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 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

Pursuant to Federal Rules of Civil Procedure 54(b), 62(c) and 62.1, as well as the Court's inherent authority, Defendants respectfully move the Court to reconsider and either vacate or modify its October 7, 2015 Preliminary Injunction, or in the alternative grant related relief available under Rule 62.1. Concurrence in this motion was sought but denied.

I. INTRODUCTION

It is well within the police power of the State of New Mexico to regulate gaming activity taking place within its borders and outside tribal lands. 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. The central

issue in this action is whether the federal Indian Gaming Regulatory Act ("IGRA") – which the Supreme Court held does not apply outside of "Indian lands" – preempts the State's police power to regulate 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 ("Board"). The Pueblo of Pojoaque – which has been illegally conducting Class III gaming since July 1, 2015 – mischaracterizes the Gaming Control Board's actions as an effort to regulate the Pueblo itself. That is incorrect. The Board is not attempting to regulate the Pueblo's gaming operations on tribal land. The Board has not sought to enforce any law with respect to the Pueblo, nor seized any Pueblo property, nor entered Pueblo lands. The Board also is not preventing any manufacturer from supplying gaming equipment to the Pueblo. 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. This Court should not have enjoined the State's legitimate exercise of its police power. The Preliminary Injunction therefore should be vacated or, at minimum, modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. New Mexico's Gaming Laws and Regulations

By law and regulation, New Mexico strictly and comprehensively regulates gaming activity within the State's borders. See generally New Mexico Gaming Control Act ("Act"), NMSA 1978, §§ 60-2E-1 to -62, and its implementing regulations, 15.1 NMAC. "Gaming" encompasses the activities commonly referred to as "gambling." NMSA 1978, §§ 60-2E-3(P), (Q). "Gaming activity" includes the conduct of gaming as well as the manufacture or distribution of gaming devices, id. § 60-2E-3(Q), and "gaming device" includes a gaming machine and associated equipment, id. § 60-2E-3(R). 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," id. § 60-2E-2(A), and if it is 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). Thus, under the Act, New Mexico officials necessarily must determine the lawfulness of gaming activity under federal and other jurisdictions' laws.

The provisions of the Act are carried out by the Board. Among other powers and responsibilities, the Board promulgates regulations necessary to implement and administer the Act, id. §§ 60-2E-7(B)(3), -8(A), and also issues and revokes licenses for persons to engage in gaming activity within the State, id. § 60-2E-7(B)(2). The Board also hires an executive director, id. §§ 60-2E-7(B)(1), -9(A), who through the Board's personnel takes necessary action to enforce and otherwise administer the provisions of the Act. Id. § 60-2E-10.[1]

[1] The Executive Director is responsible for issuing citations to licensees upon reasonable belief that a licensee has violated or is violating the Act or its implementing regulations. Id. § 60-2E-10(D)(3). Following issuance of such a citation, the Board will conduct a hearing, see generally 15.1.14 NMAC, and, if the violation is established, may impose a civil fine, NMSA 1978, § 60-2E-7(C)(1), or suspend or revoke the license, id. § 60-2E-7(B)(2).

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(B), (D). Operator licenses may be issued to racetrack casinos and to nonprofit fraternal and veterans' organizations. 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. 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). A license is a revocable privilege, and issuance of one 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 gaming 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, "[i]t 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," id. 15.1.10.9(F), and "engaging in, furthering,

or profiting from any illegal activity or practice in violation of the act or [its implementing regulations]," id. 15.1.10.9(N).

Violation of any provision of the Act or its implementing regulations by a licensee is grounds for suspension or revocation of the license. Id. 15.1.10.11(A).

