UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe; JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque,

Plaintiffs,

vs. Case No. 1:15-cv-00625 RB/GBW

STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY(sic) S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I-V,

Defendants.

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER

COME NOW Defendants State of New Mexico, Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, Carl E. Londene and John Does I-V, ("State Defendants") by and through counsel, Jerry A. Walz, Walz and Associates, P.C., and hereby respond to Plaintiffs' Request For Temporary Restraining Order ("TRO").

I. PROCEDURAL BACKGROUND.

The Court has scheduled a hearing for Friday, October 2, 2015, at 9 a.m., in Las Cruces as to whether the Court will grant or deny Plaintiffs' Request for a TRO. [Doc. 26]. The following events have occurred leading up to the Court's scheduling of this hearing:

1. Plaintiffs' filed their Motion for TRO and Preliminary Injunction late in the afternoon on Friday, September 25, 2015. [Doc. 23].

2. A Supplemental Memorandum was filed by Plaintiffs on Sunday afternoon, September 27, 2015, seeking an expedited issuance of the TRO, setting forth additional information for the Court to consider, and requesting a potential hearing date of either Monday, September 28, 2015, telephonically or on Tuesday, September 29, 2015. [Doc. 24]
3. The Court granted Plaintiffs' Motion to file a Supplemental Memorandum in Support of Motion for TRO and/or Preliminary Injunction on September 28, 2015. [Doc. 25].
4. The Court held a telephonic conference with counsel on the afternoon of September 28, 2015, to discuss scheduling of the hearing and then subsequently issued an order. [Doc. 25].
5. The Court in its instructions to counsel stated that the hearing would last two hours, each side would have 45 minutes to advance their positions, and the Court would decide how to utilize the remaining time. The Court further instructed the parties that no live witnesses and/or parties would be called, and that evidence would be submitted by proffer including affidavits.

It is in response to the scheduling of this hearing, and the pleadings filed by Plaintiffs, that State Defendants submit this Response. Even though State Defendants will show factually and legally why a TRO should not be entered, as a threshold matter the Court should determine, prior to acting on any request made by Plaintiffs, the important question as to whether this federal court has subject matter jurisdiction over any aspect of this case. Further, the State Defendants respectfully request that should a TRO be entered, that a full evidentiary hearing be scheduled before any Preliminary Injunction is issued.

By separate motions, State Defendants will file the following:

1. Motion and Memorandum to Dismiss Defendants Susana Martinez and Jeremiah Ritchie Based Upon Eleventh Amendment Immunity and Failure to State a Claim.

2. Defendants' Motion and Memorandum to Dismiss Count One Based Upon Eleventh Amendment Immunity and Lack of Subject-Matter Jurisdiction.[1]

3. Motion and Memorandum to Dismiss Defendants Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, Carl E. Londene and John Does I-V for Failure to State a Claim.

In this Response State Defendants will show by proffer and exhibits the following:

1. There is no basis for federal jurisdiction, therefore, Plaintiffs' equitable relief claims, as well as all claims, must be dismissed at the outset.
2. There is no subject matter jurisdiction for the Court to determine Plaintiffs' request based on any exception to *Ex parte Young*, 209 U.S. 123 (1908).
3. The State Defendants have not engaged in any regulatory actions against Plaintiffs as the compact between the State of New Mexico and Plaintiff Pueblo expired as of June 30, 2015.
4. The United States Attorney for the District of New Mexico has determined that without a compact in place the Pueblo of Pojoaque would violate federal law by continuing Class III gaming operations absent a Tribal-State compact or Secretarial prescribed procedures.

[1] Plaintiffs concur on Eleventh Amendment immunity grounds, but not for lack of subject matter jurisdiction, and the Pueblo reserves objections to form.

