IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE PUEBLO OF ISLETA, a federally-recognized Indian tribe, THE PUEBLO OF SANDIA, a federally-recognized Indian tribe, and THE PUEBLO OF TESUQUE, a federally-recognized Indian tribe, Plaintiffs, **PUEBLO OF SANTA ANA, a federally-recognized Indian tribe, and PUEBLO OF SANTA CLARA, a federally-recognized Indian tribe, PUEBLO OF SAN FELIPE, a federally-recognized Indian tribe,** Plaintiffs-in-Intervention, v. **SUSANA MARTINEZ, in her official capacity as Governor of the State of New Mexico, JEFFREY S. LANDERS, in his official capacity as Chair of the Gaming Control Board of the State of New Mexico, RAECHELLE CAMACHO, in her official capacities as State Gaming Representative and as a member of the Gaming Control Board of the State of New Mexico, and SALVATORE MANIACI, in his official capacity as a member of the Gaming Control Board of the State of New Mexico,** Defendants.	**No. 1:17-cv-00654-KG-KK**

PLAINTIFFS' AND PLAINTIFFS-IN-INTERVENTION'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF ARBITRABILITY

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Plaintiffs the Pueblo of Isleta, the Pueblo of Sandia, and the Pueblo of Tesuque, and the Plaintiffs-in-Intervention the Pueblo of Santa Ana, the Pueblo of Santa Clara and the Pueblo of San Felipe (collectively, the "Pueblos") hereby submit this response in opposition to the Defendants' Motion for Summary Judgment on the Issue of Arbitrability (the "Motion"), ECF No. 55, filed by Defendants Susana Martinez, Jeffrey S. Landers, Raechelle Camacho, and Salvatore Maniaci (collectively, "Defendants") on January 4, 2018.

I. INTRODUCTION

The Pueblos filed this lawsuit under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), seeking the Court's declaration that the Defendants, all individual state officials, are violating federal law by unilaterally demanding that each of the Pueblos treat free play credits as revenue under purportedly preserved provisions of their now superseded 2007 gaming compacts with the State of New Mexico ("2007 Compact") and make additional revenue sharing payments based on that treatment. The Pueblos' suit further requests this Court to enjoin the Defendants from pursuing their claims, in arbitration or otherwise, in violation of federal law.

Defendants now seek to avoid the Court determining the substantial federal law issues raised by the Pueblos' complaints by moving for summary judgment on the issue of arbitrability, arguing that the Pueblos' 2015 gaming compacts with the State ("2015 Compact") require these claims to be arbitrated. The Defendants' Motion is contrary to the plain terms of the 2015 Compact, which state that its arbitration provisions do not "waive, limit, or restrict" the parties' ability to pursue other available remedies. ECF No. 1-3 at § 7(B). The 2015 gaming compacts thus unambiguously provide that arbitration is not the exclusive remedy available to the Pueblos and that the availability of arbitration does not limit or restrict the Pueblos' ability to pursue federal litigation. Moreover, the 2015 Compact, like the 2007 Compact, expressly provides that "the arbitrators shall have no authority to determine any question as to the validity or effectiveness of

this Compact or of any provision hereof," ECF No. 1-3 at § 7(A)(3); ECF No. 1-2 at § 7(A)(3), thus placing the Pueblos' federal law challenge to the validity and effectiveness of certain Compact terms, as construed by Defendants, outside the scope of the matters subject to arbitration under each Compact and beyond the authority of arbitrators to decide.

In addition, the 2015 Compact was not affirmatively approved or disapproved by the Secretary of the Interior within the 45-day review period provided under IGRA, and, therefore, it is "considered to have been approved by the Secretary, but only to the extent it is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Thus, the 2015 Compact cannot be construed to authorize arbitration of the Defendants' claim that the Pueblos must pay revenue sharing on free play because, as the Department of the Interior has already concluded in its letters explaining its "no-action approval" of the 2015 Compacts, the State's "unilateral determination" that the Pueblos should pay revenue sharing on free play "conflict[s] with industry standards and GAAP" and "would constitute an impermissible tax on tribal gaming revenues in violation of IGRA." *See, e.g.*, Letter dated July 21, 2015, from Asst. Secretary Washburn to Isleta Pueblo Governor Torres, ECF No. 1-4 at 3. The provisions of the 2015 Compact regarding preservation and enforcement of Defendants' free play claim under the 2007 Compact are inconsistent with IGRA and, therefore, without force or effect as a matter of federal law.