Based on the foregoing statutory and regulatory provisions, the Board requires that licensees comply with all applicable laws in all jurisdictions in which they engage in any gaming activity; failure to comply with those laws will subject the licensee to sanction in New Mexico, including revocation of its New Mexico license. For example, if the Board or its Executive Director became aware that one of its manufacturer or distributor licensees was supplying gaming devices to a non-Indian unlicensed gaming operator in another state, the Board would have no jurisdiction to act to shut down the operation or to prevent the manufacturer or distributor from continuing to supply gaming devices to that operation. However, the Board would have jurisdiction and authority under the foregoing statutes and regulations to take appropriate action against the manufacturer or distributor to suspend or revoke its license to continue supplying gaming devices to operators in New Mexico. Within the gaming regulatory establishment, it is common for a regulator in one jurisdiction to take licensing action based on the licensee's involvement with illegal activity in another jurisdiction. See, e.g., Ariz. Rev. Stat. Ann. § 5-602(E) (in determining the suitability of applicants for tribal gaming license or state certification, state agency will review criminal records report from FBI); TP Racing, LLLP v. Ariz. Dep't of Gaming, No. 08-0723, 2010 Ariz. App. Unpub. Lexis 897, at *1, *27 (Ariz. Ct. App. April 6, 2010) (upholding denial of certification to provide off-track betting services to tribal casinos based on participation in illegal activity in another state).

B. Status of Gaming on the Pojoaque Pueblo

IGRA, 19 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721, divides gaming into three classes. Class I gaming encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." Id. § 2703(6). Class II gaming encompasses bingo and card games (excluding banking card games such as black jack). Id. § 2703(7). Class III gaming -- the casino-style gaming at issue herein -- encompasses "all forms of gaming that are not Class I gaming or Class II gaming." Id. § 2703(8). Under IGRA, "Class III gaming … shall be lawful on Indian lands only if such activities are … (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State … that is in effect." Id. § 2710(d)(1). "[A] tribe cannot conduct class III gaming on its lands without a compact[.]" Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2035 (2014).

In the absence of a compact, IGRA provides, with respect to Class III gaming, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling ... shall apply in Indian country" as those laws apply elsewhere in the state. 18 U.S.C. § 1166(a). IGRA further generally provides, however, that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable ... to Indian country" by the foregoing provision. Id. § 1166(d).

In 2005, the State of New Mexico and Pojoaque Pueblo entered into a compact authorizing the Pueblo to engage in Class III gaming on Pueblo lands for a ten-year term. Complaint ¶¶ 45-46 (Doc. 1). The State and the Pueblo have failed to reach agreement on the terms of a successor compact. As a result, the compact expired on June 30, 2015, and has not been expanded or replaced. This litigation stems from the fact that the Pueblo has continued, and

intends to continue, to engage in Class III gaming since that date notwithstanding the absence of a compact. Such activity is unlawful under the clear terms of IGRA quoted above. In a June 30, 2015, letter to Pojoaque Pueblo Governor Talachy, United States Attorney Damon Martinez confirmed this undeniable legal reality -- "Continued gaming operations by the Pueblo [after June 30, 2015], in the absence of a Tribal-State compact or Secretarial prescribed procedures, would violate federal law" -- although he elected to exercised his prosecutorial discretion to withhold, for the present, enforcement action against the Pueblo. See Pueblo's Mot. TRO &/or Prelim. Inj. ("TRO Motion" or "TRO Mot."), Attach. 10, at 1 (Doc. 23).

C. The State's Response to Pojoaque Pueblo's Continued, Unlawful Gaming Activity After June 30, 2015

Under the New Mexico laws discussed above, State officials must monitor, and cannot ignore evidence of, licensees' participation in illegal gaming operations in any jurisdiction. Governor Martinez and the Board were aware of the expiration of the Pojoaque compact and of the Pueblo's stated intention to continue its Class III gaming operations. The central premise of the Pueblo's Complaint and preliminary injunction motion is the notion that under federal law the State of New Mexico may take no action – not only within but also without the Pueblo's boundaries – to enforce its gaming laws based on the Pueblo's illegal gaming operations after June 30. Further, the Pueblo maintains that the State is barred even from determining the legality of the Pueblo's conduct of gaming after that date. Compl. ¶ 76. As a result, the Pueblo contends that the following actions by the State have been in violation of that federal law and "wrongfully assert[] State jurisdiction over gaming activities on the Pueblo's Indian lands, see Compl. ¶ 148: (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 Board 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." Compl. ¶¶ 65-81, 148.

