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ARTICLE

FORCING PERSONAL INJURY SUITS INTO THE REGULATION OF CLASS III GAMING—THE JUDICIAL DIVIDE REGARDING WAIVER OF TRIBAL IMMUNITY AND JURISDICTION FOR PERSONAL INJURY SUITS UNDER THE INDIAN GAMING REGULATORY ACT

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I. INTRODUCTION

There is a very important judicial divide forming in regard to Indian tribal sovereign immunity under the Indian Gaming Regulatory Act (IGRA).[1] The crux of the debate is whether IGRA permits an Indian tribe and a state to negotiate a waiver of the tribe's sovereign immunity, allowing visitors of tribal gaming facilities to file personal injury suits against the tribe.[2] The debate also includes an all-important jurisdictional

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1. Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721 (2012).

2. *See* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1255, 1263–66 (D.N.M. 2013); Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist.

component. Specifically, courts disagree about whether an Indian tribe can allocate jurisdiction to state courts for personal injury suits brought against the Indian tribe.[3] The enormous stakes in this debate are as follows: (1) Indian tribal autonomy; (2) the quest for tribal self-sufficiency through gaming opportunities; (3) the personal safety of millions of gaming visitors;[4] and (4) the opportunity for a meaningful remedy in the case of injury. The economic ramifications for these tribes may potentially implicate billions of dollars.[5] Indeed, the conclusion of this debate may give states the power to hold vast sums of money for ransom in exchange for a waiver of tribal immunity.

A. An Introduction to the Divide

Congress passed IGRA in 1988 "to oversee the establishment and regulation of Indian casinos."[6] In IGRA's "Declaration of Policy," Congress explained that the legislation would "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[7] Gaming has proved to be a critical source of income for tribal governments; indeed, the Senate reported that "for those tribes that have entered into the business . . . the income often means the difference between an adequate governmental program and a skeletal program that

LEXIS 114945, at *9–19 (W.D. Okla. Oct. 27, 2010); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 1, 31–45, 141 N.M. 269, 154 P.3d 644.

3. *Compare Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9–19 ("IGRA does not prohibit a state and a tribe from negotiating an allocation of civil-adjudicatory authority over tort claims related to gaming operations."), *and Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 1, 31–45 ("Congress intended the compacting provision of IGRA to allow the states and the tribes broad latitude to negotiate regulatory issues."), *with Nash*, 972 F. Supp. 2d at 1255, 1263–67 ("[T]he [IGRA] does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim . . . .").

4. In Minnesota alone, there were over twenty-four million visitors to Indian gaming resorts in 2007. BARRY RYAN, THE ECONOMIC CONTRIBUTIONS OF MINNESOTA TRIBAL GOVERNMENTS IN 2007, at 6 (2009).

5. In 2013, the National Indian Gaming Commission ("NIGC") reported that tribal gaming revenues exceeded $28.03 billion in the United States. *NIGC Tribal Gaming Revenues*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/images/uploads/reports/GR2013chart.pdf [http://perma.cc/XPT9-MTCT] (last visited Oct. 2, 2015) [hereinafter *NIGC Revenues: 2009–2013*].

6. Duluth v. Fond Du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1150 (8th Cir. 2013).

7. 25 U.S.C. § 2702(1) (2012).

is totally dependent on Federal funding."[8]

IGRA indicates that Indian tribes can offer gaming on tribal lands, but it requires those tribes to agree with the state on the terms that will regulate the more popular (and lucrative) forms of gaming.[9] Class III gaming under IGRA consists of almost all forms of gaming outside of bingo, "including casino 'standards' such as roulette, blackjack, and slot machines."[10] In order for an Indian tribe to engage in class III gaming under IGRA, the Indian tribe must enter into a gaming "compact" with the state.[11]

Congress recognized that states hold a significant amount of power as the party responsible for permitting class III gaming. As a result, Congress used 25 U.S.C. § 2710(d)(3)(C) to specifically limit the negotiations that a tribe and state may use to establish a gaming compact.[12] The statutory scope of this negotiation (i.e., the interpretation of this provision) is where the judicial divide arises. In pertinent part, § 2710(d)(3)(C) provides:

> (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* [*class III gaming*]; [and]
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations . . . .[13]

What are the state "civil laws and regulations . . . that are directly related to, and necessary for, the licensing and regulation of" class III gaming?[14] Is the limitation as strict as it reads, allowing only the laws that regulate the actual gaming itself? Or does this language have a broader meaning that allows the application of state tort law to visitors

8. S. REP. NO. 100-446, at 2–3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072.
9. *See* 25 U.S.C. § 2710(d)(1)(C).
10. Catskill Dev., L.L.C. v. Park Place Entm't Corp., 547 F.3d 115, 119 n.4 (2d Cir. 2008) (citing 25 U.S.C. § 2703(6)–(8) (2006)).
11. 25 U.S.C. § 2710(d)(1)(C) (2012).
12. *See id.* § 2710(d)(3)(C).
13. *Id.* § 2710(d)(3)(C)(i)–(ii) (emphasis added).
14. *Id.* § 2710(d)(3)(C)(i).

who sustain an injury at the gaming facilities on Indian lands because gaming activities brought them to the facilities? Section 2710(d)(3)(C) has various implications, which include jeopardizing the possibility of tribal waiver for these types of personal injury suits. If the state and tribe are able to negotiate these types of suits, this provision also makes it possible to waive sovereign immunity and give the state jurisdiction over the tribe.[15]

As a general overview, the courts that have addressed this question agree on one matter—IGRA must authorize an Indian tribe's gaming compact, including the agreements related to waiver and jurisdiction of a personal injury suit, or the waiver is ineffectual.[16] The disagreement, on the other hand, relates to whether IGRA allows negotiations related to the waiver and jurisdiction of personal injury suits.[17]

B. The Relevance and Impact of the Divide

This judicial divide is critically relevant because of both the nationwide reach and the vast economic impact of Indian gaming. First, Indian gaming is a nationwide business, making the potential resolution of the judicial divide important for numerous Indian tribes and states.[18] The beginning of this jurisdictional division involves splits in two very important jurisdictions for Indian law—the State of New Mexico and the Tenth Circuit.[19] The Supreme Court of New Mexico and the U.S. District Court for the Western District of Oklahoma have concluded that IGRA allows Indian tribes to waive immunity for personal injury suits under

15. *See id.* § 2710(d)(3)(C)(ii).

16. *See* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1263–66 (D.N.M. 2013); Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *9–12 (W.D. Okla. Oct. 27, 2010); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶ 29, 141 N.M. 269, 154 P.3d 644.

17. *See Nash*, 972 F. Supp. 2d at 1255, 1263–67; *Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9–19; *Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 1, 31–45.

18. *The Commission: FAQs*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/commission/faqs [http://perma.cc/GVA2-9SBP] (scroll to and expand the question "In which state does Indian gaming occur?") (last visited Oct. 2, 2015). Indian gaming is present in twenty-eight states: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Oklahoma, South Dakota, Texas, Washington, Wisconsin, and Wyoming. *Id.*

19. *See Nash*, 972 F. Supp. 2d at 1255, 1263–67; *Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9–19; *Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 1, 31–45.

state tort law and to shift jurisdiction to the state.[20] The U.S. District Court for the District of New Mexico, however, has strongly disagreed with that interpretation and held that IGRA does not permit such a waiver.[21] The result is, as previously mentioned, a split between the federal and state courts in New Mexico and two federal district courts in the all-important Tenth Circuit. This debate will likely spread across the nation since compacts are prevalent in over half of the states.[22]

Second, Indian gaming is an enormous business with a substantial economic impact on Indian tribes and states. In 2013, the National Indian Gaming Commission reported that tribal gaming revenues exceeded $28.03 billion in the United States.[23] This trend is only increasing. For example, the revenue per year from Indian gaming has nearly tripled since 2000.[24] This growth is also present in the number of Indian gaming operations that do business each year, which grew from 311 in 2000 to 449 in 2013.[25] The sheer size of Indian gaming operations has also grown; indeed, the number of operations that achieved or exceeded $100 million in revenues rose from thirty-one gaming operations in 2000 to seventy-eight in 2013.[26] These vast revenues are spread across the Indian tribes throughout the United States; no one region garnered more than twenty-five percent of the total revenues in 2013:

20. *See Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9–19; *Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 1, 31–45.

21. *See Nash*, 972 F. Supp. 2d at 1255, 1263–67.

22. *See Gaming Compacts*, U.S. DEP'T INTERIOR: INDIAN AFF., http://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm [http://perma.cc/LY3S-KKBL] (last visited on Sept. 25, 2015).

23. *NIGC Revenues: 2009–2013*, *supra* note 5.

24. *See NIGC Tribal Gaming Revenues*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/images/uploads/reports/tribalgamingrevenues05.pdf [http://perma.cc/774Y-979B] (last visited Oct. 2, 2015) [hereinafter *NIGC Revenues: 2000–2005*].

25. *See id.*; *NIGC Revenues: 2009–2013*, *supra* note 5.

26. *See NIGC Revenues: 2000–2005*, *supra* note 24; *NIGC Revenues: 2009–2013*, *supra* note 5.

TABLE 1: REGIONAL GAMING REVENUES FOR FISCAL YEAR 2013[27]

States in Region	Number of Operations	Regional Gaming Revenues ($)	Portion (%) of Total Revenues (Rounded)
Alaska, Idaho, Or., and Wash.	51	2,902,799,000	10.36
Cal. and N. Nev.	66	6,992,690,000	24.95
Ariz., Colo., N.M., and S. Nev.	48	2,738,803,000	9.77
Iowa, Mich., Minn., Mont., N.D., Neb., S.D., Wis., and Wyo.	128	4,745,087,000	16.93
Kan. and E. Okla.	68	2,033,815,000	7.26
W. Okla. and Tex.	60	1,866,562,000	6.66
Ala., Conn., Fla., La., Miss., N.C., and N.Y.	28	6,751,839,000	24.09
Total	449	28,031,595,000	100

27. *NIGC Tribal Gaming Revenues by Region: Fiscal Year 2013 and 2012*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/images/uploads/GRbyRegion2013.pdf [http://perma.cc/CCF3-9NPS] (last visited Oct. 2, 2015).

C. Outline of Analysis

This Article provides an analysis of the interpretive question at the root of this debate in four parts. First, this Article explains the fundamental principles of Indian tribal sovereign immunity and the interpretive presumptions established to protect that immunity. Second, this Article outlines the source of the IGRA debate and examines the purposes of IGRA to provide the foundation for a solution. Third, this Article outlines the rationale of the courts that currently forms the divide and creates potential avenues for future courts to follow. Fourth, this Article takes those holdings and provides an extensive analysis, explaining why IGRA does not allow Indian tribes and states to negotiate a waiver of immunity and jurisdiction for personal injury suits. This Article closes with a brief conclusion for the great number of courts that will undoubtedly address this debate in the future.

II. THE INHERENT SOVEREIGNTY OF INDIAN TRIBES

A. The Relationship Between Indian Tribal Sovereignty and the Law of the United States

Many years "before the arrival of Europeans on this continent, [Indian] tribes were self-governing political communities."[28] Since this precolonial time, Indian tribes have "possessed the full attributes of sovereignty, which include[] 'the inherent power to prescribe laws for their members and to punish infractions of those laws.'"[29] The United States government did not abolish these ancient principles of sovereignty, and it recognizes that Indian tribes "remain 'separate sovereigns pre-existing the Constitution.'"[30] Additionally, the government recognizes that "[these] powers which 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."[31] Indeed, "unless and 'until

28. MacArthur v. San Juan Cty., 309 F.3d 1216, 1221 (10th Cir. 2002) (citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985)).

29. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

30. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

31. *MacArthur*, 309 F.3d at 1222 (quoting FELIX S. COHEN, U.S. DEP'T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)).

Congress acts, the tribes retain' their historic sovereign authority."[32] Throughout history, Congress has employed a "jealous regard" for preserving "Indian self-governance."[33]

Indian tribal authority is unique, however, in that "Indian tribes are 'domestic dependent nations' [of the United States] that exercise 'inherent sovereign authority.'"[34]

> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.[35]

Courts have compared these "domestic dependent nations" and their "relation[ships] 'to the United States'" to "that of a ward to his guardian."[36] Essentially, "[a]s dependents, the tribes are subject to plenary control by Congress."[37] This guardian–ward analogy should not be misconstrued to minimize the foundational sovereignty that Indian tribes still possess. Indian tribes retain sovereign autonomy and authority in relation to other sovereign governments in every manner not specifically abrogated by Congress.[38] Indeed, "[a]lthough the tribes' power of self-government may be limited by federal statutes, treaties

32. *Bay Mills*, 134 S. Ct. at 2030 (quoting *Wheeler*, 435 U.S. at 323); *see also Wheeler*, 435 U.S. at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.").

33. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986).

34. *Bay Mills*, 134 S. Ct. at 2030 (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991)).

35. *Wheeler*, 435 U.S. at 323 (footnote omitted) (citation omitted) (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)).

36. Davids v. Coyhis, 869 F. Supp. 1401, 1405 (E.D. Wis. 1994) (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831)).

