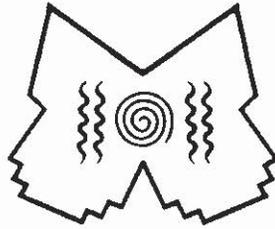


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**State of New Mexico Indian Affairs Committee  
Church Rock, NM -- Fire Rock Casino  
September 25, 2013**

### **INDIAN GAMING COMPACT NEGOTIATIONS TESTIMONY OF THE PUEBLO OF POJOAQUE**

Mr. Co-Chair and Madame Co-Chair, Honorable Members of the Indian Affairs Committee, my name is Macario Gutierrez. I am the Governor's Assistant and a Tribal Councilman for the Pueblo of Pojoaque. On behalf of Governor George Rivera, the Pueblo would like to first thank you for the invitation to testify on the issue of Tribal Government Gaming but also for your commitment to the issues facing Indian country. Governor Rivera was unable to attend today but extends his sincere gratitude for allowing us to offer comments to the Committee.

As you are aware the Pueblo of Pojoaque currently operates under the 2001 Tribal-State Gaming Compact. We are in the process of negotiating a new compact with the State of New Mexico through the Governor's Office. The Pueblo initiated negotiations through a letter addressed to Governor Susana Martinez in May of 2011. In response, Governor Martinez honored our request nearly one year later on April 23, 2012 when she appointed Jessica Hernandez and Jeremiah Ritchie to negotiate on her behalf. Since then the Pueblo of Pojoaque

along with the Pueblo of Acoma and the Mescalero and Jicarilla Apache Tribes have been faithfully participating in negotiation meetings with the State's appointed negotiators.

The last time that the Pueblo was in front of this Committee Governor Rivera testified that the New Mexico Tribes had concerns with the progress of the negotiations and the overall state of the gaming industry. The Pueblo's position remains unchanged. We have spent nearly two decades working hard on improving the impoverished conditions of our community. We are not about to negotiate ourselves back into poverty. We will not negotiate ourselves into a position of reliance where the State is the main beneficiary of Indian gaming contrary to any interpretation of the federal Indian Gaming Regulatory Act ("IGRA"). The State's hardline negotiating stances can push too hard. From our perspective, either we reach a mutually acceptable and beneficial agreement for both the State and the Pueblo, or we pay nothing in terms of revenue share.

The goals of federal Indian policy that the IGRA was enacted to promote include: tribal economic development, tribal self-sufficiency and strong tribal governments. Implicit in these goals is the concept of tribal self-determination. That is, it should be the Tribe that determines its future, not outsiders. Thus, decisions about how gaming revenues are to be utilized should be made and implemented by Tribes, through their duly authorized tribal governments.

In writing the IGRA, Congress did, however, specify several broad categories for appropriate tribal expenditures of gaming revenues first and foremost: (1) to fund tribal government operations or programs; (2) to provide for the general welfare of the tribe; and (3) to promote tribal economic development. Tribal governments determine the appropriate uses of net gaming revenues consistent with IGRA's designated categories and since the late 1980's the Pueblo of Pojoaque has committed gaming revenues to fund essential government services, including education, health care, police and fire protection, water and sewer services, and

elderly and child care. Let me outline for the Committee the *benefits that the Pueblo* contributes to Pojoaque Valley, the County of Santa Fe, and the State of New Mexico all which have a direct effect on the quality of many lives.

Tribal Government Gaming in New Mexico is a \$740M industry. The gross gaming revenue figure, however, does not reflect that Tribal governments, like all responsible employers, pay wages, benefits and employer taxes from that revenue in addition to the \$4.5M it pays in revenue share directly to the State of New Mexico. Unlike our non-Indian counterparts, however, every dollar earned from our gaming operations is invested in public purposes — to improve peoples' lives, Indian and non-Indian alike, in communities all throughout the State of New Mexico.

