No. 16-2228

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.

STATE OF NEW MEXICO, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
JAMES O. BROWNING, DISTRICT JUDGE
CASE No.: 15-CV-0625-JB/GBW

PUEBLO OF POJOAQUE'S AND JOSEPH M. TALACHY'S SUPPLEMENTAL BRIEF ON IMPACT OF APRIL 21 OPINION IN RELATED CASES

ORAL ARGUMENT REQUESTED

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Pursuant to this Court's Order of April 24, 2017, Appellants Pueblo of Pojoaque and its Governor, Joseph M. Talachy (collectively, "Pueblo") submit this Supplemental Brief addressing the impact, if any, on issues in this case of the opinion issued on April 21, 2017 in the related appeals, *State of New Mexico v. Dep't of the Interior*, Nos. 14-2219 & 14-2222 ("April 21 Opinion"). The April 21 Opinion has both substantive and procedural impacts for this case: Substantively, the April 21 Opinion does not resolve issues in this case. However, it confirms that the Eleventh Amendment immunity of the State of New Mexico ("State") does not excuse its obligation to conclude compact negotiations in good faith, and that the delicate balance of state and tribal interests in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., should not be fundamentally altered. Those points support the Pueblo's position that IGRA preempts state interference with on-reservation Indian gaming in the situation here. Procedurally, the April 21 Opinion remains subject to further review and identifies two separate remaining remedies for the Pueblo concerning the State's failure to negotiate in good faith for a gaming compact with the Pueblo. Therefore, because the Pueblo's on-reservation gaming remains subject to exclusive federal oversight, the April 21 Opinion supports preemption of State interference with the Pueblo's gaming. Allowing ongoing State interference in this case would subvert the outstanding possible remedies identified in the April 21 Opinion.

I. The April 21 Opinion Confirms the State Obligation to Negotiate Gaming Compacts in Good Faith and Supports Federal Preemption of State Interference with On-Reservation Indian Gaming Here.

The April 21 Opinion addresses separate issues from those in this case, but supports the Pueblo's arguments here. The related appeals concern what remedies, if any, a tribe has when a state asserts Eleventh Amendment immunity and refuses to negotiate or mediate a gaming compact in good faith as provided by Congress in 25 U.S.C. § 2710(d)(7)(B). This case concerns whether a state can interfere with an Indian tribe's on-reservation gaming activities in the absence of a tribal/state gaming compact while those remedies are being pursued. If the April 21 Opinion becomes final, its holding that IGRA forecloses federal regulations at 25 C.F.R. Part 291 ("Part 291") does not resolve whether IGRA preempts the State from interfering with the Pueblo's on-reservation gaming. Instead, the April 21 Opinion supports the Pueblo's position that IGRA preempts the state interference at issue in this case.

The April 21 Opinion confirms both the State's obligation under IGRA to negotiate in good faith and the delicate balance in IGRA between tribes and states as equal sovereigns. Slip. Op. at 6, 40-41. Notwithstanding state Eleventh Amendment immunity for tribal claims about good-faith compact negotiation under IGRA, the April 21 Opinion recognizes that "states still retain the obligation to negotiate in good faith under 25 U.S.C. § 2710(d)(3)(A)." *Id.* at 6; *see also id.* at

41. Also, the April 21 Opinion recognizes "'the need to provide some incentive for States to negotiate with tribes in good faith[.]'" *Id.* at 40 (citation omitted). For that, the "[e]qual bargaining" in IGRA's "delicate balancing" cannot be had and would be "fundamentally altered" where, "absent an agreement, one side will nevertheless obtain its fundamental goals[.]" *Id.* at 41. This is critical because "'if the remaining provisions cannot operate according to the congressional design . . . , it almost necessarily follows that Congress would not have enacted them . . . .'" Slip Op. at 53 n.10 (citation omitted); *see Alaska Airlines*, *Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation cannot function independently.").

These points in the April 21 Opinion support the relief sought by the Pueblo here. The State already has asserted Eleventh Amendment immunity to derail litigation by the Pueblo and continues to oppose federal regulations that could resolve claims that the State has failed to negotiate a gaming compact in good faith with the Pueblo. Now, the State seeks to interfere with the Pueblo's on-reservation gaming under federal oversight to achieve the State's fundamental goal of forcing the Pueblo to capitulate to the State's ultra vires demand for an illegal tax. IGRA's delicate balance of state and tribal interests should not be "fundamentally altered" by permitting the State to implement these strong-arm tactics with impunity.

Allowing the State to interfere with the Pueblo's on-reservation gaming here would eliminate any incentive for the State to negotiate with the Pueblo in good faith and thereby make IGRA legislation that Congress would not have enacted. Therefore, the April 21 Opinion supports interpreting IGRA to preempt the State's interference in the Pueblo's on-reservation gaming in the circumstances in this case.

II. The April 21 Opinion Remains Subject to Further Review and Identifies Remaining Remedies Concerning Compact Negotiations So It Supports Preemption of State Efforts to Subvert or Bypass Those.

The Pueblo will seek rehearing and rehearing *en banc* of the April 21 Opinion. *See* Fed. R. App. P. 35, 40. The Department of the Interior also may seek further review of the April 21 Opinion. *See id.* Also, either or both parties may petition for a writ of certiorari. *See* 28 U.S.C. § 1254(1). Therefore, while the April 21 Opinion provides relevant analysis here, it is not yet a final decision. *See* Fed. R. App. P. 41(b) (governing mandate issuance timing). Accordingly, there remains a possibility that the underlying compact negotiation dispute still may be resolved under Part 291, or otherwise resolved on remand in the related appeals.

