UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe: JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque, Plaintiffs, vs. STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I –V, Defendants.	NO.: 1:15-cv-00625 JOB-GBW

RESPONSE IN OPPOSITION TO STATE DEFENDANTS' MOTION TO RECONSIDER AND EITHER VACATE OR MODIFY THE COURT'S OCTOBER 7, 2015 PRELIMINARY INJUNCTION AND FOR OTHER RELIEF PURSUANT TO FED. R. CIV. P. 62.1.

Plaintiffs, Pueblo of Pojoaque, a federally-recognized Indian tribe and Joseph M. Talachy, Governor of the Pueblo of Pojoaque (collectively referred to as "Pueblo" or "Plaintiffs") submit their Opposition to the Defendants' State of New Mexico, Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty III, and Carl E. Londene (collectively referred to as "Defendants") Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction and for Other Relief Pursuant to Fed. R. Civ. P. 62.1.

COMMENT ON CONTEXT AND PROCEDURAL POSTURE

The Defendants have filed six motions, all of which are set to be heard on March 2, 2015:

Doc. 64 Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction.

Doc. 65 Defendants' Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction and for Other Relief Pursuant to Fed. R. Civ. P. 62.1.

Doc. 69 Motion to Modify October 7, 2015 Preliminary Injunction and to Dismiss Defendant State of New Mexico (the "State") based on the State's Eleventh Amendment Sovereign Immunity.

Doc. 71 Motion to Dismiss Counts III and IV of Plaintiffs' Complaint.

Doc. 72 Motion to Dismiss Count II of Plaintiffs' Complaint.

Doc. 73 Motion to Dismiss Count V of Plaintiffs' Complaint.

Because there is a significant amount of overlap on the facts and the analysis, rather than repeat arguments (other than this summary), the Pueblo incorporates all responses into all other responses as if fully set forth therein, and attempts to focus each response on the issues unique to that motion. In a nutshell, the Pueblo vigorously opposes the Motions to Dismiss Counts II and

III of Plaintiffs' Complaint and the three motions to stay, suspend, vacate and/or modify the Preliminary Injunction. The Pueblo does agree, subject to its approval of specific language, to the dismissal of Counts I and V by reason of the State's assertion of Eleventh Amendment immunity. The Motion to Dismiss Count IV is moot.

The Pueblo anticipates that it will file within the next few days a Motion to Stay all proceedings before the District Court pending the resolution of the appeals before the Tenth Circuit, including the Defendants' appeal from this Court's October 7, 2015 Order (doc. 31). The decisions of the Tenth Circuit in the pending appeals will likely provide substantial clarity and binding guidance regarding the issues pending in this matter.

ARGUMENT

I. Federal Preemption: The Actions of Defendants in Asserting Jurisdiction Over the Pueblo's Non-Compacted Gaming Activity is Preempted By Federal Law.

A. The State lacks jurisdiction over gaming activities on the Pueblo's Indian lands.

The State lacks jurisdiction over gaming activities on the Pueblo's Indian lands. State law can be preempted in either of two general ways. If Congress evidences its intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). *See also Hines v. Davidowitz*, 312 U.S. 52 (1941) (State authority

precluded when it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress"); *Cook v. Rockwell Intern. Corp.*, 790 F.3d 1088, 1092 (10th Cir. 2015) (discussing different types of federal preemption and their implications).

Although a state will certainly be without jurisdiction if its authority is preempted under federal law, federal courts do not limit preemption of state laws affecting Indian tribes to only those circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983). The unique historical origins of tribal sovereignty and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of preemption that are properly applied to other contexts." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption. *Jicarilla Apache Tribe v. Supron Energy Corp*., 728 F.2d 1555, 1570-71 (10th Cir. 1984); *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998); *Cabazon Band v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Applying these different standards, a well-developed body of case law now exists that overwhelmingly finds that the Indian Gaming Regulatory Act ("IGRA") has a broad preemptive scope, especially in the context of state regulatory jurisdiction.

