IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA
and TAMAYA ENTERPRISES, INC.,

Plaintiffs,

vs. **No. 1:11-cv-00957-BB-LFG**

HONORABLE NAN G. NASH, et al.,

Defendants.

MENDOZAS' RESPONSE TO PLAINTIFF SANTA ANA PUEBLO AND TAMAYA'S MOTION FOR SUMMARY JUDGMENT

COME NOW. MICHAEL HART AND GINA MENDOZA, the Personal Representatives for decedents Desiree Mendoza and Michael Mendoza, (MENDOZA) and in Response to the Motion for Summary Judgment, respond herein as follows:

1. INTRODUCTION

Plaintiffs (Pueblo) and (TEI) wish to couch this inquiry as a search for the express congressional authority which would allow the New Mexico state district court to exercise subject matter jurisdiction over the pending state court wrongful death case brought by Mendoza against TEI. Of course, there is none. The fallacy of the Plaintiffs' analysis is that this absence of express authority (often referred to as "abrogation") is not the controlling questions. Since state court jurisdiction, turns on the Compact's requirement that a state or federal court finally determines whether IGRA prohibits the Pueblo from waiving sovereign immunity, the inquiry is whether there is any language in IGRA, not giving authority to, but prohibiting the Pueblo from, waiving its immunity and agreeing to the subject matter jurisdiction of the state district court. Since there is not, the Pueblo's motion must fail.

The Compact clearly articulates the issue in the "unless" clause in Section 8A: New Mexico state district courts have subject matter jurisdiction unless "IGRA does not permit the shifting of jurisdiction over visitors personal injury suits to state court".

Despite the Pueblo's attempt to turn the inquiry on its head, the precise question the court is being asked to decide is whether there any expression, anywhere in IGRA, where congress expressly, or even implicitly, prohibited the tribes from waiving sovereign immunity. Because there is not, (indeed IGRA expressly allows jurisdictional shifting) the Pueblo's motion should be denied. Moreover, given the Pueblo's sovereign power to waive immunity, it may, and indeed here did so, without the need for congressional pre-approval.

2. RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

The Mendoza Personal Representatives do not dispute any of the material facts as presented in the Pueblo's Statement of Undisputed Material Facts.

Mendozas, however, are compelled to include these additional material facts which are also not in dispute.

1. TEI and Santa Ana Pueblo had identical interests in the outcome of this litigation, and Santa Ana has an equal and perhaps even greater interest in the outcome of the state court litigation between Mendoza and TEI, than does TEI. As such, these entities (TEI and Santa Ana Pueblo) are in privity for purposes of this litigation.

2. The Pueblo on behalf of itself and on behalf of TEI has the capacity to enter into contracts.

3. The Pueblo on behalf of itself and on behalf of TEI, has the capacity to waive its sovereign immunity. See, TEI's Memorandums in Support of Summary Judgment on

punitive damages claim, filed May 3, 2012 in Cause Number D-202-CV-2007-0711 (state court action), page 3. Exhibit A to this Memorandum.

4. In 2001, the Pueblo entered into the relevant Gaming Compact with the State of New Mexico. That Compact is part of the court record, at Doc. 51, Exhibit A.

5. In this action, Pueblo and TEI seek a ruling from this court that IGRA does not permit the type of jurisdictional shifting stated in the compact.

6. The issues raised in the claims brought into this court by the Pueblo are identical to those addressed by the New Mexico Supreme Court in Doe v Santa Clara. 144 N.M. 269, 154 P.3d 344 (2007) See Pueblo's Response to Mendozas' Motion to Dismiss, Doc. 24, Page 3.

7. In 2007, in addressing the identical claim raised herein by the Pueblo, the New Mexico Supreme Court, finally determined that IGRA did not "not permit" (that is, IGRA did not prohibit) the jurisdiction shifting agreed to in the compact. See, Doe v Santa Clara, page 271.