5. The Pueblo of Pojoaque nonetheless has continued to engage in Class III gaming operations after expiration of its compact with the State of New Mexico and after receipt of the letter from U.S. Attorney Damon Martinez.
6. Manufacturers and/or vendors as referenced in the Complaint by the Pueblo have not been instructed by any of the State Defendants that they cannot conduct business with the Pueblo.
7. U.S. Attorney Martinez, pursuant to his letter, stated that his decision not to take action against the Pueblo at this time did not create any rights or protection for third parties except as provided therein.
8. The Gaming Control Board ("GCB") has not taken any action as to manufacturers who may do business with the Pueblo of Pojoaque, and it is nothing but rank speculation as to what action, if any, the GCB may take in the future.
9. The alleged damages and irreparable harm claimed by Plaintiffs is based solely on conjecture and speculation, and is not based on scientific evidence; economic studies, published economic data, or any other measurable component. Rather, the Plaintiffs make unverified statements based on hearsay, speculation, and mere guess work that should not be considered by the Court.
10. Any claimed irreparable harm by the Plaintiffs has been brought about solely by their own actions.

II. OVERVIEW OF FEDERAL AND STATE GAMING REGULATION.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083(1987), the Supreme Court held that states could not regulate gaming on Indian lands. In response, Congress passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701-2721, which granted

"states some role in the regulation of Indian gaming." *Artichoke Joe's California Grand Casino v. Norton.* 353 F.3d 712, 715 (9th Cir.2003). "'IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.'" *Id.* (quoting *Artichoke Joe's v. Norton,* 216 F.Supp.2d 1084, 1092 (E.D.Cal.2002)).

IGRA divides gaming into three classes: Class I, which includes social games with prizes of minimum value and traditional forms of Indian gaming; Class II, which includes bingo and certain card games; and Class III, which includes all gaming that falls outside of Classes I and II, typically referred to as "casino-style" gaming. 25 U.S.C. §2703(7)(A), (7)(B), (8). Under IGRA, "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes[.]" *Id.* at §2710(a)(1). Class II gaming is also "within the jurisdiction of the Indian tribes," but subject to some federal regulation. *Id.* at §2710(a)(2).

Class III gaming is permitted only where (i) it is authorized by a tribal ordinance, (ii) conducted in a state that permits such gaming, and (iii) is "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State[.]" *Id.* §2710(d)(1).

New Mexico's stated policy with regard to gaming is that limited gaming activities are permitted in the state but only "if those activities are *strictly regulated* to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences." NMSA 1978, § 60-2E-2.(A) (emphasis supplied). In keeping with its declared public policy to strictly regulate gaming in the state, New Mexico's Gaming Control Act ("GCA") addresses numerous aspects regarding gaming and specifies certain activities which require licensing, including the sale, supply or distribution of any gaming device, and the manufacturing, fabrication, assembly,

programming or modification of a gaming device. *See* State of N.M., ex rel. NM Gaming Control Bd. v. Ten Gaming Devices, 2005-NMCA-117, 138 N.M. 426, 428-29, 120 P.3d 848, 850-51.

The New Mexico legislature, through the GCA, created the New Mexico Gaming Control Board ("GCB"). Affidavit of Jeffrey S. Landers at ¶ 3 (Attached Hereto as Exhibit "A"). The GCB has adopted rules regarding requirements for conducting gaming related activities and specifically adopted NMAC 15.10.9.F which provides that "failing to comply with all federal, state and local laws and regulations governing the operations of a gaming establishment, …," constitutes an unsuitable method of operation. *Id.* at ¶¶ 7, 8.

III. DISCUSSION, AUTHORITIES AND ARGUMENT

A. There is no basis for federal jurisdiction over this case and; the Court should deny the TRO and dismiss this case in its entirety.

Whether this Court has a basis for jurisdiction is a threshold determination. *Steel Co. v Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). "Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir.1999). "[A] judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the parties to the action." *United States v. 51 Pieces of Real Prop.*, 17 F.3d 1306, 1309 (10th Cir.1994). Any orders entered by a court without jurisdiction must be vacated. *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005).

Notwithstanding *Ex parte Young's* exception for the federal court to determine in certain circumstances whether to grant equitable or declaratory relief against a State or its officials, even when Eleventh Amendment Immunity is asserted, there still must be an underlying recognized jurisdictional basis for the Court to act, and no such jurisdictional basis exists here.

Plaintiffs have tried to sway the Court into ruling on its TRO motion, without setting forth any facts in their Complaint or supporting legal authority creating the existence of federal jurisdiction. Therefore, the State Defendants respectfully request the Court to first determine whether federal jurisdiction exists given the claims and causes of action set forth by Plaintiffs.

