F I S C A L I M P A C T R E P O R T

SPONSOR Louis **ORIGINAL DATE** 2/20/17 **LAST UPDATED** 2/22/17 **HB** 343

SHORT TITLE Add Fort Sill Apache to Advisory Councils **SB**

ANALYST Boerner

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Indian Affairs Department (IAD)

SUMMARY

Synopsis of Bill

House Bill 343 (HB 343) proposes to change the voting memberships on two advisory councils to allow representatives from the Fort Sill Apache tribe to participate on the Indian Education Advisory Council and the Native American Suicide Prevention Advisory Council.

Section 2, would allow the secretary of the Taxation and Revenue Department to enter cooperative agreements with the Fort Sill Apache Tribe for the exchange of information and the reciprocal, joint or common enforcement, administration, collection, remittance and audit of tax revenues of the party jurisdictions.

FISCAL IMPLICATIONS

None noted.

SIGNIFICANT ISSUES

On April 14, 2014 the New Mexico State Supreme Court unanimously ruled in favor of the Fort Sill Apache Tribe (FSA) requiring the state to add the Tribe to the IAD's official list of chief executives for Indian nations, tribes or pueblos and include FSA in the annual State-Tribal

Summit required under NMSA 1978, § 1 l- l 8-4(A). FSA is a federally-recognized tribe with its only Tribal Reservation located in Luna County, New Mexico. The specific ruling stated:

> NOW, THEREFORE, IT IS ORDERED that the petition for a writ of mandamus hereby is GRANTED and a writ of mandamus shall issue directing the Governor of the State of New Mexico and the Secretary of the New Mexico Indian Affairs Department to add the contact information for the Fort Sill Apache Tribe to the list of names and contact information for the chief executives of the Indian nations, tribes or pueblos and for the state agency tribal liaisons that the New Mexico Indian Affairs Department is required to maintain for public reference under NMSA 1978, § 1 l-l 8-3(D)(2009), and to include the leaders of the Fort Sill Apache Tribe in the annual state-tribal summit that the Governor is required to hold under NMSA 1978, § 1 l- l 8-4(A) (2009) (See Attachment A).

In a press release about the NM Supreme Court's ruling FSA noted, "Today's victory will open the door to collaboration, benefits and recognition enjoyed by every other New Mexico tribe and Pueblo…". "We look forward to working with the Governor and her staff and are excited to continue our journey home."

In its analysis, IAD argues that the number of FSA Tribal members living in New Mexico is "de minimis," or so small that the Tribe's representation on either state advisory council would amount to inequitable tribal determination on vital state matters. IAD states:

> Per the Fort Sill Apache tribe website, the tribe consists of 670 members, about half over the age of 18. Roughly 300 live in Oklahoma, the rest are spread across the United States, England, and Puerto Rico. (https://fortsillapache-nsn.gov) The number of tribal members living in New Mexico is de minimis. Representation on either state advisory council, given the small numbers of tribal members residing in New Mexico, allows for inequitable tribal determination on vital state matters affecting state's citizens. It is unknown if any tribal members permanently reside in its 30-acre reservation near Deming.

However, in documents provided to the court (See Attachment B *Reply in Support of Verified Petition for Writ of Mandamus*) Fort Sill pointed out:

> The Fort Sill Apache Indian Reservation is not just some land in New Mexico that the Tribe happens to own. It is the Tribe's Reservation, recognition of which was hard-won only recently and after years of legal struggles. That the majority of the population of the Tribe has not yet returned to its aboriginal territory is not surprising, given Respondents' hostility and the relatively recent recognition of the Tribe's reservation in the area of its ancestral homeland. Because Respondents do not dispute that the Fort Sill Apache Indian Reservation is in New Mexico, they cannot argue that the Tribe is not located at least partially in New Mexico.

BACKGROUND INFORMATION

The following background information about the tribe as provided on its webpage:

> The Fort Sill Apache Tribe is the successor to the Chiricahua and Warm Springs Apache Tribes. In 1886, they were taken as prisoners of war by the U.S. Army and removed from

their homelands of southwestern New Mexico and southeastern Arizona to Florida, Alabama and Oklahoma, where they were released. They organized as the Fort Sill Apache Tribe after a Federal Court affirmed their claim for the loss of over 14.8 million acres of their homeland. The Tribe has always maintained both its independence as Chiricahua – Warm Springs Apaches and its desire to return to its rightful home. After receiving an invitation from the Governor of New Mexico in 1995 and again in 2000 to return to New Mexico, the Tribe purchased the property at Akela Flats in 1998. It was made tribal trust land in 2002 and designated a Reservation in November 2011.

CB/sb/al

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 14, 2014

NO. 34,464

FORT SILL APACHE TRIBE, and the HON. JEFF HAOZOUS, Chairman of the Fort Sill Apache Tribe,

Petitioners,

v.

