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.

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs NAVAJO NATION and NORTHERN EDGE NAVAJO CASINO; ("Northern Edge"), hereby submit their Reply in Support of Motion for Summary Judgment.

I. ARGUMENT

A. ABSENT CONGRESSIONAL ACTION OR AMENDMENT OF THE NAVAJO NATION SOVEREIGN IMMUNITY ACT, PERSONAL INJURY CLAIMS AGAINST THE NAVAJO NATION CAN ONLY BE BROUGHT IN NAVAJO NATION COURTS.

Random House defines "*unequivocal*" as "unambiguous; clear; having only one possible meaning or interpretation". *Dictionary.com Unabridged.,* Random House, Inc., (accessed: March 22, 2016). "[S]tatutes 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 citations and quotation marks omitted). Waivers of the inherent sovereignty

enjoyed by the Navajo Nation "cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (internal citations and quotation marks omitted) (emphasis added).

"Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government." Navajo Nation Sovereign Immunity Act, 1 N.N.C 553(A),(B), and (C) (2009). "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (internal citations omitted). Indian tribes are neither domestic nor foreign governments; "they remain 'separate sovereigns pre-existing the Constitution.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014) (emphasis added).

Sovereign nations "possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent." *United States v. Thompson*, 98 U.S. 486, 489, 25 L. Ed. 194 (1878) (emphasis added) (internal citations omitted). This sovereignty flows from the very nature of being a sovereign nation. The Navajo Nation has long been regarded as possessing the attributes of sovereignty, except where they have been taken away by Congressional action. *Williams v. Lee*, 358 U.S. 217, 219, n. 4, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)(emphasis added); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 458 (10 Cir., 1951); *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 653, 10 S.Ct. 965, 34 L.Ed. 295 (1890); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 133 (10 Cir., 1959); *Iron*

Crow v. Oglala Sioux Tribe of Pine Ridge Res., 231 F.2d 89, 92 (8 Cir., 1956). "Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization." *Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) (emphasis added); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., supra*; *Cf. Williams v. Lee*, supra; *Haile v. Saunooke,* 246 F.2d 293, 297 (*4 Cir.*, 1957); *Colliflower v. Garland*, 342 F.2d 369, 376 (9 Cir., 1965).

Plaintiffs agree with the Defendants that the Navajo Nation has waived its sovereign immunity for personal injury claims like those brought by the McNeals in the underlying action. Plaintiffs assert, however, that the waiver is limited to claims brought in tribal court. The Sovereign Immunity act of the Navajo Nation allows for only two types of waivers of Navajo Sovereign Immunity; waiver by act of the Navajo Nation Council and waiver by act of U.S. Congress:

> B. The Navajo Nation may be sued in the courts of the Navajo Nation when explicitly authorized by applicable federal law.
>
> C. The Navajo Nation may be sued only in the courts of the Navajo Nation when explicitly authorized by Resolution of the Navajo Nation Council.

Navajo Nation Sovereign Immunity Act, 1 N.N.C. 554 (B) and (C) (emphasis added). In the present case, the Navajo Nation Council has, by resolution, authorized the gaming compact and granted a waiver of sovereign immunity claims for personal injury claims brought in a court of competent jurisdiction (Doc. 12, UMF 8, ¶ E). Pursuant to the Navajo Nation Sovereign Immunity Act though, these claims can be brought "only in the courts of the Navajo Nation". *Id.*

This is reiterated in the gaming compact itself, in which the parties left the hotly contested question of state court jurisdiction over personal injury claims up to the courts:

> 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.

(Doc. 12, UMF 8, ¶ A) (emphasis added). The Navajo Nation and the State of New Mexico could have argued for decades about the civil jurisdiction of state courts, but unemployment on the Navajo Nation is 48.5 percent, and the average household income is $8,240. The Navajo Nation Gaming Enterprise ("NNGE") is an important source of economic development and employment for the Navajo people, so, at the tip of a roman spear, rather than press the point, the Navajo Nation agreed to leave the question of jurisdiction shifting to the courts[1].

