gaming in general or poker in particular.

The District Court's conclusion that Wisconsin law "explicitly prohibits" poker is likewise erroneous. A-App. 11. The only reference to poker in the Constitution prohibits the State from offering poker or simulated poker as a lottery. Yet, the State is offering simulated poker as a lottery through a variety of scratch off games. The Wisconsin Constitution explicitly authorizes a variety of gambling, including the State lottery, charity bingo and raffles (under which poker is being played), and pari-mutuel

horse and dog race betting. There is no wholesale ban on gaming generally or poker specifically in the Wisconsin Constitution. Even if some formats of poker were illegal under Wisconsin's laws, the State regulates, it does not prohibit, poker generally. The State cannot authorize poker in one format, such as poker for charity events under the guise of a raffle license or video poker available in taverns, and then preclude Indian tribes from offering poker at Class II gaming facilities. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996); *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 539 (9th Cir. 1994) ("[A]t least insofar as…Class II-type gaming, of the sort engaged in by the Tribes in *Cabazon Band* [i.e., poker], the State cannot regulate and prohibit, alternatively, game by game…turning its public policy off and on by minute degrees.").

Finally, the District Court's decision hinges on ignoring the undisputed facts that demonstrate that the exact same Texas hold'em style poker that is played at HGC Madison through the e-Poker table is: a) openly advertised online, including by the Wisconsin Department of Tourism, ECF No. 24, ¶ 4 and ECF No. 28, ¶ 5 and Ex. 3; b) readily available and openly played at establishments serving the public, ECF No. 24, ¶¶ 6-20 and ECF No. 28, ¶¶ 6-11 and Exs. 4-8; and c) played without fear of consequence because enforcement of Wisconsin's gambling laws, at least with respect to poker, is virtually nonexistent, *Id.* and ECF No. 17, Ex. 7 at p. 17. This Court should not decide whether e-Poker is a Class II game in a factual vacuum. To interpret Wisconsin's Constitution without regard for the State permitted gambling generally, and the

widespread play of poker specifically, that is occurring in Wisconsinn would do violence to the purpose of IGRA: "to promote Indian gaming, not to limit it." *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for the W.Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004).

STANDARD OF REVIEW

Appellate review of the District Court's grant of summary judgment is *de novo*. *Storie v. Randy's Auto Sales, LLC*, 589 F.3d 873, 876 (7th Cir. 2009). "To the extent we are called upon to review the district court's interpretation of a statute, the standard of review is likewise *de novo*." *Id*.

ARGUMENT

I. The Definition Of Class II Gaming In IGRA § 2703(7) Must Be Interpreted Consistently With The Congressional Intent That The *Cabazon* Regulatory/Prohibitory Test Be Used To Determine Whether A Particular Game Is Class II Gaming.

A. History Of IGRA.

IGRA was enacted to codify the Supreme Court decision in *Cabazon*. *Cabazon* is "the seminal Indian gaming case that ultimately led to the passage of IGRA." *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1254 (9th Cir. 1994). In *Cabazon*, the Supreme Court concluded that whether gaming may be conducted by an Indian tribe turns on whether the state's general policy towards gambling is regulatory or prohibitory (hereinafter referred to as the "*Cabazon* regulatory/prohibitory test").

Cabazon, 480 U.S. at 224, n.1.[3] Congress adopted the basic holding of *Cabazon* into its legislative findings, IGRA § 2701(5): "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

Congress enacted IGRA in 1988 to, among other reasons, promote tribal economic development and self-governance, establish a federal statutory framework for Indian gaming, and create the NIGC to regulate Indian gaming. *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 359 (8th Cir. 1990); IGRA §§ 2701-2702. "[T]he thrust of the IGRA is to promote Indian gaming, not to limit it." *Grand Traverse Band*, 369 F.3d at 971. "… [IGRA] is legislation enacted basically for [Indian Tribes'] benefit. [Congress] … expect[ed] that the Federal courts, in any litigation arising out [of] this legislation, would apply the Supreme Court's time-honor[ed] rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor." *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366-67. *See also Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003).

[3] In *Cabazon*, Riverside County sought to prohibit the play of poker on the Tribe's land as a violation of an ordinance prohibiting poker. *Cabazon*, 450 U.S. at 202. Because California law and the Riverside ordinance merely regulated poker, they did not prohibit the play of poker, and poker was permitted on the Tribe's land. *Id.* at 210-11. While *Cabazon* pre-dated, and led to the enactment of, IGRA, it was dealing with Class II bingo and non-banked poker games.

As set forth in the Statement of the Case, Part I, *supra*, IGRA created three classes of gaming. States have no involvement with regulation or enforcement of Class I or II gaming. Instead, Class I gaming is regulated exclusively by Indian tribes, IGRA § 2710(a)(1) and *Sisseton-Wahpeton*, 897 F.2d at 359-60; and "Class II games are 'regulated by the [NIGC],'" *Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023 (*quoting United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000) (citing 25 U.S.C. § 2710(b)). *See also* Cohen's Handbook of Federal Indian Law § 12.02[3][a], p. 879 (12th ed. 2012) (hereinafter "Cohen's Handbook") ("The NIGC plays a very important role in the determination of whether proposed gaming is class II or class III. Because class II gaming can be conducted without a tribal-state compact and is subject only to NIGC and tribal regulation, the NIGC is frequently called upon to determine whether a particular form of gambling is within class II or class III."). Class III gaming is regulated by Indian tribes and states pursuant to tribal-state compacting. IGRA § 2710(d); ECF No. 17, ¶ 9.

IGRA defines Class II gaming as follows:

> (7)(A) The term "class II gaming" means —
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) —
>
> * * *
>
> (ii) 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.
>
> (B) The term "class II gaming" does not include —
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

IGRA § 2703(7); ECF No. 17, ¶ 5. "An Indian tribe may engage in … class II gaming on Indian lands" if "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." IGRA § 2710(b)(1).

B. The Canons Of Indian Law Construction Must Be Applied When Interpreting IGRA.

Indian Tribes are sovereign Nations that, in the absence of federal preemption, are free to operate without State interference. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). As a result, the "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* at 766. The "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* (citation and internal quotations omitted). *See also Hagan v. Utah*, 510 U.S. 399, 424, n. 3 (1994) (dissenting opinion)

("Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts 'have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.'" (quoting F. Cohen's Handbook 221 (1982 ed.)). "[S]tatutes passed for the benefit of dependent Indian tribes," like IGRA, "are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 392 (1976). *See also Lac Courte Oreilles Band Of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 350-51 (7th Cir. 1983) (acknowledging and applying the Indian law canons of construction).

"We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." *Artichoke Joe's*, 353 F.3d at 720 (citation and internal quotations omitted). "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Even if a statute appears to be unambiguous, failure to consider legislative history is judicial error when the legislative history shows that the "plain meaning" interpretation is contrary to the legislative intent shown by the legislative history:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may

> appear on "superficial examination." … In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.

Train v. Colo. Pub. Interest Research Grp., Inc., 426 U.S. 1, 10 (1976) (internal citations omitted). *See also Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 361 ("There are situations, however, when 'reliance on the plain language … alone is not entirely satisfactory' … and an examination of legislative history can shed light on the intent of Congress in enacting the statutory provision in issue here.") (internal citation omitted)); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976).

The District Court rejected the reasoning of *Train, supra*, concluding subsequent case law "implicitly overruled" *Train* and mandated that the District Court look no further than the "plain" meaning of the definition of Class II gaming. A-6-7. The District Court erred as a matter of law. *Train*, has continued to be cited with frequency for the principle quoted above. *See, e.g., Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 398 F.3d 105, n. 3 (1st Cir. 2005); *Owen v. McGaw*, 122 F.3d 1350, n.1 (10th Cir. 1997); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 992 F.2d 1359, 1376 (5th Cir. 1993). Furthermore, none of the cases cited by the district court to support its "plain meaning" interpretation and rejection of reliance on the legislative history involved Indian law or IGRA. There is no rule of statutory construction that precludes reference to legislative history even under a "plain meaning" interpretation, particularly in the context of

Indian law where the usual rules of statutory construction do not have their usual force. *Blackfeet*, 471 U.S. at 766.

As this Court has explained: "Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. ***It may show, too, that words with a denotation "clear" to an outsider are terms of art, with an equally 'clear' but different meaning to an insider…. Clarity depends on context, which legislative history may illuminate***." *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (emphasis added).

It was legal error for the District Court to interpret IGRA against the interests of the Nation and devoid of statutory and historical context:

> Were the Court to start and end with the ordinary and common meaning of the terms employed in section 20 [of IGRA], devoid of statutory and historical context, it might arrive at the reading advanced by the SNI. However, as the SNI has urged throughout its brief, issues relating to Indian law cannot be considered without historical context.

Citizens Against Casino Gambling in Erie Cnty. v. Hogen, 2008 WL 2746566, *53 (W.D. N.Y. July 8, 2008).

