

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

UNITED STATES,

Plaintiff,

v.

APPROXIMATELY \$10,128,847.42 SEIZED
FROM US BANK ACCOUNT NO. -5234
HELD IN THE NAME OF PUEBLO OF
POJOAQUE GAMING FUNDS,

Defendant-*in-rem*.

Civil No. 1:18-cv-00279-SWS-MLC

**CLAIMANT PUEBLO OF POJOAQUE'S ANSWER TO THE UNITED STATES'
VERIFIED COMPLAINT FOR FORFEITURE *IN REM* AND COUNTERCLAIM**

The Claimant Pueblo of Pojoaque ("Pueblo") answers the United States' Verified Complaint for Forfeiture *In Rem* ("Complaint"), counterclaims against the United States, and states as follows:

THE PUEBLO'S ANSWER

NATURE OF THE ACTION

1. With respect to the allegations contained in Paragraph 1 of the Complaint, the Pueblo states that the allegations are introductory and contain only legal conclusions not requiring further response. Insofar as further response is required, the Pueblo denies those allegations.

2. With respect to the allegations contained in Paragraph 2 of the Complaint, the Pueblo states that the allegations are introductory and contain only legal conclusions not requiring further response. Insofar as further response is required, the Pueblo denies those allegations.

DEFENDANT *IN REM*

3. The Pueblo admits the allegations contained in Paragraph 3 of the Complaint. The Pueblo denies any implication of liability or violation associated with this limited admission.

4. The Pueblo admits the allegations contained in Paragraph 4 of the Complaint. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

5. With respect to the allegations contained in Paragraph 5 of the Complaint, the Pueblo does not contest the Court's jurisdiction over the Defendant In Rem ("Trust Funds").

JURISDICTION AND VENUE

6. With respect to the allegations contained in Paragraph 6 of the Complaint, the Pueblo does not contest the Court's jurisdiction over this action.

7. With respect to the allegations contained in Paragraph 7 of the Complaint, the Pueblo does not contest that this Court is a proper venue for this action.

THE UNITED STATES' FACTUAL ALLEGATIONS

8. The Pueblo admits in part and denies in part the allegations contained in Paragraph 8 of the Complaint. The Pueblo denies that the "impasse" between the Pueblo and the State as to agreement on a new gaming compact resulted in the Pueblo filing two different lawsuits against the State. Rather, the impasse itself only resulted when the Pueblo brought suit in federal district court under the Indian Gaming Regulatory Act ("IGRA"), seeking a declaration that New Mexico had failed to negotiate in good faith because that action was dismissed on the basis of sovereign immunity. The Pueblo filed a separate action styled *Pueblo of Pojoaque v. New Mexico* and reported at 214 F. Supp. 3d 1028 (D.N.M. 2016), *aff'd*, 863 F.3d 1226 (10th Cir. 2017), because

New Mexico officials threatened the Pueblo's gaming vendors with substantial fines for doing business with the Pueblo and conspired to deprive the Pueblo of its right to be free of state jurisdiction over activities that occurred on tribal lands.

9. The Pueblo admits in part and denies in part the allegations contained in Paragraph 9. The Pueblo denies that in the June 28, 2015 letter from Joseph Talachy, Governor of the Pueblo of Pojoaque, to U.S. Attorney Damon P. Martinez, Governor Talachy stated that the Pueblo planned to continue engaging in Class III gaming after the expiration of the 2001 Compact. Rather, the Pueblo requested that the United States Attorney's Office forego initiating civil or criminal enforcement actions against the Pueblo during the pendency of the Pueblo's appeal in *State of New Mexico v. Department of the Interior*, in return for several commitments by the Pueblo, including the Pueblo's commitment to maintain its Class III gaming activities at the levels provided for in the 2001 Compact.

10. The Pueblo admits in part and denies in part the allegations contained in Paragraph 10. The Pueblo denies that U.S. Attorney Martinez called the Pueblo's gaming activities conducted after June 30, 2015 illegal.

