UNITED STATES DISTRIC COURT

DISTRICT OF NEW MEXICO

NAVAJO NATION,
and NORTHERN EDGE NAVAJO CASINO,

Plaintiffs,

vs. No. 1:15-cv-00799-MV-KK

Honorable Bradford Dalley,
in his official capacity; Harold McNeal and
Michelle McNeal,

Defendants.

McNEAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

l. INTRODUCTORY STATEMENT

Through the comprehensive Indian Gaming Regulatory Act, ("IGRA") 25 U.S.C. §§2701-2721 (1988), Congress preempted the field of Indian Gaming. IGRA granted broad authority to states and Indian Tribes to negotiate gaming compacts directly related to the regulation and conduct of Class III Gaming. Compacts might include provisions (1) to allow gaming patrons injured by the alleged negligence of a tribal gaming facility to choose state district court as a forum for the resolution of their tort claims, (2) to allow tribes to waive sovereign immunity for the claims of gaming patrons and (3) to allow states and tribes choose to proceed under state substantive law.

Separately, the Navajo Nation, as a sovereign, validly waived its immunity from suit for the limited purpose of granting jurisdiction to state district courts to hear tort claims brought by gaming patrons under state law. The Eleventh Judicial District Court has jurisdiction to proceed in the underlying matter because both IGRA and the Navajo

Nation authorized the jurisdiction-shifting and immunity-waiving provisions of the Compact. Accordingly, the Court must deny Plaintiffs' Motion for Summary Judgment.

By enacting IGRA, Congress established a comprehensive framework for the regulation of gaming activity applicable to all states and all Indian tribes. IGRA authorized tribes and states to negotiate jurisdictional arrangements directly related to Class III gaming in a compact that included provisions allowing tribes and states to elect to be governed by state or tribal law to the extent deemed appropriate by the parties in each particular case. Because IGRA provided a nationwide platform applicable to multiple states and hundreds of tribes, each warranting individual treatment, Congress could not and did not identify mandatory provisions for the regulation of Class III gaming. Instead, Congress deliberately granted each state and each tribe authority to negotiate for themselves suitable regulatory and jurisdiction-shifting provisions.

With respect to tort claims of casino visitors, Section 8 of the Navajo-State Compact expressly waives the Navajo Nation's sovereign immunity, adopts New Mexico substantive law and authorizes gaming patrons to elect to bring personal injury suits in New Mexico state courts. Compact provisions providing remedies and a forum for casino visitors to bring tort claims are sufficiently related to the regulation of gaming as to fall within the ambit of IGRA as enacted by Congress.

Case law requiring "express waivers" of exclusive tribal jurisdiction and tribal sovereign immunity is inapplicable where the parties acted under authority of a governing Act of Congress that preempted the field of Indian gaming. The Navajo Nation and the State of New Mexico negotiated as equal sovereigns and included Section 8 as one provision for the regulation of Class III Gaming.

Independently, the Navajo Nation exercised its power to waive immunity from suit

and to agree to state district court as a forum for resolution of visitors' tort claims. Navajo Law authorized this action.

II. ADDITIONAL UNDISPUTED MATERIAL FACTS

The McNeal Defendants adopt and incorporate Plaintiffs' statement of Undisputed Material Facts. In addition the McNeal Defendants state:

1. The New Mexico - Navajo Nation Class III Gaming Compact, Exhibit A attached to Plaintiff's Motion, is valid and was approved by the Principal Assistant Secretary of Interior - Indian Affairs in January 2004 as required by 25 U.S.C. 2710 d(3)(B). *See* McNeal Defendants' Exhibit I for the federal approval documents and an unmarked text of the Compact. ("UMF 9").

2. Harold McNeal was a casino visitor on July 6, 2012, when he sustained the injuries giving rise to the underlying action. *See* ¶¶19-20 in the McNeal Defendants' First Amended Complaint, Exhibit 2. ("UMF 10").

3. Since 1980, the Navajo Nation has waived its immunity from suit with respect to tort claims against the Navajo Nation and tribal entities covered by commercial liability insurance. Navajo Nation Sovereign Immunity Act, I N.N.C. 554(F), originally 7 N.T.C. 854(c)(1980). ("UMF 11").

