IN THE NEW MEXICO SUPREME COURT

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

Plaintiff-Respondent,

vs. No. 29,350

SANTA CLARA PUEBLO, et al.,

Defendants-Petitioners.

consolidated with:

IVAN LOPEZ and **LUCY LOPEZ,**

Plaintiffs-Respondents,

vs. No. 29, 351

SAN FELIPE PUEBLO, et al.,

Defendants-Petitioners.

On Writs of Certiorari to
The New Mexico Court of Appeals

BRIEF OF THE NEW MEXICO TRIAL LAWYERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE CASE

These two consolidated cases involve suits brought by non-Indian citizens of the State of New Mexico in the district courts of the State of New Mexico against Indian Pueblos and, in one instance, a Pueblo-owned enterprise. Both suits involve common law tort claims under New Mexico law resulting from the alleged negligence of the defendants occurring on the premises of gaming casinos. Those casinos are operated by the defendants under gaming compacts entered into between the respective Pueblos and the State of New Mexico pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988, as amended through 2001) (IGRA).

A. The *Doe v. Santa Clara* Litigation in the District Court

Doe v. Santa Clara Pueblo, et al. was filed in the First Judicial District in March, 2004, on behalf of a 15 year-old girl, asserting claims based on battery, sexual assault, negligent maintenance of premises, negligent failure to warn, and intentional infliction of emotional distress with respect to conduct occurring in the parking lot of the Big Rock Casino Bowl. Big Rock Casino is a gaming facility owned and operated by the defendants in that action. The Santa Clara tribe moved to dismiss for lack of subject matter jurisdiction, and that motion was denied by the district court in June, 2004. Defendants in *Doe* then sought an interlocutory appeal in the court of appeals.

B. The *Lopez v. San Felipe Pueblo* Litigation in the District Court

Lopez v. San Felipe Pueblo, et al. was filed in the Thirteenth Judicial District later in 2004, asserting the negligence of the defendants when Ivan Lopez tripped on a mat and fell, which also caused his mother to fall, as both were entering the front door of the

Casino Hollywood, a gaming facility owned and operated by the Pueblo defendant in that action. Both plaintiffs claimed personal injuries based on an alleged defective condition on the premises of the casino. San Felipe filed a motion to dismiss for lack of subject matter jurisdiction, but it was not until June, 2005 (well after *Doe* was argued in the court of appeals) that the district court denied the motion in *Lopez*. Defendants in *Lopez* then sought leave to file an interlocutory appeal in the court of appeals.

C. Action of the Court of Appeals on the Two Cases

The court of appeals granted Santa Clara's application for interlocutory appeal in the *Doe* case, and after full briefing issued its opinion upholding the district court's jurisdiction over the matter. The court of appeals opinion, filed on June 28, 2005, rejected the claim of Santa Clara that IGRA does not allow a state and a tribe to enter into a compact agreement that permits state court jurisdiction over personal injury claims related to casino activities. The court of appeals concluded as follows:

> The State and Santa Clara agreed in the course of negotiations as equal sovereigns that issues regarding the safety of the Casino's visitors are directly related to gaming. This conclusion is entirely consistent with the IGRA and its legislative history. Therefore, we affirm the district court's denial of Santa Clara's motion to dismiss for lack of subject matter jurisdiction.

Doe v. Santa Clara Pueblo, 2005-NMCA-110, ¶ 19, 138 N.M. 198, 118 P.2d 203. Judge Sutin dissented, concluding that IGRA does not allow a state to exercise jurisdiction over claims arising from negligent conduct on the premises of gaming casinos, and that the compact cannot circumvent the *Williams v. Lee*, 358 U.S. 217 (1959) rule of exclusive tribal court jurisdiction over torts arising on Indian land, except pursuant to an express

congressional grant of state court jurisdiction. *Doe,* at ¶ 35 (Sutin, J., dissenting). After issuing its opinion in *Doe*, the court of appeals denied the application for interlocutory appeal in *Lopez.*

D. Review in this Court

The defendants in both cases sought further review in this Court. Santa Clara Pueblo filed a petition seeking certiorari review of the court of appeals decision in *Doe* affirming the denial of the tribe's motion to dismiss for want of jurisdiction in state court, and this Court granted the Writ on August, 12, 2005. San Felipe Pueblo filed a similar petition seeking review of the same ruling by the district court in *Lopez*, and the court of appeals' refusal to allow its interlocutory appeal. This Court granted the Writ in *Lopez* on August 26, 2005, and by its Minute Order of October 13, 2005, directed that *Lopez* and *Doe* be consolidated for purposes of the filing of briefs and oral argument.

Petitioners—and a host of *amici* in support of the Petitioners—filed their opening briefs in October, 2005. The Respondents in both cases were given until January 31, 2006 to file their Answer Briefs, and *amicus* NMTLA files its brief in support of Respondents-Plaintiffs within that time period, as provided for in Rule 12-215, NMRA (2005).

INTRODUCTION TO THE ARGUMENT OF *AMICUS*

The Pueblos each entered into three explicit agreements relevant to this appeal. First, the Pueblos explicitly waived their sovereign immunity with respect to tort actions arising at their respective casinos, up to an agreed upon amount of insurance coverage. *See* Tribal-State Class III Gaming Compact (Compact) at § 8(D); Second, the Pueblos

explicitly agreed that New Mexico law shall apply in any such tort action, whether brought in state or tribal court.[1] *See id.*, and; Third, the Pueblos explicitly agreed that "to assure that any [visitor to a Gaming Facility] who suffer bodily injury or property proximately caused by the conduct of the Gaming Enterprise shall have an effective remedy for obtaining fair and just compensation," *id.* at § 8(A), "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 . . . to state court."[2] *Id.* (emphasis added).

The Pueblos do not dispute in this case that they validly waived their sovereign immunity, and they positively endorse their agreement to the application of New Mexico law to resolve casino-tort litigation. Thus, the only question presented is whether IGRA bars the Pueblos from agreeing to allow tort victims to choose state district court as a forum for resolution of immunity-waived torts to which New Mexico substantive law applies.[3]

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[1] With the exception that "the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe." Compact § 8(D).

[2] The Pueblos also agreed that injured persons would have the additional option of proceeding in binding arbitration to resolve casino-tort cases. Compact § 8(A).

[3] Although not a part of the instant case, and therefore not addressed in this brief, *Amicus* wishes to point out that there are two additional issues that surely will arise in future cases of this nature: 1) Is a Pueblo an indispensable party to a direct action available against the Insurance Company that issued liability insurance to the Pueblos under the mandate of the Compact provision compelling insurance in order to protect patrons? *See Gallegos v. Pueblo of Tesuque*, 2002-NMCA-057, ¶ 45 132 N.M. 201, 46 P.3d 108; and 2) Is there anything more, beyond a standard "sue and be sued" clause in the charter of an Indian corporate entity, required to constitute a waiver of immunity and an agreement to litigate disputes in state court? *See Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 12, 136 N.M. 682, 104 P.3d 548.

For two independent but related reasons, New Mexico State District Courts have jurisdiction in these casino-tort cases. First, IGRA authorized the Pueblos to agree that jurisdiction of casino-tort cases could be heard in state district court. Second, even if there were no affirmative authorization in IGRA, IGRA did not bar the Pueblos from properly exercising their inherent sovereign power when the Pueblos waived sovereign immunity, chose New Mexico law to govern casino-tort litigation, and agreed to concurrent state court jurisdiction.

