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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

CARRIE A. FRIAS
Pueblo of Pojoaque
Legal Department
58 Cities of Gold Road, Suite 5
Santa Fe, NM 87506
Telephone: 505-455-2271
Email: cfrias@pojoaque.org

SCOTT CROWELL
Crowell Law Office-
Tribal Advocacy Group
1487 W State Route 89A, Suite 8
Sedona, AZ 86336
Telephone: 425-802-5369
Email: scottcrowell@clotag.net

DANIEL REY-BEAR
Rey-Bear McLaughlin, LLP
421 W Riverside Ave., Suite 1004
Spokane, WA 99201-0410
Office: 509-747-2502
Email: dan@rbmindianlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

There are two consolidated appeals pending before this Court that are related to this case, *New Mexico v. Department of the Interior*, Nos. 14-2219 and 14-2222.

INTRODUCTION

This case concerns efforts by the State of New Mexico through various officials (collectively, the "State") to disrupt and impede Class III gaming by the Pueblo of Pojoaque ("Pueblo") within its original lands. The Pueblo currently operates and governs its gaming pursuant to agreements with the United States through the National Indian Gaming Commission ("NIGC") and the relevant United States Attorney's Office ("USAO"), pending resolution of two related consolidated appeals, *New Mexico v. Department of the Interior*, 14-2219 and 14-2222 ("Related Appeals"), which were argued on September 28, 2015. Per the federal agreements, the Pueblo has continued gaming pursuant to the terms of its expired 2001 gaming compact, with the exception that revenue share payments previously made to the State now are made to an escrow account. The Pueblo and the United States advocate in the Related Appeals that the United States may prescribe Secretarial Procedures under 25 C.F.R. Part 291 to govern the Pueblo's ongoing Class III gaming, given the State's assertion of sovereign immunity against claims that it failed to negotiate in good faith for a new gaming compact with the Pueblo.

The Pueblo's Opening Brief and its successful expedited and emergency motions in this Court for an injunction pending appeal explain the key errors in the lower court's ruling. Opening Br. (Doc. 01019754736) (filed 1/23/17); Pojoaque's

Expedited Mot. to Stay Order and Restore Prelim. Inj., 2/24/2017 (Doc. 01019770580) ("Expedited Mot."); Emergency Mot. to Stay Pending Adjudication Expedited Mot. to Stay Order and Restore Prelim. Inj., 2/28/2017 (Doc. 01019772192) ("Emergency Mot."). This Reply Brief addresses the Brief of Appellees, which essentially repeats the points in Judge Browning's September 30, 2017 Memorandum Opinion and Order, which dismissed the Pueblo's claims, Aplt. App. I/113, while the State had an interlocutory appeal pending regarding Judge Brack's Memorandum Opinion and Order issuing a preliminary injunction, Aplt. App. I/057. After consideration of all the submissions and the record, this Court should reverse and remand this case for entry of judgment in favor of the Pueblo. Unlike Judge Brack's prior, well-supported analysis, Judge Browning's analysis misconstrues the facts and subverts Congress' intent in enacting IGRA to ensure that states negotiate gaming compacts in good faith without an unfair negotiating advantage.

JURISDICTIONAL STATEMENT

The State does not dispute the Pueblo's Jurisdictional Statement, Opening Br. at 2, which includes the federal court's inherent equitable jurisdiction to enjoin state regulation as preempted by a federal statute, under the Supremacy Clause, *Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1383-84 (2015).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The parties generally agree as to the two issues in this appeal: (1) whether the District Court had jurisdiction to rule on the merits of the Pueblo's claims while the State's interlocutory appeal was pending; and (2) whether the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-19, preempts the State's efforts to interfere with the Pueblo's governance of on-reservation gaming. However, as discussed below, the parties frame these issues differently.

STATEMENT OF THE CASE

The State agrees in most part with the Pueblo's Statement of the Case, with the caveat that "the State does not accept the Pueblo's characterization of the State's motives and actions or the projected consequences thereof." Appellees Br. at 3. The State contends—as Judge Browning found below—that the State can act against the Pueblo's gaming vendors with only ancillary harm to the Pueblo. Judge Browning found that the State can take the actions at issue without regard to motive because the State is exercising its inherent police powers, even though the State's motive is to interfere with the Pueblo's governance of on-reservation gaming, to shutter the Pueblo's gaming operations, and to coerce the Pueblo into acquiescing to the State's 2015 gaming tax compact.

