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,

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

Plaintiffs,

vs.

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' MOTION TO STAY OR SUSPEND
THE COURT'S OCTOBER 7, 2015 PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)(1), Defendants respectfully move the Court to stay or suspend the Court's October 7, 2015 Preliminary Injunction pending resolution of their interlocutory appeal that is currently pending in the United States Court of Appeals for the Tenth Circuit. This motion is filed concurrently with Defendants' Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction, and for Relief Pursuant to Fed. R. Civ. P. 62.1 ("Rule 62.1 Motion"). Concurrence in this motion was sought but denied.

I. BACKGROUND

The relevant factual and procedural backdrop to Defendants' Motion to Stay is the same as that of their Rule 62.1 Motion. To avoid duplication, Defendants incorporate herewith the "Introduction" and "Factual Background" sections of their Rule 62.1 Motion, at 1-11.

II. GOVERNING LEGAL STANDARDS

Rule 62(c) authorizes the Court to suspend a preliminary injunction while an interlocutory appeal of the preliminary injunction is pending. Rule 8(a) authorizes a stay of a preliminary injunction pending its appeal, and subsection (a)(1) of that rule directs a party seeking the stay to file a motion with the district court first. Defendants understand that, as the terms are used in these rules, a suspension and a stay of an injunction are synonymous. See, e.g., Lucy v. Adams, 350 U.S. 1 (1955).

In deciding a motion to stay a preliminary injunction pending an interlocutory appeal, this Court will consider the same factors that the Tenth Circuit will consider under 10th Circuit Rule 8.1. General Protecht Group, Inc. v. Leviton Mfg. Co., No. 10-1020, slip op. at 5 (D.N.M. Dec. 7, 2010) ("(a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay of injunction is granted; and (d) any risk of harm to the public interest" (internal quotation marks and citation omitted)).

A court of appeals will review these factors under an abuse of discretion standard. Planned Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814, 822 (10th Cir. 2014). However, "[a] district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings." Id. Further, the appellate court will examine the district court's legal determinations, including the determination of likelihood of success on the merits, de novo. Soskin v. Reinertson, 353 F.3d 1242, 1247 (10th Cir. 2004). "Moreover, because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1070 (10th Cir. 2009) (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.

Regarding the probability-of-success-on-the-merits factor:

> The Tenth Circuit has adopted the Second Circuit's liberal definition of the probability of success requirement. Accordingly, we have held that where the moving party has established that the three "harm" factors tip decidedly in its favor, the probability of success requirement is somewhat relaxed. In such cases, the movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation. However, the Second Circuit has held, and we agree, that where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for litigation standard should not be applied.

Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks, citations, alterations & emphasis omitted) . In addition, 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.

These appellate review standards are properly applied to the parallel posture of a motion filed in the district court to stay a preliminary injunction pending interlocutory appeal. Thus, while a court ordinarily would deny a stay if the three "harm" factors favor the movant and there are questions going to the merits that make them a fair ground for litigation, where the preliminary injunction bars governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the court must consider the likelihood of success on the merits. Further, if the court concludes that the preliminary injunction was predicated on an erroneous determination of the likelihood of success on the merits, the injunction should be stayed regardless of any consideration of the three other "equitable" factors.

III. ANALYSIS

A. The Court's October 7, 2015 Preliminary Injunction

In its October 7 ruling on Plaintiffs' Preliminary Injunction Motion ("October 7 Decision") (Doc. 31), the Court misapprehended the State's position. Nowhere in its decision did the Court acknowledge New Mexico's sovereign interest in enforcing its gaming laws and regulations outside of tribal lands. Nor did the Court acknowledge the New Mexico Gaming Control Board's ("Board's") authority and obligation under New Mexico law to determine whether its licensees are complying with federal law. On the contrary, the Court ruled that, "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." October 7 Decision, at 20. Further, and importantly, the Court did not acknowledge that, while any enforcement measures may stem from licensees' participation in the Pueblo's post-June 30 illegal conduct of gaming operations at its own casino, the State will not take any action to bar the licensees from continuing to do business with the Pueblo and instead will address only the licensees' continued privilege to engage in business with gaming facilities elsewhere in the State.