11. The Pueblo admits the allegations contained in Paragraph 11.

12. The Pueblo admits in part and denies in part the allegations contained in Paragraph 12. Specifically, the Pueblo denies that it entered into a trust agreement with Thomas F. Gede on August 24, 2015. Rather, the Pueblo, U.S. Attorney Martinez, and Gede negotiated the trust agreement, which was signed only by Gede as a self-declared trust.

13. The Pueblo admits in part and denies in part the allegations contained in Paragraph 13. Specifically, the Pueblo denies that on or about July 1, 2015, it began depositing funds into a

trust account from gaming revenue generated on the Pueblo's lands that would otherwise have been paid to the State under "the 2005 Compact." Rather, the Pueblo contributed to the trust an amount equivalent to the amount the Pueblo otherwise would have paid to the State as revenue sharing, if the Pueblo's *2001 Compact* had continued in effect beyond June 30, 2018, but which the State legally could not continue receiving thereafter without a gaming compact with the Pueblo.

14. The Pueblo admits in part and denies in part the allegations contained in Paragraph 14. Specifically, the Pueblo denies that it asked the federal government to continue forbearance while the new 2015 Compact was reviewed by the State and by the Secretary of the Interior. Rather, the Pueblo alerted Acting U.S. Attorney James D. Tierney that New Mexico Governor Susana Martinez ("Governor Martinez") had delayed countersigning the 2015 Compact, despite her lack of discretion in the matter under NMSA 1978, § 11-13A-4(J), and New Mexico Governor Martinez's delay jeopardized the Pueblo because the period of non-enforcement that the federal government had agreed to was due to expire on September 1, 2017. Acting U.S. Attorney James D. Tierney then offered to forebear from bringing enforcement action for a new period in exchange for a new set of commitments by the Pueblo.

15. The Pueblo admits in part and denies in part the allegations contained in Paragraph 15. Specifically, the Pueblo denies that Acting U.S. Attorney Tierney agreed to a further extension of the previously agreed-upon period of forbearance until October 30, 2017. Rather, on August 28, 2017, Acting U.S. Attorney Tierney offered to withhold all enforcement action until October 30, 2017, or, if a fully executed gaming compact was submitted to the Department of the Interior ("DOI") by October 30, 2017, until the DOI completed its review of that compact.

16. The Pueblo admits in part and denies in part the allegations contained in Paragraph 16. Specifically, the Pueblo denies that it signed the 2015 Compact after Acting U.S. Attorney Tierney's letter. Rather, the Pueblo states that it executed the 2015 Compact on July 27, 2017, approximately one month before Acting U.S. Attorney Tierney's August 28, 2017 letter.

17. The Pueblo admits the allegations contained in Paragraph 17. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

18. The Pueblo admits the allegations contained in Paragraph 18. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

19. The Pueblo admits the allegations contained in Paragraph 19. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

20. The Pueblo admits the allegations contained in Paragraph 20. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

21. The Pueblo admits the allegations contained in Paragraph 21. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

22. The Pueblo admits the allegations contained in Paragraph 22 except that the Pueblo denies that it did not have a valid gaming compact on October 26, 2017. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

23. The Pueblo admits the allegations contained in Paragraph 23, except it clarifies that the name of the third gaming facility is called Jake's Casino. The Pueblo denies any implication of liability or violation that might be associated with this limited admission.

24. The Pueblo denies the allegations contained in Paragraph 24 that the Trust Funds are proceeds of illegal gambling.

25. The Pueblo admits the allegations contained in Paragraph 25.

THE UNITED STATES' FIRST CLAIM FOR RELIEF

26. The Pueblo incorporates all of its responses in Paragraphs 1-25 of this Answer and further states as follows:

27. With respect to the allegations contained in Paragraph 27 of the Complaint, the Pueblo states that the allegations contain only legal conclusions not requiring further response. Insofar as further response is required, the Pueblo denies those allegations.

