UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE and
BUFFALO THUNDER, INC.,

Plaintiffs,

vs. Cause No.: 1:20-CV-00166-KRS-GBW

HONORABLE BRYAN BIEDSCHEID, individually and in his official capacity as District Judge, New Mexico First Judicial District Division VI; and RUDY PENA,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Pueblo of Pojoaque and Buffalo Thunder, Inc., through undersigned counsel, Ripley B. Harwood, Esq. (Ripley B. Harwood, P.C.), pursuant to Fed. R. Civ. P. 56 and D. N.M.LR-Civ. 56, submit this Memorandum in Support of their Motion for Summary Judgment:

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Pueblo of Pojoaque (Pojoaque), is a federally recognized Indian tribe located in Santa Fe County, New Mexico. Doc. 1, ¶ 3; accord, Doc. 4, ¶ 3.

2. Plaintiff Buffalo Thunder, Inc. (BTI) is a tribally-chartered for-profit corporation wholly owned by Pojoaque, whose purpose is to operate and manage the Buffalo Thunder Resort & Casino ("BTR") located on the Pueblo of Pojoaque in the State of New Mexico. Doc. 1, ¶ 4; accord, Doc. 4, ¶ 4.

3. BTR is within Indian country. 18 U.S.C. §1151(b).

4. Defendant, Rudy Pena, was seated at a BTR slot machine when he was asked by BTR employees to move, attempted to do so, and fell. Doc. 1, ¶ 8; **see Pena Complaint, ¶ 24, attached as Exhibit A.**

5. Rudy Pena filed suit for personal injuries in the First Judicial Court for the State of New Mexico. Ex. A.

6. The Indian Gaming Regulatory Act (IGRA), does not permit the shifting of jurisdiction over visitors' personal injury suits to state court. *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013).

7. Congress has authorized waiver of sovereign immunity under IGRA only for the regulation of activities that are directly related to the regulation and licensing of Indian gaming. *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018).

8. Slip and falls occurring on casino premises within Indian Country are not activities that are directly related to the regulation and licensing of Indian gaming. *Navajo Nation v. Dalley*, 896 F.3d at 1209 (10th Cir. 2018).

9. Absent congressional authorization, state courts may not exercise jurisdiction over suits against Indian tribes or tribal entities arising from alleged wrongs committed within Indian Country. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

ARGUMENT

I. THE FIRST JUDICIAL COURT FOR THE STATE OF NEW MEXICO LACKS SUBJECT MATTER JURISDICTION

The doctrine of preemption is an outgrowth of the Supremacy Clause of Article VI of the United States Constitution. Congress may, in certain areas of the law, promulgate a uniform federal policy that States may not frustrate through judicial interpretation. *Self v. United Parcel Service, Inc.*, 126 N.M. 396, 400, 970 P.2d 582, 586 (1998). Congress has chosen to do so respecting Indian affairs.

Congress possesses plenary power over Indian affairs. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998). Thus, if state court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Cohen's Handbook of Federal Indian Law* § 7.03[1][a][ii], at 608 (Nell Jessup Newton ed., 2012). This federal supremacy forecloses state court jurisdiction over Indian affairs absent proof of congressional consent. *Cohen's*, *supra*, § 7.07[4], at 673.

Rights created under federal law are governed by the decisions of the federal courts so that federal Acts be given uniform application rather than be subject to the local interpretations of each state. *Zimmerman v. Illinois Cent. Gulf R.R.,* 220 Ill.App.3d 945, 163 Ill.Dec. 408, 410, 581 N.E.2d 359, 361 (Ct.1991). Federal law regulates a tribe's right to exercise jurisdiction over non-Indians and state adjudicative authority over Indians for on-reservation conduct is limited by federal law. *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 542, 543 (10th Cir. 2017). In exercising state court jurisdiction with respect to what is essentially a federal question, state courts are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes. Conclusions as to such essentially federal matters are particularly guided by the unanimity of opinion among the federal courts. *Desmarais v. Joy Mfg. Co.,* 130 N.H. 299, 538 A.2d 1218, 1220 (1988).

