UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe, Plaintiff, vs. STATE OF NEW MEXICO, Defendant.	**NO.:_____** **COMPLAINT** **[Failure To Conclude Compact Negotiations in Good Faith, 25 U.S.C. § 2710(d)]**

For its Complaint, the PUEBLO OF POJOAQUE, a federally recognized Indian Tribe, a sovereign tribal government ("Plaintiff", "Pojoaque" or "the Pueblo") alleges as follows:

INTRODUCTION

1. This is an action by the Pueblo of Pojoaque seeking redress for the State of New Mexico's ("State") failure to conclude negotiations in good faith pursuant to the federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 ("IGRA"), for a tribal-state compact for the regulation of Class III gaming activities on the Pueblo's Indian lands.

2. Pojoaque and the State currently have a Class III gaming compact that expires on June 30, 2015. The Pueblo has formally requested that the State enter into a compact regarding the Pueblo's Class III gaming activities on its Indian lands beyond the expiration of the current compact. More than 180 days have expired since the Pueblo made its initial request. Accordingly, Pojoaque now seeks a determination by this Court that the State has failed to conclude negotiations in good faith. With that determination, the Court has jurisdiction to invoke IGRA's remedies that will result in a negotiated compact, or submission of last best offers to a

mediator ("baseball arbitration"), and/or procedures promulgated by the Secretary of the Interior to govern the Pueblo's Class III gaming activities.

3. NMSA 1978, §§11-13A-1 to 11-13A-5 (1999) ("Compact Negotiation Act") provides that if a tribe requests a compact or amendment that is identical to a compact or amendment previously approved by the legislature, the Governor ***shall*** approve and sign the compact or compact amendment. The State has rejected compact language proposed by Pojoaque for the asserted reason the Compact Negotiation Act prevents it from considering the Pueblo's concerns because it would apply to other compacted tribes. The IGRA provides for sovereign-to-sovereign negotiations and accordingly, the imposition of a form compact violates IGRA. Applying state law in a manner that prevents the State from negotiating terms to accommodate the different circumstances presented by each Tribe's location and needs violates the good faith negotiations scheme established by Congress.

4. The most glaring demonstration of the State's failure is in the form of its continuing demand and insistence that the Pueblo pay a tax on its "net win" or gross gaming revenue, resulting in a substantial percentage of the Pueblo's critical governmental revenue being deposited directly into the State's General Fund. The State's illegal tax on tribal gaming revenue has been an issue of contention between the Pueblo and the State since 1997. The Pueblo is willing to pay for actual and reasonable costs incurred by the State to fulfill its regulatory role under the compact, and is willing to pay for appropriate mitigation of impacts to the surrounding community. Although compacts agreed upon in 1997 and 2001 include language to suggest the Pueblo is making revenue-sharing payments to the State in exchange for provisions that protect its gaming facility from competition ("exclusivity"), Pojoaque has made clear to the State that it

is not seeking any form of "exclusivity" in any new or amended tribal-state compact. Rather than correct the illegal taxing agenda of prior state administrations, the State demands that a gaming tax on net win or gross gaming revenue be increased from the current compact, and demands that the Pueblo accept illusory exclusivity provisions. Such demand by the State is bad faith, providing sufficient basis, standing alone, to implement the remedial provisions of IGRA.

5. Another glaring demonstration of the State's failure to negotiate in good faith is in the form of its demand that the compact include numerous provisions that are not directly related to the licensing or regulation of Class III gaming. Taken together or in isolation, these provisions establish the State's failure to conclude negotiations in good faith.

6. New Mexico further insists upon dispute resolution provisions that are enforceable by the State as against the Pueblo but not enforceable by the Pueblo as against the State. The State refuses to consider the Pueblo's proposals that make the agreement mutually enforceable. The State's demand that the Pueblo accept a dispute resolution provision that only allows the State to enforce the Compact as against the Pueblo establishes the State's failure to conclude negotiations in good faith.

