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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The Tohono O'odham Nation,

Plaintiff,

v.

Douglas Ducey, Governor of Arizona; Mark Brnovich, Arizona Attorney General; and Daniel Bergin, Director, Arizona Department of Gaming, in their official capacities,

Defendants.

Case No. 2:15-cv-01135-DGC

DEFENDANT DANIEL BERGIN'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)

ORAL ARGUMENT REQUESTED

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In its opposition to Director Bergin's motion to dismiss, the Nation retreats from the positions it staked out in its complaint, disclaiming its causes of action under IGRA and the Supremacy Clause, re-characterizing its requested injunctive relief in vague terms, and turning to extrinsic sources in an effort to show that there is a live controversy over Class II gaming. But these eleventh-hour shifts cannot save the Nation's complaint from dismissal.

The Nation's attempt to manufacture a live controversy with respect to Class II gaming by relying on the testimony of one of its declarants is unavailing. The Nation cannot plausibly maintain that ADG's actions have "compromised and will continue to compromise vendors' and employees' willingness to work with the [West Valley casino], even as a Class II facility." D.E. 59 at 8. The Nation's own representatives admitted during deposition [redacted] Indeed, the Nation steadfastly maintains [redacted]. Based on those facts alone, the Nation's contention that a live controversy exists as to Class II gaming must be rejected.

Next, abandoning its causes of action under the Supremacy Clause and IGRA, the Nation seeks to bring a generalized action for equitable relief against state officials under an *Ex parte Young* theory so as to circumvent the State's sovereign immunity. The Ninth Circuit has made clear that IGRA does not provide such a general private right of action (*Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000)), and those causes of action it does permit are paired with limited remedies (*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)). Allowing the Nation to vindicate its purported "federal statutory right" to engage in Class III gaming through an *Ex parte Young* action would be inconsistent with Congress's "intricate" remedial scheme, *Seminole Tribe*, 517 U.S. at 74, which provides, among other things, that claims for breach of a compact may be resolved in accordance with procedures and remedies provided by the compact.

Indeed, the Nation's preemption claim with respect to Class III gaming founders on the reality that it is only a claim that ADG is violating the terms of the tribal-State Compact. The Nation claims a "right to engage in Class III gaming" (D.E. 59 at 7), but it may do so only "in conformance with a Tribal-State compact … in effect." 25 U.S.C. § 2710(d)(1)(C). The Nation blithely assumes this condition is "satisfied." D.E. 59 at 11. But the compact requires ADG to provide certain regulatory approvals as a condition precedent to Class III gaming, and ADG is withholding them on the basis of a state gaming supervision law that was enacted in conjunction with the compact. The Nation alleges that this ground is "outside the requirements of … the Compact," and "not found in … the Compact." D.E. 1, ¶¶ 101, 108. That is wrong, but even if it were not, the fact that the compact makes ADG regulatory approvals a condition precedent to Class III gaming demonstrates that IGRA does not displace the State from the regulation of Class III gaming. To the contrary, the entire history of IGRA shows that it was enacted to permit more State power, not less, over gaming on Indian lands. And the Nation's conflict preemption argument fails for the same reason: The Nation may engage in Class III gaming only "in conformance with" the compact and the compact here permits ADG to withhold the regulatory approvals necessary for Class III gaming. The Nation's claim that ADG is withholding approvals on a basis "not found … in the Compact" is a claim that ADG is violating the compact, not that ADG is violating IGRA.

Finally, the Nation attempts to avoid Director Bergin's commandeering challenge by reformulating its request for injunctive relief as seeking an order barring Director Bergin and other state officials from relying on "impermissible considerations" in deciding whether or not to grant certain licenses and certifications. D.E. 59 at 16. But the Nation never specifies what those considerations are, other than to suggest that any consideration, other than those specifically enumerated in the compact's non-exclusive list, is impermissible. As such, the injunction is either impermissibly vague, as it does not clearly articulate a basis to restrain Defendants' actions, or else effectively forces ADG to issue the licenses and certifications the Nation demands and thus violates the Tenth Amendment's prohibition on commandeering.

II. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction Over The Nation's Claims.

1. There Is No Live Controversy Over Class II Gaming.

Director Bergin's motion to dismiss clearly and unequivocally stated that the State "has never claimed to have the authority to regulate Class II gaming." D.E. 50 at 6. Nevertheless, the Nation maintains that there is a "live, ongoing controversy over Class II gaming" because ADG supposedly has "compromised, and will continue to compromise vendors' and employees' willingness to work with the [West Valley casino], even as a Class II facility." D.E. 59 at 8. As evidence of this "compromise[d] … willingness," the Nation cites to paragraphs from the Declaration of Elizabeth Francisco filed in support of its motion for preliminary injunction, which is not part of its complaint. *See id*. at 8 n.4.