8. In 2011, in Mendoza v. TEI, 258 P.3d 1050 (2011) (the Mendoza decision the New Mexico Supreme Court, in the context of the dispute between these very parties, in reaching its conclusion that state court jurisdiction was proper, reaffirmed Doe's holding that IGRA did not disallow the jurisdictional shifting agreed to in the Compact, and specifically held that Plaintiffs herein waived sovereign immunity, and agreed to state court jurisdiction.

9. The Pueblo, while not a party in the state court proceeding, (Mendoza v TEI through its relationship with TEI), however, is in privity with TEI.

10. The issues raised by the Pueblo and TEI herein have already been decided against them in Mendoza; there are no disputed issues of fact pertaining to

application of the various preclusion doctrines to this case, and because the Pueblo and TEI seek to simply relitigate these very issues, these preclusion doctrines bar this suit, and Mendozas are entitled to Summary Judgment.

DISCUSSION

1. The Pueblo may, and clearly and unambiguously did waive its sovereign immunity, and agreed to New Mexico state court jurisdiction. The Compact contains a clear and unambiguous waiver of sovereign immunity. See, Section 8A of the Compact: "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 ….in a court of competent jurisdiction …any such claim may be brought in state district court, unless…"

As firmly established as the immunity doctrine, stated in Williams v Lee, 358 U.S. 217, 220 (1959) is the companion doctrine of waiver, as stated in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity".

Tribes do not need congressional approval to waive immunity. See, C & L Enterprises v. Cit. Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001). In C & L, the Supreme Court found a waiver of immunity in a standard form construction contract used for building a roof on tribal owned (but off reservation) property. The sparse language of the contract's arbitration clause, sufficient for a finding of waiver, recited it could be enforced: "in any court having jurisdiction thereof."

In placing tribal waiver on equal footing with congressional abrogation, the only requisite to enforce either is clarity: "To abrogate tribal immunity, Congress must "unequivocally" express that purpose. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citing United States v. Testan, 424 U.S. 392, 399 (1976)). Similarly, to waive its

immunity, a tribe's waiver must be "clear."" C & L, at 418. The waiver in C & L is less clear and unequivocal than the Compact language at issue in this case. "A tribe may voluntarily subject itself to suit by issuing a "clear" waiver." Warren v. U.S. (W.D.N.Y. 06-CV-226S 3-13-2012). Courts are willing to find a waiver of immunity, so long as the waiver is clear. The waiver in the Compact is exceptionally clear.

See, J.L. Ward Assoc.. v. Great Plains Tribal Chairmen's Health Board (D.S.D. 1-13-2012 CIV 11-4008-RAL.; "An Indian tribe or tribal entity may waive its sovereign immunity by contract if it does so with "requisite clarity." ....While a contractual waiver of sovereign immunity must be unequivocal, it need not contain "'magic words' stating that the tribe hereby waives its sovereign immunity." Rosebud Sioux Tribe v. Val-U Const, Co. of S.D., Inc., 50 F.3d 560, 563 (8th Cir. 1995); see also William C. Canby, American Indian Law 110 (5th ed. 2009) ("Although the intention to waive must be clear, the waiver need not include the precise term "'sovereign immunity.")."

See also, Vann v. Salazar (D.D.C. 9-30-2011) Civil Action 03-1711 (HHK)."[T]o relinquish its immunity, a tribe's waiver must be `clear.'"

Outside of the limited context of the Civil Rights Act of 1968 below, to be discussed, there is simply no statute, case or rule of law that requires congressional approval for a tribe to waive sovereign immunity, should it wish to, and there certainly is not one in the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 et seq/

The only conceivable challenge to this proposition is invoked by the Pueblo in its discussion of Kennerly v. District Court of Montana, 400 U.S. 423 (1971). This misplaced reliance on Kennerly becomes irrelevant in the face of Kiowa and C & L, in its own internal logic and judicial development, as well as in a comparative construction of

IGRA.

