UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe: JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque, Plaintiffs, vs. STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFREY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I –V, Defendants.	NO.: 1:15-cv-00625 JOB-GBW

PLAINTIFFS' MOTION TO STAY THE ORDER AND RESTORE THE PRELIMINARY INJUNCTION PENDING APPEAL

EXPEDITED REVIEW REQUESTED

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NOTICE OF MOTION

PLEASE TAKE NOTICE Plaintiffs Pueblo of Pojoaque (Pueblo), a federally-recognized Indian tribe, and Joseph M. Talachy, Governor of the Pueblo of Pojoaque move this Court, pursuant to Fed. R. Civ. P. 62(c) and in compliance with Fed. R. App. P. 8(a)(1)(A) and (C), for an order staying the judgment of this Court entered on September 30, 2016 (Doc. 119), and this Court's Memorandum Opinion and Order of September 30, 2016 (Doc. 118) pending appeal to the United States Court of Appeals for the Tenth Circuit. In the alternative, the Pueblo seeks a temporary stay of sixty (60) days to allow sufficient time for the Appellate Court to consider and rule upon a motion pursuant to Fed. R. App. P. 8(a)(1)(A) and (C). In support of the instant motion, the Pueblo respectfully relies on the Memorandum in Support of the Motion which is filed herewith, and copies of which have been served on counsel

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STAY THE ORDER AND RESTORE THE PRELIMINARY INJUNCTION PENDING APPEAL

Plaintiffs, PUEBLO OF POJOAQUE, a federally-recognized Indian tribe, and JOSEPH M. TALACHY, Governor of the Pueblo (collectively referred to as the "Pueblo"), pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)(1)(A) and (C), move this Court for a stay of its Memorandum Opinion and Order dated September 30, 2016, dismissing the Pueblo's action against the STATE OF NEW MEXICO (the "State"), SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, and CARL E. LONDENE (collectively, the "Defendants") in its entirety, and for a restoration of the October 7, 2015 Order of Preliminary Injunction, pending

appeal.[1] If the status quo cannot be maintained, the Pueblo seeks a temporary stay granting an amount of time sufficient for the Appeals Court to determine whether the temporary stay should extend through the appeal. *See Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014) (temporary stay granted); *Community Television of Utah, L.L.C v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1211 (D. Utah 2014) (temporary stay granted);*United States v. Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998) (granting of the Spokane Tribe's emergency motion for an injunction pending appeal in litigation where the District Court had enjoined the Spokane Tribe's Class III gaming activities for a lack of a compact).

I. OVERVIEW

The Pueblo requests, as per Rule 8(a)(1) of the Federal Rules of Appellate Procedure that this Court grant a stay of its Memorandum Opinion and Order for two reasons. First, because the Court never had jurisdiction to rule on the pleadings, as Defendants' interlocutory appeal of the Order granting preliminary injunction divested the Court of jurisdiction. Second, because even if the Court did have jurisdiction to rule on the pleadings, the elements for granting a stay pending appeal have been met.

In order to receive a stay of a court order and a restoration of a preliminary injunction pending appeal, 10th Cir. R. 8.1 requires that the plaintiff show: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. *McClendon v. City of Albuquerque*, 79 F.3d 1014 (10th Cir. 1996). In the present

[1] Counsel for the Pueblo sought concurrence for Motion pursuant to D.N.M.LR-Civ. 7.1(a).

case, the Pueblo can establish each element and has already established these elements as evidenced by the findings in the preliminary injunction (Doc. 31).

A stay pending appeal is always an extraordinary remedy. The purpose of a stay is to preserve the status quo pending appellate determination. *See Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781 (10th Cir.1964). The factors require individualized consideration and assessment in each case. *See McClendon*, 79 F.3d at 1020 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776–77 (1987)); *see also F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10th Cir. 2003); *O Centro Espirit Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 1240 (10th Cir. 2002); *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001); *Avendano v. Smith*, 2011 WL 5223041 at *4 (D. N.M. 2011)(J. Browning). However, if a party can meet the other requirements for a stay pending appeal, it will be deemed to have satisfied the likelihood of success on appeal element if it shows "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *City of Chanute v. Kansas Gas and Elec. Co*., 754 F.2d 310, 314 (10th Cir. 1985).

The order dismissing the Pueblo's action against Defendants erred in its interpretation of relevant law and facts, and essentially overturns the basic Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., principle that a state may not assert jurisdiction, either directly or indirectly, over a tribe's gaming operations in the absence of a compact. This error is made clear by the stark contrast between the September 30, 2016 order (Doc. 118), and Judge Brack's order granting the preliminary injunction (Doc. 31, 32). While the Court has now decided that the Pueblo's claims lack merit, such a decision is contrary not only to federal law but also to

Judge Brack's findings in the preliminary injunction. As Judge Brack correctly concluded, a state has no authority to regulate tribal gaming under IGRA unless a tribe specifically consents to the regulation in a compact, and absent a compact, Class III gaming is solely the jurisdiction of the federal government (Doc 31, pg. 21-22). Regardless of this Court's views of the merits of the case, the complete dichotomy of conclusions made by two different district court judges on the same case demonstrates that the questions on the merits are serious, substantial, difficult and doubtful. Therefore, a stay of the order should be granted to preserve the status quo upon appeal.

The Pueblo can establish, and has already established, the final three elements for a stay and restoration of the preliminary injunction. The devastating impact on the Pueblo, its economy, and the surrounding communities are detailed below and in the documents submitted to the District Court in support of the Motion for Preliminary Injunction.[2] On the other hand, granting the requested stay pending appeal will impose no harm whatsoever upon the State; therefore, the balance of hardships weighs overwhelmingly in favor of the Pueblo. Finally, granting a stay pending appeal will advance the public interests in protecting a tribal economy and its people, and promoting the long-standing federal policy of strong and self-sufficient tribal governance.