The Plaintiffs' Complaint ignores the fundamental legal tenant that the federal court in this situation is without jurisdiction. The Pueblo invokes the District Court's jurisdiction pursuant to 28 U.S.C. § 1331. *Complaint* at ¶ 10. A federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Federal question jurisdiction exists when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1987). While a plaintiff is free to plead a federal question in his complaint, "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 399.

To the extent the Pueblo's claim that the State of New Mexico failed to negotiate in good faith arises under the New Mexico Compact Negotiation Act, the violation of state statute does not confer federal question jurisdiction. . *See Caterpillar*, 482 U.S. at 399.

In addition to the requirement that the federal question appear on the face of the complaint, *Williams v. Bd. of Regents of Univ. of N.M.*, 990 F. Supp. 2d 1121, 1132 (D.N.M. 2014), to confer federal jurisdiction, a "plaintiff's cause of action must either be (i) created by federal law, or (ii) if it is a state-created cause of action, 'its resolution must necessarily turn on a substantial question of federal law.'" *Id.* (internal citations omitted). There is no constitutional right identified in the Complaint in this case. Because the cause asserted for the alleged failure to negotiate in good faith

is created under state, not federal law, and because the resolution of the issues does not turn on a substantial question of federal law, the alleged violation of the New Mexico Compact Negotiation Act does not confer federal jurisdiction. *See Williams,* 990 F. Supp. 2d at 1132.

Although the Pueblo identifies 42 U.S.C. §§ 1983 and 1985, these federal statutes alone do not confer federal jurisdiction. Rather, these statues merely provide that any person who violates the constitutional rights of another shall be liable for any injuries. The statutes themselves do not create any constitutional or federal right. They are merely the vehicle for asserting a constitutional claim.

The Pueblo characterizes the federal right allegedly at stake as "the federal right of the Pueblo and its members to be free of state jurisdiction over activities that occur on the Pueblo lands." *Complaint* at ¶. 1. However, the Complaint is absent of any facts that even remotely suggest the State of New Mexico is exercising jurisdiction over activities occurring on the Pueblo's lands. To the contrary, the evidence shows that New Mexico has not restricted or interfered in, or attempted to regulate, the Pueblo's gaming activities after the expiration of the gaming compact. *See Landers Aff.* at ¶ 16; *Lieurance Aff.* at ¶ 17 (attached hereto as Exhibit "B").

The Pueblo also suggests that IGRA confers federal jurisdiction. *Complaint* at ¶ 10. The State of New Mexico enjoys Eleventh Amendment immunity from actions in federal court. *Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1385 (10th Cir. 1997). IGRA cannot confer federal jurisdiction over a state that does not consent to be sued. *Id.* at 1384. *See also Seminole Tribe v. Florida,* 517 U.S. 44, 47 (1996). While, "[a] state may waive its Eleventh Amendment immunity and consent to suit in federal court," *Johns v. Stewart,* 57 F.3d 1544, 1553 (10th Cir. 1995), a court must apply "a stringent test" to determine if such a waiver has occurred. "The waiver must be unequivocal which means only where stated by the most express language or by such

overwhelming implication from the text [of a state statutory or constitutional provision] as [will] leave no room for any other reasonable construction." *Mescalero,* 131 F.3d at 1385 (internal quotations and citations omitted).

The State of New Mexico has not consented to be sued and has not waived its Eleventh Amendment immunity. There is no recitation in the Complaint to the contrary. Therefore, IGRA does not confer federal jurisdiction. *See id.* at 1384. Specifically, the Pueblo cannot sue in federal court to enforce New Mexico's duty under IGRA to negotiate a compact in good faith. *See Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014). The United States Supreme Court, in addressing this specific issue, stated as follows:

> The [Indian Gaming Regulatory] Act … imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), may not be used to enforce § 2710(d)(3) against a state official.

Seminole Tribe, 517 U.S. at 47. In other words, Congress cannot, through legislation, abrogate New Mexico's Eleventh Amendment, constitutional right, not to be sued in federal court without its consent.

Finally, the Declaratory Judgment Act is not a jurisdictional statute and does not itself confer jurisdiction on a federal court where none otherwise exists. *Franchise Tax Bd.*, 463 U.S. 1, 16 (1983).

In sum, there is no basis for federal jurisdiction, Plaintiffs' request for a TRO must be denied, and the case should be dismissed in its entirety.