7. The IGRA requires the State negotiate in good faith for the terms of a compact regulating Class III gaming activities whenever a Tribe identifies a parcel of its Indian lands over which it exercises jurisdiction. The Governor of New Mexico recently negotiated compact amendments to allow one tribe to operate at least six gaming facilities in New Mexico. Yet the State demands that Pojoaque agree to only two gaming operations. Such demand further establishes the State's failure to conclude negotiations in good faith.

8. Pojoaque is seeking a compact that enables it to achieve IGRA's objectives of tribal

economic development, tribal self-sufficiency and strong tribal government. The Pueblo seeks a compact that protects the essential governmental services and programs now in place, the 1,500 jobs and its $43 million payroll. The State's failure to conclude compact negotiations in good faith places those services, programs, jobs and payroll in untenable jeopardy. Pojoaque will not acquiesce to the State's illegal demands. Pojoaque is entitled to a compact that complies with and furthers the objective of IGRA. Accordingly, it seeks redress in this Court to implement IGRA's remedial provisions.

JURISDICTION AND VENUE

9. The District Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Specifically, this federal subject matter jurisdiction lies pursuant to the IGRA, 25 U.S.C. § 2710(d)(7)(a)(i), which states:

> The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under [§ 2710(d)(3)] or to conduct such negotiations in good faith.

10. New Mexico has the discretion to consent or to not consent to the jurisdiction of this Court per its immunity from suit vested in the Eleventh Amendment to the United States Constitution. The United States Department of the Interior has promulgated regulations that enable the Secretary of the Interior to proscribe procedures to govern a Tribe's Class III gaming in the event that the State raises Eleventh Amendment immunity as a defense in this action. 25 C.F.R pt. 291 (2010). If the State fails to answer the instant litigation, or raises Eleventh Amendment immunity as a defense, this Court should dismiss the action due to the State's sovereign immunity under the Eleventh Amendment. In such event, the Tribe will then have

standing to work directly with the Department of the Interior to establish Secretarial procedures in lieu of a tribal/state compact.

11. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1391. The Pueblo is located and does business in such District, the State is located in the District and the vast majority of the underlying acts and omissions at issue are based on events, persons and entities that have been or are currently located in that District.

PARTIES

12. Plaintiff, the PUEBLO OF POJOAQUE, is a federally recognized Indian Tribe possessing authority over its Indian lands and its membership, with its Indian lands located within the external boundaries of the State of New Mexico. The Pueblo's gaming facilities are located on its Indian lands.

13. Defendant, STATE OF NEW MEXICO is a dependent sovereign state government, a body politic within the constitutional framework of the United States of America

STATEMENT OF THE CASE
The Indian Gaming Regulatory Act of 1988

14. The intent of IGRA is 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. Congress passed IGRA in the aftermath of the Supreme Court's decision that States lacked jurisdiction to prohibit gaming on Tribal lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). As to Class III gaming activities, IGRA is intended "to create consensual agreement between two sovereign governments," by

requiring the participation of the States and the Tribes in the compacting process. *See* 134 CONG. REC. 24,024-25 (1988) (Statement of Sen. Inouye).

15. Indian gaming is the most highly regulated form of gaming in the United States. IGRA divides gaming into three classes with regulatory oversight authorities depending upon the type of activity. Tribes are the primary regulators of Class I gaming (traditional games) and Class II gaming (including electronically aided bingo, pull tabs and player-banked poker) is regulated by the Tribes in conjunction with the Federal government. Class III gaming (including slot machines and house-banked table games), however, is allowed only if three conditions are met: (1) the governing body of the Tribe and the National Indian Gaming Commission approve an ordinance for the regulation of such gaming; (2) the state permits such gaming "for any purpose by any person, organization or entity;" and (3) either (a) the Tribe and the State enter into a Compact that is approved by the Secretary of the Interior, 25 U.S.C. § 2710(d)(3) or (b) the Tribe has secured procedures promulgated by the Secretary of the Interior pursuant to 25 U.S.C. § 2710(d) (7)(B)(vii) or 25 C.F.R. pt. 291 (2010), or (c) the circumstances warrant the Tribe pursuing self-help remedies. *See Spokane Tribe v. United States,* 139 F.3d 1297 (9th Cir. 1998).

