IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe, JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque,

Plaintiffs-Appellants,

v. No. 16-2228

STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, and CARL E. LONDENE,

Defendants-Appellees.

APPELLEES' SUPPLEMENTAL MEMORANDUM BRIEF REGARDING THE IMPACT OF THE COURT'S DECISION IN *NEW MEXICO V. DEPARTMENT OF INTERIOR* ON THE PRESENT APPEAL

The Court's recent decision in the related appeal, *New Mexico v. Department of Interior*, Nos. 14-2219 & 14-2222, slip op. (10th Cir. Apr. 21, 2017), makes three broad points that strongly support the position of Appellees ("the State") in the present appeal.

I

First, the decision reaffirms – if reaffirmance even were necessary – that the Pueblo of Pojoaque currently is operating unlawfully in conducting Class III gaming activities without a tribal-state compact. (Slip op. at 15 (["A]bsent a judicial finding that a state has not negotiated in good faith, a tribe cannot secure

Class III gaming under the regime of IGRA without directly engaging with a state and hammering out the terms of a compact.").)

To date, the Pueblo has relied on the possibility that future actions – namely, Part 291 secretarial procedures or judicial adoption of the Pueblo's "severance analysis" of IGRA – might legitimize the uncompacted gaming in which the Pueblo continues to engage. But *Department of Interior* establishes that the Secretary of the Interior lacks the authority to promulgate the Part 291 regulations, because they contradict the plain text of IGRA. (Slip op. at 48 ("IGRA unambiguously forecloses the Part 291 regulations. Accordingly, we do not proceed to *Chevron* step two.").) And the decision squarely rejects the Pueblo's theory – advanced at length in the *Department of Interior* appeal and adverted to in cursory fashion in the present appeal (*see* Reply Br. at 25) – that IGRA should be radically edited or wholly invalidated to allow uncompacted gaming. (Slip op. at 55 ("We will not engage in such judicial editing of a statute."), 57 ("[I]t appears that IGRA remains capable of functioning largely as Congress intended it to do.").) Instead, *Department of Interior* confirms that there are no remaining questions regarding the validity of IGRA. (Slip op. at 58 ("We decline to strike down the rest of IGRA.").)

II

Second, the *Department of Interior* decision corrects fundamental misunderstandings of IGRA that permeate the Pueblo's briefing.

As the Pueblo would have it, IGRA was enacted to limit the ability of states to interfere with tribal gaming on Indian land. (*E.g.*, Aplt. Br. at 23 ("[T]he enactment of IGRA makes that presumption [preemption of "state intrusion on Indian gaming"] even more preclusive.").) IGRA is far more even-handed than the Pueblo acknowledges in its treatment of tribes and states as distinct sovereigns with equally cognizable interests. (*E.g.*, slip op. at 38 (noting "the significant governmental interests of competing sovereigns – including the powerful economic interests involved in the regulation of Class III gaming").) It gives full recognition to the interest of states in having a voice in how Class III gaming is conducted on Indian lands within the state. (*E.g.*, slip op. at 15 (noting "the State's interest in helping to shape . . . the terms under which the [Pueblo] may conduct Class III gaming within its territory")).

Furthermore, *Department of Interior* reflects recognition that IGRA does not mandate that a tribe desirous of Class III gaming will achieve that goal. IGRA contemplates that a tribe may not be able to engage in Class III gaming at the end of the statutory processes. (*See* slip op. pp. 36-37.) To the (substantial) extent that the Pueblo's interpretation of IGRA is based on the notion that the statue is slanted

toward the achievement of Class III gaming over the interests of a state (*see, e.g.*, Aplt. Br. at 20 (arguing that lower court did not show "due regard for governing federal and Pueblo sovereign interests")), that interpretation is contrary to IGRA's carefully crafted design. (*See* slip op. at 37.)

The present case involves a dispute regarding the State's ability to prevent the degradation of its gaming environment and the flouting of its laws by gaming licensees who promote or profit from illegal activity when that illegal activity is uncompacted gaming on Indian lands. No official, agency, or court – including this one – that has looked at the present situation has reached any conclusion other than that the Pueblo is operating illegally by continuing to conduct Class III gaming activities without a compact. Because the Pueblo's actions are prohibited by IGRA, any balance of sovereign interests in this instance weighs in favor of the State.

III

Third, the *Department of Interior* decision negates the Pueblo's insistence that it is disadvantaged in negotiating with the State and therefore deserves some form of judicial accommodation. (*E.g.*, Aplt. Br. at 11 (arguing that lower court's ruling allows State "to extort illegal compact concessions from the Pueblo").) As the *Department of Interior* decision recognizes, in light of *Seminole Tribe* Indian tribes "have seen their bargaining position diminished." (Slip op. at 56.) This

observation is consistent with that of the Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2035 (2014), that after *Seminole Tribe* states have substantial "leverage" in compact negotiations. But the changed dynamic does not justify granting the Pueblo special relief. A state's invocation of sovereign immunity still may be overcome in appropriate circumstances (slip op. at 57); it is not the case that the Pueblo is "left without legal recourse . . . against a State that has negotiated in bad faith" (Reply Br. at 25). And because "the power to remedy the defects in IGRA's remedial scheme lies . . . with Congress" (slip op. at 47) and "Congress has not amended [IGRA]" since the *Seminole Tribe* ruling more than a decade ago (*id.* at 2), Congress may be assumed to be satisfied with the operation of IGRA as matters stand. The Pueblo has no claim to judicial favoritism merely because it may not achieve all its goals through the IGRA process of "directly engaging with a state and hammering out the terms of a compact." (Slip op. at 15.)

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN
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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATIONS

This brief complies with the requirements of the Court's April 24, 2017, order requesting supplemental briefing because it is no longer than 10 pages and it has been prepared in 14-point Times New Roman type.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By__*/s/ Edward Ricco*_____
Edward Ricco

CERTIFICATE REGARDING DIGITAL SUBMISSIONS

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RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By *__/s/ Edward Ricco__*
Edward Ricco

CERTIFICATE OF SERVICE

I certify that on May 1, 2017, I filed the foregoing pleading electronically through the CM/ECF system, which caused all other parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Docket Activity.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By *_/s/ Edward Ricco_*
Edward Ricco