The Defendants also rely heavily on the case of *Michigan v. Bay Mills Indian Cmty.* for the proposition that a tribe may waive its sovereign immunity. Unlike in *Bay Mills* though, as discussed above, the Navajo Nation has waived its immunity in this case. It has just done so in a limited way and only for claims brought in tribal court. The proposition in *Bay Mills* upon which the Defendants rely states that "Michigan—like any State—could have insisted on a different deal…" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035, 188 L. Ed. 2d 1071 (2014). In the present case, the State of New Mexico also "could have insisted on a different deal". It could have required a different type of waiver of Sovereign Immunity, or it could have required the Navajo Nation to amend its Sovereign Immunity Act to allow for state court jurisdiction. It did not do so. Instead New Mexico decided to base its jurisdiction on the IGRA and to leave the question up to the courts.

The federal court in *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1255 (D.N.M. 2013)

[1] It is important to note that the Navajo Nation has challenged the jurisdiction of every personal injury lawsuit brought in state courts.

held that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury claims, and the Plaintiffs ask this court to rule similarly.

B. THE IGRA DOES NOT AUTHORIZE THE SHIFT OF JURISDICTION TO STATE COURTS FOR PERSONAL INJURY CLAIMS.

This case is not about whether a tribe may waive its sovereign immunity. Indeed, Plaintiffs agree that a tribe may waive its immunity in the manners discussed above. The real question central to this case is whether there is congressional authority in the Indian Gaming Regulatory Act ("IGRA") that would permit a state and tribe to effectively agree to shift jurisdiction over personal injury cases from tribal to state courts. This case essentially involves a question of whether state courts have subject matter jurisdiction to hear claims arising under a gaming compact, such as those in the underlying action (the "*McNeal* case").

A waiver of sovereign immunity does not confer jurisdiction on any particular court to hear the case. *See, e.g., Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) ("Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit."); *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1031) (D. Ariz. 1993) ("A housing authority's waiver of sovereign immunity cannot render it universally amenable to action in any forum that a plaintiff selects . . . Rather, a waiver only renders a housing authority amenable to suit in a court of competent jurisdiction.") (citations omitted) (emphasis added). Subject matter jurisdiction may never be waived. *See Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1146 (8th Cir.1992) ("subject-matter jurisdiction is not a mere procedural irregularity capable of being waived").

The present case involves the State of New Mexico attempting to exercise subject matter jurisdiction over personal injury claims brought by an Indian tribal member, against an Indian Tribe, for and injury that occurred on Indian land. It is firmly established 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). Unless Congress has expressly authorized (i.e., "permitted") state court jurisdiction, civil actions arising within a tribe's Indian country that involve a tribe or tribal member or entity as defendant may only be heard in the tribal court of the tribe. *Kennerly v. District Court*, 400 U.S. 423 (1971). The New Mexico Supreme Court echoes this point in the case most cited by the Defendants:

> Unless changed by "governing Acts of Congress," tribal courts retain exclusive jurisdiction over claims arising on tribal lands against tribes, including tribal entities and tribal members. *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). Through Public Law 83–280, Act of August 15, 1953, ch. 505, §§ 6, 7, 67 Stat. 590, Congress granted jurisdiction over civil and criminal matters involving reservation Indians to the states that were willing to accept it. *See Williams,* 358 U.S. at 222, 79 S.Ct. 269; *Your Food Stores, Inc. v. Vill. of Espanola,* 68 N.M. 327, 332, 361 P.2d 950, 954 (1961). New Mexico did not elect to assume jurisdiction over tribal lands. *Id.* New Mexico courts have recognized 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) (citations omitted); *see Tempest Recovery Servs., Inc. v. Belone,* 2003–NMSC–019, ¶ 14, 134 N.M. 133, 74 P.3d 67. Plaintiff acknowledges "that without ... Congressional authority, state courts lack the power to entertain lawsuits against tribal entities." If New Mexico courts have subject matter jurisdiction in this case, the jurisdictional authority must derive from the IGRA.

