STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 15, 2017

The Honorable Ilana Rubel
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: House Bill 127 (Amendment to Idaho Code § 67-429B) – Our File No. 17-56843

Dear Representative Rubel:

You have requested our review of House Bill 127 with respect to applicable federal law and treaties, the Idaho Constitution "and any other relevant authorities." The bill amends Idaho Code § 67-429B that was adopted in 2002 through an initiative popularly known as Proposition One. The Legislature has not modified the section since adoption. House Bill 127 would modify the subsection to provide:

> Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) ~~above is~~of this section shall not authorize use or possession of a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling.

Your inquiry presents the threshold issue of whether the amendment, if passed, would modify the tribal video gaming machine authorization in subsection (1). This Office believes that the answer to that question is "no" under the amendment's current language and uncertain under revised language discussed below. We further identify the most definitive authority with respect to the scope of art. III, sec. 20 of the Idaho Constitution and attach an analysis prepared during the 2016 Session with respect to draft legislation that, if introduced and passed, would have repealed § 67-429B.

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I. Relevant Statutory Construction Principles

Your request requires at the threshold determination of exactly what the amendment contained in House Bill 127 means. That determination, in turn, requires consideration of two statutory construction principles.

First, the Idaho Supreme Court clarified in *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3 502 (2011), that it must give literal effect to a statute and thus cannot "revise[] or void[] an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written." *Id.* at 896, 265 P.3d at 509; *see Hoffer v. Shappard*, 160 Idaho 868, ___, 380 P.3d 681, 695 (2016) ("This Court does not have the authority to modify an unambiguous legislative enactment."). The process of statutory construction, *Verska* further counseled, "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." 151 Idaho at 893, 265 P.3d at 506 (internal quotation marks omitted).

Second, Idaho courts presume that the Legislature has full knowledge of existing statutes and thus do not lightly find that a later-adopted statute impliedly repeals in whole or part an existing statute. *E.g.*, *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009) ("Repeal by implication occurs when 'two statutes are inconsistent and irreconcilable.' . . . Courts disfavor repeal by implication and, therefore, attempt to interpret seemingly conflicting statutes in a manner that gives effect to both provisions.") (citation omitted). "In other words, we will find an implied repeal of a statute '[o]nly when new legislation is irreconcilable with and repugnant to a pre-existing statute.'" *Chapple v. Madison County Officials*, 132 Idaho 76, 79, 967 P.2d 278, 281 (1998).

II. Application of Relevant Statutory Construction Principles

House Bill 127's Statement of Purpose states that the amendment (a) "addresses a constitutional compliance problem by amending language under Title 67, Chapter 429B, Idaho Code that contradicts Article III, Section 20 of the Idaho Constitution" and (b) "removes any ambiguity in the statute over whether or not a Tribal Video Gaming Machine can be a house-banked slot machine." The amendment, as presently drafted, accomplishes neither objective. Literally construed, it prohibits a tribal video gaming machine compliant with § 67-429B(1) from *authorizing* the *use* or *possession* of a slot machine or an electronic or electromechanical imitation or simulation of any type of casino gaming. Tribal video gaming machines, however, simply offer a form of gambling; they do not "authorize" their own use or possession or that of another gambling device. Subsection (1) "authorizes" the tribal video gaming, not the machines themselves. *See* Merriam-Webster's Collegiate Dictionary at 78 (10th ed. 1999) (defining authorize, *inter alia*, as "to invest esp. with legal authority"). The proposed amendment, in sum, has no effect on the gaming sanctioned under subsection (1).

