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

Defendants respectfully submit the following Reply to Plaintiffs' Response ("Response" or "Resp.") (Doc. 90) to Defendants' Motion to Stay or Suspend the Court's October 7, 2015 Preliminary Injunction ("Motion" or "Mot.") (Doc. 64).[1]

As Defendants have explained in more detail in their Motion, the Court may stay or suspend a preliminary injunction if it determines, following a review of the four factors that underlie the injunction, that it was premised on a legal error or clearly erroneous factual findings. In particular, if the Court determines that the movant in fact is not substantially likely to prevail on the merits of a claim to bar governmental action taken in the public interest, the stay or suspension should be granted. (Mot. at 2-3.)

On the basis of this procedural backdrop, Defendants ask the Court to reconsider the October 7, 2015, Preliminary Injunction, because the ruling is premised on a clearly erroneous conclusion that IGRA preempts New Mexico's exercise of its police power over state-licensed

[1] The same preemption analysis that is central to this Motion to Stay as well as Defendants' Motion to Reconsider (Doc. 65) 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 Stay and to Reconsider, and thus obviate the need for the Court to address the additional burden of proof and equitable issues that are implicated by a stay or reconsideration of a preliminary injunction. Defendants respectfully suggest that judicial economy will be served if the Court first addresses the motions to dismiss the Complaint.

non-Indian gaming equipment manufacturers dealing with state-licensed non-Indian gaming operators outside Indian lands. (Mot. at 5-10.) Further, in view of this conclusion, the illegality under federal law of the Pueblo's continued operation of its casino since July 1, 2015, and New Mexico's sovereign interest in exercising its legitimate police power, the three other equitable predicates to issuance of a preliminary injunction weigh in favor of a stay or suspension. (Mot. at 10-13.)

In their Response, Plaintiffs do not dispute the Defendants' description of the procedural rules and standards applicable to motions to stay or suspend preliminary injunctions. Instead, Plaintiffs focus (by incorporation by reference), appropriately, on the central preemption argument, insisting that IGRA does preempt the subject State actions that precipitated this lawsuit. (Resp. at 2.) Further, while they appear to acknowledge that, at least as IGRA actually reads, 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,[2] Plaintiffs invoke severance doctrine and urge the Court to rewrite IGRA to eliminate the violation. (Resp. at 2-17.) Plaintiffs do not appear to dispute that they are not entitled to an injunction to perpetuate illegal activity, and instead stand on their severance analysis to avoid that conclusion. (Resp. at 17.)[3]

[2] The Pueblo's violation of federal law by operating its casino without a compact since July 1, 2015, is indisputable. 25 U.S.C. § 2710(d)(1)(C). See Michigan v. Bay Mills Indian Comty., 134 S. Ct. 2024, 2028 (2014) ("A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State."); Texas v. United States, 497 F.3d 491, 507 (5th Cir. 2007) ("Absent a tribal-state compact, [IGRA] forbids tribes to offer Class III gaming."); United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 718 (10th Cir. 2000) ("Class III gaming … is allowed only where a tribal-state compact is entered."). See also Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1570 (1997) ("It is the sense of the Senate that the United States Department of Justice should vigorously enforce the provisions of the Indian Gaming Regulatory Act requiring an approved Tribal-State gaming compact prior to the initiation of class III gaming on Indian lands.").

