UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

Plaintiffs,

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

THE 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.

RESPONSE OF JUDGE NASH TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs' Motion should be denied. Tribes have the power to consent to state court jurisdiction. The Pueblo, in entering into the Compact, did consent to state court jurisdiction. And IGRA permits the specific consent that the Pueblo gave.

Statement of Undisputed Material Facts

Judge Nash takes no issue with the facts set forth in the Statement of Undisputed Material Facts in Plaintiffs' Motion. But in the course of developing its argument, Plaintiffs offer as fact two assertions not supported by admission of the Defendants or by affidavit of the Plaintiffs. These assertions do not appear to be material to Plaintiffs' argument, but to the

extent that their argument relies on such assertions, the arguments should be rejected. The assertions at issue are as follows:

1. In footnote 6, Plaintiffs assert that the 1997 compact language adopted by the New Mexico Legislature was drafted by the New Mexico Trial Lawyers Association. Not only is this not the compact language before the Court, but even if it was, the lobbying process is not relevant. What would be relevant is that the language adopted by the Legislature was the language agreed to by the Pueblo.

2. In the same footnote, Plaintiffs assert that "negotiations over the court jurisdiction language ended with an understanding that the issue would 'be litigated.'" But for this assertion, they cite only to a dissent, which cannot bind this Court.

The first of these assertions is completely immaterial, but the second has limited materiality for Plaintiffs' argument, insofar as it purports to offer history to clarify the meaning of Section 8(A) of the Compact as understood by the parties to the Compact.

I. Jurisdiction-Shifting to State Court is Permissible under IGRA.

IGRA allows jurisdiction shifting.[1] Plaintiffs look to the wrong cases for the governing law. Tribes can waive their immunity and subject

[1] 25 U.S.C. § 2710(d)(3)(C).

themselves to state court jurisdiction. And another federal District Court, considering the question presented here, recognized this possibility.

Plaintiffs cite extensively to *Williams v. Lee*[2] and its progeny, particularly *Kennerly v. District Court*,[3] but *Kennerly* is not apposite here. In *Kennerly*, the Court rejected a Tribe's attempt to confer jurisdiction over *its members* because it did not comply with the procedure set forth in the Civil Rights Act of 1968—a procedure that required a majority vote of the tribe's members; i.e., those who would be subjected to the jurisdiction of state courts by the Tribe's action. Here, the procedure for allocation of jurisdiction is the compact negotiation process between the *Tribe* and the State—a process that was followed, subjecting not a member, but an *arm of the Tribe*, to potential liability in state court.

That a Tribe can waive immunity and subject itself to state court jurisdiction is clear.[4] In *C & L Enterprises*, the issue was whether a contract between a Tribe and a private non-tribal entity, which contained an arbitration clause and permitted for the enforcement of any arbitration award in "any court having jurisdiction."[5] The contract incorporated the American Arbitration Association Rules, which provided, "Parties to these rules shall be deemed to have consented that judgment upon the arbitration

---

[2] 358 U.S. 217 (1959).
[3] 400 U.S. 423 (1971).
[4] *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001).
[5] *Id.* At 415.

award may be entered in any federal or state court having jurisdiction thereof."[6] The contract further provided that the contract was to be governed by the law of the place where the project was located, which happened to be a building in Oklahoma, on fee land (not trust land) owned by the Tribe.[7] And Oklahoma law included a provision that "the making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement and to enter judgment on an award thereunder."[8]

A unanimous Court held that "by clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of contractor C & L."[9] Although the New Mexico Supreme Court relied heavily on *C & L Enterprises* in *Doe v. Santa Clara*,[10] Plaintiffs do not confront this decision—a decision more on point and more recent than *Kennerly*—in their attempt to take down *Doe*. But it is because of *C & L Enterprises* that Plaintiffs' criticism of *Doe* falls short. *C & L Enterprises* shows that a Tribe can, by contract, consent to state court jurisdiction (again, unlike *Kennerly*, where the issue was what procedures were necessary for a Tribe to subject *its members* to state court jurisdiction). So it was proper for

[6] *Id.*
[7] *Id.* at 414–15.
[8] *Id.* at 415.
[9] *Id.* at 414.
[10] 2007-NMSC-08, 141 N.M. 269, 154 P.3d 644.

the New Mexico Supreme Court to look not for permission, but for prohibition, in IGRA.[11]

It should also be noted that unlike a contract for construction between a Tribe and a private party, the Compact is a contract expressly authorized by federal law—law that explicitly contemplates the allocation of jurisdiction between state and tribal courts.