Doe v. Santa Clara Pueblo, 2005-NMCA-110, 138 N.M. 198, 205, 118 P.3d 203, 210, *as corrected* (Sept. 7, 2005), *aff'd,* 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644 (emphasis added). The only question that remains in this case is whether any provision of IGRA would permit such an assumption

of subject matter jurisdiction by New Mexico's state courts.

As discussed in full in Plaintiffs' Motion for Summary Judgment (Doc. 12), and as the court in *Nash* ruled, nowhere does the IGRA permit the shifting of jurisdiction for claims that do not involve the regulation of gaming activity. Defendants assert that the *Nash* case is distinguishable from the present case, because *Nash* involved dram shop claims that did not relate to the regulation of gaming activity. Defendants fail to show, however, in what manner the present case, a slip and fall that occurred in a bathroom, relates to the regulation of gaming activity. Instead, Defendants spend most of their effort trying to show that "[t]here is nothing tin the language of the IGRA that 'does not permit' the agreement embodied in Section 8." [Doc. 17, pp. 16-17]. This assertion flies in the face of the rule establish by *Williams* and *Kennerly*, which states that state court jurisdiction must be "expressly authorized". *Williams*, 358 U.S. at 220; *Kennerly*, 400 U.S. at 423.

Defendants also rely heavily on the catchall provision of the IGRA, which states negotiable provisions include "any other subjects that are directly related to the operation of gaming facilities". 5 U.S.C. § 2710(d)(3)(c)(vii). However, it is only 25 U.S.C. § 2710(d)(3)(C)(i) and (ii) that expressly allows for "allocation of criminal and civil jurisdiction between the State and the Indian tribe" for enforcement of laws and regulations "that are directly related to, and necessary for, the licensing and regulation of [class III gaming]." The clause cited by the Defendants contains no language referring to any "allocation" or "shifting" of jurisdiction. There is no basis on which the Court could infer any shifting of jurisdiction in clauses (iii) through (vii) of 5 U.S.C. § 2710(d)(3)(c), especially considering that "[t]he Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S.Rep. 100-446 at 14 (emphasis added).

The committee remarked further 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. *See also Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Ultimately, the arguments of all the Defendants in this case rest heavily in ambiguities and interpretations, and waivers of the inherent sovereignty enjoyed by the Navajo Nation "cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (internal citations and quotation marks omitted) (emphasis added). Plaintiffs' Motion for Summary Judgment should be granted.

II. CONCLUSION

For all the forgoing reasons, as a matter of federal law, jurisdiction over the underlying *McNeal* case belongs exclusively to tribal courts, and Plaintiffs respectfully move the Court to enter summary judgment in their favor on the claims set forth in their Complaint.

Respectfully submitted

MASON & ISAACSON, P.A.

By /S/Patrick T. Mason

Patrick T. Mason
Fed. Bar ID#: 9mc5-167
P.O. Box 1772
Gallup, New Mexico 87305
(505) 722-4463
Attorneys for the Plaintiffs
110 W. Aztec Ave
Gallup, New Mexico 87301

CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on the 22nd day of March, 2016, I electronically filed the foregoing document with the U.S. District Court, District of New Mexico by using the Official Court Electronic Document Filing System. I certify that the following parties or their counsel of record are registered as E-Filers and that they will be served by the E-Filing system:

Linda J. Rios	linda.rios@lrioslaw.com
Daniel M. Rosenfelt	drosenfelt@rbblaw.com
Peggy (Margaret) Alison Duggan	pjeffers@nmag.gov

MASON & ISAACSON, P.A.

/s/ Patrick T. Mason
Patrick T. Mason