This Court may consider "evidence beyond the complaint" when reviewing a factual challenge to jurisdiction, and "need not presume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). That extrinsic evidence makes it readily apparent that the Nation's allegations are wholly implausible. In discovery, the Nation provided no evidence to substantiate any lack of "willingness" on the part of vendors or employees to provide goods and services to the West Valley casino if it were to open as a Class II facility. D.E. 62 at 8. To the contrary, [redacted]. Nor has the Nation produced any evidence of any employee having withdrawn an application for employment or otherwise having decided not to seek work at the facility. *Id*. at 9, citing Hoffman Decl., Exs. C, M, V. Additionally, in opposition to the Nation's motion for a preliminary injunction, Director Bergin cited [redacted]

[redacted]. As such, the Nation's allegations that the injuries are "real" and "ongoing" (D.E. 59 at 8) simply cannot be credited and do not give rise to a claim for declaratory relief.

ADG has made its position regarding Class II gaming clear to the Nation, both in its motion to dismiss, and in its recent correspondence to the Nation, in which it reiterated that "the State does not regulate Class II gaming" and is "not seeking to prohibit … provision of goods and services to a Class II-only facility." ADG also has made that "clear to any vendor who inquired before [the Nation] filed [its] complaint" and thereafter. *See* Ex. 1 (Aug. 19, 2015 Ltr. from P. Irvine to D. Spinelli). The purported live "controversy" simply does not exist. The Nation is not entitled to an advisory opinion about the lawfulness of its Class II facility under state law, nor is it entitled to an order directing ADG to stop doing something it has never done or had any intention of doing.

2. *Ex Parte Young* Does Not Permit The Nation's Suit Against State Officials To Enforce The Nation's Claimed Right To Engage In Class III Gaming.

The Nation does not dispute that that the State has not waived its or its officials' immunity from suit in federal court under the Eleventh Amendment. *See* D.E. 50 at 5. Instead, the Nation contends it can circumvent that jurisdictional bar because its "suit readily satisfies the elements of an *Ex parte Young* action." D.E. 59 at 4–5. But as the Supreme Court recently explained, the *Ex parte Young* doctrine is "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015). Where "'Congress has provided what it considers to be adequate remedial mechanisms,'" the Court has "refused to supplement that scheme with one created by the judiciary," *i.e.*, with *Ex parte Young* actions. *Seminole Tribe*, 517 U.S. at 74 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)). And as both the Supreme Court and the Ninth Circuit have recognized, Congress, in crafting IGRA, created a limited remedial scheme and thereby demonstrated "intent to foreclose" the implied remedy under *Ex parte Young* that the Nation now invokes.

The Supreme Court made this clear in its *Seminole Tribe* decision. Responding to an argument in the dissent that, under the majority opinion, there could never be an *Ex parte Young* action when Congress had enacted a "limited remedial scheme," the Court said, "[w]e find only that Congress did not intend that result in the Indian Gaming Regulatory Act." *Seminole Tribe*, 517 U.S. at 75 n.17. In accordance with that holding, the Ninth Circuit has explained "where IGRA creates a private cause of action, it does so explicitly," and does not provide a "general private right of action." *Hein*, 201 F.3d at 1260;[1] *see also Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1049 (11th Cir. 1995) ("[i]n the face of [the] express rights of action" that Congress "explicitly" provided to "management contractors … [and] other aggrieved parties," no private right of action could be implied).

The Nation contends that *Seminole Tribe* forbids *Ex parte Young* actions only as to "one particular right conferred by IGRA" as to which Congress had provided an "elaborate remedial scheme." D.E. 59 at 5. If that were true, then *Ex parte Young* would provide exactly the "general private right of action" that, according to the Ninth Circuit in *Hein*, IGRA does not. Indeed, it would render the causes of action that IGRA explicitly does provide against the State and tribes, *see* 25 U.S.C. § 2710(d)(7)(i) & (ii), superfluous.

