IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40116

STATE OF TEXAS,

Plaintiff–Appellee,

versus

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Defendant–Appellant.

Appeal from the United States District Court for the Eastern District of Texas.

(Filed Mar. 14, 2019)

Before SMITH, DUNCAN, and ENGELHARDT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

For almost thirty years, the State of Texas and one of its Indian tribes, the Alabama-Coushatta Tribe (the "Tribe"), have disputed the impact of two federal statutes on the Tribe's ability to conduct gaming on the Tribe's reservation. The first statute, the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act[1] (the "Restoration Act"),

[1] Pub. L. No. 100-89, §§ 201–07, 101 Stat. 666 (Aug. 18, 1987). The U.S. Code was updated while this case was pending

restored the Tribe's status as a federally-recognized tribe and limited its gaming operations according to state law. The second, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721, broadly "establish[ed] * * * Federal standards for gaming on Indian lands." *Id.* § 2702(3).

Soon after IGRA was enacted, this court determined that the Restoration Act and IGRA conflict and that the Restoration Act governs the Tribe's gaming activities. See *Ysleta del sur Pueblo* v. *Texas* ("*Ysleta I*"), 36 F.3d 1325, 1335 (5th Cir. 1994). Several years later, when the Tribe was conducting gaming operations in violation of Texas law, the district court permanently enjoined that activity as a violation of the Restoration Act.

The Supreme Court then decided *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), and *City of Arlington* v. *FCC*, 569 U.S. 290 (2013). And the National Indian Gaming Commission ("NIGC"), which administers IGRA, held, contrary to *Ysleta I*, that IGRA governs the Tribe's gaming activity. Citing those changes in the law, the Tribe asked the district court to dissolve the permanent injunction. The district court refused, the Tribe appeals, and we affirm.

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in district court and now omits the Restoration Act, which was previously codified at 25 U.S.C. § 731 *et seq*. Though no longer codified, the Restoration Act is still in effect.

I.

A.

In 1987, Congress passed the Restoration Act to restore "the Federal recognition of" both the Ysleta del Sur Pueblo (the "Pueblo," an Indian tribe in far west Texas) and the Tribe. Pub. L. No. 100-89, §§ 103(a), 203(a), 101 Stat. at 667, 670.[2] The Restoration Act's final section regulates gaming on the Tribe's reservation and lands. It provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." *Id.* § 207(a), 101 Stat. at 672.[3] It

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[2] Though the Pueblo has extensively litigated the same questions the Tribe raises, the Pueblo is not a party to this appeal but appears as *amicus curiae.*

[3] That subsection concludes by explaining that the "provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07." Restoration Act § 207(a), 101 Stat. at 672. That resolution, in turn, was purportedly passed out of concern that the Restoration Act would not be enacted "unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the [Tribe's] Reservation." The resolution "respectfully request[ed] [the Tribe's] representatives" in Congress amend the Restoration Act to "provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the state of Texas, shall be prohibited on the Tribe's reservation or on Tribal land."

The significance of the Restoration Act's reference to the Tribe's resolution is disputed. The state contends that the resolution represents a *quid pro quo* in which the Tribe agreed to foreswear gaming for all time in exchange for passage of the Restoration Act. The Tribe examines the evolution of drafts of the Restoration Act and emphasizes that strong prohibitory language was ultimately deleted. In any event, the stringent prohibition proposed by the resolution was not included.

bars Texas from asserting regulatory control over otherwise legal gaming on the Tribe's reservation and lands. *Id.* § 207(b), 101 Stat. at 672. It also gives "the courts of the United States * * * exclusive jurisdiction over any offense in violation" of its gaming restriction and limits Texas to "bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *Id.* § 207(c), 101 Stat. at 672.

Congress enacted IGRA the following year. Finding that "existing Federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), Congress established "Federal standards for gaming on Indian lands, and * * * a National Indian Gaming Commission * * * to protect such gaming as a means of generating tribal revenue." *Id.* § 2702(3). Though its stated purpose is broad, IGRA does not specifically preempt the field of Indian gaming law.

IGRA defines three classes of gaming that federally recognized tribes may offer and regulates each differently. Tribes have "exclusive jurisdiction" over "class I gaming," which consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming" associated with "tribal ceremonies or celebrations." *Id.* §§ 2703(6), 2710(a)(1). "Class II gaming" includes "the game of chance commonly known as bingo," *id.* § 2703(7)(A)(i), and certain "card games" either "explicitly authorized" or "not explicitly prohibited" by state law. *Id.* § 2703(7)(A)(ii)(I)–(II). Tribes have the authority to regulate class II gaming, provided that a tribe issues a self-regulatory ordinance

meeting statutory criteria and the NIGC approves that ordinance. *Id.* § 2710(b)(1)–(2). "Class III gaming" includes all forms of gaming that are not in class I or II. Class III gaming is lawful on Indian lands only if tribes secure federal administrative and state approval. *Id.* § 2703(8); see *id.* § 2710(d). IGRA created the NIGC to administer its provisions, instructing the NIGC to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter." *Id.* § 2706(b)(10).

B.

Notwithstanding the Restoration Act, Texas, the Tribe, and the Pueblo have long disputed whether IGRA applies to the Tribe and the Pueblo. Texas avers that IGRA's permissive gaming structure is inconsistent with Sections 107(a) and 207(a) of the Restoration Act, which prohibit gaming that violates Texas law on the Pueblo's and Tribe's lands, respectively. The Tribe maintains that IGRA permits it to conduct gaming operations according to IGRA's three-class structure.

This court first considered the relationship between the Restoration Act and IGRA in *Ysleta I*. Under IGRA, the Pueblo had tried to negotiate a compact with Texas to permit class III gaming. Texas refused, citing the Restoration Act and insisting that state law prohibited the proposed games. The Pueblo sued to compel Texas to negotiate, and the district court granted summary judgment for the Pueblo.

This court reversed, holding that "(1) the Restoration Act and IGRA establish different regulatory regimes with regard to gaming" and that "(2) the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue." *Ysleta I*, 36 F.3d at 1332. With respect to the first ruling, this court found it "significant" that "the Restoration Act establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA." *Id.* at 1334. Based on that finding, we had to determine "which statute [to] appl[y]." *Id.* The Pueblo urged "that, to the extent that a conflict between the two exists, IGRA impliedly repeals the Restoration Act." *Id.* at 1334–35. We rejected that theory, noting that implied repeals are disfavored and that generally "a specific statute will not be controlled or nullified by a general one." *Id.* at 1335 (cleaned up). And "[w]ith regard to gaming," we continued, "the Restoration Act clearly is a specific statute, whereas IGRA is a general one." *Id.*[4]

This court thus concluded "that [the Restoration Act]—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Id.* "If the [Pueblo] wishe[d] to vitiate [the restrictive gaming provisions] of the Restoration Act," we declared, "it will have to petition Congress to amend or repeal the Restoration Act

[4] "The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide." *Ysleta I*, 36 F.3d at 1335.

rather than merely comply with the procedures of IGRA." *Id.*[5]

C.

The Tribe was not a party in *Ysleta I*, but, "particularly with regard to the sections concerning gaming," its Restoration Act is almost identical to the Pueblo's. *Id.* at 1329 n.3. We thus suggested in *Ysleta I* that the Restoration Act—and not IGRA—would govern the legality of any gaming operations of the Tribe. Despite the Restoration Act's restrictions, the Tribe maintained a casino on its reservation after *Ysleta I*. And in 2001, the Tribe sued Texas, seeking declaratory relief that its gaming was lawful under IGRA. See *Alabama-Coushatta Tribes of Tex.* v. *Texas*, 208 F. Supp. 2d 670, 672 (E.D. Tex. 2002). Texas counterclaimed, asking the district court permanently to enjoin the Tribe's gaming activities based on Section 207 of the Restoration Act. *Id.*

Relying on *Ysleta I*, the district court held that the Restoration Act governed the legality of the Tribe's gaming activities. *Id.* at 677–78. And because those activities violated Texas law, the court permanently enjoined them in 2002. *Id.* at 681. This court affirmed, explaining that it was "bound by the determination [in *Ysleta I*] that the Restoration Act precludes [the Tribe]

[5] Though *Ysleta I* arose in the context of the Pueblo's trying to conduct IGRA class III gaming, *Ysleta I* does not suggest that the conflict between the Restoration Act and IGRA is limited to class III gaming.

from conducting all gaming activities prohibited by Texas law on tribal lands." *Alabama Coushatta Tribe of Tex.* v. *Texas*, No. 02-41030, 2003 WL 21017542, at *1 (5th Cir. Apr. 16, 2003) (per curiam) (unpublished).[6]

D.

The Tribe ceased all gaming for twelve years. But in 2015, it started the process outlined by IGRA to secure NIGC's approval to offer class II gaming. As IGRA requires, see 25 U.S.C. § 2710, the Tribe adopted an ordinance authorizing class II bingo gaming—which Texas law permits in several forms[7]—and submitted it to NIGC's Chairman for approval.[8] The Tribe concedes that by seeking that approval, the Tribe was requesting NIGC's formal administrative determination of whether, contrary to *Ysleta I*, the tribe fell within IGRA's ambit.

The Chairman approved the ordinance via letter, explaining that "[n]othing in the IGRA's language or its legislative history indicates that the Tribe is

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[6] We further ruled that *Ysleta I*'s holding that "the tribe was precluded from seeking relief under the IGRA" was binding, contrary to the Tribe's assertion that it was *dictum*. *Alabama Coushatta Tribe of Tex.*, 2003 WL 21017542, at *1. We explained that the *Ysleta I* panel was required to decide that question "because the Restoration Act placed greater limits on the tribe's ability to conduct gaming operations" than did IGRA. *Id.*

[7] See, *e.g.*, 16 Tex. Admin. Code §§ 402.100–.709.

[8] See 29 U.S.C. § 2710(b)(1)(B).

outside the scope of NIGC's jurisdiction."[9] He then determined that the Tribe's reservation—established through the Restoration Act—counts as "Indian lands" under IGRA. Those findings, the Chairman continued, demonstrate that the Tribe's "lands are eligible for gaming under IGRA." The Chairman thus concluded that the Tribe's ordinance was "consistent with the requirements of IGRA and NIGC regulations" and approved it.[10]

Despite initially observing that the Restoration Act and IGRA potentially overlap,[11] the Chairman did not carefully consider whether the Restoration Act limited the jurisdictional reach of IGRA. He opined, instead, that "the Tribe possesses sufficient legal jurisdiction over its Restoration Act lands" for IGRA to apply. In other words, the Chairman determined that the Restoration Act does not constitute a "Federal law" that is a "specific[] prohibit[ion]" on the Tribe's proposed gaming. 25 U.S.C. § 2710(b)(1)(A).

With NIGC's approval in hand, the Tribe began to develop Naskila Entertainment Center ("Naskila"), a class II gaming facility offering electronic bingo.

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[9] Letter from Jonodev O. Chaudhuri, Chairman, Nat'l Indian Gaming Comm'n, to Nita Battise, Chairperson, Alabama-Coushatta Tribe of Tex. (Oct. 8, 2015).

[10] *Id.* The Chairman noted that the Department of the Interior interpreted IGRA as impliedly repealing the Restoration Act, but the Chairman did not adopt that conclusion.

[11] See *id.* (noting that the Restoration Act "applies state gaming laws to the Tribe's lands, with a qualification," thus raising the question "how to interpret the interface between IGRA and the Restoration Act").

Before it opened, the Tribe and Texas forged a prelitigation agreement specifying that the Tribe could operate Naskila pending a state inspection. Texas committed to "advise the Tribe * * * whether the gambling operation meets the requirements of Texas law federalized in the Restoration Act" and reserved the right to seek various forms of relief if it did not.

Upon inspection, the state determined that the electronic bingo at Naskila violated various provisions of Texas gaming law. Then the state revived the decades-old case—in which the district court had permanently enjoined the Tribe's gaming activities that had violated the Restoration Act—by filing a motion for contempt, averring that the gaming at Naskila violated the 2002 injunction.[12] Texas also sought a declaration "that IGRA does not apply to the Tribe because IGRA did not repeal the Restoration Act, and, accordingly," the Tribe "may not conduct Class II IGRA gaming on its lands." The Tribe, in turn, moved for relief from the 2002 injunction, contending that the "[NIGC's] authoritative interpretation" of the Restoration Act and IGRA "both constitutes a change in law and eliminates the sole legal basis for the injunction."

Texas moved for summary judgment on issues related to its motion for contempt, and the Tribe sought partial summary judgment on whether its bingo

[12] The Tribe was the plaintiff (as it had sought a declaratory judgment that its gaming activities were lawful under IGRA), and Texas was the defendant. When Texas reopened the case, the court granted its motion to realign the parties, making Texas the plaintiff.

operations are class II gaming under IGRA. The district court granted Texas's motion "with respect to the State's request for a declaration * * * that the Restoration Act, and consequently, Texas law, applies to the Tribe's gaming activities." The court refused to extend *Chevron* deference[13] to the NIGC's letter concluding that IGRA applied, and it denied the Tribe's motion for relief from the permanent injunction.

The Tribe appeals, asking us to decide whether the district court abused its discretion by refusing to defer to the NIGC's determination that IGRA applies to the Tribe's gaming. The district court stayed its ruling pending appeal.[14]

II.

District courts may "relieve a party * * * from a final judgment, order, or proceeding" if "applying it prospectively is no longer equitable." FED. R. CIV. P. 60(b), 60(b)(5). Where, as here, "the relief sought is dissolution or modification of an injunction, the district court may grant a Rule 60(b)(5) motion when the party seeking relief can show a significant change in statutory or decisional law." *Cooper* v. *Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016) (cleaned up). The "significant change" in this case, according to the

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[13] See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 567 U.S. 837 (1984).

[14] We have jurisdiction under 28 U.S.C. § 1292(a)(1), which allows for immediate appeal of interlocutory orders "refusing to dissolve or modify injunctions."

Tribe, is the NIGC's determination that the Tribe's lands are eligible for gaming under IGRA, combined with *Brand X* and *City of Arlington*.

We review for abuse of discretion the denial of a Rule 60(b)(5) motion for relief from judgment. *Moore* v. *Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 405 (5th Cir. 2017). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc) (citation omitted). "It is not enough that granting the motion may have been permissible; instead, denial of relief must have been so unwarranted as to constitute an abuse of discretion." *Moore*, 864 F.3d at 405 (internal quotation marks and citation omitted). While review is highly deferential, "we review *de novo* any questions of law underlying the district court's decision." *Frew* v. *Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (internal quotation marks and citation omitted).

III.

This case turns on whether a judicial precedent—holding that the Restoration Act and IGRA conflict and that the former, not the latter, applies to the Tribe's gaming activity—or a later contrary agency interpretation should control. *Brand X* supplied the framework: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds

that its construction follows from the *unambiguous terms of the statute* and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added). We must thus decide whether *Ysleta I* is "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation." *Id.* at 982–83.

A.

Brand X's rule that only a prior judicial interpretation adhering to the unambiguous terms of the statute trumps an agency construction "follows from *Chevron* itself." *Id.* at 982. "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." *Id.* (citation omitted). So to be faithful to that principle, "judicial interpretations contained in precedents" must be held "to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate." *Id.* That means that a judicial interpretation should prevail over a later conflicting agency interpretation if the "court, employing traditional tools of statutory construction, ascertain[ed] that Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9.[15]

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[15] *Brand X*, 545 U.S. at 985, offers the rule of lenity as an example of a "rule of construction" that a court might have applied which "requir[ed] it to conclude that the statute was unambiguous to reach its judgment."

Consequently, a prior judicial decision need not "say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency." *Exelon Wind 1, L.L.C.* v. *Nelson*, 766 F.3d 380, 398 (5th Cir. 2014) (quoting *Fernandez* v. *Keisler*, 502 F.3d 337, 347 (4th Cir. 2007)).[16] To the contrary, where "the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation," the court's interpretation should prevail. *Id.* (quoting *Fernandez*, 502 F.3d at 347–48).[17]

Instead of requiring the prior decision to have called the relevant statute "unambiguous," reviewing courts have looked for the contrary—whether the decision called the statute "ambiguous." For example, this court recently held that an agency's interpretation could prevail over a prior judicial interpretation because the latter had "expressly recognized that the court decided to come down on one side of a complex

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[16] See also *Silva-Trevino* v. *Holder*, 742 F.3d 197, 201–03 (5th Cir. 2014) (upholding a prior judicial interpretation in the face of a conflicting agency interpretation even though the prior decision did not say that the statute was "unambiguous" because the first court was "confident" that "Congress ha[d] spoken directly to the statutory question at hand" based on the text of the statute and Congress's use of the language in other statutes).

[17] See also *Council for Urological Interests* v. *Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015) (citation omitted) ("[A] statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque.").

debate."[18] And where other circuits have deferred to an agency's interpretation under *Brand X*, those courts have "emphasize[d] that their prior decisions also noted ambiguity in the text at issue." See *Exelon Wind 1*, 766 F.3d at 398 (collecting citations).[19]

B.

Ysleta I did not find "ambiguity in the text at issue." *Id.* Instead, after applying canons of construction and legislative history to § 107(a) and (c) of the Pueblo's Restoration Act—which corresponds to § 207(a) and (c) in the Tribe's—this court concluded that "the Restoration Act and IGRA establish * * * fundamentally different regimes." *Ysleta I*, 36 F.3d at 1334. Indeed, this court was left with "the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* In other words, this court summarized, "(1) the Restoration Act and IGRA establish

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[18] *Acosta* v. *Hensel Phelps Constr. Co.*, 909 F.3d 723, 738 (5th Cir. 2018) (internal quotation marks omitted) (quoting *Melerine* v. *Avondale Shipyards, Inc.*, 659 F.2d 706, 710 (5th Cir. Unit A Oct. 1981) (discussing the "complex dispute" among courts)).

[19] A plurality of the Supreme Court has likewise held that, under *Brand X*, a court need not have said that the statute it was interpreting was "unambiguous." Instead, "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *United States* v. *Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (plurality opinion) (quoting *Chevron*, 467 U.S. at 843 n.9).

different regulatory regimes with regard to gaming, [and] (2) the Restoration Act prevails over IGRA when gaming activities proposed by [the Pueblo or Tribe] are at issue." *Id.* at 1332.

Additionally, we cited evidence that Congress did not intend for IGRA to apply to all Indian gaming.[20] Moreover, we specifically rejected the theory that "to the extent that a conflict between the two exists, IGRA impliedly repeals the Restoration Act." *Ysleta I*, 36 F.3d at 1335. Repudiating that interpretation, we cited (1) the presumption against implied repeals and (2) the canon that a specific statute controls over a general statute. *Id.* With respect to the second, we noted that the Restoration Act was "clearly" the specific statute, "whereas IGRA is a general one." *Id.*

The Tribe counters that, for two reasons, *Ysleta I* does not foreclose the NIGC's determination that IGRA applies to the Tribe. First, the Tribe emphasizes that *Ysleta I*'s holding "was based on non-textual cues from legislative history and canons of construction" and thus could not have "follow[ed] from the unambiguous terms of the statute." *Brand X*, 545 U.S. at 982. That reasoning disregards the fact that the *Brand X* inquiry stems from *Chevron* step one and requires the reviewing court to apply "traditional tools of statutory interpretation"—like the canons and legislative

[20] See *Ysleta I*, 36 F.3d at 1335 (citing later enactments expressly excluding certain tribes from IGRA's coverage as evidence of "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands").

history—to determine whether Congress has spoken to the precise issue. See *Chevron*, 467 U.S. at 843 n.9. And when "the canons supply an answer, *Chevron* leaves the stage." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (internal quotation marks and citation omitted).

