No. 18-____

IN THE

Supreme Court of the United States

HAROLD MCNEAL AND MICHELLE MCNEAL,

Petitioners,

v.

NAVAJO NATION AND NORTHERN EDGE NAVAJO CASINO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

MICHAEL B. BROWDE
DAVID J. STOUT
1117 Stanford, NE
Albuquerque, NM 87106
(505) 277-0080
browde@law.unm.edu
stout@law.unm.edu

LINDA J.R. RIOS
Counsel of Record
RIOS LAW FIRM
2201 San Mateo Blvd. NE
Ste. 3
Albuquerque, NM 87110
(505) 232-2298
Linda.rios@lrioslaw.com

Counsel for Petitioners

January 10, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In conjunction with this Court's modern jurisprudence fostering tribal sovereignty, Congress enacted the Indian Gaming Regulatory Act (IGRA) intending that States and Native American Tribes "will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming," recognizing that "it is up to those entities to determine what provisions will be in the compacts." (App. 115a). Under that statutory regime, the State of New Mexico and the Navajo Nation agreed it was important that visitors to the Navajo gaming facility "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." (App. 90a).

To accomplish this objective, the State and Nation jointly agreed that the Nation would waive sovereign immunity for torts caused by the conduct of the Gaming Enterprise. They also explicitly agreed that any such claim would be resolved under New Mexico law, and "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." (App. 90a) (emphasis added).

The question presented is:

Whether the Tenth Circuit panel violated the current jurisprudence of this Court and the Congressional policy underlying IGRA by precluding the Nation from exercising its sovereign authority to permit a patron's tort claim against the Nation and its gaming facility to be brought in state court without express congressional permission.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Harold McNeal and Michelle McNeal respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-42a) is reported at 896 F.3d 1196. The district court's opinion (App. 43a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2018. A petition for rehearing was denied on September 10, 2018 (App. 1a). On December 6, 2018 Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 10, 2019.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The asserted grounds for jurisdiction in the federal district court were 28 U.S.C. §§ 1331, 1363 and 1343. The circuit court addressed the basis for federal jurisdiction and concluded that federal court jurisdiction was proper under Section 1331 (App. 11a-12a).

STATUTORY PROVISIONS INVOLVED

This case involves the sovereign right of the Navajo Nation to consent to state court jurisdiction in a gaming compact when waiving sovereign immunity, and an interpretation of the language of the Indian

---

[1] The New Mexico Attorney General's similar motion for extension of time on behalf of the Honorable Bradford J. Dalley was granted to and including February 8, 2019.

Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 – 2721. Reproduced are: relevant portions of IGRA (App. 95a-109a); relevant parts of the legislative history of IGRA (App. 110a-123a); and relevant sections of the compact between the Navajo Nation and the State of New Mexico (App. 88a-94a).

STATEMENT OF THE CASE

A. Background

This action arose out of a slip-and-fall tort case filed in New Mexico state court against the Navajo Nation and its Northern Edge Navajo Casino by the McNeals. The Navajo Nation contested the state court's jurisdiction over the tort action, both in the state court action and in the federal declaratory judgment lawsuit that gave rise to the Tenth Circuit judgment, of which the McNeals seek the further review of this Court.

B. The State Court Action

In their 2014 lawsuit against the Navajo Nation and its casino in state district court, the McNeals alleged that, while Harold McNeal was a patron at the Casino, he slipped and fell on a wet floor in the casino bathroom. The McNeals asserted claims for negligence and loss of consortium.

The Navajo Nation moved to dismiss the McNeals' lawsuit claiming that IGRA precluded the agreement between the tribe and the state authorizing jurisdiction over casino-visitor personal injury suits to a state court. The Honorable Daylene Marsh—the initial state district court judge assigned to the case—denied the Navajo Nation's motion to dismiss, holding that *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644, was binding precedent and had expressly rejected that claim. Judge Marsh stayed

proceedings to allow the tribe to challenge the ruling in federal court.

C. The Federal Court Action

The Nation and its casino then filed a declaratory judgment action in federal district court against the state court judge[2] and the McNeals. In its motion for summary judgment, the Navajo Nation asserted that, irrespective of its compact agreement, neither IGRA nor the Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 553 et seq., (the "NNSIA") permitted it to consent to jurisdiction in state court of private personal injury lawsuits against tribes or tribal entities.

The Honorable Martha Vazquez denied the Navajo Nation's motion for summary judgment. Judge Vazquez ruled that the Navajo Nation's agreement in its gaming compact with the State of New Mexico to consent to state court jurisdiction in personal injury cases arising out of the Navajo Nation's gaming facility was within the Tribe's sovereign authority and was not precluded by IGRA or beyond the tribal authority under Navajo law. (*See* App. 64a-86a). Judge Vazquez agreed with the New Mexico Supreme Court's ruling in *Doe v. Santa Clara Pueblo*, that held "Congress intended the parties to negotiate, if they wished, the choice of laws for personal injury suits against casinos as well as the choice of venue for the enforcement of those laws. Nothing in IGRA required the tribes to negotiate the subject, not does anything in IGRA prevent them from doing so." 2007-NMSC-008, ¶ 47, 154 P.3d at 657. As a result, Judge Vazquez

---

[2] Judge Dalley had been substituted for Judge Marsh in the state court action, and also in the federal court proceeding.

dismissed the Navajo Nation's declaratory judgment action. (App. 87a).

D. The Appeal

The Navajo Nation and the Northern Edge Navajo Casino appealed and the Tenth Circuit reversed the judgment of the district court, holding that the Nation had no right to consent to state court jurisdiction over the McNeals' tort claim.[3]

The Panel's ruling on the merits, which is the subject of this Petition, rests on several conclusions. First, the Panel determined that Congress must affirmatively authorize any attempt to negotiate and agree to jurisdiction of the McNeal's tort claim in state court, and Congress failed to do so in IGRA. (Panel Op. 13-15.) The Panel opinion did not discuss Judge Dalley's argument that under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, *Inc.*, 523 U.S. 751 (1998), tribes have inherent sovereign authority to consent to state court jurisdiction that is not dependent on permission granted by Congress in IGRA, nor the related argument advanced by Amicus New Mexico Trial Lawyers Association that failure to affirm the judgment below would undermine the Tribe's inherent sovereign powers.

Second, the Panel determined that tortious conduct resulting in the personal injury involved here—negligence in identifying and remediating hazards in

[3] The Nation's alternative claim, that its compact agreement to authorize state court jurisdiction was not permitted under tribal law, was not ruled on by the circuit court, (App. 15a at n.4) and is not at issue in this Court.

a restroom used by patrons in the tribe's casino—was not "directly related to, and necessary for" the licensing and regulation of gaming activity, or "directly related to the operation of gaming activities," as provided in §§ 2710(d)(3)(C) (i) and (vii) of IGRA. (App. 18a-24a and 28a-34a). Third, and finally, the Panel concluded that these subsections of IGRA were unambiguous thereby precluding it from considering the statute's legislative history which may have indicated a contrary intent of Congress. (App. 26a-27a).

Therefore, the Panel concluded that the Navajo Nation lacked the necessary Congressional permission to agree to state court jurisdiction, requiring the reversal of the district court's ruling with direction to the district court to enter declaratory judgment in the Navajo Nation's favor, barring state court jurisdiction over the underlying personal injury action. (App. 41a-42a).

REASONS FOR GRANTING THE WRIT

A. Summary of Reasons

The Tenth Circuit's decision overturned the Navajo Nation's exercise of its sovereign power agreeing to state court jurisdiction over the McNeals' tort action because Congress had not explicitly authorized the Nation to do so in IGRA. That decision merits this Court's further review for the following reasons:

First, the decision conflicts with this Court's bedrock policy acknowledging and encouraging a tribe's right to exercise its inherent sovereign power to determine for itself what is in the best interest of the tribe. That failure led the court to wrongly conclude that here IGRA must affirmatively grant the Navajo Nation authority to negotiate and agree to state court jurisdiction over the McNeals' tort claims. To the contrary, the

only appropriate consideration of the Congressional power to abrogate inherent tribal sovereignty is whether IGRA contained an express prohibition against allocating jurisdiction to state court because Congress can limit the sovereignty of tribes but does not affirmatively grant sovereign power to tribes.

Second, in construing IGRA as it did the Tenth Circuit decision wholly ignores the legislative history leading to IGRA's passage—a history that confirms Congress's intent to leave tribes free to bargain with states as equals to determine mutually agreeable provisions in state gaming compacts, including matters of the applicability of state law and the enforcement of that law in state courts.

Third, the circuit court has decided an important federal question in a way that conflicts with a decision by the New Mexico Supreme Court.

I. THE TENTH CIRCUIT DECISION VIOLATES THE SETTLED MODERN JURISPRUDENCE OF THIS COURT THAT FOSTERS INHERENT TRIBAL SOVEREIGN POWER AND ALLOWS TRIBES TO PURSUE THEIR OWN INTERESTS IN CONTRACT NEGOTIATIONS

This Court is well aware of the evolution of federal policy with respect to the sovereign status of tribes – from the earliest Marshall Trilogy concerning the Cherokee Nation, to the Allotment and Assimilation Era (1887-1934), followed by the Reorganization Era (1934-1953) and the Termination Era (1953-1961). *See Cohen's, Handbook of Federal Indian Law*, §§ 1.02-1.06 (Nell Jessup Newton ed. 2012) ("*Cohen's Handbook*"). That history finally ended with the dramatic change in Federal Indian policy away from

federal paternalism to self-determination and self-governance. The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 to 450e-3 (transferred to 25 U.S.C. §§ 5301-5310), and the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa to 458hh (transferred to 25 U.S.C. §§ 5361-5368), constituted a declaration of independence for tribal governments that acknowledged tribal governments considerable freedom to govern.

It is now recognized that powers lawfully vested in a tribe 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." *Cohen's Handbook* § 4.01[1][a] at 207 (quoting *Wheeler v. United States,* 435 U.S. 313, 322-323 (1978)). The modern retreat from paternalism and wholesale federal governance over tribal affairs is now the settled doctrine of this Court: tribes possess broad, inherent sovereignty to govern the affairs of tribal members and tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982).

Thus, this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* made clear that the forum where a tribe is subject to suit depends on when "the tribe has waived its immunity." 523 U.S. 751, 754 (1998). Three years later in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, this Court explicitly recognized that when a tribe waives its immunity, the tribe may also consent to jurisdiction in state court. 532 U.S. 411, 414 (2001).

Although Congress has plenary authority to abrogate that tribal authority, *Kiowa Tribe*, 523 U.S. at 754 and *C&L Enterprises*, 532 U.S. at 414, Congressional intent to do so must be clear and unambiguous, because "courts will not lightly assume that Congress

in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 790 (2014).

The Tenth Circuit panel—without any focused attention paid to either *Kiowa Tribe* or *C&L Enterprises*[4]—ignored the doctrine of inherent tribal sovereign power. Instead, it wrongly assumed that IGRA must contain a clear congressional grant of permission to the Navajo Nation to negotiate for and agree to the jurisdiction-allocation provision in the Compact. Finding no express congressional grant of power, the Panel concluded that there was no valid basis for state court jurisdiction over the McNeals' personal injury lawsuit.

The Tenth Circuit erred in ignoring this Court's affirmation of the inherent sovereign power of the Navajo Nation to consent to state court jurisdiction and this Court's insistence that if Congress desires to limit that sovereign power, it must do so explicitly. In accordance with this Court's jurisprudence, the Navajo Nation and the State properly framed the question in the Compact when they mutually agreed to the exercise of state court jurisdiction "*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." (App. at 90a) (emphasis added).

---

[4] Instead, the panel misplaced reliance on *Kennerly v. District Court,* 400 U.S. 423 (1971). The *Kennerly* Court twice emphasized that it "was presented solely with the question of the procedures by which 'tribal consent' must be manifested under the new [Indian Civil Rights] Act," *id.* at 429, and that "today's decision is concerned solely with the procedural mechanisms by which tribal consent must be registered." *Id.* at 430, n. 6.

Having failed to properly frame the question, the Tenth Circuit's analysis of the relevant text of IGRA is fatally flawed and the decision undermines the proper balance between tribal sovereignty and the recognized congressional power to abrogate that sovereign power.

II. THE TENTH CIRCUIT'S DECISION WHOLLY IGNORES AND IS CONTRARY TO THE INTENT AND PURPOSE OF IGRA.

Having wrongly searched for an affirmative grant of congressional authority and finding none, the Tenth Circuit departed from the accepted and usual course of proceedings and rejected as irrelevant an analysis of the legislative history preceding the adoption of IGRA. But the legislative history is critical and confirms that IGRA was intended—consistent with this Court's modern jurisprudence—to support the tribes' right to bargain as equals with states in negotiating the terms of gaming compacts. This compounded the Panel's error.[5]

---

[5] The Panel's decision to ignore the legislative history of IGRA was also triggered by its erroneous conclusion that "*Bay Mills* leads us to the clear conclusion that Class III gaming actually relates only to activities actually involved in the *playing* of the game." (App. 19a) (emphasis in original). But *Bay Mills* is not controlling. *Bay Mills* dealt with sovereign immunity; not state court jurisdiction. It held only that "the abrogation of immunity in IGRA applies to gaming on, but not off Indian lands." 572 U.S. at 804. Most important, *Bay Mills* rejected an attempt by a State to insist on the abrogation of immunity in the absence of *both* congressional authority and where there was no waiver by the tribe, *id.* at 803-804, while *Kiowa* makes clear that a tribe is subject to suit where Congress has authorized the suit *or* the tribe has waived its immunity. *Kiowa*, 523 U.S. at 751. Here, the Nation

As the Senate Report from the Select Committee on Indian Affairs ("Report"), emphasized, 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 occurs. 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 . . . ." (App. 120a). Congress made clear it intended the compact process to assure the proper balancing of many important tribal and state interests between equal and independent sovereigns.

The Report identified many of the tribal and state interests that were legitimate matters for consideration and 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:

> 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.*

---

waived its immunity from state court jurisdiction and it consented to state court jurisdiction in the Compact as authorized by both *Kiowa* and *C&L*. *See* Point I, *infra.*

> 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*. . . .

(App. 121a) (emphasis added). 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" (App. 111a). Senator Domenici, too, noted the desire and need for flexible negotiations and give-and-take between sovereigns:

> 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.

(App. 116a). Congressman Bilbray 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 . . . ." (App. 110a).

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." (App. 121a). The Report emphasized that "[t]he Committee concluded that the compact

process is a viable mechanism for setting various matters between two equal sovereigns." (App. 120a).

Recognizing its significance for tribal sovereignty, Congress intended as a subject for negotiation the allocation of jurisdiction between the tribe and the states within the framework created by IGRA. (*see* App. 122a). The Chair of the Senate Select Committee on Indian Affairs, Senator Inouye, in an important colloquy with Sen. Domenici during the floor debate declared 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.*

(App. 113a) (emphasis added).

Senator Evans was most explicit that "[t]he 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." (App. 115a). 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 they retain and while we respect their rights to decide to what extent and in what manner they choose to participate." (App. 115a).

It is in that context—evidencing full respect for tribal sovereignty rather than viewed through the

narrow lens of federal paternalism—that the provisions of IGRA, under which Congress delegated compacting authority to states and tribes as equal sovereigns, must be evaluated.

III. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE NEW MEXICO SUPREME COURT.[6]

The circuit court's decision is in direct conflict with the decision of the New Mexico Supreme Court in *Doe v. Santa Clara Pueblo,* particularly its careful and fully explicated analysis of legislative history. 2007-NMSC-008, ¶¶ 37-45; 154 P.3d at 654-56. That analysis led to the *Doe* court's holding that:

> Congress intended the parties to negotiate, if they wished, the choice of laws for personal injury suits against casinos as well as the choice of venue for the enforcement of those laws. Nothing in IGRA required the tribes to negotiate the subject, nor does anything in IGRA prevent them from doing so. Congress unambiguously left that subject to the parties to determine for themselves.

Id. ¶ 47, 154 P.3d at 657. Thus, the New Mexico Supreme Court's decision correctly viewed IGRA through the prism of the inherent sovereign rights of tribes, recognizing that Congress did not intend to

---

[6] Not only do the circuit court decision and rationale have binding authority on New Mexico gaming tribes, but it also directly limits the authority of the more than 50 tribes that have entered into gaming compacts throughout the circuit. See list of gaming compacts, found at: https://www.bia.gov/as-ia/oig/gaming-compacts (last visited January 3, 2019).

limit the exercise of those rights in the negotiation of a gaming compact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

MICHAEL B. BROWDE
DAVID J. STOUT
1117 Stanford, NE
Albuquerque, NM 87106
(505) 277-0080
browde@law.unm.edu
stout@law.unm.edu

LINDA J.R. RIOS
Counsel of Record
RIOS LAW FIRM
2201 San Mateo Blvd. NE
Ste. 3
Albuquerque, NM 87110
(505) 232-2298
Linda.rios@lrioslaw.com

Counsel for Petitioners

January 10, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed: September 10, 2018]

No. 16-2205

NAVAJO NATION, *et al.*,
Plaintiffs-Appellants,
v.

BRADFORD J. DALLEY, District Judge,
Eleventh Judicial District, New Mexico,
in his official capacity, *et al.*,
Defendants-Appellees,
and

NEW MEXICO TRIAL LAWYERS ASSOCIATION,
Amicus Curiae.

ORDER

Before HOLMES, PHILLIPS, and MORITZ, Circuit Judges.

Appellee Bradford J. Dalley's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed: July 24, 2018]

No. 16-2205

NAVAJO NATION; NORTHERN EDGE NAVAJO CASINO,

Plaintiffs-Appellants,

v.

The Honorable BRADFORD J. DALLEY, District Judge, Eleventh Judicial District, New Mexico, in his official capacity; HAROLD MCNEAL; MICHELLE MCNEAL,

Defendants-Appellees,

NEW MEXICO TRIAL LAWYERS ASSOCIATION; PUEBLO OF SANTA ANA,

Amici Curiae.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:15-CV-00799-MV-KK)

Patrick T. Mason, Mason & Isaacson, P.A., Gallup, New Mexico, for Plaintiffs-Appellants.

Nicholas M. Sydow, Office of the New Mexico Attorney General, Santa Fe, New Mexico, for Defendant-Appellee Bradford J. Dalley.

Daniel M. Rosenfelt, Rios Law Firm, Albuquerque, New Mexico (Linda J. Rios, Rios Law Firm, Albuquerque,

New Mexico, with him on the brief), for Defendants-Appellees Harold McNeal and Michelle McNeal.

