No. 15-2187

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellees,

v.

STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, and CARL E. LONDENE,

Defendants-Appellants.

Appeal from the United States District Court for the District of New Mexico
Honorable Robert C. Brack
(D.C. No. 1:15-CV-00625-RB-GBW)

BRIEF OF APPELLANTS

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Related Appeal: New Mexico v. United States Department of Interior, No. 14-2222.

Introduction

It is well within the police power of the State of New Mexico to regulate gaming activity taking place within its jurisdiction. Through its Gaming Control Act, the State licenses manufacturers of gaming equipment who are thereby authorized to provide equipment and related services to other entities (racetrack casinos and nonprofit fraternal and veterans' organizations) licensed to conduct gaming operations within the State. At issue in this appeal is whether the federal Indian Gaming Regulatory Act (IGRA) – which the Supreme Court has held does not apply outside of "Indian lands" – preempts the State's police power to regulate the manufacturers who violate State licensing requirements by supplying gaming equipment to illegal gaming operations or by profiting from those illegal operations.

IGRA does not preempt New Mexico's police authority, and an extensive body of law supports the administrative actions taken by New Mexico's Gaming Control Board. The Pueblo of Pojoaque – which has been illegally conducting class III gaming since its gaming compact expired on June 30, 2015 – mischaracterizes the Gaming Control Board's actions as an effort to regulate the Pueblo itself. That is not so. This appeal does not involve an effort by the State to regulate the Pueblo's gaming operations on tribal land. The State has not sought to enforce any law with respect to the Pueblo, nor seized any Pueblo property, nor

entered Pueblo lands. The Board has done nothing more than regulate the conduct of non-Indian manufacturers of gaming equipment with respect to their licensure to do business with non-Indian gaming operators outside Indian lands, consistent with the requirements of the Gaming Control Act.

Federal law does not preempt the State's police authority, even if the State's exercise of such authority indirectly impacts the Pueblo's ability to conduct illegal class III gaming. The Gaming Control Board must regulate its licensees within its own territory to ensure compliance with State law. Because the district court improperly entered a preliminary injunction blocking the State's legitimate exercise of its police power, the district court's grant of injunctive relief should be reversed.

Jurisdictional Statement

Plaintiffs' complaint alleges violations of federal law relating to Indian tribal sovereignty. (Aplt. App. at 1/8.)[1] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. The district court entered a preliminary injunction against Defendants on October 7, 2015. (Aplt. App. at 2/359.) Defendants filed a timely notice of appeal on October 29, 2015. (Id. at 2/361.) Fed. R. Civ. P. 4(a)(1)(A). This Court's jurisdiction arises under 28 U.S.C. § 1292(a)(1).

[1] Citations to the Appellants' Appendix are to the volume number and page number(s).

Statement of Issues

Did the district court err in concluding that federal law prevents the State of New Mexico from exercising its police power to regulate non-Indian, gaming equipment manufacturer-licensees with respect to their authority to transact business with State-licensed, non-Indian gaming operators in connection with gaming activities conducted within the State on non-Indian lands? Did the court consequently rule improperly in enjoining Defendants from taking action against the manufacturers for violating State law by promoting and profiting from the Pueblo's illegal gaming operations?

Statement of the Case

A. The State's Regulation of Gaming Licensees

In New Mexico, gaming is regulated by the State's Gaming Control Board under the Gaming Control Act, NMSA 1978, §§ 60-2E-1 through -62 (1997, as amended). The Board licenses manufacturers and distributors of gaming equipment and operators of gaming enterprises. Id. § 60-2E-13 (2007). Casino gaming is permitted in the State if carried on by licensed racetrack casinos or nonprofit fraternal and veterans' organizations. Id. § 60-2E-26(I) (2009); see id. § 60-2E-3(GG) (2009). The Gaming Control Act recognizes that high-stakes, casino-style gaming also may be conducted where permitted by federal law, id.

§ 60-2E-4(B) (1997), such as on-reservation gaming by an Indian tribe pursuant to a compact with the State.

B. The State's Response to the Pueblo's Illegal Gaming Activities

On June 30, 2015, the Pueblo of Pojoaque's gaming compact with the State of New Mexico expired. On that date, the United States Attorney for the District of New Mexico issued a letter to the Pueblo stating that, as of midnight on June 30, 2015, "continued gaming operations by the Pueblo . . . would violate federal law." (Aplt. App. at 2/297.) The United States Attorney made this determination in response to a letter from the Governor of the Pueblo indicating that the Pueblo intended to continue its class III gaming operations notwithstanding the expiration of its compact. (Id.) The United States Attorney agreed to forbear enforcement of federal law, provided the Pueblo met certain conditions. (Id.)[2] The National Indian Gaming Commission similarly issued a letter to the Pueblo stating that it would withhold enforcement action conditionally, despite expiration of the Pueblo's compact. (Id. at 1/192). The Pueblo has continued to conduct casino

[2] The U.S. Attorney agreed to withhold enforcement action pending resolution of a related appeal in this Court, New Mexico v. United States Department of the Interior, No. 14-2222. In that appeal, the Interior Department challenges a New Mexico district court's ruling that the Secretary of the Interior lacks authority to adopt procedures, 25 C.F.R. §§ 291.1-.15, to allow class III Indian gaming without a tribal-state compact in the event a state asserts Eleventh Amendment immunity in response to an Indian tribe's suit for failure to negotiate a compact in good faith.

gaming since the expiration of its compact, despite the United States Attorney's determination that such conduct is unlawful.

On June 30, 2015, a spokesman for New Mexico Governor Susana Martinez stated that the United States Attorney's decision not to prosecute the Pueblo for violating federal law "provides no protection to banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise." (Id. at 1/135.) On July 15, 2015, the State's Gaming Control Board announced that it would hold in abeyance the license renewal applications of certain vendors known to be dealing with the Pueblo in light of the Pueblo's ongoing illegal operations. (Id. at 1/112 ¶ 8.)

On September 9, 2015, the Gaming Control Board sent letters to a number of gaming equipment manufacturers licensed by the State that had done business with the Pueblo. The letters referred to the United States Attorney's determination that the Pueblo was operating in violation of federal law by continuing to carry on casino gaming and announced that the Board intended to audit the manufacturers to assess their compliance with the New Mexico Gaming Control Act and the Board's regulations. (Aplt. App. at 1/144-48.)

In the letters, the Board cited to the State's statutory mandate that gaming licenses not be issued to persons whose "prior activities, . . . habits and associations . . . pose a threat to the public interest or to the effective regulation and

control of gaming or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming." See NMSA 1978, § 60-2E-16(B)(2) (2009). The Board also cited to its regulations classifying as unsuitable methods of operation "failing to comply with all federal, state and local laws and regulations governing the operation of a gaming establishment" and "furthering, or profiting from any illegal activity or practice," see 15.1.10.9(f), (n) NMAC. Additionally, the Board cited to its regulatory prohibitions on selling or transferring a gaming device "to any person that could not lawfully own or operate" it and on shipping gaming devices "to any destination where possession of gaming devices is illegal." See 15.1.16.8(B), 15.1.16.12(B) NMAC.

Based on the United States Attorney's determination that the ongoing gaming activities of the Pueblo violated federal law and on responses to the Board's audit letters, the Board's staff concluded that reasonable grounds existed to believe that the manufacturers had violated or were violating the Gaming Control Act and the Board's regulations. (Aplt. App. at 2/294-95 ¶¶ 6-8.) On September 25, 2015, the Board's Enforcement Division issued administrative citations to the manufacturers under statutory authority granted to the Board's acting executive director. (Id. at 2/295 ¶¶ 9-10.) Three exemplar citations are included in the record. The manufacturer in those citations was cited (1) for shipping gaming machines or equipment to the Pueblo after expiration of the

compact (id. at 2/329); (2) for selling or transferring gaming devices to the Pueblo after the compact expiration date (id. at 2/331-32); and (3) for leasing gaming devices to the Pueblo and receiving a percentage of the "net-win" from those devices after that date (id. at 2/334-35). The Board has taken no further enforcement action with respect to any of the citations issued to the manufacturers. (Id. at 2/292 ¶¶ 11-13, 16; 2/295 ¶ 16.)

C. The Current Action

On July 18, 2015, even before most of the foregoing events had come to pass, the Pueblo and its Governor as Plaintiffs instituted this action against the State of New Mexico and various State officials, including Governor Martinez, the Governor's Deputy Chief of Staff and principal negotiator with the Pueblo, and the members of the State's Gaming Control Board. (Id. at 1/8.) Plaintiffs' complaint asserted two basic claims: first, that the State had failed to negotiate in good faith regarding extension or replacement of the expired gaming compact, see 25 U.S.C. § 2710(d)(7)(A)(i) (Aplt. App. at 1/40); and second, that Defendants had infringed a right of Plaintiffs, allegedly actionable under the Supremacy Clause, 42 U.S.C. § 1983, or 42 U.S.C. § 1985, to conduct casino gaming operations on Pueblo lands free of regulation by the State (Aplt. App. at 1/40-44). Plaintiffs also asserted a pendant state-law claim for tortious interference with contractual relations. (Id. at 1/44.) In its answer the State invoked its sovereign immunity. (Id. at 1/69 ¶ 1.)

As a result, after the present appeal was commenced the parties stipulated to dismissal of the claim for bad faith failure to negotiate. See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

As the above events unfolded, Plaintiffs moved for a temporary restraining order or preliminary injunction, seeking to enjoin the members of the Board and the other Defendants from "threaten[ing], . . . punish[ing] or tak[ing] enforcement action against" the manufacturers. (Aplt. App. at 1/80.) Plaintiffs supplemented their motion in response to developments, including the Board's issuance of the citations, occurring before the motion was heard. (Id. at 2/255, 308, 322.)