First, in construing IGRA as authorizing the Pueblos to agree to state court jurisdiction, the court of appeals correctly analyzed the language of IGRA in light of the intent of Congress expressed in the Act's legislative history. The court properly read the Act and its legislative history with deference and respect for the inherent sovereignty of Indian Tribes and the resulting congressional will that Tribal sovereigns should be free to enter into government-to-government compacts as equals, making their own decisions about what terms were appropriate to foster the well-being of the Tribes and their members. This Court also should affirm that Congress did not intend to shackle the Tribes from the full exercise of their sovereign powers when it adopted IGRA.

After reviewing the relevant provisions of the gaming Compact and the legislative history of IGRA, which authorized the Compact, the appeals court in *Doe* concluded that:

- "The State and Santa Clara agreed in the course of negotiations as equal sovereigns that issues regarding the safety of the Casino's visitors are directly related to gaming, and

- "This conclusion is entirely consistent with the IGRA and its legislative history."

Doe, at ¶ 19. Petitioners take issue with both conclusions of the court of appeals, arguing that "[t]he compact language cannot reasonably be interpreted as manifesting the parties' agreement that state courts could assume jurisdiction over ordinary tort claims," Petitioners' Brief-in-Chief at 23, and that "IGRA does not authorize the shift to state courts of jurisdiction over personal injury claims," *id.* at 12, because in Petitioners' view, any other reading of the statute and legislative history would undermine tribal sovereignty in a way which Congress could not have intended.

The court of appeals was correct in both of its conclusions, and Petitioners' challenge must fail, for the following reasons: First, the relevant Compact provision makes it crystal clear that the Pueblos agreed to state court jurisdiction of these claims so long as it is legally possible for them to do so. *See* Argument at Point I, *infra.* Second IGRA affirmatively authorizes the Pueblos to enter into the agreements they have willingly agreed to providing for state district court as an optional forum for the litigation of casino torts. *See* Argument, Point II, *infra.*

There is a second reason to affirm the court of appeals. Even if this Court were to find in IGRA no affirmative grant of authority for the Pueblos to agree to state court jurisdiction, nothing in IGRA deprives the Pueblos of their inherent power to waive immunity, choose state law, and consent to state court jurisdiction. Absent a federal prohibition, the Pueblos were properly exercising their inherent sovereign powers when they agreed to state district court as an alternative forum for casino torts. Furthermore,

the agreement entered into by the Pueblos does not undermine their essential sovereignty; on the contrary, enforcing their agreement honors and acknowledges the sovereignty of the Pueblos, as this Court always has done. *See* Argument, Point III, *infra*.

ARGUMENT OF *AMICUS*

I. THE RELEVANT COMPACT PROVISION UNDOUBTEDLY PROVIDES THAT THE PUEBLOS HAVE AGREED TO STATE COURT JURISDICTION OF THESE CLAIMS SO LONG AS IT IS LEGALLY POSSIBLE FOR THEM TO DO SO.

The court of appeals in *Doe* focused on the words of the Compact. First, the court found that one express purpose of the Compact is to assure that casino visitors injured by the negligence of the "Gaming Enterprise have an effective remedy for obtaining fair and just compensation." *Doe*, at ¶ 6, quoting § 8(A) of the Compact. Then the *Doe* court focused on the specific language agreed to in that same provision of the Compact—that "any such claim 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 . . . ." *Id.* (emphasis added). From that clear, and unambiguous language, the *Doe* court necessarily concluded that "*the Compact expressly allows visitors to bring their claims in state court.*" *Doe* Slip Op. at ¶ 10. (emphasis added) Indeed, Judge Sutin, in dissent, does not take issue with that conclusion.[4]

Nonetheless, the Pueblos continue to insist that the Compact language "cannot reasonably be interpreted as manifesting the parties' agreement that state courts could

[4] Judge Sutin makes clear that the "unless" clause in Section 8 of the Compact only served to permit "Santa Clara to test [the] jurisdiction shifting" which it had agreed to for conformity with the IGRA. *See Doe* Slip Op. at ¶ 23.

assume jurisdiction" over such claims. Petitioners' Brief at 23. In essence, they claim that they only agreed to allow such suits in "a court of competent jurisdiction," and since they believe that IGRA does not allow for the transfer of jurisdiction over such suits to state court, such courts cannot be courts of competent jurisdiction *See id.* at 23-25. Petitioners seek to avoid the initial language of the last sentence of § 8(A)—"For purposes of this Section, any such claim may be brought in state district court . . ."—and contend that that entire sentence was not an expression of agreement with respect to state court jurisdiction, but *only* as a means to allow for a judicial determination "that IGRA does not permit the shifting of jurisdiction . . . to state court." Compact at §8(A). Such a strained parsing of a portion of the sentence, however, cannot avoid the clear import of the whole sentence—that the Pueblos and the State did agree to state court jurisdiction in such lawsuits *unless IGRA did not permit the Pueblos to do so.* Having agreed to state court jurisdiction if not prohibited from doing so, the Pueblos are reduced to the claim that IGRA "does not permit" state court jurisdiction over negligence claims of casino patrons, which the Pueblos and the State have expressly agreed to.[5]

II. IGRA PROVIDES AMPLE AUTHORITY TO THE TRIBES TO ENTER INTO THE AGREEMENTS THEY HAVE WILLINGLY ENTERED INTO TO ALLOW PATRONS OF THE GAMING CASINOS WHO ARE VICTIMS OF GAMING ENTITY NEGLIGENCE ON THE PREMISES OF THE CASINOS TO BRING THEIR CLAIMS IN NEW MEXICO STATE DISTRICT COURT.

[5] Ultimately, Petitioners concede as much when they note, that "it would still be error to defer to the parties' agreement on this issue" because in their view, such suits are "not within the scope of matters to which state courts may assume jurisdiction under IGRA.," Petitioner's Brief at 7, and "compact terms that exceed the bounds of IGRA are a nullity." *Id.* at 31.

Alternative provisions of IGRA affirmatively authorize the Pueblos to enter agreements that designate state courts as permissible, forums for litigation of casino torts. The first is found in sub-sections (i) and (ii) of Section 2710(d)(3)(C) of IGRA. This was the focus of the court of appeals decision and is addressed in Point II(A), *infra*. Even if these sub-sections could be construed as not providing authorization, sub-section (vii) of the same statute does so. *See* Point II(B), *infra*.

A. Sub-Sections (i) and (ii) of 25 U.S.C. § 2710(d)(3)(C) Authorize Tribes To Enter Into Agreements Designating State Courts As Permissible Optional Forums For Litigation Of Casino Torts.

The *Doe* court focused on the IGRA provision that states that a negotiated Tribal-State compact "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; [and]
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations[.]

