2021 HOUSE FINANCE AND TAXATION

HB 1212

2021 HOUSE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Room JW327E, State Capitol

HB 1212
1/26/2021

A bill relating to the creation of a charitable gaming operating fund and relating to charitable gaming tax.

Chairman Headland opened the hearing at 10:09am.

Representatives	Present
Representative Craig Headland	P
Representative Vicky Steiner	P
Representative Dick Anderson	P
Representative Glenn Bosch	P
Representative Jason Dockter	P
Representative Sebastian Ertelt	AB
Representative Jay Fisher	P
Representative Patrick Hatlestad	P
Representative Zachary Ista	P
Representative Tom Kading	P
Representative Ben Koppelman	P
Representative Marvin E. Nelson	AB
Representative Nathan Toman	P
Representative Wayne A. Trottier	P

Discussion Topics:

- Creating a charitable gaming tax
- Reducing tax rates on charities
- Gambling disorder program

Representative Dockter introduced the bill.

Troy Seibel, Chief Deputy for the Attorney General, testified in support. Testimony #3146.

Kent Blickensderfer, Kpb Consulting, introduced the next speaker.

Janelle Mitzel, Charitable Gaming Association of North Dakota, testified in support. Testimony #3208.

Don Santer, CEO for the North Dakota Association for the Disabled, testified in support. Testimony #3434.

Rudie Martinson, Executive Director for North Dakota Hospitality Association, testified in support. Testimony #3438.

Mike Motschenbacher, Executive Director for the North Dakota Gaming Alliance, testified in support. Testimony #3379 and 3289.

Cynthia Monteau, Executive Director of the United Tribes Gaming Association, testified in support with a proposed amendment. Testimony #3440.

Stephanie Dassinger, North Dakota League of Cities, testified in support but with concerns. No written testimony.

Lisa Vig, Lutheran Social Services, testified in a neutral capacity. Testimony #3457.

Collette Brown, representing the Spirit Lake Tribe, Gaming Commission Executive Director of the Gaming Regulations and Compliance Department, testified in a neutral capacity. Testimony #3419.

Additional written testimony:

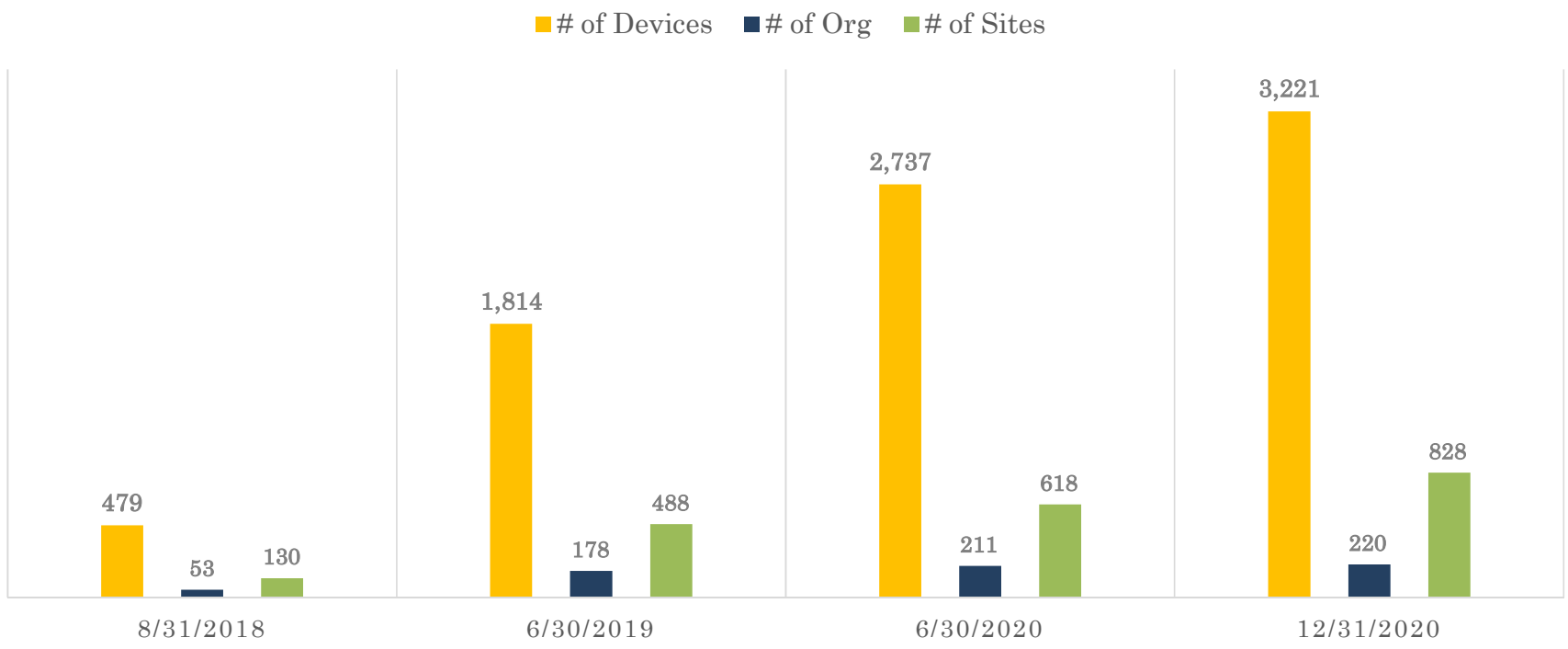
Rick Stenseth, Kelsch Law Firm-Northern Prairie Performing Arts, testimony in favor (#3324).

Ken Karls, Cystic Fibrosis Association of North Dakota, testimony in favor (#2918).

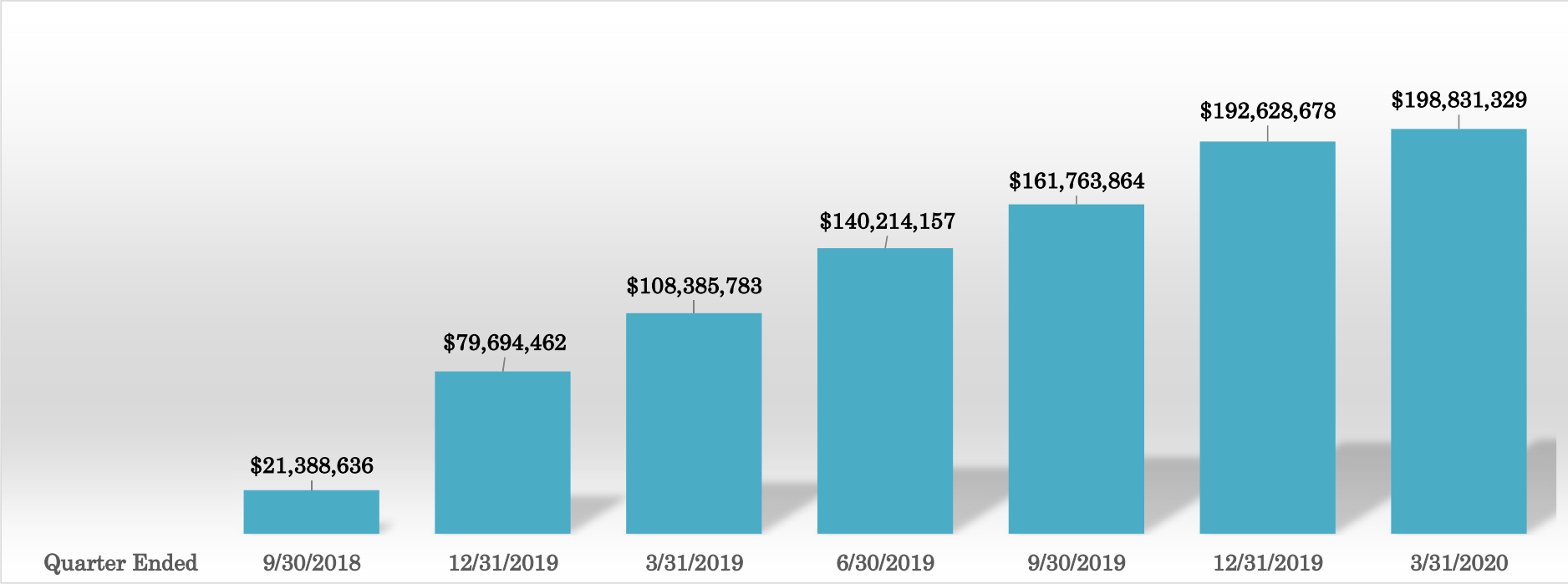
Chairman Headland closed the hearing at 11:34am.

Mary Brucker, Committee Clerk

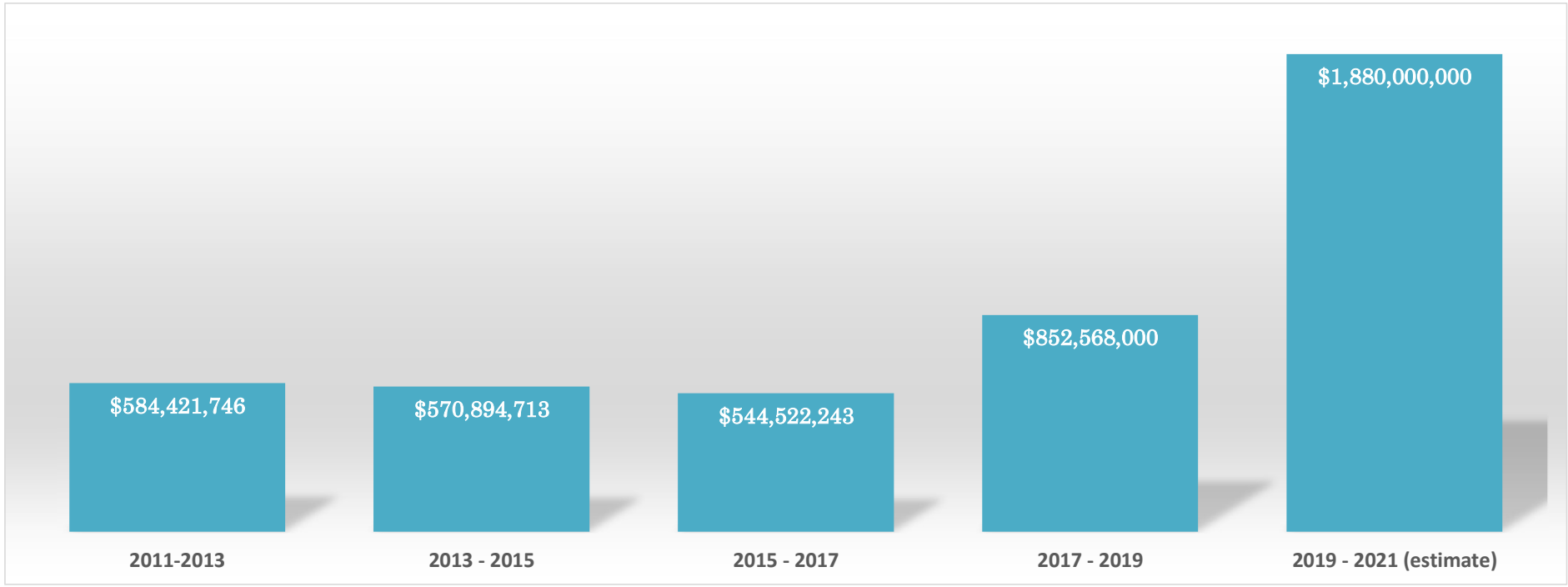
E-TAB DEVICES



E-TAB GROSS PROCEEDS PER QUARTER



ALL GAME TYPE GROSS PROCEEDS PER BIENNIUM



TOTAL GAMING TAX PER BIENNIUM

HB 1212
House Finance & Taxation Committee
Submitted by Janelle Mitzel, CGAND
January 26th, 2021

The Charitable Gaming Association of ND urges a Do Pass recommendation on HB 1212.

Why was charitable gaming established?

- A constitutional amendment was passed that empowered charities with the ability to raise critical financial resources to serve their charitable purposes, support the most vulnerable North Dakotans, and bolster community-focused organizations through charitable gaming.
- Charitable gaming has enabled loc.al non-profits to support important programs in their communities across North Dakota.

Why is charitable gaming important?
Here are just a few examples of how charitable gaming revenues have helped improve our communities in recent years:

- At **Development Homes,** these dollars have helped provide security, equipment, and specialized training to place vulnerable adolescents into community-based homes from the Life Skills and Transition Center in Grafton. We are continuing to de-institutionalize ND citizens.
- The **Lamoure Baseball Booster Club** rebuilt and maintain the local baseball fields while covering costs for the Legion Baseball program, including paying coaches and travel costs for kids play baseball. They were also able to donate additional dollars to support the local volunteer ambulance service and fire department, helping to improve public safety.
- Charitable gaming helps fund many volunteer fire departments across the state, including in **Verona**, where gaming helped provide grants for new fire equipment and fire vehicles, and in **Leonard**, where gaming revenue grants helped purchase life-saving equipment and maintain their fire trucks. These are clear public safety benefits that otherwise would need to be funded using state or local tax dollars.
- The Fargo **Metro Baseball Association** was able to convert a local baseball field into a state-of-the-art artificial turf field, build concession and locker room facilities, and cover all expenses, including travel, for fielding three legion baseball teams.
- The **Bowman Economic Development Corporation** uses revenue from charitable gaming to support the local nursing home, fund improvements to the local hospital, and provide economic incentives for local businesses. These dollars are helping sustain their local community and helping local businesses thrive.

Charitable gaming is about taking care of our most vulnerable, providing opportunities for youth sports and other activities in communities that otherwise wouldn't have the opportunity, funding for your veteran's groups, and funding critical public safety needs are just a few examples.

Charitable gaming reduces the state taxpayer burden for services charities provide in local communities, while having a positive impact on local entities. Charitable gaming promotes local control by providing funding to local community non-profits.

CGAND urges a Do Pass recommendation on HB 1212 to right-size the state gaming tax.

- For nearly four decades the tax revenue generated from charitable gaming was used primarily to fund oversight of the charitable gaming activity.

- The purpose of charitable gaming is about helping vulnerable citizens and local communities – it was never intended to be a revenue-generator to the state.

- During the 2017-2019 biennium, licensed gaming organizations raised $51.5 million for charitable uses and generated $11.3 million in gaming taxes for the state's general fund. (AG's website). The Office of Attorney General Gaming Division expenditures for the 2017-2019 biennium were $3.2 million.

- During the Fiscal Year ending June 30, 2020 gaming organizations raised nearly $38 million for charitable uses and generated over $13 million in gaming taxes for the state's general fund. The Office of Attorney General Gaming Division budget for the 2019-2021 biennium is $3.4 million.

- In the current biennium, while charities are seeing a strong 50% increase in proceeds for charitable uses, our tax bill is estimated to increase to a staggering $26-30 Million (est.), a 150% increase in tax collection.

- The Gaming Tax should be designed only to raise enough revenue to cover the cost of appropriately regulating and maintaining oversight of the industry.

- The Gaming Commission and Office of Attorney General should be adequately funded, but every extra tax dollar diverted away from the intended charitable use is a dollar that will not help a North Dakotan in need.

- We support the utilization of gaming tax revenue is for the prevention and treatment of gambling addiction.

Over the past 40 years North Dakota has built out a responsible system for charitable gaming that puts charitable organizations first, is well-regulated, beneficial to local communities, and evolving to utilize new technologies.

Thank you for your thoughtful consideration to develop a fairer tax structure, and a **Do Pass recommendation on HB 1212.**

HB 1212
House Finance & Taxation Committee
Submitted by Don Santer, NDAD
January 26th, 2021

Chairman Headland and Committee members, thank you for the opportunity to provide information regarding the charitable gaming industry of North Dakota. I am here in support of House Bill 1212.

My name is Don Santer, CEO of the North Dakota Association for the Disabled (NDAD). NDAD is a North Dakota charity that for over 45 years has been dedicated to improving the quality of life for persons with disabilities.

NDAD is a non-profit, charitable organization serving individuals with health concerns and disabilities across the state of North Dakota. We have locations in Grand Forks, Fargo, Bismarck, Minot, and Williston. In 2019, NDAD provided over $2 million in services assisting thousands of North Dakota residents. NDAD works diligently to not duplicate services provided by other state or local entities, so we truly are a last resort for many individuals. As part of our services NDAD paid for the majority of the following items with charitable gaming funds:

- 1639 prescriptions for covered medications
- 2,801 out of town medical travel trips
- 3,502 accessible rides for employment, shopping, and community events
- 7,048 hours of personal attendant care expenses
- Each year 25-50 individuals are assisted with adaptive recreational activities
- Our **H**ealthcare **E**quipment **L**oan **P**rogram (HELP) served 2032 people with 4,366 pieces of equipment equating to a savings of more than $530,000 for North Dakota residents.

Additionally, NDAD administers the North Dakota Transplant Fund, provides program services for independent living and behavioral health issues in the Williston area, as well as providing information, referral, and public awareness to North Dakota residents. Our mission is to serve the residents of North Dakota and with your Do Pass vote, we could utilize potential tax savings to help an even greater number of North Dakotans.

House Bill 1212 addresses several issues in the gaming industry:

1. Creates a charitable gaming operating fund that will assure the administrative, regulatory, enforcement, technology, and addiction funding needed is available.
2. It reestablishes the original constitutional intent for use of gaming funds. Gaming Tax was intended only to raise enough revenue to cover the cost of appropriately regulating and maintaining oversight of the industry. All other proceeds should be utilized for its intended charitable purpose and in the region it was generated.
3. Creates a tax rate based on adjusted gross proceeds and simplifies the tax code for gaming.

- Currently gaming tax is imposed on the total **gross proceeds** received by a licensed organization in a quarter. "Gross proceeds" means all cash and checks received from conducting games.
- The following are just a few examples to help explain the tax on gross proceeds for the most common game types:
  - Electronic Pull Tab device (etab) is taxed on each ticket played. A player purchases $10 in credits on an etab machine and wins $100 in credits during the course of play; the player plays all credits without purchasing additional credits; the charity is taxed on $110 (Gross Proceeds) but only $10 of actual cash went into the machine. Although rare, it is possible the charity may pay out more in winning credits than it takes in cash depending on when the large win tickets come out. In that situation they would be taxed on a loss. This same scenario can happen with paper pull tabs.
  - Twenty-one and Paddle Wheel are taxed based on the chips purchased (the Drop) by the player. The player wagers the chips and may win and lose over and over without buying more chips. At the end of play the charity is taxed on the actual cash Drop (chips purchased) for the session. If a player buys $100 in chips, then decides to leave the site and cashes in the chips without making a wager; the organization is still taxed on the $100 purchase. In a different scenario, the player buys $100 in chips and wins $1000 the organization still pays tax on the $100 even though they lost $900.
  - Setting a tax on ***"Adjusted Gross"*** (gross proceeds less cash prizes and cost of merchandise prizes) eliminates the taxation of "credits" and unifies tax calculations for all game types. In other words, a tax on the actual earnings and not on phantom dollars.

Recently I have heard erroneous statements made in hearings and in the media about the North Dakota charitable gaming industry, as they are related, I would like to take a moment to respond to some of them:

- **The charitable gaming industry is not properly regulated.**
  - I personally spend a considerable amount of time throughout the year talking to the AG's office, searching through 222 pages of laws and regulations in the current code book, preparing for audits, and testifying at hearings.
  - Proper funding for regulating the industry is the issue– the industry is highly regulated but recent budget cuts have restricted or limited the AG's gaming division office to effectively enforce and monitor the charitable gaming industry. This bill is intended to fix that issue.

- ***The charities do not issue IRS W-2G tax forms for electronic pull tab winnings.***
  - The IRS requires U.S. citizens to report **all gaming income** on their tax return, even if they were not issued a W2-G.
  - Federal IRS Laws require W-2G forms to be issued by gaming facilities on certain gambling winnings. The specific requirements for issuing and reporting a W-2G

form depend on the type of gambling, the ratio of the winnings to the wager, and the amount of the gambling winnings. For instance:

- Bingo winnings and Tribal slot machine winnings in the amount of $1,200 or more require a W-2G to be issued.
- A winning ticket for either paper or electronic pull tabs valued more than $600 require a W-2G to be issued. For quick reference, just one gaming charity in North Dakota, NDAD, issued 139 W-2G's in 2018; 192 in 2019; and 235 in 2020.
- In addition to the W-2G's, North Dakota law requires charities to perform a child support check and intercept of gambling winnings when a W-2G has been issued and past due child support is owed. This intercept of gambling winnings is not a federal requirement and is not performed at tribal casinos.
- Generally, charities avoid running games with prizes large enough to require W-2G's to be issued at all. This is because the charity may be liable for the tax if done incorrectly, players are not very cooperative giving personal information required by the IRS, and players often get irate and rude with the gaming staff; particularly if back child support is owed and the funds must be intercepted.

- **North Dakota electronic pull tab machines are not regulated well enough and allow for sex trafficking and money laundering.**
  - The recent unsubstantiated statements made in the press and at legislative committee hearings related to money laundering and sex trafficking concerns connected to electronic pull tab machines are inflammatory and vague by design. They are intended to draw suspicion and cause public distrust in the charitable gaming industry. These allegations have been made without providing any evidence, direct or indirect, and supply no specific details for how or if any such activity is actually happening.
  - At a recent interim committee hearing, Chief Deputy Attorney General, Troy Siebel was asked if these concerns were based in fact or just anecdotal; he stated he was not aware of any, past or present, sex trafficking or money laundering cases connected to charitable gaming or electronic pull tab machines in the state of North Dakota.
  - Money laundering requires a way to prove a legitimate source of funds. Even if a player decided to feed cash into a machine and then cash out, they would not be issued a W-2G; in other words, no winnings, no legitimate source of funds all they could do is exchange currency. Again, charities try and avoid prizes that require a W2G to limit their risk and to reduce the large banks required to cover big payouts.

For the past 40 years North Dakota has developed a responsible and highly regulated system for charitable gaming to benefit charitable missions that serve your local communities. Charitable gaming was legalized to enable charities a way to generate critical financial resources to serve their charitable purposes while reducing or even eliminating their reliance on public tax dollars for that funding. Charitable gaming also provides good paying jobs. The funding generated for charities supports wages for their employees providing services but also generates job opportunities for gaming employees. NDAD currently has 79 employees across the state with jobs related specifically to charitable gaming; their combined wages average over $250,000 per month.

Again, thank you for your thoughtful consideration to develop a fairer tax structure, and a **Do Pass** recommendation on **HB 1212**.

Thank you, Mr. Chairman and members of the committee, for your time. I am happy to answer any additional questions you may have.

Respectfully,
Don Santer, CEO
NDAD

ND Hospitality Association

Testimony in Support of HB 1212
Rudie Martinson, Executive Director, ND Hospitality Association
Before the House Finance and Taxation Committee
January 26, 2021

Chairman Headland and members of the House Finance and Taxation Committee:

My name is Rudie Martinson, and I appear before you today as Executive Director of the ND Hospitality Association. We are North Dakota's trade association for the restaurant, lodging, and retail beverage industries. We appreciate the opportunity to stand before you today and express our support for House Bill 1212.

We are happy to join our friends in the charitable gaming industry to express support for this policy change. As you know, the majority of charitable gaming takes place in our facilities, in space leased from hospitality venues by charities participating in gaming operations. This creates a symbiotic relationship between our industries and the success of charitable gaming as a whole benefits both.

As you know, the hospitality industry suffered disproportionately during 2020 due to the COVID-19 pandemic – cancelled travel, cancelled events, and government policy limiting our ability to operate normally were all factors harmful to our bottom line. This is equally true for charities and their gaming operations. When our venues were closed or operating at a limited capacity, this also directly impacted charitable gaming operations. In fact, in many cases charities were subject to guidelines or orders further limiting their activities beyond what the hospitality establishments they operated in were enduring (for example, longer-term limitations on dealing blackjack).

HB 1212 represents an opportunity for the legislature to correct an oversight in tax policy that was enacted when electronic pulltabs were legalized. It puts more money back into the pockets of charities so they can even better fulfill their charitable purposes. And it does all of this while providing the Attorney General's Office with needed funds to achieve their mission of regulating this growing industry in North Dakota.

For these reasons, the ND Hospitality Association supports HB 1212, and asks the committee for favorable consideration of a "do-pass" recommendation.

HB 1212. Tuesday, January 26, 2021 10:00 AM

Good morning Chairman Headland and Committee Members

My name is Mike Motschenbacher and I'm here testifying on behalf of the ND Gaming Alliance

We are kindly asking for a DO PASS recommendation on HB 1212

In addition to testimony you have already heard from others in support of this bill which we agree with, one thing I wanted to address was the fiscal note. I know $18,000,000 looks like a big number, but in short, this amount was never intended to be steered into the general fund. The $30,000,000 that was put into the general fund over the past biennium was an overlooked mistake. In the 2019 session, there was a similar bill that would have addressed this issue but it failed and as a result, the state unintentionally received approximately $30,000,000 which was much more than what was requested and estimated by the Attorney General's office. The estimated need from the Attorney General's office was about $7,000,000 to regulate gaming but as you can see now, much more was withheld from charities due to the formula that was in law. It was simply an unintended windfall. This money could have and should have been distributed to charities who in turn could have supported further Veterans Organizations, Youth Activities, Disabled Children, and many many more good causes. Instead, it was accidentally diverted into the general fund.

So once again, we would ask for a DO PASS recommendation from the committee and would stand for any questions you may have at this time.

Mike Motschenbacher

Executive Director-ND Gaming Alliance

701-471-9014

Ndgalliance@gmail.com

HB 1212. Tuesday, January 26, 2021 10:00 AM

Good morning Chairman Headland and Committee Members

My name is Mike Motschenbacher and I'm here testifying on behalf of the ND Gaming Alliance

We are kindly asking for a DO PASS recommendation on HB 1212

In addition to the testimony you have already heard from others in support of this bill which we agree with, one thing I wanted to address was the fiscal note. I know it looks like a big number, but in short, this was money that was never intended to be in the general fund. In the 2019 session, HB 1533 would have addressed this issue but it failed and as a result, the state accidentally received approximately 30 million dollars which was much more than what was requested and estimated by the Attorney General's office to regulate gaming. It was simply an unintended windfall. The fiscal note which from HB 1533 was $8.4 million which would have gone to the AG office for regulation and would have diverted $2.8 million to the general fund. This $30,000,000 could have and should have been distributed to charities who in turn could have supported further Veterans Organizations, Youth Activities, Disabled Children, and many many more good causes. Instead, it was accidentally diverted into the general fund.

I'll give one example of a small charity and how this bill will affect them. The Washburn American Legion paid $25,525 in taxes under current law in Q4 of 2020. If this bill passes, the same charity would only pay $7875 in taxes. In a town of approximately 1200 people, $18,000 can go a long way to help the community.

So once again, we would ask for a DO PASS recommendation from the committee and would stand for any questions you may have at this time.

Mike Motschenbacher

Executive Director-ND Gaming Alliance

701-471-9014

Ndgalliance@gmail.com

HB 1533 fiscal note from 2019 session link https://www.legis.nd.gov/assembly/66-2019/fiscal-notes/19-0600-06000-fn.pdf

#3440

U·T·G·A
UNITED TRIBES
GAMING ASSOCIATION

HOUSE BILL 1212
HOUSE FINANCE AND TAXATION COMMITTEE
JANUARY 26, 2021

TESTIMONY OF CYNTHIA C. MONTEAU, EXECUTIVE DIRECTOR

Mr. Chairman and members of the Committee, my name is Cynthia Monteau, I am the Executive Director of the United Tribes Gaming Association (UTGA). I come before you today as a Proponent with amendments of House Bill 1212, a bill that creates a charitable gaming operating fund for cities and counties.

The five tribes of North Dakota formed UTGA, to promote, protect and advocate for tribal gaming and economic development. Tribal casinos are economic engines in our communities by creating jobs - jobs for both tribal members and non-Indians. The impacts of tribal gaming go far beyond the doors of our tribal casinos. Tribal gaming provides essential services to our reservation communities, funds tribal operations, and promotes economic development. In addition to, building local economies in the State by purchasing goods and services from area businesses; for instance, laundry and cleaning services, meat and produce, electricians, plumbers, and heating and air conditioning services.

Tribal gaming generates over $300 million for our economy in the State and about 3,000 FTEs (full-time equivalents).

Tribal gaming provides a source of jobs for individuals who otherwise would be unemployed and it is an anchor for jobs in other sectors such as tourism, education, and healthcare which may not be available but for a tribal casino – negative impacts to tribal gaming is a negative impact throughout the State.

U·T·G·A
UNITED TRIBES
GAMING ASSOCIATION

The electronic pull tabs have dramatically impacted tribal gaming revenue and carving out a portion of 5% of an operating fund for cities and counties with licensed organizations who are conducting games within the city limits or within each county makes sense and it also makes sense to carve out a portion of 1% of an operating fund for tribes that impact the State as a whole.

Gaming impacts jobs and economic development for both our reservation communities and the communities throughout the State where we employee thousands of FTEs and purchase millions in goods and services for our operations. It is for these reasons that we urge a DO pass with amendments to House Bill 1212.

Thank you, Mr. Chairman.

House Bill 1212

Amendment

Page 2, line 3 insert

"c. One percent of the total moneys deposited in the charitable gaming operating fund to Tribes in proportion to the taxes collected under section 53-06.1-12 from licensed organizations conducting games in the State."

House Finance and Taxation Committee

HB 1212

Tuesday, January 26, 2021

Good morning Chairman Headland and members of the Finance and Taxation Committee. My name is Lisa Vig. I stand before you today, likely for the last time, as an employee of Lutheran Social Services of North Dakota. My last day of employment with LSS will be on Friday, January 29, the day the doors to an amazing agency are closed.

My entire professional career, 31 years, has been with LSSND and has been devoted to providing gambling addiction treatment, prevention and public awareness to the citizens of ND and beyond. Collectively, the 3 clinicians of the Gamblers Choice program have over 100 years of experience and expertise with this population and come with the highest level of credentialing of anyone in the State of ND. With gratitude, on Monday, February 1, the staff of Gamblers Choice will become temporary employees of the state of ND until a permanent home can be found for the program.

The Behavioral Health Division under the direction of Pam Sagness immediately began working with our gambling contract manager, James Knopik, to find a way to keep these critical services going in North Dakota.

The local news over the weekend in Fargo featured several high profile stories about the increase in drug overdoses, rising meth addiction, sting operations, prosecution of drug dealers and the devastating effects on family members. Of course, these stories create a heightened awareness and education about the tragedy of drug addiction.

So what about the stories and faces of gambling addiction? These stories rarely make the news or the headlines. You haven't heard the stories and confessions of embezzlement from beloved employers and organizations, theft from the petty cash drawers at work or their children's piggy banks late at night. I have. You haven't heard about the lingering trauma resulting from the death of 2 innocent people on a highway after 72 hours of non-stop gambling. I have. You haven't heard the desperate stories of scrounging under car seats or sofa cushions, looking for spare change to buy 1 or 2 gallons of gas, hoping to make it to work tomorrow. You haven't heard stories of prostitution, for one more $50 bill, that have resulted in a life altering diagnosis of HIV. You haven't met the people who now agonize over the fact that they have no relationship with their adult sons and daughters, because gambling was more important. You have no idea what it's like to hear someone describe the regret they have for not having the "guts" to drive their vehicle into an oncoming semi-truck on the highway after losing yet another paycheck. And then there's our 63 year old grandmother who spent an entire day taking every article of her clothing to local thrift stores before researching on Youtube how to load and shoot her husband's pistol. Thank God the gun jammed. And then there's the young gentleman who flipped his vehicle on an icy highway, waiting hours in freezing temps for the wrecker to arrive to turn it upright, only to proceed on his way to Mystic Lake Casino at 4 AM. I have heard these stories and I know these people… and you know what, these people are the lucky ones, because they found someone to tell their stories to.

When the lottery was legalized in 2004, I testified a number of times regarding the need to set aside funds for treatment and prevention efforts. Many legislators questioned if it was very fair, since typically, traditional lottery play does not usually result in addictive play. All

forms of gambling, especially if sponsored by the State and benefitting the State's general fund, should be making contributions to help those who are negatively impacted. Current contributors are the lottery, ND tribal casinos, and The Racing Commission. Contributions from charitable gambling, which has been legal in ND since 1977 are long overdue.

In just over 2 years, Gross Proceeds from charitable e-tab activity alone is well over $1 billion dollars and Adjusted Gross proceeds over $169 million.

I applaud the sponsors of HB 1212 and the intention to set aside $10,000 per quarter for the gambling disorder prevention and treatment fund, but with all due respect, to those who are still suffering from this hidden illness and their families who are innocent bystanders, this is just not acceptable.

On behalf of those who have found help and for those who are still out there suffering, I respectfully request that the set aside in HB 1212 for the gambling disorder prevention and treatment fund, at the very least, match the current lottery contribution, $80,000 per quarter.

Thank you for time today.

Lisa Vig, LAC, ICGC
Program Director
Gamblers Choice Lutheran Social Services of ND

January 26, 2021

HB 1212-Charitable gaming operating fund and tax

Good morning, Chairman Headland and the members of the committee

My name is Collette Brown from Warwick, representing the Spirit Lake Tribe. My professional title in the gaming industry is, Gaming Commission Executive Director of the Gaming Regulations and Compliance Department, our casino is located seven miles south of Devils Lake

Today I come to you with a neutral position on HB 1212 along with some suggested amendments.

- The sentence on line 15, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows. I believe the intention of giving the AG this money was to assure they have a game of integrity, if that is the point then there are a few words missing from this sentence, my suggestion is to amend it to *All other moneys in the charitable gaming operating fund are appropriated to the attorney general* ***gaming division office for the purpose of regulation and inspection of all ND state game types*** *on a continuing basis for quarterly allocations as follows.*
- Gambling disorder prevention and treatment fund allocation is a small amount considering the lottery pays in more than 10k a quarter and the lottery has not generated the revenue the etab devices have. These services are here to prevent North Dakotans from becoming addicted to gambling, $40k a year will not suffice in any outreach development. Please know that we stand with the request from Lisa Vigs testimony.
- The 5% for cities and counties is not enough for them to assist in any type of investigation assistance. That percentage should be higher, this new industry had no consideration of all aspects of gaming, and this should be at least 20% so that those cities or counties will be able to assist the AG's office in any investigative matters, such as any cheats, thefts, scams or money laundering activities.
- Gaming Tax, there are few organizations that are making a lot of money from these etab devices, those charities should pay at least 7% of their adjusted proceeds and they should have their own section, being they have over ten site locations.

With that being said I thank you for allowing me some time to give my input on this bill.

House Finance and Taxation Committee
Testimony on HB1212

Chairman Headland and Representatives:

My name is Rick Stenseth. I am a Gaming Manager for two organizations in Fargo that both conduct charitable gaming (Fargo-Moorhead Community Theatre & Team Makers Club). My involvement in our industry goes back to 1983 and I have been involved in working with the Legislature over many sessions and on many gaming topics.

HB1212 is an extremely important bill for all charitable organizations that conduct gaming in our State. It would provide significant and immediate positive impact to the programs and services supported by gaming. For many of these organizations, gaming is the largest fund raising tool they have to raise the money necessary for them to meet their missions.

While the tax rates and computations of those have changed more than a couple times over the years, the industry has always maintained that it should be responsible for the costs associated with the regulation and administration of the Laws and Rules necessary to ensure the integrity of our industry. And we have always recognized that there is a need to make help available for those who may have a problem with their gaming activity.

HB1212 addresses items that have been discussed in previous legislation over the years. One concerns the tax funds collected being designated to the Attorney General's Office and local jurisdictions for regulation and administration. A second involves the basis on which any tax rate would be applied, and third it specifies an amount to go to counseling.

Historically we began with what was termed "Gaming Tax" and it went to the AG budget to use as necessary. At that time the basis for taxation was Adjusted Gross Proceeds. AGP is what remains after all prizes are paid out to the players. For the quarter ended June 30, 2020 players received 88.3% of wagers back in prizes.

Currently organizations pay taxes based on Gross Proceeds (the total dollar value of wagers). Our industry should not be taxed with this as the basis. Changing this portion of the tax code for charitable gaming is the right way to go. Taxes should be applied based on the revenue after all prizes are paid. For many game types every actual dollar that is taken in by the organization results in $3 or more wagers (Gross), with over 80% of that amount going back out in prizes.

We all agree there are costs involved which need to be covered by the taxes collected on gaming. Total taxes collected should be calculated to easily maintain the Gaming Division of the Attorney General's Office responsibility to police the industry by enforcing regulations and administering Laws and Rules governing it.

Designating those tax dollars to a fund which is directed by Statute to be used for the purposes defined ensures that regardless of any other budgeting concerns, the AG will be able to maintain the necessary funds to meet their responsibilities.

We could have much discussion on just how things got to this point and consideration of what the funds generated by charitable gaming do for so many in our State has always been a part of any legislation. HB1212 looks at all of the needs and introduces a fair and adequate tax that will be used for appropriate State and local oversight expenses, while helping each organization significantly. I ask for a Do Pass from each of the Committee members and appreciate your attention to this proposal. Thank you for your time and I am available for any questions.

Testimony of Ken Karls (#268)

Cystic Fibrosis Association of ND

HB 1212

January 26, 2021

Chairman Headland and members of the Finance and Tax Committee, my name is Ken Karls and I represent the Cystic Fibrosis Association of ND (CFA). Rather than taking your time in committee, I am writing to urge your support for HB 1212.

CFA is a North Dakota charity that has been assisting North Dakota individuals and families for forty years dealing with cystic fibrosis, a terminal disease. CFA assists families with the cost of medications and nutritional support, with the extraordinary costs associated with medical appointments, with college scholarships, lung transplants and other hardship costs caused by fighting this relentless disease.

The money used for this assistance comes from traditional fundraising (Giving Hearts Day, the Turkey Trot, golf tournaments, etc.) and from charitable gaming. HB 1212 would significantly increase the amount of money available to help us with our charitable mission, money that is presently paid to the State of North Dakota through taxes.

In addition to lowering the tax on charities, CFA also believes HB 1212 lays out a more organized plan for dealing with the costs associated with regulating charitable gaming in North Dakota.

CFA strongly supports and asks you to vote "yes" on HB 1212.

Thank you for your time and consideration.

Ken Karls (#268)

kkarls@cfand.org

701-471-5575

2021 HOUSE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Room JW327E, State Capitol

HB 1212
2/2/2021

A bill relating to the creation of a charitable gaming operating fund and relating to charitable gaming tax.

Chairman Headland opened up for discussion at 2:45pm.

Representatives	Present
Representative Craig Headland	Y
Representative Vicky Steiner	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Jason Dockter	Y
Representative Sebastian Ertelt	Y
Representative Jay Fisher	Y
Representative Patrick Hatlestad	Y
Representative Zachary Ista	AB
Representative Tom Kading	Y
Representative Ben Koppelman	Y
Representative Marvin E. Nelson	AB
Representative Nathan Toman	Y
Representative Wayne A. Trottier	Y

Discussion Topics:

- Possible amendments

Committee discussion.

Chairman Headland closed discussion at 2:47pm.

Mary Brucker, Committee Clerk

2021 HOUSE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Room JW327E, State Capitol

HB 1212
2/3/2021

A bill relating to the creation of a charitable gaming operating fund and relating to charitable gaming tax.

Chairman Headland opened up for discussion at 3:37pm.

Representatives	Present
Representative Craig Headland	Y
Representative Vicky Steiner	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Jason Dockter	Y
Representative Sebastian Ertelt	Y
Representative Jay Fisher	Y
Representative Patrick Hatlestad	Y
Representative Zachary Ista	Y
Representative Tom Kading	Y
Representative Ben Koppelman	Y
Representative Marvin E. Nelson	Y
Representative Nathan Toman	Y
Representative Wayne A. Trottier	Y

Discussion Topics:

- Proposed amendments
- Changing to 4% under $50,000
- Changing to 12% above $50,000
- Tax exclusion for raffles

Representative Dockter explained proposed oral amendments which include on page 2 line 18 changing 2% to 4% tax rate under $50,000, on line 20 strike $100,000 so anything above $50,000 is at 12%, then excluding all raffles from tax.

Chairman Headland closed discussion at 3:45pm.

Mary Brucker, Committee Clerk

2021 HOUSE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Room JW327E, State Capitol

HB 1212
2/8/2021

A bill relating to the creation of a charitable gaming operating fund and relating to charitable gaming tax.

Chairman Headland opened up for discussion at 3:03pm.

Roll call:

Representatives	Present
Representative Craig Headland	Y
Representative Vicky Steiner	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Jason Dockter	Y
Representative Sebastian Ertelt	Y
Representative Jay Fisher	Y
Representative Patrick Hatlestad	Y
Representative Zachary Ista	Y
Representative Tom Kading	Y
Representative Ben Koppelman	Y
Representative Marvin E. Nelson	Y
Representative Nathan Toman	Y
Representative Wayne A. Trottier	Y

Discussion Topics:

- Amendment 21.0479.01002
- Additional verbal proposed amendment

Representative Dockter proposed an amendment #21.0479.01002 and to further amend on page 2 line 21 replace 4% with 12 percent (#5954 and 5955).

Representative B. Koppelman made a motion to adopt amendment 21.0479.01002 and further amend.

Representative Dockter seconded the motion.

Voice vote-motion carried

Representative Dockter made a motion for a Do Pass As Amended and Rerefer to Appropriations.

Representative B. Koppelman seconded the motion.

Roll call vote:

Representatives	Vote
Representative Craig Headland	Y
Representative Vicky Steiner	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	N
Representative Jason Dockter	Y
Representative Sebastian Ertelt	Y
Representative Jay Fisher	Y
Representative Patrick Hatlestad	Y
Representative Zachary Ista	Y
Representative Tom Kading	Y
Representative Ben Koppelman	Y
Representative Marvin E. Nelson	Y
Representative Nathan Toman	Y
Representative Wayne A. Trottier	Y

Motion carried 13-1-0

Representative Dockter will be the bill carrier.

Chairman Headland closed the discussion at 3:15pm.

Mary Brucker, Committee Clerk

DD 2/8/21
1 of 1

21.0479.01003
Title.02000

Prepared by the Legislative Council staff for
House Finance and Taxation Committee
February 8, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1212

Page 2, line 18, remove the overstrike over the second "~~one~~"

Page 2, line 18, remove "two"

Page 2, line 20, remove "one"

Page 2, line 21, overstrike "thousand" and insert immediately thereafter "five hundred"

Page 2, line 21, replace "four" with "twelve"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1212: Finance and Taxation Committee (Rep. Headland, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1212 was placed on the Sixth order on the calendar.

Page 2, line 18, remove the overstrike over the second "~~one~~"

Page 2, line 18, remove "two"

Page 2, line 20, remove "one"

Page 2, line 21, overstrike "thousand" and insert immediately thereafter "five hundred"

Page 2, line 21, replace "four" with "twelve"

Renumber accordingly

21.0479.01002
Title.

Prepared by the Legislative Council staff for
Representative Dockter
February 8, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1212

Page 2, line 18, remove the overstrike over the second "~~one~~"

Page 2, line 18, remove "two"

Page 2, line 20, remove "one"

Page 2, line 21, overstrike "thousand" and insert immediately thereafter "five hundred"

Page 2, line 21, remove the overstrike over "~~two~~"

Page 2, line 21, remove "four"

Renumber accordingly

21.0479.01002

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1212

Introduced by

Representatives Dockter, Headland, Mitskog

Senators Meyer, Bell

A BILL for an Act to create and enact a new section to chapter 53-06.1 of the North Dakota Century Code, relating to the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a continuing appropriation; to provide for a transfer; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Charitable gaming operating fund - Attorney general - State treasurer - Continuing appropriation - Allocations - Transfer to the general fund.

1. There is created in the state treasury the charitable gaming operating fund. The fund consists of all gaming taxes, monetary fines, and interest and penalties collected under this chapter.
2. Excluding moneys in the charitable gaming operating fund appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows:
   a. Ten thousand dollars to the gambling disorder prevention and treatment fund.
   b. Five percent of the total moneys deposited in the charitable gaming operating fund to cities and counties in proportion to the taxes collected under section 53-06.1-12 from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must

be included in the total amount to be distributed to other cities and counties for the quarter.