II. JURISDICTION

The Pueblo has filed its Notice of Appeal of the District Court's Memorandum Opinion and Order dated September 30, 2016 (Doc. 120). The Appeals Court will have jurisdiction pursuant to 28 U.S.C. §1295(a)(1)(appeal from Final Judgment). The District Court has

[2] Facts developed rapidly during the days preceding the full Hearing on the Motion for Preliminary Injunction, wherein the Defendants threatened the Pueblo's vendors directly with enforcement action. Supplemental declarations were filed to fully inform the District Court. The Motion for Preliminary Injunction and all supporting declarations, Docs. 23 thru 24-2, and Docs. 27 and 27-1, are cited and incorporated herein by this reference.

jurisdiction to hear this motion pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure, requiring parties requesting a stay of order and restoration of injunction to first file a motion in district court, and Rule 62(b) and (c) of the Federal Rules of Civil Procedure, which permits a court to stay a final judgement and restore a preliminary injunction pending appeal.

III. RELEVANT FACTS

On July 19, 2005, the Pueblo and the State executed a Class III Gaming Compact (the "Compact"). This Compact was set to expire on June 30, 2015 (Doc. 1). For two years prior to the Compact's expiration, the Pueblo tried in good faith to negotiate a new and reasonable compact with the State, but was unable to do so due to the State's insistence on the inclusion of illegal taxes on the Pueblo's gaming operation.

Prior to the expiration of the Compact, the Pueblo had agreed to comply with conditions set by the United States Attorney's Office concerning how the Pueblo's gaming activities would be regulated after the Compact's expiration and pending the exhaustion of the litigation, including appeal (Doc. 1, Damon Martinez Letter dated 6/30/2015, Doc. 23-10). Consequently, the Pueblo submitted a proposal for Class III gaming to the United States Secretary of the Interior pursuant to IGRA's remedial scheme for tribes unable to reach agreement with the State, which is governed by 25 U.S.C. § 2710(d)(7)(B) and 25 C.F.R. Part 291 (1999). Alleging that the Secretary of the Interior lacked the authority to promulgate regulations under 25 C.F.R. Part 291, on August 7, 2014, the State filed a lawsuit against the United States. *New Mexico v. Department of the Interior*, 1:14-cv-0695 JP/SCY, on appeal 14-2222. On October 17, 2014, Judge Parker granted summary judgment in favor of the State. An appeal to the United States

Court of Appeals for the Tenth Circuit is pending.[3]

On February 26, 2015, the New Mexico Gaming Control Board ("NMGCB") requested to perform its annual gaming compliance review on November 3– 5, 2015. (Doc. 1; Declaration of Joseph M. Talachy, Doc. 23-1; Paulette Becker Letter dated 2/26/2015, Doc. 23-2.) On May 6, 2015, another letter was sent requesting an earlier compliance review in advance of the expiration of the Compact. (Paulette Becker Letter dated 5/6/2015, Doc. 23-3.) In this letter, the Pueblo was asked to provide "[a]ny and all contract [sic] with Class III Gaming Machine Manufacturers, including and [sic] Lease, Purchase and Service Agreements." *Id.* Pursuant to its document production obligations under the Compact, the Pueblo provided the requested vendor contracts on June 24, 2015. *Id.*

On June 30, 2015, the day the Compact expired, the United States Attorney for the District of New Mexico and the National Indian Gaming Commission each issued letters stating that they would forgo enforcement action against the Pueblo as the result of the expiration of the Compact. (Doc. 1; Damon Martinez Letter dated 6/30/2015, Doc. 23-10; Jonodev Chaudhuri Letter dated 6/30/15, Doc. 23-11.) The decisions to withhold enforcement actions were conditioned on the pendency of active litigation before the Tenth Circuit Court of Appeals, the Pueblo's commitment to maintain the status quo of its gaming operations as set forth in the Compact, and the Pueblo's commitment to place in trust, the funds that would have been paid to the State under the Compact if it were still in effect. *Id.*

That same day, the Defendants publicly stated that the United States Attorney's decision

[3] Oral argument occurred on September 28, 2015. More than a year has now elapsed without a decision. The Pueblo anticipates, based upon the Appeals Court's regular practices that a decision will be issued in the very near future.

to allow the Pueblo's casinos to stay open "provides no protection to banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise." (Doc. 23-5). Fifteen days later the Defendants placed in abeyance approval of any license application or renewal for vendors doing business with the Pueblo. *Id.* No other vendor applications were placed in abeyance. *Id.* This discouraged vendors from doing business with the Pueblo (Doc. 23-1; Declaration of Michael Allgeier, Doc. 23-9).