Doe, at ¶9, quoting 25 U.S.C. § 2710(d)(3)(C)(i)-(ii). The court of appeals then evaluated this language in light of the intent of Congress with respect to "the scope of each tribal-state gaming compact to be determined by the parties in the course of their negotiations as equal sovereigns." *Doe*, at ¶ 10. In doing so, the *Doe* court came to the following conclusions:

- "Congress recognized the gravity of the tribal-state conflict [over jurisdiction] but chose not to impose a universal, nationwide solution." *Id.* at ¶ 15;
- "Congress created a mechanism by which each tribe and each state could negotiate over how to apportion jurisdiction over tribal gaming." *Id.*; and

- "The Act provides very general guidance on what issues a tribal-state compact may address and leaves the scope of each compact to be determined by the states and tribes." *Id.*

Based on this reading of the legislative history, the *Doe* court concluded that Congress, in § 2710(d)(3)(C) left the relatedness question—i.e., the relatedness of "[r]edressing injuries sustained by the Casino's visitors . . . to the regulation of tribal gaming enterprises"—to State/Tribal negotiation, and therefore "the State and Santa Clara acted within the scope of the IGRA when they formed the compact." *Doe*, at ¶10.

The Pueblos want to read the legislative history and the text of § 2710(d)(3)(C) much more narrowly, and ask this Court to overturn the decision of the court of appeals on that basis. *See* Petitioners' Brief at 12-23. The Pueblos err by selectively focusing on parts of the legislative history of IGRA thus losing sight of the Act's overarching goals.

The Pueblos agree with the court of appeals that the Act must be read in light of the legislative history, *see* Petitioners' Brief at 14, but contend that the primary (and only relevant) legislative concern was to prevent infiltration of Indian gaming "by criminal elements." *Id.* at 14; *see id.* at 14-17. Purporting to find no other relevant legislative goal, the Pueblos then argue that Congress was intent on barring state court jurisdiction except for the very limited purpose of dealing with matters which are absolutely necessary for the licensing and regulation of the "activity of gaming" itself. *See id.* at 17-18. This selective reading of the legislative history advances the argument of the Pueblos but has no basis in reality. Fair consideration of the entire legislative history belies their claim, and supports the court of appeals' conclusion that "[r]edressing injuries sustained by the

Casino's visitors is sufficiently related to the regulation of tribal gaming enterprises that . . . the State and Santa Clara acted within the scope of the IGRA when they formed the Compact." *Doe*, at ¶ 17.

1. Fair consideration of the legislative history demonstrates a much broader congressional concern than "infiltration of criminal elements" with respect to Class III gaming.

Infiltration of Indian gaming by "criminal elements" was not the sole concern of Congress when crafting IGRA. In the mid-1980's several options concerning Indian gaming were discussed—including federal and state regulatory control of such matters. S. Rep. No. 100-446, at 3-4 (1988), as reprinted in 1988 U.S.C.C.A.N. 3017, 3073-74. Tribes adamantly opposed any state regulatory control, and preferred no Congressional authority to engage in Class III gaming activities rather than submit to state regulation. *Id.* at 4. Only when the Supreme Court granted review in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), with the perceived threat of Court-approved state control, did a spirit of compromise surface. The 100th Congress adopted the IGRA formula—i.e., tribes could conduct and regulate Class I and Class II gaming, but could engage in Class III gaming only pursuant to a negotiated tribal-state compact concerning the conduct and regulation of such matters. S. Rep. No. 100-466, at 13.

Fear of the infiltration of criminal elements was only one concern, and not a major one. Senator McCain noted that "in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity." *Id.* Senator Evans captured the real issue pending before Congress in SB 555 (ultimately enacted as IGRA):

> The issue has never really been one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. At issue is economics. At present Indian tribes may have a competitive economic advantage because, rightly or wrongly, many States have chosen not to allow the same types of gaming in which tribes are empowered to engage.

134 Cong. Rec. at S12654 (statement of Wash. Sen. Evans).

More central to the policy debate about IGRA was the matter of providing a platform for sovereign Indian Tribes to assess their own interests and to negotiate and to reach agreement with the States as to the proper balance between Tribal and State interests when Class III gaming occurred. Rejecting total federal or state regulatory control of Class III gaming, Congress concluded "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . . casino gaming . . . ." S. Rep. No. 100-446, at 13 (1988). To accomplish this, Congress made clear that the Compact process was intended to assure the proper balancing of many important tribal and state interests between equal and independent sovereigns.[6] The Report identified many of the tribal and state interests that were legitimate matters for consideration and

[6] The Report contains reference to a hoary, perhaps anachronistic, canon of construction that ambiguities be resolved in a manner favorable to tribal interests. S. Rep. 100-446, at 15 (1998). The Pueblos rely on this. *See* Petitioners' Brief at 16. Whatever its lineage, it should play no significant role in construing Compacts which are premised on the equality of the State and Tribal sovereigns that negotiate them. In any event, the Report's reference to this canon is in the section of the report dealing only with litigation that would result if the negotiations do not result in a Compact. S. Rep. 100-446, at 14 (1998). (Burden of proof). Only in this setting where, the Report recognizes, there is "unequal balance" between the State and the Tribe, *id.*, does the Report call for application of the canon of construction ("trusts that the courts will interpret any ambiguities *on these issues*" in a manner favorable to tribal interests). *Id.* at 15 (emphasis added).

signaled that there might be situations where give and take would be required to resolve disputes where the interests of the respective sovereigns might appear to clash:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. . . .
>
> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, *promoting public safety* as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, *and regulating activities of persons within its jurisdictional borders*.
>
> A State's governmental interests with respect to class III gaming on Indian lands include *the interplay of such gaming with the State's public policy, safety, law and other interests*, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

S. Rep. No. 100-446, at 13 (1988) (emphasis added). Indeed, Chairman Inouye made it abundantly clear that the legislation "is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives," 134 Cong. Rec. at S12650, and "address their respective concerns in the most equitable fashion." *Id.* at S 12651. Senator Domenici, too, noted the desire and need for flexible negotiations and give-and-take between sovereigns:

> We are talking specifically about the mutual responsibility between Indian people and the State in which they reside. The class of gambling beyond bingo will require entering into an agreement where both sovereigns, the State and Indian people, attempt to arrive at a regulatory scheme which will adequately protect the Indian people and the non-Indian people.

Id. at S12655. Congressman Rhodes reiterated what the Report stated—that one legitimate state interest was the protection of non-Indians who would be attracted to Reservation casinos: "The states have a strong interest in regulating all Class III gaming

activities within their borders," in large part because "the vast majority of consumers of such gaming on Indian lands would be non-Indian citizens of the State and tourists to the State . . . ." 134 Cong. Rec. H8157.

The legislative history demonstrates time and again the confidence of Congress in the ability of Tribes and States to negotiate as equal sovereigns to reach mutually agreeable accommodations about the regulations and mechanisms that should be in place when Class III gaming went into effect. The Report makes clear that "States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States," and that "[t]his is a strong and serious presumption that must provide the framework for negotiations." S. Rept. 100-466, at 13 (1988). The report emphasizes that "[t]he Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. *Id.* The Chair of the Committee in an important colloquy with Sen. Domenici during the floor debate repeated the central premise of IGRA while also noting that jurisdictional matters were within the power of the Tribes to negotiate and to reach agreement with the State:

> [T]he committee believes that tribes and States can sit down at the negotiating table *as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate.*

134 Cong. Rec. at S12650 (emphasis added).

Indeed, Senator Evans was most explicit that "[t]he provisions for Tribal State compacting *are not meant to favor either party* and are certainly not meant to propagate the extension of criminal or civil jurisdiction over Indian gaming, but rather are meant to

provide an avenue for cooperative negotiations between the tribes and the States for regulating gaming in a manner beneficial to both parties." 134 Cong. Rec. S12654 (emphasis added); *see also id.* (statement of Wash. Sen. Evans) ("The Tribal/State compact language intends that two sovereigns will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming."). Thus, contrary to Petitioners' narrow reading of the legislative history, the preeminent congressional concern is revealed through that history to be the provision of a mechanism that would provide the opportunity for a mutually satisfactory and beneficial negotiation between equal sovereigns.