4. In approving the New Mexico Gaming Compact, the Navajo Council Resolution stated that the waiver of sovereign immunity in the Compact is "substantially similar to the Navajo Sovereign Immunity Act." *See* Exhibit 3, Resolution of the Navajo Nation Council, CAU-50-03, ¶7. ("UMF 12").

5. In 2003, the Navajo Nation accepted the State of New Mexico's suggestion that it adopt the existing 2001 compact previously negotiated by the State of New Mexico and the pueblos and tribes. *See* Exhibit 3 ¶6, ¶¶8-9. ("UMF 13").

6. Without objecting to any compact provision, the Navajo Nation Council by a vote of 59 to 13 approved the Compact and authorized the President of the Navajo Nation to sign the Compact with the State of New Mexico. *See* Exhibit 3. ("UMF 14").

7. Navajo Nation internal law authorizes contract provisions waiving the sovereign immunity of the Navajo Nation and its entities if approved by a two-thirds vote of the Navajo Nation Council. 2 N.N.C. 223(C). ("UMF 15").

ARGUMENT

III. IGRA AUTHORIZED TRIBES AND STATES TO NEGOTIATE CLASS III GAMING COMPACTS THAT COULD INCLUDE PROVISIONS FOR THE APPLICATION OF STATE OR TRIBAL LAW AS DEEMED APPPROPRIATE BY EACH TRIBE AND EACH STATE.

A. The Statute

Congress enacted the Indian Gaming Regulatory Act ("IGRA") to provide a framework for regulating gaming activity on Indian lands. *Michigan v. Bay Mills Indian Community,* -U.S-, 134 S. Ct. 2024, 2028 (2014) ("Bay Mills") (describing the purpose of 25 U.S.C. § 2702(3) as establishing "regulatory authority ... [and] standards for gaming on Indian lands."). IGRA was Congress' compromise solution to the contentious issues regarding Indian gaming. *See Artichoke Joe 's Cal. Grand Casino v. Norton,* 353 F.3d 712, 715 (9th Cir. 2003). The issue of regulation of tribal gaming had been the subject of negotiations and discussions between gaming tribes, states, the gaming industry, and Congress since at least 1979. *See* Senate Report No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 ("Senate Report") that accompanied the bill that ultimately became IGRA; *Doe v. Santa Clara Pueblo,* 2007-NMSC-008, ¶¶31-40 ("*Doe*") (explaining the background leading Congress to devise the Class III compacting process to enable tribes and states to work out between themselves

jurisdictional issues that had eluded Congress).

Indian tribes may not conduct Class Ill gaming unless they negotiate a compact with the state in which the gaming facility will exist. *See* 25 U.S.C. §2710(d)(l)(C); *Bay Mills,* 134 S. Ct. at 2035; Senate Report at 13. The statutory structure necessarily contemplates give and take between the tribe and the state regarding the regulation of gaming. The statute provides that any Tribal-State compact negotiated under IGRA may include provisions relating to:

> (i) the application of the criminal and civil laws and regulation 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;
>
> ….
>
> (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 facilities.

5 U.S.C. § 2710(d)(3)(C).

The sections quoted above authorize the application of civil laws of the state or tribe directly related to the regulation of gaming; the allocation of civil jurisdiction between the state and the tribe for the enforcement of regulations; standards for the operation and maintenance of the gaming facility; and any other subjects directly related to the operation of gaming facilities. As is explained below, rather than specify mandatory compact provisions, Congress left it to each individual tribe and state to negotiate terms for

the regulation of gaming.

Plaintiffs argue that Congress, in 25 U.S.C. § 2710(d)(3)(C)(i-ii), only delegated to tribes and states the authority to negotiate jurisdiction-shifting with respect to matters which are absolutely necessary for the regulation of the "activity" of gaming itself. Plaintiffs' Brief at 11-13, 15 ("Brief"). Plaintiffs cite *Pueblo of Santa Ana v. Nash, ("Nash")* 972 F. Supp. 2d 1254, 1255 (D.N.M. 2013) as authority for their sweeping claim that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court through a tribal - state compact.