[3] Defendants categorically deny the Pueblo's repeated allegations that New Mexico has negotiated in bad faith over the renewal of its compact with the Pueblo. The negotiations failed because Pojoaque refused to agree to compact

Plaintiffs' arguments lack merit. First, as is discussed in more detail in Defendants' Reply, at 3-12, to Plaintiffs' Response (Doc. 85) 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 (Doc. 65), filed concurrently herewith and which Defendants incorporate herein by reference, the facts of this case squarely place it outside IGRA's preemptive scope: Fundamentally, IGRA is expressly limited to Indian lands. Further, and in any event, the State is not applying its law directly to regulation of the Pueblo's gaming activities, nor is the State regulating the governance of gaming on Pueblo lands. Second, Plaintiffs' advocacy of their rash severance scheme (which represents their only hope for avoiding the damaging conclusion that their continued operation of their casino after June 30, 2015, has been illegal) is supported by neither severance jurisprudence nor IGRA case law, and further is barred by collateral estoppel. Third, the conclusions that New Mexico's off-reservation enforcement of its laws against non-Indians is not preempted and the Pueblo is engaging in an illegal activity are fatal to the equitable underpinnings of the October 7 Preliminary Injunction.

A. The Pueblo's Severance Analysis Fails, and as a Result Its "Uncompacted" Class III Gaming Is Illegal.

Plaintiffs attack the basis for the State's exercise of its police power by arguing that the Pueblo's ongoing engagement in Class III gaming activities without a compact should be viewed as lawful. To that end, Plaintiffs have repurposed an argument they made in the related litigation they previously have pursued in this Court regarding secretarial procedures, New Mexico v. Department of Interior, No. 14-695: they assert that IGRA must be reshaped by severance such that, in the absence of a compact, the Pueblo should not be prohibited from conducting Class III

terms that other tribes in New Mexico have found acceptable and instead insisted on unreasonable terms that were contrary to the best interests of the State and its citizens.

gaming but instead should itself be "allow[ed] ... to govern Class III gaming activities on its Indian lands." (Resp. at 12.)

Plaintiffs have not previously contended that the Pueblo can continue to conduct Class III gaming absent a compact without violating federal law. In fact, they have taken the opposite view. In June 2015 the Pueblo's governor wrote to the United States Attorney requesting that the government forbear from enforcing IGRA against the Pueblo even though it intended to continue its gaming activities after its compact with New Mexico expired. (See Pls.' Sept. 25, 2015 Mot. Prelim. Injunction, Ex. 1 to Ex. B (Doc. 23-10).) And no one has questioned the United States Attorney's determination that the Pueblo's continued operations without a compact "would violate federal law," (id.), a conclusion seconded by the chairman of the National Indian Gaming Commission. (See Pls.' Sept. 25, 2015 Mot. Prelim. Injunction, Ex. 2 to Ex. B (Doc. 23-11).) Indeed, Plaintiffs' argument to date has simply been that the State's actions are "preempted regardless of the legality of the Pueblo's gaming." (Resp. at 2.)

Plaintiffs' new argument advances a severance analysis which they contend must be undertaken as a result of the decision of the United States Supreme Court in Seminole Tribe v. Florida, 517 U.S. 44 (1996). Seminole holds that, in light of the immunity granted to states by the Eleventh Amendment, IGRA's grant of a cause of action allowing tribes to sue non-consenting states for bad faith in compact negotiations is invalid.

A severance analysis aims to determine, when part of a statute has been held unconstitutional, whether the remainder of the statute comes close enough to achieving Congress's intent that Congress would have enacted the statute even without the invalid portion. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) ("The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent

of Congress.... The final test ... is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." (emphasis omitted)). Plaintiffs' approach would sever vast portions of IGRA in addition to the unconstitutional provision allowing tribes to sue. But no further severance is necessary because, even if tribes lack the ability to sue for bad faith, IGRA's remedial scheme provides a powerful incentive for states to negotiate compacts in good faith and an effective remedy if a state should fail to do so. Specifically, although a tribe may not sue a non-consenting state, the United States may sue the state on behalf of the tribe. A state that is found to have acted in bad faith risks having Class III gaming procedures imposed on it as proposed by the tribe and adopted through secretarial procedures. See 25 U.S.C. § 2710(d)(7)(B). See United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1301 (9th Cir. 1998) (recognizing suit by United States that would force a bad-faith state into a compact as one possibility under which "IGRA could work as intended").