Finally, if more were needed, the State is precluded from arbitrating its claim for additional revenue sharing payments from the Pueblos because it failed to meet the deadline for initiating arbitration under Subsection 7(A) of the 2015 Compact.

In short, the Defendants' Motion should be denied because it is directly contrary to applicable federal law and the terms of the parties' agreement.

II. RESPONSES TO THE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

The Pueblos respond to the Defendants' "Undisputed Material Facts," Motion at 3–5, as follows:

1. The Pueblos do not dispute the facts stated in Defendants' paragraphs 1 through 6.

2. The Pueblos dispute the Defendants' characterization of this dispute in the first sentence of paragraph 7 because it omits reference to the questions of federal law presented in this action. The Pueblos also dispute the Defendants' contention that the Pueblos "underpaid revenue sharing owed to the State under the 2007 Compact."

3. The facts stated in Defendants' paragraph 8 are disputed and inaccurate. The Pueblos do not agree that there was an "underpayment" that could have been "cured." Nor did the Pueblos commence this litigation in order "to bar the State's recourse to arbitration." As stated in their complaints, the Pueblos commenced this action in order to obtain a declaration that the Defendants' demand for revenue sharing payments on free play violates federal law and to obtain an injunction preventing the Defendants from further pursuit of such claims. *See* ECF No. 1 at 32–34; ECF No. 11 at 12–13; ECF No. 36 at 12.

III. THE PUEBLOS' SUPPLEMENTAL STATEMENT OF UNDISPUTED MATERIAL FACTS

The following additional undisputed material facts are also relevant to the resolution of this Motion:

1. Subsection 7(B) of the 2015 Compact provides:

> Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. . . .

ECF No. 3-1 at § 7(B).

2. Subsection 7(A) of the 2015 Compact provides, in relevant part, that:

> 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance. The notice shall specifically identify the date, time and nature of the alleged noncompliance.
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> 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(l) of this Section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the State and the Tribe (hereinafter the "parties") agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.
>
> 3. . . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or any provision hereof.

ECF No. 3-1 at § 7(A).

3. The Defendants sent letters to the Pueblos with the subject line "Notice of Noncompliance" on April 13, 2017. *See, e.g.*, ECF Nos. 1-8, 1-9, 1-10.

4. The Defendants sent letters to the Pueblos with the subject line "Notice to Cease Conduct" on May 31, 2017. *See, e.g.*, ECF Nos. 1-11, 1-12, 1-13. These letters were sent via email and were therefore received by the Pueblos on the same day that they were sent. *Id.*

5. The Defendants extended the deadline for the Pueblos to take action in response to the Notice to Cease Conduct to June 19, 2017. *See* Exhibit A to Richard W. Hughes Declaration ("Hughes Decl."), attached.

6. The Pueblos did not make the payments demanded in the Defendants' May 31, 2017 letters, nor did they invoke arbitration.

7. The Pueblos of Sandia, Isleta and Tesuque commenced this action on June 19, 2017. ECF No. 1, and the Pueblos of Santa Ana and Santa Clara joined on June 29, 2017, and the Pueblo of San Felipe joined on July 28, 2017. ECF Nos. 11 and 36.

8. The Defendants sent letters to each of the Pueblos with the subject line "Notice to Invoke Arbitration" on June 30, 2017. *See* Hughes Decl., Exhibit B.

9. The Secretary did not approve or disapprove any tribe's 2015 Compact within 45 days of submission, *see, e.g.*, ECF No. 1-4, and so, under IGRA, each 2015 Compact is "considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]," 25 U.S.C. § 2710(d)(8)(C).