The Pueblo of Pojoaque is the largest private employer north of Santa Fe. The Pueblo provides 1,500 New Mexico residents with employment and employment-related benefits. As an employer,

- The Pueblo pays a total of \$43M in annual payroll and benefits for employees of the Pueblo's businesses and Tribal Government employees combined.
- Our gaming /resort businesses employ 900 residents and the payroll and benefits total approximately \$30M dollars.
- Payroll taxes submitted to the State of New Mexico from bi-weekly pay checks total in the millions.

The outcome of our compact negotiations will directly determine whether we will be put into the position of having to lay off employees or cut programs. Neither is acceptable in today's sluggish economy. Our ability to provide jobs, career training and employment-related benefits to the workforce keeps many of these individuals from relying upon State assistance such as unemployment benefits, Medicaid, Temporary Assistance for Needy Families ("TANF"), and Food Stamps. The Pueblo's role as an employer is undeniably meaningful to

the overall State's economy particularly now when reports are showing that the number of jobs in the State is down 101,000 for 2012, but that the number of hospitality and leisure jobs is up 1.3% percent or 1,100 jobs.

The IGRA requires that gaming revenues are used first and foremost to fund tribal government operations or programs. Our gaming revenues not only allow for the provision of the essential governmental services for the benefit of the Pueblo but also for the entire Pojoaque Valley, surrounding counties and, ultimately, the State of New Mexico. Tribes in New Mexico are generous with their gaming revenues. Consider that the Pueblo of Pojoaque's net gaming revenues help to provide:

- Law enforcement services to the entire Pojoaque Valley, including the surrounding non-Indian communities.
- Fire and rescue services as the Pueblo leases nearly 2 acres of land for \$1.00 annually to house the Santa Fe County Fire Department which services the entire Pojoaque Valley, Hwy 84/285, and State Roads 503 and 502.
- Community health and wellness services to 1,350 people through its Wellness Center, Healing Arts program, and Farm Project all programs open to the entire Pojoaque Valley, including our non-Indian neighbors.
- Education, child care and development programs such as our Public Library which is open to the general public and provides service to approximately 17,000 patrons annually, and our Boys & Girls Club and Teen Center that provide service to 500 community youth, both through the Summer and Winter programs and 95% of which are non-Indian.
- Utility, water and wastewater systems, and infrastructure development and maintenance through our Tribal Works Department which services the

approximately 13,000 acres of land and nearly 150 tribally-owned homes and business within the Pueblo.

The total annual cost to the Pueblo for these programs is approximately \$4M dollars. We do not stop there. The Pueblo of Pojoaque also spends nearly \$3.5M dollars on Tribal Member early childhood development, our senior citizens, social services, health services (CHR), and culture revitalization programs. These are essential governmental services.

The Pueblo of Pojoaque is also focused on its future. We have made education a number one priority. The Pueblo's Education Department has grown from a budget of approximately \$25,000 in 1989 to an approximate annual budget of 1.2M dollars. This budget supports higher education and private school options for Tribal Members and is subsidized 100% by gaming revenues.

- Since its establishment, the Program has supported 165 graduates to obtain high school diplomas, associate, bachelor and master degrees.
- Currently the Pueblo has 42 school aged children enrolled and excelling in private schools across the State of New Mexico. 40 additional tribal member students are pursuing their higher education in various colleges across the Nation.

The Pueblo is proud to announce that our high school graduation rate is nearly 100% since establishing the Education Program. This is the direct impact of our gaming revenues.

Tribal Government Gaming also has a multiplier effect. A significant amount of in-state jobs are directly attributable to tribal casino operations, and those operations directly and indirectly generate millions in economic activity within the State of New Mexico. Moreover, our gaming enterprises generate millions of dollars in taxes for local and state governments. Vendors and contractors who do business with our tribal enterprises pay taxes and purchase goods and services outside of Indian Country. The Pueblo of Pojoaque does consistent business with approximately 70 companies, contractors and vendors all of which employ a

number of employees, Indian and non-Indian, to support the needs of all New Mexico tribal casinos. Tribal casinos spend millions annually on goods and services. These dollars are spent directly within the State of New Mexico. All of our business enterprises, including gaming, directly and indirectly generate additional state and local taxes collected on purchases, profits, and incomes that originated from casino vendor outlays. There is no denying the significant and meaningful impact Tribal Government Gaming has upon the State's economy.