IGRA contains an express severability clause. See 25 U.S.C. § 2721. "[T]he inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Alaska Airlines, 480 U.S. at 686. Given the fact that, even after Seminole, IGRA contains an effective remedy against states that fail to negotiate in good faith, Plaintiffs cannot point to the requisite "strong evidence," id., that Congress would favor striking the entire statute over severing only the unconstitutional provision. The post-enactment comments of an individual member of Congress (see Resp. at 10-11) certainly do not provide such evidence. See Se. Cmty. Coll. v. Davis, 442 U.S. 397, 411 n.11 (1979) ("[I]solated statements by individual Members of Congress ..., all made after the enactment of the statute under consideration, cannot substitute for a clear

expression of legislative intent at the time of enactment."). Instead, the question whether Congress would have enacted IGRA without the invalid provision must be determined by considering the legislative history leading to the original passage of the statute, together with the language and structure of the legislation. See, e.g. Alaska Airlines, 480 U.S. at 687-97. Furthermore, the fact that Congress has not amended IGRA in the years since Seminole indicates Congress's satisfaction with the operation of the statute even without the allowance of bad faith suits by tribes against non-consenting states. Because IGRA, minus the invalid suit provision, remains "fully operative as a law" that Congress likely would have enacted, the Court "must sustain its remaining provisions." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks & citation omitted).

Plaintiffs overstate the significance of Spokane Tribe when they argue that the decision supports a severance analysis of IGRA under which Class III gaming without a compact would be legal. (Resp. at 5-6, 11-12.) In Spokane Tribe, the Ninth Circuit considered an appeal from a preliminary injunction granted to the United States against a tribe that was conducting casino gaming operations without a compact. The tribe claimed that the state had negotiated in bad faith, but it was prevented from suing the state by Seminole. Although at the outset the court stated that it "must" determine whether Congress would have enacted IGRA without giving tribes a right to sue states, 139 F.3d at 1299, in the end it proved unnecessary for the court to complete the severance inquiry. Instead, the court addressed only "the narrow question presented," id. at 1301, and held that on the record before it IGRA did not support an injunction against the tribe, id. at 1302.

The court ultimately concluded that "IGRA ... remains valid." Id. at 1301. It did not hold that, after Seminole, the tribe's gaming operations in the absence of a compact were legal.

Instead, it remanded the case for the district court to consider whether the tribe itself had failed to act in good faith, among other things, before deciding whether any renewed request for an injunction under IGRA should be granted. Id. Spokane Tribe may bear on the United States Attorney's decision regarding what measures the government may take against the Pueblo's illegal gaming if secretarial procedures are held to be unavailable in the Department of Interior appeal. But Spokane Tribe has no bearing on the legality of the Pueblo's activities.

Plaintiffs' severance approach, moreover, rather than determining whether IGRA would have been adopted without the invalid provision, substitutes a version of the statute that Congress never would have enacted. Plaintiffs do not ask the Court to sever a phrase or a single provision; they ask the Court to rewrite the statute. Plaintiffs ask the Court to strike the requirement that a state be found to have acted in bad faith before IGRA's remedies apply. Then – without explaining how a court could act if a state that was sued for bad faith invoked its Eleventh Amendment immunity – Plaintiffs propose that the court would appoint a mediator who would select whatever compact was put forward unilaterally by the tribe. The state would have the choice of either consenting to the tribe's compact or being subjected to secretarial procedures based on the tribe's compact. (See Resp. at 13-14.) If a compact could not be negotiated, tribes would be free to conduct gaming "in a State in which gambling devices are legal." (See id. at 15.)