Several courts, including the Tenth Circuit Court of Appeals, have looked to the language and history of IGRA to rule that states have no jurisdiction over gaming activities occurring on Indian lands except as expressly agreed upon in the context of a tribal-state compact. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006); *United Keetoowah Band of Cherokee v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991) ("Indeed, the very structure of the IGRA permits

assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming"); *Alabama v. PCI Gaming Authority et al*., 801 F.3d 1278 (11th Cir. 2015); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999) ("*Seminole Tribe II*"); *Sycuan Band v. Roache*, 54 F.2d 535, 538 (9th Cir. 1994) ("The Bands have not consented to the transfer of criminal jurisdiction to the State. As far as IGRA is concerned, therefore, the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming. Having correctly so concluded, the district court was well within its equitable power to enjoin the prosecutions"); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 909 (9th Cir. 2002) (state Attorney Generals lacked jurisdiction to send warning letters to communications companies stating that doing business with tribally-operated lottery was illegal); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990) ("Permitting South Dakota to apply its substantive law to the blackjack game here, which is properly classified as class II gaming, conflicts with congressional intent"); *Lac du Flambeau Band of Lake Superior Chippewa v. Wisconsin*, 473 F. Supp. 645, 646-48 (D. Wisc. 1990) ("Unless and until the state negotiates a tribal-state compact in which [the tribe] consents to the exercise of such jurisdiction, the United States has the exclusive authority to enforce violations of state gambling laws on plaintiffs' reservations"); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997) ("IGRA limits the state's regulatory authority to that expressly agreed upon in a compact. Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government"); *Flandreau Santee Sioux v. Gerlach*, ____F. Supp.___, 2015 WL 9272931 (D.S.D. 2015) ([IGRA] was "intended to expressly preempt the field in governance of gaming activities on

Indian lands"); *Cayuga Indian Nation v. Village of Union Springs*, 317 F. Supp. 2d 128, 148 (N.D. N.Y. 2004) ("The Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands"); *State ex rel Dewwberry v. Kitzhaber*, 259 Or. App. 389, 396, 313 P.3d 1135 (Ore. App. 2013) ("IGRA is a comprehensive federal statutory scheme for the regulation of gaming on Indian lands that preempts the application of state gaming laws").

Notably, the New Mexico Supreme Court acknowledged the State's lack of jurisdiction over non-compacted gaming in rejecting an equal protection challenge brought by charitable and fraternal organizations over the exchange of free games for actual pull-tabs. *Am. Legion Post # 49 v. Hughes*, 1994-NMCA-153:

> Even if it is true that the State does not enforce its gambling laws against Indians, there is a compelling reason for failing to do so. The State of New Mexico has no jurisdiction to enforce its gambling laws in Indian Territory. . . . [T]he United States has provided for exclusive federal jurisdiction over criminal prosecutions for violations of those laws, except in limited circumstances not applicable to this case.

1994-NMCA-153, ¶ 16 (citing *Sycuan Band v. Roache*, infra); *see also Taxpayers of Michigan Against Casinos v. State*, 471 Mich. 306, 323, 685 N.W.2d 221, 229 (Mich. 2004) ("Moreover, this 'federalization' of state law regulating gambling does not give a state enforcement power over violations of state gambling laws on tribal lands because "the power to enforce the incorporated laws rests solely with the United States. The state remains powerless to assert any regulatory authority over tribal gaming *unless* the tribes have assented to such authority in a compact under IGRA.") (emphasis in original).

The above-cited cases are consistent and clear: the State's jurisdiction over gaming activities that occur on Pueblo Indian lands ended on June 30, 2015 when the Pueblo's existing

compact expired. The State's assertion of Eleventh Amendment immunity and refusal to negotiate a new compact in good faith carries with it the consequence that the State does not and will not have jurisdiction over Pueblo gaming activities unless and until the State negotiates a compact with the Pueblo in good faith under IGRA.