Despite that Tribes continue to fulfill the vision of Congress through the IGRA, our efforts at reaching a new compact with this Administration are met with positions that seek to further restrict our gaming activities, limit its expansion, and impose additional taxation upon the Pueblo. We view the State's demands as effectively a tax on our gaming facilities. The IGRA explicitly prohibits states from imposing any tax or fee on Tribes, and further provides that "any demand by the State for direct taxation of the tribe" is evidence that the state is negotiating in bad faith.

Governor Martinez commented in her State of the State Address that "government has an important role in ensuring a level playing field so that New Mexicans can compete fairly." As stated by the Governor, "Businesses will locate and grow where they have the best opportunity to succeed, get a fair shake, and find the best-trained workers without being overtaxed." The Pueblo agrees and we intend to hold her to her words. We must make Tribal Government Gaming in New Mexico competitive with other states and we must get a fair shake from the State of New Mexico. We will not accept demands through our compact negotiations for additional taxation of our gaming revenues. Through the IGRA, it was also the express intent of Congress that Indian tribes be the primary beneficiaries of gaming activities on Indian lands.

The Pueblo has witnessed this Administration offer significant tax breaks and incentives to nearly every industry in the State except tribal government gaming. Quite frankly,

it is insulting for Tribes to be in negotiations over the State's taxation of gaming revenues when other industries are being exempted. We find this to be economic discrimination of sorts. The State of New Mexico cannot simply continue to demand more and more from the Tribes. Revenue share in this State is only being used to replenish the General Fund.

Our experience shows that the current Administration believes it is negotiating from a position of authority, but we point out that Congress specifically limited the right of states to tap into tribal gaming revenue. States cannot, according to the IGRA, condition approval of tribal gaming agreements on getting a share of the revenue. Revenue sharing does not have a statutory basis in the IGRA. It was a political compromise from the early days of Indian gaming when a BIA Solicitor opined a theory of the "exclusivity quid pro quo" in order to justify Connecticut's 25% revenue share agreement with the Mashantucket Pequot Tribe. Some states are now in violation of their exclusivity agreements, having authorized other privately held or state-sponsored gambling entities that compete with the tribal casinos making "exclusivity" illusory or, in some instances, non-existent.

The State of California lost in the 9th Circuit Court of Appeals on the question of whether "illusory exclusivity and illusory state concessions" justified the taking of a 15% revenue share from the tribe. In the *Rincon Band of Luiseno v. Schwarzenegger* case, the court ruled that California's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax. According to the court, "no amount of semantic sophistry can undermine the obvious; a non-negotiable, mandatory payment of 10 percent of net profits into the State Treasury for unrestricted use yields public revenue, and is a tax."

From the Pueblo's perspective in the current negotiations, the Administration is no longer able to take advantage of the desperation of tribal governments to acquire casino gaming as a means to climb out of poverty by blackmailing us with revenue sharing demands

as it did in the early days of gaming. We can no longer agree to demands that will literally wipe out the economic incentive and cash flow needed to ensure success of our gaming enterprises and the future growth of our economy. The lawsuit and resulting *Rincon* compact changed the scope and context of compact negotiations, specifically that the states can no longer demand revenue sharing as a condition for concluding a compact. If, and only if, a tribe is willing to share gaming revenue with the state, then the state must offer the tribe something of meaningful value that the tribe desires. In other words, there has to be an exchange of mutual benefits.