In Kennerly, the Court was "presented solely with a question of the *procedures* by which "tribal consent" must be manifested under the new Act", id. at 430 (emphasis in original).The new act referred to was 25 USC §1322 (Civil Rights Act of 1968) (successor legislation to P.L. 280); this had been enacted by Congress to allow states to share concurrent jurisdiction over all criminal and civil matters arising on tribal lands, and imposed very specific action to be taken by tribal members, through voting at a special election, in order to perfect a state court's concurrent jurisdiction over civil and criminal matters. The Kennerly Court, noting that neither the State of Montana, (under P.L. 280) nor the Blackfeet Tribe, under the 1968 act, had complied with the specific procedural requirements mandated by congress, held that the Montana state court did not have subject matter jurisdiction over the civil dispute (an unpaid grocery store bill) which gave rise to that litigation. In rejecting the notion that non-conforming unilateral tribal council action was sufficient to waive sovereign immunity under the 1968 act, the court found the state court to be without jurisdiction.

Prior to the enactment of the 1968 law, PL 280 had been in effect. To establish concurrent jurisdiction under it, it required specific legislation by a state legislature. The Kennerly Court found the efforts taken by the Montana legislature were likewise not in compliance with the strict procedures set out in PL 280 (thus defeating a second possible source of state court jurisdiction). Finally, the Blackfeet tribal council, in 1967, had adopted a provision to its Tribal Code, attempting to create concurrent jurisdiction tribal and state court.

The Court found this attempt to waive sovereign immunity lacking, as the PL 280 "made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction".

The Pueblo seeks to expand this narrow, procedural holding and its rejection of the Blackfeet counsel efforts to establish concurrent jurisdiction into a broad generalization that tribes under all circumstances, even under IGRA, need specific congressional approval prior to waving sovereign immunity.

The import of Kennerly is over-stated by the Pueblo. The discussion in Doe, at 276, distinguishes it: "*Kennerly* did not involve a comprehensive compact, entered into in furtherance of federal legislation, and painstakingly negotiated between the tribes and the states, in which the tribes conceded state court civil jurisdiction in exchange for substantial benefits — in this case the ability to conduct Class III gaming on tribal lands"

Since 1971, the United States Supreme Court has given only scant recognition of Kennerly, and has certainly never held it out to stand for the sweeping proposition of law urged by the Pueblo. In Three Affiliated Tribes v Wold, 476 U.S. 877 (1986) it was briefly mentioned to explain the statutory history of PL 280:, "Public Law 280 represents the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations. The Act was the result of 'comprehensive and detailed congressional scrutiny' ".

Its limited import is also mentioned in a footnote to an earlier opinion in the same Three Affiliated Tribes v. Wold dispute; see, 467 U.S. 138 (1984): Although any assumption of jurisdiction pursuant to Pub.L. 280 must comply with that statute's procedural requirements, see Kennerly v. District Court of Montana, 400 U.S. 423

(1971), Pub.L. 280's requirements simply have no bearing on jurisdiction lawfully assumed prior to its enactment.

See also, Washington v. Yakima Indian Nation, 439 U.S. 463 (1979): we adhere to the principle that the procedural requirements of Pub.L. 280 must be strictly followed"

Kennerly has been cited as a pre-emption case, see New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983): "while under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, … such authority may be asserted only if not pre-empted by the operation of federal law;" and it has been cited as a sovereignty case. See, White Mountain Apache Tribe vs. Bracker, 448 U.S. 136 (1980): Congress has broad power to regulate tribal affairs under the Indian Commerce Clause,

> … This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. … Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). See also *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (*per curiam*); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

Indeed, in view of C and L, decided 30 years after Kennerly, and Kiowa, decided 19 years after Kennerly, neither of which reserve or precondition a tribe's sovereign right to waive immunity upon express congressional prerequisites, Kennerly must be limited to its construction of 1953 P.L. 280, and the Civil Rights Act of 1968 and its expectation of strict compliance to their requirements in establishing general concurrent state court jurisdiction.

Finally, the Compact expects us to look to IGRA, not to PL 280, nor to the Civil Rights Act of 1968 to answer the question central to this case, especially since the Pueblo

and the state strictly complied with IGRA's requirements.

2. Congress, in enacting IGRA, did not prohibit a waiver of immunity to allow state court jurisdiction over visitor's injury claims

a. IGRA permits jurisdictional shifting for visitor's injury claims.

