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

Plaintiffs, Pueblo of Pojoaque, a federally-recognized Indian tribe and Joseph M. Talachy, Governor of the Pueblo (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 Stay or Suspend the Court's October 7, 2015 Preliminary Injunction.

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. 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.

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 by this reference.

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

Defendants repeatedly claim throughout their motions to modify (Doc. 65) and to stay (Doc. 64) the Preliminary Injunction that the Pueblo's gaming activities are "illegal" (Doc. 64 at 4, 7-11, Doc. 65 at 2, 4-5, 7-8, 10, 15, 19-22, and 24-26). Applying the preemption analysis referenced above, the State's regulation of the Pueblo's gaming activities is preempted regardless of the legality of the Pueblo's gaming. The State's repeated characterization of the Pueblo's gaming as "illegal" is designed to influence this Court to believe that the United States

Attorney's Office and Judge Brack are somehow sanctioning illegal conduct, rather than preserving the status quo while the correct interpretation of the Indian Gaming Regulatory Act ("IGRA") is clarified by the pending consolidated appeals. The Pueblo vigorously defends the legality of its current actions. The irony of the Defendants' claims is that the entire dispute consuming both this litigation and the pending appeals is the result of the State's blatant disregard of its federal statutory obligation to conclude compact negotiations in good faith. In sharp contrast, the Pueblo has done everything IGRA requires it to do, including the pursuit of a negotiated compact in good faith, the filing of actions against the State under IGRA, and allowing an opportunity for the State to consent to IGRA's remedial provisions as Congress intended. The Pueblo has complied in good faith with the extensive requirements of 25 C.F.R. part 291 in applying for Secretarial Procedures in lieu of a tribal/state compact, which is the subject of the related consolidated appeals. It is the State that is acting illegally in violation of its obligations under IGRA.

The State relies on the provision in IGRA that requires a tribal-state compact to be in effect in order for a tribe to be able to offer Class III gaming activities on its Indian lands. 25 U.S.C. § 2710(d)(1)(C). That passage and the case law that cites to that passage must be re-evaluated in the wake of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ("*Seminole Tribe I*"), which found that Congress lacked the Constitutional authority to subject non-consenting states to lawsuits brought by federally-recognized Indian tribes due to a state's Eleventh Amendment immunity. *Seminole Tribe I* revealed that IGRA was broken. The Pueblo advocates and supports several remedial provisions that can fix IGRA consistent with Congress' intent, including the federal government's promulgation of 25 C.F.R. part 291, which is the subject of the related

consolidated appeals pending before this Tenth Circuit, *New Mexico v. Department of the Interior*, 14-2219 and 14-2222. The Preliminary Injunction and the June 30, 2015 letter of the United States Attorney's Office both remain in effect only until the Tenth Circuit issues its mandate in those consolidated appeals. Those terms are in anticipation that the decision in those consolidated appeals will provide significant clarity regarding whether IGRA, in the wake of *Seminole Tribe I*, can be interpreted to allow for the promulgation of 25 C.F.R. part 291 or other remedies. Remedies other than 25 C.F.R. part 291 may also restore Congress' intent in passing IGRA. The one interpretation of IGRA in the wake of *Seminole Tribe I* that cannot stand, however, is the one advocated by the Defendants: States may negotiate with impunity and deprive a tribe of its statutory and sovereign right to govern gaming activities on its Indian lands by simply hiding behind Eleventh Amendment immunity.

A. When a portion of a statute is found to be unconstitutional, the federal courts must apply severance analysis consistent with congressional intent.

The Supreme Court has a "well established" two-part test for severability analysis. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987); *National Federation of Independent Business v. Sebelius*, ___U.S.____, 132 S. Ct. 2566 (2012) ("*NFIB*") (dissenting opinion).

