IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe: JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque,

Plaintiffs

vs. **No. 1:15-cv-0625 RB/GBW**

STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I–V,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, filed on September 25, 2015. Defendants filed a response in opposition on October 1, 2015. Jurisdiction arises under 28 U.S.C. §§ 1331 and 1362. The Court held a hearing on October 2, 2015 wherein the parties proffered evidence and argument. Having considered the parties submissions, the Court finds that this motion should be granted.

I. Introduction

On July 18, 2015, Plaintiffs filed suit seeking redress for: (1) the alleged failure of the State of New Mexico ("the State") to conclude tribal-state compact negotiations in good faith under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701(d); and (2) the actions and pronouncements taken by the Individual Defendants under color of state law to deprive the Pueblo of Pojoaque ("the Pueblo") of the federal right to be free of state jurisdiction over Class

III gaming[1] activities that occur on the Pueblo's Indian lands. (Compl., Doc. 1.) With respect to the second claim, Plaintiffs seek a temporary restraining order or preliminary injunction enjoining Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement action against any licensee in good standing with the New Mexico Gaming Control Board ("NMGCB") based wholly or in part on grounds that such licensee is conducting business with the Pueblo. (Plaintiffs' Motion, Doc. 23.)

II. Background

On July 19, 2005, the Pueblo and the State executed a Class III Gaming Compact ("the Compact") that expired on June 30, 2015. (Doc. 1.) In advance of the expiration of the Compact, the Pueblo formally requested that the State enter into another compact. (*Id.*) However, the parties were unable to reach an agreement. (*Id.*) On December 13, 2013, the Pueblo filed a lawsuit against the State for failure to negotiate a compact under IGRA in good faith. *See Pueblo of Pojoaque v. State of N.M.*¸ 1:13-cv-01186 JP/KBM (Mar. 3, 2014). On February 25, 2014, the State asserted Eleventh Amendment immunity as an affirmative defense to the Pueblo's Complaint. (*Id.*) Accordingly, Judge James A. Parker dismissed the lawsuit on March 3, 2014. (*Id.*)

Thereafter, the Pueblo submitted a proposal for Class III gaming to the United States Secretary of the Interior pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(B) and 25 C.F.R. Part 291 (1999). On August 7, 2014, the State filed a lawsuit against the United States alleging that the Secretary of the Interior lacks the authority to promulgate the regulations set forth in 25 C.F.R. Part 291. *New Mexico v. Department of the Interior*, 1:14-cv-0695 JP/SCY, *on appeal* 14-2222.

[1] Class III gaming includes slot machines and banked card games. *See* 25 U.S.C. § 2703(8).

On October 17, 2014, Judge Parker granted summary judgment in favor of the State and enjoined the United States from taking action pursuant to 25 C.F.R. Part 291. An appeal to the United States Court of Appeals for the Tenth Circuit is pending.[2]

On November 3, 2014 the Pueblo notified the State of a new request to negotiate a compact to govern the Pueblo's Class III gaming beyond the June 30, 2015 expiration date of the Compact. (Doc. 1.) Thereafter, representatives of the State and the Pueblo met to negotiate a new compact but were unable to reach an agreement. (*Id.*) Prior to the expiration of the Compact, the Pueblo agreed to comply with conditions set by the United States Attorney's Office concerning how the Pueblo's gaming activities would be regulated after the expiration of the Compact and while the litigation in *New Mexico v. Department of the Interior* remains pending. (*Id.*)

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

[2] Oral argument in *New Mexico v. Department of the Interior*, 14-2222 was held on September 28, 2015.