Instead, the Court reasoned that, "[i]n that [18 U.S.C.] Section 1166 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 [Board] lacks jurisdiction to issue citations to vendors for the sole reason that they conduct business with the Pueblo's [c]asinos." Id. at 13. The Court found that the Board's enforcement of the New Mexico Gaming Control Act was a "thinly disguised attempt" to regulate the Pueblo's casino gambling activities, id. at 20, and determined 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." Id. at 15. "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." Id. at 22.

B. The Plaintiffs Are Not Likely to Succeed on the Merits of Their Preemption Claim That Underlies the Preliminary Injunction.

The October 7 Preliminary Injunction issued in this action (Doc. 32) bars governmental action taken in the public interest pursuant to a statutory or regulatory scheme. See Rule 62.1 Motion, at 3-5, 7-9. Therefore, in considering whether to stay the October 7 Preliminary Injunction, the Court should not apply a "fair ground for litigation" test and instead should determine whether the Plaintiffs in fact are likely to succeed on the merits of their claim. Heideman, 348 F.3d at 1189. As is discussed in more detail in Defendants' Rule 62.1 Motion, at 15-26, which Defendants incorporate herein by reference and summarize below, Plaintiffs cannot succeed on their claim that New Mexico's exercise of police power over non-Indian licensees with respect to gaming outside of Indian lands violates Pojoaque Pueblo's tribal sovereignty rights and is preempted by federal law, and therefore the Court erred in determining in its October 7 decision that Plaintiffs were likely to succeed on the merits of their claim.

As a threshold matter, New Mexico's regulation of non-Indian gaming activity, and in particular actions of 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 a valid exercise of the State's police power. Srader v. Verant, 1998-NMSC-025, ¶¶ 11, 16, 964 P.2d 82 ("firmly assert[ing]" the State's authority to exercise its police power with respect to gaming activity within its jurisdiction).

Federal preemption analysis begins with the presumption that Congress does not intend to displace state law. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). 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). "Th[is] "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).

Because the Indian Gaming Regulatory Act ("IGRA"), 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721, does not apply outside of Indian country, 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 licensees conducting gaming within the State and off tribal lands, and IGRA cannot be read to occupy the field. "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); 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").

In granting the preliminary injunction, however, this Court did not consider this legal analysis; nor did it address the State's regulatory authority outside of Indian country, which is exceedingly broad. Instead, this Court misapprehended Defendants' position and concluded that the Board had exerted direct authority over the Pueblo's illegal gaming and on the Pueblo's lands, which the Board clearly has not. October 7 Decision, at 15 ("[T]he Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact."). The court concluded that because 18 U.S.C. § 1166 gives only the federal government jurisdiction over criminal prosecutions of gambling laws 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 13, 20.

That is error. Section 1166(d) 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" (emphasis added). The State is not criminally prosecuting anyone, let alone the Pueblo. Further, 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 the present time for violating federal and state laws under Section 1166 does not preclude the State from enforcing the New Mexico 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. 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 operation is illegal.[1]

Plaintiffs' theory is that Defendants have invaded the Pueblo's sovereignty not by directly acting against the Pueblo on Pueblo lands but by "threatening vendors regarding their licenses to do business with other entities in the state over which they ... have jurisdiction." 10/2/15 Tr. at 37. The Court agreed, holding 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. October 7 Decision, at 20. This determination was error, because the ancillary effects of the State's regulation of its licensees on the Pueblo are permissible under Supreme Court precedent and do not bar the exercise of the State's police powers.

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. In Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1178-79 (10th Cir. 2012), the court held that the state's legitimate authority permitted

[1] Moreover, Plaintiffs' claim that the State made "a unilateral determination regarding the legality of gaming on Indian lands," Compl., ¶ 133 (Doc. 1), which the Court accepted in finding that the State acted outside its jurisdiction, October 7 Decision, at 20, is demonstrably false. There can be no question that the Pueblo's ongoing Class III gaming in the absence of a compact is unlawful under IGRA. 25 U.S.C. § 2710(d)(1)(C); 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 Doc. 28-3, effectively concedes the unlawfulness of the operations. The State in any event 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." Doc. 28-3. The State's actions were expressly based on that federal determination. See Doc. 23-7 at 1, 30-2 at 1-2, 30-3 at 3.

it to seize, on state land, cigarettes lacking tax stamps that were being shipped into Indian country for sale by Indian dealers. Id. 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 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." (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. Bay Mills, 134 S. Ct. at 2034-35, 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"); Washington, 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); Oklahoma v. Hobia, 771 F.3d 1247 (10th Cir. 2014) (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)).

