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.

Case No.: 1:15-cv-00625 JOB-GBW

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL BRIEF ON MOTION TO STAY ORDER

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Plaintiffs, PUEBLO OF POJOAQUE, a federally-recognized Indian tribe, and JOSEPH M. TALACHY, Governor of the Pueblo (collectively referred to as the "Pueblo") submit this reply in support of the Pueblo's Motion for Leave to File Supplemental Brief ("Motion", Doc. 140) in support of the Pueblo's motion to stay this Court's September 30, 2016, Memorandum Opinion and Order, and restore the Preliminary Injunction pending appeal (Doc. 123). Defendants STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFREY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, AND CARL E. LONDENE (collectively, "Defendants") submitted a Response (Doc. 141), which in part asserts that Defendants oppose the Motion because the Pueblo's brief goes beyond issues that arose during the Court's October 27, 2016 hearing, and addresses tangential issues that are not dispositive of the Pueblo's still-pending motion to stay (*id.* at 1). Defendants' response also states: "If the Court is inclined to grant the Motion, or consider the proposed supplemental brief that Plaintiffs attach to the Motion, Defendants ask that the Court similarly consider Defendants' proposed supplemental response" (*id.* at 1-2). In reply, and if the Court considers Defendants' proposed supplemental response, the Pueblo asks that the Court consider the analysis set forth below.

I. EXPLANATION OF "DEEMED APPROVED LETTERS"

As noted in the Motion, the Pueblo sought to address questions raised by the Court at the hearing regarding "deemed approved" letters by the Department of the Interior ("Department") (Doc. 140 at 2). Because the Court at the hearing noted that "these letters are not familiar to me" and asked the Pueblo if it had "attached one of them as an example[,]" it was not beyond issues that arose at the hearing for the Pueblo to submit and discuss such letters. (*See* 138-3 at 161-62,

10/27/16 Tr.) Also, discussion of such letters is relevant to the motion to stay because the fact that the Department has "remain[ed] skeptical about the overall value of the 2015 Compacts' additional claimed concessions" (Doc. 140-15, Ex. M at 2, Department letter to Pueblo of Sandia) helps demonstrate the harm here if the stay is not granted and the Pueblo is forced to sign the 2015 Compact. (*See* Doc. 131 at 8-9 & n.4.)

The Pueblo noted in its proposed supplemental brief that the Department did not affirmatively approve the 2015 Compact for other tribes, and instead issued letters explaining why the 2015 Compacts were going into effect as "deemed approved" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"). (Doc. 140-1 at 2-3.) Defendants respond that those letters were not enough to show harm as a result of the 2015 Compacts violating IGRA, because the Department did not disapprove or sever the disputed provisions of the 2015 Compacts, as the Department did with proposed compacts for the Menominee Tribe and the Kialegee Tribal Town. (*See* Doc. 141-1 at 5-6 & Exs. A & B.)

The Department's Menominee letter found that proposed revenue sharing payments were illegal because the State of Wisconsin had failed to provide a "meaningful concession" with a "substantial economic benefit" to the Menominee Tribe. (*See* Doc. 141-1, Ex. A at 2-3.) In turn, Defendants cite the Kialegee letter to assert that the Department may sever a proposed compact provision that violates IGRA, which the Department did not do for the 2015 New Mexico Compact. (*See* Doc. 141-1 at 6.) However, the Department could sever a provision of the Kialegee compact only because the parties there agreed that that provision was severable (Doc. 141-1, Ex. B at 4), whereas here, the standard form 2015 New Mexico Compact provides that its revenue-sharing provision is not severable (*see* 2015 "Indian Gaming Compact Between the

State of New Mexico and the _____" §§ 11, 19[1]). Also, the Department allowed the 2015 New Mexico Compacts to be deemed approved only to the extent that they were consistent with IGRA, per 25 U.S.C. Section 2710(d)(8)(C). Here, the Pueblo has not sought any meaningful concession by the State in the form of "exclusivity" or otherwise, and has objected to the State's position that it will not execute a compact without a State tax on the Pueblo's gaming revenue (Doc. 1 ¶ 4).