But even if the Nation's readings of *Seminole Tribe* and *Hein* were correct—and they are not—under the logic of *Seminole Tribe*, *Ex parte Young* suits at least are foreclosed where Congress has provided an alternative remedial scheme. Here, the Nation claims that, by withholding regulatory approvals necessary under the tribal-State compact for Class III gaming, the State is unlawfully interfering with its "right to engage in class III gaming" (Opp. 7) "conducted in conformance with a Tribal-State compact … in effect." 25 U.S.C. § 2710(d)(1)(C). But that claim necessarily turns on the Nation's assertion that ADG's

[1] The Nation contends *Hein* is "inapposite" (D.E. 59 at 7 n.3) and attempts to limit its holding to the facts of that case. *Id*. at 11 n.5 ("The Ninth Circuit held that IGRA did not create a right of action for the wrong alleged."). But the Nation's cramped reading of *Hein* finds no support in the expansive language of that decision, and the Ninth Circuit nowhere states that its holding is limited to the facts of that case.

withholding of regulatory approvals for Class III gaming violates the State's compact with the Nation. Congress explicitly envisioned that such claims for breach of compact would be redressed according to the compact's "provisions relating to … remedies for breach of contract." *See id.* § 2710(d)(3)(C)(v). And, of course, the compact here contains detailed provisions governing the arbitration of disputes. D.E. 1-1 at 55–58. The Nation cannot circumvent the remedial scheme Congress prescribed for disputes under tribal-State compacts by repackaging the dispute as a violation of a right under IGRA to engage in gaming permitted "in conformance with a Tribal-State compact" and filing an action for injunctive relief under *Ex parte Young*. Here, as in *Seminole Tribe*, the fact that Congress provided for a remedial scheme that—because the State would be agreeing to it in its tribal-State compact—"is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create" such relief for claims that a State is not performing its obligations under the compact. 517 U.S. at 76.[2]

B. The Nation's Complaint Fails To State A Claim On Which Relief Can Be Granted.

1. The Nation's Appeal To "This Court's Equitable Authority" Does Not Grant It The Right To Seek Relief Against The State.

Recognizing that neither IGRA nor the Supremacy Clause authorize its suit (D.E. 50 at 8–9), the Nation now contends it "is not invoking a 'right of action' under either" one, but rather is resting on "federal courts' inherent equitable power." D.E. 59 at 10. But the Nation did not bring this case under the All Writs Act, 28 U.S.C. § 1651; the very first paragraph of

[2] *Friends of Amador County v. Salazar*, 2010 WL 4069473, at *3–4 (E.D. Cal. Oct. 18, 2010) and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1109–10 & n. 34 (E.D. Cal. 2002) are not to the contrary. In *Amador County*, a group of private citizens sought to challenge a tribal-state compact, and the court ruled that the *Seminole Tribe* exception to *Ex parte Young* was inapplicable because "IGRA [did] not provide a specific method for citizens to challenge the legitimacy of determinations of eligibility for class III gaming." 2010 WL 4069473, at *4. *Norton*, similarly, involved a challenge to a tribal-state compact from a group of California card clubs and charities. Thus, although there may not have been a "detailed remedial scheme" to enforce the rights of those groups under IGRA, the Nation has no such excuse, as it is a party to the tribal-State compact which *does* provide such a scheme.

the Nation's complaint alleges that "[t]he Nation brings this action seeking equitable and declaratory relief against Defendants … ***for conduct that violates the Supremacy Clause of the U.S. Constitution and the Indian Gaming Regulatory Act***." D.E. 1 ¶ 1 (emphasis added).

In any event, for all the reasons stated *supra*, section A.2, as in *Seminole Tribe* and *Armstrong*, there is no general private right of action to enforce the asserted rights under IGRA. *See Hein*, 201 F.3d at 1260. And certainly IGRA provides no right to sue in federal court under *Ex parte Young* for claimed violations of a tribal-State compact when the compact in question provides its own "carefully crafted and intricate remedial scheme" *Seminole Tribe*, 517 U.S. at 73–74.

2. IGRA Does Not Preempt The State's Authority To Withhold Regulatory Approvals In Connection With Class III Gaming.

IGRA was enacted to *permit* States to exercise authority over tribal gaming, not to prohibit it. *See*, *e.g.*, *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1298–99 (9th Cir. 1998) (IGRA "gave [S]tates considerable say over gambling in Indian country" and "shifted power to the [S]tates"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715–16 (9th Cir. 2003) (noting that "Congress enacted IGRA as a means of granting [S]tates some role in the regulation of Indian gaming" and stating that the "compacting process gives to [S]tates civil regulatory authority that they would otherwise lack under [*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)]"). IGRA did so by permitting States to enter into tribal-State compacts regarding on-reservation gaming, in which they were allowed to address, among other things, "the application of the criminal and civil laws and regulations of the … State that are directly related to, and necessary for, the licensing of such [gaming] activity"; "standards for the operation of such [gaming] activity and maintenance of the gaming facility, including licensing"; and "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(i), (vi), (vii). The Nation thus has no choice but to acknowledge that "a state can apply its general civil laws to gaming . . . though a tribal-state compact." D.E. 59 at 12.