10. When the 2015 Compact was before the Secretary for the required statutory review, the Secretary concluded that the treatment of free play as revenue under the 2007 Compact would violate IGRA because it would be contrary to generally accepted accounting principles ("GAAP") to include free play credits in the calculation of Net Win, and that "the State's unilateral determination to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA." *See* ECF No. 1-7, Letter from Kevin K. Washburn, Assistant Sec'y-Indian Affairs, U.S. Dep't of the Interior, to Hon. Susana Martinez, Governor, New Mexico, at 3 (Jun. 9, 2015) ("Secretary's Five Tribes Letter") at 3. The Secretary took the same position in her determination on the 2015 Compact with the Pueblos who brought this action. *See, e.g.*, ECF No. 1-4, Secretary's Isleta Letter at 3; ECF No. 1-5, Secretary's Sandia Letter at 2; ECF No. 36-1, Secretary's San Felipe Letter at 2;

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When ruling

on a motion for summary judgment, the court must "view all facts and evidence in the light most favorable to the party opposing summary judgment." *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1279 (10th Cir. 2013).

B. The 2015 Compact Does Not Compel the Pueblos to Arbitrate Their Claims and Some of Those Claims Are Expressly Excluded From the Scope of Matters Subject to Arbitration Under the 2015 Compact

The Defendants' Motion argues that the Court should dismiss this action because the Pueblos are required to arbitrate their claims under the 2015 Compact. *See, e.g.*, Motion at 10. That claim is directly contrary to the express terms of the agreement. The 2015 Compact specifically states that the arbitration provision in the agreement does not "waive, limit, or restrict" the parties' ability to pursue other available remedies. ECF No. 1-3 at § 7(B). The 2015 Compact, thus, unambiguously provides that arbitration is *not* the exclusive remedy under the 2015 Compact, and permits the Pueblos to pursue other available remedies, such as federal litigation. Further, the 2015 Compact clearly states that arbitrators do not have authority to decide "any question as to the validity or effectiveness" of any Compact provision, which is precisely what the Pueblos' action does with respect to Defendants' construction of the terms of the 2007 Compact concerning the treatment of free play for purposes of revenue sharing, and the purported preservation and enforcement of Defendants' claims under provisions of the 2015 Compact. Dismissal would also be improper in this case because this Court has an obligation to exercise the jurisdiction given to it and because the Pueblos' claims involve important questions about the interpretation of federal law that should be decided by a federal court.

1. *Subsection 7(B) of the 2015 Compact Expressly Provides that Arbitration Is Not the Exclusive Remedy For Resolving Disputes.*

Section 7 of the 2015 Compact governs dispute resolution between a Tribe and the State. *See* ECF No. 1-3 at § 7. Section 7 has two parts. First, Subsection 7(A) provides that either the

State or the Tribe may seek to arbitrate a claim that the other party "has failed to comply with or has otherwise breached any provision of [the 2015] Compact," and that the State may seek to arbitrate a claim that "the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement [here, the 2007 Compact] affecting payment . . . as permitted in Section 9(B)." Second, Subsection 7(B) provides:

> Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. . . .

Id. at § 7(B). "Nothing," as used in Subsection 7(B), makes clear in the strongest possible terms that the availability of the arbitration remedy set forth in Subsection 7(A) does not deprive the Pueblos of any other available remedies, such as suit in federal court. Subsection 7(B) is thus an express and unambiguous statement that the arbitration process in Subsection 7(A) is not the exclusive remedy available to the Pueblos or the State to resolve disputes.

In this case, the Pueblos have filed *Ex Parte Young* claims against the Defendants in their official capacities, seeking to enjoin them from an ongoing violation of federal law. *See, e.g.*, ECF No. 1 at 32–34; ECF No. 11 at 12–13; ECF No. 36 at 12. The Pueblos assert that the Defendants' demand that the Pueblos make revenue-sharing payments based on free play credits is a violation of IGRA, the federal regulations promulgated thereunder, and the 2007 Compacts *Id*. It follows that the Defendants' attempt to enforce that illegal claim under the 2015 Compact is likewise in violation of federal law. *Id.* It is well established that the Pueblos "may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). This lawsuit is, thus, precisely the type of alternative remedy for resolving disputes that is contemplated and preserved by Subsection 7(B). Indeed, at least some of

the federal law issues involved here, as shown *infra*, may not be determined by arbitrators. This suit provides the Pueblos with the only opportunity to have all of their federal law claims decided.