37. *Bay Mills*, 134 S. Ct. at 2030; *see also* United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); *Wheeler*, 435 U.S. at 323.

38. *See Bay Mills*, 134 S. Ct. at 2030.

with the United States, or by the restraints implicit in a 'guardian-ward' relationship, the tribes remain independent, self-governing political entities."[39]

B. The Sovereign Immunity of Indian Tribes

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[40] The U.S. Supreme Court describes this immunity as "a necessary corollary to Indian sovereignty and self-governance."[41] Similar to other inherent sovereign powers of an Indian tribe, the guardian–ward relationship between the United States and the Indian tribe does not automatically remove sovereignty.[42] "[T]he qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands."[43] The Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)."[44]

Importantly, "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation . . . . Rather[,] it presents a pure jurisdictional question."[45]

39. *Davids*, 869 F. Supp. at 1405–06; *see also Wheeler*, 435 U.S. at 323 ("But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than "private, voluntary organizations."' The sovereignty that the Indian tribes retain is of a unique and limited character." (alterations in original) (citations omitted) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

40. Sanchez v. Santa Ana Golf Club, Inc., 2005-NMCA-003, ¶ 5, 136 N.M. 682, 104 P.3d 548 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

41. *Bay Mills*, 134 S. Ct. at 2030 (quoting Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986)); *cf.* THE FEDERALIST NO. 81, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright ed., MetroBooks 2002) (1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without . . . consent*.").

42. *See Bay Mills*, 134 S. Ct. at 2030.

43. *Id.*; *see also* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.").

44. *Bay Mills*, 134 S. Ct. at 2030–31 (alteration in original) (quoting Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)).

45. Armijo v. Pueblo of Laguna, 2011-NMCA-006, ¶ 13, 149 N.M. 234, 247 P.3d 1119 (alterations in original) (quoting Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 582 (Cal. Ct. App. 2008)).

When a court applies sovereign immunity to effect dismissal, it is not like a "case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent."[46] Indeed, "[a]s a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit."[47] This preference emphasizes the importance of tribal sovereignty.

1. Immunity for Indian Tribes in State Courts

"[T]ribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals."[48] "Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country."[49] A state's required recognition of Indian tribal immunity goes far beyond the simple comity principles that are applicable when a state decides whether to recognize another state's sovereign immunity in its courts.[50] Indeed, it is clear that the "immunity possessed by Indian tribes is not coextensive with that of the States."[51]

State sovereign immunity is distinguishable from tribal sovereign immunity by not only the nature of Indian tribal immunity existing outside the relationship of federalism but also because Indian "tribes were not at the Constitutional Convention . . . [and] were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of

46. Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, ¶ 51, 132 N.M. 207, 46 P.3d 668 (quoting Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989)).

47. *Id.* (second alteration in original) (quoting Srader v. Verant, 1998-NMSC-025, ¶ 33, 125 N.M. 521, 964 P.2d 82).

48. *Bay Mills*, 134 S. Ct. at 2031; *see also* DeFeo v. Ski Apache Resort, 1995-NMCA-118, ¶ 10, 120 N.M. 640, 904 P.2d 1065 ("One aspect of an Indian tribe's sovereignty and power of self-government is its immunity from suit in state courts.").

49. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1262 (D.N.M. 2013).

50. "Comity is a principle whereby a sovereign forum state recognizes and applies the laws of another state sued in the forum state's courts." Sam v. Estate of Sam, 2006-NMSC-022, ¶ 8, 139 N.M. 474, 134 P.3d 761. "[A] forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* ¶ 13 (first citing Nevada v. Hall, 440 U.S. 410 (1979); then citing Franchise Tax Bd. v. Hyatt, 538 U.S. 488 (2003)).

51. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998).

immunity from suit by sister States plausible.'"[52] "While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits."[53] Accordingly, "tribal immunity is a matter of federal law and is not subject to diminution by the States."[54]

2. Immunity for the Commercial Activity of Indian Tribes

Notably, tribal immunity is not confined to noncommercial conduct or even to conduct that occurs only on reservations.[55] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the U.S. Supreme Court concluded, after much deliberation, that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[56] The Court noted that Indian "tribal immunity [had] c[ome] under attack" in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* due to the growing sentiment that "tribal businesses had become far removed from tribal self-governance and internal affairs."[57] The Court gave some credence to this argument, acknowledging that "modern, wide-ranging tribal enterprises extend[] well beyond traditional tribal customs and activities."[58] "This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians."[59] The Court acknowledged that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[60] The Court flatly stated its doubt about the necessity of retaining such a far-reaching immunity in the modern context:

52. *Id.* (third alteration in original) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991)).
53. *Bay Mills*, 134 S. Ct. at 2031 (quoting *Blatchford*, 501 U.S. at 782).
54. *Kiowa*, 523 U.S. at 756.
55. *See id.* at 760.
56. *Id.*
57. *Id.* at 757 (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991)).
58. *Id.* at 757–58.
59. *Id.* at 758.
60. *Id.*

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. . . . These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule.[61]

Kiowa has become a cornerstone case for Indian law because the Court did not act upon judicial doubt; instead, it reaffirmed the central role of Congress as the most appropriate authority to set the outer contours of tribal immunity.[62] The Court explained that "[a]lthough [it] has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation."[63] The Court emphasized that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" of Indian tribes in relation to immunity, and "[t]he capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by [the Court] in this area."[64] Indeed, "Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.'"[65] "In light of these concerns, [the Court] decline[d] to revisit [its] case law" even though there appeared to be a growing movement to abrogate Indian tribal immunity in some commercial areas.[66] Instead, the Court "defer[red] to the role Congress may wish to exercise in [such an] important judgment."[67] The Court relied upon Congress's inaction—not abrogating tribal immunity for commercial conduct off the reservation—and held that immunity remains for Indian tribes in these contexts.[68]

61. *Id.*
62. *See id.* at 760.
63. *Id.* at 759.
64. *Id.*
65. *Id.* (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991)).
66. *Id.* at 760.
67. *Id.* at 758.
68. *Id.* at 758, 760.

3. Immunity for Indian Tribal Entities

In many cases, Indian tribal sovereign immunity extends beyond the tribal government to cover those economic entities that are sufficiently under the Indian tribe's control.[69] In these instances, "tribal immunity extends to certain tribal corporations because 'an action against a tribal [enterprise] is, in essence, an action against the tribe itself.'"[70] "If the economic entities are held to be sufficiently close to a tribe so as to share in its sovereign immunity,"[71] courts have extended the tribe's immunity and described such entities by a variety of different names: "an arm of the tribe,"[72] "a division of the [t]ribe,"[73] "a tribal agency,"[74] "a sub-entity of the [t]ribe,"[75] "a subordinate tribal organization,"[76] and "a subordinate economic entity."[77]

This is commonly referred to as "the subordinate economic organization doctrine."[78] "Although the . . . analysis has been widely adopted, its implementation is rarely uniform."[79] The uneven application of the doctrine seems to happen because courts have found that "the demarcation between those business entities so closely related to tribal

69. *See* Sanchez v. Santa Ana Golf Club, Inc., 2005-NMCA-003, ¶ 6, 136 N.M. 682, 104 P.3d 548 ("Other entities under tribal control are extended the same sovereign immunity as the tribe itself." (citing Parker Drilling Co. v. Metlakatla Indian Cmty., 451 F. Supp. 1127, 1131 (D. Alaska 1978))).

70. Johnson v. Harrah's Kan. Casino Corp., No. 04-4142-JAR, 2006 U.S. Dist. LEXIS 7299, at *15 (D. Kan. Feb. 23, 2006) (quoting Local IV-302 Int'l Woodworkers Union v. Menominee Tribal Enters., 595 F. Supp. 859, 862 (E.D. Wis. 1984)).

71. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1185 n.9 (10th Cir. 2010).

72. *Id.* (quoting Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006)).

73. *Id.* (quoting Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1293 (10th Cir. 2008)).

74. *Id.* (quoting Dillon v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583 (8th Cir. 1998)).

75. *Id.* (quoting Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982)).

76. William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 177 (1994) (first citing Richardson v. Mt. Adams Furniture (*In re* Greene), 980 F.2d 590 (9th Cir. 1992); then citing Morgan v. Colo. River Indian Tribe, 443 P.2d 421 (Ariz. 1968) (in banc); and then citing Ramey Constr. Co. v. Apache Tribe, 673 F.2d 315 (10th Cir. 1982)).

77. *Breakthrough*, 629 F.3d at 1185 n.9.

78. *Id.* (citing Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1108–12 (Ariz. 1989)).

79. Somerlott v. Cherokee Nation Distribs., Inc., No. CIV-08-429-D, 2010 U.S. Dist. LEXIS 38021, at *8–9 (W.D. Okla. Apr. 16, 2010).

governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear."[80] The Tenth Circuit recently surveyed a number of instances in which courts have analyzed whether it is appropriate to extend immunity to a tribal entity.[81] It determined that the following five factors have proved "helpful" to courts with this inquiry:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities.[82]

The Tenth Circuit further found that a sixth policy-driven factor should guide this analysis.[83] That factor considers "the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities."[84] These "policies include protection of the tribe's monies, as well as 'preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians.'"[85]

4. Employees of Indian Tribal Entities Sufficiently Under Tribal Control

Tribal sovereign immunity extends further down the thread to employees of those tribal entities that are considered to be sufficiently under tribal control.[86] Importantly, an employee is entitled to an

80. Gavle v. Little Six, Inc., 555 N.W.2d 284, 293 (Minn. 1996).
81. *Breakthrough*, 629 F.3d at 1187 n.10.
82. *Id.* at 1187.
83. *Id.*
84. *Id.*
85. *Id.* at 1188 (citations omitted) (quoting Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1111 (Ariz. 1989)).
86. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2051 n.4 (2014) (Thomas, J., dissenting) ("[T]ribal immunity has been interpreted to cover tribal employees and officials acting within the scope of their employment."); *Breakthrough*, 629 F.3d at 1180 n.6 (noting the legal support for the parties' agreement on appeal that a general manager of a tribal casino "acting in the course and scope of his employment" shares "whatever immunity" that exists for the tribal casino); Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 727 (9th Cir. 2008) ("The principles that motivate the

extension of an Indian tribe's immunity only when the suit alleges liability for an action within the scope of the employee's work for the tribal entity.[87]

C. Recognized Methods of Abrogation or Waiver of an Indian Tribe's Sovereign Immunity

"The Supreme Court has repeatedly declared a presumption favoring tribal sovereign immunity."[88] In fact, courts have found that an Indian tribe is subject to suit in only two circumstances: (1) where Congress has specifically abrogated tribal immunity by statutorily authorizing suit; or (2) when an Indian tribe has unequivocally waived its immunity.[89]

1. Congressional Abrogation by Statute

The U.S. Supreme Court has "often held" that "[t]he baseline position . . . is tribal immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'"[90] "Congressional

immunizing of tribal officials from suit . . . apply just as much to tribal employees when they are sued in their official capacity."); *see also* Burrell v. Armijo, 603 F.3d 825, 832 (10th Cir. 2010) ("Tribal sovereign immunity generally extends to tribal officials acting within the scope of their official authority."); Dry v. United States, 235 F.3d 1249, 1253 (10th Cir. 2000) ("Due to their sovereign status, suits against tribes or tribal officials in their official capacity 'are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.'" (quoting Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997))); Williams v. Bd. of Cty. Comm'rs of San Juan Cty., 1998-NMCA-090, ¶¶ 15–16, 125 N.M. 445, 963 P.2d 522 (affirming dismissal of a suit against tribal officers in their official capacities because they "were entitled to the immunities afforded to the [tribe]").

87. *Bay Mills*, 134 S. Ct. at 2051 n.4 (Thomas, J., dissenting); *Breakthrough*, 629 F.3d at 1180 n.6; *Cook*, 548 F.3d at 727; *see also Burrell*, 603 F.3d at 832; *Dry*, 235 F.3d at 1253; *Williams*, 1998-NMCA-090, ¶¶ 15–16.

88. Demontiney v. United States *ex rel.* Dep't of Interior, Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001).

89. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) ("As 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."); *see also* Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986) ("[S]ociety has consciously opted to shield Indian tribes from suit without congressional or tribal consent.").

90. *Bay Mills*, 134 S. Ct. at 2031 (third and fourth alterations in original) (quoting C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001)).

abrogation of tribal sovereign immunity must be explicit; abrogation may not be implied. Abrogation of tribal sovereign immunity by Congress will only be found where Congress has clearly and unequivocally expressed its intent to abrogate the immunity pursuant to a valid exercise of its congressional power."[91] Thus, the Court established a foundational rule of statutory construction for when tribal sovereign immunity is at issue—"statutes are to be construed liberally in favor of the Indian[] [tribes], with ambiguous provisions interpreted to their benefit."[92]

2. Waiver by an Indian Tribe

"Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast."[93] Indeed, "[t]here is a strong presumption against waiver of tribal sovereign immunity."[94] "Therefore, a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"[95] Importantly, "a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions."[96] Instead, "[a]n Indian tribe or tribal entity may waive its sovereign immunity by" express terms—usually in the form of a contract with "requisite clarity"[97] or by tribal ordinance, resolution, charter, or constitution.[98] Again,

91. *In re* Platinum Oil Props., LLC, 465 B.R. 621, 642–43 (Bankr. D.N.M. 2011) (footnote omitted).

92. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

93. Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

94. Sanchez v. Santa Ana Golf Club, Inc., 2005-NMCA-003, ¶ 7, 136 N.M. 682, 104 P.3d 584 (citing Demontiney v. United States *ex rel.* Dep't of Interior, Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001)).

95. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

96. Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla., 692 F.3d 1200, 1206 (11th Cir. 2012).

97. J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1178 (D.S.D. 2012) (first citing C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001); then citing Colombe v. Rosebud Sioux Tribe, 835 F. Supp. 2d 736, 744–46 (D.S.D. 2011), *rev'd in part on other grounds*, 747 F.3d 1020 (8th Cir. 2014)); *see also* Larimer v. Konocti Vista Casino Resort, Marina & RV Park, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011) ("Tribes protected by sovereign immunity may waive that immunity by contract." (citing Am. Vantage Cos. v. Table Mountain Rancheria, 292 F.3d 1091, 1099 (9th Cir. 2002))).

98. *See* Big Spring v. U.S. Bureau of Indian Affairs, 767 F.2d 614, 617 (9th Cir. 1985) ("A tribe may waive this immunity by consenting to suit in its constitution or a tribal ordinance."); *see also* Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 921 (6th Cir. 2009) ("Of course, a tribe may choose to expressly waive its

waiver under such devices must still be unequivocally expressed and "will not be found by implication."[99]

"Because a tribe need not waive immunity at all, it is free to 'prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'"[100] Courts have stated that "[a]ny such conditions or limitations 'must be strictly construed and applied'"[101] and "[w]hen consent . . . is given, the terms of the consent establish the bounds of a court's jurisdiction."[102]

III. IGRA

A. The Goals of IGRA

In 1988, Congress passed IGRA "to oversee the establishment and regulation of Indian casinos"[103] and "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[104] Congress recognized the need to protect the good intentions of this goal from potential pitfalls that could arise in the promotion of gaming.[105] IGRA's "Declaration of Policy" further explained that it sought to provide a statutory framework that would (1) "adequate[ly] . . . shield [Indian tribes] from organized crime and other corrupting influences"; (2) "ensure that the Indian tribe is the primary beneficiary of the gaming operation"; and (3) "assure that gaming is conducted fairly and honestly by both the operator and players."[106] Lastly, Congress explained that IGRA was established to

tribal-sovereign immunity either in its charter or by agreement." (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998))); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980) (en banc), *aff'd*, 455 U.S. 130 (1982).

99. *Larimer*, 814 F. Supp. 2d at 955 (citing Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989)).

100. R & R Deli, Inc. v. Santa Ana Star Casino, 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d 513 (quoting Mo. River Servs., Inc. v. Omaha Tribe of Neb., 267 F.3d 848, 852 (8th Cir. 2001)).

101. *Id.* (quoting *Mo. River Servs.*, 267 F.3d at 852).

102. Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982).

103. Duluth v. Fond Du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1150 (8th Cir. 2013).

104. 25 U.S.C. § 2702(1) (2012).

105. *See id.* § 2702(2).

106. *Id.*

create the administrative and regulatory entities and authority "necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue."[107]

B. Class III Gaming and the Tribal-State Gaming Compact

For regulation purposes, IGRA divides the types of gaming into three classes.[108] "Class I includes traditional forms of gaming engaged in during tribal ceremonies; Class II is principally comprised of bingo games; and Class III includes all other forms of gaming, including casino 'standards' such as roulette, blackjack, and slot machines."[109] Class I gaming activities are left "within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of [IGRA]."[110] Class II gaming activities are also "within the jurisdiction of the Indian tribes, but [they are] subject to the provisions of [IGRA]."[111] Finally, IGRA provides that "Class III gaming activities shall be lawful on Indian lands . . . if such activities are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."[112]

Class III gaming licenses, which cover the majority of common casino gaming, are therefore dependent upon some negotiation and agreement between "the Indian tribe and the State."[113] However, Congress was mindful that if the scope of these negotiations and compacts were unlimited, states could hold precious class III gaming

107. *Id.* § 2702(3).

108. *See id.* § 2703(6)–(8).

109. Catskill Dev., L.L.C. v. Park Place Entm't Corp., 547 F.3d 115, 119 n.4 (2d Cir. 2008) (citing 25 U.S.C. § 2703(6)–(8) (2006)); *see also* Cachil Dehe Band of Wintun Indians v. California, 547 F.3d 962, 966 (9th Cir. 2008) ("Slot machines and equivalent gaming devices . . . are Class III games." (citing 25 U.S.C. § 2703(7)(B)(ii), (8))); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 9–10, 141 N.M. 269, 154 P.3d 644 ("Class III gaming[is] 'the most heavily regulated and most controversial form of gambling under IGRA.' . . . [It] includes banking card games (where the house has a monetary stake in the game because players bet against the house, not just against one another); casino games such as roulette, craps, and keno; slot machines and electronic games of chance; parimutuel horse or dog wagering; and lotteries." (citation omitted) (quoting Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 715 (9th Cir. 2004))).

110. 25 U.S.C. § 2710(a)(1) (2012).

111. *Id.* § 2710(a)(2).

112. *Id.* § 2710(d)(1)(C). The tribal government must also authorize class III gaming by an ordinance or resolution, and the state in which the tribe is located must allow such forms of gaming by other entities. *See id.* § 2710(d)(1)(A)–(B).

113. *Id.* § 2710(d)(1)(C).

licenses for ransom.[114] Indeed, "Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states."[115] With § 2710(d)(3)(C), Congress specifically limited the negotiations that may take place between a tribe and state when they endeavor to establish such a gaming 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 [class III gaming];
>
> (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.[116]

It is important to understand that Congress limited negotiations between tribes and states to these seven specific points to protect the tribes and the purposes of IGRA.[117] As the Ninth Circuit emphasized in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, "IGRA

114. *See* Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019, 1027 (9th Cir. 2010).

115. *Id.*

116. 25 U.S.C. § 2710(d)(3)(C)(i)–(vii).

117. *See Rincon*, 602 F.3d at 1027–29; *see also In re* Indian Gaming Related Cases, 331 F.3d 1094, 1111 (9th Cir. 2010).

limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes."[118] Or as the Ninth Circuit explained in *In re Indian Gaming Related Cases*:

> [I]t is clear from the legislative history that by limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming.[119]

C. Express Waiver of Tribal Immunity in IGRA

Congress abrogated an Indian tribe's sovereign immunity in only one circumstance under IGRA: "The United States district courts shall have jurisdiction over . . . 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 . . . ."[120] The majority of courts that have decided the issue seem to "support[] the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."[121] As the Supreme Court of South Dakota emphasized, "nothing in IGRA itself abrogates immunity for the purpose of allowing private civil suits against Indian tribes. The Act effects only a limited waiver of a tribe's sovereign immunity as it relates to *enforcement* of IGRA's provisions."[122]

118. *Rincon*, 602 F.3d at 1028–29 (footnotes omitted).

119. *In re Indian Gaming Related Cases*, 331 F.3d at 1111; *see also* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1264 (D.N.M. 2013) ("The IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes.").

120. 25 U.S.C. § 2710(d)(7)(A)(ii).

121. *See, e.g.*, Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997); *see also Nash*, 972 F. Supp. 2d at 1266 ("The limited case law in the Tenth Circuit supports this [c]ourt's restrictive interpretation of the IGRA and conclusion that a waiver of tribal sovereign immunity, in a compact entered into pursuant to the IGRA, can be valid only in the narrow category of cases where compliance with the IGRA's provisions is at stake.").

122. Calvello v. Yankton Sioux Tribe, 1998 SD 107, ¶ 16, 584 N.W.2d 108, 114 (footnote omitted) (citation omitted).

D. Does IGRA Permit Negotiations on the Waiver of Immunity and Jurisdiction for Personal Injury Suits in a Gaming Compact?

IGRA does not itself abrogate tribal immunity for purposes of a personal injury suit that may arise in relation to a person's visit to an Indian gaming facility. But does it allow for the Indian tribe to otherwise negotiate and waive this immunity as part of the negotiation process to achieve a gaming compact for class III gaming? The key provisions at issue in § 2710(d)(3)(C) are the first two items of approved negotiation:

> (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* [*class III gaming*]; [and]
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe *necessary for* the enforcement of such laws and regulations.[123]

It is clear that a state and an Indian tribe may negotiate a waiver of the Indian tribe's immunity, allowing a criminal or civil suit and even allowing a state to have jurisdiction over the suit against the Indian tribe.[124] However, a waiver of tribal immunity is confined to the application of criminal and civil laws that are "directly related to, and necessary for," one specific category—"the licensing and regulation of" class III gaming on tribal lands.[125] Courts are grappling with the weighty question of whether state personal injury tort doctrines are "civil laws" that are "directly related to, and necessary for," the specific function of licensing and regulating class III gaming.[126]

If plainly read, § 2710(d)(3)(C)'s reference to licensing and regulation of class III gaming seems to confine negotiations to laws related to such gaming. For example, rules requiring a license to provide class III gaming and regulations that ensure the fair play of the games relate to gaming itself. It is, however, arguable that the wording lends itself to a broader definition despite the double-layered restrictions of "directly related to" and "necessary for" class III gaming.[127] Specifically,

123. 25 U.S.C. § 2710(d)(3)(C)(i)–(ii) (emphasis added).
124. *Id.*
125. *Id.* § 2710(d)(3)(C)(i).
126. *Id.*
127. *Id.*

it is necessary to inquire whether the regulation of class III gaming includes the state's personal injury tort regime for injuries to visitors engaged in such gaming as "necessary for" the existence of the gaming itself.[128]

IV. THE DIVIDE OVER WHETHER IGRA ALLOWS FOR THE NEGOTIATION OF WAIVER AND JURISDICTION FOR PERSONAL INJURY SUITS BY VISITORS

A two-part analysis is required to answer the broader question of whether an Indian tribe and a state may negotiate tribal immunity in a gaming compact. First, is it necessary for IGRA to allow an Indian tribe to negotiate its sovereign immunity regarding personal injury suits in a gaming compact, or are Indian tribes free to waive this immunity on their own sovereign authority? If Congress's consent is not required in IGRA, then IGRA's specific restrictions become irrelevant because states and Indian tribes would not be dependent upon its provisions. Second, if an Indian tribe's waiver of sovereign immunity for personal injury suits in a gaming compact does require authority from IGRA, does IGRA actually allow for this waiver as part of the gaming compact? *Doe ex rel. J.H. v. Santa Clara Pueblo*,[129] *Pueblo of Santa Ana v. Nash*,[130] and *Muhammad v. Comanche Nation Casino*[131] answered these questions in a way that will undoubtedly spark future litigation committed to resolving these important issues.

A. Is It Even Necessary for IGRA to Authorize a Waiver of Tribal Sovereign Immunity for Personal Injury Suits in a Gaming Compact?

Given the potential implications for Indian tribal autonomy, one might expect this first question to be the source of the judicial divide. Indeed, the conclusion that an Indian tribe does not have the inherent authority to waive its own sovereign immunity would seem contradictory on some level. However, as outlined below, the courts that have considered this issue agree that IGRA must authorize an Indian tribe's

128. *Id.* § 2710(d)(3)(C)(ii).

129. Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644.

130. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254 (D.N.M. 2013).

131. Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945 (W.D. Okla. Oct. 27, 2010).

waiver of sovereign immunity regarding personal injury suits in a gaming compact for it to be legally effective.

1. *Doe ex rel. J.H. v. Santa Clara Pueblo*: Fitting the Potential Allowance for Tribal Waiver in a Gaming Compact Within the Current State of the Law

The Supreme Court of New Mexico provided the nation's first definitive analysis of these issues in *Doe ex rel. J.H. v. Santa Clara Pueblo*.[132] In *Santa Clara Pueblo*, the Indian Pueblos negotiated with New Mexico to establish a gaming compact that allowed class III gaming at Indian casinos located on tribal lands.[133] The gaming compact included a "Protection of Visitors" section "to assure that any such [visitors] who suffer bodily injury or property damage proximately caused by the conduct of the [Indian casinos] have an effective remedy for obtaining fair and just compensation."[134] This section of the compact "allow[ed] for personal injury actions . . . to 'proceed either in binding arbitration . . . or in a court of competent jurisdiction.'"[135] The compact

> define[d] a court of competent jurisdiction to include state courts subject to the following condition: [A]ny 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*

132. *See generally Santa Clara Pueblo*, 2007-NMSC-008 (examining the congressional intent of the class III compact provision and its implications).

133. *Id.* ¶ 6.