3. On or before June thirtieth of each odd-numbered year, the attorney general shall certify to the state treasurer the amount of accumulated funds in the charitable gaming operating fund which exceed the amount appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming for the subsequent biennium. The state treasurer shall transfer the certified amount from the charitable gaming operating fund to the general fund prior to the end of each biennium.

SECTION 2. AMENDMENT. Section 53-06.1-12 of the North Dakota Century Code is amended and reenacted as follows:

53-06.1-12. Gaming tax - Deposits ~~and allocations~~.

1. A gaming tax is imposed on the total adjusted gross proceeds received by a licensed organization in a quarter and it must be computed and paid to the attorney general on a quarterly basis on the tax return. This tax must be paid from adjusted gross proceeds and is not part of the allowable expenses. For a licensed organization with adjusted gross proceeds:
   a. Not exceeding ~~one million five hundred~~fifty thousand dollars the tax is one~~two~~ percent of adjusted gross proceeds.
   b. Exceeding ~~one million five hundred~~fifty thousand dollars the tax is ~~fifteen~~~~one thousand~~five hundred dollars plus two ~~and twenty-five hundredths~~~~four~~ percent of adjusted gross proceeds exceeding ~~one million five hundred~~fifty thousand dollars.
2. The tax must be paid to the attorney general at the time tax returns are filed.
3. ~~Except as provided in subsection 4, the~~The attorney general shall deposit gaming taxes, monetary fines, and interest and penalties collected in the ~~general~~charitable gaming operating fund ~~in the state treasury~~.
4. ~~The attorney general shall deposit seven percent of the total taxes, less refunds, collected under this section into a gaming tax allocation fund. Pursuant to legislative appropriation, moneys in the fund must be distributed quarterly to cities and counties in proportion to the taxes collected under this section from licensed organizations conducting games within each city, for sites within city limits, or within each county, for~~

~~sites outside city limits. If a city or county allocation under this subsection is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.~~

SECTION 3. EFFECTIVE DATE. Section 2 of this Act is effective for taxable events occurring after June 30, 2021.

2021 HOUSE APPROPRIATIONS

HB 1212

2021 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Brynhild Haugland Room, State Capitol

`HB 1212
2/12/2021

Relating to the creation of a charitable gaming operating fund; to amend and reenact section

11:02 Chairman Delzer- Opens the meeting for HB 1212

Attendance	P/A
Representative Jeff Delzer	P
Representative Keith Kempenich	A
Representative Bert Anderson	P
Representative Larry Bellew	P
Representative Tracy Boe	A
Representative Mike Brandenburg	P
Representative Michael Howe	P
Representative Gary Kreidt	A
Representative Bob Martinson	P
Representative Lisa Meier	P
Representative Alisa Mitskog	P
Representative Corey Mock	P
Representative David Monson	P
Representative Mike Nathe	P
Representative Jon O. Nelson	P
Representative Mark Sanford	P
Representative Mike Schatz	P
Representative Jim Schmidt	P
Representative Randy A. Schobinger	P
Representative Michelle Strinden	P
Representative Don Vigesaa	P

Discussion Topics:

- Charity Proceeds
- Changing the way, the electronic pull tabs are taxed

11:03 Representative Headland- Introduces the bill and testifies in favor

Additional written testimony: No written testimony

11:13 Chairman Delzer Closes the meeting for HB 1212

Risa Berube, House Appropriations Committee Clerk

2021 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Brynhild Haugland Room, State Capitol

HB 1212
2/18/2021

Relating to the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code,

Chairman Delzer- Opened the meeting for HB 1212

Attendance	P/A
Representative Jeff Delzer	P
Representative Keith Kempenich	P
Representative Bert Anderson	P
Representative Larry Bellew	P
Representative Tracy Boe	P
Representative Mike Brandenburg	P
Representative Michael Howe	P
Representative Gary Kreidt	P
Representative Bob Martinson	P
Representative Lisa Meier	P
Representative Alisa Mitskog	P
Representative Corey Mock	P
Representative David Monson	P
Representative Mike Nathe	P
Representative Jon O. Nelson	P
Representative Mark Sanford	P
Representative Mike Schatz	P
Representative Jim Schmidt	P
Representative Randy A. Schobinger	P
Representative Michelle Strinden	P
Representative Don Vigesaa	P

Discussion Topics:

- E- tickets
- Gaming Fund Balance

5:49 Chairman Delzer- Reviews the bill

5:54 Representative Nathe Do Pass

Representative Howe Second

Further Discussion

5:54 Roll Call vote was taken;

Representatives	Vote
Representative Jeff Delzer	N
Representative Keith Kempenich	N
Representative Bert Anderson	N
Representative Larry Bellew	N
Representative Tracy Boe	N
Representative Mike Brandenburg	N
Representative Michael Howe	Y
Representative Gary Kreidt	N
Representative Bob Martinson	Y
Representative Lisa Meier	N
Representative Alisa Mitskog	Y
Representative Corey Mock	N
Representative David Monson	Y
Representative Mike Nathe	Y
Representative Jon O. Nelson	N
Representative Mark Sanford	Y
Representative Mike Schatz	N
Representative Jim Schmidt	N
Representative Randy A. Schobinger	N
Representative Michelle Strinden	Y
Representative Don Vigesaa	N

5:56 Motion Fails 7-14-0

Further discussion

5:58 Representative Jon O. Nelson Makes a motion for a Do Not Pass

Representative Schatz Second

Further discussion

Roll Call Vote was taken;

Representatives	Vote
Representative Jeff Delzer	N
Representative Keith Kempenich	Y
Representative Bert Anderson	Y
Representative Larry Bellew	Y
Representative Tracy Boe	Y
Representative Mike Brandenburg	N
Representative Michael Howe	N
Representative Gary Kreidt	Y
Representative Bob Martinson	N
Representative Lisa Meier	Y
Representative Alisa Mitskog	N
Representative Corey Mock	Y
Representative David Monson	A
Representative Mike Nathe	N
Representative Jon O. Nelson	Y
Representative Mark Sanford	N
Representative Mike Schatz	Y
Representative Jim Schmidt	Y
Representative Randy A. Schobinger	Y
Representative Michelle Strinden	N
Representative Don Vigesaa	Y

Motion Carries 12-8-1 Representative Jon O. Nelson will carry the bill

Additional written testimony: No Written Testimony

6:00 Chairman Delzer- Closes the meeting for HB 1212

Risa Berube,

House Appropriations Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1212, as engrossed: Appropriations Committee (Rep. Delzer, Chairman) recommends **DO NOT PASS** (12 YEAS, 8 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1212 was placed on the Eleventh order on the calendar.

2021 SENATE FINANCE AND TAXATION

HB 1212

2021 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Fort Totten Room, State Capitol

HB 1212
3/15/2021

A BILL for an Act to create and enact a new section to chapter 53-06.1 of the North Dakota Century Code, relating to the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a continuing appropriation; to provide for a transfer; and to provide an effective date.

Chair Bell calls the meeting to order. Chair Bell, Vice Chair Kannianen, Senators Meyer, Patten, Piepkorn, J. Roers, Weber are present. [2:31]

Discussion Topics:

- Electronic pull tab machines
- Gaming administration
- Attorney General Office Regulators
- Wagers, gross proceeds and tax
- Charitable uses
- Moratorium, regulations and compliance
- Crime

Representative Dockter [2:31] introduces in favor.

Troy Seibel [2:37] Chief Deputy Attorney General, ND Attorney General's Office in favor #9129.

Janelle Mitzel [2:46], President, Charitable Gaming Association of ND in favor #9027

Ken Karls [2:51] Cystic Fibrosis Association of North Dakota in favor #9318

Don Santer [2:53] North Dakota Association for the Disabled in favor #9319

Rudie Martinson [2:59] Executive Director, North Dakota Hospitality Association in favor #9256.

Mike Motschenbacher [3:00] Executive Director/Lobbyist, North Dakota Gaming Alliance in favor 9074, 9075 and 9076.

Stephanie Dassinger [3:03] North Dakota League of Cities orally in favor

Cynthia Monteau [3:04] Executive Director of the United Tribes Gaming Association in favor and submits an amendment #9277 and #9316.

Chairman Mark Fox [3:09] MHA Nation orally in opposition.

Lisa Vig [3:31] orally in favor.

Additional written testimony:

Joe Wanner, Public Fire Protection, Gladstone Consolidated Fire District in favor #9003.

Sheri Grossman, Bismarck-Mandan Convention & Visitor's Bureau in favor #9025

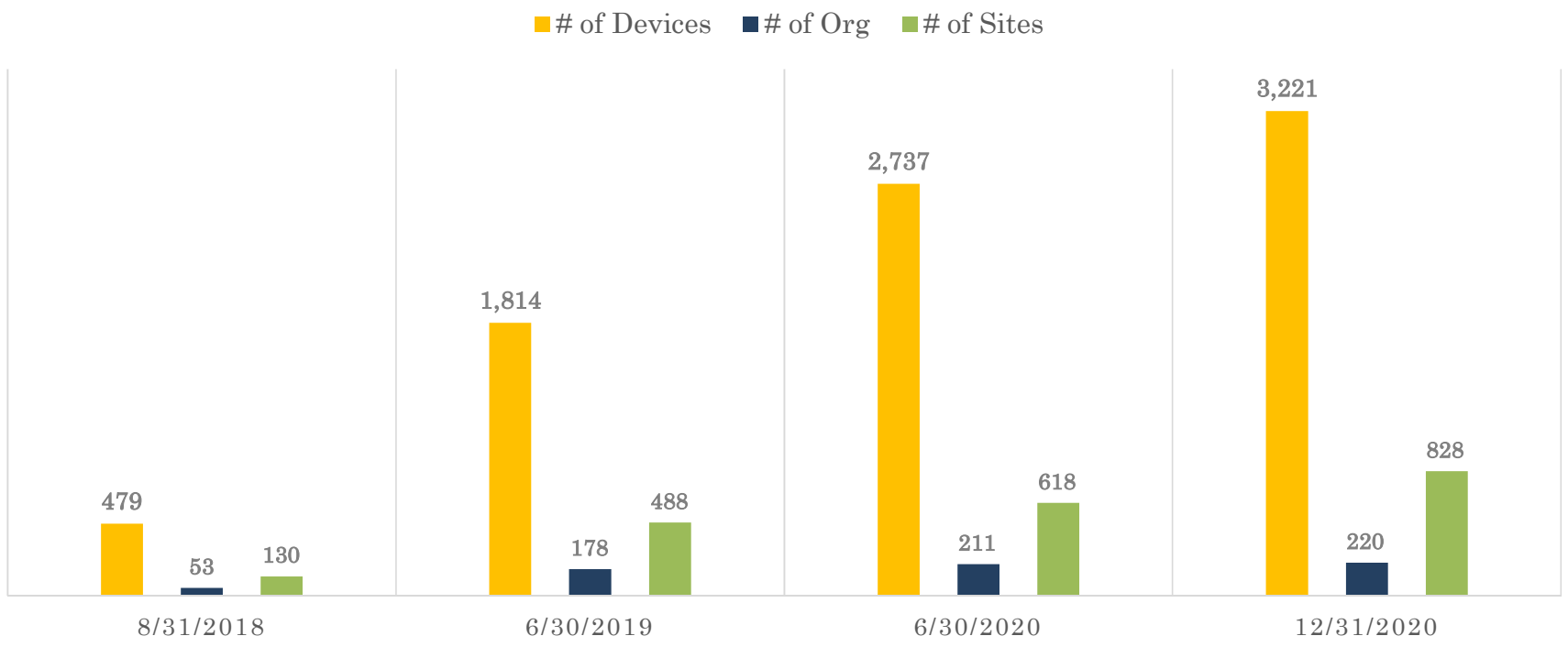
Rick Stenseth, Kelsch Ruff Kranda Nagle & Ludwig, North Prairie Performing Arts (AKA Fargo/Moorehead Community Theatre) in favor #9164.

Chair Bell adjourns the meeting. [03:39]

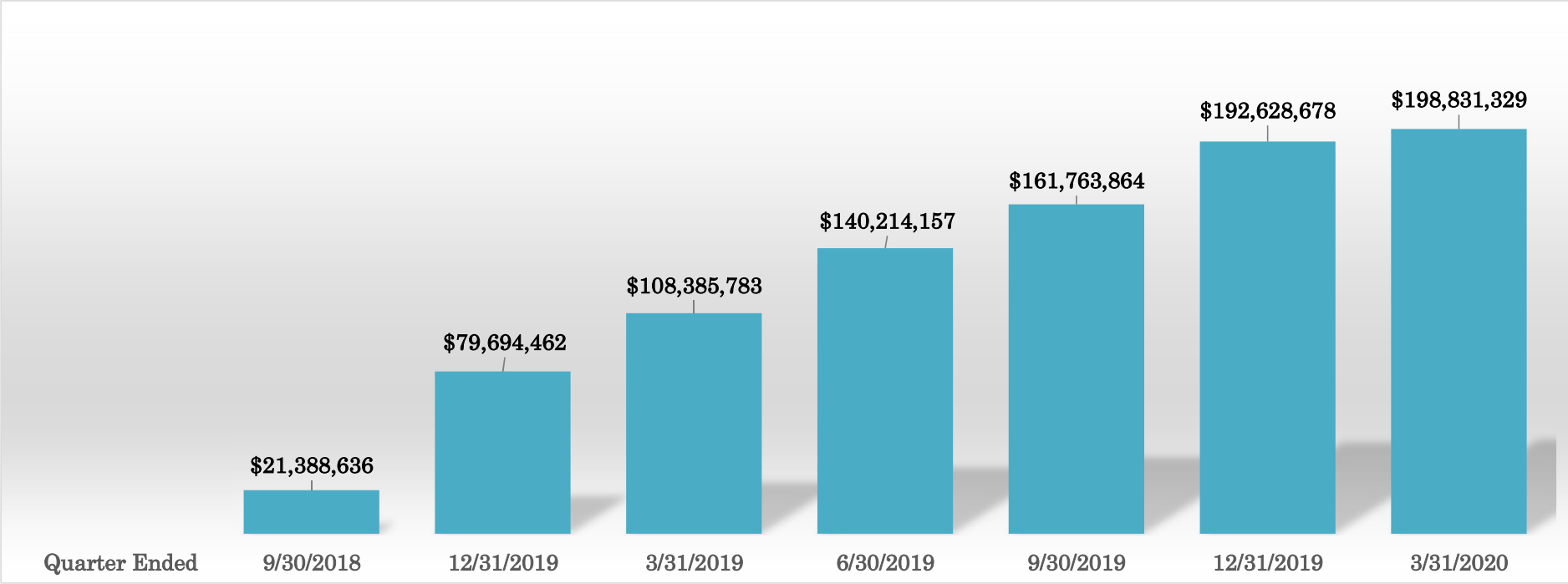
Joel Crane, Committee Clerk

#9129

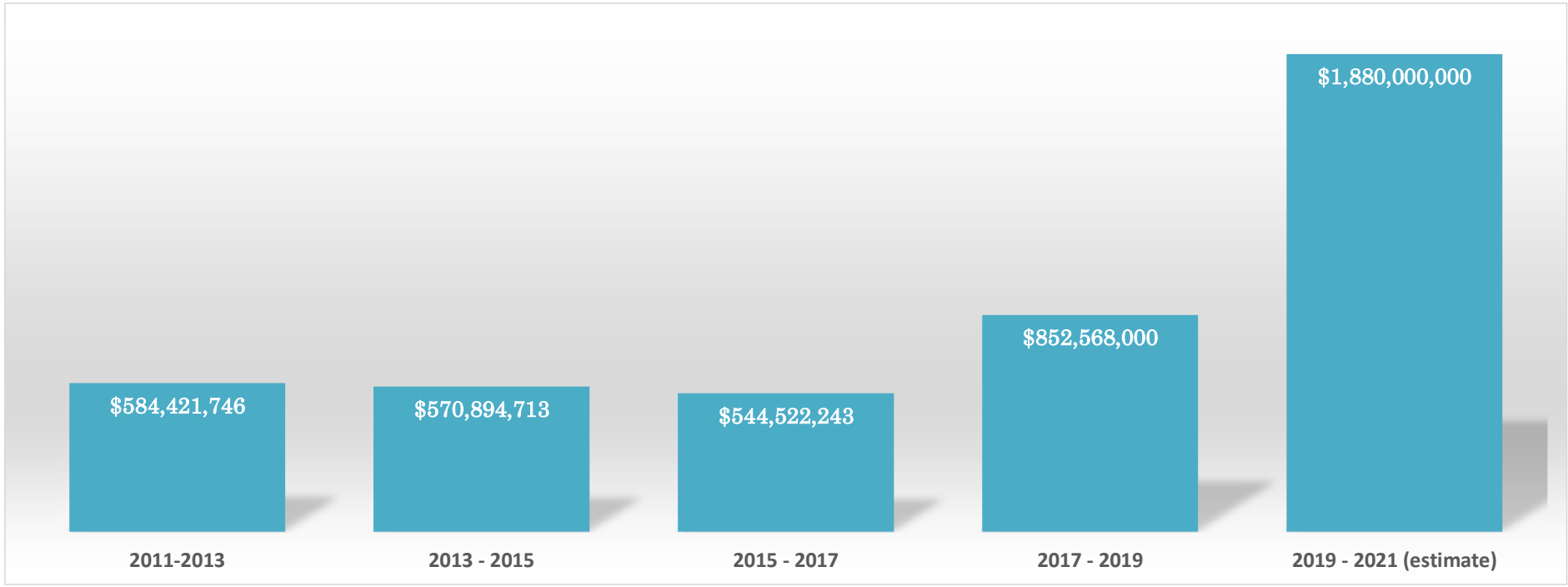
E-TAB DEVICES



E-TAB GROSS PROCEEDS PER QUARTER



ALL GAME TYPE GROSS PROCEEDS PER BIENNIUM



TOTAL GAMING TAX PER BIENNIUM

HB 1212
Senate Finance & Taxation Committee
Submitted by Janelle Mitzel, CGAND
March 15th, 2021

The Charitable Gaming Association of ND urges **a Do Pass** recommendation on HB 1212.

Why was charitable gaming established?

- A constitutional amendment was overwhelmingly approved that empowered charities with the ability to raise critical financial resources to serve their charitable purposes, support the most vulnerable North Dakotans, and bolster community-focused organizations through charitable gaming.
- Charitable gaming has enabled local non-profits to support important programs in their communities and counties across North Dakota.

Why is charitable gaming important?

Here are just a few examples of how charitable gaming revenues have helped improve our communities in recent years:

- At **Development Homes,** these dollars have helped provide security, equipment, and specialized training to place vulnerable adolescents into community-based homes from the Life Skills and Transition Center in Grafton. We are continuing to de-institutionalize ND citizens.
- The **Lamoure Baseball Booster Club** rebuilt and maintain the local baseball fields while covering costs for the Legion Baseball program, including paying coaches and travel costs for kids play baseball. They were also able to donate additional dollars to support the local volunteer ambulance service and fire department, helping to improve public safety.
- Charitable gaming helps fund **many** volunteer fire departments across the state, including in **Verona**, where gaming helped provide grants for new fire equipment and fire vehicles, and in **Leonard**, where gaming revenue grants helped purchase life-saving equipment and maintain their fire trucks. These are clear public safety benefits that otherwise would need to be funded using state or local tax dollars.
- Funding from **Grand Forks Charities** for Dial-A-Ride transportation services for persons with disabilities also comes from charitable gaming revenue.
- The Fargo **Metro Baseball Association** was able to convert a local baseball field into a state-of-the-art artificial turf field, build concession and locker room facilities, and cover all expenses, including travel, for fielding three legion baseball teams.
- The **Bowman Economic Development Corporation** uses revenue from charitable gaming to support the local nursing home, fund improvements to the local hospital, and provide economic incentives for local businesses. These dollars are helping sustain their local community and helping local businesses thrive.

Charitable gaming is about taking care of our most vulnerable, providing opportunities for youth sports and activities in communities that otherwise wouldn't have the opportunity, funding for veteran's groups, and funding critical public safety needs. These are just a few examples.

Charitable gaming reduces the state taxpayer burden for services charities provide in local communities, while having a positive impact on local entities. Charitable gaming promotes local control by providing funding to local community non-profits.

CGAND urges a Do Pass recommendation on HB 1212 to right-size the state gaming tax.

- For nearly four decades the tax revenue generated from charitable gaming was used primarily to fund oversight of the charitable gaming activity.
- The purpose of charitable gaming is about helping vulnerable citizens and local communities – it was never intended to be a revenue-generator to the state.
- During the 2017-2019 biennium, licensed gaming organizations raised $51.5 million for charitable uses and generated $11.3 million in gaming taxes for the state's general fund. (AG's website). The Office of Attorney General Gaming Division expenditures for the 2017-2019 biennium were $3.2 million.
- During the Fiscal Year ending June 30, 2020 gaming organizations raised nearly $38 million for charitable uses and generated over $13 million in gaming taxes for the state's general fund. The Office of Attorney General Gaming Division budget for the 2019-2021 biennium is $3.4 million.
- In the current biennium, while charities are seeing a strong 50% increase in proceeds for charitable uses, our tax bill is estimated to increase to a staggering $26-30 Million (est.), a 150% increase in tax collection.
- The Gaming Tax should be designed only to raise enough revenue to cover the cost of appropriately regulating and maintaining oversight of the industry.
- The Gaming Commission and Office of Attorney General should be adequately funded, but every extra tax dollar diverted away from the intended charitable use is a dollar that will not help a North Dakotan in need.
- CGAND supports the utilization of gaming tax revenue is for the prevention and treatment of gambling addiction.

Over the past 40 years North Dakota has built out a responsible system for charitable gaming that puts charitable organizations first, is well-regulated, beneficial to local communities, and evolving to utilize new technologies.

Thank you for your thoughtful consideration to develop a fairer tax structure and a **Do Pass recommendation on HB 1212.**

#9318

Testimony of Ken Karls (#268)

Cystic Fibrosis Association of ND

HB 1212

March 15, 2021

Chair Bell and members of the Senate Finance and Tax Committee, my name is Ken Karls and I represent the Cystic Fibrosis Association of ND (CFA). I am here to urge your support for HB 1212.

CFA is a North Dakota charity that has been helping North Dakota individuals and families for forty years dealing with cystic fibrosis, a terminal disease. CFA assists families with the cost of medications and nutritional support, with the extraordinary costs associated with medical appointments, with college scholarships, lung transplants and other hardship costs caused by fighting this relentless disease.

The money used for this assistance comes from traditional fundraising (Giving Hearts Day, the Turkey Trot, golf tournaments, etc.) and from charitable gaming. HB 1212 would significantly increase the amount of money available to help us with our charitable mission, money that is presently paid to the State of North Dakota through taxes.

In addition to lowering the tax on charities, CFA also believes HB 1212 lays out a more organized and efficient plan for regulating charitable gaming in North Dakota.

CFA strongly supports and asks you to vote "yes" on HB 1212.

Thank you for your time and consideration.

Ken Karls (#268)

kkarls@cfand.org

701-471-5575

#9319

HB 1212
Senate Finance & Taxation Committee
Submitted by Don Santer, NDAD
March 15th, 2021

Chairperson Bell and Committee members, thank you for the opportunity to provide information regarding the charitable gaming industry of North Dakota. I am here in support of House Bill 1212.

My name is Don Santer, CEO of the North Dakota Association for the Disabled (NDAD). NDAD is a North Dakota charity that for over 45 years has been dedicated to improving the quality of life for persons with disabilities.

NDAD is a non-profit, charitable organization serving individuals with health concerns and disabilities across the state of North Dakota. We have locations in Grand Forks, Fargo, Bismarck, Minot, and Williston. In 2019, NDAD provided over $2 million in services assisting thousands of North Dakota residents. NDAD works diligently to not duplicate services provided by other state or local entities, so we truly are a last resort for many individuals. As part of our services NDAD paid for the majority of the following items with charitable gaming funds:

- 1639 prescriptions for covered medications
- 2,801 out of town medical travel trips
- 3,502 accessible rides for employment, shopping, and community events
- 7,048 hours of personal attendant care expenses
- Each year 25-50 individuals are assisted with adaptive recreational activities
- Our **H**ealthcare **E**quipment **L**oan **P**rogram (HELP) served 2032 people with 4,366 pieces of equipment equating to a savings of more than $530,000 for North Dakota residents.

Additionally, NDAD administers the North Dakota Transplant Fund, provides program services for independent living and behavioral health issues in the Williston area, as well as providing information, referral, and public awareness to North Dakota residents. Our mission is to serve the residents of North Dakota and with your Do Pass vote, we could utilize potential tax savings to help an even greater number of North Dakotans.

House Bill 1212 addresses several issues in the gaming industry:

1. Creates a charitable gaming operating fund that will assure the administrative, regulatory, enforcement, technology, and addiction funding needed is available.
2. It reestablishes the original constitutional intent for use of gaming funds. Gaming Tax was intended only to raise enough revenue to cover the cost of appropriately regulating and maintaining oversight of the industry. All other proceeds should be utilized for its intended charitable purpose and in the region it was generated.
3. Creates a tax rate based on adjusted gross proceeds and simplifies the tax code for gaming.

- Currently gaming tax is imposed on the total **gross proceeds** received by a licensed organization in a quarter. "Gross proceeds" means all cash and checks received from conducting games.
- The following are just a few examples to help explain the tax on gross proceeds for the most common game types:
    - Electronic Pull Tab device (etab) is taxed on each ticket played. A player purchases $10 in credits on an etab machine and wins $100 in credits during the course of play; the player plays all credits without purchasing additional credits; the charity is taxed on $110 (Gross Proceeds) but only $10 of actual cash went into the machine. Although rare, it is possible the charity may pay out more in winning credits than it takes in cash depending on when the large win tickets come out. In that situation they would be taxed on a loss. This same scenario can happen with paper pull tabs.
    - Twenty-one and Paddle Wheel are taxed based on the chips purchased (the Drop) by the player. The player wagers the chips and may win and lose over and over without buying more chips. At the end of play the charity is taxed on the actual cash Drop (chips purchased) for the session. If a player buys $100 in chips, then decides to leave the site and cashes in the chips without making a wager; the organization is still taxed on the $100 purchase. In a different scenario, the player buys $100 in chips and wins $1000 the organization still pays tax on the $100 even though they lost $900.
    - Setting a tax on ***"Adjusted Gross"*** (gross proceeds less cash prizes and cost of merchandise prizes) eliminates the taxation of "credits" and unifies tax calculations for all game types. In other words, a tax on the actual earnings and not on phantom dollars.

For the past 40 years North Dakota has developed a responsible and highly regulated system for charitable gaming to benefit charitable missions that serve your local communities. Charitable gaming was legalized to enable charities a way to generate critical financial resources to serve their charitable purposes while reducing or even eliminating their reliance on public tax dollars for that funding.

Again, thank you for your thoughtful consideration to develop a fairer tax structure, and a **Do Pass** recommendation on **HB 1212**.

Thank you, Madam Chairperson and members of the committee, for your time. I am happy to answer any additional questions you may have.

Respectfully,
Don Santer, CEO
NDAD

#9256

Testimony in Support of HB 1212
Rudie Martinson, Executive Director, ND Hospitality Association
Before the Senate Finance and Taxation Committee
March 15, 2021

Chair Bell and members of the Senate Finance and Taxation Committee:

My name is Rudie Martinson, and I appear before you today as Executive Director of the ND Hospitality Association. We are North Dakota's trade association for the restaurant, lodging, and retail beverage industries. We appreciate the opportunity to stand before you today and express our support for House Bill 1212.

We are happy to join our friends in the charitable gaming industry to express support for this policy change. As you know, the majority of charitable gaming takes place in our facilities, in space leased from hospitality venues by charities participating in gaming operations. This creates a symbiotic relationship between our industries and the success of charitable gaming as a whole benefits both.

As you know, the hospitality industry suffered disproportionately during 2020 due to the COVID-19 pandemic – cancelled travel, cancelled events, and government policy limiting our ability to operate normally were all factors harmful to our bottom line. This is equally true for charities and their gaming operations. When our venues were closed or operating at a limited capacity, this also directly impacted charitable gaming operations. In fact, in many cases charities were subject to guidelines or orders further limiting their activities beyond what the hospitality establishments they operated in were enduring (for example, longer-term limitations on dealing blackjack).

HB 1212 represents an opportunity for the legislature to correct an oversight in tax policy that was enacted when electronic pulltabs were legalized. It puts more money back into the pockets of charities so they can even better fulfill their charitable purposes. And it does all of this while providing the Attorney General's Office with needed funds to achieve their mission of regulating this growing industry in North Dakota.

For these reasons, the ND Hospitality Association supports HB 1212, and asks the committee for favorable consideration of a "do-pass" recommendation.

#9074

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ISLETA *et al.*,

Plaintiffs,

vs. Civ. No. 17-654 KG/KK

MICHELLE LUJAN GRISHAM[1] *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on: (1) Defendants' Motion for Summary Judgment on the Issue of Arbitrability (Doc. 55) ("Defendants' Summary Judgment Motion"), filed January 4, 2018; (2) Plaintiffs-in-Intervention Santa Ana, Santa Clara and San Felipe's and Plaintiff Tesuque's Motion for Summary Judgment (Doc. 67), and Plaintiffs Pueblo of Isleta's and Pueblo of Sandia's Motion for Summary Judgment and Supporting Authorities (Doc. 68) (collectively, "Pueblos' Summary Judgment Motions"), both filed April 10, 2018; (3) Defendants' Motion to Compel Discovery and for Sanctions (Doc. 81) ("Defendants' Motion to Compel"), filed June 8, 2018; (4) Plaintiffs' and Plaintiffs-in-Intervention's Consolidated Motion for Protective Order to Quash Defendants' Rule 30(b)(6) Deposition Notices (Doc. 84) ("Pueblos' Motion for Protective Order"), filed June 20, 2018; and (5) Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) ("Defendants' Motion for Settlement Conference"), filed October 3, 2018.[2]

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Governor Lujan Grisham has been automatically substituted for former Governor Susana Martinez.

[2] Defendants' Summary Judgment Motion and the Pueblos' Summary Judgment Motions are before the Court pursuant to the Notice, Consent, and Reference of Dispositive Motions to a Magistrate Judge filed in this case on October 16, 2018. (Doc. 105.) The remaining motions, which are nondispositive, are before the Court pursuant to Local Rule of Civil Procedure 73.1(a). D.N.M.LR-Civ. 73.1(a); *see also* Fed. R. Civ. P. 72(a).

Having reviewed the parties' submissions, the record, and the relevant law, and for the reasons set forth below, the Court finds that: (1) Defendants' Summary Judgment Motion should be DENIED; (2) the Pueblos' Summary Judgment Motions should be GRANTED; and, (3) Defendants' Motion to Compel, the Pueblos' Motion for Protective Order, and Defendants' Motion for Settlement Conference should be DENIED AS MOOT.

I. INTRODUCTION

Plaintiffs the Pueblos of Isleta, Sandia, and Tesuque, and Plaintiffs-in-Intervention the Pueblos of Santa Ana, Santa Clara, and San Felipe (collectively, "the Pueblos"), are six (6) federally recognized Indian tribes that operate casinos in New Mexico pursuant to identical gaming compacts with the State of New Mexico ("the State"). (Doc. 67-1 at 6; Doc. 68 at 10; Doc. 99 at 6-7.) Defendants are the State Governor, the State Gaming Representative, and the Chair and members of the State Gaming Control Board ("NMGCB") in their official capacities. (Doc. 67-1 at 6-7; Doc. 68 at 10; Doc. 99 at 6-7.) The Pueblos and the State entered into gaming compacts in 2007 ("2007 Compacts"), and again in 2015 and 2016 ("2015 Compacts"). *Inter alia*, the compacts require the Pueblos to make quarterly revenue sharing payments to the State, in exchange for the Pueblos' nearly exclusive right to conduct certain kinds of gaming in New Mexico. (Doc. 67-3 at 20; Doc. 68-3 at 27.)

In 2017, Defendants sent the Pueblos notices of non-compliance and notices to cease conduct, asserting that the Pueblos had miscalculated their revenue sharing obligations under the 2007 Compacts beginning as early as April 2011. (*See, e.g.*, Docs. 1-8, 1-9, 1-10.) Specifically, Defendants claimed that, in calculating their revenue sharing payments, the Pueblos had improperly excluded the face value of free play and deducted the value of prizes won by patrons as a result of

free play wagers from their Class III gaming machines' "Net Win."[3] (*Id.*) Pursuant to the 2015 Compacts, which preserved Defendants' claims, Defendants instructed the Pueblos to make additional revenue sharing payments to the State under the 2007 Compacts. (*Id.*)

The Pueblos of Isleta, Sandia, and Tesuque filed this civil action on June 19, 2017 in response to Defendants' notices. (Doc. 1.) The Pueblos of Santa Ana and Santa Clara intervened on June 29, 2017, and the Pueblo of San Felipe intervened on August 31, 2017. (Docs. 11, 36.) In their complaints, the Pueblos ask the Court for a judgment declaring that: (1) Defendants' claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts[4] violate federal law, and the 2015 Compacts are therefore invalid and ineffective to preserve Defendants' unlawful claims, (Doc. 1 at 32-33); (2) neither the Pueblos' claims in this lawsuit nor Defendants' claims for additional revenue sharing payments are subject to arbitration under the 2015 Compacts, (*id.* at 33); and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the Pueblos. (Doc. 11 at 12; Doc. 36 at 12.) The Pueblos further ask the Court to enjoin Defendants from: (1) continuing to violate federal law by seeking to impose a tax, fee, charge, or other assessment on the Pueblos in the guise of asserting claims for additional revenue sharing payments under the 2007 and 2015

[3] As used in this Memorandum Opinion and Order, the term "free play" refers to play on a Class III gaming machine initiated by points or credits that the casino provided to the patron without consideration, and which have no cash redemption value. (*Cf.* Doc. 1-3 at 6.) "Free play" includes but is not limited to "point play," *i.e.*, play on a Class III Gaming Machine initiated by points earned or accrued by a patron through previous gaming machine play, players' clubs, or any other method, and which have no cash redemption value. (*Cf. id.*) "Free play" as used in this Memorandum Opinion and Order excludes play initiated by points or credits that can be redeemed for cash or merchandise.

[4] As used in this Memorandum Opinion and Order, the phrase "Defendants' claims for additional revenue sharing payments" refers specifically to Defendants' claims pursuant to the 2015 Compacts that the Pueblos owe the State additional revenue sharing payments under the 2007 Compacts because they did not include the face value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win from 2011 to 2016. Any other claims Defendants may have for additional revenue sharing payments are not before the Court in this civil action.

Compacts, (Doc. 1 at 34); (2) continuing their efforts to arbitrate the dispute over their claims that free play must be treated as revenue under the 2015 or 2007 Compacts, (*id.*); and, (3) taking any other action to attempt to enforce their unlawful claims against the Pueblos. (Doc. 11 at 12; Doc. 36 at 12); *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) ("[U]nder *Ex Parte Young*, [209 U.S. 123 (1908)], a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.").

II. FACTS[5]

The Pueblos and the State entered into the 2007 Compacts pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. (Doc. 55 at 3; Doc. 67-1 at 6; Doc. 68 at 12; Doc. 99 at 6-7, 10). Additionally, the State executed the 2007 Compacts pursuant to the New Mexico Compact Negotiation Act, N.M. Stat. Ann. §§ 11-13A-1 *et seq.*, which provides that the Governor will approve and sign compacts "identical to a compact . . . previously approved by the legislature except for the name of the compacting tribe[.]" N.M. Stat. Ann. § 11-13A-4(J); (Doc. 68 at 12 n.6). Thus, the terms of each of the 2007 Compacts are identical except for the Pueblos' names. (Doc. 55 at 3; Doc. 67-1 at 7; Doc. 68 at 12 n.6; Doc. 99 at 6-7.)

The 2007 Compacts authorized the Pueblos to conduct "any or all forms of Class III Gaming" on Indian Lands in New Mexico and to establish the "betting and pot limits, applicable to such gaming." (Doc. 67-3 at 8; Doc. 68 at 7, 12; Doc. 68-2; Doc. 99 at 7.) Authorized forms of Class III gaming included gaming machines played "upon insertion of a coin, token or similar

[5] Unless otherwise noted, the Court has determined that the following facts are undisputed based on its review of the parties' briefs, admissible evidence in the record, and the relevant law. By separate order, the Court has excluded portions of the Affidavit of Craig S. Telle, JD, CFE, attached to Defendants' response to the Pueblos' Summary Judgment Motions. (Doc. 99-12.)

object, or upon payment of any consideration in any manner." (Doc. 67-3 at 3-4; Doc. 68 at 12-13; Doc. 99 at 7.)

Subsection 4(C) of the 2007 Compacts provided in pertinent part:

> Audit and Financial Statements. The Tribal Gaming Agency shall require all books and records relating to Class III Gaming to be maintained in accordance with generally accepted accounting principles. . . . Not less than annually, the Tribal Gaming Agency shall require an audit and a certified financial statement covering all financial activities of the Gaming Enterprise, including written verification of the accuracy of the quarterly Net Win calculation, by an independent certified public accountant licensed by the State. The financial statement shall be prepared in accordance with generally accepted accounting principles and shall specify the total amount wagered in Class III Gaming on all Gaming Machines at the Tribe's Gaming Facility for purposes of calculating "Net Win" under Section 11 of this Compact using the format specified therein.

(Doc. 1-2 at 10; Doc. 68-2 at 10; Doc. 67-3 at 9; Doc. 99 at 6-7.)[6]

Section 7 of the 2007 Compacts pertaining to "Dispute Resolution" provided in relevant part:

> A. In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:
>
> > 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance[.]
> >
> > 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(1) of this section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or

[6] Attached to numerous pleadings on the docket in this case are true and correct copies of the generic form of the 2007 Compacts, (Doc. 1-2; Doc. 67-2 at 1 ¶ 2; Doc. 67-3; Doc. 68-2), and the 2015 Compacts. (Doc. 1-3; Doc. 68-3; Doc. 68-1 at 2 ¶ 3.) Defendants do not dispute the authenticity and veracity of these documents. (Doc. 99 at 6-7.) To avoid confusion, the Court will hereafter cite only to the 2007 Compact attached as Exhibit A (Doc. 67-3) to the Declaration of Richard Hughes (Doc. 67-2) in support of the Motion for Summary Judgment of the Pueblos of Santa Ana, Santa Clara, San Felipe, and Tesuque. (Doc 67.) The Court will likewise cite only to the 2015 Compact attached as Exhibit 2 (Doc. 68-3) to the Declaration of David C. Mielke (Doc. 68-1) in support of the Motion for Summary Judgment of the Pueblos of Isleta and Sandia. (Doc. 68.)

> activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the parties agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.
>
> 3. The arbitrators shall be attorneys who are licensed members in good standing of the State Bar of New Mexico or of the bar of another state. . . . The arbitrators . . . shall permit the parties to engage in reasonable discovery, and shall establish other procedures to ensure a full, fair and expeditious hearing on the matters at issue. . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof.
>
> 4. All parties shall bear their own costs of arbitration and attorneys' fees.
>
> 5. The results of arbitration shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction. For purposes of any such action, the State and the Tribe acknowledge that any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe.
>
> B. Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Section shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Section shall be deemed a waiver of the State's sovereign immunity.

(Doc. 67-3 at 15-16.)

Section 11 of the 2007 Compacts, entitled "Revenue Sharing," provided in pertinent part:

> A. Consideration. The Tribe shall pay to the State a portion of its Class III Gaming revenues identified in and under procedures of this Section, in return for which the State agrees that the Tribe has the exclusive right within the State to conduct all types of Class III Gaming described in this Compact, with the sole exception of the use of Gaming Machines, which the State may permit on a limited basis for racetracks and for veterans' and fraternal organizations . . . .

B. Revenue to State. The parties agree that . . . the Tribe shall make the quarterly payments provided for in Paragraph C of this Section. Each payment shall be made to the State Treasurer for deposit into the General Fund of the State.

C. Calculation of Payment Amounts.

1. As used in this Compact, "Net Win" means the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less:

(a) the amount paid out in prizes to winning patrons, including the cost to the Tribe of noncash prizes, won on Gaming Machines. The phrase "won on Gaming Machines" means the patron has made a monetary wager, and as a result of that wager, has won a prize of any value. Any rewards, awards or prizes, in any form, received by or awarded to a patron under any form of a players' club program (however denominated) or as a result of patron-related activities, are not deductible. The value of any complimentaries given to patrons, in any form, are not deductible;

(b) the amount paid to the State by the Tribe under the provisions of Section 4(E)(6) of this Compact [representing the State's regulatory costs related to the Tribe's gaming activities]; and

(c) the sum of two hundred seventy-five thousand dollars ($275,000) per year as an amount representing tribal regulatory costs, which amount shall increase by three percent (3%) each year beginning on the first day of January occurring after the Compact has been in effect for at least twelve months.

2. The Tribe shall pay the State a percentage of its Net Win [ranging from 3 per cent to 10.75 per cent depending on the date and the amount of the Tribe's Annual Net Win] . . . .

3. . . . Any payment or any portion thereof that is not made within ten (10) days of the due date shall accrue interest at the rate of ten percent (10%) per annum, from the original due date until paid. . . .

D. Limitations.

> 1. The Tribe's obligation to make the payments provided for in Paragraphs B and C of this Section shall apply and continue only so long as this Compact remains in effect; and provided that that obligation shall terminate altogether in the event the State:
>
> > a) passes, amends, or repeals any law, or takes any other action, that would directly or indirectly attempt to restrict, or has the effect of restricting, the scope or extent of Indian gaming; . . .
> >
> > d) licenses, permits or otherwise allows any non-Indian person or entity to engage in any other form of Class III gaming other than a state-sponsored lottery, pari-mutuel betting on horse racing and bicycle racing, operation of Gaming Machines, and limited fundraising by non-profit organizations, as set forth in subsection (D)(2) . . . .

(Doc. 67-3 at 20-22.)

Section 11 of the 2007 Compacts differed from Section 11 of the previous gaming compacts between the State and the Pueblos ("2001 Compacts"). (Doc. 99 at 9-10; Doc. 110 at 19-21; *see* Doc. 99-8.) Subsection 11(C) of the 2001 Compacts provided:

> C. Calculation of Payment Amounts.
>
> 1. As used in this Compact, "Net Win" means the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less:
>
> > (a) the amount paid out in prizes, including the cost to the Tribe of noncash prizes, won on Gaming Machines;
> >
> > (b) the amount paid to the State by the Tribe under the provisions of Section 4(E)(5) of this Compact; and
> >
> > (c) the sum of two hundred seventy-five thousand dollars ($275,000) per year as an amount representing tribal regulatory costs, which amount shall increase by three percent (3%) each year beginning on the first day of January occurring after the Compact has been in effect for at least twelve months.

(Doc. 99-8 at 20-21.) The State and the Pueblos negotiated the changes from the 2001 Compacts to the 2007 Compacts, including the changes to Subsection 11(C). (Doc. 99 at 10-11; Doc. 99-7;

Doc. 110 at 20-21.) The United States Secretary of the Interior ("the Secretary") approved the 2007 Compacts on July 5, 2007. (Doc. 55 at 3; Doc. 67-1 at 6; Doc. 68 at 12; Doc. 99 at 6-7); 72 Fed. Reg. 36,717-01, 2007 WL 1922332 (Jul. 5, 2007).

In 2015 and 2016, the State and each of the Pueblos entered into the 2015 Compacts. Like the 2007 Compacts, all of the terms of the 2015 Compacts are identical to each other except for the Pueblos' names. (Doc. 55 at 4; Doc. 67-1 at 8; Doc. 68 at 15; Doc. 99 6-7.) Subsection 9(A) of the 2015 Compacts provides that the 2015 Compacts "fully supplant[] and replac[e]" the 2007 Compacts, except that under Subsection 9(B), the terms of the 2007 Compacts

> (including, without limitation, any limited waiver of sovereign immunity and jurisdictional waivers and consents set forth therein) shall survive to permit the resolution of payment disputes. Such disputes shall be resolved through the procedures set forth in Section 7 of this Compact. Failure to abide by the procedures set forth in Section 7 or failure to comply with an arbitrator's final decision with respect to the parties' obligations under a Predecessor Agreement constitutes a breach of this Compact. This survival provision is intended to provide for the reasonable resolution of past disputes without hindering a Tribe's ability to obtain a new compact.