28. The Pueblo denies the allegations contained in Paragraph 28 of the Complaint.

THE UNITED STATES' SECOND CLAIM FOR RELIEF

29. The Pueblo incorporates all of its responses in Paragraphs 1-28 of this Answer and further states as follows:

30. With respect to the allegations contained in Paragraph 30 of the Complaint, the Pueblo states that the allegations contain only legal conclusions not requiring further response. Insofar as further response is required, the Pueblo denies those allegations.

31. With respect to the allegations contained in Paragraph 31 of the Complaint, the Pueblo states that the allegations contain only legal conclusions not requiring further response. Insofar as further response is required, the Pueblo denies those allegations.

32. The Pueblo denies the allegations contained in Paragraph 32 of the Complaint.

THE PUEBLO'S AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. By seizing the Trust Funds and filing the Complaint, the United States breached two binding non-enforcement agreements that it entered with the Pueblo and for which the United

States has not established and cannot establish that the Pueblo materially breached, and the Complaint is therefore subject to dismissal. In alleging this affirmative defense, the Pueblo incorporates by reference the allegations made below at Paragraphs 5-64 of the Pueblo's Counterclaim as well as the statements made in the Pueblo's Verified Claim filed with this Court on May 9, 2018.¹

3. With respect to both binding non-enforcement agreements, the United States breached the covenants of good faith and fair dealing. In alleging this affirmative defense, the Pueblo incorporates by reference the allegations made below at Paragraphs 5-64 of the Pueblo's Counterclaim as well as the statements made in the Pueblo's Verified Claim filed with this Court on May 9, 2018.

4. With respect to the second binding non-enforcement agreement, the United States' seizure of the Trust Funds and filing of the Complaint attempts to enforce an unconscionable and unenforceable term. In alleging this affirmative defense, the Pueblo incorporates by reference the allegations made below at Paragraphs 5-64 of the Pueblo's Counterclaim as well as the statements made in the Pueblo's Verified Claim filed with this Court on May 9, 2018.

5. The Pueblo expressly reserves the right to raise such additional affirmative defenses as discovery may reveal.

¹The Pueblo incorporates Paragraphs 5-64 of the Pueblo's Counterclaim and the statements contained in its Verified Claim by reference into its second, third, and fourth affirmative defenses so as not to make duplicative allegations and clutter the pleading.

THE PUEBLO'S COUNTERCLAIM

COUNTERCLAIM PARTIES

1. Claimant/Counter-Plaintiff, the Pueblo of Pojoaque ("Pueblo"), is a federally recognized Indian tribe, entitled to all privileges and immunities associated with that status.

2. Plaintiff/Counter-Defendant is the United States.

COUNTERCLAIM JURISDICTION AND VENUE

3. This Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C. Sections 1331, 1346(a)(2), 1362, and 1367(a). The Pueblo's Counterclaim does not seek money damages in excess of \$10,000 from the United States, but rather specific performance, specifically return of the seized Trust Funds to the Trustee. *See* 28 U.S.C. § 1346(a)(2).

4. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(2) and 1402(a)(1) because the Pueblo is located within this judicial district, a substantial part of the events giving rise to these claims occurred in this judicial district and because the property that is the subject of this action is situated here or was before its improper seizure by the United States.

COUNTERCLAIM FACTUAL ALLEGATIONS

5. When the Pueblo's 2001 Compact expired on June 30, 2015, the State of New Mexico's lawsuit challenging the DOI's authority to provide an adequate remedy pursuant to 25 C.F.R. §§ 291.1-291.11 ("Part 291") when a state asserts sovereign immunity in a compact-negotiation suit was pending before the U.S. Court of Appeals for the Tenth Circuit ("Part 291 litigation").