By contrast, in this case, the Court need not resort to the reading of a state law referenced by rules incorporated into a contract—although the Supreme Court found that even such a tortuous process could still result in a clear waiver of immunity and submission to state-court jurisdiction. Here, the Court need only look to the language of the Compact, which contains the waiver and submission in one simple section.

Plaintiffs also advance the so-called "Indian canon" that statutes passed for the benefit of Tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. But this canon is not just as simple as "the Tribe always wins." As the Western District of Oklahoma recognized:

> [P]lacing a restrictive limit on the phrase 'directly related to, and necessary for' regulation of gaming would be inconsistent with the congressional purpose of promoting strong tribal governments. Permitting tribes to compact for the allocation of civil-adjudicatory jurisdiction over tort claims related to gaming operations enables a tribe, as here, to develop its own

[11] *See id.* at ¶¶ 13, 25–29.

> administrative and civil law systems and to provide for the welfare of casino patrons coming onto its lands.[12]

In essence, Plaintiffs ask the Court to accept the possibility that while negotiating the Compact, the Pueblo could have said, "We'd love to submit to state court jurisdiction, but under federal law, we can't." And the principle underlying the construction that gives rise to this possibility is the importance of tribal self-government. The principle and the hypothetical situation it permits cannot be reconciled.

While the court in *Muhammad v. Comanche Nation Casino* granted the casino's motion to dismiss, it recognized that jurisdiction-shifting was permissible.[13] The *Muhammad* court found that Oklahoma's compact did not contain "an affirmative extension of state civil-adjudicatory jurisdiction by a tribal-state gaming compact" sufficient to confer jurisdiction on state courts, as the Oklahoma Compact only provided that personal injury suits could be brought "in a court of competent jurisdiction."[14] That reasoning is not applicable here, where the extension is affirmative and clear.

II. Santa Ana Agreed to Jurisdiction-Shifting.

The Pueblo agreed to state court jurisdiction for personal injury suits arising from casino operations. This is clear from the Compact. The "unless"

---

[12] *Muhammad v. Comanche Nation Casino*, 2010 U.S. Dist. LEXIS 114945, at *19 (W.D. Okla. Oct. 27, 2010).
[13] *Id.* ("[T]he Court concludes that IGRA does not prohibit a state and a tribe from negotiating an allocation of civil-adjudicatory authority over tort claims related to gaming operations.").
[14] *Id.* at *28.

clause on which Plaintiffs rest their case does not have the full import they attribute to it. It is also a resolved factual issue in the state proceeding.

Section 8(a) of the compact provides that personal injury claims arising from casino actions "may be brought in state district court, 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."[15] Under a strict reading of this provision, the state court plaintiffs were entitled to bring their suit in state court because, at this time, no state or federal court has determined that IGRA does not permit jurisdiction-shifting for personal injury claims.

But leaving that reading aside, as it perhaps proves too much, the primary import of Section 8(a) is not the "unless" that wraps it up, but the remainder of the language, which focuses on the importance of the protection of visitors.

Plaintiffs argue, based on factual assertions not supported by the record, that this language was agreed to with the understanding that the issue would be litigated.[16] It is noteworthy that Santa Clara's counsel in *Doe* is Santa Ana's counsel here, and here advances the same argument that the jurisdiction-shifting provision is only an agreement to litigate the issue that

---

[15] Compact, § 8(a).

[16] The ultimate authority for this assertion is Judge Sutin's dissent in the Court of Appeals in *Doe*. 2007-NMSC-08 at ¶ 14 (citing *Doe v. Santa Clara Pueblo*, 2005-NMCA-110, ¶ 28, 138 N.M. 198, 118 P.3d 203). While Justice Minzner's dissent accepts this, *Doe*, 2007-NMSC-08 at ¶ 55, the majority is somewhat more circumspect. *Doe*, 2007-NMSC-08 at ¶ 14.

the New Mexico Supreme Court rejected in *Doe*. But the "unless" clause may be more persuasively read as a severability clause limited to Section 8(a) (as opposed to the general severability clause found in Section 17), preserving the waiver of immunity and the right to arbitration in the event that the jurisdiction-shifting is struck down. This reading is more coherent with the whole of Section 8, which focuses not on the Pueblo's interest in self government, but its interest in the protection and safety of its visitors, including the right of injured visitors to their choice—not the Pueblo's choice—of forum.