But even if one assumes that House Bill 127 had been drafted to capture the sponsor's more likely intent—*i.e.*, nothing in *subsection (1)* shall authorize the use or possession of the prohibited gaming devices identified in the amended subsection (2)—the same conclusion might

well be reached. Subsection (1) sets out quite specific criteria for authorized tribal video gaming machines. It makes machines satisfying those criteria legal under Idaho law. The amendment (as clarified) to subsection (2) could be read to mean simply that subsection (1) does not authorize the use or possession of slot machines or electronic or electromechanical imitations or simulations of casino gaming not otherwise compliant with subsection (1). That interpretation is plausible and would give full effect to subsection (1). Indeed, it may take on somewhat enhanced plausibility because a contrary construction creates the potential for a court to hold that subsection (2), as amended, invites undoing what subsection (1) authorized. A court, in other words, may be reluctant to construe subsection (2) as designed to impair the literal operation of subsection (1) and would look to implied repeal principles as an appropriate paradigm to structure its analysis. Nevertheless, the amendment also could be construed to open up the question of tribal video gaming machines' validity under Idaho law—a question that § 67-429B(2) purported to resolve. We cannot confidently predict which interpretation would succeed.

III. Potential Article III, Section 20 and Federal Statutory Issues

This Office recognizes that the animating purpose of the proposed amendment, regardless of its precise language, may lie in prohibiting all tribal video machine gaming currently authorized under tribal-state compacts entered into pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 to -2731. This Office also recognizes the possible argument that House Bill 127 seeks to prohibit less than all forms of such gaming by severing out only those machines that imitate or simulate "casino gambling."[1] That proffered construction, however, would place form over substance since, irrespective of the particular graphic interface, the machines must behave strictly in accordance with § 67-429B(1)'s requirements, including "[s]elect[ing] randomly, by computer, numbers or symbols to determine game results." *Id.* § 67-429B(1)(e). So, for example, Idaho tribal casinos offer machine gaming that they denominate as "slots," "electronic bingo," "classic blackjack," "video poker," "video blackjack," and "virtual blackjack"—all electronic imitations or simulations of traditional casino gaming."[2] Others tribal video gaming is theme-described, but no reason exists to believe that their

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[1] There may be some dispute over what constitutes a "slot machine," but the amendment also prohibits, again, "an[y] electronic or electromechanical imitation or simulation of any form of casino gambling." The explicit reference to slot machines thus is likely superfluous because art. III, sec. 20 specifically identifies them as a form of "casino gambling" and the term's use in § 67-429B(2) almost certainly will be assigned the same scope. The terms "electronic" and "electromechanical" presumably were derived from a class II gaming exclusion under IGRA. 25 U.S.C. § 2703(7)(B)(ii) ("electronic or electromechanical facsimiles of any game of chance or slot machines of any kind").

[2] *E.g.*, Coeur d'Alene Tribe: http://www.cdacasino.com/gaming/slot_list.php (slots) and http://www.cdacasino.com/gaming/bingo.php (electronic bingo);
Kootenai Tribe: http://www.kootenairiverinn.com/games (classic blackjack);
Nez Perce Tribe: http://crcasino.com/casino/ ("video poker and video blackjack); and
Shoshone-Bannock Tribes: http://www.shobangaming.com/gaming.php (virtual blackjack).
All sites were last visited on February 14, 2017.

"numbers or symbols" are not generated randomly by computer.[3] The Office accordingly does not find the limiting construction tenable.

If House Bill 127 eventually became law, the consistency of subsection (1) with art. III, sec. 20 would likely be resolved with reference to *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir.), *cert. denied*, 516 U.S. 916 (1995). If found inconsistent, multiple federal issues would arise. I have enclosed a letter dated February 16, 2016 to Senator Davis that discusses them. Its legal analysis remains current.

I hope that this letter responds adequately to your inquiry. Please contact me with any questions about the analysis.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn

enclosure

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[3] *E.g.*, Kootenai Tribe: http://www.kootenairiverinn.com/games (Life of Luxury, Pirate Battle, Elvis, Beverly Hillbillies, C.S.I., Cheers, Super Grand Monopoly, Cashman Fever, Goldrush, Hot Shots, Mystical Temple, Million $ Gold Series, Beat the Field, Zuma, and Sphinx in true 3D);
Nez Perce Tribe: http://crcasino.com/casino/ (Fort Knox, Mystical Temple, Pirate's Loot, Jaws, and Diamond Factory); and
Shoshone-Bannock Tribes: http://www.shobangaming.com/gaming.php (Sweet Liberty, Game King, Monopoly, Penny Train, and Fort Knox).
All sites were last visited on February 14, 2017.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 16, 2016