The Department's "deemed approved" letters reinforce the Pueblo's position that a stay is warranted here until after the Tenth Circuit issues its mandate in *New Mexico v. Department of the Interior*, Nos. 14-2222/14-2219 (10th Cir. filed December 12, 2014), so that the Pueblo is allowed its day in court in the Tenth Circuit without this Court "putting a thumb on the scale" and "upsetting the careful balance that Congress created." (Doc. 118 at 121.) Only granting a stay to allow resolution of the already argued appeal will preserve the status quo for true negotiations under IGRA, as sought by the Department and the Pueblo.

II. ANALYSIS OF PRELIMINARY INJUNCTION CASES CITED BY DEFENDANTS FOR THE FIRST TIME DURING THE OCTOBER 27, 2016 HEARING

The supplemental brief next discussed two cases cited by Defendants for the first time during the October 27 hearing, regarding whether the dismissal of this case rendered moot the preliminary injunction notwithstanding the interlocutory appeal. (Doc. 140-1 at 3-4; *see* Doc.

[1] Pursuant to Federal Rule of Evidence 201(c)(2), the Pueblo hereby requests that the Court take judicial notice of the 2015 form compact entered into between the State of New Mexico and various individual Indian tribes, pueblos, and nations, which is available at the website of the New Mexico Gaming Control Board at http://www.nmgcb.org/uploads/FileLinks/dbeb00db5d484afc9412b5a6e2bf51a0/2015_Compact.pdf

138-3 at 63, 10/27/16 Tr.) Defendants understandably do not assert that the Pueblo's discussion of those cases is beyond the hearing or tangential to relevant issues. However, the Tenth Circuit's subsequent dismissal of Defendants' interlocutory appeal of the preliminary injunction renders moot Defendants' discussion of those cases during the October 27 hearing, and Defendants' supplemental arguments about those cases (Doc. 141-1 at 2-4). Moreover, the dismissal of the interlocutory appeal results in a situation with no injunction or stay in effect, such that the State claims it can now move forward with unilateral action against vendors doing business with the Pueblo, which could seriously harm the Pueblo's sovereign and economic interests. (*See* Doc. 123 at 18-25.) This development underscores the urgency of the Pueblo's motion to stay.

III. RELEVANCE OF *DINÉ CARE v. JEWELL*

Given that Defendants acknowledge that this Court referenced *Diné Citizens Against Ruining Our Environment v. Jewell* ("*Diné CARE*"), 839 F.3d 1276 (10th Cir. 2016), at the October 27 hearing (Doc. 141-1 at 4), and the Court there noted that "we may all want to take a look at that when we're done" (Doc. 138-3 at 103, 10/27/16 Tr.), Defendants understandably do not contend that the Pueblo's supplemental briefing about that case is somehow beyond the hearing or tangential. Instead, Defendants contend that the long-standing standards of this Circuit for motions for stay pending appeal no longer allow for a relaxed standard when "questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation", citing two cases concerning preliminary injunctions, *Dine CARE* and *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

Defendants assert that the standards for granting preliminary injunctions and stays pending appeal are the same (Doc. 141-1 at 4-5). However, that contention improperly overlooks that while "[t]here is substantial overlap between these [factors for granting a stay] and the factors governing preliminary injunctions," it is "not because the two are one and the same[.]" *Nken v. Holder*, 556 U.S. 418, __, 129 S. Ct. 1749, 1761 (2009). Moreover, the 2001 case cited by Defendants stating that the same standards apply to both motions for preliminary injunction and motions for stay pending appeal, *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001), was decided seven years before *Winter*, in the context of applying the more liberal standard, not the more restrictive standard at issue in *Winter* and *Dine CARE.* The Tenth Circuit has not held that the standards are the same in the wake of *Winter,* notwithstanding *Nken*.