Second, the Tribe asserts that *Ysleta I* "never had occasion to determine whether the Restoration Act constitutes a federal law that specifically prohibits [c]lass II gaming on Indian lands under IGRA." That misses what *Ysleta I* did hold—that the Restoration Act's gaming provisions, and not IGRA, provide the framework for deciding the legality of any and all gaming by the Pueblo and the Tribe on their Restoration Act lands. *Ysleta I*, 36 F.3d at 1332.[21]

In sum, *Brand X* teaches that a court should not defer to an agency's interpretation of a statute if a "judicial precedent hold[s] that the statute unambiguously forecloses the agency's interpretation." *Brand X*, 545 U.S. at 982–83. That requires us to apply *Chevron* step one to a prior judicial interpretation and to

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[21] The Tribe suggests that the Restoration Act's application of Texas laws to the Tribe's gambling is somewhat empty because Texas does not "prohibit" gaming as defined in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). This court expressly rejected that theory in *Ysleta I*, 36 F.3d at 1333–34, holding that "Congress did not enact the Restoration Act with an eye toward *Cabazon Band*." Instead, we were "left with the unmistakable conclusion that Congress—and the [Pueblo]—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the [Pueblo's] reservation in Texas." *Id.* at 1334.

determine whether that court employed traditional tools of statutory interpretation and found that Congress spoke to the precise issue. That is what *Ysleta I* did in holding that "the Restoration Act prevails over IGRA when gaming activities proposed by [the Pueblo or Tribe] are at issue." *Ysleta I*, 36 F.3d at 1332. Consequently, the NIGC's decision that IGRA applies to the Tribe does not displace *Ysleta I*. We thus reaffirm that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations on the Tribe's lands.[22] IGRA does not apply to the Tribe, and the NIGC does not have jurisdiction over the Tribe.

The district court did not abuse its discretion in denying relief from the permanent injunction. The order denying the motion for relief from judgment is AFFIRMED.

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[22] The Tribe alternatively contends that *Ysleta I* should be overruled. The rule of orderliness forbids us from reaching that issue. See *Jacobs* v. *Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (citations omitted) ("[O]ne panel of [this] court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [the] *en banc* court.").

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. 9:01-CV-299**
ALABAMA COUSHATTA	§	
TRIBE OF TEXAS,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Pursuant to 28 U.S.C. § 636(c), the Local Rules for the United States District Court for the Eastern District of Texas, and order of the District Court, this proceeding is before the undersigned United States Magistrate for all matters, including trial and entry of judgment. Pending before the Court for purposes of this order are:

- the State of Texas' *First Amended Motion for Contempt for Violation of the June 25, 2002, Injunction, and Alternatively for Equitable Declaratory and Injunctive Relief* (doc. #74) and *Motion for Summary Judgment of Contempt and to Enforce the Court's June 25, 2002, Permanent Injunction* (doc. #96); and

- the Alabama Coushatta Tribe of Texas' *Motion for Relief from Judgment* (doc. #76) and *Motion for Summary Judgment* (doc. #99).

I. Background

A. The Original Complaint and Injunction

On November 21, 2001, the Alabama-Coushatta Tribe of Texas ("The Tribe") filed a complaint for declaratory and injunctive relief (doc. #1) against the State of Texas ("The State") and a handful of its officials seeking injunctive and declaratory relief under the provisions of the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act ("The Restoration Act"), the Indian Gaming Regulatory Act of 1988 ("IGRA"), and case law. Specifically, the Tribe sought injunctive relief allowing the Tribe to govern gaming activities on its Indian lands, free from interference. In the original complaint, the Tribe cited the imminent threat presented by Texas potentially interfering in the Tribe's exercise of its sovereign and statutory rights to offer certain gaming activities on Tribal lands. The Tribe also cited background information about its circumstances at the time, including a 46% unemployment rate, poor health conditions, and a median household income for the Tribe of $10,809. See *Complaint* (doc. #1), at p. 6. The Tribe stated that it is responsible for stewardship of its 4,593 acre Reservation, the external boundaries of which fall within Polk County, Texas. The land lies in the Big Thicket area and is generally unsuitable for raising crops or cattle. The Tribe claims that it was wrongfully dispossessed of over two million acres of its original Reservation, but acknowledges that it was seeking a declaration of its rights only regarding the current acreage held by the United States in trust for the

benefit of the Tribe. The complaint goes on to explain the background regarding the Restoration Act of 1987 and the resulting sovereign authority of federally recognized tribes to govern gaming activities.

By means of the Restoration Act of 1987, Indian tribes were restored to federally recognized status. Through the Restoration Act, all rights or privileges lost to the tribes under the Termination Act of 1954, codified in Title 25, United States Code, were restored to the tribes, including the tribes' authority to manage their own affairs, govern themselves, regulate internal matters and substantive law, and have territorial boundaries. See *Complaint* (doc. #1), at ¶ 17. In this case, the Tribe avers that certain members of Congress threatened to block passage of the Restoration Act unless the Tribe agreed to language which would forever prevent it from engaging in gaming activities on its lands. *Id.* at ¶ 18. The Tribe claims that under duress, it was coerced into passing a tribal resolution supporting such language, which if passed into law, would have precluded gaming. *Id.* Congress passed the governing Restoration Act in 1987, and the Tribe's Resolution was incorporated into the Act. See 25 U.S.C.S. § 737(a)[1] (LexisNexis 2010 & Supp. 2017).

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[1] In the course of researching the Restoration Act, the Court discovered that the publishers of the United States Code Service (LexisNexis) and United States Code Annotated (West) opted to omit the statutory language of the relevant Restoration Act provisions found in Title 25 from their respective publications. The Restoration Act is, however, still in effect and the full authoritative source can be found at Pub. L. No. 100-89, 101 Stat. 666 (August 18, 1987). For the sake of efficiency and consistency, the

The complaint also discussed the United States Supreme Court's decision *in California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which the Tribe contends should be applied to Texas public policy to allow for the Tribe to have sovereign and inherent authority over its gaming activities. *Complaint*, at ¶ 19-21. In 1999, the General Council for the Tribe voted for the Tribe to offer gaming activities as a source to generate badly-needed tribal government revenues. *Id.* at ¶ 23. The Tribe constructed and opened an Entertainment Facility for members of the Tribe's private gaming club. *Id.* at ¶ 24. The Entertainment Facility maintained a number of gaming devices, including random number generators, electronic ticket dispensers, electronic pull tabs, spinning reel slots, and video lottery devices. *Id.* The Tribe cited a number of other gaming activities that are protected in Texas, including the State Lottery, a horse racing industry, an extensive "slot parlor" market, charitable carnival or casino nights, high-stakes bingo, raffles, casino cruises. *Id.* at ¶ 26. The Tribe also claimed that the State had embraced a policy of "willful blindness" when it came to non-enforcement as thousands of "eight-liner" games were being used in hundreds of establishments throughout Texas, despite the State's official policy against allowing such private, non-governmental "lottery" games. *Id.* at ¶ 27. The complaint notes that

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Court will cite the provisions found in Title 25 of the United States Code Service (LexisNexis 2010 & Supp. 2017) because that publication still includes the statutory language and because all relevant documents in this case to date cite the Restoration Act as codified in Title 25.

the Texas State Lottery and Texas State Horse Racing Commission have the regulatory/discretionary authority over gambling/gaming devices. *Id.* at ¶ 28. In conclusion, the Tribe filed their initial complaint seeking a declaration and injunctive relief from the court permitting it to possess authority to regulate gaming activities on its own Indian lands and to authorize and regulate forms of gaming on its own lands. See *id.* at ¶¶ 35-41.

After the Tribe filed the original complaint, the following course of events ensued. The State filed an answer with a competing motion for injunctive relief. The presiding judge at the time, The Honorable John Hannah, Jr., stayed the case pending a ruling by the United States Court of Appeals for the Fifth Circuit in a related case[2], *Texas* v. [*Ysleta*] *del Sur Pueblo.*[3] After the Fifth Circuit handed down its January 17, 2002, order affirming the district court in the [*Ysleta*] case, the

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[2] The [Ysleta] del Sur Pueblo litigation is relevant for consideration because the [Ysleta] del Sur Pueblo Tribe is the only other Texas tribe subject to the same Restoration Act, enacted on August 18, 1987. See 25 U.S.C.S. § 1300g *et seq.* (LexisNexis 2010 & Supp. 2017) and 25 U.S.C.S. § 731 *et seq.* (LexisNexis 2010 & Supp. 2017), Pub. L. No. 100-89, 101 Stat. 666 (August 18, 1987) ("An Act to provide for the restoration of the Federal trust relationship and Federal services and assistance to the [Ysleta] del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas[.]").

[3] See *State* v. [*Ysleta*] *del Sur Pueblo*, No. 01-51129, 31 F. App'x 835, 2002 WL 243274 (5th Cir. 2002) ("We affirm the judgment of the district court essentially for the reasons stated in its careful, thorough September 27, 2001, Memorandum Opinion.") (as cited in Judge Hannah's order, *Alabama-Coushatta Tribes of Texas* v. *Texas*, 208 F. Supp. 2d 670, 674 (E.D. Tex. 2002)).

Court lifted the stay in this case. Judge Hannah then conducted a four (4) day hearing on the requested relief, and issued his findings of fact and memorandum opinion after receiving the parties' post-hearing proposed findings of fact and briefs.

Judge Hannah issued his ruling on June 25, 2002, in a 22-page memorandum opinion and order in which he granted relief to the State of Texas in the form of a permanent injunction (doc. #36), *Alabama-Coushatta Tribes of Texas* v. *Texas*, 208 F. Supp. 2d 670, 674 (E.D. Tex. 2002). In sum, he held that "the Tribe should be permanently enjoined from operating its casino because (1) under the plain language of the Restoration Act, as codified in Title 25 of the United States Code, Section 737(a), and Texas law the Tribe is prohibited from conducting casino gaming and (2) the Tribe's resolution not to engage in gaming in exchange for restoration of its federal trust status was "incorporated into the Restoration Act." *Id.* at 672. Judge Hannah carefully analyzed governing precedent, including the Restoration Act and its history, the Fifth Circuit's decision in [*Ysleta*] *del Sur Pueblo* v. *State of Tex.*, 36 F.3d 1325, *cert. denied* 514 U.S. 1016 (1995) [*Ysleta*] *I*), and the Supreme Court's decision in *Cabazon*. See *id.* at 672-678. He concluded that the Tribe's activities in operating the Entertainment Center (to include gaming activities) violated provisions of the Texas Penal Code which prohibit certain manners of gambling and that the Entertainment Center was a public nuisance under law. See *id.* at 678-79 (citing the applicable versions of TEX. PENAL CODE §§ 47.02-47.04 and TEX. CIV. PRAC. & REM.

CODE §§ 125.001 and 125.041(1))[4] (governing common and public nuisances as defined by Texas Penal Code)). Based on this conclusion, and after weighing the appropriate factors to consider before issuing injunctive relief, Judge Hannah ordered the Tribe to cease and desist in operating its gaming and gambling activities on the Tribe's reservation which violate state law. *Id.* at 682.

On July 17, 2002, Judge Hannah entered final judgment and denied the Tribe's request to stay his ruling pending appeal (doc. #47, doc. #48). On September 11, 2002, while the appeal was pending, he also granted the State's request for an award of attorney's fees and awarded $62,828.50 in attorneys' fees and $3,816.00 in non-taxable litigation expenses to the State as the prevailing party pursuant to the Texas Civil Practice and Remedies Code. See *Order* (doc. #52).

On April 16, 2003, the Fifth Circuit issued a per curiam opinion in which a three-judge panel upheld Judge Hannah's decision. See Fifth Circuit Order (doc. #53), 66 F. App'x 525 (5th Cir. 2003). The Fifth Circuit concluded that it was bound by [*Ysleta*] *I* and further noted that "[h]owever sympathetic we may be to the Tribe's argument, we may not reconsider [*Ysleta*], even

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[4] The Texas Legislature repealed Section 125.041 of the Texas Civil Practice & Remedies Code in 2003. See Acts of 2003, 78th Leg., ch. 1202, § 14. The current provision defining a common nuisance predicated on gambling is found in Section 125.0015. See TEX. CIV. PRAC. & REM. CODE. ANN. § 125.0015(a)(5) (West. Supp. 2017).

if we believed that the case was wrongly decided." *Id.* at p. 4. The Court went on to conclude that "[j]ust as the district court concluded, we are bound by the determination that the Restoration Act precludes the [Ysleta] del Sur Pueblo and the Alabama Coushatta tribes from conducting all gaming activities prohibited by Texas Law on tribal lands." *Id.*

The United States Supreme Court denied the Tribe's petition for writ of certiorari on October 6, 2003. See *Letter* (doc. #55), 540 U.S. 882 (2003). The Clerk then shipped the case to the Federal Records Center in 2004, and Judge Hannah's injunction and judgment remained in place for over thirteen years, with no activity in the case until filings in 2016, as discussed below.

B. Developments After Judge Hannah's Injunction

In 2015, the Tribe sought guidance from the National Indian Gaming Commission (NIGC)[5] regarding the Tribe's Resolution No. 2015-038, adopted by the Tribe as a Class II gaming ordinance. See *October 8, 2015, letter from NIGC to Tribe* ("NIGC letter"), *Exhibit A to Tribe's Motion for Relief from Judgment* (doc. #76-1). The NIGC issued its responsive letter on October 8, 2015, in which the NIGC considered whether the

[5] In IGRA, Congress established the NIGC within the Department of the Interior as a three member commission to monitor gaming conducted on Indian lands and approve related tribal resolutions and ordinances See 25 U.S.C.S. §§ 2704-2707 (LexisNexis 2015).

Tribe's lands are eligible for gaming. *Id.* The NIGC considered the Restoration Act and IGRA. *Id.* The NIGC noted that a similar question regarding the [Ysleta] del Sur Pueblo's gaming ordinance arose and that the same jurisdictional analysis applies to the Alabama Coushatta because they are governed by nearly identical language under the Restoration Act.

The NIGC found that IGRA[6] applied to the Tribe, thus bringing the Tribe within the NIGC's jurisdiction. *Id.* Accordingly, the NIGC further determined that the Tribe's lands were eligible for gaming under IGRA. *Id.* Relatedly, the NIGC concluded that the Restoration Act did not bar the Tribe from conducting gaming on its lands pursuant to IGRA. *Id.*

According to the Tribe, it began development of its Naskila Entertainment Center ("Naskila") to establish a Class II gaming center for operating electronic bingo gaming on its lands. See *Motion for Relief* (doc. #76), at p. 6. The Tribe notified the State about Naskila, and, after negotiations with the Tribe, the State in turn agreed to permit the Tribe to operate Naskila pending the Court's ultimate determination of the impact of the NIGC's agency decision as it relates to the injunction in this case and, if necessary, whether the gaming at Naskila qualifies as Class II gaming under IGRA. *Id.*

On June 27, 2016, June 28, 2016, and July 14, 2016, counsel for the parties filed various motions to substitute new attorneys and to realign the parties for

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[6] 25 U.S.C.S. §§ 2701–2721 (LexisNexis 2015)

purposes of the case style, which the Court granted. See *Orders* (doc. #69, doc. #71). The docket activity prompted the Clerk to reassign the case to the docket of United States District Judge Michael H. Schneider, as Judge Hannah passed away in 2003. On August 3, 2016, Judge Schneider in turn referred the proceeding to the undersigned United States Magistrate Judge for recommended disposition. See *Order* (doc. #67). On September 13, 2016, the case was reassigned to Chief United States District Judge Ron Clark upon Judge Schneider's retirement. Finally, the parties consented to the undersigned magistrate judge for all matters, including trial and entry of judgment pursuant to 28 U.S.C. § 636(c), and Judge Clark entered his corresponding *Order of Reference* (doc. #82) on November 7, 2016.

The parties then jointly requested the entry of a scheduling order setting out certain deadlines. The Court issued scheduling orders (doc. #73, doc. #91) culminating in a motion hearing held before the undersigned on May 11, 2017. See *Minute Entry* (doc. #113), *Transcript* (doc. #115). At the hearing, the parties focused primarily on the legal issues at stake in their competing motions. The Court then took the matter under advisement with this opinion to follow. In the interim, the undersigned reset a bench trial before the Court a number of times pending the Court's ruling, the most current bench trial setting being scheduled for February 28, 2018. See *Fifth Amended Scheduling and Discovery Order* (doc. #124).

C. The Parties' Motions and Competing Arguments

The State initiated the most recent contempt proceedings after the Tribe, through its attorneys, gave the State advance notice of its intent to open Naskila in May or June 2016. See *First Amended Motion for Contempt* (doc. # 74), at p. 5. As referenced above, in May 2016, the State and the Tribe entered into a "Pre-Litigation Agreement" requiring notice of opening and allowing a physical inspection of the Naskila premises by the State to determine whether the gaming devices were operating in violation of Texas law, and therefore in violation of federalized law under the Restoration Act. *Id.* Naskila, operated by the Tribe, made a "soft" opening on May 16, 2016, then reopened at 12:00 pm on May 17, 2016, and has reportedly remained open since that time. *Id.* A "grand opening" for Naskila was then held on June 2, 2016. *Id.*

On June 15, 2016, the State conducted a physical inspection of Naskila. Based on the inspection conducted by Captain Daniel Guajardo, the State contends that hundreds of gambling devices were employed at Naskila at 540 State Park Road 56, Livingston, Texas. *Id.* See also *Declaration of Captain Daniel Guajardo, Exhibit 2 to First Amended Motion for Contempt* (doc. #74-3). Captain Guajardo states that on the date of inspection, he personally inserted cash directly into one of the gambling devices, observed six different computer servers from different vendors to generate chance, and pushed a single button to play an electronic "bingo" game which yielded a cash prize by voucher. *Id.* The

State contends this "payment of cash consideration into a game of chance which produces cash prizes is an illegal lottery as defined by Texas Penal Code § 47.01." See *Guajardo Affidavit*, at ¶ 6. It also contends that operation of electric bingo as a lottery could constitute a violation of Sections 47.02 (gambling), 47.03(a)(1) and (a)(5) (operating a gambling place or promoting gambling), 47.04(a) (keeping of a gambling place), and 47.06(a) and (c) (possession, manufacture or transfer of gambling device or gambling paraphernalia). See *id.*; see also TEX. PENAL CODE ANN. §§ 47.02, 47.03 47.04, 47.06 (West 2011 & Supp. 2017).

Based on these alleged gambling violations of the Texas Penal Code, the State contends that the Tribe is violating Judge Hannah's 2002 injunction. See *First Amended Motion for Contempt*, at p. 7. The State also seeks declaratory relief through a finding that IGRA does not apply to the Tribe because IGRA did not repeal the Restoration Act, and, accordingly, that as a Restoration Act Tribe, the Alabama-Coushatta Tribe of Texas may not conduct Class II IGRA gaming on its lands. *Id.*

The Tribe in turn filed its Motion for Relief from Judgment, which the Court construes as the companion motion filed in response to the State's motion for contempt. The Tribe argues that the NIGC's determination is entitled to deference under *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, (1984). See *Motion for Relief*, at pp. 6-7. The Tribe further contends that the NIGC's decision is a reasonable interpretation of IGRA and the Restoration Act. *Id.* at p. 10.

The Tribe relatedly argues that IGRA's text and history, along with the subsequent applicable case law, support the NIGC's decision. *Id.* at 12-16. Accordingly, the Tribe contends that the Court should defer to the NIGC's determination and dissolve the 2002 injunction. *Id.* at pp. 16, 19-20.

The Tribe also avers that the Fifth Circuit's decision in [*Ysleta*] *I* is distinguishable from the issues before the Court here because it was not a decision about the text of IGRA. *Id.* at p. 17 (citing [*Ysleta*] *I*, 36 F.3d at 1329-31). It argues that the NIGC's decision is an agency decision constituting a significant change in law providing the Court the authority to relieve the Tribe of the injunction's prospective effects. *Id.* at p. 18. The Tribe further contends that, if the Restoration Act does in fact control, it can continue to offer Class II bingo free from State oversight.

The State's motion for contempt requests that the Court order the Tribe to show cause as to whether the Tribe violated Judge Hannah's injunction by conducting Class II gaming at Naskila. See *First Amended Motion for Contempt*, at p. 12. The contempt finding would necessarily require an evidentiary hearing about the activities at Naskila as well as any civil contempt penalties, but is dependent upon the Court's determination of the preliminary issue regarding the application of the Restoration Act versus IGRA.