C. Congress Intended That IGRA's Definition Of Class II Games, §§ 2703(7)(A)(ii)(I) and (II), Be Analyzed In Conjunction With IGRA § 2710(b)(1)(A) Utilizing The *Cabazon* Regulatory/Prohibitory Test.

The legislative history of IGRA, and in particular the S. Rep. No. 100-446 at 6 (1988) (hereinafter the "Senate Report"), is routinely consulted, relied on and quoted by federal courts when interpreting IGRA, including cases determining whether a

particular game is Class II or Class III gaming. *See, e.g., United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1099-1100 (9th Cir. 2000) (relying on the Senate Report to decide whether MegaMania was a Class II bingo game); *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 798 F. Supp. 1399, 1406-1408 (D. Minn 1992) (relying on the Senate Report to determine whether keno was a Class III game); *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029-30 (2nd Cir. 1990) (relying on the Senate Report to conclude that the *Cabazon* regulatory/prohibitory test was to be used to determine whether the state had an obligation to negotiate a compact); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 803 F. Supp. 2d 1198, 1205 (D. Nev. 2011) (relying on Senate Report to determine the scope of NIGC authority); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1247 (11th Cir. 1999) (relying on Senate Report to decide whether IGRA § 2710(d)(1) allowed a state to sue a tribe to prohibit Class III gaming in the absence of a tribal-state compact).

In the Statement of Policy to the Senate Report that accompanied S. 555, which became IGRA, Congress made it plain that the *Cabazon* regulatory/prohibitory test was to be used by Federal courts to determine whether Class II gaming is allowed in a state:

> Finally, ***the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States.*** This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in Cabazon. Under Public Law 83–280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of

> State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83–280. ***Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.***

Senate Report at 6 (emphases added).

The District Court found that IGRA §§ 2703(7)(A)(ii)(I) ("explicitly authorized") and (II) ("not explicitly prohibited … and being played … in the State") should not be read with IGRA § 2710(b) ("within a State that permits such gaming for any purpose by any person, organization or entity") for purposes of determining whether e-Poker is a Class II game. According to the District Court, the "explicitly authorized" or "not explicitly prohibited … and being played … in the State" language is unambiguous and does not include e-Poker, so the "within a State that permits such gaming for any purpose by any person, organization or entity" test is inapplicable, and using the Senate Report to interpret legislative intent is inappropriate. A-4-10. The District Court reasoned that if the tests were read together, the "permits" language would make the "authorized" and "not prohibited" language mere surplusage. A-5. That analysis is flawed for several reasons.

In *Lac du Flambeau v. State of Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991), Wisconsin claimed that it did not have to negotiate with Wisconsin's Indian tribes for a compact

involving games other than lotteries and on-track pari-mutuel betting because those were the only two types of games permissible under Wisconsin law. The district court disagreed, holding that under the Supreme Court's analysis in *Cabazon*, the proper inquiry is not whether Wisconsin allows a specific game to be played but whether Wisconsin's general policy towards gambling is regulatory or prohibitory (*i.e.*, the *Cabazon* regulatory/prohibitory test). *Id.* at 486. In so ruling, the district court expressly relied on the Senate Report's analysis set forth above and acknowledged that the *Cabazon* regulatory/prohibitory test was designed to be used for Class II gaming determinations just as it was for Class III gaming.

> The Senate Report on [IGRA] makes explicit reference to *Cabazon* in discussing class II gaming, which has the same requirement as class III gaming that the gaming activity be "located within a state that permits such gaming for any purpose by any person, organization or entity….Section 2710(b)(1)(A). The Senate Committee stated that it anticipated that the federal courts would rely on the *Cabazon* distinction between regulatory gaming schemes and prohibitory law….
>
> * * *
>
> [U]nder [IGRA], the court looks at the distinction between the state's civil and criminal laws to determine whether the state permits gaming activities of the type at issue.
>
> Although the Senate committee was speaking of class II activities, its comments are equally applicable to the requirements for class III activities.

Id. at 485.[4] Yet, in this case, the District Court failed to consider the same legislative intent to interpret the words "authorized" or "prohibited" in IGRA §§ 2703(7)(A)(ii)(I) and (II) – which is derived directly from the *Cabazon* regulatory/prohibitory test – on the grounds that now IGRA's use of those words was unambiguous even in the context of *Cabazon*.

Accordingly, the District Court knew Congress intended the *Cabazon* regulatory/prohibitory test to be used to determine whether the public policy of a state permits gaming, which is dispositive of whether a Class II game can be played on Indian land. But by reading the "permits" language out of the analysis and then finding the "authorized" and "not prohibited" language to be unambiguous, the District Court ignored what Congress intended. That wooden construction would mean that only bingo merited the *Cabazon* regulatory/prohibitory test since it is the only Class II game without the "authorized" or "not prohibited" language. That would entirely thwart what the district court previously recognized – that Congress intended the *Cabazon* regulatory/prohibitory test to be used for all Class II games, not just bingo, and lead to a perverse outcome.

The District Court gave no explanation for why Congress would have intended that the *Cabazon* regulatory/prohibitory test should be used to determine the "permits"

[4] Here the District Court described the Senate Report as being "simply a committee report." A-7. Yet, the district court had no trouble relying on it as evidence of legislative intent in *Lac du Flambeau*, *supra.*

standard for Class II purposes under IGRA § 2710(b) but not the "authorized" and "not prohibited" Class II standard under IGRA §§ 2703(7)(A)(ii)(I) and (II). Consistent with Congresses' general Statement of Policy and directly contrary to the district court's ruling, in its explanatory notes to the definition of Class II gaming, Congress explained that it intended the definition of Class II card games in IGRA §§ 2703(7)(A)(ii)(I) and (II) to be read in conjunction with the "permits" language set forth in IGRA § 2710(b)(1)(A), meaning that *Cabazon* would be applied collectively to both:

> Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). ***Subparagraphs (I) and (II)*** [§ 2703(7)(A)(ii)(I) and (II)] ***are to be read in conjunction with sections 11(a)(2) and (b)(1)(A)***[§ 2710(a)(2) and (b)(1)(A)] ***to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs.***

Senate Report at 9 (emphases added).[5]

[5] The District Court said even if it considered the Senate Report, the phrase "in conjunction with" is unclear. A-6. That hardly seems plausible given the context in which it is used. But it is puzzling that the District Court would find that language to be unclear and then find the use of the phrases "explicitly authorized" and "not explicitly prohibited" in the Class II definition unambiguous in the context of *Cabazon*, particularly when it previously recognized that (footnote continued)

While the words "authorized," "prohibited" or "permits" used in IGRA §§ 2703(7)(A)(ii)(I) and (II) and 2710(b)(1)(A) (Class II) and 2710(d) (Class III) may be "words with a denotation 'clear' to an outsider," they are "terms of art, with an equally 'clear' but different meaning to an insider." *In re Sinclair*, 870 F.2d at 1342. Contrary to the District Court's conclusion, the phrases "explicitly authorized" and "not explicitly prohibited" are ambiguous given the historical context of *Cabazon* that was enacted in IGRA. Indeed, the Supreme Court held in *Cabazon* that a state does not "prohibit" poker but instead authorizes it to be played when it merely regulates gaming in general under the state's public policy. That is the definition that must be applied to the use of the words "authorized" and "prohibited" under the IGRA definition for Class II games based on Congresses' intention that the *Cabazon* regulatory/prohibitory test drives Class II gaming determinations.

The meaning of IGRA §§ 2703(7)(A)(ii)(I) and (II) must be ascertained by considering IGRA as a whole, its objective and policy, and its context. *Pilot Life Ins. Co.*, 481 U.S. at 51; *Matter of Sinclair*, 870 F.2d at 1342. To interpret IGRA devoid of historical context, as the District Court did, is legal error. *Hogen*, 2008 WL 2746566, *53. In *Forest Cnty Potawatomi of Wis. v. Norquist*, 45 F.3d 1079, 1084 (7th Cir. 1995), this Court held that the IGRA language "located within a State that permits such gaming for any

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Congress intended Class II gaming to be determined by the *Cabazon* regulatory/prohibitory test. *See Lac du Flambeau*, 770 F. Supp. at 485.

purpose by any person, organization or entity" was intended to incorporate the *Cabazon* regulatory/prohibitory standard into IGRA.

> Instead, we have the less restrictive IGRA language: "permitted in the State of Wisconsin for any purpose, by any person, organization or entity." The parties were aware of the special meaning of the included IGRA language as the test for whether gambling regulations in a Public law 280 state, such as Wisconsin, were characterized as civil-regulatory or criminal-prohibitory, following *California v. Cabazon Band of Missions Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244.

