Nos. 14-35753

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF IDAHO,

Plaintiff/Appellee,

v.

COEUR D'ALENE TRIBE,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
CASE No.: 2:14-cv-00170-BLW

BRIEF OF AMICUS CURIAE SHOSHONE-BANNOCK TRIBES IN SUPPORT OF THE COEUR D'ALENE TRIBE'S APPEAL SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Shoshone-Bannock Tribes, pursuant to Fed. R. App. P. 26.1, certifies that it has no parent corporation and certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

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CONCISE RULE 29(a) STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Amicus Curiae, Shoshone-Bannock Tribes is a federally recognized Indian Tribe with its Indian lands within the external boundaries of the Plaintiff-Appellee State of Idaho ("State"). The State filed the action below to resolve the issue of whether Texas Hold'em tournaments being offered by the Defendant-Appellant Coeur d'Alene Tribe ("CDA") are "Class II" gaming as that term is defined by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). The federal courts taking jurisdiction over the instant lawsuit in the current context will seriously erode the self-governance of the Shoshone-Bannock Tribes because the dispute is beyond Congress' intended limited abrogation of tribal sovereign immunity in actions brought by states in federal court regarding Indian gaming. Additionally, if the Court determines the subject gaming is not "Class II", the impact would be to place in serious and immediate jeopardy the scope of Class II games that the Shoshone-Bannock Tribes may offer on its Indian lands.

Shoshone-Bannock Tribes' Class II and Class III gaming operations allow the Shoshone-Bannock Tribes to provide crucial services for its tribal members. Shoshone-Bannock Tribes' Class II and Class III offerings each respectively provide a stable revenue stream that is critical as a funding source for Shoshone-Bannock Tribes-Tribes' governmental services. Moreover, the revenues also create

a source of economic strength and stability. Shoshone-Bannock Tribes must protect any and all attempts by the State of Idaho to infringe on its sovereignty. Shoshone- Bannock Tribes also must safeguard its regulation over "Class II" gaming, which provides funding for critical community services to the Shoshone-Bannock Tribes.

Amicus Curiae, Shoshone-Bannock Tribes have a Class III gaming compact with the State that differs in several material ways with the compact between CDA and the State. Accordingly, it does not assert an interest in the interpretation of the arbitration provisions in the CDA compact. Additionally, Amicus Curiae, Shoshone-Bannock Tribes does not currently offer Texas Hold'em at its gaming facility. Accordingly, this brief does not address the merits of the argument of whether Texas Hold'em is a Class II game. Amicus Curiae, Shoshone-Bannock Tribes interest are focused on the jurisdiction question. It is not the province of the State under the auspices of a compact to determine whether a game is Class II, and the state is not able to invoke the jurisdiction of the federal courts to impose its determination on the CDA. The matter is the province of the Tribe and the United States to the exclusion of the CDA.

Both the parties in this appeal, CDA and the State, have provided consent for Shoshone-Bannock Tribes to file this amicus brief pursuant to Fed.R.App.P. 29(a).

RULE 29(c)(5) DISCLOSURES

No party's counsel to this appeal authored this amicus brief, or any part thereof. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person or entity, other than the amicus curiae Shoshone-Bannock Tribes, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Amicus Curiae, Shoshone-Bannock Tribes adopts and incorporates the arguments of CDA in its Opening Brief as if fully set forth herein. The background and framework set forth by CDA negates the need for repetition in this amicus brief.

If the District Court had properly ruled that it lacks jurisdiction, this dispute would have likely been resolved in the manner Congress intended, with the NIGC making a determination as to whether Texas Hold'em is properly classified as a Class II game under IGRA. Both CDA and the State openly acknowledged and embraced the NIGC's role in this matter. The NIGC has a proven and extensive history of prudently exercising its proper jurisdiction over similar matters.

The District Court erred in ruling that the compact between CDA and the State provides the basis for the court's jurisdiction. Even if the compact purported to allow the State to challenge Class II gaming classifications, the federal courts lack jurisdiction to interpret or enforce such compact provisions. Finally, the District Court erred in applying the doctrine of primary jurisdiction to deprive the NIGC of its proper role in the implementation and enforcement of IGRA.

