Nos. 14-2222/14-2219

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO
Plaintiff/Appellee,

v.

DEPARTMENT OF THE INTERIOR *et al.*,
Defendants/Appellants,

and

PUEBLO OF POJOAQUE, a federally-recognized Indian Tribe,
Intervenor-Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
JAMES A. PARKER, DISTRICT JUDGE
CASE No.: **1:14-cv-695-JAP-SCY**

APPELLANT PUEBLO OF POJOAQUE'S MOTION TO STAY THE MANDATE

CARRIE FRIAS
Chief General Counsel
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
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
Telephone: (425) 802-5369
Email: scottcrowell@hotmail.com

DANIEL REY-BEAR
Rey-Bear McLaughlin, LLP
421 W Riverside Ave., Suite 1004
Spokane, WA 99201-0410
Telephone: 509-747-2502
Email: dan@rbmindianlaw.com

Pursuant to Fed. R. App. P. 41(d)(2)(A) and Tenth Cir. R. 41.1(B), Intervenor Defendant-Appellant Pueblo of Pojoaque ("Pueblo") hereby moves that the Court stay issuance of the mandate in this case pending the filing by the Pueblo (and/or Defendants-Appellants United States Department of the Interior and Secretary Ryan Zinke) of a Petition for Writ of Certiorari in the Supreme Court of the United States and the final disposition of this case by that Court.

The Pueblo states as follows in support of this motion:

1. On April 21, 2017, a three-judge panel of this Court issued its opinion and judgment, affirming the district court's ruling striking down 25 C.F.R. Part 291 regulations promulgated by Defendants-Appellants to provide an administrative remedy to tribes that are deprived of a tribal/state gaming compact under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. ("IGRA") because of a recalcitrant state's refusal to consent to IGRA's negotiation/mediation regulatory remedial scheme.

2. On June 20, 2017, the Pueblo filed a Petition for Rehearing and Rehearing En Banc ("Petition"). On June 22, 2017, this Court ordered Plaintiff-Appellee State of New Mexico (the "State") to respond to the Pueblo's Petition. On June 27, 2017, the National Indian Gaming Association, National Congress of American Indians, and twenty-three federally-

recognized Indian tribes and tribal business entities sought leave to file an amicus brief in support of the Petition. Also, on June 17, 2017, the Rincon Band of Luiseno Indians, Mashantucket Pequot Tribe, Big Lagoon Rancheria, North Fork Rancheria of Mono Indians, Northern Arapaho Tribe, and Estom Yumeka Maidu Tribe of the Enterprise Rancheria sought leave to file an amicus brief in support of the Petition. On July 10, 2017, the State responded to the Petition.

3. On July 24, 2017, this Court denied the Pueblo's Petition and granted leave for filing of the amici briefs.

4. The Pueblo currently intends to file a Petition for Writ of Certiorari with the Supreme Court of the United States, seeking review of this Court's April 21, 2017 decision. The deadline for filing the Petition is ninety days following this Court's denial of the Petition, or October 23, 2017. *See* Sup. Ct. R. 13.1, 13.3.

5. The Pueblo also intends to try to resolve the dispute with the State of New Mexico and on July 27, 2017, submitted to the State of New Mexico the "2015 Form Compact," which is identical to a compact previously approved by the New Mexico state legislature, except for the name of the compacting tribe and the names of the persons to execute the compact on behalf of the tribe. New Mexico state law provides that the Governor shall

execute the compact upon submission by the Pueblo. NMSA 1978 § 11-13A-4(J).

6. This Court may stay the issuance of the mandate pending the filing of a Petition for a Writ of Certiorari in the United States Supreme Court when (a) "the certiorari petition would present a substantial question and . . . there is good cause for a stay[,]" Fed. R. App. P. 41(d)(2)(A), and (b) "there is a substantial possibility that a petition for writ of certiorari would be granted." 10th Cir. R. 41.1(B).

7. The Pueblo's Petition for Writ of Certiorari will present, in substance, the following questions:

A. Whether the Department of the Interior's promulgation of regulations set forth in 25 C.F.R. Part 291 is contrary to law?

B. Whether the April 21, 2017 Opinion conflicts with *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837 (1984), and its progeny by improperly ruling that IGRA "expressly forecloses" a regulation on a "precise question" about which IGRA is completely silent, and by disregarding the Department of the Interior's general rulemaking authority?

