

# New Mexico Tribal Gaming: Long and Bumpy Road



BY HEIDI MCNEIL STAUDENMAIER

**F**or both the state of New Mexico and the tribes seeking to operate tribal casinos pursuant to the federal Indian Gaming Regulatory Act (IGRA), the road to gaming has been long and winding, and quite bumpy at times.

After passage of IGRA in 1988, the New Mexico tribes sought to engage in gaming. However, certain litigation ensued on various issues, including the authority of the New Mexico Governor to enter into Class III tribal-state gaming compacts. The tribes and the state finally saw their compacts approved by the State Legislature and the Department of the Interior in 1997. Thereafter, numerous tribal casinos were opened across the state. But various controversies continued, including disputes over revenue-sharing under the compacts.

By 2014, most of the tribes had negotiated amended compacts with the state, resolving many of the pending disputes. The Pueblo of Pojoaque (Pueblo), however, deter-

mined to terminate their negotiations based on their contention that the state was engaging in “bad faith.” The Pueblo, who operated the Buffalo Thunder and Cities of Gold casinos, essentially rejected the compact terms negotiated by the state with other New Mexico tribes. Among other things, the Pueblo asserted that the state was seeking revenue sharing rates that were unreasonable and not justified. The Pueblo filed suit against the state, but the federal District Court in New Mexico dismissed the complaint based upon the state’s Eleventh Amendment immunity defense.

As a result of the dismissal, the Pueblo then pursued the issuance of Class III “gaming procedures” from the Secretary of Interior pursuant to IGRA. Before the Secretary could issue gaming procedures to the Pueblo, the state brought suit contending the Secretary lacked authority to take such action. The federal District Court in New Mexico agreed with the state, concluding the Secretary did not have authority to issue Class III gaming procedures to the Pueblo.



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The Pueblo appealed that decision to the U.S. Circuit Court of Appeals for the Tenth Circuit.

The Pueblo's compact was set to expire at midnight on June 30, 2015. On that same date, the United States Attorney for New Mexico (Damon Martinez) issued a letter to the Pueblo advising that he would exercise his discretion to "withhold enforcement action" against the Pueblo for operating their gaming operations without a compact. The US Attorney based his decision on (1) the pending Tenth Circuit appeal; (2) the Pueblo's commitments to maintain the status quo of its gaming operations, including regulatory and auditing procedures; and (3) the Pueblo's agreement to pay revenue-sharing monies that otherwise would have been paid to the state in a trust account with an independent trustee. The US Attorney's decision was to remain in effect until 30 days after the Tenth Circuit issued its mandate, provided the Pueblo had complied with the foregoing commitments.

On the same date, the National Indian Gaming Commission Chairman (Jonodev Chaudhuri) issued a similar letter. The Chairman advised that he would exercise his discretion to not take any enforcement action against the Pueblo on generally the same grounds as noted by the US Attorney.

Thereafter, in July of 2015, the Pueblo brought suit against the state and certain state officials regarding the Governor's failure to negotiate a new compact. In October 2015, based on certain actions relative to certain vendors who were licensees of the New Mexico Gaming Control Board (NMGCB) and who were also engaged in business activities with the Pueblo, the Pueblo pursued injunctive relief from the federal District Court in New Mexico. The court granted a Temporary Restraining Order/Preliminary Injunction prohibiting the state officials from taking threatening or similar actions against any licensees of the NMGCB based on those licensees engaging in business with the Pueblo gaming operations. The

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injunctive relief was to remain in place until the Tenth Circuit rendered a decision in the gaming procedures appeal.

After further litigation proceedings over the Pueblo's ability to conduct Class III gaming, the District Court ultimately ruled in favor of the state and dismissed the Pueblo's lawsuit. In March 2017, the Tenth Circuit granted an emergency stay of the dismissal order. The Tenth Circuit also entered a temporary injunction which enjoined the state and certain state officials "from taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement action against any licensee in good standing with the New Mexico

Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo of Pojoaque." This stay and injunction was further extended by the Tenth Circuit, pending a decision in the gaming procedures lawsuit. Notwithstanding the Tenth Court's stay and injunction, several gaming equipment vendors ceased doing any further business with the Pueblo as of February 2017.

The gaming procedures appeal was heard by the Tenth Circuit in September 2015. After approximately one and a half years of having the matter under advisement, in late April 2017, the Tenth Circuit issued its opinion – affirming the District Court's determination that the Secretary lacked authority to issue gaming procedures to the Pueblo. The appellate court opined that there had never been a determination made that the state was acting in "bad faith" and, therefore, the Secretary was precluded from moving forward with the gaming procedures option under IGRA.

The Pueblo received a second negative decision from the Tenth Circuit in July 2017. In a 2-1 split decision, the appellate court affirmed the District Court's dismissal of the Pueblo's lawsuit over

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the compact. In so holding, the Tenth Circuit ruled:

“Plaintiffs-Appellants Pueblo of Pojoaque and its governor, Joseph M. Talachy, (collectively “the Pueblo”) appeal from the district court’s dismissal of its claim for declaratory and injunctive relief based on the State of New Mexico’s alleged unlawful interference with Class III gaming operations on the Pueblo’s lands. *Pueblo of Pojoaque v. New Mexico*, 214 F. Supp. 3d 1028 (D.N.M. 2016). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.”

Based upon its July decision in favor of the state, the Tenth Circuit issued a mandate in early August 2017. In addition, the Tenth Circuit denied the Pueblo’s request for a rehearing on the matter, and also refused to postpone the mandate issuance while the Pueblo’s lawyers sought to pursue review of the matter by the United States Supreme Court.

The issuance of the mandate started the clock running on the US Attorney’s forbearance of any enforcement actions as stated in the June 30, 2015 letter. US Attorney Martinez had been forced to resign earlier in 2017 after President Donald Trump took office, but his successor (James Tierney) announced that he would uphold the 30-day deadline (which was set to expire in early September 2017). The new US Attorney further advised in a public statement: “I urge the Pueblo of Pojoaque

and the State of New Mexico to reach a mutually acceptable agreement on the status of the Pueblo’s gaming operations before September first.”

Shortly after the Tenth Circuit’s issuance of its mandate, the Pueblo submitted a compact to the Governor’s office which contained similar terms the Governor had negotiated with several other tribes. This new compact has a higher revenue sharing rate (likely starting at 9 percent and ranging up to 10.75 percent of Class III revenues) than the old compact (8 percent).

Based on media reports, the Governor’s office had indicated it would likely accept the compact. [At the time this article was prepared, no formal approval had been publicly announced.]

It was unclear whether the Pueblo’s compact – assuming it is signed by the Governor – will also need approval by the New Mexico Legislature before it can be submitted to the Secretary of Interior for review. Upon submission of the final, executed compact to the Secretary, the Secretary has 45 days in which to approve, disapprove or take no action (in which case the compact would be “deemed approved”). The compact is not considered valid and binding until after Secretarial approval (or “deemed approval”) and formal publication in the Federal Register.

Notwithstanding the submission of the compact to the Governor’s office, the Pueblo could still possibly pursue review of the gaming procedures decision to the United States Supreme Court. Reportedly, the deadline for the Pueblo to file a petition for review is late October.

With the Pueblo compact dispute resolved for the time being, there still remains controversy between the state and several other tribes. This dispute concerns an interpretation of “free play credits” and whether the tribes are required to pay for these credits as part of the revenue sharing agreement in the compacts. Several tribes have filed suit against the state, seeking to block the state from collecting on these credits. It is unknown at this juncture how this litigation will proceed.

The bumpy ride for New Mexico gaming appears that it will continue at least for a bit longer. ✨

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