134. *Id.* ¶ 7 (first alteration in original) (quoting Proposed Tribal-State Class III Gaming Compact: 2001 Legislature § 8(A), at 16 [hereinafter Section 8(A) of the 2001 N.M. Compact], http://www.nmgcb.org/uploads/FileLinks/dbeb00db5d484afc9412b5a6e2bf51a0/2001compact.pdf [http://perma.cc/SV3W-2HCH]); *see also* Tribal-State Class III Gaming Compact, effective Dec. 14, 2001, between the State of New Mexico and the Pueblo of San Felipe § 8(A), at 16 [hereinafter Section 8(A) of the Pueblo of San Felipe Compact], http://www.bia.gov/cs/groups/xoig/documents/text/idc1-024788.pdf [http://perma.cc/RQA8-T3XX]; Tribal-State Class III Gaming Compact, effective Dec. 14, 2001, between the State of New Mexico and the Pueblo of Santa Clara § 8(A), at 16 [hereinafter Section 8(A) of the Pueblo of Santa Clara Compact], http://www.bia.gov/cs/groups/xoig/documents/text/idc1-025720.pdf [http://perma.cc/V8G5-QVM9].

135. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8 (second alteration in original) (quoting Section 8(A) of the 2001 N.M. Compact, *supra* note 134); *see also* Section 8(A) of the Pueblo of San Felipe Compact, *supra* note 134; Section 8(A) of the Pueblo of Santa Clara Compact, *supra* note 134.

visitors' personal injury suits to state court.[136]

The court concluded from this language that "for the limited purpose of personal injury actions involving visitor safety, the parties to the [gaming compact] agreed to state court jurisdiction *unless* IGRA does not permit it."[137] Then, the question for the court was "whether Congress, in IGRA, 'does not permit' tribes and states to do as the Pueblos and New Mexico [had] done [there]; that is, to negotiate provisions in a tribal-state compact for 'the shifting of jurisdiction over visitors' personal injury suits to state court,' including 'claims arising on tribal land.'"[138]

In reviewing IGRA, the court determined that "compacts may include terms related to the application of state law and the allocation of civil jurisdiction between the states and the tribes."[139] The court recognized, however, that this language—as to the scope of jurisdictional-shifting negotiations—required a deeper analysis.[140] Specifically, the court had to interpret the scope of the "licensing and regulation" language because

> IGRA specifically allows the parties to negotiate, regarding
>
> (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* [*class III gaming*]; [and]
>
> (ii) the allocation of *criminal and civil jurisdiction between the State and the Indian tribe* necessary for the enforcement of such laws and regulations.[141]

As the court summarized, "under IGRA a tribal-state gaming compact may apply state laws that are 'directly related to, and necessary

136. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8 (second alteration in original) (citing Section 8(A) of the 2001 N.M. Compact, *supra* note 134) (highlighting the qualifying language in the provision); *see also* Section 8(A) of the Pueblo of San Felipe Compact, *supra* note 134; Section 8(A) of the Pueblo of Santa Clara Compact, *supra* note 134.

137. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8.

138. *Id.* (quoting Section 8(A) of the 2001 N.M. Compact, *supra* note 134); *see also* Section 8(A) of the Pueblo of San Felipe Compact, *supra* note 134; Section 8(A) of the Pueblo of Santa Clara Compact, *supra* note 134.

139. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 11.

140. *See id.* ¶ 12.

141. *Id.* ¶ 11 (quoting 25 U.S.C. § 2710(d)(3)(C)(i)–(ii) (2006) (emphasis added)).

for, the licensing and regulation' of Class III gaming, and may then allocate criminal and civil jurisdiction to the state when it is 'necessary for the enforcement' of those laws."[142] Since "IGRA makes no other reference to jurisdiction shifting," the inquiry for the court was whether "IGRA 'does not permit' the negotiating parties to transfer subject matter jurisdiction to state court over personal injury claims arising on Indian lands."[143]

In its analysis, the court acknowledged that the first question it had to resolve was whether the Pueblos even needed Congress's permission to negotiate sovereign immunity and jurisdiction.[144] Specifically, did IGRA's explicit limitations on negotiations keep an Indian tribe from waiving its jurisdiction as it might in other commercial settings?[145] The Pueblos argued that "regardless of the [gaming compact's] language and their consent therein," congressional authorization was required for such a waiver.[146] "They assert[ed] that without express authority from Congress their purported consent to state court jurisdiction in the [gaming compact was] ineffective."[147] To answer the first question, the court assessed two categories of cases that concern an Indian tribe's ability to waive sovereign immunity and jurisdiction.[148]

The first category stemmed from *Kennerly v. District Court*.[149] In *Kennerly*, the U.S. Supreme Court rejected an agreement for concurrent jurisdiction between an Indian tribe and the state because the federal statute that allowed for the creation of concurrent jurisdiction over civil suits had "prerequisites" that the Indian tribe and the state did not follow in reaching their agreement.[150] The *Santa Clara Pueblo* court acknowledged that some courts believe "*Kennerly* stands for the proposition that a tribe can never consent to state court jurisdiction over civil matters arising on tribal lands without the express consent of Congress."[151] However, it rejected this interpretation of *Kennerly*

142. *Id.* ¶ 12 (first quoting 25 U.S.C. § 2710(d)(3)(C)(i); then quoting 25 U.S.C. § 2710(d)(3)(C)(ii)).
143. *Id.*
144. *See id.* ¶ 17.
145. *See id.* ¶ 22.
146. *Id.* ¶ 17.
147. *Id.* ¶ 19.
148. *See id.* ¶ 28.
149. Kennerly v. Dist. Court, 400 U.S. 423 (1971).
150. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 20 (citing *Kennerly*, 400 U.S. at 429–30).
151. *Id.* ¶ 21; *see* Wyoming *ex rel.* Peterson v. Dist. Court, 617 P.2d 1056, 1066 (Wyo.

because other courts had not found *Kennerly* to "reach quite so far,"[152] and "*Kennerly* did not involve a comprehensive compact, entered into in furtherance of federal legislation, and painstakingly negotiated between the tribes and the states, in which the tribes conceded state court civil jurisdiction in exchange for substantial benefits."[153]

The second category came from *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.[154] In *C & L Enterprises*, the U.S. Supreme Court held that a tribe effectively waived its sovereign immunity and its authority to limit jurisdiction in a commercial contract.[155] As stated in *Santa Clara Pueblo*, "*C & L Enterprises* suggests that when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur, including state court, whether or not it has express congressional authority to do so."[156] However, no federal statute controlled the contract at issue in *C & L Enterprises*, and the conduct giving rise to the suit occurred off of tribal lands.[157] Thus, the court found that neither the *Kennerly* nor the *C & L Enterprises* category was directly controlling.[158]

The court explained that gaming compacts under IGRA "fit somewhere in between" these two categories of tribal waiver:

1980) ("[W]e view the *Kennerly* majority as emphasizing 'a very vivid federal policy mandating the exclusive jurisdiction of tribal courts in cases involving internal tribal affairs or tribal self-government unless there has been an express delegation by Congress allowing the state to assume jurisdiction.'"); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05, at 590 (Nell Jessup Newton ed., 2012 ed.) ("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.").

152. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 23; *see also* Williams v. Clark, 742 F.2d 549, 554 (9th Cir. 1984) ("[T]he Supreme Court has implied that a tribe may not unilaterally relinquish jurisdiction absent explicit congressional authorization and strict compliance with statutory requirements."); Lewis v. Sac & Fox Tribe of Okla. Hous. Auth., 896 P.2d 503, 508 (Okla. 1994) ("*Kennerly* . . . does not stand as authority defeating concurrent state jurisdiction *in all civil cases*. Its thrust 'is concerned solely with the procedural mechanisms by which tribal consent must be registered.'" (quoting *Kennerly*, 400 U.S. at 430 n.6)).

153. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 25.

154. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001).

155. *Id.* at 419–20. The contract between the tribe and a private contractor allowed for arbitration, and the parties agreed to the application of state law since the project was located off of tribal lands. *Id.* at 414–15; *see also Santa Clara Pueblo*, 2007-NMSC-008, ¶ 26.

156. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 27.

157. *Id.* ¶ 28.

158. *Id.*

> (1) the *Kennerly* line, where a specific federal statute prescribes a course of action that must be followed to shift jurisdiction, but without any comprehensive agreement between the tribes and the state; and (2) the *C & L Enterprises* line, where a consensual business agreement exists between the tribe and another party, but there is no federal statute that governs jurisdiction shifting.[159]

The court found it inappropriate to simply rely upon the gaming compact language—as in *C & L Enterprises*—since IGRA was present.[160] The court also concluded that a hybrid analysis somewhere between the two categories was also inappropriate.[161] In the end, the presence of IGRA pushed the court to apply *Kennerly* even though it was "not exactly on point."[162]

"[I]n line with *Kennerly*," the court concluded that it would "look beyond the language of the [gaming compact] to determine if IGRA *authorizes* the Pueblos to shift jurisdiction over personal injury suits to state court."[163] The court assumed for purposes of its analysis that, like *Kennerly*, IGRA "provide[d] a comprehensive scheme governing tribal gaming which includes some allowance for jurisdiction shifting" and that IGRA's scheme "must be followed."[164] Accordingly, an Indian tribe's express consent to a waiver of sovereign immunity and concurrent jurisdiction within a gaming compact was valid only if IGRA authorized the consent.[165]

2. *Pueblo of Santa Ana v. Nash*: IGRA's Authorization Is Required Because the Gaming Compact Is Created and Regulated by IGRA

In *Pueblo of Santa Ana v. Nash*, the U.S. District Court for the District of New Mexico came to a similar conclusion regarding the need for IGRA's authorization of a waiver.[166] Similar to *Santa Clara Pueblo*, the Pueblo in *Nash* had a gaming compact with New Mexico that

159. *Id.*
160. *Id.* ¶ 29.
161. *See id.*
162. *Id.* ¶ 29; *see also id.* ¶ 45.
163. *Id.* ¶ 29.
164. *Id.*
165. *See id.*
166. *See* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013).

provided a section for the "Protection of Visitors."[167] With this provision, the Pueblo waived sovereign immunity for property and bodily injury claims caused by the conduct of its gaming enterprise.[168] The Pueblo's compact also provided a similar IGRA-based contingency for the waiver of immunity: "*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*."[169]

Similar to *Santa Clara Pueblo*, the *Nash* court had to decide whether an Indian tribe's waiver of sovereign immunity and jurisdiction was "legally effective" where IGRA did not otherwise contemplate the negotiation of these matters.[170] The court was committed to keeping the gaming compact consistent with IGRA.[171] As the court emphasized, "[a] gaming compact is a creation of the IGRA, which determines the compact's effectiveness and permissible scope."[172] The Pueblo and New Mexico therefore "entered into the [gaming compact], pursuant to the IGRA."[173] The court reiterated that such a compact "is nothing more than an agreement between the parties, the negotiated scope of which is controlled by [the limitations of IGRA]."[174]

The court recognized that a tribe may generally waive its immunity "under other circumstances, where congressional action affecting tribal rights is not involved."[175] However, the court reasoned that "in this instance the Pueblo negotiated the [gaming compact] in accordance with the IGRA, and thus, there can be no clear tribal waiver of immunity for matters outside the scope of IGRA."[176] In essence, "the negotiated terms of [a gaming compact]" that were created under IGRA "cannot exceed

167. *Id.* at 1256–57.
168. *Id.* at 1257.
169. *Id.* (quoting Section 8(A) of the 2001 N.M. Compact, *supra* note 134 (emphasis added)); *see also* Tribal-State Class III Gaming Compact, effective Dec. 14, 2001, between the State of New Mexico and the Pueblo of Santa Ana § 8(A), at 16 [hereinafter Section 8(A) of the Pueblo of Santa Ana Compact], http://www.bia.gov/cs/groups/xoig/documents/text/idc1-025721.pdf [http://perma.cc/5J4P-NH46].
170. *See Nash*, 972 F. Supp. 2d at 1265.
171. *See id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1266 n.11.
176. *Id.*

what is authorized by the IGRA."[177] Stated positively, "a waiver of tribal sovereign immunity, in a compact entered into pursuant to the IGRA, can be valid only in the narrow category of cases where compliance with the IGRA's provisions is at stake."[178] Accordingly, an Indian tribe does not have the authority to waive its sovereign immunity for personal injury claims in a gaming compact because the gaming compact is a creation of IGRA and remains under the control of IGRA.[179]

Similar to *Santa Clara Pueblo*, the *Nash* court concluded that § 2710(d)(3)(C) restricts negotiating points in a gaming compact.[180] "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes."[181] Therefore, negotiation of Indian tribal sovereign immunity and state court jurisdiction is valid only if permitted by IGRA.[182] Since IGRA did not allow the waiver of tribal immunity for a dramshop claim, the Pueblo's potential waiver was not valid.[183]

3. *Muhammad v. Comanche Nation Casino*: IGRA's Limited List of Negotiable Topics in § 2710(d)(3)(C) Mandates the Need for IGRA's Authorization of a Tribal Waiver

In *Muhammad v. Comanche Nation Casino*, the U.S. District Court for the Western District of Oklahoma found—in a rather short and matter-of-fact fashion—that IGRA's authorization for the waiver of tribal immunity in a gaming compact was necessary for the waiver's