Only Judge Brack made findings as to the State's motive:

> Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that

> which Defendants know they are without authority or jurisdiction to accomplish directly. Defendants' contention that the enforcement actions against the vendors do not harm the Pueblo is also disingenuous. The undisputed evidence establishes that the Pueblo will lose significant revenue and its Casinos may shut down due to Defendants' intimidation of the Pueblo's vendors.

Aplt. App. I/057 at 20. The undisputed facts establish that the State's actions are being taken solely against vendors doing business with the Pueblo, solely because they are doing business with the Pueblo. *See, e.g., id.* at 4; Pojoaque's Expedited Mot. at Exs. 4, 4(C) (New Mexico Gaming Control Board ("NMGRB") meeting agenda), 5 ¶¶ 5-9, 12; *id.*, Exs. 5(A)-(C) (NMGCB citations); Emergency Mot. at Ex. 1 ¶¶ 4-6, Ex. 2 ¶¶ 3, 6.

As even Judge Browning anticipated, these State actions threaten the Pueblo's on-reservation gaming, as the State has effectively forced numerous vendors to cease doing business with the Pueblo. *Compare* Aplt. App I/082 (Contempt MOO) at 29-30 *with* Expedited Mot., Exs. 4, 4(A)-(B), 5, 5(A)-(F); Emergency Mot. Exs. 2, 2(A)-(C). The current, un-refuted negative impacts to the Pueblo include a projected loss in gaming revenue of over $750,000 per month during the forthcoming year, equating to a loss of approximately 17% of annual revenue if no further losses occur. Expedited Mot., Ex. 5 ¶¶ 30-31, Ex. 6 ¶¶ 19-22, 27-29; *cf.* Emergency Mot., Ex. 2 (explaining additional losses). The negative impacts also include the inability to maintain and service the Pueblo's Casino Management System ("CMS") software and servers, which ensure the integrity of

key gaming operations and are required for continued operation of the Pueblo's casinos, as well as compliance with the Pueblo's current agreement with the NIGC. *See* Expedited Mot., Ex. 5 ¶¶ 3-4, 12-14, 31 and Ex. 6 ¶¶ 19-22, 30-39; Aplee. Supp. App. 1/126-30, 140, 143, 159.

Despite the pending Related Appeals concerning how to implement IGRA to prevent the State from gaining an unfair advantage in gaming compact negotiations with the Pueblo, the State recasts its action as a neutral effort to prevent profit from illegal gaming, with only indirect or ancillary effects on the Pueblo. Appellees Br. at 18-20, 28. While the State proclaims that the Pueblo's current gaming, subject to the federal agreements, is "illegal," the State has prevented any opportunity to challenge the correctness of its proclamation. No evidence in the record suggests that the named State officials were not seeking to interfere with the Pueblo's on-reservation gaming, and they have plainly done so. Even if the Court doubts that the named State officials were so motivated, taking issue with Judge Brack's findings, Judge Browning's decision should be vacated with instructions to allow discovery on the motivations for the State officials' actions against the Pueblo's gaming vendors.

Even if the State's revisionist history is correct, the State and this Court need only maintain the status quo pending resolution of the Related Appeals. Thereafter, the Pueblo will make any adjustments needed to comply with IGRA as decided in

the Related Appeals. Resolution of the Related Appeals will address the State's asserted concern about vendors profiting from alleged illegal gaming. This case should not provide an occasion to authorize "bypass[ing] the federal court system" because the State is "[d]etermined to shut down the tribe's gaming facility and unwilling to wait for the case to travel through proper legal channels[.]" *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1251 (10th Cir. 2006).

The State's characterization of its asserted interest in punishing the Pueblo's gaming vendors does not address that the current situation is temporary and that the legality of the Pueblo's gaming should be resolved in the Related Appeals. The underlying dispute concerns the State's demand that the Pueblo pay the State a 10.5% tax on its gross gaming revenue (*i.e.*, more than 21% on net profit), despite the fact that IGRA proscribes such taxation. 25 U.S.C. § 2710(d)(4); *Rincon Band of Luiseno Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). Because of that expressly prohibited State demand in gaming compact negotiations, the Pueblo sued the State under IGRA, seeking appointment of a mediator to resolve the dispute. That lawsuit was dismissed on sovereign immunity grounds after the State refused to consent to it. Appellees Br. at 5. The Pueblo then pursued Secretarial Procedures under 25 C.F.R. Part 291, only to have the State sue to enjoin the United States in what is now the Related Appeals. Throughout, the Pueblo has done what IGRA requires it to do. The State's alleged neutral motivation here

disregards its defiance of IGRA, and improperly allows the State to punish gaming vendors for doing business with the Pueblo while the Related Appeals remain pending. In a larger context, improperly allowing such action would permit a state to disregard pending litigation and force a tribe to sign a compact without having to negotiate in good faith.

