UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

Plaintiffs,

v. Case No. 1:15-CV-00625 JB/GBW

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

Defendants.

DEFENDANTS SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFREY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, AND CARL E. LONDENE'S MOTION TO DISMISS COUNT IV ON THE BASIS OF QUALIFIED IMMUNITY

Individual Defendants Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene (together "Individual Defendants") seek to dismiss Count IV of Plaintiffs Pueblo of Pojoaque and Joseph M. Talachy's (together "Plaintiffs") Complaint on the basis of qualified immunity.[1] Concurrence in this motion was sought but denied. As grounds for this motion, the Individual Defendants state as follows.

I. INTRODUCTION

The State of New Mexico, through its Gaming Control Act, licenses manufacturers of gaming equipment who are thereby authorized to provide equipment and related services to entities (non-Indian racetrack casinos and nonprofit fraternal and veterans' organizations) that

[1] As discussed with the Court at the November 24, 2015 scheduling conference, all of the Defendants will be filing additional dispositive motions directed at other counts, legal theories, and the parties.

themselves are licensed to conduct casino-style gaming operations within the State. At issue in this motion is whether the Individual Defendants, acting under color of state law, violated Plaintiffs' clearly established federal rights by taking action (or announcing that they will take action) against licensed manufacturers, potentially affecting their ability to do business with these non-Indian State-licensed gaming operators, based on the reasonable belief that the manufacturers violated State law in supplying equipment to or receiving proceeds from a gaming enterprise conducted illegally by the Pueblo of Pojoaque (the "Pueblo") on its tribal lands in the absence of a compact with the State.

Although Plaintiffs attempt to frame the issue differently, their complaints against the Individual Defendants do not arise from an effort by the Individual Defendants to regulate the Pueblo directly with respect to its gaming operations on tribal land. The Individual Defendants have not sought to enforce any law with respect to the Pueblo, nor seized any property, nor entered Pueblo lands. Nor are the Individual Defendants preventing manufacturers from dealing with the Pueblo on such terms as they see fit as licensees of the Pueblo's gaming enterprise. This motion presents a straightforward question: whether the Individual Defendants violated Plaintiffs' clearly established federal rights by regulating 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, in furtherance of the State's interest in ensuring that its licensees comply with State standards of lawful behavior.

The State's exercise of its police power is not preempted by federal law, even if the State's exercise of that authority indirectly impacts the Pueblo's ability to conduct illegal gaming. Although the Pueblo, on its lands, may be beyond direct regulation by the State in the absence of a compact, the State may regulate its licensees within its own territory. Because

Plaintiffs have no clearly established right to insulate their manufacturer vendors from State action with regard to the manufacturers' non-Pueblo licenses, the Individual Defendants are entitled to qualified immunity from Plaintiffs' claims.

II. LAW ON QUALIFIED IMMUNITY

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, at the Rule 12(b)(6) stage, a claim for damages against government officials in their individual capacities must allege facts that, if proved, would establish a violation of clearly established statutory or constitutional rights. *See id*. In evaluating a motion to dismiss, the Court "must accept all the well-pleaded allegations . . . as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (citation & internal quotation marks omitted). Nevertheless, the complaint must plead sufficient facts that, when taken as true, provide "plausible grounds" that the case will yield evidence to support Plaintiffs' allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs must "allege[ ] facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

When a government official asserts the defense of qualified immunity, the burden shifts to the plaintiffs. *See Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). Plaintiffs' burden has been described by the Tenth Circuit as a "heavy two-part burden," entailing both a showing that the Individual Defendants' actions violated Plaintiffs' rights under federal law, and

that those rights were clearly established at the time of the conduct at issue. *Id.* The Tenth Circuit has held that a plaintiff

> must do more than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited. The 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right'.

Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citation omitted).