On September 9, 2015, the NMGCB sent letters to the Pueblo's gaming vendors (Doc. 23-14). The letters asserted that the Pueblo was conducting illegal gaming operations and that its vendors were being audited by the NMGCB, and demanded the production of all communications and business records regarding Pueblo gaming operations. *Id.* As a result of this letter, vendor Scientific Games, Inc. refused to provide needed software and servicing of Pueblo gaming machines (Second Suppl. Bailey Declaration, Doc. 27-1). Their refusal caused several gaming machines to be shut down immediately, and will likely to cause many more to be shut down, resulting in substantial loss of revenue. *Id.*

On September 25, 2015, the NMGCB issued citations to all vendors doing business with the Pueblo casinos (Second Suppl. Bailey Declaration, Doc. 30). One vendor refused to show its citations to representatives of the Pueblo as it was concerned about further retaliation from the NMGCB. *Id.* Each of these citations cited the vendor's dealings with Buffalo Thunder Resort and Casino and/or the Pueblo of Pojoaque as the reason for the violation.[4] On September 30, 2015, Scientific Games, Inc. advised the Pueblo that it could not continue to conduct business with the Pueblo due to the enforcement actions taken by the NMGCB due to concerns about how

[4] See Citation Nos. 2486, 2487, 2488.

the actions of the NMGCB could impact their licenses worldwide. *Id.*

> On October 7, 2015 Judge Brack issued a preliminary injunction, stating:
>
> Defendants are enjoined from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo. This Preliminary Injunction will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate in *New Mexico v. Department of the Interior,* 14-2222.

Doc. 32.

Judge Brack blatantly called out the intended purpose of the State's strategy when he said, "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." Doc. 31 at p. 20.

On October 29, 2015, the case was reassigned after the Defendants retained new counsel with a law firm that previously employed Judge Brack, creating a conflict. In December, 2015, Defendants made motions to dismiss all counts and reconsider the preliminary injunction. The Court held a hearing on the Qualified Immunity Motion and Motion to Stay Discovery on January 12, 2016, a hearing on the Sovereign Immunity Motion, the Motion to Stay Discovery, the Motion to Reconsider Injunction, the Motion to Dismiss Counts III and IV, the Motion to Dismiss Count II, and the Motion to Dismiss Count V on March 2, 2016, and a hearing on the Motion to Stay Proceedings and Supplemental Briefing Motion on April 22, 2016. On September 30, 2016, this Court issued a memorandum and order dismissing all counts.

IV. ARGUMENT

A. THE COURT LACKED JURISDICTION TO RULE ON THE PLEADINGS

The Pueblo moves the Court stay its Order as the Court lacked jurisdiction to rule on the pleadings. Defendants' interlocutory appeal of the Order granting preliminary injunction divested the Court of jurisdiction. In its Memorandum and Opinion, the Court wrongly concluded that the Defendants' interlocutory appeal of Judge Brack's preliminary injunction does not divest the Court of jurisdiction to '"proceed to determine the action on the merits" '(Doc. 118, pg. 97). Rather than apply the bright line rule established by the Tenth Circuit in *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990 and its progeny, the Court incorrectly applied *Free Speech v. Fed. Election Comm'n,* 720 F.3d 791 (10th Cir. 2013), to come to this conclusion.

Once a party has filed an appeal from an interlocutory order, the Tenth Circuit has ruled that the District Court is divested of jurisdiction pending the appeal, except in very limited circumstances (such as enforcing a preliminary injunction), or unless the District Court certifies that the appeal is frivolous. *Hardin v. First Cash Financial Services Inc*., 465 F.3d 470 (10th Cir. 2006) (stay pending appeal of denial of motion to compel arbitration); *McCauley v. Haliburton Energy Serv. Inc*., 413 F.3d 1158 (10th Cir. 2005) (stay pending appeal of denial of motion to compel arbitration); *Donges*, 915 F.2d at 576 (applied in the context of denial of summary judgment re qualified immunity defense); *Rose v. Utah State Bar*, 2011 WL 320942 at *1 (D. Utah 2011) (applied in the context of appealing denial of preliminary injunction); *Riches v. Deepwater Horizon Rig*, 2010 WL 3036454 (D. Colo. 2010) (appeal of order denying preliminary injunction was frivolous – case proceeds at district court). *See also Morris v. Noe*,

672 F.3d 1185, 1193 n.2 (10th Cir. 2012) (District Court lacked jurisdiction to rule on argument raised in motion to stay trial because interlocutory appeal was pending an appeal had not been certified as frivolous).

A District Court's lack of jurisdiction results from the Court's failure to certify the appeal as frivolous, even if the appeal is indeed frivolous. In *Donges*, the rule was applied to void an entire trial on the merits that occurred pending the interlocutory appeal. 915 F.2d at 576. The application of this rule "provides a bright-line jurisdictional rule to prevent duplicative waste of resources, to reduce uncertainty and unnecessary litigation and to avoid inconsistent determinations" in multiple fora. *McCauley*, 413 F.3d at 1162. The *Donges* Court explained the rational for the rule:

> We begin with the unassailable general proposition that the filing of a notice of appeal, whether from a true final judgment or from a decision within the collateral order exception, is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. The divestiture of jurisdiction occasioned by the filing of a notice of appeal is especially significant when the appeal is an interlocutory one. Unlike an appeal from a final judgment, an interlocutory appeal disrupts ongoing proceedings in the district court.

915 F.2d at 575, and the simple rigidity of the rule:

> To regain jurisdiction, it must take the affirmative step of certifying the appeal as frivolous or forfeited, and until that step is taken it simply lacks jurisdiction to proceed with the trial. That requirement avoids the confusion or waste of time resulting from having the same issues before two courts at the same time.

Id. at 577-578.

In the present case, no party has sought this Court's certification that Defendants' appeal is frivolous. Absent such a certification, this Court is divested of jurisdiction.

