

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

NAVAJO NATION,  
and NORTHERN EDGE NAVAJO CASINO;

Plaintiffs,

vs.

Case No.: 1:15-CV-00799-MV-KK

HONORABLE BRADFORD J. DALLEY,  
District Judge, New Mexico,  
Eleventh Judicial District,  
in his Official Capacity;  
HAROLD McNEAL;  
and MICHELLE McNEAL;

Defendants.

**RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendant, the Honorable Bradford J. Dalley, does not dispute the material facts presented in the Plaintiffs Motion for Summary Judgment. A judgement as a matter of law is appropriate. But the Plaintiffs are not entitled to the requested relief.

Plaintiffs argue that the Navajo Nation has unqualified, inherent sovereignty, but then turn around and argue that the Navajo Nation cannot waive sovereign immunity to suits in state courts in a compact without Congress' authorization because the Navajo Nation's internal law does not authorize such a waiver. But as an inherent sovereign, the Navajo Nation may waive sovereign immunity to suits in whatever forum it wishes under general principles of sovereignty regardless of internal laws that may suggest otherwise.

## ARGUMENT AND AUTHORITY

A movant is entitled to a judgment as a matter of law if there is no genuine issue of material fact and the law supports the judgment requested. Fed.R.Civ.P. 56. In this matter, the law does not support the judgment that Plaintiffs request.

Under federal law, there are two independent methods by which the Navajo Nation can be precluded from asserting the defense of sovereign immunity: (1) when Congress has abrogated that immunity and authorized suit or (2) when the Navajo Nation has waived its immunity under the principles of inherent sovereignty. *See Kiowa Tribe of Oklahoma v. Mfg. Techs.*, 523 U.S. 751, 754, 118 S.Ct. 1700 (1998); *see also Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007).

**I. Under principles of Inherent Sovereignty, a Sovereign has the power to waive sovereign immunity and shift jurisdiction *sua sponte*, and no permission from any other sovereign is required.**

The Navajo Nation admits that it “agreed to waive its sovereign immunity for personal injury claims alleged to have been proximately cause by the conduct of NNGE, brought by visitors to its casinos, and agreed to proceed with such claims in state or tribal court.” Complaint at ¶ 10.

Plaintiffs assert that the Navajo Nation has plenary inherent sovereignty. *See Motion for Summary Judgment* at 5-6. But Plaintiffs then argue that the Sovereign Immunity Act of the Navajo Nation circumscribes the Navajo Nation’s inherent sovereignty to only permit the waiver of sovereign immunity in tribal court. *See Motion for Summary Judgment* at 7. Essentially, Plaintiffs argue that even though the Navajo Nation has plenary authority as an inherent sovereign, it did not have the authority to agree to waive sovereign immunity to suit in state

court, because the Navajo Nation limited its ability to compact externally with other sovereigns through the Navajo Nation's internal law. *Id.*

Under federal law, the Navajo Nation may relinquish its immunity if it clearly waives that immunity. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589 (2001). The New Mexico Supreme Court ("NMSC") analyzed the language at issue in the compact between the Navajo Nation and the State of New Mexico and found, as Plaintiffs admitted in the Complaint, that the language in the compact demonstrated a clear waiver of sovereign immunity, "unless IGRA does not permit" such a waiver. *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8, 154 P.3d 644. The NMSC held that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994), does not prohibit a tribe from waiving immunity to suit in state court, and therefore, a tribe may does so under principles of inherent sovereignty. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 45. Under the principles of inherent sovereignty, the Navajo Nation does not need permission from Congress to waive immunity and shift jurisdiction if it so chooses.

**II. The order issued in *Pueblo of Santa Ana v. Nash* did not determine with finality that IGRA does not permit the shifting of jurisdiction.**

"*Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble v. Marvel Entertainment LLC*, \_\_ U.S. \_\_, 135 S. Ct. 2401, 2409 (2015). The principles of *stare decisis* and the binding authority of higher courts provide stability and predictability to our legal system. Plaintiffs assert that courts have determined that IGRA does not permit jurisdiction shifting and waiver of sovereign immunity. But although some courts have determined that IGRA does not provide for jurisdiction shifting, other, higher courts have not made that determination with finality.

Plaintiffs argue that *Pueblo of Santa Ana v. Nash*, 974 F. Supp. 2d 1254, 1255 (D.N.M. 2013) constitutes a final determination that IGRA does not permit the shifting of jurisdiction to state court or a waiver of immunity for suit in state court. See Motion for Summary Judgment at 9-15. But *Michigan v. Bay Mills Indian Community*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2024, 2035 (2014) at least undermines, if not completely disarms that argument. In *Bay Mills*, Michigan attempted to sue a tribe for gaming outside Indian lands, the tribe argued that sovereign immunity barred suit, and the Court agreed with the tribe, based on the circumstances and the specific agreement brokered in that case. *Id.* at 2029-30. However, the Court observed that the tribe could have waived sovereign immunity in the compact, just like any contracting party can waive any right: “Michigan—like any State—could have insisted on a different deal.... And in that event, the limitation Congress placed on IGRA’s abrogation of tribal immunity—whether or not anomalous as an abstract matter—would have made no earthly difference.” See *id.* at 2035.

*Bay Mills* is in accord with *C & L Enterprises*, 532 U.S. at 423, where a tribe asserted “that a form contract, designed principally for private parties who have no immunity to waive, cannot establish a clear waiver of tribal suit immunity.” The Court held that the tribe “clearly consented to arbitration and the enforcement of arbitral awards in Oklahoma state court” and thereby waived immunity to the state court suit at question. *Id.* Despite Plaintiffs’ argument that Congress and IGRA do not allow a tribe to shift jurisdiction and waive sovereign immunity in a state gaming compact, it has not been finally determined that this is so.

And, as discussed above, the NMSC, whose holdings are binding on the Eleventh Judicial District Court of New Mexico, held that a tribe may waive immunity and shift jurisdiction if it so chooses in a gaming compact. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 45.

### CONCLUSION

The decision about jurisdiction in *Harold McNeal and Michelle McNeal v. Navajo Nation, Northern Edge Navajo Casino, and John and Jane Doe 1-10*, No. D-1116-CV-2014-00786, is based on legal authority that is binding upon the Eleventh Judicial District Court of New Mexico. Plaintiffs are not entitled to the requested relief, and therefore, Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted,  
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**CERTIFICATE OF E-FILING AND SERVICE**

I hereby certify that I filed and served a true and correct copy of the foregoing *Response to Plaintiffs' Motion for Summary Judgment* via the CM/ECF system on February 25, 2016.

/s/ Brian Parrish