Michael B. Browde, Albuquerque, New Mexico (David J. Stout, Albuquerque, New Mexico, with him on the brief), for Amicus Curiae New Mexico Trial Lawyers Association, in support of Defendants-Appellees.

Richard W. Hughes, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP, Santa Fe, New Mexico (Donna M. Connolly, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP, Santa Fe, New Mexico, with him on the brief), for Amicus Curiae Pueblo of Santa Ana, in support of Plaintiffs-Appellants.

Before HOLMES, PHILLIPS, and MORITZ, Circuit Judges.

HOLMES, Circuit Judge.

The Appellants, the Navajo Nation and its wholly-owned government enterprise the Northern Edge Navajo Casino (together, the "Tribe" or "Nation"), entered into a state-tribal gaming compact with New Mexico under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. The Tribe agreed not only to waive its sovereign immunity for personal-injury lawsuits brought by visitors to its on-reservation gaming facilities, but also to permit state courts to take jurisdiction over such claims. Harold and Michelle McNeal (the "McNeals") are plaintiffs in just such a state-court action against the Tribe. Mr. McNeal allegedly slipped on a wet floor in the Northern Edge Navajo Casino. This slip-and-fall incident constituted the basis for the McNeals' tort claims against the Nation for negligence, res ipsa loquitur, and loss of consortium. Judge

Bradford Dalley is a New Mexico state judge who presides over the ongoing state-court proceedings. We refer to the McNeals and Judge Dalley collectively as the Appellees.

The Tribe moved to dismiss the McNeals' complaint, arguing that the state court lacked jurisdiction because neither IGRA nor Navajo law permits the shifting of jurisdiction to a state court over such personal-injury claims. The state court rejected that motion. In response, the Tribe sought declaratory relief in federal court on the basis of the same arguments. The district court granted summary judgment for the McNeals and Judge Dalley, holding that IGRA permitted tribes and states to agree to shift jurisdiction to the state courts and that Navajo law did not prohibit such an allocation of jurisdiction. The Tribe timely appealed. Prior to oral argument, we ordered the parties to submit supplemental briefs as to whether the district court had jurisdiction.

Along with the jurisdictional issue, the parties also dispute (1) whether IGRA permits an Indian tribe to allocate jurisdiction over a tort claim arising on Indian land to a state court, and (2) assuming that IGRA does allow for such an allocation, whether the Navajo Nation Council ("NNC") was empowered to shift jurisdiction to the state court under Navajo Law.

After first concluding that we have jurisdiction to hear this appeal, we determine that IGRA, under its plain terms, does not authorize an allocation of jurisdiction over tort claims of the kind at issue here. Accordingly, we reverse the judgment of the district court and remand with instructions to grant the declaratory relief sought by the Nation.

I

A

In 1987, the Supreme Court decided *California v. Cabazon Band of Mission Indians*, in which it held that states could not regulate gaming activities on Indian land without Congressional authorization. 480 U.S. 202, 207 (1987) (rejecting California's attempted regulation of bingo and some card games), *superseded by statute*, Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, *as recognized in Michigan v. Bay Mills Indian Cmty.*, --- U.S. ----, 134 S. Ct. 2024 (2014); *see New Mexico v. Dep't of Interior* ("*N.M. / DOI*"), 854 F.3d 1207, 1211 (10th Cir. 2017) ("In 1987, the Supreme Court [in *Cabazon*] held that states lack regulatory authority over gaming activities on Indian land except where Congress has expressly provided for such authority."); Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 428 (2001) ("The [*Cabazon*] Court held that although Congress may have given to the State of California criminal jurisdiction within Indian reservations, Congress had not given the state the lesser power of civil regulatory jurisdiction on reservations.").

In response to that "bombshell" ruling, Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 154 (2010), Congress enacted IGRA in 1988 to create a framework for states and Indian tribes to cooperate in regulating on-reservation tribal gaming, *see Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1232 (10th Cir. 2017) ("In response to the Supreme Court's holding in [*Cabazon*], that states lack regulatory authority over Indian gaming on tribal lands absent congressional action, Congress enacted IGRA, 25 U.S.C. §§ 2701–2721, to provide a role for states in regulating

Indian gaming activities on tribal lands."); *see also Bay Mills*, 134 S. Ct. at 2034 ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else."); *N.M./DOI*, 854 F.3d at 1212 (noting that IGRA "gives states a role in the regulation of Indian gaming"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.01, at 876 (Nell Jessup Newton ed., 2012) [hereinafter, "COHEN'S HANDBOOK"] ("IGRA accommodated the interests of tribes in pursuing gaming but also set forth a federal regulatory regime, and gave a powerful role to states by providing for significant state involvement in the decision to permit casino-style gaming."). IGRA enables states and tribes to negotiate compacts addressing a range of topics relating to tribal gaming. *See* 25 U.S.C. § 2710(d).

Under IGRA, tribes that seek to conduct gaming activities are incentivized to negotiate gaming compacts with states because, absent such compacts, the most "lucrative" form of gaming—Class III gaming—is forbidden. *N.M./DOI*, 854 F.3d at 1212 ("The present case concerns Class III gaming, which includes the most lucrative forms of gaming."); *see* § 2710(d)(1); *Bay Mills*, 134 S. Ct. at 2035 ("[A] tribe cannot conduct class III gaming on its lands without a compact . . . ."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) ("The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located."). "Class III gaming . . . includes casino games, slot machines, and horse racing." *Bay Mills*, 134 S. Ct. at 2028; *see* Washburn, *supra*, at 429 ("IGRA provides that tribes may engage in Class III

casino-style gaming only if they first negotiate 'compacts' with states.").[1]

Importantly, IGRA expressly prescribes the matters that are permissible subjects of gaming-compact negotiations between tribes and states. § 2710(d)(3)(C). In the tribal-state compact that the Tribe and New Mexico entered into, the Tribe agrees not only to waive its sovereign immunity as to personal-injury claims brought by visitors to its casinos but also to permit such claims to be brought in state court. *See* Aplt.'s

---

[1] Notably, Congress also sought to encourage states to come to the gaming-compact bargaining table by statutorily obliging them in IGRA to negotiate in good faith and abrogating their sovereign immunity if they did not do so. § 2710(d)(3)(A), (7)(A); *see N.M. / DOI*, 854 F.3d at 1211 (noting that "IGRA provides that when a tribe believes a state has failed to negotiate in good faith, the tribe may sue in federal court"). However, the Supreme Court defanged this enforcement procedure when it held in *Seminole Tribe* that "Congress lacked the authority to make states subject to suit by Indian tribes in federal court." *N.M. / DOI*, 854 F.3d at 1211; *see Seminole Tribe*, 517 U.S. at 72 ("[W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."); *see also* Ducheneaux, *supra*, at 177 ("[E]ight years after the enactment of IGRA, the Supreme Court, in the case of *Seminole Tribe v. Florida* . . . held that Congress did not have power to subject states to suits under the Commerce clause . . . . This decision upset the delicate balance Congress had adopted in the Tribal-State Compact provision and, as feared by Congress, put the tribes at the mercy of states in compact negotiations." (footnotes omitted)); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 71 (1997) (noting that, as a result of Seminole Tribe, many states have "refus[ed] to negotiate further tribal-state compacts" which has left the tribes with "limited remedies").

App. at 26 (State-Tribal Compact, dated Nov. 6, 2003).[2] More specifically, the compact permits such

[2] The relevant portions of the compact read:

> SECTION 8. Protection of Visitors.
>
> A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Nation, 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 Nation 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.
>
> . . . .
>
> D. Specific Waiver of Immunity and Choice of Law.
>
> The Nation, by entering into this Compact and agreeing to the provisions of this Section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this Section. This is a limited waiver and does not waive the Nation's immunity from suit for any other purpose. The Nation shall ensure that a policy of insurance that it acquires to fulfill the requirements of this Section shall include a provision under which the insurer agrees not to assert the defense of sovereign

state-court litigation, "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." *Id*.

B

The present dispute has its genesis in a slip-and-fall case that the McNeals brought in New Mexico state court. Mr. McNeal allegedly fell on a wet bathroom floor in the Navajo Northern Edge Casino. He and his wife sued the Nation, which owns and operates the casino, claiming negligent maintenance, res ipsa loquitur, and loss of consortium. In a motion to dismiss, the Tribe argued that the state court lacked subject-matter jurisdiction for two reasons. First, it contended that this was so because IGRA does not authorize states and tribes to enter into compacts that shift jurisdiction over tort claims stemming from events on Indian country to state court—*viz.*, IGRA does not contemplate that the shifting of jurisdiction over such claims is a permissible subject of compact negotiations. Second, it argued that NNC was not authorized to shift jurisdiction over tort claims against the Nation, like those of the McNeals, to state court.

The state court denied the Tribe's motion to dismiss on the basis that the New Mexico Supreme Court, in

---

> immunity on behalf of the insured, up to the limits of liability set forth in this Paragraph. The Nation agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Nation.

Aplt.'s App. at 26–27.

Doe v. Santa Clara Pueblo, had already decided the issue. 154 P.3d 644, 646 (N.M. 2007) ("We now . . . hold[] that state courts have jurisdiction over personal injury actions filed against [the tribes] arising from negligent acts alleged against casinos owned and operated by the [tribes] and occurring on the [tribes'] lands."). Subsequently, Judge Dalley took over the state court case.

The Tribe then brought this suit for a declaratory judgment in the U.S. District Court for the District of New Mexico. The Tribe sought a declaratory judgment "that [the] Indian Gaming Regulatory Act does not permit the shifting of jurisdiction from tribal courts to state courts over personal injury lawsuits brought against tribes or tribal gaming enterprises, and that the New Mexico state courts do not have jurisdiction over lawsuits such as the *McNeal Lawsuit*." Aplt.'s App. at 11–12. (Am. Compl., dated Sept. 21, 2015).

The Tribe moved for summary judgment, and the district court denied relief. The court first addressed whether the Nation inherently had the authority to permit state court jurisdiction over claims arising in Indian country, and held that it did. It then concluded that NNC was authorized under Navajo law to shift jurisdiction over tort claims against the Nation, like those of the McNeals, to state court. Lastly, the court addressed the IGRA question, holding that IGRA authorized such shifting of jurisdiction as to personal-injury tort claims either under 25 U.S.C. § 2710(d)(3)(C)(i) and (ii), when read together; or under the catch-all provision, § 2710(d)(3)(C)(vii). Concluding thereafter that "there [were] no legal issues remaining to be resolved," the district court dismissed the case. *Id.* at 163 (Mem. Op. & Order, dated Aug. 3, 2016). The Tribe timely appealed from the district court's judgment.

II

We first address our jurisdiction. Because federal courts have limited subject-matter jurisdiction, "we 'may only hear cases when empowered to do so by the Constitution or by act of Congress.'" *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035 (10th Cir. 2015) (quoting *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1225 (10th Cir. 2004)). "[W]e always have an independent obligation—no matter the stage of litigation—to consider whether a case creates a live case or controversy and belongs in federal court." *Id.*; *accord Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). We review de novo whether subject-matter jurisdiction is proper. *See, e.g.*, *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006); *Austl. Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1234 (10th Cir. 2006).

Consistent with our independent obligation, we ordered the parties to submit briefing regarding, *inter alia*, whether, under 28 U.S.C. § 1331, the district court had federal jurisdiction over this action when the Tribe was raising what (at first blush) appeared to be federal defenses to pure state-law claims. Since this briefing, that jurisdictional issue has been resolved by a panel of our court in *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017), which ruled that federal courts do have jurisdiction in circumstances like those presented here.

Specifically, in *Lawrence*, a non-Indian brought a breach-of-contract claim against the Ute Indian tribe in Utah state court. Seeking to halt the state proceeding, the Tribe filed suit in federal district court, "asserting . . . that the state court lacked subject-matter jurisdiction to hear the case." *Id.* at 540. The district court, in turn, determined that it did not have jurisdiction to consider the Tribe's challenge to the

state court's jurisdiction. *Id*. The Tribe appealed, and we reversed the district court's determination, holding that the Ute Tribe's "claim—that federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation—presents a federal question that sustains federal jurisdiction." *Id*.

In reaching that conclusion, the panel first analyzed the "long history of federal law regarding Indian affairs," *id*. at 541, and observed both that "federal law regulates a tribe's right to exercise jurisdiction over non-Indians," *id*. at 542, and "that state adjudicative authority over Indians for on-reservation conduct is greatly limited by federal law," *id*. From those principles, we determined that "federal courts generally have jurisdiction to enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law," *id*. at 543, and reasoned that the tribe's suit arose under federal law because it was "seeking injunctive and declaratory relief against state regulation (the state-court proceeding) that it claims is preempted by federal law," *id*. at 547.

Lawrence's analysis is directly applicable here: the Nation here seeks declaratory relief under federal law against state regulation, *viz.*, the state-court proceeding, claiming that federal law preempts it. As such, we properly exercise jurisdiction over this appeal under § 1331.[3]

III

Proceeding to the merits, this appeal presents two issues, one of federal law and one of Navajo law. First,

---

[3] Because we conclude that we may exercise jurisdiction under § 1331, we need not reach the parties' remaining jurisdictional arguments.

the Nation asserts that the district court erred in concluding that IGRA authorizes an Indian tribe to allocate jurisdiction over a tort claim arising on Indian land to a state court. Second, even assuming that IGRA does allow a tribe to allocate jurisdiction of such claims to state courts, the Nation submits that the NNC was not empowered to shift jurisdiction to the state court as a matter of Navajo law. Because we decide the first issue in the Nation's favor, we need not reach the question of Navajo law.

A

It is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian country. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [i.e., plaintiff] is not an Indian . . . . If this power [of Indian governments over their territory] is to be taken away from them, it is for Congress to do it."); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."); *accord* COHEN'S HANDBOOK, *supra*, § 7.03[1][a][ii], at 608. It is also a well-settled principle that "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *accord Santa Clara Pueblo v. Martinez*, 436

U.S. 49, 58 (1978); *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011).

Consequently, congressional approval is necessary—i.e., it is a threshold requirement that must be met—before states and tribes can arrive at an agreement altering the scope of a state court's jurisdiction over matters that occur on Indian land. *See Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.*, 400 U.S. 423, 427 (1971) (per curiam) (holding that the "unilateral action of the Tribal Council was insufficient to vest" the state courts with jurisdiction over a civil suit against an Indian defendant stemming from a transaction occurring on tribal land because Congress did not expressly authorize such tribal-council consent as a means for states to take jurisdiction); *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont., in & for Rosebud Cty.*, 424 U.S. 382, 388 (1976) (per curiam) (holding that Montana courts could not exercise jurisdiction over adoption proceedings involving Indians on Indian land because "[n]o federal statute sanction[ed] this interference with tribal self-government"); COHEN'S HANDBOOK, *supra*, § 7.07[4], at 673 ("Because of federal supremacy over Indian affairs, tribes and states may not make agreements altering the scope of their jurisdiction in Indian country absent congressional consent."); *cf. Bay Mills*, 134 S. Ct. at 2032 (noting that "[u]nless Congress has authorized [the present] suit, [Supreme Court] precedents demand that it be dismissed").

Congress has "authorized" the tribes and states to make such jurisdiction-altering agreements "in only a few specific circumstances"; the area of tribal-state gaming compacts represents one such circumstance. COHEN'S HANDBOOK, *supra*, § 7.07[4], at 673 & n.92;

see Bay Mills, 134 S. Ct. at 2032 (acknowledging that IGRA "partially abrogate[d] tribal sovereign immunity").

All of that background leads us to the question presented: whether IGRA authorizes tribes to enter into gaming compacts with states that allocate jurisdiction to state courts with respect to state-law tort claims like the McNeals'. For the reasons that follow, we conclude it does not.[4]

As noted, "IGRA authorizes states and Indian nations to enter into compacts associated with the operation of certain forms of tribal gaming known as Class III gaming." COHEN'S HANDBOOK, *supra*, § 6.04[3][d][iii], at 569. Specifically, subparagraph (A) of § 2710(d)(3) of IGRA provides that

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III *gaming activit*y is being conducted, or is to be con-

---

[4] This background should provide a context for understanding why we need not reach the question of Navajo law noted above: because Congress, through IGRA, has not authorized tribes to enter into compacts with states allocating jurisdiction to state courts over tort claims arising on Indian land like those prosecuted by the McNeals, whether the NNC's actions under Navajo law would have permitted such a jurisdictional transfer is immaterial. In other words, because we conclude that Congress has not authorized the shifting of jurisdiction over the tort claims at bar by way of IGRA, our analysis is at an end; we need not decide more because "the negotiated terms of the Compact cannot exceed what is authorized by the IGRA." *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013); *see* COHEN'S HANDBOOK, *supra*, § 6.04[3][d][iii], at 569 (noting that "IGRA establishes *exclusive* federal jurisdiction over civil actions involving Indian gaming and gaming contract disputes, thereby supplanting any civil jurisdiction over private lawsuits that states might [otherwise] have acquired over such matters" by other congressional action (emphasis added)).

> ducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of *gaming activities*.

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

Then subparagraph (C) of this same section provides:

> Any Tribal-State compact negotiated under subparagraph (A) 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;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any *other* subjects that are directly related to *the operation* of gaming activities.

Id. § 2710(d)(3)(C)(i)–(vii) (emphases added).

The district court held that a compact could be used to shift jurisdiction to state courts for tort claims stemming from conduct in an on-reservation gaming facility based on either clauses (i) and (ii), when read together; or clause (vii). *See* Aplt.'s App. at 191–97. No party suggests any other basis under IGRA for shifting jurisdiction over tort claims. Reviewing the district court's statutory interpretation de novo, *see United States v. Porter*, 745 F.3d 1035, 1040 (10th Cir. 2014); *United States v. Willis*, 476 F.3d 1121, 1124 (10th Cir. 2007), we address each theory in turn.

B

1

The Nation first contends that the district court erred in concluding that IGRA authorizes an Indian tribe to shift jurisdiction to state courts over tort claims stemming from conduct on Indian casino property based on clauses (i) and (ii) of subparagraph (C) of § 2710(d)(3). The Nation asserts that IGRA was not intended to allow for the shifting of jurisdiction from tribal courts to state courts for private tort lawsuits such as the one at bar, but permits the shifting of jurisdiction for only those activities that are "'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." Aplt.'s Opening Br. at 15 (quoting § 2710(d)(3)(C)).

