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Pojoaque's Plan to Seek an Imposed Compact: Is Interior's Process Consistent with Indian Gaming Regulatory Act (IGRA)?

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The **Pueblo of Pojoaque** needs a new **Class III** gaming compact by June 2015 in order to continue operating its casinos which are located north of Santa Fe. However, the Pueblo objected to the financial concessions being demanded by **New Mexico's Governor Susana Martinez**, concessions similar to those previously accepted by a number of other Pueblos in the state that also were facing the June 2015 expiration date for their compacts.

Pojoaque's refusal to make financial concessions beyond those in its current compact led to a collapse of the negotiations, with each side accusing the other of failure to negotiate in good faith. With that, Pojoaque filed suit in federal court alleging that the Governor had failed to negotiate in good faith in what appeared to be the initial step in a statutory process through which a compact could be imposed on the State. The statutory process is established by the **Indian Gaming Regulatory Act** at 25 U.S.C. §2710(d)(7) ("IGRA").

New Mexico responded to the federal action by moving to dismiss due to the state's 11th Amendment sovereign immunity that was not waived for the purposes of that action. Following well-established law, the federal court granted New Mexico's motion to dismiss.

The Pojoaque complaint in the federal suit strongly suggests that the tribe knew full well that the action would be dismissed for the reasons cited by the State. However, it also makes clear that Pojoaque already was invoking administrative procedures created through an Interior regulation that would impose a compact on the Tribe and State when negotiations failed. That regulation was promulgated in 1999 and is published at 25 CFR Part 291 – "Class III Gaming Procedures." While some states may not oppose the administrative process, it is significant that Texas did oppose the process and won the legal challenge. That decision was rendered in 2007 by the 5th Circuit Court of Appeals and concluded that Interior did not have legal authority to administratively impose a compact on Texas. See Texas v. United States, 497 F.3d 491 (5th Cir. 2007).

The Pojoaque dispute may soon be coming to a head. The Pueblo's Governor announced only a few days ago that the Department of the Interior has determined that his tribe is eligible for the administrative process under which the Pueblo will submit its draft compact to which the State has 60

days in which to respond. If the State proposes an alternative draft, then a mediator would select one of the two submitted drafts, with the mediator's decision subject to final Secretary approval. Without regard to the Texas litigation in 2007, the question will certainly arise as to whether the Interior Department's "solution" to an impasse in compact negotiations is lawful. The matter almost certainly will be decided by carefully following the specific language in IGRA, just as Supreme Court Justice Elena Kagan did in the recent Bay Mills Indian Community case involving a tribal gaming facility in Michigan. And special attention will be paid to the statute's apparent requirement that no process for imposing a compact can proceed until a "[federal] court finds that the State has failed to negotiate in good faith with the Indian tribe," according to express factors specified in the law. That states can cite sovereignty to defeat legal challenges to their failure to negotiate is settled law.

See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). While the regulation in large part follows the IGRA process, it problematically ignores IGRA's predicate for invoking the subsequent administrative process that a federal court must first have adjudicated the State's failure to negotiate in good faith. Moreover, the Secretary's regulations did not resolve the potentially fatal barrier identified by the Supreme Court in Seminole Tribe that the 11th Amendment precludes any adjudication as to "good faith" by the State without consent by the State.

When Interior was drafting the regulation, there was a great deal of debate within Indian Country and the federal government about this matter. In light of this, it must be accepted that attorneys at Interior, Justice, and the National Indian Gaming Commission carefully assessed how best to confront the problem when states simply refuse to deal and then invoke state sovereign immunity to defeat the federal courts' jurisdiction to hear any legal challenge and, consequently, to render any decision as to whether the states' actions were not in good faith.

Despite the ruling in Texas v. United States, there almost certainly are good legal arguments in favor of the regulations. How the issues are resolved will be closely watched. In the meantime, the Pojoaque have about 12 months in which to secure a new compact through some process. Litigation can be time consuming, and the Pojoaque clock is ticking.

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