Our current negotiations evidence how the State has to create illusory exclusivity in exchange for extracting a tax (disguised as revenue sharing) from the Tribes. In the 2001 Tribal-State Gaming Compact, the State takes 8% of the Pueblo's gross gaming revenue in return for the State agreeing that the Pueblo has the exclusive right within the State to conduct all types of Class III Gaming *except for* the State's lottery and other Class III gaming authorized at racetracks veterans' and fraternal organizations. As a quid pro quo, the State has offered only what it is already obligated to give under the IGRA and then includes non-substantive concessions having to do with matters that fall far outside the scope of negotiations authorized by IGRA and which have no meaningful benefit to the Pueblo. It is as if the State believes that if it says exclusivity enough times throughout the course of our negotiations that it somehow starts to be real.

The Pueblo believes that in 2013, the State has nothing to offer the Pueblo of Pojoaque in terms of exclusivity. The State gave away what limited exclusivity it was willing to offer in its existing compacts. Each day our gaming enterprises compete for customers with neighboring facilities, some less than 5 miles away, and the racinos, fraternal, and other state sponsored gaming activities. We will no longer seek exclusivity from the State of New

Mexico. The Pueblo has shown that we can be a premier destination resort in Northern New Mexico now we must have the ability to compete both within and outside of the State.

Proposed tribal-state agreements for revenue sharing have to be approved by the U.S. Secretary of the Interior and must demonstrate the tribe is getting something of substantial value in return. Our experience to date, however, is that the State's negotiating stances are to put us in the position that either we pay a demand for additional taxes, fees and assessments and succumb to its over-reaching to get a gaming compact, or we challenge the process and revenue sharing provisions.

A strategy of trying to extort additional money from the Tribes in the name of regulatory oversight is particularly troubling considering this Administration's philosophy of dealing with Tribes and their neighboring rural communities in the approval of capital outlay requests. Denying necessary capital outlay is breaking the backs of these struggling communities which rely upon tribal government gaming to help create jobs, offer health insurance and other benefits that reduce the costs upon the State, and that infuse payroll and gross receipts taxes into the State coffers. It simply does not make fiscal sense.

In order for the Pueblo of Pojoaque to reach an agreement with the State, we must be certain that we are setting the stage for our businesses to grow. This requires eliminating of many prohibitions and limitations placed on the industry going back two decades when tribal gaming was introduced in this State. We need to remove all unnecessary prohibitions and limitations, such as the existing prohibition from cashing payroll checks at casinos; limitations that prohibit us from offering complimentary food and lodging to our patrons; the prohibition from selling alcohol on the gaming floor; and the prohibition from extending credit to all patrons, again to be consistent with nationwide practice in the industry. The State's reliance upon political compromises from 2001 and then additional demands for "socially responsible" limitations are exactly that, based on social policies inconsistently applied to the industry and,

in some instances, only applied to tribal gaming activities. The division of jurisdiction authorized by the IGRA was strictly limited to the regulation of gaming activities, and did not open the door to a broad invasion of tribal jurisdiction.

The Pueblo's current gaming compact will expire on June 18, 2015. The Pueblo of Pojoaque remains committed to the negotiation process in hopes of reaching a pro-business agreement that reflects the good faith sovereign-to-sovereign relationship that is reasonable, fair, and will be beneficial to both the Tribes and the State of New Mexico, and which also reflects the purpose of the IGRA.

In conclusion, I could easily sit here all day and talk about the benefits of Indian Gaming. I live the benefits each day as I work toward completing my degree this December while working nearly full-time for the benefit of my Pueblo. I extend an invitation to each of you to visit the Pueblo of Pojoaque and tour our gaming operations, visit our social and governmental programs, speak with our employees and Tribal Members. On behalf of the Governor, thank you for the time you spend serving on this Committee and your sincere interest in Native American issues affecting Tribes throughout New Mexico. The Pueblo of Pojoaque looks forward to hosting the next Indian Affairs Committee meeting at the Buffalo Thunder Resort and Casino in December. If you have any questions Governor Rivera's office number is (505) 819-2276.

Thank you.