The McNeals acknowledge that the language "gaming activity" in IGRA "refers to gambling, something that typically takes place in a casino," and more specifically Class III gaming, but stress that "[c]asinos house not only games of chance, but they are also entertainment venues where visitors come not only to gamble but

also to eat and drink, and where like [Mr. McNeal], they may use the restroom." McNeal Aplees.' Br. at 20. Therefore, the McNeals reason that it is "unrealistic" to interpret IGRA's authorization for compacting regarding the application of state civil laws relating to the regulation of Class III gaming—i.e., to "such activity," § 2710(d)(3)(C)(i)—to be restricted to laws regarding gambling activities, McNeal Aplees.' Br. at 20 (noting that the regulation of Class III gaming is not restricted to "slot odds, maximum bets and the thickness of felt at the blackjack tables" but rather relates generally to "activities that go on in a casino"). Judge Dalley takes a similar position: specifically, he argues that the agreement in the tribal-state compact to "regulate" with respect to injuries like those that the McNeals allegedly suffered, by applying "New Mexico tort law, enforceable in state court[,] is within the proper scope of a gaming compact under the IGRA." J. Dalley's Br. at 23; *see id.* ("Class III gaming activities do not take place in a vacuum. Visitors who go to the casino to gamble will necessarily use the casino's bathroom.").

The Nation counters that personal-injury claims sounding in tort do not involve civil laws "directly related to, and necessary for," the regulation of Class III gaming activities, § 2710(d)(3)(C)(i), and therefore IGRA does not authorize compacting with respect to the application of such laws under the circumstances here. We agree with the Nation.

At bottom, the parties' dispute relates to the scope of the term "class III gaming activity." In *Bay Mills*, the Supreme Court construed "class III gaming activity" to mean "just what it sounds like—the stuff involved in *playing* class III games," and in doing so, expressly interpreted § 2710(d)(3)(C)(i). 134 S. Ct. at 2032 (emphasis added). The Court continued: "[Sections

2710(d)(3)(C)(i) and 2710(d)(9), which authorize tribes to enter into management contracts for Class III gaming] make perfect sense if 'class III gaming activity' is what goes on in a casino—[that is,] *each roll of the dice and spin of the wheel*." *Id.* (emphasis added). The Court further concluded that this use of the term was consistent throughout the statute, holding that "the gaming activity is the *gambling* in the poker hall, not the proceedings of the off-site administrative authority," and that the statute's enforcement power over "gaming activity" was a power "to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them." *Id.* at 2033 (emphasizing, "[t]he 'gaming activit[y]' is (once again) the gambling" (alteration in original)).

The Court's analysis in *Bay Mills* leads us to the clear conclusion that Class III gaming activity relates only to activities actually involved in the *playing* of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike. *See Harris v. Lake of Torches Resort & Casino*, 862 N.W. 2d 903, 2015 WL 1014778, at *5 (Wis. Ct. App. Mar. 10, 2015) (per curiam) (unpublished) ("Applying th[e *Bay Mills*] definition, Harris—who was injured while working as a cook at a restaurant located in a casino—was not injured in connection with a class III gaming activity."); *see also California v. Iipay Nation of Santa Ysabel*, No. 314CV02724AJBNLS, 2016 WL 10650810, at *11 (S.D. Cal. Dec. 12, 2016) (unpublished) ("[T]he gaming activity is not the software-generated algorithms or the passive observation of the proxy monitors. Rather, it is the patrons' act of selecting the denomination to be wagered, the number of games to be played, and the number of cards to play per game."). And, even assuming that tort law is a form of "regulation" of "the

operation of gaming activities," as the district court correctly observed, *see* Aplt.'s App. at 192, actions arising in tort in circumstances similar to this one are not "directly related to, and necessary for, the licensing and regulation of such activity," § 2710(d)(3)(C)(i), because they do not stem from the actual playing of the casino game.[5] Put another way, if individuals are not participating in Class III gaming activities on Indian land—as *Bay Mills* understands them—when they are allegedly harmed by a tortfeasor, we are hard-pressed to see how tort claims arising from their activities could be "directly related to, and necessary for, the licensing and regulation" of Class III gaming activities.

This conclusion is ineluctable when the plain statutory text is viewed through the prism of *Bay Mills*. *See United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) ("[W]here a statute is clear on its face, we give its words literal effect."); *cf.* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 3 (2012) ("In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning."). Accordingly, IGRA, in clause (i), does not authorize

[5] We are not obliged to read the term "necessary" as meaning "absolutely necessary" or "indispensable." *See Fish v. Kobach*, 840 F.3d 710, 734–35 (10th Cir. 2016); *accord United States v. Comstock*, 560 U.S. 126, 134 (2010); *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 893 (10th Cir. 1990). Nevertheless, the use of the word "necessary" in clause (i) evinces the narrowing of the sphere of acceptable laws and regulations, especially when compared with clause (vii), which omits the "necessary for" condition and speaks only in terms of "subjects that are *directly related* to the operation of gaming activities." § 2710(d)(3)(C)(vii) (emphasis added).

compacting regarding the application of state tort law under the circumstances here.[6]

---

[6] The Appellees present various arguments seeking to distinguish *Bay Mills*; none are availing. Their first two arguments essentially contend that the *Bay Mills* Court did not directly assess what terms may be included in a compact, *see* McNeal Aplees.' Br. at 20–21; J. Dalley's Br. at 23 n.9, but instead addressed a different issue. *See Bay Mills*, 134 S. Ct. at 2028 ("The question in this case is whether tribal sovereign immunity bars Michigan's suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action."). This argument, however, does not move the ball for them because we are bound to follow both the holding and the *reasoning*, even if dicta, of the Supreme Court. *See Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) ("Moreover, even if the Court's rejection of the reasonable apprehension test could be plausibly characterized as *dicta*, our job as a federal appellate court is to follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu."); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("While these statements are dicta, this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."). And, as discussed, the Supreme Court's explicit interpretation of clause (i) inexorably leads to our present conclusion.

The Appellees also present a third argument. Specifically, they observe that this case involves the interpretation of provisions that enhance tribal sovereign immunity, i.e., permit the Nation to use its jurisdiction as a bargaining chip, whereas the provisions at issue in *Bay Mills* abrogated tribal sovereignty; consequently, they reason that we should read the provisions here more broadly than the *Bay Mills* Court did because of the differing effects the constructions have on Indian sovereignty interests. *See* McNeal Aplees.' Br. at 21–22; J. Dalley's Br. at 26–27 ("Here, the state courts' interpretation of the IGRA as permitting jurisdiction promotes, and does not diminish, tribal self-determination."). This argument, at base, suggests that Congress must have intended the courts to construe IGRA in a broader sense in circumstances when the effect of the construction will be to enhance tribal

We acknowledge that, in thoughtful decisions, the New Mexico Supreme Court in *Doe* and the district

---

sovereignty. The Appellees cite limited authority in support of their argument, but the authority they do cite indicates that they are relying on the well-established Indian canon of statutory interpretation—that is, the canon that provides 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 Cty., Minn.*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pac. Fisheries Co. v. U.S.*, 248 U.S. 78, 89 (1918)); *accord N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002). The Tribe relies on this canon too, but contends that it militates in favor of a conclusion that IGRA does not authorize the allocation of jurisdiction to state courts. As noted in footnote 11, *infra*, we eschew reliance on this canon because it typically plays a significant role only when the statute is ambiguous, and we have concluded that the IGRA provisions at issue are not ambiguous. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting that "statutes are to be construed liberally in favor of the Indians, with *ambiguous* provisions interpreted to their benefit" (emphasis added)); *E.E.O.C. v. Cherokee Nation* ("*E.E.O.C/Cherokee*"), 871 F.2d 937, 939 (10th Cir. 1989) (collecting cases indicating that canon of construction applies if there is ambiguity in the statute). For this same reason, we find Appellees' argument predicated on this canon to be unpersuasive. Furthermore, we underscore that we have "no roving license, even in ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Bay Mills*, 134 S. Ct. at 2034 (quoting pleadings); *accord Wis. Cent. Ltd. v. United States*, --- S. Ct. ----, No. 17-530, 2018 WL 3058014, at *5 (June 21, 2018) ("It is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." (quoting *Henson v. Santander Consumer USA Inc.*, --- U.S. ----, 137 S. Ct. 1718, 1725 (2017))); *cf.* Scalia & Garner, *supra*, at 56 ("[T]he purpose must be derived from the text [of the applicable statute], not from extrinsic sources such as . . . an assumption about the legal drafter's desires."). In sum, for the foregoing reasons, we find the Appellees' attempts to distinguish *Bay Mills* unavailing.

court here came to contrary conclusions. In particular, the New Mexico Supreme Court concluded that "[t]ort suits are . . . related to gaming activity in helping ensure that gaming patrons are not exposed to unwarranted dangers, something that inures to the benefit of the Tribes." 154 P.3d at 655. In support of its position, the *Doe* court relied on the rationale that Congress "could rationally conclude that tribes ought not to be foreclosed from negotiating such provisions perceived to be in their own interest, and as 'directly related to, and necessary for, the licensing and regulation' of gaming." *Id*. The district court also arrived at a similar conclusion: "Because tort claims alleged against Indian gaming facilities are 'directly related to' the regulation of tortious conduct arising out of Indian gaming, jurisdictional issues arising from such tort claims may be the subject of negotiation for a tribal-state compact." Aplt.'s App. at 193.

While we are comfortable assuming that tort, and more specifically personal-injury lawsuits, constitute a type of regulation, we are unable to discern how applying this form of regulation to a slip-and-fall event, like Mr. McNeal's, is "directly related to, and necessary for the licensing and regulation," § 2710(d)(3)(C)(i), of Class III gaming activity, as *Bay Mills* conceives of it. For example, whether a casino employee is negligent in cleaning up spilled water on the floor which results in a patron falling has nothing to do with the actual regulation or licensing of Class III gaming, *viz*., "each roll of the dice and spin of the wheel." *Bay Mills*, 134 S. Ct. at 2032. Put differently, just as the licensing or regulation of gaming activity only directly relates to things akin to "gambling in the poker hall" and not to "the proceedings of the off-site administrative authority," *id*. at 2033, it also does not relate to claims arising out of occurrences that happen in proximity to—but

not as a result of—the hypothetical card being dealt or chip being bet. Therefore, when viewed through the prism of *Bay Mills*, we respectfully conclude that the reading of IGRA that we adopt here is the correct one, and that the district court and the New Mexico Supreme Court are mistaken.

In discerning whether IGRA authorizes tribes to allocate jurisdiction regarding tort claims like the McNeals' to state courts, we also look to the text of clause (ii) of subparagraph (C). *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (noting "the cardinal rule that a statute is to be read as a whole"); *accord Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). Clause (ii) is entirely congruent with, and strongly reinforces, our view of the limitations of IGRA's authorization of jurisdictional allocations. Notably, this is the only clause in subparagraph (C) that explicitly authorizes tribes to allocate jurisdiction to the states. Specifically, recall that, by its terms, it provides for "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." *See* § 2710(d)(3)(C)(ii). It is clear to us that this provision applies only to the "laws and regulations" referenced in clause (i). The pronoun "such" in clause (ii) refers unambiguously back to the "laws and regulations" in the immediately preceding provision, clause (i). And those laws and regulations are ones that are "directly related to, and necessary for, the licensing and regulation of such activity." § 2710(d)(3)(C)(i). And, as we have established *supra*, the "activity" in clause (i)'s phrase "such activity" is "what goes on in a casino—[that is,] *each roll of the dice and spin of the wheel*." *Bay Mills*, 134 S. Ct. at 2032 (emphasis added).

It necessarily follows that the allocation of civil jurisdiction referenced in clause (ii) pertains solely to the allocation that is "necessary for the enforcement of the laws and regulations," § 2710(d)(3)(C)(ii), that are "directly related to, and necessary for, the licensing and regulation of" the playing of Class III games, § 2710(d)(3)(C)(i)—and not for the enforcement of laws and regulations pertaining to such tangential matters as the safety of walking surfaces in Class III casino restrooms. Put another way, because tort law in the circumstances here does not directly relate to the licensing and regulation of gambling itself, clause (ii)—which depends upon clause (i) to define the scope of its allocation of civil jurisdiction—does not authorize tribes to agree in gaming compacts to shift (i.e., allocate) jurisdiction to state courts over tort claims like those here.[7]

---

[7] We pause to highlight that our holding only pertains to the circumstances presented here. More specifically, we do not intend by this holding to categorically negate the possibility that certain classes of tort or personal-injury claims stemming from conduct on Indian land might conceivably satisfy the statutory conditions for tribal allocation of jurisdiction to the states under our plain reading of clauses (i) and (ii) of IGRA. Consider, for example, a casino patron at a roulette table: during the course of the game, an errant ball flies and hits the patron in the eye, causing damage to the patron. Or, in a different situation, a patron is playing on a dysfunctional slot machine that electrocutes the patron, again resulting in some harm. In both of those instances, it is at least arguable that the patron's injuries resulted directly from gaming activity, within the meaning of *Bay Mills*, i.e., "what goes on in a casino—each roll of the dice and spin of a wheel." 134 S. Ct. at 2032. Assuming *arguendo* this is so, the harmed plaintiffs could argue—at least colorably—that the tort laws they plan to invoke in their claims are "civil laws and regulations . . . directly related to, and necessary for, the licensing and regulation, of" the gaming activities that caused them harm, and that the allocation of jurisdiction was "necessary for the enforcement" of those tort laws.

Appellees present two principal counterarguments, but neither is persuasive. First, they contend that IGRA's legislative history supports the conclusion that the statute was created with the intent of permitting tribes to allocate their jurisdiction when they deemed it in their favor to do so. *See* McNeal Aplees.' Br. at 9–13; J. Dalley's Br. at 19–23. However, we need not consider legislative history where, as here, we find the statutory language unambiguous.[8] *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) ("[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language." (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229,

---

§ 2710(d)(3)(C)(i), (ii). In short, the hypothetical plaintiffs could argue (at least colorably) that the tribe running the casino at issue would have been authorized under IGRA's plain terms to allocate jurisdiction to the state over their tort claims. We need not and do not express any opinion on whether such hypothetical plaintiffs—or similarly situated ones—could succeed on such an argument because the circumstances of those plaintiffs are not before us. The McNeals' circumstances are. And what is clear in a slip-and-fall case, like this one, is that a plaintiff's harm cannot plausibly be said to have resulted from gaming activity, within the meaning of *Bay Mills*—that is, from the playing of dice, the pulling of a slot machine, or other participation in Class III gambling. And such a plaintiff, like the McNeals, cannot argue that the tribe would have been authorized under IGRA's plain terms to shift jurisdiction over his or her tort claims to the state courts.

[8] In this regard, we find common ground with Justice Minzner's dissent in *Doe*, in which she reasoned that "[h]ad Congress intended for such [tort] claims to be included, . . . IGRA would have been more explicit, and we would not need to parse legislative history for indicia of legislative intent." 154 P.3d at 658 (Minzner, J. dissenting). Based on our reading of IGRA's plain text, we reject the *Doe* majority's reliance on legislative history.

236 n.3 (2010))); *accord United States v. Woods*, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."); *United States v. Hunt*, 456 F.3d 1255, 1268 (10th Cir. 2006) ("We recognize that it is not necessary to resort to legislative history when statutory language is unambiguous."). Moreover, had Congress wanted to permit tribes to allocate jurisdiction in such cases, it could have crafted language to effectuate this purpose, but it did not do so. *See Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1265 (D.N.M. 2013) (declining to look for guidance in IGRA's legislative history and "opt[ing] instead to rely on the clear statutory structure of IGRA," and noting in this regard that Congress could have "worded subparagraph (ii) in a way that obviously or necessarily included a shifting of jurisdiction over such claims [i.e., tort claims involving serving alcohol to intoxicated persons]," but it did not do so); *cf. Bay Mills*, 134 S. Ct. at 2033–34 ("[T]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment.").

Appellee's second argument is one that we considered and rejected in our independent assessment of the meaning of clause (i)—that is, the argument that tort law is "directly related to, and necessary for, the licensing and regulation of" gaming activity, within the meaning of clause (i). § 2710(d)(3)(C)(i). Accordingly, we conclude that Appellees' two arguments come up short.

* * *

In sum, we conclude that clauses (i) and (ii), by their plain meaning, do not authorize tribes to allocate during the compacting process jurisdiction to state courts for tort claims such as the McNeals' arising on Indian land. We therefore turn to the second question of whether clause (vii)'s catch-all provision permits tribal-state compacts to serve as vehicles for shifting civil jurisdiction over such tort claims.

C

1

The Nation next challenges the district court's alternative holding that even if the first two clauses of § 2710(d)(3)(C) do not permit the allocating of jurisdiction during the compacting process, the Nation could have allocated jurisdiction over the McNeals' tort claims pursuant to clause (vii), the catch-all provision. Aplt.'s App. at 193 (district court reasoning that "[b]ecause tort liability resulting from 'the operation of gaming activities' is 'directly related to' the same [i.e., operation], the catchall provision . . . also provides authority for Tribes and states to negotiate the allocation of jurisdiction of such tort claims"). As noted above, clause (vii) provides that a compact may include "any other subjects that are directly related to the operation of gaming activities." § 2710(d)(3)(C)(vii). We ultimately conclude that the district court's reading of clause (vii) is mistaken and thus sustain the Nation's challenge.

Given that we must "presume that [Congress] says in a statute what it means and means in the statute what it says there," *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (collecting cases); *accord Mountain States Tel. & Tel. Co. v. Pueblo of Santa*

Ana, 472 U.S. 237, 249 (1985), it is significant that the subject of jurisdictional allocation is only mentioned in clause (ii). As the Nation puts it, "there is no language in that section [i.e., clause (vii)] that pertains to the allocation of jurisdiction between the tribe and the state." Aplt.'s Reply Br. at 12 (emphasis omitted). This omission provides a significant clue that Congress did not contemplate that this provision would cover the topic of the allocation of jurisdiction over civil lawsuits between states and tribes. Although the Appellees argue that the legislative history points to a different result, this omission militates in favor of a conclusion that our "judicial inquiry into the applicability of [clause (vii)] begins and ends with what [clause (ii)] does say and with what [clause (vii)] does not." *Germain*, 503 U.S. at 254; *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (citation omitted) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))). Here, clause (ii) speaks directly and specifically to tribal-state compacting regarding the allocation of jurisdiction, whereas clause (vii) does not explicitly raise the topic of jurisdictional allocation. This constitutes a significant clue that Congress did not intend for this provision to relate to tribal-state compacting regarding the allocation of jurisdiction.

