

**No. 16-2228**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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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

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**PUEBLO OF POJOAQUE’S EMERGENCY MOTION TO STAY PENDING  
ADJUDICATION OF PENDING EXPEDITED MOTION TO STAY THE  
ORDER AND RESTORE PRELIMINARY INJUNCTION PENDING  
APPEAL**

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## COMPLIANCE CERTIFICATE REQUIRED BY 10th CIR. R. 8.2

10th Cir. R. 8.2 provides:

### **Emergency or ex parte motions.**

**(A) Emergency relief.** Any motion that requests a ruling within 48 hours after filing must be plainly marked “EMERGENCY” and accompanied by a certificate stating:

- (1) the reason the motion was not filed earlier;
- (2) the date the underlying order was entered;
- (3) the time and date the order becomes effective;
- (4) the telephone numbers and email addresses for all counsel of record and where available, unrepresented parties; and
- (5) in immigration cases seeking a stay of removal or other emergency relief, the petitioner must attach to the motion a copy of the transcript from the Immigration Judge’s ruling, if relevant, plus copies of the written rulings of the Immigration Judge and Board of Immigration Appeals.

**(B) Ex parte relief.** Any motion that requests the court to act ex parte must include a certificate stating the reason it was not possible to provide notice to the other parties.

**(C) Notice to clerk.** If a motion for emergency relief is contemplated, the movant must notify the clerk in advance at the earliest practical time so that arrangements can be made for timely submission to the court.

In compliance with 10th Cir. R. 8.2(A), the Pueblo of Pojoaque (the “Pueblo”) provides the following certification:

**A(1): the reason the motion was not filed earlier.**

As explained in greater detail in the Pueblo's Emergency Motion, the Pueblo filed a motion pursuant to Fed. R. App. P. 8(a)(2) on Friday, February 24, 2017, seeking expedited review based on events that occurred February 22-24, 2017. As explained in the motion, the request for a stay was urgent, but circumstances did not require action to be taken within 48 hours; hence, seeking emergency relief under 10th Cir. R. 8.2 was not required at that time. On February 27, 2017, Appellees (as defined in the Pueblo's Emergency Motion) took steps that could result in imminent enforcement actions against the Pueblo's vendors based solely on such vendors doing business with the Pueblo after June 30, 2015 and during the time that Judge Brack's Order of Preliminary Injunction (Aplt. App. Vol.I/080)("PI") was in effect. The February 27, 2017 actions of Appellees have caused all major vendors to immediately cease doing business with the Pueblo, crippling the Pueblo's ability to keep its gaming operations open, and crippling the Pueblo's ability to maintain funding of its governmental programs. This Emergency Motion is being filed as early as practical, on February 28, 2017.

**A(2): the date the underlying order was entered.**

The underlying order was entered by Judge Browning on September 30, 2017 (Aplt. App. Vol.I/113) (Doc. 01019770580 at 35-181) ("MOO1"), dismissing all claims and vacating Judge Brack's PI. As required by Fed. R. App. P. 8(a)(2),

on October 4, 2016, the Pueblo filed a motion to stay the MOO1 and reinstate Judge Brack's PI pending appeal. The District Court did not rule upon the Pueblo's Motion to Stay until February 9, 2017.

**A(3): the time and date the order becomes effective.**

MOO1 had the immediate effect of vacating Judge Brack's PI, although there was some confusion from the language of the that order as to whether it was to become effective while Appellee's interlocutory appeal of the PI was still pending in the 10th Circuit. Judge Browning, on November 2, 2016 (Aplt. App. Vol.II/311-29), subsequently clarified his position that MOO1 was intended to vacate the PI despite Appellees' then-pending interlocutory appeal. *Id.* At the October 27, 2017 Hearing on the Pueblo's Motion to Stay, Appellees represented to the District Court that they had no intention of taking enforcement action "until the dust settles on this stay question." Transcript of Oct. 27, 2016 Hearing at 110 ("10/27/16 Transcript") (attached hereto as Attachment "B" (Att. "B") to the Emergency Declaration of Joseph M. Talachy (Emergency Talachy Decl.) which is attached hereto as Ex. "1").

**A(4): the telephone numbers and email addresses for all counsel of record and where available, unrepresented parties:**

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There are no unrepresented parties.

**Other matters regarding compliance with 10th Cir. R. 8.2**

A(5) is not applicable because this not an immigration case.

In compliance with 10th Cir. R. 8.2(B), the Pueblo notes that it is not seeking an order that the Court act ex parte. Counsel for Appellees have been provided notice of the Pueblo's Emergency Motion.

In compliance with 10th Cir. R. 8.2(C), the Pueblo notified the clerk of the Pueblo's intent by telephone immediately after the decision was made to pursue a Rule 8.2 Emergency Motion, on the afternoon of February 27, 2017.

The undersigned certifies to the Court that the statements made in this Compliance Certificate are true and correct.

*s/ Scott D. Crowell*

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Appellants PUEBLO OF POJOAQUE, a federally-recognized Indian tribe, and its Governor, JOSEPH M. TALACHY (collectively, “Pueblo”), pursuant to Tenth Circuit Rule 8.2, hereby move for an emergency stay of Judge Browning’s September 30, 2016 Memorandum Opinion and Order (Aplt. App. Vol.I/113) (Doc. 01019770580 at 35-181) (“MOO1”), which dismissed the Pueblo’s action against the STATE OF NEW MEXICO (“State”), SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, and CARL E. LONDENE (collectively, “Appellees”), and for restoration of Judge Brack’s Preliminary Injunction (Aplt. App. Vol.I/080) (“PI”), pending this Court’s adjudication of the Pueblo’s pending Expedited Motion to Stay the Order and Restore the Preliminary Injunction Pending Appeal (Doc. 01019770580) (“Expedited Stay Motion”). The Expedited Stay Motion seeks to restore Judge Brack’s PI to maintain the status quo pending adjudication of the merits of this appeal. This Emergency Motion to Stay Pending Adjudication of Pending Expedited Motion to Stay (“Emergency Stay Motion”) seeks to restore Judge Brack’s PI to maintain that status quo before very recent and rapidly evolving and harmful circumstances as described below, pending this Court’s ruling on the Expedited Stay Motion.



## INTRODUCTION

On October 4, 2016, the Pueblo moved to stay Judge Browning's order in district court (Aplt. App. Vol.II/266-304) ("DC Stay Motion"), which was denied on February 9, 2017. (Mem. Op. & Order, 2/9/2017) ("MOO2") (Doc. 01019770580 at 183-382). On February 24, 2017, the Pueblo filed its Expedited Stay Motion. New developments within the last 24 hours, which directly result from Judge Browning vacating Judge Brack's PI, place the Pueblo in immediate peril. Imminently, Appellees are taking actions to revoke the licenses of major gaming vendors who conducted business with the Pueblo while the PI was in effect, unless the vendors pay tens of millions of dollars in fines to the State. The vendors have been given between 24 and 72 hours to agree to those fines, or license revocation actions will commence against them. As a result, all major gaming vendors are in the process of immediately ceasing all business with the Pueblo's gaming operations, which will force the Pueblo's gaming facilities to shut down.

Two business days ago, on Friday, February 24, 2017, the Pueblo filed its Expedited Stay Motion. The Pueblo explained that it sought expedited review, rather than emergency review, because this matter was urgent but did not appear to need a decision within 48 hours. The Expedited Stay Motion set forth the facts and analysis to meet all four requirements for a stay pending appeal under Fed. R. App.

P. 8(a)(2) and Tenth Circuit Rule 8.1. Unfortunately, Appellees' actions on Monday, February 27, 2017, now warrant an emergency stay under Tenth Circuit Rule 8.2, even if only to allow for the Court's consideration of the Pueblo's Expedited Stay Motion.

The Pueblo's Expedited Stay Motion noted that two vendors had indicated they would cease all business with the Pueblo if the stay was not granted. That set of circumstances has now radically changed. As of today, February 28, 2017, three additional major gaming vendors have ceased doing business with the Pueblo to avoid or minimize the impact of Appellees' actions against the vendors' licenses. These developments force the immediate removal of many of the most profitable gaming machines at the Pueblos's facilities, and cause most other gaming machines to fall into an unrecoverable state of disrepair. These developments put the entire Casino Management System at imminent risk of crashing, from which it cannot be recovered. Card shuffling equipment necessary for proper play of table games is being removed. Credit and debit card, and check processing, services that are essential to operation are being discontinued. In short, the Pueblo's gaming operations are being stripped of their ability to function and survive.

The Pueblo's Expedited Stay Motion established that as of February 24, 2017, the Pueblo would suffer an immediate 17% drop in annual revenue, with revenue spiraling down from there. That significant loss has now expanded

because of the State's actions on February 27, 2017. Moreover, the State's actions now make closure of the Pueblo's gaming operations imminent and unavoidable absent a stay.

No longer can the Pueblo's concerns be considered speculative. No longer can the State argue to the federal courts that the Pueblo's concerns are "baseless fear mongering, speculation on the part of the Pueblo" 10/27/16 Transcript at 110 (Att. "B" to Emergency Talachy Decl. Ex. "1"). Appellees' actions yesterday at a meeting of the New Mexico Gaming Control Board ("NMGCB") remove any doubt as to the immediacy and severity of irreparable harm the Pueblo will suffer absent a stay.

### **JURISDICTION**

The District Court had subject-matter jurisdiction based on federal-question jurisdiction under 28 U.S.C. § 1331, and inherent equitable jurisdiction to enjoin preempted state action under the Supremacy Clause, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

This Court has appellate jurisdiction based on 28 U.S.C. § 1292(a)(1), and the timely filing on October 4, 2016 of a notice of appeal from the final judgment entered by the District Court on September 30, 2016, MOO1, which disposed of all claims.

## RECENT DEVELOPMENTS

The recent developments and their impact, noted in the Introduction above, are set forth and documented in detail in the attached Emergency Talachy Decl. (Ex. “1”), and Mitch Bailey, Executive Director of Gaming Operations (“Emergency Bailey Decl.”) (attached hereto as Ex. “2”). Those Declarations provide details of the relevant developments on February 27, 2017.

Specifically, the NMGCB held a special meeting on February 27 which included, in an Executive Session, “Consideration of recommendation to issue Administrative Complaint,” regarding seven vendors doing business with the Pueblo. The vendors were informed that they would be fined in punitive amounts exceeding eight figures, generally between \$10,000,000 and \$20,000,000 per vendor, for conducting business with the Pueblo while the PI was in effect. Emergency Talachy Declaration at 1, ¶¶ 3-4.

As a result of Appellees’ actions, a third major vendor, Everi, informed the Pueblo on February 27, 2017 that it is ceasing business with the Pueblo. Emergency Bailey Declaration at 1-2, ¶¶ 3-4. Everi provided a service that verified patron funds for credit card and check-cashing transactions, and provided gaming devices. *Id.* Accordingly, the Pueblo can no longer accept credit cards or cash checks or provide cash advances for its patrons, as doing so would place the Pueblo in great financial risk. *Id.*

As a result of Appellees' actions, a fourth major vendor, IGT, formally informed the Pueblo on February 27, 2017 that it too is ceasing business, which results in the immediate shuttering of 40 wide-area progressive and participation games. IGT provided more gaming machines than any other vendor, and the Pueblo has now lost the ability to replace parts or properly service the machines. *Id.* at 2-3, ¶¶ 6-7. Also as the result of Appellees' actions, a fifth major vendor, Konami, has informed the Pueblo today, February 28, 2017, that it too is ceasing business. Emergency Bailey Declaration at 3, ¶ 8.

If the Emergency Motion to Stay is denied, the Pueblo will be unable to sustain its gaming operations. The Pueblo will be—and already is—immediately and severely impacted, with a rapid deterioration resulting in the closure of its gaming facilities. As the result of Appellees' actions, Pueblo Governor Talachy is forced to put approximately 1,000 employees on notice that they may lose their jobs.

### **ARGUMENT**

The Pueblo's Expedited Stay Motion establishes the basis for a stay pending appeal. This Emergency Stay Motion builds on that foundation with the addition of the dramatic developments over the last day, which developments further support the urgent need for a stay.

**I. THE PUEBLO HAS SATISFIED THE REQUIREMENTS FOR AN EMERGENCY STAY UNDER TENTH CIRCUIT RULE 8.2**

To stay a court order and preserve the status quo pending appeal, Federal Rule of Appellate Procedure 8(a)(2) and Tenth Circuit Rule 8.1 require that a party establish: (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, 1020 (10th Cir. 1996). The Pueblo’s Expedited Stay Motion and its supporting declarations establish all four of these considerations. This Emergency Stay Motion builds on the Expedited Stay Motion and seeks a stay pending the Court’s deliberation and ruling on the Expedited Stay Motion.

For an emergency stay, Tenth Circuit Rule 8.2 provides:

**Emergency or ex parte motions.**

**(A) Emergency relief.** Any motion that requests a ruling within 48 hours after filing must be plainly marked “EMERGENCY” and accompanied by a certificate stating:

- (1) the reason the motion was not filed earlier;
- (2) the date the underlying order was entered;
- (3) the time and date the order becomes effective;
- (4) the telephone numbers and email addresses for all counsel of record and where available, unrepresented parties; . . . .

. . . .

**(C) Notice to clerk.** If a motion for emergency relief is contemplated, the movant must notify the clerk in advance at the earliest practical time so that arrangements can be made for timely submission to the court.

The Pueblo has satisfied all applicable requirements of Rule 8.2. The Pueblo's Certificate of Compliance with the requirements of Rule 8.2 is included as a Certificate in this Motion.

**II. THE STATE'S IMPROPER EFFORTS ON FEBRUARY 27, 2017 CONFIRM THE PUEBLO'S SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THIS APPEAL.**

The Expedited Stay Motion and the Pueblo's DC Stay Motion establish the substantial likelihood that the Pueblo will prevail on the merits of this appeal. Specifically, those motions establish that Judge Browning erred in finding that Congress did not intend for the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA") to preempt states from taking off-reservation actions directed at interfering with federal and tribal governance of Indian gaming on Indian lands. The actions of the last week, escalating to yesterday's actions by the NMGCB to either impose prohibitive fines upon or revoke the licenses of vendors, now establish that Judge Browning's narrow view of IGRA's preemptive scope allows the State to nullify the Pueblo's sovereign rights to game as confirmed by the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and as codified in IGRA.

Without a stay to prevent further preempted state action, Appellees are now forcing the Pueblo to shut down its on-reservation gaming operations even though IGRA gives the State no authority over those operations absent a gaming compact. This is not a mere deviation from Congress' intent in IGRA. This is a manifestation of what Congress intended to protect tribes from enduring. As set out in the Pueblo's Opening Brief in this appeal (Doc. 01019754736), in the DC Stay Motion, and in the Expedited Stay Motion, Congress' intent is the guiding principle in interpreting the scope of IGRA's preemption force. Judge Browning conceded that IGRA preempts states from on-reservation interference with tribal gaming operations, yet he defied Congress' intent by wrongly concluding that the State can take actions directed solely at interfering with on-reservation gaming, and based solely upon the Pueblo's conduct of on-reservation gaming in the absence of a compact, so long as the State's actions take place off-reservation. Recent relevant developments confirm that Judge Browning's decision, if allowed to stand, will nullify Congressional intent in its passage of IGRA. The dramatic developments of the last 24 hours underscore the correctness of the Pueblo's position on the merits. Appellees have now done exactly what Congress intended to prevent.



**III. FAILING TO ENTER AN EMERGENCY STAY PENDING APPEAL WILL CAUSE IRREPARABLE HARM TO THE PUEBLO, ITS MEMBERS, AND THE SURROUNDING COMMUNITY.**

The actions of Appellees during the last week, escalating to yesterday's actions at the NMGCB meeting, to either impose prohibitive fines upon or revoke the licenses of vendors, is a complete reversal of the position Appellees took in opposing the DC Stay Motion:

That is the action, the enforcement action that I would expect the State of New Mexico to pursue **once the dust settles on this stay question . . .** But the State of New Mexico intends to enforce state law. In the state law, **the focus of it, the parameter of it is non-Indian vendors' transactions with non-Indian gaming operators.** And it's those licenses that the State is focusing on. **And it's just baseless fear mongering, speculation on the part of the Pueblo in making the suggestion that the State is going to do anything further.**

10/27/17 Transcript at 110 (emphasis added) (Att. "B" to Emergency Talachy Decl. Ex. "1").

As discussed above, no longer can the Pueblo's concerns be considered speculative. No longer can the State argue to the federal courts that the Pueblo's concerns are "baseless fear mongering, speculation on the part of the Pueblo." Appellees actions yesterday remove any doubt as to the immediacy and severity of the irreparable harm the Pueblo will suffer.

If the Emergency Motion to Stay is denied, the Pueblo will be unable to sustain its gaming operations. The Pueblo will be—and already is—immediately and severely impacted, with a rapid deterioration that will result in the closure of

the gaming facilities. As the result of Appellees' actions, Pueblo Governor Talachy is forced to put approximately 1,000 employees on notice that they may lose their jobs.

#### **IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTERESTS SUPPORT A STAY.**

The Expedited Stay Motion and the D.C. Stay Motion establish that a stay pending appeal, or a temporary stay pending deliberation of the Expedited Stay Motion, will not cause harm to Appellees and, accordingly, the balance of hardships weighs heavily in the Pueblo's favor. Similarly, the Expedited Stay Motion and the D.C. Stay Motion establish that public interests weigh in favor of granting the requested stay. Appellees' actions on February 27, 2017 do not impact the Pueblo's analysis of either of these two considerations for the issuance of a stay order. Instead, the recent developments documented herein confirm that the balance of hardships and consideration of public interests now even more strongly support a stay. No asserted State concerns outweigh the massive employment displacement, and the resulting waves of serious governmental, economic and social impacts, that Appellees will cause by shutting down the Pueblo's on-reservation gaming facilities. A stay is required to prevent real and tremendous hardships, and to protect widespread public interests.

**V. AN INTERIM STAY WHILE THE COURT DELIBERATES THE PUEBLO'S MOTION FOR STAY PENDING APPEAL IS APPROPRIATE.**

Judge Browning's two opinions on the merits and the stay below together cover 347 pages, while Judge Brack's Memorandum and Opinion setting forth his reasons for granting the PI cover another 23 pages. Appellees have not established that any concrete problems occurred, at any level, while the PI was in effect. Appellees did represent to Judge Browning in open court that they were not contemplating any enforcement action based on a vendor's business with the Pueblo until "the dust settles on the stay question" (10/27/17 Transcript at 110 (Att. "B" to Emergency Talachy Decl. Ex. "1")). The Pueblo is entitled to a stay pending appeal, yet it recognizes that the sheer volume of Judge Browning's opinions at issue makes it difficult to rule immediately on the Expedited Stay Motion. Therefore, because Appellees' actions will impose devastating and irreparable harm on the Pueblo, its members, its employees, the surrounding community and its vendors if a stay is not ordered in the next 48 hours, the Pueblo respectfully requests that this Court, at a minimum, issue a temporary stay pending the Court's deliberation on the Pueblo's Expedited Stay Motion.

## CONCLUSION

For the reasons set forth above, Judge Browning's September 30, 2016 Memorandum Opinion and Order, which vacated Judge Brack's preliminary injunction in this case, should be stayed on an emergency basis pending the Court's deliberation of the Pueblo's Expedited Stay Motion. The Pueblo's Emergency Stay Motion should be granted.

Dated: February 28, 2017

Respectfully submitted,

s/ Scott D. Crowell

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*Attorneys for Plaintiffs-Appellants  
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Joseph M. Talachy*

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on the Court and opposing counsel via the ECF system on February 28, 2017 and that to my knowledge, all counsel of record in this case are registered to receive service through that system.

s/ Scott D. Crowell  
SCOTT D. CROWELL

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Mac 2011 in Times New Roman 14-point font.

Dated: February 28, 2017

*s/ Scott D. Crowell*  
SCOTT D. CROWELL

### **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5;
2. if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
3. the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, Bitdefender, version 5.2.0.4, updated February 21, 2017, and according to the program are free of viruses.

Dated: February 28, 2017

s/ Scott D. Crowell  
SCOTT D. CROWELL



# EXHIBIT “1”

**No. 16-2228**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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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

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**DECLARATION OF JOSEPH M. TALACHY IN SUPPORT OF THE  
PUEBLO OF POJOAQUE'S EXPEDITED MOTION TO STAY AND  
RESTORE PRELIMINARY INJUNCTION PENDING APPEAL**

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## **DECLARATION OF JOSEPH M. TALACHY**

I, Joseph M. Talachy, hereby declare and state:

1. I am the duly-elected Governor of the Pueblo of Pojoaque (“Pueblo”), a federally recognized Indian Tribe. I have served as the Governor since 2015 and I formerly served as the Lieutenant Governor of the Pueblo from 2010 to 2014. I previously served on the Tribal Council for 16 years.

2. As a Tribal Councilman and an elected official of the Pueblo, I have become familiar with, and have substantial knowledge regarding the Pueblo’s gaming activities.

3. In my capacity as Governor, I am familiar with the New Mexico Gaming Control Board (“Board”) and the manner in which the Board conducts meetings.

4. The Board held a Special Meeting on February 27, 2017 (“Special Meeting”). The agenda is attached here as Attachment “A”. Under the Pending Administrative and Enforcement Actions section of the Closed Executive Session agenda, several of the Pueblo’s gaming vendors that are also licensed by the Board (“vendors”), are listed. The agenda items state: “Consideration of recommendation to issue Administrative Complaint to [vendor]”. Several of the Pueblo’s vendors are also named under the Licensing section, for consideration of licenses at a future Board meeting.

5. Upon information and belief, during the Closed Executive Session of the Special Meeting, the Board held conference calls with the vendors listed on the agenda and informed those vendors that it will be fining them in amounts of Ten Million Dollars, Twenty Million Dollars, and more for doing business with the Pueblo. Each vendor was given a very short time frame from one to three days to reach an agreement with the Board regarding the amount of the fines and if no agreement is reached, the Board will commence to revoke or terminate licenses.

6. On February 27, 2017, after the Board meeting, I was informed by the Pueblo's casino management that additional gaming vendors for the Pueblo's casinos, including IGT, Inc. and Everi Games, Inc. notified the Pueblo that they would no longer do business with us because of the recent developments with the Board. As indicated on the Special Meeting agenda, the Board discussed whether it would recommend issuance of Administrative Complaints for those vendors.

7. As a result of these recent actions, I have been forced to consider providing notice to all employees of the Pueblo, especially the approximately 1000 employees of the Pueblo's gaming operations, that they may lose their jobs in the immediate future.

8. Attached as Attachment "B" is a true and correct copy of the October 27, 2016 transcript of motion proceedings before Judge Browning in case CV-15-0625.

I declare under penalty of perjury that the foregoing is true and correct.

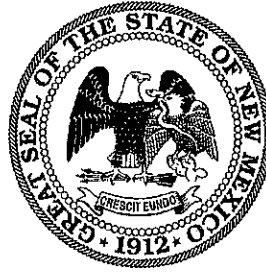
Executed on February 28, 2017.

  
\_\_\_\_\_  
Joseph M. Talachy

# ATTACHMENT

## “A”

DECLARATION OF GOVERNOR JOSEPH M. TALACHY



**NOTICE OF BOARD OF DIRECTORS MEETING  
THE NEW MEXICO GAMING CONTROL BOARD**

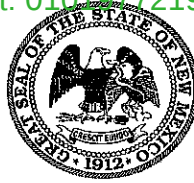
**ONE-DAY SPECIAL BOARD MEETING**

The New Mexico Gaming Control Board will conduct a one-day special Board meeting. **On Monday, February 27, 2017, the Board will meet in closed executive session commencing at 9:00 a.m. until 10:00 a.m. at which time they will meet in open session.** The meeting will be held at 4900 Alameda Blvd. NE. Albuquerque, New Mexico. Subject matters to be discussed are included on the attached proposed agenda. Please note the agenda is subject to change. A final agenda will be available to the public at least 72 hours prior to the meeting. A copy of the final agenda may be obtained from the office of the Gaming Control Board, located at 4900 Alameda Blvd. NE in Albuquerque, New Mexico or by calling Denise Leyba at the GCB office at 505-274-4345 during regular business hours.



If you are an individual requiring auxiliary aids or services, pursuant to the Americans with Disabilities Act, in order to attend a meeting of the New Mexico Gaming Control Board, please contact Denise Leyba at (505) 274-4345 at least forty-eight (48) hours prior to the meeting. The NM Gaming Control Board meetings are open to the public and your attendance is welcome. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact Denise Leyba (505) 274-4345 if a summary or other type of accessible format is needed.





**NEW MEXICO GAMING CONTROL BOARD**  
**ONE-DAY SPECIAL BOARD MEETING AGENDA**

**February 27, 2017 – 9:00 a.m.**

(Note: All items on agenda may result in Board action.)