The Pueblo also takes issue with the State's attempts to minimize the analysis in Judge Brack's October 7, 2015 Order and Opinion granting the preliminary injunction. Aplt. App. 1/057. The State suggests that it was hurried briefing and decision-making that deprived the State of the ability to make proper arguments, and that Judge Browning's decision was more "considered." Appellees Br. at 21. None of that is correct. The briefing and hearing schedules were extended to accommodate the State, and included extensive briefing, evidentiary submissions, and a two-hour hearing. Aplt. App. I/012; Aplee. Supp. App. 1/023-203; App. 2/207, 201- 46. Judge Browning's more voluminous analysis does not negate the correctness of Judge Brack's well-reasoned analysis. This appeal truly presents a tale of two judges.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT IT RETAINED JURISDICTION TO RULE ON THE STATE'S MOTIONS TO DISMISS IN VIOLATION OF THIS CIRCUIT'S STRICT RULINGS IN *STEWART* AND ITS PROGENY.

The State does not refute the Pueblo's analysis, Opening Br. at 11-16, that the State's interlocutory appeal of the preliminary injunction divested the District Court of jurisdiction to rule on the State's motions to dismiss the Pueblo's claims. Once a party has filed an interlocutory appeal, the Tenth Circuit has ruled that the district court is divested of jurisdiction pending the appeal, except in limited circumstances such as enforcing a preliminary injunction, or unless the district court certifies that the appeal is frivolous. *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990). Here, the State merely asserts that the District Court retained jurisdiction based on *Free Speech v. Federal Election Commission*, 720 F.3d 788 (10th Cir. 2013), and that *Stewart* is simply inapplicable to the present case. Appellees Br. at 13-14. The State does not refute that *Free Speech* failed to address the impact of a pending interlocutory appeal at all, much less address the applicability of *Stewart* or overturn it. *See* Opening Br. at 12-14. Nor does the State refute that *Stewart* continues to be followed by courts of the Tenth Circuit notwithstanding *Free Speech. Id.* at 14-16. Those arguments remain valid. The District Court lacked jurisdiction to hear the State's motions to dismiss the Pueblo's claims.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT IGRA DOES NOT PREEMPT STATE ACTION THAT SUBSTANTIALLY INTERFERES WITH GOVERNANCE OF INDIAN GAMING ON THE PUEBLO'S LANDS.

A. The District Court Erred In Finding That It Lacked Jurisdiction To Hear Count II Of The Pueblo's Complaint.

The Pueblo establishes that the Pueblo's primary claim, Count II of the Complaint, seeks to enjoin the State from interfering with governance of the Pueblo's on-reservation gaming as preempted by IGRA. Opening Br. at 17-20. The Supreme Court recognizes that a court may enjoin state regulatory actions that are preempted by federal law. *Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378, 1383 (2015). Moreover, the Pueblo properly relied on the extensive analysis of applying *Armstrong* to similar claims under IGRA by a tribe against Arizona officials in *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301 (D. Ariz. 2015). The State appears to concede that Judge Browning erred in his application of *Armstrong* and *Tohono O'odham* in ruling that the Pueblo failed to state a claim under Count II, explaining that the result is the same because Judge Browning's analysis of IGRA's preemptive effect is correct. Appellees Br. at 16. Therefore, given the need to reverse Judge Browning regarding IGRA's preemptive effect, as discussed below, this Court also should reverse dismissal of Count II.

B. The District Court Applied the Wrong Preemption Presumption and Analysis Because This Case Only Involves State Disruption of On-Reservation Indian Gaming.

The Pueblo establishes in its Opening Brief at 20-25, a fundamental error in Judge Browning's analysis distinguishing the State's on-reservation actions from off-reservation actions. The State's response merely repeats Judge Browning's flawed reasoning, including misplaced reliance on *Michigan v. Bay Mills Indian Community* ("*Bay Mills*"), 134 S. Ct. 2024, 2034 (2014). Appellees Br. at 23-24. *Bay Mills* addresses off-reservation Indian gaming and so cannot support state interference with on-reservation Indian gaming. Also, the Court here must apply the proper preemption presumption and analysis concerning Indian tribes.

