Nos. 12-5134 & 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

State of Oklahoma,
Appellee/Plaintiff,
v.
Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; Thomas Givens, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; John Does No. 1 as 2nd Warrior and member of the Kialegee Tribal Town Business Committee; John Does Nos. 2-7, as members of the Kialegee Tribal Town Business Committee; Florence Development Partners, LLC; and Kialegee Tribal Town, a federally chartered corporation,
Appellants/Defendants.

On Appeal from the United States District Court
For the Northern District of Oklahoma (Frizzell, C.J.)
Case No. 4:12 cv-00054-GFK-TLW

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN SUPPORT OF APPELLEE STATE OF OKLAHOMA SEEKING AFFIRMANCE OF THE DISTRICT COURT DECISION

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Introduction

The State of New Mexico (State") and the gaming tribes within its borders have a long and contentious history under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. *See State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535 (10th Cir. 1997); *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379 (10th Cir. 1997); *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768, 2002 U.S. App. LEXIS 1579 (10th Cir. 2002) (unpublished). These cases addressed two issues: (1) the validity of tribal-state compacts entered into by New Mexico's governor, and (2) enforcing revenue sharing provisions of tribal-state compacts.

The above cases are important because they established legal precedents that allowed the State and the tribes to resolve their differences and enter into enforceable compacts for the regulation of high stakes gaming. These cases established that, under IGRA, the State has a vital role in the regulation of Indian gaming by ensuring that criminal elements do not infiltrate Indian gaming. They established that the State and tribes could protect their respective public policies through the compact negotiation

process. They established that the federal courts have subject matter jurisdiction to resolve important federal law questions under IGRA.

The Appellants argue they are free to ignore IGRA by violating the terms of a tribal-state compact. They further argue that the federal courts are powerless to address the violations, even violations of federal criminal laws. If the Appellants succeed in their arguments, there will be little incentive for states and tribes to work in a cooperative fashion to regulate Indian gaming. Congress intended that a negotiated tribal-state compact would be the best method to regulate high stakes Indian gaming. Congress's intent will be thwarted if tribal-state compacts cannot be interpreted or enforced by the federal courts.

Interest of Amicus Curiae

Congress enacted IGRA to balance the states' interest in regulating high stakes gambling within their borders and the tribes' resistance to state intrusions on their sovereignty. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1289 (D.N.M. 1996); S.Rep. No. 100-446, 100th Cong., 2nd Sess. at 13.

IGRA provides for three types of gaming: Class I, Class II and Class III. Each is subject to a different regulatory scheme. Only Class III gaming, high-stakes casino-style gaming, is at issue in this case.

IGRA dictates that Class III gaming be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the State. 25 U.S.C. § 2710(d). The rationale for the compact mandate is that "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place," and thus "a logical choice is to make use of existing State regulatory systems" through a negotiated compact. S.Rep. No. 100-446, at 13-14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84.

Gaming on Indian lands is a federal crime unless it is conducted in accordance with IGRA's requirements. *Pueblo of Santa Ana*, 104 F.3d at 1549. In *Texas v. United States*, 497 F. 3d 491, 507-08 (5th Cir. 2007), the Court explained how Congress coordinated IGRA with federal criminal statutes by making the tribal-state compact the exclusive means to avoid criminal liability.

> The tribal-state compact is in fact so central to the IGRA process that it is the only means by which the tribe can avoid incurring liability under other federal statutes that regulate Indian gaming. Two statutes, both of which antedate IGRA, are relevant to this issue. First, the Johnson Act, 15 U.S.C. § 1175 et seq., prohibits the possession or use of "any gambling device . . . within Indian country." Id. § 1175(a). Second, 18 U.S.C. § 1166 punishes gambling in Indian country in derogation of state law. Congress coordinated IGRA with these criminal provisions by providing that the tribal-state compact is the exclusive means of avoiding gaming-related violations. Apart from the limited circumstances in which IGRA allows Class III gaming

> to be imposed by the Secretary following exhaustion of the judicial good-faith/mediation process, Class III gaming remains illegal in Indian country without a tribal-state compact.