Plaintiffs claimed that the Court should enjoin the Board from performing its regulatory functions because, pursuant to the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721, "states have no jurisdiction over gaming activities occurring on Indian lands except as expressly agreed upon in the context of a tribal-state compact." (Aplt. App. at 1/92.) They took the position that, because "the State's jurisdiction" over gaming activities on the Pueblo's Indian lands "ended . . . when the [c]ompact expired" (id. at 1/23), the Board could not regulate the manufacturers under the Gaming Control Act. The Board's actions allegedly "created a chilling effect" (id. at 1/84), deterring the manufacturers from continuing to do business with the Pueblo. The Pueblo alleged

that it would incur substantial loss of revenue to its gaming operations, injuring the Pueblo's economy and that of the surrounding area as a whole. (Id. at 1/100-05.)

Responding to Plaintiffs' motion, Defendants pointed out that the State's actions directed at the manufacturers did not regulate or prohibit the Pueblo's activities but only addressed the manufacturers' ability to continue to do business as State licensees with the racetrack casinos and nonprofit fraternal and veterans' organizations that were licensed to operate casino gaming in the State. (Id. at 2/292 ¶ 16, 295-96 ¶¶ 17-18.)[3] At the hearing on Plaintiffs' motion, Defendants further emphasized that the State was not attempting to prohibit the manufacturers from dealing with the Pueblo (id. at 3/419 ("[N]obody's been ordered that they cannot do business with the Pueblo[.]")) but that, under the Gaming Control Act and related regulations, "we've got to be able to carry out our regulatory duties with regard to third parties doing business with" State-licensed gaming operators "while at the same time allowing [P]laintiffs to carry on with their business on their reservation" (id. at 3/436).

[3] Besides addressing the merits issue, Defendants also challenged the district court's subject matter jurisdiction, Plaintiffs' standing, and whether any of the other requirements for granting preliminary injunctive relief had been met. (Aplt. App. at 2/272-88.)

D. The Decision on Appeal

The district court granted Plaintiffs' request for a preliminary injunction. (Id. at 2/336, 359.) The court held that Plaintiffs had demonstrated "probable irreparable harm" because "an invasion of tribal sovereignty can constitute irreparable injury." (Id. at 2/354 (internal quotation marks & citations omitted).) Additionally, the court found that the Pueblo "will lose significant revenue and its [c]asinos may shut down due to Defendants' intimidation of the Pueblo's vendors." (Id. at 2/355.)

The court rejected as "disingenuous" Defendants' explanation that the State's regulatory activity was directed toward State licensees insofar as they were authorized to do business with State-licensed gaming operators. (Id.) It concluded that the Board's actions were a "thinly disguised attempt" to regulate "indirectly" the Pueblo's casino gaming activities. (Id.) The court held that the Board's actions were "based, quite clearly, on Defendants' own determination" that the Pueblo's ongoing casino-style gaming operations in the absence of a compact were illegal and that "Defendants, just as clearly, are without jurisdiction or authority to make" that determination. (Id.) Nor, in the court's view, did the Board have jurisdiction to issue citations to the manufacturers based on their doing business with the Pueblo, "[i]n that [18 U.S.C. § 1166, a criminal provision of IGRA] explicitly provides that only the federal government may bring criminal

prosecutions to enforce the State's laws governing the licensing and gambling on tribal lands in the absence of a tribal-state compact[.]" (Id. at 2/348.)

Next, the district court concluded that Plaintiffs had demonstrated a likelihood of success on the merits because "states have no authority to regulate tribal gaming under IGRA unless the tribe specifically consents to the regulation in a compact. . . . [T]he State's jurisdiction over gaming activities that occur on the Pueblo's lands ceased when the compact expired." (Id. at 2/356-57.)

The district court also held that the balance of equities favored Plaintiffs because the State would suffer "minimal" harm whereas the Pueblo's "sovereignty and well-being" were at stake. (Id. at 2/357 (internal quotation marks & citation omitted).) Finally, the court held that public policy weighed in Plaintiffs' favor as well. "A preliminary injunction comports with . . . the paramount federal policy of ensuring that Indians do not suffer interference with their efforts to develop strong self-government." (Id. (internal quotation marks & citation omitted) (alteration omitted).)

As Plaintiffs requested, the court enjoined Defendants from "taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo." (Id. at 2/359.) The injunction is to remain

in effect until "30 days after the Tenth Circuit Court of Appeals issues its mandate in New Mexico vs. Department of the Interior, 14-2222." (Id.)[4]

Defendants timely appealed from the preliminary injunction. (Id. at 2/361.)

Summary of Argument

The Pueblo's ongoing class III gaming activities in the absence of a state-tribal compact are indisputably illegal. The State has issued citations to State-licensed, non-Indian gaming equipment manufacturers who have continued to deal with the Pueblo in violation of State law, potentially affecting their licensure to transact business with State-licensed, non-Indian gaming operators conducting gaming activities outside Indian lands. The district court's preliminary injunction prevents the State from exercising its police power under the Gaming Control Act to ensure that its licensees avoid activities and associations that threaten the effective regulation of gaming or enhance the dangers of illegal gaming.

The district court based its injunction on the belief that the State has no "jurisdiction or authority" to regulate the Pueblo or even to determine that in continuing to deal with the Pueblo the manufacturers are promoting and profiting from illegal gaming. The court is incorrect. IGRA's preemptive scope is limited to the conduct of Indian gaming on Indian land. Although the Pueblo is acting unlawfully, the State has made no attempt to prosecute the Pueblo, to seize Pueblo

[4] See supra note 2 regarding the related appeal.

property, or to enter Pueblo lands. Nor does the State's action prevent the manufacturers from continuing to do business with the Pueblo.

IGRA does not prevent the State from exercising its police power to regulate non-Indian licensees with respect to their dealings with State-licensed, non-Indian gaming operators conducting their operations on non-tribal lands. The State may exercise its lawful powers within its jurisdiction even if there is a resultant, ancillary effect on the Pueblo's illegal enterprise. And even if one were to view the State's action as an indirect regulation of the Pueblo, which it is not, the State is not barred by federal law from exercising its legitimate powers on its own lands to exert "leverage" against a tribe that is conducting illegal gaming.

Where a claim lacks merit, there is no need to consider the other, equitable factors that also must support injunctive relief. But if considered, those factors also weigh against granting a preliminary injunction. The district court's grant of preliminary injunctive relief should be reversed.

Argument

Standard of Review: "To prevail on a motion for a preliminary injunction, the movant must establish that four equitable factors weigh in its favor: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse

to the public interest." Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC, 562 F.3d 1067, 1070 (10th Cir. 2009).

"We review the district court's grant of a preliminary injunction for abuse of discretion. A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings." Planned Parenthood of Kan. v. Moser, 747 F.3d 814, 822 (10th Cir. 2014) (internal quotation marks & citation omitted). "We examine the district court's underlying factual findings for clear error, and its legal determinations de novo." Soskin v. Reinertson, 353 F.3d 1242, 1247 (10th Cir. 2004) (internal quotation marks & citation omitted). "Moreover, because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." Beltronics USA, 562 F.3d at 1070 (internal quotation marks & citation omitted). "If the claims by the party seeking injunctive relief have no merit, granting relief is an abuse of discretion." Planned Parenthood, 747 F.3d at 822.

Preservation of Issues: The propriety of the district court's grant of a preliminary injunction was raised in Defendants' response to Plaintiffs' motion for a temporary restraining order or preliminary injunction (Aplt. App. at 2/267) and in Defendants' argument at the hearing on Plaintiffs' motion (id. at 3/376-89, 408-38). See supra pp. 7-10.

THE DISTRICT COURT IMPROPERLY ENJOINED DEFENDANTS FROM EXERCISING THE STATE'S POLICE POWER OVER STATE-LICENSED, NON-INDIAN GAMING EQUIPMENT MANUFACTURERS DEALING WITH STATE-LICENSED, NON-INDIAN GAMING OPERATORS OUTSIDE INDIAN LANDS.

The first factor to be considered by a district court in determining whether to issue a preliminary injunction is the likelihood that the claimant will succeed on the merits. Supra p. 13. In this case, the district court erred in concluding that the Plaintiffs established a likelihood of success on the principle underlying their claim. Federal law does not preempt the State from exercising its police power by taking the regulatory actions at issue here, directed at non-Indian gaming licensees with respect to their ability to transact business with non-Indian gaming operations conducted on State land. The other, equitable factors relating to preliminary injunctive relief therefore need not be considered. But those factors as well weigh against injunctive relief. The district court's grant of a preliminary injunction therefore should be reversed.[5]

[5]As a threshold matter that should be beyond dispute, the district court erred in entering a preliminary injunction against the State of New Mexico. Defendants asserted the State's sovereign immunity in their answer. (Aplt. App. at 1/69 ¶ 1.) It is settled law that "[t]he Eleventh Amendment grants states sovereign immunity from suits brought in federal court by its own citizens and citizens of other states, suits by other sovereigns, and suits by an Indian tribe." Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015, 1026 (10th Cir. 2005). The injunction therefore must be reversed insofar as it applies to the State.

A. Because Federal Law Does Not Preempt State Authority To Regulate Non-Indian Licensees Outside Indian Lands, the District Court Committed an Error of Law in Concluding That Plaintiffs Had Established a Likelihood of Success on the Merits.

The district court erroneously concluded that because 18 U.S.C. § 1166 authorizes the federal government alone to bring criminal prosecutions to enforce state gambling laws on tribal lands in the absence of a tribal-state compact, the Gaming Control Board must lack jurisdiction to issue citations to its licensees for conducting business with or profiting from the Pueblo's illegal gaming operation. (Aplt. App. at 2/348.) There is no support for the proposition that a state's police authority over non-Indians is preempted because a federal statute does not authorize states to enforce state gambling laws directly against tribes on-reservation. Nor is there legal support for the district court's more general belief that IGRA precludes the State from exercising its regulatory authority over State-licensed gaming equipment manufacturers in the circumstances presented here. The court erred by failing to undertake the correct legal analysis.

