UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, and TAMAYA ENTERPRISES, INC.,

Plaintiffs,

No. 1:11-CV-00957-BB-LFG

v.

HONORABLE NAN G. NASH, District Judge, New Mexico Second Judicial District, Division XVII, in her Individual and Official Capacities; GINA MENDOZA, as Personal Representative Under the Wrongful Death Act of Michael Mendoza, Deceased; F. MICHAEL HART, as Personal Representative Under the Wrongful Death Act of Desiree Mendoza, Deceased; and DOMINIC MONTOYA,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Pueblo of Santa Ana ("Santa Ana") and Tamaya Enterprises, Inc. ("TEI"), hereby move for summary judgment as to their claim against all Defendants for a declaratory judgment that Defendant Hon. Nan Nash lacks jurisdiction to hear a lawsuit captioned *Mendoza, et al., v. Tamaya Enterprises, Inc*. (the "*Mendoza* case"), that was brought in New Mexico district court by Defendants (in the instant case) Gina Mendoza and Michael Hart, in which the plaintiffs allege that employees of TEI caused personal injury to Defendants Mendoza and Hart's decedents,[1] by allegedly negligent acts that occurred on Santa Ana land. As part of that determination, Plaintiffs also ask the Court to declare that the Indian Gaming Regulatory Act, 25

[1]Defendant Dominic Montoya later intervened into the *Mendoza* case as an additional plaintiff, claiming that he was injured in the same accident that caused the deaths of Defendant Mendoza and Hart's decedents, and that his injuries were also caused by TEI's negligence.

U.S.C. §§ 2701 - 2721 ("IGRA") does not permit the shifting of jurisdiction over personal injury lawsuits by non-Indian plaintiffs against tribal enterprises, that arise from alleged wrongs committed within the tribe's Indian country, from tribal courts to state courts.

Statement of Undisputed Material Facts

The following facts are undisputed, based on the pleadings in this case, a Stipulation agreed to by the parties that has been filed herein, and an Affidavit of John Cirrincione that is attached hereto; and based solely on these facts Plaintiffs are entitled to judgment as a matter of law:

1. Tamaya Enterprises, Inc. ("TEI"), owns and operates the Santa Ana Star Casino. TEI is wholly owned by the Pueblo of Santa Ana. Affidavit of John Cirrincione ("Cirrincione Aff."), attached hereto as Exhibit A, at ¶ 1.

2. The Pueblo of Santa Ana is a federally recognized Indian tribe. Complaint [Doc. 1] at ¶ 3; Answer of the Honorable Nan G. Nash ("Nash Answer") [Doc. 46] at ¶ 3; Gina Mendoza and Michael Hart's Answer and Counterclaim and Jury Demand ("Mendoza/Hart Answer") [Doc. 47] at ¶ 3; and Defendant Dominic Montoya's Answer to Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief ("Montoya Answer") [Doc. 48] at ¶ 2.

3. The Santa Ana Star Casino is located on Santa Ana Pueblo lands, within the exterior boundaries of the Pueblo. Compl. at ¶ 7; Nash Answer at ¶ 7; Mendoza/Hart Answer at ¶ 5; and Montoya Answer at 6.

4. Defendants Gina Mendoza, Michael Hart, and Dominic Montoya (the "state court

plaintiffs") are the plaintiffs in a lawsuit in the Second Judicial District Court of New Mexico, styled *Gina Mendoza, et al, v. Tamaya Enterprises, Inc., d/b/a Santa Ana Star Casino*, CV-2007-005711 (the "*Mendoza* case"). Compl. at ¶ 6; Nash Answer at ¶ 6; Mendoza/Hart Answer at 3; and Montoya Answer at 5.

5. Plaintiff TEI is the defendant in the *Mendoza* case. Compl. at ¶ 9; Nash Answer at ¶ 9; Mendoza/Hart Answer at ¶ 7; and Montoya Answer at ¶ 8.

6. Defendant Judge Nash is presiding over the *Mendoza* case. Compl. at ¶ 5; Nash Answer at ¶ 5; Mendoza/Hart Answer at 3; and Montoya Answer at 4.

7. The claims in the *Mendoza* case are based on the alleged over-service of alcohol by the Santa Ana Star Casino to Montoya and to Mendoza and Hart's decedents. Compl. at ¶ 8; Nash Answer at ¶ 8; Mendoza/Hart Answer at 6; and Montoya Answer at 7.

8. Section 8 of the 2001 gaming compact between the State of New Mexico and the Pueblo of Santa Ana reads, in pertinent part, as follows:

> SECTION 8. Protection of Visitors.
>
> A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.
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> . . . . .

> C. Limitation on Time to Bring Claim. Claims brought pursuant to the provisions of this Section must be commenced by filing an action in court or a demand for arbitration within three years of the date the claim accrues.
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> D. Specific Waiver of Immunity and Choice of Law. The Tribe, by entering into this Compact and agreeing to the provisions of this Section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this Section. This is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this Section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured, up to the limits of liability set forth in this Paragraph. The Tribe agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe.
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> E. Election by Visitor. A visitor having a claim described in this Section may pursue that claim in any court of competent jurisdiction, or in binding arbitration. The visitor shall make a written election that is final and binding upon the visitor.
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> . . . . .

Stipulation (Doc. 51), Ex. A (Doc. 51.1).

ARGUMENT

Standard Applicable to Motion for Summary Judgment

Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. The Rule permits speedy and expeditious disposition of issues as to which the facts are not in dispute. *See, e.g., Whelan v. New Mexico Western Oil & Gas Co.*, 226 F.2d 156, 158 (10th Cir.1955).