Plaintiffs complain of additional allegedly wrongful actions that post-date the filing of their Complaint. Specifically, Plaintiffs object to the fact that the Board 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 Board; and (iv) demand the production of all communications and business records between the Vendor and the Pueblo." TRO Mot. at 1. The Plaintiffs also complain that, following the audits, the Vendors were issued citations by the Board that 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." 2d Supp. Bailey Decl. ¶¶ 5-6, Exs. 1-3 (Doc. 30) ("Bailey Decl.").

The Board and its staff have taken no further enforcement action with respect to any of the citations issued to the manufacturers. Further, neither the Board nor its staff will take any

[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).

action to bar any manufacturer or distributor from continuing to supply gaming devices to the Pueblo for use with the Pueblo's operations on its lands. Instead, the Board intends to enforce New Mexico law only outside of tribal lands: the Board and its staff will regulate only "manufacturer licensees' ability to continue to do business in the State of New Mexico with the racetrack casino operators and the veteran, fraternal and non-profit gaming operators." Defs.' Resp. TRO Mot., Attach. 1, ¶¶ 17-19 and Attach. 2, ¶¶ 16-18 (Doc. 28) ("Defendants' Response").[3]

D. The Pueblo's Motion and the Court's Preliminary Injunction Decision and Order

Late in the day on Friday, September 25, 2015, the Pueblo served its TRO Motion. (Doc. 25) On Monday, September 28, following the Pueblo's filing of its Supplemental Memorandum that urged issuance of a TRO "as soon as reasonably possible" (Doc. 27), the Court held a conference call with counsel. The Court initially advised counsel that it intended to issue a temporary restraining order. At the request of defense counsel, the Court agreed to defer taking any such action and instead scheduled an expedited hearing for the morning of Friday, October 2. The Court advised counsel that only two hours would be reserved for the hearing and that the Court would not hear any live testimony and instead would consider only record evidence. On October 1, Defendants filed their Response to the TRO Motion. (Doc. 28) Defendants' Response, at 1-2, reflects the foregoing and the Defendants' understanding that the October 2 hearing would be limited to consideration of the TRO; Defendants requested a full evidentiary hearing prior to consideration of a preliminary injunction.

[3] The Pueblo does not contend otherwise, and instead admits 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…." TRO Mot. at 1-2.

At the October 2 hearing, counsel argued at length about the Court's jurisdiction as well as the requirements for issuance of a preliminary injunction. In connection with the discussion about the legal merits of the Complaint, defense counsel reiterated that the State did not intend to bar manufacturer licensees from continuing to supply the Pueblo's casino operation with gaming devices, and instead was enforcing State law only in connection with the manufacturers' dealings with other non-Indian gaming facilities located off tribal lands. See, e.g., 10/2/15 Tr. at 57 ("nobody's been ordered that they cannot do business with the Pueblo of Pojoaque"); 74 ("we've got to be able to carry out our regulatory duties with regard to third parties doing business with … racetrack casinos, fraternal and nonprofit gaming operations, while at the same time allowing plaintiffs to carry on with their business on their reservation"). Plaintiffs' counsel recognized the distinction as well. See id. at 37 (arguing that the 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").

In its October 7 decision (Doc. 31) ("Oct. 7 Decision"), 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 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(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 [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 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. The Court granted a preliminary injunction versus a temporary restraining order. ("Oct. 7 Order" (Doc. 32))

III. GOVERNING PROCEDURAL LAW

A. The Court May Reconsider and Vacate a Preliminary Injunction.

Rule 54(b) recognizes the Court's "inherent," Balla v. Idaho State Bd. of Corrs., 869 F.2d 461, 465 (9th Cir. 1989), authority to reconsider and revise any interlocutory order "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." "[E]very order short of a final decree is subject to reopening at the discretion of the district judge." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983). Accord Rimbert v. Eli Lilly & Co., 647 F.3d 1247, 1251 (10th Cir. 2011) ("[D]istrict courts

generally remain free to reconsider their interlocutory orders.") (internal quotation marks and citation omitted); Board of Educ. v. Trujillo, No. 05-2305, 2007 U.S. App. Lexis 827 (10th Cir. Jan. 12, 2007) (same); Hartford Fire Ins. Co. v. Gandy Dancer, LLC, 981 F. Supp. 2d 981, 1003 (D.N.M. 2013) (same).