6. To permit the parties to that the Part 291 litigation to receive the benefit of the Tenth Circuit's ruling on the appeal, Damon Martinez, the U.S. Attorney for the District of New Mexico,

and the Pueblo entered a non-enforcement agreement (“the First Non-Enforcement Agreement”), embodied in a letter of June 28, 2015 from the Pueblo’s Governor to U.S. Attorney Martinez and a letter of June 30, 2015 from U.S. Attorney Martinez to the Pueblo’s Governor.

7. In the First Non-Enforcement Agreement, U.S. Attorney Martinez agreed to withhold criminal *and civil* enforcement action regarding the Pueblo’s operation of gaming without a compact after June 30, 2015, extending until 30 days after the Tenth Circuit mandate issued for the Part 291 litigation.

8. U.S. Attorney Martinez had authority to commit and bind the United States to the First Non-Enforcement Agreement, the First Non-Enforcement Agreement was a binding contractual commitment of the United States that was not personal to U.S. Attorney Martinez, and the United States’ binding commitment in the First Non-Enforcement Agreement applied to revenue generated by the Pueblo from its gaming activities during the period while the First Non-Enforcement Agreement was in effect.

9. In exchange for U.S. Attorney Martinez’s commitment of non-enforcement in the First Non-Enforcement Agreement, the Pueblo committed to satisfy certain conditions, including to establish a trust to which it would contribute an amount equivalent to the amount the Pueblo otherwise would have paid to the State as revenue sharing, if the 2001 Compact had continued in effect after June 30, 2015, but which the State could not accept without a gaming compact.

10. To establish that trust, the Pueblo, U.S. Attorney Martinez, and the Trustee, Thomas Gede (“Trustee”), negotiated the Trust Agreement, which was signed only by the Trustee on or about August 24, 2015 as a self-declared trust.

11. The Pueblo materially met all its obligations under the First Non-Enforcement Agreement and the Trust Agreement by, among other things, depositing certain gaming-revenue funds as agreed-to in the First Non-Enforcement Agreement into the possession, custody, and control of the Trustee for the period from July 1, 2015 to October 25, 2017, the day before the Pueblo's new gaming compact took effect.

12. The Trust Agreement did not require payment of the Trust Funds to the State and instead provides, among other things, for disposition of the Trust Funds per the first of the following three events to occur:

- (1) the Pueblo and the State . . . entering into a new or amended binding compact regarding the Pueblo operating Class III gaming on its Indian lands, when notice of approval of such compact by the Secretary of the Interior has been published . . . in the Federal Register, and *entering into an agreement regarding the disposition of the remaining assets held hereunder*, after which, upon delivery of copies of such signed and binding agreements, the Trustee shall dispose of the remaining trust assets as provided in said agreement regarding the disposition of the remaining assets held hereunder;
- (2) the Department of the Interior of the United States of America [(“DOI”)] *being permitted to exercise its remedial powers under 25 C.F.R. Part 291, and that process resulting in the Pueblo and the [DOI] entering into an agreement regarding the disposition of the remaining assets held hereunder*, after which, upon delivery of a copy of such a signed and notarized agreement, the Trustee shall dispose of the remaining trust assets as provided in said agreement; or
- (3) upon the expiration of all applicable appeal periods following *the issuance by a court of competent jurisdiction of an order regarding the disposition of the remaining assets held hereunder*, after which, upon delivery of a copy of such order and upon such expiration, the Trustee shall dispose of the remaining trust assets as provided in said order.

13. The First Non-Enforcement Agreement did not and could not require the Pueblo to share revenue from its gaming activities with the State and did not allow the United States to

unilaterally pursue enforcement against that revenue or to unilaterally seize and seek forfeiture of revenue generated by the Pueblo's gaming activities during the period while the First Non-Enforcement Agreement was in effect without the United States first establishing that the Pueblo had materially breached the First Non-Enforcement Agreement such that the First Non-Enforcement Agreement was subject to rescission.