I. ABSENT GOVERNING LAW TO THE CONTRARY, STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER ACTIONS AGAINST TRIBES OR TRIBAL ENTITIES THAT ARISE WITHIN INDIAN COUNTRY.

There are few principles as firmly established in the field of federal Indian law as the rule that tribal courts retain exclusive jurisdiction over lawsuits arising on tribal lands against tribes, tribal members or tribal entities. *See Williams v. Lee*, 358 U.S. 217, 220 (1959). As the Supreme Court said in *Rice v. Olson*, 324 U.S. 786, 789 (1945), "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." In *Williams*, the Court held that an Arizona state court had no jurisdiction to hear a claim by a non-Indian trader against a Navajo Indian couple based on an open account for goods sold at an on-reservation trading post. 358 U.S. at 217-18. The Court's opinion rested on the principle of inherent tribal sovereignty, and held that absent a grant of jurisdiction by Congress "the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Furthermore, "when Congress has wished the States to exercise this power it has *expressly* granted them the jurisdiction which Worcester v. State of Georgia had denied." *Williams,* 358 U.S. at 221 (emphasis added). The Court noted that by enacting Public Law 83-280, *codified as amended at* 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 ("P.L. 280"), Congress had expressly granted, to those states willing to assume it, jurisdiction over civil and criminal disputes involving reservation Indians. *Williams*, 358 U.S. at 222. The fact that Arizona had not formally accepted such jurisdiction supported the conclusion that its courts had no jurisdiction over the case before the Court. *Id.* at 223.

In the absence of such direct congressional authority, the Court continued, "the question has always been whether the state action infringed on the right of reservation Indians to make

their own laws and be ruled by them." *Id.* at 220. The Court concluded that the exercise of state jurisdiction over the ordinary debt collection suit before it would necessarily infringe on the authority of the tribe to establish the rules governing the conduct of its members. *Id.* at 223. More recently, discussing a North Dakota ruling concerning state-versus-tribal court jurisdiction, the Supreme Court observed, "to the extent that [the decision under consideration] permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians . . ., it intruded impermissibly on tribal self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984) (citing *Williams*).[2] As the leading treatise in the field of federal Indian law puts it, "Unless there is a specific federal law stating otherwise, [tribal members] are subject to exclusive tribal jurisdiction. Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (N.Newton, ed., 2005) ("COHEN"), at 499 (footnotes omitted).[3]

New Mexico was required to relinquish any claim to jurisdiction over Indian lands within

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[2]It must be acknowledged that beginning in 1997, with *Strate v. A-1 Contractors*, 520 U.S. 438 (1996), the Supreme Court issued a series of decisions that have, in sum, imposed significant limitations on the jurisdiction of tribal courts in civil actions brought against non-Indians. *See also, Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). But each of those cases involved assertions of jurisdiction by tribal courts over non-Indian defendants. The Court has never given any indication that any of those holdings has weakened the *Williams* rule of exclusive tribal court jurisdiction where the matter arises on tribal land and the defendant is a tribe, tribal member or tribal entity.

[3]Importantly, moreover, the Supreme Court has also held that a tribe may not voluntarily relinquish its exclusive jurisdiction over cases arising within its Indian country, without strictly complying with the statutory procedures of P. L. 280. *Kennerly v. District Court,* 400 U.S. 423, 429 (1971) (tribe could not effectively consent to transfer its exclusive civil court jurisdiction to state courts unless both the state and the tribe fully complied with the conditions of P.L. 280).

the State by the New Mexico Enabling Act, Act of August 11, 1912, § 2, 37 Stat. 42, and did so in Art. XXI, § 2 of the New Mexico Constitution. It never elected to assume jurisdiction over tribal lands under P.L. 280. *Doe v. Santa Clara Pueblo,* 2007-NMSC-008, ¶ 20 n.5, 154 P.3d 644, 650 n.5; *Your Food Stores v. Village of Española*, 68 N.M. 327, 332, 361 P.2d 950, 954 (1961). The New Mexico Supreme Court has thus recognized, following *Williams*, that "[*e*]*xclusive tribal jurisdiction exists . . . when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country*." *Found. Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 516, 734 P.2d 754, 756 (1987) (emphasis added); *Tempest Recovery Svcs.,Inc., v. Belone,* 2003-NMSC-019, ¶ 14, 134 N.M. 133, 137. That rule of exclusive jurisdiction may be defeated only by authority expressly granted to the states by Congress.

The facts alleged in the *Mendoza* case bring it squarely within the *Williams* rule of exclusive tribal court jurisdiction. Santa Ana Pueblo is a federally recognized Indian tribe. TEI is a federally chartered corporation, wholly owned by the Pueblo. The tortious acts alleged to have been committed by TEI (*i.e.*, the allegedly wrongful service of alcoholic beverages to Desiree Mendoza and Michael Mendoza) all occurred on Santa Ana land, within the Santa Ana reservation boundary. By virtue of state law allowing Indian tribes to regulate the sale and service of alcoholic beverages on their land, it is undisputed that the only legal duty that TEI's employees are alleged to have violated is a duty imposed solely by Santa Ana law. *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-030, ¶ 2, 258 P.3d 1050, 1052.

