IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JANE DOE, by and through her parents and next friend, J.H.,

Plaintiff-Respondent,

vs.

SANTA CLARA PUEBLO, SANTA CLARA DEVELOPMENT CORPORATION, d/b/a BIG ROCK CASINO BOWL,

Defendants-Petitioners,

STEVEN BIRD, MIGUEL ORTIGOZA, TIMOTHY ORTIGOZA, and EMILY ORTIGOZA,

Defendants.

Supreme Court No. 29,350

(Court of Appeals No. 25,125)

consolidated with

IVAN LOPEZ AND LUCY LOPEZ,

Plaintiffs-Respondents,

vs.

SAN FELIPE PUEBLO d/b/a SAN FELIPE CASINO HOLLYWOOD and CIS INSURANCE GROUP,

Defendants-Petitioners.

Supreme Court No. 29,351

(Court of Appeals No. 25,884)

ON WRITS OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

CONSOLIDATED BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS SANTA CLARA PUEBLO, SANTA CLARA DEVELOPMENT CORPORATION, AND BIG ROCK CASINO BOWL; and DEFENDANTS-PETITIONERS SAN FELIPE PUEBLO d/b/a SAN FELIPE CASINO HOLLYWOOD, AND CIS INSURANCE GROUP

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INTRODUCTION AND INTEREST OF *AMICI*

The Pueblos of Acoma, Isleta, Laguna, Sandia, San Juan, Santa Ana, and Taos, and the Jicarilla Apache Nation ("Tribes" or "*amici*") are federally recognized tribes located in New Mexico. Each of these tribes negotiated and entered into a Class III Tribal-State compact in 2001 ("compacts") with the State of New Mexico pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d). *Amici's* compacts are identical in all material respects to those of Santa Clara Pueblo ("Santa Clara") and San Felipe Pueblo ("San Felipe").

In these compacts, the Tribes agreed to waive sovereign immunity to allow casino visitors to file personal injury claims either before an arbitrator or in a "court of competent jurisdiction." In negotiations, however, the State and Tribes could not agree on whether Congress, in IGRA, intended to authorize the compacting parties to give state courts jurisdiction over personal injury claims that otherwise could be brought only in tribal court. The Tribes maintained that IGRA, the governing federal statute, did not alter established federal law that both the Supreme Court and this Court have held precludes state courts from exercising subject matter jurisdiction over claims against tribes or Indians arising on Indian lands. The State thought otherwise.

The parties' ultimate compromise on this issue was an agreement to disagree and leave open for judicial determination the question of whether state courts are "courts of competent jurisdiction" for personal injury claims against tribally-owned and operated casinos on tribal land. Consequently, the relevant section of each compact provides that "any such claim [for personal injury] may be brought in a 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). Both the Tribes and

the State anticipated that this Court or the federal judiciary eventually would have to determine if Congress intended to authorize state jurisdiction over such suits.

Amici have a vital interest in the outcome of these consolidated matters because (1) each Tribe operates under the same compact language as Santa Clara and San Felipe; (2) the lower courts' interpretation of the compact language directly contravenes the intent of the parties which actually negotiated the compacts; and (3) acceptance of the lower courts' conclusions that IGRA allows for the shifting of jurisdiction over tort claims and that the parties agreed to such a shifting of jurisdiction contravenes both the governing federal statute and the intent of *amici*. To preserve the intent of Congress in IGRA and of the compacting parties in the compacts themselves, *amici* Tribes respectfully urge the Court to reverse the Court of Appeals' decisions that the state court has jurisdiction over the claims in this case, and order dismissal of Plaintiffs' suits for lack of subject matter jurisdiction.

ARGUMENT

I. The State Court Lacks Subject Matter Jurisdiction Over this Suit Because Congress Has Not Authorized States to Exercise Subject Matter Jurisdiction Over Tort Claims Against Tribes Arising on Tribal Lands.

It is well settled that tribal courts retain subject matter jurisdiction exclusive of state courts over claims arising on tribal lands against tribes and tribal entities, unless Congress enacts a statute specifically authorizing state court jurisdiction. *Williams v. Lee*, 358 U.S. 217, 220 (1959). This Court, following *Williams*, held that tribal sovereign immunity is a matter of federal law and is not subject to diminution by the states, *see Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 212, and acknowledged the principle that the tribal courts have exclusive subject matter jurisdiction when an Indian is being sued by a non-Indian over an occurrence arising in Indian

country. *See Found. Reserve Ins. Co., v. Garcia*, 105 N.M. 514, 516, 734 P.2d 754, 756 (1987).

The courts below acknowledged that if state courts do have subject matter jurisdiction over this personal injury claim, the only possible congressional source of authorization is the Indian Gaming Regulatory Act. *Doe v. Santa Clara*, No. D-0101-CV-200400406 at 1 (N.M.D.C. June 3, 2004); *Doe v. Santa Clara*, No. 25, 125 at 2 (Ct. App. June 28, 2004) (hereinafter, cited as "Doe Opinion"). But the lower courts gave only passing consideration to this precept. The Court of Appeals ignored the text of IGRA, and instead gave controlling significance to its misreading of the parties' intent in the compact and then allowed that misinterpretation to impute to Congress an intent the text of IGRA does not allow. Even if that were the intent of the parties to the compact – and we show in Part II(B) that it was not – it is axiomatic that parties to a contract cannot grant a court subject matter jurisdiction where it does not exist. *See Daniels Ins. Agency, Inc. v. Jordan*, 99 N.M. 297, 299, 657 P.2d 624, 626 (1982) ("Parties may not contract to grant or divest a court of subject matter jurisdiction; such jurisdiction is established only by law."). Only Congress can remove the federal law bar from such jurisdiction. As we show in Part II(A), the courts below incorrectly determined that Congress in IGRA removed that bar.

II. IGRA Does Not Authorize State Court Jurisdiction Over Tort Claims and the Compacting Parties Never Intended to Shift Jurisdiction Without Such Authority.

The Court of Appeals erroneously concluded that IGRA, 25 U.S.C. § 2710(d)(3)(C)(i)-(ii), constitutes an "express grant" of jurisdiction necessary for a state court to hear a personal injury claim against a tribe arising on tribal land. The Court of Appeals' strained reading of those subsections contravenes the purposes and legislative intent of IGRA and the plain meaning of the relevant provisions. That reading deprives *amici* Tribes of the protection Congress intended IGRA to afford tribal self-government and sovereignty in the tort realm.

A. IGRA Never Contemplated the Allocation of Jurisdiction Over Tort Claims, which are not Directly Related to and a Necessary Part of Licensing and Regulation of Gaming Activities.

IGRA's relevant purposes are "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1); to protect Tribes "from organized crime and other corrupting influences" and "to assure that gaming is conducted fairly and honestly." 25 U.S.C. § 2702(2). Finally, Congress stated that IGRA's purpose is also to establish the Federal regulatory authority "necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

With these purposes in mind, Congress meticulously set out the permissible scope of topics that may be addressed in Tribal-State compacts:

> (C) Any Tribal-State compact negotiated . . . [for the conduct of Class III gaming activities] may include provisions relating to -
>
> > (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are *directly related to, and necessary for, the licensing and regulation of such activity*;
> >
> > (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of *such laws and regulations*;
> >
> > . . . .
> >
> > (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C) (emphasis added).