The law is clearly established when a Supreme Court or Tenth Circuit decision is on point or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains. *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002). As the Supreme Court has explained, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). That inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 198; *accord Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

The purpose of the "clearly established" requirement is to give "fair warning" to a defendant of conduct that is unconstitutional. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (citation omitted). This requirement ensures that when a question is open, a court does not later answer it and hold officials liable for incorrectly predicting how the issue would be resolved. *See Hannula,* 907 F.2d at 131 ("We do not require government officials to predict future legal developments."); *see also Pearson v. Callahan,* 555 U.S. 223, 244-245 (2009) (reversing Tenth

Circuit decision denying police officers qualified immunity because, although the law clearly established that warrantless entry into a home violates the Fourth Amendment, the officers reasonably could have believed that the particular type of entry at issue was constitutional based on the "consent-once-removed doctrine").

Qualified immunity protects state officials not only from liability but also from the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). These protections allow society to avoid "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. To effectuate these purposes, "qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson*, 483 U.S. at 646 n.6.

III. PLAINTIFFS' ALLEGATIONS AGAINST THE INDIVIDUAL DEFENDANTS

In Count IV of Plaintiffs' July 18, 2015 Complaint, Plaintiff Joseph M. Talachy ("Talachy") claims entitlement to money damages from the Individual Defendants for actions that he alleges they took in their personal capacities under color of state law in violation of 42 U.S.C. §§ 1983 and 1985. (Compl. ¶¶ 143-151, Dkt. No. 1.) Talachy alleges that the "Individual Defendants knew or should have known that actions purporting to assert jurisdiction of the State over conduct occurring on Pueblo Indian lands wrongfully deprives Plaintiff Talachy and the individual members of the Pueblo their federal right to engage in conduct free from the jurisdiction of the State." (*Id.* ¶ 145.) These allegedly wrongful actions consist of the following: (1) requesting information from the Pueblo regarding their Class III Gaming Machine Manufacturer vendors ["Vendors"]; (2) stating that "the U.S. Attorney's decision [to temporarily refrain from taking enforcement action against the Pueblo for continuing to conduct Class III

gaming without a compact] 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;"[2] (3) holding a closed meeting of the New Mexico Gaming Control Board ["NMGCB"] and thereafter "announc[ing] 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" when "[n]o other vendor applications were placed in abeyance;" and (4) "announc[ing] that they intend to deny license applications, including renewals of those gaming entities doing business in the State of New Mexico if such entity continues to do business with the Pueblo." (*Id.* ¶¶ 65-81, 148.)

The Complaint alleges that these actions "establish a pattern of repeated incidents that establish a policy, custom and/or practice of wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands." (*Id.* ¶ 148.) As demonstrated below, the Individual Defendants are entitled to qualified immunity for these claims because Plaintiffs cannot establish that the Individual Defendants' alleged misconduct violated a clearly established federal right.

In Plaintiffs' September 25, 2015 motion for temporary restraining order and/or preliminary injunction, Plaintiffs complain of additional allegedly wrongful actions that post-dated the filing of their Complaint. (*See* Pls.' Mot. TRO, Dkt. No. 23.) Specifically, Plaintiffs objected to the fact that the NMGCB sent letters to the Vendors, which "(i) assert that the Pueblo is conducting illegal gaming operations; (ii) list various New Mexico state laws, including criminal laws, that are allegedly violated by doing business with an illegal gaming operation; (iii) inform each Vendor that it is being 'audited' by the NMGCB; and (iv) demand the production of all communications and business records between the Vendor and the Pueblo." (*Id.* at 1.)

[2] In his June 30, 2015 letter, the U.S. Attorney unequivocally stated that the Pueblo's continued operation of its gaming operation after its compact expired would be illegal. (6/30/15 Ltr., Dkt. No. 23-10.) But in doing so the U.S. Attorney was only stating the obvious. *See* 25 U.S.C. §§ 2710(d)(1), (d)(7)(B)(vii).

Similarly, in his second supplemental declaration, Terrence "Mitch" Bailey stated that the Vendors were issued citations by the NMGCB and attached copies of some of these citations to his declaration. (2d Supp. Bailey Decl. ¶¶ 5-6, Exs. 1-3, Dkt. No. 30.) Each citation identified statutes or rules violated by the Vendor, the Vendor's actions that constituted said violations, and noted that "the Gaming Control Board will contact [the Vendor] concerning this matter." (*Id.* at Exs. 1-3.)