Plaintiffs may say they have taken to heart the maxim that a court should not sever "more of the statute than is necessary," Alaska Airlines, 480 U.S. at 684 (internal quotation marks & citation omitted), when they sever half of the word "into" and leave "in" as part of their severed version of IGRA. (See Resp. at 15.) But the absurdity of that maneuver illustrates that Plaintiffs are not engaging in legitimate severance at all. The purpose of severance analysis is only to

ensure that the intent of Congress is sufficiently accomplished by the remainder of a statute that has been partially invalidated. Alaska Airlines, 480 U.S. at 684-85. It is not to transform the statute into one that embodies a different intent more preferred by a party. Cf. Free Enter. Fund, 130 S. Ct. at 3162 (cautioning against unnecessarily extensive "editorial freedom" in severance analysis). No court has accepted the analysis Plaintiffs offer here.[4]

It is evident from the structure of IGRA and from its legislative history that Congress strove to achieve a balanced system of Indian gaming regulation that would allow tribes to conduct some forms of gaming without state interference but would permit Class III gaming only pursuant to a compact arrived at through negotiation to reconcile state and tribal interests. Importantly, IGRA's remedies apply only if a state refuses to negotiate over a compact or negotiates in bad faith. 25 U.S.C. § 2710(d)(7)(B)(iii). Plaintiffs' version of IGRA destroys any measure of balance by subjecting even a state acting in the utmost good faith to remedial provisions driven solely by tribal interests. If the state does not waive its Eleventh Amendment immunity and a compact is not reached, the state's choices are to accept the tribe's proposed compact or to be subjected to secretarial procedures for Class III gaming based on the tribe's proposed compact. Tribes would have no incentive to negotiate a compact in good faith, because a tribe that could not obtain its desired compact terms through negotiation could simply hold the line and then have its terms imposed on the state through a mediator or by the secretary. That is in no sense the scheme envisioned by Congress.

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[4] Plaintiffs cite to Confederated Tribes of Colville Reservation v. Washington, 20 Ind. L. Reporter 3124 (E.D. Wash. June 4, 1993) (Resp. at 14-15), but the case does not help them. There the court determined – whether or not correctly is not presently at issue – that the IGRA requirement that states "shall" negotiate compacts, see 25 U.S.C. § 2710(d)(3)(A), violates the Tenth Amendment. The court concluded that all of Section 2710(d) had to be struck down because a tribe could not be required to have a compact for Class III gaming if the state could not be required to negotiate one. But ruling that states cannot be required to negotiate compacts at all is different from invalidating one remedy against a state that fails to do so in good faith where an effective, alternative remedy exists. Because the analysis in Confederated Tribes proceeds from a different premise than the present case, the result reached there does not suggest the correct result here.

Even assuming it was accepted, Plaintiffs' misapplication of the severance doctrine still does not legalize the Pueblo's ongoing Class III gaming because it does not affect 25 U.S.C. § 2710(d)(1)(C)'s requirement that a compact be in place before Class III gaming takes place on Indian land. The Pueblo's operations continue since compact expiration only as a result of the forbearance of the United States Attorney.

Finally, Plaintiffs contend that the State cannot rely on the United States Attorney's letter determining that the Pueblo's continued gaming activity is unlawful because the letter does not purport to create enforceable rights. (Resp. at 16-17; see Pls.' Sept. 25, 2015 Mot. Prelim. Injunction, Ex. 1 to Ex. B (Doc. 23-10).) The State's authority is based not on the letter but on state law. As for the determination of illegality, the letter is merely a statement of the obvious. Besides, Plaintiffs' real point is to emphasize Judge Brack's conclusion that the State's gaming authorities lacked "'jurisdiction or authority'" to determine that the Pueblo is acting illegally. (Resp. at 17 (quoting October 7 memorandum opinion and order).) But Judge Brack's error gains Plaintiffs no ground. Nothing in IGRA divests the State of its authority to determine that State licensees are violating state law by supporting and profiting from illegal gaming activity, even if the activity in question is that of the Pueblo.[5]

[5] Preliminary injunction rulings are not binding in the context of ruling on a subsequently filed motion to dismiss:

> The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction … is by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2nd Cir. 1953). Accord, City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 649 (10th Cir. 1992) (preliminary injunction fact findings reversed on summary judgment), overruled on other grounds by Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137 (10th Cir. 1997); Am. Ass'n of People with Disabilitites v. Herrera, 690 F. Supp. 2d 1183, 1211 (D.N.M. 2010) (court declined to follow conclusion of law contained in order denying preliminary injunction motion).

