UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe; et al.,

Plaintiffs,

vs. Case No. 1:15-cv-00625 JB/GBW

STATE OF NEW MEXICO, et al.,

Defendants.

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

Defendants respectfully submit the following Reply to Plaintiffs' Response ("Response" or "Resp.") (Doc. 85) to Defendants' Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015, Preliminary Injunction, and for Relief Pursuant to Federal Rule of Civil Procedure 62.1 ("Motion" or "Mot.") (Doc. 65).[1]

I. INTRODUCTION

As Defendants have explained in more detail in their Motion, the Court has inherent authority to reconsider and either vacate or modify any interlocutory order. In particular, the Court may reconsider a preliminary injunction where it has misapprehended the facts, a party's position or controlling law, and to correct clear error, and it may modify an injunction for any good reason. While the pendency of an interlocutory appeal of the preliminary injunction divests the Court of jurisdiction to grant a motion for reconsideration that would vacate or otherwise

[1] The same preemption analysis that is central to this Motion to Reconsider as well as Defendants' Motion to Stay (Doc. 64) is also dispositive of Defendants' Motions to Dismiss Counts II (Doc. 72) and III (Doc. 71) of Plaintiffs' Complaint. If the Court were to grant these two Motions to Dismiss, such rulings would moot the Motions to Reconsider and to Stay, and thus obviate the need for the Court to address the additional burden of proof and equitable issues that are implicated by reconsideration or stay of a preliminary injunction. Defendants respectfully suggest that judicial economy will be served if the Court first addresses the motions to dismiss the Complaint.

materially modify the injunction, Rule 62.1 authorizes the Court to issue an "indicative ruling" that it would grant such a motion if the appellate court would remand for that purpose, or alternatively that the motion raises a substantial issue. (Mot. at 11-15.) On this basis, Defendants ask the Court to reconsider the October 7, 2015, Preliminary Injunction, because the ruling is premised on a misapprehension of Defendants' position and a clearly erroneous conclusion that IGRA preempts New Mexico's exercise of its police power over state-licensed non-Indian gaming equipment manufacturers dealing with non-Indian gaming operators outside Indian lands.

In their Response, Plaintiffs do not dispute the foregoing procedural rules and standards applicable to motions to reconsider preliminary injunctions and Rule 62.1 indicative rulings. Plaintiffs instead focus on the central preemption argument, insisting that IGRA preempts the subject State actions. (Resp. at 2-16.) Also, while Plaintiffs no longer seriously dispute that Pojoaque Pueblo has been in violation since July 1, 2015, of IGRA's requirement that a tribal-state compact be in place before the Pueblo conducts any Class III gaming on its lands, they now invoke severance doctrine to rewrite IGRA to eliminate the violation. (Resp. at 16.)

Plaintiffs' arguments are meritless. First, New Mexico's regulation of its non-Indian gaming licensees falls outside IGRA's preemptive scope. The State is regulating activity that takes place off tribal lands. Moreover, the State is not regulating at all, much less directly regulating, the governance of gaming on tribal lands. Second, Plaintiff's severance argument fails for the reasons set forth in Defendants' Reply, at 3-10, to Plaintiffs' Response (Doc. 90) in Opposition to Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction (Doc. 64), filed concurrently herewith and which Defendants incorporate herein by reference.

II. FEDERAL LAW DOES NOT PREEMPT NEW MEXICO'S ENFORCEMENT OF ITS LICENSING LAWS APPLICABLE TO NON-INDIAN GAMING MANUFACTURERS THAT SELL EQUIPMENT TO NON-INDIAN GAMING OPERATORS OFF TRIBAL LANDS.

Plaintiffs do not dispute the key factual and regulatory underpinnings of this proceeding:

1. While New Mexico licenses non-Indian racetrack casinos and nonprofit fraternal and veterans organizations to operate gaming establishments off tribal lands, and manufacturers to supply gaming equipment to those operators, the State does not license Indian casinos or the manufacturers which supply those casinos. The Pueblo, by its own ordinance, performs these functions.

2. New Mexico requires that its licensees not participate in, support or profit from any gaming activity that is illegal under the laws applicable to any jurisdictions in which they are present. These prohibitions apply broadly, and are not limited to Indian gaming. Failure to comply with these requirements subjects the licensee to potential sanction in New Mexico, including revocation of its license.