HON. SUSANA MARTINEZ, in her official capacity as Governor of the State of New Mexico, and ARTHUR ALLISON, in his official capacity as Cabinet Secretary of New Mexico Indian Affairs Department,

Respondents.

ORDER

WHEREAS, this matter came on for consideration upon a petition for writ of mandamus, response thereto, reply, and oral argument of the parties on April 14, 2014, and the Court having considered said pleadings and oral argument and being sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Richard C. Bosson, Justice Edward L. Chávez, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for a writ of mandamus hereby is GRANTED and a writ of mandamus shall issue directing

ATTEST: A TRUE COPY
Joey D. Moya
Chief Clerk of the Supreme Court
of the State of New Mexico

the Governor of the State of New Mexico and the Secretary of the New Mexico Indian Affairs Department to add the contact information for the Fort Sill Apache Tribe to the list of names and contact information for the chief executives of the Indian nations, tribes or pueblos and for the state agency tribal liaisons that the New Mexico Indian Affairs Department is required to maintain for public reference under NMSA 1978, § 11-18-3(D) (2009), and to include the leaders of the Fort Sill Apache Tribe in the annual state-tribal summit that the Governor is required to hold under NMSA 1978, § 11-18-4(A) (2009).

IT IS SO ORDERED.

WITNESS, Honorable Barbara J. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of April, 2014.

(SEAL)

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

FORT SILL APACHE TRIBE, and the
HONORABLE JEFF HAOZOUS, Chairman
of the Fort Sill Apache Tribe,

Petitioners,

vs. S. Ct. No. 34,464

THE HONORABLE SUSANA MARTINEZ,
in her official capacity as Governor of the
State of New Mexico, and ARTHUR ALLISON,
in his official capacity as Cabinet Secretary of
New Mexico Indian Affairs Department,

Respondents.

REPLY IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDAMUS

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None of the arguments offered by Respondents justify denial of the relief sought in the Petition. Respondents do not dispute the facts showing that the Tribe is federally-recognized and that, since 2011, it has had its sole reservation in New Mexico. Under the Act, that presence is sufficient to require Respondents to recognize the Tribe.

I. RESPONDENTS FAIL TO DISPUTE THAT THE FORT SILL APACHE TRIBE HAS ITS ONLY RESERVATION IN NEW MEXICO.

The Fort Sill Apache Reservation is in New Mexico. Respondents do not dispute that according to the federal Government, the Tribe's *only* Reservation is in Luna County. 76 Fed. Reg. 72969[1] (2011) ("This notice informs the public that the Assistant Secretary—Indian Affairs proclaimed approximately 30.00 acres, more or less, as the Fort Sill Apache Indian Reservation" and setting forth the description of the Reservation within Luna County, New Mexico) (emphasis added). According to BIA, the Fort Sill Apache Indian Reservation is in New Mexico.

The Fort Sill Apache Indian Reservation is not just some land in New Mexico that the Tribe happens to own. It is the Tribe's Reservation, recognition of which was hard-won only recently and after years of legal struggles. That the majority of the population of the Tribe has not yet returned to its aboriginal

[1] The Petition cited to the issue number, rather than the page number within the issue, for this Notice.

territory is not surprising, given Respondents' hostility and the relatively recent recognition of the Tribe's reservation in the area of its ancestral homeland. Because Respondents do not dispute that the Fort Sill Apache Indian Reservation is in New Mexico, they cannot argue that the Tribe is not located at least partially in New Mexico.

II. RESPONDENTS IGNORE THE STATUTORY LANGUAGE REQUIRING RECOGNITION OF TRIBES "PARTIALLY LOCATED" IN NEW MEXICO.

While Respondents accurately quote the statutory language applying the State-Tribal Collaboration Act to "any federally recognized Indian nation, tribe or pueblo located wholly *or partially* in New Mexico," NMSA 1978, § 11-18-2(B) (emphasis added), they ignore the word "partially" in their application of the language. Respondents assert that what is controlling is "where the governmental entity is located, not where the tribe's lands are located." Resp. at 13. This is not only an inaccurate construction, as it inserts words into the statute; i.e., "governmental entity," but it is not even the construction Respondents use. The Navajo Nation has its seat of government in Window Rock, Arizona, yet Respondents include and recognize the Navajo Nation under the Act. Pet. at 22–23

and citations therein. Under the construction offered by Respondents, the Navajo Nation would not be recognized under the Act.[2]

Respondents also argue that the Fort Sill Apache Tribe is based in Oklahoma, because it has its government and the largest concentration of its members in Oklahoma. Resp. at 7. Respondents also argue that the federal government recognizes the Fort Sill Apache Tribe as being located in Oklahoma, based on a 2008 memorandum of the National Indian Gaming Commission (NIGC) and the Tribe's name in a list of recognized Tribal Entities. Resp. at 15–16. Neither of these controls.