On February 8, 2017, the parties also filed competing motions for summary judgment pursuant to an agreed briefing schedule. The State's motion for

summary judgment reasserts its position that the Restoration Act applies to the Tribe, thus prohibiting gaming on the Tribe's lands. See *State's Motion for Summary Judgment of Contempt* (doc. #96), at pp. 13-14. Predicated on a finding to this effect, the State next argues that the second issue for resolution is whether the Tribe's current gaming activities violate the Texas Penal Code's prohibition on gambling. See *id.* at p. 14.

The Tribe's *Motion for Partial Summary Judgment* (doc. #99) again argues that IGRA, not the Restoration Act, governs the gaming activities conducted on the Tribe's land. See *Motion* (doc. #99), at p. 1. The Tribe also argues that under IGRA, state law is inapplicable to the operation of Class II gaming and that the electronic bingo games conducted at Naskila constitutes Class II gaming rather than Class III gaming, contrary to the State's contention that the Tribe is in fact conducting Class III gaming. See *id.* at pp. 1, 9-13.

D. Issues for Consideration

As referenced in the parties' briefs, the Court is tasked with determining two principal questions:

First, does IGRA, 25 U.S.C. 2701 *et seq.*, apply to the Tribe, as the NIGC's October 2015 letter concluded, or does the Tribe's Restoration Act control, 25 U.S.C. §§ 731–737, as the State argues?

Second, if IGRA controls, do the operations at Naskila consist of "Class II" gaming?

Both parties submit evidentiary support for their competing positions on the second issue—whether the Tribe is conducting Class II or Class III gaming on its lands. In the Court's view, however, this evidentiary dispute need not be reached until the Court makes its determination on whether the Restoration Act or IGRA applies. This is because, as discussed herein, the application of the Restoration Act would govern all gaming under Texas law, whether Class II or Class III, perhaps rendering moot any analysis of Class II versus Class III gaming under IGRA. The only remaining issue would be the State's request for contempt, which would require certain evidentiary findings. At the May 11, 2017, motion hearing before the undersigned, the parties agreed that the evidentiary issues regarding the State's contempt request and the classification of the gaming conducted at Naskila would be dependant on the Court's determination of the initial Restoration Act versus IGRA issue. See *Transcript of May 11, 2017, Hearing* (doc. #115), at 40:20-41:23.[7] The parties

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[7] "MR. ABRAMS:" * * * if the court concludes that the Restoration Act applies, there would need to be a hearing—

> THE COURT: Sure.
>
> MR. ABRAMS: —at which the parties offer evidence.
>
> THE COURT: Okay.
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> MR. ABRAMS: And even if it were on the Class II, Class III issue, there likely would need to be live evidence about those issues, although, you know, we could determine that.
>
> THE COURT: Okay. You agreed, counsel?
>
> MR. ASHBY: Yes, we agree with that, your Honor."

See doc. #115, at p. 41.

also indicated that they were amenable to taking up the evidentiary issues related to the State's contempt motion and the enforcement of the 2002 injunction, if necessary, at an evidentiary hearing at a later date. See *id.* at 41:25-43:6.

The parties briefed all issues thoroughly and the Court has read and considered the numerous filings in full. For the sake of brevity, the undersigned will not summarize all of the responses, replies and sur-replies but will refer to them as necessary below. The Court appreciates the parties' detailed framing of all of the pertinent issues. However, given the procedural posture of the case and the parties' discussion on the record at the motion hearing, the undersigned finds it appropriate to focus the Court's analysis on the initial legal issue of whether the Restoration Act or IGRA applies to the Tribe's situation at hand. The Court will accordingly defer the questions of the Tribe's alleged contempt and the gaming classifications until after the undersigned makes the underlying legal determination and the parties have the opportunity to present their evidence on the secondary issues as needed.

II. Discussion

A. Standard of Review

In their motions, the parties request declaratory relief in the form of a legal conclusion by the Court on the issue of the Restoration Act's continued applicability and the impact, if any, of IGRA and the NIGC's recent opinion. The Court will accordingly consider this

requested relief in the context of summary judgment in a declaratory judgment action.[8] See, *e.g.*, *Northfield Ins. Co.* v. *Rodriguez*, 261 F. Supp. 3d 705, 708 (W.D. Tex. 2017) (applying summary judgment standard of review in declaratory judgment action involving interpretation of CGL insurance policy).

Summary judgment should be granted only if the moving party can show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). This rule places the initial burden on the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986) (quoting Rule 56); *Stults* v. *Conoco,*

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[8] 28 U.S.C. 2201(a) provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declarations, whether or not further relief is or could be sought." 28 U.S.C.A. § 2201(a) (Westlaw through Pub. L. No.115-90). Section 2201 is only a procedural provision that extends to controversies in the jurisdiction of the federal courts. *Northfield Ins. Co.*, at 708 (citing *Gaar* v. *Quirk*, 86 F.3d 451, 453-54 (5th Cir. 1996)). Therefore, the declaratory judgment must have an independent basis for subject matter jurisdiction. *Id.* Citing *Lowe* v. *Ingalls Shipbuilding, Inc.*, 723 F.2d 1173, 1179 (5th Cir. 1984). The jurisdictional requirements are met in this case under 28 U.S.C. 1362, which provides that the district courts shall have original jurisdiction over civil actions brought by any Indian tribe, and 28 U.S.C. § 1331 because the matter in controversy arises under federal statutes. See 28 U.S.C.A. §§ 1362, 1331 (Westlaw through Pub. L. No. 115-90); see also *Complaint* (doc. #1), at ¶¶ 6-8 (jurisdiction) and ¶¶ 35-41 (Tribe's original claim for declaratory and injunctive relief).

Inc., 76 F.3d 651, 655-56 (5th Cir. 1996) (citations omitted).

B. Applicable Statutory Framework

As the undersigned referenced above, two statutes are integral to the history of the case and the Court's decision today: the Restoration Act and IGRA. Congress passed the Restoration Act in 1987, thereby restoring the federal trust relationship between the United States and the Tribe. See *Texas* v. [*Ysleta*] *I del Sur Pueblo*, No. 99-CV-320-KC, 2016 WL 3039991, at *7 (W.D. Tex. May 27, 2016) (citing [*Ysleta*] *I*, 36 F.3d at 1329); see also 25 U.S.C.S. §§ 731 *et seq*. (LexisNexis 2010 & Supp. 2017) ("Alabama and Coushatta Indian Tribes of Texas: Restoration of Federal Supervision"). One provision of the Restoration Act states:

> "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07[9] which was approved and certified on March 10, 1986."

[9] The Tribe's Resolution No. T.C.-86-07 was approved and certified by the Tribal Council on March 10, 1986, and provides that "the Alabama-Coushatta Tribe remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation[;]" * * * "the Tribe strongly believes that the

25 U.S.C. § 737(a) (LexisNexis 2010 & Supp. 2017). The Restoration Act also provides that "the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on the lands of the tribe." *Id.* at § 737(c). "However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *Id.*

Approximately one year after passing the Restoration Act, in 1988 Congress enacted IGRA. IGRA set forth a regulatory system consisting of three classes of gaming with differing degrees of corresponding regulations. See *Texas* v. [*Ysleta*] *del Sur Pueblo*, 2016 WL 3039991, at *7; see also 25 U.S.C.S. § 2703(6)-(8) (LexisNexis 2015) (defining Class I, Class II and Class III gaming). Congress' intent in passing IGRA was, among other things, 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;" and "to provide a statutory basis for the regulation of gaming by an Indian tribe[.]" 25 U.S.C.S. § 2702(1)-(2) (LexisNexis

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controversy over gaming must not be permitted to jeopardize this important legislation[;]" and requesting that the United States Senate and House of Representatives include language in the Act "which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the state of Texas, shall be prohibited on the Tribe's reservation or on Tribal land." See *Alabama-Coushatta Tribes of Tex.* v. *Texas*, 208 F. Supp. 2d at 673-74 (quoting Alabama-Coushatta Tribal Resolution #86-07).

2015). IGRA also created the NIGC and charged it with "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of this Act." 25 U.S.C.S. § 2706(b)(10) (LexisNexis 2015).

C. Analysis of the NIGC's Letter Opinion

(1) *Chevron* Deference Generally

Under the *Chevron* doctrine, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *9 (quoting *City of Arlington* v. *Fed. Communications Comm'n.*, 569 U.S. 290, 133 S. Ct. 1863, 1868 (2013)); see also *Chevron*, 467 U.S. at 842. First, always, is the question whether Congress has directly spoken to the precise question at issue. *Chevron*, at 842. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. *Id.* at 843. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

Additionally, an agency's interpretation of a statute it does not administer is ordinarily not entitled to

deference. *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *9 (citing *America's Cmty. Bankers* v. *Fed. Deposit Ins. Corp.*, 200 F.3d 822, 833 (D.C. Cir. 2000), *Passamaquoddy Tribe* v. *Maine*, 75 F.3d 784, 793-94 (1st Cir. 1996)). The types of interpretations that may qualify for *Chevron* deference include "an agency's interpretation of a statutory ambiguity that concerns the scope of [its] regulatory authority (that is, its jurisdiction)." *Id.* Quoting *City of Arlington*, 569 U.S. at 293, 133 S. Ct. at 1866. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its authority.*" *City of Arlington*, 569 U.S. at 297 (emphasis in original).

Within the Fifth Circuit, courts are "guided by the two-step analysis" introduced in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *10 (citing *Knapp* v. *U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015)). Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears (1) that Congress delegated authority to the agency generally to make rules carrying the force of law, and (2) that the agency interpretation claiming deference was promulgated in the exercise of that authority. See *id.* Quoting *Knapp*, at 454; see also *Mead*, 533 U.S. at 226-27; *City of Arlington*, 569 U.S. at 307; *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Amalgamated Transit Union* v. *Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990) ("Where Congress prescribes the form in which an agency may exercise its

authority * * * [courts] cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.").

(2) The [Ysleta] del Sur Pueblo Litigation

Here, the Court takes much guidance from United States District Judge Kathleen Cardone of the Western District of Texas in her most recent ruling on the "protracted" gaming "saga" of the [Ysleta] del Sur Pueblo ("Pueblo Tribe[10]"). See *Texas* v. [*Ysleta*] *del* [*Sur*] *Pueblo*, at *2. She considered many of [the] same issues present here.

In the Pueblo Tribe's case, similar arguments were present regarding the Pueblo Tribe's ongoing attempt to conduct gaming at the Speaking Rock Casino on its tribal lands. See *id.* at *3. The Pueblo Tribe's situation is almost identical to that of the Alabama Coushatta's as both tribes were subject to the Restoration Act as explained *infra*. See *id.* at *6. The Pueblo Tribe sought and obtained a letter opinion from the NIGC, dated October 5, 2015,[11] in which the NIGC considered a

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[10] The [Ysleta] del Sur Pueblo are referred to as both the "Tigua" and the "Pueblo" in case law and the parties' briefs. Both designations appear correct historically, but because Judge Cardone's opinion refers to the [Ysleta] del sur Pueblo entities in her case collectively as the "Pueblo Defendants", the Court will follow suit. See [YSLETA] DEL SUR PUEBLO, http://www.ysletadelsurpueblo.org (last visited February 1, 2018); *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *1.

[11] Notably, only three (3) days prior to the NIGC's letter to the Alabama Coushatta in this case.

gaming ordinance and resolution passed by the Pueblo Tribe. *Id.* at *5. The NIGC approved the Pueblo Tribe's ordinance and concluded that the Pueblo Tribe's lands were eligible for gaming under IGRA because they qualify as Indian lands. *Id.* The NIGC's letter also cited to and incorporated a 22-page letter from the Solicitor for Indian Affairs with the Department of Interior (DOI) in support of the finding that IGRA governs gaming on the Pueblo Tribe's reservation and impliedly repealed provisions of the Restoration Act "repugnant to IGRA." *Id.* In sum, the DOI letter concluded that the Restoration Act does not prohibit the Pueblo Tribe from gaming on its Indian lands under IGRA[12]. *Id.* at *6. The DOI letter also opines that the Fifth Circuit's 1994 opinion in [*Ysleta*] *I* was wrongly decided and, contrary to the Fifth Circuit's holding in that case, that IGRA applies to the Pueblo Tribe's gaming activities. See *id.*

Similar to the Alabama Coushatta Tribe's approach in this case, the Pueblo Tribe relied on the opinion letters from the NIGC and the DOI in arguing that Judge Cardone should vacate the injunction precluding the Pueblo Tribe from conducting gaming on its lands. See *id.* The Pueblo Tribe also relatedly

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[12] Based on the record, the DOI did not issue any letter opinion specific to the Alabama-Coushatta's gaming operations, but the NIGC incorporated the DOI's letter from the [Ysleta] del Sur Pueblo's case [into its] findings in its October 8, 2015, letter to the Alabama-Coushatta. See doc. #76-1, at p. 2. The DOI letter was also briefly discussed at the May 11, 2017, hearing in the context of *Chevron* deference. See *Transcript* (doc. #115), at 32:21-33:9.

contended that the NIGC and DOI letters should be afforded *Chevron* deference. *Id.*

Judge Cardone held that "[w]hile the Pueblo Defendants urge the Court to defer to the NIGC and DOI Letters, the Court does not afford the Letters *Chevron* deference because there is no indication that Congress intended for courts to defer to NIGC and DOI interpretations of anything beyond the respective statutes each agency administers." *Id.* at *10. She explained as follows:

> "IGRA established the NIGC as an entity within the DOI, and charged it with administering IGRA. See 25 U.S.C. §§ 2704(a), 2706(b)(10) (charging NIGC with, among other things, "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of this chapter"). Likewise, DOI is charged with, among other responsibilities, administering the Restoration Act. See Restoration Act, Pub. L. No. 100-89, § 2, 101 Stat. 666 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."). Thus, NIGC's interpretations of the provisions of IGRA, and DOI's interpretations of the provisions of the Restoration Act, are interpretations potentially within the scope of agency pronouncements accorded *Chevron* deference. See *City of Arlington*, 135 [133] S. Ct. at 1866. Yet, the NIGC and DOI Letters interpret not only the agencies' respective organic statutes, but also the interplay of their organic statutes with

> other statutes and case law. See *generally* Agency Letters. *Therefore, the Court does not defer to the contents of the NIGC and DOI Letters because an agency's interpretation of a statute it does not administer is ordinarily not entitled to deference.* See Am.'s Cmty. Bankers, 200 F.3d at 833; *Passamaquoddy*, 75 F.3d at 793-94.

Id. at *10 (emphasis added).

(3) Application

This Court faces a similar situation here. The letter from the NIGC to the Tribe grounds its content in analysis of both IGRA and the Restoration Act, along with federal regulations promulgated under IGRA. See *NIGC Letter* (doc. #76-1), see also *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *11. The NIGC letter to the [Tribe] interprets the Restoration Act: "the Restoration Act must be taken into consideration as part of this ordinance review;" "we must first examine * * * whether the Tribe's Restoration Act lands are exempt from IGRA's domain." See *NIGC Letter*, at p. 2. Although IGRA does specifically task the NIGC with enforcing and interpreting IGRA as noted above, there is no indication that Congress delegated similar authority to IGRA to do the same for the Restoration Act. The NIGC also relies on the DOI letter at issue in the [Ysleta] del Sur Pueblo case and notes that "because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, that same jurisdictional analysis applies to the Alabama-Coushatta's portion of

the Restoration Act." *Id.* The NIGC letter to the Tribe further relies on the DOI letter for the conclusion that "IGRA impliedly repeals the portions repugnant to IGRA." *Id.* Therefore, the NIGC's opinion at issue here is dependant upon the very same analysis employed by the NIGC and the DOI in the Pueblo Tribe's case, to which Judge Cardone declined to afford *Chevron* deference. The Court is unpersuaded that the NIGC's opinion in this case is distinguishable to the extent that it is entitled to deference. In fact, it relies on identical analysis to that employed by the NIGC and the DOI in the Pueblo case.

Like Judge Cardone, this Court "cannot take it upon itself to assume, without any evidence, that Congress intended to entrust the NIGC with reconciling IGRA and the Restoration Act." See *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *10 (internal quotations omitted). Thus, the undersigned must also conclude that the NIGC's letter to the Tribe and findings therein do not merit *Chevron* deference on this basis. *Id.*

Judge Cardone further concluded that to the extent the Pueblo Tribe asked her to "defer to the NIGC's * * * conclusion that IGRA impliedly repealed the Restoration Act, the *Chevron* framework remains untenable." *Id.* at *11. Whether IGRA impliedly repealed the Restoration Act is "a pure question of statutory construction for the courts to decide," and not an issue that appears to "implicate [] agency expertise in a meaningful way." *Id.* Quoting *Immigration and Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987) and *Drakes* v. *Zimski*, 240 F.3d 246, 250 (3rd

Cir.), *cert. denied* 540 U.S. 1008 (2003). Judge Cardone concluded that the court should not defer to the NIGC's and DOI's respective interpretations of the interplay among several statutes and case law. *Id.* at *11. Despite the Tribe's arguments to the contrary, addressed *infra*, the undersigned is not persuaded that this case should yield a different result and accordingly concludes that the agency letter did not in effect repeal the Restoration Act governing the Alabama Coushatta.

At the hearing in this matter, the Tribe argued that in *City of Arlington*, the Supreme Court rejected the *Chevron* deference analysis employed in Judge Cardone's opinion. See *Transcript*, at p. 29. In *City of Arlington*, the United States Supreme Court considered "whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, jurisdiction)." *City of Arlington*, 569 U.S. at 296-97. After explaining the "jurisdictional" issue for Chevron purposes, Justice Scalia stated that once the labels of jurisdictional and nonjurisdictional are "sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency asserted authority, or not." *Id.* at 301 (internal quotation omitted).

The Tribe avers that the NIGC's decision reflects a judgment regarding the scope of its own authority—its regulatory jurisdiction—and, therefore, that it is unequivocally entitled to *Chevron* deference under *City of Arlington*. See *Motion for Relief*, at p. 8. The Court concurs that the NIGC has the authority to

administer and regulate Indian gaming laws because that authority is provided by IGRA. See 25 U.S.C.S. §§ 2705, 2710 (LexisNexis 2015). What the Tribe has not accounted for, however, is the gap between the authority granted to IGRA under the NIGC and the provisions of the Restoration Act, which the NIGC does not have the statutory authority to interpret or regulate. The Tribe attempts to explain this away by contending that the Restoration Act is a "contingent, general regulation" of all gaming on some Indian lands and not a "specific prohibition" of gaming on Indian lands and, therefore, IGRA, rather than the Restoration Act, applies to the Tribe. See *id.* at p. 11. This exercise in "specific" versus "general" statutory construction is unpersuasive. The fact remains that the Restoration Act speaks directly to gaming by the Tribe. See 25 U.S.C.S. § 737(a) (LexisNexis 2010 & Supp. 2017). The Fifth Circuit determined that the Restoration Act's provisions on gaming apply to Restoration Act tribes—including the Alabama-Coushatta—and concluded that it, not IGRA governs gaming by the Tribe. See [*Ysleta*] *I*, at 1336. It continues to uphold this determination as the tribes present new challenges to the prohibition on gaming. See, *e.g.*, *id.*; *Tex.* v. [*Ysleta*] *del Sur Pueblo*, 69 F. App'x 659 (5th Cir.), *cert. denied*, 540 U.S. 985 (2003); *Tex.* v. [*Ysleta*] *del Sur Pueblo*, 431 F. App'x 326 (5th Cir. 2011); *Alabama Coushatta Tribe of Tex.* v. *Tex.*, 66 F. App'x 525 (5th Cir.), *cert. denied* 540 U.S. 882 (2003).