Instead of embracing the bright line rule established by the Appeals Court and

appropriately followed by this Court in other litigation, Judge Browning incorrectly applies *Free Speech.* The plaintiffs in *Free Speech* filed an interlocutory appeal from a denial of their motion for preliminary injunction, and while that appeal was technically pending, the District Court granted the federal defendants' motion to dismiss. *Free Speech* does not even address *Donges*, much less overrule *Donges*. Moreover, a review of the briefs filed by the parties in that litigation indicates that the issue was never presented by either of the parties. *See* Declaration of Scott Crowell (Doc. 111-1). Indeed, the docket sheet indicates that the parties, on March 29, 2013, four days after the plaintiffs filed a notice of appeal from the order granting federal defendants' motion to dismiss, stipulated to dismiss the appeal of the denial of preliminary injunction. *See* Docket Sheets in appeal Case Nos. 12-8078 and 13-8033, attached to Declaration of Scott Crowell (Doc. 111-1) as Exhibits "1" and "2", respectively. The appeal from the denial of preliminary injunctive relief was terminated. To the extent that *Donges* may have been at issue in *Free Speech*, the issue was mooted by the expeditious termination of the earlier appeal.

Moreover, the Tenth Circuit has affirmatively cited *Donges* and its progeny, after the June 25, 2013 issuance of the *Free Speech* decision, as valid law. *See Martinez v. Mares,* 613 Fed.Appx. 731, 735 (10th Cir. 2015). On four occasions, District Courts in the Tenth Circuit, after the June 25, 2013 issuance of *Free Speech*, have affirmatively cited *Donges* and its progeny as the correct rule of law, including this Court in *Anderson Living Trust v. WPX Energy Prod., LLC*, 308 F.R.D. 410, 436 n.15 (D.N.M. 2015). *See Sanchez v. Hartley*, 2014 WL 5904755, *1 (D. Colo. 2014); *Callahan v. Unified Government of Wyandotte County*, 2014 WL 4437559, *1, n.2 (D. Kan. 2014); and *Burgess v. Daniels*, 2013 WL5755190, *2 (D. Colo. 2013). The District Court's embrace of *Free Speech* over *Donges* is not supported by the larger body of Tenth

Circuit case law. At best, *Free Speech* is an anomaly, with a peculiar procedural posture, and does not provide this Court with any guidance or authority to disregard the rigid rule set forth in *Donges* and its progeny.

Indeed, Judge Brack's issuance of the preliminary injunction was based on extensive analysis regarding IGRA's preemptive effect on the State's attempts to exert jurisdiction over the Pueblo's gaming activities. The relevant facts upon which the District Court relied are materially not in dispute. The "confusion or waste of time resulting from having the same issues before two courts at the same time" is avoided by applying *Donges* and its progeny to grant the Pueblo's requested stay.

B. THE FOUR ELEMENTS REQUIRED TO ISSUE A STAY PENDING APPEAL AND RESTORATION OF THE PRELIMINARY INJUNCTION PENDING APPEAL HAVE BEEN MET

If the Court continues to assert that it maintains jurisdiction to rule on the pleadings, a stay should still be ordered because the four elements required to issue a stay pending appeal have been met.

1. ELEMENT 1: THERE IS A SUBSTANTIAL LIKELIHOOD THE PUEBLO WILL PREVAIL ON THE MERITS; THE MERITS ARE SERIOUS, SUBSTANTIAL, & DIFFICULT

This Court ignores evidence presented to the Court that the Defendants actions directly target and have an impact on the Pueblo and its gaming operations. The Court now states that IGRA does not preempt the Defendants' actions; therefore there is no federal right that has been violated on behalf of the Pueblo. This Court declared that "the measure of IGRA's preemptive scope is therefore the dispositive issue" (Doc. 118, pg. 101). This statement fails to account accurately for the state of the law before IGRA. It is well accepted that IGRA represented a

diminishment of tribal rights. Congress acted to diminish the clearly established right of tribes to game as articulated in *California v. Cabazon Band of Mission Indians,* in which the United States Supreme Court found, even before the passage of IGRA, that State regulation of on-reservation gaming activity was pre-empted. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 222 (1987). The Court stated that "State regulation would impermissibly infringe on tribal government …" *Id* at 222.[5]

This Court states that because the State is simply enforcing its historic police powers, off-reservation, then there is no interference with the preemptive force of federal law under IGRA and the field of governance of gaming activities on Indian lands (Doc. 118, pg. 103). This statement is clearly wrong when read against the backdrop of federal precedence before IGRA. The rights established in *Cabazon* were not extinguished with the passage of IGRA. Nor was the "pre-emptive force of federal and tribal interests," *Id* at 221, diminished by its passage. If the State wants to regulate activity occurring on the Pueblo's Indian lands, it must negotiate a tribal-state compact in good faith.

According to Judge Brack's preliminary injunction, the Pueblo established that the Defendants are "interfering with the Pueblo's federal protected rights to tribal sovereignty and the ability to conduct their gaming activities" (Doc. 31, pg. 15). This Court stated that "IGRA would preempt only the Gaming Board's direct enforcement action against the Pojoaque Pueblo;

[5] This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. The decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

characterizing the scenario this way, because the Gaming Board took no such action here, there is no preemption" (Doc. 118, pg. 104). This statement is incompatible with existing Supreme Court precedents. "State jurisdiction is pre-empted … if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Cabazon,* 480 U.S. at 216. This Court's analysis of the merits of the case are premised on many assumptions the Court made in direct contradiction to Judge Brack's conclusions, made only one year ago. First, the Court assumes that the State is relying on the United States Attorney's statement that the Pueblo is gaming illegally. Second, the Court assumes that the Pueblo is gaming illegally. Third, the Court assumes that any actions taken by the State off-reservation do not affect the Pueblo's gaming on-reservation.