16. IGRA provides that any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is conducted, or is to be conducted, shall request the state in which such lands are located to enter into negotiations for the purpose of concluding a Tribal-State Compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact. 25 U.S.C. § 2710(d)(3)(A).

17. In promoting the goal of tribal self-determination, the IGRA has built-in measures to preserve gaming revenues as a tribal asset during compact negotiations. An approved compact permits the State and the Tribe to jointly develop a regulatory scheme to govern Class III gaming; however, IGRA sets forth the scope of negotiated provisions that may be contained in compacts. IGRA does not authorize Tribal-State Compacts for Class III gaming to contain provisions outside the restrictions in 25 U.S.C. § 2710(d)(3)(C), which provide:

> (C) Any Tribal-State Compact negotiated under subparagraph (A) may include provisions relating to—
>
> > (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> >
> > (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> >
> > (iii) the assessment by the State of such activities in such amounts as are *necessary to defray the costs of regulating such activity*;
> >
> > (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> >
> > (v) remedies for breach of contract;
> >
> > (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> >
> > (vii) any other subjects that are *directly related to the operation of gaming activities*.

18. Consistent with those purposes, IGRA specifically withholds from State and local government the power to impose "a tax, fee, charge or other assessment upon an Indian tribe . . . to engage in Class III activity." 25 U.S.C. § 2710(d)(4) and Pub. L. 100-497 Indian Gaming Regulatory Act Senate Report (Indian Committee), S. REP. No. 100-446, at 18 (1998). Moreover, IGRA prohibits any state from refusing to enter into negotiation for Class III gaming "based upon

the lack of authority in such state, or its political subdivisions, to impose such a tax, fee, charge or other assessment." 25 U.S.C. § 2710(d)(4).

19. Thus, IGRA requires that with respect to the Tribe paying funds to the State, the amounts must be correlated to the necessary costs to the State in regulating the Class III gaming activity. While the Tribe and the State may negotiate over other subjects that are directly related to the operation of gaming activities, any other subject cannot impose a tax, fee, charge or other assessment upon the Tribe as a requirement for the Tribe to be able conduct Class III gaming activity.

20. IGRA provides that a Tribe may file an action in federal court to implement IGRA's remedial provisions if more than 180 days have elapsed since the Tribe's request to the State to enter into compact negotiations. The burden is on the State to prove that it negotiated in good faith. If the Court finds that the State has failed to negotiate in good faith, the Court shall order the parties to conclude compact negotiations in sixty days. If the two governments fail to conclude a compact within that sixty-day period, the Court shall appoint a mediator who shall choose the last best offer submitted by the Tribe or by the State. If the State fails to consent to the compact selected by the Mediator, the Court shall notify the Secretary of the Interior who shall promulgate procedures consistent with the Mediator's selection, which procedures will then govern the Tribe's Class III gaming activities in lieu of a Tribal-State Compact. 25 U.S.C. § 2710(d)(7).

Brief History of the Pueblo of Pojoaque/ New Mexico Compacts

21. The course of negotiations between the State and the Tribes, Pueblos and Nations within New Mexico, including Pojoaque, over the gambling issue has been lengthy and litigious. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (tracing the history of earlier

negotiations and litigation).

The 1995 Compact

22. Pojoaque executed a Tribal-State Compact with the State of New Mexico on February 13, 1995. The Compact was affirmatively approved by the Department of the Interior on March 15, 1995. In its approval letter, the Department expressly noted that the revenue sharing agreement was in exchange for a prohibition on commercial gaming by any other entity. The Compact provided for 3% to 5% of gross revenue to be paid to the State, with 40% of such payment ear-marked for local government to be used to mitigate the impact of the tribal gaming facility on the local community.