**Monday, February 27, 2017**

**I. Call to Order –9:00 a.m.**

A. Roll Call

**II. CLOSED EXECUTIVE SESSION – (Closed pursuant to Section 10-15-1 (H) NMSA 1978, “Open Meetings Act”)**

**A. Pending Administrative and Enforcement Actions**

1. Consideration of recommendation to issue Administrative Complaint to Bally Gaming, Inc.
2. Consideration of recommendation to issue Administrative Complaint to IGT, Inc.
3. Consideration of recommendation to issue Administrative Complaint to Aristocrat Technologies, Inc.
4. Consideration of recommendation to issue Administrative Complaint to Konami Gaming, Inc.
5. Consideration of recommendation to issue Administrative Complaint to Everi Games Inc.
6. Consideration of recommendation to issue Administrative Complaint to MultiMedia Games Inc.
7. Consideration of recommendation to issue Administrative Complaint to IGT PLC

**B. Licensing**

**1. Consideration of Motion by Chairman Landers to call the following licensing matters for placement on the March 15, 2017 Regular Board Meeting.**

**A. Renewal of Business Gaming Licenses & Non-Profit Gaming Licenses**

1. Aristocrat Technology (Las Vegas, NV)
2. Global Cash Access Holdings, Inc. (Las Vegas, NV)
3. Multimedia Games (Austin, TX)
4. Scientific Games (Alpharetta, GA)

**B. New Application for Business and Non-Profit Key Persons**

1. Deron Hunsberger – Senior Vice President of Sales North America – Scientific Games Corporation (Las Vegas, NV)
2. Rosa Laricchia – Senior Vice President of Sales – NRT Technology Corporation (Toronto, Canada)
3. Gabrielle McDonald – Director – Scientific Games Corporation (Alpharetta, GA)

**C. Renewal of Business and Non-Profit Key Persons**

1. Victor Duarte – Director, President/Chief Executive Officer – GTECH Canada ULC (Ontario, Canada)
2. Barry Schwarta – Director – Scientific Games Corporation (Las Vegas, NV)

**III. Recess**

One Day Special Board Meeting -- Open  
February 27, 2017  
Page 2

**OPEN SESSION**—Please note that items after 10:00 a.m. may be taken out of sequence at the discretion of the Chair.

**IV. Call to Order –10:00 a.m.**

**A. Roll Call**

**V. Approval of Agenda**

**A. Licensing**

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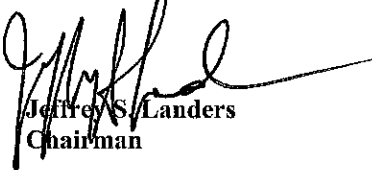
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**B. Public Comments**

**VI. Adjournment**

  
Jeffrey S. Landers  
Chairman

# ATTACHMENT “B”

DECLARATION OF GOVERNOR JOSEPH M. TALACHY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, et al.,

Plaintiffs,

VS.

NO. CV 15-0625 JB/GBW

STATE OF NEW MEXICO,

Defendant.

Transcript of Motion Proceedings before  
Honorable James O. Browning, United States  
District Judge, Albuquerque, Bernalillo County,  
New Mexico, commencing on October 27, 2016.

For the Plaintiffs: Mr. Scott Crowell; Ms. Carrie  
Frias (Both via telephone)

For the Defendant: Mr. Hank Bohnhoff; Ms. Krystle  
Thomas

Jennifer Bean, FAPR, RDR, RMR, CCR  
United States Court Reporter  
Certified Realtime Reporter  
333 Lomas, Northwest  
Albuquerque, NM 87102  
Phone: (505) 348-2283  
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& ASSOCIATES, Inc.**  
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e-mail: info@litsupport.com

1 THE COURT: All right. Well, good morning  
2 everyone. I appreciate everyone allowing me to do  
3 this on the phone and out of district. I am in  
4 Lubbock, Texas at a Fed Ex here. My father is  
5 waiting for some surgeon/nurse practitioner to come  
6 in this morning and indicate whether they're going to  
7 proceed to maybe some open heart surgery here in the  
8 near future. He has a lot of blockage in his heart.  
9 And so I appreciate y'all doing this. I've got a  
10 pretty full day -- I'm probably going to head back to  
11 Albuquerque a little later -- I've got seven hearings  
12 tomorrow. So this allows me to get it done and keep  
13 things going rather than backing it up. So I  
14 appreciate the courtesy that everyone has extended to  
15 me here.

16 All right. The Court will call Pueblo of  
17 Pojoaque, et al. versus State of New Mexico, et al.,  
18 Civil Matter No. 15-CV-0625 JB/GBW.

19 If counsel will enter their appearances for  
20 the plaintiffs.

21 MR. CROWELL: This is Scott Crowell, Your  
22 Honor. And also on the phone is my co-counsel,  
23 Carrie Frias.

24 THE COURT: Mr. Crowell, Ms. Frias, good  
25 morning to you.

1 And for the defendants?

2 MR. BOHNHOFF: Good morning, Your Honor.

3 This is Hank Bohnhoff and Krystle Thomas, with the  
4 Rodey Law Firm on behalf of the defendants. We're in  
5 the courtroom. Sitting at counsel table with us are  
6 Jeffrey Landers and Salvator Maniaci, two of the  
7 individual defendants, who are members of the New  
8 Mexico Gaming Control Board.

9 THE COURT: All right. Mr. Bohnhoff, Ms.  
10 Thomas, Mr. Landers, and Mr. Maniaci, good morning to  
11 you.

12 MS. FRIAS: Excuse me, Judge. I'm sorry to  
13 interrupt. I just wanted to let you know that we're  
14 here at the Pueblo of Pojoaque. This is Carrie  
15 Frias. And I just wanted to introduce who I have  
16 here with me.

17 GOVERNOR TALACHY: This is Governor Joseph  
18 Talachy. Good morning.

19 THE COURT: Mr. Talachy, good morning to  
20 you.

21 LT. GOVERNOR ROYBAL: Lieutenant Governor  
22 Jenelle Roybal. Good morning.

23 THE COURT: Good morning to you.

24 MS. MARTINEZ: Good morning. Dora  
25 Martinez, Tribal member.

1 THE COURT: All right. Ms. Martinez, good  
2 morning to you.

3 MR. ALLGEIER: Mike Allgeier, CEO.

4 THE COURT: All right. Good morning to  
5 you.

6 MS. FIERRO: Kathy Fierro, Tribal  
7 treasurer.

8 THE COURT: All right. Good morning.

9 MR. RIVERA: Good morning, Judge Browning.  
10 James Rivera, Tribal Councilman and Tribal member.

11 THE COURT: All right. Mr. Rivera, good  
12 morning to you.

13 All right. Anyone else, Ms. Frias?

14 MS. FRIAS: No, Your Honor.

15 THE COURT: All right. Thank you, Ms.  
16 Frias.

17 All right. A couple of disclosures; I  
18 don't think that they cause any problems. But I do  
19 know Kevin Washburn. I've known him for a number of  
20 years. And as y'all added a bunch of attachments  
21 here -- I've known, I interviewed Kevin when he was  
22 leaving the U.S. Attorney's Office about joining my  
23 firm, and then first knew him when he was Dean over  
24 at the Law School. And I've known him -- he's been  
25 in my home and I've been in his home. I have

1 stayed -- when he's been in cases, I try not to have  
2 any contact with him. And I will observe that rule  
3 here, although this case may be about to leave me up  
4 to the Tenth Circuit. But I'll try to observe that  
5 rule, too. When he was sued, I didn't have any  
6 lunches or contacts -- any lunches with him or go in  
7 his home or he in my home, but -- so I'll try to  
8 observe that rule here, and indicate that his name  
9 has come up.

10 I noticed the governors were copied in -- I  
11 meant senators were copied in -- Heinrich, Udall.  
12 And of course, I know them. I've known Senator Udall  
13 since his AG days, when I was Deputy Attorney  
14 General. And then I've known Senator Heinrich since  
15 he's been a senator, and we've talked before.

16 So I make those disclosures. I hope I got  
17 all the names that were attached that I had had some  
18 dealings with in the past. But if anybody has any  
19 questions on those or concerns, don't hesitate to  
20 raise those. I do think I can continue to be fair  
21 and impartial in these cases. But if anybody has any  
22 concerns, don't hesitate to raise those.

23 Mr. Crowell, you have filed a motion to  
24 stay the order and restore the preliminary injunction  
25 pending appeal. So why don't I let you begin



1 argument this morning.

2 MR. CROWELL: Well, thank you, Your Honor.  
3 I'd like to start with a procedural issue that I  
4 think we need to discuss in an attempt to resolve,  
5 and I've identified that in Footnote 2 -- I'm sorry,  
6 there was an interruption there. Can you hear me,  
7 Your Honor?

8 THE COURT: I can hear you.

9 MR. CROWELL: In the reply brief that we  
10 filed yesterday, we noted that after we filed the  
11 motion, but before the State's response was filed,  
12 the Tenth Circuit has issued an order indicating a  
13 preliminary determination that it lacks jurisdiction  
14 to hear the appeal, because your September 30 order  
15 provides an indicative ruling and reserves  
16 jurisdiction to dissolve or modify the preliminary  
17 injunction on remand and dismissal of the  
18 interlocutory appeal.

19 We, you know, in our looking at that issue,  
20 we think that that does prevent it from being a final  
21 judgment, even though you've referred to it as a  
22 final judgment, and closed the case. We're required  
23 to inform the appeals court on Monday of what our  
24 position is regarding that order. The order  
25 indicates that if we don't respond, then the appeal

1 would be dismissed.

2 We have been moving forward on the  
3 assumption that it is a final judgment because this  
4 Court has clarified it as such. But given the Tenth  
5 Circuit's order, we're hoping that we might get some  
6 clarification from you as to whether you intended to  
7 reserve judgment and issue an indicative ruling on  
8 the preliminary injunction upon remand or dismissal.

9 THE COURT: Well, let me --

10 MR. CROWELL: So the proper response --

11 THE COURT: Yeah, let me comment on that.

12 I'd like to help the parties as much as possible on  
13 this. One of the reasons that I entered final  
14 judgment was to help the Pueblo. I thought it was  
15 the thing -- I didn't know what else needed to be  
16 resolved here. And I thought, if I just kept the  
17 case, having done what I did, and not enter a final  
18 judgment, it put the Pueblo in a position where it  
19 couldn't go to the Tenth Circuit.

20 So one of the reasons that I thought that I  
21 needed to give you a shot at appealing to the Tenth  
22 Circuit was to give it a final judgment. Because,  
23 otherwise, just had an open case here, and it made it  
24 difficult for you to appeal what I was doing.

25 Let me also say, yes, I've looked at what

1 the Tenth Circuit has done. And I guess a couple of  
2 things: The whole purpose of an indicative ruling is  
3 to tell them that if they will divest themselves of  
4 their jurisdiction, this is what I will do. I'm not  
5 sure how you give an indicative ruling without a  
6 final judgment in this circumstance. I mean, if I  
7 had jurisdiction, I wouldn't have to be giving an  
8 indicative ruling.

9 So if somebody tells me -- I want to  
10 cooperate with the parties. If I can help you guys,  
11 if we can agree on some procedure, that's great. But  
12 when I looked at what the Tenth Circuit said, my  
13 question was, Well, yes, but isn't that what an  
14 indicative ruling is? You tell the Tenth Circuit,  
15 This is what I will do if you will send it back. But  
16 I wouldn't have to do an indicative ruling if I had  
17 jurisdiction. So it seemed to me that in the past,  
18 when I've done indicative rulings, they have been  
19 where there has been a final judgment, and nobody  
20 questioned that they had jurisdiction, and I had  
21 entered final judgment.

22 So I'm quite willing to be educated on this  
23 score, but I guess I thought that was what an  
24 indicative ruling was, was when I did not have  
25 jurisdiction, I told the Tenth Circuit what I would

1 do if I did have jurisdiction.

2 So maybe you and Mr. Bohnhoff can agree in  
3 some way to -- it seems to me that we probably all  
4 know that this is going to end up in the Tenth  
5 Circuit in some form or fashion. If we can agree --  
6 for example, if we can agree that Mr. Bohnhoff can  
7 dismiss his appeal, then I don't need to do anything  
8 here. And I can say, It's done. I can enter an  
9 order vacating the injunction, or dissolving it, or  
10 whatever you want me to do. And then I can either  
11 enter a new final judgment or it is final and I can  
12 tell the court that I'm not going to do anything  
13 further.

14 But I look for guidance from y'all. It  
15 seems like we have an incentive, all -- two courts  
16 and two sets of parties to work together to sort of  
17 resolve this, so that you can get this issue up to  
18 the Tenth. But those are my thoughts on that. And  
19 I'm glad to try to work with y'all to clarify, if it  
20 needs be clarified.

21 MR. BOHNHOFF: Your Honor, this is Hank  
22 Bohnhoff. May I be heard?

23 THE COURT: Let me hear what maybe Mr.  
24 Crowell says on that, if he has some suggestions on  
25 that, and then maybe I can come back to you, Mr.

Bohnhoff.

Mr. Crowell?

MR. CROWELL: Yes, Your Honor. You know, our position, you know, has always been, and continues to be that looking to the merits of these issues should be put on hold until the Tenth Circuit decides its case in the two consolidated appeals in the litigation where the State has sued the United States over the appropriateness of the regulations in 25 CFR Part 291.

We have our appeal now, which the Court -- the Tenth Circuit has issued this order regarding whether it has jurisdiction. And we have the interlocutory appeal where in the interlocutory appeal the Tenth Circuit had issued an order abating that appeal pending the two consolidated appeals.

So we think that it's still appropriate that the two consolidated appeals be decided first. But if that's not going to happen, we believe that the Court could proceed by withdrawing the determination of final judgment, otherwise keeping the September 30 order in effect, and see whether the Tenth Circuit does decide to grant the State's motion to dismiss the interlocutory appeal.

We have opposed their motion to dismiss the

1 interlocutory appeal, because we believe that it's an  
2 attempt to violate what we think is a prudent  
3 decision to abate the appeal pending the two  
4 consolidated appeals involving the United States.

5 So our recommendation is to -- how to  
6 proceed here is just that: Withdraw the final  
7 judgment, keep the September 30 order in effect, wait  
8 until we see whether the Tenth Circuit grants the  
9 State's motion to dismiss. And if it does grant it,  
10 then go forward with implementing your indicative  
11 ruling and enter final judgment at that point.

12 THE COURT: Okay. So your proposal is to  
13 put together a motion to withdraw the final judgment  
14 then?

15 MR. CROWELL: Yeah. If a motion is  
16 required, or if we can resolve it here --

17 THE COURT: Right. Okay. Anything else,  
18 Mr. Crowell, before I hear from Mr. Bohnhoff on that  
19 proposal?

20 MR. CROWELL: Just that there is the  
21 underlying current that what we're trying to achieve  
22 in this instant motion to stay, and --

23 THE COURT: Yeah.

24 MR. CROWELL: -- we believe, you know, the  
25 Tenth Circuit had properly done in abating an

1 interlocutory appeal.

2 THE COURT: Right.

3 MR. CROWELL: Is to preserve the status  
4 quo, and not have the interference with the Tribe's  
5 vendors while the Tenth Circuit resolves these  
6 issues.

7 THE COURT: Well, if I were to do what you  
8 suggest -- and I don't know -- we'll hear from Mr.  
9 Bohnhoff in a moment -- he may agree -- and then the  
10 issue becomes really -- then y'all can battle this  
11 out a little bit on the motion to dismiss his appeal.  
12 But if he were to agree, what, then -- would we wait,  
13 then, on your -- to argue your motion to restore the  
14 preliminary injunction pending appeal until I did  
15 enter final judgment in this case?

16 MR. CROWELL: Well, I wish I had a clear  
17 case on this. I think the prudent thing to do, given  
18 that it has been briefed, is for the Court to go  
19 forward and consider it, and issue another indicative  
20 ruling of what it would do, you know, upon the entry  
21 of final judgment. My concern about doing that is  
22 having -- in that situation we will have filed the  
23 motion to stay before the issuance of final judgment.  
24 And when I look at the court of appeals rule  
25 regarding the requirement to file the motion in the

1 first instance in the district court --

2 THE COURT: Right.

3 MR. CROWELL: -- whether we've complied  
4 with that by seeking an indicative ruling instead of  
5 a post final judgment.

6 THE COURT: Well, and it wouldn't really be  
7 an indicative ruling. I mean, I guess it would be  
8 indicative, not in the sense of the appellate rules;  
9 it would be indicative of telling you what I'm going  
10 to do in sort of just a normal sense. But it would  
11 be -- it would kind of be -- I'm trying to look for  
12 an example -- it would be like a motion in limine:  
13 This is what I'll do at trial when this occurs. When  
14 the final judgment is entered, this is what I'll do.  
15 So it's indicative of a layperson, or a just not  
16 necessarily technically with the rule.

17 Okay. I think I understand the Pueblo's  
18 position. And I'm certainly not cutting you off from  
19 arguing the issues on the stay, Mr. Crowell. But I'm  
20 just trying to get a feel here at the beginning of  
21 this issue, to see if I can help you with the Tenth  
22 Circuit issue.

23 Mr. Bohnhoff, what's your thoughts? Would  
24 you agree to withdrawal of that motion, the final  
25 judgment, would you agree to put that aside; that



1 then takes care of your issue with the Tenth, and  
2 then y'all can battle it out on the motion to  
3 dismiss. The Tenth Circuit allows you to dismiss  
4 your appeal, then I've got an open case and it looks  
5 like then, at that point, I've indicated what I'll do  
6 with the preliminary injunction, do it at that point.  
7 Then enter final judgment, then Mr. Crowell can make  
8 the appeal from that. What's your thoughts about  
9 that?

10 MR. BOHNHOFF: Your Honor, we adamantly  
11 oppose any suggestion that you should withdraw stay,  
12 hold back on your September 29 (sic) ruling.

13 THE COURT: Well, I'm not suggesting that.  
14 I'm not suggesting -- I don't think Mr. Crowell in  
15 this limited portion is asking me to stay or pull  
16 back on my ruling in any way. We're simply talking  
17 about pulling back the final judgment.

18 The September 30 opinion would stand fully;  
19 the orders in there would stay fully. Simply pull  
20 back the final judgment. That would resolve this  
21 issue about whether I got that right or not. Then  
22 y'all wouldn't have to brief that; you wouldn't have  
23 to contest that. Y'all could then focus on your  
24 motion to dismiss your appeal. And if that were  
25 granted, then I've got an open case. It comes back.

1 I do what I said I was going to do, and then I enter  
2 final judgment.

3 So it doesn't affect the September 30, and  
4 it's not a ruling on the stay or the Pueblo's request  
5 to restore the preliminary injunction pending any  
6 appeal that Mr. Crowell would make at that point.

7 MR. BOHNHOFF: Let me --

8 MS. FRIAS: Your Honor, let me clarify.  
9 All of those motions have been filed.

10 THE COURT: Hold on. Let me let Mr.  
11 Bohnhoff speak here. Mr. Bohnhoff?

12 MR. BOHNHOFF: Thank you, Your Honor. I'll  
13 make a couple of points, a few points. First, we  
14 already have filed a motion to dismiss the  
15 interlocutory appeal.

16 THE COURT: Right.

17 MR. BOHNHOFF: We filed our reply to the  
18 Pueblo's response on Tuesday of this week. I would  
19 expect the Court to rule on the motion to dismiss  
20 very quickly. And we expect the Court to dismiss the  
21 appeal.

22 This argument that, given the fact that the  
23 Tenth Circuit had abated any appeal as to the  
24 preliminary injunction should somehow bar the  
25 appellant from dismissing its appeal, certainly is

1 not supported by any authority, and really doesn't  
2 make sense. If the appellant wants to dismiss his  
3 appeal, the appellate court, ordinarily, will let  
4 that happen, regardless of the fact that the  
5 preliminary injunction appeal was previously abated  
6 based upon the pendency of this Interior Department  
7 appeal.

8 THE COURT: Well, that may be. And I don't  
9 have any reason to disagree with you. But I also  
10 don't have probably enough knowledge to say you're  
11 right or wrong on that issue. But does that really  
12 have much impact on what we're talking about here? I  
13 mean, y'all are going to have to spend a lot of money  
14 and time trying to deal with this court order that we  
15 got on Mr. Crowell's appeal. Do you want to do that?  
16 Do you want to try to defend my entry of the final  
17 judgment? Or would it be better just to pull that  
18 back; leave the September 30 order fully in place;  
19 let y'all get your motion to dismiss, your appeal  
20 taken care of, and then it seems to me that it's --  
21 no one, then, could question my ability to enter a  
22 final judgment at that point. Vacate the preliminary  
23 injunction that Judge Brack entered; enter a final  
24 judgment; and then we're ready, I think, to talk  
25 about whether I'm going to stay the orders in this

1 case, and restore the preliminary injunction pending  
2 appeal. That's what Mr. Crowell has to ask me first  
3 before he goes to the Tenth and asks them to do that.

4 MR. BOHNHOFF: My suggestion, Your Honor,  
5 is that once the Tenth Circuit dismisses the  
6 interlocutory appeal, then all of this really gets  
7 sorted out, and it's elevating form over substance.  
8 Once the Tenth Circuit --

9 THE COURT: Well -- but I mean, right now  
10 the Tenth Circuit is very interested in form. And I  
11 guess I am, too. I'd like to get it right. What are  
12 you going to tell the Tenth Circuit in response to  
13 their order? Are you going to defend what I did and  
14 say that I did have the power to enter a final  
15 judgment, given my indicative rulings?

16 MR. BOHNHOFF: Yes, Your Honor.

17 THE COURT: Tell me what the argument would  
18 be.

19 MR. BOHNHOFF: The argument is -- and it  
20 really -- well, number one, unfortunately, in that  
21 Tenth Circuit order raising a question about the  
22 finality of the judgment, I would not suggest that  
23 the Court has made a preliminary ruling. They've  
24 asked the question.

25 THE COURT: I tend to agree with you, too.

1 That might be one thing I might disagree with Mr.  
2 Crowell on, is that I think they've asked a question.  
3 They have an issue. But I'm like you, when I think  
4 they sit down and look at it, they may go, Well, what  
5 else was the district court supposed to do? The  
6 whole purpose of an indicative ruling is when the  
7 court doesn't have jurisdiction. So it kind of puts  
8 a case into a little bit of a no man's land and we  
9 try very hard for that never to be the case.

10 I want Mr. Crowell to be able to go to the  
11 Tenth Circuit if he disagrees with my rulings. At  
12 the same time, if I can't do anything down here -- I  
13 can't think of another thing I can do in this case.  
14 Right now, I -- so that's the reason I wanted to give  
15 Mr. Crowell the ability to go to the Tenth Circuit.  
16 Because every motion in front of me, every issue  
17 that's been raised, I have ruled on. I can't think  
18 of anything else I need to do. That was the reason I  
19 thought when a party, when a district court resolves  
20 all parties and all claims, that seems to me to be  
21 when I typically enter a final judgment.

22 MR. BOHNHOFF: And, Your Honor, we would  
23 defend the finality of the judgment if we had the  
24 opportunity to provide input to the Tenth Circuit.  
25 Unfortunately, that order required input only from

1 the Pueblo, not from the State.

2 Although based on the fact that this is now  
3 continuing to be discussed this morning, I'm  
4 considering whether or not we should file some sort  
5 of a motion with the Tenth Circuit, with some sort of  
6 brief attached to it, asking for an opportunity to be  
7 heard.

8 The point I want to make is --

9 THE COURT: Let me ask on that, was it a  
10 show cause just to Mr. Crowell? It was just a show  
11 cause to them?

12 MR. BOHNHOFF: Essentially, Your Honor. I  
13 have the order in front of me. It's dated October  
14 17. It said -- the Court states, "It appears that  
15 the district court's September 30 judgment is not yet  
16 final." It has some discussion, then says, "Within  
17 14 days of the date of this order appellants are  
18 directed to file a written response discussing the  
19 basis for this Court's exercise of appellate  
20 jurisdiction at this time over the district court's  
21 September 30 order."

22 The point, of course, is that in the  
23 docketing statement that the Pueblo has filed, they  
24 essentially injected the question by answering in  
25 response to the forum question: "Does the judgment

1 or order to be reviewed dispose of all claims by and  
2 against all parties?"

3 They respond by saying, Yes, with the  
4 caveat that the district court represents that the  
5 order being appealed from is a final judgment, while  
6 simultaneously indicating that it would take future  
7 action on the preliminary injunction in effect.

8 So it's prompted by that qualified  
9 statement in the docketing statement. And that's why  
10 the Court asked the Pueblo to respond, and  
11 presumably, why they didn't solicit input from us as  
12 well.

