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Indian Gambling Case [2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE APACHE TRIBE OF THE)	
MESCALERO RESERVATION,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 96-0115 (RMU)
)	
JANET RENO, In Her Official Capacity)	
as the United States Attorney General,)	
and BRUCE BABBITT, in his Official)	
Capacity as the United States Secretary)	
of the Interior,)	
)	
Defendants.)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER

The Apache Tribe of the Mescalero Reservation ("Tribe") submits this Memorandum in Opposition to Defendants' Motion to Transfer:

I. INTRODUCTION

The Tribe conducts "class III" gaming pursuant to a Compact negotiated with and signed by the Governor of New Mexico, and approved by the Secretary of the Interior, defendant Bruce Babbitt, pursuant to the Indian Gaming Regulatory Act. 25 U.S.C. § 2710(d)(8). See 60 Fed.Reg. 15,194 (March 22, 1995) (notice of Secretary's approval of Compact). This lawsuit arises from a threat by the United States Department of Justice to close the Tribe's casino, thereby terminating gaming conducted by the Tribe pursuant to the Compact. The Tribe filed a Motion for a Temporary Restraining Order in this Court on January 26, 1996, to stop the Department of Justice from taking any steps to shut down the Tribe's gaming operation or to civilly seize tribal assets and/or

to bring criminal actions against persons for operating that facility.

Defendants have now filed a motion to transfer this case to the District of New Mexico where other tribes have sued the U.S. Attorney for the District of New Mexico, and the defendants to the present suit, to prevent them from interfering with the operation of those gaming operations. The motion to transfer should be denied because (1) the Tribe has chosen this forum, (2) the parties and witnesses will not be inconvenienced by the Tribe's choice of forum, (3) this case is procedurally different from Pueblo of Santa Ana, et al. v. John J. Kelly, et al., Civ. No. 96-0002 MV/WWD (D.N.M.) and may not be consolidated with that action since this case presents a claim for injunctive relief and thus will probably require a different schedule than that case, and (4) this case presents important questions of federal law and national policy appropriate for determination in this forum.

II. ARGUMENT

A. Standard For Transferring Cases

Section 1404(a), Title 28 U.S.Code, provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.¹

The moving party bears the burden of showing that the interests require transfer of an action. Airline Pilots Ass'n v.

1. The Tribe does not contest that venue would be proper in the District of New Mexico.

Eastern Air Lines, 672 F.Supp. 525, 526 (D.D.C. 1987); Intern. Broth. of Painters v. Best Painting, 621 F.Supp. 906, 907 (D.D.C. 1985); Celanese Corp. v. Federal Energy Admin., 410 F.Supp. 571, 575-77 (D.D.C. 1976) (defendant has to make out a strong case for transfer to defeat plaintiff's privilege of choosing the forum). A decision to transfer a case under 28 U.S.C. § 1404(a) is made in a fact specific, case by case determination. American Dredging Co. v. Miller, ___ U.S. ___, 114 S.Ct. 981, 989 n.2 (1994); accord Starnes v. McGuire, 512 F.2d 918, 925 (D.C. Cir. 1974) (en banc). This Court has broad discretion in ruling on a motion to transfer under Section 1404(a). In re Scott, 709 F.2d 717, 720 (D.C. Cir. 1983).

B. The Motion Should Be Denied

1. Plaintiff's Choice of Forum
Should Be Accorded Deference

The plaintiff's choice of forum is normally given paramount consideration and substantial deference. Fine v. McGuire, 433 F.2d 499, 501-02 (D.C. Cir. 1970) (per curiam); Blake v. Capitol Greyhound Lines, 222 F.2d 25, 27 (D.C. Cir. 1955); Eastern Air Lines, 672 F.Supp. at 526. "[U]nless the balance of convenience is strongly in favor of the defendants, [plaintiff's choice] should rarely be disturbed." Intern. Broth. of Painters, 621 F.Supp. at 907. This factor is given "less deference" where plaintiff does not reside in the district because a forum in which plaintiff does not reside may be inconvenient, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981); see Martin-Trigona v.

Meister, 668 F.Supp. 1, 3 (D.D.C. 1987), but it is nonetheless still a factor to be considered, and it should not be ignored where the forum chosen is not inconvenient.²

2. Hearing this Action in the District
Will Not Inconvenience Parties and Witnesses

Defendants Attorney General Janet Reno and Secretary of the Interior Bruce Babbitt reside in this District.³ Defendant Bruce Babbitt approved the Compact in this District. Officials of the Department of the Interior reviewed the Compact and advised defendant Babbitt regarding such review in this District. A decision by defendant Reno or Justice Department officials to take enforcement action against the Tribe may be made in Washington, D.C. Thus, at least some of the persons who would be called as witnesses reside in this District.

Perhaps most importantly, this case will probably be decided on summary judgment as it principally involves disputes of law. Hence, there is no need to bring witnesses to this forum and their convenience becomes a non-issue in the transfer decision. See Resolution Trust Corp. v. Feffer, 795 F.Supp. 1223, 1224 (D.D.C. 1992) (case involving Arizona savings and loan with respondents and documents in Arizona; transfer denied because of the summary proceeding); Intern. Broth. of Painters, 621 F.Supp. at 908

2. The court in Towns of Ledvard, North Stonington, and Preston v. United States, Civ. No. 95-0880 (TAF), slip op. at 7 (D.D.C. May 31, 1995) (defendants' Exh. F), a case relied on by defendants, therefore erred in not according this factor any weight.

3. As defendants recognize, venue is proper in this District. 28 U.S.C. § 1391(e)(1).

(transfer denied because summary judgment and no live witnesses and no decision to make regarding convenience of witnesses). All the witnesses in this case can appear by affidavit or deposition.

In addition, the Tribe has selected as lead counsel a nationally-known Washington, D.C. law firm which specializes in representing Indian tribes. The firm does not have an office in New Mexico. This is a factor for the Court to consider. See Nichols v. U.S. Bureau of Prisons, 895 F.Supp. 6, 8 (D.D.C. 1995) (location of counsel a factor), mandamus denied, 1995 WL 551095 (D.C. Cir. Aug. 25, 1995).

3. The Interests of Justice
Do Not Require a Transfer

a. The Pueblo of Santa Ana Case Is Not
Dispositive of this Motion, and Does
Not Present the Claim for Injunctive
Relief Presented Here

Defendants' primary argument is that this case should be transferred because of the civil action filed by various Pueblos in the district of New Mexico. Pueblo of Santa Ana, et al. v. John J. Kelly, et al., Civ. No. 96-0002 MV/WWD (D.N.M.). This pending suit, however, is not decisive on the issue of transfer; it is only one factor for the Court to consider. Even where there is a pending suit in another court between identical parties, and which raises similar or identical issues, transfer may be denied. See, e.g., Intern. Broth. of Painters, 621 F.Supp. at 907 (refusing to transfer case despite related case in Alabama because it would probably be decided on summary judgment, D.C. area witnesses would have to testify if there was a trial, and many of

the records pertaining to the case were in D.C.); Eastern Air Lines, 672 F.Supp. at 526 (denying transfer where related case pending in Florida, despite presence of witnesses and documents in Florida, where several potential witnesses resided in the District).

Thus, the pending of a related action in another court is not determinative of a transfer motion. Moreover, as a result of a stipulation entered in the Pueblo of Santa Ana case, the Pueblos have agreed to withdraw their claims for injunctive relief, and the United States Attorney has agreed not to prosecute the Pueblos or to close their casinos pending a decision on their claim for a declaratory judgment. The Tribe has refused to agree to this stipulation, so, unlike the Pueblos, the Tribe is in danger of the Department of Justice proceeding against it, and its claim for injunctive relief is therefore very much alive, as shown by its motion for a TRO. This claim would also require a different schedule than that set in Pueblo of Santa Ana. Thus, this case is procedurally distinct from the Pueblo of Santa Ana case.⁴

5. This Case Presents Important Issues
of Federal Law and National Policy
Appropriate to this Forum

4. This action is unrelated to the action brought by the Tribe against the State in the District of New Mexico alleging that the State had failed to negotiate a compact in good faith. Mescalero Apache Tribe v. State of New Mexico, Civ. No. 92-76 JC/WWD. Although the defendant State of New Mexico has opposed dismissal of other similar cases brought against the State by other tribes on the grounds that the compacts are void, citing State ex rel. Clark, et al. v. Johnson, ___ N.M. ___, 904 P.2d 11 (1995), no such brief has been filed in the Mescalero case (the Tribe has not moved to dismiss that case).

Defendants argue that this case should be transferred because it involves claims that are "local in nature and specific to the State of New Mexico." To the contrary, the case involves important questions of federal law and is of national importance, potentially affecting the Secretary of the Interior's approval of future tribal-state gaming compacts throughout the nation, and the Secretary's and Attorney General's policy regarding other existing tribal-state compacts which are attacked following secretarial approval on procedural or state law grounds.

This case involves the interpretation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., and 18 U.S.C. § 1166, and the Johnson Act, 15 U.S.C. § 1175. This case presents the important federal question of whether a compact, once approved by the Secretary, can be invalidated by subsequent state court decisions interpreting state law.

This Court has already heard several IGRA cases, all involving plaintiffs from other forums, including one brought by this Tribe, Red Lake Band of Chippewa v. Brown, 928 F.2d 467 (D.C. Cir. 1991) (upholding IGRA against constitutional challenge), and a case like this one concerning the validity of a compact. Kickapoo Tribe of Indians v. Babbit, 827 F.Supp. 37 (D.D.C. 1993) (compact entered into by governor on behalf of state but not approved by Secretary was invalid because governor had no authority to execute), rev'd on other grounds, 43 F.3d 1491 (D.C. Cir. 1995). See also Cabazon Band of Mission Indians v. National Indian Gaming Commission, 14 F.3d 633 (D.C. Cir. 1994) (NIGC regulations upheld), cert. denied, 114 S.Ct. 2709; Pueblo of Santa Ana v. Hodel, 663

F.Supp. 1300 (D.D.C. 1987) (pre-IGRA case challenging refusal of Secretary to allow Pueblo to construct and operate dog racing facility on reservation).