First, if the court holds a statutory provision unconstitutional, it then determines whether the now-truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. *Alaska Airlines*, 480 U.S. at 685. In *Alaska Airlines*, the U.S. Supreme Court clarified that this first inquiry requires more than asking whether "the balance of the legislation is incapable of functioning independently." *Id.* at 684. Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The "relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with

the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. *See also United States v. Booker,* 543 U.S. 220, 227, 125 S. Ct. 738 (2005) ("[T]wo provisions ... must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 192, 119 S. Ct. 1187, 1199 (1999) (applying severance analysis to Executive Order, abrogation of usufructuary rights not intended unless a portion of the Order also removing Indians from lands was valid; "[E]mbodying as it did one coherent policy, [the entire order] is inseverable"). *See also Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 130 S. Ct. 3138, 3161 (2010) (Congress' intent still effectuated with severed provisions).

Second, even if the remaining provisions can operate as Congress designed them to operate, the court must determine whether Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. *See Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); *Ayote v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330, 126 S. Ct. 961 (2006) ("Would the legislature have preferred what is left of its statute to no statute at all"); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767, 116 S. Ct. 2374 (1996) (plurality opinion) ("Would Congress still have passed § 10(a) had it known that the remaining provisions were invalid?") (internal quotation marks omitted).

The Ninth Circuit decision in *U.S. v. Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998) applying the above-cited Supreme Court case law to IGRA in the wake of *Seminole Tribe I*, succinctly summarized the task:

> IGRA does contain a severability clause. *See* 25 U.S.C. § 2721*,* creates a presumption that if one section is found unconstitutional, the rest of the statute remains valid. But that presumption is not conclusive; we must still strike down other portions of the statute if we find strong evidence that Congress did not mean for them to remain in effect without the invalid section. (Citation to *Alaska Airlines* omitted*)*. The question we must ask is this: Would Congress have enacted IGRA had it known it could not give tribes the right to sue states that refuse to negotiate? (Citation to *Alaska Airlines* and to *Board of Natural Resources* omitted*)*. If the answer is yes, then the rest of IGRA remains valid. If the answer is no, things become more complicated, as we must then ask which other provisions of IGRA are called into question, and under what circumstances. Figuring out why Congress passed a piece of legislation is hard enough. Figuring out whether it would have passed that legislation in the absence of one of its key provisions is even harder. Yet, figure we must.

Spokane Tribe, 139 F.3d at 1299. In 1996, the Supreme Court truncated IGRA's remedial provisions by holding that tribes are constitutionally precluded from bringing suit against recalcitrant states that do not consent to being sued. *See Seminole Tribe I,* 517 U.S at 72 ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Significantly for purposes of this litigation and the pending appeals, the Supreme Court did not consider whether the rest of IGRA remains intact. *Id.* at 75 n.18 ("We do not here consider, and express no opinion upon, that portion of the decision below that provides a substitute remedy for a tribe bringing suit."). But the Ninth Circuit has expressly reviewed and affirmed the savings construction in the *Seminole Tribe I* decision. *See also Spokane Tribe*, 139 F.3d at 1299 ("The Supreme Court did not consider whether the rest of IGRA survives").

B. Congress intended for tribes to govern gaming activities on Indian lands where states negotiated in bad faith, or failed to negotiate at all.

One need not look beyond the findings section in IGRA to understand that Congress intended tribes to be able to exercise their sovereign right to govern gaming activities on Indian lands consistent with the landmark *Cabazon* decision:

> Congress finds that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5). Congress articulated its policy to effectuate the tribes' rights:

> The purpose of this chapter is—
>
> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702. Notably, nowhere in the Findings or in the Declaration of Policy does Congress recognize any rights of the states or express that its purpose is to provide states a role in the regulation of Indian gaming. True, Congress established a system for Class III gaming to be licensed and regulated on terms negotiated between the tribal governments and state governments. 25 U.S.C. § 2710(d). However, to guard against the possibility that states might choose not to negotiate, or to negotiate in bad faith, Congress included a complex set of procedures designed to protect tribes from these recalcitrant states. *Spokane Tribe* at 1298. Under IGRA, a tribe may ask the state to negotiate a compact, and upon receiving such a request the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If the tribe believes the state is not negotiating in good faith, it may sue the state

in district court. *See* 25 U.S.C. § 2710(d)(7)(A)(i). The specific structure of the remedy, set forth in 25 U.S.C. § 2710(d)(7), is more fully described in the Statement of the Case, *supra*.