14. On April 21, 2017, the Tenth Circuit issued an opinion in the Part 291 litigation rejecting the DOI's authority to promulgate Part 291, which foreclosed the Pueblo's reliance on the DOI either to resolve the gaming compact impasse between the Pueblo and the State under Part 291 or to enter into an agreement with the Pueblo regarding disposition of the Trust Funds under the Trust Agreement.

15. On July 24, 2017, the Tenth Circuit denied rehearing in the Part 291 litigation, and, on August 2, 2017, the Tenth Circuit issued its mandate in that case.

16. The Tenth Circuit's issuance of its mandate in the Part 291 litigation set the expiration date for the First Non-Enforcement Agreement on September 1, 2017.

17. On July 27, 2017, three days after the Tenth Circuit denied rehearing in the Part 291 litigation, the Pueblo signed and submitted to the State the 2015-form New Mexico tribal-state compact ("2015 Compact").

18. Before expiration of the First Non-Enforcement Agreement and the effective date of the 2015 Compact, the Pueblo had continued to deposit certain agreed gaming-revenue funds into the possession, custody, and control of the Trustee, and otherwise continued to fully comply with its obligations under the First Non-Enforcement Agreement.

19. The Pueblo did not materially breach the First Non-Enforcement Agreement while it was in effect before it expired on its own terms on September 1, 2017 and the United States had not alleged or established any such material breach by the Pueblo, and none of the three events that the Trust Agreement provided for the disposition of the Trust Funds had occurred as of that date.

20. After the Pueblo had signed and submitted to the State the 2015 Compact on July 27, 2017, Governor Martinez delayed countersigning the 2015 Compact over a month until August 31, 2017, which consequently delayed its submission to the DOI, and there was no valid justification for that delay because Governor Martinez had previously signed 14 other materially identical form gaming compacts with other Indian tribes and state law required Governor Martinez to sign that previously state-approved form compact.

21. Governor Martinez's unwarranted delay in countersigning the 2015 Compact jeopardized the Pueblo, because the First Non-Enforcement Agreement was due to expire on September 1, 2017, and the Pueblo anticipated that the DOI would allow the 2015 Compact to become deemed approved under IGRA 45 days after a fully signed compact was submitted to DOI, as DOI previously had done for all fourteen other 2015 Compacts for other Indian tribes in New Mexico.

22. The Pueblo alerted Acting U.S. Attorney James Tierney to the problem caused by Governor Martinez's delay.

23. To address the problem, by a letter to the Pueblo's Governor on August 28, 2017, Acting U.S. Attorney Tierney agreed to withhold all enforcement action against the Pueblo after the First Non-Enforcement Agreement expired on September 1, 2017 until October 30, 2017, or,

if a fully executed compact was submitted to the DOI by October 30, 2017, until the DOI completed its review of that compact.

24. Acting U.S. Attorney Tierney conditioned this *new and separate* period of forbearance on the Pueblo's continued compliance with its commitments in the First Non-Enforcement Agreement, namely, requiring the Pueblo (i) to maintain the statute quo of its gaming operations, including regulatory and auditing procedures as set in the 2001 Compact; (ii) to continue to place in escrow funds that otherwise would have been paid to the State at the rate established by the compact that expired in 2015; and (iii) to continue to provide the U.S. Attorney's Office with sufficient information to assess whether the Pueblo is complying with these terms.

25. Additionally, in exchange for the United States' forbearance for the *new* period extending from September 2, 2017 to October 30, 2017, Acting U.S. Attorney Tierney required the Pueblo to satisfy a *new* condition that was not a term of the First Non-Enforcement Agreement, namely, that the Pueblo and the State of New Mexico reach an agreement over the disposition of the Trust Funds.

26. The United States' exchange of a new and separate period of forbearance for a new set of conditions on the Pueblo, including the requirement that the Pueblo reach agreement with the State regarding disposition of the Trust Funds, constituted a second and separate non-enforcement agreement ("Second Non-Enforcement Agreement"), which did not amend, modify, or supersede the terms of the First Non-Enforcement Agreement regarding the period that the First Non-Enforcement Agreement was in effect through September 1, 2017 or require the Pueblo or the Trustee to modify the terms of the Trust Agreement regarding disposition of the Trust Funds.