The Court's assumption that the Pueblo is operating in violation of federal law, premised on the statements of the United States Attorney for the District of New Mexico, are flawed. This Court makes a determination that the Pueblo is operating illegally, ignoring the related litigation and the Defendants' actions which led the Pueblo to operate without a compact. The Pueblo would not be operating without a compact but for the Defendants' bad faith negotiations; the Defendants' actions to raise Eleventh Amendment immunity when the Pueblo sued for bad faith; and the Defendants' actions to sue the federal government when the Pueblo attempted to go through the Secretarial Procedures process.

The Court now concludes that because the Defendants are not taking action on Indian land, then they are not interfering with IGRA's preemptive force, and therefore are not taking any regulatory action directly against the Pueblo. In fact, Judge Brack previously recognized that "Defendants' protestations that the regulation of vendors doing business with the Pueblo does

not constitute regulation of the Pueblo's gaming activities are disingenuous and inconsistent with the record… [t]he undisputed evidence established that the Pueblo will lose significant revenue and its Casinos may be shut down due to Defendants' intimidation of the Pueblo vendors" (Doc. 31, pg. 20). This Court now asserts that the Defendants' actions do not prohibit the Pueblo from continuing its gaming operations, nor do they prevent vendors from supplying equipment to the Pueblo for such operations (Doc. 118, pg. 107). Nothing could be further from the truth. As previously demonstrated, the Defendants' interference with the Pueblo's vendors will force the vendors to stop doing business with the Pueblo. This in turn will cause the Pueblo to lose revenue and force it into a position where it either signs a compact or shuts down its casinos. (Doc. 24-2, pg. 5-7). Judge Browning's analysis would support the State building a barrier around the Reservation, keeping any and all from entering or leaving, so long as the barriers are placed just outside the Pueblo boundary. Judge Browning goes so far as to say the Defendants' motive is irrelevant. In other words, if the State's motive was to starve the Tribe into extinction, that would be fine so long as the State's actions occur off-reservation.

The Pueblo will prevail on the merits because the State lacks jurisdiction over gaming activities on the Pueblo's Indian lands absent a compact, and because IGRA pre-empts the Defendants' actions, despite their being described as "off-reservation." The Tenth Circuit stated, "Indeed, the very structure of the IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming." *United Keetoowah Band of Cherokee v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), *See also Alabama v. PCI Gaming Authority et al.,* 801 F.3d 1278 (11th Cir. 2015); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999) (*"Seminole II*"); *Sycuan Band*

v. Roache, 54 F.2d 535, 538 (9th Cir. 1994) ("The Bands have not consented to the transfer of criminal jurisdiction to the State"). As far as IGRA is concerned, therefore, the State had no authority to prosecute the Bands' employees for conducting the Bands' gaming. Having correctly so concluded, the district court was well within its equitable power to enjoin the prosecutions"); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 909 (9th Cir. 2002) (State Attorney Generals lacked jurisdiction to send warning letters to communications companies that doing business with Tribally operated lottery was illegal); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990) ("Permitting South Dakota to apply its substantive law to the blackjack game here, which is properly classified as class II gaming, conflicts with congressional intent").

The New Mexico Supreme Court has even acknowledged the State's lack of jurisdiction over non-compacted gaming in rejecting an equal protection challenge brought by charitable and fraternal organizations over the exchange of free games for actual pull-tabs. In *Am. Legion Post # 49 v. Hughs*, the New Mexico Supreme Court said the following:

> Even if it is true that the State does not enforce its gambling laws against Indians, there is a compelling reason for failing to do so. The State of New Mexico has no jurisdiction to enforce its gambling laws in Indian Territory. . . . [T]he United States has provided for exclusive federal jurisdiction over criminal prosecutions for violations of those laws, except in limited circumstances not applicable to this case.

1994-NMCA-153, ¶ 16 (citing *Sycuan Band v. Roache*, infra). The law is consistent and clear: the State's jurisdiction over the Pueblo's gaming activities ended on June 30, 2015, when the Compact expired. The State no longer has jurisdiction over Pueblo gaming activities.

Judge Browning dismissed three counts based on alleged deficiencies in the allegations of the Complaint. Count II of the Complaint was dismissed by Judge Browning reasoning it is

based on the Supremacy Clause rather than on the Court's inherent equitable jurisdiction (doc.188 at 122-123). That is incorrect. The Pueblo asserts jurisdiction pursuant to "its inherent jurisdiction to hear claims for violation of the Supremacy Clause of the United States Constitution." (Doc. 1 at ¶ 10). The Prayer for Relief, specific to Count II requests "prospective *equitable* relief as may be just and equitable, including ancillary relief. (Doc. 1, pg. 38-39). Those allegations are consistent with holdings in *Armstrong v. Exceptional Child Ctr., Inc*. 135 S. Ct. 1378 (2015) and *Tohono O'odham Nation v. Ducey*, 130 F.3d 1301 (D. Ariz. 2015).

Even if Judge Browning were correct, then it was still error to dismiss with prejudice as the defect could have easily been cured upon dismissal with leave to amend, which is particularly appropriate here as the dismissal is not based on the merits, but rather on a finding of no jurisdiction. *See Brereton v. Bountiful City Corp*., 434 F.3d 1214, 1216-1217 (10th Cir. 2006). Similarly, Judge Browning dismissed Counts III and IV (Doc. 118, pg.125-126), sounding in 42 U.S.C. §§ 1983 and 1985, because the Complaint does not allege class-based discriminatory animus. That too, is not true. The entirety of this lawsuit is about the Defendants' deprival of the Pueblo's rights flowing from their status as an Indian Tribe and individual Indians. Even if correct, however, the defect could be resolved by dismissal with leave to amend to expressly allege discriminatory animus. *Brereton,* 434 F.3d at 1216-1217.