The Honorable Bart Davis
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: RS24447—Gambling Amendments – Our File No. 16-53820

Dear Senator Davis:

This letter responds to your request for this office's review of the referenced draft bill. Substantively, the draft adds a definition of "video gaming machine" to Idaho Code § 67-7404; adds certain express limitations on the State Lottery Commission's authority in Idaho Code § 67-7408; modifies Idaho Code § 67-429A(3) to invalidate any tribal-state compact provision that authorizes play of "video gaming machines," to impose on the Governor certain reporting duties with respect to non-compliant "video gaming machines," and to provide "standing" to the Governor or any member of the Constitutional Defense Council "to pursue any administrative or judicial action necessary to enforce the prohibitions" against "video gaming machines." The bill repeals Idaho Code §§ 67-429B and -429C. Nonsubstantively, the amendments add references to art. III, sec. 20 of the Idaho Constitution to various provisions.

The following analysis will focus on the repeal of §§ 67-429B and -429C. This office's overall conclusion is that, if introduced and enacted, the bill will result in immediate arbitration or federal court litigation where the controlling question will be whether repeal of §§ 67-429B and -429C violates the Contracts Clause in the United States Constitution. U.S. Const. art. I, sec. 10, cl. 1. The issues here are largely novel. However, applying generally applicable principles, I conclude that a plausible reserved powers defense exists but that, if the merits of a Contracts Clause claim are reached, the repeal of §§ 67-429B and -429C would likely be invalidated.

I. RELEVANT BACKGROUND

A. Applicable Federal and State Law

1. Federal Law. The Indian Gaming Regulatory Act ("IGRA") governs the legality of gaming on "Indian lands" as defined in 25 U.S.C. § 2703(4). That definition encompasses "all lands within the limits of any Indian reservation." It separates gaming activities into three categories—Class I, Class II and Class III.

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- Class I gaming includes only "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)) and is subject to exclusive tribal jurisdiction (*id.* § 2710(a)(1)).

- Class II gaming covers a greater amount of gaming but expressly excludes any banking card games (e.g., baccarat or blackjack) and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.*

- Class III gaming is a residual category for all gambling that is not Class I or II. 25 U.S.C. § 2703(8). It can be lawfully undertaken only if authorized by an approved tribal ordinance or resolution (*id.* § 2710(d)(1)(A)) and the gaming activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" (*id.* § 2710(d)(1)(B)). However, unlike Class II gaming, Class III gaming also must be "conducted in conformance with a Tribal-State compact" approved by the Secretary of the Interior ("Secretary") and in effect. *Id.* § 2710(d)(1)(C). Consequently, "video gaming machines" as defined in the draft bill constitute Class III gaming. So, too, do the tribal video gaming machines authorized under Idaho Code § 67-429B.

2. Idaho Law. Art. III, sec. 20 of the Idaho Constitution, as approved in November 1992, identifies the only forms of gambling permissible in this State. In part, it provides:

> (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
> (3) The legislature shall provide by law penalties for violations of this section.

The Idaho Legislature anticipated art. III, sec. 20's adoption by enactment of Idaho Code §§ 18-3801 and -3802 effective August 15, 1992. 1992 Idaho Laws 1st Ex. Sess. Ch. 2.

Section 18-3801 defines "gambling" to mean "risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno." Excluded from that definition are:

> (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
> (2) Bona fide business transactions which are valid under the law of contracts; or
> (3) Games that award only additional play; or

> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or
> (5) Other acts or transactions now or hereafter expressly authorized by law.

Idaho Code § 18-3801(1)-(5). Section 18-3802 imposes criminal liability on individuals engaging in gambling. The Idaho federal district court and the Ninth Circuit have held that the only forms of gambling authorized under art. III, sec. 20 are "the state lottery, pari-mutuel betting if conducted in conformity with enabling legislation, and bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes." *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1280 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995); *see also Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1041 (9th Cir. 2015) (citing the 1994 *Coeur d'Alene Tribe* decision for the conclusion "that Idaho law only allowed 'a lottery and parimutuel betting' and that 'Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State'").