B. Plaintiffs' request for a TRO should be denied because they cannot meet the requirements for such equitable relief.

Before injunctive relief is granted, Plaintiffs must establish: (1) a likelihood of success on the merits; (2) a likelihood that the party will suffer irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips in the party's favor; and (4) that the injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); Little v. Jones, F.3d 1245, 1251 (10th Cir.2010). Plaintiffs cannot meet their burden of proving each of the four required elements. *See Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

A preliminary injunction is an 'extraordinary and drastic remedy.' *Munaf v. Geren*, 553 U.S. 674, 689 (2008); *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). A preliminary injunction is "never awarded as of right," *Winter*, 555 U.S. at 24, but only when "the movant's right to relief is 'clear and unequivocal.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (internal citation omitted); *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003)) (internal quotation marks omitted).[2]

Finally, a plaintiff's failure to prove any one of the four preliminary injunction factors renders its request for injunctive relief unwarranted. *See Winter*, 555 U.S. at 23-24; *accord Sierra Club, Inc. v. Bostick*, 539 Fes. Appx. 885, 888-89 (10th Cir. 2013) (unpublished decision) ("A party seeking a preliminary injunction must prove that all four of the equitable factors weigh in its favor.").

(1) Plaintiffs fail to show that they will succeed on the merits.

Plaintiffs assert that they seek redress for "two related but distinct disputes": i) the State has failed to conduct and conclude negotiations in good faith pursuant to IGRA and ii) the State

[2] Pojoaque's Motion for a TRO cites to *Petrella v. Brownback*, 787 F.3d 1242, 1256-57 (10th Cir. 2015) for what must be shown before a preliminary injunction will be granted. However it fails to cite to the relevant language in *Beltronics*

Defendants have engaged in actions to deprive the "federal right of the Pueblo and its members to be free of state jurisdiction over activities that occur on the Pueblo lands." *Complaint* at ¶¶ 1, 127-142. Plaintiffs cannot succeed on the merits of any of their claims because the State of New Mexico and the State Defendants acting in their official capacities are immune from suit pursuant to the Eleventh Amendment and because Plaintiffs fail to state a claim with regard their right to be free of state jurisdiction over activities on the Pueblo lands.

(a) New Mexico and the State Defendants are immune from suit under IGRA.

Plaintiffs assert that federal subject matter jurisdiction exists in this case pursuant to 28 U.S.C. §§ 1331, 1362, and specifically pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(a)(i). *Complaint* at ¶ 10. However, the Supreme Court has held that Congress does not have the power to abrogate the states' sovereign immunity and that IGRA does not "grant jurisdiction over a State that does not consent to be sued." *Seminole Tribe of Florida*, 517 U.S. at 47. State Defendants have affirmatively pled Eleventh Amendment immunity. *Answer* at ¶20. Accordingly, State Defendants do not consent to be sued in federal court for any of Plaintiffs' claims and therefore, Plaintiffs cannot succeed against the State.

Further, Plaintiffs' IGRA claims brought against the individually named State Defendants, in their official capacities cannot succeed because "a suit against a state official in his or her official capacity […] is no different than a suit against the State itself." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). Therefore, Plaintiffs cannot succeed on their IGRA claims against the State Defendants in their official capacities.

(b) *Ex parte Young's* exception to immunity does not apply in this case.

Defendants Susana Martinez and Jeramiah Ritchie have been sued in their official capacities and Plaintiffs seek injunctive relief against them. *Complaint* at ¶¶ 17, 18. Defendants Martinez

and Ritchie have affirmatively plead Eleventh Amendment immunity and have not waived their immunity from suit in federal court. Defendants' Answer at¶ 10.

The *Ex parte Young* exception to immunity does not apply in this case to either Defendant Martinez or Ritchie because these state officials are not alleged to have had a direct connection to the act sought to be enjoined. Specifically, Plaintiffs seek to enjoin the GCB from acting, *in the future*, to deny license applications, including renewals, to third parties who do business in the State of New Mexico if such third parties "continue to do business with the Pueblo." *Complaint* at ¶¶ 19-23, 75. Plaintiffs do not allege that either Defendant Martinez or Ritchie is a member of the GCB or that either Defendant has any direct connection to the action the Pueblo seeks to enjoin.