23. The 1995 Compact, even though executed by the Governor of New Mexico and affirmatively approved by the Department of the Interior, was not ratified by the New Mexico Legislature. The State litigated the question and the New Mexico Supreme Court ruled that legislative approval was necessary to bind the State to the terms of the Compact. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 904 P.2d 11 (1995), thus voiding the compacts. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

The 1997 Compact

24. At the opening of the 1997 legislative session, the Pueblo of Pojoaque and other New Mexico Tribes faced the threat of closure of their gaming facilities unless the State Legislature approved new and legally valid compacts. The Legislature's response was to narrowly adopt two state statutes setting out an approved form of a standard compact and a separate revenue-sharing agreement ("RSA"). The form RSA contained in NMSA 1978, §11-13-2 (1997), authorized the state governor to enter into a compact with only those tribes which have executed an RSA in the

form set forth in that Section. The RSA required a tribe to pay the state 16% of its total "net win" from gaming machines. Additionally, the compact terms imposed a significant regulatory fee. At the same time, the State authorized a significant expansion of gaming by allowing for the operation of electronic gaming devices at horse tracks every day that live or simulcast horse racing occurs, a state lottery, the operation of a large number of electronic gaming devices by fraternal, veterans, or other nonprofit membership organizations, and gaming by nonprofit tax exempt organizations for fundraising purposes.

25. Pojoaque and each of the Gaming Tribes in New Mexico entered into a compact and RSA in the form approved by the Legislature. The Pueblo of Pojoaque executed the 1997 Compact and RSA on September 9, 1997. These documents were, in turn, submitted to the Secretary of the Interior for his approval pursuant to the IGRA. IGRA authorizes the Secretary to approve or, under certain specified conditions, disapprove any Tribal-State Compact. 25 U.S.C. § 2710(d)(8). Rather than exercising this authority, however, the Secretary chose to take no official action and allow the compacts to go into effect by operation of law. See 25 U.S.C. § 2710(d)(8)(C). The Secretary notified the Pueblo of its decision in a letter dated August 23, 1997, which expressed concern that the revenue sharing provisions may be unlawful under IGRA.

26. Pojoaque along with other Gaming Tribes challenged the validity of the fees in the 1997 compacts. That resulted in litigation with the State over the validity and interpretation of the RSA and the 1997 compacts. *New Mexico v. Jicarilla Apache Tribe,* No. CIV 00-851 BB/LFG, 2000 U.S. Dist. LEXIS 20666 (D. N.M. 2000). That litigation was not resolved by final judgment, but instead was settled as part of the execution of the 2001 Compacts.

The 2001 Compact

27. In 2001, the State dismissed claims against several tribes that had refused to pay the fees under the 1997 Compact for those tribes that agreed to sign new compacts with the State. With some modest exception, the 2001 Compact provided for an 8% tax on net win, or gross gaming revenue.

28. The Pueblo initially refused to execute the 2001 Compact, but acquiesced to the State's demands in 2005. The Pueblo of Pojoaque-New Mexico Gaming Compact, executed on July 19, 2005 went into effect on August 25, 2005 and is currently in effect. It is set to end at midnight June 30, 2015. Although executed in 2005, these agreements are commonly referred to as the "2001 Compact".

The 2007 Compact

29. In 2007, the State agreed to extend the term of the 2001 Compact for those Tribes that agreed to an increase of the tax on net win to a range of 9.25% to 10.75% of net win, or gross gaming revenue, while acquiescing to an increase in non-Indian gaming activity in the State. In other words, the gaming tax increased while the alleged "exclusivity" to the Tribes diminished.