To be sure, clause (vii) functions as a catch-all provision, and, consequently, Congress expressed its scope in broad terms, to encompass "any other subjects that are directly related to the operation of gaming activities,"

§ 2710(d)(3)(C)(vii). But the key word here is "other."[9] Typically, statutory language is given its "ordinary, everyday" meaning, unless the context suggests otherwise. *Toomer v. City Cab*, 443 F.3d 1191, 1194 (10th Cir. 2006) ("We must construe the words of the statute in their ordinary, everyday sense."); *accord Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000); *see* Scalia & Garner, *supra*, at 69 ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." (emphasis omitted)). And applying the ordinary and everyday meaning of the word "other" in clause (vii), it becomes patent that Congress did not intend for that clause to address the "subjects" covered in the preceding clauses of subsection (C)—including

---

[9] In reaching the opposite conclusion than the one we ultimately do regarding the import of clause (vii)—i.e., that the clause permits the allocation of jurisdiction—the district court, quite significantly, omitted the term "other" from its analysis: "This Section allows the Tribes and states to negotiate regarding 'any . . . subjects that are directly related to the operation of gaming activities.'" Aplt.'s App. at 193 (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)). The court then concluded that "the catchall provision . . . provides authority for Tribes and states to negotiate the allocation of jurisdiction of such tort claims." *Id*. As we will explicate *infra*, adding the term "other" back into clause (vii) completely alters its meaning and undermines the district court's determination. In brief, the term "other" indicates that the catchall provision covers subjects that have not already been addressed by the other clauses of subparagraph (C). And, because the subject of jurisdictional allocation is undisputedly considered in clause (ii), a plain reading of clause (vii) in light of the rest of subparagraph (C), supports the conclusion that clause (vii) does not discuss jurisdictional considerations. *See United States v. Bishop*, 412 U.S. 346, 356 (1973) ("We continue to recognize that context is important in the quest for the word's meaning."); *accord United States v. Husted*, 545 F.3d 1240, 1243–44 (10th Cir. 2008).

the jurisdictional-allocation subject of clause (ii). *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1961) [hereinafter "WEBSTER'S"] (defining "other" to mean, *inter alia*, "being the ones distinct from the one or those first mentioned" and "not the same: Different"); THE AMERICAN HERITAGE DICTIONARY 880 (2d ed. 1982) [hereinafter "AMERICAN HERITAGE"] (defining "other" to mean, *inter alia*, "[d]ifferent from that or those implied or specified"); *see also* THE NEW OXFORD AMERICAN DICTIONARY 1205 (2d ed. 2005) [hereinafter "NEW OXFORD"] (noting that the word "other" is "used to refer to a person or thing that is different from one already mentioned or known about" and further defining it, *inter alia*, to mean "those remaining in a group; those not already mentioned"); *cf. Wis. Cent. Ltd. v. United States*, --- U.S.. ----, 138 S. Ct. 2067, 2071(2018) ("As usual, our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)) (then citing contemporary dictionaries to determine meaning of the disputed statutory term)).

Nor could one persuasively argue that the term "other" in clause (vii) authorizes the allocation of jurisdiction with respect to subjects *other than* those covered by the jurisdictional-allocation language of clause (ii). In our view, a well-established canon of statutory construction—the negative-implication canon (i.e., the canon *expressio unius est exclusio alterius*) would fatally undercut such an argument. That canon provides that the "expressi[on] [of] one item of [an] associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, --- U.S. ----, 137 S. Ct. 929, 940 (2017) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002)). In other words,"[t]he notion is one of negative implication: the

enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 & n.24 (10th Cir. 2003) (quoting William N. Eskridge, et al., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 947 (3d ed. 2001))) *see also* Scalia & Gardner, *supra*, at 107 (discussing the operation of the "negative-implication canon").

Here, clause (ii) is the only clause in subsection (C) that expressly addresses the allocation of jurisdiction between states and tribes. And, as our reasoning in Part III.B.1, *supra*, demonstrates, it does so in specific terms—albeit by cross-reference—to clause (i). That is, by its use of the language "such laws and regulations," clause (ii) expressly refers back to the "laws and regulations" of clause (i)—which are "directly related to, and necessary for, the licensing and regulation of" the playing of Class III games, § 2710(d)(3)(C)(i). And it contemplates tribal-state compacting regarding the allocation of criminal and civil jurisdiction "necessary for the enforcement" of the laws and regulations specified in clause (i). § 2710(d)(3)(C)(ii). Thus, the allocation of jurisdiction referenced in clause (ii) pertains solely to the allocation that is "necessary for the enforcement of the laws and regulations," *id.*, that are "directly related to, and necessary for, the licensing and regulation of" the playing of Class III games, § 2710(d)(3)(C)(i)—that is, "what goes on in a casino—[that is,] *each roll of the dice and spin of the wheel*," *Bay Mills*, 134 S. Ct. at 2032 (emphasis added).

Therefore, clause (ii)'s specific textual expression (by cross-reference) of matters covered by its jurisdictional allocation reasonably indicates that Congress did not

envision that any distinct subjects—such as tort claims arising from a casino's failure to safely maintain floors in its restrooms—would provide the grounds for a jurisdictional allocation. *See Halverson v. Slater*, 129 F.3d 180, 186 & n.8 (D.C. Cir. 1997) (applying the negative-implication canon to hold that a statute that specifically "delineates the class of permissible delegatees as officers, employees and members of the Coast Guard" was "intended to exclude delegation to non-Coast Guard officials" under another, general delegation statute, even though the former statute "did not *expressly* prohibit delegation of" the "powers and duties [at issue] to a non-Coast Guard official" and did not explicitly use the term "only" in listing the class of delegatees); *see also United States v. Giordano*, 416 U.S. 505, 514 (1974) (tacitly applying the logic of the negative-implication canon in concluding that, though the statute at issue did not use "[e]qually precise language forbidding delegation" as those which delegated duties *only* to certain officials, its language "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate," and another statute that generally authorized the Attorney General to delegate his or her duties to agency employees did not permit further delegation of the power to authorize wiretap applications); Scalia & Garner, *supra*, at 107 ("The doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved."); *id.* at 108 (noting that "[t]he more specific the enumeration, the greater the force of the canon"); *id.* at 111 (discussing *Giordano* in the context of noting that "the negative-implication canon is so intuitive that courts often apply it correctly without calling it by

name"). Thus, we do not believe that the term "other" in clause (vii) authorizes the allocation of jurisdiction with respect to subjects *other than* those covered by the jurisdictional-allocation language of clause (ii). *Cf.* Scalia & Garner, *supra*, at 167 ("Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides context for each of its parts.").

Lastly, our conclusion is independently and distinctly bolstered by our "preference for avoiding surplusage constructions." *King v. Burwell*, --- U.S. ----, 135 S. Ct. 2480, 2483 (2015) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (declining to "adopt respondent's construction of the statute" because it would render a word in the statute "insignificant, if not wholly superfluous"). More specifically, "[t]he canon against surplusage indicates that we generally must give effect to all statutory provisions, so that no part will be inoperative or superfluous—each phrase must have distinct meaning." *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1283 n.15 (10th Cir. 2017); *see* Scalia & Garner, *supra*, at 174 ("If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (emphasis omitted)). Yet, *if* we were to adopt an expansive reading of clause (vii), in which jurisdiction may be allocated for "*any* . . . subjects that are directly related to the operation of gaming activities," § 2710(d)(3)(C)(vii)[10]—including

[10] This is in effect the reading of clause (vii) that the district court adopted here. As mentioned in note 9, *supra*, the court's

tort claims arising from a casino's failure to safely maintain floors in its restrooms—it would render clause (ii)'s jurisdictional-allocation language mere surplusage.

Put more finely, such a reading would wholly swallow clause (ii)'s specific and narrow allowance for jurisdictional allocations that are "necessary for the enforcement of the laws and regulations," § 2710(d)(3)(C)(ii), that are "directly related to, and necessary for, the licensing and regulation of" the playing of Class III games, § 2710(d)(3)(C)(i). That is because such laws and regulations directly pertaining to, and necessary for, the licensing and regulation of Class III games, and the matters necessary for their enforcement, patently constitute one of the subjects that is "directly related to the operation of gaming activities." § 2710(d)(3)(C)(vii). In this regard, we have no doubt that (given its common, everyday meaning) the term "operation" in this context sweeps broadly. *See* WEBSTER'S, *supra*, at 1581 (defining "operation" to mean, *inter alia*, "method or manner of functioning"); AMERICAN HERITAGE, *supra*, at 871 (defining "operation" to mean, *inter alia*, "[a] process or series of acts performed to effect a certain purpose or result"); *see also* NEW OXFORD, *supra*, at 1193 (defining "operation" to mean, *inter alia*, "an activity in which" a "business or organization; a company" "is involved"); *cf. Chemehuevi Indian Tribe v. Brown*, No. EDCV161347JFWMRWX, 2017 WL 2971864, at *6 (C.D. Cal. Mar. 30, 2017) (unpublished) (noting that "if Congress intended the permissible topics set forth in . . . [clause] (vii) to be more narrowly construed, it would not have utilized the broad language it did"). And, therefore, even with the limiting lan-

---

reading failed to give effect to, and in fact misguidedly elided, the critical term "other" in clause (vii).

guage "directly," clause (vii) would have the effect of subsuming, and rendering of no effect, the language and substance of clause (ii)—*viz.*, *if* clause (vii) were construed in the expansive manner noted, to include the subject of jurisdictional allocation, it would have this effect.

Put another way, if clause (vii)'s language were read to allow for compacts to allocate jurisdiction with respect to *any* subjects directly related to the *operation* of Class III games, the more specific and limited jurisdictional-allocation language of clause (ii) would be (in substance) duplicative, nugatory, and of no effect—i.e., surplusage. Consequently, we conclude that the statutory-construction canon that counsels courts to avoid interpretations that render statutory terms surplusage is an independent and distinct ground for rejecting the expansive reading of clause (vii) discussed herein. *See Halverson*, 129 F.3d at 185 (rejecting argument that a specific delegation statute does not "provide any delegation authority beyond what [the agency head] already possesses under [a general delegation statute], and thus, at most, merely confirms his . . . authority [under that general delegation statute]" because "[t]his reading plainly violates the familiar doctrine that the Congress cannot be presumed to do a futile thing").

2

The Appellees present three counterarguments; none lands with any force. First, Appellees, again citing to the statute's legislative history, contend that the catch-all section (i.e., clause (vii)) should be read broadly, consistent with their understanding of Congress's intent. *See* McNeal Aplees.' Br. at 9–13; J. Dalley's Br. at 16–23. This argument can gain no traction here, however, in light of our conclusion that

the statute is unambiguous. Because it is so, we have no need (much less an inclination) to "resort" to the statute's legislative history. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) ("Courts should not resort to legislative history in order to ascertain Congress's intent when the plain language of the statute is unambiguous."); *see Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir. 1986) ("When the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent.").

Second, the McNeals rely on the Ninth Circuit's opinion in *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), for the proposition that clause (vii) must be read broadly to provide state residents protection from injury while they are at the casinos. *See* McNeal Aplees.' Br. at 15–16. This argument is unconvincing. First of all, it goes without saying that the Ninth Circuit's construction of IGRA is not binding on us. Furthermore, the Ninth Circuit's pertinent holding in that case—*viz.*, that labor issues were "directly related to the operation of gaming activities" under clause (vii), *In re Indian Gaming*, 331 F.3d at 1115–16—does not speak to the essential question before us: whether Congress intended clause (vii)'s broad and general language to authorize tribes and states to compact regarding the allocation of jurisdiction over tort claims like the McNeals'. Lastly, insofar as *In re Indian Gaming* informs our resolution of that question, it actually undercuts the McNeals' position. The latter two points would benefit from a little more discussion.

Specifically, in analyzing and ultimately distinguishing *In re Indian Gaming*, we accept, without definitively opining on the matter, the proposition that

labor issues fall within the broad scope of clause (vii)'s "operation of gaming activities," even when the term "gaming activities" is viewed through the prism of *Bay Mills*, to mean the actual playing of Class III games. *See Bay Mills*, 134 S. Ct. at 2032 (emphasis added) (defining "gaming activity" as "what goes on in a casino—[that is,] each roll of the dice and spin of the wheel"); Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 429–30 (2007) (Noting that many state-tribal compacts "address[ed] the issue of labor relations" pursuant to IGRA and that "it was anticipated by language in IGRA in which Congress—while not expressly referring to labor issues—broadly authorized states and tribes to include compact provisions on 'any . . . subjects that are directly related to the operation of gaming activities'"); *id*. at 430 n.47 ("There may well be grounds to question the use of IGRA to impose labor relations requirements on Indian tribes, though it seems to be a well-established practice."). But that proposition does not directly offer any insight into the specific question we must decide, regarding whether the subject of jurisdictional allocation over claims (notably, tort slip-and-fall claims) is included within the scope of clause (vii). More specifically, nothing in *In re Indian Gaming* suggests that clause (vii) permits the allocation of jurisdiction at all; indeed, the McNeals seem to recognize this by failing to make any such argument. *Cf*. COHEN'S HANDBOOK, *supra*, § 12.05[3], at 894 (describing the case as dealing with "revenue-sharing" and "labor relations" disputes, and not discussing any jurisdictional concerns).

Furthermore, to the extent that the inclusion of labor-relations issues within the ambit of clause (vii) offers clues regarding the resolution of the question before us, they do not avail the McNeals. Specifically,

assuming that labor-relations issues "directly relate[] to the operation of gaming activities," § 2710(d)(3)(C)(vii), it does not strike us as remarkable that such issues would fall squarely within the scope of clause (vii) because labor-relations issues are not expressly addressed in any of the preceding clauses of subparagraph (C) and, therefore, would be "other" in relation to the subjects addressed in those preceding clauses. In other words, labor-relations issues would naturally fall within clause (vii)'s catch-all category of "any *other* subject," *id.* (emphasis added), because that subject is not mentioned in the preceding clauses of subparagraph (C). In contrast, this logic undercuts the notion that the subject of jurisdictional allocation falls within the scope of clause (vii) because this subject *is* expressly addressed in the preceding clauses—specifically, in clause (ii). Therefore, to the extent that *In re Indian Gaming* informs our resolution of the question we must answer here, it actually belies the McNeals' argument.

Third, and lastly, Judge Dalley contends that the reading of § 2710(d)(3)(C) that we now endorse "would invalidate many provisions in this and other gaming compacts that have been negotiated by tribes and states." J. Dalley's Br. at 27. For example, he asserts that key provisions of the tribal-state compact before us—involving "the physical safety of patrons and employees," "wages on construction projects," and "criminal jurisdiction" over offenses committed by non-Indians on Indian land—will all be "invalidate[d]" because they do not "directly relate[] to" "gaming activities," as this statutory language is understood through the lens of *Bay Mills*. *See id.* We find Judge Dalley's argument unpersuasive, however.

First of all, Judge Dalley's brief fails to offer us much by the way of reasoning to explain the basis for his parade of horribles, relying instead on conclusory statements. *See id*. ("None of these provisions is likely sufficiently 'directly related to' 'gaming activities' under the Navajo Nation and Pueblo of Santa Ana's interpretations of the IGRA to survive scrutiny."). Second, at least in the absence of such reasoning, we are hard-pressed to see how the reading of the statutory language "directly related to . . . gaming activities," § 2510(d)(3)(C)(vii); *see also* § 2510(d)(3)(C)(i) ("directly related to . . . such [gaming] activity), that we endorse here could have the widespread destructive effect that Judge Dalley predicts. This language is construed in the context of our limited procedural holding that relates solely to whether IGRA authorizes tribes to *allocate jurisdiction* over tort claims like the McNeals' to state courts. This holding does not address what substantive matters are proper subjects of compacting under IGRA, such as the physical safety of casino staff and visitors, and the proper wage rates on casino projects, much less invalidate compact provisions pertaining to such substantive subjects. As noted, the question before us is a procedural one involving the statutory authorization under IGRA to shift jurisdiction over tort claims like those of the McNeals. Furthermore, even assuming *arguendo* that the Tribe has allocated to New Mexico in the instant compact *criminal* jurisdiction over offenses committed by non-Indians on tribal land, the propriety of this procedural subject is not before us, and we have no obligation nor inclination to opine on the implications of our decision for the vitality of this compact provision.

In all events, our main concern here ultimately must be the faithful and true interpretation of IGRA's plain terms, not the ostensible collateral effects of our inter-

pretation on existing compact provisions; generally, this is true at least so long as our interpretation would not yield absurd results, and it patently would not do so, nor does Judge Dalley argue to this effect. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) ("We reiterate that 'when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000))). Thus, we reject Judge Dalley's argument as well.

* * *

In sum, we hold that clause (vii) of IGRA does not authorize tribes to allocate to states jurisdiction over tort claims like the McNeals', based on our interpretation of the clause's plain language, in the context of the other clauses of subparagraph (C) of § 2710(d)(3).

IV

In light of the above, we conclude that IGRA, under its plain terms, does not authorize tribes to allocate to states jurisdiction over tort claims like those brought by the McNeals here.[11] Stated differently, the Appellees

---

[11] One argument that we do not rely upon in coming to this conclusion is the Nation's argument that we should resolve any ambiguity in IGRA in its favor based on the Indian canon of statutory interpretation. *See* Aplt.'s Opening Br. at 10. As we discussed in note 6, *supra*, this canon provides that "doubtful expressions" in statutes should be "resolved in favor of the Indians," *Bryan*, 426 U.S. at 392 (quoting *Alaska Pac. Fisheries Co.*, 248 U.S. at 89), but it is typically only operative when the statute is ambiguous, *see, e.g.*, *E.E.O.C./Cherokee*, 871 F.2d at 939. As we have underscored, we do not find the IGRA provisions at issue here to be ambiguous; therefore, we eschew reliance on this canon.

have failed to clear a threshold hurdle: they have not established that IGRA authorizes the allocation of jurisdiction to state courts for these tort claims. As such, we REVERSE the district court's judgment and REMAND with instructions to grant the Nation's request for declaratory relief.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

[Filed 08/03/16]

Case. No. 15-cv-00799

NAVAJO NATION and
NORTHERN EDGE NAVAJO CASINO,

Plaintiffs,

v.

The Honorable BRADFORD J. DALLEY, District Judge,
Eleventh Judicial District, New Mexico,
in his Official Capacity; HAROLD MCNEAL;
and MICHELLE MCNEAL,

Defendants.

