

**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 COUNTS III and IV OF PLAINTIFFS' COMPLAINT**

Plaintiff Joseph M. Talachy, Governor of the Pueblo of Pojoaque, a federally-recognized Indian tribe (Governor Talachy and the Pueblo of Pojoaque being collectively referred to as “Pueblo” or “Plaintiffs”) submits this 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 Counts III and IV 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 Defendants 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 vacate 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 a 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

Individual Defendants move to Dismiss Counts III and IV of Plaintiffs' Complaint. Because this Court has already ruled (opinion forthcoming) that Count IV is dismissed on grounds of the qualified immunity of the Individual Defendants, the current motion is moot as to Count IV.

The thrust of Individual Defendants' motion as to Count III is the argument that Plaintiff Joseph Talachy lacks standing as a person under 42 U.S.C. §§ 1983 and 1985, applying *Inyo County*, which held that tribes are not "persons" with standing to sue under federal civil rights statutes. The Individual Defendants read *Inyo County* too expansively. *Inyo County* does not preclude claims brought by Joseph Talachy on his own behalf and on behalf of the members of the Pueblo, where such claims are based on grounds other than a violation of tribal sovereignty. The Indian Gaming Regulatory Act ("IGRA"), a federal statute that protects tribal members from unlawful intrusion by a state into their affairs regarding gaming, and which provides for rights of

individual Indians, is sufficient, independent of Individual Defendants' interference with the Pueblo's sovereignty, to provide the predicate federal right cognizable under the federal civil rights statutes.

The remaining arguments raised by Individual Defendants in support of their motion are a repetition of arguments made in other pending motions, and the Court is referred to those responses, accordingly.

ARGUMENT

I. Plaintiff Joseph Talachy has Standing Sufficient to File Count III on his Own Behalf and on Behalf of the Members of the Pueblo.

Individual Defendants note that *Inyo County v. Paiute Shoshone Indians*, 538 U.S. 701 (2003) ruled that an Indian tribe is not a "person" entitled to bring a civil rights action under 42 U.S.C. §§ 1983 and 1985. The action in *Inyo County* was brought in the name of the Bishop Paiute Tribe. The *Inyo County* court's reasoning does not preclude actions brought by individuals, nor does *Inyo County*'s reasoning support Individual Defendants' contention that violations of sovereign rights are not cognizable under the Civil Rights Statutes. *Inyo County* merely concluded that an Indian tribe cannot qualify as a "person" entitled to bring an action under 42 U.S.C. §§ 1983 and 1985.

The Individual Defendants cite *Winnebago v. Kline*, 297 F. Supp. 2d 1291 (D. Kan. 2004) and *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005) for the proposition that *Inyo County* also precludes actions brought by tribal members for violations of sovereign rights. *Winnebago* involved the question of whether tribal sovereign immunity precluded the State of Wisconsin from assessing and collecting motor vehicle fuels tax for on-reservation sales to non-tribal members. 297 F. Supp. 2d at 1293. In *Winnebago*, the plaintiffs sought to amend

the complaint to include tribal officials as plaintiffs. The court rejected the attempt to amend the complaint, reasoning that the tribal officials' sovereign immunity was derived from the rights of the tribe, and not independently. 297 F. Supp. 2d at 1297-98. The *Skokomish* court similarly found that the treaty rights at issue were communal rights, rather than individual rights. 410 F.3d at 514. In contrast, IGRA expressly provides protection for the rights of individual tribal members, as well as for the rights of tribes regarding the governance of gaming on Indian lands. IGRA expressly sanctions the continued operation of "individually-owned" Class II gaming operations. 25 U.S.C. § 2710(b)(4)(B)(i). *Winnebago* and *Skokomish* can also be distinguished to the extent that the claims at issue here seek relief for violation of both sovereign and federal statutory rights to govern gaming activities on Indian lands. *See South Fork Band v. Dept. of the Interior*, 643 F. Supp. 2d 1192, 1201, n.4 (D. Nevada 2009), *affirmed in part and reversed in part on other grounds*, 588 F.3d 718 (9th Cir. 2009) ("However, those cases (*Inyo County* and *Skokomish*) turned on the tribes' assertion of sovereign rights. Here, the tribes do not assert sovereign rights").

The *Skokomish* court did note there are circumstances where a violation of federal rights might be brought on behalf of tribal members and cognizable under 42 U.S.C. § 1983. 410 F.3d at 515. The *Skokomish* court cites with approval, *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir, 1989) (violations of federal statutes may create rights cognizable under section 1983). *Hoopa Valley Tribe*, in turn, cites with approval *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865, n.16 (9th Cir. 1985) (the tribe would clearly be entitled to bring a section 1983 action based upon alleged violations of its members' due process and equal protection rights, or their rights under the Indian reservation timber laws). *White Mountain*

Apache Tribe, in turn, cites with approval *Thompson v. New York*, 487 F. Supp. 212, 216 (N.D. N.Y. 1979) (individual Indians can maintain section 1983 actions based on alleged violations of their equal protection rights).

These citations, with approval in the post-*Inyo County* case of *Skokomish* to the pre-*Inyo County* case law that allows for tribes to bring section 1983 actions on behalf of tribal members where the underlying grievance is a violation of statutory rights, instead of or in addition to infringement on tribal sovereignty, inform that *Inyo County* is not to be expanded to prevent tribal officials from bringing actions on behalf of tribal members. Accordingly, Pueblo Governor Joseph Talachy has standing to bring Count III, sounding in 42 U.S.C. §§ 1983 and 1985.

II. Plaintiff Joseph Talachy's Claims Sounding in 42 U.S.C. §§ 1983 and 1985 are Based on the Alleged Deprivation of Federal Statutory and Federal Common Law Rights by the Individual Defendants.

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 Joseph Talachy has Alleged Facts to Support his Claim that Individual Defendants Violated Federal Rights that provide a Predicate for his Section 1983 Claim.

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.

IV. Plaintiff Joseph Talachy Identifies a Denial of Equal Protection to Support his Section 1985 Claim.

Individual Defendants argue that the section 1985 claim is insufficient because Section 1985(3) “applies only to conspiracies motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus” (doc. 71 at 11). The Complaint clearly alleges that the Individual Defendants conspired to wrongfully assert jurisdiction because of their invidiously discriminatory animus against the Pueblo and its members. It is difficult to comprehend how the Individual Defendants would characterize the allegations in any other way. That the allegations are incorporated into Count III by reference, rather than expressly repeated, does not impact the sufficiency of the Complaint.

V. Plaintiff Joseph Talachy Complains of Actions Taken By the Members of the New Mexico Gaming Control Board and Actions Taken By Defendants Susana Martinez and Jeremiah Talachy.

The Court is referred to the Pueblo’s Response in Opposition to Defendants’ Motion to Dismiss Count II, which is incorporated as if fully set forth herein.

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 Counts III and IV 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**