The grounds for rehearing or rehearing en banc are strong. The April 21 Opinion concedes that the severability issue addressed there is a "close one." Slip. Op. at 58. The April 21 Opinion concedes that the invalid provision in the statute (IGRA's abrogation of Eleventh Amendment immunity) cannot be

severed where the result is one where "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Slip Op. at 52 (citing *Alaska Airlines*, 480 U.S. at 684). Congress did not intend a result where recalcitrant states can negotiate with impunity or deprive a Tribe of its sovereign and statutory rights to govern Class III gaming activities on-reservation, but that is the result if none of the four remedies identified in the April 21 Opinion are viable and no other remedy is available to the Pueblo.

Even if upheld on further review, the April 21 Opinion identified four possible remedies to address a recalcitrant state's failure to negotiate a gaming compact in good faith. Slip Op. at 56-58. Two possible remedies are a state waiving or choosing not to assert its Eleventh Amendment immunity in answer to a tribe's lawsuit under IGRA for a claim about failure to negotiate a gaming compact in good faith. *Id.* at 56-57. The State here, however, has repeatedly refused to exercise either of those options, *id.* at 3, 8; Aplt. App. 1/117, 246-47, so those two options are not viable here.

The April 21 Opinion alternatively notes that either the United States may sue the State on behalf of the Pueblo to assert that the State has failed to negotiate a gaming compact in good faith, or the Pueblo may sue the United States to compel such a lawsuit. Slip Op. at 57. The Pueblo is now in consultation with the United

States regarding those possibilities, so that "IGRA remains capable of functioning largely as Congress intended it to" here. *Id*. at 57. If those options succeed, the Pueblo finally would have its day in court concerning the State's failure to negotiate a compact in good faith. Thus, even if the April 21 Opinion becomes final without further review, the first two options noted there for resolution of the compact negotiation dispute already have been exhausted, while the two other options remain.

In relation to the above proceedings, this case concerns the State's effort to "'bypass the federal court system" because the State is "[d]etermined to shut down the tribe's gaming facility and unwilling to wait for the [related] case to travel through proper legal channels[.]" Pueblo's Reply Br. at 6 (quoting *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1251 (10th Cir. 2006)); *see also id.* at 22; Pueblo's Opening Br. at 28 (quoting same). Moreover, the State is seeking to interfere with the Pueblo's on-reservation gaming even though "IGRA gives the federal government exclusive jurisdiction over gaming on Indian Land[.]" *Wyandotte Nation*, 443 F.3d at 1256; *see also United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170, 1177 (10th Cir. 1991); *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538-40 (9th Cir. 1994); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990). Also, the United States still possesses jurisdiction over the Pueblo's gaming in the

absence of a compact, 18 U.S.C. § 1166(d);[*] 25 U.S.C. §§ 2705, 2713, and the United States continues to exercise jurisdiction over the Pueblo's gaming here, Aplee. Supp. App. 1/140-41, 143. The State's lack of jurisdiction directly results from the State allowing its prior compact with the Pueblo to expire. To allow the State to interfere with the Pueblo's on-reservation gaming in these circumstances would give the State jurisdiction where it has none, and subvert the ability of the Pueblo and the United States to seek further review of the April 21 Opinion or pursue the legal remedies relied on there to prevent IGRA from being struck down in its entirety. *See* Slip. Op. at 58. The April 21 Opinion thus confirms the Pueblo's need for judicial relief in this appeal.

Conclusion

The April 21 Opinion's repudiation of the Part 291 regulations does not resolve whether IGRA preempts the State from interfering with the Pueblo's on-reservation gaming. However, the April 21 Opinion confirms IGRA's careful balance and remaining remedies, which preempt state action here. The State lacks jurisdiction to determine whether the Pueblo's gaming activities are lawful. The State's appropriate remedy is to convince the United States, the government with jurisdiction over the Pueblo, to take enforcement action against the Pueblo. Allowing the State to interfere with the Pueblo's on-reservation gaming would

[*] Although codified in Title 18, the referenced provision was enacted as part of IGRA, Pub. L. 100–497, § 23, 102 Stat. 2467, 2487 (1988).

impermissibly disrupt IGRA's careful balance of interests as identified in the April 21 Opinion. Also, allowing state interference here would improperly subvert possible further review of and the two remaining remedies identified in the April 21 Opinion. The April 21 Opinion confirms that this Court should not allow the State to bully the Pueblo into accepting an illegal tax.

Dated: May 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on the Court and opposing counsel via the CM/ECF system on May 1, 2017 and that to my knowledge, all counsel of the record in this case are registered to receive service through that system.

Date: May 1, 2017

s/ Scott Crowell
SCOTT CROWELL

CERTIFICATE OF COMPLIANCE

I certify that this supplemental brief is 10 pages or less as ordered by the court and complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify, that this brief has been prepared in a proportionally spaced typeface using Word Mac 2011 in a 14-point New Times Roman font, and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6).

Date: May 1, 2017

s/ Scott Crowell
SCOTT CROWELL

CERTIFICATE OF DIGITAL SUBMISSION

1. I certify that with respect to the foregoing that all required privacy redactions have been made per 10th Cir. R. 25.5.

2. No hard copies are required by Order of the Court.

3. I certify that, prior to filing, the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, Bitdefender Antivirus version 5.2.0.4, last updated May 1, 2017 and according to the program is free of viruses.

Date: May 1, 2017

s/ Scott Crowell
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