On June 30, 2015, the United States Attorney for the District of New Mexico and the National Indian Gaming Commission issued letters stating that they would forgo enforcement action against the Pueblo as the result of the expiration of the Compact, during the pendency of the appeal in *New Mexico v. Department of the Interior*. (Doc. 1; Damon Martinez Letter dated 6/30/2015, Doc. 23-10; Jonodev Chaudhuri Letter dated 6/30/15, Doc. 23-11.) The decisions to withhold enforcement actions were conditioned on the pendency of active litigation before the Tenth Circuit Court of Appeals, the Pueblo's commitment to maintain the status quo of its gaming operations as set forth in the Compact, and the Pueblo's commitment to place in trust the funds that would have been paid to the State under the Compact. (*Id.*) The United States Attorney's decision will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate. (Doc. 23-10.) The United States Attorney's letter provides that it "may not be relied upon to create any rights, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal . . . ." (*Id.*)

On June 30, 2015, the Individual Defendants issued a public statement that the United States Attorney's decision to allow the Pueblo's Casinos to stay open "provides no protection to banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with an illegal gambling enterprise." (Doc. 23-5.) Additionally, on July 15, 2015, the NMGCB, through the Individual Defendants, held a closed meeting to discuss compliance issues. (Doc. 1.) Following the closed meeting, Individual Defendants announced that they had determined the Pueblo is acting illegally in its continued operation of its Class III gaming activities and placed in abeyance approval of any license application or renewal for the Pueblo's vendors. (*Id.*) No other vendor applications were placed in abeyance. (*Id.*)

The actions of the Individual Defendants discouraged vendors from doing business with the Pueblo. (Doc. 23-1; Declaration of Michael Allgeier, Doc. 23-9.) As a result, the Pueblo's two Class III gaming facilities, Buffalo Thunder Casino and Cities of Gold Casino (collectively "Pueblo Casinos"), have sustained losses in revenue. (Doc. 23-9.) The Pueblo Casinos operate more than 1,800 Class III games and provide direct financial benefit to the Pueblo's non-gaming businesses, including a resort, golf course, wedding chapel, casitas, two hotels, RV park, sports bar, two gas stations, a supermarket, sandwich shop, hardware store, apartment complex, mobile home park, bowling alley, farmer's market, storage unit facility, and vacation rentals. (*Id.*) The Pueblo's operations employ hundreds of individuals. (*Id.*)

In early 2015, the Pueblo sought to obtain a new casino management system ("CMS") for its casinos. (Doc. 23-9.) A CMS provides slot accounting and patron management for slot machines. (*Id.*) The CMS integrated gaming and non-gaming applications include slot machine monitoring and accounting, slot ticketing, cashless gaming, e-games platforms, table monitoring, live point of sale systems for bingo, race and sports books, promotional kiosks, hotel, food and beverage point of sale interfaces, surveillance and security, responsible gaming, third-party check cashing, general ledger, and data warehousing. (*Id.*) The CMS ensures the integrity of the manner in which gaming operations conduct business, for both the gaming enterprise and the patron. (*Id.*) The current CMS at the Pueblo Casinos is a product of Aristocrat Technologies, Inc. and is outdated and should be replaced. (*Id.*)

In January 16, 2015, Buffalo Thunder reached an agreement with Bally Enterprises for the purchase and installation of a new CMS to replace the current Aristocrat CMS. (Doc. 23-9; Doc. 23-12.) The new CMS would provide updated accounting and marketing purposes and

record all activity of all slot machines, table games, and poker play. (Doc. 23-9.) In March and April of 2015, Scientific Games Corporation, successor corporation to Bally, represented to Buffalo Thunder management that October 1, 2015 would be the "Go-Live" date for the new Bally CMS under the Bally Contract. (Declaration of Terrence "Mitch" Bailey, Doc. 27-1.)

On September 9, 2015, the NMGCB sent letters to the Pueblo's gaming vendors. (Doc. 23-14.) The letters assert that the Pueblo is conducting illegal gaming operations, state that the vendor is being audited by the NMGCB, and demand the production of all communications and business records with respect to the Pueblo's operations. (*Id.*) As a result of Defendants' letter of September 9, 2015, Scientific Games, Inc. refused to provide needed software and servicing of the Pueblo gaming machines on September 25, 2015. (Second Suppl. Bailey Declaration, Doc. 27-1.) The refusal has caused several gaming machines to be shut down immediately, and is likely to cause many more to be shut down, resulting in substantial loss of the Pueblo's revenue. (*Id.*)

The Pueblo has three critical needs from its vendors for the continued operation of gaming activities at the Pueblo Casinos: (1) the installation and operation of the new Bally CMS, including technical support service by Scientific Games, Inc.; (2) the ability to obtain new machines and new products through the purchase, lease, conversion, or replacement of existing older products and machines; and (3) the ability to continue to operate existing machines and products through the vendor's delivery of replacement parts and continued technical support services. (Doc. 23-9.)