"[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position or controlling law," as well as "to correct clear error." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). Accord, United States v. Christy, 739 F.3d 534, 539 (10th Cir. 2014), aff'g 810 F. Supp. 2d 1219, 1250 (D.N.M. 2011) (granting motion in part); Hartford Fire Ins. Co., 981 F. Supp. 2d at 1003 (granting motion in part).[4]

In considering whether to reconsider and vacate a preliminary injunction, a court should be mindful of the fact that, as was the case here, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules." Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (internal quotation marks and citations omitted). For these reasons, a court properly should revisit, upon a sufficient showing, its previous assessment of the legal merits of a preliminary injunction.

B. The Court May Modify a Preliminary Injunction.

A district court has "inherent," discretionary authority to modify a preliminary injunction. Sierra Club v. United States Army Corps of Eng'rs, 732 F.2d 253, 256 (2nd Cir. 1984). "The grant or denial of injunctive relief, as well as a refusal to dissolve or modify an existing injunction, is within the discretion of the district court[.]" Cablevision of Tex. III, L.P. v. Okla.

[4] A district court's authority to reconsider an interlocutory ruling to correct clear error encompasses legal as well as factual error, see, e.g., Christy, 739 F.3d at 539, and therefore is broader than the "clearly erroneous" standard applicable to factual determinations set forth in Fed. R. Civ. P. 52(a)(6).

W. Tel. Co., 993 F.2d 208, 210 (10th Cir. 1993) (reversing denial of motion to dissolve permanent injunction).

"When considering whether to modify a preliminary injunction, a district court is not bound by a strict standard of changed circumstances but is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason." Basic Research, LLC v. Cytodyne Techs., Inc., No. 99-343, 2000 U.S. Dist. Lexis 23454, at *34 (C.D. Utah Dec. 20, 2000) (internal quotation marks and citation omitted). Accord, PTI Group, Inc. v. Gift Card Impressions, LLC, No. 14-2063, 2014 U.S. Dist. Lexis 85588, at *2 (D. Kan. June 24, 2014);

C. Fed. R. Civ. P. 62(c) and 62.1

Rule 62(c) authorizes a district court, during the pendency of an appeal from a preliminary injunction, to suspend, modify, restore or grant an injunction. However, based on jurisdictional considerations, courts have given the rule a narrow construction: a district court generally loses jurisdiction over a proceeding upon the filing of a notice of appeal, at least as to those aspects of the case that are involved in the appeal, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982), although the court will retain jurisdiction to act "to aid the appeal," A. Ides, The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed, 143 F.R.D. 307, 322 (1992).

This general principle has been applied in the context of appeals of preliminary injunctions to limit the district court's authority under Rule 62(c) to encompass only relief that "preserves the status quo" or "preserves the integrity of the case on appeal." Id. at 321. These concepts essentially require that a controversy must still exist to be addressed by the appellate court. The district court may not grant relief regarding the preliminary injunction that divests the

appellate court of its jurisdiction by eliminating or materially altering the controversy. See, e.g., Ortho Pharm. Corp. v. Amgen, Inc., 887 F.2d 460, 463-64 (3rd Cir. 1989); Coastal Corp. v. Tex. E. Corp., 869 F.2d 817, 819-20 (5th Cir. 1989); Int'l Ass'n of Machinists & Aerospace Workers v. E. Air Lines, Inc., 847 F.2d 1014, 1018-19 (2nd Cir. 1988); United States v. Power Eng'g Co., 10 F. Supp. 2d 1165 (D. Colo. 1998). In particular, the pendency of the appeal deprives the district court of the jurisdiction it otherwise would possess to vacate or dissolve the preliminary injunction. Coastal Corp., 869 F.2d at 819.

Rule 62.1, promulgated in 2009, provides a mechanism by which, notwithstanding the strictures of Rule 62(c), a district court may revisit a preliminary injunction that has been appealed. The rule provides:

> (a) If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: … (3) [in addition to deferring or denying the motion] state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
>
> (b) The movant must promptly notify the circuit clerk … if the district court states that it would grant the motion or that the motion raises a substantial issue.
>
> (c) The district court may decide the motion if the court of appeals remands for that purpose.