"In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex parte Young*, 209 U.S. at 157. Accordingly, for the *Ex parte Young* exception to apply to Defendants Martinez and Ritchie, Plaintiffs must show that they had or have "a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013)(quoting *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir.2007)).

Plaintiffs fail to allege any particular duty whatsoever on the part of either Defendant to enforce any law pertaining to GCB's activities or responsibilities, or to engage in any activity with regard to any license application or renewal. Moreover, Plaintiffs fail to cite to any provision of New Mexico law that establishes a connection between the New Mexico Governor or the Deputy Chief of Staff and enforcement of the laws and regulations within the purview of the GCB. Nowhere is it alleged that any particular legislative or administrative enactment empowers either Defendant to

have any involvement whatsoever in the decisions of the GCB with regard to issuing license applications or renewals. *See Peterson*, 707 F.3d at 1205-06.

Additionally, at best, Plaintiffs' allege that Defendants' "pronouncements" threatened regulatory consequences to third parties with "employment and business relationships with the Pueblo." However, there are no allegations that Defendants Martinez or Ritchie ever directly threatened enforcement action against the Pueblo, and there are no allegations that New Mexico law gives Defendants the authority to issue nor deny license applications or renewals.

In light of the above, Plaintiffs cannot succeed on their injunctive relief claims against either Defendant Martinez or Ritchie.

(c) Plaintiffs fail to state a claim against any of the individually named Defendants.

Count Two purports to state a claim under the Supremacy Clause, alleging that Plaintiffs have a right "to engage in activity on the Pueblo's Indian lands in a manner that is free from state interference except to the limited extent that Congress, in the exercise of the United States' plenary authority over Indian affairs allows," and that Defendants have interfered with that right. *Complaint* at ¶¶ 133, 134.

"[T]he Supremacy Clause is not the 'source of any federal rights,' […] and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, ___U.S.___, 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015)(quoting *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 107, 110 S.Ct. 444 (1989). Because the Supremacy Clause does not support a private right of action, Plaintiffs cannot succeed on Count Two.

Similarly, Plaintiffs cannot succeed on Counts Three and Four. In those counts, Plaintiffs seek to assert claims for violations of their civil rights. Specifically, Plaintiffs rely upon 42 U.S.C. §§ 1983 and 1985, claiming that State Defendants' actions and pronouncements are "wrongfully

asserting State jurisdiction over gaming activities on the Pueblo's Indian lands," and that this "wrongfully deprives Plaintiff Talachy and the individual members of the Pueblo their federal right to engage in conduct free from the jurisdiction of the State." *Complaint* at ¶¶ 139, 140, 150.

The case law states, "§ 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as by the Constitution." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002)(*citing Maine v. Thiboutot,* 448 U.S. 1 (1980). However, Plaintiffs' allegations fail to cite to any right created by federal statute or Constitution that they claim were violated or they claim to enforce. Plaintiffs simply allege that State Defendants' "decisions establish a policy, custom and practice of wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands." *Complaint* at ¶¶ 139, 148, 149.

The Supreme Court has made clear that "Section 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States. Accordingly, it is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Gonzaga Univ*., 536 U.S. at 283 (emphasis in original). Section 1983 "was enacted to vindicate rights guaranteed under the Fourteenth Amendment which places limitations on the states in the interest of individual rights." *Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1187-88 (10th Cir. 1991)(*citing Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436, 88 S.Ct. 2186 (1968); *City of Memphis v. Greene*, 451 U.S. 100, 120, (1981); *Commonwealth of Pennsylvania v. Porter,* 659 F.2d 306, 314 (3rd Cir.1981) (en banc), *cert. denied,* 458 U.S. 1121 (1982)).

Other than citing to Sections 1983 and 1985, Plaintiffs fail to cite to any specific rights, privileges, or immunities secured by the Constitution or by federal statute. Moreover, Plaintiffs fail to allege any facts showing any act that would constitute a direct assertion of State jurisdiction

over gaming activities on the Pueblo's Indian lands and a violation of anyone's civil rights. Accordingly, Plaintiffs' Counts Three and Four fail to state a claim upon which relief can be granted and Plaintiffs cannot show that they will succeed on these claims.

Plaintiffs cannot meet their burden of showing that they will likely succeed on any of the claims brought against the State Defendants. Because Plaintiffs fail to meet this burden, they cannot satisfy all of the requirements necessary for a TRO, and the TRO must be denied.