(Doc. 68-3 at 26.)

Section 7 of the 2015 Compacts regarding "Dispute Resolution" provides in pertinent part:

> A. In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure within two (2) years from the date any alleged violation of this Compact is discovered or reasonably should have been discovered; or, if the State believes that, prior to the Effective Date of this Compact, the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment, the State may invoke the following procedure within two (2) years of the Effective Date of this Compact, as permitted in Section 9(B) of this Compact:
>
> > 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance. The notice shall specifically identify the date, time and nature of the alleged noncompliance.

> 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(1) of this Section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the State and the Tribe (hereinafter the "parties") agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.
>
> 3. Unless the parties agree in writing to the appointment of a single arbitrator, or as otherwise provided below, the arbitration shall be conducted before a panel of three (3) arbitrators. . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof. . . .
>
> 4. The results of arbitration shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction. For purposes of any such action, the State and the Tribe acknowledge that any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this Section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe.
>
> B. Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Section shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Section shall be deemed a waiver of the State's sovereign immunity.

(Doc. 68-3 at 22-24.)

In addition, the Appendix to the 2015 Compacts provides that

> Free Play and Point Play do not increase Net Win, and amounts paid as a result of Free Play or Point Play reduce Net Win for purposes of the revenue sharing calculation in Section 11(C). However, any form of credits with any cash redemption value increase Net Win when wagered on Gaming Machines and

> amounts paid as a result of such wagers reduce Net Win for purposes of calculating revenue sharing.

(Doc. 68-3 at 37.)

> "Free Play" means play on a Class III Gaming Machine initiated by points or credits provided to patrons without monetary consideration, and which have no cash redemption value. . . .
>
> "Point Play" means play on a Class III Gaming Machine initiated by points earned or accrued by a player through previous Gaming Machine play, players' clubs, or any other method, and which have no cash redemption value.

(Doc. 68-3 at 6-7.)

The Secretary neither approved nor disapproved the 2015 Compacts within 45 days of their submission. (Doc. 55 at 4; Doc. 58 at 8; Doc. 67-1 at 8; Doc. 68 at 16-17; Doc. 99 at 6-7; *see, e.g.*, Doc. 1-7 at 2.) As such, the 2015 Compacts are "considered to have been approved by the Secretary, but only to the extent the [Compacts are] consistent with the provisions of [IGRA]."[7] 25 U.S.C. § 2710(d)(8)(C). The United States Department of the Interior ("DOI") sent letters to the Pueblos and the State explaining the Secretary's decision to neither approve nor disapprove the 2015 Compacts contemporaneously with the decision. (Doc. 1-4 at 5-6; Doc. 1-5 at 5-6; Doc. 1-6 at 4-5; Doc. 36-1 at 3-4; Doc. 58 at 8; Doc. 67-1 at 8; Doc. 67-4 at 3; Doc. 68 at 16; Doc. 99 at 6-7.) In one such letter, the DOI took the following position:

> [w]e wish to commend the Tribe and the State for the successful resolution of the free play and point play issue. Free play and point play will now be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We note, however, that Section 7 of the 2015 Compact reserves a two-year period from its effective date for the State to pursue

[7] The 2015 Compacts between the Pueblos and the State are considered to have been approved by the Secretary on the following dates: (a) Pueblo of Isleta, July 28, 2015, 80 Fed. Reg. 44,992-01, 2015 WL 4512708 (Jul. 28, 2015); (b) Pueblo of Tesuque, October 23, 2015, 80 Fed. Reg. 64,443-01, 2015 WL 6384819 (Oct. 23, 2015); (c) Pueblo of Santa Clara; October 23, 2015, 80 Fed. Reg. 64,443-02, 2015 WL 6384821 (Oct. 23, 2015); (d) Pueblo of Sandia, April 4, 2016, 81 Fed. Reg. 19,235-01, 2016 WL 1274294 (Apr. 4, 2016); (e) Pueblo of San Felipe, April 4, 2016, 81 FR 19,236-02, 2016 WL 1274296 (Apr. 4, 2016); and, (f) Pueblo of Santa Ana, December 30, 2016, 81 FR 96,477-01, 2016 WL 7481406 (Dec. 30, 2016).

> its assertion that the Tribe's net win – and thus their revenue sharing payments – should include wins and losses arising from free play or point play. In light of its conflict with industry standards and GAAP, it is our view that such an assertion by the State to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.[8]

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[8] The record includes the DOI's letters to five of the six Pueblos, in which the agency expressed its position in five slightly different ways. In his October 16, 2015 letter to the Governor of the Pueblo of Santa Clara, Assistant Secretary Kevin Washburn used the language quoted above. (Doc. 67-4 at 3.) In his July 21, 2015 letter to the Governor of the Pueblo of Isleta, Assistant Secretary Washburn stated:

> [w]e wish to commend the Tribe and the State for the successful resolution of the free play and point play issue. Free play and point play will now be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We note, however, that Section 7 of the 2015 Compact reserves a two-year period from its effective date for the State to pursue its assertion that the Tribe's net win – and thus their revenue sharing payments – should include wins and losses arising from free play or point play. In light of its conflict with industry standards and GAAP, it is our view that the State's unilateral determination to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 1-4 at 5.) In his October 16, 2015 letter to the Governor of the Pueblo of Tesuque, Assistant Secretary Washburn stated:

> [w]e are troubled by the assertion in the Tribe's response indicating that the State seeks additional revenue sharing payments stemming from free play under the 2007 Gaming Compact. Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue it assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We are in agreement with the Tribe that its net win – and thus its revenue sharing payments – should include wins and losses arising from free play or point play and should result in a reduction in revenue sharing payments. In light of its conflict with industry standards and GAAP, it is our view that a contrary assertion by the State that includes such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 1-6 at 4.) In his March 29, 2016 letter to the Governor of the Pueblo of Sandia, Assistant Secretary Roberts stated:

> Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue its assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations.

(Doc. 1-5 at 5.) Finally, in his March 29, 2016 letter to the Governor of the Pueblo of San Felipe, Assistant Secretary Roberts stated:

> [w]e are troubled by the assertion in the Tribe's response indicating that the State seeks additional revenue sharing payments stemming from free play under the 2007 Gaming Compact. Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue it assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry

(Doc. 1-4 at 5; Doc. 1-5 at 5; Doc. 1-6 at 4; Doc. 36-1 at 3; Doc. 67-4 at 3.) In October 2017, the DOI reaffirmed its position regarding the State's claims for additional revenue sharing payments in reviewing the 2015 Compact between the State and the Pueblo of Pojoaque.[9] (Doc. 67-1 at 9; Doc. 67-5 at 2; Doc. 68 at 16; Doc. 99 at 6-7.)

On April 13, 2017, in her capacity as the Acting State Gaming Representative, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice of Noncompliance." (Doc. 55 at 4-5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17; Doc. 99 at 6-7; *see, e.g.*, Docs. 67-6, 68-22, and 68-23.) In these letters, Defendant Becker asserted that, beginning as early as April 2011, the Pueblos had underreported their Net Win and underpaid the State pursuant to the revenue sharing provisions of the 2007 Compacts, and that "prizes awarded as a result of the use of 'free play' are not deductible unless the face value of the 'free play' is included in the calculation of the total amount wagered." (Doc. 55 at 4-5; Doc. 67-1 at 9; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-6 at 1.) On this basis, Defendant Becker instructed the Pueblos to make additional revenue sharing payments to the

> standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. In light of its conflict with industry standards and GAAP, it is our view that the State's unilateral determination to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 36-1 at 3.)

[9] In his October 23, 2017 letter to the Governor of the Pueblo of Pojoaque, Deputy Assistant Secretary Clarkson repeated the language in Assistant Secretary Roberts' letter to the Governor of the Pueblo of Sandia quoted in footnote 8, *supra*, and added:

> [b]eyond being contrary to longstanding industry standards and GAAP, our view is that the State's position constitutes an attempt to impose a "tax, fee, charge or other assessment" in violation of IGRA because the customer is using a form of "house money" derived from the net win on which the tribes have already made revenue sharing payments to the State. *See* 25 U.S.C. § 2710(d)(4).

(*Compare* Doc. 1-5 at 5 *with* Doc. 67-5 at 2 & n. 6.)

State in specified amounts.[10] (Doc. 55 at 4-5; Doc. 67-1 at 9; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-6 at 1-2.) On May 19, 2017, the Pueblos sent responsive letters to Defendant Becker in which they objected to the State's requests for additional revenue sharing payments and asserted that the requests violated federal law and the terms of the 2007 Compacts. (Doc. 67-1 at 9; Doc. 67-7; Doc. 68 at 17; Doc. 68-18; Doc. 68-19; Doc. 99 at 6-7.)

On May 31, 2017, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice to Cease Conduct." (Doc. 55 at 5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17-18; Doc. 99 at 6-7; *see, e.g.*, Docs. 67-8, 68-24, and 68-25.) These letters instructed the Pueblos to either "pay all sums due or . . . invoke arbitration." (Doc. 55 at 5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17-18; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-8 at 2.) However, the Pueblos neither made the additional revenue sharing payments requested in Defendant Becker's letters nor invoked arbitration. (Doc. 55 at 5; Doc. 58 at 7.) Rather, on June 19, 2017, Plaintiffs filed this civil action; and, on June 29, 2017, Plaintiffs-in-Intervention the Pueblos of Santa Ana and Santa Clara intervened. (Docs. 1, 11.)

On June 30, 2017, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice to Invoke Arbitration," in which she invoked arbitration pursuant to Section 7 of the 2015 Compacts on the State's behalf. (Doc. 58 at 8; Doc. 58-3 at 1; Doc. 62 at 5.) Plaintiff-in-Intervention the Pueblo of San Felipe then intervened in this action on August 31, 2017. (Doc. 36.)

The Pueblos authorize patrons to play on Class III gaming machines using electronic free play credits. (Doc. 11 at 5; Doc. 36 at 4-5; Doc. 68 at 13; Doc. 82-1 at 4 Doc. 99 at 10; Doc. 110 at 20.) There is no difference in the payouts, prizes, or jackpots awarded to patrons for each instance

[10] For example, Defendant Becker instructed the Pueblo of Isleta to pay an additional $10,360,149, the Pueblo of Sandia an additional $26,491,350, and the Pueblo of Tesuque an additional $3,252,873. (Doc. 1-8 at 3; Doc. 1-9 at 3; Doc. 1-10 at 3.)

of electronic free play versus cash play of the same face value. (Doc. 99 at 11; Doc. 110 at 21.) The Pueblos do not separately account for patrons' winnings from cash wagers and their winnings from electronic free play wagers. (Doc. 99 at 11; Doc. 110 at 21.) However, the Pueblos' slot accounting systems meter each instance of electronic free play and the face value of such free play, along with each instance of cash play, and this data is generated in daily reports. (Doc. 99 at 11; Doc. 110 at 21.)

For federally recognized Indian tribes, the Governmental Accounting Standards Board ("GASB") determines authoritative sources of generally accepted accounting principles ("GAAP"). (Doc. 67-10 at 5-6.) According to GASB statements, the American Institute of Certified Public Accountants' ("AICPA") 2011 Audit and Accounting Guide—Gaming ("Gaming Guide") was the authoritative source of GAAP for the Pueblos' gaming operations at the relevant times.[11] (*Id.* at 7-8; *see also* Doc. 99-12 at 3-4.)

The Gaming Guide provides that "monetary credits may be played [on slot machines] using bills, coins, tickets, electronic wagering credits recorded on cards, or by other means." (Doc. 67-11 at 3 & n.3.)[12] The Gaming Guide defines "free play" as "[f]ree wagering offered by a gaming entity to provide cashable benefits that increase the customer's odds of winning, changing the basic odds of the game." (Doc. 67-10 at 8; Doc. 68-4 at 11.) "In these circumstances the gaming entity is providing a chance for the customer to win a slot machine outcome for no cost (i.e. 'free')."

[11] In identifying and defining the applicable GAAP, the Court has considered the Declaration and Expert Report of the Pueblos' expert witness, Andrew Mintzer, C.P.A., in light of his professional education, training, and experience and the fact that Defendants have presented no evidence creating a genuine issue of material fact regarding his opinions or expertise. (*See* Doc. 67-10.) The Court has also considered the Affidavit of Craig S. Telle, JD, CFE (Doc. 99-12), to the extent it tends to identify and define the applicable GAAP, but not his opinions regarding ultimate legal issues, as explained in the Court's Order Granting in Part and Denying in Part Motion to Exclude Telle Affidavit filed contemporaneously with this Memorandum Opinion and Order. In addition, the Court has considered the portions of the Gaming Guide in the record.

[12] This provision is from the 2014 Gaming Guide; the record does not include a comparable provision from the 2011 Gaming Guide. (Doc. 67-11 at 1, 3.)

(Doc. 67-10 at 11.) The Gaming Guide defines a gaming entity's "net win" as "the difference between [the entity's] gaming wins and losses before deducting costs and expenses. Also called gross gaming revenue." (Doc. 68-4 at 12; Doc. 99-12 at 16.) Similarly, according to the Gaming Guide, "gross gaming revenue" is "the difference between gaming wins and losses from banked games before deducting incentives or adjusting for changes in progressive jackpot liability accruals."[13] (Doc. 67-10 at 10; Doc. 99-12 at 9.)

Under GAAP, the face value of free play is not included in net win. (Doc. 67-10 at 9-13.) The Gaming Guide states that

> the use of free play will not trigger accounting recognition because revenue is measured based on an aggregate daily (or shift) basis, rather than on a per bet or per customer basis. Because revenue is the net win from gaming activities, the use of the benefit has no effect on the reporting of net win or loss from gaming activities. For example, if a customer bets $5 of his or her own cash and wins $1, the gaming entity reports revenue of $4. If a customer bets $5 of his or her own cash, uses $5 of credits from his or her club card, and wins $1, the gaming entity reports revenue of $4. In each transaction, the net win is $4.

(Doc. 67-10 at 8; Doc. 68 at 12; Doc. 99 at 7.) GAAP "permit *no recognition* in revenue for free play . . . so that the gaming entities [do] not *overstate* gross gaming revenue." (Doc. 67-10 at 11 (emphases in original).)

In addition, under GAAP, the value of prizes won by patrons as a result of free play wagers must be deducted from net win.

> GAAP requires that the gross gaming revenue or net win is calculated using the cash value of what remains 'in' the machine – such as cash, coins, electronic money transfers, tickets with cash redemption values. Thus in complying with GAAP all cash/cash equivalent payouts must be considered without regard as to whether the value was paid as the result of a paid bet or a free play bet.

[13] Somewhat confusingly, "net win" is also called "gross gaming revenue," while "net gaming revenue" refers to "gross gaming revenues less cash sales incentives and the change in progressive jackpot liabilities and revenue from gaming related activities." (Doc. 99-12 at 15.) The proper calculation of net gaming revenue under GAAP is not at issue in this case.

(*Id.* at 12.) In contrast, the cost of "complimentaries" such as free food, drinks, and hotel rooms,[14] and the cost of loyalty program points redeemed for cash or merchandise are not deducted from net win under GAAP. (*Id.* at 13-14.)

The Gaming Guide's treatment of free play and prizes won by patrons as a result of free play wagers is consistent with "economic reality and the representational faithfulness required by GAAP." (*Id.* at 9-10, 16.) In general, "revenue" consists of "the economic resources provided by customers to the entity for the products or services the entity provides to the customers." (*Id.* at 9.) "Revenues represent actual or expected cash in-flows (or the equivalent) that have occurred." (*Id.* at 11.) Thus, "providing a product or service to a customer for no . . . consideration provided by the customer does not create revenue." (*Id.* at 12.) In the context of the gaming industry, a gaming entity's "revenue is the net win or loss from gaming activities"; and, free play is not included in a gaming entity's revenue because it does not represent actual or expected cash in-flow or its equivalent. (*Id.* at 8, 12.)

III. ANALYSIS

A. Defendants' Summary Judgment Motion

The Court will first consider Defendants' Summary Judgment Motion, because it raises the threshold issue of whether the parties' dispute must be submitted to arbitration. "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999); Fed. R. Civ. P. 56(a). "A dispute is genuine when the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving

[14] The Court understands the term "complimentaries" to refer to goods or services that a casino gives to a patron for no consideration, and not as a prize won by a patron as a result of a successful wager. (*See* Doc. 68-4 at 6.)

party, and a fact is material when it might affect the outcome of the suit under the governing substantive law." *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quotation marks and brackets omitted). Only material factual disputes preclude the entry of summary judgment. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact and his entitlement to judgment as a matter of law. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998). If the movant carries this initial burden, "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of a trial from which a rational trier of fact could find for the nonmovant." *Id.* at 671 (internal quotation marks omitted). If the nonmovant demonstrates a genuine dispute as to material facts, the Court views the facts in the light most favorable to her. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). However, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In their motion, Defendants argue that the Court should grant them summary judgment "on the arbitrability issue," *i.e.*, on the Pueblos' claims for: (1) an injunction barring Defendants from taking any further steps to arbitrate or otherwise enforce their claims for additional revenue sharing payments; and, (2) a judgment declaring that neither the Pueblos' claims in this lawsuit nor Defendants' claims for additional revenue sharing payments are subject to arbitration. (Doc. 55 at 2, 10.) Defendants further ask the Court to dismiss the Pueblos' claims for a judgment declaring that: (1) Defendants' claims for additional revenue sharing payments violate federal law; (2) the 2015 Compact provisions preserving Defendants' claims are therefore invalid and ineffective, as are the 2007 Compacts' revenue sharing provisions if they mean what Defendants say they mean; and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the

Pueblos.[15] (*Id.*) In support of their motion, Defendants argue that the parties' dispute regarding the Pueblos' revenue sharing obligations under the 2007 Compacts is arbitrable because it is a payment dispute, and the 2015 Compacts provide that payment disputes under the 2007 Compacts are to be resolved by arbitration. (*Id.* at 5-6.) According to Defendants, "[t]he parties have explicitly agreed to resolve this payment dispute through arbitration, and the dispute therefore is arbitrable based on the plain language of the contract and the [federal] policy favoring arbitration." (*Id.* at 7.)

The Pueblos respond that, under the 2015 Compacts, arbitration is not an exclusive remedy for resolving disputes under the Compacts. (Doc. 58 at 9-13.) In addition, the Pueblos assert that the 2007 and 2015 Compacts exclude from arbitration "any question as to the validity or effectiveness" of the Compacts or any of their provisions, whereas in this civil action they claim that certain Compact provisions on which Defendants rely are invalid and ineffective under IGRA and other federal law. (*Id.* at 17-20.) According to the Pueblos, they would be unfairly prejudiced if forced to submit to arbitration, because they could not defend against the State's claims for additional revenue sharing payments by challenging the validity and effectiveness of these Compact provisions.[16] (*Id.*)

The law is well settled that disputes about arbitrability are for the courts to decide, unless there is clear and unmistakable evidence that the parties intended to submit such disputes to arbitration. *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 34 (2014); *AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986); *Commc'n Workers of Am. v. Avaya, Inc.*, 693 F.3d

[15] Defendants claim that if the Court grants them summary judgment on "the arbitrability issue," its ruling will necessarily resolve the issues raised by the Pueblos' remaining claims as well. (Doc. 62 at 8-9.)

[16] The Pueblos also argue that Defendants did not timely invoke arbitration. (Doc. 58 at 18-20.) However, if the parties' dispute were otherwise arbitrable, this would be a question for the arbitrators to decide. *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 34–35 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002).

1295, 1303 (10th Cir. 2012); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779–80 (10th Cir. 1998). Disputes about arbitrability "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Grp., PLC*, 572 U.S. at 34. Here, there is no evidence that the parties intended to submit disputes about arbitrability to arbitration. In fact, the parties appear to agree that their arbitrability disputes are for the Court to decide. The Court will therefore address the arbitrability issues raised in Defendants' Summary Judgment Motion.

1. The Pueblos' claims in this lawsuit fall outside the 2015 Compacts' arbitration clause and the Court must decide these claims in the first instance.

The Court must first consider the parties' competing arguments regarding whether the 2015 Compacts' arbitration clause applies to their claims. A tribal-state gaming compact under IGRA is "a form of contract" that must be interpreted according to federal common law. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-39 (10th Cir. 2018). "IGRA neither encourages nor discourages the inclusion of arbitration provisions in gaming compacts, leaving the matter entirely to the parties entering into such a compact." *Id.* at 1237. "Arbitration is a matter of contract," *id.*, "and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration[.]" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original) (quotation marks omitted); *see Commc'n Workers of Am.*, 693 F.3d at 1300 ("Because arbitration is a creature of contract, a party cannot be forced to arbitrate any issue he has not agreed to submit to arbitration."). Thus, where the parties to an agreement have specifically excepted certain types of claims from arbitration, "it is the duty of courts to enforce not only the full breadth of the arbitration clause, but its limitations as well." *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 62 (2d Cir. 1996).

Under Tenth Circuit law,

> [t]o determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a three-part inquiry. First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

Cummings v. FedEx Ground Package Sys., Inc., 404 F.3d 1258, 1261 (10th Cir. 2005) (emphasis, citations, and quotation marks omitted); *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 569 (10th Cir. 2010). Nevertheless,

> even narrow arbitration clauses must be interpreted under the liberal federal policy favoring arbitration agreements. We resolve doubts concerning the scope of arbitrable issues in favor of arbitration. When considering narrow arbitration clauses, this liberal policy does not create a presumption of arbitrability because the policy favoring arbitration does not have the strong effect that it would have if we were construing a broad arbitration clause.

Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc., 567 F.3d 1191, 1197 (10th Cir. 2009) (citations and ellipses omitted).

"[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc.*, 475 U.S. at 649*; Local 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco, Inc.*, 320 F.3d 1123, 1126 (10th Cir. 2003); *but see Int'l Bhd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colo.*, 773 F.3d 1100, 1110 (10th Cir. 2014) (holding that "incidental contact with the merits" was not error where trial court "devoted its entire discussion to answering the arbitrability question").

Defendants argue that the parties' dispute must be submitted to arbitration based on Section 9 of the 2015 Compacts, which provides that "payment disputes" under the 2007 Compacts "shall

be resolved through the procedures set forth in Section 7 of this Compact." (Doc. 68-3 at 26; Doc. 55 at 4; Doc. 68 at 15; Doc. 99 at 6-7.) Subsection 7(A) of the 2015 Compacts provides: "if the State believes that, prior to the Effective Date of this Compact, the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment, the State may invoke" arbitration. (Doc. 68-3 at 22.) To invoke arbitration, the party alleging noncompliance "shall" issue a notice of noncompliance and "may" issue a notice to cease conduct, after which it "may" invoke binding arbitration, all within specified time frames. (*Id.* at 22-23.) Subsection 7(A) further specifies that, in the event of arbitration, the arbitrators "shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof." (*Id.* at 23.) Subsection 7(B), in turn, provides that "[n]othing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and that "[n]othing in this Section shall be deemed a waiver of the Tribe's [or the State's] sovereign immunity." (*Id.* at 23, 24.)

The Court finds that the relevant provisions of the 2015 Compacts constitute a narrow arbitration clause, because they limit arbitrable disputes under the 2007 Compacts to "payment disputes" premised on a breach of compact theory and exclude from arbitration "any question as to the validity or effectiveness" of the 2015 Compact provisions. (*Id.* at 22-24, 26.) Thus, though the Court must resolve doubts concerning the arbitration clause's scope in favor of arbitration, it may not find that a party's claim is arbitrable unless on its face the claim falls within the clause's purview. *Cummings*, 404 F.3d at 1261.

Clearly, Defendants allege that the Pueblos have "failed to comply with or otherwise breached" provisions of the 2007 Compacts "affecting payment," *i.e.*, the 2007 Compacts' revenue

sharing provisions, and the Pueblos disagree. Thus, on its face, the parties' dispute is a payment dispute premised on a breach of compact theory within the meaning of the 2015 Compacts' arbitration clause.

However, this is not the end of the inquiry in light of the additional language in the arbitration clause limiting its scope. As explained below, this language removes the Pueblos' claims under both the 2015 and 2007 Compacts from the arbitration clause's purview. First, regarding the 2015 Compacts, the Pueblos claim that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments are invalid and ineffective because Defendants' claims violate IGRA and other federal law. As such, though they do relate to the parties' payment dispute, these claims fall squarely within the 2015 Compacts' exclusion from arbitration, in Subsection 7(A), of questions regarding the validity or effectiveness of the 2015 Compacts or any of their provisions. (*See* Doc. 68-3 at 23 ("[T]he arbitrators shall have no authority to determine any question as the validity or effectiveness of this Compact or any provision hereof….").) The Court therefore finds that, on their face and as a matter of law, the Pueblos' claims challenging the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims fall outside the purview of the 2015 Compacts' arbitration clause.

Second, regarding the 2007 Compacts, the Pueblos claim that the 2007 Compacts' revenue sharing provisions are also invalid and ineffective under IGRA and other federal law if they mean what Defendants say they mean. The Pueblos' claims regarding the validity and effectiveness of the 2007 Compacts' revenue sharing provisions also relate to the parties' payment dispute; and, the 2015 Compacts' exclusion from arbitration of questions regarding the validity or effectiveness of *the 2015 Compacts* does not apply to these claims. (*Id.*) Nevertheless, for the following reasons,

the Court finds that these claims fall outside the purview of the 2015 Compacts' arbitration clause as well.

As previously noted, Subsection 9(A) of the 2015 Compacts provides that the 2015 Compacts "fully supplant[] and replac[e]" the 2007 Compacts, except that under Subsection 9(B), the terms of the 2007 Compacts

> (including, without limitation, *any limited waiver of sovereign immunity and jurisdictional waivers and consents set forth therein*) shall *survive* to permit the resolution of payment disputes. . . . This *survival provision* is intended to provide for the reasonable resolution of past disputes without hindering a Tribe's ability to obtain a new compact.

(Doc. 68-3 at 26 (emphases added).) Because rights that never existed cannot "survive," Subsection 9(B) of the 2015 Compacts only preserved rights that existed under the 2007 Compacts. *See, e.g.*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/survive (to "survive" means "to remain alive or in existence" or "to continue to function or prosper") (last visited Mar. 29, 2019). Thus, because Section 7 of the 2007 Compacts expressly limited the parties' waiver of sovereign immunity[17] and expressly excluded from arbitration "questions as to the validity or effectiveness of [the 2007 Compacts] or of any provision [t]hereof," (Doc. 67-3 at 15), Subsection 9(B) of the 2015 Compacts is likewise limited in scope. Then, Sections 7 and 9 of the 2015 Compacts further limit the scope of arbitrable disputes under the 2007 Compacts to the resolution of "payment disputes" premised on the State's belief that "the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment." (Doc. 68-3 at 22.)

[17] *See* Doc. 67-3 at 16 ("[T]he State and the Tribe acknowledge that any action or failure to act on the party of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall . . . not [be] protected by the sovereign immunity of the State or the Tribe.") *and id.* ("Nothing in this Section shall be deemed a waiver of the Tribe's [or the State's] sovereign immunity.").

Pulling all of these limitations together, only claims for breach of a 2007 Compact provision affecting payment that do *not* raise questions regarding the validity or effectiveness of the 2007 Compacts or any of its provisions fall within the purview of the 2015 Compacts' arbitration clause insofar as it preserves claims under the 2007 Compacts. On their face and as a matter of law, the Pueblos' claims that the 2007 Compacts' revenue sharing provisions are invalid and ineffective under federal law fall outside the scope of the 2015 Compacts' arbitration clause because they raise questions regarding the validity and effectiveness of 2007 Compact provisions.

If further proof were needed that the 2015 Compacts do not restrict the Pueblos' ability to press in this forum their claims challenging the validity and effectiveness of the 2007 Compacts' revenue sharing provisions, one need only look at the one-sided nature of the 2015 Compacts' arbitration clause as it pertains to "payment disputes" under the 2007 Compacts. Specifically, under the 2015 Compacts, only the State may initiate the arbitration procedure to pursue payment disputes, based only on the State's belief that the Pueblos breached a 2007 Compact provision affecting payment.[18] (*Id.* at 22.) On its face, this procedure does not even apply to the Pueblos' claims challenging the validity and effectiveness of the 2007 Compacts' revenue sharing provisions, much less restrict them to arbitration.

Defendants attempt to avoid this outcome by arguing that

> [i]f the arbitrators find in the Pueblos' favor on the interpretation of the revenue sharing provisions of the Compact, no additional payments would be owed to the State and there would therefore be no issue with respect to any impermissible tax against the Pueblos, no violation of IGRA, and no validity concerns with respect to the Compact provisions. Similarly, if the arbitrators find in the State's favor, the payments that the Pueblos owe the State under the revenue-sharing provision of the 2007 Compact would not be an illegal tax against the Pueblos (and therefore would neither violate IGRA nor invalidate the Compact) because they would be a payment that the Pueblos voluntarily agreed to under the terms of the 2007 Compact.

[18] Subsection 9(B) further provides that Pueblos' "failure to comply with an arbitrator's final decision with respect to the parties' [contractual payment] obligations under a Predecessor Agreement constitutes a breach" of the 2015 Compacts. (Doc. 68-3 at 26.)

(Doc. 62 at 6.) Either way, Defendants conclude, the Compact provisions at issue would be valid. (*Id.*)

The Court declines to adopt Defendants' argument because it is a gross oversimplification of the parties' dispute and fails to address all of the reasons the Pueblos allege that the 2015 Compact provisions preserving Defendants' claims and the 2007 Compacts' revenue sharing provisions are invalid and ineffective. It is true that one of the theories on which the Pueblos rely is that Defendants' claims for additional revenue sharing payments violate federal law because the Pueblos did not agree to make these payments in the 2007 Compacts. (*See, e.g.*, Doc. 67-1 at 17-20.) However, the Pueblos offer other theories in support of their claims as well. Thus, for example, the Pueblos also allege that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments are invalid because Defendants' claims seek to force the Pueblos to calculate their net win in a manner contrary to federal regulations. (*See, e.g., id.*) In addition, the Pueblos assert that the 2015 Compact provisions preserving Defendants' claims—and the 2007 Compacts' revenue sharing provisions, as well, if they mean what Defendants say they mean—are invalid because the additional payments Defendants claim are an illegal tax, rather than permissible revenue sharing, under IGRA. (*See, e.g.*, Doc. 68 at 20-22.) Even if an arbitration panel were to find that the Pueblos agreed to the 2007 Compacts' revenue sharing provisions as Defendants interpret them, the finding would not save the 2007 Compacts' revenue sharing provisions or the 2015 Compact provisions preserving Defendants' claims from invalidation under the latter theory. "[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018).

Moreover, the Court agrees with the Pueblos that their claims regarding the validity and effectiveness of Compact provisions under federal law must be resolved in this forum before

Defendants' claims, if they survive, may be resolved by arbitration or otherwise. (Doc. 68 at 18-20.) As discussed above, the Pueblos challenge the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims and the 2007 Compacts' revenue sharing provisions based on federal law; and, the arbitration clause at issue does not allow the parties to arbitrate such challenges, so they must be decided here. If the Pueblos are correct, and these Compact provisions are invalid and ineffective because their enforcement would violate federal law, then Defendants have no right to pursue such enforcement through arbitration or otherwise. Thus, to preserve the Pueblos' rights under federal law, the Court must decide their claims before arbitration—if any—occurs.[19]

2. The Pueblos' claims challenging the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims are not subject to arbitration because the 2015 Compacts' arbitration clause is permissive and the Pueblos have not consented to arbitration.

In opposition to Defendants' Summary Judgment Motion, the Pueblos also argue that the parties' dispute is not subject to arbitration because the arbitration clause in the 2015 Compacts is permissive and they have not consented to arbitration. "[A] party cannot be forced to arbitrate against its will if the arbitration clause permits, but does not require, arbitration." *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001). The use of the term "may" in a document generally indicates that an action is permissive. *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, 750 F. Supp. 2d 125, 144 (D.D.C. 2010). Nevertheless, the use of this term in an arbitration clause does not, standing alone, indicate that arbitration is permissive. *Id.* at 143-44.

[19] There are two incidental benefits to the Court's deciding the Pueblos' claims in the first instance. First, as the Pueblos observe, it will have "the salutary effect of resolving legal uncertainty," because other tribes entered into identical gaming compacts with the State, also offered free play to their patrons at the relevant times, and will benefit from a "roadmap[]" on how to account for free play and the prizes patrons won from the use of it. *Citizen Potawatomi Nation*, 881 F.3d at 1235. Second, it will conserve the parties' resources, because the Pueblos' Summary Judgment Motions are fully briefed and for the most part raise questions of law, whereas arbitration of Defendants' claims would likely involve fact discovery regarding the Pueblos' gaming operations and accounting for the last decade or more. (*See generally, e.g.*, Doc. 81.)

Rather, many courts have held that it simply means the party may either pursue arbitration or abandon its claim, *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320–21 (4th Cir. 2001); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996); *Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990); *Bonnot v. Cong. of Indep. Unions, Local No. 14*, 331 F.2d 355, 359 (8th Cir. 1964); *Block 175 Corp. v. Fairmont Hotel Mgmt. Co.*, 648 F. Supp. 450, 452 (D. Colo. 1986), or that arbitration, though not an exclusive remedy, is mandatory once either party invokes it. *See, e.g., Deaton Truck Line, Inc. v. Local Union 612, Affiliated with Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 314 F.2d 418, 422 (5th Cir. 1962); *Benihana of Tokyo, LLC v. Benihana Inc.*, 73 F. Supp. 3d 238, 251 (S.D.N.Y. 2014); *Conax Fla. Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287, 1297–98 (M.D. Fla. 2007); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."); *MEI Techs., Inc. v. Detector Networks Int'l, LLC*, Civ. No. 09-425 RB/LFG, 2009 WL 10665141, at *9 (D.N.M. Jul. 6, 2009) (collecting cases).

However, courts have construed arbitration clauses to be permissive when they used the term "may" and also included other language supporting that construction. Thus, for example, in *Independent Oil Workers at Paulsboro, New Jersey v. Mobil Oil Corp.*, the Third Circuit held that an arbitration clause was optional where it used the term "may" and provided that "[n]othing in this agreement shall prevent either [party] . . . from applying, during the term of this agreement to a court of competent jurisdiction for the relief to which such party may be entitled[.]" 441 F.2d 651, 653 (3d Cir. 1971). As the Third Circuit noted, "the qualification . . . that 'nothing in the agreement shall prevent' application to a court of competent jurisdiction takes away the mandatory aspect of the contractual grievance procedures." *Id.* "This is an 'escape' clause which nullifies the

mandatory terms of the earlier language and makes arbitration optional." *Id.* at 654; *see also Quam Constr. Co. v. City of Redfield*, 770 F.3d 706, 708-09 (8th Cir. 2014) (holding that arbitration clause was permissive where it used the term "may" and indicated that arbitration procedure applied "if the parties agree to arbitration"). In recognizing the existence of permissive arbitration clauses, these cases undercut the theory that an arbitration clause can never be permissive because then it would be superfluous, as parties to a contract can always consent to arbitration.[20] *See, e.g.*, *Bankers Ins. Co.*, 245 F.3d 320–21; *Austin*, 78 F.3d at 879.

Here, the Court finds that, as a matter of law, the arbitration clause in the 2015 Compacts is not mandatory as to claims to enforce or resolve disputes concerning 2015 Compact provisions. Initially, Subsection 7(A) of the 2015 Compacts provides that either party "may" invoke arbitration if it believes the other party has breached the Compact. (Doc. 68-3 at 22.) Further, Subsection 7(B) expressly states that "[n]othing in Subsection 7(A)," which describes the arbitration procedure, "shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact." (*Id.* at 23.) Subsection 7(B) also provides that nothing in Section 7 should be deemed a waiver of either the Pueblos' or the State's sovereign immunity. (*Id.* at 23-24.)

Subsection 7(B) is very like the "escape clause" in *Independent Oil Workers* that, according to the Third Circuit, "ma[de] arbitration optional." 441 F.2d at 654. Its broad language expressly preserves, wholly intact, the parties' right to pursue remedies other than arbitration to enforce provisions of and resolve disputes under the 2015 Compacts.[21] The Court would necessarily nullify

[20] Arbitration clauses may serve purposes other than providing for an exclusive or mandatory remedy, for example, to specify the procedures to be followed in the event the parties agree to arbitration.

[21] It does not, however, preserve the parties' right to pursue remedies to enforce provisions of and resolve disputes under the 2007 Compacts. Subsections 7(A) and 9 of the 2015 Compacts narrowly preserve and limit the State's ability to pursue a payment related breach of Predecessor Compact dispute remedy under the specified arbitration procedure.

this subsection if it were to hold that Subsection 7(A) makes arbitration mandatory. Requiring either party to submit to arbitration would unquestionably waive, limit, or restrict the remedies otherwise available to that party to resolve disputes under the 2015 Compacts; "review of arbitration awards is among the narrowest known to the law." *Citizen Potawatomi Nation*, 881 F.3d at 1234, 1236-38.

Nullifying Subsection 7(B) would, in turn, violate the "cardinal principle of contract construction . . . that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *see Citizen Potawatomi Nation*, 881 F.3d at 1239 ("[T]his court will construe the [tribal-state gaming c]ompact [at issue] to give meaning to every word or phrase."). The Court declines to read Subsection 7(B) out of the Compacts, especially in light of the fact that Defendants do not actually contest the permissive nature of the 2015 Compacts' arbitration clause in their reply. (*See* Doc. 62 at 2 ("[W]hether arbitration is the exclusive or one of many permissible avenues available for the parties to resolve their dispute is immaterial. . . . [A]rbitration is at least one forum in which the parties are permitted to bring claims related to payment disputes arising out of the 2007 Compact.").)

In addition, the Court will not order arbitration under Subsection 7(A) "at the expense of a specific provision[,]" *i.e.*, Subsection 7(B), "meant to maintain critical aspects of the parties' sovereign immunity." *Citizen Potawatomi Nation*, 881 F.3d at 1240-41. Reading Section 7 to

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The Court's rulings in this Memorandum Opinion and Order may not foreclose the State's ability to pursue such remedies provided the dispute does not raise a question as to the validity or effectiveness of 2007 or 2015 Compact provisions. Defendants have offered evidence that the Pueblos miscalculated their revenue sharing obligations under the 2007 Compacts even using the GAAP-compliant formula the Pueblos believe to be lawful. (Doc. 99-11.) This issue is not before the Court, and the Court has not considered it in ruling on the parties' motions. Thus, the Court offers no opinion on whether if the State wished to pursue claims for additional revenue sharing payments against the Pueblos on the basis of this evidence and otherwise met the procedural requirements for invoking arbitration, Subsections 7(A) and 9(B) of the 2015 Compacts would require the Pueblos to submit to mandatory arbitration.

provide for permissive but binding arbitration of disputes concerning 2015 Compact provisions best gives meaning and purpose to both of its parts in this sense as well: Subsection 7(B) preserves the parties' sovereign immunity, while Subsection 7(A) provides for its limited waiver if both parties agree to it by consenting to arbitration. (*See* Doc. 68-3 at 23 (providing that results of arbitration are "enforceable by an action for . . . mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction," and that any official's act contrary to an arbitration decision is "not protected by . . . sovereign immunity"). Because the 2015 Compacts' arbitration clause is permissive as to disputes regarding the 2015 Compacts, and the Pueblos brought this action in lieu of arbitration (and, incidentally, before Defendants invoked arbitration), the Court finds that, as a matter of law, the parties' claims to enforce or resolve disputes concerning the provisions of the 2015 Compacts are not subject to arbitration.

In spite of all of the foregoing, Defendants argue that the Court should require the Pueblos to arbitrate Defendants' claims for additional revenue sharing payments, because the Pueblos' sovereign immunity has prevented the State from pursuing these claims in federal court. (Doc. 55 at 9); *see State of N.M. v. Pueblo of Isleta et al.*, Civ. No. 17-995 JB/KK (Notice of Dismissal, Doc. 13, D.N.M. filed Nov. 14, 2017). However, if, as the Pueblos allege, Defendants' claims violate federal law, then the lack of a forum in which to pursue them is of no consequence, because they would be unenforceable regardless. Moreover, while the Pueblos' sovereign immunity may prevent the State from pursuing the remedies it prefers, the Court is "not persuaded that [the State] lacks any adequate alternatives." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). For example, the Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Id.* Also, the State is free to negotiate with the Pueblos to modify the dispute resolution procedures in the

2015 Compacts; and, if the State "find[s] that none of these alternatives produce the revenues to which [it believes it is] entitled, [it] may of course seek appropriate legislation from Congress." *Id.*

In sum, the Court must resolve the Pueblos' claims regarding the validity and effectiveness of Compact provisions in the first instance to preserve the Pueblos' rights under federal law; and, the parties' claims to enforce or resolve disputes concerning the 2015 Compacts are not arbitrable because the 2015 Compacts' arbitration clause is permissive as to these claims and the Pueblos have not consented to arbitration. In these circumstances, Defendants have failed to show their entitlement to judgment as a matter of law on Plaintiffs' arbitrability claims, and the Court will deny Defendants' Summary Judgment Motion.

B. The Pueblos' Summary Judgment Motions

Having denied Defendants' request for summary judgment on the threshold issue of arbitrability, the Court turns to the Pueblos' Summary Judgment Motions and Defendants' request for additional discovery under Federal Rule of Civil Procedure 56(d). (Doc. 67 at 2; Doc. 68 at 33.) As an initial matter, the Court must address the proposition at the heart of the Pueblos' claims, *i.e.*, that according to GAAP, a gaming entity must exclude the face value of free play, and deduct the value of prizes won as a result of free play wagers, from its net win. (Doc. 67-1 at 14, 22, Doc. 68 at 26.)

GAAP "are the conventions, rules, and procedures that define accepted accounting practices." *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 n.7 (1984); *see also In re Imergent Sec. Litig.*, No. 2:05-CV-204, 2009 WL 3731965, at *7 (D. Utah Nov. 2, 2009) (GAAP are a set of "broad accounting principles . . . approved by the [AICPA that] establish guidelines for measuring, recording and classifying the transactions of a business entity"); *N.J. & its Div. of Inv. v. Sprint Corp.*, 314 F. Supp. 2d 1119, 1146 n.24 (D. Kan. 2004) (same). In his report, the Pueblos'

expert witness Andrew Mintzer stated that, under GAAP, the face value of free play is not included in, and the value of prizes won by patrons as a result of free play wagers must be deducted from, gross gaming revenue or net win. (Doc. 67-10 at 9-13.)

Mr. Mintzer also stated that the treatment of free play and prizes won as a result of free play wagers under GAAP is consistent with "economic reality." (*Id.* at 9-10, 16.) According to Mr. Mintzer, free play is not included in a gaming entity's revenue because it does not represent actual or expected cash in-flow or its equivalent, (*id.* at 8, 12), or, in simpler terms, because a casino doesn't make any money when a customer uses it.[22] Defendants have presented no evidence that refutes Mr. Mintzer's statements on these points.[23] (*See generally* Doc. 99.) The Court therefore finds that under GAAP the face value of free play must be excluded, and the value of prizes won by patrons as a result of free play wagers must be deducted, from net win.

1. Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the *per se* rule, and the 2015 Compact provisions preserving these claims are invalid and ineffective.

In their motions, the Pueblos first assert that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments under the 2007 Compacts are invalid and ineffective, because Defendants' claims constitute an attempt to impose a tax on the Pueblos in violation of IGRA and the *per se* rule prohibiting state taxation of Indian tribes without express

[22] Likewise, the value of prizes won by patrons as a result of free play wagers is deducted from revenue because such prizes are a net "loss from gaming activities." (Doc. 67-10 at 8.) In other words, a casino loses money when a patron wins a prize as a result of a free play wager.