Neither art. III, sec. 20 nor § 18-3801 has been amended since their original adoption. Slot machines and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" thus remain unlawful. Idaho tribes, however, were given the option to commence another form of Class III gaming—tribal video gaming machines—through passage of Proposition One in 2002. Upon passage the initiative was codified as Idaho Code §§ 67-429B and -429C. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1097-98 (9th Cir. 2006) (summarizing proposition).

B. Idaho Tribal-State Compacts

Four Idaho tribes—the Coeur d'Alene Tribe (1993), the Kootenai Tribe of Idaho (1993), the Nez Perce Tribe (1995), and the Shoshone-Bannock Tribes (2000)—have tribal-state compacts approved by the Secretary under IGRA. The first three of these tribes amended their compacts immediately following passage of Proposition One to include tribal video machines as an authorized form of gaming.[1] The Secretary approved the amendments in January 2003. The Shoshone-Bannock Tribes declined to exercise its right to include that form of gaming explicitly in its compact; they instead relied on a most-favored-nation provision unique to their compact. *Shoshone-Bannock Tribes*, 465 F.3d at 1098-99.

The consistency of those machines, to the extent compliant with § 67-429B, has never been determined on the merits. However, two individuals, who alleged that they were addicted to machine gaming (and to no other form of gambling), unsuccessfully raised that challenge in Idaho state court. *Knox v. State ex rel. Otter*, 148 Idaho 324, 223 P.3d 266 (2009) (dismissing case on jurisdictional grounds). The same individuals sued the Secretary to invalidate the 2003 approvals, but that case was voluntarily dismissed in April 2012. *Knox v. USDOI*, No. 4:09-cv-00162-BLW (D. Idaho).

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[1] The north Idaho tribes' compact contain virtually identical provisions related to the tribal video machine gaming. 2002 Coeur d'Alene Class III Gaming Compact Amendment Art. 6.8.1 ("[n]otwithstanding any other provision of this compact, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code"); 2002 Kootenai Tribe Class III Gaming Compact Amendment Art. 6.8.1 ("[n]otwithstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code"); 2002 Nez Perce Tribe Class III Gaming Compact Amendment Art. 6.4.1 (same).

None of the compacts contains a termination provision. They provide in common that "[t]he State or the Tribe may, by appropriate and lawful means, request negotiations to amend or replace this Compact" but leaves the compact "in effect until renegotiated or replaced."[2] The Shoshone-Bannock compact does contemplate the effect of a change in federal law, stipulating that "any provision of this Compact which may be inconsistent with such change shall be void only to the extent necessary to conform to that change." However, neither that compact nor the others address the effect of a change in state law.

II. LEGAL ANALYSIS

The draft bill has as a major purpose invalidating the use of tribal video gaming machines now authorized under the four Idaho tribal-state compacts. This invalidation raises a significant issue under Contracts Clause, Article I, § 10, cl. 1, of the United States Constitution. That clause, in relevant part, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[3] It also raises a question under the reserved powers exception to the application of the Contracts Clause. I discuss the exception first.

A. Reserved Powers Doctrine Analysis

In *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the United States Supreme Court explained that "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *Id.* at 22. The scope of that reserved power differs depending upon the nature of contract affected. As to purely private contracts, "laws intended to regulate existing contractual relationships must serve a legitimate public purpose"—*i.e.*, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.* As to a State's own contracts, the focus changes substantially:

> The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as *Fletcher v. Peck*, the Court considered the argument that "one legislature cannot abridge the powers of a succeeding legislature." . . . It is often stated that "the legislature cannot bargain away the police power of a State." . . . This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the

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[2] One potential topic of renegotiation is the allowable number of tribal video gaming machines. Section 67-429C(1)(b) provides:

> In the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

To this Office's knowledge, none of the tribes has requested renegotiation under subsection (1)(b).

[3] The Idaho Constitution has a corresponding provision. Idaho Const. Art. I, § 16. The Idaho Supreme Court construes it as coterminous with its federal counterpart. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 387, 299 P.3d 186, 194 (2013). Consequently, the Idaho provision is not discussed separately.

> Contracts Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty. [¶] In deciding whether a State's contract was invalid ab initio under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers.