Appearances:

For Plaintiffs Navajo Nation and Northern Edge Navajo Casino:

PATRICK THOMAS MASON
Mason & Isaacson, PA
P.O. Box 1772
Gallup, NM 87301

For Defendant Bradford Dalley:

HECTOR BALDERAS
Attorney General for the State of New Mexico
Office of the Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508

By: PEGGY (MARGARET) ALISON DUGGAN
Assistant Attorney General
Civil Litigation Division
P.O. Box 1508
Santa Fe, NM 87504-1508
505-827-6024

For Defendants Harold McNeal and Michelle McNeal:

DANIEL M. ROSENFELT
LINDA J. RIOS
Rios Law Firm
P.O. Box 3398
Albuquerque, NM 87110

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Navajo Nation and Northern Edge Navajo Casino's (collectively "Plaintiffs'") motion for summary judgment and a declaration by this Court that "the Indian Gaming Regulatory Act . . . does not permit the shifting of jurisdiction from tribal courts to state courts in personal injury lawsuits against tribal enterprises" [Doc. 12]. Defendant Bradford Dalley ("Judge Dalley") and Harold and Michelle McNeal (the "McNeals") (collectively "Defendants") filed separate oppositions to Plaintiffs' motion [Docs. 13, 17–18]. Plaintiffs timely replied in support of their motion [Doc. 19].

The Court, having considered the motions, briefs and relevant law, and being otherwise fully informed,

finds that Plaintiffs' Motion will be DENIED. Because the facts of this case are not in dispute and there are no legal issues remaining to be resolved, this matter is hereby DISMISSED.

BACKGROUND

This case comes before the Court following a routine slip-and-fall lawsuit argued before the Honorable Bradford J. Dalley in New Mexico District Court. Although the causes of action in this lawsuit are relatively mundane, the jurisdictional issues presented to this Court are not. In the tribal-state gaming compact between the Navajo Nation and the State of New Mexico ("Tribal-State Compact"), Doc. 12-1, the Navajo Nation and the State of New Mexico agreed that tort actions related to Indian gaming that arose on Navajo tribal land could be adjudicated in New Mexico district court. In this declaratory judgment action, Plaintiffs have asked this Court to state that the Navajo Nation lacked sufficient authority to grant New Mexico district courts jurisdiction over personal injury actions arising in gaming facilities in Indian country when signing the Tribal-State Compact. The Honorable Bradford J. Dalley, the New Mexico District Court Judge whom presides over the slip-and-fall action at issue, in combination with the plaintiffs in that action, Harold and Michelle McNeal, are the Defendants in this case. They assert, with the assistance of the New Mexico Attorney General, that the Navajo Nation did have sufficient authority to grant the State of New Mexico jurisdiction over the slip-and-fall at issue here because the Navajo Nation has both the inherent authority as a sovereign nation to grant New Mexico jurisdiction and because Congress has granted the Navajo Nation authority under the Indian Gaming Regulatory Act ("IGRA") to negotiate the Tribal-State Compact.

A brief summary of the convoluted history of Indian gaming in New Mexico will help explain why, paradoxically, the Navajo Nation is seeking a declaration by this Court against its own authority to enter into Section 8 of the Tribal-State Compact, while the State of New Mexico is attempting to affirm the sovereign authority of the Navajo Nation.

I. Indian Gaming Before IGRA[1]

Large-scale commercial Indian gaming is a creature of the 20th century. By the late 1970s, "a few tribes, and at least one individual Indian, had [] begun to engage in certain forms of gaming, primarily bingo." Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 108 (2010) (hereinafter "*Ducheneaux*"); NEIL JESSUP NEWTON & ROBERT ANDERSON, *ET AL.*,

---

[1] With the exception of contested legislative history, unless the Court indicates otherwise, to the extent any of the following facts are disputed, the Court concludes they are not material to the disposition of the Motion. Further, to the extent the Court relies on evidence to which the parties have objected, the Court has considered and overruled those objections. As to any remaining objections, the Court finds it unnecessary to rule on them because the Court did not rely on the disputed evidence.

The following two sections describe the relevant legislative history of IGRA as a backdrop to the Tribal-State Compact at issue in this case. Although the parties take somewhat different views regarding the legislative history of IGRA, *compare* Doc. 12, Pls. MSJ, at 11–15, *with* Doc. 17, McNeals' Opp. to MSJ, at 7–11, disputes over legislative history are generally considered legal, rather than factual, disputes. *See Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (considering legislative history in affirming a decision for summary judgment); NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:1 (7th ed. 2015). As a result, it is appropriate for the Court to consider contested legislative history in resolving a motion for summary judgment.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.01 (LexisNexis 2012) (hereinafter "COHEN") ("Indian gaming began to develop as a source for commercial revenue for tribes in the 1970s, primarily as high stakes bingo operations."). Because these Indian gaming activities "were not conducted under state licensure and were often in technical violation of other state regulatory laws, state officials began to challenge the legality of these activities in federal and state courts." *Ducheneaux* at 108. As a result of the various regulatory actions against Indian tribes initiated by state officials in the 70s and 80s, a series of state and federal precedents began to develop regarding the scope of the various Indian Tribes'[2] ability to run gaming facilities on Tribal lands. *E.g.*, *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Barona Grp. of Capitan Grande Band of Mission Indians, San Diego Cty., Cal. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982). The cumulative result of this precedent was a determination by federal courts that states "generally lack[ed civil] regulatory authority over Indian people on Indian reservations." COHEN at § 12.01.

According to Franklin Ducheneaux,[3] the primary drafter of the Indian Gaming Regulatory Act:

---

[2] For the purposes of this opinion, the various sovereign Indian entities will be referred to as "Tribes." *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 n.1 (10th Cir. 1997) (referring to New Mexican Pueblos as "Tribes").

[3] Ducheneaux, Counsel on Indian Affairs for the Committee on Interior and Insular Affairs at the United States House of Representatives, drafted the various house bills that became IGRA, *Ducheneaux* at 99. Although the bill that ultimately passed and became IGRA was a Senate bill, S. 555, the Senate bill was based largely on Congressman Udall's House bill, H.R. 2407, which was the focal point of the negotiations in the Senate

> The state of the law, prior to the enactment of IGRA, was clear. Where the laws of a state prohibited gambling for all persons as a matter of criminal law, tribes within that state could not engage in, or license and regulate, gambling. This was because federal law . . . made the state's criminal law applicable in Indian country. Conversely, where state law permitted gambling and regulated it under civil laws, tribes within that state could engage in, or license and regulate, gambling free of state control. Again, this was because state civil/regulatory law is not applicable [on tribal land].

Ducheneaux at 110. Restated, by the mid-1980s, federal courts had determined that, based on existing federal law, states that allowed gambling could not prohibit Indian gaming, and, within the borders of those states, state regulations such as licensing requirements would not apply to Indian gaming facilities due to federal preemption. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987) (affirming previous lower-court decisions); COHEN at § 12.01 ("the state's laws [applying civil regulations to Indian gaming] were preempted, because the state had not shown a sufficient interest to overcome the tribal and federal interests at stake in allowing tribal gaming to continue free of state regulation, in light of the state's authorization and encouragement of gambling in many forms").

Many Tribes recognized the potential revenue that could be generated by Indian gaming following these federal court decisions and "tribes across the country

---

Committee. *Ducheneaux* at 164–65. Ducheneaux was a party to these negotiations. *Id.*

began to establish gaming enterprises." Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 47 (1997) (hereinafter "*Tsosie*"); COHEN at § 12.01 (stating that as a result of favorable federal precedent on the issue "Indian tribes across the country began developing high stakes bingo and other gaming operations in the late 1970s and 1980s"); *see Indian Gambling Control Act: Hearing on H.R. 4566 Before the House Committee on Interior and Insular Affairs*, 98th Cong. 59–65 (1984) (statement of John Fritz, Deputy Assistant Secretary for Indian Affairs) (describing the growth in Indian gaming). The decisions by various Tribes to invest in Indian gaming was particularly important given the drastic cuts in social programs and federal assistance to the Tribes enacted by the federal government in the 1980s. *Ducheneaux* at 110–12; *see Tsosie* at 43. In the Navajo Nation, after the cuts in federal assistance in the 80s, "more than 45 percent of families live[d] in poverty." Naomi Mezey, *NOTE: The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 714 (1996) (hereinafter "*Mezey*").[4]

Although Indian gaming seemed to many to be a solution to the sudden withdrawal of federal programs assisting the Tribes in the 1980s, states "resent[ed]"

---

[4] The poverty rate in the Navajo Nation remains remarkably high. According to the U.S. Census Bureau, approximately 71,000 of 166,000 Navajo Indians living on Navajo land live below the poverty level. U.S. Census Bureau, 2010–14 American Community Survey 5-Year Estimates: Poverty Status in the Past 12 Months by Sex and Age, Navajo Nation Reservation and Off-Reservation Trust Land, AZ—NM—UT, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_B17001C&prodTy pe=table (last accessed July 8, 2016).

the fact that they could not regulate Indian gaming under existing precedent, particularly "the fact that they lack[ed] the authority to tax reservation income[.]" Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1019 (2000); *see Tsosie* at 44 (summarizing arguments against Indian gaming in Arizona). As a result of the various state pressures against Indian gaming, states began to push for federal regulation of Indian gaming, including aggressively litigating in federal court to limit Indian gaming and lobbying Congress to pass a federal statute regulating Indian gaming. Georgetown University Law Professor Naomi Mezey has described the conditions giving rise to IGRA as "a sovereignty battle in the courts between states and tribes. As states sought to prohibit tribal gaming as inconsistent with state law, the battle focused on the scope of American Indians' right to game." *Mezey* at 718, 735 ("gaming was simply the 'right' over which states and tribes fought that particular sovereignty battle"). Because of the existing federal precedent on the matter that provided relatively expansive interpretations of Tribal sovereignty vis-à-vis the states, "[b]efore IGRA was enacted, states played a very limited role in Indian gaming." COHEN at § 12.02.

To summarize, as Tribes across the country began opening Indian gaming facilities, states brought lawsuits in federal court to limit Indian gaming. However, federal courts generally ruled in favor of the Tribes and prevented state regulation. States then changed their strategy and began to lobby Congress to create a federal statute that would regulate Indian gaming. As a result of the pressure from the states to expand their ability to regulate Indian gaming, IGRA came into

existence as the United States "Congress took action to address the growing public policy questions arising from Indian gaming." COHEN at §12.01.

II. The Passage of IGRA and the Creation of Tribal-State Compacts

Worried about the growing backlash against Indian gaming in the states, Congressman Morris K Udall (D-Ariz.) introduced H.R. 4566 in 1983, which was the first formally proposed version of what would later become IGRA. *Ducheneaux* at 113–23. Although Congressman Udall proposed the bill to "forestall a possible reversal [by the Supreme Court] of the Federal court decisions, which had thus far supported the Indian tribes' right to engage in gaming free of state and federal regulation," the bill was ultimately defeated, in part by lobbying efforts from the National Congress of American Indians and the National Tribal Chairmen's Association, which saw the bill as an affront to Tribal sovereignty and an attempt to increase the influence of the states over Indian gaming. *Ducheneaux* at 122. However, when Congressman Udall reintroduced the bill in 1985 as H.R. 1920, the various lobbying groups in favor of Indian gaming switched their position and threw their support behind Congressman Udall's bill. *Ducheneaux* at 124–28. This is because, in the intervening time, Congressman Shumway (R-Cal.) and Congressman Bereuter (R-NE) had proposed legislation that would have gone much further in curtailing Indian gaming, and the lobbying groups supporting Indian gaming saw Congressman Udall's bill as a lesser threat to the Indian gaming business and Tribal sovereignty than the bills proposed by Congressman Shumway and Congressman Bereuter. *Ducheneaux* at 128–29. *Tsosie* at 48–49 (worried about the nationwide increase in Indian gaming, the states

"lobbied furiously for passage of congressional legislation on Indian gaming. . . . States asserted that legislation was necessary to prevent the potential infiltration of organized crime and also to protect state-regulated gambling from 'unfair economic competition.'"). The California delegation in particular had a powerful presence in Congress and a strong incentive to limit Indian gaming. *Ducheneaux* at 128–29 (stating that there was "strong opposition to Indian gaming coming from the State of California. California's public policy clearly favored gambling, which included stud poker card parlors, charitable bingo operations, and pari-mutuel horseracing. Indian gaming, in addition to being free of state control, was a threatening competition to those forms of gaming."). Ultimately H.R.1920 was defeated because various congressmen, including Congresspersons Tony Coelho (D-Cal.), Beverly Byron (D-MD), Jim Moody (D-WI), and Manuel Lujan (R-NM), did not think H.R. 1920 went far enough in regulating casino-style "Class III"[5] Indian gaming. *Ducheneaux* at 141–42.

After several years of negotiation focused primarily on the treatment of Class III gaming, *Ducheneaux* at 150–170, and an intervening Supreme Court decision affirming the rights of Tribes to engage in Indian

[5] Federal regulation of Indian gaming divides various games into Class I, Class II, and Class III games. 25 U.S.C. § 2703 (6) – (8) (defining Class I, Class II, and Class III gaming); COHEN at § 12.03. Class III games are casino-style games, slot machines, and lotteries that bring in substantial outside revenue. 25 U.S.C. § 2703 (8). Class II games are games of chance, predominantly bingo-style games. 25 U.S.C. § 2703 (7). Class I games are traditional Tribal games that produce little outside revenue. 25 U.S.C. § 2703 (6). Because for most Tribes Class III gaming was the most lucrative, lobbying efforts for-and-against Indian gaming focuses mostly on Class III gaming. *Ducheneaux* at 150–170.

gaming operations, *California v. Cabazon Band of Mission Indians*, a compromise between the various pro-Class III gaming and anti-Class III gaming factions was reached and Congress passed the Indian Gaming Regulatory Act. *Ducheneaux* at 166–70; COHEN at § 12.02 ("The Indian Gaming Regulatory Act of 1988 (IGRA) was designed to balance the interests of states, tribes, and the federal government."). As this Court has previously explained, "in 1988, in the wake of *Cabazon,* Congress enacted [IGRA], 25 U.S.C. §§ 2701–2721, to balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1288–90 (D.N.M. 1996) (Vázquez, J.) (citing S.Rep. No. 100–446, 100th Cong., 2d Sess. at 13), *aff'd*, 104 F.3d 1546 (10th Cir. 1997). The Act established a statutory framework for the growing Indian gaming industry which "expressly pre-empt[s] the field of governance of gaming activities on Indian lands." *Id.*; S.Rep. No. 100–446 at 6, 100th Cong., 2nd Sess., 1988 U.S. Code Cong. & Admin. News 3071, 3076.

The essence of the compromise between the Tribes and the states regarding the regulation of Class III gaming is reflected in Section 11(d) of IGRA, codified at 25 U.S.C. § 2710(d), which set forth the procedures for the negotiation of Tribal-State compacts that would allow Tribes and the States to negotiate for themselves the scope of Class III Indian gaming on various tribal lands. *Tsosie* at 33 ("The model [of negotiation between the states and the tribes] was then formalized into the structure of the Indian Gaming Regulatory Act to address tribal-state disputes over reservation gaming."); *Ducheneaux* at 176–77. Here, it is worth quoting Ducheneaux's summary of the legislative history of Section 11(d) at length:

> Subsection (d) of section 11 of IGRA comprehensively provides for the conduct and regulation of class III gaming on Indian lands. As discussed above, the anti-Indian gaming forces in Congress eventually conceded the right of tribes to engage in, and regulate, class II gaming free of state control and generally free of federal regulation. They insisted, however, that class III or what was called casino or 'hard core' gaming either be federally prohibited or subject to state control and regulations. The tribes insisted on their right to engage in class III gaming, as set out in the *Cabazon* decision, free of State control. This issue was the major source of discussion in the negotiations in the 100th Congress. The compromise adopted set out the Tribal-State compact procedure.
>
> The provision made class III gaming illegal on Indian lands unless conducted pursuant to a Tribal-State compact. However, in recognition that this provision standing alone would put tribes at the mercy of hostile states, the section authorized tribes to sue states that refused to negotiate or that negotiated in bad faith.

Ducheneaux at 176. In short, the result of the congressional debate over the passage of IGRA is that "the tribe and the state share control over Class III gaming." *Mezey* at 721; *see Tsosie* at 51 ("the IGRA mandates an existing compact before the tribe can commence Class III gaming."). COHEN summarizes the compromise over Class III gaming as follows: "Congress gave the states a significant role in class III games, which can only be conducted pursuant to

tribal-state compacts approved by the Secretary of the Interior. States that permit gaming are required to negotiate compacts in good faith with tribes or face suit in federal court or imposition of gaming procedures by the Secretary of the Interior." COHEN at § 12.02. The result of the requirement that Tribes conduct Class III gaming according to tribal-state compacts creates an "irony that the IGRA, predicated on tribal sovereignty, subjects tribal gaming to such detailed regulation and oversight that it arguably asks tribes to sacrifice sovereignty in order to exercise . . . their right to game." *Mezey* at 719. "To give states more authority, Congress had to transfer the gaming right from tribes to the federal government, and then dole it out anew between the states and tribes. The result is the federal redistribution of state and tribal sovereignty[.]" *Mezey* at 736.

To summarize, IGRA is the product of various lobbying efforts by the pro- and anti-Indian gaming camps. The heart of the dispute was how the lucrative Class III "Casino-style" gaming would be regulated. Section 11(d) of IGRA punted that question to the various parties interested in the question (the Tribes and the states) by requiring the parties to negotiate tribal-state compacts between themselves before Class III gaming can occur on Tribal land.

As a result of the passage of Section 11(d) of IGRA, the Navajo Nation is required to negotiate a Tribal-State Compact with New Mexico if it wants to conduct Class III Indian gaming operations on Tribal land. As described below, the Navajo Nation negotiated such a compact with the State of New Mexico, and the scope of that compact, as well as the Navajo Nation's authority to enter into various provisions of it, is the subject of the current declaratory judgment action.

III. The Tribal-State Compact Between the Navajo Nation and the State of New Mexico

COHEN summarizes the role of Tribal-State Compacts as follows: "The Indian Gaming Regulatory Act of 1988 (IGRA) was designed to provide states a role in certain kinds of Indian gaming by encouraging tribes and states to enter into cooperative agreements to permit class III gaming on Indian lands within a state, subject to the approval of the Secretary of the Interior." COHEN at § 12.05. In New Mexico, the signing of the tribal-state compacts first occurred in the mid-1990s. "Indian gaming became a significant campaign issue in the 1994 gubernatorial campaign. Governor King was defeated for reelection by Gary Johnson, who had publicly committed to signing Tribal–State compacts if elected Governor." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1550 (10th Cir. 1997). At that same election, voters approved a constitutional amendment authorizing a state lottery and legalizing video gambling. *See State ex rel. Clark v. State Canvassing Bd.,* 119 N.M. 12 (1995). After the people of New Mexico elected Governor Johnson, the Governor:

> [A]ppointed Professor Fred Ragsdale to negotiate compacts with various Indian tribes, and on February 13, 1995, he signed thirteen identical compacts. The Secretary of the Interior approved twelve of the compacts on March 15, 1995, and published notice of such approval in the Federal Register on March 22. The thirteenth compact, between the Pueblo of Acoma and the State, was approved by the Secretary on April 24, and notice was published in the Federal Register on May 15.