27. Acting U.S. Attorney Tierney had authority to commit the United States to the Second Non-Enforcement Agreement, the Second Non-Enforcement Agreement was a binding contractual commitment of the United States that was not personal to Acting U.S. Attorney Tierney, and the United States' binding commitment in the Second Non-Enforcement Agreement applied to revenue generated by the Pueblo from its gaming activities only during the period while the Second Non-Enforcement Agreement was in effect, namely, September 2, 2017 to October 25, 2017, the day before the 2015 Compact became effective.

28. The Second Non-Enforcement Agreement did not require the Pueblo to share revenue from its gaming activities with the State and did not authorize the United States to unilaterally pursue enforcement against that revenue or to unilaterally seize and seek forfeiture of revenue generated by the Pueblo's gaming activities during the period while the Second Non-Enforcement Agreement was in effect without the United States first establishing that the Pueblo had materially breached the Second Non-Enforcement Agreement such that the Second Non-Enforcement Agreement was subject to rescission

29. On August 31, 2017, Governor Martinez signed the 2015 Compact, one day before the First Non-Enforcement Agreement expired, and the 2015 Compact became effective on October 26, 2017, upon publication of a notice in the Federal Register that the DOI had taken no action on it within 45 days after its submission to the DOI.

30. The 2015 Compact became effective before the Second Non-Enforcement Agreement expired on October 30, 2017.

31. The Pueblo and the State did not reach an agreement regarding the disposition of the Trust Funds despite the Pueblo's concerted efforts.

32. In pursuit of such an agreement, the Pueblo and the State participated in five negotiation meetings, including a mediation conducted by a retired New Mexico state-court judge.

33. Throughout the negotiations, the Pueblo repeatedly offered material concessions, including distributing a large portion of the Trust Funds to various community organizations and emergency services in the Pojoaque Valley, disbursing all of the Trust Funds to other Tribes and Pueblos with Indian lands in New Mexico, and splitting the Trust Funds evenly with the State.

34. The Pueblo additionally suggested arbitration and was also willing to waive its sovereign immunity and have the dispute resolved in either state or federal court.

35. In contrast, the State (i) intransigently refused to negotiate in good faith; (ii) demanded all of the Trust Funds (approximately \$10.1 million), plus substantial additional payments approximating \$1.1 million to be paid into the State's general fund without any restrictions on use; and (iii) ultimately communicated that it would not engage in further negotiation or mediation, would not agree to arbitration, and would not agree to have the dispute decided in court.

36. Acting U.S. Attorney Tierney's decision to condition the Second Non-Enforcement Agreement on the Pueblo reaching an agreement with the State over the disposition of the Trust Funds or face potential civil or criminal prosecution regarding uncompacted gaming after September 1, 2017 improperly gave the State unilateral bargaining power in negotiations regarding the Trust Funds' disposition.

37. The State made unreasonable and *unlawful* demands that the Trust Funds be disposed of by unrestricted payment to the State's general fund, because IGRA requires that revenue from Indian gaming only be used to fund tribal government operations or programs or

other tribal, charitable, or local government purposes, 25 U.S.C. § 2710(b)(2)(B), and precludes their payment to state general funds, *see id.* § 2710(d)(4); accordingly, the Pueblo did not accede to the State's demands.

38. During the combined periods of the two non-enforcement agreements, none of the conditions the Trust Agreement set forth for the disposition of the Trust Funds was satisfied.