Plaintiffs' misplaced reliance upon *Nash* stems from an overly broad reading of that easily distinguishable case. *Nash* concerned the serving of alcohol at a wedding reception on tribal property *adjacent* to a casino, *not* any activity involving Class III gaming, and not within a facility used for Class III gaming. The court ruled a "personal injury claim arising from the negligent serving of alcohol has no bearing whatever on the licensing or regulation of Class III gaming activities." *Id.* at 1264. The Court in *Nash* specifically limited its ruling to a claim arising from allegedly negligent serving of alcohol on Indian lands that were not used for Class III gaming and explained its ruling did not address other personal injury claims. *Id.* at 1267.

Unlike *Nash*, the instant case concerns gaming patrons conducting Class III gaming. This case presents issues not decided in Nash. Specifically, does IGRA authorize a tribal-state Compact to allow a visitor injured by a tribe's alleged negligence inside a Class III gaming facility to sue under New Mexico's substantive law in New Mexico's state district courts to resolve tort claims for which the tribe has validly waived its immunity?

Congress did not define the terms "directly related to, and necessary for, the licensing and regulation of Class III gaming. Similarly, the statute does not specify how jurisdiction

between the state and tribes should be allocated. There is nothing in the statute to indicate the kind and type of standards that should be specified for the operation and maintenance of the gaming facility. Additionally, the statute says compacts may include "*any other subject*" directly related to the operation of gaming facilities.

The statute's use of the term "may" suggests a permissive rather than a restrictive intent. In any event, the plain meaning of the statute does not answer the question of whether the jurisdiction-shifting provisions of Section 8 of the Navajo Nation - New Mexico Compact are authorized by IGRA. Accordingly, it is necessary to look to the legislative history to help determine Congressional intent.

B. LEGISLATIVE HISTORY

While statutory interpretation must begin with an examination of the plain language at issue, the meaning of statutory language, plain or not, depends on context. *Tucker v. Grover,* 660 F.3d 1249, 1252 (10th Cir. 2011); In re *Woods,* 743 F.3d 689, 694 (10th Cir. 2014). This contextual analysis "requires us to consider the statute's intended purpose..." *Dalzell v. RP Steamboat Springs, LLC,* 781 F.3d 1201, 1207 (10th Cir., 2015). "Where the language is not dispositive, we look to congressional intent revealed in the history and purposes of the statutory scheme." *Artichoke Joe's,* 353 F.3d at 720. IGRA provided a nationwide platform for each of the several states and hundred s of Indian tribes to fashion agreements for the conduct of Class III gaming. *Bay Mills,* 134 S.Ct. at 2028. One significant congressional objective was to thwart organized crime by allowing the introduction of state regulation, state laws, and state venue on tribal lands. *See Doe* at ¶35 (citing *Pueblo of Santa Ana v. Kelly,* 932 F. Supp. 1284, 1292 (D. NM.1996); and 25 U.S.C. §2702(2).

While fear of the infiltration of criminal elements was one concern, it was not the only one. U.S. Senator John McCain of Arizona noted, "In 15 years of gaming activity on Indian

reservations, there has never been one clearly proven case of organized criminal activity." Senate Report, p. 5.

More central to the policy debate about IGRA was the matter of providing a basis for sovereign Indian Tribes to assess their own interests and to negotiate and reach agreement with the states as to the proper balance between Tribal and State interests when Class III gaming occurred. Rejecting total federal or state regulatory control of Class III gaming, Congress concluded "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . . casino gaming." Senate Report, p. 13.

To accomplish this, Congress intended and designed the Compact process to assure the proper balancing of important tribal and state interests between equal and independent sovereigns. The Senate Report identified many of the tribal and state interests that were legitimate matters for consideration and signaled that there might be situations where give and take would be required to resolve disputes where the interests of the respective sovereigns might appear to clash:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. . .
>
> 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 III 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.

Senate Report, p. 13 (emphasis added).