In *Bay Mills*, the tribe sought to operate gaming on lands that were not "Indian lands" under IGRA, and the Supreme Court held that IGRA did not apply because its preemptive scope concerns only on-reservation Indian gaming. *Bay Mills*, 134 S. Ct. at 2028, 2034. Thus, if the Pueblo sought to operate gaming on non-Indian lands, *Bay Mills* would allow state law to regulate that activity. In contrast, there is no off-reservation Indian gaming at issue in this case. It was the tribe's off-reservation gaming that avoided application of IGRA in *Bay Mills*, not Michigan's off-reservation actions.

Nothing in *Bay Mills* suggests that IGRA allows state actions that interfere with on-reservation Indian gaming. Moreover, the Supreme Court's discussion of a

state's "capacious" authority to regulate off-reservation Indian gaming does not suggest that such authority extends to interference with on-reservation Indian gaming. To the contrary, *Bay Mills* confirms that states do not possess authority over tribal gaming on Indian lands absent federal and tribal consent. 134 S. Ct. at 2034.

Other cases cited by the State, Appellees Br. at 23, 29, defeat the State's misreading of *Bay Mills* as allowing off-reservation state action that interferes with on-reservation Indian gaming. Those cases confirm that IGRA does not allow states to impose sanctions against allegedly unlawful tribal gaming on a tribe's reservation other than pursuant to a gaming compact, even if state prohibitions differ from those under IGRA. *United Keetoowah Band of Cherokee Indians v. Oklahoma* ("*United Keetowah Band*"), 927 F.2d 1170, 1178-79, 1181 (10th Cir. 1991); IGRA preempts state law interference with a tribe's ability to govern gaming, even where the governance of tribal gaming involves only non-Indian parties, because tribes need to be able to hire others to assist in regulating gaming[1]. *Gaming Corp. of Am. v. Dorsey & Whitney* ("*Gaming Corp.*"), 88 F.3d 536, 549-50 (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"). Therefore, *Gaming Corp.*, 88 F.3d at 549-50.

[1]For a concrete example as it applies to the instant case, IGRA preempts the State's effort here to prevent the Pueblo from continuing service for its CMS that is required to ensure the integrity of its on-reservation gaming in compliance with

Just as significant, Judge Browning committed reversible error by applying the wrong preemption analysis. Judge Browning relied heavily on traditional federal-state preemption analysis with a strong presumption against preemption. Aplt. Ap. I/113 at 101-21; *see also* Aplee. Supp. App. 5/612 at 117, 147-49, 165-66. This is critical because "those standards of preemption that have emerged in other areas of the law" do not apply to federal enactments regulating Indian tribes, and it is "treacherous to import to one notions of preemption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In particular, unlike the presumption favoring state authority in ordinary preemption, the opposite presumption applies to preemption of state action for on-reservation Indian activities because of the combination of overriding federal and tribal interests. *California v. Cabazon Band of Mission Indians* ("*Cabazon*"), 480 U.S. 202, 216 & n.18 (1987); *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994) ("The rationale for encouraging preemption in the Indian context" is "that the federal government is a more trustworthy guardian of Indian interests than the states[.]"). Also, no specific Congressional intent to preempt state action is required, and ambiguities in federal law are resolved in favor of tribal independence. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).

Furthermore, IGRA is even more preemptive than the prior federal-tribal

preemption analysis in *Cabazon*. As this Court has recognized, "IGRA . . . now provides both civil and criminal sanctions for Indian gaming not in accordance with its provisions" and "Congress has clearly occupied the regulatory field on Indian gaming." *United Keetoowah Band*, 927 F.2d at 1181; *see also* Aplt. App. I/113 at 103 ("Here, all parties concede—as they must—that IGRA is intended 'to expressly preempt the field of governance of gaming activities on Indian lands.'"). Also, states may assert jurisdiction over Indian gaming *only* pursuant to a class III gaming compact, and it is not relevant that state laws are different and possibly broader than IGRA. *United Keetoowah Band*, 927 F.2d at 1177, 1181. Therefore, absent a compact, a state lacks authority to impose sanctions against an allegedly unlawful on-reservation tribal gaming activity. *Id.* at 1177-78. Also, because of IGRA's "extraordinary" and complete preemption of state law, "'Federal courts should no longer balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.'" *Gaming Corp.*, 88 F.3d at 544 (quoting S. Rep. No. 100-46, at 6 (1988)), 548. Instead, IGRA "created a fixed division of jurisdiction. If a state law seeks to regulate gaming, it will not be applied." *Id.* at 546-47.