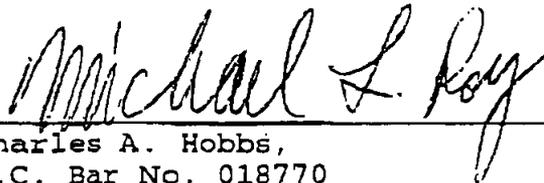
In the instant case, defendants Reno and Babbitt are the policy makers for national policies regarding the approval of Indian gaming compacts and the enforcement of federal gambling laws. It is therefore appropriate to sue them in this district.

This Circuit has recognized that the existence of a national policy issue is a factor to be considered under Section 1404(a). Starnes, 512 F.2d at 929; Fine v. McGuire, 433 F.2d 499, 501 (D.C. Cir. 1970) (complaint challenging instruction of director of federal agency in D.C. "inherently presents a factor of convenience in testing at the seat of the government the validity of instructions that issue from national headquarters").

CONCLUSION

For the foregoing reasons, the Court should deny defendants' motion to transfer this case to the District of New Mexico.

Respectfully submitted,



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Dated: February 1, 1996

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 1996, a copy of the foregoing was served by hand-delivery to:

Edward J. Passarelli
Environment & Natural Resources Division
Department of Justice
601 Pennsylvania Ave., N.W., Rm. 843
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Michael Fay

Mexico, and there are related cases filed by other tribes pending in the federal courts in the District of New Mexico.

Venue should be transferred to New Mexico, not only for the convenience of the parties and witnesses, but also because the interests of justice are promoted when criminal law controversies are resolved in the jurisdiction where the offense is committed. In addition, the resolution of this matter in the District of New Mexico will avoid duplicative litigation, the waste of judicial resources and potentially inconsistent results.

I. FACTUAL BACKGROUND

Plaintiff in this action is only one of ten similarly situated New Mexico tribes operating gambling casinos. All ten tribes signed tribal/state gaming compacts with the Governor of New Mexico during the first half of 1995, with an aim to bringing the tribes' gambling activities into compliance with the Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995).

There has been intense public concern in New Mexico regarding gaming in general and Indian gaming in particular. Plaintiff in this action and the other nine tribes vigorously asserted, and to this day continue to assert, that their casinos are operating in full compliance with all applicable state and federal laws by virtue of the Governor's execution and the Department of the Interior's subsequent approval of the compacts.

Two back-to-back decisions of the New Mexico Supreme Court related to the legality of particular types of gaming under

state law, and based on statutes that pre-existed the compact, were rendered subsequent to the signing of the compacts. On July 13, 1995, the Supreme Court of New Mexico determined that the Governor lacked the authority under New Mexico law to bind the state to these Indian gaming compacts, and enjoined the state from carrying out its responsibilities and exercising the rights conferred upon it in the compacts. State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995). Five months later, the State Supreme Court, interpreting state statutory law that pre-existed the compacts, ruled that all electronic gaming devices, slot machines and Las Vegas-style casino gaming are illegal in the State of New Mexico. Citation Bingo, Ltd. v. Otten, No. 22,736, slip op. at 5-9 (D.N.M. Nov. 29, 1995).

On December 13, 1995, John J. Kelly, the United States Attorney for the District of New Mexico, wrote Plaintiff and the other nine gaming tribes advising that the gambling casinos are operating in violation of state and federal law. The United States Attorney asked the tribes to close the casinos within 30 days or face civil forfeiture proceedings. See News Release dated December 14, 1995, Exhibit "A".

Although the United States Attorney has not yet filed a forfeiture complaint against Plaintiff, absent a mutually satisfactory alternative, it continues to be the intention of the United States Attorney and the Department of Justice to eventually file suit. Furthermore, it is the intention of the government, at the conclusion of the civil forfeiture proceeding,

and following entry of a final judgment by the federal district court in favor of the government, to seize and forfeit the Plaintiff's gambling devices to the United States.¹

On January 3, 1996, the other nine gaming tribes in New Mexico filed a civil action for declaratory and injunctive relief comparable in all material respects to this action. Pueblo of Santa Ana, et al. v. John J. Kelly, et al., Civ. No. 96-0002 MV/WWD (D.N.M.). See Exhibit "B". In the New Mexico action, however, the parties were able by stipulation to avoid the necessity of a temporary restraining order or a preliminary injunction hearing.² More to the point for purposes of this motion to change venue, because of "profound public interest" in the Indian gaming issue, the parties agreed in the New Mexico case to an expedited discovery and briefing schedule that will enable the very same legal issues raised in this case to be fully submitted to the federal district judge in the New Mexico case on cross-motions for summary judgment by May 20, 1996. See Exhibit "C"; See also Exhibit "D", news article, The Santa Fe New Mexican, dated January 24, 1996.

In addition, the Court should know that the Plaintiff sued the State of New Mexico alleging the State failed to negotiate a compact in good faith. The State has moved to

¹ However, the government does not intend to seize gambling devices or otherwise interfere with the casino's operations prior to the entry of a judgment of forfeiture in the District of New Mexico.

² See Exhibit "C", Joint Motion For Entry of Stipulation with attached Stipulation.

consolidate that case with four other similar lawsuits brought by four other New Mexico gaming Tribes. Three of the tribes moved to dismiss for mootness following the signing of the compacts by the Governor. The State has opposed dismissal of those actions on the ground that the Compacts are not valid as a matter of matter of federal, as well as state law. See, e.g., Pueblo of San Juan v. Bruce King, et al., No. Civ.-94-1160 LH/WWD. Exhibit "E".

Even though the United States Attorney for New Mexico is not named a party, it is clear that he is the public official with the most direct interest in the proposed enforcement action and the official whose specific, prospective actions are potentially adverse to the interests of the Tribe.

Argument

I. THE INTERESTS OF JUSTICE ARE BEST SERVED BY TRANSFERRING THIS CASE TO THE DISTRICT OF NEW MEXICO.

Transfer of this action to the United States District Court for the District of New Mexico is proper under 28 U.S.C. § 1404(a) (1993), which provides that:

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The purpose of § 1404(a) is "to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense'" Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (citing Continental Grain v. Barge, FBL-585, 364 U.S. 19, 26 - 27 (1960)). Defendants carry the burden of demonstrating that transfer of this action serves those purposes and furthers the interest of justice. Citizen Advocates for Responsible Expansion v. Dole, 561 F. Supp. 1238, 1239 (D.D.C. 1983) (citing e.g. Oudes v. Block, 516 F. Supp. 13, 15 (D.D.C. 1981). However, that burden is substantially diminished, where, as here, Defendants seek to transfer the action to the forum where Plaintiff resides. Id. See also Martin-Trigona v. Meister, 668 F. Supp. 1, 3 (D. D.C. 1987) (Plaintiff's choice of forum is a much less significant factor where the plaintiff is a foreigner to that forum); Towns of Ledyard, North Stonington, and Preston, Connecticut v. United States, Civ. No. 95-0880 (TAF), slip op. at 7 (D.D.C. May 31, 1995). See attached Exhibit "F", ("deference

[to plaintiffs' choice of forum] is not owed where, as here, plaintiffs file suit in a foreign forum").

This Court has been accorded broad discretion in considering a motion to transfer under § 1404(a). In re Scott, 709 F.2d 717, 720 (D.C. Cir. 1983). See also Norwood v. Kirkpatrick, 349 U.S. 29 (1955). In exercising that discretion, the Court must first determine whether this action could have been brought in the District of New Mexico. If it could have, the Court must examine three interests to determine if transfer to that forum is warranted: the convenience of the parties, the convenience of the witnesses, and the interest of justice. 28 U.S.C. §1404(a). We first show that this action could have been brought in the District of New Mexico and then demonstrate that convenience and the interest of justice require this action to be transferred to that forum.

A. The District of New Mexico is a Forum in Which This Action Might Have Been Brought.

The "threshold consideration" in determining the appropriateness of transfer under §1404(a) is whether the action "might have been brought" in the transferee district. NFERC v. Babbitt, No. 93-1579 (JHG), slip op. at 3 (D.D.C. April 13, 1994); see also Van Dusen v. Barrack, 376 U.S. at 616 (transfer power is expressly limited by the clause restricting transfer to those districts in which the action "might have been brought").

Here, because Plaintiff bases its claims on federal question jurisdiction, this Court need only consider whether venue is proper in the District of New Mexico. See Martin-

Trigona, 668 F. Supp. at 4. This case involves judicial review of prosecutorial decisions and federal action impacting gambling on land located in New Mexico and personal property in the form of gambling devices and equipment located in New Mexico.

Pursuant to 28 U.S.C. § 1391(e), venue is proper in the "judicial district in which . . . a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or [] the plaintiff resides if no real property is involved in the action." 1391(e)(2) & (3) (1993). Thus, whether this Court considers the subject of this litigation to be the prosecutorial decisions of the United States Attorney, the ongoing illegal gaming, the property possibly subject to forfeiture, or the land on which the gaming is being conducted, venue is clearly proper in the District of New Mexico.³

We now demonstrate that as the pending case in the District of New Mexico seeks to scrutinize the same prosecutorial

³ Defendants recognize that venue is also proper in the D.C. District under 28 U.S.C. § 1391(e)(1) with respect to the named defendants. While theoretically possible, a motion to transfer the New Mexico action to this forum would be highly inappropriate. Defendants did not do so because of (1) the agreement by the United States Attorney and the other federal defendants, as represented in the New Mexico stipulation, Exhibit "C", that this issue of great public importance would be litigated with expedition before the District court of New Mexico; (2) the compelling interest of having this localized issues resolved at home, Armco Steel Co., L.P. v. CSX Corp., 790 F. Supp. 311, 324 (D. D.C. 1991); (3) the nine New Mexico Tribes unique interest in resolving matters in which it has a special interest in a federal district court in new Mexico, Cf. State of Alaska v. Andrus, 429 F. Supp. 958, 964 (D. Alaska 1977); and (4) Plaintiffs' attenuated connection to this forum. Martin-Trigona, 668 F. Supp. at 4.

decision and adjudicate related issues, the convenience of the parties and interests of justice require transfer of this action to that forum.