B. Plaintiffs' Severance Argument Is Barred By Collateral Estoppel.

Even assuming for the sake of argument that Plaintiff's severance argument had merit, Judge Parker rejected it because of the available remedy of a suit alleging bad faith failure to negotiate filed by the United States on behalf of the Pueblo:

> Even without the Part 291 regulations [which Judge Parker invalidated] in place, IGRA provides a way for a Tribe to obtain a compact: agreement with the State or Secretarial Procedures implemented after a finding of bad faith and court-ordered mediation. The United States Supreme Court has blocked one of these paths when a State refuses to waive its immunity under the Eleventh Amendment. But while the Pueblo of Pojoaque is effectively precluded from obtaining a ruling on its allegations of bad faith, it appears that nothing prevents the United States from doing so as the Pueblo's trustee.
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> The fact that the Pueblo of Pojoaque's choices under IGRA are constrained to its detriment does not render the entirety of IGRA incapable of "functioning independently" from its jurisdiction-granting clause. Accordingly, this Court declines Defendants' request to invalidate any provision of IGRA other than the one invalidated by the United States Supreme Court in *Seminole Tribe of Fla. v. Florida*.

New Mexico v. Department of Interior, No. CV-14-695, slip op. at 27-28 (D.N.M. Oct. 17, 2014) (citations omitted). This ruling, adverse to the Pueblo, bars the Pueblo from repeating the same severance argument in this proceeding. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (recognizing offensive collateral estoppel); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (recognizing defensive collateral estoppel). See also 18A C. Wright, et al., Federal Practice & Procedure § 4433, at 78 (2nd ed. 2002) ("The bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal.").

C. The October 7 Preliminary Injunction Should Be Stayed Upon a Finding That the Plaintiffs Cannot Establish a Substantial Likelihood of Success on the Merits. But the Equitable Factors in the Preliminary Injunction Calculus Also Favor the Defendants.

At the December 29, 2015, hearing in this matter, Plaintiffs' counsel signaled that, notwithstanding Plaintiffs' claims to the contrary in their preliminary injunction motion, the Pueblo will not suffer catastrophic economic loss in the absence of an injunction barring New Mexico from enforcing its laws against its gaming licensees. Instead, the Pueblo can either engage in Class II gaming, which does not require a compact, or go ahead and enter into the same compact with the State that other tribes have accepted. (Tr. at 60.)

But even assuming the Pueblo could demonstrate irreparable harm, it would be harm it will suffer only as a result of not being able to continue engaging in an illegal enterprise. Irreparable harm or not, Plaintiffs have no answer to the basic proposition that equity will not protect illegal conduct. Similarly, just as Plaintiffs cannot seriously maintain, given the straightforward language of 25 U.S.C. § 2710(d)(1)(C), that they are the beneficiaries of a federal policy that encourages gaming on Indian lands in the absence of a compact, the unquestionable illegality of the Pueblo's current casino operations mandates the conclusion that the preliminary injunction is not in the public interest. For the same reason, the State's sovereign interest in exercising its police powers outweighs the Pueblo's loss from not being able to engage in an illegal activity.

D. Conclusion

For the reasons set forth in Defendants' motions to dismiss (Docs. 69, 71, 72, 73), the Court should dismiss Plaintiffs' Complaint on the merits and as a matter of law, and vacate the October 7, 2015, Preliminary Injunction on that basis. In the alternative, for the reasons set forth

in the subject motion as well as discussed above, the Court should stay the Preliminary Injunction pending resolution of Defendants' interlocutory appeal of it.

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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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