New Mexico courts have repeatedly and consistently held that in such circumstances, state courts lack jurisdiction over such cases. *See, e.g., Doe,* 2007-NMSC-008, ¶ 18, 154 P.3d at 649 ("as a general proposition of Indian law, . . . tribal courts have exclusive jurisdiction over

claims arising on tribal lands against tribes, tribal members, or tribal entities"); *DeFeo v. Ski Apache Resort,* 120 N.M. 640, 904 P.2d 1065 (Ct. App.1996) (no state court jurisdiction over non-Indian's tort suit against tribe and tribal enterprise for injuries sustained on reservation); *Hartley v. Baca*, 97 N.M. 441, 640 P.2d 941 (Ct.App.1981) (same as to suit against tribal member arising from on-reservation accident); *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977) (same as to suit between two tribal members arising on fee land within reservation boundaries); *and see Halwood v. Cowboy Auto Sales, Inc*., 1997-NMCA-098, 124 N.M. 77, 946 P.2d 1088 (tribal court had jurisdiction over claim by tribal member against non-Indian company that repossessed plaintiff's vehicle within reservation, such that tribal court judgment would be accorded full faith and credit)**.**

Decisions from other states to the same effect include *In re Estate of Big Spring*, 360 Mont. 370, 255 P.3d 121 (2011) (state court has no jurisdiction over estate of tribal member who resided on reservation at time of death; overruling prior decisions applying balancing test to determine state court jurisdiction); *Gustafson v. Estate of Poitra*, 2011 ND 150, 800 N.W.2d 842 (2011) (no state court jurisdiction over suit by non-Indian lessee of tribal land within reservation boundaries, against tribal member lessor); *Winer v. Penny Enters., Inc.*, 2004 ND 21, 674 N.W.2d 9 (2004) (no state court jurisdiction over suit by non-Indian against Indian for damages arising from on-reservation accident; rejecting claim that *Williams* rule had been altered by *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)).

Other state courts have moreover found their jurisdiction lacking in suits such as the *Mendoza* case, against tribal gaming enterprises and their employees. *Beltran v. Harrah's Arizona Corp.*, 220 Ariz. 9, 202 P.3d 494 (Ariz. App., Div. 2 2008), was a suit brought in state

court after the plaintiffs had litigated and lost in the tribal court identical claims, for damages resulting from a slip-and-fall injury at the Harrah's Ak-Chin Casino. The superior court dismissed the suit on grounds of *res judicata* and collateral estoppel, and the court of appeals affirmed. Rejecting the appellants' arguments that the superior court had erred in recognizing and giving effect to the tribal court judgment, the court added that "Arizona courts properly refuse to accept jurisdiction over a case when doing so 'would undermine the authority of the tribal courts,'" and that that would have been the effect had the superior court entertained the plaintiffs' case on its merits. 220 Ariz. at 36, 202 P.3d at 501 (quoting *Williams*). In *Kizis v. Morse Diesel Int'l, Inc*., 794 A.2d 498 (Conn. 2002), a suit by a non-Indian visitor to the Mohegan Sun Casino against non-Indian employees of the tribe and the tribal gaming authority arising from a fall, the Connecticut Supreme Court held that the state court lacked subject matter jurisdiction, and that exclusive jurisdiction over those claims was in the Mohegan (Tribal) Gaming Disputes Court. Similarly, in *Diepenbrock v. Merkel*, 97 P.3d 1063 (Kan. 2004), the court dismissed for lack of jurisdiction a suit against two non-Indian employees of the Prairie Band Potawatomi emergency health care service by the estate of a patron who died of a heart attack at the Band's casino. The Kansas Supreme Court held that even though all parties to the case were non-Indian (as in *Kizis*), since the matter arose on tribal land, and the defendants were employees of the tribe or tribally owned entities, "[i]t would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Prairie Band Potawatomi Nation to govern themselves" to allow the case to proceed in state court. *Diepenbrock*, 97 P.3d at 1067. *And see Webb v. Paragon Casino*, 872 So.2d 641 (La. Ct. App. 2004) (workers' compensation action by tribal casino employee dismissed for lack of subject

matter jurisdiction and tribal sovereign immunity).[4]

In short, unless Congress has expressly authorized state courts to assume jurisdiction over suits against tribal gaming enterprises, such cases may only be heard in tribal courts.[5] As will be shown, no such authority has been granted by Congress.

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[4]The Oklahoma Supreme Court, to be sure, recently issued a series of opinions in cases arising from tort suits against tribal gaming enterprises, in which it held that Oklahoma state courts are "courts of competent jurisdiction" for purposes of patrons' personal injury suits arising under the Oklahoma gaming compacts, despite compact language stating that "This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." *See, e.g., Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507 (2010); *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488 (2010); *Cossey v. Cherokee Nation Enters., LLC*, 2009 OK 9, 212 P.3d 447 (2009). In *Muhammad v. Commanche Nation Casino*, 2010 WL 4365568 (W.D.Okla. 2010), however, a federal court to which a tort suit against a tribal gaming enterprise had been removed from state court held that state courts could *not* be considered "courts of competent jurisdiction" for such purposes, because those courts "have no authority over conduct by a tribal entity occurring on tribal land unless authority is expressly granted to them." *Id*. at *9. It therefore dismissed the plaintiff's suit. (The court also ruled that IGRA would permit the parties to the compact to shift jurisdiction over tort suits to state court, had they chosen to do so. The only authority cited for this proposition was *Doe v. Santa Clara Pueblo*, 2007-NMSC–008, 154 P.3d 644, and the court generally adopted the analysis of IGRA contained in that opinion. *See id*. at *4 - *6 and n.7. As will be explained below, Plaintiffs believe that the *Doe* analysis of IGRA in this regard is unsupportable.) *See also Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, 2012 WL 896243 (N.D. Okla. 2012) (state court has no jurisdiction to hear patron's tort suit against tribal gaming enterprise).