B. The Convenience to the Parties and Witnesses Will Be Served By Transferring This Case.

1. Convenience to the parties.

Plaintiff is located in New Mexico. The Apache Tribe of the Mescalero Reservation is located entirely within Otero and Lincoln counties in the State of New Mexico. See Affidavit of Wendall Chino attached to Plaintiff's Motion for Temporary Restraining Order. Thus, Plaintiff will not be inconvenienced by a transfer to the District of New Mexico. Conversely, Defendants will be greatly inconvenienced if transfer is not granted and they are forced to litigate identical issues in this District as well as the District of New Mexico.

2. Convenience to the witnesses.

Convenience to witnesses is an important factor in this case. The parties in the New Mexico litigation, Santa Ana v. Kelly, have set an expedited discovery schedule. Most of the witnesses are located in New Mexico. To the extent discovery is appropriate, the related disputes should be managed in one district, under one set of rules. Requiring witnesses to appear separately in two fora on the same issues is wasteful and unnecessary given that the underlying issues are the same. Discovery and the limit of any testimonial input should be managed in the same district.

C. The Interests of Justice Will Be Best Served By Transferring This Case.

The strongest reason to transfer this action to the District of New Mexico is that the interests of justice will best be advanced by such a transfer. The interests of justice are furthered by preventing unnecessary expense to the public and duplicative use of judicial resources. Continental Grain Co., 364 U.S. at 26. See also Martin-Trigona, 668 F. Supp. 1, 3 (D.D.C. 1987) ("The interests of justice are better served when a case is transferred to the district where related actions are pending."); Towns of Ledyard, North Stonington, and Preston, Connecticut v. United States, Civ. No. 95-0880 (TAF), slip. op. at 4-5, (D.D.C. May 31, 1995). See attached Exhibit "F" (in action involving Indian gaming operations transfer serves to "conserve judicial resources" and "avoid the possibility of inconsistent results").

In addition, the interests of justice are promoted when a localized controversy is resolved locally where concerned citizens may closely follow the proceedings. Citizen Advocates, 561 F. Supp. at 1240; Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947). This compelling interest can only be furthered by transfer of this case to the District of New Mexico. Armco Steel, 790 F. Supp. at 324; Towns of Ledyard, slip op. at 5-6.

- 1. This action should be transferred in order to avoid a duplicative waste of judicial resources and the possibility of inconsistent results.**

In Continental Grain the Supreme Court explained that "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." 364 U.S. at 26.

Here, this actions and the actions pending in New Mexico seek to halt the same prosecutorial decisions and adjudicate the legality of the ongoing gaming and responsibilities of Federal defendants. The two actions present similar claims and demands for relief: both Plaintiff here and the nine other Tribes located in New Mexico seek a determination that the gaming is legal under the Indian Gaming Regulatory Act, that the alleged prosecutorial approach would be a taking without just compensation, and that it would be a breach of trust to direct the gaming to cease. Thus, not only are the two actions largely duplicative, but it is self evident that there is a strong possibility that inconsistent results could occur if challenges to this prosecutorial decision are allowed to go forward in two courts.

- 2. This action involves claims that are local in nature and specific to the State of New Mexico, where similar litigation is ongoing, and therefore, should be transferred there.**

Plaintiff's claims are directed at an agency action whose effects will be felt entirely within New Mexico and which has been the subject of intense controversy among individuals

residing in New Mexico. See, e.g., Exhibit "G".⁴ And it is significant that the related actions are pending in the federal District Court for the district of New Mexico; and that the forfeiture proceeding plaintiff seeks to preclude, in the nature of an in rem action, would be within the exclusive jurisdiction of the United State District Court for the District of New Mexico. Cf. Nichols v. Bureau of Prisons, 895 F. Supp. 6, 8 (D.D.C. 1995) (significant that criminal proceedings to which the matter relates are underway not in D.C., but in Oklahoma).⁵

⁴ The Supreme Court of New Mexico took judicial notice in State Ex Rel. Clark v. Johnson, 904 P.2d at 17 of the "'great public interest and importance'" posed by the legality of Indian gaming under compacts in New Mexico. Such interest is understandable given that in order for a gambling device to be legally possessed or operated in Indian country by a Tribe, the bar of 15 U.S.C. § 1175 must be lifted by virtue of a compact with a state in which the devices are legal. Section 2710(d)(6) of IGRA states:

The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that-

- (A) is entered into under paragraph (3) by a **state in which the gambling devices are legal**, and
- (B) is in effect.

25 U.S.C. § 2710(d)(6) (emphasis added). Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179 (10th Cir. 1993).

⁵ To the extent that local law must be examined, clearly the local federal district court is the appropriate forum. See Schmid Lab., Inc. v. Hartford Acc. and Indem. Co., 654 F.Supp. 734, 737 (D.D.C. 1986):

More importantly, the transfer provisions in the U.S. Code, which grew out of the common law doctrine of forum non conveniens, were in part intended to prevent forum shopping. Cheeseman v. Carey, 485 F.Supp. 203, 214-15 (S.D.N.Y.1980). This Court cannot find that it is in the interest of justice to encourage, or even
(continued...)

Local interest spawned intervention request in Santa Ana v. Kelly by two state legislators and a citizen on behalf of those opposed to gaming. The Judge denied intervention, but granted amicus curiae status. See Exhibit "D", news article, The Santa Fe New Mexican, dated January 24, 1996. The Supreme Court has made it clear that the interests of these local concerned citizens must be given voice in this Court's analysis of the interests of justice:

In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil, 330 U.S. at 509. See also Oil, Chemical & Atomic Workers, 694 F.2d 1289, 1300 (D.C. Cir. 1982) (quoting Liquor Salesmen's Union Local 2 v. NLRB, 664 F.2d 1200, 1205 (D.C. Cir. 1981)) (directing inquiry as to "'whether the impact of the litigation is local to one region....'").

Following the Supreme Court's lead, this Court has repeatedly held that where an action's impact is localized and

⁵(...continued)

allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case. See Cheeseman v. Carey, 485 F.Supp. 203, 215 (S.D.N.Y. 1980).

This case presents issues of State law regarding, for example the legality of gaming devices. See supra n. 3. "The benefit of having a local court construe its own law is a relevant factor in considering a transfer motion." Id. at n. 11.

there is local controversy over the action, "justice requires that such localized controversies be decided at home." Citizen Advocates, 561 F. Supp. at 1240; Armco Steel, 790 F. Supp. at 324 (the interest in having local controversies decided locally is compelling); Harris v. Republic Airlines, 699 F. Supp. 961, 963 (D.D.C. 1988). Defendants urge this Court to do so once again transferring the action to the United States District Court for the District of New Mexico. See Nichols v. Bureau of Prisons, 895 F. Supp. at 12.

Conclusion

All of the factors relevant to consideration of transfer under 28 U.S.C. § 1404(a) argue for transfer of this action to the District of New Mexico, where a challenge to the same prosecutorial decisions is pending and where the impacts of that decision will be felt. The worst possible outcome here would be to have these entwined cases proceed concurrently in two fora. Indeed, the fragmentary treatment which Plaintiff seeks through their selection of an attenuated forum does violence to the very interests of justice which the transfer statute was designed to protect. Accordingly, this Court should transfer this action to the District of New Mexico.

Dated this ____ day of January 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum In Support of Defendant's Motion to Transfer** has been served upon counsel by regular mail this ___th day of January 1996 to:

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and by **HAND DELIVERY** to:

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
INDEX TO EXHIBITS	x
Introduction	1
Factual Background	2
Summary of Argument	4
ARGUMENT	5
I. Likelihood of Success on The Merits	5
A. THE COURT LACKS JURISDICTION TO ENTERTAIN A CHALLENGE TO THE ATTORNEY GENERAL'S EXERCISE OF HER DISCRETION	5
1. THE DECISION TO INITIATE A CIVIL FOREITURE ACTION IS NOT SUBJECT TO JUDICIAL REVIEW	5
B. AN INJUNCTION BY A FEDERAL COURT TO PREVENT THE UNITED STATES FROM FILING A COMPLAINT IS UNPRECEDENTED AND INAPPROPRIATE	8
C. THIS COURT SHOULD NOT ENJOIN ENFORCEMENT ACTION AGAINST GAMING THAT IS PATENTLY ILLEGAL	9
1. THERE IS ABSOLUTELY NO LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THERE IS NO SERIOUS DOUBT THAT THE GAMING IS ILLEGAL	9
a. The Indian Gaming Regulatory Act and applicable criminal statutes.....	9
b. New Mexico gambling laws.....	10

c.	The compact did not legalize otherwise illegal gambling in New Mexico.....	16
d.	Only the legislature can change the law.....	17
2.	THERE IS NO BREACH OF TRUST IN ENFORCING THE TERMS OF THE JOHNSON ACT AND THE IGRA.....	20
3.	THE TRIBE'S PROPERTY BASED CLAIMS OF CONSTITUTIONAL WRONG ARE FATALLY FLAWED.....	22
a.	The Tribes cannot demonstrate a property right to be protected against law enforcement nor, under IGRA, to be insulated from the decision in <u>Citation Bingo</u>	22
b.	Federal enforcement based upon the <u>Citation Bingo</u> decision would not impair contractual obligations.....	22
c.	The Taking clause does not limit the challenged government action.....	24
4.	NO ESTOPPEL CLAIM CAN BE MADE AGAINST THE UNITED STATES.....	25
a.	Estoppel typically does not lie against the government....	25
b.	IGRA does not make it the Secretary's role to examine state law prior to compact approval.....	25
c.	There can be no detrimental reliance because a compact cannot authorize operation of gaming devices that are illegal.....	26
II.	PLAINTIFF FAILS TO MEET THE APPLICABLE STANDARD FOR IRREPARABLE INJURY.....	27

A.	PLAINTIFF FAILS TO MEET THE STRINGENT TEST FOR GRANTING AN INJUNCTION AGAINST ENFORCING THE LAW.....	27
B.	PLAINTIFF'S INJURIES ARE OTHERWISE INSUFFICIENT TO MERIT GRANTING A TEMPORARY RESTRAINING ORDER.....	30
III.	GRANTING AN INJUNCTION WOULD HARM OTHER INTERESTED PARTIES AND WOULD NOT SERVE THE PUBLIC INTEREST OR EQUITY.....	32
	CONCLUSION	34

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE APACHE TRIBE OF THE)	
MESCALERO RESERVATION)	
)	
)	
)	CIVIL ACTION
Plaintiff,)	NO. 96-0115 (RMU)
)	
v.)	MEMORANDUM IN OPPOSITION TO
)	MOTION FOR A TEMPORARY
)	RESTRAINING ORDER
JANET RENO, ATTORNEY GENERAL,)	
BRUCE BABBITT, Secretary of)	
the Interior,)	
)	
)	
Defendants.)	