Subsections 2710(d)(3)(C)(i) and (ii) of Title 25, U.S.C. permit the allocation of criminal and civil jurisdiction *only* as "necessary for the enforcement" of laws and regulations that are "directly

related to, and necessary for" the licensing and regulation of Class III gaming activities. *See* § 2710(d)(3)(C)(i)-(ii). Subsection 2710(d)(3)(C)(ii) expressly refers to § 2710(d)(3)(C)(i) and not to any other subsection contained in § 2710(d)(3)(C). Subsection 2710(d)(3)(C)(ii) permits the allocation of jurisdiction, but only as necessary for enforcing the laws described in § 2710(d)(3)(C)(i). Those applicable laws are criminal and civil laws that are "directly related to, and necessary for, licensing and regulation" of Class III gaming activities. 25 U.S.C. § 2710(d)(3)(C)(i).

The second subsection cannot be read to authorize the shifting of jurisdiction for anything other than those laws that are "directly related to licensing and regulation" of the gaming activities. Not only does subsection (ii) limit the allocation of jurisdiction to those applicable laws in subsection (i), but it also limits the allocation of jurisdiction to only that which is necessary for the enforcement of those laws. Personal injury claims by visitors to tribal casinos have nothing to do with the governmental functions of licensing and regulating gaming activities and therefore cannot be "directly related to, and necessary for" such licensing and regulation under § 2710(d)(3)(C)(i).

To be sure, claims by visitors to a casino that they were injured by an act or omission of the casino are matters that are "directly related to the *operation* of gaming activities." Thus, under § 2710(d)(3)(C)(vii), these matters may be addressed in a tribal-state gaming compact, but not by allocation of court jurisdiction.[1] While "operation of gaming activities" is a broad concept, Congress chose much more limited language for the allocation of jurisdiction in subsections (C)(i) and (ii): only those matters "*directly related to, and necessary for, the licensing and regulation of such*

[1] The Court of Appeals was therefore clearly mistaken that the Tribes' reading of the compact would invalidate "provisions concerning the serving of alcoholic beverages, labor conditions, employment discrimination, and liability insurance." Doe Opinion at 11.

activity." Even if a tribe and a state did *agree* to shift court jurisdiction over a subject matter, unless that subject matter is within § 2710(d)(3)(C)(i), IGRA does not authorize such an allocation of jurisdiction.[2] The plain language of the governing statute therefore dictates that Plaintiffs' complaints must be dismissed for lack of subject matter jurisdiction.

1. IGRA's Legislative History Shows Congress' Intent to Limit State Court Jurisdiction to That Required for the Enforcement of Gaming Laws and Regulations, Not to Permit State Court Jurisdiction over Tort Claims.

The legislative history of IGRA confirms the intent of Congress to narrowly circumscribe the extent of state jurisdiction. The Senate Report, S. Rep. No. 100-446 at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 states:

> It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.
>
> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and

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[2] In contrast, the compacting parties were authorized under (C)(vii) to agree that New Mexico law governs the substantive rights of a claimant who brings a personal injury claim under the visitor safety provision. *See* 2001 Compact, § 8(D). Such choice of law agreements are proper under § 2710(d)(3)(C)(vii) because that subsection allows a tribe and a state to negotiate compact provisions relating to "other subjects that are directly related to the operation of gaming activities." Agreeing to apply a uniform body of substantive tort law for visitors injured in the casino is directly related to the operation of gaming activities and therefore proper under (C)(vii). Because it does not involve the "licensing and regulation of" gaming activities, the choice of law provision cannot serve as a vehicle to an allocation of adjudicatory jurisdiction under (C)(ii).

> enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

Similarly, the Chairman of the Senate Indian Affairs Committee, Senator Inouye, stated on the Senate floor that:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands."

134 CONG. REC. 24,022 (1988).

The clear meaning of these statements is that state jurisdiction under IGRA is to be limited to "enforcement of gaming laws and regulations," not the broad panoply of tort claims. This properly precise reading is confirmed by the arguments raised by the *proponents* of state involvement in Indian gaming in Congress as IGRA was enacted in the wake of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). From the legislative history, it is apparent that the proponents of state involvement were focused solely on using states' expertise in regulating gaming and interest in protecting against gaming-related criminal behavior. *See, e.g., Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Select Comm. on Indian Affairs*, 100th Cong. 190-191 (1988) (statement of Hon. Barbara F. Vucanovich) ("These games are very complex and invite corruption and tampering without oversight by experienced regulators.") ("Neither the State nor I oppose gaming on Indian reservations as long as the State can regulate and enforce the activities. . . . [Tribes] will be better off because state regulation is in their best interest because it seeks to prevent graft, crime and corruption."); and *Id.*

at 197 (statement of Hon. Harry Reid) ("Unless control of gaming remains with the State, the hope for controlling organized crime in this country will be lost forever.") Nowhere in the legislative history is there any reference that legislators had any intent to allow the transfer of jurisdiction from tribes to states outside the narrow confines of the actual licensing and regulation of gaming activities.

The Senate Committee Report distinguished specifically between "existing State regulatory systems" and broad court jurisdiction when discussing the statutory provision regarding tribal-state compacts. It stated,

> Thus a logical choice is to *make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction* . . . . The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.

S. Rep. at 13-14, U.S.C.C.A.N. at 3083-3084 (emphasis added).[3]

In sum, IGRA allowed and the Tribes and State intended to provide for liability insurance, choice of law, binding arbitration, and an optional judicial tribal court forum for personal injury claims pursuant to § 2710(d)(3)(C)(vii). But IGRA in subsections 2710(d)(3)(C)(i) and (ii) does not authorize, and the Tribes did not intend, *allocation of jurisdiction to the state courts* regarding personal injury claims.

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[3] The Court of Appeals relied on floor statements of "[s]upporters of state jurisdiction" to buttress its holding that Congress intended more. Doe Opinion at 8. But those supporters only urged that states would have jurisdiction "to protect their citizens from the threat of criminal activity" that may accompany high-stakes gambling, 134 CONG REC. at 25,378 (Rep. Coelho) or "protect [against] victimization by criminal elements that may infiltrate . . . games operated on Indian lands." *Id.* at 25,381 (Rep. Bilbray). These statements confirm that state court jurisdiction under IGRA was to be limited to enforcing "gaming laws and regulations," which is consistent with IGRA's purposes "to shield [Indian gaming] from organized crime and other corrupting influences" and "assure that gaming is conducted fairly and honestly." 25 U.S.C. § 2702(2).