IGRA is more—not less—preemptive than regular federal-tribal preemption, which is already more preemptive than ordinary federal-state preemption. Also, because IGRA only allows state action concerning on-reservation gaming pursuant

to a tribal-state compact, and no compact allows the State to interfere with the Pueblo's gaming vendors, IGRA's preemptive scope is not limited to on-reservation state action. IGRA therefore precludes the State's efforts here to disrupt and impede the Pueblo's on-reservation Indian gaming. Judge Browning's application of the wrong standard and the wrong presumption dooms his and the State's efforts to avoid IGRA's extraordinary preemptive force.

C. The District Court's Preemption Analysis Wrongly Disrupted, Rather Than Respected, Congress's Careful Balance of Tribal and State Interests in IGRA, and Cannot Be Saved by Inapt Cases that Enforce Non-preempted State Taxation on Non-Indians.

The Pueblo has explained that Judge Browning's preemption analysis is erred by disrupting Congress's careful balance of federal, tribal, and state interests in IGRA. Opening Br. at 25-26. Also, the evidence submitted below and the Pueblo's appellate motions for an injunction pending appeal confirm that the State's actions directly and severely impact the Pueblo's on-reservation gaming. App. I/076 (PI MOO at 20); Expedited Mot., Exs. 4, 4(A)-(C), 5, 5(A)-(F),6, 6(A)-(D); Emergency Mot., Exs. 1, 1(A)-(B), 2, 2(A)-(C); *cf.* Order, 3/14/2017 (Doc. 01019778793) (granting the Pueblo's requests for an injunction pending appeal). The State responds without refuting relevant facts, by contending that its actions only have indirect or ancillary effects on tribal gaming, and by wrongly relying on various cases to assert that IGRA does not preempt its actions.

First, the State misplaces reliance on *Srader v. Verant*, 964 P.2d 82 (N.M. 1998), to assert that IGRA preserves state authority to regulate on-reservation Indian gaming outside of a compact. Appellees Br. at 18-20, 27. *Srader* involved actions by individuals who lost at games in Indian casinos in New Mexico after tribal-state gaming compacts had been found invalid for want of ratification by the State legislature. *Srader*, 964 P.2d at 85, 88 & nn. 1, 3. The plaintiffs filed claims against financial institutions for providing services to tribal gaming operations, and claims against state law enforcement officials for failing to enforce state gaming laws. *Id.* at 85-86. The New Mexico Supreme Court dismissed the case for lack of jurisdiction because the tribes were indispensable parties that could not be joined because of sovereign immunity. *Id.* at 91. However, the court in *dictum* stated that IGRA did not preempt plaintiffs' claims to enforce state law for violations outside of reservations. *Id.* at 86.

Srader does not support state authority here because it recognized that "states may exercise jurisdiction in cases that incidentally concern gaming, but not where state claims clearly and substantially involve, regulate or interfere with gaming." *Id.* at 87 n.2. That recognition in *Srader* supports preemption in this case, because the disputed state actions clearly and substantially involve and interfere with the Pueblo's on-reservation gaming rather than only incidentally concern gaming.

The State also incorrectly relies on cases upholding enforcement of state tobacco taxes on non-Indians to support the State's interference here with the Pueblo's governance of on-reservation Indian gaming. Appellees Br. at 30-31. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), authorized off-reservation state seizure of unstamped cigarettes bound for reservation sales because those sales offered "solely an exemption from state taxation" and were not "derived from value generated on the reservation by the activities involving the Tribes . . . ." *Id.* at 155, 156. Also, the tribes there had refused to cooperate with "minimal burdens" on Indian businesses, and state seizures would only enforce valid taxes on non-Indians "without unnecessarily intruding on core tribal interests." *Id.* at 159, 161-62. Later tribal smokeshop cases merely apply that analysis. *E.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991) (recognizing that tribal collection of "concededly lawful" state taxes is a "minimal burden"); *Muscogee (Creek) Nation v. Pruitt* ("*Muscogee*"), 669 F.3d 1159, 1172, 1174 (10th Cir. 2012) (same). Those cases only establish that federal laws do not occupy the field of cigarette sales and so allow "indirect" and "reasonable" regulatory burdens on Indians to enforce valid state taxes on non-Indians. *E.g., Muscogee*, 669 F.3d at 11-81-82.