For these reasons, the Court misapprehended the facts and Defendants' position and erred in granting a preliminary injunction based on the belief that Plaintiffs likely will prevail on the merits of their tribal sovereignty-based claims. Federal law does not bar 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 neither prohibits the Pueblo from operating even an illegal gaming operation on its reservation nor prevents 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. The Individual Defendants therefore are substantially likely to prevail on the merits.

C. The Remaining "Harm" Factors Are Irrelevant to the Court's Granting of a Stay. But Even If Considered, Those Factors Do Not Favor Enjoining the State's Exercise of Its Regulatory Authority.

Based on the foregoing, the Court need not address the other factors that also must support a preliminary injunction and otherwise are to be considered in ruling on a motion to stay. When a claim fails on the merits, the court may "short-circuit the factor-weighing process" and should stay the grant of an injunction regardless of how the other factors might be weighed. Soskin, 353 F.3d at 1257. But 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

In ruling on Plaintiffs' preliminary injunction request, the Court concluded that the they 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. But the State's actions do not improperly infringe the Pueblo's interests. See Rule 62.1 Motion at 17-26. And equity in any event will not support an injunction to maintain the Pueblo's revenue stream from what is a clearly illegal gaming enterprise. See, e.g., Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 281-82 (7th Cir. 1992) (reversing preliminary injunction where plaintiff had violated trademark laws; "Unclean hands is a traditional defense to an action for equitable relief, and is as relevant to preliminary as to final relief."); Big Time Worldwide Concert & Sport Club at Town Center, LLC v. Marriott Int'l, Inc., 236 F. Supp. 2d 791, 808-10 (E.D. Mich. 2003) (denying preliminary injunction where plaintiff ticket scalper was violating Michigan criminal law); see generally 43 C.J.S. Injunctions § 32, at 835 (1978) (injunction will be denied where plaintiff has "acted … illegally with respect to the matter in which redress is sought."). 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.").[2]

It is the State's sovereign interests that are suffering irreparable injury in this case by being barred from exercising its legitimate police power. Cf. Mashantucket Pequot Tribe v.

[2] The Pueblo of Pojoaque was a party to Pueblo of Santa Ana v. Kelly and thus it has long been on notice that gaming on tribal lands is illegal absent a compact with the State.

Town of Ledyard, 722 F.3d 457, 476-77 (2d Cir. 2013) (recognizing state's "sovereign interest in being in control of, and able to apply, its laws throughout its territory"); 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)). The Court failed to consider the State's irreparable harm where it issued the Preliminary Injunction on October 7.

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, 348 F.3d at 1191. The Court, however, gave minimal weight to the State's interest, which it considered to be outweighed by Plaintiffs' claimed injury to tribal sovereignty. October 7 Decision, at 22. Plaintiffs' claim of injury is "simply a refashioning," Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1158 (10th Cir. 2011), of their general tribal sovereignty interference claim which, as has been shown, lacks merit. 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 Court took the view that an injunction would serve the public interest by promoting tribal sovereignty. October 7 Decision, at 22-23. "[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. As addressed in the Rule 62. 1 Motion, the Pueblo's sovereignty on its lands does not prevent the State from regulating its licensees. It is not in the public interest to enjoin the State from enforcing compliance with the Gaming Control Act by its licensees with respect to their off-reservation activities.

In summary, the foregoing factors need not be considered in this case because Plaintiffs' legal claim plainly lacks merit and an injunction cannot be justified. But, if considered, none of these equitable factors weighs in favor of granting a stay of the injunction.

IV. CONCLUSION

For all of these reasons, the Court should stay or suspend the October 7, 2015 Preliminary Injunction pending the interlocutory appeal of its issuance.

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CERTIFICATE OF SERVICE:

I hereby certify that on December 18, 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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