New Mexico jurisprudence generally recognizes these principles. *Hinkle v. Abeita*, 2012-NMCA-074 (adopting subject matter jurisdiction "infringement test" respecting Indian sovereignty). State courts apply federal law to federally controlled

issues arising in state court, just as federal courts apply state law to cases filed in federal court but governed by state law. *Hook v. Hook*, 1984-NMSC-068, 101 N.M. 390, 391-92. In applying federal law, New Mexico courts follow the precedent established by the federal courts, particularly that of the Tenth Circuit. *State v. Snyder*, 1998-NMCA-166, ¶9. When a case concerns a right or obligation created by federal law, a state court should look to federal precedent for guidance in interpretation. *Investment Co. of the Southwest v. Reese*, 1994-NMSC-051, ¶16.

A. *Two recent cases are dispositive of SMJ in this case*

The federal courts, and in particular this District and the Tenth Circuit, have spoken on the issue of state court jurisdiction over tort claims occurring in Indian Country at Indian gaming establishments whose activities are authorized and governed by IGRA. Two federal cases establish BTI's entitlement to summary judgment in this case.

In the first case, *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013), two patrons were allegedly overserved alcohol at a Pueblo-operated casino, and thereafter drove/occupied a motor vehicle which crashed, killing them both. *Id.*, 972 F.Supp.2d at 1257. Judge Hansen ruled that IGRA does not authorize ceding subject matter jurisdiction over negligence-based personal injury claims that arise on tribal lands. *Id*., 972 F.Supp.2d at 1266. His ruling reflects the majority view on the subject: *IGRA only waives tribal sovereign immunity in a narrow category of cases involving issues of licensing and regulation of gaming activities, and then only where declaratory or injunctive relief is sought*. *Id*., citing *Mescalero Apache Tribe v. New Mexico,* 131 F.3d 1379, 1385–1386 (10th Cir.1997) (collecting cases).

In the second case, *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018), the

Tenth Circuit affirmed this view. In *Dalley,* a patron slipped and fell on casino premises owned and operated by the Navajo Nation. *Dalley*, 896 F.3d at 1200. Plaintiff brought suit in New Mexico district court. *Id*. at 1203. After a lengthy procedural history in the lower courts, the Tenth Circuit agreed that Congress authorized waiver of sovereign immunity under IGRA only for the regulation of activities that are directly related to the regulation and licensing of Indian gaming. That authorization did not extend to slip and fall claims. *Id*., 896 F.3d at 1210 (IGRA does not authorize tribes to agree in gaming compacts to shift jurisdiction to state courts over tort claims).[1]

Nash and *Dalley* reaffirm that the principles of Indian self-governance and sovereignty are so ingrained in federal law and so inviolate, that they may not be waived even by agreements such as Plaintiffs' gaming compact,[2] unless Congress expressly authorizes such a waiver. *See e.g., Kennerly* v. *District Court*, 400 U.S. 423, 427-29 (1971) (unilateral action by Tribe purporting to confer jurisdiction over actions against tribal members in state court was completely ineffective absent strict compliance with express congressional authorization). As Congress has not authorized such a waiver in IGRA even by implication, the resulting conclusion is that the exclusive recourse for torts occurring on Indian casino premises is in the tribal courts.

B. *Pena's claim that BTR employees contributed to causing his fall does not confer subject matter jurisdiction upon the state court*

[1] The Tenth Circuit in *Dalley*, cites *Michigan* v. *Bay Mills Indian Cmty*., 572 U.S. 782, 134 S. Ct. 2024, 188 L.Ed.2d 1017 (2014), in which the Supreme Court found 1) that state-tribal compacts only govern Class III gaming, not other casino activities;, 2) that IGRA only applies to gaming activities, and; 3) that Class III gaming is "the stuff involved in playing class III games and the statute's enforcement power over "gaming activity" is the power "to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them.". *Id*., 896 F. 3d at 1201,1206-07.

[2] **Relevant excerpts are attached as Exhibit G.**

Real party in interest defendant Rudy Pena is expected to argue that the facts of his case are distinctive from those asserted in *Nash* and *Dalley*. He asserts that waiver of exclusive tribal sovereignty over his claim flows from his allegation that casino employees caused or contributed to causing his fall. Proximate cause however, is merely a proof element common to every tort. It possesses no distinctive or magical jurisdiction-invoking qualities.[3] If alleging that the conduct of a gaming enterprise proximately caused one's injury is deemed to waive sovereign immunity for personal injuries occurring in Indian casinos, then the state courts will have subject matter jurisdiction over all such tort claims.[4]

Assuming for purposes of this Motion that BTI's employees did ask Mr. Pena to move from the machine, such a request does not directly (or even indirectly) involve issues of licensing and regulation of gaming activities. Mr. Pena's Complaint makes no such allegation. Ex. A. Tort claims for money damages that occur in alleged consequence of actions taken at IGRA-governed Indian gaming facilities have never survived sovereign immunity scrutiny under IGRA. *Nash, Dalley*. That BTI employees allegedly caused or contributed to causing Pena's fall in no way distinguishes his case from the slip and fall in *Dalley* or the alleged alcohol over-service of *Nash*.