3. 25 U.S.C. § 2710(d)(1) clearly provides that, "Class III gaming … shall be lawful on Indian lands only if such activities are … (C) conducted in conformance with a Tribal-State compact … that is in effect." Notwithstanding the expiration of the Pueblo's gaming compact with New Mexico on June 30, 2015, the Pueblo has continued to operate its casino, and certain manufacturers have continued to supply gaming equipment to the Pueblo, since that date.

4. New Mexico takes the position that, under the aforementioned New Mexico law, any such manufacturers who also are licensed by the State to supply gaming equipment to non-Indian gaming operators off tribal lands are at risk of license revocation or other disciplinary action, based on their participation in the Pueblo's gaming operation that is illegal under federal law.

5. Crucially, however, because its licensing laws do not apply to tribal casino operations, New Mexico has not taken and will not take any steps to bar the Pueblo from continuing to operate its casino, nor has it taken any steps to bar any manufacturer from continuing to supply gaming equipment to the Pueblo.

Defendants acknowledge (and have never maintained otherwise) that, pursuant to IGRA, absent a compact New Mexico is preempted from directly regulating Indian gaming on tribal lands. However, in their Motion Defendants establish that the State's position described above does not amount to preempted regulation of gaming on tribal lands. United States Supreme Court and other authority, in IGRA and other contexts, uniformly holds that states are not

preempted from regulating the conduct of non-Indians and even Indians off tribal lands. Because the specific gaming activity that the State proposes to regulate is the non-Indian manufacturers' ability to sell gaming equipment to non-Indian operators off tribal lands, such regulation is not preempted.

In their Response, Plaintiffs do not dispute that the specific activity that would be the subject of New Mexico's enforcement is non-Indian sales of gaming equipment off tribal lands. But Plaintiffs nevertheless repeatedly claim that such actions would "interfere" with, and thus amount to regulation of, its gaming operations. (Resp. at 10-15.) The interference accusations are for the most part vague, but Plaintiffs appear to be making two points. First, they claim that the trigger, or precipitating event, for any license sanctions would be the manufacturers' sales to the Pueblo in connection with the Pueblo's own casino operations. (Resp. at 11-12, 13.) Second, they allege that the Pueblo would suffer an adverse impact from any such enforcement if the manufacturers were to decide for economic reasons to cease doing business with the Pueblo rather than jeopardize their licenses to continue doing business with non-Indian operators elsewhere in New Mexico. (Resp. at 12.)

Plaintiffs can find no support in IGRA's legislative history, statutory language or case law for the proposition that New Mexico's enforcement of its gaming license laws and regulations off tribal lands is preempted because the Pueblo's casino operations have some causal relationship to or are impacted by those actions. On the contrary, the facts of this case fall outside IGRA's and other federal laws' preemptive scope because (1) the State is regulating activity that takes place off tribal lands, and (2) in any event the State is not regulating at all, much less directly regulating, the governance of gaming on tribal lands. Therefore, there is no preemption.

A. IGRA Preempts Only Regulation of Gaming Activity *On Tribal Lands*.

"Congress adopted IGRA in response to … California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which held that States lacked any regulatory authority over gaming on Indian lands." Michigan v. Bay Mills Indian Comty., ___ U.S. ___, 134 S. Ct. 2024, 2034 (2014). Thus, while "[IGRA] is intended to expressly preempt the field in the governance of gaming activities on Indian lands," S. Rep. No. 100-446, at 6-7 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, "Cabazon left fully intact a State's regulatory power over tribal gaming outside Indian territory – which … is capacious." Bay Mills, 134 S. Ct. at 2034. "Everything" in IGRA relates to the regulation of gaming "on Indian lands, and nowhere else." Id

The gaming activities that would be regulated by New Mexico's prospective enforcement, i.e., the transactions authorized by the licenses that could be subject to revocation or other sanction, are non-Indian manufacturers' sales of gaming equipment to non-Indian operators off tribal lands. New Mexico does not license and will not take any action to prohibit the Pueblo's continued gaming operations on its lands or any manufacturers' supplying of equipment for such operations. The Pueblo and its suppliers remain free to continue those activities on the Pueblo's lands as long as the United States Attorney forbears from enforcing IGRA.