177. *Id.* at 1266.
178. *Id.*
179. *Id.* at 1263–65.
180. *Id.*
181. *Id.*
182. *See id.* at 1266–67.
183. *Id.* at 1265. The *Nash* court further emphasized that the Pueblo had, in fact, "recognized the limitations of its powers to waive immunity outside the scope of the IGRA in the [c]ompact itself," which provided that "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." *Id.* at 1266 n.11 (quoting Section 8(A) of the 2001 N.M. Compact, *supra* note 134 (emphasis added)); *see also* Section 8(A) of the Pueblo of Santa Ana Compact, *supra* note 169. The doubt expressed by the Pueblo over the ability to waive its immunity, when coupled with the court's determination that IGRA did not allow the Pueblo to waive its immunity for a dramshop claim, resulted in the court holding that the Pueblo had not, in fact, waived its immunity. *Nash*, 972 F. Supp. 2d at 1265–67.

effectiveness.[184] In *Muhammad*, the Comanche Nation and Oklahoma entered into a gaming compact in which the Comanche Nation waived its immunity for personal injury suits on a limited basis and further agreed that such suits may be brought in a "court of competent jurisdiction."[185] The court also acknowledged that "[a] gaming compact is a creation of IGRA, which determines the compact's effectiveness and permissible scope."[186]

As with *Santa Clara Pueblo* and *Nash*, the *Muhammad* court began its analysis—on whether IGRA's authorization is necessary—with a survey of the matters available for negotiation and inclusion in a gaming compact under § 2710(d)(3)(C).[187] The court agreed with the view that Congress's decision to list those topics in § 2710(d)(3)(C) to the exclusion of all others meant that the gaming compacts could not include matters beyond those listed under that section.[188] Thus, any waiver of tribal immunity and jurisdiction needs IGRA's authorization under one of the provisions of § 2710(d)(3)(C).[189]

4. Conclusion on the Need for Authorization from IGRA for Waiver of the Indian Tribe's Sovereign Immunity

Santa Clara Pueblo, *Nash*, and *Muhammad* agree that because gaming compacts are created and regulated by IGRA, an Indian tribe may waive its sovereign immunity for personal injury suits in a gaming compact only if authorized under § 2710(d)(3)(C).[190] The logic of this point is clear and does not appear to be a subject that will be a great dispute for courts in the future. This is especially true given the *Santa*

184. Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *9–12 (W.D. Okla. Oct. 27, 2010).

185. *Id.* at *20–26 (quoting Tribal Gaming Compact, effective Jan. 27, 2005, between the Comanche Nation and the State of Oklahoma pt. 6(C), at 28, http://www.bia.gov/cs/groups/xoig/documents/text/idc-038420.pdf [http://perma.cc/B62P-4L4E]); *see also* OKLA. STAT. tit. 3A, § 281 (2011 & Supp. 2015).

186. *Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9.

187. *Id.* at *10–12; *see also* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1256, 1263–65 (D.N.M. 2013); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 1, 31–45, 141 N.M. 269, 154 P.3d 644.

188. *See Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *11 (noting that while the court agreed with such a view, it would not decide that issue as a matter of law for future cases).

189. *See id.* at *11–12.

190. *See Nash*, 972 F. Supp. 2d at 1265; *Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *9–11; *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 29.

Clara Pueblo court's thorough analysis of the current state of the law, concluding that the precepts of *Kennerly* should apply to require statutory authority for waiver under IGRA's comprehensive scheme.[191] The splitting point is, and will continue to be, whether IGRA actually authorizes a waiver within a gaming compact.

B. Does IGRA Allow an Indian Tribe to Waive Its Sovereign Immunity for Personal Injury Suits Within a Gaming Compact?

1. *Doe ex rel. J.H. v. Santa Clara Pueblo*: IGRA Authorizes Tribal Waiver for Personal Injury Suits—a Reliance on Vague Terms in Legislative History and a Failure to Recognize Established Presumptions Favoring Tribal Immunity

In *Santa Clara Pueblo*, the Supreme Court of New Mexico concluded that tribal gaming compacts that "created concurrent jurisdiction in state courts over personal injury actions against tribal-owned casinos were valid and enforceable" under IGRA.[192] The court relied heavily on legislative history, which it expansively interpreted as allowing Indian tribes and states to negotiate tribal immunity for personal injury suits that arise *as a consequence of* class III gaming.[193] The court stressed that during the five years of proposed legislation that led to IGRA, "Congress struggled" to determine the appropriate boundaries for state regulation of gaming on Indian lands.[194] Indian tribes and states were at odds over giving either side primary authority to regulate gaming.[195] The gaming compact IGRA required for class III gaming was Congress's resolution to this problem—let "the [Indian] tribes and states . . . decide for themselves" who should move forward with primary regulatory authority over class III gaming.[196] Importantly, as *Santa Clara Pueblo* noted, "Congress devised the compact provision to resolve [the tribal-state] dispute" involving class III gaming regulation, not immunity and jurisdiction for personal injury suits.[197]

191. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 29.
192. *Id.* ¶ 1.
193. *See id.* ¶¶ 31–45.
194. *Id.* ¶ 31. *See generally* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387 (1993) (discussing the historical context and suggested improvements for IGRA).
195. *Santa Clara Pueblo*, 2007-NMSC-008, ¶ 31.
196. *Id.* ¶¶ 32–33.
197. *See id.*

However, the court took the purpose of the gaming-compact mechanism a step further and concluded that Congress was also allowing these compacts to resolve the issue of tribal liability for personal injury suits that arose as a consequence of class III gaming.[198] In essence, the court conflated the class III gaming regulation issue with the entirely separate issue of liability for personal injury suits that might come as a consequence of the presence of class III gaming.[199] To the court, the regulation of class III gaming meant far more than regulating licensing and gaming; indeed, it meant everything that might be tangentially connected to gaming, such as a personal injury suit involving someone who might have slipped and fallen at a class III gaming facility.[200] But does *regulation* of class III gaming really stretch that far?

The court believed the regulation covered such tangentially connected suits for three reasons. First, IGRA's legislative history included discussions of a broad negotiation process for the regulation of class III gaming.[201] "As Senator Inouye, then-Chair of the Senate Committee, explained, '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*.'"[202] Second, IGRA's legislative history contemplated a general shifting of jurisdiction for regulation of class III gaming.[203]

> The Senate Committee explicitly advanced a broad reading of the jurisdiction shifting provisions, observing that the "subparts of each of the *broad* areas may be more inclusive," and the tribal-state compact "may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between."[204]

Although such statements in the legislative history contemplated the broad power to negotiate jurisdictional authority over the regulation of gaming, there was not the slightest mention of tort liability for

198. *Id.* ¶ 33.
199. *Id.*
200. *See id.* ¶¶ 36–40.
201. *See id.* ¶¶ 37–38.
202. *Id.* ¶ 37 (quoting 134 CONG. REC. 24024 (1988) (emphasis added)).
203. *See id.* ¶ 38.
204. *Id.* (quoting S. REP. NO. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 (emphasis added)).

individuals with personal injuries.[205] The court's attempted connection came in its third reason: IGRA's legislative history referenced that "[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."[206] The court concluded that references to such "broad state interests . . . could easily [include] the future of personal injury suits against tribal casinos."[207] The *Santa Clara Pueblo* court summarized as follows:

> In drafting IGRA, Congress was aware that the "vast majority of consumers of [class III gaming on Indian lands] would be non-Indian citizens of the State and tourists to the [S]tate." Protecting the personal safety of those outside visitors and consumers would seem to be of mutual concern to both the state and the tribes. This protection necessarily extends to personal injuries sustained by those patronizing the casinos and providing assurances of an effective remedy. Congress could rationally conclude that tribes ought not 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.[208]

If ambiguous terms, such as *safety*, *law*, and *public policy*, could be read as including an entirely separate issue of liability for personal injury suits, then what limitations did Congress intend to create that would protect Indian tribes from being strong-armed by states attempting to remove all of the tribe's sovereign protections in the context of regulating class III gaming? In *Santa Clara Pueblo*, the court provided an answer—none.[209] The court believed that Congress was not trying to prevent a state from asserting too much authority in the gaming context;

205. *See generally* S. REP. NO. 100-446, *reprinted in* 1988 U.S.C.C.A.N. 3071.

206. Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶ 36, 141 N.M. 269, 154 P.3d 644 (citing S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083) (highlighting the terms *public policy*, *safety*, *law*, and *other interests*).

207. *Id.*

208. *Id.* ¶ 40 (citations omitted) (first quoting 134 CONG. REC. 25381 (1988); then quoting 25 U.S.C. § 2710(d)(3)(C)(i) (2006)).

209. *Id.* ¶ 42.

instead, it was trying to prevent the states from using class III gaming negotiations to obtain tribal waivers in other areas of law.[210] Although IGRA's language did not expressly provide for such a bridge, the court noted that Senator Inouye mentioned other vulnerable areas where an Indian tribe might relinquish authority, such as "taxation, water rights, environmental regulation, and land use."[211] The court's conclusion was that, "by inference, when Congress tells us what is off-limits to jurisdiction shifting because [it is] not sufficiently related to regulation, we can fairly presume that other subjects falling outside those express categories are not excluded from state court jurisdiction."[212]

In reaching these conclusions based on IGRA's legislative history, the court also rejected an opinion letter from the U.S. Department of the Interior, Office of Indian Gaming Management, which had been directed to the New Mexico Legislative Committee on Compacts.[213] The letter concluded that "IGRA's 'authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim because it is an area that is not directly related to, and necessary for, the licensing and regulation of [a] class III gaming activity.'"[214] The court explained that the letter was not a formal regulation and therefore "lack[ed] the force of law."[215] For these reasons, the letter did not persuade the court.[216] Additionally, the court explained that it would not follow the letter's interpretation because several other cases noted that some gaming compacts included an agreement to allow personal injury suits against tribes.[217] Importantly, in all of those gaming compacts the Indian tribes retained jurisdictional authority for such suits, and none of those cases actually raised the issue of whether IGRA authorized negotiation in this context.[218]

210. *See id.*
211. *Id.* (quoting 134 CONG. REC. 24024 (1988)).
212. *Id.*
213. *Id.* ¶ 41 n.7.
214. *Id.* (quoting Letter from George T. Skibine, Dir., Office of Indian Gaming Mgmt., U.S. Dep't of the Interior, to Hon. John Arthur Smith, Chairman, Legislative Comm. on Compacts, N.M. State Legislature 3 (Jan. 28, 2000)).
215. *Id.* (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)).
216. *See id.*
217. *Id.* ¶ 44 (first citing Diepenbrock v. Merkel, 97 P.3d 1063, 1068 (Kan. Ct. App. 2004); then citing Bonnette v. Tunica-Biloxi Indians, 02-919, p. 6–7 (La. App. 3 Cir. 5/28/03); 873 So. 2d 1, 6; and then citing Kizis v. Morse Diesel Int'l, Inc., 794 A.2d 498, 504 (Conn. 2002)).
218. *See id.*

Strangely absent from the analysis of legislative history was any mention of the established presumptions in favor of protecting tribal immunity in the context of statutory interpretation. Indeed, in *Santa Clara Pueblo*, the court did not mention the presumption in favor of resolving statutory ambiguities in favor of Indian tribes until the last few paragraphs of the opinion.[219] Although the court acknowledged the existence of this presumption, it did not believe that an ambiguity existed when looking to both the statute *and* legislative history.[220] In essence, the vague references to the state's *public policy* and *safety* in the legislative history, with no mention of civil tort liability for personal injury suits or the need to supplement current tribal mechanisms for handling personal injury suits, resolved any ambiguity; however, that ambiguity should have generated a presumption in favor of protecting tribal sovereign immunity.

2. *Muhammad v. Comanche Nation Casino*: IGRA Authorizes Tribal Waiver for Personal Injury Suits— a Failure to Recognize How the Protection of Tribal Sovereign Immunity Benefits Indian Tribes

In *Muhammad*, the court followed the same path as *Santa Clara Pueblo* and held that Congress intended civil tort law to fall within the category of law necessary for the regulation of Indian gaming.[221] The court acknowledged that IGRA's actual, expressed purpose was to preserve the autonomy of Indian tribes, as strong governments, and to further protect "Indian tribe[s] [as] the primary beneficiar[ies] of . . . gaming [activities]."[222] The court believed, however, that there were also "broader concerns [that] existed."[223]

As in *Santa Clara Pueblo*, the *Muhammad* court turned immediately to legislative history and the reference to a state's "public policy, safety, law and other interests" by the Senate Select Committee on Indian

219. *Id.* ¶¶ 46–47.

220. *Id.* ¶ 47. "'[A]mbiguity is a prerequisite' for application of the . . . presumption." *Id.* ¶ 46 (quoting Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 729 (9th Cir. 2003)). "To determine ambiguity courts can look beyond the text of the federal statute and also examine its 'context, purpose, and legislative history.'" *Id.* (quoting *Artichoke Joe's*, 353 F.3d at 731).

221. *See* Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *13–19 (W.D. Okla. Oct. 27, 2010).