It is not the province of the State to determine whether a game is properly classified as Class II under IGRA. The State's role is limited to complaining to the NIGC and the United States Attorney, which it has done.

ARGUMENT

A. If the District Court Properly Ruled that it Lacks Jurisdiction, the Dispute Would Have Been Resolved in the Manner Congress Intended.

If the District Court had not improperly assumed jurisdiction over this dispute, it would likely have played out and been resolved as Congress intended. The NIGC would have made a determination that either Texas Hold'em is, or is not, a Class II game that may be played by Tribes with Indian lands in Idaho.

If the NIGC determines that the game is Class II, CDA is entitled to play the game and the Compact is not violated. If the NIGC determines that the game is not Class II, and CDA continues to maintain that the game is Class II, CDA has recourse under IGRA to challenge the decision of the NIGC. 25 U.S.C. §§2701, 2713-14; 25 C.F.R. §§580-81,584-85. If CDA continues to offer the game over NIGC's objection, NIGC has the authority to issue a closure order and/or serious fines for noncompliance. 25 U.S.C. §§2705, 2713; 25 C.F.R. §§ 580-81, 584-85. Additionally, the United States Attorney has authority to pursue both civil and criminal actions against CDA and tribal officials. 18 U.S.C. §§1166-68. The Compact and its terms do not come in to play.

Underscoring the Court's lack of jurisdiction, there is nothing in the record to suggest that CDA would offer the game if the NIGC determined it is not an authorized Class II game. The State speculates that CDA would then offer the

game as a Class III game and extrapolates that a compact dispute is therefore now before the District Court. CDA may choose to stand down, or may seek a compact amendment, or may proceed under the dispute resolution provisions of the Compact. There is simply no current dispute that CDA is wrongfully asserting that the compact entitles it to offer the game.

The record in this case demonstrates that both CDA and the State were aware of, and indeed embraced, the NIGC's jurisdiction, and demonstrates that the NIGC embraces and exercises its jurisdiction.

1. The Record Evidences (without dispute) that both CDA and the State were aware of, and indeed embraced, the NIGC's jurisdiction.

The materials submitted by the State in support of its Motion for Temporary Restraining Order include an extensive exchange of correspondence between the CDA and the State. It is significant that nowhere within that correspondence can be found an allegation by CDA that the subject game is a form of Class III gaming. It is also significant that the State makes clear that it will look to the NIGC and the United States Attorney to assert their jurisdiction to take enforcement action against the CDA.

Time and again, the correspondence (properly) frames the dispute as to whether the subject game is a form of Class II gaming:

> ". . . the Coeur d'Alene Tribe has determined that non-house banked poker games constitute ***class II*** gaming in the State of Idaho. . . "

(emphasis added). See Excerpts of Record (ER) 262-64. Exhibit 3 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the attachment to the April 16, 2013 letter from William Roden to Jeffrey Anderson:

> "***The State understands*** that the Tribe intends to offer nonbanking poker at its casino as a form of ***Class II*** gaming under the Indian Gaming Regulatory Act"

(emphasis added). See ER 258-61, Exhibit 4 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the May 7, 2013 letter from Jeffrey Anderson to William Roden:

> "For your further reference, I enclose an opinion letter dated December 21, 2004 issued by then Acting General Counsel of the National Indian Gaming Commission. The letter, consistent with analysis in the letter to Mr. Roden, concluded that poker is not ***class II*** gaming in Idaho.

(emphasis added). See ER 244-57, Exhibit 5 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the April 18, 2014 letter from Jeffrey Anderson to Hon. Chief Allan:

> " The Tribe's Gaming Board mandated . . . that the tournaments be played in strict compliance with standards adopted by the Gaming Board, as well as the ***applicable regulations of the National Indian Gaming Commission***."

(emphasis added). See ER 241-43, Exhibit 6 to Lottery Director Jeffrey

Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the April 28, 2014 letter from Hon. Chief Allan to Jeffrey Anderson:

> "As the April 18 letter and its attachments explain, poker in Idaho does not constitute ***Class II*** gaming under the Indian Gaming Regulatory Act."