Rather than a regulatory regime focused on the narrow problem of criminal infiltration into Indian gaming, Congress's focus in adopting IGRA was in response to a range of Tribal and State concerns requiring a unique response—the broad delegation of such matters to the Tribes and States to work out as equal sovereigns so that the Compacts would accommodate the particular needs of each.

Senator Evans captured the essence of IGRA when he stated that the Compact approach would allow "the possibility that the tribes can fully participate in our economic prosperity . . . while we respect their rights to decide to what extent and in what manner they choose to participate." 134 Cong. Rec. at S12654. It is in that context—evidencing full respect for tribal sovereignty rather than viewed through the narrow lens of federal paternalism and the need for protection from some undefined "criminal element" offered by the Petitioners—that the court of appeals properly evaluated the provision of IGRA,

under which Congress delegated compacting authority to states and tribes as equal sovereigns.

2. The court of appeals got it precisely right in concluding that congress intended to leave the degree of relatedness between "[r]edressing injuries sustained by the casino's visitors" and the regulation of tribal gaming to the tribes and states as co-equal bargaining partners in the compacting process.

After attempting to shape the legislative history to meet their needs, the Pueblos make their primary argument—that Congress, in 25 U.S.C. § 2710(d)(3)(C)(i) and (ii), only delegated to Tribes and States the authority to negotiate jurisdiction-shifting with respect to matters which are absolutely necessary for the regulation of the "activity" of gaming itself.[7] Petitioners' Brief at 20-21. That assertion is contradicted by legislative history, logic and sound legal process.

The Committee Report stresses that within the broad areas of congressionally delegated authority in Section 2710(d)(3)(C) "subparts of each of the broad areas may be more inclusive," stressing that "[a] compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between." S. Rep. No. 100-446, at 14 (1988). Such broad discretionary power was necessary in Congress' view

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[7] Petitioners also contend that sub-sections 2710(d)(3)(C)(i) and (ii) only deal with "regulatory" and not "judicial" jurisdiction. Petitioners' Brief at 19-21. They do so without reference to a single case in support of their assertion. Instead they reach wholly outside the context of § 2710, to a provision dealing with criminal prosecution of violation of state gaming laws, and draw a questionable distinction between the "transfer" of jurisdiction referred to in the criminal provision, and the "allocation" of jurisdiction referred to in § 2710.

Such a claim is belied by the Congressional intent that the compacting process was designed to allow for tribes and states to "work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied," 134 Cong Rec. at S12650 (Remarks of Chairman Inouye), one in which "a tribe might affirmatively see the extension of State jurisdiction and the application of state laws to activities conducted on Indian land . . . ." S. Rep. 100-446, at 6 (1988).

because "[t]he terms of each compact may vary extensively depending on the type of gaming, the location, the previously relationship of the tribe and the State, etc." *Id.* As Chairman Inouye stressed on the floor of the Senate, SB 555 was "intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives." 134 Cong. Rec. at S12650. That is why Congress made it absolutely clear that "to the extent tribal governments elect to relinquish rights in a tribal-State compact . . . the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes . . . ." S. Rep. No. 100-446, at 6 (1988).

The agreement to provide state district courts as an optional forum for immunity-waived casino torts unless prohibited by IGRA represents a compromise reached after protracted negotiations. This is as it should be. The Congressional drafters were convinced that the compacting process was particularly suited for the resolution of disputes over such "individual governmental objective[s]," 134Cong Rec. at S12650 (remarks of Chairman Inouye), which is why Congress directed that "[a] compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between." Sen. Rep. No. 100-440 at 14 (1988).[8]

[8] Of course, Congress made clear that its approval of compacting authority over jurisdiction in IGRA be limited to matters dealing with the unique issues surrounding Class III gaming. That is why Congress explicitly stated that the compacting approach should not be taken as authority for state jurisdiction over wholly unrelated State-tribal relations such as "taxation, water rights, environmental regulation, and land use." 134 Cong. Rec. S12651 (statement of Chairman Inouye).

The Pueblos' argument ultimately is bottomed on the fact that § 2710(d)(3)(C)(i) speaks in terms of the application of state laws that are "directly related to, *and necessary for*, the licensing and regulation of [gaming] activity," (emphasis added), and that any agreement for state court jurisdiction under sub-section (C)(ii) is similarly limited so that state court jurisdiction sinks or swims with the resolution of the sub-section (C)(i) question. The Pueblos thus insist that providing for the safety of casino visitors was not necessary for and directly related to the licensing and regulation of the Pueblo casinos. But the often contentious debates about this issue demonstrate that mutually acceptable provisions for patron safety was a central issue separating the compacting parties.

When read as a whole, the finally agreed-upon compact demonstrates the Pueblos' acknowledgement that patron safety is necessary and directly related to licensing and regulation of gaming. First, the Pueblos agreed that "[t]he safety and protection of visitors to a Gaming Facility is a priority of the Tribe," as is the need for "an effective remedy" for patrons injured by conduct of the Gaming Enterprise. *See* Compact § 8(A). Second, having concluded that patron safety was a "priority," the Pueblos assigned to the "Tribal Gaming Agency"—the agency responsible to oversee the "Conduct of Class III Gaming," Compact § 4—the specific task of providing "for the physical safety of patrons in any Gaming facility, *id.* at § 4(B)(2), among the host of other responsibilities necessary and directly related to licensing and regulation of gaming.[9]

[9] The Compact requires that the Tribe pass certain laws. Compact § 4(B). The Pueblos have assigned to the Tribal Gaming Agency the duty to assure compliance with those laws. *Id.* at § 4(A)(2). Among the laws that the Agency must enforce are laws: that prohibit persons under age twenty-one from gambling or working at the casino; that prohibit the Gaming Enterprises from

The Pueblos thus created a separate Agency to oversee the critical aspects of the conduct of Class III Gaming that are essential for licensing and regulation, and included among the Agency's responsibilities the duty to assure the protection of Gaming Enterprise patrons. Having chosen to delegate this responsibility to the Agency that must oversee all aspects of the Compact that are necessary and directly related to licensing and regulation, the Pueblos have clearly indicated their understanding that protection of patron safety is both directly relevant to and necessary for the regulation of the Gaming Enterprise.

Finally, the Pueblos urge a cramped meaning to the words "necessary for" the licensing and regulation of gaming activities in Section 2710(d)(3)(C)(i). They seek to convince the Court that these words must mean that the only compacting authority conveyed by that section of the law is that which is *absolutely* necessary for the licensing and regulation of the activity of gaming itself. The Pueblos' construction of the phrase is contrary to the settled construction of such words. In *McCulloch v. Maryland,* 17 U.S. 316, 413 (1819), Chief Justice Marshall made clear the meaning of the term "necessary" in the Necessary and Proper Clause of the Constitution:

> Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common

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cashing social security or pension checks; that prohibit the use of IOUs by patrons; that require monitoring of Gaming Machines to assure that odds are posted on them; that assure that each electronic gaming device must return at least 80% of the all amounts wagered; that gaming machines be connected by centralized computer so that the State may monitor wagers and payout. *Id.* at §§ 4(B) (1)(2)(9)(10)(11)(12)(13) and (14). In addition, the Tribal Gaming Agency is responsible for assuring that all financial statements of the Gaming Enterprise are properly kept and periodically forwarded to the representative of the State of New Mexico. *Id.* at § 4(C).

> affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.

Chief Justice Marshall rejected the rigid interpretation of the word and endorsed its more common construction of "convenient or useful" to give expression to the framers' intent with respect to the power of Congress to create a national bank to serve the other enumerated purposes of federal power. The same must obtain here with respect to the use of the term in § 25 U.S.C. § 2710(d)(3)(C)(i) to effectuate the clear congressional intent to delegate to tribes and states the power to negotiate those matters related to Class III gaming which they determine are "necessary" to "realize their unique and individual governmental objectives." 134 Cong. Rec. at S12650. Just as the Necessary and Proper Clause was broadly construed in the fundamental charter controlling the relationship of sovereign states to the sovereign federal government, so too, the word should be similarly construed in the fundamental charter providing for State and Tribal sovereigns to determine by agreement their relationship.

Chief Justice Marshall also realized that applying a standard of strict necessity would force upon the courts the task, inappropriate to principled judicial decision-making, of determining the degree of necessity which meets such a standard: "But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discussed in another place [meaning the legislature]." *McCulloch,* 17 U.S. at 423. Just as those kinds of judgments were not for the Court in *McCulloch*—because degree of necessity is not a judicially manageable standard—they are not for the Court here. That is why Congress left the

matter of the scope of sub-section 2710(d)(3)(C)(i) to be resolved by the parties in the compacting process.

B. Even If Sub-Sections 2710(D)(3)(C)(i) And (ii) Do Not Encompass Agreements Relating To Jurisdiction Of State Courts In Casino Tort Cases, These Agreements Are Permitted Under Sub-Section 2710(D)(3)(C)(vii), Which Contains No Limitation On The Power Of The State And Pueblos To Make Any Agreement Concerning "Any Other Matters That Are Directly Related To The Operation Of Gaming Activities."

Even if sub-section (i) and (ii) were inapplicable because protection of the safety of visitors is deemed not to be both "related to " and "necessary" to licensing and regulation of gaming, there is another provision of Section 2710(d)(3)(C) that legitimizes the Pueblos' agreement to litigate casino torts in state court.

Section 2710(d)(3)(C) provides that a Compact "may include provisions relating to" listed specific subjects and to "...(vii) any other subjects that are directly related to the operation of gaming activities." The Pueblos argue that this provision does not explicitly provide for agreements relating to judicial jurisdiction "and without such authority, no such jurisdiction-shifting is allowable." Petitioners Brief at 18 n.10. The Pueblos' argument seeking to bar sub-section (vii) as a basis for their consent to state court jurisdiction is unavailing.

First, the Pueblos' presumption is that IGRA must affirmatively authorize them to provide for state court jurisdiction. That is wrong. The Pueblos have compacted that state court jurisdiction exists "*unless* IGRA *does not permit* the shifting of jurisdiction." Compact § 8(A) (emphasis added). Thus, unless IGRA forbids such agreements, the Pueblos have the power to enter into them. Sus-section (vii) is an affirmative grant of

authority; it contains no negation of the Pueblos' power to enter into jurisdictional agreements in conjunction with agreements covering any subjects directly related to the operation of gaming activities. It therefore cannot bar the agreement the Pueblos and the State entered into.

Second, the Pueblos' argument presupposes that they lack inherent power to agree to state court jurisdiction without an express grant of permission to do so from the United States. That is also wrong. Tribes do not need permission. Even without express federal permission, Tribes can agree to state court jurisdiction over cases in which the Tribes have waived sovereign immunity, agreed to the application of state law to the dispute and agreed to state court as a forum for litigation. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001); see Point III, *infra*. Because IGRA does not forbid this exercise of sovereign power, the Pueblos' consent to jurisdiction is valid.

Third, the Pueblos' construction of sub-section (ii) and sub-section (vii) is contradicted by their express agreement in the Compact concerning state court jurisdiction in criminal cases. The Pueblos assert that sub-section (ii) allows jurisdiction agreements only as to matters "directly related to and necessary" to licensing and regulation of gaming and insist on a strict construction of that provision. The Pueblos also assert that sub-section (vii) bars any agreements granting jurisdiction to state courts.

Yet in Section 10(B) of the Compact the Pueblos broadly agreed that state courts shall have jurisdiction over criminal matters including those that are not directly related to and necessary for licensing and regulation. That Section provides for State court jurisdiction for: 1) any violation of any State gambling law; or 2) any other crime against

the Gaming Enterprise; or 3) any crime directed against any employee of a Gaming Enterprise; or 4) "*any other crime ... that occurs on the premises of the Tribal Gaming Facility, that is committed by any person who is not a member of the Tribe.*" Compact § 10(B) (emphasis added).

The latter provision is not limited to crimes constituting a violation of state gaming law as specifically provided for in 18 U.S.C. § 1166(d), or crimes "directly related to" and "necessary for" the regulation of gaming activities as those phrases are sought to be defined by the Pueblos in their Brief. Section 10(B) goes well beyond the strained construction of sub-section (ii) that the Pueblos here assert. If sub-section (ii) of Section 2710(d)(3)(C) is as narrow as the Pueblos claim, then Section 10(B)'s broad consent to state court jurisdiction with respect to "any other crime" must be authorized by sub-section (vii). If that is so, then *a fortiori,* sub-section (vii) must also authorize the consent to state court jurisdiction with respect to victims of Gaming Enterprise torts.

In summary, Congress gave States and Tribes the authority to work out their "individual governmental objectives," as "equal sovereigns," *see* 134 Cong. Rec. at S12650 (Remarks of Chairman Inouye), and the court of appeals was correct in concluding that Congress, in § 2710(d)(3)(C) left the question of the degree of relatedness of "[r]edressing injuries sustained by the Casino's visitors . . . to the regulation of tribal gaming enterprises"—to the State and the Tribe, and therefore "the State and Santa Clara acted within the scope of the IGRA when they formed the compact." *Doe,* at ¶17. Moreover, Congress provided broad authority in 25 U.S.C. Section 2710(d)(3)(C)(vii) for the Pueblos to address all matters that "are directly related

to the operation of gaming activities" and did not in sub-section (vii) place any bar to the Pueblo's exercise of its inherent power to waive sovereign immunity and agree to state court as an alternative forum for resolution of immunity-waived torts.

Whether through analysis of sub-sections (i) and (ii) or sub-section (vii) of 25 U.S.C. § 2710(d)(3)(C), the Court of Appeals correctly rejected the Pueblos' argument that "IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." Compact § 8(A).

This result is consistent with the aim of Congress in adopting IGRA:

> [W]e now stand at a crossroads, at a point where we may seize the opportunity to acknowledge the Indians' unequivocal right to self-determination and to invite the Indian tribes into the American mainstream. I am not advocating a return to the failed assimilationist policies of the past, but rather the possibility that the tribes can fully participate in our economic prosperity while they retain [,] and while we respect [,] their rights to decide to what extent and in what manner they choose to participate. . . .