Introduction

Through this proceeding plaintiff ("Tribe" or "Mescalero Apache Tribe") seeks the unprecedented relief of an injunction against the United States' filing of a complaint in federal court. Contrary to all settled authority, the Tribe asks this Court to enjoin the United States Attorney of the District of New Mexico from enforcing the laws of the United States. As previously set forth in the United States' Motion to Transfer, the identical issues are presently before the District Court of New Mexico in Santa Ana Pueblo et al. v. Kelly, et al., Civil No. 96-0002 MV/WWD (D.N.M.). The legal issues raised by the Tribe here will be resolved by the District Court in New Mexico.

The Tribe has no possibility of success on the merits because it attempts to interfere with the Department of Justice's

enforcement discretion. In light of the Attorney General's broad discretion to enforce federal law, the Tribe's effort must fail.

Factual Background

The Mescalero Apache Tribe is one of ten Tribes in New Mexico that are conducting casino-style gambling. Such activity constitutes Class III gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"), and includes all gaming not otherwise defined as Class I or Class II gaming under IGRA.¹ It encompasses house-banked card games such as baccarat and blackjack, casino games such as roulette and craps, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering and lotteries. 25 U.S.C. § 2703(7)(B); 25 C.F.R. § 502.4. The Tribes claim they are conducting Class III gaming legally based upon compacts which were signed by the Tribe and the Governor of New Mexico, Gary Johnson, and later approved by the Secretary of Interior ("Secretary").

Generally, Congress has applied state gambling laws to Indian country. Section 1166 of Title 18 assimilates state gambling laws in Indian country, with enforcement responsibility lying exclusively with the United States. It removes state law prohibitions only if the gambling being conducted is done so in compliance with a Tribal-State compact which is in effect

¹ Class I gaming encompasses certain traditional forms of Indian gaming, 25 U.S.C. § 2703(6), and is within the exclusive jurisdiction of the tribes, 25 U.S.C. § 2710(a)(1). Class II gaming includes bingo and certain other enumerated games. 25 U.S.C. § 2703(7)(A).

pursuant to IGRA. Likewise, the Johnson Act, 15 U.S.C. § 1175, makes gambling devices, such as slot machines and video gambling machines, illegal in Indian country. IGRA withdraws this ban only if a compact is in effect and the devices are legal in the state. Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir. 1993). Thus, if a state prohibits gambling devices or other forms of gambling activity, such activity is illegal as a matter of federal law in Indian country. Furthermore, if illegal, it cannot be sanctioned under IGRA by a Tribal-State compact.

In December, 1995, the United States Attorney advised ten New Mexico Tribes, in writing, that the gambling that they were and are offering to the public is illegal in New Mexico, not a legitimate subject of the compacts and, therefore, in violation of federal criminal law. After informing the gaming Tribes of his position, the United States Attorney provided them an opportunity to voluntarily close their operations within 30 days after which time they would face civil forfeiture proceedings. In the event of non-compliance, the United States Attorney intended to file complaints in civil forfeiture, inter alia, to afford the Tribes the full range of procedures and remedies available under the civil forfeiture provisions.

In Santa Ana, the other nine gaming Tribes in New Mexico filed an action against these defendants and the United States Attorney in the District of New Mexico raising substantially the same issues as those raised in the instant

proceeding. They, too, sought temporary and preliminary injunctive relief. However, a stipulation was crafted obviating the need for a temporary restraining order. (See Exhibit "C" to Federal Defendants' Motion to Transfer). In part, the Tribes committed to closing their casinos voluntarily if the Court rules against them on the issue of the legality of the gaming. The United States Attorney in turn agreed not to file criminal proceedings or forfeiture actions against those Tribes provided they fully comply with the stipulated agreement. Further, the parties consented to an expedited resolution of what was acknowledged to be an important public issue.

Summary of Argument

Plaintiff's Motion for a Temporary Restraining Order must be denied because it fails to meet this Circuit's standards for injunctive relief which place the burden upon them to establish: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) proof that the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) that the injunction, if issued, will not be adverse to the public interest. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). See also Cuomo v. United States Nuclear Regulatory Comm'm, 772 F.2d 972, 974 (D.C. Cir. 1985); Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp., 865 F. Supp. 2, 5-6 (D.D.C. 1994).

The Tribe has no possibility of success on the merits because the Attorney General has broad and presumptively unreviewable discretion to enforce the laws of the United States. This Court lacks jurisdiction to interfere with her decisions on how and in what manner she should execute those laws. Moreover, the gaming being conducted by the Tribe is illegal as a matter of federal and state law. Therefore, equity weighs heavily against granting the relief the Tribe seeks because to do otherwise would be to sanction illegal activity, an action contrary to the interests of the public. The Tribe has not demonstrated any irreparable harm sufficient to tip the balance of the scales in its favor.

ARGUMENT

I. LIKELIHOOD OF SUCCESS ON THE MERITS.

To demonstrate a substantial likelihood of success, the Tribe is "required to present a prima facie case showing a reasonable probability that [it] will ultimately be entitled to the relief sought." Autoskill, Inc. v. National Educ. Support Sys., Inc., 994 F.2d 1476, 1486 (10th Cir. 1993), cert. denied, 114 S. Ct. 307 (1993) (citations omitted). The Tribe has no such likelihood because as will be discussed, jurisdiction does not lie to interfere preemptively with a prosecutorial decision. No waiver of sovereign immunity allows relief that would restrain the United States Attorney from taking his proposed action. The Tribe's concerns are properly asserted only in a civil forfeiture action or other criminal proceeding, and its due process rights

will be protected in the process available in such proceedings. Even assuming, arguendo, that the Court has jurisdiction to entertain the Tribe's claims, the Tribe still cannot prevail on the underlying merits of this action.

A. THE COURT LACKS JURISDICTION TO ENTERTAIN A CHALLENGE TO THE ATTORNEY GENERAL'S EXERCISE OF HER DISCRETION.

1. THE DECISION TO INITIATE A CIVIL FORFEITURE ACTION IS NOT SUBJECT TO JUDICIAL REVIEW.

The Supreme Court "has recognized on several occasions over many years that [the] decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). "This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of . . . decisions to refuse enforcement." Id.

The presumption that prosecutorial discretion is not subject to judicial review can be rebutted only if Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion" Chaney, 470 U.S. at 834-835. That is, there must be a "law to apply." Id. However, Congress has not expressed an intent to circumscribe the discretion of the Attorney General to decide when or whether to pursue criminal enforcement actions, nor has Congress provided

any standard by which a Court could review the exercise of that discretion.

The Attorney General acts as the "chief law officer and head of the Department of Justice an executive branch of Government," Parker v. Kennedy, 212 F. Supp. 594, 595 (S.D.N.Y. 1963), and has broad powers to conduct civil and criminal litigation.² In that capacity, she "must initially interpret" the laws of the United States, United States v. Nixon, 418 U.S. 683, 703, (1974), and present the position of the United States when the matter is litigated. The Attorney General's control over the commencement of litigation is discretionary and not reviewable in federal court. See, e.g., Creek Nation v. United States, 318 U.S. 629, 639 (1943); United States v. Smith, 523 F.2d 771 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976). Her "authority to make determinations includes the power to make erroneous decisions as well as correct ones." Swift & Co. v. United States, 276 U.S. 311, 332 (1928).

Furthermore, the United States Supreme Court has historically recognized the need for broad discretion concerning decisions related to Indian litigation. "[D]iscretion would seldom be more necessary than in determining when to institute

² 28 U.S.C. § 516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

(emphasis added).

legal proceedings." Creek Nation v. United States, 318 U.S. 629, 639 (1943). Indeed, as this Court has stated in the context of Indian water rights litigation:

[T]he Court concludes that neither 5 U.S.C. § 701, et seq., 28 U.S.C. § 1362, nor 28 U.S.C. §§ 2201-2202, nor any other statute gives this court jurisdiction over the Attorney General's exercise of litigating judgment.

White Mountain Apache Tribe v. Smith, Civil No. 81-1205, slip op. at 1 (D.D.C. June 22, 1981), aff'd mem., 675 F.2d 1341 (D.C. Cir. 1982), cert. denied, 463 U.S. 1228 (1983), see attached Exhibit "A"; Crow Tribe of Montana v. United States, Civ. No. 87-2155 (D.D.C. Aug. 1992), see attached Exhibit "B".