Finally, Plaintiffs are estopped from arguing that they did not agree to jurisdiction-shifting. Federal law requires the Court to give state court decisions "the same full faith and credit . . . as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."[17] Under New Mexico law, an issue may not be relitigated if "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation."[18] Here, Plaintiff TEI was a party to the state court action before Judge Nash, the cause of action is different from the previous cause of action,

[17] 28 U.S.C. § 1738.
[18] *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-22, ¶ 9, 148 N.M. 228, 231–32, 233 P.3d 362, 365–66.

the issue of what the Pueblo agreed to was actually litigated, and it was necessarily determined.[19]

In order to determine the status of the state court plaintiffs' claims, the New Mexico Supreme Court first had to decide its jurisdiction. A necessary determination for that decision was that "the Pueblo unambiguously agreed to proceed in state courts for claims involving injuries proximately caused by the conduct of the Casino."[20] The existence of the unambiguous agreement to state court jurisdiction is a factual determination arrived at by interpretation of the Compact and the behavior of the parties to the Compact. The only question remaining is whether the Pueblo has the power to agree. As discussed above, *C& L Enterprises* says that it does. But a closer inspection under IGRA is warranted.

III. The Jurisdiction-Shifting in Section 8(a), to which Santa Ana Agreed, is Permissible under IGRA.

IGRA provides for allocation of jurisdiction between a State and the compacting Tribe.[21] Despite Plaintiffs' protestation to the contrary, Section 2510(d)(3)(C)(ii) refers specifically to "civil jurisdiction," which at least implies the possibility of private rights of action being brought in state court pursuant to an IGRA compact. Plaintiffs ignore the deterrent function of

[19] *See Mendoza v. Tamaya Enters.*, 2011-NMSC-30, ¶ 15, 150 N.M. 258, 263, 258 P.3d 1050, 1055.
[20] *Id.*
[21] 25 U.S.C. § 2510(d)(3)(C)(ii).

private tort actions.[22] The deterrence of the tort system helps regulate activity, and is therefore a proper subject for the jurisdiction-allocating provision of IGRA.

In addition, any construction of IGRA's "directly related to, and necessary for" provisions must take into account a realistic picture of a whole gaming enterprise. A construction of "directly related to, and necessary for" limited to slot odds, maximum bets, and the thickness of felt at the blackjack table ignores that casinos are entertainment venues, where patrons may come to eat, drink, and attend events. To insist that the allocation of jurisdiction between the State and the Pueblo be restricted to only what transpires on the gaming tables and slot machines, and that the State cannot negotiate protections for its citizens into the compact, fails to recognize all that is implied by Class III gaming.

For example, the regulation of the service of alcohol, and its potential dangerous interactions with gaming activity, is explicitly recognized in the Compact.[23] In particular, Section 15(c), which requires the casino to maintain liquor liability insurance, implicitly contemplates the possibility of injuries arising from the consumption of alcoholic beverages at the casino.

---

[22] *See Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983) (Posner, J.) ("Indeed, it has long been one view that deterrence, accomplished through the setting of standards of conduct and the punishment by means of damage awards, compensatory and punitive, of those who deviate from them, is the main function of tort law.").

[23] *E.g.*, Compact, §§ 15–16 (prohibiting overserving, requiring training similar to that required under New Mexico law, requiring liquor liability insurance, and prohibiting service of alcoholic beverages in gaming areas).

That the Compact thusly recognizes the connected risks of gambling and drinking shows that the State and the Tribe agreed that the regulation of the service of alcohol by a tribal casino is directly related to, and necessary for, the regulation of gaming activities.

CONCLUSION

For the reasons stated above, Judge Nash respectfully requests that Plaintiffs' Motion for Summary Judgment be DENIED, and that the case be dismissed with prejudice.

Respectfully submitted,
GARY K. KING
NEW MEXICO ATTORNEY GENERAL

/s/ Matthew E. Jackson 6/8/12
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
505-827-6021
mjackson@nmag.gov
Counsel for the Honorable Nan G. Nash

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2012, I filed the foregoing electronically through CM/ECF, which caused service by electronic means on all counsel of record.

/s/ Matthew E. Jackson 6/8/12
Assistant Attorney General