Id. at 23-24 (citations and footnote omitted). The regulation of gambling falls squarely within the type of state action subject to the reserved-powers doctrine. *Stone v. Mississippi*, 101 U.S. 814, 818 (1879) ("No one denies . . . that [the police power] extends to all matters affecting the public health or the public morals. . . . Neither can it be denied that lotteries are proper subjects for the exercise of this power.").

As *U.S. Trust* indicates, the reserved powers doctrine renders the contract itself void *ab initio*. *See Matsuda v. City and County of Honolulu*, 512 F.3d 1148, 1152 (9th Cir. 2008). Here, no dispute exists that the tribal-state compacts themselves are valid. The State entered into the compacts pursuant to IGRA, and the Secretary approved them and the amendments submitted after passage of Proposition One. *See also* 1993 Idaho Laws ch. 498 (codified at Idaho Code § 67-429A) (authorizing Governor to represent State and enter into tribal-state compacts); 2000 Idaho Laws ch. 220 (ratifying Shoshone-Bannock compact). The doctrine nevertheless also appears to capture situations where *particular* contracts rights are impaired legislatively. *E.g., N. Pac. Ry. v. Minnesota*, 208 U.S. 583, 591 (1908) ("[t]he legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court"). That is the situation presently. It raises two questions.

The threshold question is therefore whether the State has surrendered its right to reopen the northern tribes' compacts (which, again, were amended to authorize tribal video machine gaming) to conform their scope of gaming to amended Idaho law or otherwise to object to continued tribal video machine gaming. The three northern tribes' compacts address only the contingency of new state-authorized gaming (which is automatically authorized). *E.g.*, 1992 Coeur d'Alene Class III Gaming Compact Art. 6.2.3 (allowing "[a]ny additional type of gaming involving chance and/or skill, prize and consideration that may hereafter be authorized to be conducted in the State"). The Shoshone-Bannock compact simply provides that "the Tribes may operate in its gaming facilities located on Indian lands[] any gaming activity that the State of Idaho 'permits for any purpose by any person, organization, or entity,' as the phrase is interpreted in the context of the Indian Gaming Regulatory Act" and "may not operate any other form of Class III gaming activity." 2000 Shoshone-Bannock Compact Art. 4.a. Under traditional reserved-power principles, the answer to this would be "no" given gambling regulation as within the traditional scope of state police powers. *See Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 492 (Wis. 2006) (Roggensack, J., concurring in part and dissenting in part) ("it has *never* been interpreted by the United States Supreme Court to preclude a state from legislating to protect the public health or morals, regardless of what terms a contract with a state contains").[4]

[4] In *Dairyland Greyhound Park*, a closely divided Wisconsin Supreme Court upheld a Contracts Clause claim directed, in relevant part, to whether a state constitutional amendment removed the governor's authority to *renew* compacts that

The next question is whether IGRA changes that result. The answer also appears "no." IGRA § 2910(d)(1) imposes three independent conditions precedent to lawful Class III gaming: authorized under an approved ordinance or resolution; permitted under state law; and conducted in conformance with an approved compact. Inclusion in a compact, absent the State's "permit[ting] such gaming," is insufficient to establish the legality of Class III gaming. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 720 (9th Cir. 2003) ("we are mindful of cases that characterize as 'patent bootstrapping' the notion that a Tribal–State compact can satisfy both the 'permits such gaming' requirement under § 2710(d)(1)(B) and the compact requirement under § 2710(d)(1)(C)"). Although the Ninth Circuit adopted a broad construction of the term "permits such gaming" in *Artichoke Joe's*, even that reading of § 2910(d)(1)(B) does not remove state authority to pare back previously "permit[ted]" gaming for policy or constitutional compliance reasons. 353 F.3d at 722 ("[T]he word 'permit' in this statute does not necessarily require an affirmative act of legal authority in order to 'permit' conduct. California may 'permit' class III gaming within the meaning of IGRA even if it 'acquiesces, by failure to prevent' class III gaming.").