IGRA's requirement of a tribal-state compact clearly demonstrates that Congress was concerned with the negative consequences associated with high-stakes Class III gaming. Congress allowed states to have more involvement in such gaming activities to protect tribes and other state residents. In large part, the state provides this protection in the form of regulatory oversight. The state is given the opportunity to negotiate for a significant regulatory role over Class III gaming through the tribal-state compact process. *Pueblo of Santa Ana*, 932 F. Supp. at 1292-93, citing *Lac du Flambeau Band of Lake Superior Chippeaw Indians v. Wisconsin*, 770 F. Supp. 480, 481 (W.D. Wis. 1991); S.Rep. No. 100-446, 100th Cong., 2d Sess. at 13.

The federal government has plenary power over Indian affairs. Thus, Congress could have enacted legislation permitting Indian tribes to conduct all forms of gaming on their reservations without any input from the states. Instead, however, Congress gave states a significant role in the regulatory scheme. *Id*. IGRA's provisions reveal that Congress took great pains to provide states a meaningful opportunity to become intimately involved in

the regulation of gaming in order to protect themselves and the tribes from gaming's possible negative effects. *Id*. at 1296.

State interest in regulating Class III gaming within its borders is not subservient to the tribal interests involved. "We do not agree that Congress expressed little concern for state interests when it enacted IGRA. Indeed, the legislative history of the Act is replete with references to the need to accommodate tribal *and* state interests." *Pueblo of Santa Ana,* 104 F.3d at 1554.

Summary of Argument

The State of New Mexico agrees with the arguments of the State of Oklahoma to affirm the decision of the District Court under review. The State of New Mexico files this amicus brief to underscore previous decisions of this Court concerning federal question jurisdiction under IGRA that Appellants do not address. This amicus brief will address two important state interests.

First, federal courts have federal question jurisdiction to interpret and enforce the provisions of IGRA. "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court. Thus, we indisputably have the *power* to determine whether a Tribal-State compact is valid." *Pueblo of Santa Ana,* 104 F.3d at

1557. Second, IGRA provides a process to enforce tribal-state compacts entered into under IGRA.

Argument

I. There is Federal Question Jurisdiction Under IGRA

The federal question statute, 28 U.S.C. § 1331, states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." For a case to arise under federal law within the meaning of § 1331, the plaintiff's well-pleaded complaint must establish one of two things: (1) either that federal law creates the cause of action, or (2) that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1023 (10th Cir. 2012).

The complaint in this case, brought pursuant to IGRA, states both a cause of action created by IGRA and a substantial question of federal law, the resolution of which is necessary for relief under IGRA. Specifically, this case presents the substantial question of whether the lands on which the Appellants want to build a casino qualify as "Indian land" under IGRA. The resolution of that question is a matter of federal law. It is a substantial question because IGRA repeatedly states that gaming on "Indian lands"

under IGRA is an essential element to exempt the gaming from federal criminal law.

The complaint alleges that the Appellants are in the process of building a high stakes gambling casino in violation of IGRA. The complaint alleges that the casino is not located on the Indian land of the tribe conducting the gaming and its location violates the terms of the tribal-state compact. The complaint alleges violations of the following IGRA provisions:

> Class III gaming activities shall be lawful on **Indian lands** only if such activities are **conducted in conformance with a Tribal-State compact** entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710 (d)(1)(C) (emphasis added).

> Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), **class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact** entered into under paragraph (3) by the Indian tribe that is in effect.

25 U.S.C. § 2710 (d)(2)(C) (emphasis added).

This Court has addressed two factual situations in which the State of New Mexico sought relief in federal court under IGRA: (1) to seek a declaration that certain compacts were not valid pursuant to IGRA, and (2) to enforce compact provisions requiring revenue sharing.

In *Pueblo of Santa Ana*, 104 F.3d 1546, this Court addressed federal question jurisdiction to hear a case dealing with compact validity under IGRA. In the decision, this Court stated, "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court. Thus, we indisputably have the *power* to determine whether a Tribal-State compact is valid." *Id*. at 1557. This Court subsequently rejected an argument by tribal parties that this portion of *Pueblo of Santa Ana* was wrongly decided because the parties did not contest jurisdiction in that case.

> We have an independent duty to satisfy ourselves that we have jurisdiction over a case. *Phelps v. Hamilton*, 122 F.3d 1309, 1315-16 (10th Cir. 1997). We satisfied that duty in Pueblo of Santa Ana, and the same result obtains here. As the district court held, 25 U.S.C. 2710(7) confers jurisdiction over the state's counterclaim.