The *City of Arlington* analysis does not require a different conclusion, as argued by the Tribe. *City of*

Arlington speaks to the scope of an agency's delegated statutory authority and its application of that authority. See *City of Arlington*, 569 U.S. at 300. It further stands for the proposition that "*Chevron* [deference] applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *Id.* at 301. Judge Cardone's analysis did not run afoul of this deference because she rightly considered the issue of NIGC's authority—or lack thereof—under the Restoration Act, not IGRA, from which it derives its statutory authority. The Court concludes that the *City of Arlington* in fact supports both Judge Cardone's decision and the conclusion that the undersigned must reach herein. *City of Arlington* dealt with a federal agency—the FCC—which relied on its broad authority to implement the Communications Act when it issued a Declaratory Ruling setting a 90 day period for state and local governments to process applications for wireless facilities. *Id.* at 294-95. In that case, the Communications Act specifically empowered the FCC with broad authority to prescribe rules and regulations to carry out the provisions of the Communications Act. See *id.* at 293; 47 U.S.C.A. § 201 (Westlaw through Pub. L. No. 115-90). No such provision delegating this broad authority to IGRA is available in the Restoration Act, and the law remains that the Restoration Act, not IGRA, applies to the Tribe. For these reasons, the Court overrules the Tribe's reliance on *City of Arlington* for the proposition that it somehow "rejected" the governing law in this case.

The Tribe relatedly argues that the NIGC's opinion regarding the Tribe's gaming ordinance, along with *City of Arlington* and *Brand X*,[13] constitute a change in controlling law which would support the Court (1) giving deference to the NIGC decision and (2) dissolving the 2002 injunction. Again, this line of reasoning is flawed because it presumes that the NIGC has the authority to interpret the Restoration Act in the first place, which it does not. The Tribe has not established that Congress intended for the NIGC to interpret the Restoration Act or promulgate regulations pursuant to the Restoration Act. As discussed above, the NIGC's authority flows from IGRA, not the Restoration Act.

(D) The Fifth Circuit's Decision in [*Ysleta*] *I*: Binding Precedent

Finally, the Court also agrees with Judge Cardone in concluding that the undersigned is bound by the Fifth Circuit's decision in [*Ysleta*] *I*. See *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *14. As noted herein, in *Ysleta I*, the Fifth Circuit analyzed the interplay between the Restoration Act and IGRA, as applied to the Pueblo Tribe. [*Ysleta*] *I*, 36 F.3d at 1332-37. The court examined the

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[13] See *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Svcs.*, 545 U.S. 967 (2005). *Brand X* is distinguishable for the same reasons as *City of Arlington*. In *Brand X*, the Supreme Court was also considering an FCC interpretation of the Communications Act of 1934 and the Telecommunications Act of 1996, the very statutes from which its authority flows. See *Brand X*, 545 U.S. at 975-76, 983. Again, this is inapplicable to this case because the NIGC's authority does not flow from the Restoration Act, the governing statute.

text and legislative histories of both acts, and concluded that the Restoration Act, and not IGRA, "would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Id.* at 1335. In reaching this conclusion, the Fifth Circuit found that Congress had spoken to the issue of whether the Restoration Act or IGRA governs gaming on the Tribe's reservation because IGRA did not impliedly repeal the Restoration Act, and because the two statutes establish "fundamentally different regimes." See *id.* at 1334-35. The Fifth Circuit explained:

> "With regard to gaming, the Restoration Act clearly is a specific statute, whereas IGRA is a general one. The former applies to two specifically named Indian tribes located in one particular state, and the latter applies to all tribes nationwide. Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that *IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act.* Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA. Finally, we note that in 1993, Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands.

Id. at 1335 (footnotes omitted; emphasis added).

Thus, the Fifth Circuit identified a congressional intent that IGRA did not repeal the Restoration Act and that therefore the Restoration Act—and not IGRA—applies to the Tribe's gaming activity. *Texas* v. [*Ysleta*] *del Sur Pueblo*, at *14 (citing [*Ysleta*] *I*, at 1334-35). This Court is bound by Fifth Circuit precedent on this issue and, therefore, is not inclined to hold otherwise. See *id.* See also *Law* v. *Hunt Co., Tex.*, 830 F. Supp. 2d 211, 216 (N.D. Tex. 2011) ("this court will not deviate from Fifth Circuit precedent unless there are clear legal grounds to do so.")[14] Accordingly, the Restoration Act, and not IGRA, applies in this case. See *id.* Texas law governing gaming, specifically the Texas Penal Code, accordingly applies to the Tribe's gaming operations on its lands.

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[14] In its briefs, the Tribe cites a number of decisions from other Circuits in support of the NIGC's opinion and its applicability here. See, *e.g., Commonwealth of Mass.* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017), *cert. denied* ___ S. Ct. ___, 2018 WL 311322 (Jan. 8, 2018); *State of Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994); *City of Duluth* v. *Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th Cir. 2013); *Gaming Corp. of Am.* v. *Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996). Although those opinions may bolster the Tribe's position, they are insufficient to support a deviation from standing Fifth Circuit precedent without clear legal grounds to do so. See, *e.g.*, *Law*, 830 F. Supp. 2d at 216. Until the Fifth Circuit reverses itself or the Supreme Court clearly holds to the contrary, this Court must follow and apply the Fifth Circuit's determinations set forth in [*Ysleta*] *I*.

III. Concluding Statements and Order of the Court

Given the complex history of this matter and its importance to the Tribe, the undersigned must take the time to express the Court's understanding and sympathy for the Tribe's position. The Tribe is bearing the brunt of a conflicting statutory scheme, the result of which is arguably undesirable to its interests and, many would say, unjust. Counsel for both sides have done a thorough and excellent job in advocating for their clients and presenting the best case possible, especially given the context and the complicated historical, legal, social and economic issues at stake. The fact remains, however, that the Tribe submitted itself to the gaming laws of the State when it certified Tribal Resolution No. T.C.-86-07 in exchange for passage of the Restoration Act. This may have indeed taken effect under duress, but that issue is not up for consideration by this Court thirty years after the fact. The plain language of the Restoration Act stands, as does the Fifth Circuit's undisturbed interpretation of the application of that Act to the restoration tribes of Texas. Until Congress can be persuaded to amend or repeal the Restoration Act, the Court is obligated to abide by the plain language of the statute and the Tribe must conform to the gaming laws and regulations of Texas as provided by the Restoration Act. See *Tex.* v. [*Ysleta*] *del Sur Pueblo*, 431 F. App'x 326, 327 (5th Cir. 2011) (per curiam), *citing* [*Ysleta*] *I*, at 1335.

Based on the findings legal conclusions stated herein, the Court therefore ORDERS as follows:

- the State of Texas' *Amended First Motion for Contempt for Violation of the June 25, 2002, Injunction, and Alternatively for Equitable Declaratory and Injunctive Relief* (doc. #74) and *Motion for Summary Judgment of Contempt and to Enforce the Court's June 25, 2002, Permanent Injunction* (doc. #96) are **GRANTED IN PART**. Those motions are granted with respect to the State's request for a declaration from the Court that the Restoration Act and, consequently, Texas law, applies to the Tribe's gaming activities. At this time, the Court defers ruling on the State's other requests for relief regarding contempt findings and damages.

The Court further **ORDERS** that the Tribe's *Motion for Relief from Judgment* (doc. #76) and *Motion for Partial Summary Judgment* (doc. #99) are **DENIED**.

Having concluded that the Restoration Act applies, the Court finds it unnecessary to reach the question of whether the activities conducted at Naskila constitute Class II or Class III gaming under IGRA at this juncture. To the extent that the parties' motions seek relief on this issue, that relief is denied as moot, without prejudice to reassert. As indicated above, the Court further defers any finding on the State's contempt allegations and corresponding request for damages and fees until after conducting a hearing and making proper evidentiary findings.

It is so ordered.

SIGNED this the 6th day of February, 2018.

/s/ Keith F. Giblin
KEITH F. GIBLIN
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40116

STATE OF TEXAS,

Plaintiff–Appellee,

versus

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Defendant–Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed May 24, 2019)

(Opinion 918 F.3d 440 (Mar. 14, 2019))

Before SMITH, DUNCAN, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. No judge in regular active service having requested that the court be polled on rehearing

en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.*

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* Judge Ho is recused and did not participate in the consideration of the petition for rehearing en banc.

101 STAT. 666

PUBLIC LAW 100-89—AUG. 18, 1987

Public Law 100–89
100th Congress

An Act

To provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

SEC. 2. REGULATIONS.

The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act.

TITLE I—YSLETA DEL SUR PUEBLO RESTORATION

SEC. 101. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 102);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas—

(A) held by the tribe on the date of the enactment of this title;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on such date;

(C) held in trust for the benefit of the tribe by the Secretary under section 105(g)(2); and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on the date of enactment of this Act, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

SEC. 102. REDESIGNATION OF TRIBE.

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after the date of the enactment of this title, be known and designated as the Ysleta del Sur Pueblo. Any reference in any law, map, regulation, document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

SEC. 103. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP.—The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive

order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) FEDERAL SERVICES AND BENEFITS.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 104. STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) TRIBAL AUTHORITY.—The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity—

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement.

SEC. 105. PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any land within the reservation held in trust, on the date of enactment of this Act by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes[,]" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

(g) ACQUISITION OF LAND BY THE TRIBE AFTER ENACTMENT—

(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe—

(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act and take title to such land in fee simple, and

(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal. Council, the Secretary may—

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act, and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

SEC. 106. TIWA INDIANS ACT REPEALED.

The Tiwa Indians Act is hereby repealed.

SEC. 107. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

SEC. 108. TRIBAL MEMBERSHIP.

(a) IN GENERAL.—The membership of the tribe shall consist of—

(1) the individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC-5-84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC-85-005 adopted on January 16, 1985; and

(2) a descendant of an individual listed on that Roll if the descendant—

(i) has 1/8 degree or more of Tigua-Ysleta del Sur Pueblo Indian blood, and

(ii) is enrolled by the tribe.

(b) REMOVAL FROM TRIBAL ROLL.—Notwithstanding subsection (a)—

(1) the tribe may remove an individual from tribal membership if it determines that the individual's enrollment was improper; and

(2) the Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

TITLE II—ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS

SEC. 201. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 202);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushatta Indian Reservation in Polk County, Texas, comprised of—

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 1 of the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes." and approved August 23, 1954 (25 U.S.C. 721);

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

SEC. 202. ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS CONSIDERED AS ONE TRIBE.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this title and any other law or rule of law of the United States.

SEC. 203. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP: FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP.—The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other

purposes" and approved August 23, 1954, are hereby restored and such Act shall not apply to the tribe or to members of the tribe after the date of the enactment of this title.

(c) FEDERAL BENEFITS AND SERVICES.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 204. STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) CURRENT CONSTITUTION AND BYLAWS TO REMAIN IN EFFECT.—Subject to the provisions of section 203(a) of this Act, the constitution and bylaws of the tribe on file with the Committee on Interior and Insular Affairs is hereby declared to be approved for

the purposes of section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) AUTHORITY AND CAPACITY OF TRIBAL COUNCIL.—No provision contained in this title shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b). The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity—

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program, or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 205 as the successor in interest to the Tribal Council.

SEC. 205. ADOPTION OF NEW CONSTITUTION AND BYLAWS.

Upon written request of the tribal council, the Secretary shall hold an election for the members of the

tribe for the purpose of adopting a new constitution and bylaws in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

SEC 206. PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall

approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

SEC. 207. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 206(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Approved August 18, 1987.

LEGISLATIVE HISTORY—H.R. 318:

HOUSE REPORTS: No. 100-36
(Comm. on Interior and Insular Affairs).
SENATE REPORTS: No. 100-90
(Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 133 (1987):
Apr. 21, considered and passed House.
July 23, considered and passed Senate, amended.
Aug. 3, House concurred in Senate amendments.

Calendar No. 960

99TH CONGRESS }	SENATE	{ REPORT
2nd Session }		{ 99—470

PROVIDING FOR THE RESTORATION OF FEDERAL RECOGNITION TO THE YSLETA DEL SUR PUEBLO AND THE ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS, AND FOR OTHER PURPOSES

SEPTEMBER 23 (legislative day, SEPTEMBER 15), 1986—
Ordered to be printed

Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H R 1344]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 1344) providing for the restoration of Federal recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

H.R. 1344 was introduced in the House of Representatives on February 28, 1985, by Congressman Coleman of Texas. The purpose of H.R. 1344 is to restore Federal recognition or supervision to two Indian tribes located within the State of Texas. By Act of August 23, 1954, the Federal trust relationship with the Alabama and Coushatta Tribe was terminated with a proviso authorizing the transfer of tribal lands to the State of Texas. The lands so conveyed were to be held in trust by the State of Texas for the benefit of the tribes or their members. By the Act of April 12, 1968, legislation was enacted designating the descendants of the Tiwa Indians living in El Paso, Texas, of the Ysleta del Sur Pueblo, as Tiwa Indians of Ysleta, Texas, and provided that the responsibility, if any, of the United States for the said Indians was transferred to the State of Texas

H.R. 1344 will restore Federal recognition to the Alabama and Coushatta Indian Tribes as one tribal unit for purposes of this Act, and provides for recognition and restoration of the Federal trust relationship between the United States and the Tiwa Indians, with the proviso that such Indian group shall henceforth be known as the Ysleta del Sur Pueblo. The bill also provides for taking of tribal or individually-owned Indian lands into trust, and provides for expansion of the Indian land base in consultation with the State. The State shall exercise civil and criminal jurisdiction as if the State had assumed jurisdiction with the consent of

the tribes under the provisions of the Indian Civil Rights Act of 1968 (25 U.S.C. 1321, 1322).

BACKGROUND

The Pueblo at Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the Spanish[.] The revolt forced the Spanish to retreat from Santa Fe to El Paso, and the Spanish forced a large number of Tiwa Indians from Isleta Pueblo to accompany them. The Indians were settled at Ysleta del Sur and in 1682 the mission church was built, which still stands today. In 1751 Spain granted the land of Ysleta Pueblo to its inhabitants as communal property, measuring one league in all directions from the church doors.

On May 9, 1871, the Texas legislature passed an Act to incorporate the Town of Ysleta in El Paso County, and through ensuing actions of the newly created town, nearly all of the 23,000 acres of the Ysleta Spanish grant were patented to non-Indians. In May of 1967 the Texas legislature enacted legislation which authorized the State to accept a transfer of Federal trust responsibilities to the Tigua Indian Tribe, and by Act of April 12, 1968, Congress transferred to the State the responsibility, if any, of the United States for the said Indians.

Texas now holds a 100 acre reservation in trust for the tribe and, through the Texas Indian Commission, provides a superintendent, as well as administrative and economic development funding for the tribe. A

recent opinion of the Texas Attorney General has thrown in doubt the continuation of this trust relationship between the State and tribe.

The Alabama-Coushattas are a state recognized tribe of approximately 500 full blood Indians residing on a 4,600 acre reservation near Livingston, Texas. The State of Texas purchased lands in 1854 for a permanent home for the Alabama and Coushatta Indians (in part because of the tribes assistance to Sam Houston in Texas' war for independence) and since then the State has stood in the role of trustee to the tribes. A Federal trust relationship in 1928 when the United States purchased additional reservation lands for the tribe and, from 1928 to 1954, Texas and the United States maintained a joint trust responsibility to the tribe. The 1954 Act of Congress terminated the trust relationship of the United States with the tribe, but the relationship with the state continued.

In 1983 the Texas Attorney General issued an Opinion (No. JM–17) in which he concluded that the tribe's trust relationship with the State violated the Equal Rights Amendment to the State Constitution, thus throwing in jeopardy the continued trust status of the tribe's lands and its continued funding from the State.

LEGISLATIVE HISTORY

H.R. 1344 was introduced in the House by Congressman Coleman of Texas and was referred to the Committee on Interior and Insular Affairs for

consideration. The Committee held hearings on October 17, 1985; the bill was reported out of Committee on December 15, 1985; and was passed by the House and sent to the Senate on December 16, 1985.

H.R 1344 was referred to the Select Committee on Indian Affairs for consideration. The Committee held hearings on H.R 1344 on June 25, 1986. H.R 1344 was considered by the Select Committee at a business meeting on September 15, 1986, and was ordered reported out of Committee with an amendment in the nature of a substitute.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 15, 1986, with a quorum present, by unanimous vote recommends the Senate pass H.R. 1344, as amended in the nature of a substitute.

COMMITTEE AMENDMENTS

The Committee recommends an amendment in the nature of a substitute[.]

SECTION-BY-SECTION ANALYSIS

Section 1. This section cites this Act as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

Section 2. This section authorizes the Secretary of the Interior to promulgate regulations to implement this act.

Title I. Ysleta del Sur Pueblo Restoration

Section 101. This section defines certain terms for the purpose of this bill.

Section 102. This section states that from now on, the Tiwa Indians of Ysleta, Texas, shall be known as the Ysleta del Sur Pueblo.

Section 103. This section restores Federal Recognition to the Ysleta del Sur Pueblo as an Indian tribe and states that any rights of the tribe and its members which may have been lost under the Tiwa Indian Act is hereby restored. This Section also makes all benefits available to Federally recognized Indian tribes available to the Ysleta del Sur Pueblo. This section further provides that nothing in this Act shall affect any property right or contractual obligation in existence before the enactment of this Act.

Section 104. Subsection (a) provides that nothing in this section shall affect the power of the State of Texas to enact special legislation, and the State of Texas is authorized to perform any services that would benefit the Tribe that are not inconsistent with the provisions of this Act.

Subsection (b) provides that the Tribal Council shall represent the tribe in the implementation of this

title and shall be legally entitled to enter into contracts and administer programs for the Tribe.

Section 105. Subsection (a), (b) and (c) provide that the reservation is hereby declared to be a Federal Indian reservation and also provides that the Secretary shall accept any offer by the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State for the benefit of the tribe. The Secretary shall hold such land in trust for the benefit of the Tribe and take in trust any land held by the tribe upon written request by the tribe.

Subsection (d) provides that the United States Attorney General shall approve any deed from the State or the tribe which conveys title to land within El Paso or Hudspeth Counties, Texas to the United States to be held in trust by the Secretary for the benefit of the tribe.

Subsection (e) provides that the Secretary shall be able to erect permanent improvements on the land notwithstanding the fact that title to such land has not been transferred to the Secretary by the State or the tribe.

Subsection (f) provides that the State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed jurisdiction with the consent of the tribe under the Act of April 11, 1968.

[Subsections] (g), (h), (i) and (j) of this section provides for the Secretary to negotiate with the tribe for the proposal of a plan for the enlargement of the reservation. Upon approval of such plan by the tribe, the Secretary shall submit such plan, in the form of proposed legislation, to the Congress. These subsections also require consultation with local governments and other interested parties before such plan is sent to Congress[.]

Section 106. This section repeals the Tiwa Indian Act.

Section 107. This section provides that gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands. The provisions of Section 107 are also applicable to any lands acquired after the date of enactment of the Act and without regard to whether such lands are located within or outside of El Paso and Hudspeth Counties, Texas, if they are taken into trust by the Secretary and made a part of the tribe's reservation[.] The prohibition contained in this section will also apply to any lands outside the reservation which might be acquired by the tribe or a member thereof and be taken into trust. With regard to tribal lands not taken into trust and therefore not made a part of the tribe's reservation, the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable. This section also provides [penalties] for violations of these provisions[.] This section also provides that nothing in this section shall be construed

as a grant of civil regulatory jurisdiction to the State of Texas[.] This provision is a restatement of the law as provided in the Act of August 15, 1953 (67 Stat. 588, P L. 83–280), as amended by the Act of April 11, 1968 (82 Stat. 77, P.L. 90–284), and should be read in the context of the provisions of Section 105(f).

Section 108. Provides that the tribe's membership shall consist of individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC–5–84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC–85–005 adopted on January 16, 1985; and a descendant of an individual listed on that Roll if the said descendant (i) has 1/8 degree or more of Tigua-Ysleta del Sur Pueblo Indian blood, and (ii) is enrolled by the tribe. Subsection (b) allows the tribe to remove an individual from tribal membership where such enrollment was improper. Subsection (b) further provides that the Secretary, in consultation with the tribe, may review the Tribal Membership Roll and if said Secretary so determines that an individual enrolled by the tribe does not meet the criteria for membership set out in the tribe's Resolution No. TC–5–84, may, but only after affording the individual or the tribe [an] administrative appeal, declare such individual ineligible for Federal services provided to Indians because of their status as Indians. However, nothing in this section is intended to limit the authority of the tribe to determine its membership criteria or the eligibility or ineligibility of an individual to membership in the tribe, for purposes other than eligibility for Federal Indian services.

Title II: Alabama and Coushatta Indian Tribes of Texas

Section 201. Defines certain terms for the purposes of the Act[.]

Section 202. Provides that the Alabama and Coushatta Indian tribes shall be considered as one tribal unit for the purposes of this title and any other law.

Section 203. Provides that Federal recognition as an Indian tribe is hereby restored to the tribe and all rights which may have been lost under the August 23, 1954 Act which terminated the tribes are hereby restored.

This section further provides that the tribes and its members shall be eligible to receive all benefits provided to federally recognized Indian tribes[.] The section also provides that except as provided by this Act, the enactment of this title shall not affect any property or contractual rights in existence before the enactment of this title.

Section 204. Subsection (a), provides that nothing in this Act shall affect the power of the State of Texas to enact special legislation which would benefit the tribe. Furthermore, the State of Texas is authorized to perform any services for the benefit of the tribe that are not inconsistent with the provisions of this Act[.]

Subsection (b) provides that the current tribal constitution and bylaws of the tribe, on file with the Committee on Interior and Insular Affairs is hereby

declared to have been approved pursuant to section 16 of the Act of June 18, 1934[.] In addition, all laws and rules of law, specifically, the Act of April 11, 1968 (82 Stat 77) shall apply to members of the tribe, the tribe, and the reservation.

Subsection (c) provides that the provisions of this title shall not affect the powers of the Tribal Council. This Council shall represent the tribe in the implementation of this title and shall have the power to enter into contracts and administer tribal programs for the tribe.

Section 205[.] Provides that upon written request of the Tribal Council, the Secretary shall conduct an election in accordance with section 16 of the Act of June 18, 1934 for the purpose of adopting any new constitution and bylaws for the tribe.

Section 206. Provides that the reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary. The Secretary is directed to accept any offer from the State to convey title to any lands held in trust by the State. The Secretary shall hold such land in trust for the benefit of the tribe.

The Secretary is also directed to take any land in trust for the benefit of the tribe which is held by the tribe and located within the reservation.

This section also provides that the Attorney General of the United States shall approve any deed which

conveys land from the State or the tribe of the United States.

Lastly, this section provides that the State of Texas shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State has assumed jurisdiction with the consent of the tribe under the Act of April 11, 1968.

Section 207. This section provides that gaming, gambling, lottery and bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands. The provisions of Section 207 are also applicable to any lands acquired after the date of enactment of the Act and without regard to whether such lands are located within or outside of the reservation of Polk County, Texas, if it is taken into trust by the Secretary and made a part of the tribe's reservation. The prohibition contained in this section will also apply to any lands outside the reservation which might be acquired by the tribe or a member thereof and be taken into trust. With regard to tribal lands not taken into trust and therefore not made a part of the tribe's reservation, the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable. This section also provides [penalties] for violation of these provisions. This section also provides that nothing in the section shall be construed as a grant of civil regulatory jurisdiction to the State of Texas. This provision is a restatement of the law as provided in the Act of August 15, 1953 (67 Stat. 588, P.L. 83–280), as amended by the Act of April 11, 1968

(82 Stat. 77, P.L. 90–284), and should be read in the context of the provisions of Section 206(f).

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for H.R. 1344, as amended in the nature of a substitute, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 16, 1986.

Hon. MARK ANDREWS,

Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1344, the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, as amended and ordered reported by the Senate Select Committee on Indian Affairs, September 15, 1986.

This bill would grant federal recognition to the Ysleta del Sur and the Alabama and Coushatta Indian tribes. Although the bill does not specifically authorize the appropriation of funds, it would make all members of the tribes eligible for all services and benefits available to federally recognized Indian tribes. Thus, while no additional expenditures are mandated by the bill, relevant federal agencies would be required to include members of the tribes among those eligible for benefits,

and may seek additional funds in order to provide such benefits. The Bureau of Indian Affairs estimates that the average annual cost of providing such services and benefits nationally is about $1,300 per eligible Indian. If this average is applicable to the tribes recognized under this bill, then the annual cost would be about $2 million.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that H.R. 1344, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received the following Executive Communication regarding H.R. 1344.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, August 29, 1986.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to present our views on H.R. 1344, an act "To provide for the restoration of Federal recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribe of Texas, and for other purposes."

On October 17, 1985, we testified before the Committee on Interior and Insular Affairs in the House of Representatives and recommended deferral of action on H.R. 1344 pending our determination that the two tribes meet existing criteria which would make them eligible for Federal benefits as tribes. Since that time, additional information has been submitted to the Department and we do not now object to enactment of H.R. 1344 provided that it is amended as described below.

H.R. 1344 would confirm Federal recognition of the Ysleta del Sur Pueblo and restore it to the Alabama and Coushatta Indian Tribe of Texas. Since we view the Federal relationship with the Ysleta del Sur Pueblo as being very different than the Federal relationship with the Alabama and Coushatta Tribe, this report will address each title of the act independently.

Title I of H R. 1344 would confirm Federal recognition of the Ysleta del Sur Pueblo including the trust relationship between the United States and the tribe and all their rights and privileges which were diminished or lost under the termination act. The tribe

would be eligible for services extended to federally recognized Indian tribes. The State would continue to exercise civil and criminal jurisdiction in the reservation and the State's power to enact legislation benefiting the tribe would not be affected. The existing tribal council would have authority to enter into grant and contract arrangements with Federal agencies and to administer programs for the tribe. Land could be taken in trust by the Secretary of the Interior (Secretary) for the benefit of the tribe if located in El Paso or Hudspeth Counties, Texas.

The Ysleta del Sur Pueblo (also known as the "Tiguas" or "Tiwas") is a group of some 1,175 people who live on a State reservation of approximately 100 acres in El Paso County, Texas. Ancestors of these people originally left the Ysleta Pueblo of New Mexico in 1680 following the Pueblo Indian revolt. The Federal Government has neither provided services to them as Indians nor entered into a treaty or other government-to-government arrangement. Therefore, our information regarding this group is largely based on the legislative history of the Act of April 12, 1968 (Public Law 90–287; 82 Stat. 93), which transferred the Federal responsibility for the tribe "if any" to the State of Texas, and the information we have received from the tribe and the Texas Indian Commission.

In our earlier statement we objected to the restoration of the Ysleta del Sur Pueblo because we viewed H.R. 1344 as proposing to give this tribe a Federal status it never had. We further stated that the issue of recognition would be best resolved by use of the

existing Federal acknowledgment criteria under 25 CFR Part 83 that we use in determining whether any group should be acknowledged as a federally recognized Indian tribe. Since that time, the tribe has submitted additional data. Based on our review of the information submitted, it appears that the tribe meets our mandatory criteria for Federal acknowledgment. However, neither this documentation nor our evaluation of it has approached the level required of other Indian groups seeking Federal acknowledgment.

Although it continues to be our view that all groups seeking initial eligibility for Federal benefits as an Indian tribe should complete our usual acknowledgment process, we would not object to enactment of an amended Title I of H.R. 1344 because:

> Of the unique circumstances involving the 1968 Act in which Congress stated that (A) the tribe shall "be known and designated as Tiwa Indians of Ysleta, Texas", (B) any Federal responsibility for them was transferred to the State of Texas, and (C) that "none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Tiwa Indians of Ysleta del Sur", thereby precluding our acknowledgment of them under 25 CFR Part 83;
>
> The tribe's relationship with the State of Texas as a tribe for which the State has appropriated funds through that State's Indian Affairs Commission;

The tribe's acceptance as a Pueblo by the federally recognized Pueblos of New Mexico which are among the most traditional of Indian tribes; and

Our above-mentioned review of the information available to us at this time.

We have discussed with the tribe and the staff of this Committee the need for some amendments to meet our concerns regarding the tribe's membership criteria and the adoption of a constitution and bylaws. For the first time we are recommending a legislative distinction between tribal membership and eligibility for Federal services. We recommend that section 108 be amended to lock in the tribe's current membership requirements (which include a one-eighth degree descendancy requirement) as the basis for determining tribal members to be Indians for purposes of Federal law, including Federal Indian services and funding purposes, but the tribe should remain able to change its membership requirements in the future for tribal purposes. The amendment should authorize the Secretary to review the tribal membership roll at any time and, in consultation with the tribe, determine if a person is ineligible to be an Indian for purposes of Federal law and Indian services, and those individuals determined ineligible are not to be counted by the tribe for any formula funding purposes. The amendment should not preclude the application to the tribe's members of any additional requirements or restriction on eligibility for Federal Indian benefits that would otherwise be applicable.

We realize this procedure is a departure from our general policy of providing Federal services to federally recognized Indians as determined by tribal membership, but we think that this solution meets our concern of having to provide services to increasing numbers of tribal members and still allows the tribe to determine tribal membership. Moreover, we believe that the Congress should place some limit on the potential service population of tribes being made eligible for Federal benefits for the first time.

We would like to express our concern with the provision in Title I requiring the Secretary to submit a plan for reservation enlargement, in the form of proposed legislation, to the Congress. The provision does not indicate how any land acquisition would be financed. We must emphasize that, in the current fiscal climate, expenditures for land acquisition are an extremely low priority.

Title II of the act would restore Federal recognition to the Alabama and Coushatta Tribe including the Federal trust relationship and all their rights and privileges which were diminished or lost under the termination act. The tribe would be eligible for services extended to federally recognized tribes. The State would continue to exercise civil and criminal jurisdiction in the reservation and the State's power to enact legislation benefiting the tribe would not be affected. The tribe's current constitution and bylaws would be accepted by the Secretary and the tribal council would have authority to represent the tribe and its members in the implementation of H.R. 1344. If the tribal

council requests an election to adopt a new constitution and bylaws, the Secretary would be required to conduct the election[.] The tribe's land may be taken in trust by the Secretary for the benefit of the tribe.

The tribe has some 500 members and a reservation of about 4,600 acres in Polk County, Texas. The Federal trust responsibility was terminated under the Act of August 23, 1954 (68 Stat. 768; 25 U.S.C. 721) which transferred the trust duties from the Federal Government to the State of Texas. Federal laws and programs for Indians no longer applied to the tribe or its members, except that its members were authorized to attend the Bureau of Indian Affairs schools and go to Indian Health Service hospitals. The tribe continued to operate under its approved constitution (with amendments necessary because of the 1954 termination act) and until recently the State provided funds to the tribe.

On March 22, 1983, the Attorney General of Texas issued an opinion questioning the trust relationship between the State and the Alabama and Coushatta Tribe. The opinion held that as a result of the 1954 termination act, the tribe no longer exists and its lands no longer constitute an Indian reservation. It is our understanding that the tribe has received notice that taxes are due on its land. It is apparent that the opinion impacts both tribes dealt with in H.R. 1344.

In our statement before the House of Representatives we said we needed more information to determine if the Alabama and Coushatta Tribe met the

Administration's restoration criteria. We subsequently requested and received information from the Texas Indian Commission which we find verifies that the tribe does meet our restoration criteria.

We also had a concern about accepting the tribe's current constitution. By working with the tribe's attorney and this Committee's staff, we have agreed that an amendment to H.R. 1344 providing that the tribe's constitution is subject to the Indian Civil Rights Act and other applicable laws would meet this concern.

In conclusion, we do not object to enactment of H.R. 1344 with the amendments described in this report.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

HAZEL E. ELBERT,
Acting Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXIV of the Standing Rules of the Senate, it is the opinion of the Committee, that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

Calendar No. 211

100TH CONGRESS } *1st Session* }	SENATE	{ REPORT { 100–90

TO PROVIDE FOR THE RESTORATION OF FEDERAL RECOGNITION TO THE YSLETA DEL SUR PUEBLO AND THE ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS, AND FOR OTHER PURPOSES

JUNE 26 (legislative day, JUNE 23), 1987.—
Ordered to be printed

MR. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 318]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 318) to provide for the restoration of Federal recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

The amendment is an amendment in the nature of a substitute. The amendment is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

SEC. 2. REGULATIONS.

The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act.

TITLE I—YSLETA DEL SUR PUEBLO RESTORATION

SEC. 101. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 102);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas—

(A) held by the tribe on the date of the enactment of this title;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on such date;

(C) held in trust for the benefit of the tribe by the Secretary under section 105(g)(2); and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on the date of enactment of this Act, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

SEC. 102. REDESIGNATION OF TRIBE.

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after the date of the enactment of this title, be known and designated as the Ysleta del Sur Pueblo. Any reference in any law, map, regulation, document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

SEC. 103. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP: FEDERAL SERVICES AND ASSISTANCE.

(a) **FEDERAL TRUST RELATIONSHIP**.—The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934

(48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) **RESTORATION OF RIGHTS AND PRIVILEGES.**—All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) **FEDERAL SERVICES AND BENEFITS.**—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) **EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.**—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 104. STATE AND TRIBAL AUTHORITY.

(a) **STATE AUTHORITY.**—Nothing in this Act shall affect the power of the State of Texas to enact special

legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) **TRIBAL AUTHORITY**.—The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity—

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement.

SEC. 105. PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) **FEDERAL RESERVATION ESTABLISHED**.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) **CONVEYANCE OF LAND BY STATE**.—The Secretary shall—

(1) accept any offer from the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) **CONVEYANCE OF LAND BY TRIBE.**—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) **APPROVAL OF DEED BY ATTORNEY GENERAL.**—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) **PERMANENT IMPROVEMENTS AUTHORIZED.**—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) **CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION**.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (25 U.S.C. 1321, 1322).

(g) **ACQUISITION OF LAND BY THE TRIBE AFTER ENACTMENT**.—

(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe—

(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act and take title to such land in fee simple, and

(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal Council, the Secretary may—

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act, and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

SEC. 106. TIWA INDIANS ACT REPEALED.

The Tiwa Indians Act is hereby repealed.

SEC. 107. GAMING ACTIVITIES.

(a) **IN GENERAL.**—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.–02–86 which was approved and certified on March 12, 1986.

(b) **NO STATE REGULATORY JURISDICTION.**—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) **JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.**—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding

the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

SEC. 108. TRIBAL MEMBERSHIP.

(a) **IN GENERAL.**—The membership of the tribe shall consist of—

(1) the individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC–5–84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC–85–005 adopted on January 16, 1985; and

(2) a descendant of an individual listed on that Roll if the descendant—

(i) has 1/8 degree or more of Tigua-Ysleta del Sur Pueblo Indian blood, and

(ii) is enrolled by the tribe.

(b) **REMOVAL FROM TRIBAL ROLL.**—Notwithstanding subsection (a)—

(1) the tribe may remove an individual from tribal membership if it determines that the individual's enrollment was improper; and

(2) the Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

TITLE II—ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS

SEC. 201. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 202);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushatta Indian Reservation in Polk County, Texas, comprised of—

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 1 of the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes." and approved August 23, 1954 (25 U.S.C. 721);

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

SEC. 202. ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS CONSIDERED AS ONE TRIBE.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this title and any other law or rule of law of the United States.

SEC. 203. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) **FEDERAL TRUST RELATIONSHIP**.—The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) **RESTORATION OF RIGHTS AND PRIVILEGES.**—All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes" and approved August 23, 1954, are hereby restored and such Act shall not apply to the tribe or to members of the tribe after the date of the enactment of this title.

(c) **FEDERAL BENEFITS AND SERVICES.**—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) **EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.**—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 204. STATE AND TRIBAL AUTHORITY.

(a) **STATE AUTHORITY.**—Nothing in this Act shall affect the power of the State of Texas to enact special

legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) **CURRENT CONSTITUTION AND BYLAWS TO REMAIN IN EFFECT.**—Subject to the provisions of section 203(a) of this Act, the constitution and by laws of the tribe on file with the Committee on Interior and Insular Affairs is hereby declared to be approved for the purposes of section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) **AUTHORITY AND CAPACITY OF TRIBAL COUNCIL.**—No provision contained in this title shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b). The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity—

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 205 as the successor in interest to the Tribal Council.

SEC. 205. ADOPTION OF NEW CONSTITUTION AND BYLAWS.

Upon written request of the tribal council, the Secretary shall hold an election for the members of the tribe for the purpose of adopting a new constitution and bylaws in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

SEC. 206. PROVISIONS RELATING TO TRIBAL RESERVATION.

(a) **FEDERAL RESERVATION ESTABLISHED**.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) **CONVEYANCE OF LAND BY STATE**.—The Secretary shall—

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) **CONVEYANCE OF LAND BY TRIBE**.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) **APPROVAL OF DEED BY ATTORNEY GENERAL**.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) **PERMANENT IMPROVEMENTS AUTHORIZED**.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) **CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION**.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for

other purposes" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

SEC. 207. GAMING ACTIVITIES.

(a) **IN GENERAL.**—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.–86–07 which was approved and certified on March 10, 1986.

(b) **NO STATE REGULATORY JURISDICTION.**—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) **JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.**—Notwithstanding section 206(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Amend the title so as to read:

> "An Act to provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes.".

PURPOSE

H.R. 318, was introduced in the House of Representatives on January 6, 1987, by Congressman Coleman of Texas. The purpose of H.R. 318 is to restore the Federal trust relationship to two Indian tribes located within the State of Texas. By the Act of August 23, 1954, the Federal trust [relationship] with the Alabama and Coushatta Tribe was terminated by transferring federal trust duties and trust lands to the State of Texas. The lands so conveyed were to be held in trust by the State of Texas for the benefit of the tribes or their members. By the Act of April 12, 1968, legislation was enacted designating the descendants of the Tiwa Indians living in El Paso, Texas, of the Ysleta del Sur Pueblo, as Tiwa Indians of Ysleta, Texas, and provided that the responsibility, if any, of the United States for the said Indians was transferred to the State of Texas.

H.R. 318 will restore the Federal trust relationship to the Alabama and Coushatta Indian Tribes as one tribal unit for purposes of this Act, and provides for restoration of the Federal trust relationship between the United States and the Tiwa Indians, with the [provision] that such Indian group shall henceforth

be known as the Ysleta del Sur Pueblo. The bill also provides for taking of tribal or individually owned Indian lands into trust, and provides for expansion of the Indian land base in consultation with the State. The State shall exercise civil and criminal jurisdiction as if the State had assumed jurisdiction with the consent of the tribes under the provisions of the Indian Civil Rights Act of 1968 (25 U.S.C. 1321, 1322).

BACKGROUND

The Pueblo of Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the Spanish. The revolt forced the Spanish to retreat from Santa Fe to El Paso, and the Spanish forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them. The Indians were settled at Ysleta del Sur and in 1682 the mission church was built, which still stands today. In 1751 Spain granted the land of Ysleta Pueblo to its inhabitants as communal property, measuring one league in all directions from the church doors.

On May 9, 1871, the Texas legislature passed an Act to incorporate the Town of Ysleta in El Paso County, and through ensuing actions of the newly created town, nearly all of the 23,000 acres of the Ysleta Spanish grant were patented to non-Indians. In May of 1967, the Texas legislature enacted legislation which authorized the State to accept a transfer of Federal trust responsibilities to the Tigua Indian Tribe. By the Act of April 12, 1968, Congress recognized the Tiwa

people of the Ysleta del Sur Pueblo as a band of American Indians and transferred to the State of Texas any responsibility that the United States had for them. While the 1968 Tiwa Act specified that nothing in that Act would make the tribe eligible for federal Indian services nor would it make federal Indian statutes applicable to the tribe, it should be noted that the 1968 Tiwa Act was not a "termination" act. It was not enacted pursuant to the termination policy of the 1950s as set forth in House Concurrent Resolution No. 108. Rather, its purpose was to preserve the status quo between the tribe and the United States while clarifying the status of the Indians of the Ysleta del Sur Pueblo as a band of Indians recognized by the United States and thereby enabling the State of Texas to acquire land and provide services to them. The 1968 Tiwa Act thus did not, as a practical matter, alter the relationship between the United States and the Tiwa Tribe. The Tribe had not been subject to federal supervision and had received no federal Indian services before the 1968 Act, and that status [continued] after its enactment.