That said, whether the State's reserved powers encompass repeal of the tribal video machine gaming authorization in § 67-429B requires the doctrine's application in a unique statutory context.[5] Precisely how IGRA will be held to affect the common law rule cannot be predicted with any measure of a certainty. A plausible reserved powers defense to a Contracts Clause claim does exist.

B. Contracts Clause Analysis

Under the Contracts Clause, courts

> first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship." . . . This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.

Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992) (citations omitted). If each of these factors exists with respect a contract to which the allegedly impairing governmental entity is a party, that entity "has the burden of establishing that the [impairing law] is both reasonable and necessary to an important public purpose." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 894 (9th Cir. 2003). Two considerations are important on this score. First, "[a]n impairment may not be considered necessary if there is 'an evident and more moderate course' of action that would serve Defendants' 'purposes equally well.'" *Univ. of Hawai'i Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th

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authorized gaming prohibited under the amendment. 719 N.W.2d at 428-39. In so doing, the majority did not address substantively the reserved powers doctrine. One of the two dissents did and observed that "[t]he majority opinion puts the cart before the horse" because the cases relied upon by the majority, "with the exception of a portion of *U.S. Trust Co.* that the majority opinion chooses to ignore, have no application to the initial contract question presented here." *Id.* at 496 (Roggensack, J., concurring in part and dissenting in part) (footnote omitted).

[5] The 1994 *Coeur d'Alene Tribe* decision did reject the tribes' contention "that the State could not change its gaming laws after compact negotiations were requested because to do so would deprive them of vested rights." 842 F. Supp. at 1276. It reasoned that "IGRA makes it clear that the Tribes have no right, vested or inchoate, to conduct Class III games until a compact has been negotiated with the state." *Id.* Only after secretarial approval of a compact could a tribe "arguably claim a vested right to conduct a particular form of Class III gaming." *Id.* The facts here, of course, differ because compact rights are involved, thereby bringing into play the "arguabl[e] claim" not at issue in the earlier case.

Cir. 1999). Second, an impairment is also not reasonable "if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred.'" *Id.*

No doubt exists here that the draft bill, insofar as it repeals §§ 67-429B and -429C, operates to impair substantially the northern tribes' express compact rights and, by virtue of the Shoshone-Bannock compact's most-favored-nation provision, that tribe's rights. It removes from the compacts a lucrative, indeed likely the most lucrative, form of gaming. The controlling issue is therefore whether the State could carry its burden of showing that this impairment is reasonable and necessary. The answer to this question is more likely than not "no" because of the second "reasonable and necessary" consideration.

It appears that the first "reasonable and necessary" consideration—the absence of "evident and more moderate course of action"—would be satisfied. As an ordinary matter, the alternative "course of action" would be statutory, and a more tailored legislative response does not appear to exist. Tribal video machines are either lawful or not. This is, however, the unusual case because the amendments are aimed at conforming tribal gaming to Article III, Section 20. The State, in theory, could achieve that objective through litigation that would allow a neutral decisionmaker to determine the constitutionality of § 67-429B. The issue accordingly is whether a litigation alternative exists. One controlled by the State may be present, but it requires repeal of § 67-429B.

The Secretary's 2003 approval of Proposition One conforming amendments cannot be challenged by the Governor because the six-year limitation period in 28 U.S.C. § 2401(a) that applies to actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Wind River Min. Corp. v. United States*, 946 F.2d 710, 712 (9th Cir. 1991).[6] Non-APA litigation by the Governor (or the State more generally) over whether § 67-429B authorizes a form of gaming that violates Article III, Section 20 also does not appear possible. Any court challenge against the statute would either name the tribes as parties or affect their interests so as to require their joinder as parties. *See* I.R.C.P. 19; Fed. R. Civ. P. 19. In either instance, the tribes' immunity from suit would preclude the case from going forward. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014) (tribes possess common law immunity from suit absent waiver or congressional abrogation); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002) (tribes indispensable parties in suit challenging governor's authority to enter into new gaming compacts). Finally, the compacts contain a dispute resolution procedure when, to quote representative language, a "party believes that the other party has failed to comply with any requirement of this Compact." 1992 Coeur d'Alene Class III Gaming Compact Art. 21.1. But no apparent dispute exists over whether the tribal video machine games comply with § 67-429B; the dispute is over whether the statute complies with the constitution. Simply put, the tribes do not violate the compacts as currently approved by offering video machine gaming. Enactment of the draft bill, however, arguably will negate the reference to "Section 67-429B, Idaho Code" in the Proposition One compact amendments approved by the Secretary in 2003, thereby providing a basis for the State to initiate the dispute resolution process. In