As they did in their Complaint, Plaintiffs claim that these actions amount to improper interference with Plaintiffs' gaming activities. (*See* Pls.' Mot. TRO, Dkt. No. 23.) Although Plaintiffs have not sought leave to amend their Complaint to add these additional allegations to support Count IV of their Complaint, even if they were to do so, these additional allegations would not survive dismissal for the same reason: Plaintiffs cannot establish that the Individual Defendants' alleged misconduct violated a clearly established federal right.

It is also important to emphasize what Plaintiffs do *not* claim. Plaintiffs do not allege that the Individual Defendants have taken, or threaten to take, any action on the lands of the Pueblo or directly against the Pueblo to seize property or to shut down or otherwise interfere with the Pueblo's gaming operations.

On the contrary, and as the Pueblo acknowledges, New Mexico gaming licenses are only "required for the Vendors to do business with non-Indian 'racinos', fraternal and charitable entities, and the State lottery, but are not required for the Vendors to do business with any tribal gaming facility located on Indian lands within the State's borders." (Pls.' Mot. TRO at 1-2, Dkt. No. 23.) Thus, Plaintiffs' theory is that the Individual Defendants are interfering with the Pueblo's gaming operations and thereby its sovereignty "[b]y … asserting jurisdiction over the tribe's gaming activities in the form of threatening vendors regarding their licenses to do

business *with other entities* in the state over which they . . . have jurisdiction." 10/2/15 Hr'g Tr. at 37:17-19 (emphasis added). Plaintiffs' theory of liability thus distills to the proposition that the State of New Mexico cannot enforce its gaming laws and regulations against non-Indian manufacturer licensees in connection with their dealings with non-Indian gaming operators at locations off the Pueblo's lands, because such enforcement will have an impact on the Pueblo's gaming operations. As the discussion below makes clear, federal law does not support Plaintiffs' position.

IV. ARGUMENT

Count IV of Plaintiffs' Complaint should be dismissed for two reasons. First, the Individual Defendants have not violated any federal constitutional or statutory right by regulating third party licensees pursuant to the State's police power, as Plaintiffs allege. Second, Plaintiffs in any event do not allege a violation of a "clearly established right." Plaintiffs cannot identify a single case supporting the proposition that a tribe has a clearly established right that protects it from being indirectly affected by a state's regulation of a third party with which the tribe conducts business.

A. Plaintiffs Have Not Alleged Facts to Support their Claim that the Individual Defendants Violated their Federal Rights.

Plaintiffs ground their claims of violation of a federal right on either the Constitution's Supremacy Clause or pre-emption by the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721 ("IGRA"). The Supremacy Clause, however, is "'not a source of any federal rights'; it 'secures federal rights by according them priority whenever they come in conflict with state law.'" *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). And IGRA does not establish any federal "rights" upon which a claim under 42 U.S.C. §§ 1983 or

1985, upon which Plaintiffs also rely, might be based. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Moreover, neither IGRA nor any other federal law prevents the State of New Mexico from exercising its authority to enforce its gaming laws in the manner alleged in Plaintiffs' Complaint.

1. The Individual Defendants properly exercised the State's police power in connection with the regulation of State gaming activities.

Plaintiffs cannot meet their "heavy" burden of showing that the Individual Defendants' actions violated their rights under federal law, because the Individual Defendants' actions were properly taken in connection with the State's legitimate regulation of non-tribal New Mexico gaming activities in the exercise of its police power. *See Albright*, 51 F.3d at 1534. 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 (1880). 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, ¶¶ 11, 16, 964 P.2d 82, 87-88.

New Mexico regulates gaming under the Gaming Control Act, which allows limited gaming activities in the State "if those activities are strictly regulated to ensure honest and competitive gaming that is free from criminal and corruptive elements and influences." NMSA 1978, § 60-2E-2(A) (1997). To that end, the New Mexico Legislature established the NMGCB and invested it with broad authority to oversee gaming activity in the State by promulgating regulations, issuing licenses, and conducting audits and investigations, among other powers. *Id.* §§ 60-2E-5 (2002), 60-2E-7 (2009).