13 What -- the point we want to make?

14 THE COURT: Let me ask you this question,  
15 because in one sense I'd like to hear Mr. Crowell's,  
16 but you may have -- I'd like to hear your opinion.  
17 Why is it in the Pueblo's interests -- Mr. Crowell  
18 has pretty much told me he's going to confess  
19 error -- that I committed error on this final  
20 judgment. Why do you think it's in the Pueblo's  
21 interests to do that? I mean, they want to appeal.  
22 Why would they want to tell the Tenth Circuit that I  
23 committed error with entering that final judgment,  
24 which then makes it difficult for them to appeal what  
25 I did. Is it delay? What is the -- what do they get

1 out of telling the court, the Tenth Circuit, that  
2 they can't appeal my rulings?

3 MR. BOHNHOFF: I think you hit the nail on  
4 the head, Your Honor. It's the same reason why they  
5 are opposing our request to dismiss the interlocutory  
6 appeal. This is simply a play for delay. I think  
7 the Pueblo realizes, given the comprehensiveness and,  
8 frankly, indisputability of your September 29 merits  
9 ruling, that the only way the Pueblo can salvage  
10 something from this dispute is by dragging out this  
11 dispute long enough so that the Tenth Circuit rules  
12 in the Interior Department appeal, and they hope  
13 rules in their favor. That's the only avenue they  
14 have for trying to succeed on their refusal to enter  
15 into a compact with the State of New Mexico. That's  
16 the explanation, I think, for all of this procedural  
17 posturing and jostling.

18 The --

19 MR. CROWELL: Your Honor, may I respond?

20 THE COURT: Well, I'll let you respond.  
21 But let me -- I've asked Mr. Bohnhoff so many  
22 questions, he really hasn't got to argue on this. So  
23 I will let you respond, Mr. Crowell.

24 Mr. Bohnhoff?

25 MR. BOHNHOFF: It's our position that you



1 did have jurisdiction to enter the final judgment,  
2 and it's really the same reason that the  
3 defendants' -- that is our interlocutory appeal -- is  
4 now moot and should be dismissed by the Tenth  
5 Circuit. Upon the granting of the defendants'  
6 motions to dismiss, and the dismissal of the Pueblo's  
7 complaint, the preliminary injunction was really  
8 vacated by operation of law.

9 THE COURT: Well, let me ask you that: I  
10 did see that case in your footnote, and I have not  
11 had a chance to study that case. But was that in a  
12 situation like this? I tried to think of how this  
13 might be different from that situation, where you  
14 had -- where you didn't have an appeal. I mean,  
15 that's what I think may be a little different here is  
16 because there is an appeal from the preliminary  
17 injunction. Was that fact present or absent in that  
18 case that you cited?

19 MR. BOHNHOFF: I think the case that you're  
20 referring to, Your Honor, is the U.S. ex rel. Bergen  
21 case, Tenth Circuit decision, 842 F.2d 1502. That  
22 case did not involve an interlocutory appeal. And  
23 instead, in the context of that procedural posture,  
24 the court did note that with the entry of the final  
25 judgment, the life of the preliminary injunction --

1 they had a preliminary injunction, it just hadn't  
2 been appealed -- came to an end. We can cite other  
3 cases involving interlocutory appeals of preliminary  
4 injunctions where the district court ultimately moves  
5 forward and enters -- rules on the merits, and enters  
6 a final judgment, and the same basic proposition  
7 holds true; the entry of the final judgment moots,  
8 and we would suggest vacates by operation of law the  
9 preliminary injunction. There is --

10 THE COURT: You think you have district  
11 cases where there was an appeal of a preliminary  
12 injunction before the final judgment was entered?

13 MR. BOHNHOFF: Yes, Your Honor, and I'll  
14 cite two Tenth Circuit cases to you: Baker versus  
15 Bray, 701 F.2d 119; it's a 1983 Tenth Circuit case.  
16 And I'm going to butcher the name here, but it's  
17 Debardeleben versus Pugh. That's a 2003 Tenth  
18 Circuit decision. It appears at 56 Fed. Appendix  
19 464. And in both of those cases, the Court finds  
20 that the preliminary injunction, and thus the appeal  
21 of the preliminary injunction, is moot as a result of  
22 the district court's post filing of the interlocutory  
23 appeal dismissal of the case.

24 THE COURT: Do you think you have Tenth  
25 Circuit cases in identical postures here, and the

1 Tenth Circuit has basically said the appeal is moot?

2 MR. BOHNHOFF: I believe that's what these  
3 two cases I just cited to you stand for, yes, Your  
4 Honor.

5 THE COURT: Okay. What are you going to do  
6 with this order that just came to the Tenth Circuit?  
7 Are you going to file something and defend my final  
8 judgment? Or are you just going to let Mr. Crowell  
9 indicate that he thinks I made an error on putting  
10 that document into the file?

11 MR. BOHNHOFF: Based on the discussion this  
12 morning, Your Honor, I'm intending right now to file  
13 something with the Tenth Circuit. I think I want to  
14 advise the Tenth Circuit of what you've just said;  
15 that is, that you previously have entered indicative  
16 rulings at the same time that you've entered final  
17 judgments. And at least in the context of those  
18 cases, no question has been raised about the finality  
19 of the judgments.

20 I also want to --

21 THE COURT: Let me make sure I make it  
22 clear what I've done, because it is a little  
23 different than this case. I have entered final  
24 judgments, and then something has come up, sometimes  
25 from the Tenth Circuit, saying: What would you do if

1 you were presented with this question? And I give  
2 then an indicative ruling. But my point of referring  
3 to those type of cases was the whole point of doing  
4 an indicative ruling is there is a final judgment  
5 there. That's what an indicative ruling is. I don't  
6 have jurisdiction over the case.

7 So it's not -- I don't want to mislead  
8 anybody, and y'all can get on the internet and  
9 probably find these cases, because I've written on  
10 them, and see what I've done. I don't want to  
11 mislead anybody. I don't have a situation here where  
12 I gave an indicative ruling, and then entered a final  
13 judgment. I don't think I've ever done that. My  
14 situation was I gave final judgments, and then was  
15 asked to give an indicative ruling. And, you know,  
16 that's the situation it is. I mean, there is -- that  
17 the whole purpose of the filing of the indicative  
18 ruling is that everybody knows I don't have  
19 jurisdiction over this case.

20 And I guess that's why I keep kind of  
21 coming back to when I was sitting there on September  
22 30, I wanted Mr. Crowell to be able to appeal me  
23 quickly. Now, he may have reasons why he doesn't  
24 want to appeal me quickly, and I understand that.  
25 But I wanted to at least give him those options, and

1 the Pueblo, of being able to go to the Tenth. And I  
2 couldn't think of any party or any claim that was  
3 left for me to resolve. And that's the reason, then,  
4 that I thought it was appropriate to enter final  
5 judgment so that Mr. Crowell could do what he did,  
6 which is immediately appeal me, and then file this  
7 motion, which I understand he has to ask me to do  
8 before he can even ask the Tenth Circuit to do it.

9 Anything else, Mr. Bohnhoff, on this issue?

10 MR. BOHNHOFF: Yes. I mean, once the Tenth  
11 Circuit considers -- I think this case law that we've  
12 cited, we would submit that, number one, the Tenth  
13 Circuit is going to dismiss the interlocutory appeal;  
14 number two, the Tenth Circuit --

15 THE COURT: Where are you on all that  
16 briefing on your motion to dismiss your interlocutory  
17 appeal?

18 MR. BOHNHOFF: We filed our reply brief on  
19 Tuesday of this week, Your Honor.

20 THE COURT: So it's fully at the Tenth  
21 Circuit, totally done?

22 MR. BOHNHOFF: Yes.

23 THE COURT: Do you expect argument on that,  
24 or do you think that's something the Tenth Circuit  
25 will just handle on the papers?

1 MR. BOHNHOFF: My understanding is based  
2 on, really, the understanding of Mr. Ricco, who has  
3 far more experience than I do. Mr. Ricco's  
4 expectation was that the Tenth Circuit would  
5 resolve -- would rule on that motion relatively  
6 quickly, perhaps in a matter of days.

7 THE COURT: Let me ask you this -- and  
8 maybe Mr. Ricco would know the answer to this, maybe  
9 Mr. Crowell would know the answer to this: Let's say  
10 the Tenth Circuit grants your motion, and so they  
11 rule on your motion to dismiss first before they rule  
12 on this issue here. So I do now have something I  
13 need to do in this case, or arguably, I have  
14 something to do. What is then going to be the  
15 State's position? You've dismissed your appeal.  
16 I've given an indicative ruling. Are you going to  
17 want me to do something? Or are you going to  
18 basically take the position to the world that the  
19 injunction is gone?

20 MR. BOHNHOFF: I think we would -- well,  
21 number one, the Court has already suspended the  
22 injunction, so -- and that, I think, is important in  
23 terms of looking at this question of -- I mean, the  
24 Court, by suspending the injunction, has really put  
25 in play this entire question of whether a stay is

1 appropriate. And that's why we, frankly --

2 THE COURT: I thought I didn't touch that  
3 injunction. I just left it. Do you -- when you say  
4 I suspended the injunction, tell me what in my  
5 opinion that you think I have touched that  
6 injunction?

7 MR. BOHNHOFF: I'd refer the Court to page  
8 138 of your September 30 -- I stand corrected,  
9 September 30, not September 29 -- through 144.

10 THE COURT: Isn't that the indicative  
11 ruling that if it's returned to me, or the appeal is  
12 dismissed, then I will vacate the injunction?

13 MR. BOHNHOFF: Your indicative ruling  
14 appears on page 144, where you state, "Pursuant to  
15 Rule 62.1, the Court indicates that it would dissolve  
16 or vacate the preliminary injunction if the  
17 defendants dismiss the appeal and/or the Tenth  
18 Circuit remands the case for the Court's  
19 consideration."

20 But 138 through 144 is Section 7 of your  
21 ruling, the heading of which is, "The individual  
22 defendants are entitled to an order suspending the  
23 preliminary injunction."

24 THE COURT: Well, I think -- but that's my  
25 point. I think you're entitled to it. But I don't

1 think that this order has that in it yet. I can  
2 stand corrected. But I don't think it has it yet.  
3 So I guess my question is: Today you're saying you  
4 think the injunction is gone as a matter of law,  
5 because I entered final judgment, and you're going to  
6 tell the Tenth Circuit that. But if your motion is  
7 granted by the Tenth Circuit to dismiss the appeal,  
8 before you start doing things, are you going to want  
9 an order from me actually dissolving Judge Brack's  
10 preliminary injunction? Or are you going to be  
11 content to begin to do whatever the State wants,  
12 intends to do, just based upon the legal position you  
13 think the preliminary injunction is gone?

14 MR. BOHNHOFF: Let me say this, Your Honor:  
15 We do believe that if -- that, as a result of your  
16 merits ruling and dismissal of the complaint, the  
17 preliminary injunction has been vacated by operation  
18 of law. And it's the same logic that we think is  
19 going to compel the court, Tenth Circuit, to dismiss  
20 the appeal; same authority as well.

21 If you are telling us now that it was not  
22 your intent in that discussion of Section 7 of your  
23 ruling, that begins on page 138 -- if you're telling  
24 us now that it was not your intent to suspend the  
25 preliminary injunction --



1 THE COURT: Well, I didn't use that  
2 language, did I?

3 MR. BOHNHOFF: Well, in the heading you  
4 did. Section 7: "The individual defendants are  
5 entitled to an order suspending the preliminary  
6 injunction."

7 THE COURT: Well, "entitled."

8 MR. BOHNHOFF: And then, Your Honor,  
9 looking at page 144 -- I'm sorry, 145 -- the decretal  
10 part of your decision, the last paragraph it: "It is  
11 ordered that," a number of things. Point 3, "The  
12 defendants' motion to stay or suspend the Court's  
13 October 7, 2015 preliminary injunction is granted."

14 And so, by that language, we understood  
15 that you were suspending or staying Judge Brack's  
16 preliminary injunction. If you're telling us now --  
17 and this is my point -- that that was not your  
18 intent, then I think what we would want the Court to  
19 do is -- I'm thinking out loud here, Your Honor,  
20 frankly, and I think I'd want to --

21 THE COURT: Wasn't the motion that you just  
22 referred to the one that also, despite the title,  
23 it's the one that had the request for the indicative  
24 ruling?

25 MR. BOHNHOFF: As I sit here in the

1 courtroom, Your Honor, I don't know whether we asked  
2 for the indicative ruling in that motion or in the  
3 motion for reconsideration. I believe it was the  
4 separate motion for reconsideration.

5 THE COURT: Okay.

6 MR. BOHNHOFF: If the Court is going to  
7 tell us that it has not yet suspended or stayed the  
8 preliminary injunction, then I don't think the State,  
9 at this juncture, would be -- I think the State would  
10 want you to enter an order making clear that the  
11 preliminary injunction is vacated and/or suspended.

12 THE COURT: Well, I think that -- I need to  
13 think about this a little bit -- but I think that --  
14 and I think this is borne out by the thrust of the  
15 opinion -- is that I did not intend to touch the  
16 preliminary injunction. I intended to be a good,  
17 faithful district judge, and not touch that  
18 preliminary injunction, because I did feel that I had  
19 lost jurisdiction over that because of that going to  
20 the Tenth.

21 And so perhaps, if I had a moment with the  
22 opinion and reflected on it, I might think otherwise.  
23 But my memory, as I put that opinion together on the  
24 30th, and the final judgment, was that I was giving  
25 an indicative ruling. And the words were chosen

1 carefully. The defendants are entitled to it, but  
2 that I was indicating that I was not doing that at  
3 the present time; that that's something that --  
4 something had to happen with your appeal. It had to  
5 be dismissed or the Tenth Circuit -- either y'all  
6 voluntarily dismissed it or the Tenth Circuit  
7 dismissed it, and then I had the ability to actually  
8 enter an order on Judge Brack's order.

9 If that is the case, if I'm comfortable  
10 with my memory of where I was on September 30, and  
11 that was what I was intending to do, does that change  
12 anything then with where we were at the beginning?

13 Mr. Crowell is saying: Let's withdraw the final  
14 judgment; let's see what happens on Mr. Bohnhoff's  
15 motion to dismiss his appeal. If it's granted, come  
16 back; I'll give you the order that I had promised  
17 with the indicative ruling, and then reenter the  
18 final judgment, and nobody has to mess with this  
19 final judgment issue on Monday, or whenever y'all  
20 have to respond.

21 Does that change your thinking at all?

22 MR. BOHNHOFF: Your Honor, what I think the  
23 Court should do is the Court should wait for -- wait  
24 for the Tenth Circuit to rule on the motion to  
25 dismiss the interlocutory appeal.

1 THE COURT: Well --

2 MR. BOHNHOFF: And --

3 THE COURT: The problem with that is I want  
4 to get it right. I want to be a good district judge  
5 and get it right. I don't like to cause people to do  
6 things they don't need to do. I don't really have  
7 the luxury of waiting for the Tenth Circuit to rule  
8 on the motion to dismiss your appeal, because Mr.  
9 Crowell has to file something, if I remember it, I  
10 thought it was October 31, Halloween, so he's got to  
11 do something. And he's about to tell them that I got  
12 it wrong. And so I don't have the luxury of waiting  
13 for the Tenth Circuit to rule on your motion to --  
14 the motion to dismiss your appeal.

15 MR. BOHNHOFF: If the Court, on the basis  
16 of this Tenth Circuit authority that we've cited, the  
17 Baker case and the Debardeleben case that we've  
18 cited, is not comfortable with the proposition that  
19 the dismissal of the complaint, the granting of the  
20 motions to dismiss does not operate by law to vacate  
21 the preliminary injunction, then I think what the  
22 Court should do is it should enter an amended order  
23 that its judgment, September 30 judgment, is not yet  
24 final.

25 I will submit all of that -- and I would

1 assume Mr. Crowell would as well -- on October 31.  
2 And at that point, the Tenth Circuit should dismiss  
3 the interlocutory appeal, notwithstanding the  
4 Pueblo's arguments to the contrary, and at that point  
5 the Court, in very short order, I would hope, could  
6 reenter the final judgment.

7 THE COURT: Well, I guess it's somewhat --  
8 I guess, in my mind, it's somewhat in your court. I  
9 mean, if you want to go -- if Mr. Crowell wants to go  
10 up and tell them I committed error, and you want to  
11 go and tell them that I didn't, then I probably will  
12 just let y'all do what you need to do at the Tenth  
13 Circuit.

14 If, on the other hand, to save everybody  
15 trouble, and it's not going to make any difference to  
16 anybody, if y'all want to agree, and just submit me  
17 an order saying the judgment is not final, or y'all  
18 don't want it to be final -- we don't even have to  
19 say it's a matter of law; y'all can just agree that,  
20 you know, it's not final. And we can just vacate it  
21 consensually, and you can just tell the Tenth that  
22 there is no final judgment here and the appeal is not  
23 before the Tenth Circuit. And that way, you don't  
24 have to do a bunch of briefing.

25 MR. BOHNHOFF: I would --

1 THE COURT: So I see those as kind of more  
2 the State's call. If you want to go up there and  
3 fight about the final judgment being, in fact, final,  
4 you can do that. And if you just want to withdraw  
5 that final judgment, so that's not an issue; see what  
6 happens on your motion to dismiss your appeal. And  
7 then, when you come back, you'll have an open case,  
8 and get the order that I indicated I would enter.

9 MR. BOHNHOFF: I guess we need to hearken  
10 back to the logic of allowing the appeal on the  
11 merits to go forward as quickly as possible. And I  
12 think what I would be open to is an agreement that  
13 the motion to dismiss the interlocutory appeal should  
14 be granted. And then, at that point, this Court  
15 could enter an amended judgment, making clear that,  
16 without question at that point, the judgment is  
17 final.

18 THE COURT: Well, if you're already getting  
19 to the point of an amended judgment, it sounds like  
20 you're ready to sort of vacate this final judgment  
21 right now. And that way, neither one of you have to  
22 do much, other than just send a letter to the Tenth  
23 Circuit saying everybody has agreed that there will  
24 not be a final order in this case at the present  
25 time.

1 MR. BOHNHOFF: Except that the Pueblo, to  
2 date at least, has opposed dismissal of the  
3 interlocutory appeal.

4 THE COURT: Well, that's true. I mean,  
5 that's a separate issue, as far as I see. I mean,  
6 that's a different issue. That's all briefed up  
7 waiting for the Tenth. Y'all don't need to do any  
8 more work on that one.

9 So I'm just trying to -- a couple of  
10 things: I'm trying to save y'all some work that you  
11 have to do for the Tenth Circuit that they've ordered  
12 with this order.

13 And I guess I don't get any kick in life  
14 being told by the Tenth Circuit I got it wrong  
15 either. So it seems to me we might have a mutual  
16 interest here just to put together an order that says  
17 we've all agreed that no final judgment should be  
18 entered at the present time, and do that; vacate that  
19 final judgment; tell the Tenth that there is no final  
20 judgment, there is no appeal, and just wait and see  
21 what they do. If they dismiss your appeal, come back  
22 and get the order vacating Brack, enter a final  
23 judgment. Then we're done.

24 Does that make sense to you, Mr. Bohnhoff?  
25 I think that's what Mr. Crowell is suggesting.

1 MR. BOHNHOFF: I think -- well, as I sit  
2 here today, Your Honor, I think my -- I think I need  
3 to defend the finality of the judgment to the Tenth  
4 Circuit. To me, the -- if the Pueblo would  
5 dismiss -- stipulate to the dismissal of the  
6 interlocutory appeal, we could stipulate --

7 THE COURT: Well, they're not going to do  
8 that.

9 MR. BOHNHOFF: Yeah.

10 THE COURT: They're not going to do that.  
11 Do you need a break to talk to Mr. Ricco, or do you  
12 want to just plow ahead?

13 MR. BOHNHOFF: I think we ought to plod  
14 ahead, because really, I'm not sure, frankly, that  
15 this question about the finality of judgment -- it  
16 may be a separate issue that needs to be addressed.  
17 But I'm not sure that it really bears on the motion  
18 that we were actually to be arguing, which is the  
19 motion to stay.

20 THE COURT: Well, let me tell you why I  
21 think it does, because Mr. Crowell alluded to this  
22 earlier. I'm not sure we need to be arguing the  
23 motion to stay the order and restore the preliminary  
24 injunction at this time. We can, if we want to. But  
25 it seems to me that -- and I think Mr. Crowell was



1 saying this as well -- you know, the way you normally  
2 do this is enter this after a final judgment, because  
3 he's got to get ready to go to the Tenth. If I don't  
4 give him a stay, or restore the preliminary  
5 injunction pending appeal, then he's got to ask here  
6 first before he goes to the Tenth. But it's a little  
7 odd to be arguing that, if we don't have a final  
8 judgment.

9 And I guess I might make a pitch that we  
10 just hold our powder, because, you know, things  
11 change, and rather than sort of arguing it today,  
12 let's argue it in sort of a real world. I mean,  
13 people gave me letters I'd never seen before. Things  
14 are happening today. And things may happen in the  
15 future. It just seems to me that when people are  
16 asking for, basically, injunctive relief, it's kind  
17 of good to be in real-time, rather than at some  
18 speculative time.

19 But those are my thoughts as to the reason  
20 that I thought this issue was appropriately raised by  
21 Mr. Crowell right off the bat.

22 MR. BOHNHOFF: What I would propose, then,  
23 Your Honor, is that the Court recess this hearing; we  
24 go back -- we will make a submission to the Tenth  
25 Circuit either tomorrow or Monday. Mr. Crowell can

1 make his submission on Monday. We let the Tenth  
2 Circuit address the question that it raised, as well  
3 as rule on the motion to dismiss the interlocutory  
4 appeal. And I think, at that point, we're going to  
5 have the clarification that we need, including the  
6 Tenth Circuit addressing this new authority that I've  
7 mentioned. And on that basis, the Court can make a  
8 decision both as to the finality of the judgment  
9 question, the issue of whether or not an amended  
10 judgment needs to be entered. And also, the Court  
11 can rule cleanly on the motion to stay.

12 THE COURT: Well, I think Mr. Crowell is  
13 going to say: If I'm not going to touch the final  
14 judgment today, if I'm not going to go ahead and do  
15 something with this final judgment, then he needs a  
16 stay, and he needs relief from it. So if the State  
17 is not willing to sort of put an order together  
18 vacating the final judgment, then he's got a final  
19 judgment he's got to deal with, and he's ready to go.  
20 He's going to get me -- get an order from me one way  
21 or another. And then, if he needs to, he'll ask the  
22 Tenth Circuit for relief.

23 So right at the moment, unless we're going  
24 to agree that we don't want a final judgment, don't  
25 need a final judgment here, that -- I think that he's

1 entitled to argue his motion today.

2 All right. Anything else, Mr. Bohnhoff?

3 MR. BOHNHOFF: One other thing, if it helps  
4 in the consideration of these questions, Your Honor:  
5 Notwithstanding our understanding that the Court had  
6 suspended the preliminary injunction -- and I'm  
7 looking at -- I'm sorry -- what I can tell the Court  
8 is that so far the State has not started any action,  
9 any enforcement action against the vendors. I can  
10 say that the state would not start any enforcement  
11 action until we have these questions cleared up. The  
12 question that's raised by the Tenth Circuit in its  
13 order, resolution of the motion to dismiss the  
14 interlocutory appeal, and then this Court making a  
15 decision as to whether or not the judgment it  
16 interpreted is final.

17 THE COURT: It looks like the way we've got  
18 it teed up, the Tenth Circuit is going to answer that  
19 question.

20 MR. BOHNHOFF: Could be. Yeah.

21 THE COURT: You know, I mean, right at the  
22 moment, I think I've lost jurisdiction over that  
23 issue, unless we all get together and agree to vacate  
24 the final judgment that was entered, and say we agree  
25 that there is no final judgment in this case. I

1 think probably I will not decide that issue, because  
2 the Tenth Circuit is going to decide it for all of  
3 us.

4 All right. Anything else, Mr. Bohnhoff?

5 MR. BOHNHOFF: No, Your Honor.

6 THE COURT: All right. Mr. Crowell -- let  
7 me ask Ms. Frias -- was she the one that spoke up a  
8 little bit ago and wanted to talk about some motions?  
9 Was that Ms. Frias?

10 MS. FRIAS: Yes, Your Honor. And I think  
11 the State clarified. I just wanted to make sure that  
12 you knew that we were all briefed up on the  
13 interlocutory appeal and the dismissal.

14 THE COURT: Okay. All right. Thank you,  
15 Ms. Frias.

16 MS. FRIAS: Your Honor, I had a brief  
17 moment just quickly to pull those two cases that the  
18 State cited supporting their motion on the dismissal  
19 of the preliminary injunction. I think it's Baker  
20 versus Bray -- and I don't think I can pronounce this  
21 either, Debardeleben versus Pugh -- and with a quick  
22 summary of the cases I don't believe they're stating  
23 exactly what the State is saying they are. But, Your  
24 Honor, I haven't had time to properly review them.

25 THE COURT: Okay. All right. Anything

1 else, Ms. Frias?