No Court within the Tenth Circuit has eliminated or restricted the more liberal standard for stays pending appeal, as opposed to preliminary injunctions, because of *Winter*. As recently as this year, District Courts within the Tenth Circuit continue to apply the more liberal test for stays pending appeal. *See Farrell Cooper Mining Co. v. Dept. of the Interior*, 2016 WL 4097091, at *1 & n.1 (E.D. Okla. Aug. 1, 2016) (citing *F.T.C. v. Mainstream Marketing Serv., Inc.* ("*Mainstream Marketing*"), 345 F.3d 850, 852-53 (10th Cir. 2003)); *In re Neighbors*, 2016 WL 805906, at *2 & n.15 (Bnkr. D. Kan. March 1, 2016) (citing same). Numerous other in-Circuit post-*Winter* decisions adhere to pre-*Winter* Tenth Circuit case law on this standard. *See In re Akbari-Shamirzadi*, 72 Collier Bankr. Cas. 2d 917, 2014 WL 5798932, at *2 (Bnkr. D.N.M. Nov. 7, 2014) (citing *Mainstream Marketing* and *F.T.C. v. Foster*, 2007 WL 3023158, at *1 (10th Cir. 2007)); *E.E.O.C. v. Beverage Distributors Co*., 30 A.D. Cases 1906, 2014 WL 5591430, at *2 (D. Colo. Nov. 1, 2014) (citing *Mainstream Marketing*); *Evans v. Utah*, 21 F. Supp. 3d 1192,

1211-12 (D. Utah 2014) (citing *Mainstream Marketing* and *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996)); *In re Sunland, Inc*., 507 B.R. 753, 765 n.1 (Bankr. D.N.M. 2014) (citing *Mainstream Marketing* and *Foster*); Community *Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1209-10 (D. Utah 2014); *Tri-State Truck Ins., Ltd. v. First Nat. Bank of Wamego*, 2011 WL 4553071, at *2 (D. Kan. Sept. 29, 2011) (citing *Mainstream Marketing* and *McClendon*); *Façonnable USA Corp. v. Does 1-10*, 2011 WL 2173736, at *1 (D. Colo. June 2, 2011) (citing *Mainstream Marketing* and *Prairie Band of Potawatomi Indians v. Pierce* ("*Prairie Band*"), 253 F.3d 1234, 1246-47 (10th Cir. 2001)); *Lafalier v. Cinebar Service Co., Inc.*, 2010 WL 1816377, at *1 (N.D. Okla. April 30, 2010) (citing *Mainstream Marketing*).

Inherent in every motion to stay an order pending appeal is that the moving party lost in the District Court, meaning that the District Court already ruled against the party on the merits. To apply the same standard to motions to stay pending appeal, as is applied to preliminary injunctions, would result in every such motion to stay being denied simply as a matter of course, and would render futile the requirement in Federal Rule of Appellate Procedure 8(a)(1) that the motion be made first at the District Court. The very fact that Judge Brack's Opinion (Doc. 31) and Judge Browning's Opinion (Doc. 118) reach dramatically different results on identical questions of law and fact should raise concern that Judge Browning may well be wrong in his analysis, and be reversed or vacated on appeal. To upset the status quo and expose the Pueblo to immense and irreparable harm when the "'questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation[,]'" *Mainstream Marketing*, 345 F.3d at 853 (quoting *Prairie Band*, 253 F.3d at 1246-47) would be a grave injustice. Such a grave injustice can be avoided only and

easily by issuance of a stay pending resolution of the related Tenth Circuit case that was argued over a year ago.

In essence, Defendants ask this Court to determine that *Winter* impliedly overruled *Mainstream Marketing* and *Prairie Band,* even though *Nken* later recognized that stays and preliminary injunctions are "not . . . one and the same[.]" *Nken*, 129 S. Ct. at 1761. Such a determination by this Court is not tenable. It also does not comport with proper application of *stare decisis.* Because a panel of the Tenth Circuit lacks authority to overrule prior circuit panel decisions absent an intervening overruling Supreme Court decision, *United States v. Burns*, 800 F.3d 1258, 1261 n.6 (10th Cir. 2015), this Court also must lack that authority.

Finally, Defendants improperly contend that the Pueblo "must meet the high burden of demonstrating a substantial likelihood of success on the merits, not a lesser standard, when seeking to enjoin governmental action taken in the public interest pursuant to a statutory or regulatory scheme." (Doc. 141-1 at 5.) Defendants concede that previously cited cases did not involve the situation here, with three different gaming statutory and regulatory schemes at issue, namely, the Pueblo's own regulation, federal regulation under IGRA, and the State's regulation of its own activities. All three governments have legitimate interests in implementing their laws. Defendants cite *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), for the proposition that competing regulatory schemes do not change the applicability of the higher burden. Defendants fail to note, however, that the movants in *Hobby Lobby* had failed to establish that conflicting regulatory schemes existed. *Id* at *2. In contrast, the policy reasons for applying a more liberal standard here are compelling. The crux of the Pueblo's claims are that allowing the State to take action against vendors doing business with the Pueblo disrupts the

governmental regulatory scheme established by Congress in IGRA. Regardless of how the Court rules on the Motion to Stay, there will be disruption to a governmental regulatory scheme. The policy reasons for applying a higher standard to injunctions impacting regulatory schemes are not present here.