Clear error is also found in the Court's determination that it need not conduct severance analysis to determine that the Pueblo is operating illegally (Doc.118, pg. 120-121). Despite that conclusion, Judge Browning correctly states that his analysis in addressing all of the motions before him should be to implement the intentions of Congress, but that is exactly the opposite of what he has done. The Court's ruling rewards the State for negotiating with impunity. If allowed

to stand, it will have the coercive effect of forcing the Pueblo into an illegal compact or shutter its Class III gaming. The State can easily avoid the impacts of a decision in favor of the Pueblo by simply consenting to the Pueblo's suit under IGRA. In contrast, the decision leaves the Pueblo without any viable remedy. Unmistakably, the decision if allowed to stand, is grossly "upsetting the careful balance that Congress has created." Judge Browning seeks to avoid rewriting IGRA, but that is precisely what he has done with this decision.

There are numerous other errors made by Judge Browning in his 147-page decision and the Pueblo is continuing to review it. The urgency of the circumstances, however, prevents the Pueblo from providing an exhaustive list of all of the errors. Those errors expressly identified above, however, are each and collectively sufficient to establish the threshold required in a showing of a likelihood to prevail on appeal and warrant the Court granting the instant Motion to Stay.

Finally, it is actually not necessary for this Court to agree that the Pueblo will prevail on the merits because this Court's Order is in direct contradiction to the previous Memorandum and Opinion Order filed by Judge Brack, as well as established tenets of federal Indian law. This Court's decision has created "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *City of Chanute*, 754 F.2d at 314. Therefore, while there is ample evidence to suggest the Pueblo would indeed prevail on the merits, the Pueblo need only show that the other elements of a stay have been met.

2. ELEMENT 2: IRREPARABLE HARM

To demonstrate irreparable harm, the injury must be "both certain and great," not "merely

serious or substantial"; incapable of being "adequately atoned for in money"; or of the sort that "the district court cannot remedy following a final determination on the merits." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); *Port City Props. v. Union Pac. R.R. Co.*, 528 F.3d 1186, 1190 (10th Cir. 2008). A plaintiff satisfies this requirement by demonstrating "a significant risk that it will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009); *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). The movant need not establish an actual injury or the certainty of an injury occurring; it is enough to show a strong threat of irreparable injury before trial (or pending appeal). *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (quoting 11C Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 437-38 (1973)).

Specific to Indian country, the prospect of significant interference with tribal self-governance satisfies the irreparable harm criteria for preliminary injunctive relief and should similarly satisfy the same criteria for stay pending appeal. In *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 1255 (10th Cir. 2006), Kansas was enjoined from enforcing its gaming laws on Wyandotte Indian lands. In *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 716 (10th Cir. 1989), the court concluded that the inability to offer bingo would cause irreparable loss of governmental revenue and jobs, interfering with tribal self-governance. In *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) the court reversed the District Court's denial of preliminary injunction where Utah's unlawful prosecution of a tribal member interfered with tribal sovereignty. And the list of cases goes on. *See Prairie Band*, 253 F.3d at 1250 (finding irreparable harm to tribal interests in governing motor vehicles within its reservation

boundaries); *Navajo Health Foundation-Sage Mem. v. Burwell*, 100 F. Supp. 3d 1122, 1171 (D.N.M. 2015); (inability to continue critical medical care to tribal membership); *Sac and Fox*, 905 F. Supp. 904.907 (D. Kansas 1995) (lost fuels tax revenue would devastate funding of tribal governmental programs); *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226 (D. Kan. 2002); *See also Poarch Band of Creek Indians v. Hildreth*, 2015 WL 4469479 (S.D. Ala. 2015) ("By imposing taxes on the Tribal Trust Property, Hildreth would be exercising jurisdiction over the Tribe and directly assaulting its sovereign immunity," citing *Wyandotte Nation*).

Moreover, the jurisdictional basis for the claims against the State officials in their official capacities is the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which is limited to prospective equitable relief. Courts have found that the inability to recover monetary damages because of state Eleventh Amendment immunity renders the harm to be irreparable for purposes of preliminary injunctive relief. *Prairie Band*, 253 F.3d at 1251; *Kansas Health Care Ass'n Inc.*, *v. Kansas Dep't of Soc. and Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Sac & Fox*, 905 F. Supp. at 907. Even in the non-Indian context, where monetary damages are possible, courts will still find irreparable harm in situations similar to those currently facing the Pueblo, where the consequences of losses are extremely serious and devastating. *See Doran v. Salem Inn, Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561 (1975); *Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 434 U.S. 1316, 1322, 98 S. Ct. 10 (1977); *Tri-State Gen. & Transmission Ass'n*, *v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986).

Judge Brack has already found that the Pueblo will suffer irreparable harm if injunctive relief is not granted. Judge Browning's rulings do not disturb those findings. If the Court's

October 7, 2015 Preliminary Injunction is vacated, Defendants are likely to pursue the same course of action that was halted with the issuance of the preliminary injunction. Defendants have stated that "enforcement measures may stem from licensees' participation in the Pueblo's post-June 30 illegal conduct of gaming operations at its own casino," and that the State will "address ... the licensees' continued privilege to engage in business with gaming facilities elsewhere in the State." (Doc. 64, pg. 4). Since the Preliminary Injunction was issued, the Defendants have not taken any formal action on licensees doing business with the Pueblo. Defendants have also claimed that the Preliminary Injunction does not allow them to exercise their sovereign interest in enforcing the State's gaming laws and regulations. It is extremely likely that the Defendants will take action against the licensees if the Preliminary Injunction is vacated. This action may come in the form of citations or other adverse proceedings or decisions.