In contrast, *California v. Cabazon Band of Mission Indians* ("*Cabazon*"), 480 U.S. 202 (1987), distinguished tribal gaming from tribal smokeshops. Even before IGRA, the federal government's "approval and active promotion of tribal bingo enterprises" was significant. *Id.* at 218. Also, tribal gaming enterprises provide revenue for tribal governments and tribal services, and on-reservation employment. *Id.* at 218-20. In addition, tribal gaming facilities "generat[e] value on the reservations" by providing "recreational opportunities and ancillary services to their patrons, who . . . spend extended periods of time there enjoying the services the Tribes provide." *Id.* at 219-20. The value of tribal gaming contrasts with the value of tribal smokeshops, which "merely import[] a product onto the reservations for immediate resale to non-Indians[,]" who "simply drive onto the reservations, make purchases and depart[.]" *Id.* at 219. The "compelling federal and tribal interests" concerning tribal gaming preempt state interests in imposing gaming laws on Indian tribes to prevent organized crime. *Id.* at 221-22. All that applies here, especially with IGRA, and does not support the State's reliance on cigarette cases as justification for the State's interference with on-reservation tribal gaming activities

Similarly, *Mashantucket Pequot Tribe v. Town of Ledyard* ("*Mashantucket*"), 722 F.3d 457 (2nd Cir. 2013), does not support the State's argument. *Contra* Appellees Br. at 18 and 24. *Mashantucket* found that IGRA did

not preempt a state personal property tax on leased non-Indian gaming machines operated at a tribal casino. *Mashantucket*, 722 F.3d at 459, 469. The court allowed that tax because it was not "targeted at gaming" and "does not produce acute economic effects that interfere with the relevant gaming practices." *Id. at* 469, 470. That was similar to other cases without IGRA preemption that involved matters "'merely peripherally associated with tribal gaming[,]'" "with *de minimis* effects on a tribe's ability to regulate its gaming operations." *Id*. at 470 (citation omitted). Those cases stand in stark contrast to the present case, where the State's actions are targeted at the Pueblo's gaming, and produce acute economic and regulatory impacts upon the Pueblo. *See, e.g.,* Expedited Mot. at Exs. 5-6; Emergency Mot. at Exs. 1-2.

The Pueblo's interpretation of the cigarette and property tax cases cited by the State is also consistent with well-established Supreme Court jurisprudence invalidating state action applied to non-Indian entities where the ultimate burden falls upon the Tribe *See Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 853-54 (1982); *Bracker*, 448 U.S. at 151.

D. The District Court Wrongly Relied on the Lack of a Current Compact to Avoid Preemption Because the United States Continues to Govern the Pueblo's On-Reservation Gaming.

The Pueblo has set forth Judge Browning's error in finding that the Pueblo's gaming is "illegal," and relying on that finding to help avoid preemption. Opening

Br. at 26-29. In response, the State merely repeats Judge Browning's reasoning rather than refuting the Pueblo's analysis. *See* Appellees Br. at 16-18. The State's argument is unsupported and incorrect, because there is no question that the Pueblo's lack of a compact results from the State's recalcitrance, and that the Pueblo remains subject to ongoing federal oversight.

The State relies on *dicta* to assert that Class III gaming is lawful on Indian lands only if done pursuant to a tribal-state gaming compact. The cases cited by the State do not address the issue and circumstances here. First, the State cites *Bay Mills:* "[A] tribe cannot conduct class III gaming on its lands without a compact." Appellees Br. at 17. As discussed above, *Bay Mills* concerned state remedies for allegedly illegal off-reservation Indian gaming. The Court concluded that IGRA did not govern, but that Michigan could use its leverage at the compact negotiation table to secure an immunity waiver broad enough to allow for such lawsuits. *Id.* at 2035. Similarly, the State cites to *United States v. 162 Megamania Gambling Devices* ("*Megamania*"), 231 F.3d 713, 718 (10th Cir. 2000): "Class III gaming . . . is allowed only where a tribal-state compact is entered." Appellees Br. at 17. *Megamania* concerned whether gaming machines based on bingo are properly classified as Class II devices under IGRA. 231 F.3d at 715. Neither *Bay Mills* nor *Megamania* suggested that the states were depriving tribes of their abilities to secure compacts via good faith negotiations under IGRA. In neither case was there

any need to discuss the legality of on-reservation tribal gaming in the absence of a compact.

