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NM Can't Hassle Tribe's Vendors In Casino Battle, Judge Says

By **Andrew Westney**

Law360, New York (October 8, 2015, 9:49 PM ET) -- A New Mexico federal judge on Wednesday granted the Pueblo of Pojoaque's request for a temporary restraining order to block the state's gaming board from issuing citations to third-party vendors for the tribe's casinos, upbraiding the state for trying to intimidate the companies because it couldn't prevent the tribe from conducting gaming after its compact expired.

In late September, the tribe **asked for a TRO** in its suit seeking to force New Mexico to strike a new compact for its casinos, saying that the New Mexico Gaming Control Board had sent letters to vendors that provide its casinos with gaming equipment and services asserting that the tribe was conducting illegal gaming operations, informing the vendors that they would be audited and demanding copies of all communications and business records related to their dealings with the tribe.

U.S. District Judge Robert C. Brack said in an opinion and order Wednesday that only the federal government has authority under the Indian Gaming Regulatory Act to bring criminal prosecutions to enforce state gaming laws for tribal lands in the absence of a tribal-state gaming compact, and "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."

"Defendants are frustrated by and resent the ongoing gambling activity of the Pueblo," the judge said. "Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that which defendants know they are without authority or jurisdiction to accomplish directly."

The tribe's compact with New Mexico expired on June 30, but it **reached an agreement** with the U.S. Attorney's Office for the District of New Mexico to continue operating its Buffalo Thunder Resort & Casino and Cities of Gold Casino Hotel under the same terms as its previous gambling compact from 2001.

The Pueblo **sued in July** to force New Mexico to strike a new compact for its casinos, seeking hundreds of millions of dollars in damages and accusing the state of failing to negotiate in good faith.

According to the Pueblo, the state has demanded an improper tax on its gross gambling revenue and attempted to shoehorn provisions into the compact that aren't directly related to Class III gambling, among other alleged demands that violate IGRA and the tribe's sovereignty.

After the tribe filed for the TRO, New Mexico **filed an Oct. 1 opposition** contending that the TRO request should be denied — in part because it never sent the letters described by the tribe — and that the suit should be dismissed altogether because it contained no basis for federal jurisdiction for its state law claims.

Judge Brack said that under the plain terms of IGRA, the U.S. rather than New Mexico has jurisdiction to bring criminal prosecutions for violations of the law in the absence of a compact. While the defendants haven't threatened legal action, they issued citations on Sept. 25 to all of the Pueblo's casino vendors that could put their licenses to do business in New Mexico at risk as well as affect their licenses elsewhere, the judge said.

The state gaming officials named in the complaint lack sovereign immunity to the suit under the Ex parte Young doctrine, the judge said. Their efforts to enforce state gaming regulations on the Pueblo's lands without a compact in place are inconsistent with IGRA and the supremacy clause of the U.S. Constitution and interfere with the tribe's sovereignty, the judge said.

The tribes have standing to bring the suit, having alleged that they will lose \$300,000 per month because they can't install a new computerized casino management system and that the casinos may shut down "due to defendants' intimidation of the Pueblo's vendors."

The judge slammed the defendants' arguments that regulating the vendors doesn't constitute regulation of the Pueblo's casinos, saying they were "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," the judge said.

The tribe is likely to succeed on the merits of its case because states have no authority to regulate tribal gaming under IGRA unless a tribe specifically consents to such regulation in a tribal-state gaming compact, and the state's compact with the Pueblo of Pojoaque had expired in any case, the judge said.

The TRO will stay in effect for 30 days after the Tenth Circuit issues its mandate in pending litigation between New Mexico, the tribe and the U.S. Department of the Interior that seeks to outline the parties' rights and their authority to enter into lawful gaming compacts. Oral arguments were held in that case on Sept. 28.

Representatives for the parties were not immediately available for comment Thursday.

The Pueblo of Pojoaque is represented by Steffani A. Cochran, Carrie A. Frias of the Pueblo of Pojoaque Legal Department and Scott Crowell of Crowell Law Offices Tribal Advocacy Group.

New Mexico is represented by Jerry A. Walz of Walz and Associates PC.

The case is Pueblo of Pojoaque et al. v. State of New Mexico et al., case number 1:15-cv-00625, in the U.S. District Court for the District of New Mexico.

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