The Pueblo has previously outlined the injury that is likely to occur without the Preliminary Injunction in place (Doc. 23). The issuance of citations or other adverse action, for reasons of doing business with the Pueblo, would likely cause vendors to cease business with the Pueblo. Defendants' assertion that vendors can still do business with the Pueblo even if they are sanctioned by the State is misleading. Gaming vendors operate nationwide and conduct business in numerous jurisdictions. License revocation or other penalties would likely cause a domino effect on a State licensee's ability to operate business around the country. The reality is that if a vendor is threatened with sanctions by the State, it will likely cease doing business with the Pueblo. Absent the continued business of its contracted vendors, the Pueblo would be forced to cease operations. As Judge Brack recognized, such actions constitute a threat of irreparable harm to the Pueblo (Doc. 31).

Gaming revenues provide a stable revenue stream for the Pueblo. This funding source is critical for essential governmental services and programs. Gaming revenues also create a source of strength and stability for Pueblo economic development activity. Closure of the Pueblo's gaming operations would cause measurable, immediate and irreparable harm, including layoffs at both gaming and other commercial enterprises, as well as reductions in governmental services. *See* Doc. 23-1, Talachy Decl., ¶ 4. The result would cripple the Pueblo's governmental operations and its economy. However, not only would the Pueblo be affected. The Pojoaque Valley's entire regional economy as well as greater northern New Mexico would be devastated. *See id*., ¶¶ 4, 14, 17-18, 23, 28, 31; Doc. 23-9, Allgeier Decl., ¶¶ 41-43.

a. Immediate Impacts/Irreparable Harm to Pueblo Gaming Operations

Before the Preliminary Injunction was in place, Scientific Games, Inc. and International Game Technology (IGT) ceased doing business with the Pueblo because of Defendants' actions. If the Preliminary Injunction is lifted, the Pueblo anticipates that the vendors will again cease doing business with the Pueblo. Further, the Pueblo will not be able to enter into contracts for new game purchases, new game leases, and conversions of older games to new machines. This will have an immediate negative effect on gaming revenue, as the Pueblo's games will be seen as old and outdated by its customers, who will likely choose to go elsewhere. *See* Doc. 23-9, Allgeier Decl., ¶¶ 26-28. Operations will immediately lose 17% of their current revenue from an inability to support existing games. *Id*.

b. Immediate Impacts/ Irreparable Harm to Pueblo Businesses and the Greater Economy

If the Pueblo is not able to effectively conduct Class III gaming operations, it will face immediate impacts on and irreparable harm to its economy. The Pueblo is the largest private

employer north of Santa Fe, providing 1,200 New Mexico residents with employment and employment-related benefits. *See* Doc. 23-1, Talachy Decl., ¶ 3. As an employer, the Pueblo pays a total of $46,300,000 in combined annual payroll and benefits. The Pueblo's gaming/resort businesses alone employ nearly 800 individuals with annual payroll and benefits of $32,500,000. The inability to conduct Class III gaming operations would not only result in the loss of highly-trained employees, but for some, the Pueblo's inability to continue to provide employment, career training, and employment-related benefits would force them to rely upon state and federal assistance.

The Pueblo's gaming operations have a significant multiplier effect. Many of the casino employees reside at Pueblo-owned commercial rental properties. These employees generate much needed non-gaming revenue and gross receipts taxes for both Pueblo and non-Pueblo businesses. *See* Doc. 23-1, Talachy Decl., ¶ 32. Many off-reservation impacts follow from the Pueblo's gaming operations. Such impacts directly and indirectly generate economic activity within the State through vendor and service agreements, goods and services purchases, and tourism activities. Vendors and contractors doing business with the Pueblo pay state and local taxes and also purchase goods and services throughout the entire State. *See* Doc. 23-1, Talachy Decl., ¶ 31. This economic activity and the associated taxes will decrease exponentially.

c. Immediate Harm to the Pueblo's Economic Infrastructure

The Pueblo's inability to effectively conduct Class III gaming operations would cause immediate harm to existing financial agreements, would interrupt debt service payments and obligations, and could result in the Pueblo violating multiple agreements, both gaming and non-gaming related. Economic security would be lost. *See* Doc. 23-1, Talachy Decl., ¶¶ 22-23. A

portion of the Pueblo's taxes and tribal distributions from gaming activities are related to note financing activities and debt agreements with outside institutions. *See id.*, ¶ 23. The disruption of non-gaming financial agreements would result in the loss of employee and financial confidence, and would interfere with existing financial relationships, manifestly jeopardizing the economic security of existing, non-gaming commercial enterprises. *Id.*

d. Greater Impacts to Essential Governmental Operations and Programs

IGRA requires that gaming revenues be used first and foremost to fund tribal government operations or programs. 25 U.S.C. § 2710(b)(2)(B)(i). The Pueblo is fully committed to fulfilling this requirement. The Pueblo receives approximately $4,200,000 annually from its gaming operations which is used to provide essential governmental services and programs to tribal members. *See* Doc. 23-1, Talachy Decl., ¶ 13. Without Class III gaming revenue, these essential governmental services and programs would be cut or eliminated. Moreover, because of the Pueblo's location and long history of contributing to the larger community, its gaming revenues also benefit the entire Pojoaque Valley, including non-Indian residents, visitors, and neighbors, surrounding counties, and ironically, the State. *See id.*, ¶ 18. The Pueblo's gaming revenues provide law enforcement; fire, rescue, and other emergency services; utility, water and infrastructure development and maintenance; and community health and wellness services. *Id.*