30. Pojoaque did not agree to the terms of the 2007 Compact.

31. State law provides that if a request for negotiation of a compact or amendment is made and the proposed compact or amendment is identical to a compact or amendment previously approved by the legislature except for the name of the compacting Tribe and the names of the persons to execute the compact or amendment on behalf of the Tribe and on behalf of the State, the governor *shall approve* and sign the compact or amendment on behalf of the State without submitting the compact to the New Mexico Legislature for approval pursuant to the

provisions of this section. A compact or amendment signed by the governor pursuant to this subsection is deemed approved by the legislature. (Emphasis added) NMSA 1978, 11-13A-4(J).

32. In executing the 2007 Compact, the State impeded its ability to negotiate in good faith with Pojoaque by providing that a signing tribe may exercise the most-favored-nations provision that allows the signing Tribe to amend its compact to include more favorable terms agreed upon in a future compact.

Current Compact Negotiations

33. On or about June 14, 2010, Pojoaque notified the State of its request to negotiate amendments to the 2001 Compact or a new compact to govern the Tribe's Class III gaming beyond the June 30, 2015 expiration date of the 2001 Compact.

34. On or about May 18, 2011, Pojoaque renewed and reaffirmed its outstanding request for compact negotiations.

35. On or about October 11, 2011 Pojoaque renewed and reaffirmed its outstanding request for compact negotiations.

36. On April 23, 2012, the Governor for the State appointed a negotiator.

37. On or about September 12, 2013 Pojoaque renewed and reaffirmed its outstanding request for compact negotiations.

38. More than 180 days have elapsed since the Pueblo notified the State of its request to negotiate amendments to the 2001 Compact or a new compact to govern the Tribe's Class III gaming activities on its Indian lands beyond the June 30, 2015 expiration date of the 2001 Compact.

39. Since May 23, 2012, representatives of the State and the Tribe have met on numerous occasions in the context of negotiating a new compact. Although there has been progress made on a few, non-substantive issues, the State's demands regarding the crux of critical issues have not changed.

40. The State offered its first written Term Sheet to the Pueblo on January 24, 2013.

41. On March 14, 2013, Pojoaque informed the State that it does not seek exclusivity and that the Pueblo seeks a compact which strictly comports with the policies and plain language of the IGRA in the negotiation of a Tribal-State Compact.

Illegal Tax on Gaming Revenue

42. Pojoaque is agreeable to paying for the actual, necessary and reasonable costs of the State's performance of its agreed upon duty and obligations under a tribal-state compact for the regulation of Class III games. The Pueblo is also agreeable to paying for the actual necessary and reasonable cost of mitigating any adverse impacts directly related to the operation of a Class III gaming facility, or otherwise to cause such mitigation measures to be implemented. But the State demands more.

43. The State demands that Pojoaque revenue sharing to the State increase by an effective rate of 32.5 % from its present 8% to an amount at or above 9.5% of net win (gradually increasing to an amount at or above 10.5 % over the 23-year life of the compact) and offers no substantial or meaningful benefit to the Pueblo to provide consideration for, or otherwise justify, the proposed tax.

44. On March 14, 2013, after receiving no viable response to justify the tax increase, the Pueblo informed the State that it is not seeking any exclusivity in the terms of the tribal-state

compact and, accordingly, is not willing to pay any fee to the State in exchange for exclusivity.

45. On May 22, 2013, the Pueblo submitted a compact for the State's consideration that does not include any provisions for exclusivity and does not include any provisions for the Pueblo to pay a percentage of its gaming revenue to the State.

46. The State fails to substantively respond to the Pueblo position that it is not seeking exclusivity and instead, continues to demand that the Pueblo pay the State's increased fees and accept the illusory exclusivity as noted in a Term Sheet offered back to the Pueblo. Although there may be Tribes in New Mexico that agreed to pay gaming revenue to the State in exchange for restraints to state-sponsored gaming, the Pueblo's gaming facilities operate in a mature, local market where exclusivity does not constitute a meaningful concession by the State that provides substantial benefit to the Pueblo commensurate to the fees demanded by the State.