[23] In his affidavit, Mr. Telle quotes portions of the Gaming Guide to the effect that "incentives," including "free play," are not deducted from net win. (Doc. 99-12 at 5-6.) At least two factors prevent Mr. Telle's quotations from creating a genuine issue of material fact regarding whether the value of prizes won as a result of free play wagers must be deducted from net win under GAAP. First and foremost, Mr. Telle stops short of contradicting Mr. Mintzer and asserting that the value of prizes won as a result of free play wagers must *not* be deducted from net win under GAAP. (*Id.*) Second, it appears that "deducting free play" is distinct from "deducting the value of prizes won as a result of free play wagers" in the Gaming Guide. (*See* Doc. 68-4 at 6-7 (discussing the deduction of "free play offered through nondiscretionary loyalty programs" from net gaming revenue).)

Congressional authorization. The Pueblos offer two arguments in support of this assertion, *i.e.*, that (1) the Pueblos did not, in the 2007 Compacts, agree to make the additional payments Defendants seek, and (2) the additional payments are not permissible revenue sharing payments under IGRA. The Court will address these related arguments in turn.

a. *Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the* per se *rule because the Pueblos did not agree to make these payments*.

The Pueblos first argue that Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization because the Pueblos did not agree to make these payments in the 2007 Compacts. For the following reasons, the Court agrees.

"IGRA provides a comprehensive approach to the controversial subject of regulating tribal gaming, and strikes a careful balance among federal, state, and tribal interests." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1283 (11th Cir. 2015) (quotation marks and brackets omitted). IGRA's

> first stated purpose is 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. Its second stated purpose is to provide a statutory basis for the regulation of gaming by an Indian tribe, adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gambling operation, and to assure that gaming is conducted fairly and honestly by both the operator and players. The third and final declared purpose of the IGRA is to declare as necessary the establishment of independent Federal regulatory authority, Federal standards and a National Indian Gaming Commission—all to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1263 (D.N.M. 2013) (citations omitted); 25 U.S.C. § 2702; *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015) ("Congress has noted that for tribes, gaming income often means the difference between an adequate governmental program and a skeletal program that is totally

dependent on [f]ederal funding.") (quotation marks omitted); *Flandreau Santee Sioux Tribe v. Gerlach*, 155 F. Supp. 3d 972, 992 (D.S.D. 2015) (same).

IGRA

> divides gaming into three classes. Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms.

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 785 (2014) (citations omitted).

"IGRA expressly prescribes the matters that are permissible subjects of gaming-compact negotiations between tribes and states." *Navajo Nation*, 896 F.3d at 1201–02. Specifically, the statute lists seven categories of provisions a gaming compact may include, 25 U.S.C. § 2710(d)(3)(C); and, provisions falling outside of these seven categories are unlawful. *Navajo Nation*, 896 F.3d at 1205 n.4 ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA."); *Pueblo of Santa Ana*, 972 F. Supp. 2d at 1265 ("the negotiated scope" of a compact under IGRA "is controlled by § 2710(d)(3)(C).").

Tribes and states have relied on two of Section 2710(d)(3)(C)'s categories to authorize compact provisions that require a tribe to make direct payments to a state. These two categories are: (1) provisions relating to "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity," 25 U.S.C. § 2710(d)(3)(C)(iii); and, (2) the catch-all category of provisions regarding "any other subjects that are directly related to the operation of gaming activities."[24] 25 U.S.C. § 2710(d)(3)(C)(vii); *see, e.g., Rincon Band of Luiseno*

[24] Section 2710(d)(3)(C) provides in full that

> [a]ny Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the

Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006); *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003). However, IGRA limits the ability of compact parties to include provisions requiring a tribe to make direct payments to a state by further providing that,

> [e]xcept for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

25 U.S.C. § 2710(d)(4).

In light of Section 2710(d)(4), courts considering compact provisions requiring a tribe to make direct payments to a state under Section 2710(d)(3)(C)(vii) have found that such provisions are lawful only if they meet three criteria. First, as Section 2710(d)(3)(C)(vii) expressly requires, the payments must be directly related to the operation of gaming activities. *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033. Second, the payments must be "consistent with the purposes of IGRA." *Id.*; *accord City of Duluth*, 785 F.3d at 1210 (holding that trial court was required to consider "Congress's express intent that tribes be the primary beneficiaries of Indian casinos" in deciding whether to grant tribe's motion for relief from consent decree requiring it to pay percentage of casino's gross revenues to city as rent).

Finally, the parties must have

> 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.

25 U.S.C. § 2710(d)(3)(C).

> *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state [does] not have *authority* to exact such payments, it [can] bargain to receive them in exchange for a quid pro quo conferred in the compact.

Shoshone-Bannock Tribes, 465 F.3d at 1101–02 (emphases in original) (citation omitted). In other words, courts "have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where 'meaningful concessions' are offered in return." *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1036 (emphases in original). These courts have concluded that, if a state's demand for tribal payments under Section 2710(d)(3)(C)(vii) is not based on a bargained-for and agreed-upon compact provision where meaningful concessions are offered in return, it is an impermissible tax, fee, charge, or other assessment under IGRA.[25] *Id.* at 1042; 25 U.S.C. § 2710(d)(4).

Defendants claim that the additional revenue sharing payments they seek are permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).[26] However, the Pueblos argue that the payments do not comply with Section 2710(d)(3)(C)(vii) because the Pueblos did not, in the 2007 Compacts, agree to make them, and they would therefore constitute an illegal tax under Section 2710(d)(4) if imposed. To determine whether the 2007 Compacts required the Pueblos to make the additional revenue sharing payments Defendants seek, and therefore whether the Pueblos agreed to

[25] "While this court strives to avoid conflicts with sister circuits, it has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *State of N.M. v. Dep't of Interior*, 269 F. Supp. 3d 1145, 1152 (D.N.M. 2014) (quotation marks omitted). Thus, the Court, though cognizant and respectful of other circuits' decisions regarding IGRA, has engaged in an independent reasoned analysis of the issues raised in the Pueblos' Summary Judgment Motions.

[26] Defendants do not claim that the additional payments they seek are payments to reimburse the State for regulatory costs under Section 2710(d)(3)(C)(iii). Subsection 4(E)(6) of the 2007 Compacts provided for the Pueblos to make payments to the State under Section 2710(d)(3)(C)(iii), and there appears to be no dispute that the Pueblos properly made those payments.

make them, the Court must apply federal common law regarding contracts. *Citizen Potawatomi Nation*, 881 F.3d at 1238-39; *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015); *see also Shoshone-Bannock Tribes*, 465 F.3d at 1098 ("We apply general principles of contract interpretation to construe a contract governed by federal law.").

According to the Tenth Circuit,

> [u]nless a contrary intention appears in the instrument, the words used [in a contract] are presumed to have been used in their ordinary or customary meaning, deliberately and with intention. The law does not assume that the language of the contract was carelessly chosen; but it must be presumed that the parties meant something by the words used, that they intended to achieve something definite and concrete in the contract, and that they intended the consequences of its performance. Where words having a definite legal meaning are knowingly used in a contract, the parties thereto will be presumed to have intended such words to have their proper legal meaning and effect, in the absence of any contrary intention appearing in the instrument.

Raulie v. United States, 400 F.2d 487, 521 (10th Cir. 1968). Moreover,

> a contract should be interpreted as a harmonious whole to effectuate the intentions of the parties, and every word, phrase or part of a contract should be given meaning and significance according to its importance in context of the contract. Further, in construing the contract, reasonable rather than unreasonable interpretations are favored by the law.

Doña Ana Mut. Domestic Water Consumers Ass'n v. City of Las Cruces, N.M., 516 F.3d 900, 907 (10th Cir. 2008) (citation and quotation marks omitted); *see also Mastrobuono*, 514 U.S. at 63 ("[A] document should be read to give effect to all its provisions and to render them consistent with each other."); *Citizen Potawatomi Nation*, 881 F.3d at 1239 ("[T]his court will construe the Compact to give meaning to every word or phrase."). In the same vein, courts "presume that words have the same meaning throughout the contract." *McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194, 1195 (9th Cir. 1984).

"Under federal contract principles, if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself." *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Shoshone-Bannock Tribes*, 465 F.3d at 1099 ("[W]hen the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."). Extrinsic evidence is admissible "only to resolve ambiguity in the contract." *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 812 (6th Cir. 2007) ("Where a contract is unambiguous on its face, extrinsic evidence is inadmissible because no outside evidence can better evince the intent of the parties than the writing itself."). In addition, "[e]xtrinsic evidence must be relevant in order to be admitted to resolve an ambiguity." *Id.* at 815. "We have consistently held that where an industry is specialized, extrinsic evidence that helps define words within their specialized context is admissible." *Id.*; *accord* 11 Williston on Contracts § 32:4 (4th ed.) ("[T]echnical terms or words of art will be given their technical meaning."). Whether contract terms are ambiguous, and the interpretation of unambiguous terms, are questions of law. *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992)*; see also Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 810.

As a preliminary matter, the Court notes that both sides have submitted extrinsic evidence in support of their interpretation of the 2007 Compacts' revenue sharing provisions. For example, the Pueblos have offered evidence that their slot accounting systems have never segregated prizes won by patrons using free play credits versus cash or cash equivalents, (Doc. 67-12); and, Defendants have offered evidence that, before the Pueblos instituted electronic free play, they gave patrons coupons that could be exchanged for cash or tokens, and included the value of cash and tokens wagered in their net win. (Doc. 99 at 22.) However, the Court finds the relevant provisions of the 2007 Compacts to be unambiguous except for the fact that they do not identify or define the

GAAP applicable to calculating net win. Thus, the Court will consider the parties' extrinsic evidence only to the extent that it tends to identify and define the applicable GAAP.[27] *Citizen Potawatomi Nation*, 881 F.3d at 1239 (extrinsic evidence is "relevant only to resolve ambiguity in the contract").

Applying federal common law principles of contract interpretation to the 2007 Compacts, the Court finds that these Compacts unambiguously required the Pueblos to calculate their Net Win for revenue sharing purposes in accordance with GAAP. First, Subsection 4(C) of the Compacts required the Pueblos to maintain "all books and records relating to Class III Gaming . . . in accordance with [GAAP]." (Doc. 67-3 at 9.) In addition, this subsection required the Pueblos to hire an independent certified public accountant to prepare annual financial statements that included "written verification of the accuracy of the quarterly Net Win calculation"; and, critically, these financial statements were to "be prepared in accordance with [GAAP]." (*Id.*) Finally, this subsection required the Pueblos' GAAP-compliant financial statements to "specify the total amount wagered in Class III Gaming on all Gaming Machines . . . for purposes of calculating 'Net Win' under Section 11 of this Compact using the format specified therein." (*Id.*)

To summarize, then, Subsection 4(C) of the 2007 Compacts required the Pueblos to: (1) maintain all of their gaming books and records in accordance with GAAP; (2) verify their Net Win calculations in accordance with GAAP; and, (3) specify the "total amount wagered" for purposes of calculating their Net Win in accordance with GAAP. Read together, these provisions are clear: the 2007 Compacts required the Pueblos to calculate their Net Win in accordance with GAAP. And, as previously discussed, under GAAP the face value of free play must be excluded, and the value of prizes won as a result of free play wagers must be deducted, from net win. Thus, Subsection

[27] Extrinsic evidence in the record relevant to identifying and defining the applicable GAAP includes Mr. Mintzer's affidavit, the admissible portions of Mr. Telle's affidavit, and portions of the Gaming Guide in the record.

4(C) required the Pueblos to exclude the face value of free play and deduct the value of prizes won as a result of free play wagers in calculating their Net Win.

Defendants argue that Section 11 of the 2007 Compacts nevertheless required the Pueblos to include either the face value of free play or the value of prizes won as a result of free play wagers in calculating their Net Win for revenue sharing purposes. The Court disagrees. Defendants' interpretation would require the Pueblos to calculate their Net Win using one set of rules—GAAP—under Subsection 4(C), and a different set of rules—rules contrary to GAAP—under Section 11. As such, it contravenes the principle of contract construction that a contract must be read as a harmonious whole, with words having the same meaning throughout. *Mastrobuono*, 514 U.S. at 63; *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Doña Ana Mut. Domestic Water Consumers Ass'n*, 516 F.3d at 907; *McLane & McLane*, 735 F.2d at 1195–96. The Court finds that, in accordance with this principle, Section 11 can and should be read in harmony with Section 4 and therefore in conformity with GAAP.

Subsection 11(C)(1)(a) defined "Net Win" as "the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less . . . the amount paid out in prizes to winning patrons, including the cost to the Tribe of noncash prizes, won on Gaming Machines." (Doc. 67-3 at 20.) Other than limiting the Pueblos' Net Win to their net win from Class III gaming machines, this definition is consistent with the definition of net win under GAAP, *i.e.*, "the difference between [the gaming entity's] gaming wins and losses before deducting costs and expenses." (Doc. 68-4 at 12; Doc. 99-12 at 16.)

In support of their argument that Section 11 defines Net Win in a manner contrary to GAAP, Defendants rely on the additional language in Subsection 11(C)(1)(a) to the effect that

> [t]he phrase 'won on Gaming Machines' means the patron has made a monetary wager, and as a result of that wager, has won a prize of any value. Any rewards,

> awards or prizes, in any form, received by or awarded to a patron under any form of a players' club program (however denominated) or as a result of patron-related activities, are not deductible. The value of any complimentaries given to patrons, in any form, are not deductible.

(67-3 at 20-21.) According to Defendants, this language prohibited the deduction of any kind of marketing or promotional expense from Net Win, including the value of prizes won by patrons as a result of free play wagers. (Doc. 99 at 14, 30.)

In fact, however, this language also can and should be read in conformity with Subsection 4(C) and therefore GAAP. The Gaming Guide provides that "monetary credits may be played [on slot machines] using bills, coins, tickets, *electronic wagering credits recorded on cards, or by other means*." (Doc. 67-11 at 3 & n.3 (emphasis added).) Thus, under GAAP, "monetary credits" are not limited to cash or cash equivalents, and the term "monetary wagers" as used in Section 11(C)(1)(a) can be read consistently with GAAP to include wagers made using free play "monetary credits," *i.e.*, electronic free play credits assigned a monetary face value for the purpose of gaming machine play. Similarly, Section 11(C)(1)(a), though it prohibited the deduction of prizes a patron received from his or her participation in a players' club program or other "patron-related activities," did not even mention, much less prohibit the deduction of, prizes won by a patron as a result of free play wagers, which again is consistent with GAAP. Nowhere did Section 11(C)(1)(a) prohibit the deduction of all marketing or promotional expenses of any kind, as Defendants claim. Rather, in accordance with GAAP, Section 11(C)(1)(a) drew a line between the value of prizes won as a result of wagers, which were deductible, and the value of prizes awarded for other reasons, which were not.

If further support were needed, the Court notes that Section 11 was entitled "*Revenue* Sharing," and required the Pueblos to "pay to the State a portion of [their] Class III Gaming *revenues*." (Doc. 67-3 at 20 (emphases added).) However, as discussed above, free play is not

revenue, and neither is money (or the cost of non-cash prizes) the Pueblos paid out to patrons as a result of free play wagers. This is true not only under GAAP, but also in economic reality.[28] The law favors reasonable contract interpretations over unreasonable ones, *Doña Ana Mut. Domestic Water Consumers Ass'n*, 516 F.3d at 907, and it would be unreasonable to interpret Section 11 to require the Pueblos to make "revenue sharing" payments from nonrevenue. For all of these reasons, the Court finds that, under the 2007 Compacts and as a matter of law, the Pueblos did not agree to make the additional revenue sharing payments Defendants seek.

Then, because the Pueblos did not agree to them, the additional revenue sharing payments Defendants seek do not satisfy the requirements of Section 2710(d)(3)(C)(vii), *i.e.*, they are not payments made pursuant to a bargained-for and agreed-upon compact provision for which meaningful concessions were offered in return. 25 U.S.C. § 2710(d)(3)(C)(vii); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-36; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02. Lacking any authorization under Section 2710(d)(3)(C), Defendants' claims for such payments from the Pueblos constitute an impermissible attempt to impose a tax, fee, charge, or other assessment under Section 2710(d)(4). 25 U.S.C. § 2710(d)(3)(C)(vii), (d)(4); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1042.

The Court further finds that Defendants' claims for additional revenue sharing violate the "*per se* rule" prohibiting states from taxing federally recognized Indian tribes without express Congressional authorization. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 n.17 (1987), *superseded by statute on other grounds as stated in Bay Mills Indian Cmty.*, 572

[28] Economic reality likewise undermines Defendants' argument that it was inequitable for the Pueblos to exclude the face value of free play, and also deduct the value of prizes won as a result of free play wagers, from net win. (Doc. 99 at 21.) The apparent inequity merely reflects the actual nature of the transaction, *i.e.*, the Pueblos received no money from free play wagers but they did lose money when a patron won a jackpot on such a wager.

U.S. at 794-95; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475–76 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 467 (2d Cir. 2013); *Flandreau Santee Sioux Tribe*, 155 F. Supp. 3d at 995. A tax is "a monetary charge imposed by the government on persons, entities, transactions or property to yield public revenue." *Hill v. Kemp*, 478 F.3d 1236, 1245 (10th Cir. 2007). The Supreme Court "consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Blackfeet Tribe of Indians*, 471 U.S. at 765.

Because the 2007 Compacts did not require the Pueblos to make the additional revenue sharing payments Defendants seek, IGRA does not authorize them. Thus stripped of IGRA's validation, they are simply payments Defendants insist the Pueblos make to the State's general fund on the basis of past transactions between the Pueblos and their gaming patrons. It is difficult to characterize such payments as anything other than a tax. "No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment . . . into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1029–30. Moreover, Congress has clearly not authorized the State to impose such a tax; on the contrary, it explicitly withheld its authorization in Section 2710(d)(4). The Court therefore finds that Defendants' claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts constitute an attempt to impose an illegal tax not only under IGRA, but also under the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization.

b. *Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax because they are not, in fact, permissible revenue sharing payments under IGRA.*

The Pueblos also contend that the additional payments Defendants seek are not in fact revenue sharing payments and would therefore constitute an illegal tax under IGRA even if the Pueblos had agreed to them. (*See, e.g.*, Doc. 68 at 20-22.) As discussed in Section III.B.1.a., *supra*, courts to date have recognized only two types of direct payments from a tribe to a state pursuant to a gaming compact under IGRA, *i.e.*, payments to defray the state's regulatory costs associated with the tribe's gaming activities, and revenue sharing payments if they are directly tied to gaming, consistent with IGRA's purposes, and bargained for and agreed upon in exchange for meaningful concessions. *See, e.g., Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-34; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02; *In re Indian Gaming Related Cases*, 331 F.3d at 1111-12; *but see Ho-Chunk Nation*, 512 F.3d at 932 ("The validity, under the IGRA, of revenue-sharing agreements in tribal-state compacts . . . is far from a settled issue.").

Defendants contend that the additional payments they seek from the Pueblos fall into the category of "revenue sharing" payments under 25 U.S.C. § 2710(d)(3)(C)(vii). In reality, however, and according to GAAP, Defendants are attempting to "share" funds that are not "revenue" to the Pueblos. As discussed at the beginning of Section III.B., free play is not revenue to the Pueblos because they receive no money from patrons when it is used; and, prizes won as a result of free play wagers are not revenue to the Pueblos because they lose money when they award prizes to patrons on winning free play bets. If the Pueblos were to include the face value of free play or the value of prizes won as a result of free play wagers in their Net Win as Defendants insist, the Pueblos would have to pay the State a percentage of these values even though they are not actually revenue. (Doc. 67-3 at 20-21 (requiring Pueblos to pay the State a percentage of their Net Win as revenue sharing).

As a matter of first impression, the Court finds that Section 2710(d)(4) does not allow a state to collect "revenue sharing" payments from a tribe pursuant to a gaming compact under IGRA where the funds the tribe is required to "share" are not, in fact, "revenue." Such payments do not comport with GAAP or economic reality, and they do not fall within any category of direct tribal payments to states that courts have found to be permissible under IGRA. 25 U.S.C. § 2710(d)(C)(3)(iii), (vii); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-35; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02; *In re Indian Gaming Related Cases*, 331 F.3d at 1111-13.

Moreover, such payments are inconsistent with IGRA's stated purposes to promote tribal economic development and self-sufficiency, ensure that the tribes are the primary beneficiaries of their gaming operations, and protect tribal gaming activities as a means of generating tribal revenue. 25 U.S.C. § 2702; *City of Duluth*, 785 F.3d at 1210-12; *Pueblo of Santa Ana*, 972 F. Supp. 2d at 1263; *see also Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1034 ("[N]one of the purposes outlined in § 2702 includes [promoting] the State's general economic interests. The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly.") (emphasis in original). If a compact provision is to increase a tribe's direct payments to a state under IGRA, it should do so expressly and accurately, so that the tribe and the DOI have the opportunity to assess whether the increase comports with IGRA's purposes.[29] Increasing a tribe's revenue sharing payments to a state by including a percentage of nonrevenue in the payments creates an unacceptable risk of confusion and lack of mutual agreement between compact stakeholders about the nature and propriety of the

[29] For example, a compact provision could expressly provide for the tribe to pay the state a higher percentage of its net win.

payments under IGRA. The Court therefore finds that Defendants' claims for additional "revenue sharing" payments constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) not only because the Pueblos did not agree to the payments, but also because the payments are not permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).

Relatedly, according to the Pueblos, the Court should defer to the DOI's determination that Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA. The DOI made this determination in letters to the Pueblos explaining its decision to neither approve nor disapprove the 2015 Compacts, expressing concern regarding the 2015 Compact provisions preserving Defendants' claims. (*See, e.g.*, Doc. 1-4 at 5.) The Pueblos appear to concede that the statutory interpretation implicit in the DOI's determination is not binding legal authority, but they do argue that it is "persuasive authority" that is "due deference," citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). (Doc. 110 at 6-7.)

Initially, the Court agrees that the DOI's interpretation is not binding legal authority entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency interpretation is entitled to *Chevron* deference only

> when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Mead Corp., 533 U.S. at 226–27. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

The DOI clearly did not promulgate the interpretation at issue in the exercise of the type of authority *Chevron* deference requires. The parties did not brief the process by which the DOI made its determination to neither approve nor disapprove the 2015 Compacts pursuant to 25 U.S.C. § 2710(d)(8)(C). However, there is no indication in the record that it made the determination pursuant to "adjudication or notice-and-comment rulemaking" or a comparably formal process. *Mead Corp.*, 533 U.S. at 226-27. Also, in the six letters in the record, the DOI expressed its interpretation variably and offered a variety of reasons for it, putting it firmly in the category of "[i]nterpretations such as those in opinion letters . . . which lack the force of law[.]" *Christensen*, 529 U.S. at 587.

The Court further finds that the Pueblos have failed to demonstrate that the DOI's interpretation is entitled to a lesser measure of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Supreme Court held that

> [t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. Recognizing the continuing validity of *Skidmore* deference after *Chevron*, in *Mead Corp.* the Supreme Court confirmed that "an agency's interpretation may merit some deference whatever its form," depending on "the agency's care, its consistency, formality, and relative expertness," and "the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228, 234.

The Pueblos, however, fail to discuss or even acknowledge the factors listed in *Skidmore* and *Mead Corp*. (Doc. 110 at 6-7 & n.7.) Rather, they simply argue that the DOI's interpretation is due deference because it is "the product of IGRA's administrative process."[30] (*Id.*) This argument is gravely insufficient to support a finding that the interpretation is entitled to *Skidmore*

[30] In a footnote, the Pueblos also dispute Defendants' characterization of the contents of the DOI's letters. (Doc. 110 at 7 n.7.) However, the letters are in the record and therefore speak for themselves.

deference. 323 U.S. at 140; *Mead Corp.*, 533 U.S. at 228, 234; *but see Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 279-82 (D.D.C. 2018) (holding that DOI's decision to disapprove amendment to gaming compact was entitled to *Chevron* deference); *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1176-79 (E.D. Cal. 2009) (holding that DOI's approvals of gaming compacts that included unrestricted revenue sharing provisions were entitled to *Skidmore* deference).[31]

"Without a specific reference, [the Court] will not search the record in an effort to determine whether there exists dormant evidence" in support of the Pueblos' argument that the DOI's interpretation is entitled to *Skidmore* deference. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1199 (10th Cir. 2000) ("The district court was not obligated to comb the record in order to make [the plaintiff's] arguments for him."). Thus, the Court will not rely on any deference to the DOI's interpretation to support its independent conclusion that Defendants' claims for additional "revenue sharing" payments constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) regardless of whether the Pueblos agreed to them, because the payments are not, in fact, permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).

c. *The 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments under the 2007 Compacts are invalid and ineffective.*

The Pueblos argue that, because Defendants' claims for additional revenue sharing payments under the 2007 Compacts are inconsistent with IGRA, the 2015 Compact provisions

[31] However, *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-34, calls into question the continuing validity of *Fort Independence Indian Community* insofar as it held that unrestricted revenue sharing provisions in gaming compacts directly relate to gaming under Section 2710(d)(3)(C)(vii). 679 F. Supp.2d at 1179.

preserving Defendants' claims are invalid and ineffective. (*See, e.g.*, Doc. 67-1 at 17-20; Doc. 68 at 20-22.) A gaming compact under IGRA "takes effect" when the Secretary approves it and notice of the Secretary's approval is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1552 (10th Cir. 1997). Because the Secretary did not approve or disapprove the 2015 Compacts within 45 days of submission, these Compacts are "considered to have been approved by the Secretary, but only to the extent the [Compacts are] consistent with [IGRA]." 25 U.S.C. 2710(d)(8)(C).

For the reasons discussed in Section III.B.1.a. and b., *supra*, Defendants' claims for additional revenue sharing payments under the 2007 Compacts constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) and are therefore inconsistent with IGRA. To the extent that the provisions of the 2015 Compacts preserve Defendants' claims, they are likewise inconsistent with IGRA; and, to the extent the 2015 Compact provisions are inconsistent with IGRA, they are not considered to have been approved by the Secretary and did not "take effect." 25 U.S.C. § 2710(d)(3)(B), (8)(C). In addition, the 2015 Compact provisions preserving Defendants' claims are unenforceable to the extent that Defendants' claims violate the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization. *Cabazon Band of Mission Indians*, 480 U.S. at 214-15 n.17; *Blackfeet Tribe of Indians*, 471 U.S. at 766; *Moe*, 425 U.S. at 475-76; *McClanahan*, 411 U.S. at 170-71. In short, because Defendants' claims for additional revenue sharing payments under the 2007 Compacts violate IGRA and the *per se* rule, the 2015 Compact provisions preserving those claims are invalid and ineffective.

2. <u>The Court need not decide whether federal regulations required the Pueblos to calculate their Net Win according to GAAP.</u>

The Pueblos also argue that Defendants' claims for additional revenue sharing payments are inconsistent with federal regulations that require the accounting records of the Pueblos' gaming

operations to comply with GAAP. (Doc. 67-1 at 12, Doc. 68 at 26.) In support of this argument, the Pueblos rely on three federal regulations. First, they cite to 25 C.F.R. § 542.19(b), which provides that

> [e]ach gaming operation shall prepare general accounting records according to [GAAP] on a double-entry system of accounting, maintaining detailed, supporting, subsidiary records, including, but not limited to . . . [d]etailed records identifying revenues, expenses, assets, liabilities, and equity for each gaming operation[.]

25 C.F.R. § 542.19(b). Second, they cite to 25 C.F.R. § 549.19(d), which defines gross gaming revenue from gaming machines in accordance with GAAP, *i.e.*, "[f]or gaming machines, gross [gaming] revenue equals drop,[32] less fills,[33] jackpot payouts and personal property awarded to patrons as gambling winnings." 25 C.F.R. § 542.19(d)(2); *see also* 25 C.F.R. § 542.2 ("Gross gaming revenue means annual total amount of cash wagered on . . . class III games . . . less any amounts paid out as prizes or paid for prizes awarded."). Finally, they cite to 25 C.F.R. § 571.12, which provides that

> [a] tribe shall engage an independent certified public accountant to provide an annual audit of the financial statements of each . . . class III gaming operation on the tribe's Indian lands for each fiscal year. . . . Financial statements prepared by the certified public accountant shall conform to generally accepted accounting principles[.]

25 C.F.R. § 571.12(b).

According to the Pueblos, these federal regulations require them to calculate their net win in accordance with GAAP. Thus, the Pueblos continue, Defendants' demands that they calculate their Net Win in a manner contrary to GAAP for purposes of revenue sharing under the 2007

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[32] "Drop (for gaming machines) means the total amount of cash, cash-out tickets, coupons, coins, and tokens removed from drop buckets and/or bill acceptor canisters." 25 C.F.R. § 542.2.

[33] "Fill means a transaction whereby a supply of chips, coins, or tokens is transferred from a bankroll to a . . . gaming machine." 25 C.F.R. § 542.2.

Compacts contravene these regulations. Defendants counter that: (1) the regulations do not prohibit the Pueblos from creating financial records in addition to their general accounting records and annual financial statements; (2) the regulations do not require these other financial records to comply with GAAP, and, (3) discrepancies between the net win in the Pueblos' GAAP-compliant records and the Net Win in their revenue sharing calculations can be addressed by "a simple footnote . . . explaining that the [r]evenue [s]haring calculation was performed in the format set forth in Section 11 of the 2007 Compact[s]." (Doc. 99 at 27.)

Neither side cites any caselaw discussing whether the regulations on which the Pueblos rely require all of their financial records, including their Net Win calculations under the 2007 Compacts, to comply with GAAP, and the Court's research has not uncovered any such cases. *But see Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 813 (citing 25 C.F.R. § 571.12 for the proposition that the plaintiff tribe was "federally required to comply" with the Gaming Guide). Also, the Court notes that there is some doubt regarding whether the National Indian Gaming Commission had the authority to promulgate the regulations on which the Pueblos rely, *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 137-39 (D.C. Cir. 2006); and, Section 542.19 was stayed effective September 27, 2018 and is not currently enforceable. 83 Fed. Reg. 39,877-01, 2018 WL 3818191, at *39,879 (Aug. 13, 2018).

The Court need not decide whether complying with Defendants' demands for additional revenue sharing payments would require the Pueblos to violate 25 C.F.R. §§ 542.19, 542.2, and 571.12, in light of its determination that these claims constitute an attempt to impose a tax on the Pueblos in violation of IGRA and the *per se* rule. In addition, the lack of authority addressing these regulations and their uncertain validity and status make the Court reluctant to attempt to interpret them. The Court will therefore decline to decide whether these regulations required the Pueblos to

calculate their Net Win under the 2007 Compacts in accordance with GAAP. However, the Court notes that the regulations are at least consistent with the 2007 Compact provisions that required the Pueblos to calculate their Net Win in accordance with GAAP. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[A] general rule of construction presumes the legality and enforceability of contracts.").

3. Defendants are not entitled to additional time to conduct discovery and respond to the Pueblos' Summary Judgment Motions under Rule 56(d).

Defendants argue that the Court should grant them more time to conduct discovery and respond to the Pueblos' Summary Judgment Motions under Rule 56(d) because they cannot currently present facts essential to justify their opposition to the motions. (Doc. 99 at 30); Fed. R. Civ. P. 56(d). Rule 56(d) provides that

> [i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

> Although the Supreme Court has held that, under Fed. R. Civ. P. 56(f),[34] summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition, this protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion.

Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co., 22 F.3d 1527, 1536 (10th Cir. 1994) (brackets omitted).

In its affidavit,

> a non-movant requesting additional discovery under Rule 56(d) must specify (1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time

[34] When Rule 56 was amended in 2010, Rule 56(f) became Rule 56(d). Fed. R. Civ. P. 56(d), 2010 Advisory Committeee Notes.

> will enable the party to obtain those facts and rebut the motion for summary judgment.

Gutierrez, 841 F.3d at 908 (quotation marks and brackets omitted); *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). It is within the Court's discretion to deny a Rule 56(d) request based solely on a party's failure to present an affidavit that complies with the rule. *McKissick v. Yuen*, 618 F.3d 1177, 1190 (10th Cir. 2010). Also, if the information sought is irrelevant or cumulative, the nonmoving party is not entitled to relief under Rule 56(d). *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554 (10th Cir. 1993).

In support of their Rule 56(d) request, Defendants argue that they require additional time to conduct discovery regarding: (a) whether the Pueblos actually applied GAAP to their revenue sharing calculations under the Compacts; (b) the parties' negotiations regarding the revenue sharing provisions in the 2007 Compacts[35]; (c) who decided to implement free play at the Pueblos' casinos and who decided how to account for it; (d) the accuracy of Defendants' calculation of the additional revenue sharing payments they claim the Pueblos owe under the 2007 Compacts; (e) when the Pueblos began offering patrons free play; (f) how the Pueblos determined the appropriate method for calculating their net win once they started offering free play; and, (g) whether the Pueblos ever intended to comply with GAAP or the 2007 Compacts. (Doc. 99 at 30-33.)

Initially, the Court notes that, except regarding one probable fact, Defendants have failed to present an affidavit that satisfies the *Gutierrez* requirements. 841 F.3d at 908. Defendants attach two affidavits to their response to the Pueblos' Summary Judgment Motions, those of Mr. Telle and Rainier Kamplain. (Docs. 99-11, 99-12.) Mr. Telle's affidavit contains only one sentence that even remotely supports Defendants' Rule 56(d) request, *i.e.*, "[t]he Pueblos have not been

[35] Defendants have not explained why information about the parties' compact negotiations is not equally available to both sides.

forthcoming with the data needed to assess the proper Net Win calculation, further delaying the State's actual notice of the accounting discrepancies." (Doc. 99-12 at 7.) This one sentence is too vague and conclusory to comply with Rule 56(d)'s requirements and concerns information that is irrelevant to the issues raised in the Pueblos' Summary Judgment Motions. *Gutierrez*, 841 F.3d at 908; *Birch*, 812 F.3d at 1249-50.

Mr. Kamplain's affidavit is more detailed, but only regarding one probable fact, *i.e.*, "whether the Pueblos have complied with the correct Net Win and revenue sharing calculations, regardless of which format or formula they are applying in determining Net Win." (Doc. 99-11 at 4.) In his affidavit, Mr. Kamplain explained why Defendants question whether the Pueblos correctly calculated their revenue sharing obligations under the 2007 Compacts regardless of which formula they used. (*Id.* at 2-4.) He also stated in general terms what steps Defendants have taken to obtain additional information on this point, and why additional time could allow them to do so. (*Id.* at 4-5.) However, Mr. Kamplain made no attempt to address any of the other probable facts Defendants listed in support of their Rule 56(d) request. (*See generally id.*) Thus, with the one exception noted, the Court could in its discretion deny Defendants' Rule 56(d) request based solely on their failure to present an affidavit that complies with the rule. *McKissick*, 618 F.3d at 1190.

The Court need not do so, however, because Defendants' Rule 56(d) request is also subject to denial for the substantive reason that all of the information Defendants seek additional time to discover is irrelevant to the issues raised in the Pueblos' Summary Judgment Motions. The Court's decision on the Pueblos' motions turns on the meaning of certain Compact provisions and whether Defendants' claims for additional revenue sharing payments comport with federal law. As discussed in Section III.B.1.a., the Compact provisions at issue are unambiguous except regarding the identification and definition of the applicable GAAP. As such, extrinsic evidence is irrelevant

to the Court's decision except to the extent it relates to the applicable GAAP; the interpretation of the Compacts and the federal law applicable to Defendants' claims are otherwise questions of law. *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 810, 812, 815; *Bank of Okla.*, 972 F.2d at 1171.

Yet, all of the probable facts on which Defendants rely in seeking additional time for discovery under Rule 56(d) are extrinsic to the Compacts, and none have any tendency to identify or define the applicable GAAP. Consequently, none are relevant to the Court's decision on the Pueblos' Summary Judgment Motions. *Garcia*, 232 F.3d at 768. Because the information Defendants seek is irrelevant, they are not entitled to relief under Rule 56(d). *Jensen*, 998 F.2d at 1554. The Court will therefore deny Defendants' Rule 56(d) request for additional time to conduct discovery and respond to the Pueblos' motions.

4. Defendants' remaining arguments are unsupported and immaterial.

Finally, the Court must address Defendants' assertion that the Court should deny the Pueblos' Summary Judgment Motions because the Pueblos have breached the covenant of good faith and fair dealing and should not be unjustly enriched. (Doc. 99 at 27.) In support of this assertion, Defendants allege that the Pueblos failed to: (a) inform the State of their decision to offer patrons electronic free play credits rather than coupons to be exchanged for cash or tokens; (b) provide the State with documents regarding how they accounted for free play despite many requests; and, (c) attempt to renegotiate the 2007 Compacts when they began offering free play. (Doc. 99 at 28.)

Defendants fail to cite to any provision of law, equity, or contract that required the Pueblos to either inform the State of their decision to offer free play or try to renegotiate the Compacts when they did so. Defendants also fail to cite to any legal authority in support of their argument that the

Pueblos' alleged failure to produce documents under the 2007 Compacts invalidates their current claims for declaratory and injunctive relief under federal law. Interestingly, Defendants' evidence tends to show that the Pueblos and the State have been debating the proper treatment of free play in calculating the Pueblos' Net Win for revenue sharing purposes under various compacts off and on since June 2005, and neither side appears to have changed its position in all that time. (*See, e.g.*, Doc. 99-1 at 27-41; Doc. 99-2 at 4-21; Doc. 99-3 at 33-34, 47-58; Doc. 99-4 at 46-55; Doc. 99-5 at 39-46; Doc. 99-6 at 48-68.) This evidence casts some doubt on Defendants' claim of unfair surprise. However, even if Defendants' characterization of the Pueblos' past conduct is accurate, in the Court's view it is simply not relevant to the issues the Pueblos raised in their Summary Judgment Motions. Moreover, the Court declines to speculate about whether Defendants could have made a properly supported legal argument regarding the Pueblos' alleged past misconduct, or what this argument might have been. It is not the Court's role to construct the parties' arguments for them. *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009); *Brown v. City of Las Cruces Police Dep't*, 347 F. Supp. 3d 792, 811 (D.N.M. 2018). In short, the Court finds that Defendants' arguments regarding the Pueblos' alleged bad faith and inequitable conduct are unsupported and immaterial.

5. The Pueblos are entitled to declaratory and injunctive relief.

To summarize, the Court finds that Defendants' claims for additional revenue sharing payments from the Pueblos constitute an attempt to impose a tax, fee, charge, or other assessment in violation of IGRA and the *per se* rule barring state taxation of Indian tribes without express Congressional authorization. The Court further finds that the 2015 Compact provisions preserving Defendants' claims under the 2007 Compacts are invalid and ineffective. The Court so finds both because the Pueblos did not, in the 2007 Compacts, agree to make the additional payments

Defendants seek, and because the payments are not permissible revenue sharing payments consistent with IGRA's requirements and purposes. The Court also finds that Defendants are not entitled to more time to conduct discovery under Rule 56(d), and that their arguments regarding the covenant of good faith and fair dealing and unjust enrichment are unsupported and immaterial. The Court therefore concludes that, as a matter of law, the Pueblos are entitled to declaratory and injunctive relief and it will grant their Summary Judgment Motions as set forth below.

C. Defendants' Motion to Compel and the Pueblos' Motion for Protective Order[36]

"The general principle of Rule 56(d) is that summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to opposition." *N.M. Consol. Constr., LLC v. City Council of the City of Santa Fe*, 97 F. Supp. 3d 1287, 1304 (D.N.M. 2015) (quoting *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000)). "Rule 56(d) does not require, however, that summary judgment not be entered until discovery is complete." *Id.* If the information the non-moving party seeks under Rule 56(d) is "irrelevant to the summary judgment motion . . . no extension will be granted." *Id.*

As discussed in Section III.B.3., *supra*, the information Defendants seek under Rule 56(d) is irrelevant to the issues the Pueblos raised in their Summary Judgment Motions, and the Court has therefore declined to delay ruling on the Pueblos' motions to allow Defendants to complete discovery. *Id.* In these circumstances, and because the Court has determined that the Pueblos are entitled to summary judgment, the Court finds that Defendants' Motion to Compel and the Pueblos' Motion for Protective Order are moot and should be denied.

D. Defendants' Motion for Settlement Conference

[36] The Court held a hearing on Defendants' Motion to Compel and the Pueblos' Motion for Protective Order on August 16, 2018. (Docs. 94, 123.) At the hearing, the Court deferred ruling on the motions and ordered Defendants to submit a fully compliant Rule 56(d) affidavit within 30 days of the hearing to the extent they believed they needed more discovery to respond to the Pueblos' Summary Judgment Motions. (Doc. 94 at 1-2.)

In light of the Court's determination that the Pueblos are entitled to summary judgment, Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) is also moot and should be denied.

IV. CONCLUSION

IT IS THEREFORE ORDERED as follows:

1. Defendants' Motion for Summary Judgment on the Issue of Arbitrability (Doc. 55) is DENIED;

2. Plaintiffs-in-Intervention Santa Ana, Santa Clara and San Felipe's and Plaintiff Tesuque's Motion for Summary Judgment (Doc. 67) and Plaintiffs Pueblo of Isleta's and Pueblo of Sandia's Motion for Summary Judgment and Supporting Authorities (Doc. 68) are GRANTED. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, the Court hereby declares that:

a. Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016 constitute an attempt to impose a tax, fee, charge, or other assessment in violation of IGRA and the *per se* rule prohibiting state taxation of federally recognized Indian tribes without express Congressional authorization;

b. As such, the provisions of the 2015 Compacts preserving Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016 are invalid and ineffective; and

c. Neither the Pueblos' claims in this civil action, nor Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016, are subject to arbitration under the 2015 Compacts.

For the reasons set forth herein, and pursuant to Federal Rule of Civil Procedure 65, the Court hereby permanently enjoins Defendants from taking any further action, including but not limited to pursuing arbitration under the 2015 Compacts, to enforce their claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016, except that Defendants may pursue any and all appeals to which they are entitled in this civil action; and,

3. Defendants' Motion to Compel Discovery and for Sanctions, Plaintiffs' and Plaintiffs-in-Intervention's Motion for Protective Order to Quash Defendants' Rule 30(b)(6) Deposition Notices (Doc. 84), and Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) are DENIED AS MOOT.

IT IS SO ORDERED.

Kirtan Khalsa

KIRTAN KHALSA
UNITED STATES MAGISTRATE JUDGE

857 N.W.2d 601
Supreme Court of South Dakota.

FIRST GOLD, INC., Mineral Palace, LP and Four Aces Gaming, LLC, Plaintiffs and Appellants,
v.
SOUTH DAKOTA DEPARTMENT OF REVENUE AND REGULATION, Defendant and Appellee.

No. 27055.
|
Argued Nov. 17, 2014.
|
Decided Dec. 17, 2014.

Synopsis

Background: Casinos brought declaratory judgment action against Department of Revenue and Regulation seeking determination that their "free play" promotional programs were not subject to gaming tax. The Circuit Court, Sixth Judicial Circuit, Hughes County, Mark Barnett, J., granted summary judgment in favor of Department. Casinos appealed.

[Holding:] The Supreme Court, Konenkamp, J., held that casinos' slot machine free play was not subject to gaming tax as adjusted gross proceeds.

Reversed and remanded with instructions.

West Headnotes (9)

[1] **Gaming and Lotteries** Casinos

Casinos' slot machine free play was not subject to gaming tax as adjusted gross proceeds; because free play was a coupon and not money, chips, or tokens, it was not part of the drop, which was defined as the total amount of money, chips, and tokens removed from the drop boxes and was the only inclusion in the calculation of gross revenue, and casinos received no income, and the patrons wagered nothing, such that there was nothing to include and any awards or payouts as result of free play provided nothing to deduct. SDCL §§ 42–7B–28, 42–7B–28.1.

[2] **Taxation** Questions of law

Whether a statute imposes a tax under a given factual situation is a question of law and thus no deference is given to any conclusion reached by the Department of Revenue and Regulation or the circuit court.

1 Cases that cite this headnote

[3] **Taxation** Construction and operation

When the question is whether a statute imposes a tax, the Supreme court construes the statute liberally in favor of the taxpayer and strictly against the taxing body.

1 Cases that cite this headnote

[4] **Statutes** Language and intent, will, purpose, or policy

The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute.

[5] **Statutes** Natural, obvious, or accepted meaning

The Supreme Court must give a statute's language a reasonable, natural, and practical meaning to effect its purpose.