IV. NEW MEXICO REGULATIONS ON TRANSPORTATION OF GAMING DEVICES

Defendants appropriately do not object that the Pueblo's proposed supplemental briefing on New Mexico gaming device transportation regulations is somehow tangential to or beyond the scope of the October 27 hearing (Doc. 140-1 at 7-8). At the hearing, the Pueblo noted that Defendants ignored or overlooked those regulations when they asserted that the Pueblo would not be harmed by state action against the Pueblo's current gaming device vendors because the Pueblo could use other vendors not licensed in New Mexico. (*See* Doc. 138-3 at 136-37, 162, 10/27/16 Tr.) Defendants instead respond that the restriction on transportation of gaming devices into New Mexico can be avoided so long as the vendor does not have a New Mexico license (Doc. 141-1 at 7). Such a position contravenes the plain language of the regulation. The New Mexico Administrative Code provides that "[n]o person shall initiate transport of any gaming device into the state other than a licensed manufacturer or distributor." N.M.A.C. § 15.1.16(A). It further provides that "A gaming device is shipped or transported into the state when the starting point for shipping or transporting begins outside the state and terminates in the state." *Id.* § 15.1.16(B). Defendants assert that these restrictions only apply to vendors licensed by the New Mexico Gaming Control Board, citing N.M.A.C. Section 15.1.16.2 (Doc. 141-1 at 7). The cited regulation does not provide that it "only" applies to licensed vendors. Instead, the regulation

defines "person" to mean "a legal entity or individual." N.M.A.C. § 15.1.16.7(D). Defendants' analysis is non-sequiter.

V. THE PUEBLO HAS COMPLIED WITH ITS COMMITMENT TO PAY INTO A TRUST ACCOUNT THE SAME AMOUNT THAT WOULD HAVE BEEN PAID TO THE STATE IF THE EXPIRED COMPACT WERE STILL IN EFFECT

During the October 27, 2016 hearing, the Court inquired whether the Pueblo had met its obligations to pay into a dedicated trust fund an amount equal to what the Pueblo would have paid to the State if the expired Compact was still in effect. (*See* Doc. 138-3 at 112, 10/27/16 Tr.) Accordingly, it was clearly within the scope of the discussion of the October 27, 2016 hearing for the Pueblo to provide reports from the independent attorney administering the dedicated trust fund account, and from an independent certified public accounting firm auditing the Pueblo's compliance with the payment obligations. Defendants do not dispute the information submitted by the Pueblo establishing its compliance with its federal commitment to pay into a trust account the same amounts that would have been paid to the State if the expired compact were still in effect.

VI. THE UNITED STATES HAS NOTIFIED THE TENTH CIRCUIT OF THIS COURT'S SEPTEMBER 30, 2016 OPINION AND ORDER

The Pueblo in its supplemental brief informed the Court that on October 28, 2016, the United States submitted a letter to the Tenth Circuit in the two consolidated appeals (Doc. 140-1 at 9 & Ex. R). As that action occurred the day after the October 27 hearing, but related to the same litigation, it was an appropriate matter to address in a supplemental brief. Defendants respond by noting that the State submitted to the Tenth Circuit a response to the United States' letter on October 31, 2016 (Doc. 141-1 at 7-8 & Ex. C). The Pueblo submitted a response to the State's letter, which response is incorporated as if fully set forth herein. (*See* Nov. 3, 2016 Letter

from the Pueblo to the United States Court of Appeals for the Tenth Circuit, attached to the Declaration of Scott Crowell as Exhibit "A").