Texas now holds a 100-acre reservation in trust for the 1,124 member tribe and, through the Texas Indian Commission, provides a superintendant, as well as administrative and economic development funding for the tribe. A 1983 opinion of the Texas Attorney General (Opinion No. JM–17) which concluded that the tribe's trust relationship with the state violates the Equal Rights Amendment to the state constitution has cast doubt on the [continuation] of this trust relationship between the State and tribe.

The Alabama-Coushattas are a state recognized tribe of approximately 500 full blood Indians residing on a [46,000] acre reservation near Livingston, Texas. The State of Texas purchased roughly 1,200 acres of land in 1854 for a permanent home for the Alabama and Coushatta Indians (in part because of the tribes assistance to Sam Houston in Texas' war for independence) and since then the State has stood in the role of trustee to the tribes. A Federal trust relationship was [established] in 1928 when the United States purchased additional reservation lands for the tribe and, from 1928 to 1954, Texas and the United States maintained a joint trust responsibility for the tribe. The 1954 Act of Congress terminated the trust relationship of the United States with the tribe by transferring all federal trust duties and lands to the State of Texas. The trust relationship with the state has continued to the present.

LEGISLATIVE HISTORY

H.R. 318, as introduced by Congressman Coleman of Texas on January 6, 1987, was identical to the bill favorably reported in the 99th Congress by the Senate Select Committee on Indian Affairs. That bill, H.R. 1344, was not acted on by the Senate prior to the adjournment of the 99th Congress and was introduced in the 100th Congress by Congressman Coleman. H.R. 318 was referred to the Committee on Interior and Insular Affairs for consideration. The bill was passed by the House and sent to the Senate on April 21, 1987.

H.R. 318 was referred to the Select Committee on Indian Affairs for consideration. Because the Committee had held hearings on H.R. 1344 on June 25, 1986 and had compiled an extensive record on the bill in the 99th Congress, further hearings were not held on H.R. 318.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on June 17, 1987, with a quorum present, by unanimous vote recommends the Senate pass H.R. 318, as amended in the nature of a substitute.

COMMITTEE AMENDMENTS

The Committee recommends an amendment in the nature of a substitute. The amendments are in response to concerns raised by the State of Texas and Senators Gramm and Bentsen of Texas. In addition, the tribes have requested amendments to the bill to remove those concerns. Staff has worked closely with the Department of Interior and with the tribes which have resulted in a number of amendments, most of which are technical, clarifying, or conforming in nature; however, three of the amendments are substantial and merit explanation. Those three substantive amendments are explained in the "Explanation Amendments" section which follows.

EXPLANATION OF AMENDMENTS

Subsections 105(g), 105(h), 105(i) and 105(j), which directs the Secretary to establish a plan for an enlarged Ysleta del Sur Pueblo reservation and submit the plan to Congress in the form of proposed legislation within 2 years, is stricken from H.R. 318 as passed by the House of Representatives. A new subsection, 105(g), is added which permits the Ysleta del Sur Tribe to acquire additional land within El Paso or Hudspeth Counties in fee simple and permits the Secretary, upon the request of the Tribe, to accept and hold title to such lands in trust for the Tribe. Furthermore, if the additional after-acquired lands are not taken into trust by the Secretary, subsection 105(g) permits the Tribe to sell, lease or otherwise dispose of those [lands] free of federal restrictions on alienation. It should be emphasized that the authorization to dispose of those lands free of federal restraints applies only to non-reservation, non-trust lands owned by the Tribe.

Sections 107 and 207 are stricken and new sections 107 and 207 are inserted. However, the central purpose of these two sections—to ban gaming on the reservations as a matter of federal law—remains unchanged. Both tribes, by formal tribal resolution, requested that this legislation incorporate their existing law and custom that forbids gambling. The Committee's amendments simply expand on the House version to provide that anyone who violates the federal ban on gaming contained in Sections 107 and 207 will be subject to the same civil and criminal penalties that are provided under Texas law. New subsections 107(b) and

207(b) were added to make it clear that Congress does not intend, by banning gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas. New subsections 107(c) and 207(c) grant to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming ban and make it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban.

Section 108 was amended to address concerns raised by the [Administration] that after a period of years, the Pueblo could amend its membership criteria and thereby expand the tribal service population. Therefore, the ten-year period during which tribal membership criteria would be fixed by the Act [was] deleted. The effect of deleting the time period is to permanently lock in the Tribe's existing membership criteria. The Committee's willingness to accommodate the Administration on this issue is based upon the fact that the membership criteria contained in H.R. 318 are the Tribe's own pre-existing criteria and the Tribe has indicated to the Committee that it does not oppose the amendment. The Committee recognizes that Indian tribes possess the power to establish their own membership criteria. The Committee anticipates that if, at some time in the future, the Tribe determines that it must amend its membership criteria, it will petition Congress to permit it to do so.

SECTION-BY-SECTION ANALYSIS

Section 1. This section cites this Act as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act."

Section 2. This section authorizes the Secretary of the Interior to promulgate regulations to implement the act.

Title I. Ysleta del Sur Pueblo Restoration

Section 101. This section defines certain terms for the purpose of this bill.

Section 102. This section states that following the date of enactment, the Tiwa Indians of Ysleta, Texas, shall be known as the Ysleta del Sur Pueblo.

Section 103. This section restores the Federal trust relationship to the Ysleta del Sur Pueblo as an Indian tribe and states that any rights of the tribe and its members which may have been lost under the Tiwa Indian Act are hereby restored. This section also makes all benefits available to Federally recognized Indian tribes available to the Ysleta del Sur Pueblo. This section further provides that nothing in this Act shall affect any property right or contractual obligation in existence before the enactment of this Act. This section further provides that the Act of June 18, 1934 shall apply to the tribe. This Committee does not intend, however, that the tribe be required to submit a constitution and bylaws to the Secretary for approval pursuant to section 16 of such Act and intends that the tribe may

continue to operate under its present system if it chooses to do so.

Section 104. Subsection (a) provides that nothing in this section shall affect the power of the State of Texas to enact special legislation, and the State of Texas is authorized to perform any services that would benefit the Tribe that are not inconsistent with the provisions of this Act.

Section (b) provides that the Tribal Council shall represent the tribe in the implementation of this title and shall be legally entitled to enter into contracts and administer programs for the Tribe.

Section 105. Subsections (a), (b), and (c) provide that the reservation is hereby declared to be a Federal Indian reservation and also provides that the Secretary shall accept any offer by the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State for the benefit of the tribe. The Secretary shall hold such land in trust for the benefit of the tribe.

Section (d) provides that the United States Attorney General shall approve any deed from the State or the tribe which conveys title to land within El Paso or Hudspeth Counties, Texas to the United States to be held in trust by the Secretary for the benefit of the tribe.

Section (e) provides that the Secretary shall be able to erect permanent improvements on the land notwithstanding the fact that title to such land has not

been transferred to the Secretary by the State or the tribe.

Section (f) provides that the State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed jurisdiction with the consent of the tribe under the Act of April 11, 1968.

Subsection (g) provides that the tribe may acquire land in fee simple and authorizes the Secretary to accept such lands in trust if requested by the tribe. If such fee lands are not taken into trust, the tribe is authorized to convey any interest in those lands free of any federal restrictions on alienation.

Section 106. This section repeals the Tiwa Indian Act.

Section 107. This section provides that gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands. The provisions of Section 107 are also applicable to any lands acquired after the date of enactment of the Act and without regard to whether such lands are located within or outside of El Paso and Hudspeth Counties, Texas, if they are taken into trust by the Secretary and made part of the tribe's reservation. The prohibition contained in this section will also apply to any lands outside the reservation which might be acquired by the tribe or a member thereof and be taken into trust. With regard to tribal lands not taken into trust and therefore not made a part of the tribe's reservation, the

laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable. This section also provides penalties for violations of these provisions which are the same as the penalties provided by Texas law. This section also provides that nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. This provision is a restatement of the law as provided in the Act of August 15, 1953 (67 Stat. 588, P.L. 83–280), as amended by the Act of April 11, 1968 (82 Stat. 77, P.L. 90–284), and should be read in the context of the provisions of Section 105(f). This section also provides that the Federal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section and further authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming.

Section 108. Provides that the tribe's membership shall consist of individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC–5–84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC–85–005 adopted on January 16, 1985; and a descendant of an individual listed on that Roll if the said descendant (i) has 1/8 degree or more of Tigua-Ysleta del Sur Pueblo blood, and (ii) is enrolled by the tribe. Subsection (b) allows the tribe to remove an individual from tribal membership where such enrollment was improper. Subsection (b) further provides that the

Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

Title II: Alabama and Coushatta Indian Tribes of Texas

Section 201. Defines certain terms for the purposes of the Act.

Section 202. Provides that the Alabama and Coushatta Indian tribes shall be considered as one tribal unit for the purposes of this title and any other law.

Section 203. Provides that the Federal trust relationship is hereby restored to the tribe and all rights which may have been lost under the August 23, 1954 Act which terminated the tribe are hereby restored.

This section further provides that the tribe and its members shall be eligible to receive all benefits provided to federally recognized Indian tribes. This section also provides that except as provided by this Act, the enactment of this title shall affect any property or contractual rights in existence before the enactment of this title.

Section 204. Subsection (a) provides that nothing in this Act shall affect the power of the State of Texas to enact special legislation which would benefit the tribe. Furthermore, the State of Texas is authorized to perform any services for the benefit of the tribe that are not inconsistent with the provisions of this Act.

Subsection (b) provides that the current tribal constitution and bylaws of this tribe, on file with the Committee on Interior and Insular Affairs is hereby declared to have been approved pursuant to section 16 of the Act of June 18, 1934. In addition, all laws and rules of law, specifically, the Act of April 11, 1968 (82 Stat. 77) shall apply to members of the tribe, the tribe, and the reservation.

Subsection (c) provides that the provisions of this title shall not affect the powers of the Tribal Council. The Tribal Council shall represent the tribe in the implementation of this title and shall have the power to enter into contracts and administer tribal programs for the tribe.

Section 205. Provides that upon written request of the Tribal Council, the Secretary shall conduct an election in accordance with section 16 of the Act of June 18, 1934 for the purpose of adopting any new constitution and bylaws for the tribe.

Section 206. Provides that the reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary. The Secretary is directed to accept any offer from the State to convey title to any lands held in trust by the State. The Secretary shall hold such land in trust for the benefit of the tribe.

The Secretary is also directed to take any land in trust for the benefit of the tribe which is held by the tribe and located within the reservation.

This section also provides that the Attorney General of the United States shall approve any deed which conveys land from the State or the tribes to the United States.

Lastly, this section provides that the State of Texas shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such state had assumed jurisdiction with the consent of the tribe under the Act of April 11, 1968.

Section 207. This section provides that gaming, gambling, lottery and bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands. The provisions of Section 207 are also applicable to any lands acquired after the date of enactment of the Act and without regard to whether such lands are located within or outside of the reservation of Polk County, Texas, if it is taken into trust by the Secretary and made a part of the tribe's reservation. The prohibition contained in this section will also apply to any lands outside the reservation which might be acquired by the tribe or a member thereof and be taken into trust. With regard to tribal lands not taken into trust and therefore not made a part of the tribe's reservation, the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable. This section also provides penalties for violation of these provisions which are the same as the penalties provided by Texas law. This section also provides that nothing in the section shall be construed as a grant of civil or criminal regulatory

jurisdiction to the State of Texas. This provision is a restatement of the law as provided in the Act of August 15, 1953 (67 Stat. 588, P.L. 83–280), as amended by the Act of April 11, 1968 (82 Stat. 77, P.L. 90–284), and should be read in the context of the provisions of Section 206(f). This section also provides that the Federal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section and further authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming.

The intent of the Act is to provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas. The headings and the subheadings have been changed to reflect this intent.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for H.R. 318, as amended in the nature of a substitute, as provided by the Congressional Budget Office, is set forth below. Although the letter is dated May 15, 1987, the cost estimate remains the same as on the date the bill was ordered reported.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 15, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 318, the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, as amended and ordered reported by the Senate Select Committee on Indian Affairs, May 14, 1987.

This bill would grant federal recognition to the Ysleta del Sur and the Alabama and Coushatta Indian Tribes. Although the bill does not specifically authorize the appropriation of funds, it would make tribe members eligible for all services and benefits available to federally recognized Indian tribes. Thus, while no additional expenditures are mandated by the bill, relevant federal agencies would be required to include close to 2,000 tribe members among those eligible for benefits and may need to seek additional funds in order to provide such benefits. CBO estimates that the average annual cost of services and benefits provided nationally is about $3,000 per eligible Indian. However, the tribes are already eligible for and receiving some federal services and benefits, and added services resulting from federal recognition are likely to entail annual expenditures of less than $1 million.

On March 31, 1987, CBO completed a cost estimate of H.R. 318, as amended and reported by the House Committee on Interior and Insular Affairs. The estimated potential costs of both versions of the bill are the same.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that H.R. 318 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

At the time this report was prepared the Committee had not received Executive Communication on H.R. 318.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of [rule] XXIV of the Standing Rules of the Senate, it is the opinion of the Committee, that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

[SEAL] United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Michael Hoenig, General Counsel
National Indian Gaming Commission
90 K Street NE, Suite 200
Washington, DC 20002

Re: Ysleta del Sur Pueblo Restoration Act

Dear Mr. Hoenig:

This letter responds to the National Indian Gaming Commission ("NIGC") Office of General Counsel's letter dated May 29, 2015,[1] requesting our opinion regarding whether, in light of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act" or "Act"),[2] and the Indian Gaming Regulatory Act ("IGRA"),[3] the Ysleta del Sur Pueblo ("Tribe" or "Pueblo") can game pursuant to the IGRA on the Tribe's reservation and tribal lands.

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[1] Letter from Eric Shepard, General Counsel, Nat'l Indian Gaming Comm'n, to Venus Prince, Deputy Solicitor—Indian Affairs (May 29, 2015) [hereinafter "2015 NIGC Letter"].

[2] Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 731 *et seq.* (Alabama and Coushatta Indian Tribes of Texas), §§ 1300g *et seq.* (Ysleta del Sur Pueblo)). Title I of the Restoration Act addresses the Pueblo; Title II of the Restoration Act restores the Federal trust relationship with the Alabama and Coushatta Indian Tribes of Texas. *Id.*

[3] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

Applying the Department's expertise in the field of Indian affairs,[4] this Office concludes that the Restoration Act did not divest the Tribe of jurisdiction over its reservation and tribal lands and, therefore, that the IGRA applies to such lands. In addition, we conclude that the IGRA impliedly repealed Section 107 of the Restoration Act, which concerns gaming.

I. BACKGROUND

In order to answer your question, we must interpret those provisions of the Restoration Act that concern jurisdiction, including jurisdiction over gaming. The Restoration Act was enacted in the midst of a sea change in gaming law; consequently, our analysis also considers the evolution of the Act's gaming provisions, the evolution of gaming law in the State of Texas ("Texas" or "State") between 1987 and 1991, and the enactment approximately one year after the Restoration Act of the IGRA. Finally, we evaluate the Tribe's current request in light of the long-running litigation between the State and the Tribe over the Tribe's attempts to game within the bounds of the Restoration Act.

A. History of the Ysleta del Sur Pueblo

The Pueblo of Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the

[4] See, *e.g.*, *Cherokee Nation* v. *United States*, 73 Fed. Cl. 467, 479 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

Spanish.[5] When the Spanish retreated from Santa Fe, New Mexico, to El Paso, Texas, they forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them.[6] The Indians established a new Pueblo in Texas called Ysleta del Sur and, in 1682, built a church for their community.[7] In 1751, Spain granted to the inhabitants of the Ysleta del Sur Pueblo land measuring one league in all directions from the church doors.[8] However, in 1871, the Texas Legislature enacted a statute incorporating the Town of Ysleta in El Paso County, and subsequent actions by the town resulted in nearly all of the 23,000 acres of the Spanish land grant being patented to non-Indians.[9]

From 1870 through the 1960s, the Tribe "continued to reside in the area and maintain their ethnic identification as well as their basic political system * * * * Also during this time there is a record of increasing interactions between the [Tribe] and both the U.S. Government and the State of Texas."[10] In 1968, Congress passed An Act Relating to the Tiwa Indians of Texas,[11]

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[5] S. Rep. No. 100-90, at 6 (1987) (hereinafter, "1987 Senate Report").

[6] *Id.*

[7] 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (statement of Rep. Coleman).

[8] 1987 Senate Report, *supra* note 5, at 6.

[9] *Id.* at 7.

[10] 131 CONG. REC. H12012 (statement of Rep. Coleman).

[11] Pub. L. No. 90-287, 82 Stat. 93 (1968), *repealed by* Restoration Act, *supra* note 2, § 106.

wherein Congress transferred all Federal trust responsibility for the Pueblo to the State of Texas.[12]

B. The Restoration Act

In the 1980s, the State of Texas concluded that its trust relationship with the Tribe constituted a violation of the Texas Constitution and determined that the State could not continue to provide trust services to the Tribe.[13] In light of this determination, Congress acted to restore the Federal trust relationship with the Tribe and passed the Restoration Act in 1987.[14] Through the Restoration Act, Congress provided that the Tiwa Indians of Ysleta, Texas, would thereafter "be known and designated as the Ysleta del Sur Pueblo,"[15] and "restored" "[t]he Federal trust relationship between the United States and the tribe."[16] In addition, the Restoration Act designated as "a Federal Indian reservation" those lands within El Paso and Hudspeth Counties in Texas that were held by the Tribe on the date of the Act's enactment, held in trust by the State or by the Texas Indian Commission for the benefit of the Tribe, or held in trust by the Secretary for the benefit of the Tribe, as well as subsequently acquired lands acquired and held in trust by the Secretary for the benefit of the

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[12] *Id.*

[13] 1987 Senate Report, *supra* note 5, at 7.

[14] Restoration Act, *supra* note 2.

[15] *Id.* at § 102 (codified at 25 U.S.C. § 1300g-1).

[16] *Id*. at § 103(a) (codified at 25 U.S.C. § 1300g-2(a)).

Tribe,[17] and mandated that the Secretary take certain lands into trust for the benefit of the Tribe.[18] Furthermore, at Section 105(f) the Act incorporates Public Law 280,[19] as amended by the Indian Civil Rights Act,[20] by providing that the State has civil and criminal jurisdiction on the Tribe's reservation "as if such State had assumed such jurisdiction with the consent of the tribe under" 25 U.S.C. §§ 1321-1322.[21]

The original version of the Restoration Act, introduced in February 1985, contained no specific references to gaming.[22] However, the time between the bill's introduction and its final passage in 1987 was a period of

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[17] *Id.* at § 105(a) (codified at 25 U.S.C. § 1300g-4(a)) (establishing a Federal Indian reservation); at § 101(3) (codified at 25 U.S.C. § 1300g(3)) (defining "reservation").

[18] *Id.* at § 105(b)(1) (codified at 25 U.S.C. § 1300g-4(b) (requiring that the Secretary (1) accept any offer by the State to convey to the United States land within the Tribe's reservation held in trust, and (2) hold such land in trust for the benefit of the Tribe).

[19] Pub. L. 83-280, 67 Stat. 588 (1953)

[20] Pub. L. 90-284, 82 Stat. 77 (1968).

[21] Restoration Act, supra note 2, § 105(f) (codified at 25 U.S.C. § 1300g-4(f)).