The allegations by the Tribe in its pleadings are intended to challenge the decisions of the Attorney General and the United States Attorney in their investigation and enforcement of violations of federal criminal law. This is, quite obviously, an area over which no statute has given the Court jurisdiction. See, e.g., Weisberg v. U.S. Dept. of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974); Powell v. Katzenbach, 359 F.2d 234, 235 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). A determination of which claims to prosecute and how they shall be prosecuted is manifestly committed to the discretion of the Attorney General. As Judge Burger stated in Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967):

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether

to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

Moreover,

In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review.

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480 (D.C. Cir. 1995). Simply put, that the Tribe may disagree as to whether forfeiture claims should be instituted does not mean that the Tribe can divest the Attorney General of her own legal prerogatives and responsibilities to enforce the law -- the patent objective of this suit.

B. AN INJUNCTION BY A FEDERAL COURT TO PREVENT THE UNITED STATES FROM FILING A COMPLAINT IS UNPRECEDENTED AND INAPPROPRIATE.

Plaintiff's request for a temporary restraining order asks this Court to prevent the United States from filing a complaint in a civil forfeiture proceeding. Such action is wholly unprecedented under these circumstances. The federal court in which such a complaint would be filed can resolve any issues that the Tribe may wish to raise. To close the doors of the federal courthouse to the United States Attorney is wrong as a matter of jurisdiction, separation of powers, and law.

C. THIS COURT SHOULD NOT ENJOIN ENFORCEMENT ACTION AGAINST GAMING THAT IS PATENTLY ILLEGAL.

1. THERE IS ABSOLUTELY NO LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THERE IS NO SERIOUS DOUBT THAT THE GAMING IS ILLEGAL.

The Tribe first asserts that the compact is "in effect." However, it is unnecessary for the Court to reach the question of whether the compact is "in effect" as a matter of federal law. That is because the Court can find, based upon federal and New Mexico law, that the gambling the Tribe offers to the public is illegal.

a. The Indian Gaming Regulatory Act and applicable criminal statutes.

As discussed above, Class III gaming, that which the Tribe asserts it is permitted to do under the compact encompasses house-banked card games such as baccarat and blackjack, casino games such as roulette and craps, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering and lotteries. 25 U.S.C. § 2703(7)(B); 25 C.F.R. § 502.4. Congress mandated that Class III gaming would be lawful on Indian lands only when those activities are authorized by the Tribe, located in a State that permits such gaming and conducted in conformance with a compact entered into between the State and the Tribe. 25 U.S.C. § 2710(d)(1).

Congress enacted IGRA against the backdrop of the Johnson Act, 15 U.S.C. §§ 1171-1178. The Johnson Act bans the use of gambling devices on certain Federal lands and in Indian country. 15 U.S.C. § 1175. See Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir. 1993). In order for a gambling device to be legally possessed or operated in Indian country, the bar of 15 U.S.C. § 1175 must be lifted by virtue of

a compact with a state in which the devices are legal. Section 2710(d)(6) of IGRA states:

The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that-

(A) is entered into under paragraph (3) by a **state in which the gambling devices are legal**, and

(B) is in effect.

25 U.S.C. § 2710(d)(6) (emphasis added).

Section 1166 of Title 15 assimilates "all State laws pertaining to the licensing, regulation or prohibition of gambling" and applies them to Indian country and gives the "United States exclusive jurisdiction over criminal prosecutions of violations of State gambling laws . . ." 18 U.S.C. § 1166(a) and (d). If a Tribal-State compact has been entered into and is in effect, then the gaming being "conducted under" the compact does not constitute gambling within the meaning of Section 1166. However, gaming which is not permitted "for any purpose by any person, organization, or entity . . ." in the state cannot be "conducted under" a compact, pursuant to IGRA. 25 U.S.C. § 2710(d)(1)(B).

Thus, IGRA and the Johnson Act specifically incorporate state law. The Tribe has no possibility of prevailing because it is clear that the gambling being conducted is illegal as a matter of federal and state law and was at the time the compact was signed.

b. New Mexico gambling laws.

The law of New Mexico which has existed from its territorial days is that, with very limited exceptions, gambling is a crime.¹ Gambling devices are illegal in New Mexico and have been since before statehood. Based upon this authority and its predecessors, New Mexico courts have consistently held that slot machines and other gambling devices are illegal. State v. Las Cruces Elks Club of Benevolent & Protective Order of Elks, 54 N.M. 137, 215 P.2d 821 (1950); Giomi v. Chase, 47 N.M. 22, 132 P.2d 715 (1942); Territory v. Jones, 14 N.M. 579, 99 P. 338 (1908).

Video gambling machines are also illegal in New Mexico. On more than one occasion, fraternal organizations have attempted to bring video gambling within the ambit of the Bingo and Raffle Act, N.M. Stat. Ann. §§ 60-2B-1 et seq. (1978) (1991 Repl. Pamp.) which permits charities, fraternal organizations and other such entities to conduct bingo and raffles under certain limited circumstances and under the auspices of the New Mexico Regulation

¹ Licensed pari-mutuel wagering on horse races has been legalized, N.M. Stat. Ann. § 60-1-10 (1978) (Cum. Supp. 1995), as has pari-mutuel wagering on bicycle races, N.M. Stat. Ann. § 60-2D-15 (1978) (1991 Repl. Pamp.). Other limited forms of gaming are permitted to be conducted by charitable, fraternal and other organizations under the Bingo and Raffle Act, N.M. Stat. Ann. §§ 60-2B-1 et seq. (1978) (1991 Repl. Pamp.) and the permissive lottery statute, N.M. Stat. Ann. §30-19-6 (1978) (1994 Repl. Pamp.).

The Tribe refers to the pari-mutuel wagering on horse races and bicycle racing and the state lottery to attempt to argue that New Mexico permits Class III gaming, ergo all Class III gaming. That is a complete misconstruction of IGRA. See, e.g., Coeur D'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1279-1280 (D. Idaho 1994), aff'd, 51 F.3d 876 (9th Cir. 1995) (state not required to negotiate on forms of gaming not otherwise permitted even if state authorizes certain Class III games).

and Licensing Department. In the first case concerning video gambling, the Court of Appeals held that use of video gambling machines, such as video poker, on which a player could win additional games and then turn the game credits in for money or prizes was illegal. State ex rel. Rodriguez v. American Legion Post No. 99, 106 N.M. 784, 750 P.2d 1110 (Ct. App.), cert. denied, 106 N.M. 588, 746 P.2d 1120 (1987) and cert. denied, 107 N.M. 16, 751 P.2d 700 (1988). The Court of Appeals rebuffed the Clubs' argument that the definition of raffles should be construed broadly, stating: "[it] is not reasonable to assume that the legislature would authorize widespread gambling without explicitly saying so" Id. at 786-87, 750 P.2d at 1112-13.

Subsequently, the New Mexico Court of Appeals found that video machines upon which such games as poker, blackjack and keno could be played were illegal gambling devices when there was an exchange of free games won for pull tabs. American Legion Post No. 49 v. Hughes, 120 N.M. 255, 901 P.2d 186, 189-90 (Ct. App. 1994), cert. quashed, 120 N.M. 117, 898 P.2d 1255 (1995). Again, the court rejected the Clubs' attempt to bring their activity within the confines of the Bingo and Raffle Act, stating: "[t]he Clubs are not selling the rights to participate in a raffle; they are selling the rights to operate a gambling

device through which the customer might win a chance to participate in a raffle." Id. at 189.²

The New Mexico Supreme Court in Citation Bingo, Ltd. v. Otten, No. 22,736 (N.M. Nov. 29, 1995), see Exhibit "C", addressed the issue of whether a hand-held electronic device known as "Power Bingo" is a permissible piece of gaming equipment under the Bingo and Raffle Act. The Court took note of the fact that electronic or electromechanical facsimiles of any game of chance are classified as Class III gaming under IGRA. Slip op. at 6. It then stated:

[B]ecause gambling devices are proscribed generally under the criminal statutes of New Mexico, the public policy thus expressed by the legislature requires strict and not expansive interpretation of equipment specifically authorized for gaming under the Bingo and Raffle Act. No other state has authorized electromechanical gaming under an extended interpretation of machines intended or used for raffles. We . . . hold that electronic pull-tab simulations are prohibited electromechanical gambling devices.

Id. at 9. Based upon this reasoning, the Court found that "Power Bingo units are prohibited gambling devices and cannot be used." Slip op. at 11.

² The lone exception to this line of unrelenting authority was the decision of the New Mexico Court of Appeals in Infinity Group, Inc. v. Manzagol, 118 N.M. 632, 884 P.2d 523 (Ct. App.), cert. denied, 118 N.M. 533, 884 P.2d 523 (1994). Pursuant to the Bingo and Raffle Act, which permits the use of paper pull tabs, the court held that an electronic facsimile of the paper game was permissible because there was nothing in the Act which specifically prohibited its use. Id. at 526. Infinity was resoundingly overruled by the New Mexico Supreme Court in Citation Bingo, Ltd. v. Otten, No. 22,736, slip op. at 5-9 (N.M. Nov. 29, 1995).

In sum, it is clear that New Mexico has, since its territorial days, prohibited gambling devices of any kind whatsoever. All of the Tribe's machines are admittedly gambling devices. Therefore, they are being used in Indian country in violation of 15 U.S.C. § 1175 and are subject to forfeiture.

Moreover, all forms of gambling are illegal in New Mexico with the limited exceptions noted. The general rule applies to both noncommercial and commercial gambling. Making a bet or conducting a lottery is a petty misdemeanor. N.M. Stat. Ann. § 30-19-2(A) and (C) (1978) (1994 Repl. Pamp.). See, e.g., State v. Owens, 103 N.M. 121, 703 P.2d 898 (Ct. App. 1984), cert. quashed, 103 N.M. 62, 702 P.2d 1007 (1985) (making a bet constitutes a violation of this section even if it occurs in a social context).