Two of the appellate cases cited above, *Wyandotte Nation v. Sebelius* and *Alabama v. PCI Gaming Authority,* warrant closer review by this Court. In *Wyandotte Nation*, the State of Kansas was involved in pending litigation against the Department of the Interior, which ultimately resolved the question of the Wyandotte Nation's authority to offer gaming on certain land (the "Shrine Tract") as a matter of federal law. Kansas decided unilaterally that it would not wait for the courts to resolve the issue, and under the alleged authority of Kansas state law:

> Determined to shut down the tribe's gaming facility and unwilling to wait for the case to travel through proper legal channels, Kansas officials decided to simply bypass the federal court system. They sought and obtained a search warrant in Kansas state court based on suspected violations of state gaming law. On April 2, 2004, armed officials from the Kansas City Police Department, the Kansas Bureau of Investigation, and the Office of the State Attorney General stormed the casino, seized gambling proceeds and files, and confiscated gaming machines. The law enforcement officers arrested Ellis Enyart, the casino's general manager, for violating state gambling laws. That same day, the officers seized a bank account owned by the Wyandotte. In total, the officers seized more than $1.25 million in cash and equipment. Criminal charges were filed against Enyart but a state court rightly dismissed them because Kansas has no authority to enforce its gaming laws on the Shriner Tract. *Kansas v. Enyart,* Case No. 04–CR–540 (Kan. Dist. Ct.) (July 7, 2004 Order).

443 F.3d at 1251-52. The District Court correctly granted the Wyandotte Nation's motion to enjoin the State of Kansas from applying state gaming laws to the Nation's Indian lands. 337 F. Supp. 2d 1253 (D. Kan. 2004). The Court reasoned:

> The IGRA's penal provision, 18 U.S.C. § 1166, incorporates state laws as the federal law governing all nonconforming gambling in Indian country. Section 1166(a) makes "all State laws pertaining to the licensing, regulation or

> prohibition of gambling, including but not limited to the criminal sanctions applicable thereto" enforceable in Indian country. Under the IGRA, the power to enforce these incorporated state laws rests solely with the United States: "The 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...." The states have no authority to regulate tribal gaming under the IGRA unless the tribe specifically consents to the regulation in a compact.

337 F. Supp. 2d at 1256 (emphasis in original);

> The IGRA confers power to enforce Indian gaming laws exclusively with the United States. The structure of the IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate Class III gaming. No such compact has been reached.

337 F. Supp. 2d at 1273 (emphasis in original). The District Court cites to a prior Tenth Circuit decision, *United Keetoowah Band of Cherokee v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), wherein the Appeals Court vacated an injunction sought by the State of Oklahoma to enjoin the Keetoowah Band's gaming activities, alleging that state law applied under the Assimilated Crimes Act. *Id.* at 1182. The Appeals Court reasoned that state law had no application to the Band's gaming except as expressly agreed upon in the context of a negotiated tribal-state compact. *Id.* at 1177.

The District Court in *Wyandotte*, however, went too far and also enjoined the Wyandotte Nation from gaming pending the resolution of all the various lawsuits. Both the Wyandotte Nation and Kansas appealed. The Tenth Circuit, reasoning that "the likelihood that courts will determine that Kansas can exercise jurisdiction over the Shriner Tract is remote," affirmed the injunction against the State of Kansas and vacated the injunction against the Wyandotte Nation. 443 F.3d at 1256.

Recently, the Eleventh Circuit issued an opinion rejecting the State of Alabama's attempt to regulate non-compacted gaming conducted by the Poarch Band. *Alabama v. PCI Gaming Authority et al*. The Eleventh Circuit reasoned:

> Indeed, if we were to hold that states could sue to enjoin class III gaming when a tribe engaged in class III gaming without a compact, we would undermine IGRA's careful balance of federal, state, and tribal interests. *Seminole Tribe II*, 181 F.3d at 1247. Section 2710(d)(7)(A)(ii) indicates that Congress intended for a state to have a right of action to enjoin class III gaming only where the gaming is unauthorized by a compact between the state and the tribe allowing some class III gaming. Permitting a state to sue to enjoin class III gaming in the absence of a compact "would be tantamount to deleting the second requirement that must be met in order for the state to pursue this express right of action" under § 2710(d)(7)(A)(ii). *Seminole Tribe II*, 181 F.3d at 1249. We cannot "usurp the legislative role by deleting it ourselves, particularly when doing so would undermine one of the few remaining incentives for a state to negotiate a compact with a tribe." *Id.*