That is all that ADG is doing here. As part of Proposition 202, which approved the tribal-State compact at issue, the Legislature enacted certain statutes intended to assist the State with enforcement of the compact, including A.R.S. § 5-602. *See* Laws 2002, Ch. 111, § 1. In accordance with that law, ADG has notified the Nation that it cannot approve the West Valley casino for Class III gaming. The Nation asserts that ground is "independent of the Compact" (D.E. 59 at 12), but that is the heart of the dispute. Whoever is right about what the compact permits, there is no doubt that ***IGRA permits ADG to regulate in accordance with the compact***. That should be the end of both the Nation's field preemption argument and its conflict preemption argument. Any question of what is in accordance with the compact should be addressed under the dispute resolution procedures provided by the compact.

The Nation attempts to evade this conclusion by claiming that this Court already has determined that Class III gaming at the West Valley casino is "in conformance with the compact" and thus is "'expressly permitted by [IGRA]'" (D.E. 59 at 14 (citing *Arizona v. Tohono O'odham Nation*, 944 F. Supp. 2d 748, 753–54 (D. Ariz. 2013)); *see also id.* at 15 ("This Court has already held that the Compact permits the Nation to game at the [West Valley casino]")). That is an impossibility because the compact requires ADG's approvals as a condition precedent to Class III gaming and no aspect of the prior iteration of this litigation touched on—much less circumscribed—ADG's regulatory authority under the compact. And, in fact, consistent with section 2710(d)(1), what this Court held is that the Nation could engage in Class III gaming as long as it was pursuant to, and in conformance with, a valid tribal-State compact. *See TON I*, 944 F. Supp. 2d at 754 (IGRA "permits Class III gaming on 'Indian lands,' but requires that the gaming be 'conducted in conformance with a Tribal-State compact'"). *TON I* did not hold that the Nation had an unqualified right to engage in Class III gaming. "[C]onformance" with the compact requires ADG's regulatory approvals. The Nation's disagreement with ADG's decision to withhold those approvals is, as the State noted in its Motion, "a dispute about [the terms of] the compact" and what those terms permit. D.E. 50 at 12. That disagreement is not preempted by IGRA; IGRA contemplates precisely these

disputes and further contemplates that they would be addressed under procedures and remedies provided by the compact. 25 U.S.C. § 2710(d)(3)(C)(v).

3. The Nation's Reformulated Request For Injunctive Relief Is Impermissibly Vague.

In yet another attempt to escape from the causes of action the Nation actually pleaded and the relief it requested in its complaint, the Nation now argues that it is not seeking to "force the State to certify" any person or entity, but rather is seeking an injunction "barring Defendants from refusing to issue certifications or denying regulatory approvals" based on "impermissible considerations." D.E. 59 at 16. The injunction the Nation sought in its complaint was quite different, however: that injunction requested, among other things, an order "barring Defendants from refusing to certify, revoking the certification of, or otherwise threatening or sanctioning vendors, employees, or others based on the provision of goods or services for Class III or Class II gaming at the West Valley Resort" and "from taking any other actions to obstruct the Nation from conducting Class III and Class II gaming." D.E. 1 at 32–33. The Nation apparently agrees that such relief would pose Tenth Amendment concerns, hence its attempt to disguise it in less objectionable terms. But the Nation's reformulated prayer for injunctive relief, if the Court decides to entertain it, fails on its own terms because it is utterly unclear what relief the Nation is asking the Court to grant.

Under Federal Rule of Civil Procedure 65(d), the language of injunctions must be "reasonably clear so that ordinary persons will *know precisely what action is proscribed*." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995) (quotations omitted). The Nation's injunction seeks to bar the State from relying on "impermissible considerations," but what those considerations actually are is anyone's guess. The Nation has not argued that it is unconstitutional or otherwise impermissible, as a general matter, for the State to enforce A.R.S. § 5-602(A), which calls for ADG to, among other things, "certify, as provided in tribal-state compacts, prospective gaming employees" and others, and in so doing, "promote the public welfare and public safety" and "prevent corrupt influences from infiltrating Indian gaming." Rather, the Nation seems to want this Court to bar the State from relying on

anything other than the non-exclusive list of determinations in Section 5(f) of the tribal-State compact in deciding whether to make those certification decisions. D.E. 59 at 17. But an injunction barring the State from doing anything but X is effectively the same thing as requiring it to do X, and faces exactly the same commandeering problem that Director Bergin referenced in his motion. D.E. 50 at 12–13. Because the Nation's requested relief is either too vague to comply with Rule 65(d)'s notice requirements, or else would effectively commandeer the State's authority to decide whether to issue certifications or other licenses, the Nation's request should be denied.

III. CONCLUSION

For the foregoing reasons, each of the Nation's claims for relief should be dismissed with prejudice.

DATED: August 21, 2015

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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