The district court's ruling either that it would grant the motion if the court of appeal remands or that the motion raises a substantial question is called an "indicative ruling." Rule 62.1 advisory committee's notes to 2009 adoption.

Rule 62.1's advisory committee notes reflect that the rule was drafted with Rule 60(b) motions to set aside the judgment in mind. However, the rule also encompasses a Rule 62(c) motion that would exceed the foregoing jurisdictional constraint, and one court has applied the rule in this context: Russell Road Food and Beverage, LLC v. Galam, No. 13-776, 2013 U.S.

Dist. Lexis 83354 (D. Nev. June 13, 2013) (denying motion to modify or vacate preliminary injunction, but finding existence of "substantial issue").[5]

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

Federal law does not preempt the State of New Mexico from exercising its police power to regulate licensed non-Indian manufacturers of gaming equipment with respect to their dealings with non-Indian gaming operators engaged in gaming activities outside Indian lands. 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 borders outside of tribal lands is limited by indirect or ancillary effects of such action on a tribe's illegal conduct. Therefore, Plaintiffs failed to demonstrate a likelihood of success on the merits of their claim. This Court failed to undertake the correct legal analysis and as a result clearly erred in improperly enjoining the Defendants from exercising that power in connection with the manufacturers' involvement with the Pueblo's illegal gaming activity since July 1.

A. 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). There can be no doubt that New Mexico's regulation of non-Indian gaming activity, and in particular actions of the Board in

[5] Rule 62.1 thus permits a party who is appealing a preliminary injunction to seek an indicative ruling from the district court in lieu of petitioning the court of appeals to permit the district court to consider a motion to vacate the injunction. See Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2nd Cir. 1962) (if appellant wishes to move the district court to vacate or materially modify an injunction, he first must obtain the appellate court's leave to seek such relief from the lower court).

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, 125 N.M. 521 ("firmly assert[ing]" the State's authority to exercise its police power with respect to gaming activity within its jurisdiction); see also Kearns v. Aragon, 1959-NMSC-102, ¶ 16, 65 N.M. 119 (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").

Federal courts recognize and respect states' sovereign interest in enforcing their police powers within their jurisdictions. See, e.g., Mashantucket Pequot Tribe v. 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)).

B. Federal Law Does Not Preempt the State's Police Power.

1. 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 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). "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 IGRA 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. In granting injunctive relief to

the Plaintiffs, the Court did not consider the State's broad policy authority or whether IGRA conflicted with the State's assertion of authority within that framework. Had it done so, it would have concluded that IGRA does not preempt the State's authority over its licensees on State lands outside of tribal lands and that the Pueblo was not likely to prevail on the merits.

2. 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." Bay Mills, 134 S. Ct. at 2034 (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); Mashantucket Pequot Tribe, 722 F.3d at 469 (rejecting tribe's contention "that IGRA completely preempts all state legislation affecting the field of gaming"); 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)); Casino Res. Corp. v. Harrah's Ent'mt, 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 when a compact is not in place IGRA plainly does not preempt 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 valid tribal-state compact in effect. See 1998-NMSC-025, ¶ 13. 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 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. 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 correctly applied preemption principles and concluded that the Board 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.

In granting the preliminary injunction, however, this Court did not consider this 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, which the Board clearly has not. Oct. 7 Decision, at 20 (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 with respect to their dealings with State-licensed gaming operators outside of tribal lands as "disingenuous"). The court concluded that because Section 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 clear 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. 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 its Act and taking administrative action against licensees within the State. IGRA does not remove the State's authority to decide whether the Pueblo's gaming operations are lawful – something the State must do in order to enforce its own law – and the decision in Srader underscores the State's obligation to do so.[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 operation is illegal.

Moreover, Plaintiffs' claim that the State made "a unilateral determination regarding the legality of gaming on Indian lands," Compl. ¶ 133, which the Court accepted in finding that the State acted outside its jurisdiction, Oct. 7 Decision, at 20, is demonstrably false. There is no

[6] See, e.g., the hypothetical described supra at 5.

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, Defendants' Response, Attach. 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." Id. The State's actions were expressly based on that federal determination. See TRO Mot., Attach. 7, at 1; Bailey Decl. Attach. 2, at 1-2; Attach. 3, at 3.

Tribal sovereign immunity may bar states in some circumstances "from pursuing the most efficient remedy" – namely, a suit directly against the tribe itself – notwithstanding that a tribe's on-reservation conduct impinges on a state's legitimate interests. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991); see also Kiowa Tribe v. Mfg. Techs., 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). That is all the State has done. The State has not taken any action with respect to the Pueblo nor has it asserted its authority on Pueblo lands.[7] The State is not regulating the Pueblo, it is regulating licensees. The State's determination that its

[7] This is the fundamental distinction between the facts of this case and those which the Plaintiffs cited in support of their preliminary injunction application. See, e.g., Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1251-52 (10th Cir. 2006) (barring state, in absence of compact, from entering tribal lands and seizing gaming devices and proceeds).

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 Section 1166, and the Court erred in equating the two.

3. 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.

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." 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. Oct. 7 Decision, at 20. This determination was clear 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[.]" TRO Mot., at 1-2. 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 or another jurisdiction's 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 honest and free from "corruptive elements and influences." NMSA 1978, § 60-2E-2(A). See supra at 3-5.

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, 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. [8]

[8] See also Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99, 101 (2005) ("[T]he Bracker [adv. White Mountain Apache Tribe, 448 U.S. 136 (1980)] interest-balancing test applies only where a State asserts authority over the conduct of non-Indians engaging in activity on the reservation…. [U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequence." (internal quotation marks & citation omitted)).

Indeed, a state may act within its sphere of authority even though its actions could profoundly impact the viability of a tribal undertaking. Cf. 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); 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, 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 stated, New Mexico is regulating its licensees, not the Pueblo. But even assuming, solely for the sake of argument, that the issuance of citations to the manufacturers properly could

be viewed as an indirect attempt to regulate the Pueblo's illegal gaming, rather than the Board's compliance with State law, 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. The Court further 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"; 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. 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 these reasons, the Court misapprehended the facts and Defendants' position and clearly erred in granting a preliminary injunction based on the belief that Plaintiffs likely will prevail on the merits of their tribal sovereignty-based claims. The Court's fundamental error was in equating the potential ancillary impact that the Pueblo claimed it would experience as a result of New Mexico's enforcement of State law outside of the Pueblo with enforcement of those laws on the Pueblo land itself. 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 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.[9]

V. REQUESTED RELIEF

Based on the foregoing, Defendants respectfully request the Court to reconsider and either vacate its Oct. 7 Decision and Order or, in the alternative, modify the preliminary injunction to permit the State to take licensing and other regulatory action against non-Indian manufacturers of gaming equipment with respect to their dealings with licensed non-Indian gaming operators engaged in gaming activities outside Indian lands, based on the manufacturers' involvement with the Pueblo's illegal gaming activities since June 30. Because the pending appeal deprives the Court of jurisdiction to take such action, Defendants request the Court pursuant to Rule 62.1 to issue an indicative ruling, stating that it would grant the foregoing relief if the United States Court of Appeals for the Tenth Circuit remands for that purpose or, in the alternative, that this motion raises a substantial issue.

[9] The grant of a preliminary injunction properly can and should be reconsidered or modified where it is apparent that the court clearly erred in its evaluation of the plaintiff's probability of success on the merits, irrespective of the presence or absence of the remaining three "equitable" preliminary injunction factors (irreparable harm, balance of harm and public interest). Cf. Soskin v. Reinertson, 353 F.3d 1242, 1257 (10th Cir. 2004) (vacating injunction pending appeal; 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). See also Heideman, 348 F.3d at 1189 (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") (internal quotation marks and citation omitted; alteration omitted). However, for the reasons set forth in Defendants' Motion to Stay Injunction, at 10-13, filed concurrently herewith, when due respect is accorded New Mexico's sovereign interest in enforcing its police powers and the public interest in ensuring compliance with the State's gaming laws, the balance of these equities in fact tips in Defendants' favor.

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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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