[22] H.R. 1344, 99th Cong. (1985).

great uncertainty surrounding Indian gaming.[23] The Act was amended multiple times to address gaming.[24]

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[23] In February 25, 1986, the Ninth U.S. Circuit Court of Appeals held that the State of California and Riverside County could not enforce their gaming laws on the reservations of the Cabazon and Morongo Bands of Mission Indians. *Cabazon Band of Mission Indians* v. *County of Riverside*, 783 F.2d 900 (1986). One year later, the U.S. Supreme Court affirmed. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter, "*Cabazon*"]. The Fifth Circuit subsequently observed that the *Cabazon* decision "led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming." *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325, 1330 (5th Cir. 1994) [hereinafter "*Ysleta del Sur*"]; *accord Wisconsin* v. *Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015) ("The Court's decision in *Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.").

[24] Following a committee hearing [in] October 1985, the House passed an amended version of the bill that would have allowed the Tribe to enact a gaming ordinance, but only if that ordinance mirrored the laws of Texas. H. Rep. No. 99-440, at 2-3 (1985) (amendments to H.R. 1344); 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Nonetheless, "various state officials and members of Texas' congressional delegation were still concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation." *Ysleta del Sur*, 36 F.3d at 1327. As a result, the Tribe enacted Resolution No. TC-02-86, which acknowledged the controversy over gaming and asked, in part, that the bill be amended to prohibit "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, * * * on the Tribe's reservation or tribal land." Ysleta del Sur Pueblo Resolution No. TC-02-86, *reprinted in Ysleta del Sur*, 36 F.3d at 1328 n.2.

In accordance with the Tribe's request, the bill was amended again to prohibit "[a]ll gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas * * * on the tribe's reservation and on tribal lands." 131

When the Restoration Act was enacted in 1987, Texas law generally prohibited gaming, with the exception of charitable bingo on a local-option basis.[25] In the Restoration Act, the first sentence of Section 107(a) makes the State's substantive gaming laws applicable on the Tribe's lands. Similarly, the second sentence extends to the Tribe's lands the penalties provided in State law for engaging in prohibited gaming. The final sentence explains, at least in part, why Congress included

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CONG. REC. S13635 (daily ed. Sept. 24, 1986) (text of H.R. 1344, § 107(a) as passed by the Senate). That version passed the Senate. *Id.* However, the very next day, before it could be reconciled with the House version, the Senate vitiated its passage of the bill, effectively killing any restoration of the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in the 99th Congress. 131 CONG. REC. S13735 (daily ed. Sept. 25, 1986).

A new version of the bill was introduced in January 1987, and subsequently was passed by the House; it, like the earlier Senate bill, would have expressly prohibited all gaming on the Tribe's reservation and tribal lands. 133 CONG. REC. H13735 (daily ed. Apr. 21, 1987). Later that year, the bill was amended again by the Senate, which deleted the express prohibition against gaming. 1987 Senate Report, *supra* note 5, at 3 (text of H.R. 318, § 107(a) as amended by the Senate). The Senate's version of H.R. 318 ultimately was enacted, with the gaming provisions contained in Section 107. See Restoration Act, *supra* note 2, § 107.

[25] Tex. Const. art. 3, § 47(b)-(c) (as amended 1980). The Texas Constitution provided that "[the] Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in the State, as well as the sale of tickets in lotteries, gift enterprises, or other evasions involving the lottery principle, established or existing in other States." *Id.* at art. 3, § 47(a). In addition, wagering on dog and horse racing in Texas had been illegal since 1937. Texas Legislative Council, Info. Rep. No. 87-2: Analysis of Proposed Constitutional Amendments and Referenda Appearing on the November 3, 1987, Ballot, at 75 (Sept. 1987).

gaming provisions in the Act. Thus, through Section 107(a), Congress provided for a limited application of State gaming law on the Tribe's lands:

> SEC. 107. GAMING ACTIVITIES
>
> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the Tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.[26]

Despite the application of Texas law, however, Section 107(b) expressly states that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."[27] In other words, the Tribe retained civil and criminal regulatory jurisdiction over its reservation and tribal lands, except to the extent expressly divested by the following subsection of the Act.

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[26] Restoration Act, *supra* note 2, at § 107(a) (codified at 25 U.S.C. § 1300g-6(a)).

[27] *Id.* at § 107(b) (codified at 25 U.S.C. § 1300g-6(b)).

Finally, although another section of the Restoration Act generally granted the State "civil and criminal jurisdiction within the boundaries of the reservation,[28] Section 107(c) expressly provides that federal courts, not state courts, are the forum in which the State may seek to enforce alleged violations of Section 107(a):

> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.[29]

C. Gaming in Texas

Almost immediately after the Restoration Act was enacted, Texas began to open itself up to gaming. On November 3, 1987—less than three months after the Restoration Act was enacted—the people of Texas by referendum ratified the Legislature's enactment of the Texas Racing Act, allowing for pari-mutuel dog and

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[28] *Id*. at § 105(f) (codified at 25 U.S.C. § 1300g-4(f)) (granting Texas civil and criminal jurisdiction equivalent to that granted by Public Law 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act, Pub. L. 90-284, 82 Stat. 77 (1968).

[29] *Id.* at § 107(c) (codified at 25 U.S.C. § 1300g-6(c)).

horse racing.[30] Two years later, the Texas Constitution was amended to allow for "charitable raffles."[31] A more momentous change occurred in 1991, when the Texas Constitution was amended to permit certain lotteries.[32] Texas now offers a variety of lottery games, including national Powerball and MegaMillions.[33] Thus, while charitable bingo was the only gaming permitted in Texas at the time the Restoration Act was enacted, a little more than four years later the State had dramatically expanded gaming to include raffles, parimutuel racing, and a state lottery. In Fiscal Year 2014, Texas Lottery sales totaled almost $4.4 billion, returning more than $1.2 billion to the State's coffers.[34] In addition, races at Texas racetracks generated more

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[30] The Texas Racing Act ("Racing Act") was enacted by the Texas Legislature in 1986. *Id.* However, the Racing Act provided that wagering could be conducted pursuant to its provisions only after it was ratified by the State's voters. *Id.* On November 3, 1987, the voters in Texas approved the Racing Act by a wide margin. Bill Christine, *Texas Voters Finally End a 50-year Ban Against Betting on Horse Races*, L.A. TIMES, Nov. 5, 1987, *available at* http://articles.latimes.com/1987-11-05/sports/sp-18911_1_horse-racing-notes (last visited July 9, 2015).

[31] Tex. Const. art. 3, § 47(d) (as amended 1989).

[32] Tex. Const. art. 3, § 47(3) (as amended 1991).

[33] See Texas Lottery, *Play the Games of Texas*, http://www.txlottery.org/export/sites/lottery/Games/index.html (last viewed July 9, 2015).

[34] Texas Lottery Commission, *Summary of Financial Information* (undated; audited through FY2014, unaudited through March 2015), *available at* http://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited July 9, 2015).

than $438 million in wagers during calendar year 2014.[35]

D. The Indian Gaming Regulatory Act

The expansion of State-sanctioned gaming in Texas was not the only change to the legal landscape in the years immediately following enactment of the Restoration Act. On October 19, 1988, a little more than one year after it enacted the Restoration Act, Congress enacted the IGRA. Among the IGRA's stated purposes were to establish a new nationwide regulatory framework for tribal gaming on Indian lands within a tribe's jurisdiction,[36] and to promote "tribal economic

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[35] Texas Racing Commission, *Texas Pari-Mutuel Racetracks Wagering Statistics Comparison Report on Total Wagers Placed in Texas & on Texas Races For the Period: 01/01/13—12/31/13 to 01/01/14—12/31/14* at 1 (undated), *available at* http://www.txrc.texas.gov/agency/data/wagerstats/prevYr/20141231.pdf (last visited July 9, 2015).

[36] See 25 U.S.C. §§ 2701-2702 (Congress's findings and declaration of policy), § 2710 (governing tribal gaming ordinances); S. Rep. No. 100-446, at 6 (1988) [hereinafter "1988 Senate IGRA Report"] (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"); see also *Wells Fargo Bank* v. *Lake of the Torches*, 658 F.3d 684, 687 (7th Cir. 2011) (finding that among the IGRA's "stated goals was "to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes' " (quoting 25 U.S.C. § 2702(1)). *Cf. Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) [hereinafter "*Narragansett*"] ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.")

development, self-sufficiency, and strong tribal governments."[37]

The vast majority of tribal gaming in the United States is governed under the IGRA's framework, which has proven to be enormously successful. The IGRA helped spur dramatic growth in Indian gaming, from annual revenues of approximately $100 million in 1988 to approximately $28.5 billion in 2014.[38] Recent scholarship demonstrates that, as Congress intended, Indian gaming has helped strengthen tribal economies, increase household income for reservation Indians, and reduce reservation poverty and unemployment rates.[39]

E. Gaming by the Ysleta del Sur Pueblo and Resulting Litigation

Just as the public policy of the State of Texas with regard to gaming evolved in the years after the Restoration Act was enacted, so, too, did the public policy of Tribe. However, the Tribe's efforts to pursue gaming

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[37] 25 U.S.C. § 2702(1).

[38] *Compare* 1988 Senate IGRA Report, *supra* note 36, at 22 (Indian gaming "generate[s] more than $100 million in annual revenues to tribes"), *with* Nat'l Indian Gaming Comm'n, *Gaming Revenue Reports, available at* http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited Aug. 21, 2015) (Indian gaming revenue $28.5 billion in Fiscal Year 2014).

[39] Randall K.Q. Akee *et al., The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 185-87, 196-99 (2015). In addition, the growth of Indian gaming in the wake of the IGRA has also proved to be a boon to local and state governments. *Id.* at 199-203.

within the confines of the law have been thwarted at every turn by the State of Texas.

1. Litigation over the Application of the IGRA

On May 6, 1992, after Texas dramatically expanded the scope of gaming under State law, and after Congress enacted the IGRA to provide a comprehensive regulatory scheme for tribal gaming, the Tribe adopted a bingo ordinance.[40] The Tribe submitted Tribal Bingo Ordinance 00492 to the NIGC for approval, and on October 19, 1993, the ordinance was approved by the Chairman of the NIGC.[41] In February 1992, the Tribe petitioned the Governor of Texas, pursuant to the IGRA, to begin negotiations to enter a class III gaming compact.[42] The Governor, however, refused on the grounds that the State's law and public policy prohibited her from negotiating such a compact.[43] As a result, the Tribe sued to compel the State under the provision of the IGRA that allowed the Federal courts to order a state to the negotiating table.[44] The U.S. Court of

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[40] Ysleta del Sur Tribal Bingo Ordinance No. 00492 (as amended on Oct. 16, 1992; April 15, 1993; July 22, 1993; and Oct. 5, 1993), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/ysletadelsurpueblotrbe/ordappr101993.pdf.

[41] Letter from Anthony J. Hope, Chairman, NIGC, to Tom Diamond, counsel to the Ysleta del Sur Pueblo (Oct. 19, 1993).

[42] *Ysleta del Sur*, 36 F.3d at 1331.

[43] *Id.*

[44] 25 U.S.C. § 2710(d)(7)(B)(iii), *abrogated by Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996).

Appeals for the Fifth Circuit held that the Restoration Act did not give the Tribe authority to bring such a suit and that the IGRA did not apply.[45]

The question before the Fifth Circuit was whether the IGRA permitted the Tribe to sue the State for refusing to negotiate a Class III gaming compact.[46] The Fifth Circuit held that the Restoration Act, and not the IGRA, governed the dispute and, finding nothing in the Restoration Act that waived the State's Eleventh Amendment immunity, the court reversed and remanded with instructions to dismiss the Tribe's suit.[47]

First, after a lengthy review of the Restoration Act's legislative history and the *Cabazon* decision,[48] the Fifth Circuit held that "Congress—and the Tribe—intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas."[49] Next, after finding that the Restoration Act "establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA," the Fifth Circuit held that the IGRA did not effect a partial repeal of the Restoration Act.[50]

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[45] *Ysleta del Sur*, 36 F.3d 1325.

The Fifth Circuit's opinion in *Ysleta del Sur*, which was filed approximately seven months after the First Circuit filed its opinion in *Narragansett*, is discussed in greater depth in Part II, *infra.*

[46] *Ysleta del Sur*, 36 F.3d at 1327.

[47] *Id.* at 1327, 1335-36.

[48] *Id.* at 1327-31.

[49] *Id.* at 1334 (emphasis added).

[50] *Id.* at 1334-35.

The court observed that the IGRA did not expressly repeal conflicting sections of the Restoration Act, and that "[t]he Supreme Court has indicated that 'repeals by implication are not favored.'"[51] The court then observed that implied repeals are especially disfavored when it is suggested that a general statute has impliedly repealed a specific statute,[52] and opined that, with regard to gaming, the Restoration Act is a specific statute applying to two specific tribes in a particular state, while the IGRA is a general statute.[53] The court further asserted that two provisions of the IGRA that reference existing federal law demonstrate that * * * the IGRA was not intended to trump statutes such as the Restoration Act.[54] Finally, the court noted that Congress in 1993 expressly exempted the Catawba Tribe of Indians ("Catawba") in South Carolina from the IGRA, thereby "evidencing in our view a clear intension on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[55] Having concluded that the IGRA does not effect an implied repeal of contrary provisions

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[51] *Id.* at 1335 (quoting *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987)).

[52] *Id.* (*citing Crawford Fitting*, 482 U.S. at 445).

[53] *Id.*

[54] *Id.* (citing 25 U.S.C. § 2701(5) ("the Congress finds that * * * Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law"); *id.* § 2710(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

[55] *Id.*

of the Restoration Act, the Fifth Circuit wrote: "To borrow IGRA terminology, the Tribe has already made its 'compact' with the state of Texas, and the Restoration Act embodies that compact."[56] The court suggested the only way for the Tribe to game under IGRA would be to petition Congress to amend or repeal the Restoration Act.[57]

2. Litigation under the Restoration Act

Meanwhile, the Tribe opened the Speaking Rock Casino and Entertainment Center ("Speaking Rock") on its reservation in 1993.[58] Speaking Rock began as a bingo hall, but evolved into "a full-scale casino offering a wide variety of gambling activities played with cards, dice, and balls."[59] In 1999, after Speaking Rock had been open and operating for approximately six years, the State sued under Section 107(c) of the Restoration Act.[60] On September 21, 2001, the district court issued an injunction that "had the practical and legal effect of prohibiting illegal as well as legal gaming activities by

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[56] *Id.* Having concluded that the IGRA did not apply, and that the Restoration Act contained no language abrogating the State's Eleventh Amendment immunity from suit, the Fifth Circuit held that the Eleventh Amendment barred the Tribe's suit and remanded to the district court with instructions to dismiss. *Id.* at 1335-36.

[57] *Id.* at 1335.

[58] *State* v. *Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 U.S. Dist. LEXIS 28026, at *6 (W.D. Tex. Mar. 6, 2015) (hereinafter, "*State* v. *Ysleta del Sur Pueblo*").

[59] *Id.*

[60] *Id.* at 3.

the [Tribe]."[61] After an unsuccessful appeal, the Tribe in February 2002 ceased operating those gaming activities prohibited by the injunction.[62] In May 2002, at the request of the Tribe, the district court modified its injunction to allow the Tribe to offer certain specified sweepstakes promotions, but denied the Tribe's request to offer its own sweepstakes.[63] The following year, the Tribe requested permission to offer a sweepstakes promotion selling prepaid phone cards that provided patrons access to "sweepstakes validation terminal[s]"; that request, too, was denied by the district court.[64]

In 2008, upon discovering that the Tribe was operating devices at Speaking Rock that "resembled traditional eight-liner gambling devices and were operated by a card purchased with cash," the State accused the Tribe of violating the injunction and made a motion that the Tribe be held [in] contempt of court.[65] The Tribe sought further clarification of the injunction and a declaration that its "Texas Reel Skill" sweepstakes game did not violate the injunction.[66] In August 2009, the district court granted the State's motion, issued a contempt order, and refused to declare that the Tribe's "Texas Reel

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[61] *Id.* at *6-7 (internal quotation and citation omitted; alteration in original).

[62] *Id.* at *8.

[63] *Id.* at *9-10.

[64] *Id.* at *11.

[65] *Id.* at *11-12.

[66] *Id.* at *12-13.

Skill" game was legal.[67] A week later, the Tribe sought permission to operate yet another sweepstakes game, which the district court denied in October 2010.[68] The Tribe, however, did not cease operation of its sweepstakes games, and by 2012 it had opened a second sweepstakes operation at the Socorro Entertainment Center ("Socorro").[69] The State made another motion that the Tribe be held in contempt of court in September 2013, and amended that motion multiple times before withdrawing it in favor of a renewed motion for contempt made on March 17, 2014.[70] After holding a two-day evidentiary hearing and accepting more than a 1.5 million pages of documents into evidence,[71] the district court on March 6, 2015, held the Tribe in contempt and ordered that it cease all sweepstakes operations within sixty days or face civil penalties of $100,000 per day, unless the Tribe submitted "a firm and detailed proposal setting out a sweepstakes promotion that operates in accordance with federal and Texas law," the submission of which would result in a stay of the contempt sanctions while the court considered the Tribe's proposal and the State's response.[72]

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[67] *Id.* at *12-14.

[68] *Id.* at *14-15.

[69] *Id.* at *15.

[70] *Id.* at *15-16.

[71] *Id*. at *16-17.

[72] *Id.* at *118-20.

On May 5, 2015, the Tribe submitted its proposal,[73] which the State has opposed.[74]

F. The Tribe's Amended Gaming Ordinance and the NIGC Request

On August 17, 2015, the Tribe resubmitted[75] to the NIGC an amendment to its gaming ordinance.[76] The NIGC has asked the Solicitor's Office for clarification as to the Tribe's "eligibility to engage in Class II gaming under the [IGRA] in light of the [Restoration Act] and the Fifth Circuit Court of Appeal's interpretation of it in *Ysleta del Sur Pueblo* v. *State of Texas*."[77]

II. ANALYSIS

Congress has not spoken directly to the issue of whether the Restoration Act or the IGRA governs gaming on the Tribe's reservation and tribal lands. The Restoration Act neither expressly anticipates and provides for the possibility that subsequent legislation

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[73] *State* v. *Ysleta del Sur Pueblo*, ECF Docket No. 513 (May 5, 2015).

[74] *State* v. *Ysleta del Sur Pueblo*, ECF Docket No. 514 (June 5, 2015).

[75] The Pueblo previously submitted this amendment to the NIGC Chairman on March 21, 2014; June 6, 2014; August 29, 2014; November 24, 2014; February 24, 2015; and May 19, 2015. 2015 NIGC Letter, *supra* note 1, at 1.

[76] Letter from Randolph H. Barnhouse, Counsel for Ysleta del Sur, to Jonodev Osceola Chaudhuri, Chairman, NIGC (Aug. 17, 2015).

[77] 2015 NIGC Letter, *supra* note 1, at 1 (footnotes omitted).

might render certain sections of it obsolete, nor does it expressly insulate its provisions from subsequently enacted contrary legislation. Likewise, the IGRA does not make any direct or indirect references to the Restoration Act, the Tribe, or the State. As explained in greater detail throughout our analysis, we recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands.[78] However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.[79]

In interpreting a statute that we are charged with administering, we seek to effect the intent of the

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[78] See *generally Ysleta del Sur*, 36 F.3d 1325 (5th Cir. 1994).

[79] An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); *cf. Passamaquoddy Tribe* v. *Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). See also *Northern Arapahoe Tribe* v. *Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.

Congress that enacted the statute.[80] Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer "whether Congress has spoken directly to the precise question at issue" and, if the statute is clear, then the agency must give effect to "the unambiguously expressed intent of Congress."[81] If, however, the statute is "silent or ambiguous," as are both the Restoration Act and the IGRA, then the agency must base its interpretation on a "reasonable construction" of the statute.[82]

When confronted with a statute that was enacted for the benefit of Indians, as were both the Restoration Act and the IGRA, if that statute contains ambiguities we are guided by an additional principle:: "statutes passed for the benefit of * * * Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[83]

Employing both the standard rules of statutory construction and the Indian canon, and applying the

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[80] *Wyoming* v. *United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) ("The question whether federal law authorize[s] certain federal agency action is one of congressional intent.").