First, before courts will hold a state's police authority preempted, the federal statute must be clearly and manifestly preemptive. Second, IGRA does not apply outside of "Indian lands," and therefore it cannot preempt state licensing requirements on state lands. And third, there is no authority for the proposition that a state's authority to act within its jurisdiction is limited by indirect or ancillary effects on a tribe's illegal conduct.

1. The State regulates gaming activities in the exercise of its police power.

The police power of a state "extends to all matters affecting the public health or the public morals." Stone v. Mississippi, 101 U.S. 814, 818 (1879). New Mexico's regulation of non-Indian gaming activity is a valid exercise of the State's police power. Srader v. Verant, 1998-NMSC-025, 964 P.2d 82.

By law and regulation, New Mexico strictly and comprehensively regulates gaming activity within the State's borders. See generally New Mexico Gaming Control Act, NMSA 1978, §§ 60-2E-1 to -62 (1997, as amended), and its implementing regulations, 15.1 NMAC. Gaming activity is permitted in New Mexico if it is "strictly regulated to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences." NMSA 1978, § 60-2E-2(A) (1997). The activity must be conducted in compliance with the Act or another state or federal law "that expressly permits the activity or exempts it from the application of the state criminal law." Id. § 60-2E-4(B).

The provisions of the Act are carried out by the Gaming Control Board. Among other powers and responsibilities, the Board promulgates regulations necessary to implement and administer the Act, conducts audits and investigations, and issues licenses for persons to engage in gaming activity within the State. Id. § 60-2E-7 (2009).

Anyone who manufactures or distributes gaming devices used in New Mexico must obtain a license from the Board to do so. Id. § 60-2E-13. Racetrack casinos and nonprofit fraternal and veterans' organizations may be licensed to conduct gaming operations. Id. §§ 60-2E-3(GG), 60-2E-26(I). The Board also licenses gaming equipment and issues certifications or work permits for individuals involved in gaming. Id. § 60-2E-14 (2007). A corporation seeking licensure under the Gaming Control Act is subject to broad information disclosure requirements and to a detailed investigation of the corporate entity and its key personnel. See id. §§ 60-2E-14(E), -16(C), -18 through -25. The Act prohibits issuance of a license unless the Board determines that the applicant is "a person whose prior activities, . . . habits and associations do not pose a threat to the public interest or to the effective regulation and control of gaming or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming." Id. § 60-2E-16(B)(2) (2009). A license is a revocable privilege which establishes no property right or other vested interest. Id. § 60-2E-2(B).

Manufacturers and distributors are subject to the following requirements, among others:

- No licensee shall sell or transfer a gaming device to any person that could not lawfully own or operate the device. 15.1.16.8(B) NMAC.

- Manufacturers shall not ship gaming devices to any destination where possession of gaming devices is illegal. Id. 15.1.16.12(B).

- No person may service or repair a gaming device or associated equipment unless he is licensed as a manufacturer. NMSA 1978, § 60-2E-13(F).

More generally, it is the responsibility of licensees to employ and maintain "suitable methods of operation" consistent with State policy. 15.1.10.8(B) NMAC. Unsuitable methods of operation include failing to comply with all federal, State, and local laws and regulations governing operators of a gaming establishment, 15.1.10.9(F) NMAC, and engaging in, furthering, or profiting from any illegal activity or practice in violation of the Act or its implementing regulations, 15.1.10.9(N) NMAC. Violation of any provision of the Act or its implementing regulations by a licensee is grounds for suspension or revocation of the license. 15.1.10.11(A) NMAC.

The executive director of the Board is empowered to issue an administrative citation to any licensee "upon a reasonable belief that the licensee has violated or is violating any provision of the Gaming Control Act or regulations of the [B]oard." NMSA 1978, § 60-2E-10(D)(3) (2002). The Board takes enforcement action against a licensee by issuing a complaint and affording the licensee a hearing with full due process protections. See id. §§ 60-2E-32 & -59 (2002). Final action by the Board is subject to judicial review. Id. § 60-2E-60 (2002).

There is no doubt that the Board, in citing licensees for regulatory violations or otherwise carrying out its responsibilities to ensure that gaming activities in New Mexico are conducted in accordance with the law, is exercising the State's police power. Srader, 1998-NMSC-025, ¶ 11, 964 P.2d at 87; see also Kearns v. Aragon, 1959-NMSC-102, ¶ 16, 333 P.2d 607, 610 (observing that the State exercises its police power "to insure so far as possible the decent and orderly conduct of a business affecting the public health, morals, safety and welfare"). The New Mexico Supreme Court has "firmly assert[ed]" the State's authority to exercise its police power with respect to gaming activities within its jurisdiction. Srader, 1998-NMSC-025, ¶ 16, 964 P.2d at 88.

2. Federal law does not preempt the State's police power.

a. Nothing in IGRA demonstrates clear Congressional intent to preempt the exercise of state regulatory power over non-Indian licensees outside of Indian country.

In considering the Pueblo's motion, the district court first erred by failing to recognize the strong presumption against federal preemption of state law. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."). That presumption is particularly strong when the state law in question, like New Mexico's Gaming Control Act, is aimed at promoting the public welfare, safety, and morals. See Posadas de Puerto Rico Assocs. v. Tourism

Co. of Puerto Rico, 478 U.S. 328, 341 (1986). This approach "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

For a federal statute to preempt a state's historic police power, Congressional intent must be "clear and manifest." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). An intent to preempt state law is clear and manifest: (1) when Congress enacts a statute that explicitly preempts state law; (2) where state law conflicts with federal law; and (3) if federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

No federal law explicitly preempts the State's authority to regulate gaming within its jurisdiction. The federal government's exclusive criminal jurisdiction over the Tribe's illegal gaming on-reservation does not conflict with the State's regulation of non-Indian licensees' business dealings off reservation land, and IGRA cannot be read to occupy the field because IGRA does not apply outside of Indian country. The district court did not consider the State's broad policy authority or whether IGRA conflicted with the State's assertion of authority within this framework. Had it done so, it would have concluded that IGRA does not

preempt the State's authority over its licensees on State lands and that the Pueblo was not likely to prevail on the merits.

b. Because IGRA has no application outside of Indian country, it cannot preempt the State's exercise of police authority.

IGRA cannot preempt the State's police power because the Act does not apply outside of Indian country. "Everything – literally everything – in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else." Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014) (emphasis added). IGRA is intended "to expressly preempt the field in the governance of gaming activities on Indian lands." United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170, 1179 (10th Cir. 1991) (internal quotation marks & citation omitted) (emphasis added); see also Oklahoma v. Hobia, 771 F.3d 1247 (10th Cir. 2014) (same); Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1032 (10th Cir. 2003) ("[T]hrough IGRA, Congress spoke specifically to the federal government's regulatory scheme over certain forms of authorized gambling within Indian country." (emphasis added)); Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 469 (2d Cir. 2013) (rejecting tribe's contention that IGRA "completely preempts all state legislation affecting the field of gaming"); Casino Resource Corp. v. Harrah's Entertainment, Inc., 243 F.3d 435, 439 (8th Cir. 2001) (IGRA

did not preempt state law governing what was "essentially a dispute between a non-tribal general contractor and non-tribal sub-contractor").

The Supreme Court of New Mexico, addressing the State's obligation to enforce State laws, concluded that IGRA does not preempt enforcement of the State's gambling laws outside of Indian land. In Srader v. Verant, the court decided two consolidated cases related to tribal gaming that was conducted without a valid tribal-state compact in effect. See 1998-NMSC-025, ¶ 13, 964 P.2d at 88. One of those cases involved claims against various New Mexico law enforcement officials for allegedly breaching their duty to enforce New Mexico's anti-gambling laws by failing to prevent the flow of gambling money between financial institutions, gamblers, and tribal casinos operating without a compact. Id. ¶ 3, 964 P.2d at 86.

The governmental defendants argued that they could not be liable because IGRA preempted their ability to enforce New Mexico's laws where gaming by an Indian tribe was at issue. Id. ¶¶ 4, 6, 964 P.2d at 86. The court rejected that argument. It expressly recognized that the State and its law enforcement officials lacked authority to enforce state law within the boundaries of an Indian reservation which, in the absence of a compact, it concluded to be the province of the federal government. Id. ¶ 15, 964 P.2d at 88. But because "no valid compact existed here, it was the responsibility of the [g]overnment [d]efendants to determine if

New Mexico's existing gaming or other laws were being violated outside of the reservation." Id. ¶ 16, 964 P.2d at 88. The New Mexico Supreme Court correctly concluded that the State's gaming authorities and law enforcement officials are obligated to enforce State law outside the reservation against individuals or entities conducting business with illegal gaming enterprises operating on tribal land. The court's analysis should govern the present case.

The district court, however, did not consider this analysis; nor did it address the State's regulatory authority outside of Indian country, which is exceedingly broad. Instead, the court misapprehended Defendants' position and treated the Board as though it had exerted regulatory authority over the Pueblo's illegal gaming, which the Board clearly has not. (Aplt. App. at 2/355) (describing the State's actions to be a regulation of the Pueblo's gaming activities and rejecting the State's explanation that it was regulating its own licensees as "disingenuous"). The court concluded that because 18 U.S.C. § 1166 gives only the federal government jurisdiction over criminal prosecution of gambling law violations in Indian country, the State could not even determine whether the Pueblo's gaming operations in the absence of a compact were unlawful. (Id. at 2/348, 355.) See supra p. 10.