The report explains "[t]he Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. *Id.* The Chair of the Committee in an important colloquy with U.S. Senator Domenici of New Mexico during the floor debate noted that jurisdictional matters were within the power of the tribes to negotiate and to reach agreement with the state:

> [T]he committee believes that tribes and States can sit down at the negotiating table *as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate.*

134 Cong. Rec. at S12650 (emphasis added).

Rather than a regulatory regime focused on the narrow problem of criminal infiltration into Indian gaming, Congress 's focus in adopting IGRA was in response to a range of tribal and state concerns. The negotiating process entailed delegation of power to the tribes and states to work as equal sovereigns to ensure that the Compacts would accommodate the particular needs of each sovereign.

After a thorough review of the statutory language and legislative history, the New Mexico Supreme Court concluded that Congress intended the compacting provision of IGRA to allow states and tribe broad latitude to negotiate for jurisdiction- shifting provisions, if they wished, as part of a global settlement of complex issues that was necessary to make tribal gaming work. *Doe,* ¶45. The global scope of the compacting process established by Congress in IGRA authorized the sovereigns to negotiate both choice of substantive law and choice of venue for personal injury suits that arose from alleged torts at Class III gaming facilities on tribal land. *Doe*, at ¶41 and ¶47.

The tribal-state compacts negotiated pursuant to IGRA provide a congressionally authorized exception to the general rule that authorization for jurisdiction shifting must be express. *See*, Senate Report at 6 ("S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands"). In that regard IGRA is similar to P.L. 280, 18 U.S.C.A. §1162, that broadly authorized jurisdiction shifting to the states for limited purposes. *Doe,* ¶45.

Recently, the United States Supreme Court in *Bay Mills* addressed IGRA in a suit seeking to enjoin *off*-reservation gaming. In the course of its opinion, the Court discussed the compacting scheme established by IGRA explaining that because a tribe cannot conduct Class III gaming *without* a compact, a state can refuse to agree to a gaming compact absent a tribe's waiver of sovereign immunity from suit. *Bay Mills*, 134 S. Ct. at 2035. The Court's broad view of negotiating process contemplated in IGRA is similar to that of the New Mexico Supreme Court in *Doe.* While the Compact before the Court in *Bay Mills* did not authorize state court judicial remedies, the Court recognized the strong bargaining power of the states and cited an *amicus* brief that contained a list of tribal-state compacts with waivers of tribal sovereign immunity including those allowing tort suits in state court for gaming patrons. *Bay Mills,* at. 2035.

Based on *Williams v. Lee,* 358 U.S. 217, 220 (1958) and its progeny, Plaintiffs' assert that Congress had no intent to make IGRA a vehicle for shifting jurisdiction from tribal to state courts in personal injury suits because the statute contains no express language to that effect. Brief at 15. In making this claim, Plaintiffs ignore the comprehensive scope of IGRA that, in the language of *Williams v. Lee, supra* at 220, plainly is a "governing Act of Congress."

The Williams v. Lee Preemption/Infringement test is discussed at length in Cohen's

Handbook of FEDERAL INDIAN LAW, 2012 Edition, §6.03[2][b]. There are two prongs to the *Williams* test because there are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, the application of state law may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *Williams* at 220. As explained in Parts I-IV of this brief, IGRA is a governing Act of Congress passed for the benefit of Indian tribes that controls Indian gaming that authorizes jurisdiction-shifting between tribes and states if negotiated in an approved compact. Part VI below explains that the Navajo Nation has made its own laws and acted in accordance with those laws in entering into the compact. Thus, the *Williams v. Lee* test does not impact any issue in this case.

Plaintiffs cite language in the Senate report stating the Committee does not intend "compacts be used as a subterfuge for imposing State jurisdiction on tribal lands," Brief at 15. The compact, however, is limited exclusively to Class III gaming, was openly negotiated, and was validly approved by the Navajo Nation Council. Quite simply, there was no "subterfuge" as the Navajo Nation expressly waived its sovereign immunity when it ratified the Compact that it negotiated with the State of New Mexico.