47. The State insists that if it were to forego exclusivity and revenue sharing with Pojoaque, such term must be offered to every Gaming Tribe. Placing a pre-condition on getting a compact is prohibited by IGRA. *See Mashantucket Pequot v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1999).

48. A non-negotiable, mandatory payment of a percent of gaming net profits from a Tribe directly into the State General Fund for unrestricted use yields public revenue and is a tax.

49. Pled in the alternative, even if the Pueblo were to ask for exclusivity in exchange for revenue-sharing payments to the State, the gaming market in New Mexico contains 155 non-Indian businesses and non-profits engaged in gaming activities, including 55 veterans' and fraternal organizations (each which may operate up to 15 gaming machines), five racetracks (each which may operate up to 750 gaming machines), 95 licensed bingo and raffle operators,

and not including the State Lottery which is offered at 1,110 retail locations across the State, and 27 tribally-owned and operated casinos, and the capacity for additional gaming by the award of a new racino license, the relocation of one or more racinos, and the ability of other Tribes to open additional gaming facilities is such that there is no meaningful concession in the State's commitment to exclusivity that is commensurate with the rate of revenue sharing sought by the State. Accordingly, even if the Pueblo sought exclusivity, the rate sought by the State constitutes an illegal tax on gaming revenue, prohibited by IGRA.

50. Extension of the term of the compact is not a meaningful concession that justifies any revenue-sharing provisions of any compact, and the value of the concession is not commensurate with the amount of revenue sharing demanded by the State.

51. During this same time period, the State has lowered the corporate tax rate from 7.6% to 5.9%.

52. The State demands a doubling in the fees to be paid to the State's General Fund for regulatory costs.

53. In FY2012, the Annual Budget of the New Mexico Gaming Control Board ("NMGCB" or "the Board") was $5,180,200. The Board received $134,479,141 in Gaming Taxes Paid and Tribal Revenue Sharing. The Office of the State Gaming Representative (OSGR) monitors compliance of the 2001 and 2007 Compacts. The OSGR consists of the State Gaming Representative and the Tribal Clerk. Fourteen Tribes generated a total of $68,149,908 in revenue sharing and regulatory fees in FY2012 which were deposited into the State's General Fund from which the Annual Budget of the NMGCB is appropriated. The Board makes no budgetary distinction for expenditures on its obligations pursuant to a tribal-state gaming

compact.

54. Although the State may in good faith demand reimbursement or payment of the State's actual and reasonable costs to meet its regulatory oversight duties pursuant to the compact, any payment above that amount constitutes an illegal tax. The State has failed to justify the doubling in fees or to agree to provisions of transparency and accountability to ensure that the fees cover actual and reasonable cost, and nothing more.

55. At all times relevant to the negotiations, the State's offers to Pojoaque include demands for large fees that are not related to the cost of regulation, the development of related infrastructure or to payments to non-gaming tribes. Rather, the fees demanded by the State are to be used at the unrestricted discretion of the State.

56. The proposals made by the State to Pojoaque fail to make any meaningful concession to the Pueblo to justify the demanded fees. The State's demands exceed the parameters directly set forth in IGRA and constitute a tax, fee or charge. By making such demands upon Pojoaque, the State fails to meet its obligations of good faith negotiation as set forth in IGRA.

Demands on Matters Not Directly Related to the Licensing & Regulation of Class III Gaming

57. IGRA precludes negotiation of terms that have no bearing on the licensing or regulation of Class III gaming activities. According to its plain language, the scope of § 2710(d)(3)(C) set out in ¶ 17 above, is to set forth provisions that may be negotiated and included in Class III gaming compacts. IGRA limits permissible subjects of negotiation in order to ensure that Tribal-State Gaming compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes. The language and structure of § 2710(d)(3)(C) indicate that it is exhaustive in its list as to what is permitted, as

indicated even by its limitation in subparagraph (vii) to those subjects that are "directly related to the operation of gaming activities."