Mescalero Apache Tribe, 131 F.3d at 1386.

This Court again found federal question jurisdiction to hear a state case against an Indian tribe to enforce a compact provision under IGRA, relying on *Santa Ana* and *Mescalero*. In *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768 (2002) (unpublished), the district court order under review held that IGRA provides a solid foundation for both federal question jurisdiction and a waiver of tribal immunity. Relying on *Santa Ana*, the district court stated: "Case law makes it clear that the IGRA recognizes

the existence of federal question jurisdiction when the issue before the Court is the **scope** and **validity** of a tribal-state gaming compact." *State of New Mexico v. Jicarilla Apache Tribe*, No. CIV 00-851 BB/LFG, 2000 U.S. Dist. LEXIS 20666 (D.N.M. Dec. 6, 2000) (unpublished), at 4 (emphasis added). The district court found that because the State had filed the case, the Court had jurisdiction over the subject matter and the parties. In affirming the district court, this Court stated:

> We have carefully reviewed the arguments of the parties and the record in this case. We AFFIRM the district court's decision that, at this juncture in the case, it has jurisdiction over the case and the parties. *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

State of New Mexico v. Pueblo of Pojoaque, 30 Fed. Appx. at 769

Appellants ignore this precedent and assert that 25 U.S.C. § 2710(d)(7)(A)(ii) limits federal question jurisdiction to cases with three elements: (1) a class III gaming activity, (2) located on Indian land, and (3) conducted in violation of a tribal-state gaming compact. *See* Appellants' Brief at 21. Appellants' argument must fail under this Court's precedent. This Court's decisions establish that there is federal question jurisdiction to address important issues that arise under IGRA and tribal-state compacts entered into pursuant to IGRA. Clearly, whether gaming is properly

conducted on Indian land as defined by IGRA is an important and essential question to be answered by the federal courts.

The Ninth Circuit has also rejected Appellants' argument. In *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), the tribe and state had a dispute over the return of some fees paid to the state. The state argued that 25 U.S.C. § 2710(d)(7)(A)(ii) limited jurisdiction and the tribe's allegations did not state every element found in the statute. The Court rejected the state's arguments:

> We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Id. at 1056.

II. Tribal-State Compacts Are Enforceable Under IGRA

Under IGRA, a compact may include "subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). IGRA and the Oklahoma tribal-state compact require that Class III gaming activities must be on Indian land as defined by IGRA.

Appellants argue that there are no gaming activities, thus there is no jurisdiction under IGRA. Appellant's argument is similar to the one rejected

in *State of New Mexico v. Jicarilla Apache Tribe*, 2000 U.S. Dist. LEXIS 20666. In that case, the tribe argued that the State was not seeking to enjoin a Class III gaming activity but instead was seeking to enforce a revenue sharing agreement. The district court was unpersuaded, stating, "The Court must reject this crabbed statutory interpretation." *Id*., at 4. The district court went on to find that revenue sharing based upon the profits from gaming machines, were directly related to gaming activities. *Id.* at 4. This Court upheld the district court decision in *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768.

Conclusion

For the reasons argued by the State of Oklahoma and Amicus Curiae State of New Mexico, the decision of the District Court should be affirmed.

Respectfully submitted,

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Pursuant to Fed. R. App. At P. 32(a)(7)(B), I hereby certify that the Amicus Curiae Brief for the State of New Mexico is proportionally spaced and contains 2,369 words, exclusive of the items identified in Fed. R. App. At P. 32(A)(7)(B)(iii) as not counting toward the type-volume limitation. This figure was calculated through use of the word count function of Microsoft Word 2010, which was used to prepare the brief.

S/ Christopher D. Coppin
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CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Christopher D. Coppin, certify that all required privacy redactions have been made and, with the exceptions of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk and that the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, i.e. Sophos Protection, Version 10.0 updated January 25, 2013, and according to the program, are free of viruses.

s/ Christopher D. Coppin
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, a true and complete copy of the foregoing Amicus Curiae Brief for the State of New Mexico was electronically transmitted to the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the parties of record below.

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