"[C]ongressional approval is necessary – *i.e*. it is a threshold requirement that must be met – before states and tribes can arrive at an agreement altering the scope of the state court's jurisdiction." *Dalley*, 896 F.3d 1205. This pronouncement applies to

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[3] Section 8 of the gaming compact itself already promises to provide an adequate remedy for casino guests whose injuries are 'proximately caused by the conduct of the Gaming Enterprise...". See *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶7, 141 N.M. at 272.

[4] The *Dalley* Plaintiff made the same boilerplate causation allegation in his Complaint. ***See McNeal v. Navajo Nation, et al.*, First Amended Complaint for Personal Injuries at ¶ 27, attached as Exhibit B.**

all torts and is indubitably inclusive of all slip and fall cases occurring in Indian Country. It both subsumes and eclipses the mere proof elements common to tort claims.

IGRA's jurisdiction shifting authorization is narrowly and unambiguously limited to:

> … allocations that are necessary for the enforcement of the laws and regulations, [and] that are directly related to, and necessary for, the licensing and regulation of the playing of Class III games… .

Dalley, 896 F.3d at 1215, citing 25 U.S.C. § 2710(d)(3)(C)(i) & (ii). No tort so far considered in the Tenth Circuit has survived scrutiny under this unequivocal and exacting language. To the contrary, tort claims arising on casino premises have been uniformly excluded from IGRA's narrow waiver of sovereign immunity in all of the precedent so far to be developed on the subject.

C. *A bright-line standard is necessary for the protection of Tribes and to add certainty to the law*

Dicta in *Dalley* left the door open a crack as to the possibility of future facts conceivably giving rise to a sovereign immunity waiver for torts occurring on casino premises. *Dalley*, 896 F.3d at 1218, fn. 7. This Court should shut that door. In *Dalley* footnote 7, the court conjured future casino injury hypotheticals that it speculated might "colorably" be viewed as having resulted "directly" from gaming activities. For the following reasons, Plaintiffs submit that such speculation is a path down a rabbit hole from which there is no return.

It requires mention at this point that the state district court entered two orders on Defendant's Motion to Dismiss. The first order was entered on January 8, 2020 and memorializes the view of the district judge that:

> Buffalo Thunder, Inc. has waived sovereign immunity under the Indian Gaming Regulatory Act and the gaming compact … as to claims for personal injury

> occurring on its premises in circumstances where it is alleged that the activities of a casino employee caused or contributed to causing the alleged accident and injuries.

January 8, 2020 district court Order, attached as Exhibit C.

This Order accurately reflects the contentions set forth in Paragraph 24 of Mr. Pena's Complaint filed with that court. Plaintiffs here contend that that Order accurately frames the factual backdrop asserted by Mr. Pena in the state court case, and brackets the factual backdrop for this Motion. Accordingly, the law of this Circuit, as already discussed above, is dispositive of the subject matter jurisdiction issue, irrespective of Mr. Pena's proximate cause allegation.

However, the district court, *sua sponte,* amended its Order on Defendant's Motion to Dismiss to add the following statement:

> The Court finds that the Gaming Compact entered into between the State of New Mexico and Buffalo Thunder waives sovereign immunity as to claims for personal injury occurring on its premises in circumstances where it is alleged that the activities of a casino employee caused or contributed to causing an alleged accident or injury, ***and the Plaintiff was actively engaged in a gaming activity at the time of his alleged injury***.

March 18, 2020 state district court Order, attached as Exhibit D (*emphasis added*).