801 F.3d at 1299-1300. The Eleventh Circuit also went into detail as to how allowing the State of Alabama to assert jurisdiction would usurp legislative intent:

> After considering the text of § 1166 and the structure of IGRA, we conclude that Congress did not intend to create an implied right of action in § 1166 But even if the statutory text and structure did not conclusively resolve whether there is an implied right of action, the legislative history and context of the statute make Congress's intent clear. As we explained in *Seminole Tribe II,* the legislative history "indicates that Congress, in developing a comprehensive approach to the controversial subject of regulating tribal gaming, struck a careful balance among federal, state, and tribal interests." 181 F.3d at 1247 (citing S.Rep. No. 100-446 at 5-6). To strike this balance, Congress placed "limits on the application of state laws and the extension of state jurisdiction to tribal lands." *Id.* (citing S.Rep. No. 100-446 at 5-6). According to the Senate Report, "'the compact process is a viable mechanism for settling various matters between [states and tribes as] equal sovereigns.' "*Id.* at 1248 (quoting S.Rep. No. 100-446 at 13) (alteration in original). The Senate Report recognized the need for "'some incentive' "for states to negotiate in good faith. *Id.* (quoting S.Rep. No. 100-446 at 13) Permitting states to sue to enjoin class III gaming without a compact "would surely frustrate [Congress's] intent [as expressed in the legislative history]." *Id.*

801 F.3d at 1300. The Defendants ignore the tidal wave of consistent authority from many different federal courts, spanning the 28 years since IGRA was enacted, all finding IGRA to preempt the application of state laws regarding the regulation of gaming that interfere with the tribes' pursuit of the objectives of IGRA, and instead, insist that IGRA does not preempt state police power regarding the regulation of gaming.

B. The Defendants' preemption analysis is unavailing.

The State carefully frames argument A(2)(a) (doc. 65 at 17) to note "nothing in IGRA demonstrates clear Congressional intent to preempt the exercise of state regulatory power over non-Indian licensees outside of Indian country" (emphasis added). The State then concedes in A(2)(b)(doc. 65 at 18) that "IGRA is intended to expressly preempt the field in the governance of gaming activities on Indian lands." The Defendants attempt to navigate around the clear case law regarding the State's limited jurisdiction by noting that IGRA does not preempt the State's police powers. The Defendants cite to several cases regarding federal preemption for the proposition that IGRA does not preempt state authority outside of Indian lands, and then cite several cases regarding taxation of tobacco sales on Indian lands for the proposition that negative impacts upon a tribe resulting from the enforcement of state law does not prevent a state from enforcing that law as to non-Indians. Looking past the summary statements in the motions to modify (doc. 65) and to stay (doc. 64), and reviewing the cases cited therein, the cases support the Pueblo's position and do not support the Defendants.

The Pueblo does not dispute or take issue with the State's ability to use its police powers to regulate gaming on State lands. It is when that police power is used to regulate gaming on Pueblo tribal lands that Defendants breach the preemptive force of IGRA. The cases cited by

both the Pueblo and the Defendants acknowledge that IGRA's preemptive scope has its limits. The current dispute is over actions taken by the Defendants which clearly and substantially involve, regulate or interfere with a tribe's on-reservation gaming activities. These actions fall within IGRA's preemptive scope regardless of whether the action occurs on or off Indian lands.