(2) Plaintiffs fail to show that they will suffer irreparable harm in the absence of a preliminary injunction

(a) Irreparable Harm Requirement.

[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction [therefore] the moving party must first demonstrate that such injury is likely before the other requirements for issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990)); *Petrella v Brownback*, 787 F.3d 1242, 1256-57 (10th Cir. 2015).

To prove irreparable harm, the party seeking injunctive relief must show that failing to grant the injunction will cause plaintiff to suffer an injury that is not merely serious or substantial, but certain, actual, and not theoretical. *Pinson v. Pacheco*, 424 Fed. Appx. 749, 754 (10th Cir. 2011) (unpublished decision); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). In this case, there are no facts alleged to show actual versus speculative harm. The State of New Mexico has filed no action to attempt to close, restrict, or regulate the Pueblo's gaming operations, despite the expiration of its gaming compact. *Landers Aff.* at ¶ 25. The GCB has not taken administrative action and has not been asked to take any action against any manufacturer in connection with whether its current business relationship with the Pueblo violates the GCA. *Id.* at

¶¶ 11, 13. 15 17. While citations were issued to the manufacturers for engaging in gaming activity with the Pueblo after the expiration of its gaming compact, *Lieurance Aff.* at ¶¶ 7, 9, those citations may very well be resolved without intervention by the GCB. *See id.* at ¶¶ 12, 13. Only occasionally do citations result in the issuance of an administrative complaint. *Id.* at ¶ 14. The GCB has taken no action to regulate the Pueblo's activities. *Id.* at ¶ 17. In other words, even the alleged harm to the third party manufacturers is speculative.

In addition to the fact that the State of New Mexico has not taken any action to restrict the Pueblo's activities and has not contemplated action against those conducting gaming business with the Pueblo, even had the State done so, any alleged harm suffered by the Pueblo is due to its own actions. The United States Attorney for the District of New Mexico, on behalf of the United States, as opposed to the State of New Mexico, advised the Pueblo that gaming operations after the expiration of the gaming compact would violate federal law. *See Aff. of Michael Allgeier (Doc. 23-9 at ¶48)_* . The Pueblo's continued gaming operations after the expiration of its gaming compact also violates its own regulations. *See Pueblo of Pojoaque Gaming Ordinance 10-8-10* attached as Exhibit "D" Although there are procedures in place for continuing gaming operations absent a compact, the Pueblo has not availed itself of these procedures. *See 18 U.S.C §1166.*

Finally, the Pueblo has no standing to redress any alleged harm to manufactures. As set forth in more detail in Section C, *infra.*, a party must assert its own legal rights and cannot rest its claim on the interests of others. *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Therefore, even if a plaintiff has been injured because some third party has been denied legal rights, the plaintiff may not generally assert the third party's rights as the basis of its claim. *Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City,* 952 F.2d 1183, 1187 (10th Cir. 1991). Accordingly, even if Plaintiffs' allegations are true that Defendants "intend to deny license applications, including

renewals of those gaming entities doing business in the State of New Mexico if such entity continues to do business with the Pueblo," *Complaint* at ¶¶ 19-23, 75, these facts are insufficient to demonstrate that Plaintiffs themselves, as opposed to third parties, have been injured.

(b) Governor Talachy's "Declaration" does not establish irreparable harm.

The "Declaration" of Joseph M. Talachy (Governor of the Pueblo of Pojoaque) should correctly be entitled "affidavit." The affiant should have knowledge of the facts set forth, as well as the requisite expert qualifications to form conclusions. There are numerous statements set forth in the affidavit in which Governor Talachy has set forth conclusions without any facts to support those conclusions. For an example, there is no financial or economic analysis to support the claims of irreparable harm to the Pueblo of Pojoaque as forth in paragraph 4. With regard to paragraph 8, Governor Talachy does not set forth any facts to support any of his claims with regard to a "closed executive session" that occurred on July 15, 2015. With regard to paragraph 11, Governor Talachy has no personal knowledge as to the Pueblo's condition during the 16th century. Moreover, the condition of the Pueblo during the 16th century has no relevance with regard to a Pueblo that currently has a payroll of $46,300,000, as set forth in paragraph 28 of the affidavit. At ¶¶ 12-18, Governor Talachy has not set forth any objective or financial analysis to support his statements with regard to the Pueblo's ability to have revenue to support its governmental infrastructure. Moreover, Governor Talachy makes conclusions that would fall within the realm of an expert and this Court would have to exercise its gate-keeping role, to properly access the conclusions. In paragraphs 19 through 32, Governor Talachy sets forth a very speculative economic analysis with regard to Pueblo's businesses and greater economy. Again, Governor Talachy does not have the requisite expert first-hand or historical knowledge to make the conclusions set forth in these paragraphs. Even though the Rules of Evidence may be relaxed to a