Plaintiffs respectfully suggest that the addition of this language should be disregarded for purposes of this Motion. Paragraph 24 of Mr. Pena's Complaint filed with the district court does not allege that he was actively engaged in a gaming activity at the time of his alleged injury. Moreover, surveillance video capturing the incident does not show Mr. Pena to have been engaged with the slot machine at the time of the incident.[5]

This *sua sponte* insertion by the district court of an additional fact not in evidence

[5] **Arrangements will be made to supply this video to the Court on a flash drive as Exhibit E to this Motion.**

should not alter the outcome of the fundamental jurisdictional question at issue. While it might be desirable for this Court's ruling to encompass this additional fact since Plaintiffs herein contend that no unintentional tort occurring on casino premises should ever be deemed directly related to the regulation and licensing of Class III gaming, nevertheless, that fact is not in operation in this case. Thus, as a technical matter a legal determination encompassing it should have to wait another day and for another case.

With the foregoing *caveat*, Plaintiffs argue that this Court should regard *Dalley* footnote 7 as merely exemplary of the flaws common to *dicta*. Conspicuously absent from the anecdotal musings of that footnote is any review or analysis of the overall nature of tort claims and the tort law. Plaintiffs submit that upon considered reflection, no tort claim should ever be deemed directly related to the licensing and regulation of Indian gaming any more than such claims would be deemed directly related to the operation of any other type of business. The basic fact of the matter is that tort claims are a universally *in*direct consequence of inviting visitors to any place of business. The most rudimentary of electronic "slip and fall" legal research queries is proof enough that such claims arise at and in every sort of business. Nothing about the business of gaming distinguishes it in this respect from any other commercial activity, alters the indirect nature of torts occurring in consequence of such activities, or warrants super-elevated jurisdictional analysis.

For these reasons it is high time for a bright-line rule on this point. A bright-line rule would avoid revisiting settled Indian law subject matter jurisdictional issues whenever a new tort law fact scenario arises at an IGRA-regulated gaming facility. A bright-line rule is needed because every such tort irrespective of factual nuances is as susceptible of

adequate remedy in a tribal court as it is in any state court. The notion that it is not flies in the face of basic federally declared tribal sovereignty rights, is intolerably and unjustifiably paternalistic, and results in costly and needless litigation.

Global consideration of the subject of torts occurring on Indian casino premises should lead to the bright-line conclusion that such claims can and should *categorically* never be viewed as being directly related to the licensing and regulation of gaming activity. Even the examples envisioned in *Dalley* footnote 7, tied as directly as clever judges could envision to the actual physical activity of gaming, are nevertheless in the final analysis mere offshoots of such activity. The primary goal of IGRA is to prevent the infiltration of organized crime into Indian gaming. *Doe v. Santa Clara Pueblo*, 2007 NMSC-008, ¶ 35. The resolution of tort claims occurring on casino premises, no matter how directly they may arise from the activity itself, bears no relationship whatsoever to IGRA's overarching goal, and so bears no relationship whatsoever to the licensing and regulation of gaming activity as that term was envisioned in IGRA and as it has since been narrowly construed by the Courts.

To the contrary, tort claims that occur on Indian casino premises are always a merely tangential consequence of the activity, indistinct from similar risks inherent in the operation of any business. Although Justice Bosson opined that IGRA's legislative history reference to state interests in "safety", "law" and "public policy" could be read to include interests in where tort lawsuits find a home,[6] the implication that such premises liability claims cannot be as fully vindicated by a Tribal Court system is paternalistic and lacking in factual support. The Tenth Circuit expressly considered this issue in *Dalley*, concluding:

[6] *Santa Clara Pueblo*, *supra*, 2007-NMSC-008, ¶ 36.

> the allocation of civil jurisdiction referenced in [§2710(d)(3)(C)(ii)] pertains solely to the allocation that is "necessary for the enforcement of the laws and regulations … that are "directly related to, and necessary for, the licensing and regulation of" the playing of Class III games…and not for the enforcement of laws and regulations pertaining to such tangential matters as the safety of walking surfaces in Class III casino restrooms.

Dalley, *supra*, 896 F.3d at 1210. While personal-injury lawsuits could conceivably be viewed as a type of regulation, the *Dalley* court was unable to discern how that form of regulation would be directly related to, and necessary for the licensing and regulation of Class III gaming, as required by IGRA. *Id.*, 896 F.3d at 1209-10.