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1550 (10th Cir. 1997). In the run-up to the signing of the

compact, New Mexico Tribes "construct[ed] new or improved gaming facilities, and ha[d] implemented various tribal programs with existing gaming revenues or in anticipation of such revenues." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1550 (10th Cir. 1997). At that time, the presence of Indian gaming was "a major source of income for the Tribes." *Id.*

Although Governor Johnson negotiated and ultimately signed the compact, Governor Johnson failed to seek approval from the New Mexico state legislature for the deal. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1290–91 (D.N.M. 1996) (Vázquez, J.), *aff'd*, 104 F.3d 1546 (10th Cir. 1997). The United States District Court for the District of New Mexico, *id.*, and the New Mexico Supreme Court, *State ex rel. Clark v. Johnson,* 120 N.M. 562 (1995), ruled that this action violated IGRA and the New Mexico Constitution. The Tenth Circuit affirmed this Court's decision in *Pueblo of Santa Ana v. Kelly*. 104 F.3d 1546, 1555 (10th Cir. 1997).

As a result of these developments, the previous tribal-state compacts were invalidated and the New Mexico State Legislature adopted the Compact Negotiation Act, which formalized the process for compact negotiations between the Tribes and New Mexico and allowed the process to begin anew, this time with adequate legal foundation. N.M. Stat. § 11-13A-1 *et seq.*; NEW MEXICAN GAMING CONTROL BOARD, NEW MEXICAN INDIAN GAMING HISTORICAL PERSPECTIVE, http://www.nmgcb.org/history.aspx (last accessed July 8, 2016). The State of New Mexico and the Navajo Nation conducted negotiations pursuant to IGRA and the Compact Negotiation Act and entered into a formal Tribal-State Compact in 2003. Doc. 12-1, Tribal-State Compact. The Navajo Nation Council approved the

compact by a vote of 59 to 13. Doc. 17, McNeals' Opp. to MSJ, at 4 ¶ 6; Doc. 17-3, Resolution of the Navajo Nation Counsel, at 1 ¶ 2 (noting that sovereign immunity cannot be waived without a 2/3 majority vote of the full membership of the counsel).

The Secretary of the Interior approved the Tribal-State Compact between the State of New Mexico and the Navajo Nation (the "Tribal-State Compact") in January of 2004 pursuant to 25 U.S.C. 2710 (d)(3)(B). Doc. 17, McNeals' Opp. to Pls. MSJ, at 3 ¶ 1. The Tribal-State Compact contains the following provisions relevant to this case:

INTRODUCTION

> The State of New Mexico ("State") is a sovereign State of the United States of America . . . and is authorized by its constitution to enter into contracts and agreements, including this Compact, with the Nation;
>
> The Navajo Nation ("Nation") is a sovereign federally recognized Indian tribe and its governing body has authorized the officials of the Nation to enter into contracts and agreements of every description, including this Compact, with the State;
>
> The Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988 . . . which permits Indian tribes to conduct Class III Gaming on Indian Lands pursuant to a tribal-state compact entered into for that purpose;
>
> . . .
>
> The State and the Nation, in recognition of the sovereign rights of each party and in a

spirit of cooperation to promote the best interests of the citizens of the State and the members of the Nation, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

. . .

TERMS AND CONDITIONS

. . .

SECTION 8. Protection of Visitors.

A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Nation, 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 Nation 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.

. . .

> D. Specific Waiver of Immunity and Choice of Law. The Nation, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of ten million dollars ($10,000,000) per occurrence . . . . The Nation agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Nation.

Doc. 12-1, Tribal-State Compact, at 1–2, 14–15 (emphasis added).

IV. The State Court Action

In July of 2012, Harold McNeal visited the Northern Edge Navajo Casino, a wholly owned government enterprise of the Navajo Nation located on Navajo Nation Land in San Juan County, New Mexico. Doc. 12, Pls. MSJ, at 2 ¶¶ 1–2. The Navajo Nation operates the Northern Edge Navajo Casino pursuant to the Tribal-State Compact. *See* Doc. 12, Pls. MSJ, at 2–4 ¶¶ 1–3, ¶ 8. On July 6, 2012, Harold McNeal allegedly went into the bathroom at the southwest end of the Northern Edge Navajo Casino where he slipped on a wet floor and was injured. Doc. 3-2, State Court Compl., at 3 ¶ 20.

The McNeals filed a complaint of tortious negligence against Northern Edge Navajo Casino, the Navajo

Nation, and unknown Navajo Nation employees based on the above facts in New Mexico district court on August 4, 2014. *See* Doc. 3-2, at 1. Judge Dalley, a judge sitting in the Eleventh Judicial District Court of New Mexico, is the judge presiding over that case. Doc. 12, Pls. MSJ, at 3 ¶ 6.

In September of 2013, United States Senior District Court Judge Leroy Hansen ruled that "[t]he IGRA only authorizes the extension of state jurisdiction to enforce criminal and civil laws and regulations 'directly related to, and necessary for, the licensing and regulation' of tribal gaming activities[.]" Doc. 3, Compl., at 4 ¶ 11 (citing *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013). This action shares some similarities to the declaratory judgment action the Pueblo of Santa Ana successfully submitted before Judge Hanson. Doc. 3, Compl., at 4 ¶ 11.

Seeking to halt the state court action from proceeding, Plaintiffs in this federal matter (the Navajo Nation and Northern Edge Navajo Casino), filed a declaratory judgment action in the United States District Court for the District of New Mexico on September 21, 2915 in order to prevent Judge Dalley from exercising state-court jurisdiction over the McNeals' lawsuit. *See* Doc. 3, Compl.

ANALYSIS

I. Declaratory Judgment

The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Federal Rules of

Civil Procedure explicitly provide for a court to hear a declaratory judgment action. FED. R. CIV. P. 57 advisory committee's note to 1937 amendment (providing that a declaratory judgment action may be entertained as long as the case or controversy is otherwise justiciable). Declaratory relief is generally only appropriate if there are no "genuine issues of fact[.]" *United States v. Fisher-Otis Co.*, 496 F.2d 1146, 1149 (10th Cir. 1974). In this case, the facts are not in dispute, Doc. 13, Dalley Opp. to MSJ, at 1 ("the Honorable Bradford J. Dalley[] does not dispute the material facts presented in the Plaintiffs Motion for Summary Judgment"); *see* Doc. 17, McNeal Opp. to MSJ, at 3–4 (accepting Plaintiffs' facts and alleging additional facts); Doc. 19, Pls. Reply ISO MSJ (not disputing the McNeals' additional facts), and the case is ripe for review because it seeks to clarify the jurisdiction of a state court within the District of New Mexico regarding a pending tort action. Doc. 12, Pls. MSJ, at 2. This justiciable controversy is therefore appropriate for declaratory judgment.

II. Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1290 (10th Cir. 1999). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. at 248.

Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993). The moving party need not negate the nonmovant's claim, but rather must show "that there is an absence of evidence to support the nonmoving party's case." *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party meets its initial burden, the nonmoving party must show that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l Inc. v. First Affiliated Secs., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1991) (citation omitted). The nonmoving party cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment, *see Pueblo v. Neighborhood Health Ctrs., Inc.*, 847 F.2d 642, 650 (10th Cir. 1988), but rather must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (citation omitted).

Upon a motion for summary judgment, the Court "must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence." *Kaus v. Standard Ins. Co.*, 985 F. Supp. 1277, 1281 (D. Kan. 1997), *aff'd*, 162 F.3d 1173 (10th Cir. 1998). If there is no genuine issue of material fact in dispute, then a court must next determine whether the movant is entitled to judgment in its favor as a matter of law. *See, e.g.*, *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996); *Celotex*, 477 U.S. at 322.

Here, the facts are not in dispute. Doc. 13, Dalley Opp. to MSJ, at 1; *see* Doc. 17, McNeal Opp. to MSJ, at 3–4; Doc. 19, Pls. Reply ISO MSJ. Although the parties take somewhat different views regarding the legislative history of IGRA, *compare* Doc. 12, Pls. MSJ, at 11–15, *with* Doc. 17, McNeals' Opp. to MSJ, at 7–11, disputes over legislative history are generally considered legal, rather than factual, disputes. *See Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (considering legislative history in affirming a decision for summary judgment); NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:1 (7th ed. 2015) (hereinafter "SUTHERLAND"). Because there are no non-legislative history facts in dispute, summary judgment is appropriate in this case. FED. R. CIV. P. 56.

III. New Mexico State Court Jurisdiction

The crux of the dispute in this case is whether the Navajo Nation has the authority to allow civil law tort actions on Navajo land related to Indian gaming to be adjudicated by New Mexico courts. Section 8 of the Tribal-State Compact waives sovereign immunity for personal injury claims related to Indian gaming on Tribal land and specifically authorizes New Mexico courts to exercise jurisdiction over tort claims arising on Tribal land in connection with Indian gaming. It provides that: "[f]or 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." Doc. 12-1, Tribal State Compact, at 14 (emphasis added). Section 8 further provides that "[t]he Nation, by entering into this Compact and agreeing to the provisions of this section,

waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage[.]" *Id.* at 15. In short, the Tribal-State Compact presumptively confers jurisdiction to the New Mexico District Court over the action in question "unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction[.]" *Id.* at 14.

In this declaratory judgment action, Plaintiffs assert two theories against the presumption of New Mexico State Court jurisdiction contained in Section 8 of the Tribal-State Compact. First, because the Navajo Nation Sovereign Immunity Act, 1 N.N.C. §§ 551 *et seq.*, precludes the shifting of jurisdiction absent specific circumstances and because the Navajo Nation Sovereign Immunity Act only allows the Navajo Nation to be sued in the courts of the Navajo Nation, the terms of the Tribal-State Compact could not shift jurisdiction to New Mexico courts because the Navajo Nation Council had no authority to agree to this jurisdictional shift. Doc. 12, Pls. MSJ, at 7–9; Doc. 19, Reply ISO MSJ, at 3–5. Second, Plaintiffs argue that IGRA does not authorize Tribal-State Compacts to shift jurisdiction to New Mexico courts and therefore federal law has preempted any attempt to shift jurisdiction to New Mexico courts in this area. Doc. 12, Pls. MSJ, at 9–15; Doc. 19, Reply ISO MSJ, at 5–8.

Defendants attempt to defeat the first of Plaintiffs' theories by arguing that as an inherently sovereign Tribe, the Navajo Nation did have the authority to enter into the Tribal-State Compact and shift jurisdiction to New Mexico courts regardless of prior Navajo law to the contrary. Doc. 13, Dalley Opp. to MSJ, at 2–3; Doc. 17, McNeal Opp. to MSJ, at 17–18. Second, Defendants argue that IGRA provides the Tribes and

states broad discretion in negotiating Tribal-State Compacts and therefore IGRA itself confers on the parties the authority to shift jurisdiction to New Mexico courts. Doc. 17, McNeal Opp. to MSJ, at 4–16.

a. The Navajo Nation's Authority to Enter into a Jurisdiction-Shifting Agreement

Tribes possess broad, inherent sovereignty to govern the affairs of Tribal members and Tribal lands. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 138 (1982) ("Indian Tribes "possess[] sovereignty over both their members and their territory.") (quotations removed). The basic principles of Indian law dictates that those powers that are lawfully vested in an Indian tribe 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." *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a 'necessary result' of their . . . status." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978). As this Court previously observed, "[i]t is clearly established law that Indian tribes do not derive their sovereign powers from congressional delegation. Rather, tribal sovereignty is inherent, and tribes retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Kerr–McGee v. Farley,* 915 F.Supp. 273, 277 (D.N.M.1995), *aff'd* 115 F.3d 1498 (10th Cir.1997) (*citing Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987)).

In addition to the Tribes inherent sovereignty, numerous acts of Congress reinforce the principle of Tribal sovereignty, and the Supreme Court has recognized that, "[t]hrough various Acts governing Indian tribes,

Congress has expressed the purpose of fostering tribal self-government." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 138 (1982) (citations removed). As a result of both the Navajo Nation's inherent sovereignty and repeated congressional action designed to foster tribal self-government, it is well-established that "Indian tribes retain attributes of sovereignty over both their members and their territory," *United States v. Mazurie,* 419 U.S. 544, 557 (1975); *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1302–04 (D.N.M. 1999) (Vázquez, J.).

As sovereign entities, Tribes are generally entitled to sovereign immunity, including immunity from suit in state courts. *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996); *see Williams v. Lee*, 358 U.S. 217, 220 (1959). However, while Tribes generally possess broad sovereignty over matters on Tribal land and matters regarding Tribal members, Tribal sovereignty is, in at least some instances, "subordinate to . . . the Federal Government." *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 154 (1980); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987). Consequently, an action by Congress may abrogate tribal immunity from state suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754 (1998) ("[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). A Tribe may also waive immunity by consenting to suit in a specific forum. *See Santa Clara Pueblo v. Martinez,* 436 U.S. at 58; *Kizis v. Morse Diesel Int'l, Inc.*, 260 Conn. 46, 53–54 (2002). "However, such waiver may not be implied, but must be expressed unequivocally." *McClendon v. United States,* 885 F.2d 627, 629 (9th Cir.1989).

In determining jurisdiction over civil law matters on Tribal lands, the Supreme Court has held that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 155 (1980). In the context of Indian gaming, state law may be applied to Tribes on their reservations pursuant to congressional authorization. *California v. Cabazon Band of Mission Indians,* 480 U.S. at 207 & 215–17; *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1288-90 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997). State law may also be applied to gaming activities on Indian lands if "a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands[.]" *Muhammad v. Comanche Nation Casino,* No. 09–CIV–968, 2010 WL 4365568, at *9 (W.D. Okla. Oct. 27, 2010) (citing S. Rep. 100–446, at 5–6, *reprinted in* 1988 U.S.C.C.A.N. at 3075). Only "an affirmative extension of state civil-adjudicatory jurisdiction by a tribal-state gaming compact will be sufficient" to expand state court jurisdiction to tribal gaming activities. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 364 (Okla. 2013).

Because the Tribe is an inherently sovereign entity and such an entity can waive its sovereign immunity, it is clear that the Navajo Nation can consent to suit in New Mexico state court. The next question this Court must address is whether the Navajo Nation has appropriately done so here.

i. The Scope of the Navajo Nation's Waiver

In this case, the parties do not dispute that the Navajo Nation has the inherent power to waive its sovereign immunity and can waive that immunity regarding causes of action based in New Mexico tort

law. Doc. 19, Reply ISO MSJ, at 1–5; Doc. 13, Dalley Opp. to MSJ, at 1–5; Doc. 17, McNeal Opp. to MSJ, at 17–18. However, the parties dispute whether the Navajo Nation has the authority to consent to the New Mexico state court forum via Section 8 of the Tribal-State Compact.

The Navajo Nation asserts that the Navajo Nation Counsel did not have the authority to negotiate the waiver in the Tribal-State Compact regarding the specific forum for such lawsuits because a previous act by the Navajo Nation Council, the Navajo Nation Sovereign Immunity Act, prohibits future delegation of civil adjudicatory authority to courts outside Navajo Tribal land. Doc. 19, Reply ISO MSJ, at 1–5 (citing 1 N.N.C. §§ 551 *et seq.*); *see Begay v. Navajo Eng'g & Constr. Auth.*, 2011 Navajo Sup. LEXIS 1, at *5 (Navajo Sup. Ct. 2011) (ruling that satisfying the Navajo Nation Sovereign Immunity Act is a "jurisdictional condition[] precedent when the Nation, its officers, employees, or agents are sued.") (quotations omitted). The Defendants dispute these assertions. *E.g.*, Doc. 13, Dalley Opp. to MSJ, at 2.

Sections 551 through 555 of the Navajo Nation Code, the 1980 Navajo Sovereign Immunity Act, provide in pertinent part that:

> B. The Navajo Nation may be sued in the courts of the Navajo Nation when explicitly authorized by applicable federal law.
>
> C. The Navajo Nation may be sued only in the courts of the Navajo Nation when explicitly authorized by Resolution of the Navajo Nation Council.

1 N.N.C.A. § 554 (B)–(C). Relying on this language, Plaintiffs assert that "[i]n cases of waiver by act of the

Navajo Nation Council, the Sovereign Immunity Act explicitly states that such cases can be brought 'only in the courts of the Navajo Nation[.]'" Doc. 12, Pls. MSJ, at 7.[6]

The Defendants contend that legislation by the Navajo Nation Council subsequent to the Navajo Sovereign Immunity Act cited by Plaintiffs abrogated the Act as applies to the Tribal-State Compact. Specifically, Title 2 of the Navajo Nation Code, Section 223 provides that:

> C. Contracts shall not waive the sovereign immunity of the Navajo Nation or its entities unless approved by two-thirds (2/3) vote of the full membership of the Navajo Nation Council. This provision shall not apply to authority to waive immunity properly delegated.

2 N.N.C.A. § 223(C). In short, Title 2, Section 223 of the Navajo Nation Code modifies the Navajo Sovereign Immunity Act by allowing the Navajo Nation Council to abrogate the Tribe's sovereign immunity by a supermajority vote. Furthermore, the resolution by the Navajo Nation Council that consented to the Tribal-State Compact, the Resolution of the Navajo Nation Counsel Approving a Gaming Compact between the Navajo Nation and the State of New Mexico for

---

[6] The Court notes that it is not clear on the face of the Navajo Sovereign Immunity Act that Section 554(C) precludes New Mexico from exercising her jurisdiction over tort claims where an otherwise valid waiver by the Navajo Nation exists with regard to a tort cause of action without specifically consenting to a state court forum. *See* 1 N.N.C.A. § 554 (C). Because Defendants have not broadly contested Plaintiffs' reading of the Navajo Sovereign Immunity Act and have instead focused their challenge elsewhere, Plaintiffs' reading is assumed herein.

the Conduct of Legalized Gambling, passed 59-to-13, appears to have considered Section 223 controlling:

> Pursuant to 2 N.N.C. §223(D) "Contracts shall not waive the sovereign immunity of the Navajo Nation or its entities unless approved by two-thirds (2/3) vote of the full membership of the Navajo Nation Council"; and
>
> . . .
>
> The proposed Gaming Compact includes a limited waiver of sovereign immunity. The limited waiver of sovereign immunity is substantially similar to the Navajo Sovereign Immunity Act . . . . The waiver is limited to . . . bodily injury and property damage and requires a vote of the full Navajo Nation Council pursuant to 2 N.N.C. § 224(D)[.]
>
> . . .
>
> The Navajo Nation Council hereby approves the proposed Gaming Compact between the Navajo Nation and the State of New Mexico[.]