134 Cong. Rec. S 12653 (statement of Sen. Evans).

III. WHEN THE PUEBLOS EXPLICITLY WAIVED SOVEREIGN IMMUNITY, EXPRESSLY CONSENTED TO JURISDICTION IN STATE COURT AND VOLUNTARILY AGREED TO THE APPLICATION OF NEW MEXICO SUBSTANTIVE LAW, THEY EXERCISED THEIR INHERENT SOVEREIGNTY IN A MANNER NOT FORBIDDEN BY IGRA.

The court of appeals properly concluded that IGRA authorized the Pueblos to compact with the State of New Mexico to allow injured patrons to choose state district court as a forum for litigating casino torts. *See* Argument, Point I and II, *supra.* Amicus here demonstrates that even if IGRA had not provided an affirmative grant of power to the Pueblos, the Pueblos had and exercised an inherent sovereign power to waive

sovereign immunity, to choose New Mexico state district courts as an available forum and to provide that New Mexico substantive law shall apply to the resolution of casino torts.

Tribes and Pueblos possess inherent sovereign power:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'

Cohens's Handbook of Federal Indian Law 206 (Newton 3d ed., Lexis/Nexis 2005) (hereafter cited as *Cohens's Handbook*) (quoting *Wheeler v. United States*, 435 U.S. 313, 322-323 (1978)). That inherent power, not taken away by the United States, provides an independent source for honoring the Pueblos' agreements in the Compacts.

There is no dispute that the Pueblos have voluntarily waived sovereign immunity in the Compacts[10] and voluntarily agreed to the application of New Mexico law with respect to the claims pursued below.[11] Although the Pueblos attempt to separate their explicit waiver of sovereign immunity in the Compact from their express agreement that state courts may exercise jurisdiction of casino-tort actions,[12] such an attempt is unavailing.

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[10] "[T]he Tribe agrees to a limited waiver of its immunity from suit ... with respect to claims for bodily injury ... proximately caused by the Gaming Enterprise." Compact § 8(A); *see also id.* at § 8(D) ("The Tribe ... waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury ... up to the amount of fifty million dollars.")

[11] "New Mexico law shall govern the substantive rights of the claimant ... except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by member of the Tribe." Compact § 8(D).

[12] The Pueblos state that the sovereign immunity issue "will not be pressed *here* but the Court should be aware that it is present." Petitioners' Brief at 8, n.6 (emphasis added). The inference is that if this Court affirms that the state district courts have jurisdiction over these cases, the

Rather, the Pueblos' valid waiver of sovereign immunity triggers the included power of the Pueblos to choose state court as an optional forum for the resolution of the immunity-waived casino tort claims and to choose New Mexico law as controlling.

A. As Independent Sovereigns, the Pueblos Possess Both Inherent Sovereign Immunity and the Power to Waive Their Immunity

The Pueblos of Santa Clara and San Felipe needed no affirmative grant of authority from the United States to waive their sovereign immunity and to permit casino torts to be tried in state district court. Sovereign immunity adheres to their status: "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity of tribes "is a necessary corollary to Indian sovereignty and self governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1996).

It is, of course, true that "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," *id.* at 891, but unless Congress eliminates the Pueblos' sovereign immunity independent of their will, the Pueblos are fully empowered to choose to waive their sovereign immunity. Suits against tribes and pueblos "are thus barred by sovereign immunity *absent a clear waiver by the tribe* or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (emphasis added); *See also, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The leading

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Pueblos may still claim on remand that the actions should be dismissed because they have no power to waive their sovereign immunity.

treatise agrees: "[I]t is now clear that Indian nations *can waive* immunity by tribal law or *by contract* as long as it is 'clearly'done." *Cohens's Handbook* at 642 (emphasis added).

C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) is the most recent case to acknowledge the inherent power of Tribes to waive their sovereign immunity without an affirmative grant of authority from the United States. In *C&L Enterprises*, the Tribe entered into a construction contract for a building owned by the Tribe at an off-reservation site in Oklahoma. The contract contained an arbitration clause and provided that judgment could be entered upon the award in any court having jurisdiction. The American Arbitration Association rules, which were incorporated into the contract, provided that a judgment upon the award could be entered in "any federal or state court having jurisdiction thereof," and the contract contained a choice of law clause providing for the application of Oklahoma law.[13] Oklahoma law in turn provided that an agreement to arbitrate in Oklahoma conferred jurisdiction on Oklahoma courts to enforce the award. *Id.* at 412-413. No Act of Congress authorized the tribe to waive immunity. None was needed. The Court stated that "[t]he question presented is whether the Tribe *waived its immunity* from suit in state court...." *Id.* at 414 (emphasis added). For a unanimous Court, Justice Ginsburg ruled that "the tribe clearly consented to arbitration and to the enforcement of arbitral wards in Oklahoma state court; the Tribe thereby waived its sovereign immunity...." *Id.* at 423.

[13] The clause provided that the law of the place where the project was located [here Oklahoma] was applicable. 532 U.S. at 415.

New Mexico courts acknowledge the right and power of Indian Tribes to waive sovereign immunity and do not demand proof of prior federal approval. In *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548, the court of appeals noted that tribes possessed a common law sovereign immunity but declared, without qualification, that "[a] tribe can waive its own immunity by expressing such a waiver." *Id.* at ¶ 5. The *Sanchez* court also noted that Tribal power to waive sovereign immunity could be exercised "either generally or with respect to particular transactions. *Id.* at ¶ 19. Even more recently the court of appeals has confirmed that "[a] tribe is free to waive its sovereign immunity." *R &R Deli, Inc. v. Santa Ana Star Casino*, ¶ 10 , No. 25,581 (December 21, 2005).

B. The Pueblos Unequivocally Waived Sovereign Immunity for the Tort Actions which are the Subject of this Appeal

Although the power of tribes to waive immunity is indiputable, in some cases, a question arises as to whether the language of an apparent waiver is sufficiently explicit to constitute a waiver. *E.g., C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411 (2001); *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548.[14] That is not the case here. The Compact could not be more specific as to the waiver of sovereign immunity. Section 8(D) is titled "Specific Waiver of Immunity and Choice of Law" The section provides that "[t]he Tribe, by entering into this Compact and agreeing to the provisions of this section, waives

[14] The issue in *Sanchez* was whether a tribal corporate entity had waived immunity. The court noted that such entities might share the Tribe's immunity, "but may waive such protection." *Id.* at ¶ 6.

its defense of sovereign immunity in connection with any claims for compensatory damages" up to the amount of $50 million dollars and provides that its liability insurance policy will contain a provision requiring the insurer to forego the defense of sovereign immunity in any action within the policy limits. Compact § 8(D); *see also id.* at § 8(A).

C. When a Sovereign Waives its Sovereign Immunity, the Sovereign May Choose the Forums in Which the Resulting Litigation Will Occur.

Sovereigns that waive immunity are free to select the forums in which resulting disputes will be resolved. *Chandler v. Dix*, 194 U.S. 590, 591-592 (1904); *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959) (waiver of immunity in state court does not constitute a waiver of immunity in federal court). Thus, for example, the United States has waived sovereign immunity from certain tort liability but has limited resulting litigation to federal courts. 28 U.S.C. § 1346(b)(1). So too, New Mexico has partially waived sovereign immunity from tort liability but has limited the immunity-waived lawsuits to New Mexico State District Courts. *See* Section 41-4-18(A) NMSA 1978.