As in *Santana v. Muscogee (Creek) Nation*, 508 Fed. Appx. 821 (10th Cir. 2013), the gaming compact to which BTI subscribed at all times material to Mr. Pena's lawsuit establishes due process for the protection of visitors. Sections 8.A and B of that compact prescribe a tribal court remedy for such claims and establish an eight-figure insurance compensation fund. Ex. G. Thus, even if Justice Bosson's hypothesis is right that the state retains an interest in seeing that victims of Indian casino premises torts are fairly compensated, there is simply no basis to believe that this interest cannot be met through Pojoaque Pueblo Tribal Court process and the insurance fund that the Compact mandates.

It is a bedrock proposition of Indian Law derived from the sovereign status of Indian tribes, that tribal courts have exclusive jurisdiction over claims arising on tribal lands against tribes, tribal members, or tribal entities. *Williams v. Lee,* supra, 358 U.S. at 219–20; *Found. Reserve. Ins. Co. v. Garcia,* 105 N.M. 514, 516, 734 P.2d 754, 756 (1987); *DeFeo v. Ski Apache Resort,* 120 N.M. 640, 642, 904 P.2d 1065, 1067 (Ct.App.1995). This

overarching sovereign interest eclipses any state interest in micromanaging the tort law. This proposition should be regarded as incontrovertible where compact safeguards for personal injury victims are a declared tribal priority, and where, as in this case, legal process and financial protections are both in place.

Under such circumstances, it is incumbent upon state courts to simply uphold the rights of a co-equal sovereign to manage such peripheral things as tort claims arising on their premises. No such claim should ever be regarded as undermining the sovereignty of an Indian Nation just because creative lawyers spin the proof elements of individual claims. This Court should rule that IGRA simply does not waive sovereign immunity for any unintentional tort claims arising on casino premises, period. Only such a rule fosters across-the-board certainty, accords due respect to Indian sovereignty, and eliminates the need for expensive piecemeal resort to the federal courts such as this case and the entire tortured legal history underlying this recurrent issue exemplifies.

Sovereign immunity from suit not only prevents a defendant from being subject to liability, but also relieves an immune defendant from the burden and expense of defending against unauthorized lawsuits. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). "The entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). It is an affront to Indian sovereignty to be repeatedly subjected to the indignity and expense of being hailed into the courts of another sovereign and forced to defend against claims such as this up and down through the state and federal courts. A bright-line rule is needed, long overdue, and now clearly indicated by the evolved federal precedent.

Last, but not least, such tort claims never seek non-monetary relief. Their entire, express purpose is to recover money. Accordingly, such claims should invariably be

regarded as being beyond the scope of the limited waiver of sovereign immunity under IGRA. *Nash, supra*, 972 F.Supp.2d at 1266. Proof that an element of a tort claim might be met through the activities of casino employees is utterly superfluous to the analysis if claims for money as a whole are outside the scope of the waiver. This Court should rule that the state district court lacked subject matter jurisdiction over Mr. Pena's Complaint as a matter of established federal law. It should rule that the sole venue for Mr. Pena's Complaint is the Pojoaque Pueblo Tribal Court. Lastly, this Court should take this opportunity to announce that all unintentional torts occurring on Indian casino premises are to be remedied in Indian Tribal Courts, and that those courts have exclusive jurisdiction over such claims irrespective of disparate factual hyper technicalities certain to arise in future cases.

II. THIS CASE MEETS THE FIVE-FACTOR TEST FOR EXERCISING JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT

The general rule is that federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). Nevertheless, the district courts have discretion regarding whether to exercise jurisdiction over a declaratory judgment action. *Gerhardt v. Mares*, 179 F.Supp.3d 1006, 1057 (D. N.M. 2016). Five factors determine whether the district courts in this Circuit should exercise discretionary jurisdiction over a declaratory judgment action:

> [1]whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; [4] whether use of a declaratory action would increase friction between our federal and state courts

> and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

Id., citing *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F3d 1167, 1169 (10th Cir. 1995).

Plaintiffs submit that their First Amended Complaint (Doc. 18) meets all five factors: first, as in *Nash* and *Dalley,* the relief Plaintiffs request would settle the controversy because federal law governs the outcome. Second, as in *Nash* and *Dalley,* each opportunity to reiterate the limits which IGRA represents with respect to Indian sovereignty and sovereign immunity serves the useful purpose of clarifying those limits in an area where the recurrence of such issues in and of itself demonstrates the need for further clarification. This goal will be even better enhanced if this Court endorses the need for a bright-line rule respecting torts occurring on casino premises, and takes the opportunity to announce such a rule.