Doc. 17-3, Resolution of the Navajo Nation Council, at 1–2. Consequently, the question presented to this Court is whether either Title 2 Section 223 of the Navajo Nation Code or the Tribal-State Compact overrides the Navajo Sovereign Immunity Act's prohibition on shifting jurisdiction to New Mexico state courts.

1. Navajo Law Regarding Jurisdiction Shifting

This Court is not an expert on Navajo constitutional law or the specific principles of Navajo statutory interpretation. As a result, this Court generally defers to interpretations of Navajo law by Navajo courts, particularly where the question is "intimately involved

with a sovereign prerogative" such as sovereign immunity. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); LARRY W. YACKLE, FEDERAL COURTS 513–15 (Carolina Academic Press, 3rd ed. 2009). However, the question of Navajo law presented here – whether a subsequent act of the Navajo Nation Council can modify or supersede a previous act by the Navajo Nation Council – appears to be a question of first impression previously unaddressed by Navajo Tribal courts. Absent guiding precedent from the Navajo Tribal courts on the issue, the Court will apply general principles of constitutional law and statutory interpretation to the question at hand.

It is a general principle of European and American law that a subsequent legislative action can overturn a previous law. NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 1:3 (7th ed. 2015) (hereinafter "SUTHERLAND").[7] In the American legal system, Article IV of the Constitution applies a similar legal principle to duly ratified treaties. United States Constitution, Article IV Cl. 2 ("all Treaties made . . . under the Authority of the United States, shall be the supreme

[7] The case of Prohibition in the United States may be illustrative. In 1920, the Eighteenth Amendment of the Constitution prohibited "the manufacture, sale, or transportation of intoxicating liquors[.]" United States Constitution, XVIII Amend. However, the Twenty-First Amendment to the United States Constitution, a subsequent constitutional amendment, repealed that prohibition. United States Constitution, XXI Amendment ("Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed."). As a result of the ratification of the Twenty First Amendment, the Eighteenth Amendment was no longer valid. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 Am. J. Comp. L. 641, 678–79 (2014).

Law of the Land").[8] When a treaty between the United States and a foreign power conflicts with a pre-existing act of Congress, the text of the treaty controls and the act of Congress is no longer applicable. *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."); *Alverez v. United States*, 216 U.S. 167, 176 (1910) ("an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject."); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1262 (N.D. Cal. 1992) (same). If a treaty is later in time, the treaty must be enforced over a domestic statute. *Id.*; *United States v. Felter*, 546 F. Supp. 1002, 1012 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985) ("If there is an irreconcilable conflict between language of a treaty and an act of Congress, the enactment that is later in time prevails.").

At issue in this case is Title 1 Section 554 of the Navajo Nation Code. It was last amended in relevant part in 1992. *See* 1 N.N.C.A. § 554 (2010). Title 2, Section 223, the portion of the Navajo Nation Code relied on by the McNeals, was enacted in 2003, more than ten years after the statute relied upon by Plaintiffs. 2. N.N.C.A § 223(C) (2010); Doc. 17, McNeal Opp. to MSJ, at 4 ¶ 7; 17. Plaintiffs do not dispute these facts. Doc. 19, Reply ISO MSJ, at 1–5. In addition, Section 223(C) of Title 2 of the Navajo Nation Code provides a specific procedure for waiving sovereign immunity. 2 N.N.C.A. § 223(C) (2010). Based on

---

[8] This clause is also applicable to treaties with the Tribes. *United States v. State of Mich.*, 471 F. Supp. 192, 265 (W.D. Mich. 1979). This Court need not determine here whether it applies to tribal-state compacts.

these facts and the general principles of statutory interpretation applied herein, the most natural reading of the Navajo Nation Code is that Title 1 Sections 551 *et seq*. defines the scope of Navajo sovereign immunity. Title 2 Section 223(C) of the Navajo Nation Code, a more specific statute which was enacted later in time, provides a method for abrogation that sovereign immunity by the Navajo Nation Council. *Compare* 1 N.N.C.A. §554, *with* 2 N.N.C.A. § 223. This comports not only with the principle that statutes that are later in time can supersede previous statutes, but also the principle of *in pari materia*, which holds that statutes dealing in the same subject matter should be construed together if possible. SUTHERLAND at § 51:5; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3VAND. L. REV. 395, 402 (1950).

Tenth Circuit precedent instructs the Court to read statutes in such a manner. *See State of Utah, By & Through Div. of State Lands v. Kleppe*, 586 F.2d 756, 768–69 (10th Cir. 1978) (citing SUTHERLAND, 4th ed.), *rev'd on alt. grounds, Andrus v. Utah*, 446 U.S. 500 (1980). In *Kleppe*, the Tenth Circuit explained that "[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling." *Id.* Here, both the sequence of the statutes – 1 N.N.C. § 554 was passed before 2 N.N.C. § 223 – and the specificity level of the statutes – Section 223 is more specific than Section 554 – indicate under general principles of statutory interpretation that Section 223 should control.

The Navajo Nation Council seemed to have reached the same conclusion in deliberating on the Tribal-State Compact. When addressing the issue of sovereign immunity, the Council itself chose to specifically follow the procedure specified in Section 223 when they authorized the Tribal-State Compact even though they were aware of the Navajo Sovereign Immunity Act and acknowledged both pieces of prior legislation in their resolution. *See* Doc. 17-3, Resolution of the Navajo Nation Council, at 2 ¶ 7. As a result of the Navajo Nation Council's deliberations, it appears that both Section 223 and Section 554 were considered and that the Navajo Nation Council believed that it had followed the legal requirements of both sections in abrogating the Navajo Nation's sovereign immunity. *See id.*

The Court notes that even if Section 223 were not interpreted to allow the Navajo Nation Council to abrogate Navajo sovereign immunity as elaborated in Section 554, the Court would assume that Navajo law would recognize the Tribal-State Compact as the legal equivalent to a Navajo statute in the same way the laws of the United States recognize foreign treaties as equal to acts of Congress. *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870). As a result, a Tribal-State Compact properly ratified by the Navajo Nation could also abrogate the Navajo Nation's sovereign immunity. *Id.* Under either theory, it appears that the Navajo Nation voluntarily abrogated its sovereign immunity here.

Ultimately, it is a matter of Navajo law whether the Tribal-State Compact, negotiated between the Navajo Nation and the State of New Mexico and seemingly appropriately ratified by both entities, can supersede the Navajo Nation Sovereign Immunity Act. Based on

the foregoing analysis, the Court has determined that the Tribal-State Compact, as ratified by a supermajority of the Navajo Nation Council, can supersede the Navajo Sovereign Immunity Act. This would clearly be the result if the rules of statutory interpretation commonly applied to state and federal statutes are used to interpret Navajo laws.

However, this Court is relatively unfamiliar with the constitutional law and rules of statutory interpretation of the Navajo Nation, and the Court recognizes that its interpretation of Navajo law could be in error. If so, it could be that the Navajo Nation's ratification of the jurisdiction-shifting principle embodied in Section 8 of the Tribal-State Compact may be *ultra vires* and therefore void as Plaintiffs in this action assert. This would certainly not be unprecedented. For example, in *Pueblo of Santa Ana v. Kelly*, this Court determined that a failure to properly ratify a Tribal-State Compact by the State of New Mexico according to New Mexico state law was impermissible. 932 F. Supp. 1284 (D.N.M. 1996). In that case, the Governor of New Mexico sought to enter into a Tribal-State Compact without seeking adequate legislative approval. *Id.* Unlike *Pueblo of Santa Ana*, in this case, it appears that the relevant negotiating entity, the Navajo Nation, did follow all of the appropriate procedures for negotiating the Tribal-State Compact, including the necessary procedures for consenting to the jurisdiction of New Mexico state courts for resolving tort law actions arising on Tribal lands and related to Indian gaming.[9]

---

[9] Because of the Court's concern regarding this delicate issue of Tribal sovereignty, the Court notes for Plaintiff Navajo Nation that if Navajo constitutional law is similar in this regard to the constitutional law of the United States and the Navajo Nation is unhappy with the decision of this Court, the Navajo Tribal

IV. Federal Preemption: the Scope of Jurisdiction-Shifting Provisions Permissible under IGRA

The alternative theory against New Mexico's jurisdiction advanced by the Plaintiffs is that IGRA limits the bargaining positions the Navajo Nation and New Mexico can take in negotiating the Tribal-State Compact such that any jurisdiction-shifting provision in the compact is impermissible under federal law. Doc. 12, Pls. MSJ, at 9–15. Specifically, Section 8 of the Tribal-State compact shifts jurisdiction to New Mexico state courts for adjudicating tort claims arising on Tribal land by stating that: "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." Doc. 12-1, Tribal State Compact, at 14 (emphasis added). Pointing to the language in the second half of this clause, Plaintiffs argue that IGRA does not permit such jurisdiction shifting. Doc. 12, Pls. MSJ, at 9–15. Defendants argue, by contrast, that jurisdiction-shifting is permissible under IGRA. *E.g.*, Doc. 17, Dalley Opp. to MSJ, at 3–5.

Council could simply pass a statute that invalidates the jurisdiction-shifting provision of the Tribal-State Compact. *See, e.g.*, *Alverez v. United States*, 216 U.S. 167, 176 (1910) ("an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject."); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1262 (N.D. Cal. 1992) (same). The Court takes no position on whether such an act would constitute bad faith under the Tribal-State Compact.

a. Federal Law Can Determine the Scope of Tribal Authority to Regulate Jurisdiction

As a threshold matter, the Court recognizes that the Plaintiffs' have not asserted a theory that is impermissible on its face. Although the Tribes are recognized as sovereign entities, federal law may limit a tribal court's assertion of its own jurisdiction. *Strate v. A–1 Contractors,* 520 U.S. 438, 442 (1997). Similarly, federal law can circumscribe the allocation of jurisdiction between the Tribes and the states. *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1262–63 (D.N.M. 2013). As this Court previously held in *Pueblo of Santa Ana*: "Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country. . . . The exclusive jurisdiction of tribal courts may . . . be shifted to state court by a valid, clear tribal waiver of immunity[.]" *Id*. As a result, it is plausible that IGRA would limit jurisdiction shifting via the Tribal-State Compact such that Section 8 or a portion thereof is invalidated.

b. IGRA Does Not Prohibit the Negotiation of Jurisdiction-Shifting Provisions

While Plaintiffs' argument is plausible on its face, a close analysis of IGRA, its legislative history, and the precedent interpreting the statute indicates that IGRA does allow tribes and states to negotiate jurisdiction-shifting provisions in their tribal-state compacts.

As a general matter, IGRA gives Tribes and states broad discretion in negotiating tribal-state compacts. *Artichoke Joe's Cal. Grand Casino,* 353 F.3d at 726; COHEN at § 12.05 ("The compact negotiated between individual states and tribes can define with particularity a state's role with regard to gaming activities on

Indian lands."). Section 11(d) of IGRA, the Section principally focused on the regulation of Class III "Casino-style" gaming, provides, in pertinent part:

> (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.
>
> . . .
>
> (C) Any Tribal-State compact negotiated under subparagraph (A) 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;
>
> . . .
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C.A. § 2710(d)(3). 25 U.S.C. § 2710(d)(3)(C) enumerates what terms may be negotiated in a tribal-state compact and specifically states that terms regarding the application of "civil laws and regulations . . . that are directly related to, and necessary for [the] regulation [of Indian gaming]" may be negotiated through the Tribal-State Compact. 25 U.S.C. § 2710(d)(3)(C)(i). The immediately subsequent statutory provision further provides that "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations" may be a subject of negotiation for the Tribal-State Compact. 25 U.S.C. § 2710(d)(3)(C)(ii). In short, if tort liability can be viewed as "regulating" gaming activity then it falls within the scope of IGRA and can therefore be a subject of negotiation.

Plaintiffs cite no authority for the proposition that tort liability does not constitute regulation. *See* Doc. 12, Pls. MSJ, at 12–15; Doc. 19, Reply ISO MSJ, at 7–9. Contrary to Plaintiffs' position, it is a fundamental principle of the common law that tort law is a kind of regulation. *See* RESTATEMENT (SECOND) OF TORTS § 6 (AM. LAW INST. 1965) (describing liability arising from "tortious conduct" as a kind of regulation); *see generally* Dan B. Dobbs, *The Law of Torts* § 5–6 (2000) (explaining that tort law is a kind of regulation). As conservative legal scholar Richard Epstein has famously argued, tort liability is a type of regulation that predates the existence of the regulatory state. *E.g.*, Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL'Y 5, 18 (2013). Because tort claims alleged against Indian gaming facilities are "directly related to" the regulation of tortious conduct arising out of Indian gaming, jurisdictional issues arising from such

tort claims may be the subject of negotiation for a tribal-state compact. 25 U.S.C. § 2710(d)(3)(C)(i)–(ii).

Although jurisdictional issues regarding tortious conduct related to Indian gaming fall directly under the first two provisions of Section 11(d)(3)(C), even if this were not the case, they would also fall under the catchall provision in Section 11(d)(3)(C)(vii). This Section allows the Tribes and states to negotiate regarding "any . . . subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). Because tort liability resulting from "the operation of gaming activities" is "directly related to" the same, the catchall provision of Section 11(d)(3)(C) also provides authority for Tribes and states to negotiate the allocation of jurisdiction of such tort claims.

The legislative history of IGRA bolsters this Court's conclusion that IGRA allows Tribal-State Compacts to include jurisdiction-shifting provisions for tort law regulation of Indian gaming. As elaborated in Sections I and II, *supra*, the relevant legislative history demonstrates that IGRA was essentially a compromise between pro- and anti-Indian gaming interests. *Ducheneaux* at 166–70; COHEN at § 12.02. This compromise punted the regulation of Class III gaming to the states and the tribes through the negotiation of tribal-state compacts. *Id.*; *Mezey* at 721; *see Tsosie* at 51. The central piece of the legislative negotiation of IGRA was Section 11(d) of IGRA, which was codified at 25 U.S.C. § 2710(d). *See* 25 U.S.C. § 2710; *Ducheneaux* at 176. As the New Mexico Supreme Court explained in *Doe v. Santa Clara Pueblo*, "instead of Congress allocating jurisdiction between the tribes and states, [Section 11(d)] allowed the tribes and states to negotiate and decide for themselves the division of civil, criminal, and regulatory responsibility." 141 N.M. 269, 278 (2007)

(citing 25 U.S.C. § 2710(d)(3)). As one commentator has summarized: "The compact requirement . . . presented an opportunity for state jurisdiction, albeit with the consent of tribal governments. In sum, Congress 'punted' the issue of deciding state versus tribal jurisdiction to the states and tribes to negotiate amongst themselves on a case-by-case basis." Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts,* 47 WASH. U. J. URB. & CONTEMP. L. 51, 86 (1995); *see also* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?,* 26 CREIGHTON L. REV. 387, 407 (1993) ("Congress introduced the Tribal–State compact concept, rather than require tribes to accept state law and jurisdiction, as a condition to conducting Class III gaming."). Because Section 11(d) was intended to allow Tribes and states to negotiate for themselves how to regulate Class III gaming, this history strongly suggests that the Class III compacting provision was intended to be broad enough to allow the Tribes and the states to work out between themselves solutions to the jurisdictional issues that had eluded Congress. *See Doe*, 141 N.M. at 278–81.

As the Court has previously ruled, Congress intended that IGRA balance the states' and Tribes' interests through the compact negotiation process. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297 (D.N.M. 1996). The Tenth Circuit, in affirming this decision, summarized the legislative history of Section 11(d) of IGRA as follows:

> As the legislative history makes clear, Congress was concerned about striking a balance between the interests of tribes and of states in class III gaming. Thus, the Act gives states

> multiple chances to negotiate a compact governing the conduct of such gaming. . . . Congress could have permitted Indian tribes to conduct any kind of gaming on Indian lands without any involvement by states. The fact that it provided states with several opportunities to become involved through the compacting process suggests Congressional concern to permit state involvement if a state so desires [and the Tribe at issue consents].

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1555–56 (10th Cir. 1997). In essence, the Tenth Circuit has held that tribal-state compacts should be treated as contracts. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556–58 (10th Cir. 1997) (explaining that compacts are a "form of contract," and that, "[a]s with any contract, parties entering into one must assure themselves that each contracting party is authorized to enter into the contract."). The Tenth Circuit recently confirmed and clarified this position in *Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino* by applying it specifically to a jurisdiction-shifting provision within a tribal-state compact between Oklahoma and the Creek Nation. 508 F. App'x. 821 (10th Cir.2013), *cert. denied,* 133 S.Ct. 2038 (2013). In that case, Mr. Santana invoked a tribal-state compact to sue the Creek Nation in Oklahoma state court. *Id.* at 822. Mr. Santana claimed the Creek Nation induced him to gamble at its casino, resulting in the tribe's unjust enrichment. *Id.* The Creek Nation removed the suit to federal court and argued that its compact with the State of Oklahoma did not extend jurisdiction to Oklahoma state courts to hear civil tort claims against the Tribe because state courts were not "courts of competent jurisdiction" under the terms of the compact. *Id.* A unanimous three-judge panel of the Tenth Circuit

agreed and affirmed the District Court by applying the principles of contract law to the tribal-state compact at issue. The Tenth Circuit found that the compact between Oklahoma and the Creek Nation "expressly provided that '[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.'" *Id.* The Tenth Circuit held that because of the foregoing provision, another provision in the tribal-state compact at issue that used the phrase "court of competent jurisdiction" could not be reasonably read to include Oklahoma's state courts. *Id.* at 822–23. In short, the Tenth Circuit has held that the terms of the particular tribal-state compact at issue determine the scope of a given jurisdiction-shifting provision within that compact. *Id.*

Numerous courts have followed the lead of the Tenth Circuit and determined that the issue of jurisdiction shifting should be determined based on the particular terms of the tribal-state compact at issue. *See, e.g., Diepenbrock v. Merkel*, 33 Kan. App. 2d 97, 104–05 (2004); *Bonnette v. Tunica-Biloxi Indians*, 873 So. 2d 1, 5–7, *on reh'g* (Mar. 24, 2003); *Kizis v. Morse Diesel Int'l, Inc.*, 260 Conn. 46, 57–58 (2002); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 365–66 (Okla. 2013) ("The intention of the parties to the negotiation of the model gaming compact is clear. The Governor of the State of Oklahoma did not negotiate an allocation of civil-adjudicatory jurisdiction to the courts of this state."); *see Gallegos v. Pueblo of Tesuque*, 132 N.M. 207, 218 (2002) ("The 1997 Compact is a contract between the State of New Mexico and Tesuque, codified by the Legislature"); *Confederated Tribes of the Chehalis Reservation v. Johnson,* 135 Wash. 2d 734, 750 (1998) ("Tribal-state gaming compacts . . . are interpreted as contracts."). Thus, for example, in *Kizis v. Morse Diesel*, the Connecticut Supreme Court

determined that civil tort actions arising under the IGRA could not be brought in Connecticut courts because the tribal-state compact at issue in that case:

> explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court. . . . Although Connecticut has a genuine interest in providing a judicial forum to victims of torts, the gaming act provided the state with a mechanism to negotiate with the tribe, to establish the manner in which to redress torts occurring in connection with casino operations on the tribe's land. As a result of these negotiations, the tribe maintained jurisdiction over tort actions of this type.