2 MS. FRIAS: No, Your Honor. I'll let Mr.  
3 Crowell step in.

4 THE COURT: All right. Mr. Crowell?

5 MR. CROWELL: Well, yes, let me -- there  
6 was a lot said that I feel that I need to respond to,  
7 but I'll try to respond to those things that I think  
8 are really germane to trying to advance this matter.

9 First, you know, as everyone has  
10 identified, you know, the motion to dismiss the  
11 interlocutory appeal is fully briefed. Mr. Bohnhoff  
12 indicated that he expects to get a decision quickly.  
13 That's consistent with my experience on these kinds  
14 of motions at the appellate court level.

15 So, you know -- and that runs contrary to  
16 his suggestion, which frankly, I take offense to,  
17 that my response to the Tenth Circuit's order would  
18 be motivated by delay. What I want to avoid is going  
19 through all the expense and time of an appeal, to  
20 possibly have the court say, well, we didn't have  
21 jurisdiction in the first place. And we will have  
22 spent more time and money just to get back to where  
23 we are now.

24 I think the Court's suggestion to Mr.  
25 Bohnhoff is a good one. And I guess I'm attempting

1 to persuade Mr. Bohnhoff to reconsider his decision.  
2 I will clarify that I'm not asking for the memorandum  
3 and opinion to be vacated or alternated in any way.  
4 It's the final judgment that would be vacated. And  
5 it would only be vacated for a very short time.

6 If the Tenth Circuit grants the motion to  
7 dismiss the appeal, then we just go through the  
8 perfunctory efforts of taking -- of entering final  
9 judgment, and the Court following through with its  
10 indicative ruling on the preliminary injunction. If  
11 the court of appeals denies the motion to dismiss,  
12 then I believe, you know, we could come back, you  
13 know, to this Court, and the State can move for entry  
14 of final judgment or modification of the September 30  
15 order to allow it to be an appealable final judgment.

16 That is what we want. We want a final  
17 judgment that we can take to the court of appeals,  
18 and where the court of appeals clearly has  
19 jurisdiction to resolve the issues. That's the  
20 prudent thing to do. We're not talking about  
21 withdrawing the final judgment for an indefinite  
22 period of time that leads to delay and confusion.  
23 We're -- we're -- we're talking about taking the  
24 prudential action at this level of vacating the final  
25 judgment, to moot this issue of whether we have an

1     appealable final judgment or not, which by Mr.  
2     Bohnhoff's own representations, those should be  
3     resolved in a matter of days. That's the prudent  
4     thing to do. And I'm, frankly, surprised that  
5     Mr. Bohnhoff has not accepted the Court's invitation  
6     to do that, and would encourage him to reconsider  
7     doing that.

8             Our representations to the -- to the Tenth  
9     Circuit will be based on what I see as the law, is we  
10    have confusion here in terms of, you know, whether or  
11    not there are open issues. Mr. Bohnhoff takes the  
12    position that it gets dissolved as a matter of law.  
13    And we don't.

14            So -- and there is not just -- and --  
15    and -- and I haven't had an opportunity to read the  
16    cases we cited for the first time in this argument as  
17    well, but I'm relatively certain that those cases  
18    didn't have in place an order of abatement at the  
19    Tenth Circuit level regarding the interlocutory  
20    appeals that may or may not have been pending in  
21    those cases.

22            It just -- it just strikes me that we can  
23    go through a lot of added expense and machinations  
24    for something that could be mooted simply by vacating  
25    the final judgment for a very short period of time to

1 see what the Tenth Circuit does with -- with the  
2 State's motion to dismiss the interlocutory appeal.

3 THE COURT: All right. I understand your  
4 position, Mr. Crowell, and I don't have any great  
5 disagreement with it.

6 I guess I have not looked at this final  
7 judgment issue since I entered it. I haven't had a  
8 chance to look at these cases either. So I'll take a  
9 look at those, and I may do something on my own, if  
10 there is no agreement to do it. But I need to  
11 probably look at these cases first.

12 All right. Mr. Crowell, since we still  
13 have a final judgment, we don't have an agreement to  
14 vacate that, why don't you go ahead and argue, then,  
15 the portion of your motion about the motion to stay  
16 the order and restore the preliminary injunction  
17 pending appeal.

18 MR. CROWELL: I'm certainly prepared to do  
19 that, but -- and I'm not in the courtroom with Mr.  
20 Bohnhoff -- but -- but I'm wondering whether it would  
21 make sense to take a break from this oral argument  
22 for Mr. Bohnhoff to consult with his clients and  
23 clarify, or whether he can tell us now that he's  
24 insistent on his position to not vacate the final  
25 judgment.



1 THE COURT: Well, I think I pressed him  
2 pretty hard. I think he's going to go defend the  
3 final judgment in this.

4 Is that your position, Mr. Bohnhoff?

5 MR. BOHNHOFF: My position remains the  
6 same, Your Honor, yes.

7 THE COURT: Okay. Do you want any break to  
8 talk to anybody, or are you ready to go ahead and  
9 argue the rest of the motion here?

10 MR. BOHNHOFF: I'm prepared to argue the  
11 motion to stay, Your Honor.

12 THE COURT: All right. Let's go ahead and  
13 proceed then, Mr. Crowell, if you wish to do so.

14 MR. CROWELL: Yes, Your Honor. You know,  
15 we do believe that a stay preserving the status quo  
16 would be appropriate in this matter. The -- we have  
17 really two levels of arguments. The first is whether  
18 the Court had jurisdiction to issue the September 30  
19 order. And then the standard criteria that would go  
20 to a motion to stay, which matched the criteria for a  
21 motion for preliminary injunction, with the exception  
22 of clarification on what qualifies as establishing  
23 the likelihood of prevailing on the merits at this  
24 stage.

25 What's really at stake here -- and I found,

1 you know, in Mr. Bohnhoff's discussion earlier where  
2 he was suggesting that, you know, that the Tribe is  
3 seeking delay until the Tenth Circuit rules on two  
4 consolidated appeals. And that's been our position  
5 in this litigation all along, is that the Dack  
6 (phonetic) case, which -- which, you know, will  
7 hopefully provide with finality -- but certainly  
8 provide clarification -- of what remedies tribes have  
9 in situations like we have here, where the Pueblo of  
10 Pojoaque has done everything that the federal law  
11 requires it to do to secure a compact with the state.  
12 It's pursued its remedies as clearly established  
13 against the State under IGRA. It's pursued its  
14 remedies as provided by the federal government in the  
15 Part 291 regulations. And yet, here we are in a  
16 situation where -- where the State's motivation in  
17 this litigation is to put the Tribe in a position to  
18 where -- where it's coerced into a compact that has  
19 illegal terms and is not the product of good faith  
20 negotiations. That's the bigger overall dispute,  
21 which we think waiting for that Tenth Circuit  
22 decision would likely result in mooted or greatly  
23 narrowing the issues that are in dispute here.

24           Going to -- to the merits, we believe that  
25 this Court improperly carved out a preliminary

1 injunction exception to the Donges Rule, when there  
2 is no such exception recognized by the Tenth Circuit.

3 The Free Speech case that this Court relied  
4 upon, that the State relied upon, did not even  
5 address the jurisdictional issues, did not even  
6 address Donges. And yet, now, it's being elevated to  
7 create a hard exception from Donges, where Donges  
8 said, you know, Here's the bright line rule.

9 And they chose to pursue the interlocutory  
10 appeal; not the Tribe. When they did that, they  
11 divested this Court of jurisdiction to hear that  
12 under the Donges Rule. But even if the Donges Rule  
13 didn't apply, and the rule that's used in most other  
14 circuits as to whether the issues on appeal are  
15 inextricably bound to the issues remaining at the  
16 district court, the district court is divested of  
17 those issues as well. Otherwise, we have -- we have  
18 exactly the duplicity and exactly the two bites at  
19 the apple that the Donges Rule was designed to avoid.

20 So, as a matter of course, we don't believe  
21 that this Court had the jurisdiction to issue the  
22 September 30 ruling in the first place. Assuming  
23 that it did, and we look to the four factors: Is  
24 there a substantial likelihood that the Tribe would  
25 prevail on the merits; will the Tribe suffer

1 irreparable harm if the request is denied; what is  
2 the balance of hardships that -- of what the Tribe  
3 would suffer versus what the State would suffer if  
4 the motion is granted; and the public interest  
5 factors. And all of those weigh in favor of the  
6 Pueblo.

7 When you're dealing with this on appeal,  
8 although we think we would meet, and do meet the  
9 typical substantial likelihood to prevail on the  
10 merits argument, the question is whether the appeal  
11 raises serious questions of law. And I had my notes  
12 in front of me to quote -- to quote the standard.  
13 But we clearly have that.

14 You know, with all due respect, Judge  
15 Browning, we have -- we have two district court  
16 judges issuing opinions on these -- these critical  
17 issues in this case, in two different contexts in the  
18 same case.

19 I think the very fact that Judge Brack --  
20 and let me back up. We take great disagreement with  
21 the characterization by the State that somehow Judge  
22 Brack acted, you know, in haste, without a thorough  
23 review. At the preliminary injunction stage this  
24 matter was fully briefed. The court hearings were --  
25 were set to accommodate the schedule of the State's

1 lawyers. We had a full day of hearings. And  
2 virtually all of the arguments that have been raised  
3 by the State in its subsequent motions, or the  
4 defendants' subsequent motions were raised in front  
5 of Judge Brack. And Judge Brack came to different  
6 conclusions on the same issues. One of the most  
7 glaring of which, where we believed that this Court  
8 clearly erred was this notion that because the  
9 State's actions physically occurred off of Indian  
10 lands, that IGRA doesn't preempt the State from doing  
11 that. If you take that to its illogical extreme,  
12 this Court would be condoning the State setting up  
13 roadblocks or building a fence around the  
14 reservation, preventing anybody from coming in or  
15 out. And because the fence is on the state side of  
16 the line, instead of the reservation side of the  
17 line, the State would be able to do that, and  
18 interfere with the Tribe's governance on its lands  
19 with impunity.

20 But that's not what the case law says. The  
21 case law says the State can't exercise its  
22 jurisdiction in a way that directly interferes with  
23 the Tribe's governance of its gaming activities. And  
24 when that question is answered, there is no doubt  
25 that what the State has done here is specifically

1 directed at regulating or interfering with the  
2 Tribe's governance of its gaming activities. And  
3 more specifically, is an attempt to try to coerce the  
4 Pueblo into signing a bad compact, with illegal terms  
5 not negotiated in good faith, without ever having its  
6 day in Court at the Tenth Circuit of Appeals in the  
7 two consolidated appeals.

8 For purposes of our motion to stay, we  
9 don't need to rehash every issue that this Court has  
10 ruled upon and prove that the Court was wrong. We  
11 have to establish that there are serious questions  
12 that have been raised that justify preserving the  
13 status quo pending appeal. And we believe we clearly  
14 have done that.

15 Now, what I find troubling about the  
16 State's views in this case is their attempt to use  
17 this litigation to force the Tribe into signing a bad  
18 compact. That's -- you know, that that's --  
19 that's -- that's what they're trying to do. This is  
20 not -- you know, I appreciate the fact that they said  
21 they're not going to take any enforcement action now.  
22 But what they're clearly teed up to do is take  
23 enforcement action, you know, as soon as -- as soon  
24 as this Court rules on the motion to stay.

25 When you look at the irreparable harm issue

1 and the balance of harm issue, it's not even a close  
2 question. You're looking at the Tribe's business  
3 being crippled. You're looking at thousands of  
4 people being put out of work. You're looking at  
5 millions of dollars that -- that are put into tribal  
6 governmental programs, that will -- that -- that  
7 those programs will have to either be seriously cut  
8 back or withdrawn altogether. You're looking at the  
9 largest private employer -- or the largest non --  
10 other than non-Indian governments, you're looking at  
11 the largest employer and economic tool in the entire  
12 valley and region, and crippling it. For what? For  
13 the State to say, Oh, you know, we've got -- you  
14 know, we've got our police powers to protect.

15 Well, the Tribe is a government, too. And  
16 the Tribe has police powers, too. And when they look  
17 at case law, when they try to cite case law that  
18 says, Well, you don't use the serious questions of  
19 law standard when you're dealing with an injunction  
20 of the State exercise of its police powers, none of  
21 those cases deal with another government having its  
22 own police powers that are being interfered with if  
23 the stay is denied.

24 And that's exactly what happens if the  
25 Court denies the stay here. It is interference with

1 the Tribe's ability to govern its gaming activities  
2 on its lands.

3 The cases that have looked at injunctions  
4 in the context of the Indian Gaming Regulatory Act,  
5 the public interest is that interest articulated by  
6 congress in the very first section of the Indian  
7 Gaming Regulatory Act. You have a federal public  
8 policy to use the Indian Gaming Regulatory Act for  
9 tribes to become strong tribal governments,  
10 economically self-sufficient. And Pojoaque is being  
11 deprived of its ability to do that, because of the  
12 State's actions here.

13 The Tribe wants the courts to resolve these  
14 issues. The Tribe will comply with the ultimate  
15 resolution of these issues. The State is trying to  
16 prevent the tribe from being able to do that by  
17 putting the tribe into the circumstances to where,  
18 for it to survive, it has to sign onto this illegal  
19 course of compact.

20 The fact -- the fact that Judge Brack  
21 granted summary judgment, the fact that Judge Brack  
22 found that the Tribe would suffer irreparable harm,  
23 found that the balance of power tips heavily in favor  
24 of the Tribe, and that the public interest is  
25 advanced by granting the preliminary injunction are



1 all relevant here in purposes of the Tribe  
2 establishing the grounds for -- for the motion to  
3 stay.

4 There is no good reason that I have yet to  
5 hear be articulated by the State of why the status  
6 quo cannot be preserved until these questions are  
7 resolved at the court of appeals.

8 We're disappointed in your September 30  
9 ruling, of course we are. But even with the  
10 September 30 ruling, we would hope that this Court  
11 would understand that these are not easy questions;  
12 that there is authority for -- for -- for the Tribe's  
13 position. And that it would be a gross injustice to  
14 see the Tribe put into a situation to where -- where  
15 it has to either sign onto an illegal compact, or --  
16 or shutter its doors at its gaming facilities. It's  
17 an outrageous circumstance.

18 And we would hope, and we believe that the  
19 case law and all the evidence provided in the motion  
20 supports the Tribe's position that a stay should be  
21 granted. The efforts by the State through Mr.  
22 Landers' declaration suggests that, Oh, well, you  
23 know, the fired employees could be hired elsewhere;  
24 that the Tribe could revert to other types of  
25 gaming -- those were all addressed in front of Judge

1 Brack as well. The only thing that is different is,  
2 yes, the -- the -- the back of the house computer  
3 system that links all of the computers to help with  
4 the regulatory aspects of the Tribe -- of the tribal  
5 obligations dealing with the National Indian Gaming  
6 Commission, yes, that system is now in place.

7 But as we've shown in our declaration that,  
8 yeah, that doesn't mean that we can now proceed,  
9 without a relationship with the vendor that put that  
10 system in place, because it is always being repaired  
11 and upgraded with software and hardware. And we  
12 would be precluded from being able to do that, which  
13 would cause that very system to shut down.

14 So, if anything, the situation is worse now  
15 than it was before, because the Tribe made a huge  
16 capital investment that will be rendered useless if  
17 it's not able to continue to do business with  
18 Scientific Games.

19 Every other aspect that we established in  
20 front of Judge Brack remains true, in terms of the  
21 number of employees that are being put out of the  
22 work, the gutting of tribal programs that would be  
23 necessary, the inability to compete with Class 2  
24 gaming in an environment where we have competitors,  
25 literally, you know, hundreds of yards away from the

1 Tribe's operations that will be offering Class 3  
2 games.

3 The use of the Santa Clara letter to  
4 suggest that, you know, other tribes believe that --  
5 that -- that Pojoaque is being given an unfair  
6 advantage in the situation, you know, is not  
7 supported by the vast majority of tribes in the  
8 country, as we provide in the resolutions of the  
9 National Indian Gaming Association, the National  
10 Congress of American Indians, the Affiliated Tribes  
11 of Northwestern Indians, and the Navajo Nation.

12 The Pueblo has done everything federal law  
13 requires it to do, and yet, it is now looking at  
14 having to shutter its doors because the State refuses  
15 to negotiate in good faith, the State refuses to  
16 waive its Eleventh Amendment immunity. And now the  
17 State is taking coercive action against the vendors  
18 doing business with the Tribe solely because they're  
19 doing business with the Tribe, with the Pueblo. And  
20 yet they've yet to articulate any kind of concrete  
21 harm that they would suffer by providing the Tribe  
22 its day in court in front of the Tenth Circuit. We  
23 believe a stay is warranted.

24 THE COURT: Let me ask you a few questions  
25 that go to the real -- what I was talking about

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1 earlier -- the real practicalities of the moment.  
2 One of the things that struck me about your  
3 affidavits is two things -- and I'll put them both on  
4 the table, but they're separate issues -- is one, it  
5 looked to me like, during the time that you have had  
6 this preliminary injunction in place, you've gotten  
7 yourself in a good position. You got the stuff from  
8 Scientific Games that might have been halted if that  
9 preliminary injunction had not been entered. So  
10 you're in a good position. And what struck me about  
11 the affidavits, and to a certain degree the  
12 arguments, is that ultimately, what the State does to  
13 you could be a problem. But right at the moment, the  
14 Pueblo is in good shape.

15 If the State squeezes a few vendors out  
16 there, you might lose a machine here or there. But  
17 by and large, the Pueblo is in a position to wait  
18 out -- you know, continue to do what it's doing for a  
19 very lengthy period of time, and certainly during the  
20 period of time that it would take the Tenth Circuit  
21 to give us a definitive ruling on the appeal of what  
22 I have done on September 30.

23 Your thoughts and reaction to that?

24 MR. CROWELL: Well, I have to take strong  
25 disagreement to that. This is not squeezing out a

1 few vendors. This is squeezing out 98 percent of the  
2 primary Class 3 gaming product providers in the  
3 industry.

4 The games -- it won't be a long period of  
5 time that the games could remain operational. As  
6 soon as there is a software defect, it goes down. As  
7 soon as there is a hardware defect, it goes down. If  
8 the system goes down, we won't be able to work with  
9 Scientific Games to keep the system up. And the way  
10 it's currently structured, that would cause  
11 everything to go down.

12 Now, we do have Michael Allgeier in the  
13 room with Carrie Frias, you know, who -- you know, if  
14 need be, you know, I would proffer him up to answer  
15 the Court's questions from his -- from the practical  
16 business point of view, because he's the guy that has  
17 to deal with the practical reality of what the Pueblo  
18 would face if the stay is denied.

19 But the notion that we would be able to go  
20 on for a long period of time if the stay is denied --  
21 I wish it were true, but the practical reality is  
22 that it's not.

23 MS. FRIAS: Your Honor, may Michael --

24 THE COURT: Let me ask one more question  
25 here, and then we can -- then I'll hear from you,

1 Ms. Frias.

2 Is Scientific Games the only -- are they  
3 the only vendor that the State might, under its  
4 gaming operations, be trying to -- to regulate, or  
5 are there other vendors that -- other than Scientific  
6 Games?

7 MR. CROWELL: All of the Tribe's vendors  
8 would be impacted by the State's moves.

9 Mr. Allgeier would be able to be more  
10 specific. But I believe it's Scientific Games,  
11 Bally, Aristocrat, Omega. All of the suppliers of  
12 the Class 3 gaming equipment to the Tribe are at risk  
13 if the stay is denied.

14 THE COURT: So there is more vendors  
15 related to gaming than just Scientific Games?

16 MR. CROWELL: That's right. And if you go  
17 back to the pleadings in the preliminary injunction  
18 in front of Judge Brack, you know, they have all  
19 received citations from the State, the New Mexico  
20 Gaming Control Board; not just Scientific Games.

21 THE COURT: Well, I knew that the net was  
22 wide. But I wondered, from a real world standpoint,  
23 if the only vendor that really was very important  
24 here to the Pueblo was Scientific Games, given the  
25 materials that were attached to the current briefing.

1 Ms. Frias.

2 MR. CROWELL: Go ahead.

3 THE COURT: No, go ahead and finish up, Mr.  
4 Crowell.

5 MR. CROWELL: You know, I believe that the  
6 reason that the focus of the declaration is on  
7 Scientific Games is because the State made the  
8 argument that because that system is now in place,  
9 the Tribe wouldn't be harmed by not being able to get  
10 the system in place. And the system is a Scientific  
11 Games system, and it requires constant monitoring,  
12 repairing, and upgrading that only Scientific Games  
13 could provide.

14 THE COURT: All right. Ms. Frias?

15 MS. FRIAS: Your Honor, I'm sitting here  
16 with Mr. Allgeier. Would you like him to address any  
17 of your questions? He's probably got the most real  
18 world perspective on this.

19 THE COURT: Yeah. I do think, though, that  
20 for the record, I probably ought to swear him in. So  
21 can you give me his name again, who this will be?

22 MR. BOHNHOFF: Your Honor, this --

23 MS. FRIAS: Mr. Allgeier.

24 MR. BOHNHOFF: -- this is Mr. Bohnhoff.

25 May I be heard?

1 THE COURT: All right. Mr. Allgeier, if  
2 you'll raise your right hand, Ms. Wild will  
3 administer the oath.

4 MR. BOHNHOFF: Your Honor, this is Hank  
5 Bohnhoff. She stepped out of the room for a moment.  
6 May I be heard?

7 THE COURT: Well, just a second here. Let  
8 me swear Mr. Allgeier in, and then I'll let you --

9 THE CLERK: I'm here.

10 THE COURT: Mr. Allgeier, if you'll raise  
11 your right hand.

12 (The witness was duly sworn.)

13 THE COURT: All right. Do you have an  
14 objection to me taking some information from Mr.  
15 Allgeier, Mr. Bohnhoff?

16 MR. BOHNHOFF: Yes, Your Honor, I do. The  
17 Pueblo could have submitted an affidavit. Mr.  
18 Allgeier is -- somewhere; he's certainly not here in  
19 the courtroom. He's -- if we were going to take  
20 testimony, I would want to have notice, one; and two,  
21 I'd want to have the witness present so I could  
22 cross-examine him effectively. And I can't do that  
23 over the phone.

24 THE COURT: Well, let me hear what Mr.  
25 Allgeier is wishing to say.



1           Why don't we take a break right now. I  
2   need to give Ms. Bean a break. She's been going  
3   about an hour and a half. So why don't we take a  
4   break. I'll hear what he has to say, and then, if  
5   you wish to cross-examine him, you can. I think I'm  
6   inclined to hear his testimony, hear what he has to  
7   say in the nature of -- this is kind of in the nature  
8   of a preliminary injunction hearing, and everybody  
9   kind of scrambles and does the best they can. And so  
10   I don't want to prejudice the Pueblo in telling me  
11   what the exigencies of this are. And sometimes we  
12   just have to do the best we can when we're dealing  
13   with equity.

14           So I am going to hang up. And let's get  
15   back together in about 15 minutes, and then we'll  
16   resume the hearing. And I'll let Mr. Allgeier  
17   indicate what he wants. And Ms. Frias may want to  
18   ask him some questions to direct his testimony.

19           All right. We'll be in recess for about 15  
20   minutes.

21           (The Court stood in recess.)

22           THE COURT: All right. We'll go back on  
23   the record. While we were taking a break, I did  
24   check my email, and the Tenth Circuit has just issued  
25   a brand-new opinion on preliminary injunctions. And

1 since the standards for this motion are the same  
2 as -- pretty similar to the ones for preliminary  
3 injunctions, we might want to take a look at it.  
4 It's Dine, D-I-N-E, and I forget rest of it. It's  
5 versus Jewell, the Secretary of Interior, I believe.  
6 And it's a case I had, and they've affirmed. There  
7 is Paul Kelly and McKay, looked like they affirmed  
8 across the board. There is a dissenting opinion in  
9 part. So it's concurring in part and dissenting in  
10 part by Judge Lucero. So we may all want to take a  
11 look at that when we're done, because it does  
12 involve -- it's an environmental case, but it does  
13 involve the standards. And there was an  
14 interlocutory appeal of that preliminary injunction  
15 in that case.

16 All right. Ms. Frias, if you wish to  
17 present Mr. Allgeier, you may do so at this time.

18 MS. FRIAS: Yes, Your Honor.

19 MICHAEL ALLGEIER,  
20 after having been first duly sworn under oath,  
21 was questioned and testified as follows:

22 DIRECT EXAMINATION

23 BY MS. FRIAS:

24 Q. Mr. Allgeier, what's your position here at  
25 the Pueblo?

1           A.    I'm the CEO of Pueblo of Pojoaque  
2 businesses and the CEO of Buffalo Development.

3           Q.    And can you explain what Buffalo Thunder  
4 Development Authority does?

5           A.    Buffalo Development Authority encompasses  
6 both casinos --

7           THE CLERK: We can't hear.

8           (Discussion held off the record.)