The Senate Report on S. 555 (the basis for IGRA) repeatedly emphasizes Congress' affirmative decision to balance the interests of tribes and states. *See, e.g.*, S.Rep. No. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071 ("[T]he issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons."); *id.* at 5, 1988 U.S.C.C.A.N. at 3075 ("[T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong federal interest in preserving the sovereign rights of tribal governments[.]"); *id.* at 6, 1988 U.S.C.C.A.N. at 3076 ("This legislation is intended to provide a means by which tribal and state governments can realize their unique and individual governmental objectives"). In describing the balancing, the report refers specifically to the provision for suing states:

> Section 11(d)(7) grants a tribe the right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming.... [T]he issue before the Committee was how best to encourage states to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a state if a compact is not negotiated....

Id. at 14, 1988 U.S.C.C.A.N. at 3084 (emphasis added).

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming or for the protection of other state-licensed gaming enterprises from free market competition with Indian tribes.

Id. at 13, 1988 U.S.C.C.A.N. at 3083. The Committee did not intend that "compacts be used as a subterfuge for imposing state jurisdiction on tribal lands," but instead, chose to apply "the good

faith standard as the legal barometer for the state's dealings with tribes in class III gaming negotiations." S. Rep. No. 100-466 at p.14. IGRA's conflict resolution process counterbalanced state authority by limiting a state's ability to deny tribes "any legal right they may now have to engage in class III gaming." *Id*. "This bill should not be construed, however, to require tribes to unilaterally relinquish any other rights, powers, or authority." *Id*. 1988 U.S.C.C.A.N. at 3105 (supplemental remarks of sponsoring Senator Dan Evans (WA)).

Statements on the floor of Congress reinforce the unavoidable conclusion that IGRA cannot be interpreted to enable states to deprive tribes of the sovereign right and authority to govern gaming activities on Indian lands. *See also* May 4, 1987 letter to Congressman Claude Pepper:

> "One effect of the Court decision is that some tribes are now opposing enactment of any legislation imposing regulations on tribal gaming. … While I can appreciate this change in attitude of the tribes, I still feel that some legislation is desirable to provide needed protection for the tribes, themselves, and the public. As a consequence, I have directed by staff to redraft a bill which recognizes the rights secured to the tribes by the Supreme Court decision and, yet, establishes some Federal standards and regulations to protect the tribes and the public interest. *However, I believe that this Federal regulation must be accomplished in a manner which is least intrusive upon the right of tribal self-government* (emphasis added).

The Act recognizes tribal sovereignty and "...does not seek to invade or diminish that sovereignty. 134 Cong. Rec. S12650, (A109) (daily ed. Sept. 15, 1988) (statement of sponsoring Senator Dan Inouye (HI)). Congressman Udall, the Chairman of the House Insular Affairs Committee, the Committee with jurisdiction over Indian affairs, at the time noted while supporting S. 555, that he had opposed earlier versions of the legislation:

> On July 6, I inserted a statement in the Record which set out my position on this issue. I stated that I could not support the unilateral imposition of state jurisdiction over Indian tribal governments … Over the years I have strongly resisted the imposition of state jurisdiction over Indian tribes in this and other

> areas. This Nation has had a longstanding policy of protecting the rights of Indian tribes to self-government. Most acts of Congress in the last 50 years including in this Congress have been designed to strengthen those governments. The tribal-state compact provision of S. 555 should be viewed in those terms.

134 Cong. Rec. 25376 (Sep. 26, 1988) (statement of Rep. Udall).

Congress did not intend that states necessarily have a role in the regulation of Class III gaming. Indeed Congress contemplated that a state may choose to have no role in such regulation:

> . . . [W]hen a tribe and a state negotiate a compact, there need be no imposition of state jurisdiction whatsoever. Language in the report, such as "the extension of state jurisdiction and the application of state laws" and "relinquishment of rights" must be read in their full context of a compact where a tribe requests and consents to such extension or relinquishment. . . . It is entirely conceivable that a particular state will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity and there will be no jurisdictional transfer recommended by the particular tribe and state. Congress should expect a reasonable and rational approach to these compacts and not simply a demand that tribes come under a state system.

134 Cong. Rec. S. 12651 (statement of sponsoring Senator Dan Evans (WA)).

> The compacts are not intended to impose de facto state regulation . . . . The bill references the types of provisions that may go into compacts. These provisions are not requirements. Some tribes can assume more responsibility than others and it is entirely conceivable that a state may want to defer to tribal regulatory authority and maintain only an oversight role.

134 Cong. Rec. S. 12651 (statement of sponsoring Senator Dan Inouye (HI)).

When the Eleventh Amendment became a concern after IGRA became law, Senator Daniel Inouye, Chair of the Senate Committee on Indian Affairs and one of S. 555's authors, explicitly answered the dispositive question.[1] He explained that Congress would not have passed

[1] The Ninth Circuit looked to the statements of Senator Inouye in its decision to vacate an injunction sought by the United States for the Spokane operation of Class III gaming in the absence of a tribal-state compact. *Spokane Tribe* 139 F.3d at pp.1300-1301. In doing so it noted

IGRA in the form it did, had it known that tribes wouldn't be allowed to sue states:

> Because I believe that if we had known at the time we were considering the bill-if we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states which have sought to avoid entering into compacts by asserting the Tenth and Eleventh Amendments to defeat federal court jurisdiction, we would not have gone down this path.

Implementation of Indian Gaming Regulatory Act: Oversight Hearings Before the House Subcommittee on Native American Affairs of the Committee on Natural Resources, 103rd Cong., 1st Sess., Serial No. 103–17, Part 1, at 63 (April 2, 1993)(emphasis added).

> If the courts rule that the Eleventh Amendment would prohibit the tribal governments from suing State officials, then you've got a piece of paper as a law.

Implementation of Indian Gaming Regulatory Act: Hearing Before the Senate Select Committee on Indian Affairs, 102nd Cong., 2d Sess., S. Hrg. 102–660, Part 2, at 58 (March 18, 1992) (emphasis added).

Those federal courts that have looked to the text of IGRA and its legislative intent have concluded, consistent with the Pueblo's position, that Congress did not intend to allow states to deprive tribes of their sovereign and statutory rights by merely hiding behind Eleventh Amendment immunity and refusing to consent to the negotiation/mediation structure intended by Congress. The most extensive analysis was provided by the Ninth Circuit Appeals Court in its decision to vacate an injunction sought by the United States against the Spokane Tribe's operation of Class III gaming in the absence of a compact. Judge Alex Kozinski, writing for the

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that in the context of severance analysis, the sponsoring Senator's statements are highly relevant: "[W]e seek to determine not what the statute means but whether it would have passed without the invalid provision. For this purpose, it's highly instructive to see how one of the key players in the enactment process views the matter." *Id*. at 1300 n.4.

Ninth Circuit Appeals Court opined:

> It is quite clear from the structure of the statute that the tribe's right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless.

Spokane Tribe 139 F.3d at 1300 (emphasis added). The Court of Appeals for the Ninth Circuit further stated:

> IGRA as passed thus struck a finely-tuned balance between the interests of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming. In our case, the Tribe claims it attempted to negotiate in good faith, but that attempt failed because of bad faith on the part of the State. The Tribe thus fulfilled its obligation under IGRA. The Tribe then sued the State, as it was entitled to under the statute, but found it could not continue that suit after *Seminole Tribe.* As far as we can tell on the record before us, nothing now protects the Tribe if the State refuses to bargain in good faith or at all; the State holds all the cards (so to speak). Congress meant to guard against this very situation when it created IGRA's interlocking checks and balances.

Spokane Tribe, 139 F.3d at 1301 (emphasis added).

C. Applying the law to the record of Congress' intent: severance analysis allows the Pueblo to proceed with the governance of class III gaming on its Indian lands.

Application of the well-reasoned two-part guidance of the Supreme Court, set forth in detail in subsection (a) *supra*, compels a conclusion that allows the Pueblo to govern Class III gaming activities on its Indian lands in the absence of a tribal-state compact. Certainly, the severance of the provisions in IGRA that allow a tribe to sue a state will not result in IGRA operating in the manner Congress intended. The second part of the Supreme Court's well-reasoned guidance on severance, whether Congress would have enacted IGRA without the ability of tribes to sue states, is also clearly resolved in the Pueblo's favor. Congress, in opening

the door for states to have a role in what had previously been a federal-tribal relationship, did not intend to deprive tribes of gaming rights.

The Court is able to and should engage in the two-part severance guidance in a manner consistent with Congress' intent. *See Spokane Tribe*, 139 F.3d at 1299. In the context of severance analysis, language can be severed from IGRA in a manner that allows the Part 291 regulations to be upheld. For example, striking those portions of 25 U.S.C. § 2710(d) that would have otherwise required the State's consent to be sued in federal court would create a result that would still provide the State an option of concluding a compact while the remedial administrative provisions were pending, yet not allow the State to stop the process:[2]

> (7)
> (A) The United States district courts shall have jurisdiction over—
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
> (B)
> ***~~(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).~~***
> ***~~(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—~~***
> ***~~(I) a Tribal-State compact has not been entered into under paragraph (3), and~~***
> ***~~(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,~~***
> ***~~the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State~~***

[2] to facilitate a clean reading, the proposed severed provisions are shown as ***~~bold, italicized and strike-thru~~*** font

> ~~*compact governing the conduct of gaming activities.*~~
> ~~*(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian Tribe [tribe] to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—*~~
> ~~*(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and*~~
> ~~*(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.*~~
> (iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court ~~*issued under clause (iii),*~~ the Indian tribe ~~**and the State**~~ shall ~~*each*~~ submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. ~~*The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.*~~
> ~~*(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).*~~
> (vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).
> (vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—
> (I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and
> (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. § 2710(d)(7)(as severed). The District Court for the Eastern District of Washington, severed 25 U.S.C. § 2710(d) from IGRA. That severance analysis was conducted pursuant to litigation concerning the State of Washington and Colville over compact negotiations.

> If this court were to only sever the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach agreement with the State. Thus subsection (d) regarding class III gaming is not fully operable without the unconstitutional language. Further, even if subsection (d) were fully operable without the unconstitutional portions, the language of the act and the legislative history indicate State participation and speedy resolution of an impasse were key components of the bill. See; e.g., 25 U.S.C. § 2710(d)(7)(B)(i) (court assistance may be invoked if a compact is not reached within 180 days); Senate Report 100-466, 100th Cong. 2 Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3076 (the Act "does not contemplate and does not provide for the conduct of class III gaming on Indian lands in the absence of a tribal-state compact."). Therefore the entire subsection (d) regarding class III gaming must be severed from the Act as unconstitutional.

Confederated Tribes of the Colville Reservation v. Washington, 20 Indian Law Reporter 3124, DK# CS-92-0426-WFN (E.D. Wash. June 4, 1993) (emphasis added).

Concerns regarding the Johnson Act are easily corrected by severance. 25 U.S.C. § 2710(d)(6) can be carefully severed to read:

> The provisions of section 1175 of title 15 shall not apply to any gaming conducted ~~***under a Tribal-State compact that —***~~
> ~~***(A) is entered***~~ in~~***to under paragraph (3) by***~~ a State in which gambling devices are legal~~***, and***~~
> ~~***(B) is in effect.***~~

25 U.S.C. § 2710(d)(6)(as severed). Courts read IGRA and the Johnson Act together and consistently conclude that the Johnson Act is repealed or exempted from gaming otherwise conducted in compliance with IGRA. *See, e.g.*, *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1034 (10th Cir. 2003); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 717 (10th Cir. 2000); *United States v. Santee Sioux Tribe*, 324 F.3d 607, 611 (8th Cir. 2003); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1101(9th Cir. 2000); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 371 (D.C. Cir. 2000).