The case most heavily relied upon by the Defendants, *Srader v. Verant*, 1998-NMSC-025, 121 N.M. 521, 964 P.2D 82,[1] concedes that IGRA preempts state police powers. *Srader* expressly notes the narrow circumstances where state police power can be exercised; circumstances which are not present here. *Srader* involved actions taken by New Mexico citizens who claimed to be pathological gamblers harmed by their ability to game on Indian lands. The New Mexico citizens filed claims against various financial institutions providing banking and financial services to tribal gaming operations, and also filed claims against state law enforcement officials alleging that the law enforcement officials had an obligation to enforce state laws against such financial institutions. The lawsuit was brought at a time when all of the gaming compacts between the State and New Mexico tribes had been struck down for want of ratification by the New Mexico State Legislature. 121 N.M. at 527. The New Mexico Supreme Court found that IGRA's preemptive sweep did not preclude the citizens' cause of action to require enforcement of state law against violations that occurred off of Indian lands, 121 N.M. at 527, but then ruled that the Court lacked jurisdiction to hear the case because the tribes were necessary and indispensable parties that could not be joined because they possessed sovereign immunity from suit. 121 N.M. at 530.

[1] It should also be noted that the *Srader* Court's discussion of IGRA's preemptive scope is *dictum*, because the Court found it lacked jurisdiction to hear the case.

The *Srader* Court did recognize that IGRA has preemptive force and simply provides limited circumstances where state law will still apply:

> Hence, rather than suggesting that states are completely preempted from the field of Indian gaming, IGRA's provisions and history strongly suggest that the states possess an important participatory role in the field.

121 N.M. at 525 (emphasis added);

> A state may exercise jurisdiction on Indian land in such cases where a tribe and state have consented to such an arrangement. See, e.g., *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996). Additionally, states may exercise jurisdiction in cases that incidentally concern gaming, but not where state claims clearly and substantially involve, regulate or interfere with gaming. See *Gallegos v. San Juan Pueblo Bus. Dev. Bd. Inc*., 955 F. Supp. 1348 (D.N.M. 1997) (holding that a state law replevin claim against a pueblo was not preempted by IGRA even though the dispute involved an alleged agreement over slot machines).

121 N.M. at 526, n.2 (emphasis added). The *Srader* Court expressly narrowed its decision to violations of state law that occur outside of the reservation:

> Thus, upon declaration by this Court that the gaming compacts of 1995 were invalid as a matter of state law, it was the responsibility of the federal government to enforce any violations of gaming laws which might have taken place on the reservation. However, we firmly assert the State officials' authority to enforce New Mexico's laws outside of the reservations, NMSA 1978, § 29-1-1 (1921), especially where no valid compact divests this State of jurisdiction within its own territory. Since no valid compact existed here, it was the responsibility of the Government Defendants to determine if New Mexico's existing gaming or other laws were being violated outside of the reservation. Subsequently, the Government Defendants could exercise appropriate discretion in bringing possible charges against any violators of these laws.

121 N.M. at 527 (emphasis added). The distinction recognized by the Court in *Srader* is critical because, in the present case, the sole basis for the actions and threatened actions against the applicants/licensees is the violation of gaming laws occurring on the Pueblo's Indian lands, not

outside of the reservation.[2] The Defendants also cite to *Michigan v. Bay Mills Indian Community*, ____U.S. ___, 134 S. Ct. 20124 (2014) and improperly cite[3] *Oklahoma v. Hobia*, 771 F.3d 1247 (10th Cir. 2014) to reinforce the point that IGRA does not regulate activity off of Indian lands. In *Bay Mills* and *Hobia*, Michigan and Oklahoma, respectively, filed actions under IGRA to stop alleged illegal gaming activity. Because the gaming activity at issue was not on Indian lands, the courts held that the states could not file under IGRA, but in dicta, the *Bay Mills* Court suggested other means available to the states to assert jurisdiction over the off-reservation gaming activity. Those cases have no applicability here. The activity at issue in this lawsuit is unquestionably gaming occurring on Indian lands and the sole purpose of the Defendants' actions is to substantially involve, regulate or interfere with that gaming activity.