9           THE COURT: Ms. Bean is asking for the  
10 witness to repeat what he just said.

11          A.    This is Michael Allgeier. I'm the CEO of  
12 BTBA, which encompasses the Buffalo Thunder Resort  
13 Casino and the Cities of Gold Casino.

14          (Discussion held off the record.)

15          A.    This is Michael Allgeier. Can you hear me  
16 now?

17          THE CLERK: It's better.

18          A.    I am the CEO of Buffalo Development  
19 Authority, which includes Cities of Gold Casino and  
20 Buffalo Thunder Resort and Casino.

21          Q.    And Mr. Allgeier, if the gaming vendors  
22 stop doing business with the Pueblo, can you explain  
23 to the Court what happens?

24          A.    All the vendors supply our software to the  
25 slot machines. Periodically, software gets revoked.

1 In other words, it's no longer valid software based  
2 on either GLI, which is Gaming Laboratories, Inc.,  
3 that make sure the software is correct. If we cannot  
4 deal with the vendors, we would not know when that  
5 happens.

6 If we were not to be able to deal with  
7 Scientific Games, we would not be able to fix any  
8 software glitches; they could not monitor our system;  
9 and we would have to shut down all -- both the  
10 casinos, and basically send everybody home because  
11 we'd have no customers.

12 Q. And how quickly would something like that  
13 happen?

14 A. That can happen today, tomorrow, next week.  
15 It could happen at any time. And, periodically, it  
16 does happen.

17 Q. And have you received any communication  
18 from any of the vendors recently?

19 A. I received one from Aristocrat asking us --  
20 MR. BOHNHOFF: Your Honor, I object. This  
21 is hearsay.

22 THE COURT: Well, it is, but this is a  
23 preliminary injunction hearing, in effect, so I'll  
24 take his testimony. Overruled.

25 A. We received one inquiry to what -- where we

1 are at with the injunction. We responded, "I don't  
2 know," because I didn't know at the time. And that's  
3 basically the one we had.

4 The Aristocrat, they supply us with  
5 probably about 20 percent of the machines on the  
6 floor. And again, if we cannot communicate with  
7 Aristocrat, or they cannot work with us, if revoked  
8 software comes up or a system glitch or whatever,  
9 we'd have to shut all their machines down.

10 MS. FRIAS: Scott, did you have any further  
11 questions for Mr. Allgeier?

12 MR. CROWELL: Yes.

13 EXAMINATION

14 BY MR. CROWELL:

15 Q. Besides Scientific Games, can you identify  
16 the major vendors that you're aware of receiving  
17 citations that do business with the Pueblo?

18 MR. BOHNHOFF: Your Honor, how many lawyers  
19 are we going to have doing the direct examination? I  
20 object.

21 THE COURT: Well, I'll allow this. I'd  
22 like to get a good record here rather than stand on  
23 the formality of which lawyer is questioning. So  
24 overruled.

25 Mr. Crowell?

1 BY MR. CROWELL:

2 Q. Yes, my question was, other than Scientific  
3 Games, what other vendors do business with the Pueblo  
4 that you know have received citations from the New  
5 Mexico Gaming Control Board?

6 A. I don't have exactly all of them. But I'm  
7 very positive that IGT, Kanomie, Aristocrat have  
8 notified us that they received citations.

9 Q. And of those three vendors, how much of  
10 your floor is games provided by those vendors?

11 A. Including Scientific Games, that would be  
12 about 90 percent of the floor.

13 Q. And if you're unable to do business with  
14 those vendors, what position -- how would you respond  
15 to that?

16 A. We would have to close down. We cannot  
17 operate unless we can deal with our vendors.

18 Again, I go back to the software issue.  
19 Either a glitch or the revoked software, the vendors  
20 notify us. They ship us new software, or they fix  
21 the glitch. Now, if they can't do that, we cannot  
22 operate.

23 MR. CROWELL: Thank you. No more  
24 questions.

25 THE COURT: All right. Mr. Bohnhoff, do

1 you have questions of Mr. Allgeier?

2 CROSS-EXAMINATION

3 BY MR. BOHNHOFF:

4 Q. Mr. Allgeier, this is Hank Bohnhoff. Has  
5 the Pueblo done any contingency planning as to what  
6 it would do if Scientific Gaming terminates its  
7 contract with the Pueblo?

8 A. No, we haven't. No, we have not.

9 MR. BOHNHOFF: No further questions, Your  
10 Honor.

11 THE COURT: Do you have anything else, Mr.  
12 Crowell? Ms. Frias?

13 MS. FRIAS: No, Your Honor.

14 THE COURT: Mr. Crowell, do you have any?

15 MR. CROWELL: No, Your Honor.

16 THE COURT: Let me look at something here.  
17 I may have some questions.

18 EXAMINATION

19 BY THE COURT:

20 Q. Mr. Allgeier, when is the last time that  
21 the Pueblo had a problem with its software and had to  
22 go back to one of these vendors and either get new  
23 software or help them write?

24 A. Right now, we're still dealing with -- it's  
25 been ongoing since we had the Bally installed in

1 February. The system is still not working correctly.  
2 It's more on the accounting side than it is on the  
3 gaming side. But the entire system relies on Bally  
4 for its -- I'm sorry, Scientific Games -- to correct  
5 it.

6 On the other vendors, that happens  
7 periodically. Sometimes there is four or five or 10  
8 software revokes a month. Sometimes it's two to  
9 three months before we have to deal with them.

10 Q. So if Scientific Games -- you're dealing  
11 with them presently on a daily basis, as they try to  
12 help you with their -- with that particular software?

13 A. Right. Sometimes on a daily basis we're in  
14 communications; sometimes it's a few days later.  
15 They do a fix on the system. We make sure it works  
16 or it doesn't work. We get back with them. They  
17 send their representatives out here to help us out,  
18 and make sure the system is operating correctly.

19 Q. If Scientific Games were to notify you that  
20 they were not going to assist you any further because  
21 the state has threatened their ability to continue to  
22 operate in New Mexico, or their license, would the  
23 Pueblo continue to offer gaming, or would it stop  
24 immediately?

25 A. It would probably continue to offer gaming



1 until officially it came up where we couldn't offer  
2 it because the system went down. Then every game  
3 would be shut down. Because if you can't operate  
4 through the Scientific Game system, you cannot  
5 service the customers. The games don't work  
6 correctly. They couldn't get paid and we couldn't  
7 take money in. So, in essence, they'd have to shut  
8 down.

9 Q. Now, my experience with software is  
10 limited, and usually it's limited to the software  
11 that I used when I operated my own law firm and  
12 things like that. Rarely, did I lose total ability  
13 to use the software. It was usually that there were  
14 problems, glitches, that I wanted to have fixed;  
15 upgrades; maybe there was some function that I had  
16 been promised that it wasn't doing. But it wasn't a  
17 total -- I can't think of a circumstance where after  
18 I bought the software and it was operating, I lost  
19 total ability to use that. So my thinking is here,  
20 trying to figure out what's happened, is that you  
21 might not get all that you paid for from Scientific  
22 Games to operate the software; it might not be  
23 perfect. But you could go a long time with the  
24 software that you had. Your thoughts on that?

25 A. Okay. Here's what can happen, and this is

1 the same thing that would happen with the State, if  
2 they weren't allowed to deal with Scientific Games  
3 with the Lottery. Every machine is hooked up to the  
4 servers, which does the accounting functions, which  
5 tells us how much all the games won or lost in any  
6 given day, month, year. Without that, we cannot  
7 accurately calculate our win/loss.

8 So if -- just to give you an example, if  
9 the software went down from the Bally system, or the  
10 server went down, there would be no accounting  
11 functions available to the entire property. Now, one  
12 individual game may go down; that would be fine, we  
13 could still operate the rest of them. But it has to  
14 do with the entire system. That's the issue.  
15 Because if something happened to the Lottery, they  
16 had to change the software in the Lottery, the State  
17 couldn't operate unless they could deal with  
18 Scientific Games.

19 Q. Say that last sentence again.

20 A. It would be the same thing if there was a  
21 software glitch in the Lottery system that the State  
22 of New Mexico has, and they could not deal with  
23 Scientific Games, that he would have to shut the  
24 Lottery down until such time as they could fix that  
25 software glitch.

1 THE COURT: Okay. I'm going to give people  
2 an opportunity to follow-up on my questions, but let  
3 me ask Mr. Crowell a question. And if you want to  
4 answer it Ms. Frias, you can, and if y'all want to  
5 have Mr. Allgeier answer the question, you can. Let  
6 me see if can I remember it, because I thought of it  
7 before this hearing even began, and I'm now having a  
8 hard time -- oh, the State in its papers raised the  
9 issue -- I hope I'm characterizing what they were  
10 arguing, but they seemed to question that there was  
11 no check on when the Pueblo and Damon Martinez  
12 reached an agreement that Mr. Martinez would not try  
13 to shut down gaming operations on the Pueblo if they  
14 continued to pay suspended payments to the State and  
15 held them in trust. If I understand what the State  
16 was arguing is there is really nobody checking that  
17 at the present time, and so nobody really knows  
18 whether the Pueblo is holding up its end of the  
19 bargain with Mr. Martinez or not. So it's a question  
20 to you, Mr. Crowell. But if you want to have  
21 somebody else answer it, you're welcome to do that.

22 MR. CROWELL: No, I'm happy to answer it,  
23 Your Honor, in that it's a sloss (phonetic). We have  
24 two levels of check. First, we established an  
25 independent fund. And that fund retained Tom Getty,

1 former Director of the Western Conference of  
2 Attorneys General, to monitor and provide monthly  
3 reports to ensure that the payments are made.

4 Additionally, per the agreement, we have an  
5 independent outside accounting firm provide monthly  
6 reports and quarterly reports to ensure compliance  
7 with their obligations to pay into the fund. In  
8 addition to the agreement reached with Mr. Martinez,  
9 or in addition to complying with the conditions that  
10 Mr. Martinez provided, the Tribe also is working with  
11 the National Indian Gaming Commission, which is the  
12 federal entity with regulatory authority over the  
13 operation, and they have the right to audit and  
14 monitor those reports as well. To date, every report  
15 has come back with -- compliant with the Tribe's  
16 obligations of its conditions provided by Attorney  
17 General -- excuse me, U.S. Attorney Martinez.

18 THE COURT: And I'll ask this question, and  
19 maybe this is -- go ahead.

20 MR. CROWELL: If I could add, and, you  
21 know, we would be happy to supplement the pleadings  
22 with a declaration attaching all of those reports.

23 THE COURT: And I guess the question I  
24 would ask -- and you may want to have Mr. Allgeier  
25 answer this question -- this is software that we're

1 talking about with Scientific Games, is that  
2 important to how it calculates what it has paid in  
3 the past to the State of New Mexico?

4 THE WITNESS: Absolutely. Without that, we  
5 could not tell what we would have to pay. It  
6 actually calculates it for us, just like every other  
7 casino does the same thing. Without that software,  
8 without upgrades, to make sure that the hardware is  
9 intact and working, we could not calculate what  
10 actually right now we are putting in the fund.

11 THE COURT: All right. Mr. Crowell, I've  
12 asked some questions of Mr. Allgeier. Do you have  
13 any follow-up of him based on the Court's questions?

14 MR. CROWELL: No, Your Honor. Thank you.

15 THE COURT: How about you, Ms. Frias?

16 MS. FRIAS: I have one additional question.

17 THE COURT: Ms. Frias.

18 REDIRECT EXAMINATION

19 BY MS. FRIAS:

20 Q. Mr. Allgeier, if the software is revoked,  
21 can we continue to operate per our Gaming Commission  
22 with revoked software?

23 A. No, we cannot.

24 THE COURT: Ms. Frias, I'm without  
25 real-time so I can't look at your question. Would

1 you state your question again?

2 MS. FRIAS: Yes, Your Honor.

3 Q. I said, if the software was revoked, per  
4 our Tribal Gaming Commission, can we continue to  
5 operate on revoked software?

6 A. No, we cannot.

7 THE COURT: I guess I don't understand the  
8 question. Maybe you need to explain that a little  
9 bit more. It's obvious that Mr. Allgeier understands  
10 it. But can you just explain the question a little  
11 more?

12 MS. FRIAS: Sure.

13 Q. So Mr. Allgeier, do we have a Tribal Gaming  
14 Commission that regulates our gaming?

15 A. Yes.

16 Q. And they have regulations?

17 A. Correct.

18 Q. So per their regulations, if the software  
19 is for some reason revoked -- and maybe can you  
20 explain what that means -- does our Gaming Commission  
21 allow you to continue to operate with a system that's  
22 been revoked?

23 A. No, we cannot.

24 And the best way I can explain this is, you  
25 have a slot machine that's operating, and GLI, Gaming

1 Laboratories, Inc., is doing additional testing on  
2 it, and they find a glitch in the software that may  
3 make the game not correct, or pay out too much or too  
4 little, then that software gets revoked. Sort of  
5 like they find something wrong with an Excel  
6 spreadsheet in Microsoft, they revoke that; you can't  
7 use it. You have to get new. Well, the same thing  
8 with us.

9 THE COURT: Maybe, Ms. Frias, you can just  
10 give me a little bit of tutorial. What is the Tribal  
11 Commission that you're referring to? Give me a  
12 little education on it.

13 MS. FRIAS: So, in addition to being  
14 regulated by the NIGC, each tribe is also required to  
15 have their own tribal gaming commission, which has  
16 internal standards and regulations. So the Pueblo  
17 has its own gaming commission, which, in addition to  
18 the federal, creates a local regulatory scheme. So  
19 they, in addition to anything that the State could  
20 do, or that the federal government can do, we have a  
21 tribal regulatory system.

22 So if our tribal regulatory system finds  
23 that we are not in compliance, they can also  
24 technically shut us down. And what happened  
25 previously, when we were applying for the preliminary

1 injunction, was that our gaming commission went in  
2 and shut down machines in the casino because the  
3 software on it was revoked. I think it was about 20  
4 machines, maybe a little bit less.

5 So that was actually not done by the state  
6 or the federal government; it was actually done by  
7 our own gaming commission following our own internal  
8 regulations.

9 THE COURT: And is this something that  
10 is -- we're talking about a gaming commission that's  
11 just governing the Pojoaque Pueblo, or are we talking  
12 about something that governs a lot of tribal casinos,  
13 or are we talking about something just that governs  
14 the Pojoaque Pueblo?

15 MS. FRIAS: Yes, it does. It's our primary  
16 regulator. And each tribe is required to have one.

17 And I just wanted to add that, per the 2001  
18 compact, per our agreement with the U.S. Attorney's  
19 Office, we are also following the 2001 compact. So  
20 whatever we agreed to in the 2001 compact, we are  
21 still following those regulations as well. So we  
22 have kind of three levels of regulations.

23 THE COURT: All right. Ms. Frias -- and I  
24 shouldn't have done this, but I interrupted your  
25 questioning of Mr. Allgeier to sort of make sure I



1 understood the question. Do you have further  
2 questions of Mr. Allgeier?

3 MS. FRIAS: No. I just want to make sure  
4 you understood, Your Honor, what the revoked software  
5 meant.

6 THE COURT: I think I understand.

7 All right. Mr. Bohnhoff, do you have  
8 questions of Mr. Allgeier as a result of the Court's  
9 questioning and the further questioning by Ms. Frias?

10 MR. BOHNHOFF: Yes, Your Honor. Thank you.

11 RECROSS-EXAMINATION

12 BY MR. BOHNHOFF:

13 Q. Mr. Allgeier, Pojoaque Pueblo has a tribal  
14 ordinance that establishes rules for Class 3 gaming,  
15 doesn't it?

16 A. Yes.

17 Q. And it's the ordinance that this tribal  
18 commission is supposed to be enforcing; correct?

19 A. Correct.

20 Q. One of the requirements of the tribal  
21 ordinance is that Pojoaque is supposed to have a  
22 compact in order to engage in Class 3 gaming;  
23 correct?

24 A. Correct.

25 Q. So the gaming commission clearly, over the

1 past year-and-a-half, has been free to ignore the  
2 requirements of the ordinance and permit Pojoaque  
3 Pueblo to continue gaming; correct?

4 MR. CROWELL: I'll object to the question  
5 because it asks for a legal conclusion.

6 THE COURT: Well, I don't want to put -- I  
7 think I understand the situation, so I won't require  
8 an answer on that. Sustained.

9 MR. BOHNHOFF: No further questions, Your  
10 Honor.

11 THE COURT: All right. Thank you, Mr.  
12 Bohnhoff.

13 Anything further, Ms. Frias or Mr. Crowell?

14 MR. CROWELL: Just, you know, to close the  
15 opening argument on the motion to stay --

16 THE COURT: Let me see if you have any  
17 further questions of Mr. Allgeier.

18 MR. CROWELL: Oh. No, I don't, Your Honor.

19 THE COURT: Do you have any, Ms. Frias?

20 MS. FRIAS: No, Your Honor.

21 THE COURT: All right. Thank you, Mr.  
22 Allgeier. I appreciate your testimony.

23 All right. Mr. Crowell, if you wish to  
24 finish your argument on your motion.

25 MR. CROWELL: Yes, you know, I just -- the

1 words that I was struggling to find earlier when I  
2 was talking about the standard for compliance with  
3 the substantial likelihood of success prongs in  
4 dealing with this appeal is whether there are  
5 questions going to the merits so serious,  
6 substantial, difficult, and doubtful as to make the  
7 issues ripe for litigation and deserving a more  
8 deliberate investigation.

9 And even though we disagree with this  
10 Court's September 30 memorandum opinion, we would  
11 hope and expect that the Court understands that the  
12 questions raised therein are -- meet the standard.

13 Other than that, I believe that I covered  
14 everything I needed to say earlier.

15 THE COURT: All right. Thank you, Mr.  
16 Crowell.

17 All right. Mr. Bohnhoff, if you wish to  
18 speak to the motion.

19 MR. BOHNHOFF: Thank you, Your Honor.

20 I'd like to make a few points, a few  
21 prefatory points. Number one, the State's response  
22 to the motion is not untimely, as the Pueblo contends  
23 in its reply. The Pueblo is ignoring the fact that  
24 under Federal Rule of Civil Procedure 6(d), as well  
25 as the local Rule 5.1(a), a party has three

1 additional days, in addition to the 14 days to  
2 respond.

3 THE COURT: Interestingly enough, we  
4 have -- our committee on the civil rules has, I  
5 think, noticed a little bit of an inconsistency  
6 between the CM/ECF filings and this local rule. So  
7 that local rule is about to disappear. So that there  
8 is not an inconsistency between our local rules and  
9 the federal rules. So, in the future, when people  
10 are filing by CM/ECF, they will -- I think they will  
11 not get those three days. So you might kind of keep  
12 an eye on that. You might check with the local  
13 rules, but -- it is in there, but I think it's in the  
14 process of disappearing.

15 MR. BOHNHOFF: I understand, Your Honor,  
16 And I believe the change in the Rules of Civil  
17 Procedure takes effect on December 31.

18 Currently, at least, I think what we've  
19 done is appropriate.

20 More substantively, for the most part, this  
21 motion to stay is really a thinly disguised motion to  
22 reconsider the Court's September 30 ruling. It  
23 really reiterates the same arguments that the Pueblo  
24 has previously advanced, and which this Court has  
25 expressly rejected. The Pueblo is offering no

1 additional -- certainly, no good grounds for the  
2 Court to reach a different result.

3 I'd also note that the motion, the initial  
4 brief, the reply brief referred to, quote, "Judge  
5 Browning's errors," not quote, the "Court's errors."  
6 It would appear that the briefs are written for,  
7 perhaps, the Tenth Circuit's consumption, not your  
8 consumption.

9 I also need to note that the reply brief  
10 contains language that we find, at this table,  
11 astounding. I'm quoting from page 9 of the reply  
12 brief. Quote, "Judge Browning spins his facts out of  
13 thin air." Quote, "It is disingenuous for the State  
14 or this Court to maintain that the Pueblo will avoid  
15 harm if it signs the defendants' form compact." This  
16 argument is illogical, insincere, and insulting.

17 The Pueblo may not like the result of the  
18 September 30 ruling. But it has absolutely no basis  
19 for questioning the Court's good faith or motives.  
20 And that kind of language is entirely inappropriate.  
21 It speaks volumes, Your Honor, about the Pueblo's  
22 equal lack of any basis for accusing New Mexico also  
23 of acting in bad faith as well, in the context of  
24 negotiating the compact with the Pueblo.

25 I'll address briefly the jurisdiction

1 point. It really amounts to the first rehashing of  
2 the previous arguments. And that's the Pueblo's  
3 reliance on the Donges case in support of its  
4 argument that the Court cannot rule on the merits of  
5 the Pueblo's complaint while the interlocutory appeal  
6 of the preliminary injunction is pending.

7 The Court addressed this argument fully on  
8 pages 93 through 97 of the September 30 ruling. Our  
9 response really remains the same, as the Court has  
10 thoroughly analyzed. The 1990 Donges case is not  
11 governing precedent, because it didn't involve a  
12 preliminary injunction appeal. Instead, it involved  
13 a qualified immunity appeal.

14 The properly governing Tenth Circuit  
15 precedent is the Free Speech case, a 2013 case. That  
16 case squarely adopts the rule that's generally  
17 accepted in other circuits that a district court  
18 retains jurisdiction to rule on the merits of the  
19 case, notwithstanding the pendency of an  
20 interlocutory appeal of a preliminary injunction.

21 The Pueblo, in addition, ignores --  
22 although the Court did not ignore in the September 30  
23 ruling -- the 1990 decision by the Tenth Circuit in  
24 Colorado versus Idarado Mining. That case was handed  
25 down only a couple of weeks after Donges. And that

1 case correctly limited the Donges holding to the  
2 qualified immunity context.

3 Donges simply does not articulate a  
4 generally applicable, broadly applicable rule that in  
5 all circumstances a preliminary injunction divests a  
6 court, a district court of jurisdiction.

7 Moving to the substantive question, which  
8 is: Can the Pueblo establish the requirements for a  
9 stay of the Court's September 30 ruling? I want to  
10 spend a little bit of time on the standard or test,  
11 because it's really dispositive. Per the Supreme  
12 Court decision, Hilton versus Braunskill, "A party  
13 seeking a stay must make the same four element  
14 showing that it must make in order to obtain a  
15 preliminary injunction: 1, likelihood of success on  
16 the merits; 2, irreparable harm; 3, no harm to the  
17 opposing party. The test is slightly different than  
18 the preliminary injunction test, at least in that one  
19 respect. The court is not balancing harms. The  
20 court is asking itself: Will the party opposing the  
21 stay be harmed? And then fourth, public interests.

22 In the context of our case, the Pueblo has  
23 to satisfy all four elements, including proving  
24 likelihood of success on the merits. This lesser  
25 merits standard, quote, "Serious, substantial,

1 difficult, doubtful questions that establish fair  
2 grounds for litigation" -- I'm paraphrasing, Your  
3 Honor, but that's the gist -- the test goes on,  
4 though, if the other three elements tip strongly in  
5 the movant's favor, that lesser standard isn't  
6 available here because this was an injunction that  
7 enjoined governmental action taken in the public  
8 interest. That's the teaching of the Heideman versus  
9 Salt Lake City case, Tenth Circuit case in the Soskin  
10 versus Reinerston, Tenth Circuit case.

11 Now, the Pueblo, in its reply brief, argues  
12 that this the Heideman Rule somehow doesn't apply  
13 when it's a government entity that's seeking a  
14 preliminary injunction against another governmental  
15 entity. The problem with that argument, of course,  
16 is the Pueblo doesn't have any authority for that  
17 proposition. The Heideman Rule is not so limited.

18 And then the Pueblo cites in its reply  
19 brief three cases that it suggests apply a different  
20 rule. But the problem is, if you look at those  
21 cases, first of all, they're not Tenth Circuit cases.  
22 They don't overturn Heideman; they don't overturn  
23 Soskin.

24 Moreover, they're distinguishable for other  
25 reasons. There is a Second Circuit case that they



1 cited, a 1992 decision. In that case, the district  
2 court had said, actually, that the preliminary  
3 injunction would be granted under either standard,  
4 including the likelihood of success standard. The  
5 Second Circuit in that case said that the serious  
6 substantial test would apply. But it was only  
7 because the Court had first determined that the  
8 governmental action in question was not in the public  
9 interests. I don't think any argument could be made  
10 that New Mexico's actions are in the public  
11 interests. It is enforcing state law, the Gaming  
12 Control Act.

13 The Pueblo, in its reply, makes an argument  
14 to the effect, if I understand it, that New Mexico is  
15 not acting pursuant to a regulatory scheme because  
16 there is no more compact in effect. Well, they're  
17 missing the point. The regulatory scheme in  
18 question, the regulatory scheme that New Mexico is  
19 enforcing is state law; not the compact, the Gaming  
20 Control Act. And it's the Gaming Control Act that  
21 applies to the actions of non-Indians acting off the  
22 reservation. We're not talking about the compact  
23 that would govern actions taken on reservation,  
24 because that's not what New Mexico is enforcing.