VII. NOTICE TO THIS COURT THAT NEW MEXICO HAS CUT THE PUEBLO'S TRIBAL INFRASTRUCTURE FUND MONEY IN RESPONSE TO THIS LITIGATION

The Pueblo in its supplemental brief reported that on October 28, 2016, it was notified by the State that the State had cut the Pueblo's Tribal Infrastructure Fund money in direct response to this pending litigation (Doc. 140-1 at 9 & Ex. S). Because that matter arose the day after the October 27 hearing, it was an appropriate matter for the supplemental brief. Defendants correctly respond that the letter cutting the funding has since been withdrawn (Doc. 141-1 at 8 & Exs. D & D(1)). But that withdrawal came only after the Pueblo's vehement objection and does not un-ring the bell. The fact is that a state agency, citing the pending litigation as the sole reason, withdrew funding for the Pueblo's governmental infrastructure. Such action supports the Pueblo's allegations that the State is seeking to extort the Pueblo into signing the 2015 Form Compact.

VIII. ALLGEIER'S HEARING TESTIMONY

The Pueblo in its proposed supplemental brief did not address or supplement the testimony at the October 27 hearing by Michael Allgeier, CEO of the Pueblo's gaming enterprises. Defendants dispute that testimony in their proposed supplemental response brief, but without common sense or legal justification, thereby warranting a supplemental reply here. In particular, Defendants assert, based on a declaration of Eric Roybal and Francis Trias referring to past circumstances of the State-owned Downs racino, that the Pueblo's gaming enterprises could still operate if the State revoked the State licenses for the Pueblo's gaming vendors, thereby rendering the Pueblo unable to use its Casino Management System ("CMS"). (Doc. 141-1 at 9-

10 & Exs. E and F.) However, Defendants fail to acknowledge that it is a violation of the State's regulations for the Downs to operate a gaming machine that is not connected and communicating to an approved central monitoring system, which is what the CMS is (N.M.A.C. § 15.1.7.9). *See* the Declaration of Michael Allgeier ("Allgeier Decl.") ¶ 6 attached hereto. This would also be a similar violation of NIGC regulations and regulations of the Pueblo's Gaming Commission. Also, it is a violation of Pueblo of Pojoaque Gaming Ordinance Rule 12 for a slot machine's software to be expired or revoked. *Id.* ¶ 13. Therefore, Defendants are incorrect in asserting that the Pueblo could operate its gaming machines absent the CMS system, or a CMS system with software that is expired or has not received the required updates, as these situations would violate the applicable regulations.

Furthermore, Defendants improperly contend that either the Downs of Albuquerque or the Pueblo's gaming operations could function, efficiently and practically, without a central monitoring system. The gaming machines at the Downs must be connected to the CMS because the New Mexico Gaming Control Board turns the machines on and off using the CMS when the racino opens and closes each day. *Id.* ¶ 7. In addition, the gaming machines at the Downs would operate only approximately twelve transactions before they would stop operating because the internal system would not have any information to operate from. *Id.* ¶ 8. Thus, it is false when Mr. Roybal and Mr. Trias state that the Downs would still be able to operate its gaming floor by simply utilizing the meters within its slot machines to determine the amount of coin-in and jackpots paid out by each machine. (Doc. 141-1 at Ex. E ¶¶ 5-6) and (Doc. 141-1 at Ex. F ¶ 7). Due to the much larger size of the Pueblo's gaming operations, and the fact that all of the machines at the Pueblo's Casinos are controlled by the CMS and 99% use the ticket in ticket out

process, it would be extremely cost prohibitive to manually pay out every amount when a patron cashes out any credits on any machine on the gaming floor. *See* Allgeier Decl. ¶¶ 9-12.

Both Defendants' arguments and Mr. Roybal's assertions that the Pueblo could operate without a CMS are false because the Pueblo's Casinos could not practically operate and it would violate applicable regulations.

CONCLUSION

The Pueblo has established all four factors to support its Motion to stay judgment pending appeal, and those factors weigh heavily in favor of granting the Motion. For the reasons set forth herein and previously, the Pueblo's Motion for Leave to File Supplemental Brief in Support of Stay and the Pueblo's Motion to Stay Order and Restore the Preliminary Injunction Pending Appeal should be granted.

Date: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on December 5, 2016, I caused the **PUEBLO OF POJOAQUE'S AND JOSEPH TALACHY'S REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL BRIEF ON MOTION TO STAY ORDER AND DECLARATIONS OF SCOTT D. CROWELL AND MIKE ALLGEIER** to be served upon counsel of record through the Court's electronic service system.

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