C. Whether the April 21, 2017 Opinion conflicts with *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), by allowing state assertion of Eleventh Amendment immunity in actions by Indian tribes under IGRA to deprive tribes of their rights to govern gaming activities contrary to Congressional intent in IGRA?

8. These questions involve how to address the constitutional defect in the IGRA identified by the United States Supreme Court in *Seminole Tribe v. Florida*,

517 U.S. 44 (1996), which held that Congress lacked the constitutional authority to abrogate state Eleventh Amendment immunity from a lawsuits brought by an Indian tribe against a state under IGRA for a state's failure to conclude tribal/state compact negotiations in good faith. The Supreme Court expressly left unanswered the question of how IGRA is to operate in the absence of a tribe's ability to bring a lawsuit against a non-consenting state. *Id.* at 1122 n.4. The April 21, 2017 Opinion creates a result that was not countenanced by Congress. As identified in the amici briefs from tribes and national tribal organizations representing the vast majority of Indian country, if this decision is allowed to stand, it will dramatically alter the ability of tribes to hold states accountable in the compact negotiation process. Moreover, this Court, by its own analysis, concluded that "[u]ltimately, the severability question is a close one." *New Mexico v. Dep't of the Interior*, 854 F.3d 1207, 1235 (10th Cir. 2017). Accordingly, the Petition for Writ of Certiorari presents a substantial question.

9. Additionally, there is good cause for a stay of the mandate. No prejudice will result to Plaintiff-Appellee if this Court grants a short stay, allowing the Pueblo (and/or the United States Department of the Interior and Secretary Zinke) to file a Petition for Writ of Certiorari.

10. Additional good cause for a stay is established because the additional time will materially facilitate resolution of the dispute, possibly

avoiding the need to seek certiorari.[1] On June 30, 2015, when the Pueblo's prior compact expired, the Pueblo reached an agreement with the the United States Attorney for the District of New Mexico to refrain from federal enforcement action against the Pueblo for Class III gaming in the absence of tribal/state compact or secretarial procedures . By its terms, that agreement remains in effect until 30 days after the issuance of the mandate. Although the Pueblo has now signed and submitted the compact demanded by the State, it is unknown whether the State will also sign even though New Mexico state law mandates that it sign. NMSA 1978 § 11-13A-4(J). Even if the State immediately signs the compact, it likely would not go into effect until 45 days or more after it is submitted to the Department of the Interior. *See* 25 U.S.C. § 2710(d)(8).

11. Without a stay of the mandate, the agreement of the United States Attorney for New Mexico will expire before the compact is in effect, unnecessarily placing in jeopardy hundreds of jobs and critical tribal governmental programs. Efforts by the United States to take enforcement action against the Pueblo under these circumstances would likely result in

[1] The impact of resolving the matter by reaching a compact and having the Department Interior act to effectuate the compact is not clear. The issue likely remains justiciable because the situation of an Indian tribe and a state not concluding a gaming compact and a state asserting Eleventh Amendment immunity for a tribal action under IGRA is capable of repetition, yet evading

additional, needless litigation. *See United States v. Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998) (vacating injunction when reason a tribe lacks a compact is a state's assertion of Eleventh Amendment immunity). Accordingly, staying the mandate will facilitate resolution of the dispute between the Pueblo and the State without disruption and additional proceedings by the parties.[2]

12. There is a substantial possibility that the Pueblo's Petition for Writ of Certiorari will be granted.

A. The Ninth and Eleventh Circuits have opined that procedures of the kind ultimately promulgated in 25 C.F.R. Part 291 are needed for IGRA to function in close approximation to the manner intended by Congress in the passage of IGRA. Moreover, two of the three judges in *Texas v. United States* ("*Kickapoo*"), 497 F.3d 491 (5th Cir. 2007) expressed that tribes must have a viable remedy against recalcitrant states. Accordingly, there is a deep division of authority among and within the Circuits.