On September 25, 2015, the NMGCB issued citations to all the vendors doing business with the Pueblo Casinos. (Second Suppl. Bailey Declaration, Doc. 30.) At least one vendor

refused to show its citations to representatives of the Pueblo as it was concerned about further retaliation from the NMGCB. (*Id.*) Plaintiffs submitted copies of three citations issued to Aristocrat Technologies, Inc. on September 25, 2015. (Docs. 30-1, 30-2, 30-13.) Citation No. 2486 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.16.9(C), (D), (E) & (F) NMAC; 15.1.16.11 NMAC; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present the licensee shipped gaming machines or equipment to Buffalo Thunder Resort and Casino: [sic] No notice was given to the New Mexico Gaming Control Board. Additionally licensee did not self-report this activity." (Doc. 30-1.)

Citation No. 2487 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.16.8(B) NMAC; 15.1.16.12(B) NMAC; 60-2E-4 NMSA; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present, the Pueblo of Pojoaque did not have in effect a Tribal-State Gaming Compact or Secretarial prescribed procedures permitting Class III gaming on the Pueblo of Pojoaque. By letter dated June 30, 2015 the United State [sic] Attorney for the District of New Mexico stated that the Pueblo of Pojoaque would be in violation of federal law if it engaged in Class III gaming without one of the aforementioned documents in place. The Pueblo of Pojoaque's Tribal Gaming Ordinance also prohibits Class III gaming on the Pueblo in the absence of a Tribal-State Gaming Compact or Secretarial prescribed procedures. Federal law makes applicable State law when gaming is occurring on Indian lands in the absence of a Tribal-State Gaming Compact or Secretarial prescribed procedures. During the period of July 1, 2015 to present, licensee sold or transferred gaming devices to a person that

could not lawfully own or operate the gaming device. Additionally, licensee did not self-report this activity." (Doc. 30-2.)

Citation No. 2488 charges Aristocrat Technologies, Inc. with "violation of New Mexico gaming laws, rules and regulations, minimum internal controls or New Mexico Bingo and Raffle act [sic]" under "15.1.10.9(f), ([unreadable]) and (g) NMAC; 15.1.10.11(A) NMAC; 60-2E-4 NMSA; and 15.1.10.13 NMAC," based on the facts that "from July 1, 2015 to present, the licensee has in effect agreements with gaming operations on the Pueblo of Pojoaque, more specifically Buffalo Thunder Resort and Casino and Cities of Gold Casino, whereby licensee leases gaming devices to the casinos for use and play. Licensee receives a percentage of 'net-win' from each machine. Additionally, licensee has in place agreements with the gaming operators on the Pueblo of Pojoaque for wide area progressive gaming machines and the licensee receives a percentage of 'net-win' from the play of these machines. Since July 1, 2015 there has been no Tribal-State Gaming Compact or Secretarial prescribed procedures in effect that permit Class III gaming on the Pueblo of Pojoaque. By letter dated June 30, 2015, the United States Attorney for the District of New Mexico stated that such gaming activity occurring after June 30, 2015 would violate federal law. For purposes of federal law, State gaming laws apply to gaming activity occurring on Indian lands where no Tribal-State Gaming Compact or Secretarial prescribed procedures are in place permitting such activity. Additionally, licensee did not self-report this activity." (Doc. 30-3.)

On September 30, 2015, representatives of Scientific Games, Inc. advised Terrence "Mitch" Bailey, the Executive Director of Gaming Operations of the Pueblo, that they could not conduct business with the Pueblo due to the enforcement actions taken by the NMGCB. (Doc.