After the Oklahoma Supreme Court's decision in *Cossey* (and while *Dye* and *Griffiths* were pending in that court), the Choctaw Nation of Oklahoma demanded arbitration of the question whether an Oklahoma state court could be considered a "court of competent jurisdiction" for purposes of personal injury suits under the Oklahoma compact. The arbitrators ruled in favor of the tribe, and in *Choctaw Nation of Oklahoma v. Oklahoma*, 724 F.Supp.2d 1182 (W.D.Okla. 2010), a federal judge certified the arbitrators' decision and issued a mandatory injunction ordering the state to comply with it. (The Supreme Court had issued its decisions in *Dye* and *Griffiths* after the arbitration award was issued, but before *Choctaw Nation* was decided. That court declined to reconsider either of those decisions in light of the arbitration award.)

[5]Patrons who suffer injury at tribal gaming establishments also have the right under Section 8 of the Compact to invoke binding arbitration of their claims.

II. IGRA DOES NOT AUTHORIZE THE SHIFT TO STATE COURTS OF JURISDICTION OVER PERSONAL INJURY CLAIMS.

The 2001 class III gaming compact between the state and the Pueblo of Santa Ana (the "Compact"), which is the compact that was in effect when the events alleged in the *Mendoza* case complaint occurred, see *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-030, ¶ 14, 258 P.3d 1050, 1054, states, at Section 8(A), that

> the Tribe agrees . . . to proceed either in binding arbitration proceedings *or in a court of competent jurisdiction*, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, *unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court*.

Stipulation, Doc. 51, Ex. A, Doc 51.1, (emphasis added). Section 8(E) reads, in its entirety,

> E. A visitor having a claim described in this Section may pursue that claim in any court of competent jurisdiction, or in binding arbitration. The visitor shall make a written election that is final and binding upon the visitor.

Id. Thus, the parties agreed in the Compact that personal injury suits against the tribal gaming enterprise could be heard either in binding arbitration or in a "court of competent jurisdiction," but that unless it was finally determined through litigation of the issue that "IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court," the tribe would agree that such cases could be heard in state courts.[6] In fact, that issue was presented to

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[6]To understand why the tribes agreed to this language in the 2001 Compact, it is instructive to examine the comparable language that was written into the compact enacted by the state legislature in 1997, which is codified in the state statutes at NMSA (1978) § 11-13-1 (1997). That compact was enacted after the state Supreme Court and the federal courts had found an earlier compact, that the tribes had negotiated with then-Governor Gary Johnson, to be void. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995); *Pueblo of Santa Ana v. Kelly*, 104 F.2d 1546 (10th Cir. 1997). The 1997 compact was not the product of negotiations, but was simply written by the legislature and presented to the tribes as a "'take it or leave it'

the New Mexico Supreme Court several years after the 2001 Compact was approved, but that court rejected the tribes' argument that IGRA did not allow jurisdiction-shifting as to personal injury cases. *Doe*, 2007-NMSC–008, 154 P.3d 644. But as a state court decision on an issue of pure federal law–the interpretation of IGRA–the *Doe* decision is not binding, and this court owes it no deference. *United States v. Miami University*, 294 F.3d 797, 811 (6th Cir. 2002). As will be explained below, in section III, moreover, Plaintiffs believe that its reasoning is deeply flawed.

As was shown above, *Williams* established that "absent governing Acts of Congress," states have "no power to regulate the affairs of Indians on a reservation." *Williams* noted that P.L. 280 was such a "governing Act," and *Kennerly v. District Court*, 400 U.S. 423 (1971), essentially held that without strict compliance with the procedural requirements of that Act, a state court had no authority to assume jurisdiction over a civil matter arising within Indian country in which a tribal member was the defendant, even where the tribe had unilaterally consented to such jurisdiction. The question presented here is whether IGRA is also such a "governing Act of Congress" with respect to personal injury suits against tribal gaming enterprises, and in particular, whether IGRA permits states and tribes to effectuate a transfer of jurisdiction over such suits from tribal to state courts by agreeing to such transfer in a tribal-state

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offer." *Pueblo of Sandia v. Babbitt*, 47 F. Supp.2d 49, 51 (D.D.C. 1999). Section 8 of that compact, which had been drafted by the New Mexico Trial Lawyers Association and was adopted by the legislature over vigorous tribal opposition (and the opposition of the Secretary of the Interior; *see Doe*, 2007-NMSC-008, ¶ 41 n.7, 154 P.3d at 655 n.7), specifically provided for "concurrent jurisdiction" of state and tribal courts over visitors' personal injury claims (as well as for binding arbitration). When, after the enactment of the Compact Negotiation Act, NMSA (1997) §§ 11-13A-1 though 11-13A-5 (1999), the tribes were able to enter into meaningful negotiations for a new compact with the state, although they were able to get most of Section 8 rewritten, negotiations over the court jurisdiction language ended with an understanding that the issue would "be litigated." *Doe*, 2007-NMSC-008, ¶ 55, 154 P.3d at 658-59 (Minzner, J., dissenting).

class III compact entered into under that Act. Plaintiffs submit that if there is no provision of IGRA that does permit such a transfer, the *Williams* rule of exclusive tribal jurisdiction controls, and the state court lacks jurisdiction over the *Mendoza* case.