39. Given the lack of and inability for agreements by the Pueblo with the State or the DOI regarding disposition of the Trust Funds after the 2015 Compact became effective, in order to resolve the disposition of the Trust Funds, the Pueblo filed a petition in Pojoaque Tribal Court against the Trustee for disposition of the Trust Funds pursuant to Article II, Section B(3) of the Trust Agreement, an Unopposed Motion for Summary Judgment, and a Verified and Unopposed Motion for Declaratory Judgment on Disposition of Gaming Trust Funds, in the case *Pueblo of Pojoaque v. Gede* (“*Gede*”), No. 17-166-CV (Pojoaque Tribal Ct.).

40. The Trustee, as Respondent in *Gede* did not oppose either motion by the Pueblo in that case, and the Pojoaque Tribal Court in *Gede* is a court of competent jurisdiction for purposes of satisfaction of Article II, Section B(3) of the Trust Agreement.

41. Although neither the State nor the United States were parties in the *Gede* action, the Pueblo provided both with courtesy copies of filings in that lawsuit.

42. Although neither the State nor the United States intervened in the *Gede* action, Acting U.S. Attorney Tierney acknowledged that lawsuit in a letter sent to both the Pueblo and the State.

43. Acting U.S. Attorney Tierney encouraged the Pueblo and the State to resume discussions in order to reach a mutual agreement as to the disposition of the Trust Funds, or absent

that, to agree to a forum in which the Pueblo and the State would be amendable to litigating disposition of the Trust Funds.

44. Notwithstanding the two non-enforcement agreements, Acting U.S. Attorney Tierney threatened that, if the State and the Pueblo did not reach an agreement as to the disposition of the Trust Funds, he would contemplate further action, including assessing whether the Trust Fund constituted proceeds of illegal gambling obtained in violation of 18 U.S.C. § 1955, rendering them subject to civil forfeiture.

45. Acting U.S. Attorney Tierney's threat of civil enforcement unless the Pueblo and the State reached an agreement about disposition of the Trust Funds directly played into the State's hands, further encouraging its intransigent and unlawful demands regarding the disposition of the Trust Funds.

46. The State maintained both its refusal to negotiate or mediate in good faith and its repeated unlawful demand that all the Trust Funds plus more than an additional \$1 million be paid into the State's general fund without restriction on use.

47. Consequently, notwithstanding and perhaps in part because of Acting U.S. Attorney Tierney's actions, the Pueblo and the State did not reach an agreement concerning the Trust Funds' disposition.

48. On or about February 9, 2018, the United States unilaterally breached its obligations under the two non-enforcement agreements and seized the Trust Funds, consisting of gaming revenue the Pueblo had deposited into trust for the period from July 1, 2015 (immediately after the 2001 Compact expired) to October 25, 2017 (immediately before the 2015 Compact became effective).

49. On May 3, 2018, the Pojoaque Tribal Court issued an order in the *Gede* action declaring that the Pueblo is entitled to disposition of all Trust Funds under IGRA and the Trust Agreement, and a copy of that order has been delivered to the Trustee and no party has appealed or challenged that decision which therefore now has become final.

50. The delivery and finality of that order satisfies Article II, Section B(3) of the Trust Agreement and therefore entitles the Pueblo to all of the Trust Funds.

**COUNT I –
BREACH OF FIRST NON-ENFORCEMENT AGREEMENT**

51. The Pueblo incorporates by reference all of the allegations as set forth in Paragraphs 1-50 of this Counterclaim and further states as follows:

52. The United States' and the Pueblo's exchange of commitments, referred to as the First Non-Enforcement Agreement, is a valid and binding contract.

53. The United States has not alleged, and there is no basis to assert, that the Pueblo violated any obligation under the First Non-Enforcement Agreement during its operative period.

54. The First Non-Enforcement Agreement does not mean that, after the expiration of the agreement's term on September 1, 2017, the United States was free to initiate enforcement action against either the Pueblo or the gaming revenue the Pueblo deposited into trust regarding Agreement's operative period.