2 Cases that cite this headnote

[6] **Administrative Law and Procedure** Construction

Essentially the same tenets apply to the Supreme Court's construction of administrative rules as apply to the construction of statutes.

[7] **Administrative Law and Procedure** Rule or regulation as a whole; relation of parts to whole and one another

The Supreme Court's function is to construe administrative rules according to their intent, as ascertained from the rules as a whole.

[8] **Administrative Law and Procedure** Construction

When interpreting administrative regulation, the Supreme Court confines itself to the language used in the regulations.

[9] **Administrative Law and Procedure** Clarity and ambiguity; multiple meanings

When the meaning of an administrative regulation is clear and unambiguous, the Supreme Court only declares its meaning as clearly expressed.

Attorneys and Law Firms

***602** Sandra Hoglund Hanson of Davenport, Evans, Hurwitz & Smith, LLP, Sioux Falls, South Dakota, Attorneys for plaintiffs and appellants.

Marty J. Jackley, Attorney General, Jared C. Tidemann, Jeromy J. Pankratz, Assistant Attorneys General, Pierre, South Dakota, Attorneys for defendant and appellee.

Opinion

KONENKAMP, Justice.

[¶ 1.] Three Deadwood casinos jointly brought a declaratory judgment action in circuit court seeking a ruling that their "free play" promotional programs are not subject to gaming tax under SDCL chapter 42–7B. After an adverse ruling in circuit court, the casinos appealed.

Background

[¶ 2.] First Gold Hotel, Mineral Palace Hotel and Gaming, and Four Aces Gaming, LLC (Establishments) each run promotional programs intended to attract patrons to their casinos. If the patrons join an establishment's "club," they receive coupons or credits called "free play." Each establishment has its own operating rules, but it is agreed that free play allows patrons to play slot machines without using any of their personal money. Patrons ***603** cannot purchase free play, and distributed free play credits or coupons have an expiration date. Free play cannot be redeemed for cash, merchandise, or other promotional offers. Yet patrons can win money from the use of free play credits or coupons.

[¶ 3.] The Establishments brought suit in circuit court against the South Dakota Department of Revenue and Regulation requesting a declaration that free play is not part of adjusted gross proceeds and, therefore, is not subject to gaming tax. Both sides moved for summary judgment. The Establishments contended that free play is not subject to gaming tax under SDCL chapter 42–7B because no statute or regulation "dictates that free play must be included in gross revenue in the first place." The Department responded that free play is taxable because the gaming tax regulations specifically say that promotional awards are not a deductible event. The Department relied on a ruling from the South Dakota Gaming Commission declaring that "promotional money shall be reported as gross revenue and/or adjusted gross proceeds[.]"

[¶ 4.] The circuit court issued a number of rulings, but only the taxability question remains for our consideration. On that subject, the court held that the Establishments were not entitled to declaratory relief because the administrative regulations on gaming clearly and unambiguously provide that promotional play—i.e., free play—is not a deductible event in the calculation of adjusted gross revenue. *See* ARSD 20:18:18:26. Reasoning that free play has value "in its possibility of enticing patrons to play, which also translates to money," the court concluded that any ambiguity in the administrative regulations must be construed to mean that promotional awards are not deductible. Thus, the court granted the Department's motion for summary judgment, holding that free play must be included in adjusted gross proceeds.

Analysis and Decision

[1] [¶ 5.] In this appeal, we address only the interpretation of South Dakota's gaming tax statutes and regulations; specifically, whether slot machine free play is subject to gaming tax as adjusted gross proceeds under SDCL 42–7B–28,–28.1.* The Establishments contend that the circuit court erred when it declared that free play must be counted as part of adjusted gross proceeds under SDCL chapter 42–7B because no statute or regulation includes free play in the calculation of adjusted gross proceeds. They further assert that regulatory language regarding the *deductibility* of promotional awards is immaterial; this case concerns whether free play is *includable* in the first place.

[2] **[3]** **[4]** **[5]** **[6]** [¶ 6.] "Whether a statute imposes a tax under a given factual situation is a question of law and thus no deference is given to any conclusion reached by the Department or the circuit court." *Midcontinent Broad. Co. v. S.D. Dep't of Revenue,* 424 N.W.2d 153, 154 (S.D.1988). Moreover, when the question is whether a statute imposes a tax, we construe the statute "liberally in favor of the taxpayer and strictly against the taxing body." *Nat'l Food Corp. v. Aurora Cnty. Bd. of Comm'rs,* 537 N.W.2d 564, 566 (S.D.1995) ***604** (quoting *Thermoset Plastics, Inc. v. S.D., Dep't of Revenue,* 473 N.W.2d 136, 138 (S.D.1991)) (internal quotation mark omitted). "The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained *primarily* from the language expressed in the statute." *Goetz v. State,* 2001 S.D. 138, ¶ 16, 636 N.W.2d 675, 681 (quoting *US West Commc'ns, Inc. v. Pub. Utils. Comm'n,* 505 N.W.2d 115, 123 (S.D.1993)). We must give a statute's language "a reasonable, natural, and practical meaning" to effect its purpose. *Robinson & Muenster Assocs. v. S.D. Dep't of Revenue,* 1999 S.D. 132, ¶ 7, 601 N.W.2d 610, 612. Essentially the same tenets apply to our construction of administrative rules. *Hartpence v. Youth Forestry Camp,* 325 N.W.2d 292, 295 (S.D.1982).

[¶ 7.] Here, the Legislature imposes a tax of eight plus one percent on the adjusted gross proceeds from allowed gaming. SDCL 42–7B–28,–28.1. "Adjusted gross proceeds" is defined as "gross proceeds less cash prizes." SDCL 42–7B–4(1). "Gross proceeds" is not further defined by statute, so we look to the administrative rules promulgated by the Gaming Commission as part of the Commission's rule-making authority. *See* SDCL 42–7B–7. The gaming regulations refer to "gross revenue" rather than "gross proceeds," but, for the purpose of this proceeding, both sides agree the terms are synonymous. Under ARSD 20:18:22:12, gross revenue for each slot machine "equals drop less fills to the machine jackpot payouts, hand pay credit lockups, and vouchers issued."

[¶ 8.] It is not readily apparent from ARSD 20:18:22:12 that "free play" is included in the calculation of gross revenue. The "drop" is the only inclusion in the calculation, and "drop" is defined as "the total amount of *money, chips,* and *tokens* removed from the drop boxes[.]" ARSD 20:18:01:01(8) (emphasis added). A "chip" is defined as "a nonmetal or partly metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming [.]" ARSD 20:18:20:01(1). A "token" is defined as "a metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming." *Id.* at (2). "Free play," however, is the "use of a coupon that is issued to a patron by an establishment for play for which no bet is required [.]" ARSD 20:18:01:01(11). Because free play is a coupon and not money, chips, or tokens, it is not part of the drop.

[7] **[8]** **[9]** [¶ 9.] The Department argues that free play is "in essence a computerized token" and "has value" to the Establishments, a value taxable as income. Our function is to "construe administrative rules according to their intent[,]" as ascertained from the rules as a whole. *Estate of He Crow v. Jensen,* 494 N.W.2d 186, 191 (S.D.1992). We confine ourselves to the language used in the regulations. *Goetz,* 2001 S.D. 138, ¶¶ 15–16, 636 N.W.2d at 681. As with statutes, when the meaning of a regulation is clear and unambiguous, we only declare its meaning "as clearly expressed." *See U.S. West Commc'ns, Inc.,* 505 N.W.2d at 123. Here, a free play coupon is not money, a token, or a chip. The language defining a "drop" is clear and unambiguous, and therefore, we must only declare the meaning of the regulation. It is immaterial that free play might be valuable to the Establishments, and whether it is "in essence" a token does not mean a free play coupon is a token. On the contrary, the clear language of ARSD 20:18:20:01(2) defines a token as "a metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming."

***605** [¶ 10.] On another tack, the Department argues that free play must be included in the calculation of adjusted gross revenue because ARSD 20:18:18:26 specifically provides that "[p]romotional awards are not a deductible event in the adjusted gross revenue calculation," and ARSD 20:18:20.02:01 provides that an establishment that "engages in promotions to increase business ... may not deduct payouts made pursuant to the promotion from adjusted gross income [.]" And the Department relies on the Gaming Commission's

ruling in 2007 that promotional awards must be included in the calculation of adjusted gross proceeds under SDCL chapter 42–7B.

[¶ 11.] The Gaming Commission's legal opinion that the gaming statutes and regulations impose a gaming tax upon a promotional program similar to the Establishments' free play program in this case is not controlling. *See Midcontinent Broad. Co.,* 424 N.W.2d at 154. We review de novo whether a statute or regulation imposes a tax, and based on our review of ARSD 20:18:18:26 and ARSD 20:18:20.02:01, neither regulation supports the conclusion that the value of free play is included in the calculation of adjusted gross revenue. True, both regulations clearly provide that promotional awards and payouts cannot be *deducted.* But prohibiting a *deduction* for *awards* and *payouts* from promotions does not perforce mean that the regulations therefore *include* the value of a *free play coupon.* On the contrary, ARSD 20:18:18:26 and ARSD 20:18:20.02:01 confirm that these regulations do not *include* free play in the calculation of adjusted gross revenue.

[¶ 12.] Under ARSD 20:18:18:26, "[p]romotional and bonus systems" are described as "gaming devices that are configured to participate in electronically communicated promotional and bonus award payments from an approved host system." Promotional awards "entitle players to special promotional awards based on patrons' play activity or awards gifted by the casino to guests." *Id.* These awards, therefore, "are not a deductible event in the adjusted gross revenue calculation." *Id.* Unlike promotional awards, however, "[p]ayouts as a result of a bonus event are a deductible event in the adjusted gross revenue calculation." *Id.* This is because "[b]onus awards are based on a specific wager or specific event and are available to all patrons playing bonused slot machines." *Id.* Looking then to ARSD 20:18:20.02:01, when a *promotional award* is the result of a *specific wager,* the establishment may deduct the payouts made pursuant to the promotion. Free play is not the result of a specific wager because it is defined as a "play for which no bet is required[,]" ARSD 20:18:01:01(11), and a "bet" requires a "*wager* in a game of chance[,]" SDCL 42–7B–4(2). (Emphasis added.)

[¶ 13.] The only reasonable, natural, and practical interpretation of the gaming laws and regulations is that the value of free play is not included in calculating adjusted gross revenue and, therefore, is not part of adjusted gross proceeds under SDCL chapter 42–7B. Indeed, the Establishments receive no income, and the patron wagers nothing. Consequently, there is nothing to include, and any awards or payouts as a result of free play provide nothing to deduct. Because the statutes and regulations do not include the value of free play for slot machines in the calculation of an establishment's adjusted gross revenue, the circuit court erred when it ruled that the Establishments must remit gaming tax under chapter 42–7B for the value of free play.

[¶ 14.] Reversed with instructions to enter a declaratory judgment for the Establishments ***606** in accordance with this decision.

[¶ 15.] GILBERTSON, Chief Justice, and ZINTER, SEVERSON, and WILBUR, Justices, concur.

All Citations

857 N.W.2d 601, 2014 S.D. 91

Footnotes

* The circuit court considered additional issues, such as whether the Establishments could obtain a refund and whether a declaratory action was the proper vehicle for tax questions. The Establishments concede that they cannot obtain a refund in this declaratory action, and the Department concedes that a declaratory action is proper for addressing taxability questions. *See* SDCL 21–24–1 (the circuit court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed").

#9076

NORTH DAKOTA GAMING ALLIANCE

HB 1212 Senate Finance and Taxation- March 15, 2021

Madam Chair Bell and members of the Senate Finance and Tax Committee,

My name is Mike Motschenbacher, and I am the Executive Director of the ND Gaming Alliance. Our membership consists of Charities, Fraternal Organizations, Veterans Organizations, Hospitality Venues, Distributors, and Manufacturers. Today I am here in support of HB 1212.

To not repeat what others have said in support, I would like to add a couple points regarding precedents set by other states and to touch on the fiscal note.

I have emailed you copies of the two forms that I have here in my hand. The first is a Supreme Court of SD decision in which it was deemed to be illegal to tax "credits" or "free play". The second is a New Mexico District Court decision which deemed the same. In addition to these two court cases, I have done extensive research on this, and to my knowledge, North Dakota is the only state in the nation that taxes free play. It is simply not legal to do so, and we would urge the Senate to follow the lead of the House and pass HB 1212 in its current form.

Secondly, the fiscal note. I have spoken with many legislators regarding the size of the fiscal note. I understand it appears to be a big number, but it needs to be realized that this was never intended to be a cash windfall for the state. This money that the state "benefited" from over the past biennium should be considered a "bonus" that was able to be used over the past biennium but cannot be depended on moving forward. This is the charities money that they should be able to distribute to help the needs of the communities which they represent. This is simply not the states money.

Third, the ND Gaming Alliance has taken the position that we are opposed to any additional amendments that may be brought forth to this bill. We, along with others that are testifying in support of this bill, believe that we have accepted amendments that were made to this bill in the house and have done our due diligence in negotiating to bring an acceptable bill to the Senate. The original bill had the tax structure set at 2% under 50K net proceeds and 4% over 50K net proceeds. In negotiations, we accepted 1% under 50K and 12% over 50K net proceeds. Although this is not what we were looking for in the original bill, we believe it is acceptable at this time and would like to see it passed in this current form.

Finally, the charitable gaming industry over the past two year has felt the pinch of the over-taxation that was set in place by administrative rules. In 2019, HB 1533 would have fixed this issue, but it failed. As a result, the 1% tax on gross income was set by the Attorney General's office, not by the legislature. Here is the legislatures' chance to pass this bill you see in front of you to better serve the communities which benefit from charitable gaming.

The ND Gaming Alliance appreciates us having the opportunity to speak today and encourages a DO PASS recommendation on HB 1212. With that, I stand for any questions.

Mike Motschenbacher
Executive Director
ND Gaming Alliance
701 471 9014
Ndgalliance@gmail.com

U·T·G·A
UNITED TRIBES
GAMING ASSOCIATION

#9277

HOUSE BILL 1212
SENATE FINANCE AND TAXATION COMMITTEE
MARCH 15, 2021

TESTIMONY OF CYNTHIA C. MONTEAU, EXECUTIVE DIRECTOR

Madam Chair and members of the Committee, my name is Cynthia Monteau, I am the Executive Director of the United Tribes Gaming Association (UTGA). I come before you today as a Proponent with amendments of House Bill 1212, a bill that creates a charitable gaming operating fund for cities and counties, a quarterly allocation to the Attorney General's office, and a small amount to a gambling disorder prevention and treatment fund.

The five tribes of North Dakota formed UTGA, to promote, protect and advocate for tribal gaming and economic development.

In 2017, the electronic pull tabs were discussed as simply making a paper game an electronic game by implementing current technology. Since August of 2018, these electronic pull tab devices have generated in 29 months, the amount of revenue that previously took the State almost 10 years to generate.

These machines were initially in bars to help the charities collect the tickets. We now have them in gas stations, restaurants, and within the last couple of weeks in the mall in Bismarck.

The rent increase also expanded the number of machines per location. And more recently, the charity receiving the most amount of revenue has taken to straight out purchasing bars.

U·T·G·A
UNITED TRIBES
GAMING ASSOCIATION

UTGA proposes the following amendments in HB1212:

Page 3, New Section 3, Moratorium and Compliance. The UTGA Board supports the Attorney General instituting a moratorium on the current number of electronic pull tab devices in the state, although the transferring of licenses and the upgrading of devices is allowed. The Attorney General shall require all devices to be in compliance with the Internal Revenue Service Title 31 reporting requirements, and verified at a minimum, annually.

Further, New Section 3, requires a legislative management study during the interim. The study shall include the nature and scope of electronic pull tab games, the impacts on charitable and tribal gaming revenues, the impacts of gambling addiction and a cost-benefit analysis of the increase in charitable gaming revenues and impacted services.

It is with these amendments that UTGA supports HB 1212 and recommends a Do Pass.

Thank you, Madam Chair.

#9316

PROPOSED AMENDMENT TO HOUSE BILL NO. 1212

NEW SECTION 3.

53-06.1-19 Moratorium and Compliance

1. Notwithstanding any other provision of law, the Attorney General shall institute a moratorium: as of the effective date of this Act, the number of electronic pull tab devices in operation in the state and authorized pursuant to this chapter shall not increase.
2. Under the moratorium, transfer of existing electronic pull tab device licenses from one permitted facility to another is permitted.
3. Under the moratorium, replacement of existing electronic pull tab devices with new electronic pull tab devices is permitted.
4. The Attorney General shall require that all electronic pull tab devices be operated in compliance with Internal Revenue Service Title 31 reporting requirements, and compliance shall be verified at least annually.

53-06.1-20 Legislative Management Study.

During the 2021-23 interim, the Interim Tribal Taxation Issues Committee shall study the expansion of electronic pull tab devices in the state. The study must include the nature and scope of electronic pull tab games, the impacts on charitable and tribal gaming revenues, the impacts on gambling addiction, and a cost-benefit analysis of the increase in charitable gaming revenues and impacted services. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

NEW SECTION 4.

Emergency. This Act is declared to be an emergency measure.

NEW SECTION 5.

Effective Date. Section 2 of this Act is effective for taxable events occurring after June 30, 2021.

FIRE DEPT.

Gladstone Consolidated Fire District

Box 128
Gladstone, North Dakota 58630

#9003

March 15, 2021

To: Senate Finance and Taxation Committee

Re: HB 1212 – Charitable Gaming Fund

Dear Chairman Bell, and the Senate Committee Members:

The Gladstone Consolidated Fire District urges a DO PASS on HB 1212.

As a recipient of charitable gaming proceeds, the Gladstone Consolidated Fire District agrees with the highlights of HB 1212 that outlines an equitable state gaming tax, benefits of regulation and enforcement, and the costs for such regulation and enforcement of the state gaming industry.

Creation of a Charitable Gaming Operation Fund with oversight, funds, and regulations benefit all charitable organizations, including the Gladstone Consolidated Fire District.

The Gladstone Consolidated Fire District urges a DO PASS on HB 1212.

Sincerely,

Joe Wanner – Fire Chief

Gladstone Consolidated Fire District

#9025

Bismarck-Mandan
Convention & Visitors Bureau
1600 Burnt Boat Drive
Bismarck, ND 58503
701-222-4308
800-767-3555

Testimony of Sheri Grossman
Bismarck-Mandan Convention & Visitors Bureau
HB 1212
March 15, 2021

Chairman Bell and Members of the Senate Finance and Taxation Committee:

My name is Sheri Grossman, and I am the CEO for the Bismarck-Mandan Convention & Visitors Bureau (CVB). We support HB 1212.

Our mission at the CVB is to promote engaging visitor experiences resulting in community economic growth and quality of place. Lodging tax and gaming revenue from our gaming sites are our primary funding sources.

HB 1212 creates a tax based on adjusted gross proceeds and simplifies the tax code for gaming. Currently, gaming tax is imposed on **gross proceeds** received by a licensed organization. Electronic Pull Tab machines are taxed on each ticket played. Here is one scenario. A player purchases $20 in credits on an etab machine and wins $200 in credits during play. The player plays all credits without purchasing additional credits. The charity is taxed on $220 (gross proceeds) but only $20 of actual money went into the machine.

Changing the tax to **adjusted gross proceeds** (gross proceeds less cash prizes and cost of merchandise prizes) eliminates the taxation of "credits" and unifies the tax calculation for all games.

There are so many worthy charitable gaming organizations and this bill would allow these charities more money to disperse. I encourage the Committee to recommend a do pass for HB 1212.

Thank you for your time and consideration.

Testimony in Support of
Engrossed HB 1212
Senate Finance and Taxation Committee
(March 15, 2021)

#9164

Chairman Bell and Senate Finance and Taxation Committee Members:

My name is Rick Stenseth. I am a Gaming Manager for two organizations in Fargo that both conduct charitable gaming (Northern Prairie Performing Arts (NPPA) aka Fargo-Moorhead Community Theatre & Team Makers Club). My involvement in our industry goes back to 1983 and I have been involved in working with the Legislature over many sessions and on many gaming topics. I am submitting this testimony through our NPPA lobbyist, Todd D. Kranda, an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan.

HB 1212 is an extremely important bill for all charitable organizations that conduct gaming in North Dakota. HB 1212 would provide significant and immediate positive impact to the programs and services supported by gaming. For many of these organizations, gaming is the largest fund raising tool they have to raise the money necessary for them to meet their missions. Attached for your reference is a copy of the **2020 Summary of Eligible Use Contributions** report compiled by the Attorney General Gaming Division showing the various charitable purposes benefitting from charitable gaming in North Dakota.

HB 1212 changes the basis on which gaming tax is applied using an adjusted gross proceeds rather than gross proceeds. The industry supports the change and has always maintained that it should be responsible for the costs associated with the regulation and administration of the laws and rules necessary to ensure the integrity of our industry through the Attorney General's Office and local jurisdictions. Also, we have always

recognized that there is a need to make help available for those who may have a problem with their gaming activity. HB 1212 addresses both of these items.

Historically we began with what was termed "Gaming Tax" and it went to the AG budget to use as necessary. At that time the basis for taxation was Adjusted Gross Proceeds. AGP is what remains after all prizes are paid out to the players. For the quarter ended June 30, 2020 players received 88.3% of wagers back in prizes.

Currently organizations pay taxes based on Gross Proceeds (the total dollar value of wagers). Our industry should not be taxed with this gross proceeds formula as the basis. Changing this portion of the tax code for charitable gaming is the right way to go. Taxes should be applied based on the revenue after all prizes are paid. For many game types every actual dollar that is taken in by the organization results in $3 or more wagers (Gross), with over 80% of that amount going back out in prizes.

We all agree there are costs involved which need to be covered by the taxes collected on gaming. Total taxes collected should be calculated to easily maintain the Gaming Division of the Attorney General's office responsibility to police the industry by enforcing regulations and administering laws and rules governing it.

Designating those tax dollars to a fund which is directed by statute to be used for the purposes defined ensures that regardless of any other budgeting concerns, the AG will be able to maintain the necessary funds to meet their responsibilities.

HB 1212 establishes a fair and adequate tax that will be used for appropriate State and local oversight expenses, while helping each organization significantly. I ask for a **Do Pass** recommendation and appreciate your support for the passage of **HB 1212**. Thank you for your time and I am available for any questions. Rick Stenseth

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
A-02	THE ABUSED	183,811	0.7
A-03	ALCOHOL AND DRUG ABUSE	9,044	0.0
A-04	ANIMAL PROTECTION	37,738	0.1
A-05	ALZHEIMERS	1,725	0.0
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A-08	CANCER	119,112	0.4
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A-37	YOUTH ACTIVITIES	6,120,069	21.9
A-46	ADULT ACTIVITIES	212,605	0.8
A-47	HEAD INJURIES	2,350	0.0
A-58	HOME ON THE RANGE	52,029	0.2
A-61	MARCH OF DIMES	300	0.0
A-64	MEALS ON WHEELS	13,900	0.0
A-65	MEDICAL FACILITIES NON-PROFIT	155,524	0.6
A-67	MEMORIAL FUNDS	30,968	0.1
A-70	NURSING HOMES NON-PROFIT	81,399	0.3
A-75	DAYCARE FACILITIES NON-PROFIT	62,298	0.2
A-80	RONALD MCDONALD HOUSE	15,805	0.1
A-82	SALVATION ARMY	18,650	0.1
A-88	SPECIAL OLYMPICS	51,758	0.2
A-90	DISASTER RELIEF ORGANIZATIONS	4,450	0.0
A-91	UNITED FUND/UNITED WAY	137,900	0.5
A-94	YMCA/YWCA	9,500	0.0
A-97	VOLUNTEER SERVICES	9,200	0.0
A-98	GAMBLING ADDICTION	1,000	0.0
A-99	OTHER	228,292	0.8

Subtotal Of Contributions: $12,373,023 Percent to Grand Total: 44.3%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
B-10	RELIGOUS USES	245,177	0.9

Subtotal Of Contributions: $245,177 Percent to Grand Total: 0.9%

Eligible Code	Description	Check Amount	% of Grand Total
C-10	AGRICULTURE	85,412	0.3
C-20	THE ARTS	1,787,549	6.4
C-25	EDUCATIONAL PUBLIC SERVICES	932,663	3.3
C-30	SAFETY	40,902	0.1
C-40	4-H ACTIVITIES	70,545	0.3
C-50	EDUCATIONAL INSTITUTIONS AND A	1,254,178	4.5
C-75	PERSERVATION OF CULTURAL HERIT	394,964	1.4
C-80	SCHOLARSHIPS	1,621,007	5.8
C-90	VOCATIONAL WORKSHOPS	5,018	0.0
C-99	OTHER	54,132	0.2

Subtotal Of Contributions: $6,246,370 Percent to Grand Total: 22.4%

Eligible Code	Description	Check Amount	% of Grand Total
D-10	CAMP GRASSICK	14,960	0.1
D-20	FRATERNAL FOUNDATIONS	115,802	0.4
D-30	LEGION BASEBALL	276,328	1.0
D-40	VETERAN'S CEMETARY	42,903	0.2
D-50	DISABLED OR INJURED VETERANS A	130,950	0.5
D-60	MILITARY FAMILY SUPPORT	46,823	0.2
D-70	VETERANS FACILITY IMPROVEMENTS	227,921	0.8
D-99	OTHER	67,932	0.2

Subtotal Of Contributions: $923,619 Percent to Grand Total: 3.3%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
E-10	SCOUTING ACTIVITIES AND BOYS O	84,443	0.3
E-30	COMMUNITY BANDS, COLOR AND HONOR GUARDS, FLAG	325,800	1.2
E-99	OTHER	30,769	0.1

Subtotal Of Contributions: $441,012 Percent to Grand Total: 1.6%

Eligible Code	Description	Check Amount	% of Grand Total
F-10	ERECTION OR MAINTENANCE OF PUB	661,469	2.4

Subtotal Of Contributions: $661,469 Percent to Grand Total: 2.4%

Eligible Code	Description	Check Amount	% of Grand Total
G-10	COMMUNITY EMERGENCY SERVICES	2,278,143	8.2
G-15	DISBURSEMENTS DIRECTLY TO A CI	431,632	1.5
G-25	IMPROVEMENT OF PUBLIC AREAS	270,049	1.0
G-50	PARKS AND RECREATION	871,594	3.1
G-60	LAW ENFORCEMENT	85,568	0.3
G-99	OTHER	4,224	0.0

Subtotal Of Contributions: $3,941,210 Percent to Grand Total: 14.1%

Eligible Code	Description	Check Amount	% of Grand Total
H-00	LOSS OF THE HOME VICTIMS	20,126	0.1

Subtotal Of Contributions: $20,126 Percent to Grand Total: 0.1%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
I-00	SUFFERERS OF SERIOUS DISABLING	774,925	2.8

Subtotal Of Contributions: $774,925 Percent to Grand Total: 2.8%

Eligible Code	Description	Check Amount	% of Grand Total
K-10	ECONOMIC DEVELOPMENT	476,685	1.7
K-30	TOURISM	1,043,163	3.7
K-65	COMMUNITY FACILITY IMPROVEMENTS	213,067	0.8
K-99	OTHER	587,899	2.1

Subtotal Of Contributions: $2,320,814 Percent to Grand Total: 8.3%

Eligible Code	Description	Check Amount	% of Grand Total
V-00	VOIDED CHECK	0	0.0

Subtotal Of Contributions: $0 Percent to Grand Total: 0.0%

Total Of All Contributions: $27,947,745

--- End of Report ---

2021 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Fort Totten Room, State Capitol

HB 1212
3/16/2021

A BILL for an Act to create and enact a new section to chapter 53-06.1 of the North Dakota Century Code, relating to the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a continuing appropriation; to provide for a transfer; and to provide an effective date.

Chair Bell calls the meeting to order. Chair Bell, Vice Chair Kannianen, Senators Meyer, Patten, Piepkorn, J. Roers, Weber are present. [11:57]

Discussion Topics:

- Moratorium on e-pull tab devices
- Study
- Emergency clause

Senator Kannianen [11:58] offers and moved amendment LC 21.0479.02001 #9588.
Senator Patten seconds the motion

Senators	Vote
Senator Jessica Bell	N
Senator Jordan Kannianen	Y
Senator Scott Meyer	N
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Jim Roers	N
Senator Mark Weber	N

Motion fails 3-4-0

Senator Meyer [12:08] moved DO PASS and re-refer to Appropriations
Senator Kannianen seconds the motion

Senators	Vote
Senator Jessica Bell	Y
Senator Jordan Kannianen	Y
Senator Scott Meyer	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Jim Roers	N
Senator Mark Weber	Y

Motion carries 6-1-0
Senator Meyer carries

Chair Bell adjourns the meeting. [12:10]

Joel Crane, Committee Clerk

21.0479.02001

Sixty-seventh
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1212

Introduced by

Representatives Dockter, Headland, Mitskog

Senators Meyer, Bell

A BILL for an Act to create and enact ~~a~~two new ~~section~~sections to chapter 53-06.1 of the North Dakota Century Code, relating to a moratorium on licensing additional electronic pull tab devices and the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a legislative management study; to provide a continuing appropriation; to provide for a transfer; ~~and~~ to provide an effective date; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Moratorium and compliance.

1. Notwithstanding any other provision of law, the attorney general may not permit the operation of electronic pull tab devices in excess of the number of electronic pull tab devices operating in the state as of the effective date of this Act.
2. This section does not preclude the transfer of existing electronic pull tab device licenses from one permitted facility to another permitted facility or the replacement of existing electronic pull tab devices with new devices.
3. The attorney general shall require all electronic pull tab devices be operated in accordance with title 31 of the United States Code in regard to reporting requirements and verify compliance no less than annually.

SECTION 2. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Charitable gaming operating fund - Attorney general - State treasurer - Continuing appropriation - Allocations - Transfer to the general fund.

1. There is created in the state treasury the charitable gaming operating fund. The fund consists of all gaming taxes, monetary fines, and interest and penalties collected under this chapter.
2. Excluding moneys in the charitable gaming operating fund appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows:
   a. Ten thousand dollars to the gambling disorder prevention and treatment fund.
   b. Five percent of the total moneys deposited in the charitable gaming operating fund to cities and counties in proportion to the taxes collected under section 53-06.1-12 from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.
3. On or before June thirtieth of each odd-numbered year, the attorney general shall certify to the state treasurer the amount of accumulated funds in the charitable gaming operating fund which exceed the amount appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming for the subsequent biennium. The state treasurer shall transfer the certified amount from the charitable gaming operating fund to the general fund prior to the end of each biennium.

SECTION 3. AMENDMENT. Section 53-06.1-12 of the North Dakota Century Code is amended and reenacted as follows:

53-06.1-12. Gaming tax - Deposits ~~and allocations~~.

1. A gaming tax is imposed on the total adjusted gross proceeds received by a licensed organization in a quarter and it must be computed and paid to the attorney general on a quarterly basis on the tax return. This tax must be paid from adjusted gross

proceeds and is not part of the allowable expenses. For a licensed organization with adjusted gross proceeds:

a. Not exceeding ~~one million five hundred~~fifty thousand dollars the tax is one percent of adjusted gross proceeds.

b. Exceeding ~~one million five hundred~~fifty thousand dollars the tax is ~~fifteen thousand~~five hundred dollars plus ~~two and twenty-five hundredths~~twelve percent of adjusted gross proceeds exceeding ~~one million five hundred~~fifty thousand dollars.

2. The tax must be paid to the attorney general at the time tax returns are filed.

3. ~~Except as provided in subsection 4, the~~The attorney general shall deposit gaming taxes, monetary fines, and interest and penalties collected in the ~~general~~charitable gaming operating fund ~~in the state treasury~~.

~~4. The attorney general shall deposit seven percent of the total taxes, less refunds, collected under this section into a gaming tax allocation fund. Pursuant to legislative appropriation, moneys in the fund must be distributed quarterly to cities and counties in proportion to the taxes collected under this section from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation under this subsection is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.~~

SECTION 4. LEGISLATIVE MANAGEMENT STUDY - EXPANSION OF ELECTRONIC PULL TAB DEVICES. During the 2021-22 interim, the legislative management shall consider studying the expansion of electronic pull tab devices in the state. The study must include a review of the nature and scope of electronic pull tab games, the impact of electronic pull tab devices on charitable and tribal gaming revenues, the impact of electronic pull tab devices on gambling addiction, and a cost-benefit analysis of the increase in charitable gaming revenues and impacted services as a result of the expanded operation electronic pull tab devices. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

SECTION 5. EFFECTIVE DATE. Section 2 of this Act is effective for taxable events occurring after June 30, 2021.

SECTION 6. EMERGENCY. Section 1 of this Act is declared to be an emergency measure.

REPORT OF STANDING COMMITTEE

HB 1212, as engrossed: Finance and Taxation Committee (Sen. Bell, Chairman) recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1212 was rereferred to the **Appropriations Committee**.

21.0479.02001

Sixty-seventh
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

#9588

ENGROSSED HOUSE BILL NO. 1212

Introduced by

Representatives Dockter, Headland, Mitskog

Senators Meyer, Bell

A BILL for an Act to create and enact ~~a~~two new ~~section~~sections to chapter 53-06.1 of the North Dakota Century Code, relating to a moratorium on licensing additional electronic pull tab devices and the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a legislative management study; to provide a continuing appropriation; to provide for a transfer; ~~and~~ to provide an effective date; and to declare an emergency.

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2. This section does not preclude the transfer of existing electronic pull tab device licenses from one permitted facility to another permitted facility or the replacement of existing electronic pull tab devices with new devices.
3. The attorney general shall require all electronic pull tab devices be operated in accordance with title 31 of the United States Code in regard to reporting requirements and verify compliance no less than annually.

SECTION 2. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Charitable gaming operating fund - Attorney general - State treasurer - Continuing appropriation - Allocations - Transfer to the general fund.

1. There is created in the state treasury the charitable gaming operating fund. The fund consists of all gaming taxes, monetary fines, and interest and penalties collected under this chapter.
2. Excluding moneys in the charitable gaming operating fund appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows:
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3. On or before June thirtieth of each odd-numbered year, the attorney general shall certify to the state treasurer the amount of accumulated funds in the charitable gaming operating fund which exceed the amount appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming for the subsequent biennium. The state treasurer shall transfer the certified amount from the charitable gaming operating fund to the general fund prior to the end of each biennium.

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2021 SENATE APPROPRIATIONS

HB 1212

2021 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1212
3/25/2021
Senate Appropriations Committee

Relating to the creation of a charitable gaming operating fund.

Senator Krebsbach opened the hearing at 2:46 PM.

Senators present: **Holmberg, Krebsbach, Wanzek, Bekkedahl, Poolman, Erbele, Dever, Oehlke, Rust, Davison, Hogue, Sorvaag, Mathern, and Heckaman.**

Discussion Topics:

- Profit from Tax goes to Charities
- Lutheran Social Services
- Gamble Responsibly organization

Rep. Jason Dockter, District 7, introduced the bill.

Lisa Vig, Licensed Addiction Counselor, Bismarck, ND – testified in favor.

Todd Kranda, Lawyer, Kelsch, Ruff, Kranda, Nagle & Ludwig Law Firm - testified in favor and submitted testimony #10735.

Adam Mathiak, Legislative Council – testified neutrally.

Bill Kalanek, Charitable Gaming Association – testified in favor.

Dave Weiler, Attorney - testified in favor.

Deb McDaniel, Director, ND Attorney General's Office – testified in favor.

Additional written testimony: #10431, #10631, #10632.

Senator Holmberg closed the hearing at 3:51 PM.

Rose Laning, Committee Clerk

Testimony in Support of
Engrossed HB 1212
Senate Appropriations Committee
(March 25, 2021)

Chairman Holmberg and Senate Appropriations Committee Members:

My name is Rick Stenseth, a Gaming Manager for two organizations in Fargo that both conduct charitable gaming (Northern Prairie Performing Arts (NPPA) aka Fargo-Moorhead Community Theatre & Team Makers Club). I am submitting this testimony through our NPPA lobbyist, Todd D. Kranda, an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan.

I have been involved in the charitable gaming industry since 1983 and have worked with the Legislature on many different gaming topics in past sessions.

HB 1212 is an extremely important bill for all charitable organizations that conduct gaming in North Dakota. HB 1212 provides significant and immediate positive impact to the programs and services supported by gaming. Many of the charitable organizations rely on gaming revenues as the largest fund raising tool they have to meet their organizations purpose and mission. Attached for your reference is a copy of the **2020 Summary of Eligible Use Contributions** report compiled by the Attorney General Gaming Division showing the various charitable purposes benefitting from charitable gaming in North Dakota.

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and administration of the laws and rules necessary to ensure the integrity of our charitable gaming industry through the Attorney General's Office and local jurisdictions should be covered by the tax revenues from the industry. Additionally, the charitable gaming industry has always recognized that there is a need to make help available for those who may have a problem with their gaming activity. HB 1212 addresses both of these items.

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There are costs involved which need to be covered by the taxes collected on gaming. Total taxes collected should be calculated to maintain the activity in the Gaming Division of the Attorney General's office that is responsibility to police the industry by enforcing regulations and administering laws and rules governing it.

Designating those tax dollars to a fund which is directed by statute to be used for

the purposes defined ensures that regardless of any other budgeting concerns, the AG will be able to maintain the necessary funds to meet their responsibilities.

HB 1212 establishes a fair and adequate tax that will be used for appropriate oversight expenses, while helping each organization significantly. Your Senate Finance and Taxation committee supported HB 1212 with a Do Pass recommendation by a vote of 6-1. Accordingly, I would strongly encourage and ask for a **Do Pass** recommendation and appreciate your support for the passage of **HB 1212**.

Thank you for your time and I am available for any questions. Rick Stenseth

User: PWONDRA

North Dakota Office of Attorney General
Summary of Eligible Use Contributions

01/26/21 10:04:39

Fiscal Year: 2020
Quarter: All

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A-46	ADULT ACTIVITIES	212,605	0.8
A-47	HEAD INJURIES	2,350	0.0
A-58	HOME ON THE RANGE	52,029	0.2
A-61	MARCH OF DIMES	300	0.0
A-64	MEALS ON WHEELS	13,900	0.0
A-65	MEDICAL FACILITIES NON-PROFIT	155,524	0.6
A-67	MEMORIAL FUNDS	30,968	0.1
A-70	NURSING HOMES NON-PROFIT	81,399	0.3
A-75	DAYCARE FACILITIES NON-PROFIT	62,298	0.2
A-80	RONALD MCDONALD HOUSE	15,805	0.1
A-82	SALVATION ARMY	18,650	0.1
A-88	SPECIAL OLYMPICS	51,758	0.2
A-90	DISASTER RELIEF ORGANIZATIONS	4,450	0.0
A-91	UNITED FUND/UNITED WAY	137,900	0.5
A-94	YMCA/YWCA	9,500	0.0
A-97	VOLUNTEER SERVICES	9,200	0.0
A-98	GAMBLING ADDICTION	1,000	0.0
A-99	OTHER	228,292	0.8

Subtotal Of Contributions: $12,373,023 Percent to Grand Total: 44.3%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
B-10	RELIGOUS USES	245,177	0.9

Subtotal Of Contributions: $245,177 Percent to Grand Total: 0.9%

Eligible Code	Description	Check Amount	% of Grand Total
C-10	AGRICULTURE	85,412	0.3
C-20	THE ARTS	1,787,549	6.4
C-25	EDUCATIONAL PUBLIC SERVICES	932,663	3.3
C-30	SAFETY	40,902	0.1
C-40	4-H ACTIVITIES	70,545	0.3
C-50	EDUCATIONAL INSTITUTIONS AND A	1,254,178	4.5
C-75	PERSERVATION OF CULTURAL HERIT	394,964	1.4
C-80	SCHOLARSHIPS	1,621,007	5.8
C-90	VOCATIONAL WORKSHOPS	5,018	0.0
C-99	OTHER	54,132	0.2

Subtotal Of Contributions: $6,246,370 Percent to Grand Total: 22.4%

Eligible Code	Description	Check Amount	% of Grand Total
D-10	CAMP GRASSICK	14,960	0.1
D-20	FRATERNAL FOUNDATIONS	115,802	0.4
D-30	LEGION BASEBALL	276,328	1.0
D-40	VETERAN'S CEMETARY	42,903	0.2
D-50	DISABLED OR INJURED VETERANS A	130,950	0.5
D-60	MILITARY FAMILY SUPPORT	46,823	0.2
D-70	VETERANS FACILITY IMPROVEMENTS	227,921	0.8
D-99	OTHER	67,932	0.2

Subtotal Of Contributions: $923,619 Percent to Grand Total: 3.3%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
E-10	SCOUTING ACTIVITIES AND BOYS O	84,443	0.3
E-30	COMMUNITY BANDS, COLOR AND HONOR GUARDS, FLAG	325,800	1.2
E-99	OTHER	30,769	0.1

Subtotal Of Contributions: $441,012 Percent to Grand Total: 1.6%

Eligible Code	Description	Check Amount	% of Grand Total
F-10	ERECTION OR MAINTENANCE OF PUB	661,469	2.4

Subtotal Of Contributions: $661,469 Percent to Grand Total: 2.4%

Eligible Code	Description	Check Amount	% of Grand Total
G-10	COMMUNITY EMERGENCY SERVICES	2,278,143	8.2
G-15	DISBURSEMENTS DIRECTLY TO A CI	431,632	1.5
G-25	IMPROVEMENT OF PUBLIC AREAS	270,049	1.0
G-50	PARKS AND RECREATION	871,594	3.1
G-60	LAW ENFORCEMENT	85,568	0.3
G-99	OTHER	4,224	0.0

Subtotal Of Contributions: $3,941,210 Percent to Grand Total: 14.1%

Eligible Code	Description	Check Amount	% of Grand Total
H-00	LOSS OF THE HOME VICTIMS	20,126	0.1

Subtotal Of Contributions: $20,126 Percent to Grand Total: 0.1%

Fiscal Year: 2020
Quarter: All

Eligible Code	Description	Check Amount	% of Grand Total
I-00	SUFFERERS OF SERIOUS DISABLING	774,925	2.8

Subtotal Of Contributions: $774,925 Percent to Grand Total: 2.8%

Eligible Code	Description	Check Amount	% of Grand Total
K-10	ECONOMIC DEVELOPMENT	476,685	1.7
K-30	TOURISM	1,043,163	3.7
K-65	COMMUNITY FACILITY IMPROVEMENTS	213,067	0.8
K-99	OTHER	587,899	2.1

Subtotal Of Contributions: $2,320,814 Percent to Grand Total: 8.3%

Eligible Code	Description	Check Amount	% of Grand Total
V-00	VOIDED CHECK	0	0.0

Subtotal Of Contributions: $0 Percent to Grand Total: 0.0%

Total Of All Contributions: $27,947,745

--- End of Report ---

NORTH DAKOTA GAMING ALLIANCE

HB 1212 Senate Appropriations- March 25, 2021

Chairman Holmberg and members of the Senate Appropriations Committee,

My name is Mike Motschenbacher, and I am the Executive Director of the ND Gaming Alliance. Our membership consists of Charities, Fraternal Organizations, Veterans Organizations, Hospitality Venues, Distributors, and Manufacturers. Today I am writing in support of HB 1212.

I have emailed you copies of the two forms that I have found in relation to previous court cases that have been decided in other states. The first is a Supreme Court of SD decision in which it was deemed to be illegal to tax "credits" or "free play". The second is a New Mexico District Court decision which deemed the same. In addition to these two court cases, I have done extensive research on this, and to my knowledge, North Dakota is the only state in the nation that taxes free play. It is simply not legal to do so, and we would urge the Senate to follow the lead of the House and pass HB 1212 in its current form.

Secondly, the fiscal note. I have spoken with many legislators regarding the size of the fiscal note. I understand it appears to be a big number, but it needs to be realized that this was never intended to be a cash windfall for the state. This money that the state "benefited" from over the past biennium should be considered a "bonus" that was able to be used over the past biennium but cannot be depended on moving forward. This is the charities money that they should be able to distribute to help the needs of the communities which they represent. This is simply not the states money.