A. The NIGC Memorandum Does Not Control.

The NIGC memorandum is not dispositive because it dealt with a different statutory scheme and a different issue, and because the federal government has since recognized the Tribe's Reservation in New Mexico.

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[2] Because Respondent Allison does not adhere to the construction of the Act that he offers here, his interpretation of the Act should not be accorded any deference whatsoever. *See Atlixco Coalition v. Cnty. of Bernalillo*, 1999-NMCA-088, ¶ 26, 127 N.M. 549, 555, 984 P.2d 792 (adopting the reasoning that "a court should not defer if the agency . . . , rather than using its knowledge and expertise to discern the policies embodied in an enactment, decides on the basis of what it now believes to be the best policy.") (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, 119 N.M. 29, 888 P.2d 475; *see also Phelps Dodge Tyrone, Inc. v. N.M. WQCC*, 2006-NMCA-115, ¶ 11, 140 N.M. 464, 468, 143 P.3d 502 ("We give little or no deference to agencies engaged in statutory construction because they have no expertise in that area.").

The 2008 NIGC memorandum dealt with whether the Tribe's land in New Mexico fell within the "last recognized reservation exception" under IGRA, which permits gaming on lands acquired in trust after October 17, 1988 if "such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." NIGC Memorandum, http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f051808ftsillapachelunaconmproperty.pdf&tabid=120&mid=957 (May 19, 2008), at 7. To determine where a tribe is "presently located" under the exception, the NIGC looks to the seat of tribal government and population center. *Id.* at 8. While NIGC acknowledges that under some circumstances, "a tribe may be 'presently located' in more than one state," *id.* at 11, it still looks for a "major governmental presence." *Id.* at 11. By contrast, the State-Tribal Collaboration Act looks only to whether a tribe is "wholly *or partially* located in New Mexico." NMSA 1978, § 11-18-2(B) (emphasis added). The Collaboration Act does not reference the seat of tribal government, major governmental presence, or population centers.

Moreover, the NIGC memorandum preceded BIA's formal recognition of the Fort Sill Apache Indian Reservation in New Mexico. The NIGC memorandum was limited to whether Fort Sill could engage in gaming on its New Mexico land. By contrast, the BIA's 2011 decision proclaiming that the Fort Sill Apache Indian

Reservation is in New Mexico, 76 Fed. Reg. 72969 (2011), explicitly locates the Tribe's Reservation in New Mexico. It is this decision, not a memorandum dealing with whether gaming could occur on land acquired in trust after October 17, 1988, that controls for the purposes of the State-Tribal Collaboration Act.

Although the majority of the Tribe's population is in Oklahoma, it is undisputed that the Tribe has a presence in New Mexico and that its Reservation is in New Mexico. The Tribe is therefore at least partially located in New Mexico.

B. The List of Recognized Tribal Entities Does Not Control.

Respondents' reliance on the Federal Register list of recognized tribes for location purposes is also not warranted. It is a list of "Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs," 78 Fed. Reg. 26385, and not a document that purports to rehearse the exclusive locations of recognized tribal entities. For many of the entities, it does not provide any State at all. *See id.* at 26385–86 (listing, *inter alia*, the Cayuga Nation, the Cherokee Nation, the Chickasaw Nation, the Puyallup Tribe of the Puyallup Reservation, the Shawnee Tribe). For others, it only lists one State even where a Tribe is located in multiple States. *Compare id.* at 26388 (listing the "Zuni Tribe of the Zuni Reservation, New Mexico) *with* 71 Fed. Reg. 75981 ("In 1984, the United States established a reservation for the Zuni Indian Tribe (Tribe) in northern Arizona, the Zuni Heaven Reservation, for

longstanding religious and sustenance activities."). By contrast, the recognition by BIA of the Fort Sill Apache Indian Reservation in New Mexico deals explicitly with location; it even contains a property description.

Respondents admit that the Tribe has trust land in New Mexico, Resp. at 2, and that it runs a business on that land. *Id.* at 3. As discussed above, the 30 acre parcel in Luna County comprises the totality of the Fort Sill Apache Reservation. The Tribe is located at least partially in New Mexico.

III. THE RELIEF SOUGHT UNDER THE STATUTE HAS NOTHING TO DO WITH THE TRIBE'S DESIRE TO ENGAGE IN GAMING AS A MEANS OF FINANCING DEVELOPMENT ON ITS RESERVATION.

This petition has nothing to do with Petitioner's desire to engage in gaming on its reservation, as Respondents assume. This case is not about gaming; it is about recognition. While the Tribe may later seek to commence gaming operations on its Reservation, this case is about the recognition by the Respondents of the Tribe, as the State-Tribal Collaboration Act requires—nothing more. The propriety of gaming on Indian land is governed by separate statutes and regulations, both state and federal.