The same IGRA standard applies to both Class III (§ 2710(d)) and to Class II gaming (§ 2710(b)(1)(A)), so the District Court's finding that Congress intended that the *Cabazon* regulatory/prohibitory standard should apply for Class III gaming but not for Class II gaming is untenable. *See also Muhammad v. Comanche Nation Casino* , 2010 WL 4365568, *9 (W.D. Okla. Oct. 27, 2010) (concluding that the Congressional finding set forth in IGRA § 2701(5) incorporated the basic holding of *Cabazon* into all of IGRA).

There is not a single case where a court has determined whether a particular game is classified and defined as Class II or Class III wholly divorced from IGRA § 2710 and without reliance on the *Cabazon* regulatory/prohibitory test. Instead, consistent with the Congressional record of IGRA, federal and Wisconsin courts analyze IGRA § 2703 in conjunction with IGRA § 2710. *See, e.g., Panzer v. Doyle*, 2004 WI 52, ¶ 14 and n. 9, 271 Wis. 2d 295, 680 N.W.2d 666, abrogated in part by, *Dairyland Greyhound Park,*

Inc. v. Doyle, 206 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365-66; *Roache,* 54 F.3d at 535 (analyzed in Part II.A., *infra*).

The same approach is utilized by the NIGC, the agency charged with enforcing Class II gaming violations. In its February 26, 2009 advisory opinion to the Nation concerning the play of e-Poker at HCG Madison, the NIGC analyzed the definition of Class II card games in IGRA § 2703(7)(A)(ii) in conjunction with IGRA § 2710(b)(1)(A) and utilized the *Cabazon* regulatory/prohibitory test. ECF No. 17, Exh. F at p. 6. The NIGC concluded that non-banked e-Poker at HCG Madison falls within IGRA's definition of Class II gaming because Wisconsin does not "wholly prohibit[]" the play of poker and poker is being played in the State. *Id.* The NIGC has taken the same approach in other Class II card game advisory opinions, *i.e.*, examining a state's Constitutional and statutory limitations (or prohibitions on gaming) in conjunction with IGRA § 2710 and the Congressional intent and legislative history of IGRA.[6] *See, e.g., Advisory Opinion—Asian Bingo* issued July 14, 1998 to Salt River Pima-Maricopa Indian Community (quoting, Senate Report at 9, "Subparagraphs (I) and (II) [of § 2703(7)(A)(ii)] are to be read in conjunction with sections 11(a)(2) and (b)(1)(A) [of

[6] "The fact that the [NIGC's] policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Informal rulings "provide a practical guide...as to how the office representing the public interest in its enforcement will seek to apply" the law. *Id.* at 138. Resorting to NIGC opinions for guidance is appropriate. *Id.* Indeed, the NIGC has developed significant expertise in gaming classifications because it "is frequently called upon to determine whether a particular form of gambling is within class II or class III." Cohen's Handbook § 12.02[3][a], p. 879.

§ 2710] to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs."), avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/asianbingo.pdf; *Game Classification Opinion – "Poker Club"* issued June 17, 1999 to the Oneida Indian Nation ("States can influence class II gaming on Indian lands within their borders only if they prohibit those games for everyone under all circumstances…. New York 'regulates' rather than 'prohibits' gambling in general." (citations omitted), avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Card%20Games/poker%20club%20061799.pdf; *Game Classification Opinion – "Double Hand High-Low"* issued September 9, 1999 to Maverick Gaming Enterprises, avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/card%20games/doublehandhighlow.pdf; *Request for Game Classification Decision – Non-banked Poker* issued May 29, 2013 to the Mohegan Tribal Gaming Commission (citing to IGRA § 2710(b) and *Gaming Corp. of Am.*, 88 F.3d at 536, *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365 and other federal cases to conclude Connecticut's exception for social games to its criminal gambling laws meant that poker was class II gaming: "The social exception to the prohibition indicates that poker, in all of its forms, is not explicitly prohibited by Connecticut law. It is not a criminal violation if played socially."), *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=3tF4Otkkf5c%3d&tabid=789.

Contrary to Congresses' intent that the provisions of IGRA §§ 2703(7)(A)(ii)(I) and (II) and 2710(b) be read together to determine whether a card game is Class II gaming, the District Court concluded that determining whether e-Poker is Class II gaming requires a court to first apply the definition of Class II gaming in IGRA § 2703(7)(A)(ii) and then apply the "*additional condition* on class II gaming" found in IGRA § 2710(b)(1). A-5 (emphasis in original). The District Court concluded that an interpretation that reads IGRA § 2703(7)(A)(ii) in conjunction with IGRA § 2710(b)(1) would effectively supplant IGRA § 2703(7)(A)(ii) with IGRA § 2710(b)(1), rendering it superfluous. *Id.* To the contrary, it is the District Court's interpretation that renders portions of IGRA superfluous. If poker is either "explicitly authorized" or "not expressly prohibited … and … played … in the state," IGRA §§ 2703(7)(A)(ii)(I) and (II), then poker by definition is being "permitted" by the State. Yet, then why would IGRA § 2710(b)(1)(A) include "permitted in the state" as yet "an additional condition" for Class II non-banked card games if it is not intended to cover circumstances where the other two standards may not apply? The phrase "located within a State that permits such gaming for any purpose by any person, organization or entity," which this Court has held is the *Cabazon* regulatory/prohibitory standard, is located in *both* IGRA § 2710(b), concerning Class II games, and IGRA § 2710(d), concerning Class III games. *See Forest Cnty Potawatomi of Wis.*, 45 F.2d at 1084. Congress must have intended the phrase to mean something with respect to all Class II games, including card games.

Had Congress intended IGRA § 2710(b) not to apply to the definition of Class II card games, it would have specifically excluded card games from the "permits" language and limited its finding in IGRA § 2710(5) (adopting the *Cabazon* regulatory/prohibitory test) only to Class III gaming.

Congress intended courts to "consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to either allow or prohibit certain activities." Senate Report at 6; *see also* IGRA § 2710(5). Congress intended that IGRA § 2703(7)(A)(ii)(I) and (II) be read in conjunction with IGRA § 2710(a)(2) and (b)(1)(A) "to determine which particular card games are within the scope of class II." Senate Report at 9. Contrary to the District Court's conclusion that IGRA § 2710(b)(1) imposes an "additional condition" on Class II gaming, "[n]o additional restrictions [were] intended by these subparagraphs." *Id.* Instead, to determine whether the laws of the State "explicitly authorize" or "not explicitly prohibit" poker and, therefore, "permits such gaming for any purpose by any person" for purposes of Class II non-banked poker, a court must apply the *Cabazon* regulatory/prohibitory test. Senate Report at 6.

II. Poker Is Either "Explicitly Authorized" Or "Not Explicitly Prohibited" By Wisconsin Law And Played In Wisconsin For Purposes Of IGRA § 2703(7)(A)(ii).

A. Wisconsin Regulates And Does Not Prohibit Gaming In General And Poker In Particular.

"States can influence class II gaming on Indian lands within their borders only if they *prohibit* those games for everyone under all circumstances." *Gaming Corp. of Am.*, 88 F.3d at 544 (emphasis added). "Short of a complete ban, states have virtually no regulatory role in class II gaming." *Id.* "At no point does IGRA give a state the right to make particularized decisions regarding a specific class II gaming operation." *Id.*

In *Sycuan Band of Mission Indians*, the Ninth Circuit analyzed the *Cabazon* decision and its applicability to Class II gaming under IGRA:

> In [*Cabazon Band*], the Supreme Court made it clear that state law ... may be excluded from Indian country as "regulatory" *even though the regulatory aspects of the law are enforced by criminal penalties*. The key is 'whether the conduct at issue violates the State's public policy.' In *Cabazon Band*, the Supreme Court undertook this inquiry in regard to California's attempt to ban high-stakes bingo and [poker] [Class II] games in Indian country, and concluded that the State had no public policy against the gambling: it simply regulated it. Accordingly, California could not prohibit the games in issue, carried on by the Bands in Indian country.
>
> * * *
>
> We express no opinion concerning Class III, ***but at least insofar as the State's argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in Cabazon Band [i.e., poker]***, the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees. *Cabazon Band*

> addressed the problem at a higher level of generality than that. The essence of the Supreme Court's holding in *Cabazon Band* was distinctly set forth by the Court:
>
> > In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular .... [Accordingly], ... California [may not] enforce its gambling laws against Indian tribes.

Id. at 539 (internal citations omitted) (emphasis added). Thus, even though a particular California statute prohibited high-stakes bingo and a county ordinance prohibited poker, the overall body of California law demonstrated that California merely regulated rather than prohibited gaming and, accordingly, the statute and ordinance were regulatory in nature and could not be enforced on Indian land.

The district court previously found that Wisconsin is a *Cabazon* regulatory state.

> [T]he initial question in determining whether Wisconsin "permits" the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory.