Moreover, the blanket statement that all Class III gaming without a tribal-state gaming compact is unlawful defies IGRA, and the State's position in the Related Appeals that IGRA allows for Indian gaming under Secretarial Procedures where a federal court has found that a state failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(vii). Indeed, five federally-recognized tribes, the Mashantucket Pequot Tribe,[2] the Northern Arapaho Tribe,[3] the Rincon Band of Luiseno Indians,[4] the North Fork Rancheria of Mono Indians,[5] and the Enterprise Rancheria of Maidu Indians,[6] all are operating Class III gaming without a compact.[7] The Related Appeals correspondingly concern whether the United States may allow tribes like the Pueblo to offer gaming in lieu of a compact where a state asserts Eleventh Amendment immunity to prevent a federal court from finding that the state has failed to negotiate in good faith.

The State attempts, Appellees Br. at 5 and 17, to misdirect attention away

---

[2] https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026009.pdf.
[3] https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038585.pdf.
[4] https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026439.pdf.
[5] https://www.indianaffairs.gov/cs/groups/xasia/documents/text/idc2-056230.pdf.
[6] https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc2-056229.pdf.
[7] The formal correspondence and text of procedures are available at the official web page of the Office of Gaming Management, of the Department of the Interior, www.indianaffairs.gov.

from its own improper and non-binding determination that the Pueblo is operating illegally by asserting that the USAO made such a determination in its letter of June 30, 2015. (Aplt. App. at I/119-20 ("USAO Letter").) The State also alleges that the NIGC determined that the Pueblo is operating illegally. Appellees Br. at 17. There is no such determination in the cited NIGC letter, which merely states that the NIGC will withhold any enforcement action while the Related Appeals are pending. (Aplee. Supp. App. at 1/143.) The State even asserts that the Pueblo is conceding it is operating illegally by seeking the commitments of the USAO and NIGC to refrain from taking enforcement action. No doubt, the State's recalcitrance has diverted the Pueblo into uncharted waters, such that it is prudent that the Pueblo consult with the two federal entities that do have jurisdiction (as opposed to the State) over the Pueblo's gaming. The State's suggestion that the Pueblo's prudence is a concession as to illegality wholly lacks merit. But for the State's unwillingness to negotiate a compact in good faith and its lawsuit against the Department of Interior, it is likely that the Pueblo would be operating under a compact or Secretarial Procedures now.

The State's and Judge Browning's reliance on the USAO Letter is simply wrong for several reasons. The USAO Letter by its express terms precludes the State's reliance on it: "this letter does not and 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." (Aplee. Supp. App. 1/140-41) (emphasis added). Critically, the United States' position is that the Pueblo's proper course of action is to operate pursuant to Secretarial Procedures promulgated under 25 C.F.R. Part 291 in lieu of a tribal-state gaming compact, which stands in sharp contrast to the State's position. Moreover, the statement in the USAO Letter is not a formal finding of any sort. The USAO has not opined or taken any position regarding the legality of the Pueblo's gaming operation if the Related Appeals find 25 C.F.R. Part 291 to be invalid. Quite simply, the USAO Letter does not provide any authority for Judge Browning to conclude that the Pueblo is operating illegally.

The State's characterization of its actions to "mark the existence of unlawful gaming activities," Appellees Br. at 17, reveals the State's understanding that it lacks jurisdiction to determine the legality of the Pueblo's gaming. Like the State of Kansas in *Wyandotte Nation*, the State may not bypass federal courts because it is "[d]etermined to shut down the tribe's gaming facility and unwilling to wait for the case to travel through proper legal channels[.]" 443 F.3d at 1251-52.

The State is not able to cite to a single case that holds that a tribe, positioned as the Pueblo is positioned, is operating illegally. Even in the Fifth Circuit's decision invalidating 25 C.F.R. Part 291, *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), two of three judges opined that IGRA must be interpreted in a manner that prevents the unconscionable circumstances at issue here.