Kizis, 260 Conn. at 57–58. In short, the compact between Connecticut and the Mohegan Tribe required civil tort actions to be brought in Tribal court. By contrast, Section 8 of the Tribal-State Compact in this case authorizes the state of New Mexico to exercise jurisdiction over personal injury claims arising on Tribal land related to Indian gaming, stating that: "For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land[.]" Doc. 12-1, Tribal State Compact, at 14 (emphasis added). Thus, under the contract-law reading of tribal-state compacts by the Tenth Circuit, the Navajo Nation and the State of New Mexico have determined between themselves that state court jurisdiction is appropriate here.

In summary, the text of Section 11(d) of IGRA indicates that it is entirely appropriate that Tribes and states negotiate the allocation of jurisdiction to adjudicate tort actions related to Indian gaming. The legislative history bolsters, rather than contradicts,

this plain-language interpretation. Because in the Tribal-State Compact at issue here the Navajo Nation and the State of New Mexico did negotiate a jurisdiction-shifting provision that governs the McNeals' personal injury action, the results of that negotiation should be honored and New Mexico should be allowed to exercise jurisdiction in this case.

Because the Plaintiffs in this action have not demonstrated that state court jurisdiction is inappropriate in this case, and because Defendants have demonstrated that state court jurisdiction is appropriate, Plaintiffs' motion for summary judgment is DENIED.

CONCLUSION

The Navajo Nation has inherent authority to waive its sovereign immunity and waived its sovereign immunity to the state-court action at issue here when it ratified the Tribal-State Compact. The Navajo Sovereign Immunity Act does not prohibit this waiver. Instead, subsequent legislation and the ratification of the Tribal-State Compact itself abrogated the Navajo Nation's sovereign immunity. As a result, the Plaintiffs cannot rely on the Navajo Sovereign Immunity Act to invalidate Section 8 of the Tribal-State Compact.

The IGRA also does not prohibit the Navajo Nation's waiver of sovereign immunity. Instead, the IGRA embodies contract-law principles that encourage the Tribes and states to determine for themselves the appropriate allocation of jurisdiction under IGRA. As a result, the Plaintiffs cannot rely on IGRA to invalidate Section 8 of the Tribal-State Compact.

The Court reiterates is sentiments, expressed above in Footnote 9, that the Navajo Nation's waiver of sovereign immunity is based fundamentally on the Tribe's consent to be sued in New Mexico courts under

Section 8 of the Tribal-State Compact. Nothing presented before the Court suggests that Section 8 was the result of coercion, undue influence upon the Tribe, or any other equitable doctrine that would undermine the force of the Navajo Nation's consent to that provision. If the results of this opinion are offensive to the Navajo Nation, the Tribe may consider withdrawing its consent either through legislation by the Navajo Nation Council, the renegotiation of the Tribal-Sate Compact, or some alternative method.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment [Doc. 12] is DENIED. Because there are no more issues left to adjudicate in this declaratory judgment action, this case will be DISMISSED.

DATED this 3rd day of August, 2016.

/s/ Martha Vázquez
MARTHA VÁZQUEZ
United States District Judge

APPENDIX D

INDIAN GAMING COMPACT BETWEEN THE STATE OF NEW MEXICO AND THE NAVAJO NATION

INTRODUCTION

The State of New Mexico ("State") is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310, and is authorized by its constitution to enter into contracts and agreements, including this Compact, with the Nation;

The Navajo Nation ("Nation") is a sovereign federally recognized Indian tribe and its governing body has authorized the officials of the Nation to enter into contracts and agreements of every description, including this Compact, with the State;

The Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (hereinafter "IGRA"), which permits Indian tribes to conduct Class III Gaming on Indian Lands pursuant to a tribal-state compact entered into for that purpose;

The 1999 State legislature has enacted SB 737, as 1999 N.M. Laws, ch. 252, known as the "Compact Negotiation Act," creating a process whereby the State and the Nation have engaged in negotiations leading to this Compact, with review by a joint legislative committee, and with final approval by a majority vote in each house of the legislature;

The Nation owns or controls Indian Lands and by Ordinance has adopted rules and regulations governing Class III games played and related activities at any Gaming Facility;

The State and the Nation, in recognition of the sovereign rights of each party and in a spirit of cooperation to promote the best interests of the citizens of the State and the members of the Nation, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the State and the Nation agree as follows:

TERMS AND CONDITIONS SECTION

SECTION 1. Purpose and Objectives.

The purpose and objectives of the State and the Nation in making this Compact are as follows:

A. To evidence the good will and cooperative spirit between the State and the Nation;

4. All parties shall bear their own costs of arbitration and attorneys' fees.

5. The results of arbitration shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Nation in any court of competent jurisdiction. For purposes of any such action, the State and the Nation acknowledge that any action or failure to act on the part of any agent or employee of the State or the Nation, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this Section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not

protected by the sovereign immunity of the State or the Nation.

B. Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Section shall be deemed a waiver of the Nation's sovereign immunity. Nothing in this Section shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Protection of Visitors.

A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Nation, 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 Nation 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.

B. Insurance Coverage for Claims Required. The Gaming Enterprise shall maintain in effect policies of liability insurance insuring the Nation, its agents and

employees against claims, demands or liability for bodily injury and property damages by a visitor arising from an occurrence described in Paragraph A of this Section. The policies shall provide bodily injury and property damage coverage in an amount of at least fifty million dollars ($50,000,000) per occurrence and fifty million dollars ($50,000,000) annual aggregate. The Nation shall provide the State Gaming Representative annually a certificate of insurance showing that the Nation, its agents and employees are insured to the required extent and in the circumstances described in this Section.

C. Limitation on Time to Bring Claim. Claims brought pursuant to the provisions of this Section must be commenced by filing an action in court or a demand for arbitration within three years of the date the claim accrues.

* * *

Mechanical Code, the Uniform Fire Code and the Uniform Plumbing Code, and any and all Gaming Facilities or additions thereto constructed by the Nation hereafter shall be constructed and all facilities shall be maintained so as to comply with such standards. Inspections will be conducted with respect to these standards at least annually. If the State Gaming Representative requests sufficiently in advance of an annual inspection, the State Gaming Representative may be present during such inspection. The Nation agrees to correct any deficiencies noted in such inspections within a time agreed upon between the State and the Nation. The Tribal Gaining Agency will provide copies of such inspection reports to the State Gaming Representative, if requested to do so in writing.

SECTION 9. Conditions for Execution; Effective Date.

A. The parties acknowledge that they have been engaged in litigation, captioned *State of New Mexico v. Jicarilla Apache Tribe, et al.,* No. 00-0851 (D.N.M.) (the "Lawsuit"), that was initiated by the State in United States District Court on June 13, 2000, in which the State seeks an injunction against the Tribe's conduct of Class m gaming under the Predecessor Agreements unless the Tribe pays the State the full amount that the State claims it is owed under the revenue sharing provision of the Predecessor Agreements. The Tribe disputes the validity of such provision of the Predecessor Agreements, but the parties have agreed to settle the dispute addressed in the Lawsuit, and have agreed to enter into this new Compact.

B. This Compact may not be executed by the Governor of the State unless and until it has been executed by the appropriate representative of the Nation, and until the State Attorney General has certified to the Governor in writing that the Tribe and the State have negotiated a complete settlement of the issues in dispute in the Lawsuit (except that such settlement shall be contingent upon this Compact going into effect under the provisions of IGRA), and that the Tribe has either paid in full the amount agreed to by the terms of the settlement, into the registry of the federal court, or has entered into a binding and fully enforceable agreement for the payment of such amount that is acceptable to the Attorney General. Upon receiving such certification, the Governor shall execute the Compact and forward it to the Secretary of the Interior for approval. Upon the Secretary's affirmative approval of this Compact, as set forth in Paragraph C of this Section, such sum,

plus interest, shall be immediately paid into the State General Fund. In the event the Secretary fails to affirmatively approve this Compact, such sum, plus interest, shall be immediately repaid to the Tribe.

C. This Compact shall take effect upon publication of notice in the Federal Register of its approval by the Secretary of the Interior, or of the Secretary's failure to act on it within 45 days from the date on which it was submitted to him; provided, however, that notwithstanding its taking effect, the parties expressly agree that the provisions of this Compact shall remain suspended, and shall confer no rights or obligations on either party, and that the terms and provisions of the Predecessor Agreements shall remain fully in force and effect, subject to the Tribe's and the State's claims in the Lawsuit, unless and until the Secretary shall have affirmatively approved this Compact, pursuant to 25 U.S.C. § 2710(d)(8)(A).

D. Upon the publication of notice of the Secretary's affirmative approval of this Compact in the Federal Register, the Predecessor Agreements shall be and become

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact nor any provision herein may be changed, waived, discharged or terminated orally, but only by an instrument, in writing, signed by the Nation and the State and approved by the Secretary of the Interior. This Compact shall not be amended without the express approval of the Nation, the Governor of the State and the State Legislature, as provided in the Compact Negotiation Act.

SECTION 15. Filing of Compact with State Records Center.

Upon the effective date of this Compact, a copy shall be filed by the Governor with the New Mexico Records Center. Any subsequent amendment or modification of this Compact shall be filed with the New Mexico Records Center.

SECTION 16. Counterparts.

This Compact may be executed by the parties in any number of separate counterparts with the same effect as if the signatures were upon the same instrument. All such counterparts shall together constitute one and the same document.

SECTION 17. Severability.

Should any provision of this Compact be found to be invalid or unenforceable by any court, such determination shall have no effect upon the validity or enforceability of any other portion of this Compact, and all such other portions shall continue in full force and effect, except that this provision shall not apply to Sections 4, 5, 6, 9 and 11 hereof, or to any portions thereof, which the parties agree are nonseverable.

THE NAVAJO NATION	STATE OF NEW MEXICO
/s/ Joe Shirley, Jr.	/s/ Bill Richardson
Joe Shirley, Jr., President	Bill Richardson, Governor
Date: Sept 19, '03	Date: 11/06/03

APPENDIX E

United States Code
Title 25. Indians
Chapter 29. Indian Gaming Regulation
25 U.S.C. § 2710

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management

official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section[1] may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

---

[1] So in original. Probably should be followed by a comma.

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) 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;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe[2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable

[2] So in original. Probably should not be capitalized.

Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

APPENDIX F

CONGRESSIONAL RECORD – HOUSE
September 26, 1988

INDIAN GAMING REGULATORY ACT

[H 8146]

Mr. UDALL. Mr. Speaker. I move to suspend the rules and pass the Senate bill (S. 555) to regulate gaming on Indian lands.

* * *

[H 8157]

Mr. BILBRAY. Mr. Speaker, I wish to take this opportunity to say a few words In support of S. 555. the Indian Gaming Regulatory Act.)

* * *

The States have a strong interest in regulating all class III gaming activities within their borders—the vast majority of consumers of such gaming on Indian lands would be non-Indian citizens of the State and tourists to the State.

APPENDIX G

CONGRESSIONAL RECORD —SENATE
September 15, 1988

REGULATING OF GAMING ON INDIAN LANDS

[S 12643]

Mr. INOUYE. Mr. President, pursuant to authority granted by the majority leader, I ask unanimous consent for the immediate consideration of S. 555, Calendar Order No. 862.

* * *

[S 12650]

Mr. INOUYE. It is also true that S.555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact. In in adopting this position, the committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, 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.

Mr. DOMINICI. Tribes in my State are very concerned about the precedent of allowing States to have jurisdiction over Indian lands. I share those concerns and would like to ask about other precedents for State jurisdiction over Indian lands.

Mr. INOUYE. Thank you for your concern about this issue that goes to the heart of Indian country. First, let me say that under S. 555. there is no blanket transfer to any State of any Jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty. The issue has been how to resolve the clash between States and tribes with respect to sophisticated forms of gaming such as casinos and parimutuel gaming.

States that allow such gaming have regulatory systems in place and are adamantly opposed to tribes operating such games unless they do so in accordance with State law. The States interests in protecting all citizens, including tribal members, from unscrupulous persons is a concern shared by lawmakers everywhere, including tribal officials. However, it is simply not realistic for any but a very few tribes to set up regulatory systems. Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level.

Therefore, for those tribes wishing to engage in such gaining, the most realistic option appeared to be State regulation. However, the committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming. Thus, the best option available is the approach taken by the committee on S. 555 and that is the tribal-state compact approach.

Under this provision, tribes that choose to engage in gaming may only do so if they work out a tribal-state compact with the State. Tribes that do not want any

State jurisdiction on their lands are precluded from operation of what the bill refers to as class III gaming.

This is not the best of all possible worlds but the 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.

* * *

[S 12651]

Mr. INOUYE. The compacts are not intended to impose de facto State regulation. Rather, the idea is to create a consensual agreement between the two sovereign governments and it is up to those entities to determine what provisions will be in the compacts. Page 65 of the bill references the types of provisions that may go into compacts. These provisions are not requirements. Some tribes can assume more responsibility than others and it is entirely conceivable that a State may want to defer to a tribal regulaory authority and maintain only an oversight role.

I do want to publicly state that I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact.

Mr. EVANS. On the question of precedent, am I correct that the use of compacting methods In this bill are meant to be limited to tribal-State gaming compacts and that the use of compacts for this purpose is not to be construed to signal any new congressional

policy encouraging the subjugation of tribal governments to State authority.

Mr. INOUYE. The vice chairman is correct. No subjugation is intended. The bill contemplates that the two sovereigns address their respective concerns in the most equitable fashion. There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. On the contrary, the tribal power to regulate such activities, recognized by the U.S. Supreme Court in cases such as United States versus Montana and Kerr-McGee versus Navajo Tribe, remain fully intact. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas.

* * *

[S 12653]

Mr. EVANS addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. EVANS. Mr. President, the distinguished chairman of the Subcommittee on Indian Affairs, Senator INOUYE from Hawaii, and I have filed what I consider to be an important colloquy, one which in detail goes into the elements of this bill and tries to assure that its provisions do not act as a precedent for other nonrelated relationships between Indian tribes and the United States or State governments.

* * *

[S 12654]

The portion of this bill most troubling to the tribes is that which provides for a cooperative mechanism through which the tribes and the States can agree on the extent of Indian gaming that would prove beneficial to both the tribes and the States. 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.

* * *

[S 12655]

I firmly believe that we now stand at 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.

A new understanding of our economic relationship with the tribes would require, in the economic field even more so than in others, that we treat the Indian not as a race but as a political and legal entity as the courts have so ruled. With this understanding in the future we may avoid such legislation as this before us which has had such dangerous potential for infringing on tribal rights.

* * *

Mr. DOMENICI. Mr. President, first, let me thank the distinguished chairman of the Senate Select

Committee on Indian Affairs, Senator INOUYE, for the colloquy in which he has engaged with the Senator from New Mexico. It was helpful to me, and I believe it will be helpful to our Indian people because it does, indeed, clarify again in a yet different way the issue of Indian sovereignty and makes it unequivocal that there is no intention to denigrate Indian sovereignty, We are talking specifically about the mutual responsibility between the 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 the Indian people, attempt to arrive at a regulatory scheme which will adequately protect the Indian people and the non-Indian people.

APPENDIX H

S. REP. 100-446, S. REP. 100-446 (1988)

S. Rep. No. 446, 100TH Cong., 2ND Sess. 1988, 1988 U.S.C.C.A.N. 3071, 1988 WL 169811, S. REP. 100-446 (Leg.Hist.) P.L. 100-497, INDIAN GAMING REGULATORY ACT DATES OF CONSIDERATION AND PASSAGE House: September 27, 1988 Senate: September 15, 1988 Senate Report (Indian Affairs Committee) No. 100-446, Aug. 3, 1988 [To accompany S. 555] Cong. Record Vol. 134 (1988) No House Report was submitted with this legislation.

* * *

SENATE REPORT NO. 100-446

August 3, 1988

The Select Committee on Indian Affairs, to which was referred the bill (S. 555) to regulate gaming on Indian lands, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

S. 555 provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.

* * *

STATEMENT OF POLICY

The regulation of gaming activities on Indian lands has been the subject of much controversy. Representatives of States with experience in regulating some forms of gaming activities, such as Nevada and California, have expressed concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities. The criminal division of the U.S. Department of Justice has expressed similar concerns, although as stated in the additional views of Senator John McCain, in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity.

Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus that there was no need to duplicate those mechanisms on a Federal level.

It is a long- and well-established principle of Federal—Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modem times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal

governments before State jurisdiction can be extended to tribal lands.

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal—Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in

a tribal-State compact that they might have otherwise reserved, 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, or as a general abrogation of other reserved rights or of tribal sovereignty.

* * *

Class HI—tribal-State compacts.—Section 11(d) encompasses provisions relating to tribal-State compacts that will govern the operation of class III gaming on Indian lands. After lengthy hearings, negotiations and discussions, the Committee concluded that 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 parimutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. The State of Nevada and the Fort Mojave Indian tribe negotiated a compact to govern future casino gaming on the Nevada portion of the tribe's reservation. While that compact itself may not be an appropriate model for other compacts, the issues addressed by the compact are the same issues that the Committee considers may be the subject of negotiations between other States and tribes.

In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. 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. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State

regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming—many can and will.

The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section 11(d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility. A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. 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.

Finally, the bill allows States to consider negative impacts on existing gaming activities. That is not to say that the bill would allow States to reject Indian

gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, States must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

* * *