25 The Court should know that this whole

1 argument, again, about the appropriate standard for  
2 addressing the merits is really a second rehashing of  
3 your September 30 decision. Because on pages 138  
4 through 144, you thoroughly discuss the Heideman and  
5 the Soskin cases in the course of making your ruling.

6 Let's talk about substantial likelihood of  
7 success. Initially, we need to continue to be  
8 mindful that under Hilton the testing is that the  
9 Pueblo must make a strong showing of likelihood of  
10 success on the merits to obtain a stay. I say  
11 "continue to be mindful," because, Your Honor, you  
12 noted that on page 144 of your September 30 decision.

13 And, again, this is really amounting to the  
14 third instance of a rehashing of the analysis that  
15 took place in your September 30 decision. It's the  
16 third attempt that the Pueblo is making to seek  
17 consideration -- reconsideration of that decision.

18 You've already ruled on the merits, and  
19 after exhaustive analysis, that the Pueblo can't show  
20 substantial likelihood of success on the merits of  
21 its preemption claim. In other words, you've already  
22 ruled that the Pueblo has no federal right to bar the  
23 State from taking enforcement action against  
24 non-Indian vendors' off-reservation activities based  
25 upon their participation in what is unquestionably

1 illegal gambling activity at the Pueblo's casino.

2 Indeed, Your Honor, in light of your  
3 comprehensive analysis, we would submit that the  
4 Pueblo no longer can show even a question of the  
5 existence -- can no longer show that the question of  
6 whether or not it has a cause of action is even  
7 serious or doubtful. You've put that to rest with  
8 the decision you made on September 30.

9 All the Pueblo clings to is just Judge  
10 Brack's preliminary injunction ruling. It was a  
11 preliminary injunction ruling, not a summary judgment  
12 ruling, as Mr. Crowell argued earlier this morning.  
13 It's precisely because it was preliminary that that  
14 decision cannot be considered in connection with any  
15 further merits ruling.

16 And I would remind the Court that at the  
17 time Judge Brack made that decision, he had no  
18 benefit of the State's analysis of the preliminary --  
19 I'm sorry, of the preemption issue -- because the  
20 State hadn't articulated that in its response to the  
21 preliminary injunction motion.

22 THE COURT: Mr. Bohnhoff, hold on just a  
23 second. Ms. Wild, would you send to Federal Express  
24 here, would you send a copy of the Tenth Circuit's  
25 Dine opinion this morning, so that I can look at it:

1 Would you send it by email?

2 THE CLERK: Okay.

3 THE COURT: All right. Go ahead, Mr.

4 Bohnhoff.

5 MR. BOHNHOFF: Thank you, Your Honor.

6 Putting aside the questions about  
7 likelihood of success on the merits, the Pueblo also  
8 cannot establish that the other three stay elements,  
9 quote, "tip strongly in its favor."

10 And I'll address irreparable harm first.  
11 The Pueblo, in its motion papers, admits that  
12 irreparable harm must be shown to be imminent,  
13 certain, and great. The Pueblo can't show the  
14 certainty of irreparable harm if the Court's  
15 suspension or vacation of the preliminary injunction  
16 is not stayed, and instead, the State is free to  
17 proceed to enforce state law against non-Indian  
18 vendors of gambling equipment for really several  
19 reasons. First, as we've touched on, the Pueblo  
20 doesn't face an imminent threat. And that's because  
21 it's completed installation of its new gambling  
22 equipment.

23 I think the Court's questioning is correct.  
24 And Mr. Algire's testimony reveals that,  
25 notwithstanding the fact that they've apparently been

1 dealing with glitches in the accounting portion of  
2 the software since February, eight months, they have  
3 still managed to continue to stay in business. So  
4 this working through the glitches, the wrinkles, the  
5 software updates, that's not going to shut them down.

6 THE COURT: But haven't they enjoyed the  
7 benefit of the preliminary injunction, in the sense  
8 that their interactions with Scientific Games has  
9 been unimpeded? I mean, now, if this preliminary  
10 injunction disappears, they're going to have to  
11 figure out this software on its own --

12 MR. BOHNHOFF: I think --

13 THE COURT: -- on their own?

14 MR. BOHNHOFF: I think that's what Mr.  
15 Allgeier said.

16 But, Your Honor, what I would point out is,  
17 Mr. Allgeier is saying -- I believe his testimony  
18 was: It hasn't been working correctly or perfectly  
19 or as they anticipated since February.  
20 Notwithstanding the fact that there are these issues,  
21 it's still working well enough that they can stay in  
22 operation.

23 And my suggestion is what that tells us is  
24 they could continue under the current regime of  
25 wrinkles, of lack of updates and further corrections.

1 If they've got problems, they need corrections, but  
2 the problems haven't been corrected for eight months,  
3 and they're still in business, it stands to reason  
4 they could stay in business for at least another  
5 period of time, notwithstanding the fact that they've  
6 still got these problems.

7 THE COURT: But isn't the reality, from a  
8 court standpoint -- my standpoint -- isn't it a  
9 reality that at some point, probably, they're going  
10 to have some problems that may cause gaming and  
11 accounting to -- the gig to be up, and at some point  
12 some of the horrors that they have indicated may  
13 come about? We don't know when that's going to  
14 occur, but at some point it probably will occur,  
15 whether it's tomorrow, a week from tomorrow, a year  
16 from now, or 10 years from now. But probably at some  
17 point, the gig will be up. Isn't that the reality of  
18 it?

19 MR. BOHNHOFF: I don't think I would  
20 dispute, Your Honor, the proposition that at some  
21 point there might be enough problems, issues, with  
22 the software that they might be shut down. What I  
23 think --

24 THE COURT: And in fact, that's really what  
25 the State wants; right? At some point, they want the

1 problems to be at a point where the Pueblo can't  
2 operate.

3 MR. BOHNHOFF: No, Your Honor. What the  
4 State wants to be able to do is enforce its law off  
5 reservation, with respect to the activities of  
6 non-Indians.

7 The State would love to enter into a  
8 compact with Pojoaque. That's what the State wants  
9 to do. The State has proposed the same compact to  
10 Pojoaque that all of the other tribes in New Mexico  
11 have concluded is an acceptable, a workable compact.

12 What I can suggest to the Court is that,  
13 because we're talking about some period of time,  
14 whether it's multiple months or multiple years before  
15 the software finally and totally breaks down, we  
16 don't have any imminency of a threat that would be  
17 the basis for a stay.

18 Number two, the question is: What can the  
19 Pueblo do in the meantime?

20 And actually, Your Honor, before we get to  
21 that point, I would submit that we still have in the  
22 record no competent evidence that the Pueblo's  
23 existing vendors would stop doing business with it if  
24 the State took enforcement action in connection with  
25 their licenses to do businesses elsewhere, off

1 reservation.

2 THE COURT: Isn't the letter from  
3 Scientific Games, though -- I mean, they're careful  
4 not to say exactly what they're going to do -- but  
5 they certainly seem to suggest that they're going to  
6 bow to the State, rather than continue to operate  
7 with Pojoaque.

8 MR. BOHNHOFF: Your Honor, the -- back in  
9 September, late September, October, there could be a  
10 justification for doing away with hearsay  
11 requirements and considering hearsay in the context  
12 of that preliminary injunction hearing.

13 Respectfully, I don't believe that that  
14 justification continues with respect to a motion to  
15 stay, where the Pueblo, not only has had an entire  
16 month since the Court entered its September 30  
17 decision to get an affidavit from one of these  
18 vendors actually saying that's what we'll do, but,  
19 indeed, they've had now a half a year since we had  
20 argument on the merits decisions. They knew -- if  
21 they didn't understand the writing was on the wall,  
22 they certainly knew that there was a considerable  
23 risk that the Court would rule as it's ruled. And  
24 they have taken no action to be prepared to actually  
25 present competent evidence of what the vendors would



1 do.

2 Respectfully, I'd urge the Court not to  
3 accept hearsay evidence about what the vendors will  
4 do, particularly hearsay evidence now, that's almost  
5 a year old.

6 And let me point out as well, Your Honor:  
7 There is a particularly revealing statement in the  
8 Pueblo's reply brief that was filed yesterday. I'm  
9 looking at page 11 of the brief. This is the first  
10 full paragraph. The Pueblo writes, "Defendants'  
11 actions could cause gaming vendors to cease doing  
12 business with the Pueblo." That's the first line.

13 And then on the fifth line there is another  
14 sentence that starts, "This has a multiplier effect,  
15 namely, the Pueblo having to shut down its machines  
16 which could" -- and I emphasize the word "could --  
17 "eventually lead the Pueblo to close its gaming  
18 facilities, putting hundreds of employees out of  
19 jobs." The Pueblo itself is admitting, acknowledging  
20 that it is speculating about what the vendors would  
21 do.

22 Third, even if the Pueblo's existing  
23 vendors terminated their relationship with the  
24 Pueblo -- based on Mr. Landers' declaration, which  
25 hasn't been contradicted by any of the Pueblo's

1 witnesses -- the Pueblo still has over 20 other  
2 vendors of gaming equipment which don't do business  
3 elsewhere in New Mexico, from which it could buy  
4 Class 3 gaming equipment.

5 THE COURT: But isn't the problem with that  
6 is that, if you squeeze those guys, they may say --  
7 if they continue to deal with Pojoaque, and you  
8 revoke their license, they've got to go tell people  
9 in California and other areas that we got a problem  
10 with our license in New Mexico, so it may impact  
11 their business in other states. It's not as clean as  
12 just, Well, New Mexico, I don't have any other  
13 customers here; isn't it going to be a problem for  
14 their highly regulated industry to have to tell other  
15 people that they got their license suspended in New  
16 Mexico?

17 MR. BOHNHOFF: No, they wouldn't --

18 THE COURT: Before you answer that, someone  
19 just got on for the next hearing.

20 We're still having this hearing. We're  
21 going to go about seven more minutes, and then  
22 probably break for lunch. So whoever got on, just  
23 hold on just a second. Mr. Bohnhoff?

24 FEMALE VOICE: Yes, sir, I will call back.

25 Thank you.

1 MR. BOHNHOFF: Thank you, Your Honor.

2 THE COURT: I tell you what, I think  
3 probably, Mr. Bohnhoff, we're going to get so many  
4 calls here, that probably it's going to interrupt.  
5 Why don't we go ahead and take our lunch break on  
6 this one.

7 THE CLERK: There is only going to be one  
8 phone call that comes in. Everybody will be on a  
9 conference call line with an operator.

10 THE COURT: Okay. All right. Go ahead,  
11 Mr. Bohnhoff.

12 MR. BOHNHOFF: What you suggested, Your  
13 Honor, is that a substitute vendor would have its  
14 license, New Mexico license, revoked. And I don't  
15 think that would happen, Your Honor. Because what  
16 these other alternative vendors are, are vendors that  
17 do not have New Mexico licenses. They have never  
18 elected to do business, or even try to do business  
19 elsewhere in New Mexico, and thus, they don't have  
20 New Mexico licenses. So they wouldn't have had --  
21 they wouldn't face the risk of losing the New Mexico  
22 license that might operate somehow negatively with  
23 respect to their operations in other states.

24 THE COURT: Well, would those vendors dare  
25 try to do business with Pojoaque, if they don't even

1 have a license in New Mexico? It seems to me that  
2 would be highly risky for them to do that.

3 MR. BOHNHOFF: They could, Your Honor.  
4 There is no New Mexico law that requires a vendor  
5 doing business with a pueblo, with an Indian tribe,  
6 to have a New Mexico license. The vendor needs a New  
7 Mexico license only to do business with non-Indian  
8 gaming operators outside of Indian tribal boundaries.

9 THE COURT: So these would be vendors that  
10 don't do any business with any of the tribes, but  
11 they may, say, do something with the Downs in  
12 Albuquerque?

13 MR. BOHNHOFF: Correct, that's where you  
14 need a New Mexico license.

15 THE COURT: Well, why would those vendors  
16 that don't presently have a relationship with  
17 Pojoaque, why would they step into the breach and  
18 start doing something with Pojoaque?

19 MR. BOHNHOFF: Make some money, Your Honor.

20 Your Honor, my point is that we are  
21 speculating. And the Pueblo is speculating,  
22 certainly, if they make any suggestion that they  
23 can't find a vendor to replace Scientific Games, or  
24 Aristocrats, or whomever, and sell them gaming  
25 equipment.

1 And a request for a stay should certainly  
2 not be based on that kind of speculation. And let's  
3 not forget that the Pueblo can always stay open --  
4 and this time legally -- without a compact, by simply  
5 engaging in Class 2 gambling, as opposed to Class 3  
6 gambling.

7 Now, they're going to come back and say,  
8 Well, we won't be able to make as much money with  
9 Class 2 gaming, as opposed to Class 3 gaming.

10 The problem there, Your Honor, is at that  
11 point, we're just talking about money; i.e., we're  
12 talking about damages. We don't have any rights  
13 being violated. That's what you've already decided.  
14 But even if there were rights being violated, the  
15 Pueblo, at that point, would have a damages remedy.  
16 And if they have a damages remedy, there is no  
17 irreparable harm, and there is no right to a stay.

18 Lastly, as to the irreparable harm point,  
19 the Pueblo is free to sign the same 2015 compact that  
20 all the other New Mexico Indian tribes have found  
21 acceptable. If it's acceptable, Your Honor, to the  
22 other tribes, I'd suggest it's hard for the Pueblo to  
23 make a credible claim that it would suffer  
24 irreparable harm by itself signing the document.

25 And if you look at the response -- and I'll

1 give a copy of this to Ms. Wild when the hearing is  
2 over so that she can provide it to Your Honor. But  
3 if you look at the response that the Pueblo filed to  
4 our motion to dismiss the appeal. On page 7, what it  
5 says is that -- and I'll quote, "Whether the two  
6 consolidated appeals decide in favor of the Pueblo  
7 and the United States, or in favor of the State, the  
8 Pueblo will abide by that decision, likely rendering  
9 the dispute in the case below moot."

10 So, in other words, they're saying, if we  
11 lose the Interior Department appeal, we're not going  
12 to seek cert; we're just going to accept the ruling,  
13 and we will live with it. If they can live with the  
14 alternatives, which would be either Class 2 gaming or  
15 signing the compact at that point, then it's not  
16 irreparable harm; they're going to live with it.

17 Again, the Pueblo is opposing the compact  
18 because it doesn't think it can make as much money  
19 with the 2015 compact as it thinks it can make with  
20 the compact that it would prefer to have in place.

21 THE COURT: Let me ask Ms. Wild, does it  
22 look like I've got everybody for the next hearing,  
23 Ms. Wild?

24 THE CLERK: I'm going to have to presume  
25 they're all on the line. I won't know until we take

1 roll.

2 THE COURT: Okay. Mr. Bohnhoff, if it's  
3 all right with you and Mr. Crowell and Ms. Frias, why  
4 don't we take our lunch break. And I will see you  
5 back at 1:00 o'clock. Is that all right with you,  
6 Mr. Crowell?

7 MR. BOHNHOFF: That's fine, Your Honor,  
8 with me. I've got another five or 10 minutes.

9 THE COURT: All right. How about you,  
10 Ms. Frias? Does that work for you?

11 MS. FRIAS: That's fine for us.

12 THE COURT: Does that work for you, Mr.  
13 Crowell?

14 MR. CROWELL: I had my mute on. I  
15 apologize. That works for me.

16 THE COURT: I figured that was it. I will  
17 then see y'all back at 1:00.

18 And I'll stay on the line and start my  
19 initial scheduling conference in the next case. All  
20 right. Thank you, Counsel. I appreciate it.

21 We'll be in recess on this matter.

22 (The lunch recess was held.)

23 THE COURT: All right. Mr. Crowell is on  
24 the phone. Ms. Frias, are you on the phone?

25 MS. FRIAS: Yes, Judge.

1 THE COURT: Okay. Well, again, thank you  
2 everybody for making themselves available. I'm back  
3 at the hospital. So if it gets too loud in the  
4 background -- I found a little waiting room that I  
5 think will work.

6 All right. Mr. Bohnhoff, if you wish to  
7 continue your argument on this motion.

8 MR. BOHNHOFF: Thank you, Your Honor. Your  
9 Honor, Ms. Wild just handed us a copy of this Dine  
10 Citizens case.

11 THE COURT: You're ahead of me, because Fed  
12 Ex here said they would not be able to print it out  
13 until 4:30 Texas time. And I tried to get ahold of  
14 Ms. Wild and see if she could fax it to me, but we  
15 weren't able to work that out. So y'all are ahead of  
16 me if y'all got a copy of it.

17 MR. BOHNHOFF: I think Fed Ex ought to hire  
18 your Deputy Clerk; maybe they'd get things quicker.

19 THE COURT: I don't want to lose my clerk.

20 MR. BOHNHOFF: What I'd tell the Court is:  
21 You may have gotten notice this morning from the  
22 Tenth Circuit. It's not up on the Tenth Circuit's  
23 website, and so it could very well be that opposing  
24 counsel haven't been able to find a copy here.

25 What it does appear is that the Tenth



1 Circuit was affirming your decision in which you held  
2 the party seeking the preliminary injunction to the  
3 substantial likelihood of success on the merits  
4 standard, as opposed to the serious substantial  
5 difficult and doubtful lesser standard, based on 2008  
6 US Supreme Court case, Winter versus Natural  
7 Resources Defense Council. And the Tenth Circuit  
8 affirmed and agreed with that decision.

9 If that is applied -- if the Supreme Court  
10 rationale is applied to this case -- I don't think  
11 there would be any basis not to -- it would seem to  
12 me that that would be yet an additional ground,  
13 separate and apart from Heideman, for this Court to  
14 apply a substantial likelihood of success on the  
15 merits standard.

16 A couple of other initial points: The  
17 Pueblo -- I would suggest -- let me back up. I took  
18 another look at the Court's ruling -- I won't belabor  
19 this point -- and in our motions that the Court was  
20 ruling on. Our motion to stay or suspend the  
21 preliminary injunction was a separate motion from our  
22 motion to vacate or modify the preliminary injunction  
23 to reconsider the preliminary injunction, and as  
24 alternative relief, issue an indicative ruling under  
25 the Rule 62.1.

1 In the Court's initial decision about the  
2 stay or suspension of the preliminary injunction, the  
3 Court noted that under Rule 62(c), a district court  
4 is permitted to stay or suspend a preliminary  
5 injunction, notwithstanding the pendency of an  
6 interlocutory appeal, and granted that motion. The  
7 Court did not discuss, in the context of that point,  
8 that the Court was precluded from staying or  
9 suspending the preliminary injunction based on the  
10 pendency of the preliminary injunction somehow  
11 divesting the Court of jurisdiction to do that. And  
12 then, it was in the separate section, the subsequent  
13 section, where the Court issued the indicative  
14 ruling.

15 I say that preliminary to the point --

16 THE COURT: You're probably right, because  
17 what you're requesting there is really the same thing  
18 that Mr. Crowell is asking here; right? Just suspend  
19 it or stay it until the Tenth Circuit gets a chance  
20 to look at it. So it's really no different from what  
21 he's requesting; right?

22 MR. BOHNHOFF: Yes. And I say that in  
23 conjunction with, really, the fundamental reason why  
24 the Pueblo now has filed their motion to stay.  
25 They're filing that because they understand that the

1 preliminary injunction is no longer in effect.

2 I'm quoting from page 27, the concluding  
3 paragraph of their motion, October 4 motion, where  
4 they ask the Court to enter a stay of its memorandum  
5 opinion and order and final judgment, pending appeal.  
6 Quote, "This will have the effect of restoring  
7 pending appeal, the October 7, 2015 preliminary  
8 injunction."

9 THE COURT: I guess -- I'm not trying to  
10 rewrite Mr. Crowell's motion, but he still has a  
11 preliminary injunction. So it doesn't need to be  
12 restored. But if I've stayed it or suspended it  
13 under the rules, while it's on appeal, then he needs  
14 some protection until he gets on appeal. So it may  
15 be not restore the preliminary, but restore the  
16 effect of the preliminary injunction.

17 But I think you're right. I think now  
18 we're operating under the rules, rather than just  
19 operating without jurisdiction. I think I do have  
20 the power to suspend or stay. And I must have agreed  
21 to do that. So I think you're right.

22 MR. BOHNHOFF: Thank you, Your Honor.

23 One other thing I wanted to address was in  
24 the context of -- sorry, Your Honor, I lost my train  
25 of thought -- it's this question of the lesser merit

1 standard, as opposed to the substantial likelihood of  
2 success on the merits standards in the Heideman and  
3 Soskin cases in the Tenth Circuit.

4 The Pueblo had cited three cases. I  
5 referred to the one case, the Second Circuit case.  
6 The other two cases are district court cases here  
7 within the Tenth Circuit. One is a decision by Judge  
8 Vazquez. The other is a decision by Judge Kane up in  
9 Colorado. Those two cases, not only are they not  
10 Tenth Circuit cases, and certainly can't possibly  
11 overrule Heideman or Soskin, but moreover, the two  
12 cases really did not even discuss the fact that  
13 Heideman had articulated this principle that the  
14 lesser standard can't be used when you're talking  
15 about an injunction that enjoins governmental action  
16 taken in the public interests.

17 So the point is, neither of those three  
18 cases really calls into question the Heideman Rule.

19 Now, to get back to where we were when we  
20 took our break, to conclude the point about  
21 irreparable harm. The Pueblo may not be able to make  
22 as much money under the 2015 compact as it could  
23 under the compact it would like to have. But if  
24 so -- similar to the point about Class 2 gaming --  
25 what we're talking about is a damages situation.

1 That's not irreparable harm. If the Pueblo wants to,  
2 they can appeal. They can see if they can establish  
3 a federal right, establish that there has been  
4 preemption to get you overruled on that decision.  
5 And then, if they could, then they could come back  
6 and they could seek damages for the fact that they  
7 entered into the 2015 compact. But they can't claim  
8 irreparable harm when they have the alternative  
9 available of the 2015 compact that all of the other  
10 Indian tribes in New Mexico think is acceptable.

11 The last two elements of the stay request  
12 or harm to the opposing party and then public  
13 interest: Again, it's not balancing the harm when  
14 you get to a stay. It's will New Mexico be harmed?  
15 New Mexico would suffer harm from a stay. It's going  
16 to suffer injury to its sovereign right to enforce  
17 its laws, that the Court has now found do not violate  
18 federal law.

19 The Pueblo claims its sovereign rights are  
20 being violated. Well, the Pueblo really has no  
21 superior interest in protecting its sovereignty that  
22 somehow trumps the State's interest in protecting its  
23 sovereignty.

24 And there is three points, I think that can  
25 be said about public interests. First of all, the

1 Santa Clara Pueblo Governor's letter that we attached  
2 to Mr. Ritchie's declaration makes clear, at a  
3 minimum, that it's a debatable point whether it's in  
4 the public interests to permit Pojoaque to continue  
5 to conduct gaming activities without a compact. And  
6 I think the Court can and should take that into  
7 consideration. They can't make the strong showing  
8 that they need to about public interest.

9 Second, the Pueblo claims that if it's shut  
10 down, even entirely, that the other pueblo casinos in  
11 the Espanola valley wouldn't pick up all the economic  
12 activity that is associated with the pueblo casinos,  
13 and that the Pueblo might lose, in the absence of the  
14 stay. But the reality is, Your Honor, they're simply  
15 speculating about that. And speculation cannot be  
16 the basis for a stay.

17 Third -- and really in any event, the  
18 Pueblo cannot incredibly dispute that it is currently  
19 engaged in illegal -- in fact, criminal, under  
20 federal law -- activity. It's engaging in Class 3  
21 gaming without a compact.

22 That consideration is really dispositive of  
23 the public interest equity. We've cited the Court  
24 cases: Will not act to shield or protect criminal or  
25 other illegal activity. Similarly, the public

1 interest is not advanced by condoning or enabling the  
2 same illegal activity.

3 We're really dealing with a different  
4 factual situation than the other cases, the Wyandotte  
5 case, for example, that the Pueblo relies upon so  
6 heavily. Because in that case, the court had found  
7 that the State was acting in excess of its authority.  
8 It was acting in a manner that was preempted by  
9 trying to shut down gaming activity that was actually  
10 occurring on the reservation.

11 We don't have that here. We have a  
12 situation where you have now concluded that the State  
13 is acting within its rights -- not contrary to any  
14 federal law -- in taking action with respect to  
15 gaming activity that's occurring outside the  
16 reservation. So we're dealing with a situation where  
17 the State is acting properly.

18 Further, we're dealing with a situation  
19 where the Pueblo is clearly acting illegally. It's  
20 been doing so now -- going on for a year-and-a-half.  
21 The Pueblo really is not in a position to argue that  
22 the State should be barred from taking its actions  
23 based on its -- the Pueblo's -- desire to continue  
24 with that illegal activity.