That is plainly incorrect. Section 1166 provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State

gambling laws that are made applicable under this section to Indian country[.]" 18 U.S.C. § 1166(d) (emphasis added). The State is not criminally prosecuting anyone, let alone the Pueblo. The State has not sought to seize any property from the Pueblo, nor entered Pueblo lands. The fact that the United States has chosen not to prosecute the Pueblo for violating federal and state laws under Section 1166 at the present time does not preclude the State from enforcing the Gaming Control Act and taking administrative action against licensees operating outside of Indian country within the State.

IGRA does not remove the State's ability to decide whether the Pueblo's gaming operations are lawful. Indeed, the State must do so in order to enforce its own law – an obligation underscored by the decision in Srader v. Verant.[6] IGRA may limit criminal prosecution of the Pueblo for unlawful gaming to the United States, but Section 1166(d) says nothing about the State's authority to enforce State law outside of Indian country or to determine independently whether a gaming

[6] Consider the following scenario. Suppose the State were to determine that a State-licensed manufacturer was providing gaming equipment to or profiting from a casino operating illegally in Texas. Nothing would prevent the State in that case from taking action against the manufacturer's license to do business in New Mexico based on the manufacturer's violation of New Mexico law, although the State would not have jurisdiction to move against the illegal gaming operation in Texas. There is no material distinction here. Although Section 1166 prevents the State from taking prosecutorial action against illegal gaming on the Pueblo's lands, the State still may ensure that its licensed manufacturers comply with State law insofar as the manufacturers seek to do business in the State.

operation is illegal in furtherance of the State's obligation to regulate the entities it licenses.

Plaintiffs' claim that the State made "a unilateral determination regarding the legality of gaming on Indian lands" (Aplt. App. at 1/41 ¶ 133), which the district court accepted in finding that the State acted outside its jurisdiction, supra p. 10, is not accurate. First, there is no question that the Pueblo's ongoing class III gaming in the absence of a compact is unlawful under IGRA. Bay Mills, 134 S. Ct. at 2035 ("[A] tribe cannot conduct class III gaming on its lands without a compact[.]"); United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 718 (10th Cir. 2000) ("Class III gaming . . . is allowed only where a tribal-state compact is entered."). Plaintiffs do not argue to the contrary. The Pueblo Governor's request to the United States Attorney to forbear from prosecuting the Pueblo for continuing its gaming operations without a compact (see Aplt. App. at 2/297) effectively concedes the unlawfulness of the operations. Federal law does not preempt the State from recognizing the obvious.

Moreover, the State did not have to make its own determination that the Pueblo's gaming activities are illegal, because the United States Attorney determined that once the Pueblo's compact with the State expired, "[c]ontinued gaming operations by the Pueblo . . . would violate federal law." (Id.) The State's

actions were expressly based on that federal determination. (See id. at 1/144, 2/331-32, 335.)

In any case, to restate the key point, the State has not taken any action with respect to the Pueblo, nor has it asserted its authority on Pueblo lands. As the State explained in opposing Plaintiffs' motion for preliminary injunction, supra p. 9, the State is not regulating the Pueblo; it is regulating licensees. IGRA does not bar the State from issuing citations to non-Indian manufacturers, with respect to their licenses to do business with non-Indian gaming operations located off Indian land, for violating State law by promoting or profiting from illegal gaming. The State's determination that its licensees are violating State law by doing business with an entity that is illegally conducting gaming is not equivalent to attempting to prosecute the Pueblo contrary to 18 U.S.C. § 1166, and the district court erred in equating the two.

c. The ancillary effects of the State's regulation of its licensees on the Pueblo do not preclude exercise of the State's police power.

The district court also held that the State's use of its licensing authority was impermissible because the State could not do indirectly what federal law prevents it from doing directly. Supra p. 10. That, too, was error. The State's authority to regulate its own licensees with respect to their ability to transact business with other State licensees outside of Indian lands cannot be doubted. Plaintiffs have

themselves acknowledged that "State licenses are required for the [manufacturers] to do business with non-Indian 'racinos', fraternal and charitable entities, and the State Lottery, but are not required for the [manufacturers] to do business with any tribal gaming facility located on Indian lands[.]" (Aplt. App. at 1/80-81.) Plaintiffs' theory is that Defendants have invaded the Pueblo's sovereignty not by directly acting against the Pueblo but by "threatening vendors regarding their licenses to do business with other entities in the state over which they . . . have jurisdiction." (Id. at 3/399.)

But where the State has jurisdiction, it may legitimately assert its police power to ensure that its licensees do not further or profit from illegal activity or otherwise violate its laws. The State may ensure that the gaming equipment manufacturers that it has licensed and thereby authorized to do business with licensed, non-Indian gaming operators within the State have not engaged in activities that threaten the effective regulation of gaming or create or enhance the dangers of illegal gaming. It may effectuate its declared public policy that gaming activities within the State shall be strictly regulated to ensure that they remain honest and free from "corruptive elements and influences." NMSA 1978, § 60-2E-2(A). Supra pp. 17-19.

Tribal sovereign immunity may bar states (in some circumstances) "from pursuing the most efficient remedy" – namely, a suit directly against the tribe itself

– when a tribe's on-reservation conduct impinges on a state's legitimate interests. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991); see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 755 (1998). But "the Supreme Court has not found that application of state law outside Indian country infringes on tribal sovereignty." Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1182 (10th Cir. 2012). Indeed, a state may enforce its laws and policies on its own lands even if doing so has a consequential impact on reservation-based activity by an Indian tribe.

For instance, this Court has upheld off-Indian country seizure of cigarettes pursuant to state law despite the effect of these seizures on the tribe. In Muscogee (Creek) Nation, the Court held that the state's legitimate authority permitted it to seize, on state land, cigarettes lacking tax stamps that were being shipped into Indian country for sale by Indian dealers. 669 F.3d at 1178-79. The Court explained that, although "[t]he alleged ancillary effect of these laws based on the State's off-Indian country enforcement of them, is that [the tribe's] members cannot buy contraband cigarettes . . . such an indirect effect does not establish a preemption or an infringement of tribal sovereignty claim." Id. at 1183; see also Okla. Tax Comm'n, 498 U.S. at 514 ("States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation or by assessing wholesalers who supplied unstamped cigarettes to the

tribal stores." (citation omitted)); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 162 (1980) (approving of off-Indian country seizure of cigarettes to "police[ ] against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests"). The State's action here falls far short of depriving Indian merchants of the very goods they seek to sell; here the State is not preventing the manufacturers from continuing to do business with the Pueblo.

Indeed, a state may act within its sphere of authority even though its actions could profoundly impact the viability of a tribal undertaking. Cf. Colville, 447 U.S. at 145 (state could tax on-reservation cigarette sales to non-tribal members, even though Indian tobacco sellers were substantially dependent on state tax exemption to attract business from nonmembers of tribe); Bay Mills, 134 S. Ct. at 2034-35, 2035 n.1 (noting that Michigan properly could prosecute or sue tribal officials and employees, or anyone else who "maintains – or even frequents" a tribe's off-reservation illegal gaming operation, notwithstanding that such "alternative remedies may be more intrusive on, or less respectful of, tribal sovereignty"); Hobia, 771 F.3d at 1256 (explaining that "when the Supreme Court in Bay Mills discussed the Ex parte Young doctrine, it did so in the context of noting that Michigan could bring suit against tribal officials or employees (rather

than the Tribe itself) seeking an injunction for violations of Michigan state law, such as gambling without a license" (internal quotation marks & citation omitted)).

Consistent with these decisions, while IGRA prevents the State from prosecuting the Pueblo for conducting its unlawful gaming operations on tribal lands, the State properly can assert its sovereign interests by issuing citations to its manufacturer-licensees who violate State law by supporting or profiting from tribal gaming activities that are unquestionably illegitimate. The Supreme Court has recognized that "[w]hen . . . State interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land[.]" Nevada v. Hicks, 533 U.S. 353, 362 (2001). Here, significant State interests are involved, yet the State has limited its regulatory reach to non-tribal members acting off tribal land.

As previously stated, New Mexico is regulating its licensees, not the Pueblo. But even assuming, for argument's sake, that the issuance of citations to the manufacturers could be viewed as an indirect attempt to regulate the Pueblo's illegal gaming, the State's actions would not be improper. The Supreme Court recognized in Bay Mills that a state is within its rights to assert "leverage" to enforce its laws against an Indian tribe that is conducting illegal gaming. 134 S. Ct. at 2035. Although a state might not be able to act directly against a tribe that is gaming illegally but is shielded from state action by federal exclusivity or tribal

sovereign immunity, the state's ability to assert its authority indirectly by enforcing its law on its own lands remains "capacious." Id. at 2034; see id. at 2034-35 (explaining that although a "State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation, … on its own lands, [it] has many other powers over tribal gaming"; for instance, a state can deny a license to a tribe for an off-reservation casino and can bring suit against tribal officials or employees seeking an injunction for gambling illegally); cf. Okla. Tax Comm'n, 498 U.S. at 514 (noting that, although sovereign immunity protected tribe from suit by state to enforce collection of cigarette sales tax, state could "of course collect the sales tax from cigarette wholesalers").

For the foregoing reasons, the district court erred in concluding that Plaintiffs are likely to prevail on the merits of their contention that federal law bars the State from applying its laws and policy to non-Indian, State-licensed gaming equipment manufacturers with respect to their licensure to do business with non-Indian, State-licensed casino operators within the State but outside Indian lands – an action that does not prohibit the Pueblo from operating even an illegal gaming operation on its reservation nor prevent the manufacturers from dealing with the Pueblo as they see fit. The State's police power outside the reservation is not neutralized by tribal interests in the circumstances presented by this case.

B. Because the State Is Exercising Its Legitimate Authority Over Licensed Gaming Equipment Manufacturers Operating Within the State's Jurisdiction, Plaintiffs Also Failed to Show That Equitable Factors Favor Granting a Preliminary Injunction.