While the Pueblo's illegal gaming may remotely underlie the State's licensing enforcement measures, several considerations make clear that the State is not regulating that activity. First, the event that will directly precipitate those actions in fact is the manufacturers' participation in the Pueblo's continued operation by way of supplying gaming equipment, not the Pueblo's operation itself. That is, the immediate trigger for the State's licensing measures would be the manufacturers' violation of state law, not the Pueblo's gaming operation per se. Thus,

Plaintiffs are incorrect in claiming that "the sole basis" of New Mexico's action is the illegal gaming on Pueblo lands. (Resp. at 11.) The actual basis for any licensing sanctions is the manufacturer's decision to violate state law by participating in that illegal operation.

Second, the New Mexico laws and regulations in question do not target the Pueblo, or even tribal gaming operations. Rather, those laws and regulations generally prohibit manufacturers from participating in, supporting and profiting from gaming operations that are illegal under the laws of any jurisdiction. (See Mot. at 3-5.) Here, the illegal (under federal law) operation happens to be conducted on the Pueblo's lands, but New Mexico would be equally obligated to take the same enforcement measures if one of the State's licensees was supplying gaming equipment to an illegal non-Indian operation in another state. Just as here, the action would be taken against the supplier, not the operator (against which New Mexico would have no jurisdiction).

Third, while IGRA "place[s] limits on the application of state laws … to tribal lands," Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1300 (11th Cir. 2015) (internal quotation marks and citation omitted), New Mexico is not applying its state law to determine the legality of the triggering activity on the Pueblo's lands. Rather, it is federal law that the Pueblo is violating. That federal law violation, as incorporated into NMSA 1978, § 60-2E-4(B) (1997), and 15.1.10.9(F) NMAC, is the predicate for any potential revocation of the non-Indian manufacturers' state licenses.[2] A violation of federal law that leads the State to enforce state law against non-Indians' privilege to do business off Indian lands does not constitute the application of state law on Indian lands.

[2] As such, this case presents the converse of the "federalization" of state law that was a factor in the preemption determinations in AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 909 (9th Cir. 2002), United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 364 (8th Cir. 1990), and Taxpayers of Michigan Against Casinos v. Michigan, 685 N.W.2d 221, 229 (Mich. 2004).

B. IGRA Preempts Only *Direct* Regulation of Gaming Activity.

Not only is IGRA's preemptive scope limited to regulation of gaming activity on tribal lands, federal case law makes clear that preemption extends only to direct regulation of such activity. Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 549 (8th Cir. 1996) (IGRA preempts "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own licensing process"); United Keetoowah Band v. Oklahoma, 927 F.2d 1170, 1177 (10th Cir. 1991) (IGRA "appears to leave no other direct role for such State gaming enforcement").

This judicial expression of the breadth of IGRA's preemptive reach dovetails with the language of 25 U.S.C. § 2710(d)(3)(C):

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; ….

(Emphasis added.) Thus, while in the absence of a compact a state may not directly enforce its laws and assert its jurisdiction over the licensing and regulation of gaming on Indian lands, it may do that to the extent authorized by a compact. Because Congress did not deem it necessary to authorize enforcement of state law that is only indirectly related to the licensing and regulation of gaming on tribal lands, it logically follows that such laws are not preempted in the first place.

New Mexico manifestly is not applying its law directly to regulation of the Pueblo's gaming activities. The State is regulating only its licensees. The Pueblo may continue its operations and manufacturers may continue to supply it. The potential effects which Plaintiffs label as impermissible regulation are not actions of the State and instead, if they occur, would be the consequence of economic decisions made by third parties which the State does not control.

Plaintiffs cite many cases, (Resp. at 3-9), but none involves a fact pattern resembling the present one. Plaintiffs' cases uniformly involve state efforts to apply state laws directly to tribal gaming activities conducted on tribal land. The two cases on which Plaintiffs place particular focus are illustrative. In Wyandotte Nation v. Sebelius, 443 F.3d 1247 (10th Cir. 2006), the state raided the tribe's on-reservation gaming operation for violating state gambling laws, confiscating cash and gaming equipment. And in Alabama v. PCI Gaming Auth., the state sued the tribe to enjoin an on-reservation gaming operation as a public nuisance under state law. It is undisputed that New Mexico has taken no such action against the Pueblo. Plaintiffs point to no support, in IGRA or in any other Indian law context, for their argument that the State's regulation of its non-Indian licensees based on state law violations is preempted.