Third, the ND Gaming Alliance has taken the position that we are opposed to any additional amendments that may be brought forth to this bill. We, along with others that are testifying in support of this bill, believe that we have accepted amendments that were made to this bill in the house and have done our due diligence in negotiating to bring an acceptable bill to the Senate. The original bill had the tax structure set at 2% under 50K net proceeds and 4% over 50K net proceeds. In negotiations, we accepted 1% under 50K and 12% over 50K net proceeds. Although this is not what we were looking for in the original bill, we believe it is acceptable at this time and would like to see it passed in this current form.

Finally, the charitable gaming industry over the past two year has felt the pinch of the over-taxation that was set in place by administrative rules. In 2019, HB 1533 would have fixed this issue, but it failed. As a result, the 1% tax on gross income was set by the Attorney General's office, not by the legislature. Here is the legislatures' chance to pass this bill you see in front of you to better serve the communities which benefit from charitable gaming.

The ND Gaming Alliance appreciates us having the opportunity to speak today and encourages a DO PASS recommendation on HB 1212. With that, I would be happy to entertaiin any questions.

Mike Motschenbacher

Executive Director
ND Gaming Alliance
701 471 9014
Ndgalliance@gmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ISLETA *et al.*,

Plaintiffs,

vs. Civ. No. 17-654 KG/KK

MICHELLE LUJAN GRISHAM[1] *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on: (1) Defendants' Motion for Summary Judgment on the Issue of Arbitrability (Doc. 55) ("Defendants' Summary Judgment Motion"), filed January 4, 2018; (2) Plaintiffs-in-Intervention Santa Ana, Santa Clara and San Felipe's and Plaintiff Tesuque's Motion for Summary Judgment (Doc. 67), and Plaintiffs Pueblo of Isleta's and Pueblo of Sandia's Motion for Summary Judgment and Supporting Authorities (Doc. 68) (collectively, "Pueblos' Summary Judgment Motions"), both filed April 10, 2018; (3) Defendants' Motion to Compel Discovery and for Sanctions (Doc. 81) ("Defendants' Motion to Compel"), filed June 8, 2018; (4) Plaintiffs' and Plaintiffs-in-Intervention's Consolidated Motion for Protective Order to Quash Defendants' Rule 30(b)(6) Deposition Notices (Doc. 84) ("Pueblos' Motion for Protective Order"), filed June 20, 2018; and (5) Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) ("Defendants' Motion for Settlement Conference"), filed October 3, 2018.[2]

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Governor Lujan Grisham has been automatically substituted for former Governor Susana Martinez.

[2] Defendants' Summary Judgment Motion and the Pueblos' Summary Judgment Motions are before the Court pursuant to the Notice, Consent, and Reference of Dispositive Motions to a Magistrate Judge filed in this case on October 16, 2018. (Doc. 105.) The remaining motions, which are nondispositive, are before the Court pursuant to Local Rule of Civil Procedure 73.1(a). D.N.M.LR-Civ. 73.1(a); *see also* Fed. R. Civ. P. 72(a).

Having reviewed the parties' submissions, the record, and the relevant law, and for the reasons set forth below, the Court finds that: (1) Defendants' Summary Judgment Motion should be DENIED; (2) the Pueblos' Summary Judgment Motions should be GRANTED; and, (3) Defendants' Motion to Compel, the Pueblos' Motion for Protective Order, and Defendants' Motion for Settlement Conference should be DENIED AS MOOT.

I. INTRODUCTION

Plaintiffs the Pueblos of Isleta, Sandia, and Tesuque, and Plaintiffs-in-Intervention the Pueblos of Santa Ana, Santa Clara, and San Felipe (collectively, "the Pueblos"), are six (6) federally recognized Indian tribes that operate casinos in New Mexico pursuant to identical gaming compacts with the State of New Mexico ("the State"). (Doc. 67-1 at 6; Doc. 68 at 10; Doc. 99 at 6-7.) Defendants are the State Governor, the State Gaming Representative, and the Chair and members of the State Gaming Control Board ("NMGCB") in their official capacities. (Doc. 67-1 at 6-7; Doc. 68 at 10; Doc. 99 at 6-7.) The Pueblos and the State entered into gaming compacts in 2007 ("2007 Compacts"), and again in 2015 and 2016 ("2015 Compacts"). *Inter alia*, the compacts require the Pueblos to make quarterly revenue sharing payments to the State, in exchange for the Pueblos' nearly exclusive right to conduct certain kinds of gaming in New Mexico. (Doc. 67-3 at 20; Doc. 68-3 at 27.)

In 2017, Defendants sent the Pueblos notices of non-compliance and notices to cease conduct, asserting that the Pueblos had miscalculated their revenue sharing obligations under the 2007 Compacts beginning as early as April 2011. (*See, e.g.*, Docs. 1-8, 1-9, 1-10.) Specifically, Defendants claimed that, in calculating their revenue sharing payments, the Pueblos had improperly excluded the face value of free play and deducted the value of prizes won by patrons as a result of

free play wagers from their Class III gaming machines' "Net Win."[3] (*Id.*) Pursuant to the 2015 Compacts, which preserved Defendants' claims, Defendants instructed the Pueblos to make additional revenue sharing payments to the State under the 2007 Compacts. (*Id.*)

The Pueblos of Isleta, Sandia, and Tesuque filed this civil action on June 19, 2017 in response to Defendants' notices. (Doc. 1.) The Pueblos of Santa Ana and Santa Clara intervened on June 29, 2017, and the Pueblo of San Felipe intervened on August 31, 2017. (Docs. 11, 36.) In their complaints, the Pueblos ask the Court for a judgment declaring that: (1) Defendants' claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts[4] violate federal law, and the 2015 Compacts are therefore invalid and ineffective to preserve Defendants' unlawful claims, (Doc. 1 at 32-33); (2) neither the Pueblos' claims in this lawsuit nor Defendants' claims for additional revenue sharing payments are subject to arbitration under the 2015 Compacts, (*id.* at 33); and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the Pueblos. (Doc. 11 at 12; Doc. 36 at 12.) The Pueblos further ask the Court to enjoin Defendants from: (1) continuing to violate federal law by seeking to impose a tax, fee, charge, or other assessment on the Pueblos in the guise of asserting claims for additional revenue sharing payments under the 2007 and 2015

[3] As used in this Memorandum Opinion and Order, the term "free play" refers to play on a Class III gaming machine initiated by points or credits that the casino provided to the patron without consideration, and which have no cash redemption value. (*Cf.* Doc. 1-3 at 6.) "Free play" includes but is not limited to "point play," *i.e.*, play on a Class III Gaming Machine initiated by points earned or accrued by a patron through previous gaming machine play, players' clubs, or any other method, and which have no cash redemption value. (*Cf. id.*) "Free play" as used in this Memorandum Opinion and Order excludes play initiated by points or credits that can be redeemed for cash or merchandise.

[4] As used in this Memorandum Opinion and Order, the phrase "Defendants' claims for additional revenue sharing payments" refers specifically to Defendants' claims pursuant to the 2015 Compacts that the Pueblos owe the State additional revenue sharing payments under the 2007 Compacts because they did not include the face value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win from 2011 to 2016. Any other claims Defendants may have for additional revenue sharing payments are not before the Court in this civil action.

Compacts, (Doc. 1 at 34); (2) continuing their efforts to arbitrate the dispute over their claims that free play must be treated as revenue under the 2015 or 2007 Compacts, (*id.*); and, (3) taking any other action to attempt to enforce their unlawful claims against the Pueblos. (Doc. 11 at 12; Doc. 36 at 12); *see Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) ("[U]nder *Ex Parte Young*, [209 U.S. 123 (1908)], a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.").

II. FACTS[5]

The Pueblos and the State entered into the 2007 Compacts pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. (Doc. 55 at 3; Doc. 67-1 at 6; Doc. 68 at 12; Doc. 99 at 6-7, 10). Additionally, the State executed the 2007 Compacts pursuant to the New Mexico Compact Negotiation Act, N.M. Stat. Ann. §§ 11-13A-1 *et seq.*, which provides that the Governor will approve and sign compacts "identical to a compact . . . previously approved by the legislature except for the name of the compacting tribe[.]" N.M. Stat. Ann. § 11-13A-4(J); (Doc. 68 at 12 n.6). Thus, the terms of each of the 2007 Compacts are identical except for the Pueblos' names. (Doc. 55 at 3; Doc. 67-1 at 7; Doc. 68 at 12 n.6; Doc. 99 at 6-7.)

The 2007 Compacts authorized the Pueblos to conduct "any or all forms of Class III Gaming" on Indian Lands in New Mexico and to establish the "betting and pot limits, applicable to such gaming." (Doc. 67-3 at 8; Doc. 68 at 7, 12; Doc. 68-2; Doc. 99 at 7.) Authorized forms of Class III gaming included gaming machines played "upon insertion of a coin, token or similar

[5] Unless otherwise noted, the Court has determined that the following facts are undisputed based on its review of the parties' briefs, admissible evidence in the record, and the relevant law. By separate order, the Court has excluded portions of the Affidavit of Craig S. Telle, JD, CFE, attached to Defendants' response to the Pueblos' Summary Judgment Motions. (Doc. 99-12.)

object, or upon payment of any consideration in any manner." (Doc. 67-3 at 3-4; Doc. 68 at 12-13; Doc. 99 at 7.)

Subsection 4(C) of the 2007 Compacts provided in pertinent part:

> Audit and Financial Statements. The Tribal Gaming Agency shall require all books and records relating to Class III Gaming to be maintained in accordance with generally accepted accounting principles. . . . Not less than annually, the Tribal Gaming Agency shall require an audit and a certified financial statement covering all financial activities of the Gaming Enterprise, including written verification of the accuracy of the quarterly Net Win calculation, by an independent certified public accountant licensed by the State. The financial statement shall be prepared in accordance with generally accepted accounting principles and shall specify the total amount wagered in Class III Gaming on all Gaming Machines at the Tribe's Gaming Facility for purposes of calculating "Net Win" under Section 11 of this Compact using the format specified therein.

(Doc. 1-2 at 10; Doc. 68-2 at 10; Doc. 67-3 at 9; Doc. 99 at 6-7.)[6]

Section 7 of the 2007 Compacts pertaining to "Dispute Resolution" provided in relevant part:

> A. In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:
>
> > 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance[.]
> >
> > 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(1) of this section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or

[6] Attached to numerous pleadings on the docket in this case are true and correct copies of the generic form of the 2007 Compacts, (Doc. 1-2; Doc. 67-2 at 1 ¶ 2; Doc. 67-3; Doc. 68-2), and the 2015 Compacts. (Doc. 1-3; Doc. 68-3; Doc. 68-1 at 2 ¶ 3.) Defendants do not dispute the authenticity and veracity of these documents. (Doc. 99 at 6-7.) To avoid confusion, the Court will hereafter cite only to the 2007 Compact attached as Exhibit A (Doc. 67-3) to the Declaration of Richard Hughes (Doc. 67-2) in support of the Motion for Summary Judgment of the Pueblos of Santa Ana, Santa Clara, San Felipe, and Tesuque. (Doc 67.) The Court will likewise cite only to the 2015 Compact attached as Exhibit 2 (Doc. 68-3) to the Declaration of David C. Mielke (Doc. 68-1) in support of the Motion for Summary Judgment of the Pueblos of Isleta and Sandia. (Doc. 68.)

> activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the parties agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.
>
> 3. The arbitrators shall be attorneys who are licensed members in good standing of the State Bar of New Mexico or of the bar of another state. . . . The arbitrators . . . shall permit the parties to engage in reasonable discovery, and shall establish other procedures to ensure a full, fair and expeditious hearing on the matters at issue. . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof.
>
> 4. All parties shall bear their own costs of arbitration and attorneys' fees.
>
> 5. The results of arbitration shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction. For purposes of any such action, the State and the Tribe acknowledge that any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe.
>
> B. Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Section shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Section shall be deemed a waiver of the State's sovereign immunity.

(Doc. 67-3 at 15-16.)

Section 11 of the 2007 Compacts, entitled "Revenue Sharing," provided in pertinent part:

> A. Consideration. The Tribe shall pay to the State a portion of its Class III Gaming revenues identified in and under procedures of this Section, in return for which the State agrees that the Tribe has the exclusive right within the State to conduct all types of Class III Gaming described in this Compact, with the sole exception of the use of Gaming Machines, which the State may permit on a limited basis for racetracks and for veterans' and fraternal organizations . . . .

B. Revenue to State. The parties agree that . . . the Tribe shall make the quarterly payments provided for in Paragraph C of this Section. Each payment shall be made to the State Treasurer for deposit into the General Fund of the State.

C. Calculation of Payment Amounts.

1. As used in this Compact, "Net Win" means the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less:

(a) the amount paid out in prizes to winning patrons, including the cost to the Tribe of noncash prizes, won on Gaming Machines. The phrase "won on Gaming Machines" means the patron has made a monetary wager, and as a result of that wager, has won a prize of any value. Any rewards, awards or prizes, in any form, received by or awarded to a patron under any form of a players' club program (however denominated) or as a result of patron-related activities, are not deductible. The value of any complimentaries given to patrons, in any form, are not deductible;

(b) the amount paid to the State by the Tribe under the provisions of Section 4(E)(6) of this Compact [representing the State's regulatory costs related to the Tribe's gaming activities]; and

(c) the sum of two hundred seventy-five thousand dollars ($275,000) per year as an amount representing tribal regulatory costs, which amount shall increase by three percent (3%) each year beginning on the first day of January occurring after the Compact has been in effect for at least twelve months.

2. The Tribe shall pay the State a percentage of its Net Win [ranging from 3 per cent to 10.75 per cent depending on the date and the amount of the Tribe's Annual Net Win] . . . .

3. . . . Any payment or any portion thereof that is not made within ten (10) days of the due date shall accrue interest at the rate of ten percent (10%) per annum, from the original due date until paid. . . .

D. Limitations.

> 1. The Tribe's obligation to make the payments provided for in Paragraphs B and C of this Section shall apply and continue only so long as this Compact remains in effect; and provided that that obligation shall terminate altogether in the event the State:
>
> > a) passes, amends, or repeals any law, or takes any other action, that would directly or indirectly attempt to restrict, or has the effect of restricting, the scope or extent of Indian gaming; . . .
> >
> > d) licenses, permits or otherwise allows any non-Indian person or entity to engage in any other form of Class III gaming other than a state-sponsored lottery, pari-mutuel betting on horse racing and bicycle racing, operation of Gaming Machines, and limited fundraising by non-profit organizations, as set forth in subsection (D)(2) . . . .

(Doc. 67-3 at 20-22.)

Section 11 of the 2007 Compacts differed from Section 11 of the previous gaming compacts between the State and the Pueblos ("2001 Compacts"). (Doc. 99 at 9-10; Doc. 110 at 19-21; *see* Doc. 99-8.) Subsection 11(C) of the 2001 Compacts provided:

> C. Calculation of Payment Amounts.
>
> 1. As used in this Compact, "Net Win" means the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less:
>
> > (a) the amount paid out in prizes, including the cost to the Tribe of noncash prizes, won on Gaming Machines;
> >
> > (b) the amount paid to the State by the Tribe under the provisions of Section 4(E)(5) of this Compact; and
> >
> > (c) the sum of two hundred seventy-five thousand dollars ($275,000) per year as an amount representing tribal regulatory costs, which amount shall increase by three percent (3%) each year beginning on the first day of January occurring after the Compact has been in effect for at least twelve months.

(Doc. 99-8 at 20-21.) The State and the Pueblos negotiated the changes from the 2001 Compacts to the 2007 Compacts, including the changes to Subsection 11(C). (Doc. 99 at 10-11; Doc. 99-7;

Doc. 110 at 20-21.) The United States Secretary of the Interior ("the Secretary") approved the 2007 Compacts on July 5, 2007. (Doc. 55 at 3; Doc. 67-1 at 6; Doc. 68 at 12; Doc. 99 at 6-7); 72 Fed. Reg. 36,717-01, 2007 WL 1922332 (Jul. 5, 2007).

In 2015 and 2016, the State and each of the Pueblos entered into the 2015 Compacts. Like the 2007 Compacts, all of the terms of the 2015 Compacts are identical to each other except for the Pueblos' names. (Doc. 55 at 4; Doc. 67-1 at 8; Doc. 68 at 15; Doc. 99 6-7.) Subsection 9(A) of the 2015 Compacts provides that the 2015 Compacts "fully supplant[] and replac[e]" the 2007 Compacts, except that under Subsection 9(B), the terms of the 2007 Compacts

> (including, without limitation, any limited waiver of sovereign immunity and jurisdictional waivers and consents set forth therein) shall survive to permit the resolution of payment disputes. Such disputes shall be resolved through the procedures set forth in Section 7 of this Compact. Failure to abide by the procedures set forth in Section 7 or failure to comply with an arbitrator's final decision with respect to the parties' obligations under a Predecessor Agreement constitutes a breach of this Compact. This survival provision is intended to provide for the reasonable resolution of past disputes without hindering a Tribe's ability to obtain a new compact.

(Doc. 68-3 at 26.)

Section 7 of the 2015 Compacts regarding "Dispute Resolution" provides in pertinent part:

> A. In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure within two (2) years from the date any alleged violation of this Compact is discovered or reasonably should have been discovered; or, if the State believes that, prior to the Effective Date of this Compact, the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment, the State may invoke the following procedure within two (2) years of the Effective Date of this Compact, as permitted in Section 9(B) of this Compact:
>
> > 1. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision believed to have been violated and shall specify the factual and legal basis for the allegation of noncompliance. The notice shall specifically identify the date, time and nature of the alleged noncompliance.

> 2. In the event an allegation by the complaining party is not resolved to the satisfaction of such party within twenty (20) days after service of the notice set forth in Paragraph A(1) of this Section, the complaining party may serve upon the other party a notice to cease conduct of the particular game(s) or activities alleged by the complaining party to be in noncompliance. Upon receipt of such notice, the responding party may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The responding party shall act upon one of the foregoing options within ten (10) days of receipt of notice from the complaining party, unless the State and the Tribe (hereinafter the "parties") agree to a longer period, but if the responding party takes neither action within such period the complaining party may invoke arbitration by written notice to the responding party within ten (10) days of the end of such period.
>
> 3. Unless the parties agree in writing to the appointment of a single arbitrator, or as otherwise provided below, the arbitration shall be conducted before a panel of three (3) arbitrators. . . . The arbitrators shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof. . . .
>
> 4. The results of arbitration shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction. For purposes of any such action, the State and the Tribe acknowledge that any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this Section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe.
>
> B. Nothing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Section shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Section shall be deemed a waiver of the State's sovereign immunity.

(Doc. 68-3 at 22-24.)

In addition, the Appendix to the 2015 Compacts provides that

> Free Play and Point Play do not increase Net Win, and amounts paid as a result of Free Play or Point Play reduce Net Win for purposes of the revenue sharing calculation in Section 11(C). However, any form of credits with any cash redemption value increase Net Win when wagered on Gaming Machines and

> amounts paid as a result of such wagers reduce Net Win for purposes of calculating revenue sharing.

(Doc. 68-3 at 37.)

> "Free Play" means play on a Class III Gaming Machine initiated by points or credits provided to patrons without monetary consideration, and which have no cash redemption value. . . .
>
> "Point Play" means play on a Class III Gaming Machine initiated by points earned or accrued by a player through previous Gaming Machine play, players' clubs, or any other method, and which have no cash redemption value.

(Doc. 68-3 at 6-7.)

The Secretary neither approved nor disapproved the 2015 Compacts within 45 days of their submission. (Doc. 55 at 4; Doc. 58 at 8; Doc. 67-1 at 8; Doc. 68 at 16-17; Doc. 99 at 6-7; *see, e.g.*, Doc. 1-7 at 2.) As such, the 2015 Compacts are "considered to have been approved by the Secretary, but only to the extent the [Compacts are] consistent with the provisions of [IGRA]."[7] 25 U.S.C. § 2710(d)(8)(C). The United States Department of the Interior ("DOI") sent letters to the Pueblos and the State explaining the Secretary's decision to neither approve nor disapprove the 2015 Compacts contemporaneously with the decision. (Doc. 1-4 at 5-6; Doc. 1-5 at 5-6; Doc. 1-6 at 4-5; Doc. 36-1 at 3-4; Doc. 58 at 8; Doc. 67-1 at 8; Doc. 67-4 at 3; Doc. 68 at 16; Doc. 99 at 6-7.) In one such letter, the DOI took the following position:

> [w]e wish to commend the Tribe and the State for the successful resolution of the free play and point play issue. Free play and point play will now be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We note, however, that Section 7 of the 2015 Compact reserves a two-year period from its effective date for the State to pursue

[7] The 2015 Compacts between the Pueblos and the State are considered to have been approved by the Secretary on the following dates: (a) Pueblo of Isleta, July 28, 2015, 80 Fed. Reg. 44,992-01, 2015 WL 4512708 (Jul. 28, 2015); (b) Pueblo of Tesuque, October 23, 2015, 80 Fed. Reg. 64,443-01, 2015 WL 6384819 (Oct. 23, 2015); (c) Pueblo of Santa Clara; October 23, 2015, 80 Fed. Reg. 64,443-02, 2015 WL 6384821 (Oct. 23, 2015); (d) Pueblo of Sandia, April 4, 2016, 81 Fed. Reg. 19,235-01, 2016 WL 1274294 (Apr. 4, 2016); (e) Pueblo of San Felipe, April 4, 2016, 81 FR 19,236-02, 2016 WL 1274296 (Apr. 4, 2016); and, (f) Pueblo of Santa Ana, December 30, 2016, 81 FR 96,477-01, 2016 WL 7481406 (Dec. 30, 2016).

> its assertion that the Tribe's net win – and thus their revenue sharing payments – should include wins and losses arising from free play or point play. In light of its conflict with industry standards and GAAP, it is our view that such an assertion by the State to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.[8]

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[8] The record includes the DOI's letters to five of the six Pueblos, in which the agency expressed its position in five slightly different ways. In his October 16, 2015 letter to the Governor of the Pueblo of Santa Clara, Assistant Secretary Kevin Washburn used the language quoted above. (Doc. 67-4 at 3.) In his July 21, 2015 letter to the Governor of the Pueblo of Isleta, Assistant Secretary Washburn stated:

> [w]e wish to commend the Tribe and the State for the successful resolution of the free play and point play issue. Free play and point play will now be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We note, however, that Section 7 of the 2015 Compact reserves a two-year period from its effective date for the State to pursue its assertion that the Tribe's net win – and thus their revenue sharing payments – should include wins and losses arising from free play or point play. In light of its conflict with industry standards and GAAP, it is our view that the State's unilateral determination to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 1-4 at 5.) In his October 16, 2015 letter to the Governor of the Pueblo of Tesuque, Assistant Secretary Washburn stated:

> [w]e are troubled by the assertion in the Tribe's response indicating that the State seeks additional revenue sharing payments stemming from free play under the 2007 Gaming Compact. Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue it assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. We are in agreement with the Tribe that its net win – and thus its revenue sharing payments – should include wins and losses arising from free play or point play and should result in a reduction in revenue sharing payments. In light of its conflict with industry standards and GAAP, it is our view that a contrary assertion by the State that includes such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 1-6 at 4.) In his March 29, 2016 letter to the Governor of the Pueblo of Sandia, Assistant Secretary Roberts stated:

> Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue its assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations.

(Doc. 1-5 at 5.) Finally, in his March 29, 2016 letter to the Governor of the Pueblo of San Felipe, Assistant Secretary Roberts stated:

> [w]e are troubled by the assertion in the Tribe's response indicating that the State seeks additional revenue sharing payments stemming from free play under the 2007 Gaming Compact. Section 7 of the 2015 Compact provides a two-year period from its effective date for the State to pursue it assertion that the Tribe's net win should not deduct wins and losses arising from free play or point play. Our position remains the same. Free play and point play must be treated according to industry

(Doc. 1-4 at 5; Doc. 1-5 at 5; Doc. 1-6 at 4; Doc. 36-1 at 3; Doc. 67-4 at 3.) In October 2017, the DOI reaffirmed its position regarding the State's claims for additional revenue sharing payments in reviewing the 2015 Compact between the State and the Pueblo of Pojoaque.[9] (Doc. 67-1 at 9; Doc. 67-5 at 2; Doc. 68 at 16; Doc. 99 at 6-7.)

On April 13, 2017, in her capacity as the Acting State Gaming Representative, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice of Noncompliance." (Doc. 55 at 4-5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17; Doc. 99 at 6-7; *see, e.g.*, Docs. 67-6, 68-22, and 68-23.) In these letters, Defendant Becker asserted that, beginning as early as April 2011, the Pueblos had underreported their Net Win and underpaid the State pursuant to the revenue sharing provisions of the 2007 Compacts, and that "prizes awarded as a result of the use of 'free play' are not deductible unless the face value of the 'free play' is included in the calculation of the total amount wagered." (Doc. 55 at 4-5; Doc. 67-1 at 9; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-6 at 1.) On this basis, Defendant Becker instructed the Pueblos to make additional revenue sharing payments to the

> standards and Generally Accepted Accounting Principles (GAAP) by excluding both from the definition of "net win," which forms the basis for revenue sharing calculations. In light of its conflict with industry standards and GAAP, it is our view that the State's unilateral determination to include such sums in revenue sharing calculations would constitute an impermissible tax on tribal gaming revenues in violation of IGRA.

(Doc. 36-1 at 3.)

[9] In his October 23, 2017 letter to the Governor of the Pueblo of Pojoaque, Deputy Assistant Secretary Clarkson repeated the language in Assistant Secretary Roberts' letter to the Governor of the Pueblo of Sandia quoted in footnote 8, *supra*, and added:

> [b]eyond being contrary to longstanding industry standards and GAAP, our view is that the State's position constitutes an attempt to impose a "tax, fee, charge or other assessment" in violation of IGRA because the customer is using a form of "house money" derived from the net win on which the tribes have already made revenue sharing payments to the State. *See* 25 U.S.C. § 2710(d)(4).

(*Compare* Doc. 1-5 at 5 *with* Doc. 67-5 at 2 & n. 6.)

State in specified amounts.[10] (Doc. 55 at 4-5; Doc. 67-1 at 9; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-6 at 1-2.) On May 19, 2017, the Pueblos sent responsive letters to Defendant Becker in which they objected to the State's requests for additional revenue sharing payments and asserted that the requests violated federal law and the terms of the 2007 Compacts. (Doc. 67-1 at 9; Doc. 67-7; Doc. 68 at 17; Doc. 68-18; Doc. 68-19; Doc. 99 at 6-7.)

On May 31, 2017, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice to Cease Conduct." (Doc. 55 at 5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17-18; Doc. 99 at 6-7; *see, e.g.*, Docs. 67-8, 68-24, and 68-25.) These letters instructed the Pueblos to either "pay all sums due or . . . invoke arbitration." (Doc. 55 at 5; Doc. 58 at 7; Doc. 67-1 at 9; Doc. 68 at 17-18; Doc. 99 at 6-7; *see, e.g.*, Doc. 67-8 at 2.) However, the Pueblos neither made the additional revenue sharing payments requested in Defendant Becker's letters nor invoked arbitration. (Doc. 55 at 5; Doc. 58 at 7.) Rather, on June 19, 2017, Plaintiffs filed this civil action; and, on June 29, 2017, Plaintiffs-in-Intervention the Pueblos of Santa Ana and Santa Clara intervened. (Docs. 1, 11.)

On June 30, 2017, Defendant Becker sent letters to each of the Pueblos with the subject line "Notice to Invoke Arbitration," in which she invoked arbitration pursuant to Section 7 of the 2015 Compacts on the State's behalf. (Doc. 58 at 8; Doc. 58-3 at 1; Doc. 62 at 5.) Plaintiff-in-Intervention the Pueblo of San Felipe then intervened in this action on August 31, 2017. (Doc. 36.)

The Pueblos authorize patrons to play on Class III gaming machines using electronic free play credits. (Doc. 11 at 5; Doc. 36 at 4-5; Doc. 68 at 13; Doc. 82-1 at 4 Doc. 99 at 10; Doc. 110 at 20.) There is no difference in the payouts, prizes, or jackpots awarded to patrons for each instance

[10] For example, Defendant Becker instructed the Pueblo of Isleta to pay an additional $10,360,149, the Pueblo of Sandia an additional $26,491,350, and the Pueblo of Tesuque an additional $3,252,873. (Doc. 1-8 at 3; Doc. 1-9 at 3; Doc. 1-10 at 3.)

of electronic free play versus cash play of the same face value. (Doc. 99 at 11; Doc. 110 at 21.) The Pueblos do not separately account for patrons' winnings from cash wagers and their winnings from electronic free play wagers. (Doc. 99 at 11; Doc. 110 at 21.) However, the Pueblos' slot accounting systems meter each instance of electronic free play and the face value of such free play, along with each instance of cash play, and this data is generated in daily reports. (Doc. 99 at 11; Doc. 110 at 21.)

For federally recognized Indian tribes, the Governmental Accounting Standards Board ("GASB") determines authoritative sources of generally accepted accounting principles ("GAAP"). (Doc. 67-10 at 5-6.) According to GASB statements, the American Institute of Certified Public Accountants' ("AICPA") 2011 Audit and Accounting Guide—Gaming ("Gaming Guide") was the authoritative source of GAAP for the Pueblos' gaming operations at the relevant times.[11] (*Id.* at 7-8; *see also* Doc. 99-12 at 3-4.)

The Gaming Guide provides that "monetary credits may be played [on slot machines] using bills, coins, tickets, electronic wagering credits recorded on cards, or by other means." (Doc. 67-11 at 3 & n.3.)[12] The Gaming Guide defines "free play" as "[f]ree wagering offered by a gaming entity to provide cashable benefits that increase the customer's odds of winning, changing the basic odds of the game." (Doc. 67-10 at 8; Doc. 68-4 at 11.) "In these circumstances the gaming entity is providing a chance for the customer to win a slot machine outcome for no cost (i.e. 'free')."

[11] In identifying and defining the applicable GAAP, the Court has considered the Declaration and Expert Report of the Pueblos' expert witness, Andrew Mintzer, C.P.A., in light of his professional education, training, and experience and the fact that Defendants have presented no evidence creating a genuine issue of material fact regarding his opinions or expertise. (*See* Doc. 67-10.) The Court has also considered the Affidavit of Craig S. Telle, JD, CFE (Doc. 99-12), to the extent it tends to identify and define the applicable GAAP, but not his opinions regarding ultimate legal issues, as explained in the Court's Order Granting in Part and Denying in Part Motion to Exclude Telle Affidavit filed contemporaneously with this Memorandum Opinion and Order. In addition, the Court has considered the portions of the Gaming Guide in the record.

[12] This provision is from the 2014 Gaming Guide; the record does not include a comparable provision from the 2011 Gaming Guide. (Doc. 67-11 at 1, 3.)

(Doc. 67-10 at 11.) The Gaming Guide defines a gaming entity's "net win" as "the difference between [the entity's] gaming wins and losses before deducting costs and expenses. Also called gross gaming revenue." (Doc. 68-4 at 12; Doc. 99-12 at 16.) Similarly, according to the Gaming Guide, "gross gaming revenue" is "the difference between gaming wins and losses from banked games before deducting incentives or adjusting for changes in progressive jackpot liability accruals."[13] (Doc. 67-10 at 10; Doc. 99-12 at 9.)

Under GAAP, the face value of free play is not included in net win. (Doc. 67-10 at 9-13.) The Gaming Guide states that

> the use of free play will not trigger accounting recognition because revenue is measured based on an aggregate daily (or shift) basis, rather than on a per bet or per customer basis. Because revenue is the net win from gaming activities, the use of the benefit has no effect on the reporting of net win or loss from gaming activities. For example, if a customer bets $5 of his or her own cash and wins $1, the gaming entity reports revenue of $4. If a customer bets $5 of his or her own cash, uses $5 of credits from his or her club card, and wins $1, the gaming entity reports revenue of $4. In each transaction, the net win is $4.

(Doc. 67-10 at 8; Doc. 68 at 12; Doc. 99 at 7.) GAAP "permit *no recognition* in revenue for free play . . . so that the gaming entities [do] not *overstate* gross gaming revenue." (Doc. 67-10 at 11 (emphases in original).)

In addition, under GAAP, the value of prizes won by patrons as a result of free play wagers must be deducted from net win.

> GAAP requires that the gross gaming revenue or net win is calculated using the cash value of what remains 'in' the machine – such as cash, coins, electronic money transfers, tickets with cash redemption values. Thus in complying with GAAP all cash/cash equivalent payouts must be considered without regard as to whether the value was paid as the result of a paid bet or a free play bet.

[13] Somewhat confusingly, "net win" is also called "gross gaming revenue," while "net gaming revenue" refers to "gross gaming revenues less cash sales incentives and the change in progressive jackpot liabilities and revenue from gaming related activities." (Doc. 99-12 at 15.) The proper calculation of net gaming revenue under GAAP is not at issue in this case.

(*Id.* at 12.) In contrast, the cost of "complimentaries" such as free food, drinks, and hotel rooms,[14] and the cost of loyalty program points redeemed for cash or merchandise are not deducted from net win under GAAP. (*Id.* at 13-14.)

The Gaming Guide's treatment of free play and prizes won by patrons as a result of free play wagers is consistent with "economic reality and the representational faithfulness required by GAAP." (*Id.* at 9-10, 16.) In general, "revenue" consists of "the economic resources provided by customers to the entity for the products or services the entity provides to the customers." (*Id.* at 9.) "Revenues represent actual or expected cash in-flows (or the equivalent) that have occurred." (*Id.* at 11.) Thus, "providing a product or service to a customer for no . . . consideration provided by the customer does not create revenue." (*Id.* at 12.) In the context of the gaming industry, a gaming entity's "revenue is the net win or loss from gaming activities"; and, free play is not included in a gaming entity's revenue because it does not represent actual or expected cash in-flow or its equivalent. (*Id.* at 8, 12.)

III. ANALYSIS

A. Defendants' Summary Judgment Motion

The Court will first consider Defendants' Summary Judgment Motion, because it raises the threshold issue of whether the parties' dispute must be submitted to arbitration. "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1291 (10th Cir. 1999); Fed. R. Civ. P. 56(a). "A dispute is genuine when the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving

[14] The Court understands the term "complimentaries" to refer to goods or services that a casino gives to a patron for no consideration, and not as a prize won by a patron as a result of a successful wager. (*See* Doc. 68-4 at 6.)

party, and a fact is material when it might affect the outcome of the suit under the governing substantive law." *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (quotation marks and brackets omitted). Only material factual disputes preclude the entry of summary judgment. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact and his entitlement to judgment as a matter of law. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998). If the movant carries this initial burden, "the burden shifts to the nonmovant to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of a trial from which a rational trier of fact could find for the nonmovant." *Id.* at 671 (internal quotation marks omitted). If the nonmovant demonstrates a genuine dispute as to material facts, the Court views the facts in the light most favorable to her. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). However, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In their motion, Defendants argue that the Court should grant them summary judgment "on the arbitrability issue," *i.e.*, on the Pueblos' claims for: (1) an injunction barring Defendants from taking any further steps to arbitrate or otherwise enforce their claims for additional revenue sharing payments; and, (2) a judgment declaring that neither the Pueblos' claims in this lawsuit nor Defendants' claims for additional revenue sharing payments are subject to arbitration. (Doc. 55 at 2, 10.) Defendants further ask the Court to dismiss the Pueblos' claims for a judgment declaring that: (1) Defendants' claims for additional revenue sharing payments violate federal law; (2) the 2015 Compact provisions preserving Defendants' claims are therefore invalid and ineffective, as are the 2007 Compacts' revenue sharing provisions if they mean what Defendants say they mean; and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the

Pueblos.[15] (*Id.*) In support of their motion, Defendants argue that the parties' dispute regarding the Pueblos' revenue sharing obligations under the 2007 Compacts is arbitrable because it is a payment dispute, and the 2015 Compacts provide that payment disputes under the 2007 Compacts are to be resolved by arbitration. (*Id.* at 5-6.) According to Defendants, "[t]he parties have explicitly agreed to resolve this payment dispute through arbitration, and the dispute therefore is arbitrable based on the plain language of the contract and the [federal] policy favoring arbitration." (*Id.* at 7.)

The Pueblos respond that, under the 2015 Compacts, arbitration is not an exclusive remedy for resolving disputes under the Compacts. (Doc. 58 at 9-13.) In addition, the Pueblos assert that the 2007 and 2015 Compacts exclude from arbitration "any question as to the validity or effectiveness" of the Compacts or any of their provisions, whereas in this civil action they claim that certain Compact provisions on which Defendants rely are invalid and ineffective under IGRA and other federal law. (*Id.* at 17-20.) According to the Pueblos, they would be unfairly prejudiced if forced to submit to arbitration, because they could not defend against the State's claims for additional revenue sharing payments by challenging the validity and effectiveness of these Compact provisions.[16] (*Id.*)

The law is well settled that disputes about arbitrability are for the courts to decide, unless there is clear and unmistakable evidence that the parties intended to submit such disputes to arbitration. *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 34 (2014); *AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986); *Commc'n Workers of Am. v. Avaya, Inc.*, 693 F.3d

[15] Defendants claim that if the Court grants them summary judgment on "the arbitrability issue," its ruling will necessarily resolve the issues raised by the Pueblos' remaining claims as well. (Doc. 62 at 8-9.)

[16] The Pueblos also argue that Defendants did not timely invoke arbitration. (Doc. 58 at 18-20.) However, if the parties' dispute were otherwise arbitrable, this would be a question for the arbitrators to decide. *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 34–35 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002).

1295, 1303 (10th Cir. 2012); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779–80 (10th Cir. 1998). Disputes about arbitrability "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Grp., PLC*, 572 U.S. at 34. Here, there is no evidence that the parties intended to submit disputes about arbitrability to arbitration. In fact, the parties appear to agree that their arbitrability disputes are for the Court to decide. The Court will therefore address the arbitrability issues raised in Defendants' Summary Judgment Motion.

1. The Pueblos' claims in this lawsuit fall outside the 2015 Compacts' arbitration clause and the Court must decide these claims in the first instance.

The Court must first consider the parties' competing arguments regarding whether the 2015 Compacts' arbitration clause applies to their claims. A tribal-state gaming compact under IGRA is "a form of contract" that must be interpreted according to federal common law. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-39 (10th Cir. 2018). "IGRA neither encourages nor discourages the inclusion of arbitration provisions in gaming compacts, leaving the matter entirely to the parties entering into such a compact." *Id.* at 1237. "Arbitration is a matter of contract," *id.*, "and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration[.]" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original) (quotation marks omitted); *see Commc'n Workers of Am.*, 693 F.3d at 1300 ("Because arbitration is a creature of contract, a party cannot be forced to arbitrate any issue he has not agreed to submit to arbitration."). Thus, where the parties to an agreement have specifically excepted certain types of claims from arbitration, "it is the duty of courts to enforce not only the full breadth of the arbitration clause, but its limitations as well." *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 62 (2d Cir. 1996).

Under Tenth Circuit law,

> [t]o determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a three-part inquiry. First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.

Cummings v. FedEx Ground Package Sys., Inc., 404 F.3d 1258, 1261 (10th Cir. 2005) (emphasis, citations, and quotation marks omitted); *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 569 (10th Cir. 2010). Nevertheless,

> even narrow arbitration clauses must be interpreted under the liberal federal policy favoring arbitration agreements. We resolve doubts concerning the scope of arbitrable issues in favor of arbitration. When considering narrow arbitration clauses, this liberal policy does not create a presumption of arbitrability because the policy favoring arbitration does not have the strong effect that it would have if we were construing a broad arbitration clause.

Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc., 567 F.3d 1191, 1197 (10th Cir. 2009) (citations and ellipses omitted).

"[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc.*, 475 U.S. at 649*; Local 5-857 Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Conoco, Inc.*, 320 F.3d 1123, 1126 (10th Cir. 2003); *but see Int'l Bhd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colo.*, 773 F.3d 1100, 1110 (10th Cir. 2014) (holding that "incidental contact with the merits" was not error where trial court "devoted its entire discussion to answering the arbitrability question").

Defendants argue that the parties' dispute must be submitted to arbitration based on Section 9 of the 2015 Compacts, which provides that "payment disputes" under the 2007 Compacts "shall

be resolved through the procedures set forth in Section 7 of this Compact." (Doc. 68-3 at 26; Doc. 55 at 4; Doc. 68 at 15; Doc. 99 at 6-7.) Subsection 7(A) of the 2015 Compacts provides: "if the State believes that, prior to the Effective Date of this Compact, the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment, the State may invoke" arbitration. (Doc. 68-3 at 22.) To invoke arbitration, the party alleging noncompliance "shall" issue a notice of noncompliance and "may" issue a notice to cease conduct, after which it "may" invoke binding arbitration, all within specified time frames. (*Id.* at 22-23.) Subsection 7(A) further specifies that, in the event of arbitration, the arbitrators "shall make determinations as to each issue presented by the parties, but the arbitrators shall have no authority to determine any question as to the validity or effectiveness of this Compact or of any provision hereof." (*Id.* at 23.) Subsection 7(B), in turn, provides that "[n]othing in Subsection 7(A) shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and that "[n]othing in this Section shall be deemed a waiver of the Tribe's [or the State's] sovereign immunity." (*Id.* at 23, 24.)

The Court finds that the relevant provisions of the 2015 Compacts constitute a narrow arbitration clause, because they limit arbitrable disputes under the 2007 Compacts to "payment disputes" premised on a breach of compact theory and exclude from arbitration "any question as to the validity or effectiveness" of the 2015 Compact provisions. (*Id.* at 22-24, 26.) Thus, though the Court must resolve doubts concerning the arbitration clause's scope in favor of arbitration, it may not find that a party's claim is arbitrable unless on its face the claim falls within the clause's purview. *Cummings*, 404 F.3d at 1261.

Clearly, Defendants allege that the Pueblos have "failed to comply with or otherwise breached" provisions of the 2007 Compacts "affecting payment," *i.e.*, the 2007 Compacts' revenue

sharing provisions, and the Pueblos disagree. Thus, on its face, the parties' dispute is a payment dispute premised on a breach of compact theory within the meaning of the 2015 Compacts' arbitration clause.

However, this is not the end of the inquiry in light of the additional language in the arbitration clause limiting its scope. As explained below, this language removes the Pueblos' claims under both the 2015 and 2007 Compacts from the arbitration clause's purview. First, regarding the 2015 Compacts, the Pueblos claim that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments are invalid and ineffective because Defendants' claims violate IGRA and other federal law. As such, though they do relate to the parties' payment dispute, these claims fall squarely within the 2015 Compacts' exclusion from arbitration, in Subsection 7(A), of questions regarding the validity or effectiveness of the 2015 Compacts or any of their provisions. (*See* Doc. 68-3 at 23 ("[T]he arbitrators shall have no authority to determine any question as the validity or effectiveness of this Compact or any provision hereof….").) The Court therefore finds that, on their face and as a matter of law, the Pueblos' claims challenging the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims fall outside the purview of the 2015 Compacts' arbitration clause.

Second, regarding the 2007 Compacts, the Pueblos claim that the 2007 Compacts' revenue sharing provisions are also invalid and ineffective under IGRA and other federal law if they mean what Defendants say they mean. The Pueblos' claims regarding the validity and effectiveness of the 2007 Compacts' revenue sharing provisions also relate to the parties' payment dispute; and, the 2015 Compacts' exclusion from arbitration of questions regarding the validity or effectiveness of *the 2015 Compacts* does not apply to these claims. (*Id.*) Nevertheless, for the following reasons,

the Court finds that these claims fall outside the purview of the 2015 Compacts' arbitration clause as well.

As previously noted, Subsection 9(A) of the 2015 Compacts provides that the 2015 Compacts "fully supplant[] and replac[e]" the 2007 Compacts, except that under Subsection 9(B), the terms of the 2007 Compacts

> (including, without limitation, *any limited waiver of sovereign immunity and jurisdictional waivers and consents set forth therein*) shall *survive* to permit the resolution of payment disputes. . . . This *survival provision* is intended to provide for the reasonable resolution of past disputes without hindering a Tribe's ability to obtain a new compact.

(Doc. 68-3 at 26 (emphases added).) Because rights that never existed cannot "survive," Subsection 9(B) of the 2015 Compacts only preserved rights that existed under the 2007 Compacts. *See, e.g.*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/survive (to "survive" means "to remain alive or in existence" or "to continue to function or prosper") (last visited Mar. 29, 2019). Thus, because Section 7 of the 2007 Compacts expressly limited the parties' waiver of sovereign immunity[17] and expressly excluded from arbitration "questions as to the validity or effectiveness of [the 2007 Compacts] or of any provision [t]hereof," (Doc. 67-3 at 15), Subsection 9(B) of the 2015 Compacts is likewise limited in scope. Then, Sections 7 and 9 of the 2015 Compacts further limit the scope of arbitrable disputes under the 2007 Compacts to the resolution of "payment disputes" premised on the State's belief that "the Tribe has failed to comply with or has otherwise breached any provision of a Predecessor Agreement affecting payment." (Doc. 68-3 at 22.)

[17] *See* Doc. 67-3 at 16 ("[T]he State and the Tribe acknowledge that any action or failure to act on the party of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall . . . not [be] protected by the sovereign immunity of the State or the Tribe.") *and id.* ("Nothing in this Section shall be deemed a waiver of the Tribe's [or the State's] sovereign immunity.").

Pulling all of these limitations together, only claims for breach of a 2007 Compact provision affecting payment that do *not* raise questions regarding the validity or effectiveness of the 2007 Compacts or any of its provisions fall within the purview of the 2015 Compacts' arbitration clause insofar as it preserves claims under the 2007 Compacts. On their face and as a matter of law, the Pueblos' claims that the 2007 Compacts' revenue sharing provisions are invalid and ineffective under federal law fall outside the scope of the 2015 Compacts' arbitration clause because they raise questions regarding the validity and effectiveness of 2007 Compact provisions.

If further proof were needed that the 2015 Compacts do not restrict the Pueblos' ability to press in this forum their claims challenging the validity and effectiveness of the 2007 Compacts' revenue sharing provisions, one need only look at the one-sided nature of the 2015 Compacts' arbitration clause as it pertains to "payment disputes" under the 2007 Compacts. Specifically, under the 2015 Compacts, only the State may initiate the arbitration procedure to pursue payment disputes, based only on the State's belief that the Pueblos breached a 2007 Compact provision affecting payment.[18] (*Id.* at 22.) On its face, this procedure does not even apply to the Pueblos' claims challenging the validity and effectiveness of the 2007 Compacts' revenue sharing provisions, much less restrict them to arbitration.

Defendants attempt to avoid this outcome by arguing that

> [i]f the arbitrators find in the Pueblos' favor on the interpretation of the revenue sharing provisions of the Compact, no additional payments would be owed to the State and there would therefore be no issue with respect to any impermissible tax against the Pueblos, no violation of IGRA, and no validity concerns with respect to the Compact provisions. Similarly, if the arbitrators find in the State's favor, the payments that the Pueblos owe the State under the revenue-sharing provision of the 2007 Compact would not be an illegal tax against the Pueblos (and therefore would neither violate IGRA nor invalidate the Compact) because they would be a payment that the Pueblos voluntarily agreed to under the terms of the 2007 Compact.

[18] Subsection 9(B) further provides that Pueblos' "failure to comply with an arbitrator's final decision with respect to the parties' [contractual payment] obligations under a Predecessor Agreement constitutes a breach" of the 2015 Compacts. (Doc. 68-3 at 26.)

(Doc. 62 at 6.) Either way, Defendants conclude, the Compact provisions at issue would be valid. (*Id.*)

The Court declines to adopt Defendants' argument because it is a gross oversimplification of the parties' dispute and fails to address all of the reasons the Pueblos allege that the 2015 Compact provisions preserving Defendants' claims and the 2007 Compacts' revenue sharing provisions are invalid and ineffective. It is true that one of the theories on which the Pueblos rely is that Defendants' claims for additional revenue sharing payments violate federal law because the Pueblos did not agree to make these payments in the 2007 Compacts. (*See, e.g.*, Doc. 67-1 at 17-20.) However, the Pueblos offer other theories in support of their claims as well. Thus, for example, the Pueblos also allege that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments are invalid because Defendants' claims seek to force the Pueblos to calculate their net win in a manner contrary to federal regulations. (*See, e.g., id.*) In addition, the Pueblos assert that the 2015 Compact provisions preserving Defendants' claims—and the 2007 Compacts' revenue sharing provisions, as well, if they mean what Defendants say they mean—are invalid because the additional payments Defendants claim are an illegal tax, rather than permissible revenue sharing, under IGRA. (*See, e.g.*, Doc. 68 at 20-22.) Even if an arbitration panel were to find that the Pueblos agreed to the 2007 Compacts' revenue sharing provisions as Defendants interpret them, the finding would not save the 2007 Compacts' revenue sharing provisions or the 2015 Compact provisions preserving Defendants' claims from invalidation under the latter theory. "[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018).

Moreover, the Court agrees with the Pueblos that their claims regarding the validity and effectiveness of Compact provisions under federal law must be resolved in this forum before

Defendants' claims, if they survive, may be resolved by arbitration or otherwise. (Doc. 68 at 18-20.) As discussed above, the Pueblos challenge the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims and the 2007 Compacts' revenue sharing provisions based on federal law; and, the arbitration clause at issue does not allow the parties to arbitrate such challenges, so they must be decided here. If the Pueblos are correct, and these Compact provisions are invalid and ineffective because their enforcement would violate federal law, then Defendants have no right to pursue such enforcement through arbitration or otherwise. Thus, to preserve the Pueblos' rights under federal law, the Court must decide their claims before arbitration—if any—occurs.[19]

2. The Pueblos' claims challenging the validity and effectiveness of the 2015 Compact provisions preserving Defendants' claims are not subject to arbitration because the 2015 Compacts' arbitration clause is permissive and the Pueblos have not consented to arbitration.

In opposition to Defendants' Summary Judgment Motion, the Pueblos also argue that the parties' dispute is not subject to arbitration because the arbitration clause in the 2015 Compacts is permissive and they have not consented to arbitration. "[A] party cannot be forced to arbitrate against its will if the arbitration clause permits, but does not require, arbitration." *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001). The use of the term "may" in a document generally indicates that an action is permissive. *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, 750 F. Supp. 2d 125, 144 (D.D.C. 2010). Nevertheless, the use of this term in an arbitration clause does not, standing alone, indicate that arbitration is permissive. *Id.* at 143-44.

[19] There are two incidental benefits to the Court's deciding the Pueblos' claims in the first instance. First, as the Pueblos observe, it will have "the salutary effect of resolving legal uncertainty," because other tribes entered into identical gaming compacts with the State, also offered free play to their patrons at the relevant times, and will benefit from a "roadmap[]" on how to account for free play and the prizes patrons won from the use of it. *Citizen Potawatomi Nation*, 881 F.3d at 1235. Second, it will conserve the parties' resources, because the Pueblos' Summary Judgment Motions are fully briefed and for the most part raise questions of law, whereas arbitration of Defendants' claims would likely involve fact discovery regarding the Pueblos' gaming operations and accounting for the last decade or more. (*See generally, e.g.*, Doc. 81.)

Rather, many courts have held that it simply means the party may either pursue arbitration or abandon its claim, *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320–21 (4th Cir. 2001); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996); *Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990); *Bonnot v. Cong. of Indep. Unions, Local No. 14*, 331 F.2d 355, 359 (8th Cir. 1964); *Block 175 Corp. v. Fairmont Hotel Mgmt. Co.*, 648 F. Supp. 450, 452 (D. Colo. 1986), or that arbitration, though not an exclusive remedy, is mandatory once either party invokes it. *See, e.g., Deaton Truck Line, Inc. v. Local Union 612, Affiliated with Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 314 F.2d 418, 422 (5th Cir. 1962); *Benihana of Tokyo, LLC v. Benihana Inc.*, 73 F. Supp. 3d 238, 251 (S.D.N.Y. 2014); *Conax Fla. Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287, 1297–98 (M.D. Fla. 2007); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."); *MEI Techs., Inc. v. Detector Networks Int'l, LLC*, Civ. No. 09-425 RB/LFG, 2009 WL 10665141, at *9 (D.N.M. Jul. 6, 2009) (collecting cases).

However, courts have construed arbitration clauses to be permissive when they used the term "may" and also included other language supporting that construction. Thus, for example, in *Independent Oil Workers at Paulsboro, New Jersey v. Mobil Oil Corp.*, the Third Circuit held that an arbitration clause was optional where it used the term "may" and provided that "[n]othing in this agreement shall prevent either [party] . . . from applying, during the term of this agreement to a court of competent jurisdiction for the relief to which such party may be entitled[.]" 441 F.2d 651, 653 (3d Cir. 1971). As the Third Circuit noted, "the qualification . . . that 'nothing in the agreement shall prevent' application to a court of competent jurisdiction takes away the mandatory aspect of the contractual grievance procedures." *Id.* "This is an 'escape' clause which nullifies the

mandatory terms of the earlier language and makes arbitration optional." *Id.* at 654; *see also Quam Constr. Co. v. City of Redfield*, 770 F.3d 706, 708-09 (8th Cir. 2014) (holding that arbitration clause was permissive where it used the term "may" and indicated that arbitration procedure applied "if the parties agree to arbitration"). In recognizing the existence of permissive arbitration clauses, these cases undercut the theory that an arbitration clause can never be permissive because then it would be superfluous, as parties to a contract can always consent to arbitration.[20] *See, e.g.*, *Bankers Ins. Co.*, 245 F.3d 320–21; *Austin*, 78 F.3d at 879.

Here, the Court finds that, as a matter of law, the arbitration clause in the 2015 Compacts is not mandatory as to claims to enforce or resolve disputes concerning 2015 Compact provisions. Initially, Subsection 7(A) of the 2015 Compacts provides that either party "may" invoke arbitration if it believes the other party has breached the Compact. (Doc. 68-3 at 22.) Further, Subsection 7(B) expressly states that "[n]othing in Subsection 7(A)," which describes the arbitration procedure, "shall be construed to waive, limit or restrict any remedy that is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact." (*Id.* at 23.) Subsection 7(B) also provides that nothing in Section 7 should be deemed a waiver of either the Pueblos' or the State's sovereign immunity. (*Id.* at 23-24.)

Subsection 7(B) is very like the "escape clause" in *Independent Oil Workers* that, according to the Third Circuit, "ma[de] arbitration optional." 441 F.2d at 654. Its broad language expressly preserves, wholly intact, the parties' right to pursue remedies other than arbitration to enforce provisions of and resolve disputes under the 2015 Compacts.[21] The Court would necessarily nullify

[20] Arbitration clauses may serve purposes other than providing for an exclusive or mandatory remedy, for example, to specify the procedures to be followed in the event the parties agree to arbitration.

[21] It does not, however, preserve the parties' right to pursue remedies to enforce provisions of and resolve disputes under the 2007 Compacts. Subsections 7(A) and 9 of the 2015 Compacts narrowly preserve and limit the State's ability to pursue a payment related breach of Predecessor Compact dispute remedy under the specified arbitration procedure.

this subsection if it were to hold that Subsection 7(A) makes arbitration mandatory. Requiring either party to submit to arbitration would unquestionably waive, limit, or restrict the remedies otherwise available to that party to resolve disputes under the 2015 Compacts; "review of arbitration awards is among the narrowest known to the law." *Citizen Potawatomi Nation*, 881 F.3d at 1234, 1236-38.

Nullifying Subsection 7(B) would, in turn, violate the "cardinal principle of contract construction . . . that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995); *see Citizen Potawatomi Nation*, 881 F.3d at 1239 ("[T]his court will construe the [tribal-state gaming c]ompact [at issue] to give meaning to every word or phrase."). The Court declines to read Subsection 7(B) out of the Compacts, especially in light of the fact that Defendants do not actually contest the permissive nature of the 2015 Compacts' arbitration clause in their reply. (*See* Doc. 62 at 2 ("[W]hether arbitration is the exclusive or one of many permissible avenues available for the parties to resolve their dispute is immaterial. . . . [A]rbitration is at least one forum in which the parties are permitted to bring claims related to payment disputes arising out of the 2007 Compact.").)

In addition, the Court will not order arbitration under Subsection 7(A) "at the expense of a specific provision[,]" *i.e.*, Subsection 7(B), "meant to maintain critical aspects of the parties' sovereign immunity." *Citizen Potawatomi Nation*, 881 F.3d at 1240-41. Reading Section 7 to

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The Court's rulings in this Memorandum Opinion and Order may not foreclose the State's ability to pursue such remedies provided the dispute does not raise a question as to the validity or effectiveness of 2007 or 2015 Compact provisions. Defendants have offered evidence that the Pueblos miscalculated their revenue sharing obligations under the 2007 Compacts even using the GAAP-compliant formula the Pueblos believe to be lawful. (Doc. 99-11.) This issue is not before the Court, and the Court has not considered it in ruling on the parties' motions. Thus, the Court offers no opinion on whether if the State wished to pursue claims for additional revenue sharing payments against the Pueblos on the basis of this evidence and otherwise met the procedural requirements for invoking arbitration, Subsections 7(A) and 9(B) of the 2015 Compacts would require the Pueblos to submit to mandatory arbitration.

provide for permissive but binding arbitration of disputes concerning 2015 Compact provisions best gives meaning and purpose to both of its parts in this sense as well: Subsection 7(B) preserves the parties' sovereign immunity, while Subsection 7(A) provides for its limited waiver if both parties agree to it by consenting to arbitration. (*See* Doc. 68-3 at 23 (providing that results of arbitration are "enforceable by an action for . . . mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction," and that any official's act contrary to an arbitration decision is "not protected by . . . sovereign immunity"). Because the 2015 Compacts' arbitration clause is permissive as to disputes regarding the 2015 Compacts, and the Pueblos brought this action in lieu of arbitration (and, incidentally, before Defendants invoked arbitration), the Court finds that, as a matter of law, the parties' claims to enforce or resolve disputes concerning the provisions of the 2015 Compacts are not subject to arbitration.

In spite of all of the foregoing, Defendants argue that the Court should require the Pueblos to arbitrate Defendants' claims for additional revenue sharing payments, because the Pueblos' sovereign immunity has prevented the State from pursuing these claims in federal court. (Doc. 55 at 9); *see State of N.M. v. Pueblo of Isleta et al.*, Civ. No. 17-995 JB/KK (Notice of Dismissal, Doc. 13, D.N.M. filed Nov. 14, 2017). However, if, as the Pueblos allege, Defendants' claims violate federal law, then the lack of a forum in which to pursue them is of no consequence, because they would be unenforceable regardless. Moreover, while the Pueblos' sovereign immunity may prevent the State from pursuing the remedies it prefers, the Court is "not persuaded that [the State] lacks any adequate alternatives." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). For example, the Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Id.* Also, the State is free to negotiate with the Pueblos to modify the dispute resolution procedures in the

2015 Compacts; and, if the State "find[s] that none of these alternatives produce the revenues to which [it believes it is] entitled, [it] may of course seek appropriate legislation from Congress." *Id.*

In sum, the Court must resolve the Pueblos' claims regarding the validity and effectiveness of Compact provisions in the first instance to preserve the Pueblos' rights under federal law; and, the parties' claims to enforce or resolve disputes concerning the 2015 Compacts are not arbitrable because the 2015 Compacts' arbitration clause is permissive as to these claims and the Pueblos have not consented to arbitration. In these circumstances, Defendants have failed to show their entitlement to judgment as a matter of law on Plaintiffs' arbitrability claims, and the Court will deny Defendants' Summary Judgment Motion.

B. The Pueblos' Summary Judgment Motions

Having denied Defendants' request for summary judgment on the threshold issue of arbitrability, the Court turns to the Pueblos' Summary Judgment Motions and Defendants' request for additional discovery under Federal Rule of Civil Procedure 56(d). (Doc. 67 at 2; Doc. 68 at 33.) As an initial matter, the Court must address the proposition at the heart of the Pueblos' claims, *i.e.*, that according to GAAP, a gaming entity must exclude the face value of free play, and deduct the value of prizes won as a result of free play wagers, from its net win. (Doc. 67-1 at 14, 22, Doc. 68 at 26.)

GAAP "are the conventions, rules, and procedures that define accepted accounting practices." *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 n.7 (1984); *see also In re Imergent Sec. Litig.*, No. 2:05-CV-204, 2009 WL 3731965, at *7 (D. Utah Nov. 2, 2009) (GAAP are a set of "broad accounting principles . . . approved by the [AICPA that] establish guidelines for measuring, recording and classifying the transactions of a business entity"); *N.J. & its Div. of Inv. v. Sprint Corp.*, 314 F. Supp. 2d 1119, 1146 n.24 (D. Kan. 2004) (same). In his report, the Pueblos'

expert witness Andrew Mintzer stated that, under GAAP, the face value of free play is not included in, and the value of prizes won by patrons as a result of free play wagers must be deducted from, gross gaming revenue or net win. (Doc. 67-10 at 9-13.)

Mr. Mintzer also stated that the treatment of free play and prizes won as a result of free play wagers under GAAP is consistent with "economic reality." (*Id.* at 9-10, 16.) According to Mr. Mintzer, free play is not included in a gaming entity's revenue because it does not represent actual or expected cash in-flow or its equivalent, (*id.* at 8, 12), or, in simpler terms, because a casino doesn't make any money when a customer uses it.[22] Defendants have presented no evidence that refutes Mr. Mintzer's statements on these points.[23] (*See generally* Doc. 99.) The Court therefore finds that under GAAP the face value of free play must be excluded, and the value of prizes won by patrons as a result of free play wagers must be deducted, from net win.

1. Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the *per se* rule, and the 2015 Compact provisions preserving these claims are invalid and ineffective.

In their motions, the Pueblos first assert that the 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments under the 2007 Compacts are invalid and ineffective, because Defendants' claims constitute an attempt to impose a tax on the Pueblos in violation of IGRA and the *per se* rule prohibiting state taxation of Indian tribes without express

[22] Likewise, the value of prizes won by patrons as a result of free play wagers is deducted from revenue because such prizes are a net "loss from gaming activities." (Doc. 67-10 at 8.) In other words, a casino loses money when a patron wins a prize as a result of a free play wager.

[23] In his affidavit, Mr. Telle quotes portions of the Gaming Guide to the effect that "incentives," including "free play," are not deducted from net win. (Doc. 99-12 at 5-6.) At least two factors prevent Mr. Telle's quotations from creating a genuine issue of material fact regarding whether the value of prizes won as a result of free play wagers must be deducted from net win under GAAP. First and foremost, Mr. Telle stops short of contradicting Mr. Mintzer and asserting that the value of prizes won as a result of free play wagers must *not* be deducted from net win under GAAP. (*Id.*) Second, it appears that "deducting free play" is distinct from "deducting the value of prizes won as a result of free play wagers" in the Gaming Guide. (*See* Doc. 68-4 at 6-7 (discussing the deduction of "free play offered through nondiscretionary loyalty programs" from net gaming revenue).)

Congressional authorization. The Pueblos offer two arguments in support of this assertion, *i.e.*, that (1) the Pueblos did not, in the 2007 Compacts, agree to make the additional payments Defendants seek, and (2) the additional payments are not permissible revenue sharing payments under IGRA. The Court will address these related arguments in turn.

a. *Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the* per se *rule because the Pueblos did not agree to make these payments*.

The Pueblos first argue that Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA and the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization because the Pueblos did not agree to make these payments in the 2007 Compacts. For the following reasons, the Court agrees.

"IGRA provides a comprehensive approach to the controversial subject of regulating tribal gaming, and strikes a careful balance among federal, state, and tribal interests." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1283 (11th Cir. 2015) (quotation marks and brackets omitted). IGRA's

> first stated purpose is 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. Its second stated purpose is to provide a statutory basis for the regulation of gaming by an Indian tribe, adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gambling operation, and to assure that gaming is conducted fairly and honestly by both the operator and players. The third and final declared purpose of the IGRA is to declare as necessary the establishment of independent Federal regulatory authority, Federal standards and a National Indian Gaming Commission—all to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1263 (D.N.M. 2013) (citations omitted); 25 U.S.C. § 2702; *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1211 (8th Cir. 2015) ("Congress has noted that for tribes, gaming income often means the difference between an adequate governmental program and a skeletal program that is totally

dependent on [f]ederal funding.") (quotation marks omitted); *Flandreau Santee Sioux Tribe v. Gerlach*, 155 F. Supp. 3d 972, 992 (D.S.D. 2015) (same).

IGRA

> divides gaming into three classes. Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms.

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 785 (2014) (citations omitted).

"IGRA expressly prescribes the matters that are permissible subjects of gaming-compact negotiations between tribes and states." *Navajo Nation*, 896 F.3d at 1201–02. Specifically, the statute lists seven categories of provisions a gaming compact may include, 25 U.S.C. § 2710(d)(3)(C); and, provisions falling outside of these seven categories are unlawful. *Navajo Nation*, 896 F.3d at 1205 n.4 ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA."); *Pueblo of Santa Ana*, 972 F. Supp. 2d at 1265 ("the negotiated scope" of a compact under IGRA "is controlled by § 2710(d)(3)(C).").

Tribes and states have relied on two of Section 2710(d)(3)(C)'s categories to authorize compact provisions that require a tribe to make direct payments to a state. These two categories are: (1) provisions relating to "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity," 25 U.S.C. § 2710(d)(3)(C)(iii); and, (2) the catch-all category of provisions regarding "any other subjects that are directly related to the operation of gaming activities."[24] 25 U.S.C. § 2710(d)(3)(C)(vii); *see, e.g., Rincon Band of Luiseno*

[24] Section 2710(d)(3)(C) provides in full that

> [a]ny Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the

Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006); *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003). However, IGRA limits the ability of compact parties to include provisions requiring a tribe to make direct payments to a state by further providing that,

> [e]xcept for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity.

25 U.S.C. § 2710(d)(4).

In light of Section 2710(d)(4), courts considering compact provisions requiring a tribe to make direct payments to a state under Section 2710(d)(3)(C)(vii) have found that such provisions are lawful only if they meet three criteria. First, as Section 2710(d)(3)(C)(vii) expressly requires, the payments must be directly related to the operation of gaming activities. *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033. Second, the payments must be "consistent with the purposes of IGRA." *Id.*; *accord City of Duluth*, 785 F.3d at 1210 (holding that trial court was required to consider "Congress's express intent that tribes be the primary beneficiaries of Indian casinos" in deciding whether to grant tribe's motion for relief from consent decree requiring it to pay percentage of casino's gross revenues to city as rent).

Finally, the parties must have

> 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.

25 U.S.C. § 2710(d)(3)(C).

> *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state [does] not have *authority* to exact such payments, it [can] bargain to receive them in exchange for a quid pro quo conferred in the compact.

Shoshone-Bannock Tribes, 465 F.3d at 1101–02 (emphases in original) (citation omitted). In other words, courts "have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where 'meaningful concessions' are offered in return." *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1036 (emphases in original). These courts have concluded that, if a state's demand for tribal payments under Section 2710(d)(3)(C)(vii) is not based on a bargained-for and agreed-upon compact provision where meaningful concessions are offered in return, it is an impermissible tax, fee, charge, or other assessment under IGRA.[25] *Id.* at 1042; 25 U.S.C. § 2710(d)(4).

Defendants claim that the additional revenue sharing payments they seek are permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).[26] However, the Pueblos argue that the payments do not comply with Section 2710(d)(3)(C)(vii) because the Pueblos did not, in the 2007 Compacts, agree to make them, and they would therefore constitute an illegal tax under Section 2710(d)(4) if imposed. To determine whether the 2007 Compacts required the Pueblos to make the additional revenue sharing payments Defendants seek, and therefore whether the Pueblos agreed to

[25] "While this court strives to avoid conflicts with sister circuits, it has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *State of N.M. v. Dep't of Interior*, 269 F. Supp. 3d 1145, 1152 (D.N.M. 2014) (quotation marks omitted). Thus, the Court, though cognizant and respectful of other circuits' decisions regarding IGRA, has engaged in an independent reasoned analysis of the issues raised in the Pueblos' Summary Judgment Motions.

[26] Defendants do not claim that the additional payments they seek are payments to reimburse the State for regulatory costs under Section 2710(d)(3)(C)(iii). Subsection 4(E)(6) of the 2007 Compacts provided for the Pueblos to make payments to the State under Section 2710(d)(3)(C)(iii), and there appears to be no dispute that the Pueblos properly made those payments.

make them, the Court must apply federal common law regarding contracts. *Citizen Potawatomi Nation*, 881 F.3d at 1238-39; *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015); *see also Shoshone-Bannock Tribes*, 465 F.3d at 1098 ("We apply general principles of contract interpretation to construe a contract governed by federal law.").

According to the Tenth Circuit,

> [u]nless a contrary intention appears in the instrument, the words used [in a contract] are presumed to have been used in their ordinary or customary meaning, deliberately and with intention. The law does not assume that the language of the contract was carelessly chosen; but it must be presumed that the parties meant something by the words used, that they intended to achieve something definite and concrete in the contract, and that they intended the consequences of its performance. Where words having a definite legal meaning are knowingly used in a contract, the parties thereto will be presumed to have intended such words to have their proper legal meaning and effect, in the absence of any contrary intention appearing in the instrument.

Raulie v. United States, 400 F.2d 487, 521 (10th Cir. 1968). Moreover,

> a contract should be interpreted as a harmonious whole to effectuate the intentions of the parties, and every word, phrase or part of a contract should be given meaning and significance according to its importance in context of the contract. Further, in construing the contract, reasonable rather than unreasonable interpretations are favored by the law.

Doña Ana Mut. Domestic Water Consumers Ass'n v. City of Las Cruces, N.M., 516 F.3d 900, 907 (10th Cir. 2008) (citation and quotation marks omitted); *see also Mastrobuono*, 514 U.S. at 63 ("[A] document should be read to give effect to all its provisions and to render them consistent with each other."); *Citizen Potawatomi Nation*, 881 F.3d at 1239 ("[T]his court will construe the Compact to give meaning to every word or phrase."). In the same vein, courts "presume that words have the same meaning throughout the contract." *McLane & McLane v. Prudential Ins. Co. of Am.*, 735 F.2d 1194, 1195 (9th Cir. 1984).

"Under federal contract principles, if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself." *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Shoshone-Bannock Tribes*, 465 F.3d at 1099 ("[W]hen the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."). Extrinsic evidence is admissible "only to resolve ambiguity in the contract." *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 812 (6th Cir. 2007) ("Where a contract is unambiguous on its face, extrinsic evidence is inadmissible because no outside evidence can better evince the intent of the parties than the writing itself."). In addition, "[e]xtrinsic evidence must be relevant in order to be admitted to resolve an ambiguity." *Id.* at 815. "We have consistently held that where an industry is specialized, extrinsic evidence that helps define words within their specialized context is admissible." *Id.*; *accord* 11 Williston on Contracts § 32:4 (4th ed.) ("[T]echnical terms or words of art will be given their technical meaning."). Whether contract terms are ambiguous, and the interpretation of unambiguous terms, are questions of law. *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992)*; see also Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 810.

As a preliminary matter, the Court notes that both sides have submitted extrinsic evidence in support of their interpretation of the 2007 Compacts' revenue sharing provisions. For example, the Pueblos have offered evidence that their slot accounting systems have never segregated prizes won by patrons using free play credits versus cash or cash equivalents, (Doc. 67-12); and, Defendants have offered evidence that, before the Pueblos instituted electronic free play, they gave patrons coupons that could be exchanged for cash or tokens, and included the value of cash and tokens wagered in their net win. (Doc. 99 at 22.) However, the Court finds the relevant provisions of the 2007 Compacts to be unambiguous except for the fact that they do not identify or define the

GAAP applicable to calculating net win. Thus, the Court will consider the parties' extrinsic evidence only to the extent that it tends to identify and define the applicable GAAP.[27] *Citizen Potawatomi Nation*, 881 F.3d at 1239 (extrinsic evidence is "relevant only to resolve ambiguity in the contract").

Applying federal common law principles of contract interpretation to the 2007 Compacts, the Court finds that these Compacts unambiguously required the Pueblos to calculate their Net Win for revenue sharing purposes in accordance with GAAP. First, Subsection 4(C) of the Compacts required the Pueblos to maintain "all books and records relating to Class III Gaming . . . in accordance with [GAAP]." (Doc. 67-3 at 9.) In addition, this subsection required the Pueblos to hire an independent certified public accountant to prepare annual financial statements that included "written verification of the accuracy of the quarterly Net Win calculation"; and, critically, these financial statements were to "be prepared in accordance with [GAAP]." (*Id.*) Finally, this subsection required the Pueblos' GAAP-compliant financial statements to "specify the total amount wagered in Class III Gaming on all Gaming Machines . . . for purposes of calculating 'Net Win' under Section 11 of this Compact using the format specified therein." (*Id.*)

To summarize, then, Subsection 4(C) of the 2007 Compacts required the Pueblos to: (1) maintain all of their gaming books and records in accordance with GAAP; (2) verify their Net Win calculations in accordance with GAAP; and, (3) specify the "total amount wagered" for purposes of calculating their Net Win in accordance with GAAP. Read together, these provisions are clear: the 2007 Compacts required the Pueblos to calculate their Net Win in accordance with GAAP. And, as previously discussed, under GAAP the face value of free play must be excluded, and the value of prizes won as a result of free play wagers must be deducted, from net win. Thus, Subsection

[27] Extrinsic evidence in the record relevant to identifying and defining the applicable GAAP includes Mr. Mintzer's affidavit, the admissible portions of Mr. Telle's affidavit, and portions of the Gaming Guide in the record.

4(C) required the Pueblos to exclude the face value of free play and deduct the value of prizes won as a result of free play wagers in calculating their Net Win.

Defendants argue that Section 11 of the 2007 Compacts nevertheless required the Pueblos to include either the face value of free play or the value of prizes won as a result of free play wagers in calculating their Net Win for revenue sharing purposes. The Court disagrees. Defendants' interpretation would require the Pueblos to calculate their Net Win using one set of rules—GAAP—under Subsection 4(C), and a different set of rules—rules contrary to GAAP—under Section 11. As such, it contravenes the principle of contract construction that a contract must be read as a harmonious whole, with words having the same meaning throughout. *Mastrobuono*, 514 U.S. at 63; *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Doña Ana Mut. Domestic Water Consumers Ass'n*, 516 F.3d at 907; *McLane & McLane*, 735 F.2d at 1195–96. The Court finds that, in accordance with this principle, Section 11 can and should be read in harmony with Section 4 and therefore in conformity with GAAP.

Subsection 11(C)(1)(a) defined "Net Win" as "the total amount wagered in Class III Gaming at a Gaming Facility, on all Gaming Machines less . . . the amount paid out in prizes to winning patrons, including the cost to the Tribe of noncash prizes, won on Gaming Machines." (Doc. 67-3 at 20.) Other than limiting the Pueblos' Net Win to their net win from Class III gaming machines, this definition is consistent with the definition of net win under GAAP, *i.e.*, "the difference between [the gaming entity's] gaming wins and losses before deducting costs and expenses." (Doc. 68-4 at 12; Doc. 99-12 at 16.)

In support of their argument that Section 11 defines Net Win in a manner contrary to GAAP, Defendants rely on the additional language in Subsection 11(C)(1)(a) to the effect that

> [t]he phrase 'won on Gaming Machines' means the patron has made a monetary wager, and as a result of that wager, has won a prize of any value. Any rewards,

> awards or prizes, in any form, received by or awarded to a patron under any form of a players' club program (however denominated) or as a result of patron-related activities, are not deductible. The value of any complimentaries given to patrons, in any form, are not deductible.

(67-3 at 20-21.) According to Defendants, this language prohibited the deduction of any kind of marketing or promotional expense from Net Win, including the value of prizes won by patrons as a result of free play wagers. (Doc. 99 at 14, 30.)

In fact, however, this language also can and should be read in conformity with Subsection 4(C) and therefore GAAP. The Gaming Guide provides that "monetary credits may be played [on slot machines] using bills, coins, tickets, *electronic wagering credits recorded on cards, or by other means*." (Doc. 67-11 at 3 & n.3 (emphasis added).) Thus, under GAAP, "monetary credits" are not limited to cash or cash equivalents, and the term "monetary wagers" as used in Section 11(C)(1)(a) can be read consistently with GAAP to include wagers made using free play "monetary credits," *i.e.*, electronic free play credits assigned a monetary face value for the purpose of gaming machine play. Similarly, Section 11(C)(1)(a), though it prohibited the deduction of prizes a patron received from his or her participation in a players' club program or other "patron-related activities," did not even mention, much less prohibit the deduction of, prizes won by a patron as a result of free play wagers, which again is consistent with GAAP. Nowhere did Section 11(C)(1)(a) prohibit the deduction of all marketing or promotional expenses of any kind, as Defendants claim. Rather, in accordance with GAAP, Section 11(C)(1)(a) drew a line between the value of prizes won as a result of wagers, which were deductible, and the value of prizes awarded for other reasons, which were not.

If further support were needed, the Court notes that Section 11 was entitled "*Revenue* Sharing," and required the Pueblos to "pay to the State a portion of [their] Class III Gaming *revenues*." (Doc. 67-3 at 20 (emphases added).) However, as discussed above, free play is not

revenue, and neither is money (or the cost of non-cash prizes) the Pueblos paid out to patrons as a result of free play wagers. This is true not only under GAAP, but also in economic reality.[28] The law favors reasonable contract interpretations over unreasonable ones, *Doña Ana Mut. Domestic Water Consumers Ass'n*, 516 F.3d at 907, and it would be unreasonable to interpret Section 11 to require the Pueblos to make "revenue sharing" payments from nonrevenue. For all of these reasons, the Court finds that, under the 2007 Compacts and as a matter of law, the Pueblos did not agree to make the additional revenue sharing payments Defendants seek.

Then, because the Pueblos did not agree to them, the additional revenue sharing payments Defendants seek do not satisfy the requirements of Section 2710(d)(3)(C)(vii), *i.e.*, they are not payments made pursuant to a bargained-for and agreed-upon compact provision for which meaningful concessions were offered in return. 25 U.S.C. § 2710(d)(3)(C)(vii); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-36; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02. Lacking any authorization under Section 2710(d)(3)(C), Defendants' claims for such payments from the Pueblos constitute an impermissible attempt to impose a tax, fee, charge, or other assessment under Section 2710(d)(4). 25 U.S.C. § 2710(d)(3)(C)(vii), (d)(4); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1042.

The Court further finds that Defendants' claims for additional revenue sharing violate the "*per se* rule" prohibiting states from taxing federally recognized Indian tribes without express Congressional authorization. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 n.17 (1987), *superseded by statute on other grounds as stated in Bay Mills Indian Cmty.*, 572

[28] Economic reality likewise undermines Defendants' argument that it was inequitable for the Pueblos to exclude the face value of free play, and also deduct the value of prizes won as a result of free play wagers, from net win. (Doc. 99 at 21.) The apparent inequity merely reflects the actual nature of the transaction, *i.e.*, the Pueblos received no money from free play wagers but they did lose money when a patron won a jackpot on such a wager.

U.S. at 794-95; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475–76 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 467 (2d Cir. 2013); *Flandreau Santee Sioux Tribe*, 155 F. Supp. 3d at 995. A tax is "a monetary charge imposed by the government on persons, entities, transactions or property to yield public revenue." *Hill v. Kemp*, 478 F.3d 1236, 1245 (10th Cir. 2007). The Supreme Court "consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Blackfeet Tribe of Indians*, 471 U.S. at 765.

Because the 2007 Compacts did not require the Pueblos to make the additional revenue sharing payments Defendants seek, IGRA does not authorize them. Thus stripped of IGRA's validation, they are simply payments Defendants insist the Pueblos make to the State's general fund on the basis of past transactions between the Pueblos and their gaming patrons. It is difficult to characterize such payments as anything other than a tax. "No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment . . . into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1029–30. Moreover, Congress has clearly not authorized the State to impose such a tax; on the contrary, it explicitly withheld its authorization in Section 2710(d)(4). The Court therefore finds that Defendants' claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts constitute an attempt to impose an illegal tax not only under IGRA, but also under the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization.

b. *Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax because they are not, in fact, permissible revenue sharing payments under IGRA.*

The Pueblos also contend that the additional payments Defendants seek are not in fact revenue sharing payments and would therefore constitute an illegal tax under IGRA even if the Pueblos had agreed to them. (*See, e.g.*, Doc. 68 at 20-22.) As discussed in Section III.B.1.a., *supra*, courts to date have recognized only two types of direct payments from a tribe to a state pursuant to a gaming compact under IGRA, *i.e.*, payments to defray the state's regulatory costs associated with the tribe's gaming activities, and revenue sharing payments if they are directly tied to gaming, consistent with IGRA's purposes, and bargained for and agreed upon in exchange for meaningful concessions. *See, e.g., Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-34; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02; *In re Indian Gaming Related Cases*, 331 F.3d at 1111-12; *but see Ho-Chunk Nation*, 512 F.3d at 932 ("The validity, under the IGRA, of revenue-sharing agreements in tribal-state compacts . . . is far from a settled issue.").

Defendants contend that the additional payments they seek from the Pueblos fall into the category of "revenue sharing" payments under 25 U.S.C. § 2710(d)(3)(C)(vii). In reality, however, and according to GAAP, Defendants are attempting to "share" funds that are not "revenue" to the Pueblos. As discussed at the beginning of Section III.B., free play is not revenue to the Pueblos because they receive no money from patrons when it is used; and, prizes won as a result of free play wagers are not revenue to the Pueblos because they lose money when they award prizes to patrons on winning free play bets. If the Pueblos were to include the face value of free play or the value of prizes won as a result of free play wagers in their Net Win as Defendants insist, the Pueblos would have to pay the State a percentage of these values even though they are not actually revenue. (Doc. 67-3 at 20-21 (requiring Pueblos to pay the State a percentage of their Net Win as revenue sharing).

As a matter of first impression, the Court finds that Section 2710(d)(4) does not allow a state to collect "revenue sharing" payments from a tribe pursuant to a gaming compact under IGRA where the funds the tribe is required to "share" are not, in fact, "revenue." Such payments do not comport with GAAP or economic reality, and they do not fall within any category of direct tribal payments to states that courts have found to be permissible under IGRA. 25 U.S.C. § 2710(d)(C)(3)(iii), (vii); *cf. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-35; *Shoshone-Bannock Tribes*, 465 F.3d at 1101–02; *In re Indian Gaming Related Cases*, 331 F.3d at 1111-13.

Moreover, such payments are inconsistent with IGRA's stated purposes to promote tribal economic development and self-sufficiency, ensure that the tribes are the primary beneficiaries of their gaming operations, and protect tribal gaming activities as a means of generating tribal revenue. 25 U.S.C. § 2702; *City of Duluth*, 785 F.3d at 1210-12; *Pueblo of Santa Ana*, 972 F. Supp. 2d at 1263; *see also Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1034 ("[N]one of the purposes outlined in § 2702 includes [promoting] the State's general economic interests. The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly.") (emphasis in original). If a compact provision is to increase a tribe's direct payments to a state under IGRA, it should do so expressly and accurately, so that the tribe and the DOI have the opportunity to assess whether the increase comports with IGRA's purposes.[29] Increasing a tribe's revenue sharing payments to a state by including a percentage of nonrevenue in the payments creates an unacceptable risk of confusion and lack of mutual agreement between compact stakeholders about the nature and propriety of the

[29] For example, a compact provision could expressly provide for the tribe to pay the state a higher percentage of its net win.

payments under IGRA. The Court therefore finds that Defendants' claims for additional "revenue sharing" payments constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) not only because the Pueblos did not agree to the payments, but also because the payments are not permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).

Relatedly, according to the Pueblos, the Court should defer to the DOI's determination that Defendants' claims for additional revenue sharing payments constitute an attempt to impose an illegal tax under IGRA. The DOI made this determination in letters to the Pueblos explaining its decision to neither approve nor disapprove the 2015 Compacts, expressing concern regarding the 2015 Compact provisions preserving Defendants' claims. (*See, e.g.*, Doc. 1-4 at 5.) The Pueblos appear to concede that the statutory interpretation implicit in the DOI's determination is not binding legal authority, but they do argue that it is "persuasive authority" that is "due deference," citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). (Doc. 110 at 6-7.)

Initially, the Court agrees that the DOI's interpretation is not binding legal authority entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency interpretation is entitled to *Chevron* deference only

> when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Mead Corp., 533 U.S. at 226–27. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

The DOI clearly did not promulgate the interpretation at issue in the exercise of the type of authority *Chevron* deference requires. The parties did not brief the process by which the DOI made its determination to neither approve nor disapprove the 2015 Compacts pursuant to 25 U.S.C. § 2710(d)(8)(C). However, there is no indication in the record that it made the determination pursuant to "adjudication or notice-and-comment rulemaking" or a comparably formal process. *Mead Corp.*, 533 U.S. at 226-27. Also, in the six letters in the record, the DOI expressed its interpretation variably and offered a variety of reasons for it, putting it firmly in the category of "[i]nterpretations such as those in opinion letters . . . which lack the force of law[.]" *Christensen*, 529 U.S. at 587.

The Court further finds that the Pueblos have failed to demonstrate that the DOI's interpretation is entitled to a lesser measure of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Supreme Court held that

> [t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. Recognizing the continuing validity of *Skidmore* deference after *Chevron*, in *Mead Corp.* the Supreme Court confirmed that "an agency's interpretation may merit some deference whatever its form," depending on "the agency's care, its consistency, formality, and relative expertness," and "the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228, 234.

The Pueblos, however, fail to discuss or even acknowledge the factors listed in *Skidmore* and *Mead Corp*. (Doc. 110 at 6-7 & n.7.) Rather, they simply argue that the DOI's interpretation is due deference because it is "the product of IGRA's administrative process."[30] (*Id.*) This argument is gravely insufficient to support a finding that the interpretation is entitled to *Skidmore*

[30] In a footnote, the Pueblos also dispute Defendants' characterization of the contents of the DOI's letters. (Doc. 110 at 7 n.7.) However, the letters are in the record and therefore speak for themselves.

deference. 323 U.S. at 140; *Mead Corp.*, 533 U.S. at 228, 234; *but see Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 279-82 (D.D.C. 2018) (holding that DOI's decision to disapprove amendment to gaming compact was entitled to *Chevron* deference); *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1176-79 (E.D. Cal. 2009) (holding that DOI's approvals of gaming compacts that included unrestricted revenue sharing provisions were entitled to *Skidmore* deference).[31]

"Without a specific reference, [the Court] will not search the record in an effort to determine whether there exists dormant evidence" in support of the Pueblos' argument that the DOI's interpretation is entitled to *Skidmore* deference. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1199 (10th Cir. 2000) ("The district court was not obligated to comb the record in order to make [the plaintiff's] arguments for him."). Thus, the Court will not rely on any deference to the DOI's interpretation to support its independent conclusion that Defendants' claims for additional "revenue sharing" payments constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) regardless of whether the Pueblos agreed to them, because the payments are not, in fact, permissible revenue sharing payments under Section 2710(d)(3)(C)(vii).

c. *The 2015 Compact provisions preserving Defendants' claims for additional revenue sharing payments under the 2007 Compacts are invalid and ineffective.*

The Pueblos argue that, because Defendants' claims for additional revenue sharing payments under the 2007 Compacts are inconsistent with IGRA, the 2015 Compact provisions

[31] However, *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1033-34, calls into question the continuing validity of *Fort Independence Indian Community* insofar as it held that unrestricted revenue sharing provisions in gaming compacts directly relate to gaming under Section 2710(d)(3)(C)(vii). 679 F. Supp.2d at 1179.

preserving Defendants' claims are invalid and ineffective. (*See, e.g.*, Doc. 67-1 at 17-20; Doc. 68 at 20-22.) A gaming compact under IGRA "takes effect" when the Secretary approves it and notice of the Secretary's approval is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1552 (10th Cir. 1997). Because the Secretary did not approve or disapprove the 2015 Compacts within 45 days of submission, these Compacts are "considered to have been approved by the Secretary, but only to the extent the [Compacts are] consistent with [IGRA]." 25 U.S.C. 2710(d)(8)(C).