The same is true for Tribes. "Because a tribe need not waive immunity at all, it is free to 'prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit will be conducted.'" *R & R Deli, Inc.* at ¶ 10 (sovereign immunity waived only for litigation in tribal court); *Cavello v. Yankton Sioux Tribe*, 899 F.Supp. 431, 436 (D.S.D. 1995) (Where the Tribe's limited waiver of sovereign immunity was for suits brought in state court, federal court lacked power to hear case).

Several New Mexico cases acknowledge the relationship between a Tribe's waiver of immunity and the separate question of whether the Tribe has likewise consented to jurisdiction in the New Mexico District Courts and each recognizes that Tribes can consent to state court jurisdiction over immunity-waived claims. In *State ex rel. Coll v. Johnson*, 1999-NMSC-036 at ¶ 4, 128 N.M. 154, 990 P.2d 1277, for example, this Court noted that "the Tribes and Pueblos are entitled to sovereign immunity and *may not be sued in state court without their consent.*" (emphasis added). So, too, this Court acknowledged that "[a]s Sovereigns, Indian tribes are immune from suit absent Congressional authorization *or an effective waiver in tribal, state, or federal court. Srader v. Verant*, 1998-NMSC-025 at ¶ 29, 125 N.M. 521, 964 P.2d 82 (emphasis added). In *Srader*, this Court explicitly stated that "[a] State may exercise jurisdiction on Indian land in such cases where a tribe and state have consented to such an arrangement." *Id.* at ¶ 10, n. 2.

The United States Supreme Court has confirmed that Tribes can waive sovereign immunity and, in the same document, consent to state court jurisdiction over immunity-waived suits. In *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the Court, confronted the question "whether the Tribe waived its immunity from suit *in state court.*" *Id.* at 514 (emphasis added). The Court not only ruled that the Tribe waived sovereign immunity but also determined that "the Tribe is *amenable to a state-court suit*," *id.* (emphasis added), to enforce an arbitration award because it waived sovereign immunity and chose state court as a forum for enforcement of the award.

In the instant cases, the Pueblos could not have been more emphatic in their stated desire to have immunity-waived tort claims litigated in state district court. The Pueblos specifically agreed that "any such claim may be brought in state district court" unless the federal government, in IGRA, barred the Pueblos from the exercise of their sovereign power to choose state district court as the place of litigation for immunity-waived tort actions.

D. In Selecting the New Mexico State District Court as a Permissible Forum for Immunity-Waived Cases, the Pueblos Chose a Court that Has Subject Matter Jurisdiction.

Having chosen New Mexico District Court the Pueblos now assert that the District Court lacks subject matter jurisdiction to resolve the pending cases. Petitioners' Brief at 8-12. They assert that the District Court inherently lacks power to hear cases involving the Pueblos and that the consent of the parties cannot confer subject matter jurisdiction on courts that otherwise lack the power to hear the cases. The Pueblos purport to find support for this argument in Article XXI, § 2 of the New Mexico Constitution, Public Law 280 and *Williams v. Lee*, 358 U.S. 217 (1959).

None of these assertions is correct. The State District Courts are courts of general jurisdiction; there is nothing in the New Mexico Constitution that diminishes their jurisdiction; Public Law 280 is irrelevant and *Williams v. Lee* supports rather than negates state district court subject matter jurisdiction in these cases.

1. The New Mexcio district court is a court of general jurisdiction, presumptively possessing power to resolve all disputes

The New Mexico Constitution provides that the district court "shall have original jurisdiction of all matters not excepted in this constitution." N.M. Const. Art VI, § 13. This provision "means that the district courts are courts of general jurisdiction." *Sanchez v. Attorney General*, 93 N.M. 210, 214, 598 P.2d 1170, 1174 (Ct. App. 1979). As such, they enjoy the "presumption of jurisdiction, in the absence of proof to the contrary." *Marchman v. NCNB Texas National Bank*, 120 N.M. 74, 84, 898 P.2d 709, 719 (1995). The party seeking to disprove subject matter jurisdiction of a court of general jurisdiction has the burden of proof. *State v. Cutnose*, 87 N.M. 307, 309, 532 P.2d 896, 898 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

2. Article XXI, § 2 of the New Mexico Constitution does not bar the assertion of district court jurisdiction in these cases

The Pueblos claim that Article XXI, Section 2 of the New Mexico Constitution limits the subject matter jurisdiction of the District Court in these cases. Petitioners' Brief in Chief at 10. That is not correct. The provision "disclaim[s] all right and title" to described Indian land, N.M. Const. Art XXI, Sec. 2, and prohibits discriminatory taxation of Indian property. *Id.* The United States Supreme Court has noted the limited roll of equivalent provisions. In *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984), the Court noted that "As for the disclaimer provisions of the Enabling Act, the presence or absence of specific jurisdictional disclaimers rarely has had controlling significance in this Court's past decisions about state jurisdiction over Indian affairs or activities on Indian lands." *Id.* at 149. Analyzing the provision in the North Dakota Enabling Act (similar to the Enabling Act which required Passage of

Article XXI, § 2) the court concluded that the legislative history suggested "only that the Enabling Act's phrase 'absolute [congressional] jurisdiction and control' was meant to foreclose state regulation and taxation of Indians and their lands, not that Indians were to be prohibited from entering state courts to pursue judicial remedies against non-Indians." *Id.*

In like manner, Article XXI, § 2 does not disclaim state court subject matter jurisdiction of tort cases brought against the Pueblos with the Pueblos' consent. Neither land titles nor taxation are involved in the pending litigation. The constitutional provision is only "a disclaimer of proprietary interest" in title to Indian lands, "and not a disclaimer of governmental control." *Sangre De Cristo Development Corp. v. City of Santa Fe*, 84 N.M. 343, 350, 503 P.2d 323, 330 (1972). Article XXI, § 2 does not even bar the State of New Mexico from regulating Indian Country land use so long as title to the land is not affected. *Id.* at 350-351, 503 P.2d at 330-331.

Furthermore, this Court has recognized that Article XXI, § 2 does not prohibit the exercise of district court jurisdiction over tort actions occurring within the territorial limits of a Tribe or Pueblo. In *Paiz v. Hughes*, 76 N.M. 562, 417 P.2d 51 (1966), tribal members injured by a non-Indian in a motor vehicle accident within the Jicarilla-Apache Reservation sued in state district court for personal injuries and wrongful death. The District Court dismissed on the ground that the district court lacked jurisdiction of the subject matter. This Court reversed. The Court addressed a number of challenges to the district court's jurisdiction including a claim that Article XXI, § 2 deprived the district court of jurisdiction. *Id.* at 565, 417 P.2d at 53. This Court rejected the argument that

Article XXI, § 2 limited the subject matter jurisdiction of the district court because that provision is "a disclaimer of proprietary, rather than of governmental interest." *Id.*

3. Public Law 280 poses no barrier to state court jurisdiction of these cases

The Pueblos also rely on Public Law 280 as a barrier to state court jurisdiction. Petitioners' Brief at 9-10. Public Law 280 is a fifty year old statute that provides that states could assert civil and criminal jurisdiction over Indian parties and transactions by following certain procedures built into the statutory scheme. *See Cohens's Handbook* at 544. New Mexico is not one of the states to which the statute applies, *id.*, so it has no relevance to this case. The Pueblos nonetheless argue that unless New Mexico follows those procedures, it cannot assert jurisdiction over Indian Tribes even though they consent to jurisdiction. Petitioner's Brief at 9. The Pueblos are wrong. Public Law 280 applies to "jurisdiction over civil causes of action between Indians or to which Indians are parties." 28 U.S.C. § 1360(a). It does not apply to actions against Tribes. Indeed, even Tribes that are covered by Public Law 280 reject its application to suits against them: "Because this language [of Public Law 280] refers only to individual Indians and does not mention suits against Indian nations, tribal defendants sued in Public Law 280 states have argued that the states lack jurisdiction altogether." *Cohens's Handbook* at 555. Moreover, *C&L Enterprises Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001), demonstrates that Tribal waiver of immunity and consent to state court jurisdiction is effective without reference to Public Law 280.