The case that has facts closest to the present case is *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998). The State makes a failed attempt to distinguish the present case from *Spokane Tribe* and cites it for propositions that run contrary to its holding. Appellees Br. at 35-36. Like the Pueblo, the Spokane Tribe was confronted by a recalcitrant state that insisted on restrictions in a gaming compact not allowed under IGRA. 139 F.3d at 1298 and n.1. Like the Pueblo, the Spokane Tribe's Complaint under IGRA was dismissed on Eleventh Amendment immunity grounds. *Id*. The Ninth Circuit first stayed and then vacated an injunction against non-compacted class III gaming. *Id.* at 1302. The Ninth Circuit found that the circumstances warranted an inquiry into how IGRA will work as Congress intended following the decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), but pending resolution of those issues, IGRA could be interpreted in a manner that deprived the Tribe of its inherent and statutory right to govern gaming activity:

> 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? 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. . . . 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. . . . None of the circumstances that might justify enforcing IGRA according to its terms appears to be present here. **We are left, then, with a tribe that believes it has followed IGRA faithfully and has no legal recourse against a state that allegedly hasn't bargained in good faith. Congress did not intentionally create this situation and would not have countenanced it had it known then what we know now.** Under the circumstances, IGRA's provisions governing class III gaming may not be enforced against the Tribe.

139 F.3d at 1301-1302 (citations omitted, emphasis added). The Ninth Circuit rejected the argument that the Tribe was operating illegally and clearly concluded that enforcement against the Spokane Tribe for non-compacted Class III gaming, in the same circumstances that the Pueblo is now confronting, was inappropriate. During remand, the Spokane Tribe and Washington State reached terms on a tribal-state gaming compact,[8] mooting the need to consider severance issues raised by the Ninth Circuit.

[8] https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024617.pdf.

The State is correct that *Spokane Tribe* suggested that on remand the United States file suit against Washington State on behalf of the Spokane Tribe as a possible avenue to save IGRA. 139 F.3d at 1300. The State fails to acknowledge that *Spokane Tribe* also suggested that the Department of the Interior promulgate regulations, such as those now at issue in the Related Appeals. *Id.* at 1300-01. Significantly, the State also fails to acknowledge that severance analysis may result in no action against non-compacted Class III gaming, so that the State's assertion of Eleventh Amendment immunity may merely remove the State from any role in governance of the Tribe's on-reservation gaming activities. *Id.* at 1302 ("the Department of Justice might resuscitate the statute by prosecuting tribes only when it determines that the state has negotiated in good faith"). By suggesting that a lawsuit by the United States is the appropriate remedy, the State is conceding that the result here in is not consistent with Congressional intent. It is wrong for Judge Browning and the State to conclude unequivocally that the Pueblo is operating "illegally" without conducting severance analysis to provide a clear remedy for the Pueblo. Similar to *Spokane*, the Pueblo, which believes it has followed IGRA faithfully, should not be left without legal recourse against a State that has negotiated in bad faith. Furthermore, the State should not be allowed to attack the Pueblo's gaming vendors and interfere with on-reservation gaming overseen by

federal authorities in order to circumvent pending litigation and force the Pueblo to sign a form compact without good faith negotiations.

CONCLUSION

The Pueblo of Pojoaque and its Governor respectfully request that the judgment of the District Court be reversed, and that the case be remanded with instructions to reinstate the injunction and enter judgment in favor of the Pueblo.

STATEMENT OF ORAL ARGUMENT

Oral argument has been set for May 9, 2017.

Dated: April 12, 2017

Respectfully submitted,

s/ Scott Crowell
Scott Crowell
Crowell Law Office-
Tribal Advocacy Group
1487 W State Route 89A, Suite 8
Sedona, AZ 86336
Telephone: 425-802-5369
Email: scottcrowell@clotag.net

Carrie Frias, Chief General Counsel
Pueblo of Pojoaque Legal Department
Pueblo of Pojoaque
58 Cities of Gold Road, Suite 5
Santa Fe, NM 87506
Telephone: 505-455-2271
Email: cfrias@pojoaque.org

Daniel Rey-Bear
Rey-Bear McLaughlin, LLP
421 W Riverside Ave., Suite 1004

Spokane, WA 99201-0410
Telephone: 509-747-2502
Email: dan@rbmindianlaw.com

Attorneys for Plaintiffs-Appellants
Pueblo of Pojoaque and
Joseph M. Talachy

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 April 12, 2017 and that to my knowledge, all counsel of the record in this case are registered to receive service through that system.

Date: April 12, 2017

s/ Scott Crowell
SCOTT CROWELL

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,020 of words 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: April 12, 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. I certify that, within two business days, I will cause to be delivered to the Clerk of the Court seven copies in paper form of this Reply Brief, which will be exact replicas of the electronically filed version.

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 April 10, 2017 and according to the program is free of viruses.

Date: April 12, 2017

s/ Scott Crowell
SCOTT CROWELL