The Defendants repeatedly argue throughout their motion that their actions involve only activity outside or off of Indian lands (doc. 65 at 1-2, 9-10, 15, 17-22, and 24-26). The Defendants frame their actions as the exercise of police power, and note that their actions are against non-Indian vendors and licenses to do business with non-Indian gaming businesses, disingenuously suggesting that the actions have no impact upon the Pueblo's gaming enterprises. The Defendants frame their actions as a legitimate exercise of state police power, but all state authority at issue in the cases cited by the Pueblo regarding IGRA's preemptive effect on state authority could also be characterized as state police power – that does not change the result of

[2] The State Defendants characterize *Srader* as concluding "the Board is obligated to enforce state laws against licensees conducting business with illegal gaming enterprises, including illegal gaming enterprises on tribal land" (doc. 65 at 19). The case does not support that characterization. There is nothing in the *Srader* opinion to suggest that the state law prosecution(s) may be based upon on-reservation activity.

[3] The decision cited by State Defendants (doc. 65 at 18 & 24), 771 F.3d 1247, was vacated and superseded on rehearing. 775 F.3d 1204 (2014). The analysis regarding the status of lands at issue, however, did not change. 775 F.3d at 1207-08 and 1212-13.

those cases. The Defendants' characterization of their actions as an exercise of state police power does not provide an excuse for the State or its officials. Rather, regardless of how the actions are characterized, it remains clear that the only activity at issue is the on-reservation activity of the Pueblo. Framing the actions in the context of the ability of state licensees to conduct business with state gaming entities does not change the fact that the actions at issue are the assertion of regulatory jurisdiction over the Pueblo's gaming activities.

Applying *Srader's* criteria to determine whether actions related to state enforcement of state law "clearly and substantially involve[s], regulate[s] or interfere[s] with gaming," the Defendants' actions fall within the scope of IGRA's preemptive force. The Defendants concede that "but for'' the applicants/licensees doing business with the Pueblo, the Defendants would not have taken or threatened any adverse actions against the applicants/licensees (doc. 62 at 3; 65 at 7-9). The Defendants also concede that the adverse actions at issue were taken because the Pueblo's gaming activities on its Indian lands were allegedly illegal (doc. 62 at 3; 65 at 7-9). Indeed, it was the intent of the Defendants to "clearly and substantially involve, regulate or interfere with gaming" on the Pueblo's Indian lands. The State even suggests that the action was proper to manufacture "leverage" against the Pueblo (Doc. 65 at 21), which in itself is a concession that the motive of the Defendants was to disrupt the balance of tribal, federal, and state interests intended by Congress in the passage of IGRA. Judge Brack was correct in evaluating these facts and these circumstances to reject the State's rationalization for its actions:

> Defendants are frustrated by and resent the ongoing gambling activity of the Pueblo. Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that which Defendants know they are without authority or jurisdiction to accomplish directly. Defendants' contention that the enforcement actions against the vendors do not harm the Pueblo is also disingenuous.

October 7, 2015 Order (Doc. 31) at p. 20. Correct application of the analysis found in *Srader*, *Bay Mills* and *Hobia* to the instant motion supports the District Court's issuance of the Preliminary Injunction and supports denial of Defendants' motions to modify (doc. 65) and to stay (doc. 64) the Preliminary Injunction.

The Defendants also rely on two cases that found limitations to IGRA's preemptive force. Both of these cases, upon closer review, support the Pueblo's position. First, in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), the Second Circuit found that IGRA did not preempt the Town of Ledyard from assessing a personal property tax on non-Indian lessors of slot machines used by the tribe. The court's inquiry turned on whether the off-reservation tax on a non-Indian entity interfered with the tribe's governance of its gaming activities:

> While the Tribe is correct that IGRA preempts certain state regulations affecting the governance of gaming, the tax at issue here does not affect the Tribe's "governance of gaming" on its reservation. Therefore, we conclude that IGRA does not preempt the tax.

722 F.3d at 469 (citation omitted). Here, the actions of the Defendants directly affect the Pueblo's governance of gaming on its reservation. Accordingly, *Town of Ledyard* supports the District Court's issuance of the Preliminary Injunction.