Commercial gambling is a fourth degree felony. N.M. Stat. Ann. § 30-19-3 (1978) (1994 Repl. Pamp.). A gambling device or a gambling place is a public nuisance per se and can be enjoined. N.M. Stat. Ann. § 30-19-8 (1978) (1994 Repl. Pamp.). And, gambling devices and other equipment used in gambling are subject to forfeiture. N.M. Stat. Ann. § 30-19-10 (1978) (1994 Repl. Pamp.).

The Tribe claims that casino-style games, such as blackjack and poker, are permitted under its compact with the State because charities had allegedly been conducting "Las Vegas nights" under the permissive lottery statute. N.M. Stat. Ann. § 30-19-6(D) (1978) (1994 Repl. Pamp.). This statute is a limited exception to the general rule that conducting lotteries is

illegal. N.M. Stat. Ann. §§ 30-19-2(C) and (D) and 30-19-3(E) (1978) (1994 Repl. Pamp.). Although this statute had never been definitely interpreted before the signing of the compacts to address the Tribe's assertion that it permits casino-style gambling, the New Mexico Supreme Court has now spoken on this issue.

In both State ex rel. Clark v. Johnson, 904 P.2d 11 (1995) and Citation Bingo, the Court unequivocally declared that the permissive lottery statute does not authorize casino-style gambling. In Clark, the Court discussed the statute in the context of the Governor's assertion that casino-style gaming was being conducted by charities pursuant to the permissive lottery statute.³ Initially, the Court noted that neither it nor the Court of Appeals had construed the statute "to decide specifically what forms of gaming or gambling the legislature may have intended to allow . . ." Clark, 904 P.2d at 20. After discussing the term "lottery," the Court rejected the Governor's position and stated: "We think that any expansive construction of the term 'lottery' in Section 30-19-6 that would authorize any of these organizations to engage in a full range of 'casino-style' gaming would be contrary to the legislature's general

³ The New Mexico Supreme Court ruled in State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) that the compacts were of no legal effect as a matter of state law. The Defendants take no position at this time as to whether the compacts are in effect as a matter of federal law. The Defendants are not citing Clark for the proposition that the compacts have no legal effect, but rather for the proposition that under state law the types of gaming the Tribe is conducting are illegal.

public policy against gambling." Clark, 904 P.2d at 21. The Court further stated:

We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy.

Id. at 21.

The Supreme Court reiterated this conclusion more forcefully in Citation Bingo:

We take judicial notice of recent newspaper references to "the Las Vegas-night law" applicable to charities. While the record before this Court does not reveal whether gambling devices traditionally found in casinos have in fact been used in this state for gratuitous amusement or even to make bets we find no statutory authorization for any "Las Vegas-night" gambling in New Mexico. We are cited to no authoritative use of the term "lottery" to include casino-style gaming.

Citation Bingo, slip op. at 5.

Citation Bingo, together with the previous decisions in American Legion and Rodriguez, establish beyond doubt that casino-style games such blackjack and poker in all of its forms, keno, baccarat, craps and roulette are illegal in New Mexico and were at the time the compacts were signed. Therefore, such activity is illegal as a matter of federal law.

c. The compact did not legalize otherwise illegal gambling in New Mexico.

The Tribe claims that its activity is legal because the compact provides

The Tribe may conduct . . . any or all Class III Gaming, that, as of the date this Compact is signed by the Governor of the State is permitted within the State for any purpose by any person, organization or entity

(Compact, Section 3.) The compact includes various recitals about what the Tribe claims was legal gaming, such as casino-style gambling, video pull tabs and video bingo. The compact does not, however, provide specifically for slot machines.

Upon information and belief, the Tribe has slot machines, poker machines and multi-game machines which permit different types of games to be played such as poker and keno. In addition, the Tribe conducts various table games such as blackjack, craps and poker.

As has been established, gambling devices, video games and casino-style games were illegal in New Mexico pursuant to existing statutes at the time the compacts were signed by the Tribes and the Governor and published in the Federal Register. Moreover, that activity was not and could not have been legalized by the compact. The fact that compacts were signed by Governor Johnson and the tribes and approved by the Secretary does not alter this basic premise. The Tenth Circuit in Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir. 1993) expressly held that a Governor cannot by compact authorize gaming forbidden by his state's laws stating that it would be "patent bootstrapping" to find that the compact legalizes otherwise illegal gambling for purposes of IGRA's waiver

provision. 995 F.2d at 181.⁴ It opined: "Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal . . . and that the compact be 'in effect'" See also United States v. Cook, 922 F.2d 1026, 1033-35 (2d Cir.), cert. denied, 500 U.S. 941 (1991) (15 U.S.C. § 1175 not repealed by IGRA).

Therefore, it is clear that the compact did not authorize the Tribe to conduct gambling that is otherwise illegal in New Mexico.

d. Only the legislature can change the law.

The Tribe claims that a change in New Mexico law occurred when Citation Bingo was decided because the custom and practice under the permissive lottery statute had been to permit casino-style gambling by charitable organizations. The Tribe bases this contention on its bare assertion that such activity had been ongoing and condoned by the New Mexico Attorney General. The Tribe does not, however, support this statement with any admissible evidence.

Only the legislature can change the law. It is established beyond peradventure that "the public policy of a state is for the legislature whose judgment as to the wisdom, expediency or necessity of any given law is conclusive on the courts unless the declared public policy runs counter to some

⁴ Obviously, Potawatomi presents an insurmountable obstacle for the Tribe in the Tenth Circuit. At present, there is no such clear pronouncement in this Circuit.

specific constitutional objection." Village of Deming v. Hosdreg Co., 62 N.M. 18, 33, 303 P.2d 920, 930 (1956).

The responsibility of the courts is confined to interpreting the law as they understand it, "not to making of new law to satisfy [their] conceptions of right or wrong." State v. Pace, 80 N.M. 364, 371, 456 P.2d 197, 204 (1969). As the New Mexico Supreme Court quoted with approval:

"We make no laws. We change no constitutions. We inaugurate no policy. When the Legislature enacts a law, the only question which we can decide is whether the limitations of the Constitution have been infringed upon."

Hutchens v. Jackson, 37 N.M. 325, 330, 23 P.2d 355, 358 (1933) (quoting Prohibitory Amendment Cases, 24 Kan. 700, 706 (1881)).

Under similar circumstances, the Federal Circuit in Catawba v. United States, 982 F.2d 1564, 1570 (Fed. Cir.), cert. denied, 113 S. Ct. 2995 (1993) found that notice of the law is an objective test:

While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe subjectively first knew what the Act means, it is fundamental jurisprudence that the Act's objective meaning and effect were fixed when the Act was adopted. Any later pronouncements simply explain, but do not create, the operative effect.

The New Mexico Supreme Court did not alter the law when it decided Citation Bingo; it merely interpreted statutes which had been in existence for several years.⁵ And, as the Court

⁵ In addition, at the time the compacts were signed, the gaming Tribes of New Mexico had before them a definition of the
(continued...)

pronounced, the New Mexico legislature, through the various gambling statutes, has decreed that "[g]ambling is a crime in New Mexico." Citation Bingo, slip op. at 3. Moreover, "[c]urrent legislation and the public policy expressed by that legislation do not favor the accommodation of gambling." Id. at 12.

It is axiomatic that if the courts of New Mexico cannot change the law of the State as it concerns gambling, the New Mexico Attorney General surely cannot. Therefore, the purported failure of the New Mexico Attorney General and the various district attorneys to enforce the law, if true, would constitute nothing more than mere inaction. The Tribe cannot make legal by custom and practice that which has been declared illegal by the State's highest court and which in turn becomes federal law through 18 U.S.C. § 1166. "[C]ustom and usage involving criminality do not defeat a prosecution for violation of a federal criminal statute." United States v. Brookshire, 514 F.2d 786, 789 (10th Cir. 1975). See also Burnett v. United States, 222 F.2d 426, 427 (6th Cir. 1955) ("No custom is a justifiable defense for violation of the criminal code of the United States."); Smith v. United States, 188 F.2d 969, 970 (9th Cir.

⁵(...continued)
word "lottery" very recently rendered by the New Mexico Supreme Court. In discussing the propriety of the format of the proposed constitutional amendment which would have permitted a state-conducted lottery, the Court stated "[a] . . . lottery . . . is a single, limited form of gambling involving the purchase of chances and a drawing of lots to determine a winner." State ex rel. Clark v. State Canvassing Board, 119 N.M. 12, 17, 888 P.2d 458, 463 (1995). This explanation certainly does not comport with the Tribe's interpretation.

1951) ("Custom, involving criminality, cannot justify a criminal act.").

"[T]he fact that it is the legal custom to violate the law does not constitute a defense. It is immaterial that such custom and usage may have been for a long time acquiesced in by the community in which it prevails."

State v. Evans, 225 So. 2d 548, 551 (Fla. Ct. App. 1969), cert. denied, 397 U.S. 1053 (1970) (quoting 1 Wharton Criminal Law and Procedure § 129). See also State v. Lujan, 79 N.M. 525, 527, 445 P.2d 749, 751 (Ct. App. 1968) ("Lack of uniformity in enforcement of the law does not excuse a particular defendant's violation of the law . . ."). Furthermore, the New Mexico Attorney General's alleged failure to enforce the permissive lottery statute cannot bind the United States Attorney in his prosecutorial decisions as he interprets state law through the prism of 18 U.S.C. § 1166.

In sum, there was no "change in law" upon which the Mescalero Apache Tribe can found its claims. Therefore, the gambling which is occurring on the Tribe's reservation is illegal pursuant to the Johnson Act and 18 U.S.C § 1166, and the Tribe cannot demonstrate a substantial likelihood of prevailing on the merits.

2. THERE IS NO BREACH OF TRUST IN ENFORCING THE TERMS OF THE JOHNSON ACT AND THE IGRA.

The Mescalero Apache Tribe cannot claim a breach of trust where the United States advises it to comply with the terms of IGRA and the applicable federal criminal statutes. There is no breach of trust when the effect of compliance precludes a criminal violation of the Johnson Act and other provisions and

allows the Tribes to act consistently with federal civil and criminal laws.