That Respondents raise the gaming issue at the beginning of their Response to the Petition may go some way to explain why they refuse to comply with the State-Tribal Collaboration Act's mandate as to Petitioners despite recognizing other Tribes based wholly or partially in New Mexico. *See* Att. X to Pet. (email

from Respondent Allison to officials with various tribes and pueblos regarding the 2013 State-Tribal Summit). The Act, however, has nothing to do with gaming. The Act is about fostering positive relationships between and among the State and the Tribes and Pueblos located—wholly or partially—within New Mexico.

IV. THIS COURT SHOULD ACCEPT JURISDICTION OVER THIS DISPUTE BETWEEN STATE OFFICERS AND ONE OF NEW MEXICO'S SOVEREIGN TRIBES.

This case presents a fundamental constitutional question of great public importance. As set forth in the Petition, the Respondents' refusal to comply with the terms of the Act goes to the heart of important intergovernmental relations between the State and Native Americans in New Mexico. New Mexico has a "unique and venerable tradition of deferring to a 'tribal government's exercise of the sovereign power vested in them.'" *State v. Harrison*, 2010-NMSC-038, ¶ 27, 148 N.M. 500, 509, 238 P.3d 869 (quoting *Benally v. Marcum*, 1976-NMSC-054, 89 N.M. 463, 553 P.2d 1270). In *Harrison*, this Court recognized that New Mexico courts are more deferential to tribal sovereignty than the federal government. 2010-NMSC-038, ¶ 27. New Mexico's "tradition of cooperation and comity between state and tribal governments," *see Harrison*, ¶ 29, is fundamental to the State's identity.

Respondents try to minimize the relief sought by focusing only on two concrete pieces of relief required under the Act: the inclusion in the tribal summit

and the addition of the Tribe to the list of tribal contacts. But these are just two concrete manifestations of the relief sought, which is to "ensure that State agencies under [Respondents'] direction and control collaborate with and otherwise include the tribe in all interactions between and all benefits exchanged between the State and its tribes and pueblos as is required by the Act and other applicable law." Pet. at 25. In other words, Petitioners ask the Court to require Respondents to recognize the Tribe, as required by state law. The relationship between the State of New Mexico and the Tribes and Pueblos distinguishes New Mexico constitutionally, not just culturally from the rest of the Union. *See id.* It is this cooperation and comity that Petitioners seek.

The duties the Act places on Respondents are ministerial. A state agency "*shall* make a reasonable effort to collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of the state agency that directly affect American Indians or Alaska Natives." NMSA 1978, § 11-18-3(C) (emphasis added). Respondents, in failing to recognize the Fort Sill Apache Tribe as a Tribe located wholly or partially in New Mexico, have failed to perform this duty.

Respondents' argument that there are factual disputes fails. The facts are not in dispute. The question before the Court is the legal effect of those facts. *See Collado v. MVD*, 2005-NMCA-056, ¶ 9, 137 N.M. 442, 445, 112 P.3d 303 (noting

that MVD did not dispute facts, but only the legal effect of those facts). Even Respondents' argument that the federal Government treats the Tribe as an Oklahoma Tribe is premised not on a denial, but on the refusal to acknowledge the federal Government's declaration of the Tribe's Reservation in New Mexico. Respondents also do not dispute that the New Mexico Secretary of State, in the "Blue Book," recognizes the Tribe as a New Mexico Tribe.

Respondents argue that a plain, speedy, and adequate remedy at law exists for Petitioners via declaratory judgment. Resp. at 11–12. But declaratory judgment "does not constitute an adequate remedy at law that would preclude mandamus relief." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 26, 149 N.M. 330, 338 (citing *City of Albuquerque v. Ryon*, 1987-NMSC-121, 106 N.M. 600, 747 P.2d 246). Respondents identify no plain, speedy, and adequate remedy at law available to Petitioners, because there is none.

Moreover, Respondents argue that no expeditious resolution is necessary. But the 2014 summit is approaching quickly—more quickly than a district court will likely be able to resolve the matter. For the 2013 summit, preparations began as early as February 7, 2013. *See* Att. U to Pet. (soliciting proposals for hosting). On February 28, 2013, Respondent Allison sent a survey seeking input into topics and issues to be discussed during the 2013 summit; the survey was to be returned no later than March 29, 2013. Att. V. to Pet. If Petitioners are to fully participate

in the 2014 summit, and otherwise gain the benefits mandated by the Act, an expeditious resolution of this dispute is necessary.

Respectfully submitted,

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We hereby certify that a copy of the foregoing Reply was served by first-class mail and electronic mail to:

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