As Subsection 7(B) makes unambiguously clear, "[n]othing" in Subsection 7(A) can be relied on to deprive the Pueblos of the right to bring an action under *Ex parte Young* to obtain a declaration that federal law bars Defendants' claim that free play used on gaming machines must be treated as revenue, and revenue sharing paid on its use. These two provisions, Subsections 7(A) and 7(B), must be read together, both because Subsection 7(B) expressly limits the scope of Subsection 7(A), and to accord with the basic rule that a "writing is interpreted as a whole." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (quoting Restatement (Second) of Contracts § 202(2) (1979)); *accord Resolution Trust Corp. v. Fed. Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1499 (10th Cir. 1994). By expressly preserving and protecting "any remedy that is otherwise available to either party," Subsection 7(B) confirms that the arbitration provisions of Subsection 7(A) are not the exclusive remedy under the 2015 Compact. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1045 (9th Cir. 2015) (arbitration clause in tribal-state compact that permits litigation or arbitration is not exclusive).

As multiple circuit courts have ruled, federal lawsuits should not be dismissed based on arbitration clauses in contracts that do not expressly provide that arbitration is the exclusive remedy. The decision in *Idaho v. Coeur d'Alene Tribe*, is illustrative and on point. In that case, the tribe argued that the state's suit could not be heard in federal court due to an arbitration clause in the parties' tribal-state gaming compact. The Ninth Circuit held otherwise, ruling that an arbitration clause is mandatory only if it "contain[s] language that clearly designates a forum as the exclusive one." *Id.* at 1045. Because the arbitration clause at issue in that case simply stated that either party "may" pursue binding arbitration to enforce or resolve disputes, the Ninth Circuit

held that it was not a clear designation of an exclusive forum. *Id.* In the instant case, the 2015 Compact unambiguously states in Subsection 7(B) that arbitration is *not* the exclusive remedy available to the parties, and it also makes the arbitration remedy set forth in Subsection 7(A) permissive, not mandatory, by providing that the party asserting breach "*may* invoke the following procedure." ECF No. 1-3 at § 7(A) (emphasis added). This provision is permissive, even as it applies to disputes that are within its scope, which, as explained at Section 3, *infra*, certain of the Pueblos' *Ex Parte Young* claims against Defendants are not. "'To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one.'" *Coeur d'Alene Tribe*, 794 F.3d at 1045 (quoting *N. California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995)). The language of Section 7 does not designate arbitration as the exclusive remedy.

Similarly, in *New York v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 62 (2d Cir. 1996), the Second Circuit rejected the tribe's argument that a federal lawsuit should be dismissed based on an arbitration clause in a gaming compact. The arbitration clause in that case contained an exception that stated, "[a] claim by the State that the Nation is conducting a Class III gaming activity not authorized by this Compact is not subject to mandatory arbitration." *Id.* at 61. The Second Circuit ruled that the state's claims in the federal lawsuit fell within that exception and thus were not subject to mandatory arbitration. *Id.* at 62. In reaching this result, the Second Circuit stated that "[w]here the parties to an arbitration agreement specifically have excepted a certain type of claim from mandatory arbitration, *it is the duty of courts to enforce not only the full breadth of the arbitration clause, but its limitations as well*." *Id.* (emphasis added). Likewise here, the parties specifically agreed in Subsection 7(B) that arbitration is not mandatory by declaring that

the Pueblos' right to pursue an alternative remedy is not "waive[d], limit[ed], or restrict[ed]" by Subsection 7(A). That express statement that arbitration is not mandatory should be enforced.

Outside the gaming context, courts have similarly ruled that non-exclusive arbitration clauses in contracts do not foreclose federal litigation. *See, e.g., Brennan v. King*, 139 F.3d 258, 266 (1st Cir. 1998) (finding arbitration not required where contract did not "manifest an intent that arbitration be the exclusive means for addressing a dispute"); *Indep. Oil Workers at Paulsboro, N.J. v. Mobil Oil Corp.*, 441 F.2d 651, 653 (3d Cir. 1971) (finding arbitration not mandatory where agreement stated: "Nothing in this agreement shall prevent either [party] . . . from applying, during the term of this agreement to a court of competent jurisdiction for the relief to which such party may be entitled"). The same result is warranted in this case.

2. *The Defendants' Motion Reads Subsection 7(B) Out of the 2015 Compact and Misreads Subsection 9(B) to Refer to Subsection 7(A) Only.*

The Defendants' Motion asks the Court to dismiss this lawsuit in order to allow the parties to arbitrate their dispute. *See, e.g.*, Motion at 10. As discussed above, this request is directly contrary to the parties' agreement in Subsection 7(B) of the 2015 Compact, which precludes the arbitration provision of Subsection 7(A) from being read to "waive, limit, or restrict" other remedies that are available to the parties. ECF No. 1-3 at § 7(B). Dismissal of this lawsuit would be a severe limitation and restriction on the remedies available to the Pueblos to pursue their claims for the reasons discussed at Section IV(B)(3), *infra*, and would deprive them of their chosen forum.