E. Application of the *Williams v. Lee* Infringement Test Demonstrates that New Mexico Courts Have Subject Matter Jurisdiction of These Casino-Torts Cases.

The Pueblos' ritual incantation of *Williams v. Lee*, 358 U. S. 217 (1959), in support of their assertion that New Mexico courts lack subject matter jurisdiction is misplaced. *Williams* supports the existence of state court jurisdiction in the cases under review.

Williams involved a claim for breach of contract brought by a non-Indian against an individual Indian for an on-reservation transaction. The Supreme Court denied jurisdiction because "the exercise of state jurisdiction ... would infringe on the right of the Indians to govern themselves." *Id.* at 223. The Court thus acknowledged that states must respect the right of sister sovereigns to make decisions for themselves regarding the content of their law and the forums for its enforcement. Absent contrary Congressional mandate, "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.

Williams does not bar state court jurisdiction: It provides a roadmap for determining the extent to which state courts may exercise their powers of general jurisdiction without violating the sovereign status of Indian tribes. In making that determination, New Mexico courts "start with the proposition that the Indian land is a part of New Mexico and that New Mexico law, both civil and criminal, is in force on the Indian land unless rendered inapplicable by higher authority." *Alexander v. Cook*, 90 N.M. 598, 599, 566 P.2d 846, 847 (Ct. App. 1977). Applying the *Williams* infringement test, this Court correctly noted that it provides "that a state could protect its interest up to the point where tribal self government would be affected." *Temple Recovery Services, Inc. v. Belone*,

2003-NMSC-19, ¶ 134 N.M. 133, 74 P.3d 67,. The core issue before this Court is whether tribal self-government would be negatively affected if New Mexico district courts assert jurisdiction in these casino-tort cases.

The *Williams* test is useful when determining whether state courts can exercise jurisdiction in lawsuits concerning individual Indians conducting activities in Indian Country where the sovereign Tribe has not agreed to share jurisdiction with the State. Violation of the *Williams* infringement test is impossible when the State merely carries out the express wishes of the Indian governments that state courts be available to litigate casino torts and that state law should apply to resolve the litigation.

When the Pueblos waived immunity and selected the state district court as a proper forum for litigation, they exercised their inherent sovereign right to do so. Only Congress could have denied them that power, and Congress did not do so. Indeed, "[b]efore holding that treaties or federal statute limit tribal powers, the courts have generally insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty," *Cohens's Handbook*, at 222, and there is no such expression of congressional extinguishment of sovereignty here. The Pueblos also agreed that "New Mexico law shall govern the substantive rights of the claimants," Compact § 8(D), with a single exception.[15] The Pueblos do not here assert that they lacked power to choose New Mexico law, just as they do not deny that they have the power to waive

[15] The Pueblos' choice of New Mexico law was neither the result of a lack of bargaining power, nor inadvertent. To the contrary, the Pueblos bargained for and preserved the right to apply Pueblo law in Pueblo courts to immunity-waived casino torts brought against the Pueblo by members of the Pueblo. *See* Compact, § 8(D).

sovereign immunity. Indeed, even private parties can agree to the choice of a particular state's law to control litigation. *E.g., United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 775 P.2d 233 (1989). So too, sovereigns can condition their waiver of immunity on the application of a particular body of law. *E.g.*, Section 41-4-14 NMSA (1998 Repl.) (defenses to New Mexico Tort Claims Act cases are those "available under the law of New Mexico"). Sovereigns can even agree that the law of a different government shall apply to determine the sovereign's tort liability. 28 U.S.C. Sec. 1346(b); *e.g., Cheromiah v. United States*, 55 F.Supp.2d 1295 (D. NM 1999) (United States liable in accordance with laws of Indian Tribe).

The Pueblos' choice of New Mexico law has particular significance for the application of the *Williams* test. Having selected New Mexico tort law to resolve the casino-tort disputes, the Pueblos cannot now successfully argue that the application of New Mexico law in New Mexico courts will strip the Pueblos of the ability "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). As a leading treatise has noted:

> [J]ust as tribal court jurisdiction is ordinarily derivative of tribal authority to regulate the underlying dispute, so too, is state court jurisdiction generally derivative of the ability to apply state substantive law as the rule of decision.

American Indian Law Deskbook, 213, (Charles Smith, ed., Univ. Colo. Press 2004).

The Pueblos carefully reserved the right to apply Pueblo law in Pueblo courts when a Pueblo member sues for a casino tort: "[T]he trial court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe." Compact § 8(D).

This further undercuts the Pueblos' reliance on *Williams* by illustrating that the Compact does not deprive the tribal court of subject matter jurisdiction over casino torts. To the contrary, the Compact anticipates that Pueblo courts will have concurrent jurisdiction with New Mexico courts. It also demonstrates that with but the one exception noted, the Pueblos have agreed that New Mexico substantive law "shall be applied by the forum in which the claim is heard." *Id.* Thus, in Compact provisions not here challenged by the Pueblos, the Pueblos agreed not to apply tribal law in tribal courts to casino torts unless the plaintiff is a member of the Pueblo. Under the Compact, Pueblo law will not be applied in Pueblo courts in almost any event.

The Pueblos have exercised their sovereign right to negotiate and enter into Compacts with New Mexico. They have concluded that the benefits of the Compact justify a partial waiver of sovereign immunity, concurrent jurisdiction in tribal and state court and the application of state law generally to resolve casino-tort cases in state or Pueblo courts. They carefully reserved the right to apply their own law in their own courts when the Pueblos had a vital interest in doing so. To honor the Pueblos' choices is not to violate *Williams v. Lee* but to demonstrate respect for the principles of tribal sovereignty that *Williams v. Lee* protects.

For these reasons, this Court should conclude, as it did in *Temple Recovery Services, Inc.*, that "[w]e cannot see and [the Pueblo] does not demonstrate how concurrent jurisdiction would impinge upon tribal sovereignty in this context." *Temple Recovery Services, Inc. v. Belone*, 2003-NMSC-19, ¶ 15, 134 N.M. 133, 74 P.3d 67.

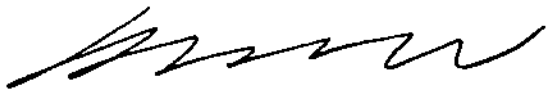
CONCLUSION

New Mexico has a long history of respect for the sovereignty of Indian governments. Affirming the decisions of the courts below in these cases is not to denigrate that sovereignty but to affirm it, because:

> [S]overeignty and self-determination are promoted when tribes are free to decide what voluntary agreements they will or will not enter into, and when and under what circumstances they will waive their sovereign immunity and subject themselves to state court jurisdiction.

Friends of East Willits Valley v. County of Mendocino, 123 Cal.Rptr.2d (Cal. App. 2002).

Respectfully submitted,



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