IV. PROVIDING A FORUM AND CHOICE OF LAW FOR THE ADJUDICATION OF PERSONAL INJURY CLAIMS OF CASINO VISITORS IS SUFFICIENTLY CLOSELY RELATED TO THE REGULATION OF CLASS III GAMING AS TO BE WITHIN THE CONTEMPLATION OF CONGRESS

Unquestionably, IGRA intended that in the compacting negotiation process, states could assert their interests. The legislative history specifically identifies state interests to include issues of safety, law and public policy. Senate Report at 13.

Explaining that these subjects play a significant role in tort suits, the *Doe* Court

correctly concluded that the broad compact negotiating process may include the issue of jurisdiction over personal injury claims. *Doe,* ¶39 (*See Bay Mills* 134 S. Ct. at 2035) (*accord*, *Muhammad v. Comanche Nation Casino,* W.D. OK, No. Civ-09-968-D, 2010 WL 4365568 (allocation of jurisdiction for civil tort claims directly related to and necessary for regulation of gaming activities). Redressing injuries sustained by a casino's visitors is sufficiently related to the regulation of tribal gaming. *Doe,* ¶39. The Court in *Doe* continued:

> "Personal injury law is meant, in part, to expose weaknesses in safety procedure s 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"); ("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."). *Doe* at ¶39 quoting Dobbs, *supra* at I0. 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. *Doe*, at ¶39. See, *Jones v. Reagan,* 696 F.2d 551, 554 (7th Cir. 1983) (Posner, J.) (discussing the regulatory function of tort law).
>
> *Id.*

Noting that no provision of IGRA refers to the transfer of jurisdiction over personal injury claims, Plaintiffs argue that the statute only allows a state directly to apply its laws concerning the licensing and regulation of gaming activities, nothing else. Plaintiffs' Brief at 13-14. This view is taken by the Justice Minzner's dissent, but it is *not* the law. *See Doe at* ¶ 53 ("IGRA takes a narrow view of jurisdiction shifting). The legislative history does not support this position.

The Senate Report explains with respect to the delegated authority in Section 2710(d)(3)(C) "subparts of each of the broad areas may be more inclusive," stressing that "[a] compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between." Senate Report p. 14. Such discretionary power was necessary

in Congress' view because "[t]he terms of each compact may vary **extensively depending on the type of gaming, the location, the previous relationship of** the tribe and the State, etc." *Id.* (emphasis added). As Chairman Inouye stressed on the floor of the Senate, SB 555 (that became IGRA) was "intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives." 134 Cong. Rec. at S12650. That is why Congress made it absolutely clear "to the extent tribal governments elect to relinquish rights in a tribal- State compact the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes" Senate Report at 6.

Contrary to Plaintiffs' suggestion, Brief at 15, nothing in the Compact extends state court jurisdiction beyond claims of visitors to gaming facilities. Nowhere does the Compact exceed the limits contemplated by Congress. See *Doe*, at ¶ 42.

Section 8 of the Compact, moreover, reflects the determination of the Navajo Nation and the State of New Mexico that agreeing to allow gaming visitors injured by the alleged negligence of the Nation in a Gaming Facility to choose state district court as a forum for resolution of immunity-waived torts to which New Mexico substantive law applies is "directly related to, and necessary for" the regulation of Class III gaming. IGRA grants states and tribes the power to negotiate arrangements of this type. *Doe* at ¶ 44*;* (see also *Bay Mills,* 134 S. Ct. at 2035).

If this Court were to accept the Navajo Nation's narrow reading of the IGRA, several other Compact provisions would be invalid. For example, the Compact regulates wages on construction projects §4(B)(4); liability insurance §4(B)(15) & §8(B); serving of alcohol the Gaming Facility, §4(B)(15), and labor conditions §4(B)(3). See, the New Mexico Court of Appeals opinion, *Doe v. Santa Clara Pueblo,* 2005-NMCA-110 ¶18.

Any construction of IGRA's "directly related to, and necessary for" language must recognize that casinos are entertainment venues where visitors may come to eat and drink. It is unrealistic to limit regulation of Class III gaming to slot odds, maximum bets and the thickness of felt at the blackjack tables.