Preliminarily, it must be noted that any claimed authority in IGRA allowing a transfer of tribal jurisdiction to the states must be express; it cannot be implied. "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Iowa Mut.*, 480 U.S. at 18 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)). The principle that tribes retain jurisdiction as a matter of sovereign right requires that IGRA provide clear and specific authority for a state court to assume jurisdiction over cases such as these. *See Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress . . . cautions that we tread lightly in the absence of clear indications of legislative intent.").

Applicable canons of statutory construction in this field instruct that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (internal quotation marks and quoted authority omitted). This principle applies fully to IGRA, one of whose purposes is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp.2d 838, 848-51 (W.D. Mich. 2008). Interpretation of IGRA, therefore, should afford due deference to the protection of tribal interests.

A. Relevant Legislative History Shows That IGRA's Jurisdiction-Shifting Provision is Solely Directed at the Concern Over Possible Criminal Infiltration of Tribal Gaming.

IGRA requires that a tribe wishing to conduct class III gaming must negotiate with the state and enter into a compact whose terms will govern the conduct of class III gaming activities. 25 U.S.C. § 2710(d)(3)(A). The purpose of the compact in the complex regulatory regime created by IGRA is explained in the Act's legislative history, especially the report of the Senate Indian Affairs Committee that accompanied S. 555, the bill that was ultimately enacted as IGRA. *See* S. Rep. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 ("the Report" or "S.Rep. 100-446").[7] At the very outset, the Report explained that the overriding concern of state and federal law enforcement officials was that Indian gaming enterprises "may become targets for infiltration by criminal elements." S. Rep. 100-446 at 2, *and see id*. at 5. The same concern appears as the second of the three "purposes" enumerated by Congress at the beginning of the text of the Act itself, as being "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, . . ." 25 U.S.C. § 2702(2). That concern was the principal basis for the calls for federal or state regulation of Indian gaming, especially casino-style gaming, which became known, in the IGRA lexicon, as "class III gaming." The Report describes the political maneuvering that ensued during congressional consideration of IGRA around the highly controversial proposition of allowing state regulatory

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[7]Courts have regularly looked to this Senate committee report as authority for congressional intent in IGRA. *See, e.g., Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027, 1029 n. 10 (9th Cir, 2010); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C.Cir. 2007); *Colorado R. Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp.2d 123, 139 (D.D.C. 2005); *Artichoke Joe's v. Norton*, 216 F. Supp.2d 1084, 1125 (E.D.Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003); *A.T. & T. Corp. v. Couer d'Alene Tribe*, 283 F.2d 1156, 1175 (9th Cir. 2002).

jurisdiction on tribal lands, S. Rep. 100-446 at 2-5, and how the committee ultimately settled on the device of the tribal-state compact as the means of resolving state regulatory concerns. A tribe could engage in high-stakes bingo and related games ("class II gaming"), with no state involvement, but if it wanted to venture into class III, it could do so only pursuant to the terms of a negotiated agreement--a compact--with the state in which the gaming would be conducted.

The Report explains that the compact was devised in part in response to Justice Department objections to federal regulation of class III gaming. The Department argued that "the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies," and that that expertise need not be duplicated at the federal level. *Id*. at 5. But the committee opposed any unilateral imposition of state authority on tribal land, and concluded that such state regulatory authority should only be applied to tribal gaming in accordance with an agreement between the tribe and the state, embodied in a compact. It concluded that the compact was "the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." *Id.* at 13.

It is apparent from the Report that the committee was duly cognizant of what a dramatic step it was taking, in permitting states, even with tribal consent, to participate in the regulation of a tribal activity within Indian country. As the Supreme Court has noted, in doing so IGRA was "extend[ing] to the States a power withheld from them by the Constitution." *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996). The Report is thus understandably replete with cautionary language indicating the committee's concern that the state role was to be strictly limited to the regulation of class III gaming, and that this was not intended as an invitation to any broader assertions of state authority in Indian country. For example, the Report states,

> *The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands*.
>
> *The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands*. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

S.Rep. 100-446 at 14 (emphasis added). "*In no instance*," the committee urged, "does S.555 contemplate the extension of State jurisdiction or the application of State laws *for any other purpose*" than the regulation of class III gaming. *Id.* at 6 (emphasis added). And for good measure, the committee added a key passage expressing its understanding that

> courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

Id. at 15.

In short, the concept of allowing some degree of state regulatory jurisdiction over tribal class III gaming through a negotiated compact was directly in response to state concerns over the possibility that organized crime might attempt to infiltrate or even take over tribal gaming enterprises, and that tribes very likely lacked the regulatory resources and expertise to police their gaming operations on their own. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D.N.M. 1996) ("The difference between the requirements for Class II gaming and Class III gaming demonstrates that the central purpose of the Act's Class III gaming provisions is to protect against the infiltration of organized crime into high-stakes gaming."), *aff'd*, 104 F.2d 1546 (10th Cir. 1997); *Doe*, 2007-NMSC-008, ¶ 35, 154 P.3d at 653 ("one of the primary

purposes behind IGRA's Class III gaming provisions was to thwart organized crime by allowing the introduction of state regulation, state laws, and state venue.").

That point, as made plain by the committee that drafted the bill and by courts that have examined the Act, sheds important light on the true meaning and effect of the provisions of IGRA that do permit shifting of jurisdiction of certain types of cases to state courts, as will be explained.