Third, no 'procedural fencing' is involved. Plaintiffs have come to the source of federal law for a reiteration of principles that are not only exclusively federal in nature, but deemed to be of paramount importance. *Seneca-Cayuga Tribe of Okla*., 874 F.2d 709, 713 (10th Cir. 1989)("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian country.").

Fourth, while this factor is a matter of perspective, Plaintiffs submit that settling this issue hopefully once and for all by adopting a bright-line rule respecting subject matter jurisdiction over unintentional torts occurring on IGRA-controlled Indian Gaming premises would decrease the recurring frictions this case itself exemplifies by fostering greater certainty as to controlling federal law. Fifth, and last, there is no better or more effective remedy than a federal court deciding federal law on an issue of paramount federal importance.

Presumably because all these factors are so clearly met in this particular arena of federal Indian law, they were never even reviewed nor analyzed in *Nash* or *Dalley*. They are raised here merely in anticipation of claims that this Court should decline to exercise jurisdiction under the Declaratory Judgment Act.

III. ABSTENTION DOCTRINES DO NOT APPLY

Plaintiffs address this issue because they filed a parallel Application for Interlocutory Appeal in the New Mexico Court of Appeals. That Application however, has since been denied. ***See* July 16, 2020 Order denying Application for Interlocutory Appeal, attached as Exhibit F.**

A. *Brilhart abstention* - "*Brillhart*" abstention is most frequently associated with declaratory judgment actions.[7] It typically arises "when a plaintiff sues a defendant in state court and the defendant subsequently sues the plaintiff in federal court in a competing and parallel action seeking declaratory relief on the same core issues." *Valdez v. Metropolitan Property & Cas. Ins. Co*., 867 F.Supp.2d 1143, 1190 (D. N.M. 2012). That scenario is in play here.

However, BTI seeks not only declaratory judgment but also for this Court to enjoin New Mexico's First Judicial District Court from further proceedings in this matter were this Court to grant declaratory judgment.[8] Doc. 1, ¶ 20 & prayer for relief bullet C. *Brillhart* abstention is inapplicable to declaratory judgment actions that also involve good faith claims for injunctive relief. *THI of N.M. at Las Cruces, LLC v. Fox,* 727 F.Supp.2d 1195,

[7] Brillhart v. Excess Ins., Co., 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942)).
[8] Plaintiff concedes that because of an amendment to 42 U.S. C. §1983, injunctive relief would be available only if Judge Biedscheid were to violate a declaratory decree of this Court. *See Pueblo of Santa Ana et al. v. Nash et al*., Civ. No. 11-0957 BB-LFG, Doc. 43 at pp. 16-17 (and authority cited therein).

1203 (D.N.M.2010)(Browning, J.)(recognizing that the Tenth Circuit "has cited favorably" cases which hold that abstention under *Brillhart v. Excess Ins. Co.* is inappropriate when a party seeks an injunction or other coercive relief); *see Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 795 (8th Cir.2008); *Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 211 (4th Cir.2006). Accordingly, *Brillhart* abstention should be deemed inapplicable to Plaintiffs' First Amended Complaint. When a party seeks both a declaratory judgment and injunctive relief, abstention is governed by what is known as the Colorado River abstention doctrine. *THI of New Mexico at Las Cruces, LLC v. Fox, supra*, 727 F.Supp.2d at 1203 (citations to supporting authority omitted). As with other abstention doctrines, the district courts should only stay or dismiss an action when weighing the Colorado River abstention factors demonstrates 'extraordinary circumstances'. *Id*. at 1202. The doctrine is rooted in the lesser concerns of judicial economy, as opposed to constitutional concerns over federal-state comity. Accordingly, it is only properly invoked to decline jurisdiction when there is the "clearest of justifications". *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819, 96 S.Ct. 123647 L.Ed.2d 483 (1976). The factors are non-exclusive and somewhat amorphous, and no single factor is determinative. *THI, supra*, at 1202 & 1208.

B. *Colorado River abstention* - Colorado River abstention does not appear to have ever been raised in any reported federal decision involving IGRA, Indian tribal sovereign immunity, the gaming compact, or related subject matter jurisdiction issues, including the numerous cases involving these issues in this District. As discussed below, Younger abstention has been rejected in such and similar cases for reasons likely to be viewed as carrying over to Colorado River abstention.