If Congress had wanted to grant jurisdiction for tort claims through IGRA, it knew well how to do so. Public Law 83-280, Act of August 15, 1953, ch. 505, §§ 6 , 7, 67 Stat. 590, 25 U.S.C. § 1322 is an example of an express and wholesale congressional grant of civil and criminal jurisdiction to the states willing to assume such jurisdiction (and later only if tribes were willing to surrender it). That statute authorizes states electing to take jurisdiction under Public Law 83-280 to "hav[e] jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country." 25 U.S.C. § 1322(a). *See generally, Bryan v. Itasca County*, 426 U.S. 373 (1976). New Mexico did not elect to assume jurisdiction under Public Law 83-280. The language in IGRA, subsections 2710(d)(3)(C)(i) and (ii), and the legislative history of the Act, by contrast to Public Law 83-280, show an intent to *limit* jurisdiction shifting. The Court of Appeals' reading of the statute is precisely the reading that Congress intended to prevent.

2. The Responsible Agency Interprets IGRA to Prohibit Shifting Tort Jurisdiction to the State.

If this court finds that Congress was silent or ambiguous regarding whether IGRA allows state court jurisdiction over tort claims, the Court must look to the responsible agency's interpretation of the statute. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). The Department of the Interior has determined that IGRA does not permit state courts to assume jurisdiction over personal injury claims. In a January 28, 2000 letter to the New Mexico Legislative Committee on Compacts, the Director of the Department of the Interior's Office of Indian Gaming Management explained to the State that "it is not legally possible to give a patron the choice of whether to file tort claims in tribal court or state court because Federal law does not permit such a choice." Letter from George T. Skibine, Director, Office of Indian Gaming Mgmt, Dep't of the Interior to Hon. John Arthur Smith, Chairman, Legis. Comm. on Compacts, New Mexico State

Legis. 1 (Jan. 28, 2000) (attached as Exhibit A). IGRA's "authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim because it is an area that is not directly related to, and necessary for, the licensing and regulation of a class III gaming activity." *Id.* at 2.

When an agency interprets a statute which it has been directed by Congress to interpret, even in the absence of formal rulemaking, the agency's interpretation is entitled to judicial deference. *See Barnhart v. Walton,* 535 U.S. 212, 221-22 (2002) (the fact that an agency interprets a statute "through means less formal than 'notice and comment' rulemaking, does not automatically deprive that interpretation of the judicial deference otherwise its due.") (internal citations omitted). Courts should look to the Agency's interpretive method and the nature of the question at issue when determining whether to give judicial deference to an agency's interpretation of a statute. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-231 (2001)).

The Department of the Interior's letter interpreting IGRA for the compacting parties, was issued pursuant to a specifically defined delegation of interpretive authority. Through IGRA, Congress delegated express authority to the Secretary of the Interior to determine whether a particular gaming compact complies with federal law. *See* 25 U.S.C. §2710(d)(8)(B) (Secretary may disapprove a compact if it violates IGRA, other federal law, or the Federal Government's trust obligations to tribes). The Department of the Interior charges its Office of Indian Gaming Management with the responsibility of developing policies and procedures for implementing gaming activities under IGRA and other federal laws, and coordinating with compacting parties regarding gaming compact proposals. *See* Dep't of the Interior Departmental Manual, 110 DM 8.3(A) (Apr. 21, 2003). The Director's interpretation of the statute in the letter to the State was fully within the duties with which his office is charged, was amply supported by law and reasoning, and was part

of the ongoing compacting process that ultimately led to the compacts currently in force in New Mexico. The Director's interpretation of IGRA, thus, is entitled to judicial deference, and that interpretation is in accord with the Tribes' position here – that IGRA does not allow allocation of tort jurisdiction.

B. Section 8(A) of the Gaming Compact Did Not and Could Not Shift Jurisdiction Over Tort Claims to State Court Because the Compacting Parties Never Intended to Shift Jurisdiction Absent Congressional Authority.

1. The Court of Appeals' Reading of § 8(A) of the Gaming Compact Contravenes the Intent of the Parties.

As discussed, *supra* at 1, the State and the compacting Tribes eventually compromised on the language addressing the court jurisdiction issue that appears in the 2001 compact. That compromise included language providing that such claims may be brought in state district court, "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." 2001 Compact, § 8(A). This language reflects the parties' agreement to disagree on whether IGRA authorized jurisdiction shifting to state courts for personal injury claims.[4] It plainly is not and cannot legally be an independent authorization of state court jurisdiction over tort suits.

The Court of Appeals misconstrued the visitor protection provisions of the compacts as an

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[4] The Tribes understood that shifting tort jurisdiction over to the state courts is illegal under IGRA. Letter from the New Mexico Indian Gaming Association to New Mexico Governor Gary Johnson 5-6 (Jan. 14, 2000) (attached as Exhibit B)("[I]t is not legally possible to give a patron the choice of whether to file in tribal court or state court; federal law does not permit such a choice.") The Department of the Interior's interpretation of IGRA as prohibiting such allocation of jurisdiction bolstered the Tribes' understanding that tort claims could only be brought in tribal court. *See* Letter from George T. Skibine, Director, Office of Indian Gaming Mgmt., Dep't of the Interior to Hon. John Arthur Smith, Chairman, Legis. Comm. on Compacts, New Mexico State Legis. 1 (Jan. 28, 2000) (attached as Exhibit A). The Tribes never intended for state courts to have jurisdiction over tort claims arising on tribal lands, because they believed that such jurisdiction is illegal.

agreement that state courts would have jurisdiction over visitors' tort claims. Doe Opinion at 5, 10-11. But by these provisions, the Tribes only agreed to provide injured patrons "an effective remedy for obtaining fair and just compensation," by giving the injured patron the option to pursue a claim through arbitration or in "a court of competent jurisdiction." 2001 Compact § 8(A). The references in § 8(A) to "court" and "a court of competent jurisdiction" were clearly references to *tribal* court, and expressly only included *state* courts if a state or federal court judicially determined that IGRA permits jurisdiction shifting over visitors' personal injury suits. The compact language simply preserved this issue for determination by the courts.

2. Absent Express Congressional Authority, the Compacting Parties Lacked the Power to Allocate Jurisdiction over Personal Injury Claims, Even if That Was the Parties' Intent.

The Court of Appeals ignored the express intent of the parties to preserve the propriety of state court jurisdiction under IGRA for judicial determination, and reached the erroneous conclusion that the Tribes intended § 8(A) to give jurisdiction over personal injury actions to the state courts. Assuming *arguendo* that the Tribes *had* intended to allocate jurisdiction, however, that allocation would have been ineffective. A tribe may not effectively surrender its own civil jurisdiction without strictly complying with the procedures of the federal statute that authorizes the transfer of such jurisdiction. *See Kennerly v. Dist. Court*, 400 U.S. 423, 429 (1971) (holding that the Blackfeet Tribe could not effectively surrender to state court civil jurisdiction without complying with the provisions of Public Law 83-280). Thus, even if the Tribes and the State *had* intended § 8(A) to transfer jurisdiction over tort claims to the state court, the provision could not effectively transfer jurisdiction unless IGRA authorized them to do so. The Court of Appeals placed too much weight on what it thought the parties intended, and insufficient weight on the controlling intent of Congress as

reflected in the text, and the legislative history, of IGRA.

CONCLUSION

It is settled law that only a federal statute can grant state courts subject matter jurisdiction over personal injury claims against a tribe arising on tribal land. The courts below erred in determining that IGRA authorized state court subject matter jurisdiction over tort claims. In addition, the Court of Appeals' reasoning that § 8(A) transferred the jurisdiction needed for the state court to hear Plaintiffs' personal injury claims contravenes the compacting parties' intent and IGRA itself. The compacting parties did not intend to shift such jurisdiction and even if they did, the controlling statute did not allow the jurisdiction shifting. Thus, the Court of Appeals' decision should be reversed, and Plaintiffs' suits should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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I hereby certify that true copies of the foregoing Brief of *Amici Curiae* in Support of Defendants-Petitioners were served on the following persons via U.S. Mail on this 17th day of October, 2005:

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JAN 28 2000

Director
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MS 2070-MIB

Honorable John Arthur Smith
Chairman
Legislative Committee on Compacts
New Mexico State Legislature
State Capitol
Santa Fe, New Mexico 87501

Dear Chairman Smith:

Thank you for your letter dated December 10, 1999, requesting the Department of the Interior's comments on the proposed Tribal-State gaming compact negotiated by the Governor of New Mexico and various Indian tribes and pueblos, and subsequently submitted to the Committee on Compacts (Committee) on November 18, 1999. The Committee-submitted recommendations for modifications to that proposed compact to Governor Johnson by letter dated January 3, 2000. By letter dated January 12, 2000, to Governor Johnson, several tribes submitted their responses to the Committee's proposals. We offer the following comments on the proposed compact as amended, the Committee's January 3 letter to the Governor, and the tribes' January 12 responses.

Section 4(B)(21): This section includes a requirement that a tribe, tribal gaming agency, gaming enterprise, management company or any agents of those entities must report political contributions from moneys derived from gaming revenues to the New Mexico Secretary of State. We believe that, although the proposed compact may require the tribes to report political contributions, the tribes' failure to comply with this requirement should trigger breach of compact provisions, rather than trigger the enforcement and penalty provisions of the New Mexico Campaign Reporting Act. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, does not authorize the application of state laws and regulations over tribes in the manner proposed, and only authorizes the allocation of jurisdiction to the State when necessary for the enforcement of laws and regulations that are directly related to, and necessary for, the licensing and regulation of a gaming activity. *See* 25 U.S.C. § 2710 (d)(3)(C)(i)-(ii).

Section 8: We agree with the tribes' statement in their January 12 letter, that it is not legally possible to give a patron the choice of whether to file tort claims in tribal court or state court because Federal law does not permit such a choice. State courts generally have no jurisdiction to entertain an action against a tribal entity involving a tort claim arising on Indian lands. The

EXHIBIT A

IGRA only permits the allocation of civil jurisdiction between the State and the tribe necessary for the enforcement of civil laws and regulations "that are directly related to, and necessary for, the licensing and regulation of [class III gaming activities]." This authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim because it is an area that is not directly related to, and necessary for, the licensing and regulation of a class III gaming activity.

Section 8: We agree with the tribes' statement in their January 12 letter, that including a provision allowing a business to bring suit against a gaming enterprise for breach of contract in state district court and allowing a gaming enterprise to bring a similar suit against a business in tribal court, violates Federal law because state courts have no jurisdiction to entertain an action against a tribal entity involving a contractual matter arising on Indian lands. As with a casino patron's tort claim, IGRA does not authorize this allocation of civil jurisdiction.

Section 9: This section provides that the provisions of the new compact, notwithstanding its taking effect, shall remain suspended until: 1) the Secretary has affirmatively approved the new compact, and 2) the tribe comes into full compliance with the current compact's provisions regarding payment of revenue sharing at the rate of 16% on the annual net win from gaming machines, with the provisions regarding payment of regulatory fees, and with the provisions that the tribe produce and supply to the State financial statements and audits. We understand the desire of the State and the tribes to resolve the impasse over the regulatory fees and 16% revenue-sharing payments under the 1997 compacts. However, we could not affirmatively approve any resolution that takes the form of a provision mandating revenue-sharing and regulatory fee payments under the terms of the existing compacts for the reasons stated in our letter to the tribes and to the Governor dated August 23, 1997. Tribal representatives have discussed alternative proposals that would seek to meet the goals of the State legislature in resolving the regulatory fees and revenue-sharing payments dispute under the 1997 compacts, and be consistent with IGRA. The Department has not evaluated these tribal proposals, but encourages a cooperative dialogue among tribal representatives and the State to resolve this issue.

Section 11: Paragraph C of this section was amended by the tribes' January 12 letter to provide for revenue-sharing at the rate of 6.7% of net win except that if a tribe's total net win of gaming machines per year is less than twelve million dollars, the amount payable by the tribe is 3% of the first four million dollars of net win, and 6.7% of the rest of the net win for the year.

As consideration for the revenue-sharing payments, Paragraph D of this section grants the tribes limited exclusivity to operate gaming machines by limiting availability of gaming machines to licensed horse racetracks (300 machines per track for up to 12 hours per day) and veterans and fraternal organizations. Subparagraph D(3) provides a scale for reducing revenue-sharing payments if the State expands non-tribal class III gaming.

As a matter of policy, the Department has determined that it will not approve compacts that call for tribal payments in exchange for less than substantial exclusivity for Indian gaming. Our rationale is that anything less than substantial exclusivity effectively gives states an opportunity to leverage very large payments from Indian tribes, in derogation of Congress' intent not to permit States to exact a tax, fee, charge or other assessment upon an Indian tribe to engage in class III

responsibility to Indian tribes to ensure that the payment received by a State in a compact is appropriate in light of the benefit conferred on the tribe. We believe that, if Subparagraph D(3) is deleted, revenue-sharing at the rate of 6.7% of net win in exchange for the limits on non-tribal gaming described above is within the range acceptable to the Department under our exclusivity policy, and under our trust responsibility to the New Mexico tribes and pueblos.

The only possible circumstance under which we could approve the gradual reduction of revenue-sharing payments when the State reduces the level of tribal exclusivity, as proposed in Subparagraph D(3), is if the tribes and the State provide us with an economic analysis that demonstrates that the payments to be received by the State are appropriate in light of the benefit conferred on the Tribes when non-tribal gaming is incrementally expanded. The Department will only have 45 days in which to review and approve the New Mexico compacts, and that is not enough time to conduct the type of analysis necessary to determine if approval of the revenue sharing payments under the flexible scale in Subparagraph D(3) is consistent with our responsibilities under IGRA and our trust responsibility.

The Committee has proposed raising the revenue-sharing rate to 9.2% on the annual net win of gaming machines, and offered additional changes to this section regarding the limitations under which payments must be made. For the same reasons articulated by the tribes in their January 12, 2000, letter to Governor Johnson, we would not be able to affirmatively approve a compact that modifies Subsection 11 of the compact as proposed by the Committee.

We hope that these comments will be helpful to the Committee, the Governor, and the tribes in negotiating new compacts between the State of New Mexico and the New Mexico Indian tribes and pueblos. Thank you for your interest in Indian gaming.

Sincerely,

George T. Skibine
Director, Office of Indian Gaming Management

January 14, 2000

Hon. Gary E. Johnson, Governor
State Capitol Building
Santa Fe, New Mexico 87503

Dear Governor Johnson:

The undersigned gaming tribes have met and considered the changes proposed by the Joint Legislative Committee on Compacts to the compact that was negotiated between the tribes and your office, which proposed changes were submitted to you by letter of January 3, 2000. In many respects we consider the committee's recommendations to be helpful, and in a few instances even favorable to the tribes' positions, and we appreciate of the committee's efforts to improve the draft compact. In other respects, however, the committee's proposals are problematic. We have tried, wherever possible, to suggest compromise positions, as stated in this letter. In a few instances, however, there was simply no intermediate position between our negotiated agreement and the committee's recommendations on which we could agree. We are willing to accept 23 of the 37 committee proposals, more or less as stated. On eight items, we believe that the Governor's proposal is better, and on 6 items we have counter-offers to present. We thus believe that we have made substantial progress working with the committee, and we want to make clear that we will continue to work with the committee, to reach agreement on terms that will command the support of a majority of the committee and of the legislature. Please note, by the way, that in many cases we have conditioned our willingness to accept certain recommendations, or have proposed compromise positions, without setting forth specific language. In those instances, if our proposals are agreeable, we would plan to have our attorneys work with your representative (and with Legislative Council Service staff) to come up with appropriate language to accomplish the stated purposes.

With those thoughts in mind, our responses to the committee's proposals are as follows:

1. *In Section 4(B)(14), include a provision that the state, at the state's cost to be included as a regulatory cost, may connect a state gaming machine central monitoring system to the tribe's central monitoring system, while ensuring that such monitoring would not allow the state or any other unauthorized entity to alter or affect the operation of the tribe's gaming machines or to breach the security of the tribe's gaming machines or monitoring system.*

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EXHIBIT B

Response: Although we do not believe that this change will necessarily enhance the reliability of the data reflecting gaming machine activity, the tribes are willing to agree to this change, provided that the language makes clear that the state's access is "read-only," and the system would be designed in cooperation with tribal technical staff and operated so as to assure compatibility with each tribe's existing hardware and so as to absolutely minimize any possibility of third-party infiltration into the tribe's system, or unauthorized access by the State Gaming Representative to information other than machine wager, payout and hold data.

2. *Strike the prohibitions found in Section 4(B)(20) against providing food or lodging for no charge or at reduced prices, while retaining the prohibition against providing similar discounts on alcoholic beverages. The committee believes this change would foster economic development by allowing casinos to attract more out-of-state patrons.*

Response: This recommendation is accepted. The tribes believe that this change in the compact will greatly enhance their ability to attract patrons from out-of-state, thereby bringing into New Mexico revenues that would not otherwise have reached us and reducing any possible adverse impact of tribal gaming on New Mexico citizens.

3. *Amend the prohibition in Section 4(B)(21) against using gaming revenue to make political contributions to include a provision that a tribe, tribal gaming agency, gaming enterprise, management company or any agents of those entities may do so only if they report those contributions, as if they were a political committee as defined in the state's Campaign Reporting Act and only if they expressly agree to a limited waiver of sovereign immunity for the purposes of being subject to the enforcement and penalty provisions of that act.*

Response: The proposal to delete the prohibition against political contributions from gaming revenues is accepted, as is the requirement that the tribes or tribal entities that make political contributions to state candidates with gaming revenues report those contributions in the same manner and at the same time as if they were political committees as defined in the state's Campaign Reporting Act. We would further agree that the reporting requirement would be subject to the penalty provisions of that Act (but not the criminal provisions). We do not agree that any waiver of sovereign immunity is necessary or appropriate here, however, inasmuch as this provision of the compact is surely enforceable in the same manner as any other provision of the compact, either through the state's ability to take the tribe to federal court or through the arbitration procedure set forth in Section 7.

4. *In Section 4(C), amend the time in which the tribal gaming agency has to provide the financial statements and audits to the state gaming representative and the state treasurer from 120 days of receipt by the tribal gaming agency to 30 days of receipt.*

Response: For some tribes, this change creates serious problems, in that it does not allow sufficient time for the audit to be reviewed by the tribal council, and for correction of errors, before it is released to the state. The tribes are therefore unable to concur in this recommendation.

5. *In Section 4(E)(3)(a), regarding the confidentiality of certain records, restore the language of the current compact and additionally provide a definition for "proprietary information" as follows: "Proprietary information means information that is not available to competitors concerning the particular operations of the gaming enterprise, the disclosure of which would disadvantage the enterprise and provide an advantage to a competitor, such as patents, copyrights or trademarks. Proprietary information does not include audits and financial statements, revenue, expense, profit and related information or management and equipment contracts."*

Response: We cannot agree to this recommendation. Indeed, if anything, this language is worse from the tribes' standpoint than is the language of the current compact, since it would require that information that we consider unquestionably confidential, even under the current compact language, become public information upon being provided to the state. The confidentiality language that was contained in the proposed compact that was submitted to the committee is virtually identical to the comparable provision of the state Gaming Control Act, which deals with documents and information supplied by applicants for licenses and licensees (such as race tracks and veterans and fraternal organizations) to the state Gaming Control Board. We see no legitimate basis on which the tribes should be treated differently in this regard from the tracks and the veterans and fraternal organizations. We agree that the gaming industry is different from other industries, and that of course justifies the extraordinary level of regulatory control that is imposed on this industry, but this is not a regulatory provision: it is merely an invitation to the media to conduct fishing expeditions through confidential records of tribal gaming operations. We believe we should be entitled to at least the same protections from media trolling as are the tracks and the veterans and fraternal organizations. Notwithstanding that, however, we are willing to include language in this provision specifying that certain types of documents and information supplied by the tribes to the state would be available to the public, including the following: tribal gaming ordinances and regulations; official rulings of the tribal gaming agency (in matters not subject to a confidentiality order);

other information and documents of the tribal gaming agency or gaming enterprise ordinarily available to the public; quarterly "net win" figures used as the basis for computation of a tribe's revenue sharing payment to the state; and correspondence between the tribe or tribal entity and the state, unless such correspondence is specifically labeled "Confidential." Additionally, we would agree that the state Gaming Control Board may release aggregate bottom-line figures taken from all of the tribes' financial statements. Other than these, however, we cannot agree to public disclosure of business or other confidential records of the gaming enterprise. Furthermore, to avoid (or resolve) disputes over documents submitted previously, we want language making clear that this provision applies equally to information submitted to the state under the current compact.

6. *In Section 4(E)(5), broaden the language regarding the regulatory costs for which the state may be reimbursed to allow the state to be reimbursed for the costs incurred by any state agency, not just the gaming control board, involved in regulating activities under the compact. Additionally, please provide the committee with a breakdown and estimate of those costs so it may consider that information in its future deliberations.*

Response: We have no objection to including within reimbursable regulatory costs those costs incurred by agencies other than the Gaming Control Board for *bona fide* regulatory functions performed under the provisions of the compact, provided that those costs can be documented to the same extent as would be required of the reimbursable costs of the Gaming Control Board. In the course of the committee's deliberations on this point, however, it was suggested that rather than require the annual accounting, with its costs and complexities and the attendant possibility of dispures over whether particular costs are reimbursable or not, the parties ought to be able to come up with a satisfactory estimate of the state's annual regulatory costs, and simply reduce this to a flat annual amount to be paid by each tribe. We strongly support a flat-fee approach, so as to avoid the need for--and disputes over--the accounting. We therefore propose that each tribe will pay a flat amount of $100,000 per year ($25,000 per quarter) to cover the state's costs of regulating Indian gaming.

7. *In Section 7, provide that arbitration proceedings be open to the public.*

Response: We are unwilling to agree to a flat requirement that all proceedings in all arbitrations be open to the public. Undoubtedly, it may be appropriate that some such proceedings be open, but probably not in every case. We propose that the arbitration provision contain language leaving it to the discretion of the arbitrators, after input from each party, as to whether an arbitration proceeding, or

any part thereof, should be opened to the public.

8. *In Section 7(A)(2), strike the proposed language allowing the parties to agree to a longer period than ten days for the responding party to either invoke arbitration or to stop the activity that is complained about.*

Response: We cannot agree to this recommendation. To prevent the parties from having the ability to extend this one time period would needlessly impede the parties' ability to resolve disputes amicably before they are forced into the arbitration procedure. The current pending arbitration between the state and three tribes illustrates perfectly well how this recommendation could be contrary even to the state's own interests. It has been the state that has repeatedly sought delays in the pending arbitration, in order to seek other means of resolving the dispute. The proposed change would prevent the parties from being able to agree to any reasonable delays. We believe that this recommendation is clearly contrary to public policy.

9. *Throughout the proposed compact, reconcile the specific, limited waivers of sovereign immunity with the statement in Section 7(B) that nothing in the compact is a waiver of sovereign immunity.*

Response: We agree with this recommendation, and propose that it be resolved by changing the language of the two sentences in § 7(B) that are referred to, so that they state that nothing in that *section* constitutes a waiver of either the tribe's or the state's sovereign immunity.

10. *In Section 7(A)(3), state more explicitly that the arbitrators are authorized only to determine questions of fact and not questions of law.*

Response: It is our understanding that the central concern of this recommendation is the final phrase of the referenced paragraph, "under state or federal law". If so, we have no objection to deleting that phrase. We do not agree, however, that the arbitrators should have no power to decide any of the myriad routine legal issues that arise in the ordinary course of a dispute over the meaning or effect of a provision of a contract, or in determining the appropriate remedy for a violation. Such a restriction would create unnecessary and time-consuming arguments over whether a particular issue was factual or legal in nature, would utterly hamstring the arbitrators, and would effectually render the arbitration proceeding practically useless as a dispute resolution mechanism.

11. *In Section 8, regarding the protection of visitors, reinstate the language of the*

current compact with the exception of the technical change to the insurance coverages in Subsection B.

Response: We cannot agree to this recommendation. The only significant change from the existing compact that is made in the proposed new compact is the elimination of the purported conferral of jurisdiction on state courts to hear patrons' tort claims against the gaming enterprise. Contrary to comments that were made by members of the committee when this provision was being considered, it is not legally possible to give a patron the choice of whether to file an action in tribal court or state court; federal law does not permit such a choice. Rather, the Supreme Court has held expressly and repeatedly that a civil action against a tribe or tribal member or tribal entity arising from an occurrence on tribal land may be brought *only* in tribal court. *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971) (*Williams* rule applies even where tribe unilaterally attempted to confer jurisdiction over *Williams*-type cases on state court); *and see Hartley v. Baca*, 97 N.M. 441, 640 P.2d 941 (Ct.App. 1981); *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977). Consequently, a judgment entered by a state court in such a case would be void, as a result of the state court's lack of jurisdiction. It cannot be a benefit to patrons of tribal casinos to lead them unknowingly into proceedings that would result in void judgments. The language proposed in the draft compact is fully consistent with, and we believe mandated by, federal law, and we cannot agree to go back to the existing language.

12. *In Section 8, include a provision allowing a business to bring suit against a gaming enterprise for breach of contract in state district court and allow a gaming enterprise to bring a similar suit against a business in tribal court.*

Response: We cannot agree to this recommendation. Again, for all of the reasons described above, as a matter of federal law, a state court would have no jurisdiction to entertain an action against a tribal entity involving contractual matters arising on Indian land. Moreover, unlike patrons who are accidentally injured due to the negligence of the gaming enterprise, a business that voluntarily enters into a financial arrangement with a tribal gaming enterprise is fully capable of negotiating terms as part of its agreement that would provide for a suitable means of resolving any dispute that might arise in the course of the business relationship. There is no need for an extraordinary measure such as this recommendation proposes to protect those business enterprises, and as noted above, any such provision would clearly violate federal law.

13. *In Section 9, require that before the state may execute a new compact with the tribe, the tribe must be fully in compliance with the current compact's provisions*

regarding payment of revenue sharing at the rate of 16 percent on the annual net win from gaming machines, with the provisions regarding payment of regulatory fees, and with the provisions that the tribe produce and supply to the state financial statements and audits.

Response: As a major concession, the tribes agree to make full back payments of the revenue sharing requirement contained in the current (1997) revenue sharing agreement, at the rate of 16% of net win on gaming machines, but conditioned on a prospective revenue sharing rate of 6.7%, as set forth in our response to Item 14, provided that for those tribes unable to pay the full amount up front, the amount due shall be paid in full within three years of the date on which the new compact takes effect. We believe that the combined average rate paid is likely to be approved by the Secretary. We also will agree to pay back due regulatory fees, based on the agreed-upon flat fee discussed in our response to Item 6; provided, however, that tribes that have paid regulatory fees under the terms of the previous compact will be given credit against future payments for all amounts paid in excess of such flat fee. In addition, we will provide audit reports and financial statements, subject to the conditions contained in our response to Item 5.

14. *In Section 11, provide for revenue sharing at the rate of 9.2 percent on the annual net win of gaming machines.*

Response: Even though the proposed percentage applies only to net win from machines, we believe that this percentage will not be approved by the Secretary of the Interior. There is no value whatever in our arriving at terms that cannot achieve Secretarial approval, and regardless, we believe there is no legitimate basis for the state to demand such a substantial percentage of our net win if the state is unwilling to give us in return substantial protection from competing business. In an effort to fully and completely resolve this issue, we would be willing to agree to a revenue sharing payment based on 16% of net win on gaming machines until this new compact goes into effect, as stated in our response to Item 13, and 6.7% of net win on gaming machines thereafter (except that for a tribe with a total annual net win on machines of less than $12 million, the first $4 million would be subject only to a 3% revenue sharing requirement). This is tied to and conditioned upon the Committee's acceptance of our proposed term of 22 years pursuant to Item 19. We believe that this figure, combined with full back payments of revenue sharing and with the terms we propose relative to the "Limitations" provisions of Section 11, would have a fair chance of being approved by the Secretary.

15. *In Section 11, remove the provision that would distribute 25 percent of the revenue sharing to local or tribal governments and provide that all of the revenue*

sharing payment be delivered to the state for deposit into the general fund.

Response: We regret very much that the committee chose to recommend deletion of this provision, as we believe that this provision is extremely important to assure fairness to the local governmental entities that deal directly with the tribes and their gaming operations. Especially in areas outside of the major metropolitan centers, local governmental entities may be cash-strapped and unable to handle extraordinary or unexpected stresses on their services. Having tribes make payments to such local entities is increasingly becoming a feature of tribal-state gaming compacts around the country, and we note that it was a specific suggestion made by the Gaming Control Board in its submissions to the governor's office during the course of the negotiations. Consequently, we are unwilling to agree to the deletion of this provision.

16. *In Section 11, strike the reductions in revenue sharing contained in Section11(D)(3), strike Section 11(D)(1)(b); strike Section 11(D)(1)(c) and strike Section 11(D)(2), and include a new provision in Section 11(D)(1) that revenue sharing terminates if a tribe is in compliance with the compact and if the state licenses:*
(a) additional tracks within a fifty mile radius of the tribe's gaming facility other than those tracks that were operating as of September 1, 1999, or operating during the calender year 1996;
(b) any nontribal entity to conduct Class III gaming other than the operation of gaming machines, pari-mutuel wagering on horse races at licensed horse race tracks or bicycle races at licensed bicycle tracks, the operation of a state lottery or limited fundraising activities conducted by nonprofit tax exempt organizations; or
(c) any nontribal entity other than fraternal and veteran clubs to operate gaming machines within a fifty mile radius of the tribe's gaming facility.

Response: These changes are unacceptable. To delete the limitations on expansion of tribal gaming in Section 11 would severely jeopardize any likelihood that the Secretary of the Interior could approve this compact with a revenue sharing provision, even at the level that we have proposed above. The committee seems not to understand that the Indian Gaming Regulatory Act ("IGRA") forbids the state from charging a tribe *any tax, levy, assessment or fee* to engage in Class III gaming, and the Secretary of the Interior has been willing to approve provisions that require tribal payments to states only where those requirements were supported by valuable consideration. Generally, the form of consideration that the Secretary has found acceptable has taken the form of some sort of market exclusivity or at least competitive advantage, resulting from the state's willingness to prohibit non-Indians from engaging in Class III gaming beyond stated levels. The provisions in the draft compact were carefully crafted, through arduous and lengthy

negotiations, in an effort to achieve something that the Secretary would agree amounted to valuable consideration for the revenue sharing payments that the tribes have indicated a willingness to make. The wholesale deletion of those carefully crafted provisions, as proposed by the committee, would almost certainly result in the disapproval of the compact. The committee's proposed substitution of certain restrictions that would apply within a 50-mile radius of a tribal gaming facility, moreover, fails to supply an adequate justification for revenue sharing. For the tribal gaming facilities that are in rural areas, a 50-mile radius is practically meaningless, as those tribes' markets extend far beyond that distance. (For example, for those tribes such as Acoma and Laguna that rely upon traffic on I-40, the "market" really covers the entire length of that important cross-country highway through the state.) The committee has moreover offered no limitation on the ability of the state to expand gaming at existing tracks, leaving tribes near existing tracks completely unprotected from substantial competition. Consequently, the committee's suggested substitute set of limitations simply fails to afford the tribes any valuable benefits sufficient to warrant the revenue sharing payments that the tribes are willing to make. The committee needs to understand that if it expects substantial payments from the tribes, it must be willing to offer something valuable in return, in the way of limitations on the state's ability to expand non-Indian gaming that would effectively compete with tribal facilities. This recommendation fails that test.

17. *In Section 11(C)(1), strike the provision that allows federal regulatory fees to be deducted from the amount wagered in calculating net win.*

Response: This change is acceptable.

18. *Include a provision that the tribe must provide an accounting with any payment to the state that identifies separately the amount of revenue sharing included in the payment and the amount of reimbursement for regulatory fees that is included in the payment.*

Response: This change is acceptable.

19. *In Section 12, provide that the term of the compact runs as follows: for an initial period of seven years with an automatic renewal period of eight years if the tribe is in compliance with the compact, and with a subsequent renewal period of seven years if the tribe is in compliance and neither party has served notice on the other 365 days prior to the expiration of the compact of its desire to negotiate changes to the compact.*

Response: We agree to changing the term to an initial period of seven years and two renewal periods, one of eight years and the second of seven years, but we do not agree to the provision that the second renewal be subject to a notice of a wish to renegotiate. There are too many ambiguities inherent in that requirement to make it workable, such as whether the notice would have to come from the State Gaming Representative, the Governor or the legislature, or all three; whether such a notice served on the tribe the day after the compact takes effect constitutes the required notice; what kind of renegotiation would it have to request; and what happens to the compact if negotiations are still going on when the first renewal term comes to an end. Under the Compact Negotiation Act, moreover, the Governor or the legislature may request the reopening of negotiations at any time, and the tribe is required to respond to such a request, so that this provision of the committee recommendation seems unnecessary. We propose that the renewals be automatic if the tribe has been in full compliance with all material terms of the compact during the preceding periods, and that "compliance" in this context means that where the parties have had a dispute over any issue that could not be resolved informally, the tribe has fully and promptly complied with any decision of an arbitration panel with respect to the dispute.

20. *In Section 17, in addition to the proposed sections referenced in the severability clause, include language making the regulatory provisions in all of Section 4, the licensing requirements of Section 5 and the standards in Section 6 of the proposed compact among those provisions that are nonseverable, and strike the words "or other forum" from the section.*

Response: This change is acceptable.

21. *Throughout the proposed compact, make the following changes:*

(a) Move the language stating that the state gaming representative may contract with private persons, firms or other entities from the definition in Section 2(O) and place it in a more appropriate place in the proposed compact.

(b) Clarify the language in Section 2(O) to read that the state legislature may enact legislation establishing a specific agency of the state to be the state gaming representative.

(c) In Section 2(Q), include the word "nation" in the definition of "Tribe", i.e. "Indian nation, tribe or pueblo".

(d) Beginning in Section 4(b)(9) and throughout the proposed compact as

appropriate, replace "AFDC" with "TANF".

(e) In Section 4(B)(18), strike the word "such" and insert in lieu thereof "so".

(f) Include definitions of "statistical drop" and "statistical win" in the definitions section.

(g) In Section 4(B)(17), require that the 0.25 percent of net win spent to support programs for the treatment and assistance of compulsive gamblers and for the prevention of compulsive gambling be spent in New Mexico for those purposes.

(h) Beginning in Section 4(E)(1) and throughout the compact as appropriate, strike "hereinafter" insert in lieu thereof "of this compact".

(i) Beginning in Section 4(F)(2)(b) and throughout the compact as appropriate, strike "facility" and insert in lieu thereof "enterprise".

(j) In Section 7(A)(2), provide that the complaining party may also invoke arbitration.

(k) After Section 8(A)(2), insert the word "or".

(l) Include the definition of the term "predecessor agreements" in the definition section.

(m) In Section 11, restore the language basing the quarterly payments on quarterly activity.

(n) In Section 11(C)(3), include language making it clear that the interest charged for late payments is also charged on under-payments and that the interest is calculated on a daily basis.

(o) Throughout the compact, remove the parentheses as appropriate.

(p) In Section 10(D), retain the language "that is still pending" in place of the proposed change.

(q) In Section 3, strike the listing of various games by name and replace the listing with the defined term "Class III gaming".

Response: All of the changes set forth in this paragraph are acceptable, with the following exceptions:

(1) The terms "statistical drop" and "statistical win," whose meanings are questioned in paragraph (f), refer to the design parameters of a particular gaming machine, which design parameters are built into the EPROM (the electronic circuit board that controls the machine's operation). These design parameters establish how much of the money that goes into the machine will be held, over the course of several million plays. In the short term, the actual drop and win of a particular machine may vary substantially from the statistical drop and win, in either direction, but the longer it is in use the machine's actual performance should approach the design parameters to an ever-greater degree. The statistical drop and statistical win are shown on the "PAR" sheet that accompanies each machine when it is shipped from the manufacturer. (The data on the sheet, in turn, are derived from tests conducted on the EPROM contained in that machine by a national testing lab, certified by the Nevada and New Jersey gaming boards.) These terms are well understood in the gaming industry; moreover, the terms are used only once in the compact, as simply two of several types of data that must be retained by the tribal gaming agency. They have no substantive significance, and we do not believe they need to be defined. If the committee feels strongly about the point, however, there would be no inconvenience caused by doing so, except to the trees.

(2) We cannot agree to the change proposed in paragraph (g), and believe that this change would be entirely contrary to the laudable aims of the requirement of Section 4(B)(17). Requiring that the tribes spend in New Mexico all of the money earmarked for dealing with compulsive gambling problems would prevent tribal gaming enterprises, for example, from sending their employees to training events held in Las Vegas or Atlantic City, where there is undoubtedly substantial expertise in this field. Moreover, it would prevent us from utilizing consultants, therapists, trainers or other resources from anywhere else in the country for assistance in addressing this problem. We would agree, however, to specify in Section 4(B)(17) that the money must be used in a way that will be for the benefit of compulsive gamblers in New Mexico, and of patrons of New Mexico gaming facilities.

(3) With respect to the change recommended in paragraph (m), we do not object to clarifying the language, but would suggest that rather than reinserting the deleted language, we add, after the word "quarter" in the 4th line of paragraph 11(C)(3), the phrase, "and shall be based upon the Tribe's net win during the preceding quarter".

(4) We cannot accept the change recommended in paragraph (p). The point of the language in the proposed compact was to make sure that the tribe receives a report on each matter that is referred to the state under the provisions of Section 8. To limit the annual reports only to matters that are pending as of the date of the report could result in matters that had been referred and dealt with fully after one report but before the next one not being covered by any report. Since it is in the interest of both the state and the tribe to have a record of how these matters are handled, we believe our language, which was intended to avoid having any referred cases fall through the cracks, is more appropriate.

We will appreciate your communicating these views to the committee, and we look forward to its further consideration of the points made herein.

Sincerely yours,

PUEBLO OF ACOMA ~~Abstain—but support the efforts of the gaming~~ Gov. Lloyd Tortalita tribes	PUEBLO OF ISLETA Gov. Alvino Lucero	PUEBLO OF LAGUNA /s/ Gov. Harry D. Early
MESCALERO APACHE TRIBE Pres. Sara Misquez	PUEBLO OF POJOAQUE /s/ Gov. Jacob Viamial	PUEBLO OF SANDIA /s/ Gov. Stuart Paisano
PUEBLO OF SAN FELIPE /s/ Gov. Sam Candelaria	PUEBLO OF SAN JUAN /s/ Gov. John B. Bird	PUEBLO OF SANTA ANA /s/ Gov. Lawrence Montoya
PUEBLO OF TAOS Gov. Don LightningBow	PUEBLO OF TESUQUE /s/ Gov. Gilbert Vigil	PUEBLO OF SANTA CLARA /s/ Gov. Denny Gutierrez

(4) We cannot accept the change recommended in paragraph (p). The point of the language in the proposed compact was to make sure that the tribe receives a report on each matter that is referred to the state under the provisions of Section 8. To limit the annual reports only to matters that are pending as of the date of the report could result in matters that had been referred and dealt with fully after one report but before the next one not being covered by any report. Since it is in the interest of both the state and the tribe to have a record of how these matters are handled, we believe our language, which was intended to avoid having any referred cases fall through the cracks, is more appropriate.

We will appreciate your communicating these views to the committee, and we look forward to its further consideration of the points made herein.

Sincerely yours,

PUEBLO OF ACOMA	PUEBLO OF ISLETA	PUEBLO OF LAGUNA
Gov. Lloyd Tortalita	Gov. Alvino Lucero	Gov. Harry D. Early
MESCALERO APACHE TRIBE	PUEBLO OF POJOAQUE	PUEBLO OF SANDIA
Pres. Sara Misquez	Gov. Jacob Viarrial	Gov. Stuwart Paisano
PUEBLO OF SAN FELIPE	PUEBLO OF SAN JUAN	PUEBLO OF SANTA ANA
Gov. Sam Candelaria	Gov. John E. Bird	Gov. Lawrence Montoya
PUEBLO OF TAOS	PUEBLO OF TESUQUE	
Gov. Don LightningBow	Gov. Gilbert Vigil	

(4) We cannot accept the change recommended in paragraph (p). The point of the language in the proposed compact was to make sure that the tribe receives a report on each matter that is referred to the state under the provisions of Section 8. To limit the annual reports only to matters that are pending as of the date of the report could result in matters that had been referred and dealt with fully after one report but before the next one not being covered by any report. Since it is in the interest of both the state and the tribe to have a record of how these matters are handled, we believe our language, which was intended to avoid having any referred cases fall through the cracks, is more appropriate.

We will appreciate your communicating these views to the committee, and we look forward to its further consideration of the points made herein.

Sincerely yours,

PUEBLO OF ACOMA	PUEBLO OF ISLETA	PUEBLO OF LAGUNA
Gov. Lloyd Tortalita	Gov. Alvino Lucero	Gov. Harry D. Early
MESCALERO APACHE TRIBE	PUEBLO OF POJOAQUE	PUEBLO OF SANDIA
Pres. Sam Mitchell	Gov. Jacob Viarrial	Gov. Stuwart Paisano
PUEBLO OF SAN FELIPE	PUEBLO OF SAN JUAN	PUEBLO OF SANTA ANA
Gov. Sam Candelaria	Gov. John E. Bird	Gov. Lawrence Montoya
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Gov. Harry D. Early

MESCALERO APACHE TRIBE

Pres. Sara Misquez

PUEBLO OF POJOAQUE

Gov. Jacob Viarrial

PUEBLO OF SANDIA

Gov. Stuwart Paisano

PUEBLO OF SAN FELIPE

Gov. Sam Candelaria

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Gov. John E. Bird

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Pres. Sara Misquez	Gov. Jacob Viarrial	Gov. Stewart Pinaro
PUEBLO OF SAN FELIPE	PUEBLO OF SAN JUAN	PUEBLO OF SANTA ANA
Gov. Sam Candelaria	Gov. John E. Bird	Gov. Lawrence Montoya
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