[6] It is theoretically possible that a non-State party with standing can satisfy § 2401(a) to the extent the right of action accrued six years or less before the lawsuit commenced. *Id.* at 715 ("If . . . a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require a more 'interested' person than generally will be found in the public at large."). The federal court *Knox* challenge to the Secretary's 2003 approval of the northern tribes' compact amendments represents such a suit. The State, however, has no control over the filing of a *Knox*-like case.

other words, repeal of § 67-429B may be the only means of creating a dispute that can be resolved arbitrally or judicially.

The difficulty with defending against a Contracts Clause claim under Ninth Circuit precedent stems from second "reasonable and necessary" consideration: whether the "problem sought to be resolved" by the impairment was present when the contractual obligation initially arose. The constitutionality of §§ 67-429B and -429C is not a new issue. It was raised before and after Proposition One's passage. *Noh v. Cenarrusa*, 137 Idaho 798, 800-01, 53 P.3d 1217, 1219-20 (2002) (plaintiffs lacked standing and further failed to establish ripe controversy in pre-election challenge); *Bell v. Cenarrusa*, No. 29226 (Idaho Sup. Ct. June 2, 2003) (dismissing post-election challenge for lack of original jurisdiction). The Legislature also had the opportunity to repeal Proposition One. *E.g.*, *Gibbons v. Cenarrusa*, 140 Idaho 316, 319-20, 92 P.3d 1063, 1066-67 (2002). The question thus becomes whether the Legislature's ability to repeal Proposition One has expired.

It thus seems probable that the second consideration would weigh against the reasonableness and necessity of the proposed legislation. The tribes have engaged in video machine gaming under the compacts for over 13 years without state interference, invested substantially in their casinos and governmental initiatives more generally based in part on revenue from that gaming, and (with the exception of the Shoshone-Bannock Tribes) made the contributions required under § 67-429C(1)(c). Removing this source of tribal funding would have significant impact not only on new tribal governmental activities but also on their ability to discharge liabilities previously undertaken on the assumption that tribal video machine revenue would continue to flow into the tribes' coffers. Nothing to this Office's knowledge has changed in the interim to warrant the proposed repeal or these quite severe consequences. *See Dairyland Greyhound Park*, 719 N.W.2d at 436-37 ("[t]o determine the reasonableness of a constitutional amendment, we evaluate whether the social concerns that prompted the changes were foreseeable when the State entered into the compact, and whether the conditions have changed sufficiently since the State entered the contract"). In this regard, a court may well be troubled by the Legislature's failure to exercise its power to repeal the Proposition One provisions during the 13-year period despite the fact that its constitutionality was challenged both immediately before and after the 2002 general election and in the *Knox* litigation. This Office does not suggest that an arbitration panel or court should resolve the second consideration against the repeal's validity, but a substantial possibility exists that will result.

III. CONCLUSION

This Office understands that the underlying rationale for the draft legislation is to reflect the Legislature's view that the gaming permitted under § 67-429B violates Article III, Section 20. However, repealing that provision will prompt arbitral or federal court litigation over the the Compacts Clause issue. The outcome of that litigation is uncertain because, with the exception of *Dairyland Greyhound Park*, that issue has not been decided in even a roughly comparable factual or legal context. Notwithstanding the differences between the Wisconsin and Idaho controversies, it is not unreasonable to assume that much of the analysis by the Wisconsin Supreme Court majority will be given substantial weight by the federal district court and, on appeal, by the Ninth Circuit. Consequently, as discussed above, the reserved powers doctrine may provide the best defense for the bill if introduced and adopted. The Legislature should recognize that litigation almost certainly will end only with the United States Supreme Court's denying certiorari or issuing an opinion on the merits.

Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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