222. *Id.* at *13–14 (quoting 25 U.S.C. § 2702(2) (2006)).

223. *Id.* at *14.

Affairs.[224] The Committee stated as follows:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. . . . *A tribe's governmental interests include* raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, *promoting public safety as well as law and order on tribal lands*, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. *A State's governmental interests* with respect to class III gaming on Indian lands *include the interplay of such gaming with the State's public policy, safety, law and other interests*, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.[225]

Also, as in *Santa Clara Pueblo*, the court latched onto this *public policy* language and found that "[c]ivil tort laws fall well within the realm of public safety, policy, and order."[226] The court further drew the connection and explained that "[p]ersonal injury laws serve to expose safety hazards and protect the public, as well as to provide an incentive for preventing injuries and allow for compensation of injured parties."[227] Without citing any specific language in IGRA or its legislative history, the *Muhammad* court believed that "Congress [must have been] well aware that many casino patrons would be non-Indian state citizens or tourists, and the personal safety of these visitors to Indian lands would be a logical concern of both states and tribes."[228]

The court stated that "Congress, as well as compacting parties, could reasonably view the regulation of tortious conduct occurring in the course of commercial gaming and casino operations as directly related to and necessary for the regulation of gaming activities."[229] On this basis,

224. *Id.* at *14–15 (quoting S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083).

225. *Id.* (alteration in original) (quoting S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083 (emphasis added)).

226. *Id.* at *15.

227. *Id.*

228. *Id.*

229. *Id.* at *15–16.

"the [*Muhammad* c]ourt [was] unconvinced that Congress intended to preclude negotiations concerning such important matters as which sovereign's civil laws and courts would be responsible for the welfare of participants in gaming activities."[230] In sum, "the [c]ourt [was] unwilling to read into IGRA a barrier to negotiations that is not compelled by the language of the statute."[231] As in *Santa Clara Pueblo*, the court addressed an opinion letter "from the director of the Office of Indian Gaming Management of the Bureau of Indian Affairs to the chairman of a legislative committee in New Mexico."[232] The letter explained that IGRA did not allow the waiver of sovereign immunity for personal injury suits, but the court found the letter to be nonbinding and unpersuasive.[233]

What about the fundamental rule that an ambiguous statute must be liberally construed in favor of the Indian tribe? As in *Santa Clara Pueblo*, the court did not address this rule until the paragraph before its conclusion.[234] *Muhammad* differed, however, from *Santa Clara Pueblo* in that it did not expressly find a lack of ambiguity even though it considered the legislative history.[235] Instead, the court could not understand how interpreting IGRA to disallow negotiation over sovereign immunity for personal injury claims would favor Indian tribes.[236] The court actually found that interpreting IGRA to allow the negotiation of sovereign immunity and jurisdiction would be favorable to Indian tribes because it would give them the opportunity "to develop [their] own administrative and civil law systems and to provide for the welfare of casino patrons coming onto [their] lands."[237]

3. *Pueblo of Santa Ana v. Nash*: IGRA Does Not Authorize Tribal Waiver for a Dramshop Wrongful Death Suit—a Commitment to Clear Language and the Presumption Favoring Tribal Immunity

In *Nash*, the court held that "[IGRA] does not authorize an allocation

230. *Id.* at *15.
231. *Id.* at *16.
232. *Id.*
233. *Id.* at *16–18.
234. *Id.* at *18–19.
235. *See id.*
236. *Id.*
237. *Id.* at *19.

of jurisdiction from tribal court to state court over a personal injury claim arising from the allegedly negligent serving of alcohol on Indian land."[238] Although the court was reluctant to expand the precedential effect of its conclusion beyond dramshop personal injury suits, it did not provide any reasoning about why other personal injury suits would not be similarly precluded.[239] Indeed, it appears from the court's explanation that its limitation was based purely on a conservative notion to secure relief for only the parties involved.[240] But it seems evident from the rationale behind its analysis that the court's holdings would be applicable to all other personal injury suits in the future.

a. The Purposes of IGRA Are Focused Strictly on the Regulation of Actual Gaming

The court used the three expressed purposes of IGRA as an aid in analyzing congressional intent.[241] The first purpose is "to provide a statutory basis for the operation of [Indian] gaming . . . as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[242] The second purpose is to regulate gaming to provide an "adequate . . . shield . . . from organized crime and other

238. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1255 (D.N.M. 2013). The *Nash* court acknowledged that the Supreme Court of New Mexico had determined "the same issue . . . before [the c]ourt" in *Santa Clara Pueblo* but noted that adjudication of the IGRA waiver issue was appropriate because "federal courts owe no deference to a state court's interpretation of a federal statute." *Id.* at 1262. The court specifically limited its holding to claims "arising from the allegedly negligent serving of alcohol on Indian land" (i.e., dramshop liability claims). *Id.* at 1266.

Although the divide between the Supreme Court of New Mexico and the U.S. District Court of New Mexico has not been readdressed by New Mexico's highest court, there is strong case law that could persuade the state's courts to follow the federal district court's precedent. In fact, New Mexico courts have acknowledged that "[t]ribal immunity is a matter of federal law and is not subject to diminution by the states." Armijo v. Pueblo of Laguna**,** 2011-NMCA-006, ¶ 10, 149 N.M. 234, 247 P.3d 1119 (quoting Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668). New Mexico courts have also established that this conclusion requires complete deference to federal courts on the matter of tribal immunity with an expressed doubt toward any state case to the contrary. *See id.* ¶ 21. As the New Mexico Court of Appeals explained in *Armijo*, "tribal sovereign immunity is a matter of federal law thereby making any reliance on state case law interpretations of federal law and cases questionable." *Id.* (quoting Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299, 1305 (D.N.M. 2009)).

239. *See Nash*, 972 F. Supp. 2d at 1266–67.

240. *See id.* at 1267.

241. *Id.* at 1263.

242. *Id.* (citing 25 U.S.C. § 2702(1) (2012)).

corrupting influences," ensuring that gaming is done in a fair manner.[243] The third and final purpose is to establish a federal authority to oversee and protect Indian gaming for the benefit of Indian tribes.[244] The court concluded that "the three stated purposes of the IGRA solely relate to operation, regulation[,] and oversight of Indian gaming."[245] In other words, the focus of IGRA is the gaming itself.

b. IGRA's Permitted Points of Negotiation Do Not Allow the Indian Tribe to Waive Immunity and Jurisdiction for Personal Injury Suits Arising Merely as a Consequence of Class III Gaming

The court's analysis focused on the "directly related to" and "necessary for" language of § 2710(d)(3)(C)(i) & (ii), stating as follows:

> Subparagraph (ii), the only subparagraph in this section of the statute that mentions jurisdiction, permits an allocation of jurisdiction between the State and the Indian tribe, only as necessary for the enforcement of laws and regulations of the State or Indian tribe, that are directly related to, and *necessary for, licensing and regulation* of class III gaming activities.[246]

In reviewing the limiting "directly related to" and "necessary for" language of these provisions, the court held that IGRA did not allow a tribe to waive its immunity for a personal injury claim in state court.[247] The court gave two primary reasons for this conclusion: (1) the legislative history supported a narrow interpretation of licensing and regulation; and (2) a broader interpretation would do nothing to further the primary purposes of the statute.[248]

First, in regard to the legislative history, the court specifically explained that

> [there was] no justification for concluding that the IGRA intends the extension of state court jurisdiction for any other purpose than resolution of issues involving the licensing and regulation

243. *Id.* (citing 25 U.S.C. § 2702(3)).
244. *Id.* (citing 25 U.S.C. § 2702(3)).
245. *Id.*
246. *Id.* at 1264.
247. *Id.*
248. *See id.*

> of class III gaming. A personal injury claim arising from the negligent serving of alcohol has no bearing whatsoever on the licensing or regulation of class III gaming activities.[249]

IGRA strictly concerns Indian gaming, and a personal injury suit in state court was not necessary for "the licensing or regulation of class III gaming."[250]

Unlike the *Santa Clara Pueblo* and *Muhammad* courts, which based the interpretation of IGRA almost entirely upon a few vague references to public policy and safety in IGRA's legislative history, the *Nash* court held that IGRA's legislative history offered no "sufficient" indication that Congress intended dramshop liability (or other personal injury claims) to be "within the categories of issues that may be allocated to state court jurisdiction."[251] The court explained that a complete reading of the history provided no further clarity because each mention of a state interest, such as public safety, was couched within concurrent support for tribal immunity and autonomy.

> Having read all of the legislative history cited to it by both parties, and in many other reported cases, the [c]ourt [found] no support in the legislative history of the statute, sufficient to persuade it that the [dramshop] claim in the underlying state court litigation [was] within the categories of issues that may be allocated to state court jurisdiction. For each statement contained in the legislative record on one side of the issue, the [c]ourt . . . found a countervailing statement. For example, in the Report of the Senate Indian Affairs Committee at 3083, . . . in discussing the strong and serious presumptions that must provide the framework for negotiations, such factors as "promoting public safety as well as law and order on tribal lands" are mentioned immediately prior to "realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders."[252]

The court concluded that "[g]iven the ambiguity and randomness of

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* (quoting S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083).

parsing through and placing absolute reliance on isolated portions of legislative history, [it would] instead . . . rely on the clear statutory language and structure of the IGRA."[253] Importantly, the court noted that the ambiguous language in the legislative history would not have led to a holding in favor of allowing negotiation—even if an ambiguity were found in the statute—because the court would have been obligated to interpret IGRA "most favorably toward tribal interests."[254] IGRA's limitations are clear. However, assuming they were not, the *Santa Clara Pueblo* and *Muhammad* courts relied on vague terms from the legislative history, and the *Nash* court would have found that these ambiguous terms favored protection of tribal sovereign immunity.[255]

Second, the court explained that a waiver of tribal immunity for a dramshop claim "does nothing to further the IGRA's three stated purposes."[256] These three purposes "solely relate to operation, regulation and oversight of Indian gaming."[257] The court found that Congress intended to allow tribal-state negotiations on state regulation specific to Indian gaming and not for detached tort claims that may apply to a gaming facility.[258]

V. ANALYSIS

A. The Language of § 2710(d)(3)(C) Is Not Ambiguous on Whether Civil Tort Liability for Personal Injuries Is Allowed as a Point of Negotiation for a Gaming Compact

1. Civil Tort Liability for Tangential Personal Injuries Is Not Directly Related to, or Necessary for, the Regulation of Class III Gaming

It is important to note that "[o]n a pure question of statutory

253. *Id.*; *see also* Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123, 139 (D.D.C. 2005) ("The statutory language and the structure of the IGRA are clear, and so resort to the legislative history of the statute is unnecessary.").

254. *Nash*, 972 F. Supp. 2d at 1265 n.10 (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)).

255. *See id.*

256. *Id.* at 1264. Again, the court explained that IGRA's three stated purposes are to (1) "provide a statutory basis for . . . Indian [gaming]"; (2) protect Indian gaming "from organized crime," preserving benefits for the tribes; and (3) create a federal regulatory authority for Indian gaming. *Id.* at 1263.

257. *Id.*

258. *Id.* at 1264–65.

construction, [a court's] first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'"[259] "[T]he starting point in every case involving construction of a statute is the language itself."[260] The U.S. Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[261] The relevant question for a court to determine is whether the statute is ambiguous regarding the specific point presented in the case, not whether the statute is ambiguous in the abstract on some theoretical question.[262]

Importantly, "it is the words of the statute that set the metes and bounds of the authority granted by Congress. Thus, [a court] need not—and, indeed, should not—look to legislative history when the statute is clear on its face."[263] "[T]he mere existence of a dispute over the interpretation of a statute, in the absence of an ambiguity, should not give

259. NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)).

260. Watt v. Alaska, 451 U.S. 259, 265 (1981) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)).

261. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted)).

262. *See, e.g.*, *id.* at 450 ("As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*.'" (emphasis added) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))); Schlup v. Delo, 513 U.S. 298, 350 (1995) (Scalia, J., dissenting) ("[U]nless the question in [the] case is one on which the statute *is* silent or ambiguous (in which event the Court should explain why that is so), the response is irrelevant."); State v. Stately, 216 P.3d 1102, 1104 (Wash. Ct. App. 2009) ("[The] 'purpose in construing a statute is to ascertain and give effect to the intent and purpose of the Legislature.' When faced with an unambiguous statute, we discern the legislature's intent from the plain language alone. . . . We also presume that the legislature does not include superfluous language. We turn to legislative history and relevant case law to discern the legislature's intent only if the plain meaning analysis fails to resolve the question before the court." (citations omitted) (quoting State v. Van Woerden, 967 P.2d 14, 17 (Wash. Ct. App. 1998))).