Lac du Flambeau, 770 F. Supp. at 486. Applying the *Cabazon* regulatory/prohibitory test to the history of gambling regulation in Wisconsin, the district court concluded that even a blanket prohibition on commercial gambling in Wisconsin does not render gaming prohibitory rather than regulatory for purposes of the *Cabazon* test. *Lac du*

Flambeau, 770 F. Supp. at 486-87. Instead, the inquiry requires that a state's overall policy towards gaming be examined. *Id.*

> The original Wisconsin Constitution provided that "[e]xcept as provided in this section, the legislature shall never authorize any lottery, or grant any divorce." For more than a century, this prohibition against "any lottery" was interpreted as prohibiting the operation or playing of any game, scheme or plan involving the elements of prize, chance and consideration.
>
> * * *
>
> In 1965, however, the constitution was amended to allow Wisconsin citizens to participate in promotional sweepstakes (by defining "consideration" as not including listening to or watching a radio or television program or visiting a store or other place without being required to make a purchase or pay a fee). The constitution was amended again in 1973 to authorize bingo when played by charitable organizations, and in 1977 to allow raffles for charitable organizations. In 1987 the electorate approved two constitutional amendments: one authorized the state to operate a lottery, with the proceeds going to property tax relief, *Wis. Const. Art. 4, § 24(6)*; the second removed any prohibition on pari-mutuel on-track betting. Art. 4, § 24(5).
>
> When the voters authorized a state-operated "lottery," they removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration, with minor exceptions.
>
> * * *
>
> ***The amendments to the Wisconsin Constitution evidence a state policy toward gaming that is now regulatory rather than prohibitory in nature***.

770 F. Supp. at 486 (emphasis added).[7]

The Wisconsin Constitution was again amended in 1993. After the amendments, it continues to authorize a variety of Class II and Class III gaming. Pari-mutuel on-track betting and a state-operated lottery, which are Class III games for purposes of IGRA, are also permitted. *See* Wis. Const. Art. IV, §§ 24(5) and (6). While Wis. Const. Art. IV, § 24(6)(c) prohibits the State from authorizing "poker" or games simulating poker as a lottery, it does not prohibit poker from being played in Wisconsin. Indeed, the undisputed record evidence demonstrates that the State lottery utilizes simulated poker scratch off tickets (despite the apparent Constitutional limitation on such gambling), and charitable, religious, service, fraternal or veterans organizations utilize the bingo and raffle provisions, Wis. Const. Art. IV, §§ 24(3) and (4), to offer Charity Poker to raise money. ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶¶ 4-5 and Exs. 1-3.

Eleven years after the 1993 amendments to the Wisconsin Constitution Art. IV, § 24 (Gambling), in 2004, the Seventh Circuit examined Wisconsin's policy towards gambling in deciding whether IGRA's gubernatorial concurrence provision was constitutional. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United*

[7] What makes "little sense" is for the District Court now to opine that Congress intended the *Cabazon* regulatory/prohibitory standard to apply to Class III but not Class II gaming. A.App. 10. Since Class II gaming is supposed to be regulated solely by the Tribes, why would Congress intend less protection for Tribes with regard to Class II games than for Class III games, particularly when *Cabazon* involved Class II games? To preserve the Tribes' sovereign jurisdiction over Class II games, the application of *Cabazon* is more important for Class II than for Class III games, which are jointly regulated by Tribes and states through compacting.

States, 367 F.3d 650, 664 (7th Cir. 2004). The Seventh Circuit agreed with, and relied on, the *Lac du Flambeau* decision:

> The establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed. 2d 244 (1987). In *Cabazon*, the Supreme Court held that a state has no authority to enforce its gaming laws on Indian lands if it permits ***any gaming activity*** under state law. *Id.* at 211, 107 S.Ct. 1083. Further, because IGRA permits gaming on Indian lands only if they are "located in a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(d)(1)(B), ***the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming***. Although Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(B) to prohibit gambling on Indian lands, Wisconsin once sought (albeit unsuccessfully) to limit Indian gaming to the "identical types of games" authorized for the Wisconsin State Lottery. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 487 (W.D. Wis. 1991) *appeal dismissed for want of jurisdiction*, 957 F.2d 515 (7th Cir. 1992).

Id. at 664 (emphases added). *See also Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994) (holding that Class II games include "bingo and related games, such as lotto and pull-tabs, and ***card games, such as poker***, in which players play against each other rather than against the house") (emphasis added)); *Sisseton-Wahpeton*, 897 F.2d at 367-68 (concluding South Dakota's policy toward gaming in general and black jack in particular was regulatory given the variety of gaming permitted in the state); *Mashantucket Pequot Tribe*, 913 F.2d at 1031-32 (upholding the district court's conclusion

that Connecticut's policy towards gaming was regulatory as a result of a statute authorizing nonprofits to have "Las Vegas nights," together with other state-sanctioned gambling such as lottery, bingo and pari-mutuel betting).

This Court has already concluded that the *Cabazon* regulatory/prohibitory test may not be applied on a game-by-game basis and that Wisconsin's policy towards gaming is regulatory rather than prohibitory. *Lac Courte Oreilles, supra*. Thus, it is already a matter of well-settled law that Wisconsin merely regulates and does not prohibit gaming in Wisconsin, meaning that Wisconsin has "explicitly authorized" and has not "explicitly prohibited" non-banked card games for purposes of IGRA §§ 2703(7)(A)(ii)(I) and (II) by allowing all the gaming that is taking place in Wisconsin.

B. The Wisconsin Constitution Does Not Explicitly Prohibit Non-Banked Poker.

The District Court concluded that Article IV, section 24 of the Wisconsin Constitution "explicitly prohibits"[8] the playing of non-banked poker. A-11. However, the provision does not prohibit gambling generally or poker specifically. Instead, it is a constitutional limitation on the power of the legislature to *authorize* gambling:

> Except as provided in this section, the legislature *may not authorize* gambling in any form.

[8] The phrase "explicitly prohibits" does not appear in IGRA § 2703(7).

Wis. Const. Art. IV, § 24(1) (emphasis added). The Constitutional provision then identifies the gambling the legislature may authorize, including bingo, raffle games, pari-mutuel on-track betting and a state-operated lottery. *See* Wis. Const. Art. IV, §§ 24(3)-(6). The only reference to poker provides that the State shall not offer poker as part of the State lottery. Wis. Const. Art. IV, § 24(6)(c)(3).

The District Court's decision would allow states to pass laws "prohibiting" gaming and then simply not enforce them, or at least only enforce them with civil regulatory penalties, and then prevent Tribes from competing with such games on Tribal trust land based on the state's purported "prohibitions." That is exactly what Wisconsin is doing and what the *Cabazon* regulatory/prohibitory standard and IGRA are designed to prevent.

Under the explicit Wisconsin Constitutional authorization, which the District Court termed an explicit prohibition, poker is played to raise money for nonprofit organizations or charitable purposes. ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶ 4 and Exs. 1-2; Wis. Const. Art. IV, §§ 24(5)-(6). A variety of poker events held throughout Wisconsin are advertised on the State of Wisconsin Department of Tourism website, www.travelwisconsin.com (search "poker"), some of which appear to be Charity Poker. ECF No. 24, ¶ 4; ECF No. 28, ¶ 5 and Ex. 3. Allowing charitable and other organizations to conduct non-banked poker is an explicit authorization by Wisconsin for the playing of non-banked poker:

> Section 2710(b)(1)(A) permits a tribe to engage in class II gaming if "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity."
>
> * * *
>
> The statutory language in issue first appeared in H.R. 1920, which, as previously discussed, was the principal Indian gaming legislation considered by the 99th Congress. The Senate Report on this earlier measure noted that if state law completely barred class II gaming, then the Act would also bar such gaming. S. Rep. No. 99-493, *supra*, at 14. If the state permitted some form of class II gaming, however, then a tribe could engage in such gaming subject to the Act's requirements. *Id.* '[T]ribes may conduct certain defined games (bingo, lotto and cards) under the Federal regulatory frame-work, provided the laws of the state allow such games *to be played at all*.' *Id.* at 2.
>
> The Senate Report accompanying the bill ultimately enacted, S. 555, also discussed the difference between a state prohibiting, as opposed to merely regulating, a particular gaming activity:
>
> > The phrase "for any purpose by any person, organization or entity" makes *no distinction between State laws that allow class II gaming for charitable*, commercial, or governmental *purposes*, or the nature of the entity conducting the gaming. *If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.*
>
> S. Rep. No. 100-446, *supra*, at 12, 1988 U.S. Code Cong. & Admin. News 3082 (emphasis added).

Sisseton-Wahpeton Sioux Tribe, 897 F.2d at 365. *See also Lac du Flambeau*, 770 F. Supp. at 488 (holding a state "permits" gaming even by allowing "gaming activity to be carried

out by small charitable groups on very limited occasions")[9]; *Mashantucket Pequot Tribe*, 913 F.2d at 1024 (Tribe allowed to conduct casino type gaming because charitable organizations allowed to do so).