The Pueblo spends an additional $3,500,000 on early childhood development, its Senior Citizen Center, social services, community health services, and culture revitalization programs. The Poeh Museum and Cultural Center is fully funded by gaming revenues and grant funding. Efforts to revitalize and teach the Pueblo's native language, traditional song and dance, and material culture will also be impacted by lost gaming revenue. *See id.*, ¶¶ 14-17. All of the

Pueblo's businesses through taxes, rents, contributed capital, etc., contribute 58% of the total cost to support these programs. *See id*., ¶ 33. The remainder comes from grants and governmental contracts, though the State denied all capital outlay requests for the Pueblo in 2014. *Id.* If tribal and non-tribal residents in the Pojoaque Valley are unable to access Pueblo services, these individuals will simply look for the services elsewhere--with non-Pueblo local, county and state sources.

e. Irreparable Harm to the Pueblo's Economy—The Domino Effect

The Pueblo has invested in its people by funding higher education and private schooling for tribal members. The Pueblo's Education Department is 100% subsidized by gaming revenues. If the Pueblo cannot effectively conduct Class III gaming operations, education for all tribal members enrolled within the program will be interrupted and most students will be unable to continue. *See* Doc. 23-1, Talachy Decl., ¶¶ 15, 34.

3. ELEMENT 3: THE STATE IS NOT IRREPARABLY HARMED IN ANY MATERIAL MANNER IF THE MOTION FOR STAY PENDING APPEAL IS GRANTED

Any harm caused to the Defendants by granting the stay pending appeal is substantially outweighed by the harm that the Pueblo will suffer if the Court does not grant the stay. The District Court in *Wyandotte* reasoned, "in the context of entering a preliminary injunction, the Tribe is faced with more devastating losses than the State Defendants' temporary inability to enforce its state gaming laws. 337 F. Supp. 2d at 1270. In affirming this case, the Tenth Circuit reasoned, "the harm caused by granting the injunction to Kansas is minimal at best whereas the harm to the Wyandotte's sovereignty and well-being caused by permitting the state to continue exercising jurisdiction is quite substantial." *Wyandotte*, 443 F.3d at 1255.

There is no harm of which the Pueblo is aware that the State will suffer if the requested relief is granted. The Pueblo's gaming activities have continued since June 30, 2015, in exactly the same manner that they occurred prior to June 30, 2015, except that, per the request of the United States Attorney's Office (the "USAO"), the gaming tax previously paid to the State is paid into an independent trust account.

The State argues that the Preliminary Injunction poses a threat to its sovereign interest to enforce its gaming laws (Doc. 64, pg. 4). But the State could cure any such threat by negotiating in good faith with the Pueblo for a Class III gaming compact as required by IGRA. The State could also choose to waive its immunity for the limited purpose of a lawsuit to determine whether it negotiated in good faith, which would provide resolution to a longstanding dispute. Additionally, the Pueblo sought to involve the State in discussions over Class III gaming procedures issued by the Secretary of the Interior. Instead of engaging in the process, the State filed suit against the United States claiming that the procedures were unlawful. The Pueblo has offered these various options to the State in hopes of moving forward, but the State only continues its fight. Accordingly, the balance of harms tips overwhelmingly in favor of granting the requested relief. Any intangible harm incurred by the State does not negate the devastating and irreparable harm the Pueblo will suffer if the requested relief is denied.

4. ELEMENT 4: A STAY PENDING APPEAL WILL ADVANCE AND ENHANCE PUBLIC INTEREST

The public's interest in issuing a stay pending appeal weighs heavily in favor of the Pueblo. The public policy interests intended to be advanced by IGRA include providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

The public interest in assuring the continued presence of economic development and employment, social and education programs and benefits, and life and public safety services that are funded by gaming revenue generated on Indian lands is significant. The public also has a genuine interest in helping to assure tribal self-government, self-sufficiency and self-determination. As Judge Brack noted, the Tenth Circuit has expressed that "ensuring that Indians do not suffer interference with their efforts to 'develop . . . strong self-government'" is the "paramount federal policy". Doc. 31 at 22 (citing *Seneca–Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989)).

VI. CONCLUSION

The four criteria for a stay pending appeal have been overwhelmingly proven herein. At a minimum, the substantial likelihood of prevailing on the merits involves "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *See McClendon*, 79 F.3d at 1020-21. Consequently, this Court should enter a stay of its Memorandum Opinion and Order and Final Judgment (Docs. 118, 119) pending appeal. This will have the effect of restoring, pending appeal, the October 7, 2015, Order of Preliminary Injunction. Such a stay will continue to prohibit the Defendants from undertaking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or institutes enforcement against any licensee in good standing with the NMGCB, based wholly or in part on grounds that such licensee is conducting business with the Pueblo.

If the Court is inclined to deny the Motion to Stay pending appeal, the Court should grant a sixty-day stay to allow the Pueblo and the Tenth Circuit sufficient time to consider the Tribe's Motion to Stay to the Tenth Circuit.

DATED: October 4, 2016

BY:

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on October 4, 2016, I caused the **PUEBLO OF POJOAQUE AND JOSEPH TALACHY'S MOTION TO STAY THE ORDER AND RESTORE THE PRELIMINARY INJUNCTION PENDING APPEAL AND DECLARATION OF SCOTT CROWELL** to be served upon counsel of record through the Court's electronic service system.

/s/Scott Crowell
Scott Crowell, AZ Bar No. 009654**