A federal agency incurs specific fiduciary duties toward particular Indian Tribes when it is required by statute to manage or operate Indian lands or resources. United States v. Mitchell, 463 U.S. 206, 226 (1983) (specific duties defined by statute and regulation). Compare United States v. Mitchell, 445 U.S. 535, 545 (1980) (general limited trust). The elements of this type of common law trust are a trustee (the United States), a beneficiary (the Indian allottees) and a trust corpus (the Indian property, lands or funds being managed). Id. at 225. See, e.g., Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995). The Tribe's actions in conducting Class III casino-style gaming are not protected trust assets. The facts show that the Tribe is gaming illegally. It cannot now complain that civil forfeiture of their gambling devices and other assets by the United States would interfere with its sovereign gaming rights. The United States does not manage Indian gaming assets and property under IGRA as a trustee. Contrary to the Tribe's contention that the federal government has assumed pervasive control or supervision over its gaming activities, the federal government manages none of the day-to-day activities involving Indian gaming. The business decisions are left completely in the hands of the Tribe.

"[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" Pawnee v. United States,

830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) (quoting United States v. Mitchell, 463 U.S. 206, 224 (1983)). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no judicially enforceable claim for breach of "trust" can be stated. Pawnee, 830 F.2d at 192. See Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

Here the federal government cannot be charged with a breach of trust for seeking compliance by the Tribe with the statutory prohibition on Indian gaming contained in the Johnson Act and other provisions and not exempted under IGRA. The federal government violated no statute. Instead, it seeks enforcement of federal criminal laws. Assuming, arguendo, a fiduciary trust, Congress has defined the terms of that trust in the Johnson Act and in IGRA. Abiding by the terms of those provisions is inherently consistent with any alleged fiduciary trust duties contained therein.

3. THE TRIBE'S PROPERTY BASED CLAIMS OF CONSTITUTIONAL WRONG ARE FATALLY FLAWED.

- a. The Tribes cannot demonstrate a property right to be protected against law enforcement nor, under IGRA, to be insulated from the decision in Citation Bingo.

The Tribe argues that its federally approved IGRA compact conveyed a property immunity from the Johnson Act, 15 U.S.C. §§ 1171-1178, and related federal law enforcement discretion. The broad reach of law enforcement discussed above, precludes the Tribe's success on this argument.

Alternatively, the Tribe constructs a theory which interprets the compacts as conveying a property interest immunizing them against what they describe to be a substantive change in state gaming law: i.e. Citation Bingo. The Tribe reasons that casino-style gambling and video gambling were legal for any person in New Mexico, 25 U.S.C. §2710(d)(1)(B), when the compacts were approved by the Secretary and published in the Federal Register. As detailed above, however, state law did not allow the Tribe's gaming, and custom and practice cannot change the law.

b. Federal enforcement based upon the Citation Bingo decision would not impair contractual obligations.

First, the Tribe points to the Constitution's Contract Impairment Clause, U.S. Const. Art I, § 10, which provides that a state may not "pass any ... Law impairing the Obligation of contracts... ." See also N.M. Const. Art. II, 19. The Tribe cannot demonstrate that the United States Attorney's notice of intent to enforce the Johnson Act unconstitutionally impairs their rights. The federal clause applies to state, not federal, action. As a matter of law, federal enforcement action cannot result in impairment of contractual rights in violation of the United States Constitution.

At the state level, there has been no new law passed; rather, the state's highest court has interpreted preexisting legislation. The Tribe cannot demonstrate that a "new" action has occurred which represents a "substantial" change. Cf.

Versluis v. Town of Haskell, 154 F.2d 935, 938, 943 (10th Cir. 1946) ("suitor cannot toll or suspend the running of the statute of limitations by relying upon the uncertainties of controlling law. It is incumbent upon him to test his right and remedy in the available forum."). The Tribe has not demonstrated that Citation Bingo is a change in the New Mexico Supreme Court's interpretation of New Mexico law that unfairly "burdens" the compact. The "detriment" worked by the Citation Bingo decision is not confined to the Tribe. The New Mexico Supreme Court's interpretation of state law in both Clark and Citation Bingo precludes the State from benefitting from the revenue sharing contemplated by the gaming compacts. Moreover, recent Tenth Circuit authority, has established that "the correction of a misapplied existing law which disadvantages one in reliance on its continued misapplication" is not constitutionally prohibited. Stephens v. Thomas, 19 F.3d 498, 500 (10th Cir. 1994) (ex post facto clause does not prohibit correction of misapplied existing law). Cf. Catawba Tribe, 982 F.2d at 1570.

Assuming, arguendo, that the Citation Bingo decision can be fairly characterized as a change of law, the impairment claim otherwise fails. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). "Although the language of the Contracts Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people'." Id. at 410 (quoting Blaisdell, 290 U.S. at 434) and at 436 (citing Stone v.

Mississippi, 101 U.S. 814, 819 (1879)) (amendment in a state constitution that put an end to previously authorized state lottery did not impair contracts). See also Douglas v. Kentucky, 168 U.S. 488, 502 (1897) ("lottery grant is not in any sense a contract, within the meaning of the Constitution of the United States, but is simply a gratuity and license").

c. The Taking Clause does not limit the challenged government action.

The Fifth Amendment's Taking Clause is not a limitation on federal government authority but, instead, a condition subsequent to governmental action. If the governmental action effects compensable interference with a property expectancy, then just compensation is due. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Because the Tucker Act, 28 U.S.C. § 1491, affords the just compensation remedy required by the Constitution, an injunctive remedy is unavailable. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

The Tribe's taking claim will fail for an additional reason. Even assuming a total loss of economically productive or beneficial use, compensability will still turn on the threshold question of whether the plaintiff indeed held the claimed property expectancy.⁶ Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) (the "logically antecedent

⁶ The Defendants do not concede that the Tribe has lost all economically beneficial use contemplated by their compacts. Assuming that proposition, arguendo, the claim would nonetheless fail.

inquiry"). As detailed above, the Tribe will be unable to demonstrate that its contract "expectancies" included a right to be insulated from prosecutorial discretion and New Mexico's interpretation of its police power and gaming statute in Citation Bingo.⁷

4. **NO ESTOPPEL CLAIM CAN BE MADE AGAINST THE UNITED STATES.**
- a. **Estoppel typically does not lie against the government.**

In DePaolo v. United States 45 F.3d 373, 376 (10th Cir. 1995) (quoting FDIC v. Hulsey, 22 F.2d 1472, 1490 (10th Cir. 1994)) (citation omitted), the Tenth Circuit reiterated the severe limitation on estoppel against the government: "It is far from clear that the Supreme Court would ever allow an estoppel defense against the government under any set of circumstances" In any event, estoppel does not apply to the enforcement of the laws of the United States:

Courts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws.

FDIC v. Hulsey, 22 F.2d at 1489. Simply, enforcement of the public laws represented in the Johnson Act and IGRA cannot be undermined by estoppel against officers and agents of the United States.

⁷ The Tribe's estoppel based property theory also fails inasmuch as the Tribe's reasonable expectancies should have contemplated both law enforcement obligations to assure compliance with applicable federal law.

- b. IGRA does not make it the Secretary's role to examine state law prior to compact approval.**

Assuming, arguendo, that equitable estoppel had any application, "equitable estoppel against the government is an extraordinary remedy." Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1498 (10th Cir. 1994). Assuming estoppel could be applicable, the Courts have indicated that there must be a showing of affirmative misconduct on the part of the government.

"Affirmative misconduct is a high hurdle for the asserting party to overcome." Id. "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct." Isaac, 18 F.3d at 1499 (citation omitted).

There is no affirmative misconduct in this case. The Secretary's limited responsibility was to approve the compact under 25 U.S.C. § 2710. The Secretary of the Interior's approval process does not contemplate an examination of state law. The issue of whether gaming is legal under state law is independent of compact approval. Potawatomie v. Green, 995 F.2d 179 (10th Cir. 1993).

- c. There can be no detrimental reliance because a compact cannot authorize operation of gaming devices that are illegal.**

For estoppel to apply, there must be reasonable detrimental reliance on whatever conduct is in question. See Hulsey, 22 F.3d at 1489. In this instance, the Tribe was, at a minimum, on constructive notice that, irrespective of the

existence of a compact, the Johnson Act exemption did not apply if the gaming was illegal in the State, 25 U.S.C. § 2710 (d) (6), and that Class III gaming activities were "lawful" only if "located in a state that permits such gaming for any purpose," 25 U.S.C. 2710(d)(1)(C). Furthermore, in Potawatami, the Tenth Circuit stated unequivocally that compact approval and state legality were both independently required for the gaming to be legal. It was under this backdrop of law that the Secretary's approval was sought and given. The approval contained no representation or warranty that the gaming compacted for was legal. Even had it done so, it would not matter. IGRA explicitly requires both an approved compact and legal gaming within the state for the gaming to be lawful.

II. PLAINTIFF FAILS TO MEET THE APPLICABLE STANDARD FOR IRREPARABLE INJURY.

The Tribe is requesting relief from civil forfeiture and criminal proceedings under the Johnson Act, 15 U.S.C. § 1175, and 18 U.S.C. § 1166. If the Tribe is to establish the requisite harm, it must flow from the mere filing of a civil forfeiture complaint. The United States Attorney does not intend imminent seizure of any gambling equipment machines. In reality, the Tribe urges the Court to condone continued illegal activity that happens to be extremely lucrative for the Tribe and those who lease, sell, maintain and manage gambling devices.