Even if sub-sections 2710(d)(3)(C)(i) and (ii) do not extend to the jurisdiction of state courts in casino tort cases, those agreements are permitted under sub-section 25 U.S.C. §2710(d)(3)(C)(vii). That section authorizes agreements without limitation on "any other subjects that are directly related to the operation of gaming activities." There is no other limitation in this provision. *See,* e.g., *In re Gaming Related Cases*, 331 F.3d 1094 1116 (9th Cir. 2003) (holding labor relations provisions "directly related to the operation of gaming activities" and thus permissible under §271O(d)(3)(C)(vii)).

Plaintiffs also cite the so-called "Indian law canon" of statutory construction that doubtful provisions in a statute must be resolved in favor of the Indians. Brief at 13, citing *Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). See, also, *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (ambiguities found in statute enacted for the benefit of Indians must be interpreted in favor of the tribe). Ambiguity is a prerequisite for the application of the *Blackfeet* presumption. *Artichoke Joe 's,* 353 F.3d at 729.

Consideration of the legislative history (including the excerpts set out above) shows that Congress deliberately chose *not* to specify mandatory provisions for inclusion in tribal-state compacts. Instead IGRA sets out broad parameters of what may and may not be included. Because the statute is clear and not ambiguous, the "Indian law canon" of construction does not apply. See *Doe* ¶47.

Harold McNeal visited Northern Edge Navajo Casino to engage directly in Class III gaming, (i.e., rolling the dice and spinning the wheel). While inside the casino in service

of his gaming visit, Harold McNeal suffered injury in the gaming facility's restroom as a result of the Navajo Nation's alleged negligence. Restrooms are an inseparable part of any Class III gaming facility. The Compact's allowance of tort suits for visitors injured in a gaming facility is sufficiently related to gaming to be included in tribal-state compacts. *Doe,* ¶44. (*see also Bay Mills,* 134 S. Ct. at 2035.)

V. THE NAVAJO-STATE COMPACT EXPRESSLY WAIVES THE NATION'S IMMUNITY FROM SUIT AND UNAMBIGUOUSLY PERMITS PERSONAL INJURY CLAIMS TO BE BROUGHT IN STATE COURT UNDER STATE LAW.

Section 8 of the Compact between the State of New Mexico and the Navajo Nation is crystal clear. The safety and protection of visitors to a Gaming Facility is a "Priority" of the Navajo Nation. The stated purpose of Section 8 is to assure that visitors who suffer bodily injury proximately caused by the conduct of the Gaming Enterprise have an "effective remedy for obtaining fair and just compensation." To that end the Navajo Nation agreed to carry insurance, waive its immunity from suit and allow the visitors to elect to proceed in state district court "unless" a state or federal court finally determines that "IGRA does not permit the shifting of jurisdiction over visitors personal injury suits to state court". *See* UMF 8.

Section 8D, headed "Specific Waiver of Immunity and Choice of Law" states that the Navajo Nation "waives its defense of sovereign immunity" for covered claims of visitors up to the amount of $50,000,000 per occurrence. The Navajo Nation further agreed, "New Mexico law shall govern the substantive rights of the claimant."

Parts I through IV above demonstrate that IGRA authorizes jurisdiction shifting to state court. The language of Section 8 reflects that the Navajo Nation unambiguously and expressly agreed to jurisdiction shifting as well as the waiver of tribal sovereign immunity. In addition to the language of the Compact, the Tribal Council Resolution approving the

Compact and directing the President to sign it makes clear that there was complete agreement between the Navajo Nation and the State of New Mexico on this provision. *See* UMF 11.

Since 1980 the Navajo Nation had waived its immunity from tort claims to the extent covered by its commercial liability policy. UMF 11. The Tribal Council Resolution approving the compact said it was "substantially similar" to existing Navajo Law. UMF 12.