(emphasis added). See ER 238-40, Exhibit 7 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the May 1, 2014 letter from Jeffrey Anderson to Hon. Chief Allan.

Such correspondence also reveals an understanding by the State that the issue of whether the game is a Class II game is the province of the Tribe and the United States to the exclusion of the State:

> ". . . the Idaho State Lottery (the State agency responsible for compact compliance) has ***no responsibility*** for gaming the type that the Coeur d'Alene Tribe seeks to undertake". . . .
>
> " ***The National Indian Gaming Commission has monitoring and enforcement authority with respect to Class II*** gaming under 25 U.S.C. § 2706(b). See also, 25 C.F.R. Pts. 571, 573. I have forwarded this letter, together with yours, under separate cover to NIGC Chairwoman Traci Stevens and United States Attorney Wendy J. Olson."

(emphasis added). See ER 258-61, Exhibit 4 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the May 7, 2013 letter from Jeffrey Anderson to William

Roden:

> ". . . the State will exercise all available remedies to end such gambling. They include. . . ***a request for civil and/or administrative enforcement proceedings by the National Indian Gaming Commission; and/or a request for criminal proceedings under 25 U.S.C. § 1166 by the United States Attorney for the District of Idaho***. .."

(emphasis added). See ER 244-57, Exhibit 5 to Lottery Director Jeffrey Anderson's Declaration in Support of State's Motion for Temporary Restraining Order, specifically the April 18, 2014 letter[1] from Jeffrey Anderson to Hon. Chief Allan.

2. The Record Evidences (without dispute) that the NIGC actively and aggressively exercises its jurisdiction regarding the classification of, and enforcement jurisdiction over, Class II games.

The Record also clearly indicates that the NIGC actively and aggressively exercises its jurisdiction regarding the classification of, and enforcement jurisdiction over, Class II games. The NIGC has issued no less than 115 formal opinions[2] as to whether a game qualifies as Class II, including 58 negative decisions, and including 12 formal opinions regarding forms of poker, three of which were negative decisions. The District Court even cites to one of the negative

[1] Significantly, the State copied the letter to Eric Shepard, Acting General Counsel, NIGC, and Wendy J. Olson, United States Attorney.

[2] All of NIGC's gaming classification opinions can be found at its official web page: http://www.nigc.gov/Reading_Room/Game_Classification_Opinions.aspx

decisions, ER 14-37 (September 5, 2014 Order at page 18).

Additionally, the NIGC has promulgated specific regulations for the investigation of unlawful Class II games, enforcement against such unlawful activity, and a formal process to appeal such enforcement. See 25 C.F.R. §§ 571 – 585. Additionally, although not formally obliged, the NIGC has a process for entities, including States, to request advisory legal opinions and the NIGC has a liberal policy of accommodating such requests.[3]

Both CDA and the State actively engaged the NIGC. CDA was being transparent with the NIGC. The NIGC has a proven track record of addressing such disputes, including rulings against Tribes. The State informed the CDA that it would request the NIGC and the United States Attorney to take enforcement action against CDA. The NIGC has a proven track record of thoroughly and responsibly exercising its jurisdiction. Yet the State circumvents the NIGC and the United States Attorney and instead files the lawsuit below for alleged breach of Compact, and the District Court sanctions such circumvention.

[3] See NIGC's formal web page at http://www.nigc.gov/LinkClick.aspx?fileticket=Qo0rfkyDmMY%3d&tabid=959

B. The District Court Erred in Ruling that CDA's Compact Vests The Federal Courts with Jurisdiction to Hear the State's Complaint

If the District Court is correct, and it does have jurisdiction, it sets precedent that enables every state to use the auspices of a tribal/state compact to encroach into a class of tribal gaming of which Congress intentionally excluded from the states. If this Circuit affirms, any state within the Circuit that has an issue with the scope of Class II gaming offered by a compacted tribe will be able to assert jurisdiction over Class II gaming, despite Congress' clear intent. The District Court tries to avoid this practical result by arguing that CDA agreed in its Compact that it would not offer any Class III games that are not expressly authorized by the Compact. That reasoning is flawed for two reasons. First, even if an agreement to fiat such jurisdiction is contained in the Compact, Congress' narrow abrogation of tribal sovereign immunity does not provide the Court jurisdiction. Second, inclusion of such a provision in a compact is not sanctioned by IGRA and accordingly, should not be enforced by the Court.