Even though the Compact, to nullify the Pueblo's otherwise clear waiver of immunity, requires a finding that IGRA does not permit jurisdictional shifting, one possible way to reach that answer is to appreciate that IGRA actually does allow the tribes and states to negotiate the allocation of jurisdiction, in specified areas, such as those "directly related to, and necessary for, the licensing and regulation of such [Class III gaming] activity", and with "any other subjects that are directly related to the operation of gaming activities".

While IGRA does not specifically mention visitor's tort or personal injury claims, courts have convincingly deemed them to be subsumed within the broad scope of what are the statutorily permitted areas of compact negotiations. Damages case are necessary for, (and should remain to be) the regulation of, and related to, the activities of operating a casino. While IGRA does indeed limit the terms of what a compact may contain, See Seminole Tribe v. Florida, 517 U.S. 44, 49 (1996), once a provision is found to be within the scope of a permissible topic, it cannot be considered to be prohibited. The few courts that have looked at this question agree that IGRA, at 25 U.S.C. § 2710(d)(3), permits the states and tribes to negotiate jurisdictional shifting as it pertains to visitors personal injury claims.

Fnt[1] Even if the court determines that IGRA does not expressly allow jurisdictional shifting, that is not the same thing as determining that it prohibits it

25 USC §2710(c) provides:

(C) Any Tribal-State compact negotiated under subparagraph (A) 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;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

Doe, supra, for one, has addressed this question. It held that IGRA allows the parties to a compact to negotiate these jurisdictional shifting/ immunity waiver provisions as they pertain to personal injury claims.

Clearly, congress allowed the tribes and states to negotiate jurisdiction with regard to regulation and enforcement of gaming operations as well as "other subjects",. Personal injury claims fall within the scope of these permissible topics. Doe holds that

since the very purpose of tort law has traditionally been to regulate activity, and articulate standards of reasonableness in a social and commercial milieu, they fall well within the scope of what is regulating activity. See Doe, at 279:

> The 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. *See Doe*, 2005-NMCA-110, ¶ 17, 138 N.M. 198, 118 P.3d 203 ("Redressing injuries sustained by the Casino's visitors is sufficiently related to the regulation of tribal gaming. . . ."). Issues of safety, law, and public policy play a significant role in tort suits. Personal injury law is meant, in part, to expose weaknesses in safety procedures and protect the public from safety hazards. *See generally* Dan B. Dobbs, *The Law of Torts* § 5, at 8 (2000) (indicating tort law "can be seen as [a] means of imposing a degree of social control by preventing injury or compensating it"); *id.* § 6, at 10 ("Tort law is . . . one of a number of ways in contemporary American society aimed at creating incentives for safety or at providing compensation for loss or both."). Tort suits are thus related to gaming activity in helping ensure that gaming patrons are not exposed to unwarranted dangers, something that inures to the benefit of the Tribes.

More recently, In Muhammad v. Commanche Nation Casino, (W.D. Okla. 10-27-10; CIV-09-968-D), page 9, a federal district judge, while ultimately rejecting jurisdiction shifting based on a more limited compact waiver than is present here, like Doe, also came to this same conclusion regarding the scope of IGRA's permissible areas of negotiation:

> IGRA does not prohibit a state and a tribe from negotiating an allocation of civil-adjudicatory authority over tort claims related to gaming operations. The Court finds that the civil disputes about which the State of Oklahoma and the Comanche Nation negotiated — tort claims and prize disputes — are sufficiently related to and necessary for the regulation of gaming activities that jurisdiction over such disputes is a legitimate subject

of tribal-state negotiations and, where an accord can be reached, a Class III gaming compact.

b. The legislative history of IGRA supports jurisdiction shifting provisions

The Pueblo relies heavily on the Senate Indian affairs Committee Report, (Report), at pages 14-17 of Doc. 52. This report, however, offers more support to Mendoza. For example, on pages 3075-3076, it acknowledges that "the mechanics for facilitating this unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal state compact" (emphasis added); and at page 3083, under the section "tribal state compacts":

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class IIII gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. (emphasis added)