25 So for all of those reasons, Your Honor,

1 I'd respectfully suggest and urge that the Court deny  
2 the Pueblo's motion to stay.

3 THE COURT: Let me ask you a question. You  
4 know, one of the things that makes a district judge  
5 nervous in doing what I have done -- and that is  
6 basically saying that I'm going to dissolve the stay,  
7 and I've now suspended, or stayed the stay, or stayed  
8 the operation of the preliminary injunction -- you  
9 know, that's on the current facts. This is what the  
10 State of New Mexico is doing currently.

11 But, as Mr. Crowell has pointed out, you  
12 know, the State might run with it and try to put a  
13 wall around the Pueblo, or try to stop traffic going  
14 in, or something along those lines. How far is the  
15 State going to go? What is the lay of the land for  
16 purposes of me deciding whether to stay my decision?  
17 Am I going to wake up and find out that the State is  
18 doing something more than what was going on when  
19 Judge Brack enjoined the state?

20 MR. BOHNHOFF: Your Honor, the State has  
21 respected -- I mean, we really had a similar  
22 conversation back in January on the contempt motion.  
23 The State has taken a position that it can take  
24 certain action with respect to non-Indian vendors,  
25 transactions, and dealings with non-Indian gaming



1 operators outside of tribal grounds. That is the  
2 action, the enforcement action that I would expect  
3 the State of New Mexico to pursue once the dust  
4 settles on this stay question.

5 The State has no intention to my  
6 knowledge -- and I do believe it has no intention at  
7 all of building a wall around Pojoaque Pueblo, of  
8 arresting people as they go into the Pueblo.  
9 Although, I might add the Bay Mills -- Justice  
10 Kagan's decision suggests that the State, in fact,  
11 would be within its rights to take that action.

12 But the State of New Mexico intends to  
13 enforce state law. In the state law, the focus of  
14 it, the parameter of it is non-Indian vendors'  
15 transactions with non-Indian gaming operators. And  
16 it's those licenses that the State is focusing on.  
17 And it's just baseless fear mongering, speculation on  
18 the part of the Pueblo in making the suggestion that  
19 the State is going to do anything further.

20 THE COURT: All right. Anything further,  
21 Mr. Bohnhoff?

22 MR. BOHNHOFF: No, Your Honor. Thank you.

23 THE COURT: All right. Thank you, Mr.  
24 Bohnhoff.

25 Mr. Crowell, I'll give you and Ms. Frias

1 the last word on your motion.

2 Do you have your mute button on, Mr.  
3 Crowell?

4 MR. CROWELL: I apologize. I'm in a noisy  
5 place, and I'm trying to do my best.

6 I'd like to start where we ended. The  
7 answer to your last question doesn't fit the actions  
8 of the State prior to the Tribe going to Judge Brack.

9 You know, in fact, Governor Martinez,  
10 herself, put out a press release that said: All  
11 vendors, all customers, all employees, anybody having  
12 anything to do with the Pueblo are at risk. So, you  
13 know, it's true, that between the time of her  
14 statement and the time of the injunction, the only  
15 manifestation of that that we saw was the citation  
16 issued against the vendors.

17 But there is no reason to believe that the  
18 State won't go further. And Mr. Bohnhoff's  
19 speculation to that effect, you know, doesn't fit the  
20 actions of his own clients.

21 THE COURT: Let me ask you this: Let's say  
22 you had customers, let's start at that level. What  
23 possible state law could customers going to Buffalo  
24 Thunder -- what possible state law could they violate  
25 by doing that, even -- I mean, while this is going

1 on?

2 MR. CROWELL: Well, given the State's  
3 position about its ability to make judgment about  
4 activity that occurs on the Tribe, they could go  
5 after them for conspiring to engage in illegal  
6 gambling.

7 THE COURT: Would that be the same answer  
8 you would give if I were to ask you about, say, Pepsi  
9 Cola, if they drove a truck on to sell Pepsi Cola,  
10 that would be the same answer?

11 MR. CROWELL: Yes.

12 THE COURT: Okay. All right.

13 MR. CROWELL: Now, for example, back -- I  
14 know that in Washington State, in the 1990s, the  
15 State Patrol would put officers on the state side of  
16 the lands when -- and when someone went into a tribal  
17 smoke shop and bought the cigarettes that didn't have  
18 the state tax stamp, they'd arrest them as they come  
19 off the reservation. So -- and it's beyond the pale  
20 (inaudible) to imagine the State would take the kind  
21 of order that this Court has made and run with it.  
22 And, you know, because this Court has drawn a line  
23 that says: So long as it's off reservation, then  
24 it's fine, and here, the facts are undisputed that  
25 the sole purpose for them to go after the vendors --

1 which the vendor is doing business with Pojoaque --  
2 and they otherwise had no concern regarding the  
3 activities of those vendors. So that was clearly and  
4 directly (inaudible) with the Tribe's governance of  
5 its gaming activities.

6 And, you know, there is nothing in your  
7 opinion that suggests that -- that there is a line to  
8 be crossed off reservation that would be illegal  
9 interference on reservation.

10 And, you know, with all due respect, I  
11 think that's one of the critical errors in your  
12 analysis.

13 Now, I want to go back to the beginning of  
14 Mr. Bohnhoff's argument. And he said that this is a  
15 thinly disguised motion to reconsider, even though,  
16 you know, we have repeatedly said, you know, we are  
17 not looking for this Court to vacate the September 30  
18 argument. We're looking for this Court to stay it.  
19 We wouldn't mind if the Court were to reconsider the  
20 September 30 order. But to suggest that that's what  
21 we're trying to do is just simply not the case.

22 He also criticized our language used -- and  
23 no disrespect was intended to show to this Court --  
24 but the statement that this Court made in its  
25 September 30 order that there really isn't any reason

1 to fix the Indian Gaming Regulatory Act, or ensure  
2 that the tribes, like the Pueblo, have a viable  
3 remedy, because there are all these compacts out  
4 there and it's working.

5 Well, with all due respect, Your Honor,  
6 there is nothing in the record to support that kind  
7 of statement. And we believe that if you did a true  
8 investigation of the compacts that are in effect, and  
9 the circumstances around those negotiations, you  
10 would find that they're the products of (inaudible).

11 (Discussion off the record about lack of  
12 phone reception.)

13 MR. CROWELL: That they are the products of  
14 overreaching, as a result of the Seminole decision,  
15 depriving tribes of the remedy under IGRA and that  
16 they contain numerous provisions that are illegal or  
17 unacceptable.

18 We point out in our reply brief -- and I  
19 find it, you know, surprising that Mr. Bohnhoff would  
20 make the statement that the 2015 form compact is,  
21 quote, "acceptable to all of New Mexico's tribes," or  
22 that those tribes looked at those compacts and found  
23 them to be fair and genuine, and signed them because  
24 of that.

25 No, those tribes were confronted with the

1 same -- the same dilemma that Pojoaque is confronted.  
2 The difference is Pojoaque does not intend to  
3 capitulate to the State's illegal act. There is not  
4 (inaudible).

5 THE CLERK: Judge, it's happening again.

6 THE REPORTER: I am not writing anything.

7 THE COURT: Mr. Crowell, they're having the  
8 same problem. Has Ms. Bean missed something?

9 (Discussion off the record about lack of  
10 phone reception and Mr. Crowell disconnected.)

11 THE CLERK: Judge?

12 THE COURT: Yes, I'm still here. Did we  
13 lose somebody? Mr. Crowell, are you still there?

14 THE CLERK: We lost Mr. Crowell, I believe.

15 MR. CROWELL: I'm back. If I'm responsible  
16 for any of these technical glitches, I apologize.

17 THE COURT: You're fine.

18 MR. CROWELL: My point is that there is not  
19 a single compact submitted, or negotiated and  
20 submitted by the Martinez administration to the  
21 Department of Interior that has been approved. The  
22 regular process is that they're submitted to the  
23 department, and within 45 days they make the decision  
24 to approve or disapprove the compact. And if they  
25 don't make a decision within those 45 days, they are,

1 quote, "deemed approved," which means that they are  
2 only lawful to the effect that they are otherwise  
3 compliant with IGRA and federal law.

4 In most every -- and I believe every -- but  
5 at least most every situation, the Department, on  
6 that 45th day, or soon thereafter, issued a letter  
7 both to chairman or president or governor of the  
8 tribe or pueblo, and to Governor Martinez, expressing  
9 serious concerns regarding the legality and viability  
10 of the terms of the compact.

11 Despite those letters, the State has not  
12 budged in its position regarding -- regarding the  
13 substantive provisions in the compact. And, you  
14 know, Mr. Bohnhoff admonished me for using words such  
15 as, you know, the court spinning facts out of thin  
16 air. Well, you know, these are facts regarding --  
17 regarding the compacts. He wanted to conflate to  
18 say, well, then that just shows that, you know, the  
19 Pueblo also has no basis in their bad faith claims  
20 against the State.

21 Yet the only reason we are in this  
22 courtroom and the only reason we have this dispute is  
23 the State says, Oh, we've negotiated in good faith,  
24 but we refuse to let a federal court make that  
25 decision on the merits or allow for the merit review

1 of their negotiation position that the federal  
2 statute adopted by congress provides.

3 So the notion -- we can provide one clear  
4 example of the State's bad faith to show we're not  
5 just, you know, making it up. Federal law is very  
6 clear that -- that -- that a state cannot use a  
7 negotiation process to impose a tax on tribal gaming  
8 revenue. And -- and -- and even if -- if the State  
9 wants to provide something beyond IGRA, in exchange  
10 for revenue, it can't demand that the Tribe go into  
11 the compact on that condition.

12 And that's exactly what we have here. The  
13 State of New Mexico is telling the Pueblo that --  
14 that the only way that you can have a compact, is if  
15 you agree to pay the state somewhere between 9 and 10  
16 and a half percent of its gross gaming revenue to the  
17 state. That is illegal under IGRA.

18 They refuse to allow the Tribe to have its  
19 day in court to show the bad faith of the State's  
20 position. The suggestion that -- I don't know how  
21 many times in this litigation I have heard  
22 Mr. Bohnhoff say: All they have to do is sign the  
23 compact, and the State has been negotiating in good  
24 faith. You know, and at the same time refuse the  
25 tribe's remedy.



1 (Crowell's cellphone disconnected again.)

2 THE COURT: Was that Mr. Crowell that we  
3 lost?

4 MS. FRIAS: I believe, so Your Honor.

5 THE COURT: All right. Mr. Crowell?

6 MR. CROWELL: Yeah, I'm so sorry. I am  
7 back.

8 THE COURT: That's all right. That's all  
9 right.

10 MR. CROWELL: Okay. So to conflate the  
11 Tribe's accusations of bad faith with the Tribe  
12 saying that this Court looked to facts that don't  
13 exist in the record to make statements about IGRA  
14 working in its current context, is just -- it's just  
15 simply a false argument. The State can (inaudible)  
16 Eleventh Amendment immunity, and then we can resolve  
17 those issues on the merits. The reason we're here is  
18 because they don't.

19 Now, I want to just go now to the argument  
20 regarding Heideman and this issue of what (inaudible)  
21 a strict standard likelihood of prevailing on the  
22 merits or the serious questions test that the Tribe  
23 has to (inaudible).

24 THE REPORTER: Forget it. I can't hear  
25 you, sir. It is all garbled.

1 THE COURT: Mr. Crowell, we're having a  
2 little trouble hearing you. You are fading out a  
3 little bit. Do you want to say those last couple of  
4 sentences again for the court reporter?

5 MR. CROWELL: Yes. The Dine case, and two  
6 other cases cited by Mr. Bohnhoff have been brought  
7 to our attention for the first time in this oral  
8 argument. If they're going to have a factor in the  
9 Court's deliberation of the motion, we would like the  
10 opportunity to provide supplemental pleading on the  
11 narrow issue of the applicability of those three  
12 cases.

13 I have read Heideman and the cases cited in  
14 the briefs. And the -- what I find surprising about  
15 Mr. Bohnhoff's explanation of that line of cases is  
16 that he seems to fail to understand that the Tribe,  
17 too, is a sovereign government; that the Tribe, too,  
18 has its interests in seeing that its laws are  
19 enforced on its Indian lands, and you have  
20 interference by the State in those circumstances.

21 So to cite cases that say, Oh, well, this  
22 involves compliance with a state statutory scheme,  
23 and therefore, the stricter standard must apply,  
24 doesn't fit. Because either way, you're going to  
25 wind up also interfering with the Tribe's statutory

1 scheme, and the State -- and if the State gets what  
2 it's asking this Court to do, there will be  
3 interference and diminishment of the Tribe's ability  
4 to protect its public interests, as reflected in its  
5 laws, and as reflected in the federal Indian Gaming  
6 Regulatory Act.

7 So with all due respect --

8 (Crowell's cellphone disconnected again.)

9 THE COURT: Was that Mr. Crowell we lost  
10 again?

11 THE CLERK: Yes.

12 THE COURT: All right. We'll wait for just  
13 a second.

14 MR. CROWELL: I don't know whether to laugh  
15 or cry.

16 THE COURT: It's all right. Just keep  
17 going.

18 MR. CROWELL: Okay. All right. So we  
19 believe that the proper standard here is the serious  
20 questions about -- that justify the granting of the  
21 stay. We believe we've identified several errors,  
22 both in today's argument and in the briefs, that  
23 would establish even the more stricter substantial  
24 likelihood of prevailing on the merits standard.

25 The State also -- excuse me, let me get to

1 my notes here -- also, I want to point out that we  
2 cite in our briefs the link to the official website  
3 of the Department of Interior, Office of Indian  
4 Gaming, that will provide all of the letters that I  
5 referred to by the Department admonishing the state  
6 for the position that it's taken in the compact.  
7 That is the reason why the Department of Interior has  
8 not affirmatively approved those compacts.

9 THE COURT: Has it sent any letter  
10 specifically as to Pojoaque?

11 MR. CROWELL: Well, no, because Pojoaque  
12 and the State haven't submitted a compact for  
13 approval. But it's in that context, the Tribe and/or  
14 the State submit a negotiated compact to the  
15 Department. The Department reviews that compact for  
16 compliance with IGRA. Ordinarily, it will approve or  
17 disapprove what it has done in all situations  
18 regarding Governor Martinez is to allow the 45 days  
19 to lapse, and issue these letters expressing grave  
20 concerns regarding the terms and conditions of the  
21 compact. And they're all available on the official  
22 website of the Department of Interior, Office of  
23 Indian Gaming. And we -- the road map to that  
24 website in our reply brief.

25 THE COURT: Did you attach -- these letters

1 are not familiar to me. Did you attach one of them  
2 as an example?

3 MR. CROWELL: No, Your Honor. We cited to  
4 the web page as opposed to attaching a specific one.  
5 We can provide you copies of all those letters.

6 THE COURT: Well, I think as long as I have  
7 access -- I haven't looked at the website, so I  
8 haven't seen these letters. And I just wondered,  
9 well, did I just miss one or -- but I need to look at  
10 the website?

11 MR. CROWELL: Unfortunately, I believe you  
12 need to look at the website.

13 THE COURT: Okay.

14 MR. CROWELL: Regarding the arguments of 30  
15 other vendors, you know, what we have is -- in Mr.  
16 Landers' declaration, I believe it's his last  
17 paragraph that says, Oh, well, there is, you know, to  
18 his recollection, as many as 30 vendors of Class 3  
19 gaming equipment that don't do business in the State  
20 of New Mexico.

21 Several responses: First, New Mexico State  
22 law requires for the transportation of (inaudible)  
23 into the state for the manufacturer to be licensed.

24 Second, the declaration doesn't identify  
25 the 30 companies. What products they provide;

1 whether they're suitable for licensing; or whether  
2 they're suitable for licensing under either the  
3 tribal standards, as set forth in the NIGC approved  
4 gaming ordinance, or the suitability standards of the  
5 National Indian Gaming Commission itself. They don't  
6 provide whether they're compatible with Scientific  
7 Games' back of the house system, or whether the  
8 entities are even viable.

9 As far as we know, you know, these are, you  
10 know, very small startup companies, with quirky  
11 products, that are hoping to be bought out by  
12 Scientific Games or Aristocrat.

13 The business reality is that -- is that  
14 (inaudible) entities that have -- that are doing  
15 business on non-Indian lands in the state provide  
16 more than 90 percent of the market of Class 3 gaming  
17 equipment that's out there.

18 And the suggestion that, Oh, well, you  
19 know, the Tribe can survive by going to these  
20 unidentified vendors with these unidentified  
21 products, it doesn't defeat evidence that the Tribe  
22 has put out that says, you know, that the clear  
23 reality is that if this -- if we're not allowed to  
24 operate, pending appeal, without the vendors being  
25 threatened by the State, we're likely to have to

1 close down or be seriously crippled as a result.

2 Mr. Bohnhoff doesn't even mention the  
3 Tribe's evidence and argument that because we're  
4 committed to using denture agreements regarding the  
5 financing of Buffalo Thunder that a drop -- that a  
6 modest drop in revenue will put the Tribe in default,  
7 and that itself could cause the Tribe to shut down or  
8 seriously cripple its business.

9 They also try to say, Well, the Tribe can  
10 operate Class 2 games. What Class 2 games are, are  
11 games that are based on bingo. And they play bingo.  
12 They're not -- we're in an environment where --  
13 where, you know, hundreds of yards away there is  
14 competing Class 3 Tribal gaming. Up the road, down  
15 the road, all around, we have a saturated market in  
16 New Mexico.

17 And the suggestion that the Tribe could  
18 compete in that Class 3 market with bingo machines is  
19 just simply not a credible argument. This argument  
20 was raised in front of Judge Brack. And the  
21 declarations that we provided to Judge Brack made it  
22 quite clear that -- that not only would they not be  
23 viable, but those vendors that provide Class 2 games  
24 don't sell them. They -- they -- they enter into  
25 agreements where they get a chunk of the net off the

1 top before the Tribe sees a dime.

2 It is not -- it is not a viable option to  
3 say, Oh, well, you know, Pojoaque, you can replace  
4 your slot machines with bingo machines.

5 And there is nothing in Mr. Landers'  
6 declaration to suggest otherwise.

7 Also, you know, Mr. Bohnhoff's argument  
8 that really what this is a concern is that the Tribe  
9 won't make quite as much money. Frankly, you know,  
10 (laughter) you know, that's not the argument. The  
11 argument is to protect the Tribe's governance and  
12 sovereignty and gaming on its lands.

13 But even if that were true -- and he says,  
14 Well, the Tribe could turn around and seek damages,  
15 and therefore, it's not irreparable harm. Well, the  
16 state, as we know, is protected by the Eleventh  
17 Amendment immunity. If the Tribe were to bring an  
18 action against the State for damages, the State would  
19 cause that to be dismissed by asserting Eleventh  
20 Amendment immunity.

21 And I don't have the case cite in front of  
22 me, but I'm more than happy to provide it to the  
23 Court in supplemental pleadings.

24 But there are cases that have actually  
25 addressed that issue, and says, because the State's



1 Eleventh Amendment immunity otherwise precludes the  
2 Tribe from -- from being remedied by a damage award  
3 is irreparable harm.

4 So the argument that this is just about  
5 money, even if it were true, still establishes  
6 irreparable harm, because the Tribe is not able to  
7 get damages as a remedy against the State.

8 THE COURT: What about the fact that they  
9 could get damages against the individuals, either the  
10 Governor or the members of the gaming board, under  
11 1983?

12 MR. CROWELL: Well, I don't want to  
13 preclude that opportunity, but I think that -- and I  
14 haven't -- we haven't briefed that argument. But my  
15 understanding is that if the individual, working in  
16 their official capacity, then we wouldn't be able to  
17 get damages. You would be able to get prospective  
18 equitable relief, but not damages.

19 THE COURT: Well, if you sue them  
20 individually -- not in their official capacity, but  
21 individually -- I guess I'm not sure why you wouldn't  
22 be able to get damages. I mean, you'd have to deal  
23 with qualified immunity, whether the law was clearly  
24 established, and those sort of things. But it's  
25 precisely when they are acting in their scope of

1 their jobs that you can hold them liable under 1981,  
2 if they're acting as just individuals -- which I  
3 think it would be hard to argue that here -- it seems  
4 to me that that is when 1983 would give you a chance  
5 to get some damages.

6 MR. CROWELL: Well, you know, in terms  
7 of -- in terms of whether factoring that into the  
8 Pueblo's ability to -- to secure a stay, I think the  
9 Court's point on qualified immunity, you know,  
10 takes -- you know, needs to be taken into serious  
11 consideration.

12 What the Pueblo has done, both in working  
13 with the Department of Interior for the promulgation  
14 of secretarial procedures under the Part 291  
15 regulations, and in bringing this lawsuit, is to get  
16 clarification of the law. We believe that we're  
17 correct in the law. As this Court has identified,  
18 it's not a slam/dunk. You know, we thought it was.  
19 We believe that it is. But the fact that qualified  
20 immunity may, or likely, would prevent us from  
21 getting actual damages against individuals, I think  
22 the Court needs to -- that money damages is not a  
23 viable remedy to the Pueblo in these circumstances.

24 The Court -- Mr. Bohnhoff said, I think,  
25 quote, "It cannot be disputed that the Pueblo has

1 engaged in criminal activity." And, unfortunately, I  
2 believe that there is a sentence or two in the  
3 September 30 order that suggests the same. And we  
4 take the strongest issue with that.

5 The Indian Gaming Regulatory Act did not  
6 contemplate a situation where tribes would pursue a  
7 compact, file their lawsuit, and be confronted by  
8 Eleventh Amendment immunity in those circumstances.

9 Part of the analysis that we would like  
10 this court to do, that we would like the Tenth  
11 Circuit to do, is to ascertain what remedies, if any,  
12 are available to tribes in these circumstances.

13 Judge Kozinski, in the Spokane case,  
14 suggested that one way to resolve the dispute there  
15 where the United States brought an action against the  
16 Spokane Tribe for operating Class 3 gaming without a  
17 compact -- and Judge Kazinski said, Here you have a  
18 tribe that has done everything that it requires it to  
19 do. And but for the State's assertion of Eleventh  
20 Amendment immunity, it would get the remedy available  
21 to it as congress intended. Since we're not in that  
22 circumstance, we're going to vacate the injunction  
23 that was issued by the district court. And we  
24 encourage the parties -- in that case the United  
25 States and the Spokane Tribe -- to find what remedy

1 is available to tribes under these circumstances.

2 And then he went into a list of several  
3 examples. Those examples was: Did the Secretary  
4 promulgate procedures similar to the Part 291  
5 procedures that are at issue in the two consolidated  
6 appeals?

7 Another option that he set was simply to do  
8 nothing. That when the enforcement action against  
9 the Tribe for non-compact Class 3 gaming, the  
10 Tribe -- the lack -- the reason that the Tribe is  
11 unable to get a compact is the State's assertion of  
12 Eleventh immunity, is inappropriate.

13 So to say that it is, you know, clear that  
14 the Pueblo is violating the law, when that question  
15 remains unresolved, and the interpretation of IGRA as  
16 it applies to circumstances, or tribes in the  
17 position that the Pueblo finds itself in, is  
18 simply -- it's simply not resolved.

19 And what I find really surprising about Mr.  
20 Bohnhoff looking to that argument is the only thing  
21 that's clear here is that the State refuses to follow  
22 the Indian Gaming Regulatory Act, both in the sense  
23 that it's refusing to negotiate in good faith, and  
24 it's taking affirmative action to deprive the Tribe  
25 of the remedy available to tribes under -- as

1 congress intended, in the passage of the Indian  
2 Gaming Regulatory Act.

3 So to say that it's undisputed that the  
4 Pueblo is engaged in criminal activity, you know, is  
5 just simply not true. The only thing that is real  
6 clear is that the State's defiance of the Indian  
7 Gaming Regulatory Act, and we're looking at the  
8 equitable factors that are at stake in the current  
9 motion, the State's actions, and the State's refusal  
10 to abide by the process of what congress intended is  
11 what's at stake here.

12 What we're looking at, Your Honor, is a  
13 situation to where, if the State gets away with this,  
14 they're going to set a precedent that the says,  
15 States, you can negotiate with Indian tribes with  
16 impunity. You can take actions against people doing  
17 business with Indian tribes with impunity, without  
18 regard to the manner in which it impacts and deprives  
19 the Tribe the rights it has as a matter of federal  
20 law.

21 When you look at the equities in that  
22 situation, which we believe is the appropriate  
23 paradigm, there should be no doubt that a stay should  
24 be granted in this situation.

25 With that, unless Carrie has something to

1 add, I conclude my arguments.

2 THE COURT: All right. Thank you, Mr.  
3 Crowell.

4 How about you, Ms. Frias? Do you have  
5 anything further you want to add?

6 MS. FRIAS: Not at this time, Your Honor.

7 THE COURT: All right. Let me ask a few  
8 questions that are mechanical. Let me tell you what  
9 I'd like to do, and then you tell me -- I'm looking  
10 primarily to the Pueblo, because this seems to me to  
11 be a motion to protect the Pueblo's interests, and  
12 that's primarily what I want to focus on with these  
13 questions that go to the timing and mechanics. I  
14 guess I would like to think about this, what we've  
15 talked about today, I'd like to give some thought to  
16 it.

17 But the first thing I'm going to do when we  
18 conclude today is look at this final judgment issue  
19 that we talked about this morning, to see if I need  
20 to do anything sua sponte -- or I guess it's really  
21 not sua sponte, it's at the request of the Pueblo --  
22 go ahead and withdraw that final judgment. So I'll  
23 probably take a look at that.

24 But I guess my question, Mr. Crowell, would  
25 be: How much time do I have to look at this? I

1 mean, in one sense until I do something, you can't  
2 ask the Tenth Circuit for a stay. So I don't want to  
3 interfere with your ability to protect your interests  
4 by going to the Tenth Circuit.

5 Do you have a time frame that you think I  
6 need to have some order or opinion or some  
7 combination of that out to you so that you can go on  
8 to the Tenth Circuit if I don't give you what you  
9 want hear?

10 MR. CROWELL: Well, Mr. Bohnhoff made a  
11 statement earlier today that they have no intention  
12 of going through the process of taking action against  
13 the vendors until a certain quantum of these motions  
14 have been resolved. So the question may be back to  
15 him, you know.

16 But secondly, you know, we would  
17 encourage -- and we've set this forth in our original  
18 motion -- that if the Court is in any way inclined to  
19 deny our motion to stay pending appeal, we would ask  
20 the Court to issue a temporary stay to give us enough  
21 time to go to the Tenth Circuit and have them rule on  
22 a motion to stay.

23 THE COURT: Well, what if I did this: What  
24 if I take a little bit of time to look at this? But,  
25 Mr. Crowell, if I'm taking too long, and something is

1 happening out there and you need to go to the Tenth,  
2 you call Ms. Wild immediately and tell her that you  
3 need a ruling? Would that work for you?

4 MR. CROWELL: I believe so, Your Honor.

5 I would hope that Mr. Bohnhoff would give  
6 me the heads up if they're looking to take any kind  
7 of action against the vendors, or otherwise interfere  
8 with the Pueblo's gaming activities.

9 MS. FRIAS: Your Honor?

10 THE COURT: Yeah. Hold on just a second,  
11 Ms. Frias, because I need to think a second.

12 There was one second question I wanted to  
13 ask -- oh, I remember it. So let me ask it now, so I  
14 don't forget it, because I keep forgetting it.

15 Mr. Crowell, let's say this scenario plays  
16 out: Let's say that -- let's say the Tenth Circuit  
17 says on Tuesday of next week -- after y'all tell them  
18 that I didn't enter a proper final judgment -- and  
19 let's say, Wednesday the Tenth Circuit dismisses Mr.  
20 Bohnhoff's appeal. And let's say next Thursday I  
21 vacate Judge Brack's preliminary injunction, enter  
22 the final judgment. Do you need any further word on  
23 this motion, or at that point, do you want me to just  
24 take what we've done and rule? Are you going to need  
25 any other motion, any other argument or anything,



1 or --

2 MR. CROWELL: As you indicated earlier, you  
3 know, we're looking at a motion to stay. You know,  
4 we're not knowing whether circumstances might change.  
5 But barring no change in circumstances, then, yes, we  
6 would ask you to rule on the pending motion to stay.

7 THE COURT: Without a further hearing or  
8 anything?

9 MR. CROWELL: Barring a change of  
10 circumstances, yes.

11 THE COURT: Okay. Well, let me do this,  
12 then, if this is all right with you. I'm going to  
13 ask Mr. Bohnhoff if this is all all right with him,  
14 too. But I'll do it like I did the other motion;  
15 that if -- or the other question I had -- if you need  
16 anything further, or you need a hearing or something  
17 like that before I enter an order on this motion,  
18 you'll call Ms. Wild and let her know; otherwise,  
19 I'll assume that nobody is wanting further argument.  
20 Everybody has said what they had to say today. Does  
21 that work for you, Mr. Crowell?

22 MR. CROWELL: The only caveat that I would  
23 provide, Your Honor, is that in going to the issue of  
24 final judgment, we do -- we're obligated to report to  
25 the Tenth Circuit on Monday what our position is.

1 THE COURT: Right.

2 MR. CROWELL: The discussion that we had  
3 earlier, you know, that Mr. Bohnhoff did not agree  
4 to, we think that the Court should do the Pueblo's  
5 request, or sua sponte, that the prudent thing to do  
6 is to vacate final judgment and wait till the Tenth  
7 Circuit -- which won't be a long wait -- rules on the  
8 State motion to dismiss the interlocutory appeal.  
9 That, I think, provides everybody a short window of  
10 time for this Court to then take into further  
11 consideration what it will do with our motion to stay  
12 once final judgment is reentered.

13 THE COURT: Yeah. And I understand your  
14 position. But my question doesn't depend on whether  
15 the Tenth Circuit tells me I don't have a final  
16 judgment or I decide I don't have a final judgment.

17 My question is: When I do enter a final  
18 judgment, whether you need any further hearing or  
19 want to make any showing, and if you do, what I'm  
20 saying, will you just call Ms. Wild and say,  
21 Something has happened, or I've got some more  
22 evidence, or I've got to make another argument, or I  
23 want another argument? Otherwise, can I assume that  
24 we've had our argument today?

25 MR. CROWELL: Well, I don't intend to be

1       equivocating on this. But, you know, the way that we  
2       are reading the federal rule is that we need to make  
3       the motion to stay in the first instance at the  
4       district court.

5               So, if final judgment is -- so again, we  
6       think the proper thing to do is to wait to see what  
7       they do with the interrogatory appeal. But we  
8       believe that we would at least have to go through the  
9       mechanical aspect of re-upping our motion to stay  
10      after the issuance of the revised final judgment.

11             THE COURT: All right. Let's say you did  
12      this: Let's say you put in, you know, a two-pager  
13      saying we incorporate everything that we have said in  
14      Document 123 and our reply and at the hearing on  
15      October 27; would you need anything further? And  
16      then I would rule on that motion?

17             MR. CROWELL: No, I believe -- absent a  
18      change of circumstances -- I believe that would be  
19      appropriate.

20             THE COURT: Okay.

21             All right. Ms. Frias, what did you want to  
22      add?

23             MS. FRIAS: No. Mr. Crowell covered my  
24      argument. I was -- just wanted to remind the Court  
25      about our deadline on Monday.

1 THE COURT: All right. Well, I'm going to  
2 get off here. And I'm going to start doing research  
3 on that final judgment issue, to see if I need to  
4 correct myself on that. And go ahead and indicate  
5 that I agree that I don't have final judgment. So I  
6 can vacate that. And y'all can just tell the Tenth  
7 Circuit that it's not an issue.

8 And if you don't hear from me, then it  
9 looks like y'all will have to tell the Tenth Circuit  
10 something. Mr. Bohnhoff is going to tell them I did  
11 the right thing. And I guess the Pueblo will tell  
12 them that they don't think I should have entered  
13 final judgment.

14 Mr. Bohnhoff, are you comfortable with  
15 Mr. Crowell letting us know whether he needs further  
16 argument? Otherwise, we'll just consider this to be  
17 the final judgment, even if he feels it's necessary  
18 to file another motion after I enter final judgment?

19 MR. BOHNHOFF: I don't think that the Court  
20 needs to receive any further written or oral argument  
21 about the stay question. I think we've addressed  
22 that sufficiently.

23 It seems to me -- well, Your Honor, your  
24 statements about whether, in fact, you did stay or  
25 suspend the preliminary injunction -- your statements

1 when we got on right after lunch, if I'm  
2 understanding the Court correctly, you were agreeing  
3 that your September 30 order did, in fact, stay or  
4 suspend the preliminary injunction. If that's the  
5 case --

6 THE COURT: Well, this is the way I would  
7 word it. I think that's what threw me off. Because  
8 I think I've been very careful not to touch the  
9 preliminary injunction. So I did not suspend or do  
10 anything to the preliminary injunction.

11 What I did is what I think the rules allow  
12 me to do, is I can stay my order, which is changing  
13 the preliminary -- or I can stay the preliminary  
14 injunction's effect pending appeal. That's what Mr.  
15 Crowell is asking for me to do right now is stay my  
16 order. So I think I can do that.

17 So I can stay the effect. But I can't  
18 touch the preliminary injunction itself. I mean, I  
19 have to leave that in place, because you've appealed  
20 it. The Tenth Circuit has jurisdiction.

21 But I still have the ability under the  
22 rules to stay the effect of that preliminary  
23 injunction and -- but I can't suspend the preliminary  
24 injunction, I can't dissolve the preliminary  
25 injunction, but I can suspend the effects of it until

1 it's appealed. Is that helpful?

2 MR. BOHNHOFF: Yes. And I think, even if  
3 we're talking about the effect being stayed, what  
4 that still means is the motion to stay, that the  
5 Pueblo has already filed, really needs to be decided.  
6 Because if the Court stayed the effect of the  
7 preliminary injunction currently -- that is today --  
8 the State is in a position to go ahead and take  
9 enforcement action. And, therefore, really  
10 regardless of what happens next week, if in fact it's  
11 next week, the scenario of Tenth Circuit finding on  
12 Tuesday that you don't have -- that there was no  
13 final judgment; Wednesday, the Tenth Circuit  
14 dismisses the interlocutory appeal; Thursday, the  
15 Court enters a new final judgment -- regardless of  
16 that, really, it seems to me the motion to stay is  
17 already properly teed up and in need of ruling.

18 If we had that scenario next week, that  
19 would, I think, buttress the need for a ruling on the  
20 motion to stay. But I don't think that we're really  
21 having to wait until that scenario plays out before  
22 we actually need a ruling on the motion to stay.

23 If that happened next week, the Pueblo  
24 might file a new motion to stay that's identical to  
25 the one they've already filed. And the argument

1 would be identical to the argument that we've already  
2 had.

3 But I say that, Your Honor, to emphasize,  
4 from the State's point of view, I think we need to  
5 have a ruling as quickly as possible on the stay.  
6 And I guess I'm concerned a little bit about your  
7 statement that you might take a little bit of time to  
8 look at this. We would urge the Court to rule as  
9 quickly as possible.

10 I have not spoken with my clients. And I  
11 can't make any representation about how long the  
12 State would wait on taking enforcement action, were  
13 we to have the scenario next week of the  
14 interlocutory appeal being dismissed, and then one  
15 way or the other, we have a final judgment in place  
16 by Thursday, or whatever the day is.

17 I can't make any representation to the  
18 Court as to how quickly after issues are -- the  
19 pending issues are resolved with the Tenth Circuit --  
20 I can't make any representation as to how quickly  
21 after that the State would not determine that it  
22 needs to move forward on enforcement actions.

23 So I think we do need to get that stay  
24 motion decided sooner rather than later. I guess I'm  
25 willing to give advance notice -- I think I can state

1 that to Mr. Crowell -- as to whether or not the State  
2 is going to initiate enforcement action.

3 But I think I do need to emphasize and  
4 stress that this is an issue that does need to be  
5 resolved on an expedited basis.

6 THE COURT: Well, I hear you; I hear what  
7 the State is saying. But, realistically, I'm  
8 probably going to look to the Pueblo on the timing  
9 here. I would like to have some time to consider  
10 this. And so I hear what the State is saying, but  
11 probably I'm going to be looking to the Pueblo. If  
12 they feel like I'm taking too much time, I'll go get  
13 a ruling very quickly.

14 I've been in this situation before and I  
15 know what I have to do -- but I also think that it's  
16 primarily for their production. So if they're  
17 willing to run naked a little bit while I'm trying to  
18 figure out what to do on their motion, then I'm  
19 probably going to respect them, because it's  
20 primarily their rights that are at issue at this  
21 point. Y'all are just looking for a little bit of  
22 extra frosting on the cake. And I think that's fine.  
23 I understand why you're doing that. But I think it's  
24 primarily the Tribe's interests here at this point  
25 that are at issue.



1 MR. BOHNHOFF: Your Honor, if I could:  
2 Given your other schedule and calendar, assuming that  
3 by Thursday of next week, just to pick a day, the  
4 interlocutory appeal had been dismissed, and by that  
5 day we have a final judgment in place one way or the  
6 other, how quickly after that would the Court be  
7 expecting to rule on the motion to stay?

8 THE COURT: Well, I don't know. You know,  
9 a lot has been put into these motions. Some  
10 materials I have not seen, and that Judge Brack  
11 didn't see that I know of. So there has been a lot  
12 more that has been said. Of course, we're almost a  
13 year to the day from when Judge Brack had this. So  
14 some additional things have occurred during that  
15 period of time, as y'all know from your affidavit.

16 And quite frankly, I didn't -- you know,  
17 how injunctive relief is -- you can plan out what  
18 you're trying to do right now -- I wasn't planning to  
19 work on this case anymore. I mean, I probably should  
20 have thought about it, that this motion was coming  
21 in. But, you know, once you get it out of September  
22 30, you kind of move on to other things. And I have  
23 moved on to other things.

24 I'm now going to have to sit down and  
25 figure out how I'm going to fit this into a fairly

1 busy airport runway. And so I think that's pretty  
2 hard for the Court to answer. And that's one reason  
3 I'm probably going to look to -- primarily, Mr.  
4 Crowell, to tell me, Okay, Judge, the gig is up, I  
5 need it -- and the parties have done this before -- I  
6 mean, parties have said, Well, Judge, we need it in  
7 48 hours; others will say, Yeah, 2 weeks, 3 weeks.  
8 But I'm not hearing that right at the bottom. So,  
9 you know, I'm not probably going to do much more at  
10 the present time other than look at this final  
11 judgment issue.

12 All right. Is there anything else we need  
13 to discuss while we're together? Anything else I can  
14 do for you, Mr. Crowell? Mr. Crowell, are you still  
15 there?

16 MR. CROWELL: I had my mute on. Sorry, no,  
17 Your Honor. Nothing further.

18 THE COURT: How about you, Ms. Frias?

19 MS. FRIAS: No, Your Honor.

20 THE COURT: Mr. Bohnhoff?

21 MR. BOHNHOFF: No, Your Honor.

22 THE COURT: All right. I appreciate  
23 y'all's presentations. Like I said, I'm going to  
24 take a first look at this final judgment issue, and  
25 then after that, then I'll start trying to see where

1 I can fit this in. And I'll try to get something out  
2 to you as soon as possible. Obviously, we'll be  
3 checking to see what happens at the Tenth. But, as  
4 y'all know, it probably helps us if y'all let us  
5 know. But we'll be taking a look at it ourselves, we  
6 don't, as you know, sit around and look at the  
7 docket, at the Tenth Circuit cases that we have on  
8 appeal all the time. That's not -- there is nothing  
9 that I can do about it, so I don't sit around and  
10 look at those dockets very much. So if you do have  
11 some developments there, do keep us posted on it.

12 Again, appreciate your presentations.  
13 Again, appreciate the courtesy to the Court, allowing  
14 me to do this out of the district and on the phone.  
15 It has been very helpful to my family and to me. And  
16 I really appreciate the courtesy.

17 Mr. Crowell, you have a good flight.

18 Thank y'all. Y'all have a good afternoon.

19 MR. BOHNHOFF: Thank you, Your Honor.

20 MR. CROWELL: Thank you, Your Honor. And  
21 best wishes to your father.

22 (The hearing was adjourned.)  
23  
24  
25

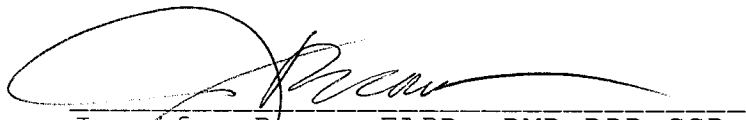
C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
Official Court Reporter for the State of New Mexico,  
do hereby certify that the foregoing pages constitute  
a true transcript of proceedings had before the said  
Court, held in the District of New Mexico, in the  
matter therein stated.

In testimony whereof, I have hereunto set my  
hand on October 28, 2016.



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# EXHIBIT “2”

**No. 16-2228**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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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

---

**DECLARATION OF MITCH BAILEY IN SUPPORT OF PUEBLO OF  
POJOAQUE'S EMERGENCY MOTION TO STAY PENDING  
ADJUDICATION OF PENDING EXPEDITED MOTION TO STAY THE  
ORDER AND RESTORE PRELIMINARY INJUNCTION PENDING  
APPEAL**

---

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  
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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](mailto:dan@rbmindianlaw.com)

**DECLARATION OF TERRENCE “MITCH” BAILEY**

I, Terrence “Mitch” Bailey, hereby declare and state:

1. I am the Executive Director of Gaming Operations of gaming enterprises for the Pueblo of Pojoaque (“Pueblo”): Buffalo Thunder Inc. (“Buffalo Thunder”), which operates Buffalo Thunder Resort and Casino®, and Pojoaque Gaming, Inc., which operates Cities of Gold Casino<sup>SM</sup> (together, the “Pueblo Casinos”). I have worked for the Pueblo’s gaming enterprises since 2008.

2. As Executive Director, I am responsible for all gaming operations at the Pueblo Casinos related to slot machines, table games, simulcast, and poker. I am familiar with and have knowledge of our relations and contracts with our gaming machine vendors for these gaming operations.

3. Yesterday, February 27, 2017, I received notice from Everi Payments, Inc. (“Everi”), that they will immediately cease all check cashing, cash advance, and credit card services for the Pueblo Casinos in light of recent legal events. I understand from Everi that these recent legal events include the denial of a stay in the Pueblo’s pending gaming litigation against the State of New Mexico and a meeting yesterday by the New Mexico Gaming Control Board (“NMGCB”), at which the NMGCB considered and moved forward toward fining Everi and revoking its state gaming license solely because Everi had continued to do business



with the Pueblo Casinos. See February 27, 2017 letter from Everi attached as Attachment "A".

4. Now that the Pueblo Casinos are unable to use Everi to verify the availability of patron funds for transactions, we cannot accept credit cards or cash checks or provide cash advances for our patrons, as doing so would put us in great financial risk. Most months, credit card, check cashing and cash advances at the Pueblo Casinos total over \$1.2 million worth of business. This inability to have electronic transaction verification will leave the Pueblo Casinos open to fraudulent charges and unscrupulous behavior.

5. Additionally, Everi Games, Inc., yesterday told us to immediately shut down one Class III Participation gaming machine for the same reason as the Everi Payments business cessation. Based on past usage, I calculate that the Pueblo Casinos will lose \$142,285 over the next year from the loss of this one game.

6. Also yesterday, IGT also told us to immediately shut down 3 Wide Area Progressive ("WAP") games and 29 Participation Games leased from IGT, which they will now arrange to be returned to them. IGT stated that this is due to recent events, which they explained and I understood to refer to the recent denial of a stay in our pending gaming litigation against the State of New Mexico and the NMGCB's resulting decision to resume enforcement actions against the Pueblo Casinos' gaming vendors. The Pueblo Casinos will lose \$2,504,215 over the next

year from the loss of these 32 games. See February 27, 2017 letter from IGT attached as Attachment "B".

7. IGT is also terminating service for 8 Speilo (2 WAP plus 6 Participation) games. The Pueblo Casinos will lose \$632,917 per year from the loss of these 8 games.

8. Today, Konami notified me that they are ceasing all business with the Pueblo and that we are to turn off all participation/lease units that are subject to our agreement with them until a time they can schedule removal of this equipment. We have now shut down 2 Konami Participation Games. The Pueblo Casinos will lose \$134,969 over the next year from the loss of these 2 games. See February 28, 2017 letter from Konami attached as Attachment "C".

9. Cumulatively, between last Friday and today, the Pueblo Casinos have had to disconnect 68 WAP and Participation Games, 19 machines we own but pay a daily rate for software use, and 2 Shuffle Master table games from the casino floor, all due to Judge Browning's recent denial of the Pueblo's motion to stay in the pending gaming litigation.

10. These new losses for the Pueblo Casinos total \$3,414,386 in gaming revenue per year. This amount is above and beyond the \$7,200,228<sup>1</sup> in annual

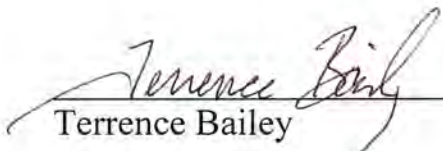
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<sup>1</sup> This amount was recalculated. Previously, we stated it was \$7,091,064. However, it should actually be \$7,200,228. Therefore, Paragraph 29 of the February 23, 2017 Baily Declaration and Paragraph 21 of the February 23, 2017 Allgeier Declaration

revenue the Pueblo Casinos lost on Thursday, February 23, 2017, when Scientific Games (Bally's, WMS's and Shuffle Master's parent company) and Aristocrat suspended all business transactions with the Pueblo. Thus, the Pueblo Casinos' total loss over the past three business days is \$10,614,614 in annual revenue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 2017.

  
Terrence Bailey

---

should be corrected from \$3,305,558 in revenue lost per year to \$3,414,722 per year. Additionally, Paragraph 30 of the February 23, 2017 Baily Declaration and Paragraph 22 of February 23, 2017 Allgeier Declaration should be corrected from \$7,091,064 in revenue lost per year to \$7,200, 228 per year.

# ATTACHMENT “A”

DECLARATION OF MITCH BAILEY



250 S. Main Ave  
Las Vegas, NV 89113

D: 702.855.3000  
F: 702.855.3040

everi.com  
NYSE: EVRI

February 27, 2017

Sent via Email [arpadilla@pojoaque.org](mailto:arpadilla@pojoaque.org)

Ms. Angela Padilla, Director  
Pueblo of Pojoaque Gaming Commission  
5 W. Gutierrez, Suite 4 #7  
Santa Fe, NM 87506

Dear Ms. Padilla,

In light of the recent legal events, our Companies have no option but to provide this written notice that we are ceasing all business effective immediately with the Buffalo Thunder and Cities of Gold Casinos.

The services are as follows:

- Everi Games – all Class III Slot Machines
- Everi Payments – CashClub with Credit, Debit and Check Cashing
- Central Credit, LLC – Check Warranty and all data base services

Please feel free to contact me if you need any additional information or have any questions. I can be reached at email address [crocco@everi.com](mailto:crocco@everi.com) or by telephone at 702.262.5052.

Thank you,

A handwritten signature in blue ink that reads 'Mel Rocco'.

Mel Rocco  
Director, Corporate Compliance

cc: Carrie Frias, Chief General Counsel – [cfrais@pojoaque.org](mailto:cfrais@pojoaque.org)  
Mitch Bailey, Gaming Operations Director – [tbailey@pojoaque.org](mailto:tbailey@pojoaque.org)  
Kathy McEachern, Cage Director – [kmceachern@buffalothunder.com](mailto:kmceachern@buffalothunder.com)  
Donovan Lieurance, New Mexico Gaming Control Board Acting Executive Director - [donovan.lieurance@state.nm.us](mailto:donovan.lieurance@state.nm.us)

# ATTACHMENT “B”

DECLARATION OF MITCH BAILEY



February 27, 2017

Pueblo of Pojoaque Gaming Commission  
2 Petroglyph Circle  
Santa Fe, NM 87506  
Attn: Ms. Angela Padilla, Executive Director

Re: IGT

Dear Ms. Padilla,

This letter is to inform that IGT intends to cease doing business with all casino properties within your jurisdiction.

We will work directly with the affected properties to ensure this is done in an expeditious manner.

Please contact me directly at (702) 273-8703 or via email at [christine.masino@igt.com](mailto:christine.masino@igt.com) should you require further information.

Regards,

A handwritten signature in dark ink, appearing to read "Christ Masino", is positioned above the printed name.

Christine Masino  
Director, Regulatory Compliance

cc: Luke K. Orchard, SVP, Chief Compliance & Risk Management Officer  
Donovan Lieurance, Acting Executive Director, New Mexico Gaming Control Board

# ATTACHMENT “C”

DECLARATION OF MITCH BAILEY



# KONAMI

February 28, 2017

**Via Email to:**

[tbailey@buffalothunder.com](mailto:tbailey@buffalothunder.com)

Mr. Mitch Bailey, Asst. Slot Director  
Buffalo Thunder Resort and Casino  
30 Buffalo Thunder Trail  
Santa Fe, NM 87506

Re: Direction to Shut Down Operations of Konami Gaming Devices

Dear Mr. Bailey:

Due to the New Mexico Gaming Control Board's recent actions, Konami Gaming, Inc. ("Konami") is ceasing all business with the Pueblo of Pojoaque. Please turn off all participation/lease units that are the subject of an agreement with Konami until a time is scheduled to remove this equipment.

Thank you for your assistance in this matter. If you have any questions regarding the contents of this letter, please do not hesitate to contact me.

Regards,



Thomas A. Jingoli  
Exec. VP/Chief Commercial Officer