55. On or about February 9, 2018, the United States unilaterally breached its obligations under the First Non-Enforcement Agreement by seizing the Trust Funds, consisting of gaming revenue the Pueblo had deposited into trust for the period from July 1, 2015 (immediately after the 2001 Compact expired) to September 1, 2017 (when the First Non-Enforcement Agreement Expired).

**COUNT II –
BREACH OF SECOND NON-ENFORCEMENT AGREEMENT**

56. The Pueblo incorporates by reference all of the allegations as set forth in Paragraphs 1-55 of this Counterclaim and further states as follows:

57. The United States' commitment to forebear from any enforcement action against the Pueblo from September 2, 2017 through October 30, 2017, in exchange for certain conduct by the Pueblo, referred to as the Second Non-Enforcement Agreement, is a valid and binding contract.

58. In the alternative, the United States' commitment to forebear from any enforcement action against the Pueblo from September 2, 2017 through October 30, 2017, in exchange for certain conduct by the Pueblo, referred to as the Second Non-Enforcement Agreement, is a valid and binding contract, except for U.S. Attorney Tierney's new term in the Second Non-Enforcement Agreement that the Pueblo and the State reach an agreement regarding disposition of the Trust Funds held under the Trust Agreement, which is an unconscionable, unenforceable term.

59. The United States has not alleged, and there is no basis to assert, that the Pueblo either violated or failed to substantially comply with its commitments under the Second Non-Enforcement Agreement during its operative period.

60. The Second Non-Enforcement Agreement does not mean that, after the expiration of its term on October 30, 2017, the United States was free to initiate enforcement action against either the Pueblo or the gaming revenue the Pueblo deposited into trust during that Agreement's operative period or during the prior period based on activities subject to the First Non-Enforcement Agreement.

61. On or about February 9, 2018, the United States unilaterally breached its obligations under the Second Non-Enforcement Agreement by seizing the Trust Funds, consisting

of gaming revenue the Pueblo had deposited into trust for the period from September 2, 2017 (when the Second Non-Enforcement Agreement came into being) through to October 25, 2017 (immediately before the 2015 Compact became effective).

62. In the alternative, the United States' commitment to forebear from any enforcement action against the Pueblo from July 1, 2015 (immediately after the 2001 Compact expired) through October 30, 2017, in exchange for the Pueblo's commitments, is a valid and binding contract, except for U.S. Attorney Tierney's term, added effective September 2, 2017, that the Pueblo and the State reached a funds-disposition agreement, which is an unconscionable and unenforceable modification, and, on February 9, 2018, the United States unilaterally breached its obligations under its contract with the Pueblo.

**COUNT III –
BREACH OF COVENANTS OF GOOD FAITH AND FAIR DEALING**

63. The Pueblo incorporates by reference all of the allegations as set forth in Paragraphs 1-62 of this Counterclaim and further states as follows:

64. The United States' actions, as described above, were a breach of the covenants of good faith and fair dealing incorporated by law into both the First Non-Enforcement Agreement and Second Non-Enforcement Agreement.

PRAYER FOR RELIEF

WHEREFORE, having answered the United States' Verified Complaint for *Forfeiture In Rem* and asserted its Counterclaim, the Pueblo requests the following relief:

1. The Court enter judgment in the Pueblo's favor;

2. The Court award the remedy of specific performance on the Pueblo's counterclaim and, accordingly, order the United States to return the seized Trust Funds to the Trustee, or in the alternative to the Pueblo, together with accrued interest;

3. The Complaint be dismissed with prejudice; and

4. The Court grant attorneys fees and costs and such other and further relief as it deems just and proper and authorized by law.

Respectfully submitted:

FREEDMAN BOYD HOLLANDER
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- and -

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Attorneys for the Pueblo of Pojoaque

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I filed and served a true and correct copy of the foregoing on all counsel of record via filing with the CM/ECF filing system.

I further certify that on May 29, 2018, a true and correct copy of the foregoing was emailed to the following counsel of record:

John C. Anderson
United States Attorney
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