degree for an equitable relief hearing, there still should be an indicia of reliability. Governor Talachy's self-proclaimed damage analysis does not even touch the surface of an expert opinion as defined by law. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Also, the Governor fails to mention that if the Pueblo would have negotiated in good faith, and the compact been renewed, neither the Pueblo nor the State would have found themselves in the present situation. It is not the State Defendants who have caused the claimed irreparable injury.

(3) Plaintiffs fail to show that the balance of equities tips in their favor

Plaintiffs cannot show that the balance of equities tips in their favor. Plaintiffs seek to enjoin State Defendants from properly carrying out their duties as members of the GCB. Those duties include the licensing of third parties with regard to the sale, supply and distribution of gaming devices and the manufacturing, fabrication, assembly, programming and modification of a gaming devices being used by a racetrack casino or veteran, fraternal or non-profit gaming operation in the State of New Mexico. A TRO, enjoining State Defendants from acting on the licensing of third parties would directly and significantly harm their ability to effectively enforce and administer the New Mexico GCA rto entities who do business with non-tribal gaming operators.

The GCA specifies that it is the stated policy of the State of New Mexico that limited gaming activities are to be permitted in the state but only "if those activities are *strictly regulated* ensure honest and competitive gaming that is free from criminal and corruptive elements and influences." NMSA 1978, § 60-2E-2.A (emphasis supplied). Clearly, it is the public policy of the State to engage in strict regulation of gaming in order to prevent criminal and corruptive elements and influences in the gaming industry. In performing its duties with respect to licensing, the GCB must act pursuant to the GCA's stated policy.

The GCB is aware that the Pueblo is not presently complying with IGRA, with its own gaming ordinance, or with 18 U.S.C. § 1166. *See Lieurance Aff.* at ¶ 7. Further, the GCB is aware that since June 30, 2015, the Pueblo has been engaging in Class III gaming operations that are in violation of federal law. *Id.*

Plaintiffs simply cannot show that the balance of equities tips in their favor where an injunction against the State Defendants would prohibit the GCB from properly carrying out their regulatory duties with regard to *third parties* doing business with racetrack casinos, fraternal and non-profit gaming operations., while at the same time allowing Plaintiffs to carry on with business as usual, engaging in gaming activities that have been deemed by the U.S. Attorney to be in violation of federal gaming laws. Moreover, the exercise of prosecutorial discretion does not demonstrate that something is not prohibited by law. *See Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996).

(4) Plaintiffs fail to show that that the injunction serves the public interest

For the same reasons stated above, Plaintiff cannot demonstrate that the issuance of an injunction will not be adverse to the public's interest. The public's interest, as reflected in the legislatively stated policy of the GCA, is in strict regulation of gaming activities in order to prevent criminal and corruptive elements and influences in the gaming industry. NMSA 1978, § 60-2E-2.A. Limiting or preventing the GCB from performing its statutory duty in regulating third parties in violation of New Mexico law and regulations that do business with gaming entities who continue to operate in violation of federal law does not serve the public interest.

Plaintiff cannot show that the injunction will serve the public interest, and the TRO should be denied.

C. Plaintiffs fail to sufficiently allege an injury in fact their claims should be dismissed for lack of Article III standing

In addition to lack of jurisdiction and to failing to meet the requirements for a TRO, Plaintiffs' allegations fail to show an injury in fact. Accordingly, Plaintiffs' claims should be dismissed.

In order to meet Article III's standing requirement, Plaintiffs must make three showings: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). An "injury in fact" is an invasion of a "legally protected interest" that is "concrete and particularized, not conjectural or hypothetical." *Id.* (quotations omitted). "Causation" consists of showing that the injury asserted is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal alterations and quotation omitted). "Redressibility" means a favorable decision will likely redress the claimed harm. *Id.* at 561.

Beyond the constitutional requirements, the Supreme Court has also set forth principles of standing that limit the class of persons that may invoke the courts' powers. *See Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955, (1984); *Valley Forge Christian College*, 454 U.S. at 474–75; *accord Acorn v. City of Tulsa,* 835 F.2d 735, 738 (10th Cir. 1987). For example, one significant limitation is that a party must assert its own legal rights and cannot rest its claim on the interests of others. *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205. "Without such limitations ... the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500. Consequently, even though the plaintiff has suffered palpable injury because some third party has been denied legal rights, the plaintiff may not generally assert the third party's rights as the basis

of its claim. *Hous. Auth. of Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991).

Here, Plaintiffs' lawsuit should be dismissed as the purported injuries relate to third parties. Plaintiffs allege in Count Three of their Complaint that the GCB-member Defendants, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene, "intend to deny license applications, including renewals of those gaming entities doing business in the State of New Mexico if such entity continues to do business with the Pueblo." *Complaint* at ¶¶ 19-23, 75. Plaintiffs fail to plead sufficient facts to demonstrate that they have suffered an injury in fact pursuant to *Lujan*. Plaintiffs' allegations of injury are conjectural, hypothetical and purely speculative. Significantly, no action has been taken against the Pueblo and "[n]o action has been taken by the GCB and no decision has been made by the GCB regarding any manufacturer, with respect to whether its current business relationships and business practices violate the GCA or the Board's Rules." *Landers Aff.* at ¶ 11.

Moreover, Plaintiffs' purported injuries are based on the rights of a third party, the manufacturers. Plaintiffs must assert their own legal rights and not rest their claims on the interests of others. Presently, Plaintiffs are attempting to assert injury based on the speculation that manufacturers *may* be harmed in the future by having their license applications to do business with non-tribal racetrack casino, veteran, fraternal and non-profit gaming operators denied.

Finally, New Mexico's U.S Attorney, in a letter of June 30, 2015, specifically stated "[e]xcept as expressly set forth herein, this letter does not and may not be relied upon to create any rights, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the United States Attorney's Office for the District of New Mexico or the Department of Justice." See Exhibit

"C"; *Doc. 23-9 at ¶48*. Plaintiffs have failed to allege an injury in fact and their lawsuit should be dismissed for lack of standing

IV. CONCLUSION.

As noted throughout this Response, there is no basis for federal jurisdiction and the *Ex parte Young* exception does not apply. Further, Defendants are prepared to go forward with additional motion practice and argument as necessary. Plaintiffs are not entitled to a TRO because they cannot meet their burden of proving: likelihood of success on the merits, irreparable harm, that the balance of equities tips in their favor, or that a TRO would in any way serve the public interest. Finally, Plaintiffs cannot show Article III standing.

For all of the above reasons, Plaintiffs' request for a TRO should be denied and this case should be dismissed in its entirety.

State Defendants note that dismissal of Plaintiffs' claims will not leave the Pueblo without remedy for its alleged harms. Pursuant to the GCA, "[a]ny person aggrieved by an action taken by the [Gaming Control Board] or one of its agents may request and receive a hearing for the purpose of reviewing the action." NMSA 1978, § 60-2E-59. As used in this provision, "person" means a legal entity. NMSA 1978, §60-2E-3(HH). Moreover, after a hearing, any person adversely affected by the action of the GCB may appeal to the New Mexico Court of Appeals. NMSA. 1978, § 60-2E-60. Finally, pursuant to the authority granted to it by the GCA, the GCB has adopted detailed regulations concerning the administrative appeal process, applicable to "all licensees, applicants for licensure, and *persons aggrieved by an action of the Gaming Control Board*." N.M.A.C §15.1.15.2 (emphasis supplied).

In light of the above, should the Plaintiffs be "aggrieved" by an action of the GCB with regard to the licensure of third parties doing business with the Pueblo, Plaintiffs may request a public

hearing, with adequate procedures for discovery and due process, and if need be, the right to appeal to the New Mexico Court of Appeals.

Respectfully submitted,

WALZ AND ASSOCIATES, P.C.

/s/ Jerry A. Walz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of October, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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