B. Congressional intent in IGRA to establish a statutory basis for tribes to conduct the gaming activities they are entitled to offer, as affirmed in *California v. Cabazon Band*, 480 U.S. 202 (1987), and to provide states with

[2] The facts and circumstances regarding the harm suffered by an interruption in the Pueblo's gaming operations are set forth in detail in the record of the related appeal. *Pueblo of Pojoaque v. State of New Mexico*, Dkt. No. 16-2228. The Pueblo seeks judicial notice of the record in those proceedings for purpose of establishing the factual statements made herein.

a limited role in that, is thoroughly stymied by the April 21, 2017 Opinion. Congress did not intend and federal courts cannot countenance an interpretation of IGRA that allows states to deprive tribes of their sovereign and statutory rights to offer gaming on their Indian lands by negotiating compact terms with impunity and/or asserting Eleventh Amendment immunity.

C. The Department of the Interior properly promulgated 25 C.F.R. Part 291 to fill the gap not addressed by Congress of what remedy is available to tribes when states assert Eleventh Amendment immunity under IGRA. That gap was not *created* by the Supreme Court in *Seminole*, rather, it was revealed by *Seminole.* The analysis in the April 21, 2017 Opinion that Congress was aware that tribes may not be able to sue recalcitrant states is revisionist history not supported by fact or law. The Pueblo's Petition set out in greater detail the errors of the April 21 Opinion. This Court has denied the Petition, but the analysis is germane to the instant motion to stay the mandate because it explains why the Supreme Court may grant the Pueblo's (and/or the Department of the Interior and Secretary Zinke's) Petition for Certiorari.

D. Moreover, the Supreme Court in 2008 asked for the views of the United States in consideration of the Petition for Certiorari filed by the Traditional Tribe of Kickapoo, in a case also challenging the legality of 25 C.F.R. Part 291. *Kickapoo Traditional Tribe of Texas v. Texas*, Dkt. No. 07-

1109. In response, (attached hereto as Exhibit A), the United States expressed that the decision issued by the Fifth Circuit Court of Appeals was wrongfully decided, but was not worthy of certiorari because its impact was limited to the (few) tribes in the three states within the Fifth Circuit. Now that the direct impact extends to many Indian tribes and states within the Tenth Circuit, materially impairing the negotiation positions of dozens of tribes and adversely impacting all of Indian country, the United States' previously stated reason for avoiding certiorari is no longer valid.

13. Counsel for the Pueblo has informed counsel for Defendants-Appellants Department of the Interior and Secretary Zinke of this Motion, which do not oppose this Motion. Counsel for the Pueblo has informed counsel for Plaintiff-Appellee State of New Mexico, which has been confirmed, and as of the time of filing, has not indicated its position on this Motion.

WHEREFORE, the Pueblo respectfully moves that this Court stay issuance of the mandate in this case pending the filing by the Pueblo of a Petition for Writ of Certiorari in the Supreme Court of the United States and the final disposition of this case by that Court.

Date: July 28, 2017

Respectfully submitted,

s/ Scott Crowell
SCOTT CROWELL
Crowell Law Office-
Tribal Advocacy Group

1487 W State Route 89A, Suite 8
Sedona, AZ 86336
Telephone: 425-802-5369
Email: scottcrowell@clotag.net

Carrie Frias, Chief General Counsel
Pueblo of Pojoaque Legal Department
Pueblo of Pojoaque
58 Cities of Gold Road, Suite 5
Santa Fe, NM 87506
Telephone: 505-819-2253
Email: cfrias@pojoaque.org

Daniel Rey-Bear
Rey-Bear McLaughlin, LLP
421 W Riverside Ave., Suite 1004
Spokane, WA 99201-0410
Telephone: 509-747-2502
Email: dan@rbmindianlaw.com

Attorneys for Intervenor-Defendant-Appellant
Pueblo of Pojoaque

CERTIFICATE OF DIGITAL SUBMISSION

1. I certify that with respect to the foregoing that all required privacy redactions have been made per 10th Cir. R. 25.5.

2. No hard copies are required by Order of the Court.

3. I certify that, prior to filing, the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, Bitdefender Antivirus version 5.2.0.4, last updated July 27, 2017 and according to the program is free of viruses

Dated: July 28, 2017

s/ Scott D. Crowell
SCOTT D. CROWELL

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017 I filed the foregoing APPELLANT PUEBLO OF POJOAQUE'S MOTION FOR STAY OF MANDATE electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s/ Scott D. Crowell
SCOTT D. CROWELL