263. Thompson v. Goetzmann, 337 F.3d 489, 495 (5th Cir. 2003) (footnote omitted), *superseded by statute on other grounds*, Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066; *see also* McCarn v. WYHY Fed. Credit Union (*In re* McCarn), 218 B.R. 154, 160–61 (B.A.P. 10th Cir. 1998) (adhering to "the well-established rule of statutory construction that when the language of a statute is clear the court should not look to legislative history") (first citing *Conn. Nat'l Bank*, 503 U.S. 249; then citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989)).

rise to an analysis of its legislative history."[264]

The question, which the *Santa Clara Pueblo* and *Muhammad* courts rushed too quickly past en route to the legislative-history analysis, is whether the language of § 2710(d)(3)(C) actually contains an ambiguity regarding the permissibility of negotiating civil tort liability for personal injury suits. Indeed, neither court expressly establishes this ambiguity before pointing its analysis toward IGRA's legislative history.

Again, the relevant provisions of § 2710(d)(3)(C) allow an Indian tribe and a state to negotiate the following within a gaming compact:

> (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 [class III gaming]; [and]
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations.[265]

Section 2710(d)(3)(C) allows only waiver and jurisdiction for laws specifically related to the licensing and regulation of class III gaming.[266] Congress went to unusual linguistic lengths to ensure that tribes and states would not push the limits on these two specific matters. Accordingly, Congress imposed a two-layered qualifying clause that ensures the negotiated laws are both "directly related to" and "necessary for" the licensing and regulation of class III gaming.[267] Can civil tort liability for the personal injuries of a visitor that occur at a gaming facility really fit within such tightly woven language?

In *Nash*, the court correctly answered this question in the negative.[268] Civil tort liability for personal injuries cannot fit within any law that is related to, or necessary for, the administrative *licensing* of a class III gaming facility. If anywhere, civil tort liability for personal injuries must somehow fit within a law related to the actual regulation of class III gaming. A law that regulates class III gaming must actually regulate class III gaming. This may seem like an obvious statement on its face,

264. Kenan v. Fort Worth Pipe Co. (*In re* George Rodman, Inc.), 792 F.2d 125, 128 n.8 (10th Cir. 1986).

265. 25 U.S.C. § 2710(d)(3)(C)(i)–(ii) (2012).

266. *See id.*

267. *Id.* § 2710(d)(3)(C)(i).

268. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1263 (D.N.M. 2013).

but it is the foundational point that the *Santa Clara Pueblo* and *Muhammad* courts failed to recognize at the base of this debate. Unless one is hypothetically considering a casino game that itself places the player's health at risk, which is not a hypothetical that either court considered, a personal injury that just happens to occur at or near a gaming facility would in almost every conceivable case have nothing substantive to do with the actual gaming itself. Thus, civil tort laws for tangential personal injuries do not regulate class III gaming and therefore do not have a place within § 2710(d)(3)(C).

Does the "directly related to" and "necessary for" language potentially pull these civil tort laws into the scope of § 2710(d)(3)(C)? Fundamentally, one must acknowledge that these clauses are of a limiting nature and are used under an abundance of caution to preclude a liberal reading of the *licensing* and *regulation* terms, which would include laws not intended to be negotiated. The clauses require an absolutely direct and dependent (i.e., necessary) relationship between the potential law and the regulation of class III gaming. Accordingly, these provisions screw the lid tighter on the scope of the term *regulation* and cannot be the basis of an ambiguity regarding the inclusion of civil tort laws for personal injury.

Personal injuries that happen to occur at gaming facilities do not have a direct relationship to the actual gaming itself (again, excluding the absurd hypothetical game that injures the visitor). At best, they have a tangential or coincidental relationship that is simply based on the notion that the visitor happened to be at the facility to engage in gaming. Indeed, to conclude otherwise would be like finding that the Federal Food and Drug Administration may regulate civil tort liability for a slip-and-fall injury at a McDonald's because the agency can regulate the hamburger that brought the visitor to the restaurant.

Furthermore, civil tort laws for personal injury are not necessary for the actual regulation of class III gaming. The fairness or function of class III gaming activities, such as slot machines or blackjack, does not depend on whether a state may apply its tort law in one of its courts when a visitor slipped and fell in the casino lobby. The running of games is entirely separate and simply not dependent upon the availability of tort liability. Therefore, state tort law for personal injuries is also not necessary for the actual regulation of class III gaming.

Although § 2710(d)(3)(C) does allow some negotiation on laws that pertain to the licensing and regulation of class III gaming, the clear

restriction related to these matters in the language of that section simply precludes the finding of any ambiguity that may potentially allow the application of state civil tort law for personal injuries. As the *Nash* court concluded, liability for tangential personal injuries simply "has no bearing whatsoever on the licensing or regulation of class III gaming activities."[269]

2. The Established Presumption in Favor of Interpreting Statutes to Retain Tribal Immunity Weighs Against an Ambiguity in § 2710(d)(3)(C)

When analyzing a statute that a party argues affects tribal sovereign immunity, it is critical to reemphasize that the U.S. Supreme Court has "often held" that "[t]he baseline position . . . is tribal immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'"[270] "Congressional abrogation of tribal sovereign immunity must be explicit; abrogation may not be implied. Abrogation of tribal sovereign immunity by Congress will only be found where Congress has clearly and unequivocally expressed its intent to abrogate the immunity pursuant to a valid exercise of its congressional power."[271]

Although the issue here is whether Congress has authorized an Indian tribe to waive its sovereign immunity under IGRA, as opposed to Congress abrogating this immunity, the principle remains the same because the consequences would, in theory, be the same. Should the U.S. Supreme Court determine that IGRA allows negotiation over the application of state law and jurisdiction for personal injury suits against Indian tribes, a state would have immediate leverage over the Indian tribe's ability to retain its sovereign status and to reap the intended benefits of class III gaming. In essence, the fate of the Indian tribe's sovereign status would, by definition, be left up to the discretion of the state since the state must agree to a gaming compact for there to be any class III gaming for the Indian tribe. The states would essentially have the power to abrogate tribal immunity at will. Since interpreting § 2710(d)(3)(C) to allow the negotiation of civil tort liability and

269. *Id.* at 1264.

270. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031 (2014) (second and third alterations in original) (quoting C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001)).

271. *In re* Platinum Oil Props., LLC, 465 B.R. 621, 642–43 (Bankr. D.N.M. 2011) (footnote omitted).

jurisdiction would create an abrogation of tribal immunity, the presumptions noted above should apply, and they further support the conclusion that there is no ambiguity that would allow for state civil tort liability and jurisdiction for personal injuries.

3. The Express Goals of IGRA Preclude an Ambiguity in § 2710(d)(3)(C) Capable of Allowing Civil Tort Liability and State Jurisdiction Related to Personal Injury Suits

One of the fundamental differences between the approach taken by the *Nash* court and the one taken by the *Santa Clara Pueblo* and *Muhammad* courts is that the *Nash* court found IGRA's goals to be significant in determining the intent of Congress.[272] Since Congress voted to provide these goals within the text of IGRA, the *Nash* court correctly found them more reliable than the vague discussions in IGRA's legislative history.[273]

Again, Congress explained in IGRA's "Declaration of Policy" that a primary purpose of IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[274] Congress also recognized the need for a law that protects the good intentions of this goal from potential pitfalls that could arise in the promotion of gaming. Indeed, IGRA's "Declaration of Policy" further explains that it seeks to provide a statutory framework that (1) is "adequate to shield [Indian tribes] from organized crime and other corrupting influences"; (2) "ensure[s] that the Indian tribe is the primary beneficiary of the gaming operation"; and (3) "assure[s] that gaming is conducted fairly and honestly by both the operator and players."[275]

In *Nash*, the court correctly concluded that the ability of states to impose, through negotiation, state civil tort liability and jurisdiction for personal injury suits did nothing to advance any of IGRA's goals.[276] Moreover, none of these goals provide any indication that Congress intended states to have the power to hold an Indian tribe's class III gaming opportunity ransom in exchange for the application of state law

272. *See Nash*, 972 F. Supp. 2d at 1263–65.
273. *See id.*
274. 25 U.S.C. § 2702(1) (2012).
275. *Id.* § 2702(2).
276. *Nash*, 972 F. Supp. 2d at 1264.

and jurisdiction. If anything, the primary goals of promoting tribal self-sufficiency, strong tribal governments,[277] and gaming as a means of generating tribal revenue would work strongly against providing states the opportunity to hold such leverage over Indian tribes.[278] Again, as the Ninth Circuit explained in *Rincon*, "Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states."[279]

The *Santa Clara Pueblo* and *Muhammad* courts chose to look past the robust evidence of express legislative intent; as a result, those courts failed to give primary deference to the strong evidence that supports the basic policy Congress had in mind when it limited § 2710(d)(3)(C). The courts in *Santa Clara Pueblo* and *Muhammad* further faulted when they elevated vague references within the legislative history to the same status as the policy and goals that were actually written into IGRA. Indeed, the *Muhammad* court acknowledged that the express goals existed; however, the court completely relied on legislative history[280] in stating that it believed "broader concerns existed."[281] In *Santa Clara Pueblo*, the court's analysis fell even shorter since it did not acknowledge the critical purposes of § 2702, except for a brief consideration of Congress's intent to prevent the infiltration of organized crime into Indian gaming.[282]

One of the primary policies behind the enactment of IGRA was to strengthen tribal self-sufficiency by providing an open avenue to establish gaming. This foundational policy precludes an interpretation of § 2710(d)(3)(C) that would give a state the power to restrict the availability of class III gaming unless the Indian tribe surrenders both sovereign immunity and jurisdiction for personal injury torts. Such state power would, at a minimum, hinder the availability of gaming and would ultimately harm tribal strength, autonomy, and self-sufficiency by pressuring the Indian tribe to waive immunity and jurisdiction.

277. 25 U.S.C. § 2702(1).

278. *Id.* § 2702(3).

279. Rincon Band of Luiseno Mission v. Schwarzenegger, 602 F.3d 1019, 1027 (9th Cir. 2010).

280. Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *13–15 (W.D. Okla. Oct. 27, 2010).

281. *Id.* at *14.

282. Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 34–36, 141 N.M. 269, 154 P.3d 644.

Accordingly, IGRA's primary goals and policy, as expressed in § 2702, preclude the finding that an ambiguity that allows the negotiation of immunity and jurisdiction for personal injury suits exists within § 2710(d)(3)(C).

B. Even If the Legislative History Is Consulted, There Is an Ambiguity for Which Interpretation Is Required in Order to Protect the Tribe's Sovereign Immunity

1. The Vague References in the Legislative History Relied on by the *Santa Clara Pueblo* and *Muhammad* Courts Are Ambiguous Regarding a Waiver of Immunity and Jurisdiction for Personal Injury Suits

As explained above, the U.S. Supreme Court has established that whenever tribal sovereign immunity is at issue, "statutes are to be construed liberally in favor of the Indian[] [tribes], with ambiguous provisions interpreted to their benefit."[283] Essentially, if a legislative provision might affect tribal immunity, and if there is an ambiguity on whether sovereign immunity could be abrogated or waived, the court must interpret the provision in favor of preserving tribal immunity.[284] "An '[a]mbiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.'"[285] This may be because (1) "there is duplicity, indistinctness, or uncertainty in the meaning of the language";[286] (2) "the words used have more than one meaning";[287] (3) "the purpose, intent or object of the statute cannot be ascertained from the language employed therein";[288] or (4) "there is a conflict between the two provisions that creates ambiguity."[289]

All of these characteristics of ambiguity are present in the legislative history and are what the *Santa Clara Pueblo* and *Muhammad* courts relied on; both courts found that negotiation of immunity and jurisdiction

283. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).
284. *See id.*
285. Allen v. Geneva Steel Co. (*In re* Geneva Steel Co.), 281 F.3d 1173, 1178 (10th Cir. 2002) (alteration in original) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.02, at 11–12 (6th ed., rev. vol. 2000)).
286. United Fire & Cas. Ins. Co. v. Thompson, 758 F.3d 959, 962 (8th Cir. 2014) (quoting Gulf Ins. Co. v. Noble Broadcast, 936 S.W.2d 810, 814 (Mo. 1997) (en banc)).
287. Kenan v. Fort Worth Pipe Co. (*In re* George Rodman, Inc.), 792 F.2d 125, 128 n.8 (10th Cir. 1986).
288. *Id.*
289. Lustgraaf v. Behrens, 619 F.3d 867, 880 (8th Cir. 2010).

for personal injury suits is allowed.[290] The piece of legislative history at issue was a report submitted in 1988 by Senator Inouye of the Select Committee on Indian Affairs.[291] The "Highlights" portion of that report focused on specific portions of Senate Bill 555—which became IGRA—and discussed class III tribal-state compacts.[292] Both the *Santa Clara Pueblo* and *Muhammad* courts relied upon the mention of public policy and safety within this portion of the report to permit the waiver of immunity and jurisdiction for personal injury suits.[293] Again, these terms were mentioned in the following paragraph:

> 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.[294]

First, it is important to recognize that this brief paragraph is not an additional list of items for negotiation intended to supplement the specific provisions in § 2710(d)(3)(C). Rather, it is a description of the

290. *See* Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *9–19 (W.D. Okla. Oct. 27, 2010); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 31–45, 141 N.M. 269, 154 P.3d 644.

291. *See* S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.