30.) The representatives stated that they are concerned about how the actions of NMGCB could impact their licenses worldwide. (*Id.*)

The Pueblo projects revenue losses of $300,000 per month starting October 1, 2015, due to its inability to install and implement the new CMS. (Declaration of Michael Allgeier, Doc. 23-9.) Additionally, the Pueblo's inability to enter into contracts for new game purchases, new game leases, and conversions of older games to new machines, has an immediate negative effect on gaming revenue and fees paid to vendors. (*Id.*) The Pueblo will suffer imminent harm, as the operations will immediately lose 17% of their current revenue from an inability to support existing games. (*Id.*) The gaming operations are now at risk of the entire CMS failing, which will result in an inability to operate Class II or Class III gaming. (*Id.*) The loss of the gaming revenue would result in substantial layoffs, and millions of dollars in lost revenue, placing the Pueblo in breach of financial agreements, reductions in essential government services to the Pueblo's membership and possibly force the closure of the Pueblo's gaming facilities. (Doc. 23-1.)

The Pueblo provides 1,200 New Mexico residents with employment and employment-related benefits. (Doc. 23-1.) As an employer, the Pueblo pays a total of $46,300,000 in combined annual payroll and benefits. (*Id.*) The Pueblo's gaming/resort businesses alone employ nearly 800 individuals with annual payroll and benefits of $32,500,000. (*Id.*) The inability to conduct Class III gaming operations would result in the loss of highly trained employees. (*Id.*) Additionally, the Pueblo's inability to continue to provide employment, career training, and employment-related benefits would force some of the employees to rely upon state and federal assistance. (*Id.*)

Plaintiffs request a temporary restraining order and/or preliminary injunction prohibiting Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the NMGCB based wholly or in part on grounds that such licensee is conducting business with the Pueblo. Defendants opposed the motion and assert that there is no federal jurisdiction, that Plaintiffs cannot meet the requirements for equitable relief, and that Plaintiffs lack standing.

III. Discussion

A. Overview

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.' " *Michigan v. Bay Mills Indian Comm.*, 134 S.Ct. 2024, 2030 (2014) (*quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) and *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). "As dependents, the tribes are subject to plenary control by Congress." *Bay Mills*, 134 S.Ct. at 2030 (*citing United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive' " to "legislate in respect to Indian tribes"). "And yet they remain 'separate sovereigns pre-existing the Constitution.' " *Bay Mills*, 134 S.Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 134 S.Ct. at 2030 (*quoting United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

"Congress enacted IGRA in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that because Congress had not regulated Indian gaming, the states lacked authority to regulate gaming on

Indian lands." *Bay Mills*, 134 S.Ct. at 2034. IGRA regulates gaming that occurs on Indian lands, which include "any lands title to which is [ ] held in trust by the United States for the benefit of any Indian tribe . . . and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). IGRA provides "a comprehensive approach to the controversial subject of regulating tribal gaming, [and strikes] a careful balance among federal, state, and tribal interests." *Florida v. Seminole Tribe of Fla.* (*Seminole Tribe II*), 181 F.3d 1237, 1247 (11th Cir. 1999).

IGRA "divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class." *Seminole Tribe of Fla. v. Florida* (*Seminole Tribe I*), 517 U.S. 44, 48 (1996). IGRA defines Class II gaming to include bingo and permits the use of "electronic, computer, or other technologic aids" in connection with the game. 25 U.S.C. § 2703(7)(A)(i). Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. *See* 25 U.S.C. § 2703(8). Generally, a tribe may conduct Class III gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. *See* 25 U.S.C. § 2710(d)(1)(C).

IGRA provides tribes with a right of action to sue in federal court with respect to tribal-state compacts. *Alabama v. PCI Gaming Authority*, ___ F.3d ___, 2015 WL 5157426 (11th Cir. Sept. 3, 2015). If a state fails to negotiate a tribal-state compact in good faith, a tribe may bring a civil action against the state in federal court. 25 U.S.C. § 2710(d)(7)(A)(i). However, IGRA limits the remedies available to the tribe in such an action. *Id*. Additionally, a state may raise Eleventh Amendment immunity with respect to a claim that the state failed to negotiate a compact in good faith. *See Seminole Tribe I*, 517 U.S. at 47. Under such circumstances, the

tribe may not obtain broad injunctive relief in federal court. *Id.* Rather, the only remedy available to a tribe for such a claim is to request that the Secretary of the Interior set forth the terms under which the tribe may engage in Class III gaming on Indian lands within the state. *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv), (vii).[3]