58. The State demands the inclusion of several provisions that are not directly related to the operation of gaming, including but not limited to requiring the Pueblo: (1) provide certain employment-related benefits; (2) provide certain employment-related grievance processes; (3) meet certain campaign reporting requirements; (4) collect and remit child support payments to the State; (5) prohibit or unduly restrict the extension of credit and prohibit the cashing of payroll checks; (6) prohibit complimentary food, alcohol or lodging ; (7) impose requirements related to alcohol service, training, and liability coverage; and (8) submit to state court jurisdiction on matters not related to the regulation of gaming, including the transfer of jurisdiction from the Pojoaque Pueblo Tribal Court to State Court.

59. The State demands that the Pueblo agree to a definition of "Gaming Facility" that is overbroad by extending to non-gaming areas. This is particularly significant to Pojoaque's operation of the Buffalo Thunder Resort, which provides high-quality lodging and numerous non-gaming amenities to its customers.

60. Taken together or in isolation, these examples of the State's demands to include provisions not directly related to the licensing and regulation of Class III gaming establish the State's failure to conclude negotiations in good faith.

Dispute Resolution

61. New Mexico insists upon dispute resolution provisions that are enforceable by the State as against the Pueblo but not enforceable by the Pueblo as against the State.

62. The State refuses to consider the Pueblo's proposals that make the agreement mutually enforceable.

63. The State's demand that the Pueblo accept a dispute resolution provision that only allows the State to enforce the Compact as against the Pueblo and does not allow the Pueblo to enforce the Compact as against the State, establishes the State's failure to conclude negotiations in good faith.

Limits on the Number of Facilities

64. IGRA allows a Tribe to request a compact for any parcel of eligible Indian lands over which it exercises jurisdiction. Accordingly, if the Tribe identified three or more specific parcels in three separate requests, the State would be obligated to negotiate a compact for each parcel.

65. Pojoaque has the desire to determine for itself where and to what extent to allow gaming on its existing Indian lands.

66. The State demands that the Pueblo agree to limit its number of gaming facilities to two.

67. The State's demand violates IGRA and constitutes per se failure to conclude negotiations in good faith.

68. Pled in the alternative, the State has no legitimate public policy basis to limit the Pueblo to two gaming facilities. The State allows the operation of a large number of gaming facilities, tribal and non-tribal throughout the State, and the Governor has agreed to allow a single Tribe to operate six facilities over a large geographic region in the State, including facilities within only a few miles of existing facilities operated by other tribes. Having no legitimate public policy basis for limiting the number gaming facilities to two, the demand establishes the State's failure to conclude negotiations in good faith.

Class II Gaming

69. IGRA does not allow for the State to have any role in the regulation of Class II gaming.

70. The State's proposed language defining "gaming machine" is overbroad such that could reasonably be read to apply to electronic aids to Class II games.

71. A definition of "gaming machine" that includes Class II games as Class III games under the Compact is not allowed under IGRA.

72. By demanding that the Pueblo accept the State's definition of "gaming machine", the State fails to meet its obligations of good faith negotiation as set forth in IGRA.

73. Pled in the alternative, the State has no legitimate basis to demand limitations on the Pueblo's Class II gaming activities. The Governor has agreed to with a single Tribe whereby at least 80% of the total Gaming Machines, which it operates on its Indian Lands, will be Class III Gaming Machines (allowing no more than 20% of the Gaming Machines to be Class II upon which the State is not entitled obtain revenue sharing). Having no legitimate public policy basis to demand limitations on the Pueblo's Class II gaming activities, the demand establishes the State's failure to conclude negotiations in good faith.

Demand that the Pueblo Waive Sovereign Immunity Beyond Proceeds of Insurance Policies

74. The Pueblo secures adequate liability insurance commensurate to industry standards and as a matter of tribal self-governance waives its sovereign immunity from suit for patron and employee disputes involving matters directly related to the licensing and regulation of Class III gaming.