The factors involved in Colorado River abstention are detailed in Judge

Browning's *THI* opinion and are simply too extensive to warrant a factor by factor review. Suffice it to say that, like Younger abstention below, the law driving Plaintiffs' First Amended Complaint in this case is not only federal law, but federal law that is exclusive and paramount, involving as it does core concepts of Indian self-governance and sovereign immunity. There are no issues of ulterior motive underlying Plaintiffs' First Amended Complaint. Plaintiffs' Application for Interlocutory Appeal has been denied, such that their only relief and recourse is in the federal courts.

Given that Plaintiffs' First Amended Complaint involves a fundamental question of subject matter jurisdiction involving paramount issues of federal law, it seems improbable that Colorado abstention could ever be justified upon any ground. If anything, the schizophrenic legal history surrounding this particular jurisdictional issue as it has bounced up and down with inconsistent results in multiple cases through New Mexico's state courts and our federal district and appeals courts, underscores the need for the dispositive and controlling precedent that the Plaintiffs here beseech this Court to declare. A vexatious scenario involving fundamental questions of Indian sovereignty and basic subject matter jurisdiction that legal history proves is capable of tiresome recurrence, might well be regarded as the least likely candidate for abstention on any grounds, much less those of simple judicial economy. The federal courts exist to bring clarity, finality, and uniformity to such questions. The state interests discussed in subsection I.B, above must yield to federal interests in uniform sovereign immunity law as it pertains to the scope of permissible waivers under IGRA. As pointed out above, the state interest in assuring that tort victims at Indian casinos have a forum for meaningful redress is met through tribal court jurisdiction, compact safeguards, and in-place insurance protections. Colorado River abstention should be rejected.

C. *Younger abstention is inapplicable -* *Younger* abstention from the exercise of federal jurisdiction is also "an extraordinary and narrow exception to the duty of a District Court to adjudicate the controversy properly before it." *Pueblo of Santa Ana v. Nash, supra*, 854 F.Supp.2d at 1140-41 (citations to supporting authority omitted). Younger abstention was so extensively discussed in the so closely analogous *Nash* case that review of the specific factors is likewise unwarranted. Where the issue in "the first place" is whether a state court has subject matter jurisdiction to hear a case, AND, where that jurisdictional question is inextricably intertwined with "paramount and federal" Indian sovereign immunity issues, abstention is improper. *Nash, supra*, 972 F.Supp.2d at 1141. Dominant federal interests in ensuring uniformity of law in this area of fundamental importance overshadow state interests under such circumstances. *Id*. at 1142.

This issue was again neatly and thoroughly analyzed in the recent albeit unreported decision of *Navajo Nation v. Rael*, 2017-WL-3025917. In that case, Judge Johnson noted that the common thread in the cases rejecting Younger abstention (principally those involving Indian law sovereign immunity issues, is that

> where the issue before a federal court is "paramount" and "federal"—particularly where the question is whether state court has jurisdiction over a particular category of cases—*Younger* is not appropriate because that question must be resolved in federal court based on federal law.

Rael, supra, 2017 WL 3025917 at *6. Notably, Judge Johnson regarded the *Nash* decision as settling the jurisdictional question not only in that case but as to <u>all personal injury lawsuits brought in state courts pursuant to IGRA against Indian tribes or their gaming enterprises</u>. *Id*. And yet, here again these Plaintiffs are forced to seek the aid

of the federal court in defense of what by now should be regarded as a firmly established limit on state court jurisdiction and a principle of Indian sovereignty… .

For all of the foregoing reasons, Plaintiffs request that this Court unequivocally declare that the exclusive venue for unintentional torts of whatever kind and character, occurring in Indian Country at Indian gaming facilities operating under the auspices of IGRA, shall be in the tribal courts. Plaintiffs request that this Court grant this Motion and authorize the Plaintiffs to seek injunctive relief in the event that the state district court were to proceed with Mr. Pena's lawsuit despite this Court's declaration. Plaintiffs request such other and further relief as this Court deems proper.

Respectfully submitted,

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I HEREBY CERTIFY that on the _____ day of June, 2021, a true and correct copy of the foregoing Plaintiffs' Motion for Summary Judgment together with Memorandum in Support were filed electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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