Second, in *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435 (8th Cir. 2001), the Eighth Circuit found IGRA did not preempt an action brought by a sub-contractor against a management company after the management company terminated its agreement with an Indian tribe. The court's inquiry turned on whether the lawsuit could encroach on IGRA's goals:

> In contrast, the instant case presents the issue of whether IGRA preempts state law claims by one non-tribal entity against another, when resolution requires

> some review of a contract terminating a gaming management arrangement between one of the parties and a tribal entity. Unlike *Gaming Corp.*[4], where we stifled management companies' attempts to employ state law to circuitously challenge the outcome of an Indian nation's internal governmental decisions, here the challenge is merely to the decisions of a management company. Therefore, Gaming Corp. does not predestine our resolution. . . . Congressional intent is the touchstone of the complete preemption analysis." *Magee v. Exxon Corp*. 135 F.3d 599, 601–02 (8th Cir.1998). Through IGRA, Congress has sought to bring sundry policy goals to fruition, including protecting tribes' sovereign immunity, protecting tribes' "considerable control of gaming to further their economic and political development," *Gaming Corp.*, 88 F.3d at 549, protecting "the Indian gaming industry from corruption and ... provid[ing] for extensive federal oversight of all but the most rudimentary forms of Indian gaming," *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir.1995). CRC's claims encroach on no IGRA goal.

243 F.3d at 438 (emphasis added). Notably, the Eighth Circuit's analysis, in distinguishing between the circumstances in *Casino Resources Corp.* that were determined to be outside of IGRA's preemptive scope, and the circumstances in *Gaming Corp.* that were determined to be within IGRA's preemptive scope, relied upon the fact that the lawsuit in *Gaming Corp*. was being used to "circuitously challenge" internal tribal governmental decisions. *Id.* The Defendants attempt to distinguish *Wyandotte* from the instant circumstances by noting that actions taken against applicants/licensees are different than an actual physical raid on Indian lands (doc. 65 at 2). *Gaming Corp.,* however, goes to the other end of the spectrum – a lawsuit between two non-Indian firms. The facts here fall in the middle of *Wyandotte* and *Gaming Corp*. But the actions at issue in all three cases "clearly and substantially involve, regulate or interfere with gaming."

[4] *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

Additionally, the Defendants cite to a series of cases,[5] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); and *Muscogee Creek Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012), in the context of states seeking to impose state excise taxes on tobacco products sold to non-Indians on Indian lands (Doc. 65 at 21-24). *Citizen Band Potawatomi* is not a federal preemption case. *Confederated Tribes* found no statutory rights at stake that authorized Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere. 447 U.S. at 135 ("Federal statutes . . . do not go so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State"). The statutes at issue in *Muscogee* were the Indian Trader Statutes, 25 U.S.C. §§ 261-264. The Tenth Circuit found that those statutes were not impacted by taxation of tobacco sales to non-Indians because tribes have no vested right to sell tobacco products to non-Indians. 669 F.3d at 1175. None of the tobacco tax cases cited involve interference with congressionally-enacted statutes intended for the benefit of tribes, such as IGRA. The cases are inapposite.

II. State Defendants Incorrectly Assume/Determine that the Pueblo's Non-Compacted Gaming Activities Are "Illegal".

The Court is referred to the Pueblo's Response in Opposition to Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction, which is incorporated as if fully set forth herein by this reference.

[5] State Defendants also cite *Kiowa Tribe v. Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998), in which the Court held that tribal sovereign immunity extends to off-reservation actions. It is unclear how that is relevant to the current litigation.

III. The State Defendants Fail to Establish Error in the District Courts Analysis of Irreparable Harm and Balance of Hardships

The Court is referred to the Pueblo's Response in Opposition to Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction, which is incorporated as if fully set forth herein by this reference.

CONCLUSION

For the reasons set forth herein, and set forth in the Pueblo's responses to pending motions, incorporated herein, Defendants' Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction and for Other Relief Pursuant to Fed. R. Civ. P. 62.1 should be denied.

RESPECTFULLY SUBMITTED on January 25, 2016,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on January 25, 2016, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

/s/Scott Crowell
Scott Crowell, AZ Bar No. 009654**