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 DISMISS COUNT II OF PLAINTIFFS COMPLAINT

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' Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty III, and Carl E. Londene (collectively referred to as "Individual Defendants") Motion to Dismiss Count II of Plaintiffs' Complaint.

COMMENT ON CONTEXT AND PROCEDURAL POSTURE

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

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

Doc. 65 Individual 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 of Plaintiff's Complaint by reason of the State's assertion of Eleventh Amendment immunity.v 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 resolution of the appeals before the Tenth Circuit, including the Individual Defendants' appeal from this Court's October 7, 2015 Order. 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.

INTRODUCTION

I. The Court Has Jurisdiction to Hear Count II.

The Supreme Court has recently affirmed and recognized the existence of the cause of action set forth in Count II in *Armstrong v. Exceptional Child Ctr., Inc*., ___U.S.____, 135 S. Ct. 1378, 1383 (2015). In recent litigation, *Tohono O'odham Nation v. Ducey*, _____ F. Supp. 3d ____, 2015 WL 5475290 (D. Ariz. Sept. 17, 2015), cited with approval by Individual Defendants (Doc. 72 at 12) and similar in many aspects to the instant litigation, the United States District Court for the District of Arizona provided well-reasoned and thorough analysis as to why, applying *Armstrong*, similar claims of the Tohono O'odham Nation against Arizona State gaming officials can be brought as the result of the State of Arizona's actions in violation of the Supremacy Clause:

> The Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1383 (2015). The

Supremacy Clause is not, however, "the source of any federal rights, and certainly does not create a cause of action." *Id*. (internal quotation marks and citations omitted). The clause "is silent regarding who may enforce federal laws in courts, and under what circumstances they may do so." *Id.* For this reason, the Nation states that it does not seek to assert a private right of action under the Supremacy Clause. Doc. 59 at 15.

The Nation also disavows any private right of action found in IGRA. Id. This too is wise, as the Ninth Circuit has noted that "where IGRA creates a private cause of action, it does so explicitly." *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000). In the absence of an express cause of action in IGRA, "plaintiffs could not sue for every violation of IGRA by direct action under the statute." Id. (citing *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995)). IGRA creates no private right of action for the claim asserted by the Nation in this case.

Lacking a private right of action under the Supremacy Clause and IGRA, the Nation argues that its claims "rest on federal courts' inherent equitable power to 'issue an injunction upon finding . . . state regulatory actions preempted.'" Doc. 59 at 15 (quoting *Armstrong*, 135 S. Ct. at 1384). Invoking this equitable right of action, the Supreme Court has recognized that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulated is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction[.]" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

The "power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* (internal quotation marks and citation omitted). Thus, to determine whether equitable relief is available in connection with a federal statutory scheme, courts look to "Congress's 'intent to foreclose' equitable relief." *Id.* (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)).

Defendant Bergin argues that Congress, in enacting IGRA, intended to foreclose equitable relief. IGRA creates three specific causes of action, and the Ninth Circuit has held that private rights of action under IGRA are limited to these three. *Hein*, 201 F.3d 1260. But the Court cannot conclude that Congress's passage of IGRA also reveals an intent to exclude all other types of actions, including equitable actions.

Defendants rely heavily on the Supreme Court's recent decision in *Armstrong*.135 S. Ct. at 1385. The plaintiffs in *Armstrong* brought suit against a state agency and its administrator seeking an injunction to force the agency to increase Medicaid reimbursement rates. Id. at 1382. After the Court held that there was no private right of action under the Supremacy Clause or under the

> Medicaid Act itself, id. at 1384, 1387, the plaintiffs claimed that their action could proceed in equity, id. at 1385. The Court rejected this argument because "[t]wo aspects of [the Medicaid Act] establish Congress's 'intent to foreclose' equitable relief." *Id.* (quoting *Verizon*, 535 U.S. at 647). First, Congress had created a remedy for the very wrong about which the plaintiffs were complaining – the state's failure to comply with Medicaid's requirements. *Id*. Second, Congress had entrusted that remedy to the executive branch, not the courts. *Id.* The "sheer complexity associated with enforcing [the statute], coupled with the express provision of an administrative remedy," showed that Congress intended to preclude an action in equity. *Id*. at 1385.
>
> IGRA provides no comparable remedy for allegedly preempted state efforts to regulate Indian gaming. Bergin argues that § 2710(d)(3)(C) – which allows compacts to include remedies for their breach – is comparable to the remedy addressed in Armstrong. But that clearly is not the case. Permitting the parties to agree upon remedies for breach of the compact is not the same as specifically entrusting the remedy to an executive branch agency and prescribing complex procedures for the dispute's resolution. And, as noted above, § 2710(d)(3)(C) is optional, leaving parties free to include no remedy for breach, in which event court action may be the only available alternative, or to agree that breaches of the compact will be resolved in court. Such a flexible provision does not evince a congressional intent to keep disputes out of court.
>
> Armstrong also relied on the fact that the statutory provision the plaintiff sought to enforce – § 30A – was unusually complex and contained standards that reasonably could be applied only with the expertise of the executive branch agency. The same is not true here. Courts are well suited to deciding equitable claims.
>
> For these reasons, the Court is not convinced that Congress intended to foreclose an equitable cause of action asserting preemption. The Supreme Court recognized the existence of such a cause of action in *Armstrong*, and Bergin has cited no IGRA provision that shows a congressional intent to foreclose it.

2015 WL 5475290 at *9 -*11. The Court should apply *Armstrong* to Count II in the same manner as Tohono O'odohm and come to the same conclusion that Count II is a cognizable claim under *Armstrong.* It is ironic that the Individual Defendants cite *Tohono O'odham* with approval and fail to note that the *Tohono O'odham* Court concluded that the tribe's claims against the Director of the Arizona Department of Gaming (ADOG) for interfering with the tribe's governance of its gaming activities by threatening action against ADOG licensees, survived an identical challenge to dismiss the claim.

II. The Actions Taken by Individual Defendants are Preempted by Federal Law.

The Court is referred to the Pueblo's Response in Opposition to 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, which is incorporated as if fully set forth herein.

III. Plaintiff Governor Talachy has Standing to bring Count II against Individual Defendants.

The Court is referred to the Pueblo's Response in Opposition to Defendants' Motion to Dismiss Counts III and IV of Plaintiff's Complaint, which is incorporated as if fully set forth herein.

IV. All Individual Defendants, Including Governor Martinez and Jeremiah Ritchie, Should Remain Subject to Count II.

Individual Defendants argue that Count II as alleged against Defendants Governor Susana Martinez and Jeremiah Ritchie should be dismissed because the majority of the Pueblo's allegations are against the New Mexico Gaming Control Board (the "NMGCB") officials, and because the Governor and Attorney General of Arizona were recently dismissed in a similar action. *Tohono O'odham Nation v. Ducey*, _____ F. Supp. 3d ____, 2015 WL 5475290 (D. Ariz. Sept. 17, 2015). These arguments are unavailing. As set out in the Complaint, the Pueblo's allegations against Governor Martinez and Mr. Ritchie are sufficient, on their own, to survive the Motion to Dismiss. Further, the Pueblo has reason to believe that the Individual Defendants are refusing to provide information that is likely to further substantiate the Pueblo's claims against Governor Martinez and Mr. Ritchie. Finally, the facts at issue in *Tohono O'odham* are critically distinguishable.

The Individual Defendants concede (Doc. 60 at pp. 21-22) that the Complaint alleges that Governor Martinez caused the issuance of press releases to the public that were designed to threaten banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that were doing business with the Pueblo (Doc. 31, p.4), and that Mr. Ritchie made or caused to be made similar statements. These allegations are further supported by the Declaration of the Pueblo's Governor, Joseph Talachy, submitted in support of the Pueblo's Motion for Preliminary Injunction (Doc. 23-1 generally and at ¶ 7 and exhibits 4 and 5, specifically). As the Individual Defendants concede, this Court "must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff" (Doc. 60 at p. 3).

The actions of Governor Martinez and Mr. Ritchie constituted, and continue to constitute, threats to licensees doing business with the Pueblo, and are part of the State's unlawful attempt to assert jurisdiction over the Pueblo's gaming activities. Judge Brack expressly identified the press statements (Doc. 60, p. 4) as part of the actions that caused him to conclude that "Plaintiffs have established that the Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact" (Doc. 31 at p. 15). The fact that NMGCB members have engaged in more frequent and concrete examples of threatening behavior does not excuse Governor Martinez and Mr. Ritchie. The concrete examples of threatening action identified in the Complaint provide reason to believe that discovery will reveal many more examples and/or much more evidence of threatening actions and even more direct involvement.

Indeed, the Pueblo has been in pursuit of the correspondence between officials in the Governor's Office and officials with the NMGCB under New Mexico's Inspection of Public

Records Act, NMSA 1978, §§ 14-2-1 et seq. ("IPRA"), which will likely reveal additional manifestations of misconduct by Governor Martinez and/or Mr. Ritchie, or otherwise provide evidence of a conspiracy between officials in the Governor's Office and in the NMGCB. *See* December 18, 2015 Declaration of Martina LaForge-Lara and attachments thereto (Doc. 66-1). Although those IPRA requests have been pending since late September, 2015, the responses received by the Pueblo thus far have been limited to claims for the need of additional time, and a limited disclosure that does evidence at least two (2) meetings between Mr. Richie and Mr. Landers, and possibly others, specifically to discuss the Pueblo,[1] and most recently, generic statements that many documents will be withheld as privileged attorney-client information. *Id.*

These delays coincide with the motion activity occurring in this case, both in the context of the Pueblo's pending Motion seeking an Order to Show Cause re Contempt (Doc. 53), and the Individual Defendants' pending Motion to Dismiss (Doc. 60). Notably, an attorney-client privilege claim was made when the Pueblo sought correspondence in the form of communications between the Governor's office and the NMGCB, which communications are not attorney communications. Governor Martinez, Mr. Ritchie, and NMGCB Chairman Landers are all attorneys, but the communications being sought were made in their official capacities, and the Pueblo is aware of no circumstances where an attorney-client privilege would attach. In fact, it

[1] The limited IPRA disclosure that was provided reveals at least six emails that reference two meetings in early May 2015 between Mr. Richie and Mr. Landers, and possibly others, specifically to discuss the Pueblo. They include a May 1, 2015 email (Bates-stamped # 0054), a May 4, 2015, email (Bates-stamped # 055) and four emails dated May 6 and May 7, 2015 (Bates-stamped ## 001-003 and 0057-59), which refer to a "follow-up meeting" to occur on May 8, 2015. The referenced emails are attached to the December 18, 2015, LaForge-Lara Declaration (Doc. 66-1) as Exhibit "5". The entire disclosure consisted of only seventy (70) pages in total. Aside from these emails, the remaining pages include the forty-one (41) page Complaint in this matter and multiple copies of letters between the Pueblo, the United States Attorneys' Office, and the National Indian Gaming Commission, which are already part of the record.

would likely be a conflict of interest for any of these individuals to be acting as the attorney for another in the context of this case. *Anderson v. Creighton* correctly notes that the discovery of facts material to the issue of qualified immunity may be necessary before a court's consideration of a qualified immunity defense may be resolved. 483 U.S. at 646, n.6. At a bare minimum, if the communications and other documentation sought by the Pueblo are to be withheld by the State under the IPRA, the Individual Defendants should be required to prepare and submit a privilege log that identifies with specificity the documents being withheld and the basis for the assertion of privilege. The Pueblo is entitled to know who attended the above-referenced meetings, and whether other meetings occurred, to ascertain whether any attorney-client privilege attaches. This Court should review those documents *in camera* to determine if the alleged privilege may properly be attached.

Finally, the facts at issue in *Tohono O'odham Nation* regarding the Governor and the Attorney General of Arizona are critically distinguishable from the facts at issue in this case. In *Tohono O'odham*, the Arizona Governor and Attorney General wrote to the Director of the Arizona Department of Gaming regarding what enforcement action the Department might take to threaten vendors doing business with the Tohono O'odham Nation. *Id at *5*. Here, Governor Martinez and Mr. Ritchie are alleged to have taken action to cause *public* threats attributed to the Governor's Office and intended to assert jurisdiction over the Pueblo's gaming activities, broadly threatening banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that were doing business with the Pueblo. The actions of the NMGCB officials are simply one small part of the Governor's larger scheme to assert jurisdiction over the Pueblo's gaming activities. This distinction also weighs on the relevance of the documents being

withheld under IPRA. If indeed, Governor Martinez and Mr. Ritchie conspired with members of the NMGCB to assert jurisdiction over the Pueblo's gaming activities, they cannot escape liability under Count II.

CONCLUSION

For the reasons set forth herein, and set forth in the Pueblo's responses to pending motions, as fully incorporated herein, Individual Defendants' Motion to Dismiss Count II of Plaintiffs' Complaint 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**