75. The State demands that the Pueblo waive its immunity beyond the proceeds of such liability insurance and demands that the waiver extend to any patron or employee dispute at the Gaming Facility without regard to whether the dispute is directly related to gaming or whether the patron was engaging in gaming activities or whether the injury occurred at a location where gaming is conducted.

76. Such demands unreasonably expose the non-gaming assets of the Pueblo, such that it undermines IGRA's purposes of establishing economic self-sufficiency, tribal self-governance and strong tribal government.

77. The State's demands regarding the overbroad waiver of tribal sovereign immunity establishes the State's failure to conclude negotiations in good faith.

Settlement of Outstanding Free Play Dispute

78. The State's demand, through its compact negotiations, that the Pueblo settle previous allegations by the New Mexico Gaming Control Board that certain New Mexico gaming tribes underpaid revenue sharing to the State of New Mexico as a result of the treatment of slot free play in the determining revenue sharing amounts and the State's position that the Tribes should pay revenue sharing on Free Play and settle the allegations is an illegal precondition on concluding a compact and contrary to good faith.

State Statutory Interference with IGRA's Government-to-Government Negotiation Process

79. The Compact Negotiation Act provides that if a Tribe requests a compact or an amendment that is identical to a compact or amendment previously approved by the legislature, the Governor ***shall*** approve and sign the compact or compact amendment.

80. The IGRA provides for sovereign-to-sovereign negotiations wherein the State is obligated to negotiate in good faith with an Indian Tribe that requests negotiations for gaming on eligible Indian lands.

81. The State demands that a Tribe sign a form compact violates legislative intent of the IGRA.

82. The State has rejected compact language proposed by Pojoaque for the asserted reason that the "Compact Negotiation Act" prevents it from considering the Tribe's concerns as other Gaming Tribes would be able to sign-on to any agreement made between the State and the Pueblo.

83. The State asserts that Pojoaque must accept and pay substantial fees to the State General Fund for exclusivity because other Tribes have agreed to pay substantial fees to the State General Fund for exclusivity, despite the fact that Pojoaque has made clear it does not seek exclusivity.

84. Applying state law in a manner that prevents the State from negotiating terms to accommodate the different circumstances presented by each Tribe's location and needs violates the good faith negotiations scheme established by Congress.

CAUSE OF ACTION

Failure to Conclude Tribal-State Compact Negotiations in Good Faith Indian Gaming Regulatory Act 25 U.S.C. 2710(d)

85. Plaintiff Pueblo of Pojoaque incorporates into this claim all the foregoing allegations.

86. More than 180 days have passed since Pojoaque requested that New Mexico enter into good faith negotiations and no compact has been concluded.

87. The State of New Mexico has failed to conduct negotiations in a manner that is conducive to reaching a fair agreement for the regulation of Class III gaming on Pojoaque Indian lands beyond June 30, 2015.

88. New Mexico's demands regarding the substantive provisions of the compact negotiations are not based on legitimate public policy concerns of the State and are contrary to law.

89. The State of New Mexico has failed to conclude negotiations in good faith.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Pueblo of Pojoaque petitions this Court for an order:

A. Declaring that the State has failed to negotiate in good faith and/or failed to conclude negotiations in good faith;

B. Appointing a Mediator which shall work with the parties for a period of no more than sixty days, and if no agreement is reached, the selection by the Mediator between the last best offers submitted by the parties as compacts to govern the gaming activities on Pojoaque tribal lands; and if the State fails to consent to the last best offer selected by the Mediator, to cause the Mediator to notify the Secretary of the Interior of the State's failure to consent and to provide the Secretary with a true and correct copy of the selected last best offer; and

C. Granting such other relief as may be just and equitable, including ancillary relief.

DATED: December 13, 2013.

Respectfully Submitted,

/s/ Steffani A. Cochran
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