Gaming is permitted in the State if conducted in compliance with and pursuant to 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 (1997). Gaming equipment manufacturers,

distributors, and operators must be licensed by the NMGCB. *Id.* § 60-2E-13 (2007). Operator licenses may be issued to non-Indian racetrack casinos and to nonprofit fraternal and veterans' organizations. *Id.* §§ 60-2E-3(GG) (2009), 60-2E-26(I) (2009). The NMGCB 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 by the NMGCB of the corporate entity and its key personnel. *See id.* §§ 60-2E-14(E), -16(C), -18 through -25. A license is a revocable privilege, and issuance of one establishes no property right or other vested interest. *Id.* ¶ 60-2E-2(B) (1997).

The Act prohibits issuance of a license unless the NMGCB 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). Under the NMGCB's regulations, it is an unsuitable method of operation to fail to comply with all "laws and regulations governing the operations of a gaming establishment" or to "further[ ], or profit[ ] from any illegal activity or practice." 15.1.10.9(f), (n) NMAC. It is unlawful for any licensee to "sell or transfer a gaming device to any person that could not lawfully own or operate the gaming device." 15.1.16.8(B) NMAC. It also is unlawful for a manufacturer or distributor to ship a gaming device "to any destination where possession of gaming devices is illegal." 15.1.16.12(B) NMAC.

The executive director of the NMGCB is empowered to "issue administrative citations 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 NMGCB 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 NMGCB is subject to judicial review. *Id.* § 60-2E-60 (2002).

There is no doubt that the NMGCB, 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; *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. Therefore, the actions of which Plaintiffs complain were properly taken by the Individual Defendants in connection with the State's legitimate exercise of its police power to regulate non-Indian licensees with respect to their ability to deal with other non-Indian licensees in conducting gaming activities on non-tribal lands.

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

Nor can Plaintiffs claim that the Individual Defendants' actions were taken in violation of IGRA, because IGRA neither preempts the State's proper exercise of its police powers nor applies to the actions taken by the Individual Defendants. Given the strong presumption against federal preemption of state law, IGRA does not preempt the State's authority over its licensees on State lands. *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 powers, 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. Federal law does not conflict with the State's regulatory authority over non-Indian licensees conducting gaming within the State and outside tribal lands, and IGRA cannot be read to occupy the field because IGRA 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 Community,* 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) (citation & internal quotation marks omitted) (emphasis added); *Oklahoma v. Hobia*, 775 F.3d 1204, 1212-13 (10th Cir. 2014) (same). *See also Seneca-Cayuga Tribe 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" (footnote omitted)).

The Supreme Court of New Mexico addressed the State's obligation to enforce State laws and concluded that when a compact is not in place IGRA plainly does not preempt the enforcement of the State's gambling laws outside of Indian land. In *Srader*, the court decided two consolidated cases related to tribal gaming that was conducted without a tribal-state compact in effect. *See* 1998-NMSC-025. 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. The governmental defendants argued that IGRA preempted their ability to enforce New Mexico's laws where gaming by an Indian tribe was at issue. *Id.* ¶¶ 4, 6. The court concluded, however, that IGRA did not preempt the State's authority, because "gaming compacts are the vehicles that give force to IGRA's potential preemptive power." *Id*. ¶ 14. The court recognized that the State and its law enforcement officials lacked authority to enforce state law within the boundaries of an Indian reservation, which it concluded to be the province of the federal government. *Id*. ¶ 15. 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. The New Mexico Supreme Court applied the correct

preemption framework set forth in *Cipollone* and established the legal principle that the NMGCB is obligated to enforce State law against licensees conducting business with illegal gaming enterprises, including illegal enterprises operating on tribal land. The Court's analysis should govern the present case.