Srader v. Verant, 1998-NMSC-025, 964 P.2d 82, correctly observes the crucial distinction between the State's direct enforcement of its gambling laws against the Pueblo on its lands and the State's enforcement of its laws with respect to its non-Indian licensees outside the Pueblo. The New Mexico Supreme Court recognized that the State could not exercise jurisdiction over gaming "on Indian land" except pursuant to a tribal-state compact or where the State's action only "incidentally concern[ed] gaming." Id. ¶ 10 n.2. The State, however, could assert its police power off Indian lands against financial institutions that supported illegal on-reservation gaming. The State's law enforcement officials have both the "authority to enforce New Mexico's laws outside of the reservations" and "the responsibility ... to determine if New Mexico's existing gaming or other laws were being violated outside of the reservation." Id. ¶ 16. Plaintiffs cannot materially distinguish Srader. (Resp. at 10-12.)[3]

[3] Plaintiffs repeatedly rely on Srader (as opposed to federal case law or the language or legislative history of the statute itself) as the primary source of their expansive view that IGRA preempts actions "which clearly and substantially involve, regulate or interfere with a tribe's on-reservation gaming activities." (Resp. at 10-13, 15.) The facts and actual ruling of Srader do not support this effort. Enforcement of the state laws in question would

Even assuming the Pueblo's continued illegal operation of its casino after July 1, 2015 was a but-for cause of the State's enforcement measures against its licensees, that is not the test for preemption. The Pueblo can point to no support, in either IGRA or any other Indian law context, for the proposition that enforcement of state law off Indian lands is preempted merely because the precipitating event in the causal chain is on-reservation activity. Srader and Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 469 (2nd Cir. 2013) (no preemption of state personal property tax on casino's slot machines, which were leased by non-Indian supplier)[4], affirmatively find no preemption notwithstanding such a fact pattern, as do the cigarette seizure cases, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 162 (1980); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991); and Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1178-79 (10th Cir. 2012). (See Mot. at 23.)

C. IGRA Preempts Only Regulation of *Governance* of Gaming Activity.

Courts articulate the focus of IGRA's preemption in terms of "governance." Mashantucket Pequot Tribe, 722 F.3d at 469 ("IGRA preempts certain state regulations affecting the governance of gaming"); Gaming Corp. of Am., 88 F.3d at 550 (state law fraud and breach of fiduciary duty claims would "interfere with the nation's ability to govern gaming"); United Keetoowah Band, 927 F.2d at 1179 ("'S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands.'" (quoting S. Rep. No. 100-446, at 6)).

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have prohibited banks situated off tribal lands from providing any funding and other financial services to pueblos' and other Indian tribes' casino operations, 1998-NMSC-025, ¶¶ 22, 23. Yet the New Mexico Supreme Court determined that such regulation of off-reservation activity, notwithstanding its obvious connection to and likely "interference with" tribal casino operations, only "incidentally concern[ed] gaming, id. ¶ 10 n.2, and thus was not preempted. Thus, the court understood "clear and substantial involvement, regulation or interference with a tribe's on-reservation gaming activities" to require direct regulation of the tribal gaming operation itself.

[4] Plaintiffs incorrectly assert that the tax in question in Mashantucket was an off-reservation tax. (Resp. at 14.) "Here, no relevant transaction occurs off-reservation. Instead, the tax is levied upon slot machines because they are located in the State of Connecticut – here, on the Tribe's reservation." 722 F.3d at 471-72.

New Mexico is not regulating the governance of gaming on Pojoaque Pueblo lands. Even the broadest of IGRA preemption rulings differs significantly from the facts here. In Gaming Corporation of America, two gaming management companies brought suit against the legal counsel for a tribe after the tribal gaming authority denied the companies' license applications. The court held that the suit was preempted to the extent the companies sought "to use state law to challenge the outcome of an internal governmental decision" of the tribe. 88 F.3d at 549. Here, the State is doing nothing of the sort. Insofar as the State is concerned, the Pueblo may adopt its own gaming laws and regulations and license and deal with the gaming operators and vendors of its choice regarding the conduct of gaming on Pueblo land. Absent a compact, the State recognizes that it has no voice in those matters.

Rather than engaging in the governance of gaming on Indian land, the State is doing what it is fully permitted to do: it is governing gaming activity by non-Indians outside tribal land. The State regulates only the transaction of business by State-licensed manufacturers with State-licensed gaming operators at facilities operated by non-Indians within New Mexico. The State has not prohibited any Pueblo gaming activity.

D. IGRA's Preemptive Scope Is Consistent with General Principles of Preemption in Other Areas of Indian Affairs.

Congress intended that IGRA's preemptive scope be consistent with general principles of preemption that have developed in other areas of federal Indian law:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years…. Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands….

S. Rep. No. 100-446, at 5. Thus, the fundamental on-/off-reservation dichotomy of IGRA's preemption of state law parallels the scope of preemption in other areas of Indian affairs. See,

e.g., Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99, 101 (2005) (no preemption where state asserts jurisdiction over non-Indians engaging in activity off Indian lands.).

Similarly, when tribal activity on Indian land has a spill-over effect on a state's interests, the state may act within its own jurisdiction to protect those interests even if there is a resulting, ancillary impact on the tribe and even if that impact is substantial. Washington v. Confederated Tribes of the Colville Indian Reservation establishes this point. In Colville, the tribes sought to prevent the State of Washington from collecting its cigarette excise tax on sales by tribally authorized tobacco outlets on the reservation to non-tribal members. A great majority of the sales were to non-Indians who purchased cigarettes from the Indian dealers in order to avoid the state tax. That business would "dry up" if the price advantage associated with tax-free, on-reservation purchases were to be eliminated. 447 U.S. at 145.

The Supreme Court held nonetheless that the state could tax the sales made on the reservation to non-members of the tribes. Although the tribes argued that they would be deprived of substantial revenues that they used to provide essential government services, the Court held that "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise," did not prevent the state from imposing its excise tax. Id. at 154-55; see also id. at 156 ("Washington does not infringe the right of reservation Indians to make their own laws and be ruled by them merely because the result of imposing its taxes will be to deprive the [t]ribes of revenues which they currently are receiving." (internal quotation marks and citation omitted)).

Moreover, the state could seize on state land cigarettes bound for the reservation dealers that did not bear the state's tax stamps. The cigarettes were merchandise to the dealers on the reservation, but they were contraband under state law on state land. "It is significant," the Court

wrote, "that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries." Id. at 162.

Plaintiffs attempt to distinguish Colville and similar cases by arguing that those cases refused to recognize a claimed tribal right that had no statutory basis and that the cases did not involve "interference with congressionally-enacted statutes intended for the benefit of tribes, such as IGRA." (Resp. at 16.) But the holdings of these cases do not rest on such a consideration. Moreover, the Pueblo has no statutory basis for conducting Class III gaming without a compact; doing so in fact violates IGRA and the Johnson Act. In Colville the Court observed that imposing the state's cigarette tax "d[id] not burden commerce that would exist on the reservations without respect to the tax exemption." 447 U.S. at 157. Here the State's actions with respect to its licensees, to the extent they have an impact on the Pueblo, do not burden an activity that would exist if the Pueblo were in compliance with IGRA.[5]

III. CONCLUSION

The Court should issue an indicative ruling that, should the Tenth Circuit remand for that purpose, it would vacate the October 7, 2015, Preliminary Injunction.

[5] This last point bears repeating: As a matter of federal law the Pueblo has had no right to engage in Class III gaming since July 1, 2015. Indeed, and fundamentally, IGRA articulates no federal policy promoting gaming activity on tribal lands in the absence of a compact. For this reason as well, while the vestigial preemption recognized in California v. Cabazon Band of Mission Indians (see Dfdts' Reply in Support of Mot. Dismiss Count II, at 3 n.2, filed concurrently herewith) may bar New Mexico from exercising jurisdiction over activity on the Pueblo's lands, it does not insulate the Pueblo's non-Indian suppliers acting off tribal lands from the application of state law that governs their equipment sales at those locations.

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CERTIFICATE OF SERVICE:

I hereby certify that on February 23, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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