1. Congress' narrow abrogation of tribal sovereign immunity does not provide the Court jurisdiction

Pursuant to the Constitution, Congress has plenary authority over Indian affairs. U.S. Const. art. I, § 8, cl. 3; *United States v. Hellard*, 322 U.S. 363, 367 (1944). "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, not with the

States." *Id.*; *see also Oklahoma Tax Comm'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509-11 (1991). Hence, the State must establish that IGRA or another federal statute abrogated the Tribe's sovereign immunity to provide a federal cause of action to take the proposed enforcement action.

Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the Tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). This immunity applies to the Tribe's commercial as well as governmental activities. *Id.* at 754-55. As recently stated by the Supreme Court:

> Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and "[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U. S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U. S., at 58). That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government. See, e.g., *id.*, at 58–60; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U. S. 9, 18 (1987); *United States v. Dion*, 476 U. S. 734, 738–739 (1986).

Michigan v. Bay Mills Indian Community, 572 U.S. ____, 134 S.Ct. 2024, 2031-32 (2014).

IGRA's abrogation of tribal sovereign immunity is limited to actions to force compliance with Class III gaming compacts. It is the province of the Tribal Gaming Commission and the United States, to the exclusion of the states, to take

enforcement action against unlawful Class II gaming. The Department of Justice has the exclusive authority to take criminal enforcement against a Tribe for unlawful Class II gaming. 18 U.S.C. § 1166(d). The Department of Justice and the NIGC have joint authority to take civil enforcement action against a Tribe for unlawful Class II gaming. See, 25 U.S.C. § 2706(b); 25 C.F.R. Parts 571, 573; *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1506–07 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994); *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558 (8th Cir. 1998); *United Keetoowah Band of Cherokee Indians v. State of Oklahoma ex rel Moss*, 927 F.2d 1170 (10th Cir. 1991). See also, *Alabama v. PCI Gaming Authority*, 2:13-CV-178-WKW, 2014 WL 1400232 (M.D. Ala. Apr. 10, 2014) *appeal pending* (11th Cir). In both *Sycuan* and *PCI Gaming Authority*, the court rebuked efforts by the State to exert jurisdiction where no compact was in place. In *PCI Gaming Authority*, the State sought to enjoin activity that the Tribe claimed to qualify as Class II gaming.

The District Court relied on *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997) for the proposition that IGRA's narrow grant of jurisdiction found at 25 U.S.C. § 2710(d)(7)(A)(ii) extends to disputes regarding the interpretation of tribal/state gaming compacts. (ER 14-37, September 5, 2014 Order at 11-14). In 1997, only a small number of California Tribes had compacts with the State of California, and those were limited to off-track betting ("OTB").

The state argued that it should have been excused from honoring a court-ordered judgment over OTB fees because the tribes were offering slot machines, which the State contended were illegal Class III games not authorized by the compacts then in effect. 124 F.3d. at 1058. The Ninth Circuit struggled with the state's position and found that IGRA limits the Court's jurisdiction to only those games that are the subject of the compact. *Id*. at 1059. It follows that this instant litigation is the easier case and that the District Court should have exercised similar restraint. At issue in *Cabazon* was the play of games, slot machines, that were indisputably Class III but beyond the reach of the Compact. *Id.* Here, the issue is whether CDA's play of Texas Hold'em is beyond the reach compact, and here CDA looks to IGRA's express authority for Class II games.

The District Court improperly distinguishes *Wilson* based on CDA's compact commitment to only offer certain Class III games. The District Court reads into that provision that CDA agreed that it can be sued for the play of any other games that that State considers to be Class III gaming. The CDA Compact merely states that CDA's Class III gaming is limited to the enumerated games. The *Wilson* Court properly found that enforcement against games not included in a compact, including Class III games, remain the "exclusive" province of the federal government. *Id*. at 1059.