A. PLAINTIFF FAILS TO MEET THE STRINGENT TEST FOR GRANTING AN INJUNCTION AGAINST ENFORCING THE LAW.

The decision of whether to enforce the laws of the United States through either criminal or civil means are matters committed to the discretion of those in the agencies charged with that enforcement. Heckler v. Chaney, 470 U.S. 821, 830-831 (1985); United States v. Batchelder, 442 U.S. 114, 124 (1979). See also Cox v. Secretary of Labor, 739 F. Supp. 28 (D.D.C. 1990) (discretion to investigate and bring suit). Attacks on decisions to undertake such investigations and preemptive strikes at these agencies are neither appropriate nor permitted. "Therefore, federal courts are reluctant to intervene in investigations and or prosecutions." Hartford Assoc. v. United States, 792 F. Supp. 358 (D.N.J. 1992) (citing Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030, 1065 (D.C. Cir 1978), cert. denied, 440 U.S. 949 (1979)) (Noting the particularly heavy burden of a party seeking equitable intervention, "only the most extraordinary circumstances warrant anticipatory judicial involvement . . .").

The facts in this case do not merit granting injunctive relief from the possible filing of a civil forfeiture action. Although courts have granted injunctions in some criminal proceedings under extraordinary circumstances, such relief is not appropriate in this action to enforce the goals of the criminal law through civil means, as the Supreme Court explained in Younger v. Harris, 401 U.S. 37, 46 (1971) (citations omitted; emphasis added):

Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution,

could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

See also Deaver v. Seymour, 822 F.2d 66 (D.C. Cir. 1987).

Similarly, in North v. Walsh, 656 F. Supp. 414, 420 (D.D.C. 1987), the court acknowledged the particularly heavy burden on a party who seeks to enjoin a criminal investigation. The court noted that the Supreme Court "routinely rejected collateral challenges which impede ongoing criminal investigations." Id.

Adequate legal remedies exist in civil forfeiture. The Johnson Act, 15 U.S.C. § 1177 provides, in pertinent part:

[a]ny gambling device . . . possessed or used in violation of the provisions of this chapter shall be seized and forfeited to the United States. All provisions of law relating to . . . forfeiture, . . . for violation of the customs laws; . . . shall apply to seizures and forfeitures incurred, under the provisions of this chapter, . . .

In a forfeiture hearing under 28 C.F.R. § 8.10, the regulation implementing § 1177, any person with a legal or equitable interest in property forfeited under the Johnson Act may file a petition for remission of such property. A petition may contain, inter alia, "the facts and circumstances, established by satisfactory proof, relied upon by the petitioner to justify remission or mitigation of the forfeiture." 28 C.F.R. § 8.10(b)(3). Thus, a petitioner could claim that the Johnson Act does not apply to certain forfeited devices. See, e.g., United States v. One Hundred Thirty Seven (137) Draw Poker-Type Machines

& Six (6) Slot Machines, 606 F. Supp. 747 (N.D. Ohio 1984), aff'd, 765 F.2d 147 (6th Cir. 1985) (in a forfeiture action defendants raised the affirmative defense that the machines are not gambling devices within the meaning of the Johnson Act).

Moreover, the Tribe has adequate remedies at law if its taking theory or breach of trust theory is correct. "[T]he availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur as a result of the final-conveyance provisions . . ." Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 149 (1974). If compensation under the Tucker Act is available, injunctive relief is not for property deprivations. Union Carbide Agr. Products Co. v. Costle, 632 F.2d 1014, 1019 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981).

If, as the Tribe alleges, the United States has breached trust duties or taken their property without just compensation, they would have an adequate remedy at law under the Tucker Act for breach of trust. The Tribe claims that the duties of the Department of the Interior and Department of Justice are pervasive management duties (Complaint, ¶¶ 83-86) akin to the Supreme Court's decision in Mitchell II. Assuming, arguendo, such duties exist, the Supreme Court found in Mitchell II that an action could be brought in the Court of Federal Claims for money damages for breach of trust. Thus, there is no irreparable harm.

**B. PLAINTIFF'S INJURIES ARE OTHERWISE INSUFFICIENT TO
MERIT GRANTING A TEMPORARY RESTRAINING ORDER.**

To be sufficient, "[t]he harm must be both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985). See also Freeman v. Cavazos, 756 F. Supp. 1 (D.D.C. 1990). Generally, claims of monetary injury are insufficient to compel issuing a preliminary injunction. Citing Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), this Circuit has held that monetary injuries suffered by a petitioner, however substantial, are insufficient alone, to warrant a preliminary injunction. Perpetual Bldg. Ltd. Partnership v. District of Columbia, 618 F. Supp. 603, 615 (D.D.C. 1985).

Generally, destruction of a business constitutes irreparable harm sufficient to warrant the granting of a preliminary injunction provided the other three elements [of the test for a preliminary injunction] are met.

Id. at 616 (emphasis added).

"Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movants business." Housing Study Group v. Kemp, 736 F. Supp. 721, 736 (D.D.C. 1990) (quoting Ashland Oil, Inc. v. Federal Trade Comm'n, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976). In Brown v. Artery Organization, Inc., 691 F. Supp 1459 (D.D.C. 1987), where the owner of housing units sought a stay pending appeal of a preliminary injunction so that repairs and modifications could be made to those units in anticipation of

raising the rents, the court denied the motion for a stay, explaining in part:

[i]t is well settled that economic loss, the sole basis for the Artery defendant's claim of irreparable injury "does not in and of itself, constitute irreparable harm."
Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

Rena Brown, 691 F. Supp. at 1461. See also Shoshone-Bannock Tribes v. Reno, Civ. No. 93-0581 (NHJ) (D.D.C. Aug 2. 1993), aff'd Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995), see Exhibit "D".

The Tribe has failed to demonstrate destruction of a business due to the possibility of a civil case. President Chino's Affidavit speaks in terms of possibilities, not absolutes. The existing civil action in New Mexico in which the legality of the gaming is being litigated, together with the pronouncements of the United States Attorney, have not stopped people from patronizing the casinos.

Nor has the Tribe demonstrated how its reputation would be adversely affected were a civil forfeiture action to be filed. The United States Attorney's position is well known and has been for some time.

Moreover, unlike the above-cited cases where economic injury was an insufficient cause for granting an injunction, the source of revenue in the instant case is illegal gambling. And, this Tribe began illegal, non-compacted gambling long before the compact at issue was signed.

III. GRANTING AN INJUNCTION WOULD HARM OTHER INTERESTED PARTIES AND WOULD NOT SERVE THE PUBLIC INTEREST OR EQUITY.

The Tribe maintains that neither the United States government nor the public would be harmed by the continued conduct of prohibited gaming. "[A] fundamental principle of equity jurisprudence is that 'equity follows the law.'" In re Shoreline Concrete Co. Inc., 831 F.2d 903, 905 (9th Cir. 1987) (quoting Hedges v. Dixon County, 150 U.S. 182, 192 (1893)). Accordingly, "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" I.N.S. v. Pangilinan, 486 U.S. 875, 883 (1988) (quoting Hedges, 150 U.S. at 192). See also Timken Co. v. United States, 37 F.3d 1470, 1477 (Fed. Cir. 1994) ("This court will not act in a manner contrary to a statutory provision dealing with the precise issue."); United States v. Coastal Refining and Marketing, Inc., 911 F.2d 1036, 1043 (5th Cir. 1990) ("A court in equity may not do that which the law forbids."); In re Shoreline Concrete Co., 831 F.2d 903, 905 (9th Cir. 1987) ("Courts of equity are bound to follow express statutory commands to the same extent as are courts of law."). Statutory restrictions bind courts of equity as well as courts of law. Hedges v. Dixon County, 150 U.S. 182, 192 (1893). "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law." Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122 (1873). As noted in a different context in Shondell v. McDermott, 775 F.2d 859, 868 (7th Cir. 1983):

[The doctrine of unclean hands serves] to withhold an equitable remedy that would encourage, or reward (and thereby encourage), illegal activity, as where an injunction would aid in consummating a crime, the issue in Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944).

Thus, equity cannot support the Tribe's request to be permitted to continue its illegal gambling activities.

IGRA and the Johnson Act were intended to protect the public. See 25 U.S.C. § 2702. A presumption of irreparable harm arises from a failure to enforce a statute intended to protect the public. Navel Orange Administration Comm. v. Exeter Orange Co., 722 F.2d 449, 453 (9th Cir. 1983); American Fruit Growers v. United States, 105 F.2d 722, 725 (9th Cir. 1939); United States v. Richlyn Labs Inc., 827 F. Supp. 1145, 1150 (E.D. Pa. 1992) (violation of statute "implied finding that violations will harm the public and ought to be restrained if necessary").

An applicant for injunctive relief carries a particularly heavy burden where, as here, the result of an injunction would be to impede the orderly administration of a governmental responsibility intended to serve the public interest. Yakus v. United States, 321 U.S. 414, 440 (1944). The Mescalero Apache Tribe seeks to interfere with the investigative and prosecutorial judgments of Attorney General and her United States Attorney. They do so when such decisions are traditionally committed to the discretion of the government's officials. See Heckler v. Chaney, 470 U.S. at 831. The decision as to how best to enforce the federal laws through either criminal or civil means are matters

committed to the discretion of the agencies charged with that enforcement:

In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review.

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480 (D.C. Cir. 1995).

CONCLUSION

The Tribe attempts to limit prosecutorial discretion after great forbearance by the United States Attorney, and after being duly warned to bring its casino into compliance with the law. It is abundantly clear that the injunctive relief sought by the Tribe would "interfere with a continuing government program and impede the accomplishment of important government ends."

Turner v. Kings River Conservation District, 360 F.2d 184, 197 (9th Cir. 1966). The public interest and equity call for denial of such relief. Moreover, injunctive relief is not warranted. There is no likelihood of success on the merits, no irreparable harm, and the public interest augers against interfering with the prosecutorial discretion of the United States Attorney.

For the foregoing reasons, Defendants respectfully request the Court for an Order denying Plaintiff's Motion for Temporary Restraining Order and for such other and further relief as the Court may deem just and proper.

Dated this 31st day of January 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum In Opposition To Motion For A Temporary Restraining Order has been telefax and served upon counsel by regular mail this 31st day of January 1996 to:

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