292. *Id.* at 7–8, 1988 U.S.C.C.A.N at 3077; *see also id.* at 13, 1988 U.S.C.C.A.N at 3083.

293. *See Muhammad*, 2010 U.S. Dist. LEXIS 114945, at *14–15; *Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 36–40.

294. S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083.

context and interests surrounding the negotiation process.[295] The language of this paragraph encourages Indian tribes and states to realize the context for their negotiation—mutual benefit and interest.[296] However, there is no provision that purports to override § 2710(d)(3)(C)'s specific limitations on the items that may be negotiated within a gaming compact.[297] Indeed, the acknowledgment of various mutual benefits and interests is not a license to violate the actual statute and its clear limitations. This fundamental recognition should prevent a finding that the brief discussion on "interests" could definitively add to § 2710(d)(3)(C).

Turning to the *public policy* and *safety* terms that the *Santa Clara Pueblo* and *Muhammad* courts relied on, one cannot escape the conclusion that these terms are entirely vague.[298] What does the interplay between gaming, public policy, and safety mean?[299] The term *public policy*, which comes with no other defining term, could have as many meanings as there are public policies at issue for a state in general. Similarly, the term *safety* is just as ambiguous without another term to give any shred of definition or scope. The term could very well mean the safety of the games themselves. Indeed, the use of the term *safety* is in relation to its interplay with gaming.[300] There is no language here to indicate that the safety interest extends past gaming to separate aspects of a facility, such as the lobby, where the visitor may slip and fall.[301]

Although less likely, perhaps this interplay between gaming and safety could represent a broader idea like the *Santa Clara Pueblo* and *Muhammad* courts imagined. The mention of *gaming* could be interpreted as more than actual gaming; it could be a reference to the general attraction of gaming and the myriad of safety risks that accompanies the attraction of visitors.

Importantly, the breadth of this potential reading is irrelevant because it simply cannot be concluded that the lone term *safety* clearly dictates any one specific reading. There is an ambiguity in the language.[302] The terms could mean only the safety of the games

295. *See id.*
296. *Id.*
297. *See id.*
298. *See id.*
299. *See id.*
300. *See id.*
301. *See id.*
302. *See id.*

themselves.[303] They could mean safety as it relates to the dangers that come from the attraction of gaming. They could mean one hundred other things. Thus, the terms—and their interplay—are vague. They are ambiguous. There is also an ambiguity related to the term *personal injury suits* since those suits were not specifically referenced in this section.[304] Indeed, there is no such reference in the entirety of the report.[305]

Furthermore, the language is entirely ambiguous about whether the state's own safety laws (and jurisdiction to enforce those laws) are implicated. At best, the language provides that the state has a general interest in safety.[306] It does not indicate that the state has an interest requiring the implementation of its own safety laws; instead, the state has some general interest in the safe administration of gaming.[307] Indeed, the drafters mentioned the state's law as an entirely separate interest.[308] The safety interest could, therefore, easily mean that the state has an interest in encouraging the Indian tribe to create and implement its own safety rules, policies, or regulations. This encouragement or interest would not even require the negotiation of a provision in the gaming compact. Regardless, it is important to note that there is ambiguity regarding the reasonable meaning of the language.

The ambiguity is compounded by potential conflicts with other interests and policies described in this section, as well as the rest of the report. In the previously mentioned paragraph's list of interests surrounding a gaming compact, the drafters explain that the Indian tribe has an interest in "Indian self-determination[] and regulating activities of persons within its jurisdictional borders."[309] These specific interests would certainly conflict with a potential interpretation of the state's interest in safety due to the application of state-determined tort law to activities within tribal borders, which would be enforced in the state courts outside of those borders.

Moreover, the rest of the report lacks any other reference that could plausibly be interpreted to contemplate waiver and jurisdiction for personal injury suits. Rather, much like § 2710(d)(3)(C), the rest of the report refers specifically to negotiations on the regulation of only

303. *See id.*
304. *See id.*
305. *See generally* S. REP. NO. 100-446, *reprinted in* 1988 U.S.C.C.A.N. 3071.
306. *See id.* at 13, 1988 U.S.C.C.A.N. at 3083.
307. *See id.*
308. *Id.*
309. *Id.*

gaming. In the report's "Statement of Policy," Senator Inouye explains, in reference to the gaming-compact mechanism, that

> [t]his 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.[310]

Furthermore, the first paragraph of the report's "Class III—Tribal-State Compacts" section describes the substance of the negotiation between an Indian tribe and a state as the regulation of the gaming itself.

> 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.[311]

In sum, there is an ambiguity related to the report's vague references of *public policy* and *safety* because there are a number of different reasonable conclusions about what these terms could mean. Furthermore, there are several other provisions in the report—many of which are much more specific—that would conflict with the *public policy* and *safety* references if those terms were interpreted to mean that states may negotiate waiver and jurisdiction for personal injury suits.

In recognizing these issues, the *Nash* court rightly concluded that "[g]iven the ambiguity and randomness of parsing through and placing absolute reliance on isolated portions of legislative history, [it would]

310. *Id.* at 6, 1988 U.S.C.C.A.N. at 3076 (emphasis added).
311. *Id.* at 13, 1988 U.S.C.C.A.N. at 3083 (emphasis added).

instead . . . rely on the clear statutory language and structure of the IGRA."[312] Section 2710(d)(3)(C)'s limitation on negotiations involving the regulation of actual gaming was clear, and there was no need to consult the legislative history. However, the court also correctly concluded that—even if it had consulted the legislative history analyzed above—ambiguous language would have still resulted in a finding against the allowance of waiver and jurisdiction for personal injury suits because the court would have been obligated to interpret IGRA "most favorably toward tribal interests."[313]

2. The Ambiguity of the Legislative History Must Result in Favor of Protecting Sovereign Immunity for an Indian Tribe

The *Muhammad* court differed from the *Santa Clara Pueblo* court in that it did not expressly find a lack of ambiguity even when considering the legislative history.[314] Instead, the court could not understand how interpreting IGRA to disallow negotiation over sovereign immunity and jurisdiction for personal injury claims would favor Indian tribes.[315] The court found that interpreting IGRA to allow for negotiation related to sovereign immunity and jurisdiction would be favorable to Indian tribes because it would give tribes the opportunity "to develop [their] own administrative and civil law systems and to provide for the welfare of casino patrons coming onto [their] lands."[316] Therefore, the court favored generally subjective terms for the Indian tribe's overall good.

The *Muhammad* court's handling of the presumption in favor of Indian tribes was incorrect because it detached the presumption from its specifically established context of preserving tribal immunity within an ambiguous statute. The U.S. Supreme Court is at the genesis of this presumption, which it highlighted in *Montana v. Blackfeet Tribe of Indians*.[317] Since *Blackfeet*, the Court and numerous other courts have

312. Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1264–66 (D.N.M. 2013); *see also* Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123, 139 (D.D.C. 2005) ("The statutory language and the structure of the IGRA are clear, and so resort to the legislative history of the statute is unnecessary.").

313. *Nash*, 972 F. Supp. 2d at 1265 n.10 (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)).

314. *See* Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *18–19 (W.D. Okla. Oct. 27, 2010).

315. *Id.*

316. *Id.* at *19.

317. *See Blackfeet Tribe*, 471 U.S. at 766.

firmly held that the favor they must show to Indian tribes—when dealing with an ambiguous legislative provision—is presumed protection of tribal sovereign immunity.[318] The *Muhammad* court's application of this presumption in general terms, however, actually negated the protection of sovereign immunity. Therefore, this application was contrary to the presumption. The litany of cases that properly apply the presumption should have caused the *Muhammad* court to determine that the ambiguous language in the legislative history required a holding that sovereign immunity and jurisdiction for personal injury suits are not items subject to negotiation under IGRA.

3. The *Santa Clara Pueblo* and *Muhammad* Courts Should Have Applied the Principle Established in *Kiowa*: The Judiciary Should Defer to Congress to Clearly Set the Outer Bounds of Tribal Immunity

As explained herein, the U.S. Supreme Court set an important precedent of judicial restraint in *Kiowa* and reaffirmed the central role of Congress as the most appropriate authority to set the outer contours of tribal immunity.[319] The *Kiowa* Court emphasized that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" of Indian tribes in relation to immunity.[320] "The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by [the Court] in this area."[321] "In light of these concerns," the Court declined to act on what appeared to be a growing movement to abrogate Indian tribal immunity in some

318. *See id.* (noting the canon of construction that requires "statutes . . . to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *see also* Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224, 1232–33 (11th Cir. 2012) (explaining the presumption in the context of protecting tribal sovereignty from an ambiguous statute); Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 921 (6th Cir. 2009) ("[The] directive to favor tribes counsels against interpreting [the statute] as impliedly waiving tribal-sovereign immunity."); Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1285 (11th Cir. 2001) (relating the presumption to the protection of tribal immunity); Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299, 1301–02 (D.N.M. 2009) ("[T]he courts construe statutes liberally in favor of Native Americans."). Some courts were applying a variation of this presumption even before its enunciation in *Montana v. Blackfeet Tribe of Indians*. *See* Wildcatt v. Smith, 316 S.E.2d 870, 885 (N.C. Ct. App. 1984) (applying "the general rule of construction applicable to congressional statutes claimed to terminate Indian immunities—that doubts be resolved in favor of tribal self-government").

319. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 755–60 (1998).

320. *Id.* at 759.

321. *Id.*

commercial areas by choosing not to "revisit [such] case law."[322] The Court instead "defer[red] to the role Congress may wish to exercise in this important judgment."[323]

The *Santa Clara Pueblo* and *Muhammad* courts missed this important example of judicial restraint. The language of § 2710(d)(3)(C) does not permit the negotiation of waiver and jurisdiction for personal injury suits. At a minimum, § 2710(d)(3)(C) does not *clearly* permit such negotiation. The legislative history examined by the *Santa Clara Pueblo* and *Muhammad* courts does not provide any clarification on this point. Congress's inaction—not clearly providing for the negotiation of waiver and jurisdiction to allow for personal injury suits—should have persuaded the *Santa Clara Pueblo* and *Muhammad* courts to reject this interpretation in a manner similar to *Kiowa*.[324] The final conclusion of the *Santa Clara Pueblo* and *Muhammad* courts should have been one of deference, respecting "the role Congress may wish to exercise in this important judgment"[325] and Congress's "position to weigh and accommodate the competing policy concerns and reliance interests" related to these matters in future legislation.[326]

VI. CONCLUSION

Santa Clara Pueblo, *Muhammad*, and *Nash* agree that an Indian tribe's use of a gaming compact to waive immunity and jurisdiction for personal injury suits cannot be effective unless such a waiver was an authorized point of negotiation under IGRA.[327] Based upon the language of § 2710(d)(3)(C) and the *Santa Clara Pueblo* court's thorough application of existing tribal waiver law, future courts should not meet with much disagreement on this point.[328]

However, the current judicial divide on whether IGRA actually permits such a negotiation and waiver will likely be the subject of future litigation and dispute. Courts cannot interpret IGRA to allow an Indian

322. *Id.* at 760.
323. *Id.* at 758.
324. *See id.* at 755–60.
325. *Id.* at 758.
326. *See id.* at 759.
327. *See* Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1265–67 (D.N.M. 2013); Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 U.S. Dist. LEXIS 114945, at *9–12 (W.D. Okla. Oct. 27, 2010); Doe *ex rel.* J.H. v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 29, 47, 141 N.M. 269, 154 P.3d 644.
328. *See Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 17–29.

tribe and a state to negotiate a waiver of immunity and jurisdiction for personal injury suits against the tribe. The language included in § 2710(d)(3)(C)(i)–(ii) clearly restricts the application of state civil law and jurisdiction to the regulation of class III gaming, not to personal injury suits that may arise as a consequence of such gaming. Since there is no ambiguity on this point in § 2710(d)(3)(C), the legislative history's vague references to public policy and safety should not even be considered relevant in interpreting the statute. However, if the report and legislative history are considered, these references are, at best, entirely ambiguous on the application of state personal injury law and jurisdiction. The ambiguity in the legislative history requires that the court protect tribal immunity as a matter of presumption.

Accordingly, future courts presented with this question should follow the analysis and holding of the *Nash* court. These courts should also consider the analysis of this Article, which further develops these points. Future courts should (1) reject *Santa Clara Pueblo* and *Muhammad* because those courts failed to recognize the *lack* of ambiguity on this point in § 2710(d)(3)(C); (2) note the *existence* of ambiguity with regard to the *public policy* and *safety* terms in IGRA's legislative history; (3) faithfully apply the interpretive presumption in favor of protecting tribal immunity; and (4) adhere to the principle of judicial restraint in deference to Congress regarding tribal immunity, as exemplified in *Kiowa*.

IGRA does not allow for the waiver of immunity and jurisdiction for personal injury suits against Indian tribes. This is a public policy decision left to the discretion and authority of Congress. Future courts should follow *Nash*'s precedent for the proper acknowledgment and application of this conclusion. If the waiver of immunity and jurisdiction for personal injury suits is to have a place in future gaming compacts, it must not come from the dictates of a court; instead, it should come from Congress clearly placing such authority in the language of IGRA.