Once the Pueblo elected to serve alcohol at its casino, that service and the consumption of alcohol became an intrinsic activity in the operation of a casino. Drinking encourages gambling; gambling encourages drinking; driving while intoxicated follows; the nexus between the gaming, drinking and the states' concern for safety and laws is obvious. Civil dramshop liability regulates drinking, a lucrative activity undertaken at the casino. They all take place under one roof, and they all take place at the same time, and they are all, as the Senate report noted, "activities conducted on Indian land"

The cases relied on by the Pueblo attempting to vitiate this nexus are readily distinguishable; indeed they hardly stand for that proposition at all. Two of these cases, Filer v Tohono O'dham Nation Gaming, 129 P.3d (Ariz. App. 2006), and Holguin v. Ysleta del Sur, 954 SW2d 843 (Tx App 1997) both were personal injury claims brought under state dramshop laws; both argued that given the tribes' shared jurisdiction with the states over regulation of liquor distribution, pursuant to 18 USC §1161, a waiver of sovereign immunity for monetary damages could be implied. These theories were rejected, as neither court could find a clear and unambiguous waiver of immunity and designation of forums, as required under Santa Clara, Kiowa and C&L, supra. Nor did these cases involve a Compact, such as the one before the court, and certainly neither contained the clear and unambiguous waiver of immunity that Santa Ana Pueblo committed to when it entered into the Compact.

3. Given that Congress permitted the tribes and the states to negotiate where jurisdiction would lie for visitors injury claims, the plain language in this Compact is consistent IGRA's mandate. The Compact provides a clear waiver of sovereign immunity and a clear agreement by the Pueblo to submit to state court jurisdiction for tort claims such as this.

It is universally recognized that a compact is creature of contract law Seminole Tribe v. Florida 517 U.S. 44, 49 (1996), and now having resolved the question as to whether Section 8 is not something prohibited by IGRA, it follows then to conclude that since the waiver meets the requirements of clarity, the Mendoza's wrongful death action is a legitimate and valid exercise of jurisdiction under the Compact.

The Pueblo's waiver of immunity is valid. Santa Clara Pueblo v. Martinez, supra stands for the proposition that a tribe, absent congressional prohibition, may waive its sovereign immunity, so long as it is unequivocally expressed. See, Merrion v Jicarilla Apache Tribe, 455 U.S. 130 "Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."

The compact effects such a waiver; its terms are unmistakable: "the tribe …agrees to a limited waiver of its immunity from suit". Indeed, the Pueblo concedes the Compact contains a valid waiver of immunity, subject only to the inquiry as to whether IGRA probhibts this waiver. Page 11, Pueblo's Motion for Summary Judgment: "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', and "any such claim may be brought in state court", id., Undisputed Fact 8 (page 3)."

4 . Finally, IGRA does not prohibit jurisdictional shifting nor a tribe's waiver of immunity for tort cases. Rather, as discussed in Holguin, supra, 85, IGRA "creates a limited waiver of immunity for the regulation of gaming, but is silent [i.e. but does not prohibit] as to any waiver of immunity with respect to alcohol served incident to gaming activities on reservations. Even within the context of gaming on reservations, the IGRA waives tribal sovereign immunity as to regulations incident to gaming, but does not create [i.e. does not prohibit] a private cause of action for money damages". As the presence in IGRA an express prohibition was the only limitation to the Pueblo's waiver of sovereign immunity all that is left to determine is whether anything intrinsic to IGRA creates that prohibition, and there is none.

The Pueblo's comments on page 12 of its Memorandum that Doe should be ignored because it is a state court decision contradicts its own promise to be bound by a state or federal court determination as to whether IGRA prohibits jurisdiction shifting

Neither Williams v Lee, nor its progeny are applicable in the face of an authorized valid, clear waiver of immunity. The Pueblo cannot cite to one case that does not uphold a waiver of immunity when a Compact provides such a clear expression of waiver, and designation of forum as is present here.

CONCLUSION

For the foregoing reasons, the Court should deny the Pueblo's Motion for Summary Judgment, and for any other relief deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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