The Defendants' Motion essentially asks this Court to rule that arbitration is the exclusive remedy available to the parties for resolving this dispute. That contention reads Subsection 7(B) right out of the 2015 Compact, a result contrary to fundamental principles of contract law, which require that all provisions of a compact should be given effect if possible. *See Mastrobuono*, 514 U.S. at 63 (recognizing "[a] cardinal principle of contract construction . . . that a document should

be read to give effect to all its provisions and to render them consistent with each other."); *see also Oneida Indian Nation of N.Y.*, 90 F.3d at 63 (rejecting argument that dispute must be arbitrated because it would read exception to mandatory arbitration out of the agreement). Remarkably, Defendants' brief never even mentions Subsection 7(B), much less attempt to explain why it does not foreclose the Defendants' requested relief.

The mainstay of Defendants' argument is that this dispute is "precisely the kind of dispute the parties expressly agreed to arbitrate in the 2015 compacts." Motion at 2.[1] That argument falls flat both because it ignores the parties' express agreement that arbitration would not be the only remedy available for the resolution of compact disputes, and because it ignores the plain language of Subsection 7(A)(3), which precludes arbitration of disputes related to the validity or effectiveness of a compact provision, such as at least some of the federal law claims asserted by the Pueblos in this action. Thus, even if certain issues in this lawsuit *could* be arbitrated under Subsection 7(A), Subsection 7(B) unambiguously provides that this dispute is not *required* to be arbitrated and, as discussed in Section IV(B)(3) *infra*, Subsection 7(A)(3) provides that certain of the Pueblos' claims are beyond the scope of the matters subject to arbitration under Subsection 7(A).

The Defendants' Motion also relies upon Subsection 9(B) of the 2015 Compact, but that section actually hurts, not helps, their argument. Subsection 9(B) provides as follows:

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[1] *See also id. at* 6 ("The State's claim for revenue sharing due under the 2007 Compact in connection with the Pueblos' use of free play credits falls squarely within the purview of the arbitration provisions of the 2015 Compact."); *id.* at 7 ("Despite the parties' clear agreement in the 2015 Compact to arbitrate the present payment dispute . . .); *id.* ("the parties have explicitly agreed to resolve this payment dispute through arbitration, and the dispute therefore is arbitrable . . ."); *id.* at 8 ("In this case, requiring arbitration would do no more than hold the Pueblos to a dispute resolution process to which they agreed in the 2015 Compact."); *id.* at 10 ("The State's claim for additional revenue sharing under the 2007 Compact is a payment dispute that falls plainly within the scope of the 2015 Compact's arbitration provisions. Therefore, it must be arbitrated.").

> Notwithstanding Paragraph A, the terms of any Predecessor Agreement [meaning the 2007 Compact] . . . shall survive to permit the resolution of payment disputes. *Such disputes shall be resolved through the procedures set forth in Section 7 of this Compact.* Failure to abide by the procedures set forth in Section 7 or failure to comply with an arbitrator's final decision with respect to the parties' obligations under a Predecessor Agreement constitutes a breach of this Compact. This survival provision is intended to provide for the reasonable resolution of past disputes without hindering a Tribe's ability to obtain a new compact.

ECF No. 1-3 at § 9(B) (emphasis added). Paragraph A provides, in effect, that the 2015 Compact (the addendum to which clearly states that free play and point play do not increase Net Win or affect the deductibility of all payouts) supplants and replaces the 2007 Compact on the date of publication of notice in the Federal Register. *Id.* at § 9(A). Subsection 9(B) thus purports to provide that provisions of the 2007 Compact survive to resolve payment disputes under the procedures set forth in Section 7 of the 2015 Compact. The "procedures set forth in Section 7" of course include Subsections 7(A) and 7(B), and because Subsection 9(B) does not distinguish between them, its terms apply equally to both. Indeed, because Subsection 9(B) expressly refers to "Section 7," no other construction is plausible. Given that Section 7 *includes* Subsection 7(B), which unambiguously provides that arbitration does *not* waive, limit, or restrict other available remedies, and authorizes this action to assert federal law claims that could not be decided by arbitration given Subsection 7(A)(3), Defendants' reliance on Subsection 9(B) is of no avail.

Had the parties intended to make arbitration the exclusive remedy for payment disputes under the 2007 Compact, as Defendants contend, they would have expressly stated in Subsection 9(B) that such disputes would be decided under Subsection 7(A), where the arbitration provisions are located, rather than "Section 7" generally. They did not. There is, thus, no basis for reading Subsection 9(B) as making arbitration the exclusive remedy available to the parties, particularly given the nature and substance of the Pueblos' federal law claims.

Additionally, Defendants' argument ignores the fact that the Secretary did not affirmatively approve the 2015 compacts, but rather allowed each of them to go into effect by expiration of the 45-day period allowed by IGRA for Secretarial action. *See* Defs.' Statement of Facts ¶ 4, ECF No. 55. Thus, the 2015 Compacts are in effect "only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). If the Defendants' claims that the Pueblos must pay revenue sharing based on the value of free-play credits violate federal law, then the provisions of the 2015 Compact that purport to preserve those claims and permit their enforcement are themselves not valid, effective or enforceable.

The Pueblos' ability to bring an *Ex Parte Young* action against State officials to enjoin ongoing violations of federal law is an important federal right. The Court should not interpret the 2015 Compact as forfeiting that right in the absence of a clear statement to that effect. *See Coeur d'Alene Tribe*, 794 F.3d at 1045 ("'To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one.'") (*quoting N. California Dist. Council of Laborers*, 69 F.3d at 1037). There is no such statement in Subsection 9(B).[2]

The Defendants also seek to invoke the "federal policy favoring arbitration," Motion at 6, but that effort is unavailing as well. The Supreme Court has ruled that "courts may not use policy considerations" favoring arbitration "as a substitute for party agreement." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 289–90 (2010); *see also Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to

[2] If, contrary to the Pueblos' arguments above, the Court determines that Subsection 9(B) is ambiguous as to whether it makes arbitration the exclusive remedy, the Court should nonetheless deny the Defendants' Motion in order to allow the parties to present further evidence regarding the meaning of any ambiguity in this provision.

submit.'") (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). In this case, the parties unambiguously agreed in Subsection 7(B) that arbitration was not their exclusive remedy, so general policies favoring arbitration cannot be used to rewrite the express terms of their agreement. The Supreme Court has also stated that the presumption favoring arbitration applies "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Granite Rock Co.*, 561 U.S. at 301. In this case, the presumption is inapplicable because the contract at issue unambiguously provides that arbitration is not the exclusive remedy. *See Coeur d'Alene Tribe*, 794 F.3d at 1045 n.9 ("Although ambiguous arbitration clauses are to be resolved in favor of coverage, the rule does not apply here because the arbitration clause is unambiguous.") (citations omitted). In addition, the presumption is inapplicable to the Defendants' Motion because the Pueblos challenge, as a matter of federal law, the validity of the arbitration provision as the Defendants seek to use it. *Riley Mfg. Co. Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779–80 (10th Cir. 1998) ("when the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away"). Finally, the presumption deals only with the scope of an arbitration agreement, not with whether the arbitration clause provides the exclusive forum for the parties to resolve that dispute. *Id.*

3. *Dismissal Would Unfairly Prejudice the Pueblos Because Their Federal Law Challenge to Validity and Effectiveness of Compact Provisions Cannot Be Decided in Arbitration.*

The Defendants' Motion should be denied for the additional reason that in the arbitration proceeding that Defendants assert is the exclusive remedy for this dispute, the Pueblos could not question the validity or effectiveness of any provision of the 2015 Compact, or of the 2007 Compact purportedly preserved thereby, because the arbitrators have no authority to decide such questions. The Pueblos intend to make such arguments in this proceeding – indeed, that is the core

of this case – and thus they would be severely prejudiced if this lawsuit were dismissed and they were forced to take this dispute to arbitration.

The arbitration remedy provided under Subsection 7(A) applies only to breach of compact claims: first, either the State or the Pueblo may seek arbitration on a claim that the other party "has failed to comply with or has otherwise breached any provision of [the 2015] Compact"; second, the State may seek arbitration on a claim that "the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement [here, the 2007 Compact] affecting payment . . . as permitted in Section 9(B)." ECF No. 1-3 at § 7(A). But that remedy is further narrowed by an explicit exclusion from the scope of the arbitrators' authority, which provides:

> . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators *shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof*. . . .

Id. at § 7(A)(3) (emphasis added). This limitation prevents a party from challenging the "validity or effectiveness" of any 2015 Compact provision in an arbitration proceeding. The same limitation appears in the 2007 Compact, ECF No. 1-2 at § 7(A)(3), and has the same effect with respect to that compact. Those limitations would prevent the arbitrators from considering some of the Pueblos' core claims in this case.

In their April 13, 2017 letters to the Pueblos, the Defendants took the position that Section 11 of the 2007 Compact requires the inclusion of free play credits in the calculation of the revenue-sharing payments owed to the Defendants. *See, e.g.*, ECF No. 1-8 at 1. If the Defendants assert that argument in an arbitration proceeding, the Pueblos would respond that the Defendants' interpretation of the 2007 Compact is incorrect and contrary to Subsection 4(C) of the 2007 Compact, which expressly requires the Pueblos' accounting, including the calculation of Net Win, to comply with GAAP. *See, e.g.*, ECF No. 11 at 8. The Pueblos would also argue that if Section 11 of the Compact could be interpreted to require such payments, that provision would be invalid

because it would violate federal law. More specifically, the Pueblos would assert that federal law controls the validity and effectiveness of the provisions of the 2007 Compact, that treating free play as revenue violates each Pueblo's obligation under IGRA and under the compact to account for its gaming revenues in accordance with GAAP, 25 C.F.R. § 571.12, that GAAP requires that free play be disregarded in calculating Net Win and that all payouts be deducted from Net Win regardless of where the bets came from, and that thus Defendants' claims would amount to an assessment on an Indian tribe in violation of IGRA. 25 U.S.C. § 2710(d)(4). On that basis, the Pueblos would argue that to the extent that any language of Section 11 of the 2007 Compact may be construed to support the Defendants' free play claim, that language is invalid and ineffective. But no such argument challenging the validity of language in Section 11 would be allowed in arbitration, due to the limiting language in Subsection 7(A)(3).

The Defendants' Motion argues that the "validity or effectiveness" exception to arbitration is inapplicable to this dispute because that exception only applies to interpretations of the 2015 Compact, whereas the Defendants' claims arise under the 2007 Compact. Motion at 7. The Defendants appear to be arguing that the Pueblos *could* challenge the validity of provisions of the *2007* Compact in arbitration, but the arbitration provisions in the 2007 Compact contain an identical "validity or effectiveness" exception. ECF No. 1-2 at § 7(A)(3). The Defendants also argue that the "validity or effectiveness" of the 2007 Compact would not be at issue in an arbitration. Motion at 7–8. This is incorrect because, as explained above, the Pueblos contest the validity of any provision of the 2007 Compact that, according to Defendants' construction of it, purported to require the Pueblos to calculate Net Win in a manner that violates federal law, and the validity and effectiveness of the provisions of the 2015 Compact to the extent they are applied in a manner that would preserve claims that violate federal law.

Furthermore, "[c]ourts must treat agreements to arbitrate like any other contract," and must apply the "cardinal principle of contract construction that all provisions of a contract should be given effect if possible," *Oneida Indian Nation*, 90 F.3d at 63 (citing *Mastrobuono*, 514 U.S. at 63). In this case, that principle requires that the provisions of Subsections 7(A) and 7(B) be read together, and as so read, those provisions establish that the parties agreed to limit the claims that may be arbitrated to breach of compact claims, to make the arbitration of such claims permissive, not mandatory, to expressly exclude any claim that requires consideration of the validity or effectiveness of any provision of the 2015 Compact, and to expressly preserve all other remedies.

4. *Important Questions of Federal Law Should Be Decided by a Federal Court.*

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Even though in their Answers to the Pueblos' complaints in this case Defendants admit there is federal jurisdiction, Defendants' now seek to preclude this Court from considering and deciding the threshold federal law issues at stake. This Court's obligation to consider and determine substantive issues of federal law further militates against the Defendants' request for dismissal of this federal lawsuit based upon a non-exclusive arbitration clause.

This Court has jurisdiction over the Pueblos' claims under 28 U.S.C. §§ 1331 and 1362, because these claims are brought by federally-recognized Indian tribes seeking a ruling that the Defendants' conduct violates IGRA and the federal regulations promulgated thereunder. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 n.2 (2014) ("The general federal-question statute, 28 U.S.C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA."). The Defendants do not dispute that this Court has subject matter jurisdiction over this case. *See* Defs.' Ans., ECF No. 39 at ¶ 7. This Court, therefore, has a "virtually unflagging obligation" to exercise its jurisdiction over this case, and dismissal of the

Pueblos' claims based on the non-mandatory arbitration provision of Subsection 7(A) would be improper.

This lawsuit also involves important questions of federal law that should be decided by a federal court, rather than by an arbitrator, even were the Court to conclude that Subsection 7(A)(3) does not preclude arbitration of at least some of these federal law questions. The Pueblos contend in this lawsuit that the Defendants' demand for revenue-sharing based on free-play credits violates federal regulations that require that the Pueblos' accounting comply with GAAP, and therefore the Defendants' demands amount to a "tax, fee, charge or other assessment" that are not permitted under IGRA. *See, e.g.,* ECF No. 11 at 11–12. This Court will be required to interpret both IGRA and the federal regulations promulgated thereunder in order to resolve these claims and to decide whether the Pueblos are entitled to the declaratory judgment and injunctive relief that they seek. *See, e.g., id.* at 12. These questions of federal law should be decided by a federal court, rather than an arbitrator, particularly since these rulings will potentially affect other tribes in the state that are not parties to this lawsuit but have compacts that are identical to those at issue in this case. In contrast, if this case were dismissed, each Pueblo would be entitled to engage in a separate arbitration with the State, which would be a tremendous waste of resources for all of the parties involved, and could result in inconsistent decisions on the central federal law issues.

C. Defendants Failed to Comply with the Timing Requirements for Invoking Arbitration Under the 2015 Compact.

The Defendants' Motion should be denied for the additional reason that the Defendants failed to comply with the timing requirements for invoking arbitration under Subsection 7(A) of the 2015 Compact. Because the Defendants missed the timing requirements, the Defendants cannot initiate arbitration at the present time.

Subsection 7(A) of the 2015 Compact, which governs arbitration, provides that:

> 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance. The notice shall specifically identify the date, time and nature of the alleged noncompliance.
>
> 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(l) of this Section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the Defendants and the Tribe (hereinafter the "parties") agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.

ECF No. 1-3 at § 7(A).

The Defendants sent Notice of Noncompliance letters regarding the free play dispute to the Pueblos on April 13, 2017. *See* Pueblos' Supplemental Statement of Facts, *supra*, ¶ 3. The Defendants subsequently sent Notice to Cease Conduct letters to the Pueblos on May 31, 2017. *Id.* at ¶ 4. These letters were sent via email and were therefore received by the Pueblos on the same day that they were sent. *Id.* Under Subsection 7(A)(2) of the 2015 Compact, the Pueblos had 10 days from receipt of the Notice to Cease Conduct letters to either stop the complained of conduct or invoke arbitration, but the Pueblos did neither. Ten days from receipt of notice was June 12, 2017, which was a Saturday. The Pueblos would agree that the deadline for them to act was thus the following Monday, June 14, 2017. The State agreed to extend that deadline to June 19, 2017. *Id.* at ¶ 5. The Defendants then had 10 days from June 19, 2017, to invoke arbitration by written notice. The deadline for the Defendants was thus June 29, 2017, but the Defendants did not send the Notice to Invoke Arbitration to the Pueblos until June 30, 2017. *Id.* ¶ 8.

Because the Defendants failed to meet the timing requirements of Subsection 7(B), their attempted invocation of arbitration was not valid under the terms of the Compact. The Defendants, therefore, cannot initiate arbitration at the present time, which further weighs against the Defendants' request for dismissal of this lawsuit in favor of arbitration.

V. CONCLUSION

For the reasons set forth above, the Defendants' Motion should be denied.

Date: February 6, 2018

Respectfully submitted,

/s/ Richard W. Hughes

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I caused the foregoing to be filed using CM/ECF, which caused all parties or counsel to this case to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Richard W. Hughes