During the l990's the New Mexico tribes and pueblos had profited dramatically from Class III gaming. *See Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1549 (10th Cir. 1997). For at least a decade a tribal referendum had compelled the Navajo Nation to sit on the sidelines and watch its large population spend money at casinos on lands of other Indian tribes. There is no reason to believe that in 2003 the Navajo Nation wanted to challenge any provision of their Compact. UMF 13 and 14. The decision in *Nash,* however, led the Navajo Nation to believe it might persuade a federal court to invalidate one of the Compact provisions it had previously accepted without sacrificing any other benefit reaped by the Navajo Nation through the Compact.

The waiver of immunity and jurisdiction-shifting provisions embodied in the Compact are part of a contract between the State of New Mexico and the Navajo Nation codified by the Legislature. *Doe,* ¶15. Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts. *Id.; Santa Ana v. Kelly* 104 F. 3d at 1556; *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California,* 618 F.3d 1066, 1073 (9th Cir. 2010).

The Navajo Nation agreed to jurisdiction shifting "unless IGRA does not permit" it. In other words, the condition stated in the compact does not require an affirmative grant of authority in IGRA. There is nothing in the language of IGRA that “does not permit” the

agreement embodied in Section 8. *Doe*, ¶13, ¶16.

VI. THE NAVAJO NATION EXERCISED ITS INDPENDENT AUTHORITY TO WAIVE IMMUNITY FROM SUIT.

Indian Nations have independent authority to waive sovereign immunity by contract so long as it is "clearly" done. *C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe,* 532 U.S. 41 1, 419 (2001). *See Kiowa Tribe of Oklahoma v. Mfg. Techs,* 523 U.S. 751, 754 (1998). Based on the express language of the Compact as well as the Resolution of the Navajo Nation Council authorizing approval of the Compact, the Navajo Nation's waiver of immunity was sufficiently clear.

The Navajo Nation's willing agreement to the provisions of Section 8 of the Compact constituted a valid waiver of sovereign immunity, because the Compact was authorized by IGRA. See Sections I-IV above. A different issue is presented when the Navajo Nation exercises its own sovereign power. When the Nation operates independently from congressionally imposed constraints, it may contract freely for any terms it finds acceptable. C *& L Enterprises* provides a separate basis to sustain the Nation 's waiver of sovereign immunity.

Plaintiffs'assert that Navajo Sovereign Immunity Act prohibits the Navajo Nation Council from authorizing suit against the Navajo Nation other than in the courts of the Navajo Nation. Brief, pp. 6, 7, citing 1 N.N .C. 554 (C). But, with respect to contracts, that statute has been superseded by 2 N.N.C. 223, enacted in 2003. This more recent statute allows contracts to waive the immunity of the Navajo Nation if approved by a two-thirds vote of the full membership of the Navajo Nation Council. The vote reflected in CAU-

50-03 approving the Gaming Compact was 59-13, more than the 2/3 needed to satisfy the only standard set out in the statute. UMF 15. The statute does not prohibit contracts from specifying state courts as the forum for resolution of disputes, and it does not incorporate any of the procedures or limitations of the Navajo Nation Sovereign Immunity Act.

If the Court should find that IGRA does not authorize jurisdiction shifting to state judicial district courts of the State of New Mexico for the immunity-waived tort claims of casino visitors, the Court should nevertheless rule that Section 8 of the Compact is a valid contract because it is based on the sovereign authority of the Navajo Nation. Essentially, it becomes a side-agreement providing remedies for tort claims of casino visitors engaged in Class III gaming pursuant to the Compact.

Without citing any controlling authority, the *Nash* Court ruled that the negotiated terms of a Compact cannot exceed what is authorized by IGRA. *Nash,* 972 F. Supp. 2d at 1266. This ruling appears to conflict with the United States Supreme Court decision in *C&L Enterprises*. That decision affirmed the sovereign power of tribes to include state court remedies in their contracts. Additionally, the *Nash* Court read a limitation on the power of Indian tribes into IGRA, but the statute contains no limitation of that sort.

Simply put, there is no law that restricts the sovereign power of the Navajo Nation to make this contract with the State of New Mexico.

CONCLUSION

For the foregoing reasons, this Court must DENY the Plaintiffs Motion for Summary Judgment.

Respectfully submitted,

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on this 7th day of March, 2016

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