2. Inclusion of Provisions in a Compact Allowing a State to Assert Jurisdiction Over Class II Gaming is Not Sanctioned by IGRA and Accordingly, Should Not Be Enforced by the Court.

Assume for the purpose of argument that the Compact included language wherein CDA expressly agreed that the State could challenge, under the auspices of a compact violation, the CDA's ability to offer games that CDA contended were authorized under IGRA as Class II games. Such a compact provision would not be allowed by the Department of the Interior. Recently, in a formal letter to the Mashpee Wampanoag Tribe and the State of Massachusetts explaining why the compact in question was being "deemed approved, rather than formally approved, the Department stated:

> The IGRA draws a bright line providing that ***only tribes and the National Indian Gaming Commission may regulate class II gaming***. Nothing in IGRA or its legislative history indicates that Congress intended to allow gaming compacts to be used to expand state regulatory authority over tribal activities that are not directly related to the conduct of class III gaming. ***To the extent the parties implement this compact at some undefined point in the future in a manner to grant the state authority over class II gaming, such action would not be lawful***.

(emphasis added). January 6, 2014 letter from

, ASIA, to Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe[4].

Provisions allowing for a state to challenge Class II gaming classifications

[4] The full text can be found on the Department of the Interior's official web page at http://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-025901.pdf

fall outside of the scope of seven specific items that Congress allowed for inclusion in tribal-state compacts, 25 U.S.C. § 2710(d)(3)(A)[5]. Accordingly the federal courts lack jurisdiction to enforce such such provisions. See *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (6th Cir. 2008)(*en banc*); *Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013), *appeal dismissed*, DK## 13-2182 & 13-2191 (10th Cir. Mar 13, 2014).

In *Wisconsin v. Ho-Chunk Nation*, the Tribe and state disagreed as to whether the Tribe was obligated under it's compact to make certain payments to the state even though subsequent events raised doubts as to whether the Tribe received proper consideration for such payments. After several stages of complicated litigation and arbitration, an *en banc* panel of the Sixth Circuit ruled:

> [A] proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal–State compact is violated, but rather that

[5] (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.

> jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process.

512 F.3d at 933. The Sixth Circuit, accordingly, found the dispute over revenue sharing provisions of the Ho-Chunk/Wisconsin compact to be outside of the federal courts' jurisdiction, and the dispute over the compact's dispute resolution/arbitration provisions to be within the federal courts' jurisdiction[6].

Reaching a similar result under a different paradigm, in Pueblo of *Santa Ana v. Nash*, the court found jurisdiction to interpret the Pueblo's compact with the State of New Mexico, but held that it would not enforce the compact's provisions subjecting the Pueblo to dram shop liability because such provision falls outside of the seven stated items that IGRA allows to be included in a compact:

> The IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes. . . . The IGRA does not authorize states to exercise subject matter jurisdiction under the circumstances present in this case, and consequently this Court concludes that the Pueblo's exclusive jurisdiction over the claims in the underlying state court litigation must prevail.

972 F.Supp.2d at 1264-65. Under either paradigm, assuming *arguendo*, that the CDA Compact otherwise allows for the Court to determine whether a game is

[6] Shoshone-Bannock Tribes notes that CDA and the State disagree over the proper application of the CDA/Idaho Compact's arbitration provisions. Shoshone-Bannock Tribes has no position on the merits of that dispute, but notes that any arbitration panel would also lack jurisdiction to determine whether Texas Hold'em is a Class II game.

properly classified as Class II, such compact provisions are beyond the scope of IGRA's jurisdictional grant.

3. The Doctrine of Primary Jurisdiction Does Not Apply, but if it Did Apply, the District Court Erred in Failing to Refer the Matter to the NIGC.

The District Court erred in reframing the issue as one of invoking and applying the doctrine of primary jurisdiction. The District Court took it upon itself to reframe CDA's and Shoshone-Bannock Tribes' jurisdictional arguments as advocating that the Court should exercise its discretion and refer the matter to the NIGC under the doctrine of primary jurisdiction. (ER 14-37, September 5, 2014 Order at 16-18). The doctrine of primary jurisdiction only comes into play in litigation where the court has established federal jurisdiction. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 299-300 (1973). The argument addressed above and presented in the briefing below is that the federal court lacks jurisdiction.