B. IGRA's Language Narrowly Limits Allowable State Jurisdiction to that Necessary for Enforcement of State Laws Directly Related to and Necessary for Regulation of Tribal Gaming.

25 U.S.C. § 2510(d)(3)(C) sets out the permissible topics that may be addressed in tribal-state class III compacts, and it reads, in part:

> (C) Any Tribal-State compact negotiated [for the conduct of Class III gaming operations] may include provisions relating to-
>
> > (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are *directly related to, and necessary for, the licensing and regulation of such activity*;
> >
> > (ii) *the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations*; . . .

25 U.S.C. § 2710(d)(3)(C) (emphasis added). Thus, subsection (d)(3)(C)(ii) permits the allocation of criminal and civil jurisdiction *only* as "necessary for the enforcement" of laws and regulations that are "directly related to and necessary for" the licensing and regulation of class III gaming activities. This provision embodies the congressional decision that, if agreed to by the tribe in a compact, a state could directly apply its laws concerning the licensing and regulation of gaming activities to tribal gaming, and could be involved in the enforcement of those laws. *See*

Colorado R. Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 123, 135-36 (D.D.C. 2005).

There are other provisions of § 2710(d)(3)(C) describing other topics that may be dealt with in a compact (including a catch-all category covering "any other subjects that are directly related to the operation of gaming activities," § 2710(d)(3)(C)(vii)), but none of them includes any language permitting any transfer of jurisdiction of any kind to the state. Indeed, no other provision of IGRA authorizes or refers to any transfer of jurisdiction to a state.

The specific terminology used in § 2710(d)(3)(C)(i) and (ii) is worth careful examination. The clauses permit allocation of criminal and civil jurisdiction "necessary for the enforcement of [the] laws and regulations" of the state that are applied to tribal gaming under § 2710(d)(3)(C)(i).[8] The term "enforcement" generally refers to governmental compulsion to obey officially prescribed norms. Like "licensing and regulation," that term strongly suggests direct governmental oversight of gaming, not private remedies for compensation. The jurisdiction that is to be "allocated" under § 2710(d)(3)(C)(ii), thus, is governmental regulatory authority, not court jurisdiction over private civil actions. Second, the use of the term "allocation of . . . jurisdiction," rather than "transfer" (as appears in 18 U.S.C. § 1166(d), which was enacted as part of Section 23 of IGRA), referring to the shift of specific federal criminal jurisdiction to a state, is suggestive of establishing jurisdiction that is not pre-existing; *e.g.*, creating new authority on the part of a state to enforce its gambling laws within Indian country–authority that "was withheld from [the States] by the Constitution." *Seminole*, 517 U.S. at 58. Importantly, none of this

[8]Clause (C)(i) actually refers to the laws and regulations of "the Indian tribe or the State," but that is undoubtedly meant to display evenhandedness. A tribe plainly does not need authority in a compact to apply its own laws and regulate its own activity on its own land.

language even suggests that Congress contemplated the transfer to the state courts of pre-existing tribal court jurisdiction over ordinary private, civil causes of action, that have no relation to the conduct of gaming other than the fact that they arose on the premises of a gaming facility.

Section 10 of the Compact contains precisely the type of provision as is contemplated by 25 U.S.C. § 2710(d)(3)(C)(ii) (and by 18 U.S.C. § 1166(d)). That section allows the State to investigate and prosecute, in state courts, any violations of state gambling laws made applicable to Indian country by § 1166(a), by non-tribal members. As crimes committed by non-Indians against an Indian gaming enterprise within Indian country, these crimes would normally be subject to exclusive federal jurisdiction. COHEN, § 9.03, at 754; 18 U.S.C. § 1166-68. Section 10 sets out detailed procedures by which the State is to exercise such authority, including provisions relating to the involvement of tribal regulatory and law enforcement personnel and regular reporting to the tribe on state enforcement activity. This is the kind of jurisdiction-shifting that the cited sections of IGRA authorize, not some broad power over ordinary civil suits.

C. Private Tort Suits Have No Direct or Necessary Relationship to Regulation of Class III Gaming, and Thus Are Not Within the Scope of Allowable Jurisdiction-Shifting Under IGRA.

Wholly apart from the fact that the *Mendoza* case is an ordinary tort suit against a tribal entity that is otherwise within the pre-existing exclusive jurisdiction of tribal courts, and thus is not, as shown above, the type of matter that Congress contemplated allowing states to exercise jurisdiction over under 25 U.S.C. § 2710(d)(3)(C)(ii), personal injury suits against tribes and their gaming enterprises are plainly not "directly related to or necessary for" the "licensing or regulation" of class III gaming activities. This is evident from the complaint in the state court

case.

The complaint in the *Mendoza* case alleges that employees of TEI served alcoholic beverages to Desiree Mendoza, Michael Mendoza and Dominic Montoya when those employees knew or should have known that those persons were already intoxicated. Such a claim has no bearing whatever on the licensing or regulation of class III gaming activities. These three persons are not alleged to have been involved in any class III gaming activity at any time, nor were they even in the casino when the alleged over-service of alcohol occurred. They were at a wedding reception in the "event center," which happens to be attached to the casino. The claim of negligence that is alleged has nothing to do with the operation of class III gaming. Rather, it is an allegation of breach of a claimed duty of the type that would be alleged in any dramshop case, wherever it might arise.