IGRA includes three provisions codified in the criminal code, only one of which is relevant here.[4] Section 1166, titled "Gambling in Indian country," applies to Class III gaming conducted in the absence of a tribal-state compact. *See* 18 U.S.C. § 1166(c). This section incorporates "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto" into federal law. *See* 18 U.S.C. § 1166(a). These state laws "shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." *Id.* Section 1166 makes it a federal crime to commit an act or omission involving gambling where the conduct "would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred," under the state's laws "governing the licensing, regulation, or prohibition of gambling." 18 U.S.C. § 1166(a). The punishment for this assimilated federal crime is the same as the punishment would be under state law for the state crime. *Id.*

Notably, IGRA expressly provides that the United States has the exclusive jurisdiction to bring criminal prosecutions for violations of § 1166(b). *See* 18 U.S.C. § 1166(d). In that the Compact between the Pueblo and the State expired on June 30, 2015, Section 1166(d) applies to

[3] When the Pueblo pursued this remedy, the State filed a lawsuit against the United States alleging that the Department of the Interior lacks the authority to promulgate the regulations set forth in 25 C.F.R. Part 291. This is the subject of the pending appeal in *New Mexico v. Department of the Interior*.

[4] The two other provisions criminalize theft from, and theft by officers or employees of, gaming establishments on Indian lands. *See* 18 U.S.C. §§ 1167–68.

the Pueblo's gaming operations. By the plain terms of the statute, the United States, and not the State, has exclusive jurisdiction to bring criminal prosecutions for violations of the State's laws governing the licensing and regulation of gambling on the Pueblo's lands. *See* 18 U.S.C. § 1166. While Defendants have not threatened criminal action against the Pueblo's vendors, the NMGCB has issued administrative citations that could endanger the vendors' licenses to conduct business within the State of New Mexico and affect their licensure status in other jurisdictions. In that Section 1166(d) explicitly provides that only the federal government may bring criminal prosecutions to enforce the State's laws governing the licensing and gambling on tribal lands in the absence of a tribal-state compact, it follows that the NMGCB lacks jurisdiction to issue citations to vendors for the sole reason that they conduct business with the Pueblo's Casinos.

B. Jurisdiction

Defendants challenge this Court's federal subject matter jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Gunn v. Minton*, —— U.S. ——, 133 S.Ct. 1059, 1064 (2013) (*quoting Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted)). As a result, "there is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *McKenzie v. U.S. Citizenship and Immigration Servs., Dist. Director*, 761 F.3d 1149, 1154 (10th Cir. 2014). Plaintiffs invoke this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1362 (jurisdiction over actions brought by Indian tribes arising under the Constitution, laws, or treaties of the United States).

Courts have held that Section 1331 confers jurisdiction on cases arising under IGRA or

"the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes and the states." *Sycuan Band v. Roache*, 54 F.2d 535, 538 (9th Cir. 1994) (*citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). Additionally, an action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within Section 1362 jurisdiction as a matter arising under the Constitution, treaties, or laws of the United States. *United Keetoowah Band of Cherokee v. Oklahoma*, 927 F.2d 1170, 1173 (10th Cir. 1991) (*citing Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472–73 (1976)). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (exercising federal jurisdiction over tribe's request for preliminary injunction against a state). Accordingly, the Court has federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

Defendants also assert sovereign immunity. Plaintiffs acknowledge that the State enjoys immunity from Plaintiffs' claim for failure to conclude tribal-state compact negotiations in good faith. *See Seminole Tribe I*, 517 U.S. at 47. However, the Individual Defendants are not immune from suit. More specifically, because Plaintiffs allege that the Individual Defendants are committing ongoing violations of IGRA, a federal law, and Plaintiffs seek injunctive relief to stop the violations, the Individual Defendants are not entitled to immunity. *See PCI Gaming Authority*, 2015 WL 5157426 at *5.