1. The remaining factors are irrelevant when a claim fails on the merits.

Because Plaintiffs cannot succeed on their claim that the State's exercise of police power over non-Indian licensees with respect to gaming outside of Indian lands violates the Pueblo's tribal sovereignty rights, the Court need not address the equitable factors, supra pp. 13-14, that also must support a preliminary injunction. When a claim fails on the merits, the Court may "short-circuit the factor-weighing process" and must reverse the grant of an injunction regardless of how the other factors might be weighed. Soskin, 353 F.3d at 1257.

2. Even if considered, the remaining factors do not favor enjoining the State's exercise of its regulatory authority.

Even if the remaining equitable factors were to be considered, however, they no more support injunctive relief than does an assessment of Plaintiffs' probability of success.

Irreparable Injury

The district court concluded that Plaintiffs demonstrated irreparable injury because the Pueblo's tribal sovereignty had been infringed by the State and the Pueblo's flow of revenue from its class III gaming operation was jeopardized. Supra p. 10. But the State's actions do not improperly infringe the Pueblo's

interests. Supra Point A. And equity will not support an injunction to maintain the Pueblo's revenue stream from an illegal gaming enterprise. See, e.g., Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985) ("[I]n equity as in law the plaintiff's fault, like the defendant's, may be relevant to the question of what if any remedy the plaintiff is entitled to. An obviously sensible application of this principle is to withhold an equitable remedy that would encourage, or reward (and thereby encourage), illegal activity, as where the injunction would aid in consummating a crime[.]" (citation omitted)). Furthermore, the Pueblo's claimed economic injury is of its own making. Cf. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1556 (10th Cir. 1997) ("[W]hile we appreciate the enormous costs . . . which the Tribes will incur if they must now close gaming facilities they currently operate under these compacts [which the Court determined to be invalid], the Tribes must bear some responsibility for their dilemma because . . . most of them commenced gaming well before these compacts were signed.").

It is the State that is suffering injury in this case by being barred from exercising its legitimate police power. Cf. Kansas v. United States, 249 F.3d 1213, 1227-28 (10th Cir. 2001) (upholding preliminary injunction staying action on federal agency decision that non-reservation land on which Indian tribe intended to conduct gaming was Indian land; "[B]ecause the State of Kansas claims the . . . decision places its sovereign interests and public policies at stake,

we deem the harm the State stands to suffer as irreparable if deprived of those interests without first having a full and fair opportunity to be heard on the merits. . . . [The State's] interests in adjudicating the applicability of IGRA, and the ramifications of such adjudication, are sufficient to establish the real likelihood of irreparable harm if the Defendants' gaming plans go forward at this stage of the litigation." (citations omitted)); see also Mashantucket Pequot Tribe, 722 F.3d at 476 (recognizing state's "sovereign interest in being in control of, and able to apply, its laws throughout its territory").

Balance of Hardships

"[T]he ability of [government] to enact and enforce measures it deems to be in the public interest is . . . an equity to be considered in balancing hardships." Heideman v. S. Salt Lake City, 348 F.3d 1182, 1191 (10th Cir. 2003). The district court, however, gave minimal weight to the State's interest, which it considered to be outweighed by Plaintiffs' claimed injury to tribal sovereignty. Supra p. 11. Plaintiffs' claim of injury "is simply a refashioning of [their] general sovereign immunity . . . argument[ ]" which, as has been shown, lacks merit. Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1158 (10th Cir. 2011). The harm to the State's interest in exercising its police power over the holders of State-issued gaming licenses to regulate gaming activity within the State outweighs the claimed harm to the Pueblo's sovereignty interest.

Public Interest

The district court took the view that an injunction would serve the public interest by promoting tribal sovereignty. Supra p. 11. "[W]here the Plaintiffs' claim of the public interest is largely a restatement of their own . . . interest, and the [State's] claim of public interest is largely a restatement of its own interest in regulating the conduct in question, the 'public interest' prong of the preliminary injunction inquiry is nothing more than a restatement of the 'balance of hardships' prong." Heideman, 348 F.3d at 1191. That balance favors the State. For reasons already addressed, the Pueblo's sovereignty on its lands does not prevent the State from regulating its non-Indian licensees with respect to their ability to do business with non-Indian gaming operators outside tribal lands. It is not in the public interest to enjoin the State from enforcing compliance with the Gaming Control Act within its jurisdiction.

In summary, the foregoing factors need not be considered in this case because Plaintiffs' claim plainly lacks merit and an injunction cannot be justified. But, if considered, none of these equitable factors weighs in favor of granting injunctive relief. The district court clearly erred in reaching a contrary conclusion.

Conclusion

Neither IGRA nor any related concept of tribal sovereignty bars the State of New Mexico from enforcing its laws with respect to the licensure of non-Indian

manufacturers of gaming equipment to do business with licensed, non-Indian gaming operators in connection with gaming activities occurring within the State and outside Indian lands. The district court erred in enjoining the State's proper exercise of its police power. For the reasons discussed, the district court's grant of preliminary injunctive relief was in error and should be reversed.

Statement Regarding Oral Argument

This appeal presents a question of vital concern to the State regarding the extent to which it may exercise its police power to regulate its non-Indian gaming licensees with respect to their ability to do business with non-Indian gaming operations conducted on non-Indian land, in the face of the Pueblo's claim that federal law precludes the State from doing so. Appellants therefore request oral argument.

Respectfully submitted,

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,555 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing software in 14-point Times New Roman type.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By *__/s/ Edward Ricco__*
Edward Ricco

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RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By *__/s/ Edward Ricco_____*
Edward Ricco

CERTIFICATE OF SERVICE

I certify that on December 22, 2015, I filed the foregoing pleading electronically through the CM/ECF system, which caused all other parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Docket Activity.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By *_/s/ Edward Ricco _____*
Edward Ricco

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs

vs. **No. 1:15-cv-0625 RB/GBW**

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

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, filed on September 25, 2015. Defendants filed a response in opposition on October 1, 2015. Jurisdiction arises under 28 U.S.C. §§ 1331 and 1362. The Court held a hearing on October 2, 2015 wherein the parties proffered evidence and argument. Having considered the parties submissions, the Court finds that this motion should be granted.

I. Introduction

On July 18, 2015, Plaintiffs filed suit seeking redress for: (1) the alleged failure of the State of New Mexico ("the State") to conclude tribal-state compact negotiations in good faith under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701(d); and (2) the actions and pronouncements taken by the Individual Defendants under color of state law to deprive the Pueblo of Pojoaque ("the Pueblo") of the federal right to be free of state jurisdiction over Class

III gaming[1] activities that occur on the Pueblo's Indian lands. (Compl., Doc. 1.) With respect to the second claim, Plaintiffs seek a temporary restraining order or preliminary injunction enjoining Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement action against any licensee in good standing with the New Mexico Gaming Control Board ("NMGCB") based wholly or in part on grounds that such licensee is conducting business with the Pueblo. (Plaintiffs' Motion, Doc. 23.)

II. Background

On July 19, 2005, the Pueblo and the State executed a Class III Gaming Compact ("the Compact") that expired on June 30, 2015. (Doc. 1.) In advance of the expiration of the Compact, the Pueblo formally requested that the State enter into another compact. (*Id.*) However, the parties were unable to reach an agreement. (*Id.*) On December 13, 2013, the Pueblo filed a lawsuit against the State for failure to negotiate a compact under IGRA in good faith. *See Pueblo of Pojoaque v. State of N.M.*¸ 1:13-cv-01186 JP/KBM (Mar. 3, 2014). On February 25, 2014, the State asserted Eleventh Amendment immunity as an affirmative defense to the Pueblo's Complaint. (*Id.*) Accordingly, Judge James A. Parker dismissed the lawsuit on March 3, 2014. (*Id.*)

Thereafter, the Pueblo submitted a proposal for Class III gaming to the United States Secretary of the Interior pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(B) and 25 C.F.R. Part 291 (1999). On August 7, 2014, the State filed a lawsuit against the United States alleging that the Secretary of the Interior lacks the authority to promulgate the regulations set forth in 25 C.F.R. Part 291. *New Mexico v. Department of the Interior*, 1:14-cv-0695 JP/SCY, *on appeal* 14-2222.

[1] Class III gaming includes slot machines and banked card games. *See* 25 U.S.C. § 2703(8).

On October 17, 2014, Judge Parker granted summary judgment in favor of the State and enjoined the United States from taking action pursuant to 25 C.F.R. Part 291. An appeal to the United States Court of Appeals for the Tenth Circuit is pending.[2]

On November 3, 2014 the Pueblo notified the State of a new request to negotiate a compact to govern the Pueblo's Class III gaming beyond the June 30, 2015 expiration date of the Compact. (Doc. 1.) Thereafter, representatives of the State and the Pueblo met to negotiate a new compact but were unable to reach an agreement. (*Id.*) Prior to the expiration of the Compact, the Pueblo agreed to comply with conditions set by the United States Attorney's Office concerning how the Pueblo's gaming activities would be regulated after the expiration of the Compact and while the litigation in *New Mexico v. Department of the Interior* remains pending. (*Id.*)

On February 26, 2015, the New Mexico Gaming Control Board ("NMGCB"), through Defendant Paulette Becker, requested to perform its annual compliance review on November 3–5, 2015. (Doc. 1; Declaration of Joseph M. Talachy, Doc. 23-1; Paulette Becker Letter dated 2/26/2015, Doc. 23-2.) However, on May 6, 2015, Defendant Becker sent a letter requesting an earlier compliance review in advance of the expiration of the Compact. (Paulette Becker Letter dated 5/6/2015, Doc. 23-3.) In the May 6, 2015 letter, Defendant Becker requested the Pueblo provide "[a]ny and all contract [sic] with Class III Gaming Machine Manufacturers, including and [sic] Lease, Purchase and Service Agreements." (*Id.*) Pursuant to its document production obligations under the Compact, the Pueblo provided the requested vendor contracts on June 24, 2015. (*Id.*)

[2] Oral argument in *New Mexico v. Department of the Interior*, 14-2222 was held on September 28, 2015.