Having opened the door for charitable organizations to offer Charity Poker, the State cannot preclude the Nation from offering poker as a Class II game by asserting it has not "explicitly authorized" or that it has "explicitly prohibited" poker play. Any other conclusion would be directly contrary to Congressional intent. *Lac du Flambeau*, 770 F. Supp. at 488; *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365 (quoting the Senate Report).

C. The Laws Of Wisconsin Do Not Explicitly Prohibit Poker And Poker Is Being Played In The State.

1. Simulated Poker Is Being Played As Part Of The State Lottery.

Despite the constitutional prohibition against the State offering poker, or a game simulating poker, as a lottery, Wis. Const. Art. IV, § 24(6)(c), the State has offered at least 23 scratch-off lottery poker games, including Five Card Stud, Straight Poker, Badger Hold'em and a variety of other poker games. ECF No17, Exh. F. The game descriptions provided by the State demonstrate that the lottery games are simulations of poker. ECF No. 17, Exh. F. For example, the description of Championship Poker lottery scratch off is much like Texas Hold'em poker played at HCG Madison. *Compare*

[9] The district court ignored this holding in its prior decision.

ECF No. 17, ¶ 34 with ECF No. 17, Ex. F at p. 14. Just like poker offered at HCG Madison, Championship Poker uses two "hole cards" and five "community cards" displayed on the "flop," "turn" and "river." Just like poker offered at HCG Madison, Championship Poker allows players to create their best five-card hand. Just like poker offered at HCG Madison, Championship Poker utilizes traditional poker hands to determine winning players. *Id*. The State's offering of simulated poker scratch-off lottery tickets demonstrates that it is "not ... willing to sacrifice its lucrative lottery ... in order to obtain authority under *Cabazon*" to prohibit Class II gaming on Indian lands. *Lac Courte Oreilles*, 367 F.3d at 664. *See also Request for Game Classification Decision – Non-banked Poker* issued May 29, 2013, Argument Part I.C., *supra* ("The social exception to the prohibition indicates that poker, ***in all of its forms, is not explicitly prohibited by Connecticut law.***" (Emphasis added.)).

The simulated scratch off lottery poker games also involve betting. "Bet" is defined in Wisconsin as "a bargain in which the parties agree that, dependent upon chance … one stands to win or lose something of value specified in the agreement." Wis. Stat. § 945.01(1). Each scratch off game comes with a set of rules, including top dollar prizes, odds of winning and what constitutes a winning poker hand. ECF No. 17, Exh. F. The person who plays a poker lottery ticket must pay the ticket price for a chance to win, *e.g.*, make a bet. ECF No. 17, Exh. F. The player stands to win the specified prizes or loose the ticket price according to the rules of the game. ECF No.17,

Exh. F. The State has been offering simulated poker as the lottery since the Constitution was amended in 1993 despite the "prohibition" against doing so. The State cannot ignore a prohibition directed specifically at its lottery and then use it against the Nation to argue that it has "explicitly prohibited" poker play. The State has opened the door for Indian tribes to offer poker at Class II facilities.

2. Video Poker Is Merely Regulated By The State.

Video poker is also commonly played in taverns throughout Wisconsin. Possession of five or fewer video gambling machines in Class B taverns, including video poker, is not a crime.[10] ECF No. 17, ¶¶ 36-39. Video gambling machines, including video poker, may be used by players for amusement purposes under certain circumstances without violating any criminal laws. *See State v. Hahn*, 203 Wis. 2d 450, 553 N.W.2d 292 (Ct. App. 1996).

Video poker is an electronic facsimile of poker. Like e-Poker, the player has to place a wager in order to play video poker. ECF No. 17, ¶¶ 24-30 and 39. Like e-Poker, but wholly unlike slot machines, video poker requires the player to make strategic

[10] Even if playing poker is making a bet under Wis. Stat. § 945.02(1) or playing a video poker machine in a Class B tavern with fewer than five video poker machines for purposes other than amusement is a violation of § 945.02(2), the resulting Class B misdemeanors would not mean that Wisconsin has explicitly prohibited the playing of poker. The fact that gambling law violations are enforceable by criminal as well as civil penalties is not dispositive. *Cabazon*, 480 U.S. at 211; *Roache*, 54 F.3d at 539; *Mashantuckett Pequot Tribe*, 913 F.2d at 1029. The decriminalization of video poker and the abundance of gambling activities in Wisconsin mean that it regulates rather than prohibits gambling such as poker. *Lac Courte Oreilles*, 367 F.3d at 664; *Lac du Flambeau*, 770 F. Supp. at 485-87. Moreover, even if a crime, as set forth in Part II.C.4., *infra*, the State does not enforce these laws.

decisions regarding the cards (*e.g.*, which cards to hold in video poker and whether to fold a hand in e-Poker). ECF No. 17, ¶¶ 24-30 and 39. Like e-Poker, video poker involves the random draw of electronic cards. ECF No. 17, ¶¶ 24-30 and 39. Like e-Poker, a winning hand is determined using traditional poker hands, such as a straight, flush, three of a kind, etc. ECF No. 17, ¶¶ 24-30 and 39. The only difference is that the player is playing against the machine rather than other players. Video poker machines are prevalent in taverns throughout Wisconsin. ECF No. 24, ¶ 15.

Video poker is not explicitly prohibited by the laws of the State. IGRA § 2703(7)(A(ii)(II). Further, it is undisputed that video poker is played at a location in the State. *Id.* As a result, poker is Class II gaming, and the Nation may offer it at its Class II gaming facilities, including HCG Madison.

3. Poker Is Being Played At Tribal Casinos.

Both banked and non-banked poker are permitted in Wisconsin on Tribes' Class III gaming properties pursuant to the tribal-state compacts. ECF No. 17, ¶¶ 20-21. In *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 22-49, 295 Wis. 2d 1, 719 N.W.2d 408, the question before the Court was whether the 1993 Wisconsin Constitutional Amendment prohibited the expansion of gaming at Class III facilities. The Court ruled that expanded gaming was permitted under the terms of the Compact and, therefore, protected by the Commerce Clause. *Id.*, ¶¶ 81-95. However, the

Compact did not require the State to permit expanded gaming but rather allowed expansion of gaming to take place if both the State and the Nation agreed. *Id.*, ¶¶ 82-83.

In its February 26, 2009, advisory opinion to the Nation concerning the play of poker at HCG Madison, the NIGC carefully analyzed the *Dairyland* decision. ECF No. 17, Exh. 6. The NIGC concluded that "because poker is permitted under the Wisconsin tribal-state compacts, it is permitted in Wisconsin for 'any purpose by any person,' [IGRA] 25 U.S.C. § 2710(b)(1)(A), and is a permissible game in Wisconsin." *Id.* at p. 6. NIGC also concluded that non-banked poker falls within IGRA's definition of Class II gaming because Wisconsin does not "wholly prohibit[]" the play of poker. *Id.*

The District Court rejected the Nation's reliance on the play of banked and non-banked poker in Tribal Class III gaming casinos as a demonstration that the State is "permitting" or "authorizing" poker play for purposes of IGRA. A-13. The District Court reasoned that compacts do not qualify as "laws of the State" for purposes of IGRA § 2703(7)(a)(ii). *Id.* The District Court's reasoning misses the point. The Governor was given the authority to negotiate the terms of the compacts with Tribes under Wis. Stat. § 14.035, a law of the State. It was within the Governor's ***statutory authority***, acting on behalf of the State, to decide whether to authorize poker to be played at Class III facilities. When the Governor exercised his statutory authority and chose to agree to expand gaming to include poker at Class III facilities, he was acting on behalf of the State to "permit" and "authorize" such play to take place in Wisconsin.

See Artichoke Joe's, 353 F.3d at 720-31 (concluding that whether gaming on Indian lands pursuant to a compact could qualify as the state "permitting" such gaming for purposes of IGRA § 2710(b)(1) was ambiguous, therefore, the *Blackfeet* presumption applied and the Court construed IGRA in favor of the Tribe).[11]

The District Court also concluded that the compacts could not be used to demonstrate that the State "permits" or does not "explicitly prohibit" poker because compacts "are meant to address *class III* gaming, not class II gaming." A-12 (emphasis in original). Again, the District Court's reasoning misses the mark. Irrespective of whether the attributes of play would classify a card game as Class II gaming (*i.e.*, non-banked, such as e-Poker) or Class III gaming (*i.e.*, banked, such as Charity Poker, video poker, and poker lottery tickets), poker in some form is being played in the State. *See Rumsey*, 64 F.3d at 1254 (holding, the *Cabazon* regulatory/prohibitory test requires a court to examine a State's "public policy at a level of generality far above that of the individual game at issue"); *see also Roache,* 54 F.3d at 539 ("at least [for] Class II-type gaming of the sort engaged in by the Tribes in *Cabazon Band* [i.e. poker], the state cannot regulate and prohibit, alternately, game by game … turning its public policy off and on by minute degrees. *Cabazon Band* addressed the problem at a higher level of generality than that.").

[11] At every point of its decision, the District Court construed IGRA narrowly and against the interests of the Nation. That construction was clear error. *Bryan,* 426 U.S. at 392; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians,* 700 F.2d at 350-51.

Finally, according to the District Court, using poker played pursuant to a compact to qualify as "authorization" or "permission" by the State for purposes of IGRA §§ 2703(7)(A)(ii) and 2710(b)(1) would blur the distinction between Class II and Class III gaming and make it impossible "for the state to allow for gaming for a limited purpose in the content of a compact." A-12. That analysis again makes little sense. Class II games are limited to those defined in IGRA § 2703(7) (bingo and non-banked card games). Applying the *Cabazon* regulatory/prohibitory standard to the "authorized" and "prohibited" language of IGRA § 2703(7)(A)(ii), which only applies to non-banked card games, does not expand the types of Class II gaming beyond bingo and non-banked card games. The District Court's "slippery slope" analysis is insupportable.

Because Wis. Stat. § 14.035 authorized the Governor to negotiate tribal-state compacts and those compacts authorize the play of poker, Wisconsin "permits" the play of poker for "any purpose by any person" within the meaning of IGRA § 2710(b) and poker is not "explicitly prohibited" by the laws of the State and is being played in the State within the meaning of IGRA § 2703(7)(A)(ii). *Artichoke Joe's*, 353 F.3d at 720-31.

4. The State Does Not Enforce Its Gambling Laws Against Poker Play.

[redacted]

[redacted]

Similarly, Poker Leagues are advertised online and league organizers are operating games on a nightly basis in south central and south eastern Wisconsin. ECF No. 24, ¶¶ 6-14; ECF No. 28, ¶¶ 6-7 and Exs. 4-8. The Poker Leagues award cash prizes to winners, publicly boast that thousands of dollars are paid out, and send winners to

out-of-state poker tournaments such as the World Series of Poker as a prize to top winners. *Id.* Cash poker tournaments are also common and played openly in establishments serving the public. ECF No. 24, ¶¶ 16-20; ECF No. 28, ¶¶ 9-11. Even if the Poker Leagues and cash poker tournaments are illegal under Wisconsin's gambling laws, such open and public play of poker demonstrates a complete lack of enforcement. With little effort, the Nation's investigator located such prevalently played poker tournaments, and Wisconsin law enforcement officers could do likewise. But, as the LRB reported, private gambling such as "low-stakes poker games" is "common and generally perceived to cause little harm," and therefore "local law enforcement authorities rarely prosecute noncommercial betting activities." ECF No. 17, Ex. I at p. 17.

In *Lac du Flambeau*, 770 F. Supp. at 488, the district court stated: "[a] state might not prohibit a particular Class III gaming activity, but simply allow it to be conducted, without taking any steps to restrict it in any way…" thereby permitting its play in the state for IGRA purposes. Yet, the District Court held in this case that the prevalence of poker being played in the State is not relevant to whether poker is Class II gaming. A-13. According to the District Court, having to analyze enforcement, or lack thereof, of gambling laws would create an unworkable standard for the court to employ. A-13. The District Court had no trouble using the identical standard for Class III purposes and failed to offer any reason why the standard was workable for Class III but not for

Class II purposes. IGRA is intended to promote, not limit, gaming by Indian nations. *Grand Traverse Band*, 369 F.3d at 971. The District Court's interpretation of IGRA would allow a State to prohibit Indian gaming by enacting statutes that it does not, and in the case of possession of five or fewer video poker machines never intended to, enforce against non-Indians but use those "prohibitions" to foreclose Tribal gaming. Congress intended to abolish such regulatory artifice and economic protectionism by states when it enacted IGRA. *Gaming Corp. of Am.*, 88 F.3d at 544.

The case law supports the conclusion that whether the State actually enforces its gambling laws is relevant to determining whether Wisconsin's public policy is regulatory or prohibitory for purposes of the *Cabazon* test. For example, in *Artichoke Joe's*, the Court of Appeals analyzed whether California "permitted" the type of gaming contained in compacts between California and Tribes. *Artichoke Joe's*, 353 F.3d at 720-22. The Court concluded that the word permit did not "require a legally binding affirmative act" by California. *Id.* at 721. Instead, California could "permit" gaming "even if it 'acquiesces, by failure to prevent.'" *Id.* at 722 (*citing Rumsey, supra*).

Contrary to the District Court's conclusion, it is neither onerous nor unworkable for the District Court to consider the nearly wholesale lack of enforcement. The State could have, but did not, dispute the findings of the Nation's private investigator. ECF No. #30. The State could have, but did not, submit evidence that it prosecutes video poker possession or poker tournaments and games held in taverns and public

establishments.[12] ECF No. #30. To ignore this undisputed evidence in the analysis of whether the general policy of the State is to authorize, permit or prohibit poker would undermine one of the basic purposes of IGRA: to allow Tribes the "exclusive right to regulate gaming activity on Indian lands if the gaming activity … is conducted in a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." IGRA § 2701(5). While Wisconsin's gambling laws may prohibit some forms of poker and regulate others, it is certainly not the policy of the State to prohibit all such gaming activity by everyone under all circumstances. *Gaming Corp. of Am.*, 88 F.3d at 544.

III. Non-Banked Poker That Is Offered By The Nation At HCG Madison Is Class II Gaming For Purposes Of IGRA.

The State's sole basis for seeking, and the District Court's sole basis for entering, an injunction prohibiting the play of e-Poker at HCG Madison is that it is Class III gaming and the Compact does not allow for Class III gaming at HCG Madison. ECF No. 1; A-14. As set forth in the Argument, Part II, *supra*, e-Poker is Class II gaming for purposes of IGRA §§ 2703(7)(A)(ii) and 2710(b). The Compact does not concern, control or limit Class II gaming generally or the gaming at HCG Madison specifically. As a result, there is no basis under IGRA for an injunction precluding the play of e-Poker at

[12] The District Court concluded that the State "disputes many of these allegations" of non-enforcement. A-13. While the State disputed the *relevance* of the evidence, it did not submit evidence refuting the Nation's evidence. *See* ECF No. 30. It stipulated to the statements as being accurate facts, not merely disputed "allegations."

HCG Madison. *See* IGRA § 2710(d)(7)(A)(ii) (only allowing suit against a Tribe to enjoin activity "conducted in violation of any Tribal-State compact").

CONCLUSION

For the reasons set forth herein, e-Poker is Class II gaming that may be offered at HCG Madison. The District Court's June 12, 2014 Opinion and Order and June 13, 2014 Judgment should be reversed and the permanent injunction, which is not yet in effect, should be vacated.

Dated this 20th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief and Appendix of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,574 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 12 point Palatino Linotype font.

/s/ Thomas M. Pyper

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Thomas M. Pyper

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2014 the Brief and Appendix of Defendant-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STATE OF WISCONSIN,

Plaintiff,

v.

HO-CHUNK NATION,

Defendant.

OPINION AND ORDER

13-cv-334-bbc

- -

The state of Wisconsin has brought this case to enjoin defendant Ho-Chunk Nation from offering electronic poker at Ho-Chunk Gaming Madison (formerly DeJope), the Ho-Chunk Nation's gaming facility in Madison, Wisconsin. The question raised in the parties' cross motions for summary judgment is whether Ho-Chunk Nation's poker game violates a compact with the state. The answer to that question turns on whether electronic poker qualifies as a "class II" or "class III" game under the Indian Gaming Regulatory Act. Class III games are prohibited by the compact except under certain conditions not present in this case, but class II games are permitted. Because I conclude that Ho-Chunk Nation's electronic poker game is a class III game, I am granting the state's motion for summary judgment and denying Ho-Chunk Nation's motion.

The following facts are taken from the stipulation submitted by the parties. Dkt. #17.

UNDISPUTED FACTS

Defendant Ho-Chunk Nation owns a gaming facility in Madison, Wisconsin, called Ho-Chunk Gaming Madison. Games that are classified as "class II" under the Indian Gaming Regulatory Act are permitted at the facility but "class III" games are not permitted.

In 1992, the state and Ho-Chunk Nation entered into a gaming compact. In 2003, the parties executed an amendment to the compact that authorized Ho-Chunk Nation to offer poker at its class III gaming facilities (which do not include Madison). In addition, the compact permitted Ho-Chunk Nation to offer class III gaming at the Madison facility if a referendum authorizing Ho-Chunk Nation to do so was passed by voters in Dane County in 2004. Although the referendum was held, it did not succeed. Approximately 94,000 people voted against allowing class III gaming; approximately 52,000 voted for it. Since that time, neither the state nor Ho-Chunk Nation has taken any action to approve or authorize class III gaming at the Madison facility.

In November 2010, Ho-Chunk Nation began offering a "non-banked" electronic poker game called PokerPro at the Madison facility. In non-banked card games, the house has no monetary stake in the game itself, the house does not place bets and the players play and bet against one another. Playing PokerPro is virtually identical to playing poker on a traditional table, except the cards and chips are maintained in an electronic medium and there is no live, human dealer.

OPINION

The Indian Gaming Regulatory Act divides gaming into three categories. "Class I gaming" includes "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). "Class II" gaming includes certain kinds of bingo as well as "card games" that are (1) "explicitly authorized by the laws of the State" or (2) "not explicitly prohibited by the laws of the State and are played at any location in the State." 25 U.S.C. § 2703(7). "Class III" gaming encompasses all forms of gaming that do not qualify as "class I" or "class II" gaming. 25 U.S.C. § 2703(8). "Class III" games must be authorized by a compact between a state and a tribe. 25 U.S.C. § 2710(d)(1)(C).

The state makes a straightforward argument in support of its view that Ho-Chunk Nation's electronic poker game at the Madison facility is a "class III" card game. (The parties do not dispute that the electronic poker at issue in this case qualifies as a "card game" within the meaning of § 2703(7).) In particular, the state cites art. IV, § 24 of the Wisconsin Constitution, which states that the "legislature may not authorize gambling in any form" except for the games listed in the amendment. Because poker is not one of the listed exceptions, the state says that poker is prohibited under state law, so it cannot meet either definition of card games that qualify as class II gaming under § 2703(7).

Ho-Chunk Nation argues that its electronic poker game is a "class II" game, but it arrives at that conclusion through a more circuitous route. In fact, in its opening brief, Ho-Chunk Nation all but ignores § 2703(7) and focuses instead on a number of other issues

with little explanation of how those issues are relevant to the legal questions before the court. However, from a review of both of its briefs, I understand Ho-Chunk Nation to be making the following arguments:

- First, Ho-Chunk Nation says that the meaning of "explicitly authorized" and "not explicitly prohibited" in § 2703(7)(A)(ii) must be read "in conjunction with" 25 U.S.C. § 2710(b)(1), which permits a tribe to engage in class II gaming if it "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)."

- Second, Ho-Chunk Nation says that, read together, § 2703 and § 2710, along with relevant legislative history, require courts to apply the standard from California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), to determine whether a particular game qualifies under class II. In particular, Cabazon stands for the proposition that a tribe may engage in gaming if the state's "general policy towards gambling is regulatory or prohibitory." Dft.'s Resp. Br., dkt. #33, at 8.

- Third, Ho-Chunk Nation says that, because Wisconsin does not prohibit *all* gaming, it follows that the state takes a "regulatory" approach, which means that it cannot prohibit poker either. Alternatively, Ho-Chunk Nation must be allowed to offer electronic poker because Wisconsin allows poker in other contexts and does not enforce its laws that restrict poker.

- Finally, Ho-Chunk Nation says that the Wisconsin Constitution does not "explicitly prohibit" the poker at its Madison gaming facility.

Having reviewed both parties' briefs and the legal authorities they cite, I am persuaded that the state has the better argument. In law, as in many things, the simplest answer is often the best one.

A. Effect of § 2710 on § 2703

Ho-Chunk Nation's argument regarding the proper interpretation of § 2703(7)(A)(ii)

is simply untenable. Ho-Chunk Nation says that § 2703(7)(A)(ii) must be read "in conjunction with" 25 U.S.C. § 2710(b)(1), but the statutes serve a different purpose. Section 2703(7)(A)(ii) *defines* class II gaming; section 2710(b)(1) imposes an *additional condition* on class II gaming. In other words, it must be determined first whether a particular game meets the definition for a class II game under § 2703(7)(A)(ii). If the game meets that definition, then the game must meet the requirements in § 2710(b)(1) before it can be offered by the tribe. On its face, § 2710(b)(1) does not purport to expand or contract the meaning of a class II game under § 2703(7)(A)(ii).

Distilled, Ho-Chunk Nation's argument is not that the two statutes should be read "in conjunction" with each other, but that § 2710(b)(1) should *supplant* § 2703(7)(A)(ii). In other words, Ho-Chunk Nation's position is that the questions whether a game is "explicitly authorized by the laws of the State" or "not explicitly prohibited by the laws of the State" in § 2703(7)(A)(ii) should be the same as the question whether the state "permits such gaming for any purpose" in § 2710(b)(1). However, if that were the case, § 2703(7)(A)(ii) would serve no purpose and would be read out of the United States Code. Ho-Chunk Nation's "reading is thus at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Corley v. United States, 556 U.S. 303, 314 (2009) (alterations and internal quotations omitted). Why would Congress provide an express definition of a term if it believed it already had defined the term in another provision? Ho-Chunk Nation does not answer that question. Particularly because §

2710(b)(1) does not purport to be a definition, I see no reason to conflate the two provisions.

In support of its interpretation, Ho-Chunk Nation cites a Senate committee report for the Indian Gaming Regulatory Act. Dft.'s Br., dkt. #26, at 19-20. This report includes the same language Ho-Chunk Nation has been using, which is that § 2703(7)(A)(ii) and § 2710(b)(1) should be read "in conjunction" with each other. The meaning of the phrase "in conjunction" in this context is not clear, but even if I assume that it means what Ho-Chunk Nation says it does, that piece of legislative history would not be enough to overcome the plain language of the statute.

Ho-Chunk Nation cites Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976), for the proposition that, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination." However, since Train, both the Supreme Court and the Court of Appeals for the Seventh Circuit have stated repeatedly that a federal court has no discretion to rely on other indicia of legislative intent when the language of a statute is unambiguous. Boyle v. United States, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity."); Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."); Holder v. Hall, 512 U.S. 874, 932 n.28

(1994) ("Resort to legislative history is only justified where the face of the [statute] is inescapably ambiguous."); Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 1046-47 (7th Cir. 2013) ("The preeminent canon of statutory interpretation requires that courts presume that the legislature says in a statute what it means and means in a statute what it says there. If Congress determines later that the plain language of the statute does not accurately reflect the true intent of Congress, it is for Congress to amend the statute.") (internal quotations, citations and alterations omitted); Shlahtichman v. 1-800 Contacts, Inc., 615 F.3d 794, 802 (7th Cir. 2010) ("We need not explore [the statute's] legislative history in view of the unambiguous terms of the statute."); United States v. Hayward, 6 F.3d 1241, 1245 (7th Cir. 1993) ("[W]hen the language of a statute is clear and unambiguous, no need exists for the court to examine the legislative history, and the court must give effect to the plain meaning of the statute."). See also American Hospital Association v. NLRB, 499 U.S. 606 (1991) (affirming federal agency's interpretation of statute even though it was inconsistent with committee report).

Even if I assume that Train has not been implicitly overruled by later cases, that case is not controlling. First, the Court did not hold that the statute was unambiguous in that case, so the statement Ho-Chunk Nation cites is dicta. Second, the legislative history at issue in Train was not simply a committee report. Rather, the Court relied on the entire history of the law, including proposed amendments, multiple reports and a number of different statements by legislators. Train, 426 U.S. at 11-23. Finally, the Court stated that the lower court's interpretation was not just inconsistent with legislative history but also

"would have marked a significant alteration of the pervasive regulatory scheme embodied in the" statute at issue. Id. at 23-24. None of these things apply in this case.

Ho-Chunk Nation cites a number of cases in which a court cited with approval the same committee report on which it is relying, but in none of these cases did the court rely on the report as justification for ignoring unambiguous statutory text. United States v. 103 Electric Gambling Devices, 223 F.3d 1091, 1099-1100 (9th Cir. 2000) (relying on report to determine "[t]he distinction under IGRA between an electronic 'aid' and an electronic 'facsimile'"); Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024, 1029 (2d Cir. 1990) (relying on report to aid in interpreting § 2710; court did not consider meaning of "class II gaming" under § 2703); United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 359 (8th Cir. 1990) (relying on report to determine the meaning of phrase "nature and scope" in § 2703(7)(C)); Crosby Lodge, Inc. v. National Indian Gaming Commission, 803 F. Supp. 2d 1198, 1205 (D. Nev. 2011) (relying on report to determine role of National Indian Gaming Commission); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399, 1407 (D. Minn. 1992), aff'd, 16 F.3d 261 (8th Cir. 1994) (relying on report to distinguish bingo from "high-stakes casino gambling" that must be classified as a class III game). Accordingly, none of these cases are instructive.

B. "Regulatory" versus "Prohibitory" Treatment of Gaming

The Nation cites California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), as providing the standard for determining whether a type of gaming is a class II

game. In particular, it says that the distinction in Cabazon between a "prohibitory" and "regulatory" approach to gaming should apply and that its electronic poker must be permitted under the standard in Cabazon because Wisconsin takes a "regulatory" approach to gaming.

This argument is misguided. Cabazon had nothing to do § 2703 or the meaning of "class II gaming." Rather, the question in Cabazon was whether a particular federal statute not at issue in this case gave the California government authority to prohibit certain kinds of gaming conducted by tribes. When the Court concluded that the statute did not give the state such authority, Congress enacted the Indian Gaming Regulatory Act to address the vacuum. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996) ("[T]he [Indian Gaming Regulatory] Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands."). See also Michigan v. Bay Mills Indian Community, No. 12-515, — U.S. —, 2014 WL 2178337 (U.S. May 27, 2014) ("[T]he problem Congress set out to address in IGRA (Cabazon's ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact."); Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 367 F.3d 650, 654-55 (7th Cir. 2004) ("Following the Supreme Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which held that Congress had not yet expressly granted the States jurisdiction to enforce state civil gaming regulations on Indian reservation land, Congress passed IGRA for the purpose of creating a federal regulatory scheme for the operation of gaming on Indian lands."). Because

the Act created new state authority over tribal gaming, it makes little sense to interpret the Act using a standard that was applied before the states had that authority.

Ho-Chunk Nation also cites Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), for the proposition that Wisconsin is a "regulatory" state, but Lac du Flambeau is not helpful because it was about class III gaming, not class II. Thus, by relying on that case, the Nation is asking the court to eliminate any distinction between class II and class III games. If anything, the 1991 decision undermines that position because the decision emphasizes that "[t]he essential feature of the [Indian Gaming Regulatory] Act is the tribal-state compact process." Id. at 481. In this case, it is Ho-Chunk Nation, not the state, that is attempting to do an end-run around the compact process.

In arguing that the state must allow the Nation to offer poker at the Madison gaming facility because the state allows *some* forms of gaming both at that facility and elsewhere, the state relies entirely on the "regulatory/prohibitory" distinction made in cases such as Cabazon and Lac du Flambeau. Because I have concluded that Cabazon and Lac du Flambeau are not instructive, that argument cannot prevail.

C. "Explicitly Authorized" or "Not Explicitly Prohibited" by "the Laws of the State"

Art. IV, § 24(1) of the Wisconsin Constitution states, "Except as provided in this section, the legislature may not authorize gambling in any form." Neither poker generally nor electronic poker in particular is listed in the provision as something the legislature may

authorize. As a result, the state says, the electronic poker at Ho-Chunk Nation's Madison gaming facility is "explicitly prohibited" by the Wisconsin Constitution.

In response, the Nation raises several arguments. First, "the 'explicit language [in art. IV, § 24] precludes the legislature from authorizing any gambling not within the exceptions in § 24, [but] it 'explicitly prohibits' only one thing: the State conducting poker or simulated poker as part of the lottery." Dft.'s Br., dkt. #33, at 20. Ho-Chunk Nation cites art. IV, § 24(6)(c), which allows the legislature to create a lottery, but excludes poker as a game that may be part of the lottery.

The point the Nation is trying to make is not immediately clear. To the extent it means to argue that poker is "not explicitly prohibited" by the state constitution because it is not listed individually as a prohibited game, I disagree. The state constitution "explicitly prohibits" *all* gambling unless it falls within a listed exception. Ho-Chunk Nation cites no authority for the view that a state must "itemize" all the games it prohibits.

The Nation may be arguing that there is some significance to the way that art. IV, § 24 is worded. It compares the phrase "the legislature may not authorize gambling" in art. IV, § 24 with the Idaho Constitution, which states that "[g]ambling is . . . strictly prohibited" before listing a number of exceptions. Idaho Const. art. III, § 20. Ho-Chunk Nation seems to believe that there is something more permissive about the language in the Wisconsin Constitution, but it never explains the practical difference between prohibiting the legislature from authorizing an activity and prohibiting the activity directly. Because all gambling is prohibited in Wisconsin without an act of the legislature authorizing it, I see no

relevant difference.

Alternatively, Ho-Chunk Nation says that electronic poker is "authorized" under Wisconsin law because compacts with the state allow tribes to offer poker games in some contexts. E.g., Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 82, 295 Wis. 2d 1, 719 N.W.2d 408 (because compacts were entered into before amendment to art. IV, § 24 was enacted and compacts anticipated that tribe and state could "allow new games should the parties agree to amend the scope of gaming," state constitution did not prohibit governor from agreeing with tribe to expand scope of gaming as anticipated by compacts). The National Indian Gaming Commission relied on a similar argument in concluding in an opinion that electronic poker is "explicitly authorized" or "not explicitly prohibited" by state law. Dkt. #17-7.

There are two problems with this argument. First, gaming compacts are meant to address *class III* gaming, not class II. 25 U.S.C. § 2710(d); Lac du Flambeau, 770 F. Supp. at 484. If permission to engage in gaming under a compact qualified as "explici[t] authoriz[ation]" under § 2703, it would significantly blur the distinction between class II and class III gaming by making it impossible for the state to allow gaming for a limited purpose in the context of a compact. In other words, once the state allowed class III gaming through a compact, that game necessarily would become a class II game that the state could not prohibit in other contexts. If that were the law, it is likely that the state would be much less willing to negotiate compacts.

Second, under § 2703(7), a game qualifies as a class II game if it is authorized or not

prohibited "by the laws of the State." Ho-Chunk Nation cites no authority for the proposition that a compact qualifies as a state law for the purpose of § 2703(7).

D. Lack of Enforcement

Ho-Chunk Nation devotes much of its briefs to arguing that poker is being played in Wisconsin in various contexts, such as in taverns and at charity events. The state disputes many of these allegations, but even if they are true, they cannot carry the day for the Nation. The question whether the state is failing to fully enforce its own laws against playing poker might be relevant in determining whether poker is a game subject to compact negotiations, Lac du Flambeau, 770 F. Supp. at 485, or it might be relevant to determining whether a game is "played at any location in the State" under § 2703(7)(A)(ii). However, Ho-Chunk Nation does not explain how a lack of enforcement is relevant to the question whether poker is prohibited or authorized "by the laws of the State." On its face, § 2703(7) does not permit an inquiry into enforcement practices.

Many laws suffer from some amount of underenforcement, but that does not mean that they are no longer "laws." I agree with the state that Ho-Chunk Nation has proposed an unworkable standard because it would require courts to determine the particular degree of enforcement or underenforcement that would qualify as "prohibiting" or "authorizing" a game. Particularly because there is no basis in the statutory text for making that determination, I decline to adopt that interpretation of the statute.

In sum, I conclude that the electronic poker Ho-Chunk Nation is offering at the

Madison gaming facility qualifies as a "class III" game under the Indian Gaming Regulatory Act. Because it is undisputed that the compact between the parties prohibits class III games under the circumstances of this case, I am granting the state's motion for summary judgment and enjoining Ho-Chunk Nation from offering electronic poker at the Madison gaming facility.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by plaintiff state of Wisconsin, dkt. #16, is GRANTED, and the motion for summary judgment filed by defendant Ho-Chunk Nation, dkt. #23, is DENIED.

2. Ho-Chunk Nation is ENJOINED from offering electronic poker at Ho-Chunk Gaming Madison in the absence of a compact between the parties that permits electronic poker at the Madison facility. The injunction shall take effect 30 days after the conclusion of any appeals filed by Ho-Chunk Nation or 30 days after the expiration of Ho-Chunk Nation's deadline for filing an appeal, whichever is later.

3. The clerk of court is directed to enter judgment in favor of the state and close this case.

Entered this 12th day of June, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STATE OF WISCONSIN,

ORDER

Plaintiff,

13-cv-334-bbc

v.

HO-CHUNK NATION,

Defendant.

- -

It has come to my attention that the June 12, 2014 order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment contains a typographical error. On page 10, in the third sentence of the second full paragraph, the word "state" should be replaced with the word "Nation."

In all other respects, the order entered on June 12, 2014, remains unchanged.

Entered this 18th day of June, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

Case No. 13-cv-334-bbc

HO-CHUNK NATION,

Defendant.

This action came for consideration before the court with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff State of Wisconsin against defendant Ho-Chunk Nation granting plaintiff's motion for summary judgment.

IT IS FURTHER ORDERED AND ADJUDGED that Ho-Chunk Nation is ENJOINED from offering electronic poker at Ho-Chunk Gaming Madison in the absence of a compact between the parties that permits electronic poker at the Madison facility. The injunction shall take effect 30 days after the conclusion of any appeals filed by Ho-Chunk Nation or 30 days after the expiration of Ho-Chunk Nation's deadline for filing an appeal, whichever is later.

Approved as to form this 12th day of June, 2014.

Barbara B. Crabb
Barbara B. Crabb, District Judge

Peter Oppeneer
Peter Oppeneer, Clerk of Court

6/13/14
Date