While state officials enjoy limited sovereign immunity to suit in federal court, they can be sued in their official capacity in federal court under certain circumstances. *See Ex parte Young*, 209 U.S. 123 (1908). Specifically, in *Ex parte Young*, the Supreme Court recognized an exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law. *Ex parte Young*, 209 U.S. at 155–56.

Under the legal fiction established in *Ex parte Young*, when a state official violates federal law, he is stripped of his official or representative character and is no longer immune from suit. *Id.* at 159–60.

The Supreme Court has explained that the application of *Ex parte Young* is straightforward. The Court stated: "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 131 S.Ct. 1632, 1639 (2011). As a result, "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction," such that the state officer is not immune from suit. *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). The Tenth Circuit Court of Appeals has held that a state official need not violate a federal statute to be subject to suit under *Ex parte Young*; all that is required is an allegation that the state official is interfering, or is about to interfere, with a federally protected right. *See Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205 (10th Cir. 2002) (finding that the *Ex parte Young* doctrine applied where plaintiff tribe sought injunctive relief to stop officials from interfering with the tribe's right to hunt and fish on Indian land).

In this case, Plaintiffs have established that the Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact. These actions are inconsistent with IGRA and the Supremacy Clause. The Individual Defendants' actions are interfering with the Pueblo's federal protected rights to tribal sovereignty and the ability to conduct their gaming activities. The Pueblo seeks injunctive relief to stop the

Individual Defendants from interfering with their federally protected rights. Thus, the *Ex parte Young* doctrine applies.

Defendants contend that *Ex parte Young* is inapplicable to Plaintiffs' claims against the Individual Defendants based on the exception to *Ex parte Young* set out in *Seminole Tribe I*. Defendants' argument is not legally supported. The Supreme Court's decision in *Seminole Tribe I* addressed only whether *Ex parte Young* permitted a state official to be sued under 25 U.S.C. § 2701(d), the provision of IGRA that gives a tribe an express cause of action to sue to compel a state to negotiate in good faith a tribal-state compact governing Class III gaming based on the limited remedial scheme available to a tribe to vindicate this right. *See Seminole Tribe I*, 517 U.S. at 47. *Seminole Tribe I* neither addressed nor decided whether state and tribal officials are immune from other IGRA-based claims to enforce rights for which the statute does not set forth such a detailed, limited remedial scheme.

Notably, courts across the country have held that the *Seminole Tribe I* exception to *Ex parte Young* is inapplicable to claims such as Plaintiffs' claims against the Individual Defendants. *See Tohono O'odham Nation v. Ducey*, _____ F. Supp. 3d ____, 2015 WL 5475290 (D. Ariz. Sept. 17, 2015); *Massachusetts v. Wampanoag Tribe of Gay Head*, _____ F. Supp. 3d ____, 2015 WL 854850 (D. Mass. Feb. 27, 2015); *Friends of Amador Cty. v. Salazar*, No. CIV. 2:10–348 WBS KJM, 2010 WL 4069473, at *4 (E.D. Cal. Oct. 18, 2010); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1109 n. 34 (E.D. Cal. Aug. 5, 2002). As an example, the *Tohono O'odham* decision expressly rejected the argument by the Director of the Arizona Department of Gaming that *Seminole I* precludes an action by a tribe seeking an injunction against state officials, noting that Tohono O'odham's actions seeking to enjoin the Arizona Department of

Gaming from threatening vendors were separate and distinct from claims that Arizona had failed to negotiate a compact in good faith. *Id.*, 2015 WL 5475290 at *6–7. Additionally, the *Wampanoag* decision held that counterclaims by a tribe against a state seeking to enjoin interference with a tribe's gaming activities are cognizable under the *Ex parte Young* doctrine. *Wampanoag Tribe*, 2015 WL 854850 at *17. The circumstances of this case are materially similar to these cases and the *Seminole Tribe I* exception to *Ex parte Young* is inapplicable here. Unlike the provisions at issue in *Seminole Tribe I*, Congress did not create a detailed remedial scheme for tribes to challenge state officials' unauthorized enforcement of state gaming regulations to an Indian gaming operation in the absence of a tribal-state compact. Thus, Plaintiffs have satisfied the requirements of *Ex parte Young* with respect to their claims against Individual Defendants. Accordingly, this Court has jurisdiction to grant injunctive relief.