Assuming arguendo, however, that the primary jurisdiction doctrine was available here, the District Court erred in concluding that it need not refer the matter to the NIGC.

Primary jurisdiction applies where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, which are placed within the special competence of the administrative body. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39

F.3d 51, 57-58 (2d Cir. 1994)(citations omitted). Primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular legislative duties." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956). The primary jurisdiction doctrine serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims. *Golden Hill Paugussett Tribe*, 39 F.3d at 59 (citations omitted). The doctrine is a flexible concept concerned with "promoting proper relationships between the courts and administrative agencies charged with particular duties." *State v. Oneida Indian Nation of New York*, 78 F.Supp.2d 49, 58 (N.D.N.Y.)(citations omitted).

The factors to consider in determining the applicability of the doctrine of primary jurisdiction are: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether prior application to the agency has been made. *Id*.

The District Court below cited *New York v. Oneida Indian Nation* to reject CDA's and the Shoshone-Bannock Tribes' argument that the Court should allow the NIGC to decide in the first instance whether Texas Hold-em as conducted by CDA is a Class II or Class III game. (ER 14-37, September 5, 2014 Order at 16). The District Court's reliance on that case is misplaced as it is distinguishable from the case at bar because both of the parties agreed that the game at issue, a cashless video gaming machine, was a Class III game subject to the Tribal-state compact. The only dispute was whether the New York Racing and Wagering Board (rather than the "state") had the authority to approve the game and add it to the list of games authorized under the compact.

All of the criteria favor invoking the doctrine of primary jurisdiction. The District Court cites to a Class II gaming classification ruling of the NIGC regarding poker in Idaho that is adverse to CDA's and the Shoshone-Bannock Tribes' interests. (ER 14-37, September 5, 2014 Order at 18). Accordingly, the District Court is acknowledging NIGC's issuing 115 classification rulings, 12 of which involve various forms of poker (of which three were adverse to the Tribes). Clearly the NIGC is the appropriate agency with experience for technical and policy considerations. Clearly, the question at issue is within NIGC's discretion. The District Court asserts that there is little danger of an inconsistent ruling because of the NIGC's prior ruling, but that only begs the question as to why the District

Court would not refer the matter to the NIGC while at the same time using a prior NIGC ruling to support its decision on the merits. If the District Court is allowed to make Class II classification decisions without referring the matters to the NIGC, Tribes within the Ninth Circuit will face the very real danger of conflicting decisions where the NIGC will condone games that the federal court condemns, and vice versa. Finally, although no formal application has been made to the NIGC, the State informed CDA, prior to the initiation of the lawsuit below, that it would in fact solicit a determination from the NIGC and request that NIGC take enforcement action against CDA. See ER 244-57 (the State will pursue a "request for civil and/or administrative enforcement proceedings by the National Indian Gaming Commission; and/or a request for criminal proceedings under 25 U.S.C. § 1166 by the United States Attorney for the District of Idaho").

The doctrine of primary jurisdiction should be applied together with the doctrine of exhausting administrative remedies. Both the bodies of case law require as a matter of comity the exhaustion of tribal remedies, see e.g. *Grand Canyon Skywalk Development LLC v. Vaughn* 715 F.3d 1196 (9th Cir. 2013), and the exhaustion of administrative remedies, see e.g. *McCarthey v. Madigan, 503* U.S. 140 (1992), which are analogous and applicable to the instant circumstances.

CONCLUSION

For the reasons set forth herein, and those stated in the briefs submitted by CDA, the preliminary injunction issued by the District Court should be vacated and this matter should be remanded to the District Court with instructions to dismiss the lawsuit for want of jurisdiction.

STATEMENT OF RELATED CASES

The Tribe is not aware of any related cases currently pending before this court.

DATED: OCTOBER 10, 2014

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14-point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word 2011 for Windows software, this brief contains 4,998 words up to the signature lines that follow the brief's conclusion.

/s/ SCOTT CROWELL
Scott Crowell

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using CM/ECF system on October 10, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 10, 2014

Respectfully Submitted,

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