The Individual Defendants have not taken any action with respect to the Pueblo, nor have they asserted their authority on Pueblo lands. The Individual Defendants are not regulating the Pueblo. They are regulating the NMGCB's licensees: the Vendors. Plaintiffs do not allege otherwise. The fact that such regulation may indirectly affect the Pueblo's illegal gaming does not change the analysis. Many cases recognize that 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, the Tenth Circuit has upheld off-Indian country seizure of cigarettes pursuant to state law despite the effect of these seizures on the tribe. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012). In *Muscogee (Creek) Nation*, the Tenth Circuit 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, explaining that "[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. But such an indirect effect does not establish a preemption or an infringement of tribal sovereignty claim." *Id.* at 1178-79, 1183. The Tenth Circuit also noted that "the Supreme Court has not found that application of state law outside Indian country infringes on tribal sovereignty." *Id.* at 1182; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("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.") (citations 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 Individual Defendants' actions here fall far short of depriving Indian merchants of the very goods they seek to sell; here the Individual Defendants are not preventing the Vendors from continuing to do business with the Pueblo.

Indeed, a state may act on its own lands, even though its actions could profoundly impact the viability of a tribal undertaking. *Cf. Colville*, 447 U.S. at 161-162 (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.7 (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*, 775 F.3d at 1213-14 (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'").

The only actions alleged by Plaintiffs are licensing actions taken, or threatened to be taken, against non-Indian manufacturers in connection with their licenses to do business with non-Indian gaming operators at locations off the Pueblo's lands. 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 outside of tribal lands. The foregoing authority establishes that these actions are a proper exercise of New Mexico's police powers and are not pre-empted by IGRA or any other federal law even though the licensing actions stem from the Vendors' support of, or profiting from, the Pueblo's illegal gaming operation. Therefore, Plaintiffs' Complaint does not allege a violation of a federal right, constitutional or otherwise.

If the State properly may take action against the licenses of non-Indian manufacturers in connection with their dealings with off-reservation non-Indian gaming operators, it follows that it may make determinations about the illegality of the Pueblo's and thus the Vendors' conduct in accordance with Section 60-2E-4 NMSA and NMAC 15.1.10.9(f). Plaintiffs, however, allege that the Individual Defendants are barred from determining that the Pueblo is acting illegally in continuing its gaming operations in the absence of a compact. (Complaint ¶ 76, Dkt. No. 1.) This is obviously incorrect. 18 U.S.C. § 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 at this time for violating federal and state laws under Section 1166 does not preclude the State from enforcing its Gaming Control Act and taking administrative action against licensees within the State. IGRA does not remove the State's ability to decide whether the Pueblo's gaming operations are lawful – something the State must

do in order to enforce its own law – and *Srader* underscores the State's obligation to do so.[3] IGRA may limit criminal prosecution of the Pueblo for unlawful gaming to the United States, but the exclusivity language of 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 operation is illegal.

Finally, even assuming *arguendo* that the State's issuance of citations to the manufacturers were solely an indirect attempt to regulate the Pueblo's illegal gaming rather than the NMGCB's compliance with State law (an intent that the Individual Defendants deny), the United States 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. The United States Supreme Court explained 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";[4] 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. *Id.* at 2034-35; *cf. Potawatomi*, 498

[3] 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 (Section 60-2E-4), 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.

[4] Tribal sovereignty 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. *Potawatomi*, 498 U.S. at 514; *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998). Here, the State has initiated no such suit against the Pueblo.

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").

B. Plaintiffs Have Failed to Assert a Clearly Established Right Allegedly Violated by the Individual Defendants.

For the reasons stated above, the Individual Defendants' actions did not violate Plaintiffs' federally established rights. At a minimum, however, Plaintiffs cannot show that there is a *clearly established* right under federal law that they allege the Individual Defendants violated. Accordingly, the Individual Defendants are entitled to qualified immunity and dismissal of Count IV.[5]

"Whether the law in question was clearly established when the conduct complained of occurred is a legal issue to be resolved by the court." *Miller v. City of Mission*, 705 F.2d 368, 375 n.6 (10th Cir. 1983) (citing *Harlow*, 457 U.S. at 819). Furthermore, it is "[t]he plaintiff's burden to establish that the law is clearly established," and this burden "must be undertaken in light of the case's specific context, not as a broad proposition." *Smith v. Kenny*, 678 F. Supp. 2d 1124, 1145 (D.N.M. 2009) (Browning, J.) (quoting *Saucier*, 533 U.S. at 201). For a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (citation & internal quotation marks omitted). "A plaintiff 'must do more than identify in the abstract a clearly established right and allege that the defendant has violated it.'" *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 517 (10th Cir. 1998) (quoting *Pueblo Neighborhood Health Ctrs. v.*

[5] There is no mandatory sequence for considering the two components of the qualified immunity analysis, and therefore this Court can dismiss Count IV either on the ground that Plaintiffs have failed to allege a violation of constitutional rights or on the ground that any rights that may have been violated were not clearly established. *Pearson*, 555 U.S. at 236.