Defendants argue that Plaintiffs lack Article III standing because they failed to establish sufficient facts to demonstrate that they have suffered an injury in fact as their claims are based on the rights of the vendors rather than their own rights. To establish Article III standing, a plaintiff must establish (1) that they have "suffered an injury in fact;" (2) that the injury is "fairly traceable to the challenged action of the defendant;" and, (3) that it is "likely" that "the injury will be redressed by a favorable decision." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 131 S.Ct. 1436, 1442 (2011) (quotations omitted).

Defendants dispute whether Plaintiffs have met the first element, injury in fact. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *See Winn*, 131 S.Ct. at 1442 (quotations omitted). Plaintiffs have alleged that the actions of Defendants will cause the Pueblo to lose

significant amounts of revenue. More specifically, the Pueblo projects revenue losses of $300,000 per month starting October 1, 2015, due to its inability to install and implement the new CMS. (Declaration of Michael Allgeier, Doc. 23-9.) Additionally, the Pueblo's inability to enter into contracts for new game purchases, new game leases, and conversions of older games to new machines, has an immediate negative effect on gaming revenue and fees paid to vendors. (*Id*.) The Pueblo will suffer imminent harm, as the operations will immediately lose 17% of their current revenue from an inability to support existing games. (*Id*.) The gaming operations are now at risk of the entire CMS failing, which will result in an inability to operate Class II or Class III gaming. (*Id*.) The loss of the gaming revenue would result in substantial layoffs, and millions of dollars in lost revenue, placing the Pueblo in breach of financial agreements, reductions in essential government services to the Pueblo's membership and possibly force the closure of the Pueblo's gaming facilities. (Doc. 23-1.) Plaintiffs have established that they have suffered an injury in fact that is more than "fairly traceable" to Defendants' actions and it is likely that the injury will be redressed by a favorable decision. Thus, Plaintiffs have Article III standing.

C. Injunctive relief

Temporary restraining orders and preliminary injunctions are "extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). In the Tenth Circuit, a party requesting injunctive relief must "demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the

balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

It is well-established that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (citations omitted). Plaintiffs have satisfied this factor. The Tenth Circuit has "repeatedly stated that . . . an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation*, 443 F.3d at 1255. In *Wyandotte Nation*, the Tenth Circuit Court of Appeals upheld a preliminary injunction preventing Kansas from enforcing state gaming laws on a tract of tribal land because of the resulting infringement on tribal sovereignty. *Id.* at 1254–57; *see also Ute Indian Tribe v. State of Utah*, ___ F.3d ____, 2015 WL 3705904 (10th Cir. Jun. 16, 2015) (slip op.) (reversing district court denial of preliminary injunction where state's unlawful prosecution of tribal member interfered with tribal sovereignty); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir. 2001) (finding irreparable harm to tribal interests in governing motor vehicles within its reservation boundaries).

Defendants' conduct "create[s] the prospect of significant interference with [tribal] self-government" that the Tenth Circuit Court of Appeals has found sufficient to constitute "irreparable injury." *Prairie Band*, 253 F.3d at 1250–51. Moreover, the inability to recover monetary damages because of Eleventh Amendment immunity renders the harm to be irreparable for purposes of preliminary injunctive relief. *See Prairie Band*, 253 F.3d at 1251; *Kansas Health*

Care Ass'n Inc. v. Kansas Dep't of Soc. and Rehab. Servs., 31 F.3d 1536, 1543 (10th Cir. 1994).

Defendants' protestations that the regulation of vendors doing business with the Pueblo does not constitute regulation of the Pueblo's gaming activities are disingenuous and inconsistent with the record. Defendants' actions are based, quite clearly, on Defendants' own determination that the post-June 30, 2015 Class III gaming at the Pueblo is illegal – a determination that the Defendants, just as clearly, are without jurisdiction or authority to make. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (observing "that the very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over Class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004) ("Although the IGRA provides that Class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, it does not follow that the states have any authority to regulate Class III gaming in the absence of a compact. States may not enforce the terms of IGRA—the only enforcement provided for in the IGRA is through the federal government."), *vacated and remanded on other grounds*, 443 F.3d 1247 (10th Cir. 2006).