There are perhaps other ways to sever portions of IGRA that are consistent with *Seminole Tribe I*. The Pueblo asserts that if severance analysis cannot otherwise be applied in a manner that effectuates Congressional intent; namely, providing the Pueblo an effective remedy against New Mexico's recalcitrance, then the Class III provisions of IGRA in their entirety should be struck down, and the Pueblo should be able to govern gaming activities on its Indian lands without regard to IGRA, as was the legal landscape between the issuance of the *Cabazon* decision in 1987 and the passage of IGRA in 1988.

The Ninth Circuit found that enforcement action against a tribe that has done everything it is required to do is inappropriate. *Spokane Tribe*, 139 F.3d at 1302. Congress intended for the Pueblo to be able to affirmatively seek relief on its own behalf. The Supreme Court makes clear that the analysis is not simply whether IGRA can function independently of the unconstitutional provisions, but whether in doing so, the statute functions in a manner consistent with the intent of Congress.

D. **The United States Attorney's Office Letter of June 30, 2015 does not support the position of the Defendants.**

The Defendants allege that the United States Attorney's Office, in its letter of June 30, 2015 confirming that it will forebear federal enforcement against the Pueblo pending the consolidated appeals in *New Mexico v. Department of the Interior*, 14-2219 and 14-2222, found that the Pueblo's non-compacted gaming is illegal. Judge Brack properly rejected the notion that the Defendants could rely on that letter, and that it was the Defendants' own determination of the illegality of the Pueblo's gaming activities that formed the basis of their actions against applicants/licensees:

On June 30, 2015, the United States Attorney for the District of New Mexico and

> the National Indian Gaming Commission issued letters stating that they would forgo enforcement action against the Pueblo as the result of the expiration of the Compact, during the pendency of the appeal in New Mexico v. Department of the Interior. (Doc. 1; Damon Martinez Letter dated 6/30/2015, Doc. 23-10; Jonodev Chaudhuri Letter dated 6/30/15, Doc. 23-11.) The decisions to withhold enforcement actions were conditioned on the pendency of active litigation before the Tenth Circuit Court of Appeals, the Pueblo's commitment to maintain the status quo of its gaming operations as set forth in the Compact, and the Pueblo's commitment to place in trust the funds that would have been paid to the State under the Compact. (Id.) The United States Attorney's decision will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate. (Doc. 23-10.) The United States Attorney's letter provides that it "may not be relied upon to create any rights, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal . . . ." (Id.):

October 7, 2015 Order (Doc. 31) at 4 (emphasis added).

> 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, 2015 Order (Doc. 31) at 20 (emphasis added).

III. The Defendants Fail to Establish Error in the Judge Brack's Analysis of Irreparable Harm and Balance of Hardships

The Defendants argue that Judge Brack erred in his analysis regarding irreparable harm to the Pueblo and the balance of the hardships (Doc. 64 at 11-12). The State does not dispute Judge Brack's analysis that the Pueblo would suffer irreparable catastrophic consequences resulting in the loss of thousands of jobs, severe cuts to essential governmental services, and a severe negative impact on the regional economy, in addition to the infringement on tribal sovereignty, if the request for the Preliminary Injunction was not granted (October 7, 2015 Order (Doc. 31) at 18-21). Rather, Defendants argue that "equity will not support an injunction to maintain the Pueblo's revenue stream from an illegal gaming enterprise" (Doc. 64 at 11). That argument merely begs the question set forth in Section II, above.

The State's position that equity should not support an injunction that maintains illegal activity should also be turned on the State in the context of the balance of hardships. Eleventh Amendment immunity does not morph the State's illegal, bad faith negotiation tactics into legal, good faith tactics. Except for repeating the State's interest in regulating gaming activity outside of the reservation, which regulatory authority is not limited by the Preliminary Injunction, the Defendants fail to otherwise articulate how Judge Brack erred in his analysis regarding the balance of hardships – catastrophic consequences to the Pueblo and an entire regional economy on the one hand, and an esoteric limitation on the State's ability to assert jurisdiction on the other. There is no error.

CONCLUSION

For the reasons set forth herein, and set forth in the Pueblo's responses to pending motions, as fully incorporated herein, Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction 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**