Losavio, 847 F.2d 642, 645 (10th Cir. 1988). Instead, Plaintiffs "must show legal authority which makes it apparent that in the light of pre-existing law a reasonable official … would have known that" the specific conduct at issue violated Plaintiffs' constitutional rights. *Green*, 574 F.3d at 1300 (citation & internal quotation marks omitted). *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."). This, Plaintiffs have not done.

Plaintiffs complain of the following actions taken by the Individual Defendants: (1) obtaining information regarding the Vendors from the Pueblo; (2) stating that the U.S. Attorney's decision to refrain from enforcement action against the Pueblo does not protect the Vendors; (3) holding closed NMGCB meetings where the NMGCB determined the Pueblo is acting illegally in its continued post-compact operation of Class III gaming activities and placing in abeyance approval of any license application renewals for the Vendors; (4) announcing that they intend to deny the Vendors' license applications and renewals; (5) sending letters to the Vendors regarding the Pueblo's illegal gaming operations, the illegality of continuing to do business with the Pueblo's illegal gaming operations, informing them that they are being audited, and demanding the production of communications and documents exchanged with the Pueblo; and/or (6) issuing citations to the Vendors, which identified the statues violated by the Vendor and the Vendor's actions that constituted said violations, and noted that "the Gaming Control Board will contact [the Vendor] concerning this matter." (*See* Compl. ¶¶ 65-81; 148; Pl.s' Mot. TRO at 1-2; 2d Supp. Bailey Decl. ¶¶ 5-6 and Exs. 1-3.)

Plaintiffs claim that in taking the actions they allege above, the Individual Defendants are "wrongfully asserting State jurisdiction over gaming activities on the Pueblo's Indian lands." (Compl. ¶ 148.) Although Plaintiffs also claim that the "Individual Defendants knew or should

have known that actions purporting to assert jurisdiction of the State over conduct occurring on Pueblo Indian lands wrongfully deprives Plaintiff Talachy and the individual members of the Pueblo their federal right to engage in conduct free from the jurisdiction of the State" (Compl. ¶ 145), they have no authority to support the proposition that the alleged illegality of these actions is clearly established. In addition, Plaintiffs can cite no case holding, or even suggesting, that a tribe or its officials have a right enforceable in an action under Section 1983 or 1985 to be free from state jurisdiction in these circumstances. Nor is there authority that, even if the state laws being enforced by the Defendants were preempted – which they are not – application of state law to third-party vendors (not to Plaintiffs) would violate any right held by Plaintiffs.

The Tenth Circuit has addressed – entirely outside the context of rights protected by Section 1983 – whether a State may enter tribal land to seize property, such as gaming devices and gaming proceeds. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1251-52 (10th Cir. 2006). However, Plaintiffs do not allege, nor could they, that the Individual Defendants have physically entered tribal land to seize property or otherwise interfere with the Pueblo's gaming operations. Instead, the Pueblo complains solely of actions and communications that the Individual Defendants directed at non-tribal Vendors with regard to the Vendors' licenses needed to conduct business with non-tribal gaming operators. The Individual Defendants have not prevented the Vendors from conducting business with the Pueblo, and Plaintiffs can point to no clearly established law that demonstrates that the Individual Defendants' actions taken against non-Pueblo entities with regard to their ability to contract with non-Pueblo gaming operations are barred by any federal law, much less that they rise to the level of a right protectable under Section 1983.

Therefore, assuming solely for the sake of argument that the Individual Defendants wrongfully interfered with the Pueblo's tribal sovereignty, the Individual Defendants are nevertheless entitled to qualified immunity because the right allegedly being violated by the Individual Defendants is not supported by clearly established law. Instead, as detailed in Section IV(A) above, current United States Supreme Court, Tenth Circuit, and other persuasive authority – at a minimum – makes it unclear whether the Individual Defendants' actions violated the Pueblo's right to tribal sovereignty. Thus, any such right was not clearly established and the Individual Defendants are entitled to qualified immunity.

C. Plaintiffs Fail to Allege Facts Against Governor Martinez or Jeremiah Ritchie that Show they are Responsible for any Deprivation of a Federal Right.

Both Governor Susana Martinez ("Governor Martinez") and Jeremiah Ritchie ("Ritchie") are entitled to dismissal of Count IV on the basis of qualified immunity for yet another reason: the actions of which Plaintiffs complain are not actions taken by either Governor Martinez or Ritchie.

"The Tenth Circuit requires a plaintiff to demonstrate that the defendant before the court is responsible for the constitutional deprivation at issue." *Martinez v. New Mexico Dep't of Health*, No. 04-CV-1326, slip op. at 17 (D.N.M. Dec. 4, 2006) (Browning, J.) (citing *Martinez v. Mafchir*, 35 F.3d 1486, 1491-92 (10th Cir. 1994)). "In order to carry his burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) (citation omitted). The Tenth Circuit "require[s] a showing of an affirmative link between the defendant's conduct and any constitutional violation" in their complaints in both published and unpublished opinions. *Stidham v. Peach Officer Standards &*

Training, 265 F.3d 1144, 1156 (10th Cir. 2001). The Tenth Circuit has affirmed the dismissal of a claim because the plaintiff "failed to allege facts demonstrating that the Defendants personally participated in the alleged constitutional violations, or acquiesced in the alleged wrongdoing." *Dametz v. Romer*, No. 93-1213, 1993 WL 495066, at *1 (10th Cir. Dec. 1, 1993) (citations omitted). Dismissal of Count IV against Governor Martinez and Ritchie is appropriate for the same reasons.

All of the factual allegations that Plaintiffs complain of in their Complaint and subsequent pleadings are allegations of wrongdoing by NMGCB save one: Governor Martinez's statement that "the U.S. Attorney's decision [to temporarily refrain from taking enforcement action against the Pueblo for continuing to conduct Class III gaming without a compact] 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." (Compl. ¶ 68, Dkt. No. 1.) This is the only allegation made against Governor Martinez and, with regard to Ritchie, the Complaint merely generally alleges that he "made or caused to be made" similar "official pronouncements." (*Id.* ¶ 72.)

The United States District Court for the District of Arizona recently granted a motion to dismiss Arizona's governor and attorney general under very similar circumstances. *See Tohono O'odham Nation v. Ducey*, No. 15-CV-01135, 2015 U.S. Dist. Lexis 124979, at *18 (D. Ariz. September 17, 2015). In *Tohono*, the Arizona governor and attorney general wrote letters to the Arizona Department of Gaming ("ADG") reciting their views regarding the illegality of the tribe's actions. *See id.* at *15-18. The court found that even though the governor and the attorney general influenced the ADG's decision to deny the tribe's gaming certification, their indirect involvement was insufficient to subject the governor and attorney general to individual

liability under *Ex parte Young* because neither the governor nor the attorney general took "actual enforcement action" against the tribe. *See id.* at *16-18. The same is true here.

The only allegations of wrongful conduct made against Governor Martinez and Ritchie – issuing a statement that the U.S. Attorney's decision to refrain from enforcement action against the Pueblo does not protect the Vendors – are even further removed from any claimed violation of the Pueblo's clearly established rights than the allegations against the NMGCB. There is no clearly established authority that would have alerted Governor Martinez and Ritchie that any warning to the Vendors of potential enforcement action against them would violate the Pueblo's federal rights. Accordingly, for this additional reason, Governor Martinez and Ritchie are entitled to qualified immunity.

V. CONCLUSION

For the reasons discussed above, the Court should dismiss Count IV of Plaintiffs' Complaint on the basis of qualified immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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