For the reasons discussed in Section III.B.1.a. and b., *supra*, Defendants' claims for additional revenue sharing payments under the 2007 Compacts constitute an attempt to impose a tax, fee, charge, or other assessment in violation of Section 2710(d)(4) and are therefore inconsistent with IGRA. To the extent that the provisions of the 2015 Compacts preserve Defendants' claims, they are likewise inconsistent with IGRA; and, to the extent the 2015 Compact provisions are inconsistent with IGRA, they are not considered to have been approved by the Secretary and did not "take effect." 25 U.S.C. § 2710(d)(3)(B), (8)(C). In addition, the 2015 Compact provisions preserving Defendants' claims are unenforceable to the extent that Defendants' claims violate the *per se* rule prohibiting state taxation of Indian tribes without express Congressional authorization. *Cabazon Band of Mission Indians*, 480 U.S. at 214-15 n.17; *Blackfeet Tribe of Indians*, 471 U.S. at 766; *Moe*, 425 U.S. at 475-76; *McClanahan*, 411 U.S. at 170-71. In short, because Defendants' claims for additional revenue sharing payments under the 2007 Compacts violate IGRA and the *per se* rule, the 2015 Compact provisions preserving those claims are invalid and ineffective.

2. <u>The Court need not decide whether federal regulations required the Pueblos to calculate their Net Win according to GAAP.</u>

The Pueblos also argue that Defendants' claims for additional revenue sharing payments are inconsistent with federal regulations that require the accounting records of the Pueblos' gaming

operations to comply with GAAP. (Doc. 67-1 at 12, Doc. 68 at 26.) In support of this argument, the Pueblos rely on three federal regulations. First, they cite to 25 C.F.R. § 542.19(b), which provides that

> [e]ach gaming operation shall prepare general accounting records according to [GAAP] on a double-entry system of accounting, maintaining detailed, supporting, subsidiary records, including, but not limited to . . . [d]etailed records identifying revenues, expenses, assets, liabilities, and equity for each gaming operation[.]

25 C.F.R. § 542.19(b). Second, they cite to 25 C.F.R. § 549.19(d), which defines gross gaming revenue from gaming machines in accordance with GAAP, *i.e.*, "[f]or gaming machines, gross [gaming] revenue equals drop,[32] less fills,[33] jackpot payouts and personal property awarded to patrons as gambling winnings." 25 C.F.R. § 542.19(d)(2); *see also* 25 C.F.R. § 542.2 ("Gross gaming revenue means annual total amount of cash wagered on . . . class III games . . . less any amounts paid out as prizes or paid for prizes awarded."). Finally, they cite to 25 C.F.R. § 571.12, which provides that

> [a] tribe shall engage an independent certified public accountant to provide an annual audit of the financial statements of each . . . class III gaming operation on the tribe's Indian lands for each fiscal year. . . . Financial statements prepared by the certified public accountant shall conform to generally accepted accounting principles[.]

25 C.F.R. § 571.12(b).

According to the Pueblos, these federal regulations require them to calculate their net win in accordance with GAAP. Thus, the Pueblos continue, Defendants' demands that they calculate their Net Win in a manner contrary to GAAP for purposes of revenue sharing under the 2007

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[32] "Drop (for gaming machines) means the total amount of cash, cash-out tickets, coupons, coins, and tokens removed from drop buckets and/or bill acceptor canisters." 25 C.F.R. § 542.2.

[33] "Fill means a transaction whereby a supply of chips, coins, or tokens is transferred from a bankroll to a . . . gaming machine." 25 C.F.R. § 542.2.

Compacts contravene these regulations. Defendants counter that: (1) the regulations do not prohibit the Pueblos from creating financial records in addition to their general accounting records and annual financial statements; (2) the regulations do not require these other financial records to comply with GAAP, and, (3) discrepancies between the net win in the Pueblos' GAAP-compliant records and the Net Win in their revenue sharing calculations can be addressed by "a simple footnote . . . explaining that the [r]evenue [s]haring calculation was performed in the format set forth in Section 11 of the 2007 Compact[s]." (Doc. 99 at 27.)

Neither side cites any caselaw discussing whether the regulations on which the Pueblos rely require all of their financial records, including their Net Win calculations under the 2007 Compacts, to comply with GAAP, and the Court's research has not uncovered any such cases. *But see Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 813 (citing 25 C.F.R. § 571.12 for the proposition that the plaintiff tribe was "federally required to comply" with the Gaming Guide). Also, the Court notes that there is some doubt regarding whether the National Indian Gaming Commission had the authority to promulgate the regulations on which the Pueblos rely, *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 137-39 (D.C. Cir. 2006); and, Section 542.19 was stayed effective September 27, 2018 and is not currently enforceable. 83 Fed. Reg. 39,877-01, 2018 WL 3818191, at *39,879 (Aug. 13, 2018).

The Court need not decide whether complying with Defendants' demands for additional revenue sharing payments would require the Pueblos to violate 25 C.F.R. §§ 542.19, 542.2, and 571.12, in light of its determination that these claims constitute an attempt to impose a tax on the Pueblos in violation of IGRA and the *per se* rule. In addition, the lack of authority addressing these regulations and their uncertain validity and status make the Court reluctant to attempt to interpret them. The Court will therefore decline to decide whether these regulations required the Pueblos to

calculate their Net Win under the 2007 Compacts in accordance with GAAP. However, the Court notes that the regulations are at least consistent with the 2007 Compact provisions that required the Pueblos to calculate their Net Win in accordance with GAAP. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[A] general rule of construction presumes the legality and enforceability of contracts.").

3. Defendants are not entitled to additional time to conduct discovery and respond to the Pueblos' Summary Judgment Motions under Rule 56(d).

Defendants argue that the Court should grant them more time to conduct discovery and respond to the Pueblos' Summary Judgment Motions under Rule 56(d) because they cannot currently present facts essential to justify their opposition to the motions. (Doc. 99 at 30); Fed. R. Civ. P. 56(d). Rule 56(d) provides that

> [i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

> Although the Supreme Court has held that, under Fed. R. Civ. P. 56(f),[34] summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition, this protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion.

Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co., 22 F.3d 1527, 1536 (10th Cir. 1994) (brackets omitted).

In its affidavit,

> a non-movant requesting additional discovery under Rule 56(d) must specify (1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time

[34] When Rule 56 was amended in 2010, Rule 56(f) became Rule 56(d). Fed. R. Civ. P. 56(d), 2010 Advisory Committeee Notes.

> will enable the party to obtain those facts and rebut the motion for summary judgment.

Gutierrez, 841 F.3d at 908 (quotation marks and brackets omitted); *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). It is within the Court's discretion to deny a Rule 56(d) request based solely on a party's failure to present an affidavit that complies with the rule. *McKissick v. Yuen*, 618 F.3d 1177, 1190 (10th Cir. 2010). Also, if the information sought is irrelevant or cumulative, the nonmoving party is not entitled to relief under Rule 56(d). *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554 (10th Cir. 1993).

In support of their Rule 56(d) request, Defendants argue that they require additional time to conduct discovery regarding: (a) whether the Pueblos actually applied GAAP to their revenue sharing calculations under the Compacts; (b) the parties' negotiations regarding the revenue sharing provisions in the 2007 Compacts[35]; (c) who decided to implement free play at the Pueblos' casinos and who decided how to account for it; (d) the accuracy of Defendants' calculation of the additional revenue sharing payments they claim the Pueblos owe under the 2007 Compacts; (e) when the Pueblos began offering patrons free play; (f) how the Pueblos determined the appropriate method for calculating their net win once they started offering free play; and, (g) whether the Pueblos ever intended to comply with GAAP or the 2007 Compacts. (Doc. 99 at 30-33.)

Initially, the Court notes that, except regarding one probable fact, Defendants have failed to present an affidavit that satisfies the *Gutierrez* requirements. 841 F.3d at 908. Defendants attach two affidavits to their response to the Pueblos' Summary Judgment Motions, those of Mr. Telle and Rainier Kamplain. (Docs. 99-11, 99-12.) Mr. Telle's affidavit contains only one sentence that even remotely supports Defendants' Rule 56(d) request, *i.e.*, "[t]he Pueblos have not been

[35] Defendants have not explained why information about the parties' compact negotiations is not equally available to both sides.

forthcoming with the data needed to assess the proper Net Win calculation, further delaying the State's actual notice of the accounting discrepancies." (Doc. 99-12 at 7.) This one sentence is too vague and conclusory to comply with Rule 56(d)'s requirements and concerns information that is irrelevant to the issues raised in the Pueblos' Summary Judgment Motions. *Gutierrez*, 841 F.3d at 908; *Birch*, 812 F.3d at 1249-50.

Mr. Kamplain's affidavit is more detailed, but only regarding one probable fact, *i.e.*, "whether the Pueblos have complied with the correct Net Win and revenue sharing calculations, regardless of which format or formula they are applying in determining Net Win." (Doc. 99-11 at 4.) In his affidavit, Mr. Kamplain explained why Defendants question whether the Pueblos correctly calculated their revenue sharing obligations under the 2007 Compacts regardless of which formula they used. (*Id.* at 2-4.) He also stated in general terms what steps Defendants have taken to obtain additional information on this point, and why additional time could allow them to do so. (*Id.* at 4-5.) However, Mr. Kamplain made no attempt to address any of the other probable facts Defendants listed in support of their Rule 56(d) request. (*See generally id.*) Thus, with the one exception noted, the Court could in its discretion deny Defendants' Rule 56(d) request based solely on their failure to present an affidavit that complies with the rule. *McKissick*, 618 F.3d at 1190.

The Court need not do so, however, because Defendants' Rule 56(d) request is also subject to denial for the substantive reason that all of the information Defendants seek additional time to discover is irrelevant to the issues raised in the Pueblos' Summary Judgment Motions. The Court's decision on the Pueblos' motions turns on the meaning of certain Compact provisions and whether Defendants' claims for additional revenue sharing payments comport with federal law. As discussed in Section III.B.1.a., the Compact provisions at issue are unambiguous except regarding the identification and definition of the applicable GAAP. As such, extrinsic evidence is irrelevant

to the Court's decision except to the extent it relates to the applicable GAAP; the interpretation of the Compacts and the federal law applicable to Defendants' claims are otherwise questions of law. *Citizen Potawatomi Nation*, 881 F.3d at 1239; *Sault Ste. Marie Tribe of Chippewa Indians*, 475 F.3d at 810, 812, 815; *Bank of Okla.*, 972 F.2d at 1171.

Yet, all of the probable facts on which Defendants rely in seeking additional time for discovery under Rule 56(d) are extrinsic to the Compacts, and none have any tendency to identify or define the applicable GAAP. Consequently, none are relevant to the Court's decision on the Pueblos' Summary Judgment Motions. *Garcia*, 232 F.3d at 768. Because the information Defendants seek is irrelevant, they are not entitled to relief under Rule 56(d). *Jensen*, 998 F.2d at 1554. The Court will therefore deny Defendants' Rule 56(d) request for additional time to conduct discovery and respond to the Pueblos' motions.

4. Defendants' remaining arguments are unsupported and immaterial.

Finally, the Court must address Defendants' assertion that the Court should deny the Pueblos' Summary Judgment Motions because the Pueblos have breached the covenant of good faith and fair dealing and should not be unjustly enriched. (Doc. 99 at 27.) In support of this assertion, Defendants allege that the Pueblos failed to: (a) inform the State of their decision to offer patrons electronic free play credits rather than coupons to be exchanged for cash or tokens; (b) provide the State with documents regarding how they accounted for free play despite many requests; and, (c) attempt to renegotiate the 2007 Compacts when they began offering free play. (Doc. 99 at 28.)

Defendants fail to cite to any provision of law, equity, or contract that required the Pueblos to either inform the State of their decision to offer free play or try to renegotiate the Compacts when they did so. Defendants also fail to cite to any legal authority in support of their argument that the

Pueblos' alleged failure to produce documents under the 2007 Compacts invalidates their current claims for declaratory and injunctive relief under federal law. Interestingly, Defendants' evidence tends to show that the Pueblos and the State have been debating the proper treatment of free play in calculating the Pueblos' Net Win for revenue sharing purposes under various compacts off and on since June 2005, and neither side appears to have changed its position in all that time. (*See, e.g.*, Doc. 99-1 at 27-41; Doc. 99-2 at 4-21; Doc. 99-3 at 33-34, 47-58; Doc. 99-4 at 46-55; Doc. 99-5 at 39-46; Doc. 99-6 at 48-68.) This evidence casts some doubt on Defendants' claim of unfair surprise. However, even if Defendants' characterization of the Pueblos' past conduct is accurate, in the Court's view it is simply not relevant to the issues the Pueblos raised in their Summary Judgment Motions. Moreover, the Court declines to speculate about whether Defendants could have made a properly supported legal argument regarding the Pueblos' alleged past misconduct, or what this argument might have been. It is not the Court's role to construct the parties' arguments for them. *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009); *Brown v. City of Las Cruces Police Dep't*, 347 F. Supp. 3d 792, 811 (D.N.M. 2018). In short, the Court finds that Defendants' arguments regarding the Pueblos' alleged bad faith and inequitable conduct are unsupported and immaterial.

5. The Pueblos are entitled to declaratory and injunctive relief.

To summarize, the Court finds that Defendants' claims for additional revenue sharing payments from the Pueblos constitute an attempt to impose a tax, fee, charge, or other assessment in violation of IGRA and the *per se* rule barring state taxation of Indian tribes without express Congressional authorization. The Court further finds that the 2015 Compact provisions preserving Defendants' claims under the 2007 Compacts are invalid and ineffective. The Court so finds both because the Pueblos did not, in the 2007 Compacts, agree to make the additional payments

Defendants seek, and because the payments are not permissible revenue sharing payments consistent with IGRA's requirements and purposes. The Court also finds that Defendants are not entitled to more time to conduct discovery under Rule 56(d), and that their arguments regarding the covenant of good faith and fair dealing and unjust enrichment are unsupported and immaterial. The Court therefore concludes that, as a matter of law, the Pueblos are entitled to declaratory and injunctive relief and it will grant their Summary Judgment Motions as set forth below.

C. Defendants' Motion to Compel and the Pueblos' Motion for Protective Order[36]

"The general principle of Rule 56(d) is that summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to opposition." *N.M. Consol. Constr., LLC v. City Council of the City of Santa Fe*, 97 F. Supp. 3d 1287, 1304 (D.N.M. 2015) (quoting *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000)). "Rule 56(d) does not require, however, that summary judgment not be entered until discovery is complete." *Id.* If the information the non-moving party seeks under Rule 56(d) is "irrelevant to the summary judgment motion . . . no extension will be granted." *Id.*

As discussed in Section III.B.3., *supra*, the information Defendants seek under Rule 56(d) is irrelevant to the issues the Pueblos raised in their Summary Judgment Motions, and the Court has therefore declined to delay ruling on the Pueblos' motions to allow Defendants to complete discovery. *Id.* In these circumstances, and because the Court has determined that the Pueblos are entitled to summary judgment, the Court finds that Defendants' Motion to Compel and the Pueblos' Motion for Protective Order are moot and should be denied.

D. Defendants' Motion for Settlement Conference

[36] The Court held a hearing on Defendants' Motion to Compel and the Pueblos' Motion for Protective Order on August 16, 2018. (Docs. 94, 123.) At the hearing, the Court deferred ruling on the motions and ordered Defendants to submit a fully compliant Rule 56(d) affidavit within 30 days of the hearing to the extent they believed they needed more discovery to respond to the Pueblos' Summary Judgment Motions. (Doc. 94 at 1-2.)

In light of the Court's determination that the Pueblos are entitled to summary judgment, Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) is also moot and should be denied.

IV. CONCLUSION

IT IS THEREFORE ORDERED as follows:

1. Defendants' Motion for Summary Judgment on the Issue of Arbitrability (Doc. 55) is DENIED;

2. Plaintiffs-in-Intervention Santa Ana, Santa Clara and San Felipe's and Plaintiff Tesuque's Motion for Summary Judgment (Doc. 67) and Plaintiffs Pueblo of Isleta's and Pueblo of Sandia's Motion for Summary Judgment and Supporting Authorities (Doc. 68) are GRANTED. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, the Court hereby declares that:

a. Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016 constitute an attempt to impose a tax, fee, charge, or other assessment in violation of IGRA and the *per se* rule prohibiting state taxation of federally recognized Indian tribes without express Congressional authorization;

b. As such, the provisions of the 2015 Compacts preserving Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016 are invalid and ineffective; and

c. Neither the Pueblos' claims in this civil action, nor Defendants' claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016, are subject to arbitration under the 2015 Compacts.

For the reasons set forth herein, and pursuant to Federal Rule of Civil Procedure 65, the Court hereby permanently enjoins Defendants from taking any further action, including but not limited to pursuing arbitration under the 2015 Compacts, to enforce their claims that the Pueblos owe the State additional revenue sharing payments because the Pueblos excluded the value of free play, and deducted the value of prizes won by patrons as a result of free play wagers, from their Net Win at any time between 2007 and 2016, except that Defendants may pursue any and all appeals to which they are entitled in this civil action; and,

3. Defendants' Motion to Compel Discovery and for Sanctions, Plaintiffs' and Plaintiffs-in-Intervention's Motion for Protective Order to Quash Defendants' Rule 30(b)(6) Deposition Notices (Doc. 84), and Defendants' Motion for Settlement Conference Pursuant to Rule 16 (Doc. 102) are DENIED AS MOOT.

IT IS SO ORDERED.

Kirtan Khalsa

KIRTAN KHALSA
UNITED STATES MAGISTRATE JUDGE

857 N.W.2d 601
Supreme Court of South Dakota.

FIRST GOLD, INC., Mineral Palace, LP and Four Aces Gaming, LLC, Plaintiffs and Appellants,
v.
SOUTH DAKOTA DEPARTMENT OF REVENUE AND REGULATION, Defendant and Appellee.

No. 27055.
|
Argued Nov. 17, 2014.
|
Decided Dec. 17, 2014.

Synopsis

Background: Casinos brought declaratory judgment action against Department of Revenue and Regulation seeking determination that their "free play" promotional programs were not subject to gaming tax. The Circuit Court, Sixth Judicial Circuit, Hughes County, Mark Barnett, J., granted summary judgment in favor of Department. Casinos appealed.

[Holding:] The Supreme Court, Konenkamp, J., held that casinos' slot machine free play was not subject to gaming tax as adjusted gross proceeds.

Reversed and remanded with instructions.

West Headnotes (9)

[1] Gaming and Lotteries Casinos

Casinos' slot machine free play was not subject to gaming tax as adjusted gross proceeds; because free play was a coupon and not money, chips, or tokens, it was not part of the drop, which was defined as the total amount of money, chips, and tokens removed from the drop boxes and was the only inclusion in the calculation of gross revenue, and casinos received no income, and the patrons wagered nothing, such that there was nothing to include and any awards or payouts as result of free play provided nothing to deduct. SDCL §§ 42–7B–28, 42–7B–28.1.

[2] Taxation Questions of law

Whether a statute imposes a tax under a given factual situation is a question of law and thus no deference is given to any conclusion reached by the Department of Revenue and Regulation or the circuit court.

1 Cases that cite this headnote

[3] Taxation Construction and operation

When the question is whether a statute imposes a tax, the Supreme court construes the statute liberally in favor of the taxpayer and strictly against the taxing body.

1 Cases that cite this headnote

[4] Statutes Language and intent, will, purpose, or policy

The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute.

[5] Statutes Natural, obvious, or accepted meaning

The Supreme Court must give a statute's language a reasonable, natural, and practical meaning to effect its purpose.

2 Cases that cite this headnote

[6] Administrative Law and Procedure Construction

Essentially the same tenets apply to the Supreme Court's construction of administrative rules as apply to the construction of statutes.

[7] **Administrative Law and Procedure** Rule or regulation as a whole; relation of parts to whole and one another

The Supreme Court's function is to construe administrative rules according to their intent, as ascertained from the rules as a whole.

[8] **Administrative Law and Procedure** Construction

When interpreting administrative regulation, the Supreme Court confines itself to the language used in the regulations.

[9] **Administrative Law and Procedure** Clarity and ambiguity; multiple meanings

When the meaning of an administrative regulation is clear and unambiguous, the Supreme Court only declares its meaning as clearly expressed.

Attorneys and Law Firms

***602** Sandra Hoglund Hanson of Davenport, Evans, Hurwitz & Smith, LLP, Sioux Falls, South Dakota, Attorneys for plaintiffs and appellants.

Marty J. Jackley, Attorney General, Jared C. Tidemann, Jeromy J. Pankratz, Assistant Attorneys General, Pierre, South Dakota, Attorneys for defendant and appellee.

Opinion

KONENKAMP, Justice.

[¶ 1.] Three Deadwood casinos jointly brought a declaratory judgment action in circuit court seeking a ruling that their "free play" promotional programs are not subject to gaming tax under SDCL chapter 42–7B. After an adverse ruling in circuit court, the casinos appealed.

Background

[¶ 2.] First Gold Hotel, Mineral Palace Hotel and Gaming, and Four Aces Gaming, LLC (Establishments) each run promotional programs intended to attract patrons to their casinos. If the patrons join an establishment's "club," they receive coupons or credits called "free play." Each establishment has its own operating rules, but it is agreed that free play allows patrons to play slot machines without using any of their personal money. Patrons ***603** cannot purchase free play, and distributed free play credits or coupons have an expiration date. Free play cannot be redeemed for cash, merchandise, or other promotional offers. Yet patrons can win money from the use of free play credits or coupons.

[¶ 3.] The Establishments brought suit in circuit court against the South Dakota Department of Revenue and Regulation requesting a declaration that free play is not part of adjusted gross proceeds and, therefore, is not subject to gaming tax. Both sides moved for summary judgment. The Establishments contended that free play is not subject to gaming tax under SDCL chapter 42–7B because no statute or regulation "dictates that free play must be included in gross revenue in the first place." The Department responded that free play is taxable because the gaming tax regulations specifically say that promotional awards are not a deductible event. The Department relied on a ruling from the South Dakota Gaming Commission declaring that "promotional money shall be reported as gross revenue and/or adjusted gross proceeds[.]"

[¶ 4.] The circuit court issued a number of rulings, but only the taxability question remains for our consideration. On that subject, the court held that the Establishments were not entitled to declaratory relief because the administrative regulations on gaming clearly and unambiguously provide that promotional play—i.e., free play—is not a deductible event in the calculation of adjusted gross revenue. *See* ARSD 20:18:18:26. Reasoning that free play has value "in its possibility of enticing patrons to play, which also translates to money," the court concluded that any ambiguity in the administrative regulations must be construed to mean that promotional awards are not deductible. Thus, the court granted the Department's motion for summary judgment, holding that free play must be included in adjusted gross proceeds.

Analysis and Decision

[1] [¶ 5.] In this appeal, we address only the interpretation of South Dakota's gaming tax statutes and regulations; specifically, whether slot machine free play is subject to gaming tax as adjusted gross proceeds under SDCL 42–7B–28,–28.1.* The Establishments contend that the circuit court erred when it declared that free play must be counted as part of adjusted gross proceeds under SDCL chapter 42–7B because no statute or regulation includes free play in the calculation of adjusted gross proceeds. They further assert that regulatory language regarding the *deductibility* of promotional awards is immaterial; this case concerns whether free play is *includable* in the first place.

[2] **[3]** **[4]** **[5]** **[6]** [¶ 6.] "Whether a statute imposes a tax under a given factual situation is a question of law and thus no deference is given to any conclusion reached by the Department or the circuit court." *Midcontinent Broad. Co. v. S.D. Dep't of Revenue,* 424 N.W.2d 153, 154 (S.D.1988). Moreover, when the question is whether a statute imposes a tax, we construe the statute "liberally in favor of the taxpayer and strictly against the taxing body." *Nat'l Food Corp. v. Aurora Cnty. Bd. of Comm'rs,* 537 N.W.2d 564, 566 (S.D.1995) ***604** (quoting *Thermoset Plastics, Inc. v. S.D., Dep't of Revenue,* 473 N.W.2d 136, 138 (S.D.1991)) (internal quotation mark omitted). "The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained *primarily* from the language expressed in the statute." *Goetz v. State,* 2001 S.D. 138, ¶ 16, 636 N.W.2d 675, 681 (quoting *US West Commc'ns, Inc. v. Pub. Utils. Comm'n,* 505 N.W.2d 115, 123 (S.D.1993)). We must give a statute's language "a reasonable, natural, and practical meaning" to effect its purpose. *Robinson & Muenster Assocs. v. S.D. Dep't of Revenue,* 1999 S.D. 132, ¶ 7, 601 N.W.2d 610, 612. Essentially the same tenets apply to our construction of administrative rules. *Hartpence v. Youth Forestry Camp,* 325 N.W.2d 292, 295 (S.D.1982).

[¶ 7.] Here, the Legislature imposes a tax of eight plus one percent on the adjusted gross proceeds from allowed gaming. SDCL 42–7B–28,–28.1. "Adjusted gross proceeds" is defined as "gross proceeds less cash prizes." SDCL 42–7B–4(1). "Gross proceeds" is not further defined by statute, so we look to the administrative rules promulgated by the Gaming Commission as part of the Commission's rule-making authority. *See* SDCL 42–7B–7. The gaming regulations refer to "gross revenue" rather than "gross proceeds," but, for the purpose of this proceeding, both sides agree the terms are synonymous. Under ARSD 20:18:22:12, gross revenue for each slot machine "equals drop less fills to the machine jackpot payouts, hand pay credit lockups, and vouchers issued."

[¶ 8.] It is not readily apparent from ARSD 20:18:22:12 that "free play" is included in the calculation of gross revenue. The "drop" is the only inclusion in the calculation, and "drop" is defined as "the total amount of *money, chips,* and *tokens* removed from the drop boxes[.]" ARSD 20:18:01:01(8) (emphasis added). A "chip" is defined as "a nonmetal or partly metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming [.]" ARSD 20:18:20:01(1). A "token" is defined as "a metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming." *Id.* at (2). "Free play," however, is the "use of a coupon that is issued to a patron by an establishment for play for which no bet is required [.]" ARSD 20:18:01:01(11). Because free play is a coupon and not money, chips, or tokens, it is not part of the drop.

[7] **[8]** **[9]** [¶ 9.] The Department argues that free play is "in essence a computerized token" and "has value" to the Establishments, a value taxable as income. Our function is to "construe administrative rules according to their intent[,]" as ascertained from the rules as a whole. *Estate of He Crow v. Jensen,* 494 N.W.2d 186, 191 (S.D.1992). We confine ourselves to the language used in the regulations. *Goetz,* 2001 S.D. 138, ¶¶ 15–16, 636 N.W.2d at 681. As with statutes, when the meaning of a regulation is clear and unambiguous, we only declare its meaning "as clearly expressed." *See U.S. West Commc'ns, Inc.,* 505 N.W.2d at 123. Here, a free play coupon is not money, a token, or a chip. The language defining a "drop" is clear and unambiguous, and therefore, we must only declare the meaning of the regulation. It is immaterial that free play might be valuable to the Establishments, and whether it is "in essence" a token does not mean a free play coupon is a token. On the contrary, the clear language of ARSD 20:18:20:01(2) defines a token as "a metal representative of value, redeemable for cash, issued and sold by a licensee for use at gaming."

***605** [¶ 10.] On another tack, the Department argues that free play must be included in the calculation of adjusted gross revenue because ARSD 20:18:18:26 specifically provides that "[p]romotional awards are not a deductible event in the adjusted gross revenue calculation," and ARSD 20:18:20.02:01 provides that an establishment that "engages in promotions to increase business ... may not deduct payouts made pursuant to the promotion from adjusted gross income [.]" And the Department relies on the Gaming Commission's

ruling in 2007 that promotional awards must be included in the calculation of adjusted gross proceeds under SDCL chapter 42–7B.

[¶ 11.] The Gaming Commission's legal opinion that the gaming statutes and regulations impose a gaming tax upon a promotional program similar to the Establishments' free play program in this case is not controlling. *See Midcontinent Broad. Co.,* 424 N.W.2d at 154. We review de novo whether a statute or regulation imposes a tax, and based on our review of ARSD 20:18:18:26 and ARSD 20:18:20.02:01, neither regulation supports the conclusion that the value of free play is included in the calculation of adjusted gross revenue. True, both regulations clearly provide that promotional awards and payouts cannot be *deducted.* But prohibiting a *deduction* for *awards* and *payouts* from promotions does not perforce mean that the regulations therefore *include* the value of a *free play coupon.* On the contrary, ARSD 20:18:18:26 and ARSD 20:18:20.02:01 confirm that these regulations do not *include* free play in the calculation of adjusted gross revenue.

[¶ 12.] Under ARSD 20:18:18:26, "[p]romotional and bonus systems" are described as "gaming devices that are configured to participate in electronically communicated promotional and bonus award payments from an approved host system." Promotional awards "entitle players to special promotional awards based on patrons' play activity or awards gifted by the casino to guests." *Id.* These awards, therefore, "are not a deductible event in the adjusted gross revenue calculation." *Id.* Unlike promotional awards, however, "[p]ayouts as a result of a bonus event are a deductible event in the adjusted gross revenue calculation." *Id.* This is because "[b]onus awards are based on a specific wager or specific event and are available to all patrons playing bonused slot machines." *Id.* Looking then to ARSD 20:18:20.02:01, when a *promotional award* is the result of a *specific wager,* the establishment may deduct the payouts made pursuant to the promotion. Free play is not the result of a specific wager because it is defined as a "play for which no bet is required[,]" ARSD 20:18:01:01(11), and a "bet" requires a "*wager* in a game of chance[,]" SDCL 42–7B–4(2). (Emphasis added.)

[¶ 13.] The only reasonable, natural, and practical interpretation of the gaming laws and regulations is that the value of free play is not included in calculating adjusted gross revenue and, therefore, is not part of adjusted gross proceeds under SDCL chapter 42–7B. Indeed, the Establishments receive no income, and the patron wagers nothing. Consequently, there is nothing to include, and any awards or payouts as a result of free play provide nothing to deduct. Because the statutes and regulations do not include the value of free play for slot machines in the calculation of an establishment's adjusted gross revenue, the circuit court erred when it ruled that the Establishments must remit gaming tax under chapter 42–7B for the value of free play.

[¶ 14.] Reversed with instructions to enter a declaratory judgment for the Establishments ***606** in accordance with this decision.

[¶ 15.] GILBERTSON, Chief Justice, and ZINTER, SEVERSON, and WILBUR, Justices, concur.

All Citations

857 N.W.2d 601, 2014 S.D. 91

Footnotes

* The circuit court considered additional issues, such as whether the Establishments could obtain a refund and whether a declaratory action was the proper vehicle for tax questions. The Establishments concede that they cannot obtain a refund in this declaratory action, and the Department concedes that a declaratory action is proper for addressing taxability questions. *See* SDCL 21–24–1 (the circuit court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed").

2021 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1003 & 1212
4/1/2021
Attorney General Sub-committee

HB 1003: A BILL for an Act to provide an appropriation for defraying the expenses of the attorney general.
HB 1212: A BILL for an Act to create and enact a new section to chapter 53-06.1 of the North Dakota Century Code, relating to the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide a continuing appropriation; to provide for a transfer; and to provide an effective date.

Senator Bekkedahl opened the hearing at 2:48 p.m.

Senators present: **Bekkedahl, Holmberg and Heckaman.**

Discussion Topics:

- Federal Issues
- Gaming

Wayne Stenehjem, Attorney General, answered questions of the sub-committee

Levi Kinnischtzke, Fiscal Analyst, answered questions of the sub-committee.

Senator Bekkedahl closed the hearing at 3:31 p.m.

Skyler Strand, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1212
4/7/2021
Senate Appropriations Sub-committee

Relating to the creation of a charitable gaming operating fund.

Senator Holmberg opened the committee work at 3:43 PM.

Senators present: **Holmberg, Heckaman. Senator Bekkedahl** was absent.

Discussion Topics:

- Gaming for Native American Tribes
- Limiting machines

Senator Bell, District 33, presented amendment LC 21.0479.02002 - #11437.

Cynthia Monteau, Executive Director, United Tribes Gaming Association – testified in favor.

Senator Holmberg closed the committee work at 4:00 PM.

Rose Laning, Committee Clerk

21.0479.02002

Sixty-seventh
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1212

Introduced by

Representatives Dockter, Headland, Mitskog

Senators Meyer, Bell

A BILL for an Act to create and enact section 53-06.1-08.3 and a new section to chapter 53-06.1 of the North Dakota Century Code, relating to electronic pull tab devices and the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide for a legislative management study; to provide a continuing appropriation; to provide for a transfer; ~~and~~ to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023.

SECTION 2. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Charitable gaming operating fund - Attorney general - State treasurer - Continuing appropriation - Allocations - Transfer to the general fund.

1. There is created in the state treasury the charitable gaming operating fund. The fund consists of all gaming taxes, monetary fines, and interest and penalties collected under this chapter.
2. Excluding moneys in the charitable gaming operating fund appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows:

a. Ten thousand dollars to the gambling disorder prevention and treatment fund.

b. Five percent of the total moneys deposited in the charitable gaming operating fund to cities and counties in proportion to the taxes collected under section 53-06.1-12 from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.

3. On or before June thirtieth of each odd-numbered year, the attorney general shall certify to the state treasurer the amount of accumulated funds in the charitable gaming operating fund which exceed the amount appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming for the subsequent biennium. The state treasurer shall transfer the certified amount from the charitable gaming operating fund to the general fund prior to the end of each biennium.

SECTION 3. AMENDMENT. Section 53-06.1-12 of the North Dakota Century Code is amended and reenacted as follows:

53-06.1-12. Gaming tax - Deposits ~~and allocations~~.

1. A gaming tax is imposed on the total adjusted gross proceeds received by a licensed organization in a quarter and it must be computed and paid to the attorney general on a quarterly basis on the tax return. This tax must be paid from adjusted gross proceeds and is not part of the allowable expenses. For a licensed organization with adjusted gross proceeds:
   a. Not exceeding ~~one million five hundred~~fifty thousand dollars the tax is one percent of adjusted gross proceeds.
   b. Exceeding ~~one million five hundred~~fifty thousand dollars the tax is ~~fifteen thousand~~five hundred dollars plus ~~two and twenty-five hundredths~~twelve percent of adjusted gross proceeds exceeding ~~one million five hundred~~fifty thousand dollars.
2. The tax must be paid to the attorney general at the time tax returns are filed.

3. ~~Except as provided in subsection 4, the~~The attorney general shall deposit gaming taxes, monetary fines, and interest and penalties collected in the ~~general~~charitable gaming operating fund ~~in the state treasury~~.

~~4. The attorney general shall deposit seven percent of the total taxes, less refunds, collected under this section into a gaming tax allocation fund. Pursuant to legislative appropriation, moneys in the fund must be distributed quarterly to cities and counties in proportion to the taxes collected under this section from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation under this subsection is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.~~

SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING. During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

SECTION 5. EFFECTIVE DATE. Section ~~23~~ of this Act is effective for taxable events occurring after June 30, 2021.

SECTION 6. EXPIRATION DATE. Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective.

Prepared by the Legislative Council staff for
Senator Wardner
April 6, 2021

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1212

Page 1, line 1, after "enact" insert "section 53-06.1-08.3 and"

Page 1, line 2, after the first "to" insert "electronic pull tab devices and"

Page 1, line 3, after the semicolon insert "to provide for a legislative management study;"

Page 1, line 4, remove "and"

Page 1, line 4, after "date" insert "; and to provide an expiration date"

Page 1, after line 5, insert:

"**SECTION 1.** Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023."

Page 3, after line 5, insert:

"**SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING.** During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Page 3, line 6, replace "2" with "3"

Page 3, after line 7, insert:

"**SECTION 6. EXPIRATION DATE.** Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective."

Renumber accordingly

2021 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

HB 1212
4/8/2021
Senate Appropriations Committee

Relating to the creation of a charitable gaming operating fund.

Senator Holmberg opened committee work at 3:20 PM.

Senators present: **Holmberg, Krebsbach, Wanzek, Bekkedahl, Poolman, Erbele, Dever, Oehlke, Rust, Davison, Hogue, Sorvaag, Mathern, and Heckaman.**

Discussion Topics:

- Explanation of Amendment

Senator Bekkedahl presented and explained amendment LC 21.0479.02002 - #11473.
Senator Krebsbach second.

Senators			***Senators***	
Senator Holmberg	Y		*Senator Hogue*	Y
Senator Krebsbach	Y		*Senator Oehlke*	N
Senator Wanzek	A		*Senator Poolman*	N
Senator Bekkedahl	Y		*Senator Rust*	N
Senator Davison	A		*Senator Sorvaag*	N
Senator Dever	Y		*Senator Heckaman*	Y
Senator Erbele	Y		*Senator Mathern*	Y

Roll Call vote 8-4-2. Motion passed.

Senator Bekkedahl moved Do Pass as Amended on HB 1212.
Senator Krebsbach second.

Senators			***Senators***	
Senator Holmberg	Y		*Senator Hogue*	Y
Senator Krebsbach	Y		*Senator Oehlke*	N
Senator Wanzek	A		*Senator Poolman*	Y
Senator Bekkedahl	Y		*Senator Rust*	N
Senator Davison	A		*Senator Sorvaag*	Y
Senator Dever	Y		*Senator Heckaman*	N
Senator Erbele	Y		*Senator Mathern*	N

Roll Call Vote - 8-4-2. Motion passed.

Senator Meyer will carry the bill.

Senator Holmberg closed the hearing at 3:29 PM.

Rose Laning, Committee Clerk

21.0479.02002
Title.03000

Prepared by the Legislative Council staff for
Senator Wardner
April 6, 2021

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1212

Page 1, line 1, after "enact" insert "section 53-06.1-08.3 and"

Page 1, line 2, after the first "to" insert "electronic pull tab devices and"

Page 1, line 3, after the semicolon insert "to provide for a legislative management study;"

Page 1, line 4, remove "and"

Page 1, line 4, after "date" insert "; and to provide an expiration date"

Page 1, after line 5, insert:

"**SECTION 1.** Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

53-06.1-08.3 Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023."

Page 3, after line 5, insert:

"**SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING.** During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Page 3, line 6, replace "2" with "3"

Page 3, after line 7, insert:

"**SECTION 6. EXPIRATION DATE.** Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1212, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 4 NAYS, 2 ABSENT AND NOT VOTING). Engrossed HB 1212 was placed on the Sixth order on the calendar.

Page 1, line 1, after "enact" insert "section 53-06.1-08.3 and"

Page 1, line 2, after the first "to" insert "electronic pull tab devices and"

Page 1, line 3, after the semicolon insert "to provide for a legislative management study;"

Page 1, line 4, remove "and"

Page 1, line 4, after "date" insert "; and to provide an expiration date"

Page 1, after line 5, insert:

"**SECTION 1.** Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

53-06.1-08.3 Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023."

Page 3, after line 5, insert:

"**SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING.** During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Page 3, line 6, replace "2" with "3"

Page 3, after line 7, insert:

"**SECTION 6. EXPIRATION DATE.** Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective."

Renumber accordingly

Prepared by the Legislative Council staff for
Senator Wardner
April 6, 2021

11473

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1212

Page 1, line 1, after "enact" insert "section 53-06.1-08.3 and"

Page 1, line 2, after the first "to" insert "electronic pull tab devices and"

Page 1, line 3, after the semicolon insert "to provide for a legislative management study;"

Page 1, line 4, remove "and"

Page 1, line 4, after "date" insert "; and to provide an expiration date"

Page 1, after line 5, insert:

"**SECTION 1.** Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023."

Page 3, after line 5, insert:

"**SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING.** During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Page 3, line 6, replace "2" with "3"

Page 3, after line 7, insert:

"**SECTION 6. EXPIRATION DATE.** Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective."

Renumber accordingly

21.0479.02002

Sixty-seventh
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1212

Introduced by

Representatives Dockter, Headland, Mitskog

Senators Meyer, Bell

A BILL for an Act to create and enact section 53-06.1-08.3 and a new section to chapter 53-06.1 of the North Dakota Century Code, relating to electronic pull tab devices and the creation of a charitable gaming operating fund; to amend and reenact section 53-06.1-12 of the North Dakota Century Code, relating to charitable gaming tax; to provide for a legislative management study; to provide a continuing appropriation; to provide for a transfer; ~~and~~ to provide an effective date; and to provide an expiration date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Section 53-06.1-08.3 of the North Dakota Century Code is created and enacted as follows:

Moratorium on electronic pull tab devices.

The attorney general may not authorize the installation of additional electronic pull tab devices at any location in the state during the period beginning on the effective date of this Act and ending July 31, 2023.

SECTION 2. A new section to chapter 53-06.1 of the North Dakota Century Code is created and enacted as follows:

Charitable gaming operating fund - Attorney general - State treasurer - Continuing appropriation - Allocations - Transfer to the general fund.

1. There is created in the state treasury the charitable gaming operating fund. The fund consists of all gaming taxes, monetary fines, and interest and penalties collected under this chapter.
2. Excluding moneys in the charitable gaming operating fund appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming, all other moneys in the charitable gaming operating fund are appropriated to the attorney general on a continuing basis for quarterly allocations as follows:

a. Ten thousand dollars to the gambling disorder prevention and treatment fund.

b. Five percent of the total moneys deposited in the charitable gaming operating fund to cities and counties in proportion to the taxes collected under section 53-06.1-12 from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.

3. On or before June thirtieth of each odd-numbered year, the attorney general shall certify to the state treasurer the amount of accumulated funds in the charitable gaming operating fund which exceed the amount appropriated by the legislative assembly for administrative and operating costs associated with charitable gaming for the subsequent biennium. The state treasurer shall transfer the certified amount from the charitable gaming operating fund to the general fund prior to the end of each biennium.

SECTION 3. AMENDMENT. Section 53-06.1-12 of the North Dakota Century Code is amended and reenacted as follows:

53-06.1-12. Gaming tax - Deposits ~~and allocations~~.

1. A gaming tax is imposed on the total adjusted gross proceeds received by a licensed organization in a quarter and it must be computed and paid to the attorney general on a quarterly basis on the tax return. This tax must be paid from adjusted gross proceeds and is not part of the allowable expenses. For a licensed organization with adjusted gross proceeds:
   a. Not exceeding ~~one million five hundred~~fifty thousand dollars the tax is one percent of adjusted gross proceeds.
   b. Exceeding ~~one million five hundred~~fifty thousand dollars the tax is ~~fifteen thousand~~five hundred dollars plus ~~two and twenty-five hundredths~~twelve percent of adjusted gross proceeds exceeding ~~one million five hundred~~fifty thousand dollars.
2. The tax must be paid to the attorney general at the time tax returns are filed.

3. ~~Except as provided in subsection 4, the~~The attorney general shall deposit gaming taxes, monetary fines, and interest and penalties collected in the ~~general~~charitable gaming operating fund ~~in the state treasury~~.

~~4. The attorney general shall deposit seven percent of the total taxes, less refunds, collected under this section into a gaming tax allocation fund. Pursuant to legislative appropriation, moneys in the fund must be distributed quarterly to cities and counties in proportion to the taxes collected under this section from licensed organizations conducting games within each city, for sites within city limits, or within each county, for sites outside city limits. If a city or county allocation under this subsection is less than two hundred dollars, that city or county is not entitled to receive a payment for the quarter and the undistributed amount must be included in the total amount to be distributed to other cities and counties for the quarter.~~

SECTION 4. LEGISLATIVE MANAGEMENT STUDY - CHARITABLE GAMING. During the 2021-22 interim, the legislative management shall consider studying the laws and regulatory structure of charitable gaming. The study must include consideration of the impacts of charitable gaming on tribal gaming, including revenues, regulatory requirements, and employment opportunities; whether a portion of gaming proceeds should be deposited in the gaming disorder prevention and treatment fund; the definitions of charitable and public-spirited organizations; the eligible uses of net proceeds; and regulations regarding the number of machines, sites, and locations. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

SECTION 5. EFFECTIVE DATE. Section ~~23~~ of this Act is effective for taxable events occurring after June 30, 2021.

SECTION 6. EXPIRATION DATE. Section 1 of this Act is effective through July 31, 2023, and after that date is ineffective.