In a closely analogous context, courts in three states have held that although Congress has given the states express regulatory jurisdiction over the sale and possession of alcoholic beverages within Indian country in 18 U.S.C. § 1161, *see Rice v. Rehner*, 463 U.S. 713 (1983), that regulatory authority does not embrace or imply the power to require tribes to answer to private dramshop-type actions allegedly involving sale of alcohol by tribal licensees to intoxicated persons. *Filer v. Tohono O'odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (Ariz. App., Div.2 2006); *Greenidge v. Volvo Car Finance, Inc.*, No. X043CV9601194756, 2000 WL 1281541 (Conn. Super., Aug. 25, 2000); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. Ct. App. 1997). In none of these cases did the court see a sufficient nexus between the state regulatory scheme and a private claim for damages arising out of the regulated activity, and that was so even though, in both the Arizona case and the Texas

case, the dramshop action was created by a statute that was part of the state alcoholic beverage regulatory scheme. But if dramshop actions are not plausibly considered part of the "regulation" of the sale and service of alcoholic beverages, under no imaginable logic could they (or any other private personal injury lawsuit) be deemed an aspect of the "regulation" of gaming.

In short, the language of § 2710(d)(3)(C)(ii) provides only narrow authorization for allocating to the state government the authority to enforce (through state courts, if agreed to by a tribe) state laws that are "directly related to and necessary for" the "licensing and regulation of gaming." This language necessarily precludes any finding that IGRA permits a compact to shift to state courts jurisdiction over ordinary private tort suits against a tribal gaming enterprise that are committed exclusively, as a matter of federal law, to the jurisdiction of the tribal courts.

III. THE NEW MEXICO SUPREME COURT DECISION IN *DOE* RESTS ON FLAWED REASONING, AND SHOULD NOT BE FOLLOWED.

In *Doe*, the New Mexico Supreme Court was presented with the same issue that is presented here. In a lengthy opinion, and over the strong dissent of the late Justice Patricia Minzner, 2007-NMSC-008, ¶¶ 50-56, 154 P.3d at 657-59, it ultimately concluded that IGRA did allow states and tribes to shift jurisdiction over patrons' personal injury suits to state courts. While that decision, as noted above, is not one to which this Court need pay deference, Plaintiffs believe that it would be useful to examine the bases for the court's decision.

The opinion covers a broad swath,[9] but eventually comes down to the very same inquiry

[9]For example, the court engages in a textual analysis of the relevant Compact language, but by misstating that language reaches the conclusion that "the Pueblos have consented to state court jurisdiction." *Doe*, 2007-NMSC-008, ¶ 13-16, 154 P.3d at 648-49. The court said that the Pueblos agreed to language that "gave state courts jurisdiction over personal injury claims,

addressed in the previous section of this brief: whether IGRA can be interpreted as authorizing tribes and states to agree in a compact to shift jurisdiction over personal injury suits to state courts. *Doe*, 2007-NMSC-008, ¶ 30, 154 P.3d at 652. The court agreed that the provision of the statute discussed in detail above, at 25 U.S.C. § 2510(d)(3)(C)(i) and (ii), is the only language in the statute that refers to jurisdiction-shifting of any kind, *id*. at 2007-NMSC-008, ¶ 12, 154 P.3d at 648, and it acknowledged that preventing the infiltration of organized crime into tribal gaming was one of the Act's primary purposes, *id*. at 2007-NMSC-008, ¶ 35, 154 P.3d at 653, but it proceeded to a thorough scrutiny of the legislative history, finding language in the Senate committee Report noting that a state's interest in class III gaming could include "'the State's *public policy, safety, law and other interests*, as well as impacts on the State's regulatory system.'" *Id*. at 2007-NMSC-008, ¶ 36, 154 P.3d at 654 (quoting S.Rep. No. 100-446 at 13) (emphasis by the court). These interests, the court concluded, could encompass personal injury lawsuits. *Id*. The opinion then quotes a passage in the Report referring to the jurisdiction-shifting provision of the Act, that suggests some flexibility in how that feature would be

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conditioned not upon IGRA *allowing* such jurisdiction, but upon IGRA *not prohibiting* jurisdiction shifting. . . . Nothing in the language of IGRA prohibits jurisdiction shifting." *Id*. 2007-NMSC-008, ¶ 13, 154 P.3d at 648 (emphasis in the original). While that last statement is true, that is not what the Compact language says. The language (of Section 8(A)) says nothing about "prohibiting." Rather, it says that the tribe agrees that these cases can be heard in state court unless it is finally determined judicially "that IGRA *does not permit* the shifting of jurisdiction . . ." (Emphasis added.) The point is that under *Williams*, there must be express statutory authority for the tribes and the state to agree to jurisdiction-shifting. If IGRA does not *permit* (or "allow") such an agreement, then there is no authority for it, and any such agreement would be void. The only required inquiry, thus, is whether IGRA provides authority for (or, "permits") such jurisdiction-shifting. There is no need to look for an express "prohibition" against such agreements. And importantly, even if the tribes had unequivocally agreed to state court jurisdiction, if there were no authority for such an agreement in IGRA that agreement would be void. *Kennerly*, 400 U.S. at 426-30 (1971).

implemented,[10] and it therefore concludes that "[t]he broad compact negotiating process by which Congress sought to ensure that states could protect their interests in public policy, safety, and laws, may reasonably be interpreted to include the issue of jurisdiction over personal injury suits." Id. at 2007-NMSC-008, ¶ 39, 154 P.3d at 654-55.