On June 30, 2015, the United States Attorney for the District of New Mexico and the National Indian Gaming Commission issued letters stating that they would forgo enforcement action against the Pueblo as the result of the expiration of the Compact, during the pendency of the appeal in *New Mexico v. Department of the Interior*. (Doc. 1; Damon Martinez Letter dated 6/30/2015, Doc. 23-10; Jonodev Chaudhuri Letter dated 6/30/15, Doc. 23-11.) The decisions to withhold enforcement actions were conditioned on the pendency of active litigation before the Tenth Circuit Court of Appeals, the Pueblo's commitment to maintain the status quo of its gaming operations as set forth in the Compact, and the Pueblo's commitment to place in trust the funds that would have been paid to the State under the Compact. (*Id.*) The United States Attorney's decision will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate. (Doc. 23-10.) The United States Attorney's letter provides that it "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 . . . ." (*Id.*)

On June 30, 2015, the Individual Defendants issued a public statement that the United States Attorney's decision to allow the Pueblo's Casinos to stay open "provides no protection to banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise." (Doc. 23-5.) Additionally, on July 15, 2015, the NMGCB, through the Individual Defendants, held a closed meeting to discuss compliance issues. (Doc. 1.) Following the closed meeting, Individual Defendants announced that they had determined the Pueblo is acting illegally in its continued operation of its Class III gaming activities and placed in abeyance approval of any license application or renewal for the Pueblo's vendors. (*Id.*) No other vendor applications were placed in abeyance. (*Id.*)

The actions of the Individual Defendants discouraged vendors from doing business with the Pueblo. (Doc. 23-1; Declaration of Michael Allgeier, Doc. 23-9.) As a result, the Pueblo's two Class III gaming facilities, Buffalo Thunder Casino and Cities of Gold Casino (collectively "Pueblo Casinos"), have sustained losses in revenue. (Doc. 23-9.) The Pueblo Casinos operate more than 1,800 Class III games and provide direct financial benefit to the Pueblo's non-gaming businesses, including a resort, golf course, wedding chapel, casitas, two hotels, RV park, sports bar, two gas stations, a supermarket, sandwich shop, hardware store, apartment complex, mobile home park, bowling alley, farmer's market, storage unit facility, and vacation rentals. (*Id.*) The Pueblo's operations employ hundreds of individuals. (*Id.*)

In early 2015, the Pueblo sought to obtain a new casino management system ("CMS") for its casinos. (Doc. 23-9.) A CMS provides slot accounting and patron management for slot machines. (*Id.*) The CMS integrated gaming and non-gaming applications include slot machine monitoring and accounting, slot ticketing, cashless gaming, e-games platforms, table monitoring, live point of sale systems for bingo, race and sports books, promotional kiosks, hotel, food and beverage point of sale interfaces, surveillance and security, responsible gaming, third-party check cashing, general ledger, and data warehousing. (*Id.*) The CMS ensures the integrity of the manner in which gaming operations conduct business, for both the gaming enterprise and the patron. (*Id.*) The current CMS at the Pueblo Casinos is a product of Aristocrat Technologies, Inc. and is outdated and should be replaced. (*Id.*)

In January 16, 2015, Buffalo Thunder reached an agreement with Bally Enterprises for the purchase and installation of a new CMS to replace the current Aristocrat CMS. (Doc. 23-9; Doc. 23-12.) The new CMS would provide updated accounting and marketing purposes and

record all activity of all slot machines, table games, and poker play. (Doc. 23-9.) In March and April of 2015, Scientific Games Corporation, successor corporation to Bally, represented to Buffalo Thunder management that October 1, 2015 would be the "Go-Live" date for the new Bally CMS under the Bally Contract. (Declaration of Terrence "Mitch" Bailey, Doc. 27-1.)

On September 9, 2015, the NMGCB sent letters to the Pueblo's gaming vendors. (Doc. 23-14.) The letters assert that the Pueblo is conducting illegal gaming operations, state that the vendor is being audited by the NMGCB, and demand the production of all communications and business records with respect to the Pueblo's operations. (*Id.*) As a result of Defendants' letter of September 9, 2015, Scientific Games, Inc. refused to provide needed software and servicing of the Pueblo gaming machines on September 25, 2015. (Second Suppl. Bailey Declaration, Doc. 27-1.) The refusal has caused several gaming machines to be shut down immediately, and is likely to cause many more to be shut down, resulting in substantial loss of the Pueblo's revenue. (*Id.*)

The Pueblo has three critical needs from its vendors for the continued operation of gaming activities at the Pueblo Casinos: (1) the installation and operation of the new Bally CMS, including technical support service by Scientific Games, Inc.; (2) the ability to obtain new machines and new products through the purchase, lease, conversion, or replacement of existing older products and machines; and (3) the ability to continue to operate existing machines and products through the vendor's delivery of replacement parts and continued technical support services. (Doc. 23-9.)

On September 25, 2015, the NMGCB issued citations to all the vendors doing business with the Pueblo Casinos. (Second Suppl. Bailey Declaration, Doc. 30.) At least one vendor

refused to show its citations to representatives of the Pueblo as it was concerned about further retaliation from the NMGCB. (*Id.*) Plaintiffs submitted copies of three citations issued to Aristocrat Technologies, Inc. on September 25, 2015. (Docs. 30-1, 30-2, 30-13.) Citation No. 2486 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.16.9(C), (D), (E) & (F) NMAC; 15.1.16.11 NMAC; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present the licensee shipped gaming machines or equipment to Buffalo Thunder Resort and Casino: [sic] No notice was given to the New Mexico Gaming Control Board. Additionally licensee did not self-report this activity." (Doc. 30-1.)

Citation No. 2487 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.16.8(B) NMAC; 15.1.16.12(B) NMAC; 60-2E-4 NMSA; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present, the Pueblo of Pojoaque did not have in effect a Tribal-State Gaming Compact or Secretarial prescribed procedures permitting Class III gaming on the Pueblo of Pojoaque. By letter dated June 30, 2015 the United State [sic] Attorney for the District of New Mexico stated that the Pueblo of Pojoaque would be in violation of federal law if it engaged in Class III gaming without one of the aforementioned documents in place. The Pueblo of Pojoaque's Tribal Gaming Ordinance also prohibits Class III gaming on the Pueblo in the absence of a Tribal-State Gaming Compact or Secretarial prescribed procedures. Federal law makes applicable State law when gaming is occurring on Indian lands in the absence of a Tribal-State Gaming Compact or Secretarial prescribed procedures. During the period of July 1, 2015 to present, licensee sold or transferred gaming devices to a person that

could not lawfully own or operate the gaming device. Additionally, licensee did not self-report this activity." (Doc. 30-2.)

Citation No. 2488 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.10.9(f), ([unreadable]) and (g) NMAC; 15.1.10.11(A) NMAC; 60-2E-4 NMSA; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present, the licensee has in effect agreements with gaming operations on the Pueblo of Pojoaque, more specifically Buffalo Thunder Resort and Casino and Cities of Gold Casino, whereby licensee leases gaming devices to the casinos for use and play. Licensee receives a percentage of 'net-win' from each machine. Additionally, licensee has in place agreements with the gaming operators on the Pueblo of Pojoaque for wide area progressive gaming machines and the licensee receives a percentage of 'net-win' from the play of these machines. Since July 1, 2015 there has been no Tribal-State Gaming Compact or Secretarial prescribed procedures in effect that permit Class III gaming on the Pueblo of Pojoaque. By letter dated June 30, 2015, the United States Attorney for the District of New Mexico stated that such gaming activity occurring after June 30, 2015 would violate federal law. For purposes of federal law, State gaming laws apply to gaming activity occurring on Indian lands where no Tribal-State Gaming Compact or Secretarial prescribed procedures are in place permitting such activity. Additionally, licensee did not self-report this activity." (Doc. 30-3.)

On September 30, 2015, representatives of Scientific Games, Inc. advised Terrence "Mitch" Bailey, the Executive Director of Gaming Operations of the Pueblo, that they could not conduct business with the Pueblo due to the enforcement actions taken by the NMGCB. (Doc.

30.) The representatives stated that they are concerned about how the actions of NMGCB could impact their licenses worldwide. (*Id.*)

The Pueblo projects revenue losses of $300,000 per month starting October 1, 2015, due to its inability to install and implement the new CMS. (Declaration of Michael Allgeier, Doc. 23-9.) Additionally, the Pueblo's inability to enter into contracts for new game purchases, new game leases, and conversions of older games to new machines, has an immediate negative effect on gaming revenue and fees paid to vendors. (*Id.*) The Pueblo will suffer imminent harm, as the operations will immediately lose 17% of their current revenue from an inability to support existing games. (*Id.*) The gaming operations are now at risk of the entire CMS failing, which will result in an inability to operate Class II or Class III gaming. (*Id.*) The loss of the gaming revenue would result in substantial layoffs, and millions of dollars in lost revenue, placing the Pueblo in breach of financial agreements, reductions in essential government services to the Pueblo's membership and possibly force the closure of the Pueblo's gaming facilities. (Doc. 23-1.)

The Pueblo provides 1,200 New Mexico residents with employment and employment-related benefits. (Doc. 23-1.) As an employer, the Pueblo pays a total of $46,300,000 in combined annual payroll and benefits. (*Id.*) The Pueblo's gaming/resort businesses alone employ nearly 800 individuals with annual payroll and benefits of $32,500,000. (*Id.*) The inability to conduct Class III gaming operations would result in the loss of highly trained employees. (*Id.*) Additionally, the Pueblo's inability to continue to provide employment, career training, and employment-related benefits would force some of the employees to rely upon state and federal assistance. (*Id.*)

Plaintiffs request a temporary restraining order and/or preliminary injunction prohibiting Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the NMGCB based wholly or in part on grounds that such licensee is conducting business with the Pueblo. Defendants opposed the motion and assert that there is no federal jurisdiction, that Plaintiffs cannot meet the requirements for equitable relief, and that Plaintiffs lack standing.

III. Discussion

A. Overview

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.' " *Michigan v. Bay Mills Indian Comm.*, 134 S.Ct. 2024, 2030 (2014) (*quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) and *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). "As dependents, the tribes are subject to plenary control by Congress." *Bay Mills*, 134 S.Ct. at 2030 (*citing United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive' " to "legislate in respect to Indian tribes"). "And yet they remain 'separate sovereigns pre-existing the Constitution.' " *Bay Mills*, 134 S.Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 134 S.Ct. at 2030 (*quoting United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

"Congress enacted IGRA in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that because Congress had not regulated Indian gaming, the states lacked authority to regulate gaming on

Indian lands." *Bay Mills*, 134 S.Ct. at 2034. IGRA regulates gaming that occurs on Indian lands, which include "any lands title to which is [ ] held in trust by the United States for the benefit of any Indian tribe . . . and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). IGRA provides "a comprehensive approach to the controversial subject of regulating tribal gaming, [and strikes] a careful balance among federal, state, and tribal interests." *Florida v. Seminole Tribe of Fla.* (*Seminole Tribe II*), 181 F.3d 1237, 1247 (11th Cir. 1999).

IGRA "divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class." *Seminole Tribe of Fla. v. Florida* (*Seminole Tribe I*), 517 U.S. 44, 48 (1996). IGRA defines Class II gaming to include bingo and permits the use of "electronic, computer, or other technologic aids" in connection with the game. 25 U.S.C. § 2703(7)(A)(i). Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. *See* 25 U.S.C. § 2703(8). Generally, a tribe may conduct Class III gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. *See* 25 U.S.C. § 2710(d)(1)(C).

IGRA provides tribes with a right of action to sue in federal court with respect to tribal-state compacts. *Alabama v. PCI Gaming Authority*, ___ F.3d ___, 2015 WL 5157426 (11th Cir. Sept. 3, 2015). If a state fails to negotiate a tribal-state compact in good faith, a tribe may bring a civil action against the state in federal court. 25 U.S.C. § 2710(d)(7)(A)(i). However, IGRA limits the remedies available to the tribe in such an action. *Id*. Additionally, a state may raise Eleventh Amendment immunity with respect to a claim that the state failed to negotiate a compact in good faith. *See Seminole Tribe I*, 517 U.S. at 47. Under such circumstances, the

tribe may not obtain broad injunctive relief in federal court. *Id.* Rather, the only remedy available to a tribe for such a claim is to request that the Secretary of the Interior set forth the terms under which the tribe may engage in Class III gaming on Indian lands within the state. *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv), (vii).[3]

IGRA includes three provisions codified in the criminal code, only one of which is relevant here.[4] Section 1166, titled "Gambling in Indian country," applies to Class III gaming conducted in the absence of a tribal-state compact. *See* 18 U.S.C. § 1166(c). This section incorporates "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto" into federal law. *See* 18 U.S.C. § 1166(a). These state laws "shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." *Id.* Section 1166 makes it a federal crime to commit an act or omission involving gambling where the conduct "would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred," under the state's laws "governing the licensing, regulation, or prohibition of gambling." 18 U.S.C. § 1166(a). The punishment for this assimilated federal crime is the same as the punishment would be under state law for the state crime. *Id.*

Notably, IGRA expressly provides that the United States has the exclusive jurisdiction to bring criminal prosecutions for violations of § 1166(b). *See* 18 U.S.C. § 1166(d). In that the Compact between the Pueblo and the State expired on June 30, 2015, Section 1166(d) applies to

[3] When the Pueblo pursued this remedy, the State filed a lawsuit against the United States alleging that the Department of the Interior lacks the authority to promulgate the regulations set forth in 25 C.F.R. Part 291. This is the subject of the pending appeal in *New Mexico v. Department of the Interior*.

[4] The two other provisions criminalize theft from, and theft by officers or employees of, gaming establishments on Indian lands. *See* 18 U.S.C. §§ 1167–68.

the Pueblo's gaming operations. By the plain terms of the statute, the United States, and not the State, has exclusive jurisdiction to bring criminal prosecutions for violations of the State's laws governing the licensing and regulation of gambling on the Pueblo's lands. *See* 18 U.S.C. § 1166. While Defendants have not threatened criminal action against the Pueblo's vendors, the NMGCB has issued administrative citations that could endanger the vendors' licenses to conduct business within the State of New Mexico and affect their licensure status in other jurisdictions. In that Section 1166(d) explicitly provides that only the federal government may bring criminal prosecutions to enforce the State's laws governing the licensing and gambling on tribal lands in the absence of a tribal-state compact, it follows that the NMGCB lacks jurisdiction to issue citations to vendors for the sole reason that they conduct business with the Pueblo's Casinos.

B. Jurisdiction

Defendants challenge this Court's federal subject matter jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Gunn v. Minton*, —— U.S. ——, 133 S.Ct. 1059, 1064 (2013) (*quoting Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted)). As a result, "there is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *McKenzie v. U.S. Citizenship and Immigration Servs., Dist. Director*, 761 F.3d 1149, 1154 (10th Cir. 2014). Plaintiffs invoke this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1362 (jurisdiction over actions brought by Indian tribes arising under the Constitution, laws, or treaties of the United States).

Courts have held that Section 1331 confers jurisdiction on cases arising under IGRA or

"the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes and the states." *Sycuan Band v. Roache*, 54 F.2d 535, 538 (9th Cir. 1994) (*citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). Additionally, an action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within Section 1362 jurisdiction as a matter arising under the Constitution, treaties, or laws of the United States. *United Keetoowah Band of Cherokee v. Oklahoma*, 927 F.2d 1170, 1173 (10th Cir. 1991) (*citing Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472–73 (1976)). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (exercising federal jurisdiction over tribe's request for preliminary injunction against a state). Accordingly, the Court has federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

Defendants also assert sovereign immunity. Plaintiffs acknowledge that the State enjoys immunity from Plaintiffs' claim for failure to conclude tribal-state compact negotiations in good faith. *See Seminole Tribe I*, 517 U.S. at 47. However, the Individual Defendants are not immune from suit. More specifically, because Plaintiffs allege that the Individual Defendants are committing ongoing violations of IGRA, a federal law, and Plaintiffs seek injunctive relief to stop the violations, the Individual Defendants are not entitled to immunity. *See PCI Gaming Authority*, 2015 WL 5157426 at *5.

While state officials enjoy limited sovereign immunity to suit in federal court, they can be sued in their official capacity in federal court under certain circumstances. *See Ex parte Young*, 209 U.S. 123 (1908). Specifically, in *Ex parte Young*, the Supreme Court recognized an exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law. *Ex parte Young*, 209 U.S. at 155–56.

Under the legal fiction established in *Ex parte Young*, when a state official violates federal law, he is stripped of his official or representative character and is no longer immune from suit. *Id.* at 159–60.

The Supreme Court has explained that the application of *Ex parte Young* is straightforward. The Court stated: "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 131 S.Ct. 1632, 1639 (2011). As a result, "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction," such that the state officer is not immune from suit. *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). The Tenth Circuit Court of Appeals has held that a state official need not violate a federal statute to be subject to suit under *Ex parte Young*; all that is required is an allegation that the state official is interfering, or is about to interfere, with a federally protected right. *See Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205 (10th Cir. 2002) (finding that the *Ex parte Young* doctrine applied where plaintiff tribe sought injunctive relief to stop officials from interfering with the tribe's right to hunt and fish on Indian land).

In this case, Plaintiffs have established that the Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact. These actions are inconsistent with IGRA and the Supremacy Clause. The Individual Defendants' actions are interfering with the Pueblo's federal protected rights to tribal sovereignty and the ability to conduct their gaming activities. The Pueblo seeks injunctive relief to stop the

Individual Defendants from interfering with their federally protected rights. Thus, the *Ex parte Young* doctrine applies.

Defendants contend that *Ex parte Young* is inapplicable to Plaintiffs' claims against the Individual Defendants based on the exception to *Ex parte Young* set out in *Seminole Tribe I*. Defendants' argument is not legally supported. The Supreme Court's decision in *Seminole Tribe I* addressed only whether *Ex parte Young* permitted a state official to be sued under 25 U.S.C. § 2701(d), the provision of IGRA that gives a tribe an express cause of action to sue to compel a state to negotiate in good faith a tribal-state compact governing Class III gaming based on the limited remedial scheme available to a tribe to vindicate this right. *See Seminole Tribe I*, 517 U.S. at 47. *Seminole Tribe I* neither addressed nor decided whether state and tribal officials are immune from other IGRA-based claims to enforce rights for which the statute does not set forth such a detailed, limited remedial scheme.

Notably, courts across the country have held that the *Seminole Tribe I* exception to *Ex parte Young* is inapplicable to claims such as Plaintiffs' claims against the Individual Defendants. *See Tohono O'odham Nation v. Ducey*, _____ F. Supp. 3d ____, 2015 WL 5475290 (D. Ariz. Sept. 17, 2015); *Massachusetts v. Wampanoag Tribe of Gay Head*, _____ F. Supp. 3d ____, 2015 WL 854850 (D. Mass. Feb. 27, 2015); *Friends of Amador Cty. v. Salazar*, No. CIV. 2:10–348 WBS KJM, 2010 WL 4069473, at *4 (E.D. Cal. Oct. 18, 2010); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1109 n. 34 (E.D. Cal. Aug. 5, 2002). As an example, the *Tohono O'odham* decision expressly rejected the argument by the Director of the Arizona Department of Gaming that *Seminole I* precludes an action by a tribe seeking an injunction against state officials, noting that Tohono O'odham's actions seeking to enjoin the Arizona Department of

Gaming from threatening vendors were separate and distinct from claims that Arizona had failed to negotiate a compact in good faith. *Id.*, 2015 WL 5475290 at *6–7. Additionally, the *Wampanoag* decision held that counterclaims by a tribe against a state seeking to enjoin interference with a tribe's gaming activities are cognizable under the *Ex parte Young* doctrine. *Wampanoag Tribe*, 2015 WL 854850 at *17. The circumstances of this case are materially similar to these cases and the *Seminole Tribe I* exception to *Ex parte Young* is inapplicable here. Unlike the provisions at issue in *Seminole Tribe I*, Congress did not create a detailed remedial scheme for tribes to challenge state officials' unauthorized enforcement of state gaming regulations to an Indian gaming operation in the absence of a tribal-state compact. Thus, Plaintiffs have satisfied the requirements of *Ex parte Young* with respect to their claims against Individual Defendants. Accordingly, this Court has jurisdiction to grant injunctive relief.

Defendants argue that Plaintiffs lack Article III standing because they failed to establish sufficient facts to demonstrate that they have suffered an injury in fact as their claims are based on the rights of the vendors rather than their own rights. To establish Article III standing, a plaintiff must establish (1) that they have "suffered an injury in fact;" (2) that the injury is "fairly traceable to the challenged action of the defendant;" and, (3) that it is "likely" that "the injury will be redressed by a favorable decision." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 131 S.Ct. 1436, 1442 (2011) (quotations omitted).

Defendants dispute whether Plaintiffs have met the first element, injury in fact. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *See Winn*, 131 S.Ct. at 1442 (quotations omitted). Plaintiffs have alleged that the actions of Defendants will cause the Pueblo to lose

significant amounts of revenue. More specifically, the Pueblo projects revenue losses of $300,000 per month starting October 1, 2015, due to its inability to install and implement the new CMS. (Declaration of Michael Allgeier, Doc. 23-9.) Additionally, the Pueblo's inability to enter into contracts for new game purchases, new game leases, and conversions of older games to new machines, has an immediate negative effect on gaming revenue and fees paid to vendors. (*Id*.) The Pueblo will suffer imminent harm, as the operations will immediately lose 17% of their current revenue from an inability to support existing games. (*Id*.) The gaming operations are now at risk of the entire CMS failing, which will result in an inability to operate Class II or Class III gaming. (*Id*.) The loss of the gaming revenue would result in substantial layoffs, and millions of dollars in lost revenue, placing the Pueblo in breach of financial agreements, reductions in essential government services to the Pueblo's membership and possibly force the closure of the Pueblo's gaming facilities. (Doc. 23-1.) Plaintiffs have established that they have suffered an injury in fact that is more than "fairly traceable" to Defendants' actions and it is likely that the injury will be redressed by a favorable decision. Thus, Plaintiffs have Article III standing.

C. Injunctive relief

Temporary restraining orders and preliminary injunctions are "extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). In the Tenth Circuit, a party requesting injunctive relief must "demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the

balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

It is well-established that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (citations omitted). Plaintiffs have satisfied this factor. The Tenth Circuit has "repeatedly stated that . . . an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation*, 443 F.3d at 1255. In *Wyandotte Nation*, the Tenth Circuit Court of Appeals upheld a preliminary injunction preventing Kansas from enforcing state gaming laws on a tract of tribal land because of the resulting infringement on tribal sovereignty. *Id.* at 1254–57; *see also Ute Indian Tribe v. State of Utah*, ___ F.3d ____, 2015 WL 3705904 (10th Cir. Jun. 16, 2015) (slip op.) (reversing district court denial of preliminary injunction where state's unlawful prosecution of tribal member interfered with tribal sovereignty); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir. 2001) (finding irreparable harm to tribal interests in governing motor vehicles within its reservation boundaries).

Defendants' conduct "create[s] the prospect of significant interference with [tribal] self-government" that the Tenth Circuit Court of Appeals has found sufficient to constitute "irreparable injury." *Prairie Band*, 253 F.3d at 1250–51. Moreover, the inability to recover monetary damages because of Eleventh Amendment immunity renders the harm to be irreparable for purposes of preliminary injunctive relief. *See Prairie Band*, 253 F.3d at 1251; *Kansas Health*

Care Ass'n Inc. v. Kansas Dep't of Soc. and Rehab. Servs., 31 F.3d 1536, 1543 (10th Cir. 1994).

Defendants' protestations that the regulation of vendors doing business with the Pueblo does not constitute regulation of the Pueblo's gaming activities are disingenuous and inconsistent with the record. Defendants' actions are based, quite clearly, on Defendants' own determination that the post-June 30, 2015 Class III gaming at the Pueblo is illegal – a determination that the Defendants, just as clearly, are without jurisdiction or authority to make. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (observing "that the very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over Class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004) ("Although the IGRA provides that Class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, it does not follow that the states have any authority to regulate Class III gaming in the absence of a compact. States may not enforce the terms of IGRA—the only enforcement provided for in the IGRA is through the federal government."), *vacated and remanded on other grounds*, 443 F.3d 1247 (10th Cir. 2006).

Defendants are frustrated by and resent the ongoing gambling activity of the Pueblo. Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that which Defendants know they are without authority or jurisdiction to accomplish directly. Defendants' contention that the enforcement actions against the vendors do not harm the Pueblo is also disingenuous. The undisputed evidence establishes that the Pueblo will lose significant revenue and its Casinos may shut down due to Defendants' intimidation of the Pueblo's vendors. Under these circumstances, Plaintiffs have established

irreparable harm.

Plaintiffs have also demonstrated a likelihood of success on the merits. It is well-established that only the federal government or the tribes themselves can subject the tribes to suit; tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. MFG. Technologies, Inc.*, 523 U.S. 751, 754 (1998). To be sure, IGRA gives states an enforcement role, but only through agreed-upon terms negotiated between the state and the tribe and embodied in a tribal-state compact. *See* 18 U.S.C. § 1166. However, as the Tenth Circuit Court of Appeals has recognized, states have no authority to regulate tribal gaming under IGRA unless the tribe specifically consents to the regulation in a compact. *See United Keetoowah Band of Cherokee*, 927 F.2d at 1177 (describing IGRA as preempting state criminal jurisdiction and a congressional limitation of "the states' enforcement role to Class III gaming conducted under a compact").

In fact, a number of courts have recognized the tribal-state compact restriction on states' enforcement authority. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997) ("Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on Class III gaming remains the exclusive province of the federal government."); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (observing "that the very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over Class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"); *PCI Gaming Authority*, 2015 WL 5157426 at *17 ("if we were to hold that states could sue to enjoin Class III gaming when a tribe engaged in Class III gaming without a compact, we would undermine IGRA's careful balance of federal, state, and tribal interests . . .");

Wyandotte Nation v. Sebelius, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004) ("Although the IGRA provides that Class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, it does not follow that the states have any authority to regulate Class III gaming in the absence of a compact. States may not enforce the terms of IGRA—the only enforcement provided for in the IGRA is through the federal government."), *vacated and remanded on other grounds*, 443 F.3d 1247 (10th Cir. 2006). Simply put, the State's jurisdiction over gaming activities that occur on the Pueblo's lands ceased when the compact expired. As a result, Plaintiffs have established a likelihood of success on the merits.

Additionally, the balance of equities tips in Plaintiffs' favor. A preliminary injunction would not harm the State, but allowing the State to intimidate the Pueblo's vendors would harm the economic viability of the Pueblo's gaming operations. As the Tenth Circuit Court of Appeals reasoned in the *Wyandotte Nation*, "the harm caused by granting the injunction to Kansas is minimal at best whereas the harm to the Wyandotte's sovereignty and well-being caused by permitting the state to continue exercising jurisdiction is quite substantial." *Wyandotte Nation*, 443 F.3d at 1255. In that the harm caused to the State by granting the preliminary injunction is minimal and the harm suffered by the Pueblo without the preliminary injunction would be substantial, the balance of equities tips in favor of Plaintiffs.

Finally, the public policy interest factor of the analysis weighs in favor of Plaintiffs. A preliminary injunction comports with what the Tenth Circuit Court of Appeals has described as the "paramount federal policy" of ensuring that Indians do not suffer interference with their efforts to "develop . . . strong self-government." *Seneca–Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989); *see also Prairie Band*, 253 F.3d at 1253. IGRA

identifies the public policy interests that Congress intended to advance namely "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Accordingly, the public interest is served by maintaining the status quo for the duration of the appeal in *New Mexico v. Department of the Interior* and for 30 days thereafter.

IV. Conclusion

The Court will grant Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction and issue a preliminary injunction enjoining Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo. This decision will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate in *New Mexico v. Department of the Interior*, 14-2222.

THEREFORE,

IT IS ORDERED that Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, filed on September 25, 2015, is **GRANTED**.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs

vs. **No. 1:15-cv-0625 RB/GBW**

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

Defendants.

PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, filed on September 25, 2015. Defendants filed a response in opposition on October 1, 2015. Jurisdiction arises under 28 U.S.C. §§ 1331 and 1362. The Court held a hearing on October 2, 2015, wherein the parties proffered evidence and argument. On October 7, 2015, the Court issued a Memorandum Opinion and Order and granted the motion. Accordingly, Defendants are enjoined from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo. This Preliminary Injunction will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate in *New Mexico v. Department of the Interior*, 14-2222.

Given the Pueblo's commitment to place funds that otherwise would have been paid to the State of New Mexico as revenue sharing into a trust held by an independent trustee, I exercise my discretion not to require a bond. *See Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461 (10th Cir. 1987) (holding that the Court has the discretion not to order an injunction bond).

IT IS SO ORDERED.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE