IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JANE DOE, by and through her parents and next friend, J.H.,
Plaintiff-Respondent,
v. **No. 29,350**

SANTA CLARA PUEBLO, SANTA CLARA DEVELOPMENT CORPORATION, d/b/a BIG ROCK CASINO, **(Ct. App. No. 25,125)**
Defendants-Petitioners,

First Judicial District Court, Santa Fe County; Hon. Carol Vigil, District Judge

consolidated with

IVAN LOPEZ and LUCY LOPEZ,
Plaintiffs-Respondents,
vs. **No. 29,351**

SAN FELIPE PUEBLO d/b/a SAN FELIPE CASINO HOLLYWOOD and CIS INSURANCE GROUP, **(Ct. App. No. 25,884)**
Defendants-Petitioners.

Thirteenth Judicial District Court, Sandoval County
Hon. Louis McDonald, District Judge

ON WRITS OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PETITIONERS' CONSOLIDATED BRIEF-IN-CHIEF

Maxine Velasquez
General Counsel
Pueblo of San Felipe
Post Office Box 4339
San Felipe, New Mexico 87001
(505) 771-6640

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLP
Richard W. Hughes
Post Office Box 8180
1215 Paseo de Peralta
Santa Fe, New Mexico 87504-8180
(505) 988-8004

Attorneys for Defendants-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW MEXICO STATE CASES

CASES FROM OTHER STATES

FEDERAL CODE

NEW MEXICO STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION

The two consolidated cases before the Court are ordinary tort suits, each of which arose on Indian land and is brought against an Indian tribe or tribally owned enterprise. By a uniform body of precedent in this Court and the federal courts, spanning half a century, such cases cannot be heard in state courts. The Court of Appeals, however, concluded that these cases could proceed in state court, based on a striking misinterpretation of the plain language of the current tribal-state class III gaming compacts in effect between the State and the two tribes involved in this proceeding, and on an apparent disregard or misunderstanding of the language and purpose of the Indian Gaming Regulatory Act. The result portends a profound and unwarranted imposition of state authority onto the right of Indian tribes in the state to make their own laws and be ruled by them. The decision below must be reversed, and the actions dismissed.

SUMMARY OF PROCEEDINGS

A. *Doe v. Santa Clara Pueblo, et al.*

1. Nature of the Case

This is a tort suit, filed in the First Judicial District Court, against the Pueblo of Santa Clara, a federally recognized Indian tribe ("Santa Clara"), and four non-Indian individuals, for damages arising out of certain events that allegedly occurred, in part, in the parking lot of the Big Rock Casino Bowl ("Big Rock"), a gaming facility on Santa Clara land, within the Santa Clara Pueblo Grant. Big Rock is operated on behalf of Santa Clara by a corporation that is wholly owned by Santa Clara. Record Proper ("R.P.") at 135. The plaintiff is a minor female child, appearing through her mother. 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 the same day. There is no record showing that service was ever made or attempted on any of the individual defendants. On March 11, 2004, Santa Clara filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, with an accompanying memorandum of law. R.P. at 32. Following briefing, but without a hearing, the district court, on June 3, 2004, issued a written decision of slightly over two pages denying Santa Clara's Motion to Dismiss. R.P. at 109. The court subsequently granted Santa Clara's motion to certify the decision for interlocutory appeal. R.P. at 134. Santa Clara and SCDC filed an Application for Interlocutory Appeal, that the Court of Appeals granted on September 8, 2004. On June 28, 2005, that court issued its opinion (without hearing oral argument), affirming the district court, in a 2 to 1 decision, with Judge Sutin dissenting. *Doe v. Santa Clara Pueblo*, 2005-NMCA-110, 138 N.M. 198, 118 P.3d 203. On July 18, 2005, Petitioners filed their Petition for Writ of Certiorari, which this Court granted on August 12, 2005.

On September 18, 2005, Petitioners, together with Petitioners in a companion case, *Lopez v. San Felipe Pueblo, et al.*, No. 29,35l, moved the Court to consolidate the two proceedings for filing of this brief-in-chief and for oral argument, and by order entered 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.[1] The complaint was filed by a 15-year-old girl, anonymously identified as "Jane Doe," through her parent, "J.H.," against Santa Clara and certain individuals, seeking damages for injuries allegedly arising from an incident that occurred on the evening of February 7, 2003. On that evening, Plaintiff allegedly was abducted by Defendants Bird and Miguel and Timothy Ortigoza from the Big Rock parking lot on Santa Clara land in Española, New Mexico, taken to some other location and assaulted, and eventually left near her home in Española. R.P. at 1-2. The complaint alleges that Santa Clara (and, as alleged in the amended complaint, SCDC; hereafter, except as may be otherwise specified, "Santa Clara" will refer to both the Pueblo and SCDC, collectively) has some responsibility for Plaintiff's injuries because it failed to have adequate lighting in the casino parking lot, it failed to have adequate security on the premises, and it failed to aid in locating Plaintiff when it became apparent that she was missing from the premises. R.P. at 6.

B. *Lopez v. San Felipe Pueblo*

1. Nature of the Case.

This is a tort suit, filed in the Thirteenth Judicial District Court, against San Felipe Pueblo, a federally recognized Indian tribe ("San Felipe"), "d/b/a San Felipe Casino

---

[1]Erroneous assertions of law, of course, enjoy no such presumption of correctness, and in considering a motion to dismiss under NMRA 1-012(B)(1), the presumption largely disappears altogether. *E.g., Valenzuela v. Singleton,* 100 N.M. 84, 89, 666 P.2d 225 (Ct. App. 1984). In particular, the complaint's repeated references to the form gaming compact that appears in the state statutes at 1978 NMSA § 11-13-1, as being the compact in effect between the State and Santa Clara, *e.g.*, Complaint at ¶¶ 7, 17, are simply in error. As will be explained, that form of compact was no longer in effect at the time the events giving rise to the complaint occurred. *See infra*, pp. 6 n.5, 26-30.

Hollywood,"[2] and CIS Insurance Group.[3] The action is an ordinary slip-and-fall case, in which liability is premised on some allegedly defective condition of the premises surrounding the casino.

2. Course of Proceedings.

This action was filed on December 21, 2004. The defendants (including Petitioner San Felipe) responded with a Motion to Dismiss for Lack of Subject Matter Jurisdiction.[4] R.P. at 37. Following briefing and argument, the district court denied the motion, but agreed to certify the order for interlocutory appeal, which order was entered on June 14, 2005. R.P. at 114. San Felipe filed its Application for Interlocutory Appeal on June 21, 2005. One week later, on June 28, 2005, the Court of Appeals issued its decision in *Doe*, and on June 30, 2005, issued an Order denying the Application for Interlocutory Appeal in *Lopez*. San Felipe filed its Petition for Writ of Certiorari to the Court of Appeals in this Court on July 18, 2005, and this Court granted the petition and issued the writ on August 26, 2005. By order entered on October 13, 2005, this

---

[2]San Felipe's gaming facility, "San Felipe's Casino Hollywood," is actually operated by San Felipe Gaming Enterprise, Inc. ("SFGE"), a Pueblo-chartered corporation that is wholly owned by the Pueblo. At the time this Court granted the petition for writ of certiorari, a motion to amend the complaint to add SFGE as a party defendant was pending in the district court.

[3]Plaintiffs intended to sue the insurer of Casino Hollywood, but CIS Insurance Group ("CIS") is actually only a third-party administrator of the casino's liability insurance. The pending motion to amend (*see supra* note 2) would also add the actual insurer as a defendant.

[4]As to Defendant CIS, the motion was based on the contention that if there were no jurisdiction over the claim against San Felipe, a claim against the insurer (which, admittedly, CIS is not; *see supra* note 3) had to be dismissed for lack of an indispensable party, as this Court held in *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207. Given the district court's disposition of the motion, it did not reach that issue, and that issue is not before this Court in this proceeding.

Court ordered *Lopez* and *Doe* consolidated for purposes of filing of the briefs-in-chief and oral argument.

3. Summary of the Facts.

Because this case was decided on a motion to dismiss filed in response to the complaint, the properly pleaded allegations of the complaint are accepted as true, together with certain additional facts supplied by the affidavit of Gov. Jimmie Cimarron (relating to the status of SFGE and the current gaming compact), submitted in support of the motion to dismiss. R.P. at 39. The complaint alleges that on or about July 10, 2004, Plaintiffs, Ivan Lopez and his mother, Lucy Lopez, drove to San Felipe's Casino Hollywood, and as they were walking toward the front door of the casino Ivan Lopez tripped on a mat and fell, which caused his mother to fall also. R.P. at 2. They allege that they suffered various injuries as a result of their falls, and that San Felipe is liable for their injuries because it negligently failed to secure the mat properly. R.P. at 3.

ARGUMENT

I. SUMMARY OF THE ARGUMENT

No proposition is more firmly settled in the field of federal Indian law than the rule that, absent a governing act of Congress, a lawsuit against an Indian tribe, tribal entity or tribal member that arises from an occurrence or condition within Indian country may only be brought in tribal court. This rule was established in *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court decision that literally marks the beginning of the modern era of Indian law adjudication, and this Court reaffirmed it just two years ago. *See Tempest Recovery Svcs., Inc., v. Belone*, 2003-NMSC-019, ¶ 14, 134 N.M. 133, 137, 74 P.3d 67, 71.

Each of the two cases before the Court falls squarely within the *Williams* rule. Each is a tort suit, arising from events or conditions alleged to have occurred or existed within Indian country, in which claims have been made against the tribe itself or a tribal entity. Petitioners submit that there is no basis for state court jurisdiction over either case, unless Respondents can show that there is a governing act of Congress that authorizes such jurisdiction.

In *Doe*, the Court of Appeals held that the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 through 2721 ("IGRA"), provided the requisite authorization for state court jurisdiction in tort cases against tribal gaming entities, and that the identical tribal-state class III gaming compacts entered into between the State of New Mexico and the two Pueblos involved in these cases in 2001 ("the Compact")[5] effectively conferred jurisdiction on state courts to hear such suits. *Doe*, 2005-NMCA-110, ¶¶ 17-19, 118 P.3d at 209. Petitioners submit that neither proposition is correct, that the language of IGRA demonstrates conclusively that there is no authority for state courts to assume such jurisdiction, and that the Compact makes no allocation

[5]The complaints in both cases cite repeatedly to the form of gaming compact contained in the New Mexico statutes at 1978 NMSA § 11-13-1 (1997), but that compact is no longer in effect for Santa Clara or San Felipe, or, indeed, for any gaming tribe in New Mexico. The tribes and the State negotiated a new compact in 2000, under the Compact Negotiation Act, 1978 NMSA §§ 11-13A-1 through 11-13A-5 (1999), that the state legislature approved in 2001, and that took effect for most tribes in late 2001. *See* 66 Fed.Reg. 64,856 (Dec. 14, 2001) (notices of Secretarial approval of compacts between New Mexico and, *inter alia*, Pueblo of Santa Clara and Pueblo of San Felipe). The 2001 compact is similar in many respects to the 1997 compact, but one of several significant changes is contained in Section 8, dealing with claims by patrons for damages for personal injury allegedly caused by a tribal gaming enterprise. The changes, and the circumstances that led to them, are discussed in the text, *infra* pp. 26-30. A copy of the 2001 compact between the state and Santa Clara was submitted to the district court, as an attachment to Santa Clara's memorandum in support of its Motion to Dismiss. *Doe* R.P. at 46. It was also attached to the Petition for Writ of Certiorari filed in this Court in *Doe*. A copy of the 2001 compact between the state and San Felipe was attached as an exhibit to the Affidavit of Gov. Jimmie Cimarron, submitted in support of the Motion to Dismiss filed in the district court. *Lopez* R.P. at 41. It was also attached to the Petition for Writ of Certiorari filed in this Court in *Lopez*.

of such jurisdiction to the courts of the State, absent clear and express authority therefor in IGRA. In fact, IGRA permits a class III gaming compact to shift to state courts jurisdiction only over a very strictly defined category of actions – those "necessary for" the enforcement of state laws and regulations "directly related to and necessary for the licensing and regulation" of class III gaming. 25 U.S.C. §2710(d)(3)(i), (ii). As will be shown, this carefully and narrowly worded authorization comes nowhere near permitting state courts to exercise jurisdiction over ordinary tort suits such as these. Moreover, the language of the Compact relied on by the Court of Appeals and Respondents cannot fairly be described as "expressly allow[ing] visitors to bring their claims in state court," *Doe*, 2005-NMCA-110, ¶ 10, 118 P.3d at 207. The language rather amounts to a conditional agreement that tort cases may be filed in state court, but only if this Court or a federal court finally determines that IGRA actually permits jurisdiction-shifting as to such cases. The Court of Appeals' concern about "second guess[ing] the conclusion of New Mexico and Santa Clara that personal injuries sustained by Casino patrons due to the allegedly negligent operation of the Casino are 'directly related' to the regulation of Class III gaming," *id.* at ¶ 17, 118 P.3d at 209, thus, is entirely misplaced. The compacting parties in fact obviously disagreed on that issue, and invited the appellate courts of this state to determine whether there was any such relationship, "direct" or otherwise. *See id.* at ¶ 28, 118 P.3d at 211 (Sutin, J., dissenting) ("The parties to the Compact expected the issue to be litigated.").

Even if the Compact language could be interpreted as an agreed-upon conferral of jurisdiction over such claims on state courts, it would still be error to defer to the parties' "agreement" on this issue: tort suits are plainly not within the scope of matters as to which state courts may assume jurisdiction under IGRA, and the law is clear that parties may not create state

court jurisdiction by agreement, especially where the effect would be to override the federal rule of exclusive tribal court jurisdiction over any action against an Indian tribe or tribal entity that arises within Indian country. *See Kennerly v. District Court*, 400 U.S. 423 (1971).[6]

In short, the Court of Appeals misread the Compact and the relevant law, and its decision in *Doe* (and its refusal to accept the interlocutory appeal in *Lopez*) should be reversed. Respondents may pursue their claims against the tribal gaming enterprises in their respective tribal courts, or in binding arbitration as provided in the Compact at § 8(F).

Standard of Review

A decision on a motion to dismiss for lack of jurisdiction under Rule 1-012(B)(1), NMRA is considered to be a ruling on a question of law, that is reviewed *de novo*. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 9, 132 N.M. 207, 212, 46 P.3d 668, 673.

II. ABSENT GOVERNING LAW TO THE CONTRARY, STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER ACTIONS SUCH AS THESE.

There are few principles as firmly established in the field of Indian law as the rule that tribal courts retain exclusive jurisdiction over claims arising on tribal lands against tribes, tribal members or tribal entities. *See Williams*, 358 U.S. at 220. In *Williams*, the United States Supreme Court held that Arizona state courts had no jurisdiction to hear a claim by a non-Indian

[6]Petitioners wish to make clear, further, as they pointed out to the district courts in both cases, that since the relevant Compact provision provides for a waiver of the tribe's sovereign immunity only with respect to claims filed "as provided in this section," Compact at § 8(D), a claim that is not filed in a "court of competent jurisdiction" is also barred by tribal sovereign immunity. *See Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548. Since the same argument results in dismissal on both jurisdiction and sovereign immunity grounds, the sovereign immunity issue will not be pressed here, but the Court should be aware that it is present.

trader against a Navajo Indian couple based on an open account for goods sold at an on-reservation trading post. 358 U.S. at 217-18. The Court's opinion rested on the principle of inherent tribal sovereignty and held that absent a grant of jurisdiction by Congress "the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Furthermore, "when Congress has wished the States to exercise this power it has *expressly* granted them the jurisdiction which Worcester v. State of Georgia had denied." *Williams,* 358 U.S. at 221 (emphasis added). The Court noted that by Public Law 83-280 ("P.L. 280"), *as amended*, 25 U.S.C. § 1322, Congress had expressly granted, to those states willing to assume it, jurisdiction over civil and criminal matters involving reservation Indians. *Williams*, 358 U.S. at 222. The fact that Arizona had not formally accepted such jurisdiction supported the conclusion that its courts had no jurisdiction over the case before the Court. *Id.* at 223.

In the absence of direct congressional authority, the Court continued, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. Finding no express congressional grant of jurisdiction, the Court concluded that the exercise of state jurisdiction over this ordinary debt collection suit would necessarily infringe on the authority of the tribe to establish the rules governing the affairs of its members. *Id.* at 223.

P. L. 280 generally is the vehicle by which states may assume jurisdiction over civil suits (and crimes) arising within Indian country. If a state has chosen not to take on such responsibility (by, among other things, amending its constitution to remove prohibitions against such assumption of jurisdiction), it remains divested of such power. *See Williams,* 358 U.S. at

222-23. Similarly, a tribe may not even voluntarily relinquish its own civil jurisdiction to the state without strictly complying with the statutory procedures of P. L. 280. *See Kennerly,* 400 U.S. at 429 (holding that a tribe could not effectively consent to transfer its exclusive civil court jurisdiction to state courts unless both the state and the tribe fully complied with the conditions of P.L. 280).

New Mexico was required to relinquish any claim to jurisdiction over Indian lands within the State by the New Mexico Enabling Act, Act of August 11, 1912, § 2, 37 Stat. 42, and did so in Art. XXI, § 2 of the New Mexico Constitution. It never elected to assume jurisdiction over tribal lands under P. L. 280, by repealing that constitutional provision or otherwise. *See Your Food Stores v. Village of Española*, 68 N.M. 327, 332, 361 P.2d 950, 954 (1961). This Court has thus recognized, following *Williams*, that "[*e*]*xclusive tribal jurisdiction exists . . . when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country*." *Found. Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 516, 734 P.2d 754, 756 (1987) (emphasis added); *Tempest Recovery Svcs.,* 2003-NMSC-019, ¶ 14, 134 N.M. at 137. That rule of exclusive jurisdiction may be defeated only by authority expressly granted to the states by Congress.

The facts alleged in the cases before the Court bring both cases squarely within the *Williams* rule of exclusive tribal court jurisdiction. Santa Clara is a federally recognized Indian tribe. SCDC is a tribally chartered corporation, wholly owned by the Pueblo. The tortious acts alleged to have been committed by Santa Clara and SCDC in *Doe* all occurred on Santa Clara land within the Santa Clara reservation boundary. Similarly, in *Lopez*, the allegedly tortious

conditions were on the land of San Felipe Pueblo, a federally recognized Indian tribe, within the San Felipe Indian Reservation, and the defendant is the Pueblo itself.

This Court and the Court of Appeals have repeatedly and consistently held that in such circumstances, state courts lack jurisdiction over such cases. *See, e.g., DeFeo v. Ski Apache Resort,* 120 N.M. 640, 904 P.2d 1065 (Ct. App.1996) (no state court jurisdiction over non-Indian's tort suit against tribe and tribal enterprise for injuries sustained on reservation); *Hartley v. Baca*, 97 N.M. 441, 640 P.2d 941 (Ct.App.1981) (same as to suit against tribal member arising from on-reservation accident); *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977) (same as to suit between two tribal members arising on fee land within reservation boundaries); *and see Halwood v. Cowboy Auto Sales, Inc*., 1997-NMCA-098, 124 N.M. 77, 946 P.2d 1088 (tribal court had jurisdiction over claim by tribal member against non-Indian company that repossessed plaintiff's vehicle within reservation, such that tribal court judgment would be accorded full faith and credit).

In comparable cases, moreover, other state courts have similarly found jurisdiction lacking in suits against tribal gaming enterprises and their employees. For example, in *Kizis v. Morse Diesel Int'l, Inc*., 794 A.2d 498 (Conn. 2002), a suit by a non-Indian visitor to the Mohegan Sun Casino against non-Indian employees of the tribe and the tribal gaming authority arising from a fall, the Connecticut Supreme Court held that the state court lacked subject matter jurisdiction, and that exclusive jurisdiction over those claims was in the Mohegan (Tribal) Gaming Disputes Court. Similarly, in *Diepenbrock v. Merkel*, 97 P.3d 1063 (Kan. 2004), the court dismissed for lack of jurisdiction a suit against two non-Indian employees of the Prairie Band Potawatomi emergency health care service by the estate of a patron who died of a heart

attack at the Band's casino. The Kansas Supreme Court held that even though all parties to the case were non-Indian (as in *Kizis*), since the matter arose on tribal land, and the defendants were employees of the tribe or tribally owned entities, "[i]t would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Prairie Band Potawatomi Nation to govern themselves" to allow the case to proceed in state court. *Diepenbrock*, 97 P.3d at1067. *And see Webb v. Paragon Casino*, 872 So.2d 641 (La. Ct. App. 2004) (workers' compensation action by tribal casino employee dismissed for lack of subject matter jurisdiction and tribal sovereign immunity).

Those considerations apply with far greater force here, where the named defendants are the Pueblos themselves, respectively, or their wholly-owned corporate entities. Such claims may be heard only in the tribal courts of the two Pueblos, respectively, unless Congress has expressly permitted state courts to assume jurisdiction over them.[7] As will be seen, that has not occurred.

III. IGRA DOES NOT AUTHORIZE THE SHIFT TO STATE COURTS OF JURISDICTION OVER PERSONAL INJURY CLAIMS.

The majority in *Doe* acknowledged that state courts generally have no jurisdiction over actions against Indian entities arising on Indian land, but it noted that "Congress may confer jurisdiction over such a suit on a state court." *Doe*, 2005-NMCA-110, ¶ 7, 118 P.3d at 206. It recognized, however, that "if New Mexico courts have subject matter jurisdiction in this case it must derive from the IGRA." *Id.* at ¶ 8, 118 P.3d at 206. Importantly, the majority did *not* find that IGRA permitted the transfer to state courts of jurisdiction over ordinary tort actions; rather, it

[7]Respondents in each case also have the right under Section 8 of the Compact to invoke binding arbitration of their claims. *See infra* p. 34.

viewed the language of the Compact as amounting to a determination by the State and the various tribes that "apportioning jurisdiction over the claims of injured visitors was 'directly related to, and necessary for, the licensing and regulation of [Class III gaming] activity,'" *id*. at ¶ 10, 118 P.3d at 207 (quoting IGRA at 25 U.S.C. § 2710(d)(3)(C)(I)). It concluded that "it is not the province of this Court to second-guess that determination." *Id*.

The Court of Appeals was correct that ordinary tort suits against tribal entities may be heard in state courts only if IGRA contains express authority for such transfer of jurisdiction, and it was further correct in ruling that the "directly related to . . ." language describes the only category of actions that may be shifted to state courts by a compact under IGRA. Its conclusion as to the parties' intent in the Compact, however, was far wide of the mark, as will be shown below. Just as important, a thorough review of the provision of IGRA cited by the Court of Appeals will demonstrate that under no circumstances could that language be viewed as permitting the supposed transfer to state courts of jurisdiction over ordinary tort suits, that are subject to the exclusive jurisdiction of tribal courts.

Preliminarily, it must be noted that any claimed authority for a transfer of tribal jurisdiction to the states, were it to exist, must be express; it cannot be implied. "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)). The principle that tribes retain jurisdiction as a matter of sovereign right requires that IGRA provide clear and specific authority for a state court to assume jurisdiction over cases such as these. *See Santa Clara Pueblo v. Martinez*, 436 U.S.

49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress . . . cautions that we tread lightly in the absence of clear indications of legislative intent.").

Applicable canons of statutory construction in this field instruct that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (internal quotation marks and quoted authority omitted). This principle applies fully to IGRA, whose purpose is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Interpretation of IGRA, therefore, should afford due deference to the protection of tribal interests.

A. Relevant Legislative History Shows That IGRA's Jurisdiction-Shifting Provision is Solely Directed at the Concern Over Possible Criminal Infiltration of Tribal Gaming.

IGRA requires that a tribe wishing to conduct class III gaming must enter into a compact with the state to govern the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A). The purpose of the compact in the complex regulatory regime created by IGRA is explained in the Act's legislative history, especially the report of the Senate Indian Affairs Committee that accompanied S. 555, the bill that was enacted as IGRA. *See* S. Rep. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 ("S. Rep. 100-446").[8] At the very outset, the committee report

[8]Although New Mexico courts should rely primarily on statutory language for the determination of legislative intent, they may also look to legislative history as a guide to the meaning of the language. *First Nat'l Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.*, 101 N.M. 431, 435, 684 P.2d 577, 581 (1984). Courts have regularly looked to the Senate committee report as authority for congressional intent in IGRA. *See, e.g., A.T. & T. Corp. v. Couer d'Alene Tribe*, 283 F.2d 1156, 1175 (9th Cir. 2002); *Colorado R. Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F.Supp.2d 123, 139 (D.D.C. 2005); *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1125 (E.D.Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003).

explained that the overriding concern of state and federal law enforcement officials was that Indian gaming enterprises "may become targets for infiltration by criminal elements." S. Rep. 100-446 at 2, *and see id*. at 5.[9] That was the principal basis for the calls for federal or state regulation of Indian gaming, especially casino-style gaming, which became known, in the IGRA lexicon, as "class III gaming." The Report describes the political maneuvering that ensued during congressional consideration of IGRA around the highly controversial proposition of allowing state regulatory jurisdiction on tribal lands, *id*. at 2-5, and how the Committee ultimately settled on the device of the tribal-state compact as the means of resolving state regulatory concerns. A tribe could engage in high-stakes bingo and related games ("class II gaming"), with no state involvement, but if it wanted to venture into class III, it could do so only pursuant to the terms of a negotiated agreement--a compact--with the state in which the gaming would be conducted.

The Report explains that the compact was devised in part in response to Justice Department objections to federal regulation of class III gaming. The Department argued that "the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies," and that that expertise need not be duplicated at the federal level. *Id*. at 5. But the Committee opposed any unilateral imposition of state authority on tribal land, and concluded that such state regulatory authority should only be applied to tribal gaming in accordance with an agreement between the tribe and the state, embodied in a compact. It concluded that the compact

[9]Thus, IGRA identifies one of its express purposes as being "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, . . ." 25 U.S.C. § 2702(2).

was "the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." *Id.* at 13.

It is apparent from the Report that the Committee was duly cognizant of what a dramatic step it was taking, in permitting states, even with tribal consent, to participate in the regulation of a tribal activity within Indian country. As the Supreme Court has noted, in doing so, the bill was "extend[ing] to the States a power withheld from them by the Constitution." *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996). The Report is thus understandably replete with cautionary language indicating the committee's concern that the state role was to be strictly limited to the regulation of class III gaming, and that this was not intended as an invitation to any broader assertions of state authority in Indian country. For example, the Report states,

> *The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands*.
>
> *The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands*. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

Id. at 14 (emphasis added). "*In no instance*," the Committee urged, "does S.555 contemplate the extension of State jurisdiction or the application of State laws *for any other purpose*" than the regulation of class III gaming. *Id.* at 6 (emphasis added). And for good measure, the Committee added a key passage expressing its understanding that

> courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

Id. at 15.

In short, the concept of allowing some degree of state regulatory jurisdiction over tribal class III gaming through a negotiated compact was directly in response to state concerns over the possibility that organized crime might attempt to infiltrate or even take over tribal gaming enterprises, and that tribes very likely lacked the regulatory resources and expertise to police their gaming operations on their own. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D.N.M. 1996) ("The difference between the requirements for Class II gaming and Class III gaming demonstrates that the central purpose of the Act's Class III gaming provisions is to protect against the infiltration of organized crime into high-stakes gaming."), *aff'd*, 104 F.2d 1546 (10th Cir. 1997).

That point, as made plain by the committee that drafted the bill and by courts that have examined the Act, sheds important light on the true meaning and effect of the provisions of IGRA that the *Doe* majority mistakenly thought would permit the transfer to state courts of jurisdiction over ordinary tort suits against tribal gaming enterprises. As will be shown, the language of the Act, seen in the light of its actual purpose as described above, does not support the majority's conclusion.

B. IGRA's Language Narrowly Limits Allowable State Jurisdiction to that Necessary for Enforcement of State Laws Directly Related to and Necessary for Regulation of Tribal Gaming.

The relevant provision of IGRA sets out the permissible topics that may be addressed in tribal-state class III compacts, and it reads, in part:

> (C) Any Tribal-State compact negotiated [for the conduct of Class III gaming operations] 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*; . . .

25 U.S.C. § 2710(d)(3)(C) (emphasis added). Thus, subsection (d)(3)(C)(ii) permits 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. This provision embodies the congressional decision that, if agreed to by the tribe in a compact, a state could directly impose its laws concerning the licensing and regulation of gaming activities onto tribal gaming, and could be involved in the enforcement of those laws. *See Colorado R. Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F.Supp. 123, 135-36 (D.D.C. 2005).

There are other provisions of § 2710(d)(3)(C) describing other topics that may be dealt with in a compact (including a catch-all category covering "any other subjects that are directly related to the operation of gaming activities," § 2710(d)(3)(C)(vii)[10]), but none of them includes any language permitting any transfer of jurisdiction of any kind to the state. Tellingly, no other provision of IGRA authorizes or refers to any transfer of jurisdiction to a state, with but one

---

[10]This category allows a compact to deal with, for example, such matters as service of alcoholic beverages at gaming facilities, labor conditions, employment discrimination, and others. The Court of Appeals' contention that Petitioners' argument here would invalidate the provisions of the Compact that address these subjects, *Doe*, 2005-NMCA-110, ¶ 18, 118 P.3d at 209, is simply wrong: these matters are all "directly related to the operation of gaming activities," and are thus perfectly appropriate and allowable subjects for inclusion in a gaming compact–just as is the matter of remedies for patrons who suffer bodily injury. But there is no authority in IGRA for giving the state regulatory or judicial jurisdiction with respect to these matters, as there is with respect to enforcement of state laws directly related to the licensing and regulation of gaming activities, and without such authority, no such jurisdiction-shifting is allowable.

exception, a provision contained in Section 23 of IGRA as it was enacted, that explains even more clearly the type of jurisdiction that may be "allocated" to a state pursuant to § 2710(d)(3)(C)(ii).

Most of the bill that was enacted as IGRA, P.L. 100-497, 102 Stat. 2467, was codified to Title 25 of the United States Code, which deals with Indian affairs. Section 23 of the Act, however, 102 Stat. 2487-88, enacted three new sections of the federal criminal code, codified at 18 U.S.C. §§ 1166-68. Sections 1167 and 1168 created new federal crimes, dealing with theft from tribal gaming establishments, but § 1166 was another direct response by Congress to state concerns about the possible lack of adequate regulation of gaming activity on Indian lands. In subsection (a) of that section, Congress applied "all State laws pertaining to the licensing, regulation, or prohibition of gambling" to Indian country, "to the same extent as such laws shall apply elsewhere in the State," and subsection (b) essentially "federalizes" violations of such state laws within Indian country. Subsection (c), however, provides that "for purposes of this section, the term 'gambling' does not include—(1) class I gaming or class II gaming . . .; or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 U.S.C. § 2710(d)(8)] that is in effect." Thus, the state laws applied to Indian country by § 1166(a) only apply to gaming not authorized by IGRA.

The language of § 1166(d) bears directly on the issue before the Court, and is worth setting out in full. It states:

> (d) *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact* approved by the Secretary of the

> Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of federal law, *has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.*

18 U.S.C. § 1166(d) (emphases added). This subsection gives the United States sole power to enforce state criminal laws pertaining to "the licensing, regulation or prohibition of gambling" that are applied to Indian country by subsection (a), *unless the tribe agrees to transfer such jurisdiction to the state in a compact*. This passage obviously refers to the "allocation of criminal . . . jurisdiction" to the state that may be included in a compact under 25 U.S.C. § 2710(d)(3)(C)(ii). But it is *federal* criminal jurisdiction (to enforce state gaming laws) that IGRA allows a compact to transfer to a state, not *tribal* jurisdiction.

Section 2710(d)(3)(C)(ii) also refers to "allocation" of "civil jurisdiction," but that, like the criminal jurisdiction referred to, is what is "necessary for the enforcement of [the] laws and regulations" of the state that are applied to tribal gaming under § 2710(d)(3)(C)(i).[11] The language of these provisions is telling: First, the term "enforcement" generally refers to governmental compulsion to obey officially prescribed norms. Like "licensing and regulation," the term "enforcement" strongly suggests direct governmental oversight of gaming, not private remedies for compensation. The jurisdiction that is to be "allocated" under § 2710(d)(3)(C)(ii), thus, is governmental regulatory authority, not court jurisdiction over private civil actions. Second, the use of the term "allocation of . . . jurisdiction," rather than "transfer" (as appears in 18 U.S.C. § 1166(d), referring to the shift of specific federal criminal jurisdiction to a state) is suggestive of establishing jurisdiction that is not pre-existing; *e.g.*, creating new authority on the

[11]The statute actually refers to the laws and regulations of "the Indian tribe or the State," but that is undoubtedly meant to display evenhandedness. A tribe plainly does not need authority in a compact to regulate its own activity on its own land.

part of a state to enforce its gambling laws within Indian country–authority that "was withheld from [the States] by the Constitution." *Seminole*, 517 U.S. at 58. Importantly, none of this language gives any hint that Congress contemplated the transfer to the state courts of pre-existing tribal court jurisdiction over ordinary private, civil causes of action, that have no relation to the conduct of gaming other than the fact that they arose on the premises of a gaming facility.

Section 10 of the Compact contains precisely such a provision as is contemplated by 25 U.S.C. § 2710(d)(3)(C)(ii) and 18 U.S.C. § 1166(d). That section allows the State to investigate and prosecute, in state courts, any violations of state gambling laws made applicable to Indian country by § 1166(a), by non-tribal members. It sets out detailed procedures by which the State is to exercise such authority, including provisions relating to the involvement of tribal regulatory and law enforcement personnel and regular reporting to the tribe on state enforcement activity. This is the kind of jurisdiction-shifting that the cited sections of IGRA authorize, not the broad power over ordinary civil suits that the majority below concluded was transferrable.

C. Private Tort Suits Have No Direct or Necessary Relationship to Regulation of Class III Gaming, and Thus Are Not Within the Scope of Allowable Jurisdiction-Shifting Under IGRA.

Wholly apart from the fact that the two cases before this Court are ordinary tort suits against tribes, that are otherwise within the pre-existing exclusive jurisdiction of tribal courts, and thus are not, as shown above, the types of matters that Congress contemplated for transfer to state jurisdiction under subsection (d)(3)(C)(ii), personal injury suits against tribes and their gaming enterprises are plainly not "directly related to or necessary for" the "licensing or regulation" of class III gaming activities. This is evident from the complaints in the two cases before the Court.

The complaint in *Doe* alleges that Santa Clara was negligent in failing to maintain adequate lighting or security in the casino parking lot. Such a claim has no bearing whatever on the licensing or regulation of class III gaming activities. The Plaintiff was not involved in any class III gaming activity at any time relevant to her alleged injury (nor, being only 14 at the time, could she have been). Further, the alleged negligence pertains only to the casino parking lot, not to any area where gaming was taking place, and the alleged duty of due care has no relationship to the fact that the parking lot was adjacent to a class III gaming facility. Rather, it is a general duty of the type that might be alleged in any premises liability case, wherever it might arise. The same is true of the allegations in *Lopez*, which merely have to do with an allegedly negligent condition existing outside of but near the entrance to San Felipe's Casino Hollywood. These claims would be alleged in no different terms had they arisen in the parking lots of tribally owned grocery stores. Most importantly, there is no apparent connection between patrons' tort suits and the need to protect the operation of tribal gaming activity from criminal influences, which, as shown above, was the sole purpose to be served by the provision of IGRA that permits the allocation of certain limited jurisdiction to a state, 25 U.S.C. § 2710(d)(3)(C)(ii).

In a closely analogous context, courts in two states have held that although Congress has given the states express regulatory jurisdiction over the sale and possession of alcoholic beverages within Indian country in 18 U.S.C. § 1161, *see Rice v. Rehner*, 463 U.S. 713 (1983), that regulatory authority does not embrace or imply the power to require tribes to answer to private dram shop-type actions allegedly involving sale of alcohol by tribal licensees to intoxicated persons. *Greenidge v. Volvo Car Finance, Inc.*, No. X043CV9601194756, 2000 WL 1281541 (Conn.Super., Aug. 25, 2000); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex.

Ct. App. 1997). In neither case did the court see a sufficient nexus between the state regulatory scheme and a private claim for damages arising out of the regulated activity, and that was so even though, in the Texas case, the dram shop action was created by a statute that was part of the state alcoholic beverage regulatory scheme.

In short, the language of § 2710(d)(3)(C)(ii) provides only narrow authorization for allocating to the state government the authority to enforce (through state courts, if agreed to by a tribe) state laws that are "directly related to and necessary for" the "licensing and regulation of gaming." This language necessarily precludes any finding that IGRA permits a compact to shift to state courts jurisdiction over ordinary private tort suits against a tribal gaming enterprise that are committed exclusively, as a matter of federal law, to the jurisdiction of the tribal courts.

IV. THE COMPACT LANGUAGE CANNOT REASONABLY BE INTERPRETED AS MANIFESTING THE PARTIES' AGREEMENT THAT STATE COURTS COULD ASSUME JURISDICTION OVER ORDINARY TORT CLAIMS.

The *Doe* majority professed that the language of Section 8 of the Compact reflected a "determination" by the State and the tribe that patrons' tort suits was a subject that was "directly related to, and necessary for, the licensing and regulation of [class III gaming] activity," and thus within the scope of what could be transferred to state court jurisdiction under IGRA. The majority stated that it would not "second-guess" that determination. *Doe*, 2005-NMCA-110, ¶¶ 10, 17, 118 P.2d at 207, 209. But the court's reading of the relevant language is insupportable. Even were that a fair interpretation of Section 8(A) of the Compact, moreover, it would be precluded by applicable law regarding exclusive tribal jurisdiction and the primacy of IGRA over contrary compact language.

A. Section 8 of the Compact Manifests the Parties' Disagreement Over Whether State Court Jurisdiction Over Private Tort Suits is Allowable Under IGRA.

The relevant language of the Compact is contained in Section 8, which is entitled, "Protection of Visitors," and which contains provisions intended to assure that casino patrons who suffer bodily injury or property damage attributable to the tribe or the tribal gaming enterprise will have an effective means for claiming compensation for such loss. Subsection (A) of that section reads as follows:

> A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and *agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election,* with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. *For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.*

Compact, § 8(A) (emphasis added). It is important to note that this paragraph sets out the general policy of this section, whose specifics are contained in the remaining provisions of the section. Subsection (B) lays out the tribe's obligation to maintain liability insurance coverage, subsection (C) specifies a three-year limitation period for the bringing of claims under this section, and subsection (D) provides that the tribe waives its sovereign immunity from unconsented suit for claims that are "asserted as provided in this section," and provides that in certain such claims the tribe agrees that New Mexico substantive law shall be applied.

Subsection (E), titled "Election by Visitor," states, "A visitor having a claim described in this section *may pursue that claim in any court of competent jurisdiction,* or in binding arbitration." Subsection (F) specifies the procedure for arbitration of claims brought under this section, subsection (G) provides for periodic increases in the liability insurance limits, and subsection (H) deals with other health and safety issues.

The specific undertaking of each tribe that has entered into the Compact, thus, is to agree that visitors' personal injury claims may be presented to an arbitration panel, or to a "court of competent jurisdiction." That term, of course, is a well understood legal term of art that, as one court observed, "has acquired so definite a meaning in the law that we cannot give a contrary interpretation to the phrase, especially in a formal instrument." *George S. May Int'l Co. v. King*, 629 N.E.2d 257, 262 (Ind. App. 1994). The *May* court went on to explain,

> A "court of competent jurisdiction" is any court which has jurisdiction over the defendant (personal jurisdiction), jurisdiction over the particular case, and jurisdiction over the subject matter of the dispute, and thus is competent to render a binding judgment in the case.

Id. Plainly, a state court would normally not be a "court of competent jurisdiction" with respect to a claim against a tribe or tribal entity that arose within Indian country (or as to which a tribal defense of sovereign immunity could be asserted), unless the tribe had consented to the assumption of jurisdiction over such claims by the state court, pursuant to express congressional authority. *Williams*; *Kennerly.* In § 8(A) of the Compact, quoted above, the tribe agrees, essentially, that visitors' tort claims may be brought in state courts, "*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.*" (Emphasis added.) In other words, the question whether IGRA provided authority for jurisdiction-shifting as to such claims was left for judicial

determination. *See Doe*, 2005-NMCA-110, ¶ 28, 118 P.3d at 211 (Sutin, J., dissenting) ("The parties to the Compact expected the issue to be litigated.").

B. A Review of Past Compact Language Clearly Shows the Course of the Dispute Over the Tort Suit Jurisdictional Issue.

A brief account of the somewhat tortuous history of tribal gaming compacts in New Mexico, with particular attention to the provisions dealing with patrons' tort claims, will help explain the present language of § 8(A). The first compact entered into between the tribes and the State was that negotiated in 1995 by then-Governor Gary Johnson, which was approved by the Secretary of the Interior in March of the same year. *See* 60 Fed. Reg. 15194 (March 22, 1995) (notice of approval of tribal-state class III gaming compacts between the State of New Mexico and, *inter alia*, Pueblos of Santa Clara and San Felipe). That compact, at § 8(A), merely provided that the tribe would not assert the defense of sovereign immunity as to any claim of up to $1 million in compensatory damages that was filed in "a court of competent jurisdiction."

This Court held that that compact was void, however, in *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), primarily due to its not having been ratified or otherwise approved by the legislature, and when the tribes subsequently went to federal court to prevent the United States Attorney from closing their gaming operations, the federal district court and the Tenth Circuit agreed. *Pueblo of Santa Ana v. Kelly*, 932 F.Supp. 1284 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997). The Tenth Circuit decision was issued on January 10, 1997, just one week before the 1997 session of the New Mexico Legislature convened, and the tribes thus turned to the legislature for approval of a compact during that session.

What occurred was something rather different than the "good faith" negotiations that Congress had contemplated in IGRA, especially at 25 U.S.C. § 2710(d)(3).[12] Rather than negotiate with the tribes, the legislature simply enacted a form compact, which was codified to the New Mexico statutes at NMSA 1978 § 11-13-1.[13] As a federal district judge in the District of Columbia put it, the legislature simply made a "'take it or leave it' offer to the tribes," legislating "nonnegotiable terms for compacts." *Pueblo of Sandia v. Babbitt,* 47 F.Supp.2d 49, 51 (D.D.C. 1999).

The tribes' principal objection to those terms, as was explained in *Pueblo of Sandia*, was the 16 percent revenue-sharing requirement, and the regulatory fees, that the compact form enacted by the legislature imposed on the tribes. But that compact also contained problematic language in the section dealing with visitors' tort suits, in § 8 of the 1997 form compact, which had been drafted by the New Mexico Trial Lawyers Association and was adopted by the legislature over strong tribal objection. That language, plainly drafted with an eye squarely on 25 U.S.C. § 2710(d)(3)(C)(ii), stated, at subsection (A), that the "safety and protection of visitors

---

[12]Congress had originally provided means in IGRA by which a tribe either could force a recalcitrant state into "good faith" compact negotiations, or, if the state refused to talk, could compel a "last best offer" arbitration proceeding, or, as a last resort, could get the Secretary of the Interior to issue "procedures" under which the tribe could engage in class III gaming without the state's assent. *See* 25 U.S.C. § 2710(d)(7). That process had to be commenced by a suit brought in federal court by the tribe against the state, under § 2710(d)(7)(A)(i). In *Seminole Tribe*, however, which was decided while the federal litigation over the validity of the 1995 New Mexico compact was still pending, the Supreme Court held that Congress had no power to abrogate state sovereign immunity from suit for such purposes, essentially leaving tribes with no leverage against states that refused to negotiate compacts in good faith. *SeminoleTribe* largely informed the atmosphere of the 1997 legislative session.

[13]The legislature also enacted the form for a companion revenue-sharing agreement, that became the object of intense controversy between the tribes and the State, at § 11-13-2. The State's entry into the form compact with a tribe was "conditioned" on the tribe's entering into the form revenue-sharing agreement. *See id*. at text preceding the form agreement.

to a Gaming Facility . . . is directly related to and necessary for the regulation of Tribal gaming activities in this state." NMSA 1978 § 11-13-1, Compact, § 8(A). "To that end," it continued, "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." *Id*. Subsection (E) specified that a visitor could bring his or her claim "in the State court of general jurisdiction for such claims or the Tribal court," or could proceed by arbitration. *Id*. at Compact, § 8(E).

The language of § 8 of the 1997 form compact is, in fact, exactly what the *Doe* majority claimed to see in the language of the 2001 Compact: an apparent determination by the parties (though in fact, of course, a unilateral declaration by the legislature) that providing for visitors' tort claims is "directly related to and necessary for" the regulation of tribal gaming, such that an allocation to state courts of jurisdiction to hear such claims was permitted by §2710(d)(3)(C)(ii). But there is no such language even remotely comparable to that in the 2001 Compact, and as will be shown, even if there were, it could not survive judicial scrutiny.

Faced with the imminent prospect of having to shut down their gaming operations unless a new, valid compact were entered into, the New Mexico tribes signed the compact drafted by the 1997 legislature, *see Pueblo of Sandia*, 47 F.Supp.2d at 51, and it was submitted to the Secretary for approval. The Secretary did an unusual thing, however: rather than approve or disapprove the compact, he took no action at all, and allowed the compact to go into effect by the expiration of the 45-day approval period, pursuant to 25 U.S.C. § 2710(d)(8)(C). *See* 62 Fed. Reg. 45867 (August 29, 1997) (notice that compacts between State of New Mexico and, *inter alia*, Pueblos of Santa Clara and San Felipe, had gone into effect by the expiration of the approval period). By

so doing, the Secretary left open the important question whether certain dubious provisions of that form agreement had in fact gone into effect, given their possible conflict with IGRA. *See* 25 U.S.C. § 2710(d)(8)(C) (compact that is not acted on within 45 days after submission to Secretary "shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]"). In the first visitor's tort claim to reach this Court thereafter, *Gallegos v. Pueblo of Tesuque*, a number of gaming tribes filed a brief as *amici curiae* arguing that, if the Court found that the 1997 compact applied to the claim,[14] it should hold that the provisions of Section 8 of that compact that purported to grant jurisdiction over such claims to state courts were invalid, because they were not permitted by IGRA. This Court noted the issue, 2002-NMSC-012, ¶ 10 n.3, 132 N.M. at 213 n.3, but in light of its ruling on other issues in the case did not decide it. *See supra* note 14.

In 1999, the legislature enacted the Compact Negotiation Act, 1978 NMSA §§ 11-13A-1 through 11-13A-5. That Act provides a detailed procedure by which a gaming compact (or an amendment to an existing compact) can be negotiated between a tribe or group of tribes and the State (represented by the Governor's office), with input from a special joint legislative committee, then submitted to the legislature for an up-or-down vote. (This latter feature assures that whatever is ultimately voted on is something to which the tribes have agreed, and would not include any terms unilaterally imposed by the legislature.) Under the procedures prescribed by that Act, the state's gaming tribes entered into negotiations for a new compact, and those efforts finally bore fruit when S.J.Res. 37 was approved during the regular 2001 legislative session,

[14]The incident from which the claim arose had occurred in 1996, after the 1995 compact had been held invalid by this Court but before the 1997 compact went into effect. The district court had held, and this Court affirmed, that as there was no valid compact in effect at the time, there was no applicable waiver of tribal immunity, and the case was dismissed.

approving a completely new form compact.[15] Although no tribe could sign the compact until it had settled with the State the outstanding issue of unpaid revenue-sharing payments, *see* Compact § 9(B), most New Mexico gaming tribes reached such settlements in time for the Compact to be signed and approved before the end of the year. *See* 66 Fed. Reg. 64856 (Dec. 14, 2001) (notices of Secretarial approval of compacts between State of New Mexico and, *inter alia*, Pueblos of Santa Clara and San Felipe).

The 2001 Compact is similar to the 1997 form drafted by the legislature in many respects, but one of the major areas of difference is in the language of § 8, dealing with where visitors' personal injury suits could be filed. A comparison of the 1997 language, quoted *supra* p. 27, with the current language, quoted *supra* pp. 23-24, demonstrates the effect of the negotiations on this issue. While the State was unwilling to delete all references to state courts, the language equating visitors' tort claims with gaming regulation was deleted entirely, and, as noted above, the current Compact simply identifies the court in which such claims are to be brought as a "court of competent jurisdiction." Plainly unable to agree on the question whether a state court may properly be considered such a court, the negotiators left that issue for judicial resolution, specifying that the issue turns on whether IGRA permits any such shift in jurisdiction over ordinary tort suits. Compact § 8(A).

In short, the current language of Section 8 is the product of a legal tug-o'-war over the jurisdictional issue that has spanned 10 years of compact negotiations in New Mexico. The final sentence of § 8(A) does no more than identify the issue for decision by this Court or a federal court. Under no circumstances can it plausibly be contended, as the *Doe* majority claimed, that

---

[15]The text of the resolution, and the form compact that it approved, may be found on the New Mexico Legislature's website: http://legis.state.nm.us.

that language reflects an agreement between the State and the tribes that visitor tort suits are "directly related to" or "necessary for" the purely governmental concerns of licensing and regulation of class III gaming activity as to which, Congress decided, states might properly be given a role. The decision below, rather than effectuate the intent of the parties to the Compact as shown by its language, utterly distorts that intent, and attempts to revive instead the text of the 1997 compact.[16] The opinion engages in wholly unwarranted assumptions as to the parties' intentions that are contrary to the plain language of the Compact, and based on those assumptions bootstraps itself out of making the determination that the parties agreed were needed.

Worse, if left to stand, the decision below would allow the very thing against which Congress sought to protect: the use of the compact to circumvent the *Williams* rule of exclusive tribal court jurisdiction over general tort actions arising on Indian land. 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*, 358 U.S. at 223. It is worth recalling the expression of concern by the Senate Indian Affairs Committee in making its case for the precisely limited regulatory role states could be granted in compacts negotiated pursuant to IGRA: "The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S.Rep. 100-446 at 14.

---

[16]Section 9(D) of the Compact states that upon "publication of notice of the Secretary [of the Interior]'s affirmative approval of this Compact in the Federal Register, the Predecessor Agreements shall be and become null and void, and of no further effect, . . ." Section 2(L) defines "Predecessor Agreements" as the compacts and revenue sharing agreements in the form enacted by the legislature in 1997.

C. Even if Section 8 Purported to Confer Jurisdiction Over Tort Suits on State Courts, Such a Provision Would Be Void as a Matter of Federal Law.

The Court of Appeals compounded its error by its declaration that it would not "second-guess" its misguided belief as to what the parties to the Compact intended in § 8(A). 2005-NMCA-110, ¶ 17, 118 P.3d at 209. Even had the parties actually intended to allow state courts unqualifiedly to assume jurisdiction over ordinary tort suits against tribes, such a momentous departure from the federal rule of exclusive tribal court jurisdiction would have demanded judicial scrutiny. It is well established that compact terms that exceed the bounds of IGRA are a nullity. *Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469 (6th Cir. 1998) (compact provision that purports to authorize tribe to conduct gaming on land acquired after IGRA's enactment does not override requirements of 25 U.S.C. § 2719). Thus, an express consent to state court jurisdiction over patrons' tort suits in the compact is likewise ineffective without express authorization for such shift of jurisdiction in IGRA. *Kennerly*, 400 U.S. at 428 (tribal council action agreeing to state court jurisdiction over civil suits against tribal members ineffective to confer such jurisdiction, unless authorized by, and fully in compliance with, federal law). The Court of Appeals thus erred not only in its misinterpretation of the parties' intent in the Compact, but also by incorrectly assuming, without deciding, that the agreement to transfer jurisdiction that it erroneously perceived in the Compact's language would be effective even in the absence of express congressional authorization in IGRA.

The *Doe* majority's view of the Compact as an agreement that state courts may assume jurisdiction over tort suits by casino patrons, as an aspect of the regulation of gaming, flies in the face of the plain language of the Compact itself, and its assumption that such a transfer of jurisdiction is "entirely consistent with the IGRA," *Doe*, 2005-NMCA-110, ¶ 19, 118 P.3d at

209, is likewise directly contrary to the language and intent of that Act. The decision must be reversed.

V. EITHER TRIBAL COURT ADJUDICATION OR ARBITRATION PROVIDES PATRONS WITH AN "EFFECTIVE REMEDY" FOR RESOLUTION OF PERSONAL INJURY CLAIMS AGAINST TRIBAL GAMING ENTERPRISES.

Finally, there is no reason for concern that a determination that state courts are not "courts of competent jurisdiction" for purposes of § 8 of the Compact will leave tribal casino patrons without an effective remedy for adjudication of their damage claims. As Judge Sutin said in his dissent,

> [h]aving an effective remedy does not necessarily require state court jurisdiction. Nothing in the record indicates that a visitor claimant cannot have an effective remedy through tribal court or arbitration as long as those processes provide due process.

2005-NMCA-110, ¶ 27, 118 P.3d at 211 (Sutin, J., dissenting). Federal law and policy fully support such a role for the tribal courts. *See, e.g., Iowa Mutual*, 490 U.S. at 16-17 ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."); *Santa Clara Pueblo*, 436 U.S. at 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes involving important personal and property interests of both Indians and non-Indians."); *Tempest Recovery Svcs.*, 2003-NMSC-019, ¶ 15 n.3, 134 N.M. at 138 n.3 ("We recognize that the Supreme Court has interpreted the 'longstanding policy of encouraging tribal self-government,' as including the development of tribal courts because '[t]ribal courts play a vital role in tribal self-government.'" (citing *Iowa Mutual*, 480 U.S. at 14)). Moreover, the Indian Civil Rights Act compels such courts to assure due process to all litigants. *See* 25 U.S.C. § 1302.

Alternatively, Respondents may demand arbitration of their claims, in accordance with the procedures set forth in the Compact at Section 8(F). That provision assures a fair and objective proceeding before a panel of three arbitrators, and establishes a remedy that is universally accepted and encouraged as a fair and effective means for resolution of disputes of all kinds. *See, e.g., K.L. House Const. Co. v. City of Albuquerque*, 91 N.M. 492, 493-94, 576 P.2d 752, 753-54 (1978) ("The announced policy of this State favors and encourages arbitration . . ."). The Compact thus assures that Respondents will have an effective remedy for seeking compensation for their alleged injuries. But the course these Respondents chose is not a remedy that the Compact allows, or that it could allow.

CONCLUSION

For the above-stated reasons, Petitioners Santa Clara and San Felipe Pueblos respectfully urge this Court to reverse the *Doe* decision below, and the Order denying San Felipe's application for interlocutory appeal, and to remand these cases to the Court of Appeals. That court should further be directed to reverse the district court decisions denying Petitioners' respective motions to dismiss for lack of jurisdiction.

Respectfully submitted,

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLP
Richard W. Hughes
Post Office Box 8180
1215 Paseo de Peralta
Santa Fe, New Mexico 87504-8180
(505) 988-8004

Maxine Velasquez, General Counsel
Pueblo of San Felipe

Post Office Box 4339
San Felipe, New Mexico 87001

By:_____
Attorneys for Petitioners Santa Clara Pueblo, Santa Clara Development Corporation and San Felipe Pueblo

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2005, I caused a true and correct copy of the foregoing Brief-in-Chief to be served on each of the following counsel by deposit of the same in the U.S. mail, first-class postage prepaid:

Merit Bennett, Esq.
460 St. Michael's Drive, #703
Santa Fe, New Mexico 87505-7646

Paul J. Kennedy, Esq.
René A. Ostrochovsky, Esq.
Kennedy & Han, PC
201 12th Street, NW
Albuquerque, New Mexico 87102

Wayne H. Bladh, Esq.
Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
1239 Paseo de Peralta
Santa Fe, New Mexico 87501-2758

Thomas J. Peckham, Esq.

Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
405 Martin Luther King Avenue, N.E.
Albuquerque, New Mexico 87102-3541

C. Bryant Rogers, Esq.
Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP
P.O. Box 1447
Santa Fe, New Mexico 87504-1447

Peter C. Chestnut, Esq.
Chestnut Law Office
121 Tijeras N.E. #2001
Albuquerque, New Mexico 87102-3465

David C. Mielke, Esq.
Sonosky, Chambers, Sachse, Endreson & Mielke
500 Marquette Avenue, N.W. #700
Albuquerque, New Mexico 87102-5335

Lee Bergen, Esq.
Bergen Law Offices, LLC
4110 Wolcott Avenue NE, Ste A
Albuquerque, New Mexico 87109

Catherine Baker Stetson, Esq.
Stetson Law Offices, P.C.
1305 Rio Grande Boulevard NW
Albuquerque, New Mexico 87104-2696

John D. Wheeler
Attorney at Law
P O Box 1810
Alamogordo, New Mexico 88311-1810

Frank A. Demolli
Pueblo of Pojoaque Legal Dept.
58 Cities of Gold Road
Santa Fe, New Mexico 87106

_____

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM,
SCHOENBURG & BIENVENU, LLP