In short, the court drew inferences from passages in the legislative history, including both the Report and statements made on the floor of the Senate, to determine that the Act created authority for the shifting of jurisdiction over personal injury suits to state courts.[11] Remarkably, moreover, after all of that, the court addressed the argument that IGRA should be interpreted in accordance with the canon of construction that laws intended to benefit Indians and Indian tribes should be interpreted in the manner that best promotes tribal interests. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).[12] The court declined to apply that canon, it

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[10]The court failed to note that that discussion, in S.Rep. 100-44 at 14, was with specific reference to issues regarding regulation of gaming.

[11]The court found "further support" for its conclusion from the fact that compacts in other states also dealt with jurisdiction over personal injury suits, but in support of that it cited only *Diepenbrock* and *Kiziz*, discussed above, and *Bonnette v. Tunica-Biloxi Indians*, 873 So. 2d 1, 6 (La.Ct.App. 2003). *Id*. at 2007-NMSC-008, ¶ 44, 154 P.3d at 656. As the court acknowledged, in each of those cases the compact specified that such cases were to be heard in tribal court. The court characterized those provisions as "granting jurisdiction" over such cases to the tribal courts, and it thus concluded that a similar provision in the New Mexico compact "granting jurisdiction" to the state courts was not materially different. But this is fundamentally wrong. The tribal courts already have exclusive jurisdiction of such suits by virtue of the *Williams* rule. The Kansas, Connecticut and Louisiana compacts did no more than acknowledge that fact; they "granted" nothing.

[12]This, the so-called "Indian canon," has been routinely applied to the interpretation of IGRA. *See, e.g., Rincon Band*, 602 F.3d at 1028-29 n.9; *Sault Ste. Marie Tribe*, 576 F.Supp.2d at 848-51; *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 971 (6th Cir. 2004); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir 2003) (rejecting argument that doctrine is outmoded), *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 548 (8th Cir. 1996); and *Sisseton-Wahpeton Sioux Tribe v. United States*, 804 F.

said, without a hint of irony, because "we are convinced after examining the legislative history that Congress' intent is clear . . . that Congress intended the parties to negotiate, if they wished, the choice of laws for personal injury suits against casinos as well as a choice of venue for the enforcement of those laws. . . . Without an ambiguity, the *Blackfeet* presumption does not apply." *Id*. at 2007-NMSC-008, ¶ 47, 154 P.3d at 657.

Plaintiffs submit that the *Doe* court improperly disregarded the requirement of express statutory authority for allowing state court jurisdiction over Indian people and entities, and that its easy inference of such authority from vague passages in the legislative history ignored the strict language of the statute itself referring to jurisdiction-shifting, and the specific cautions in the Report warning against using the compact device to achieve any unauthorized broadening of state power in Indian country. Finally, given the court's approach, its rejection of the application of the Indian canon of construction because "Congress' intent is clear" is impossible to credit. The *Doe* decision thus does not merit any weight in this Court's consideration of these issues.

IV. EITHER TRIBAL COURT ADJUDICATION OR ARBITRATION PROVIDES PATRONS WITH AN "EFFECTIVE REMEDY" FOR RESOLUTION OF PERSONAL INJURY CLAIMS AGAINST TRIBAL GAMING ENTERPRISES.

Finally, there is no reason for concern that a determination that state courts are not "courts of competent jurisdiction" for purposes of Section 8 of the Compact will leave tribal casino patrons without an effective remedy for adjudication of their damage claims. As Judge Sutin said in his dissent from the New Mexico court of appeals decision in *Doe*,

> [h]aving an effective remedy does not necessarily require state court

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Supp. 1199, 1209 (D.S.D. 1992).

> jurisdiction. Nothing in the record indicates that a visitor claimant cannot have an effective remedy through tribal court or arbitration as long as those processes provide due process.

Doe v. Santa Clara Pueblo, 2005-NMCA-110, ¶ 27, 118 P.3d at 211 (Sutin, J., dissenting). Federal law and policy fully support such a role for the tribal courts. See, e.g., *Iowa Mut. Ins. Co. v. LaPlante* , 480 U.S. 9, 16-17 ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes involving important personal and property interests of both Indians and non-Indians."); *Tempest Recovery Svcs.*, 2003-NMSC-019, ¶ 15 n.3, 134 N.M. at 138 n.3 ("We recognize that the Supreme Court has interpreted the 'longstanding policy of encouraging tribal self-government,' as including the development of tribal courts because '[t]ribal courts play a vital role in tribal self-government.'" (quoting *Iowa Mutual*, 480 U.S. at 14)). Moreover, the Indian Civil Rights Act compels such courts to assure due process to all litigants. *See* 25 U.S.C. § 1302(8).

Alternatively, Respondents may demand arbitration of their claims, in accordance with the procedures set forth in the Compact at Section 8(F). That provision assures a fair and objective proceeding before a panel of three arbitrators, and establishes a remedy that is universally accepted and encouraged as a fair and effective means for resolution of disputes of all kinds. *See, e.g., K.L. House Const. Co. v. City of Albuquerque*, 91 N.M. 492, 493-94, 576 P.2d 752, 753-54 (1978) ("The announced policy of this State favors and encourages arbitration . . ."). The Compact thus assures that Respondents will have an effective remedy for seeking compensation for their alleged injuries. But the course the plaintiffs in the *Mendoza* case chose is not a remedy that the Compact allows, or

that it could allow.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully move the Court to enter summary judgement in their favor on the claims set forth in the Complaint herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of May, 2012, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as fully reflected on the Notice of Electronic Filing:

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