Defendants are frustrated by and resent the ongoing gambling activity of the Pueblo. Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that which Defendants know they are without authority or jurisdiction to accomplish directly. Defendants' contention that the enforcement actions against the vendors do not harm the Pueblo is also disingenuous. The undisputed evidence establishes that the Pueblo will lose significant revenue and its Casinos may shut down due to Defendants' intimidation of the Pueblo's vendors. Under these circumstances, Plaintiffs have established

irreparable harm.

Plaintiffs have also demonstrated a likelihood of success on the merits. It is well-established that only the federal government or the tribes themselves can subject the tribes to suit; tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. MFG. Technologies, Inc.*, 523 U.S. 751, 754 (1998). To be sure, IGRA gives states an enforcement role, but only through agreed-upon terms negotiated between the state and the tribe and embodied in a tribal-state compact. *See* 18 U.S.C. § 1166. However, as the Tenth Circuit Court of Appeals has recognized, states have no authority to regulate tribal gaming under IGRA unless the tribe specifically consents to the regulation in a compact. *See United Keetoowah Band of Cherokee*, 927 F.2d at 1177 (describing IGRA as preempting state criminal jurisdiction and a congressional limitation of "the states' enforcement role to Class III gaming conducted under a compact").

In fact, a number of courts have recognized the tribal-state compact restriction on states' enforcement authority. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997) ("Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on Class III gaming remains the exclusive province of the federal government."); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (observing "that the very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over Class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"); *PCI Gaming Authority*, 2015 WL 5157426 at *17 ("if we were to hold that states could sue to enjoin Class III gaming when a tribe engaged in Class III gaming without a compact, we would undermine IGRA's careful balance of federal, state, and tribal interests . . .");

Wyandotte Nation v. Sebelius, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004) ("Although the IGRA provides that Class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, it does not follow that the states have any authority to regulate Class III gaming in the absence of a compact. States may not enforce the terms of IGRA—the only enforcement provided for in the IGRA is through the federal government."), *vacated and remanded on other grounds*, 443 F.3d 1247 (10th Cir. 2006). Simply put, the State's jurisdiction over gaming activities that occur on the Pueblo's lands ceased when the compact expired. As a result, Plaintiffs have established a likelihood of success on the merits.

Additionally, the balance of equities tips in Plaintiffs' favor. A preliminary injunction would not harm the State, but allowing the State to intimidate the Pueblo's vendors would harm the economic viability of the Pueblo's gaming operations. As the Tenth Circuit Court of Appeals reasoned in the *Wyandotte Nation*, "the harm caused by granting the injunction to Kansas is minimal at best whereas the harm to the Wyandotte's sovereignty and well-being caused by permitting the state to continue exercising jurisdiction is quite substantial." *Wyandotte Nation*, 443 F.3d at 1255. In that the harm caused to the State by granting the preliminary injunction is minimal and the harm suffered by the Pueblo without the preliminary injunction would be substantial, the balance of equities tips in favor of Plaintiffs.

Finally, the public policy interest factor of the analysis weighs in favor of Plaintiffs. A preliminary injunction comports with what the Tenth Circuit Court of Appeals has described as the "paramount federal policy" of ensuring that Indians do not suffer interference with their efforts to "develop . . . strong self-government." *Seneca–Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989); *see also Prairie Band*, 253 F.3d at 1253. IGRA

identifies the public policy interests that Congress intended to advance namely "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Accordingly, the public interest is served by maintaining the status quo for the duration of the appeal in *New Mexico v. Department of the Interior* and for 30 days thereafter.

IV. Conclusion

The Court will grant Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction and issue a preliminary injunction enjoining Defendants from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo. This decision will remain in effect for 30 days after the Tenth Circuit Court of Appeals issues its mandate in *New Mexico v. Department of the Interior*, 14-2222.

THEREFORE,

IT IS ORDERED that Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, filed on September 25, 2015, is **GRANTED**.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE