IN THE SUPREME COURT OF NEW MEXICO

JANE DOE, by and through her
parent and next friend, J.H.,
Plaintiff-Respondent,
vs.

No. 29, 350
(Ct. App. No. 25, 125)

SANTA CLARA PUEBLO,
SANTA CLARA DEVELOPMENT
CORPORATION, d/b/a
BIG ROCK CASINO
Defendants-Petitioners,

STEVEN BIRD, MIGUEL ORTIGOZA,
TIMOTHY ORTIGOZA and EMILY
ORTIGOZA,
Defendants.
consolidated with

IVAN LOPEZ and LUCY LOPEZ
Plaintiffs-Respondents,
v.

SAN FELIPE PUEBLO d/b/a/ SAN FELIPE
CASINO HOLLYWOOD and CIS
INSURANCE GROUP,
Defendants-Petitioners.

ON WRITS OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PLAINTIFF-RESPONDENT'S BRIEF-IN-CHIEF

MERIT BENNETT, P.C.
Merit Bennett
460 Saint Michael's Dr.
Suite 703
Santa Fe, New Mexico 87505
(505) 983-9834

Attorneys for Plaintiff-Respondent

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SUMMARY OF THE PROCEEDINGS

1. Nature of the Case.

This is a tort action, filed in State District Court for the First Judicial District, against the Pueblo of Santa Clara and four other individuals, for damages arising out of events that occurred on the premises of the Big Rock Casino Bowl ("Big Rock"), a gaming facility located on and wholly owned by Santa Clara Pueblo. The Plaintiff is a parent of a minor female child, acting on behalf of the child. The complaint was amended to add the Santa Clara Development Corporation ("SCDC"), the entity that operates Big Rock on behalf of Santa Clara. As against Santa Clara and SCDC, the amended complaint alleges claims based on battery, sexual assault, negligent maintenance of premises, negligent failure to warn and intentional infliction of emotional distress.

2. Course of Proceedings.

The complaint was filed on March 2, 2004, and Santa Clara was served with the summons and complaint on the same day. On March 11, 2004 Santa Clara filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. Plaintiff filed a response opposing said motion, and Santa Clara filed its reply. The District Court ruled against Santa Clara's Motion to Dismiss.

Santa Clara moved the Court to certify the decision for interlocutory appeal, which Plaintiff opposed. On July 27, 2004, the Court held a hearing and granted Santa Clara's motion to certify the order. Santa Clara filed its Application for Interlocutory Appeal in the Court of Appeals on August 11, 2004. Plaintiff filed her opposition on August 18, 2004, and on September 8, that Court issued its order granting the application. On June 28, 2005, the Court of Appeals affirmed the District

Court's decision. *Doe v. Santa Clara Pueblo,* 2005-NMCA-110, 138 N.M. 198, 118 P.3d 203 (2005). On July 18, 2005, Petitioners filed for Writ of Certiorari, which this Court granted on August 12, 2005. Petitioners moved this Court to consolidate this case with *Lopez v. San Felipe Pueblo, et al.,* No. 29, 351, on September 18, 2005. On October 13, 2005, this Court granted that motion.

3. **Summary of the Facts.**

For purposes of this appeal, the facts as alleged in the complaint are assumed to be true. The complaint herein was filed by Jane Doe, a fourteen-year-old girl, through her mother (collectively "Plaintiff"), against Santa Clara and certain individuals for injuries arising from events that occurred on the night of February 7, 2003. Jane Doe was kidnaped by Defendants Bird and Miguel and Timothy Ortigoza from the parking lot of Big Rock Casino, owned and operated by Santa Clara, while her mother and grandmother were eating at the casino's restaurant. The boys forced Doe into their vehicle, which was parked in the casino parking lot, and drove away. They repeatedly raped her and subsequently dumped her in Espanola. Plaintiff alleges that the abduction of Doe was accomplished because the casino did not provide adequate lighting in its parking lot, provided no security in its parking lot and, further, refused to aid in locating Doe when it became apparent that she was missing from the casino's premises. Plaintiff alleges that, as a direct result of the conduct of the Defendants, she has suffered and will continue to suffer physical injury, severe emotional distress, embarrassment, humiliation and loss of self-esteem.

ARGUMENT

I. INTRODUCTION

The Plaintiff submits that the District Court has concurrent jurisdiction over the subject matter of the claims in this case, and that therefore, the District Court's ruling denying Santa Clara's Motion to Dismiss should be affirmed. A court has subject matter jurisdiction over a case if it is within the general class of cases that the court has been empowered, by constitution or statute, to hear and determine. *Marchman v. NCND Texas Nat'l Bank*, 120 N.M. 74, 83, 898 P.2d 709 (1995).

The issues before this Court are four-fold. The main issue posed by Santa Clara is whether the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721 (1994) ("IGRA"), permits State courts to assume jurisdiction over personal injury suits arising on Indian lands where the tortious actions occurred on the premises of the Tribal gaming facility. This question will be answered below in the affirmative.

The second question posed is whether the New Mexico Tribal-State Compact of 2001 ("Compact") provides for permissible jurisdiction shifting to State court, of matters which would fall otherwise under the purview of exclusive Tribal court jurisdiction. This Compact expressly includes a limited waiver of sovereign immunity, giving visitors to gaming facilities the choice to proceed with their case in a binding arbitration setting or in State District Court.

Thirdly, does the present claim, which involves activities that are directly related to the licensing and regulation or operation of gaming activities, as both the IGRA and 2001 Compact indicate and case law demonstrates, invoke State court jurisdiction. This is answered below in the affirmative.

Lastly, if the Plaintiff's claim is covered by the 2001 Compact, and the IGRA allows for jurisdiction shifting, the question posed by the Defendant is whether state jurisdiction over this claim "infringes on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959). To this issue, the Plaintiff urges this Court to answer in the negative.

Santa Clara argues that, in the absence of direct Congressional authority, Indian Tribal courts retain exclusive jurisdiction. However, as Congress has authorized, State jurisdiction over certain matters where the Tribe *has agreed in a written compact* with the state is permitted. Santa Clara argues that the Court must look to the IGRA alone to determine whether Congress expressly intended to override *Williams*[1] to allow the State the opportunity to assume jurisdiction over a general court claim. Santa Clara's argument stems from the fact that the Compact states that "any such claim [for personal injury] 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."* 2001 Compact, 8(a) (emphasis added).

However, case law clearly demonstrates that the IGRA specifically left this jurisdictional determination up to the states and Tribes to be agreed upon in Indian gaming compacts, and courts have consistently found that the IGRA does permit such jurisdictional shifting. The Court of Appeals in *Doe* gave great deference to the sovereignty of the Tribe and its power to enter into binding agreements with the State.

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[1]In *Williams v Lee*, 358 U.S. 217 (1959), the Court stated that, in that particular case, the assertion of state jurisdiction here surely would "undermine the authority of the Tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, at 223.

Standard of Review

A decision on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) is considered to be a ruling on a question of law that is reviewed *de novo*. *Gallegos v. Pueblo of Tesuque*, 132 N.M. at 211, 46 P.3d at 672.

II. THE IGRA PERMITS STATE COURTS TO ASSUME JURISDICTION OVER TORT CLAIMS ARISING ON INDIAN GAMING FACILITIES

Santa Clara argues that the Compact language does not discuss or affect the shifting of jurisdiction. Santa Clara also claims that the language of the IGRA demonstrates that there is no authority for State courts to assume jurisdiction and also that the Compact makes no allocation of such jurisdiction, absent a clear and express authorization in the IGRA. *See* Petitioners' Brief-in-Chief at 23.

However, the Court of Appeals in *Doe v. Santa Clara Pueblo* below held that the IGRA provides the requisite authorization for State court jurisdiction in tort cases against Tribal gaming establishments and that the Compact effectively confers this jurisdiction on the State court to hear such suit. *See Doe v. Santa Clara Pueblo*, 2005-NMCA-110, 17-19, 118 P.3d at 209. The *Doe* Court found that, through the IGRA, Congress created a mechanism whereby each Tribe and each State could negotiate over how to apportion jurisdiction over Tribal gaming, and the scope of each compact was to be determined by the States. *Id.* at 15.

The IGRA provides that States and Tribes may enter into compacts regarding jurisdictional arrangements over tort claims arising on Indian gaming facilities. The IGRA established the framework under which Indian Tribes and States could negotiate compacts permitting Class III

gaming on Indian reservations and govern issues directly related to such matters. 25 U.S.C. §2702 (1994). As all activities concerning gaming on Tribal lands are governed by the federal Indian Gaming Regulatory Act (IGRA), the Court must determine what, if any, effect the provisions of the IGRA have on this case.

Furthermore, Congress has expressly left certain questions of jurisdiction to be decided by the Tribe and the State. The IGRA provides that a Tribal-State compact may include provisions relating to:

(I) the application of the criminal and civil laws and regulation with the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) allocation of criminal and civil jurisdiction between the State and the Indian Tribe that are necessary for the enforcement of such laws. 25 U.S.A. §2710 (d)(3)©) [2] (emphasis supplied); *See Hatcher v. Harrah's NC Casino Company, L.L.C.,*151 N.C.App. 275, 276 (2002).

Hence, under the IGRA, a Tribal-State compact may include provisions relating to the allocation of civil jurisdiction between the Indian Tribal government and the State government. This is applicable to the case at issue, as the Plaintiff was injured on the Santa Clara reservation while patronizing Santa Clara's gaming facility.

In *Kiowa Tribe of Oklahoma v. Manufact. Technologies*, Inc., 523 U.S. 751 (1998), the Court recognized that Indian gaming through the IGRA, at 25 U.S.C. §2710(d)(7)(A)(ii), is one area where Congress has limited Tribal immunity. That section authorizes a State "to enjoin class III gaming activities located on Indian lands and conducted in violation of any Tribal-State compact." *Id.* As explained in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999), the IGRA

[2] A State may exercise jurisdiction over a Tribe pursuant to IGRA when a Tribe and a State have consented to such an arrangement in a gaming compact. 2710(d)(3)(C)(ii).

abrogates sovereign immunity in the limited circumstance where a Tribe is conducting gaming operations pursuant to an existing compact. *Id.*

The IGRA gives States the option to assume jurisdiction over Indian casinos through the compacting process. *Id.* The declared policy of Congress in enacting the IGRA is to provide a statutory basis for the regulation of Class III gaming by Indian Tribes adequate to shield it from organized crime and other corrupting influences and to assure that gaming activities are conducted fairly and honestly. *See* 25 U.S.C. Section 2702(2).

The principle set forth in *Merrion v. Jicarilla Apache Tribes*, 455 U.S. 130 (1983), states that "civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in Tribal courts ***unless*** affirmatively limited by a specific treaty provision or federal statute." *Id.* at 138. (Emphasis supplied.) Congress has affirmatively spoken on this point, stating: "Class III gaming would be lawful on Indian lands only if such activities were conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State...[and that Compact was] in effect." 25 U.S.C. §2710(d)(1)©)(1994).

It is acknowledged that without an unequivocal and express waiver of sovereign immunity or Congressional authority, State courts lack the power to entertain lawsuits against Tribal entities. *See Puyalep Tribe, Inc. V. Dept'. Of Game*, 433 U.S. 165 (1977). However, in the present case, an effective waiver exists. The IGRA preempts State civil jurisdiction over Indian gaming unless a Tribal-State compact has been negotiated respecting certain classes of gaming defined in the act. *See Keetoowah Indians v. State of Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991). An action contesting the validity of a Tribal-State compact is not preempted because the "IGRA says nothing

specific about how a court determines whether a State and Tribe have entered into a valid compact," and "[s]tate law must determine whether a State has validly bound itself to a compact" (internal quotation marks omitted). *Saratoga County Chamber of Commerce Inc. V. Pataki*, 275 A.D.2d 145, 157 (2000). Hence, State courts have the power to entertain lawsuits in this narrow area.

It cannot be said that Congress intended to "preempt the field" when it expressly ceded the decision regarding who would have jurisdiction over laws and regulations related to gaming activities to the Tribe and the State. *See Hatcher v. Harrah's NC Casino Company*, L.L.C.,151 N.C.App. 275, 276 (2002). In *Hatcher v. Harrah's Casino Company*, 565 S.E.2d 241 (2002), a patron of an Indian Tribe's casino brought an action against the management company, alleging that the company had refused to pay a jackpot he won from a gaming machine. The court held the IGRA did not preempt the exercise of State court jurisdiction in the casino patron's action against the management company. The court held that the patron's claims neither affected the Tribe's internal government nor its decisions. *Id.* at 243.

Also, in *Ortego v. Tunica Biloxi Indians of LA*, 865 So.2d 985 (2004), a casino employee filed a claim contesting the termination of workers' compensation benefits. The court looked solely to the Tribal-State compact to determine whether the Tribe waived sovereign immunity and therefore whether the State retained jurisdiction over workers' compensation claims. These cases evidence what is clearly stated in the IGRA: the IGRA has specifically given deference to Tribal-State compacts, and courts need not examine the IGRA to determine whether or not the Tribal-State compact is valid

By enacting the IGRA, Congress gave the States, with federal oversight and Tribal permission, the ability to exercise jurisdiction over gaming activities occurring on Tribal land. 25 U.S.C. 2702 (3) (2000); *See also, Simms v. Napolitano,* 73 P.3d 631 (Ariz.App.Div.1) (2003). Congress decided that the States should administer this regulatory function, rather than a federal licensing agency. Although the Tribal-State compact is the mechanism through which regulation by the State is possible, the Court in *Simms* concluded that the regulatory activities constitute a proper exercise of State police power and not merely an exercise of a contractual right. *See Dano v. Collins,* 802 P.2d 1021 (App. 1990).[3]

Hence, the issue before this Court, whether the IGRA permits jurisdiction-shifting for personal injury claims, has already been addressed by many courts and they have consistently found that it is permitted by the IGRA.

A. LEGISLATIVE HISTORY

Santa Clara claims that this Court must look to the IGRA and the IGRA alone to decide whether Congress expressly intended to override the principle established in *Williams* and to allow States the opportunity to assume jurisdiction over tort claims occurring at Indian gaming facilities. See Petitioners' Brief-in-Chief at 25, 31. Additionally, Santa Clara wants this Court to explore the legislative history behind the IGRA.

A court "begin[s] the search for legislative intent of a statute by looking 'first to the words chosen by the Legislature and the plain meaning of the Legislature's language'." *State v. Davis,*

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[3]The police power is an attribute of State sovereignty, and, within the limitation of State and federal constitutions, the State may exercise its police power to enact laws for the promotion of public safety, health, morals and for the public welfare. *Dano at 1025.*

2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (quoting *State v. Martinez*, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747). Santa Clara's resort to legislative history of the IGRA is unnecessary because the language of the Statute is plain and unambiguous.[4] When the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms." *U.S. v. Ron Pair Enter., Inc.*, 484 U.S. 235 (1989).[5] When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete." *Comn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992).

However, if this Court finds that the language of the IGRA is not plain on its face, legislative history and the intent of Congress in passing the IGRA clearly demonstrate that the IGRA permits jurisdictional shifting to the States.

Santa Clara argues that the IGRA does not authorize and the Tribes did not intend allocation of jurisdiction to State courts regarding personal injury claims. (Brief, P. 8). Santa Clara's Brief-in-Chief states that jurisdiction shifting provisions in the 2001 Compact were only concerning criminal infiltration in Tribal gaming. (P. 14). Santa Clara claims that the "jurisdiction to be allocated is governmental regulatory authority, and not court jurisdiction over private civil actions." (P. 20 of Brief-in-Chief). Then Santa Clara argues that the question of "whether IGRA provides authority for jurisdiction shifting was left for judicial determination." (P. 25 of Brief-in-Chief). Santa Clara states that because the harm to Ms. Doe occurred in the casino parking lot, it occurred where gaming does not take place. (See P. 14 of Brief-in-Chief).

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[4] The IGRA states, in relevant part, that a State may exercise jurisdiction over a Tribe pursuant to IGRA when a Tribe and a State have consented to such an arrangement in a gaming compact. 2710(d)(3)(C)(ii).

[5] The Court notes that, "we have stated time and again that courts must presume that a legislature says in statute what a legislature means and means in statute what it says there." *Id.*

However, a full reading of the legislative history of the IGRA demonstrates that the IGRA provides authority to States and Tribes to compact with respect to jurisdiction concerning all matters related to Indian gaming. Additionally, "[r]edressing injuries sustained by the Casino's visitors is sufficiently related to the regulation of Tribal gaming enterprises that . . . the State and Santa Clara acted within the scope of the IGRA when they formed the Compact." *Doe* at 17.

Article I, Section 8, of the United States Constitution provides Congress with the ultimate authority over Indian affairs, and, thus, Congress can expressly authorize suits against Indian Tribes through legislation. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986). A Tribe can also waive its own immunity by unequivocally expressing such a waiver. *Kiowa Tribe* at 751.

Before the passage of the IGRA, Congress found that "numerous Indian Tribes had become engaged in or had licensed gaming activities on Indian lands as a means of generating Tribal revenue." 25 U.S.C. §2701(1994). Federal law, however, did not "provide clear standards or regulations for conduct of gaming on Indian lands." 25 U.S.C. §2701(3)(1994). In 1988, Congress passed the IGRA, providing "a comprehensive regulatory framework for gaming activities on Indian lands which sought to balance interests of Tribal governments, the States, and the federal governments." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).

Most importantly, the IGRA established the framework under which Indian Tribes and States could negotiate compacts permitting class III gaming on Indian reservations located within State territory. *See* 25 U.S.C. §2702(1994); S.Rep. No. 100-446 (1989); *Srader v. Verant*, 964 P.2d 82. As previously stated, the States' role with respect to jurisdiction is limited. *See Srader v. Verant*,

964 P.2d 82. However, the language of the IGRA allows the States and the Tribes to negotiate with respect to jurisdiction. *See* 25 U.S.C. §2710(d)(3)(C)(ii)(1994).[6] It must be noted that Congress authorized States to exercise their police power through Tribal-State compacts "to keep gaming free from criminal elements and to protect the gaming public, while preserving Tribal sovereignty." 25 U.S.C. 2702; S.Rep. No. 100-446. Concern for criminal elements is only one factor that a State takes into consideration in negotiating a Tribal-State compact.

Congressman Rhodes explained in his extended remarks, "[t]he states have a strong interest in regulating all Class III gaming activities within their borders," in large part because "the vast majority of consumers of such gaming on Indian lands would be non-Indian citizens of the State and tourists to the State . . . ." Cong. Rec. H8157.

The Tribal-State compact "may allocate most or all of the jurisdictional responsibility to the Tribe, to the state or to any variations in between." S. Rep. No. 100-446, at 14. *See also Gallegos,* 2002-NMSC-012, P.10. *Gallegos* notes that "according to Congress, a State court may exercise jurisdiction over a Tribe pursuant to the IGRA when a Tribe and a state have consented to such an arrangement. In a gaming compact."Santa Clara argues that this is an expansive reading of the IGRA and that legislative history warns against any such interpretations. However, reading the plain language of the IGRA and finding that jurisdictional shifting is allowed, in the very narrow area set out by a Tribal-State compact, is not an expansive reading. The Court need not even construe the language of the IGRA broadly, as the Petitioner contends, in order to arrive at the fact that the IGRA allows for the jurisdiction-shifting evidenced in this case. This Court need only look to the language

[6]25 U.S.C. 2710(d) provides, in relevant part: "class III gaming activities shall be lawful on Indian lands only if such activities are...(C) Conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State."

of the IGRA and prior case law in order to find that resort to legislative history is unnecessary and that the language of the IGRA is plain and unambiguous.

Additionally, the court in *Gallegos v. Pueblo of Tesuque,* stated that in the IGRA, "Congress attempted to strike a balance between the rights of Tribes as sovereigns and the interests that states may have in regulating sophisticated forms of gambling." *State ex rel. Clark v. Johnson* , 120 NM 562, 904 P.2d 11, 15 (1995).

As previously stated, the State's role with respect to jurisdiction over Tribal matters is limited. See *Found. Reserve Ins. Co. v. Garcia* , 105 N.M. 514, 516, 734 P.2d 754, 756 (1987). However, the language of the IGRA allows the States and the Tribes to negotiate with respect to jurisdiction. See 25 U.S.C. § 2710(d)(3)(C)(ii) (1994) Thus, according to Congress, a State court may exercise jurisdiction over a Tribe pursuant to the IGRA when a Tribe and a State have consented to such an arrangement in a gaming compact. *See, e.g.* , *Gallegos v. Pueblo of Tesuque,* 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668 (2002)

B. THE SAFETY AND PROTECTION OF VISITORS TO A GAMING FACILITY AND THE APPLICATION OF LAWS AND JURISDICTION TO CLAIMS ARE DIRECTLY RELATED TO THE REGULATION OF TRIBAL GAMING ACTIVITIES.

It is on the basis of this reading of the legislative history that the *Doe* court concluded that Congress, in § 2710(d)(3)©), left the relatedness question—*i.e.*, the relatedness of "[r]edressing injuries sustained by the Casino's visitors . . . to the regulation of Tribal gaming enterprises"—to the State and the Tribe, and therefore, "the State and Santa Clara acted within the scope of the IGRA when they formed the compact." *Doe* at 17.

The IGRA lists a number of generic provisions which a Tribal-State compact "may include"

but specifically excludes only two types of provisions. IGRA, Section 2710(d)(3), (4), (5). The potentially includable subjects relate to the application of criminal and civil laws and regulations of both the Tribe or the State "that are directly related to, and necessary for enforcement of such laws and regulations."

The Court of Appeals in *Doe* found that the provision of the 2001 Compact that provides for jurisdiction in State court for personal injury lawsuits by people injured in Tribal casinos is directly related to the regulation of gaming and is, therefore, valid under the IGRA. *Doe* at 17-19.

The IGRA states that the Tribal-State compact should resolve such matters as the applicability of "State laws at the casinos, State taxation of gambling revenues and any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(3)(C)(I). Hence, the section of the New Mexico Compact entitled "Protection of Visitors" logically provides, in clear language, where a suit involving such matters can be brought.

However, the Defendants-Petitioners claim that personal injuries suffered by casino patrons on casino premises "have nothing to do with the 'licensing or regulation' of class III gaming activities" and hence, that the Plaintiff's claims are not governed by the Compact in this case. Petitioners' Brief-in-Chief at 17. However, Jane Doe enjoys the benefit of the Compact's Section 8 jurisdiction-shifting provisions and waiver of sovereign immunity because she is in the class of intended beneficiaries of the Compact: Doe and her family were patrons visiting Big Rock Casino. Santa Clara has conceded that the New Mexico Tribal-State Compact, which governs the Tribe's class III gaming activities pursuant to the IGRA, includes a clear waiver of Tribal sovereign immunity in limited cases. One of those limited cases where the Tribe has waived immunity is for tort claims brought by patrons of Indian casinos against the Tribe. Compact 2001 8(A).

Additionally, while Santa Clara's previous compact of 1997 with the State of New Mexico is no longer in effect, it is in their previous compact that Santa Clara admits that personal injuries of casino patrons come under the purview of "licensing or regulation of class III gaming activities."[7] A glance at Section 8(A) of N.M.S.A. 11–13-1 of the 1997 Compact between Santa Clara Pueblo and the State reveals that the State and Tribe have agreed that such claims by casino patrons are "directly related to the regulation of Tribal gaming activities in the State of New Mexico." While Santa Clara has renegotiated a new compact with the State since the 1997 Compact, the former compact is dispositive of the intent of the parties, and its unequivocal language constitutes an admission by the Defendants-Petitioners that Ms. Doe's claims are definitely covered by the current Compact. Additionally, it establishes that the claims at issue in this case are directly related to the regulation of Tribal gaming activities, even though the Defendants-Petitioners are now arguing otherwise. The Title of Section 8, "Protection of Visitors," also indicates that one of the 1997 Compact's purposes was to protect the general public. N.M.S.A. 1978, 11-3-1, Section 8, further provides as follows:

> 1.A. Liability to Visitors. The safety and protection of visitors to a Gaming facility and uniformity and application of laws and jurisdictional claims *is directly related to and necessary for the regulation of Tribal gaming activities in this State.* To that end, the general civil laws of New Mexico and concurrent civil jurisdiction in the State courts and the Tribal courts shall apply to a visitor's claim of liability for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise and:
>
> 1. Occurring at a Gaming facility, other premises, structures, on grounds or involving vehicles and mobile equipment used by a Gaming enterprise.
> 2. Arising out of a condition at the Gaming facility or on premises or roads and passageways immediately adjoining it. Section 11-13-1. In light of this language, which explicitly serves the goal of protecting visitors, we conclude

[7]Section 8(A) of N.M.S.A. 11–13-1 (hereinafter "1997 Compact").

that the Compact benefits the public.[8]

3. occurring outside of the Gaming Facility but arising from the activities of the Gaming Enterprise;

4. as a result of a written contract that directly relates to the ownership, maintenance or use of a Gaming Facility or when the liability of others is assumed by the Gaming Enterprise; or

5. on a road or other passageway on Indian lands while the visitor is traveling to or from the Gaming Facility.

However, even if the 1997 Compact never existed, many Courts have time and again assumed that the personal injuries of casino patrons have everything to do with the "licensing or regulation" of casino gaming. As the Court in *Gallegos* stated, "no one disputes that the parties to the gaming compacts sought to ensure a forum and compensation for those injured at the Tribal casinos." *Gallegos* at 674.

The Court in *Romero v. Pueblo of Sandia,* 80 P.3d 490 (2003), held that it did not agree with the Defendant because the compact had wide-ranging goals, any purpose outside of the "purposes and objectives" section are rendered incidental. This view would disregard the entire section devoted to the "Protection of Visitors." *Id.* The same is true for the 2001 Compact at issue. It is evident that, through Santa Clara's past and present Compacts and its dealings with the State, that the Tribe believed and intended that the safety and protection of visitors to gaming facilities is directly related to the regulation of Tribal gaming activities in the State of New Mexico.

III. THIS COURT SHOULD LOOK TO THE COMPACT IN ORDER TO DETERMINE WHETHER THE CASE AT ISSUE MAY BE BROUGHT IN STATE COURT

The legislative history of the IGRA demonstrates that Congress intended the scope of each Tribal-State compact to be determined by the parties in the course of their negotiations. (P. 6 of Ct

[8] *See also Gallegos v Pueblo of Tesuque, 46 P.3d 668 (2002).*

of Appeals Opinion). "Congress ultimately adopted a flexible solution that allowed competing State and Tribal interests to be balanced on a case by case basis." See S. Rep. No. 100-446, at 6; 1134 Cong. Rec. at 25, 378 (Cal. Rep. Anthony Coehlo).

The easiest way for a Tribe to lose its sovereign immunity is to waive it. In *C&L Enters. Inc. v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the U.S. Supreme Court loosened the test for waiver. The Supreme Court issued an unanimous opinion, holding that the Tribe had waived its sovereign immunity by agreeing to abide by the Rules of the American Arbitration Association and Oklahoma state law. In a careful reading of those Rules and law, the Court found phrases stating that arbitration awards could be enforced in State court. Therefore, the Tribe had "clearly" agreed that it could be sued in State court.

In order to relinquish its sovereign immunity, an Indian Tribe's waiver must be clear. *C&L Enters. Inc. at* 411 (2001). Santa Clara, claims that the 2001 Compact "leaves the jurisdictional issue for judicial determination." The 2001 Compact, provides, in part, that *"any such claim [for personal injury] 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 shifting of jurisdiction over visitors' personal injury suits to State court."* 2001 Compact 8(A) (Emphasis supplied). However, as stated previously, both the case law and the plain language of the IGRA itself confirm that the IGRA permits jurisdiction-shifting if agreed to in a Tribal-State compact. Further, the 2001 Compact states that "a visitor having a claim described in this section may pursue that claim *in any court of competent jurisdiction...*" 2001 Compact 8(E) (Emphasis supplied). This section can have no other reading but to include the State District Court as a State court of competent jurisdiction.

A Compact is a form of contract, and, generally, the goal of a contract is to "ascertain the

intentions of the contracting parties." *Ponder v. St. Farm Mut. Auto. Ins.*, 129 N.M. 698, 702, 12 P.3d 960, 964 (2000). Having demonstrated that jurisdiction-shifting in a Tribal-State compact is allowed by the IGRA, the Court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the Court may not alter or fabricate a new agreement for the parties. *Id.* Courts have defined a compact as a contract which, when approved by Congress, has the force of federal law. This Court's duty is confined to interpretation of the contract that the parties made for themselves, and absent any ambiguity, the Court may not alter or fabricate a new agreement for the parties. *Texas v. New Mexico*, 482 U.S. 124 (1987).

The express language of the 2001 Compact is clear and unambiguous. *See Vickers v. N.Am. Land Devs., Inc.*, 607 P.2d 603 (1980) (noting that a contract is ambiguous only "if it is reasonably and fairly susceptible of different constructions"). As the New Mexico Court stated in *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (2002), "no one disputes that the parties to the gaming compact sought to ensure a forum and compensation for those injured at the Tribal casinos." *Gallegos* at 672. The State and the Pueblo had the opportunity to define the limitations of their agreement, and the court should not infer an intent on either parties' behalf contrary to both the Compact's plain language and the policies underlying the protection of Tribal immunity and State regulation. References to concurrent jurisdiction in the Compact represents the Tribe's consent to be sued in State court, as long as the waiver of sovereignty is unequivocal, which it is here. *See C&L Enterprises* at 414..

In *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (2002), a patron of the casino sued an Indian Tribe for injuries allegedly sustained while entering the casino located on the Indian reservation. Gallegos claimed Tesuque Pueblo waived its sovereign immunity *and thus* consented to be sued in

New Mexico State court under the 2001 Compact.[9] The court held that the Compact did not apply retroactively, so the plaintiff could not claim State court jurisdiction under the Compact. However, the present case differs because there existed a valid Tribal-State Compact at the time Ms. Doe was injured, and it clearly speaks to tort claims of patrons of casinos located on Indian reservations.

In *Gallegos,* the Compact was not in effect at the time because of procedural issues, so any waiver of immunity or jurisdictional-shifting within the Compact would not cover that claim. The Court, however, went on to note that, in a Compact, an Indian Tribe can waive sovereign immunity by unequivocally expressing such a waiver. "A State court may exercise jurisdiction over a Tribe, pursuant to IGRA, when a Tribe and a State have consented to such an arrangement in a valid gaming compact." 25 USCA 2710(d)(3)(C)(ii); *Gallegos* at 674.

To contrast the Tribal-State compact at issue in this case, one can examine the Tribal-State compact at issue in *Bonnette v. Tunica-Biloxi Indians*, WL 21229282 (La. App.3d Cir. 2003). In *Bonnette*, the Louisiana Tribal-State compact did not have specific language demonstrating the Tribe's consent to be sued by a third party in State court. The only language referencing State court jurisdiction in the Louisiana compact states that the Tunica-Biloxi Indian Tribe of Louisiana and the State "shall preserve the full territorial and subject matter jurisdiction of the Tunica-Biloxi Indian Tribe of Louisiana and the Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such [tort] claims." *Id.* The court in *Bonnette* examined the Louisiana compact to determine whether the Tribe had exclusive jurisdiction over non-members' claims, and the court

[9]In 1995, the Tribes and government of New Mexico negotiated to enter into a Tribal-State compact permitting Class III gaming. *See Clark*, 120 N.M. at 567. The Secretary of the Interior then approved the Compact and published it in the Federal Register, as required by law. The validity of the 1995 Compact was challenged in *Clark* on grounds that the Governor lacked authority to commit New Mexico to these compacts because he attempted to unlawfully exercise legislative authority. The Court agreed, and in 1996, the 1995 Compact was declared void. After Clark, the Tribes continued to participate in class III gaming. *See Kelly I*, 932 F.Supp. at 1290.

determined that the Tribe retained its jurisdiction because the Tribe had not waived its sovereign immunity via the compact. *Id.* In contrast to the compact in *Bonnette*, the New Mexico Indian Gaming Compact of 2001 contains specific language giving patrons of casinos a right to sue in State court.

Hence, if the Tribe in *Bonnette* had waived its sovereign immunity in the compact, as is the case in the compact at issue here, the State court would have jurisdiction over such claims. Where the Tunica-Biloxi Tribe expressly retained its sovereign immunity in the Tribal-State compact, with respect to tort claims by gaming patrons, Santa Clara Pueblo expressly relinquished its sovereign immunity with respect to such claims in the New Mexico 2001 Compact at issue.

In many compacts, the State lacks subject matter jurisdiction over casino patrons' personal injury actions because many Tribes have not elected to waive their sovereign immunity in such compacts. This is not the case in the 2001 Compact where there is a clear waiver of sovereign immunity and a clear granting of concurrent jurisdiction to the State court. If Santa Clara feels that the jurisdiction-shifting provision in the 2001 Compact infringes on the self-determination of its people, then it could have refrained from waiving its sovereign immunity and retained exclusive jurisdiction in such cases. It is clear that this was not the intention of the Tribe.[10]

A. THE NEW MEXICO 2001 COMPACT DOES NOT INFRINGE ON SANTA CLARA'S RIGHT TO SELF GOVERNANCE AND SELF-DETERMINATION

In addition to agreements regarding the environment, resource conservation, taxation and water rights, many States and Tribes enter into agreements that establish their respective rights and

[10]This issue might raise estoppel issues, as Santa Clara has contracted to waive its immunity and avail itself in State court but claims that this contract they entered into is invalid because it infringes on their self-determination. It appears that the Tribe was exercising its right to self govern when it entered into the 2001 Compact as a contracting party.

the procedures each must follow in order to combat criminal activity that crosses Tribal-State borders.

In addition to the legal and legislative rules that have been discussed governing this case, there are many policy concerns that must be taken into consideration, as Santa Clara is essentially asking the Court to rule that its contracts with the State of New Mexico should be dissolved whenever the outcome is unfavorable to the Tribe. When Santa Clara entered into its second Compact, as a contracting party, it was exercising its right to self-govern. Now, it is claiming that the contract that they entered into is against their right to self-govern.

In *Defeo v. Ski Apache Resort*, 120 N.M. 1065, 904 P.2d 1065 (N.M. App.1995), a non-Indian sued the Apache Tribe of Mescalero Reservation for personal injuries sustained at the Tribal ski resort. The District Court denied the Tribe's motion to dismiss for lack of jurisdiction. The Court of Appeals ruled that the Tribe did not impliedly waive sovereign immunity by engaging in commercial activity. Thus, suits against Indian Tribes are still barred absent a clear waiver of immunity by the Tribe or Congress.

In the *Defeo* case, the Tribal court expressly *reserved* jurisdiction of the Tribal courts in civil matters. This is in stark contrast to the present case before this Court where the Tribe expressly *waived* its sovereign immunity and allowed for concurrent jurisdiction for tort claims made by patrons of the casino. Additionally, by the *Defeo* Court holding that no waiver of sovereign immunity existed, the Court reaffirmed the notion that there is no federal bar to the creation of a waiver of sovereign immunity by the Tribe so that Indians can submit jurisdiction to State court. If such a bar did exist, this would be contrary to the policy of self-determination.

Further, while Indian Tribes have been congressionally recognized as possessing the common

law immunity from suit traditionally enjoyed by sovereign powers, and Indian Tribes enjoy sovereign authority over their members and territories, their immunity from suit in State court is not absolute. *Santa Clara v. Martinez*, 436 U.S. 49, 58 (1978). In *Nevada v. Hicks*, 533 U.S. 353 (2001), the court held that Tribal courts have no jurisdiction over State law enforcement officials who enter Tribal lands to investigate an off-reservation crime. If this holding is interpreted broadly, the *Hicks* ruling would prevent Tribes from asserting any regulatory authority whatsoever over non-members, even if they trespass on Tribal lands and commit torts or other harms, unless those nonmembers had expressly contracted to voluntarily submit themselves to Tribal jurisdiction. *Id.*

The express concern with Tribal sovereignty over non-members is that Tribes are not directly subject to the Bill of Rights; they are regulated only by the 1968 Indian Civil Rights Act. *Santa Clara v. Martinez*, 520 U.S. 438 (1997); Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303 (2000). Moreover, the United States Supreme Court has generally remained deferential to State sovereignty when non-Indians bring complaints against the State. This is pertinent to this case because State governments are generally trusted by the Supreme Court to exercise their powers wisely, even when those powers are exercised over Indians. *See Hicks* at 340. The Supreme Court's recent judicial divestment policy suggests that the Court does not trust Tribal governments to be sensitive to the rights of non-Indians. This is in light of the fact that the Tribes know that at various periods of United States history, the federal government has acted to diminish or abolish Tribal government. Since 1982, the Supreme Court has been more and more unwilling to grant Indians regulatory powers or court jurisdiction over non-members. *Id.*

Additionally, it must be noted that Tribal business has become so far removed from Tribal self-governing and internal affairs in the gaming context that the rationale can be challenged as

inapposite to modern, wide-ranging Tribal enterprises extending well beyond traditional Tribal customs and activities. There are reasons to doubt the wisdom of perpetuating the doctrine of Tribal immunity in these contexts. *Ortego* at 990. At one time, the doctrine of Tribal immunity from suit might have been thought necessary to protect nascent Tribal government from encroachment by States. In our interdependent and mobile society, however, Tribal immunity extends beyond what is needed to safeguard Tribal self-governance. This is evident when Tribes take part in the nation's commerce. Tribal enterprises now include ski resorts, gambling casinos and sales of cigarettes to non-Indians. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

In this economic context, immunity can harm those who are unaware that they are dealing with a Tribe, who do not know of Tribal immunity or who have no choice in the matter, as in the case of tort victims. *Ortego* at 987.

B. THE WILLIAMS INFRINGEMENT TEST

Santa Clara claims that this case falls squarely within the *Williams* rule. Assuming that the IGRA and the 2001 Compact allow for State court jurisdiction of the present claim, the argument the Defendants-Petitioners have put forward is that State court jurisdiction would unduly infringe on the Tribe's ability to self-govern. Santa Clara repeatedly relies on *Williams v. Lee,* 358 U.S. 217, 223 (1959), to assert that jurisdictional shifting in State compacts is not allowed.

Additionally, Santa Clara argues at length that P.L. 280 is the vehicle by which States may assume jurisdiction over civil suits arising within Indian country and states that if a State has not chosen to integrate P.L. 280 into its law (as New Mexico has not done), then that State remains divested of power to exercise State jurisdiction. *See* Brief-in-Chief at 9. However, P.L. 280 specifically and narrowly addresses only State court jurisdiction over actions involving individual

Indians, not actions involving Tribes and causes of action between non-Indians. Therefore, any argument that New Mexico did not adopt P.L. 280 is irrelevant to the discussion in this case.

In *New Mexico ex rel. Dept. of Human Services v. Jojola,* 660 P.2d 590 (1983), the New Mexico Supreme Court held the State court had subject matter jurisdiction over an action by Human Services to determine a paternity suit and child support. The Court, applying the *Williams* test, found no Acts of Congress governing jurisdiction in the case and therefore proceeded to determine whether State action infringed on the right of the reservation Indians to make its own laws. The Court balanced the interest of the Indians to govern themselves against that of the State to enforce the Tribal-State compact and found no interference with the Tribe's interest on the part of the State. The third consideration concerns the weighing of relative interests affected by the exercise of State court jurisdiction.

Since *Williams* and *Jojola* were decided in 1983, Congress enacted IGRA in 1989, which gives States the right to contract with Tribes concerning jurisdiction over the tort claim at issue in this case. Since there now exists an Act of Congress that governs this area of the law, the *Williams* infringement test is not necessary and should not be implemented by this Court. The *Williams* test is used only to determine whether a State has authority in a matter relating to Indians, *absent a governing act of Congress.*

However, if this Court determines that the *Williams* analysis does apply, the Court will find that the State of New Mexico has not infringed on the self-determination of the Santa Clara Tribe.

First, one must examine the doctrine of preemption in the context of this case. The State's power over Indian Tribes must be determined in light of the federal government's plenary power over all Indians. *Wildcatt v. Smith*, 316 S.E.2d 870 (1984). State action may be barred upon a showing

of congressional intent to "occupy the field" and prohibit parallel State action. *Id.* Conversely, in the present case, Congress not only did not "occupy the field" but Congress intended to give States the power to make compacts with Tribes with regard to the regulation of gaming activities.

The necessary analysis was articulated by our Supreme Court in *Jackson County v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987), as a two-prong inquiry. The issue before the Court in *Swayney* was whether our State courts had jurisdiction to hear a paternity suit in which the mother, child, and putative father were all members of the Eastern Band of Cherokee Indians living on the Indian reservation, and the plaintiff agency was located off the reservation. The Court first considered whether federal law preempted State-court jurisdiction. *See Id.* at 319 N.C. 56, 352 S.E.2d at 415. Having found no preemption, the Court next considered whether the exercise of State court jurisdiction "unduly infringe[d] on the self-governance of the Eastern Band of Cherokee Indians." *Id.* at 58, 352 S.E.2d at 417 (footnote omitted) (citing *Williams v. Lee*, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 254 (1959)).

Having disposed of the doctrine of federal preemption as a barrier, we next consider whether the exercise of State court jurisdiction unduly infringes on the self-government of Santa Clara. Absent governing Acts of Congress, which is not the case at issue here, the question has always been whether the State action infringed on the right of the reservation Indians to make their own laws and be ruled by them. To determine whether the exercised State jurisdiction infringes on the right of an Indian nation to make its own laws and be governed by them, the New Mexico Supreme Court considers three specific factors:[11]

(1) whether the parties are Indians or non-Indians;

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[11] *See Tempest Recovery Services, Inc., v. Belone,* 74 P.3d 67 (2003).

(2)Whether the cause of action arose within the Indian reservation; and

(3) what is the nature of the interest protected

The Supreme Court of New Mexico has adopted the above infringement test developed from *Williams*.[12] The *Williams* test, which is principally applicable in situations involving a non-Indian party, is "designed to resolve the conflict by providing that a State could protect its interest up to the point where Tribal self-government would be effected." *State ex rel. Dep't. of Human Services v. Jojola*, 99 N.M. 500 (1983). Where a State asserts authority over the conduct of non-Indians in engaging in activities on the reservation, a particularized inquiry must be made into the nature of the State, federal and Tribal interests at stake; an inquiry designed to determine whether, in the specific context, the exercise of State authority would violate federal law. *White Mountain Apache Tribe v. Bleaker*, 472 U.S. 181 (1985).

Applying the aforementioned criteria to the present facts, nothing in the record suggests that litigation of this claim in State court impermissibly infringes upon Santa Clara's sovereignty. Moreover, the facts in this case do not fit squarely within any of the categories of exclusive Tribal jurisdiction. *See State Sec., Inc. v. Anderson*, 84 N.M. 629 (1973) (Noting that powers not reserved to Indians for their exclusive jurisdiction, including suits by Indians against outsiders, are given to the State).

Considering the first element of the *Williams* test, the claimant is a non-Indian and the broadness of Tribal civil jurisdiction has been limited as it applies to non-Indians. *Montana v. U.S.*, 450 U.S. 444 (1981). Looking to the second element, the tortious acts arose on Indian land. The third and most complex element asks the Court to balance both State and Tribal interests to determine if

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[12]*See Jackson v. Swayney*, 352 S.E.2d 413 (1987).

an infringement of Tribal self-governance exists. Under *Williams*, State regulatory laws may apply to Tribal regulations unless their application would frustrate Tribal self-government or impair a right granted or received by federal law. *Moe v. Salish & Koofenai Tribes*, 425 U.S. 463 (1976).

When applying the *Williams* test, an Indian interest is the interest of the Pueblo government in protecting Indian land. In the present case, a tort claim against the Indian casino brought by a non-Indian would not infringe on the ability of Santa Clara to protect its land. It has been held that a State's resolution of a damage suit involving non-Indians did not infringe upon Tribal self-government. *Alexander v. Cook*, 566 P.2d 846 (1977).

In weighing the State's interest against the Tribe's, one can look to the purpose stated for enacting IGRA: "Congress has authorized States to exercise their police power through Tribal-State compacts to keep gaming free from criminal elements and to protect the gaming public, while preserving Tribal sovereignty." 25 U.S.C. 2702; S.Rep. No. 100-446. Additionally, New Mexico has a genuine interest in providing a judicial forum for victims of torts, and the Compact provides the State with a mechanism to negotiate with the Tribe in order to establish the manner in which to redress torts occurring in connection with casino operations on the Tribe's land. As a result of these negotiations, the Tribe waived its sovereign immunity and established concurrent jurisdiction over tort actions of this type, which also happen to involve criminal activity such as rape and kidnaping. *See Gallegos* at 674.

Applying this test, it is clear that State court jurisdiction has not impinged on the Tribe's self-governance. The Tribe's interest is outweighed by the State interest to enforce its Tribal-State compact.

CONCLUSION

For the foregoing reasons, there can be no "substantial ground for difference of opinion" that the District Judge made the correct decision; and accordingly, the Plaintiff urges this Court to affirm the decision below.

Respectfully submitted,

MERIT BENNETT, P.C.

Merit Bennett
460 St. Michael's Drive, Suite 703
Santa Fe, New Mexico 87505
(505) 983-9834
Attorneys for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2006, I cause a true and correct copy of the foregoing Memorandum to be served on the following counsel by deposit of the same in the U.S. mail, first-class postage prepaid.

Richard W. Hughes
Sean J. Flynn
Post Office Box 8180
1215 Paseo De Peralta
Santa Fe, New Mexico 87504-8180
(505) 988-8004

Merit Bennett, P.C.