[81] *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[82] *Id.* at 840.

[83] *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

Department's expertise in the field of Indian affairs,[84] the Department interprets the IGRA as impliedly repealing the gaming provisions of the Restoration Act. Therefore, we conclude that the IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands.

Our interpretation contains four distinct subparts. First, having analyzed both the text and the legislative history of the IGRA, employing both the standard rules of statutory construction and the Indian canon, we concur in your conclusion[85] that Congress intended for the IGRA to apply to the Tribe. Second, we conclude that the Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA and, therefore, that the IGRA governs gaming on the Tribe's reservation and tribal lands. Third, we conclude that Section 107 of the Restoration Act is repugnant to the IGRA and, therefore, that the statutes cannot be harmonized. Finally, we conclude that in this conflict the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act.

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[84] *Cherokee Nation* v. *United States*, 73 Fed. Cl. at 497 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

[85] See 2015 NIGC Letter, *supra* note 1, at 2. Although we have not seen your analysis, we reach the same conclusion and, therefore, concur.

A. Both the text of the IGRA and its legislative history demonstrated that Congress intended for the IGRA to apply to the Tribe.

The IGRA "is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands."[86] Among the IGRA's "stated goals [was] to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'"[87] The text of IGRA, itself, contains no express exemption for the Tribe, or for any other tribe; rather, the IGRA is written broadly to encompass all federally recognized Indian tribes.[88] Thus, "[b]y its own terms, the [IGRA], if taken in isolation, applies to any federally recognized Indian tribe that possesses powers of self-governance."[89] Therefore, given IGRA's broad purposes, and the fact that nothing in the plain language of IGRA expressly excludes the Tribe, we conclude that, on its face, IGRA applies to the Tribe.

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[86] *Narragansett*, 19 F.3d at 689.

[87] *Wells Fargo Bank*, 658 F.3d at 687 (quoting 25 U.S.C. § 2702(1)).

[88] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which—(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.")

[89] *Passamaquoddy*, 75 F.3d at 788 (citing 25 U.S.C. § 2703(5)).

The Fifth Circuit, however, pointed to two sections of the IGRA that make reference to "other federal law," and that it believed demonstrated Congress's intent that the IGRA not supersede the gaming provisions of the Restoration Act and similar statutes. Noting that the IGRA was enacted scarcely a year after the Restoration Act, the court wrote that Congress "explicitly stated in two separate provisions of the IGRA that IGRA should be considered in light of other federal law,"[90] the Fifth Circuit interpreted these two sections as providing that the IGRA does not apply where Congress had previously spoken to gaming, as it had in the Restoration Act.[91]

We interpret these provisions differently than the Fifth Circuit. The Senate Report on the IGRA explains that this language instead "refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175."[92]

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[90] *Ysleta del Sur*, 36 F.3d at 1335 (citing 25 U.S.C. § 2701(5) ("The Congress finds that—(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming is not specifically prohibited by Federal law* and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (emphasis added)); and 25 U.S.C. § 2701(b)(1)(A) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (*and such gaming is not otherwise specifically prohibited on Indian lands by Federal law*)" (parenthetical in original, emphasis added))).

[91] *Id.*

[92] 1988 Senate IGRA Report, *supra* note 36, at 12. The 1988 Senate IGRA Report also explains that the IGRA was not intended to "supersede any specific restriction or specific grant of

In other words, the language that the Fifth Circuit relied upon in finding that the text of the IGRA expressly exempted tribes for whom prior Federal law addressed gaming was, instead, intended to make clear that the IGRA did not legalize certain *games* that were already illegal as a matter of Federal law.

The legislative history of the IGRA contains no specific evidence that Congress sought to exclude the Tribe from the IGRA's ambit. The 1988 Senate IGRA Report contains no specific references to the Tribe, the State of Texas, or the Restoration Act.[93] That Report does explain that Congress did not intend for the IGRA to "supersede any specific restriction or grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute," citing as a specific example the Maine Indian Claims Settlement Act.[94] However, the Restoration Act contains

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Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act and the [Maine] Indian Claim Settlement Act (citations omitted). *Id.* This language does not change our analysis. The Restoration Act expressly provides that it *is not* a grant of Federal authority or jurisdiction with regard to gaming, but is instead merely an extension of the State's substantive gaming law with a specified federal court remedy. Restoration Act, *supra* note 2, at § 107(a) (applying State's substantive gaming law), § 107(b) (no grant of jurisdiction to the State), § 107(c) (remedy in federal court).

[93] See generally 1988 Senate IGRA Report, *supra* note 36.

[94] *Id.* at 12 (citations omitted). The Maine Indian Claims Settlement Act provides in part that any subsequently enacted Federal laws "for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the

no "specific restriction * * * of Federal authority," and although Section 105(f) provides for a general grant of jurisdiction to the State, Section 107(c) specifically states that that grant of jurisdiction *does not* give the State jurisdiction over gaming.[95]

The Fifth Circuit concluded that Congress's 1993 decision to exclude the Catawba in South Carolina from the IGRA's ambit was evidence of "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[96] However, the actions of the 103d Congress shed no light whatsoever on the intentions of the 100th Congress at the time that it enacted the IGRA; rather, the fact that specific legislation was required to place the Catawba outside the IGRA's ambit in South Carolina strongly suggests that, absent an explicit act such as that taken with the Catawba, a tribe must be presumed to fall within the IGRA's ambit. Consequently, because no act of Congress expressly places the Tribe

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laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." 25 U.S.C. § 1735.

[95] *Compare* Restoration Act, *supra* note 2, *with* Maine Indian Claims Settlement Act, 25 U.S.C. § 1735. The Restoration Act—enacted by the very same Congress that enacted the IGRA scarcely a year later—contains no language whatsoever that would preserve its gaming provisions in the face of subsequently enacted Federal law, such as the IGRA.

[96] *Ysleta del Sur*, 36 F.3d at 1135.

outside of the IGRA's scope, we interpret the IGRA as including the Tribe within its ambit.

Therefore, we conclude that the gaming on the Tribe's reservation and Indian lands falls within the ambit of the IGRA.

B. The Tribe possesses and exercises jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA.

The IGRA is not applicable to all land owned by a tribe. First, the IGRA provides for gaming only on "Indian lands," a category which includes: (1) land located within the exterior boundaries of a tribe's reservation; and (2) trust land and restricted fee land over which a tribe exercises governmental authority.[97] Second, the

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[97] The IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). The NIGC's regulations further define "Indian lands" and specify that in order for land outside of a tribe's reservation to qualify as Indian lands the tribe must exercise governmental authority over that land. 25 C.F.R. § 502.12 (defining "Indian lands" as "land within the limits of an Indian reservation," "land over which an Indian tribe exercises governmental power * * * [and is] [h]eld in trust by the United States for the benefit of any Indian tribe or individual," or "land over which an Indian tribe exercises governmental power * * * [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

IGRA requires that a tribe possess legal jurisdiction over the land.[98] There is a presumption that tribes possess legal jurisdiction over land located within the exterior boundaries of their own reservations.[99] Where there is a question as to the tribe's jurisdiction, courts have found that a tribe must meet two requirements[100]: First, the provisions of the IGRA related to Class I and class II gaming require that a tribe must *have jurisdiction* over the land;[101] second, the provision defining the elements of "Indian lands" requires that a tribe must *exercise governmental power* over the land.[102]

Courts have found that possession of legal jurisdiction over land is a threshold requirement to the exercise of governmental power required for trust and restricted

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[98] 25 U.S.C. § 2710(b)(1) (providing that, subject to enumerated criteria, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction"); *id.* at § 2710(d)(1)(A)(i) (providing that, subject to enumerated criteria, "Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands").

[99] Letter from Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, to Jo-Ann Shyloski, Associate General Counsel, NIGC, at 4-5 n.26 and decisions cited therein (Aug. 23, 2013) [hereinafter "2013 Wampanoag Opinion Letter], *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f20130823AquinnahSettlementActInterpretationsigned.pdf&tabid=120&mid=957.

[100] *Narragansett*, 19 F.3d at 701.

[101] *Id.* (citing 25 U.S.C. § 2710(b)(1)).

[102] *Id.* (citing 25 U.S.C. § 2703(4)).

fee land.[103] Whether a tribe possess *legal jurisdiction* over a particular parcel of land often hinges on construing settlement or restoration acts that limit the tribe's jurisdiction[104] or on a determination of which tribe possesses jurisdiction over a particular parcel of land.[105] A showing *of governmental power* requires a concrete manifestation of authority and is a factual inquiry.[106] For trust or restricted fee land to qualify as

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[103] See *Kansas* v. *United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."); *Narragansett*, 19 F.3d at 701-03 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), *as stated in Narragansett Indian Tribe* v. *Nat'l Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998); *Miami Tribe of Oklahoma* v. *United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma* v. *United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

[104] See, *e.g.*, *Narragansett*, 19 F.3d at 701-02 (finding that Narragansett Indian Tribe possessed the requisite jurisdiction to trigger the IGRA in light of the tribe's settlement act); 2013 Wampanoag Opinion Letter, *supra* note 99, at 5 n.31 and authorities cited therein.

[105] Letter from Lawrence S. Roberts, General Counsel, NIGC, et al., to Tracie Stevens, Chairwoman, NIGC, at 10-13 (May 24, 2012) (determining that Muscogee (Creek) Nation had jurisdiction over land in question and that the Kialegee Tribal Town had not demonstrated that it had legal jurisdiction), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltownopinion52412.pdf&tabid=120&mid=957; 2013 Wampanoag Opinion Letter, *supra* note 99, at 5-6 n.32 and authorities cited therein.

[106] *Narragansett*, 19 F.3d at 703.

Indian lands over which a tribe possess jurisdiction, the two requirements of having jurisdiction and exercising governmental authority must both be met. Once a tribe has established that its land qualifies as Indian lands and that the tribe possesses jurisdiction over that land—making it eligible for Indian gaming—the tribe has the exclusive right to regulate gaming on that land, and a state can exten[d] its jurisdiction only through a tribal-state compact.[107]

Approximately twenty years ago, the First Circuit in *Rhode Island* v. *Narragansett Indian Tribe*[108] determined whether a tribe's settlement act prohibited gaming. It created a two-step analysis, first asking whether the tribe possesses the requisite jurisdiction for the IGRA to apply to the tribe's lands; and next asking whether the tribe's settlement act and the IGRA can be read together, or whether the IGRA impliedly repealed the settlement act's gaming provisions.[109] This office has since used the *Narragansett* framework to evaluate whether the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 prohibited the Wampanoag Tribe of Gay Head

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[107] 25 U.S.C. § 2701(5) ("The Congress finds that * * * Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

[108] 19 F.3d 685 (1st Cir. 1994).

[109] *Id.*

(Aquinnah) from gaming.[110] Because the settlement act at issue in *Narragansett* and the Restoration Act at issue here raise similar questions with respect to gaming and the application of the IGRA, we employ that framework here.[111]

In applying the *Narragansett* court's framework to the present question, we begin by asking whether the Ysleta del Sur Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the application of the IGRA.[112] To determine whether the Tribe possesses the requisite jurisdiction for the IGRA to apply, we must first determine what the IGRA's reference to "jurisdiction" means.[113] A basic tenet of Indian law dictates that tribes retain attributes of sovereignty, and therefore jurisdiction, over their lands and members.[114] In *Narragansett*, the court explained that the jurisdiction required for the IGRA to apply is

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[110] 2013 Wampanoag Opinion Letter, *supra* note 99, at 4-5 n.26 and decisions cited therein.

[111] See generally *id.* In *Narragansett*, the First Circuit held that the Narragansett Indian Tribe ("Narragansett Tribe") possessed and exercised jurisdiction under its settlement act that was sufficient to trigger the application of the IGRA. 19 F.3d at 700-03. Upon concluding that the IGRA was triggered, the court examined the interplay between the settlement act and the IGRA and concluded that the IGRA effected an implied partial repeal of portions of the settlement act. *Id*. at 703-05.

[112] 2013 Wampanoag Opinion Letter, *supra* note 99, at 7-15.

[113] *Id.* at 7.

[114] The U.S. Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon*, 480 U.S. at 207 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)).

derived from a tribe's retained rights flowing from their inherent sovereignty.[115] Against that backdrop, we construe the IGRA's language.

As noted above, statutory interpretation begins with the plain meaning of the language itself. With respect to class II gaming, the IGRA states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands* within such tribe's jurisdiction."[116] With regard to class III gaming, the IGRA explains that "[a]ny Indian tribe having jurisdiction over the *Indian lands* upon which a class III gaming activity is being conducted" must enter into a compact with the state.[117] It further requires that a gaming ordinance authorizing class III gaming be "adopted by the governing body of the Indian tribe having jurisdiction over *such lands*."[118] In each of the IGRA's three references to its jurisdictional requirement, the statute clearly states that a tribe must possess jurisdiction over its lands.[119]

We, like the First Circuit, also view as important the amount of jurisdiction a tribe must possess in order to trigger application of the IGRA. Tribes possess aspects of sovereignty not ceded by treaty or withdrawn by

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[115] 19 F.3d at 701 ("We believe that jurisdiction is an integral aspect of retained sovereignty.").

[116] 25 U.S.C. § 2710(b)(1) (emphasis added).

[117] *Id.* § 2710(d)(3)(A) (emphasis added).

[118] *Id.* § 2710(d)(1)(A)(i) (emphasis added).

[119] 2013 Wampanoag Opinion Letter, *supra* note 99, at 8 n.57 and authorities cited therein.

statute or by implication as a necessary result of their dependent status.[120] In other words, tribes are presumed to have jurisdiction over their land unless it has been ceded or withdrawn. When Congress enacts a status depriving a tribe of jurisdiction, it must do so explicitly.[121] Furthermore, "acts diminishing the sovereign rights of Indian [t]ribes should be strictly construed."[122] This statutory rule is bolstered by the Indian canon of construction.

We require Congress's explicit divestiture of tribal jurisdiction to avoid the IGRA's application to Indian lands, as did the *Narragansett* court.[123] In other words,

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[120] *Narragansett*, 19 F.3d at 701 (citing *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)).

[121] *Id.* at 702 ("Since the settlement Act does not *unequivocally articulate* an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive" (emphasis added)); Letter from Michael J. Anderson, Acting Assistant Secretary—Indian Affairs, to Patricia A. Marks, Attorney, Wampanoag Tribe of Gay Head, at 3 (Sept. 5, 1997) [hereinafter "1997 AS-IA Letter"] (pointing to "long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty" and explaining that "[i]n this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed" (citing *Bryan*, 426 U.S. at 392)).

[122] *Narragansett*, 19 F.3d at 702.

[123] *Id.* at 702. The Assistant Secretary also has emphasized this point. 1997 AS-IA Letter, *supra* note 121, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction.").

unless a tribe has been completely divested of jurisdiction, the IGRA applies. A mere grant of state jurisdiction is not enough to find the State has exclusive jurisdiction over the land.[124]

Here, the Restoration Act does not confer upon the State *jurisdiction* over gaming on the Tribe's reservation and tribal lands, but instead merely provides that "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."[125] This merely codified the distinction, set forth in *Cabazon* and affirmed in the IGRA, between *regulated* gaming activities, which a tribe may engage in pursuant to the IGRA, and *prohibited* gaming activities, which a tribe may engage in only under the terms of a compact with a state. At most, Section 107(a) functions as a choice-of-law provision, employing the State's substantive gaming law to set the bounds of permissible gaming on the Tribe's reservation and tribal lands. Under either reading of the Restoration Act, Section 107(a) diminishes the Tribe's sovereign right to enact its own gaming laws; however, it does not diminish the Tribe's jurisdiction, on its reservation and tribal lands, to regulate gaming

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[124] 2013 Wampanoag Opinion Letter, *supra* note 99, at 9; *Narragansett*, 19 F.3d at 702 (because the Settlement Act's "grant of jurisdiction to the state is non-exclusive," the Narragansett Tribe "retain[s] that portion of jurisdiction they possess by virtue of their sovereign existence as a people—a portion sufficient to satisfy the Gaming Act's 'having jurisdiction' prong.").

[125] Restoration Act, *supra* note 2, § 107(a).

activities undertaken in accordance with the State's substantive gaming laws.

In addition, the application of the State's gaming laws on the Tribe's reservation and tribal lands must be strictly construed, under basic tenets of Indian law and the *Narragansett* framework. No provision of the Restoration Act expressly, or even impliedly, divests the Tribe of *regulatory* jurisdiction over its reservation and tribal lands. In fact, Section 107(b) of the Act provides: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Moreover, Section 107(c) of the Restoration Act provides that Federal courts "have exclusive jurisdiction over" alleged violations of Section 107(a), thereby impliedly divesting the Tribe only of its *adjudicatory* jurisdiction over gaming disputes that arise under the Act. Therefore, the Tribe retains nearly complete civil and criminal regulatory jurisdiction over its reservation and tribal lands, except for the narrow exception for Federal court jurisdiction provided in Section 107(c), which means that the State does not and cannot have exclusive jurisdiction over those lands.[126]

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[126] Both the Assistant Secretary and this Office have observed that the gaming provisions of the Restoration Act differed markedly from those contained in the Massachusetts Indian Land Claims Settlement act. 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95; 1997 AS-IA Letter, *supra* note 121, at 5. Neither letter contained an in-depth analysis of the Restoration Act, and neither concluded that the Restoration Act completely divested the Tribe of jurisdiction over gaming on its reservation and tribal lands; rather, both letters simply observed that the differences in the two statutes provided a reason not to follow the

In addition, the Restoration Act's only grant of jurisdiction to the State, contained in Section 105(f), does not suggest that such State jurisdiction is exclusive. Instead, it merely provides that the State has civil and criminal jurisdiction on the Tribe's reservation and Indian lands consistent with Public Law 280, as amended by the Indian Civil Rights Act,[127] which does not extinguish the Tribe's inherent jurisdiction, but instead merely authorizes the State to exercise jurisdiction concurrent with that of the Tribe.[128] Section 105(f)

Fifth Circuit's *Ysleta del Sur* opinion in their respective analyses of the Massachusetts Indian Land Claims Settlement Act. *Id.* Even if those Letters had concluded that the Restoration Act completely divested the Tribe of jurisdiction over its reservation and tribal lands, they would not preclude us from reconsidering that opinion in this Memorandum. See *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on a continuing basis.").

We are aware of the Assistant Secretary's statement that the Restoration Act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas on the reservation and lands of the Ysleta del Sur Pueblo." 1997 AS-IA Letter, *supra* note 121, at 5; 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95 (quoting AS-IA Letter). This statement was not made in a detailed analysis of the Restoration Act, itself, but rather, in the Assistant Secretary's analysis of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, and therefore is not dispositive here.

[127] Restoration Act, *supra* note 2, § 105(f). Nothing in Section 105(f) suggests that the grant of jurisdiction to the State is exclusive.

[128] 1-6 Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2012) ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars

does not use the words "exclusive" or "complete" in describing the jurisdiction conferred upon the State in Section 105(f).[129] It does, however, use the word "exclusive" in Section 107(c) to describe the grant of jurisdiction to the federal courts for resolution of gaming disputes arising from the provisions of Section 107(a).[130] "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "[131]

In sum, the Restoration Act does not grant the State exclusive jurisdiction over the Pueblo's land and does not divest the Pueblo of its inherent jurisdiction. To

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is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched" (internal citations omitted)).

[129] See *Narragansett*, 19 F.3d at 702 ("omission of words such as 'exclusive' or 'complete' " in statute assigning jurisdiction was "meaningful"); *United States* v. *Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (finding absence of terms "exclusive" or "complete" in Federal statute's grant of jurisdiction over offenses committed by or against Indians meant the statute only extended to the state jurisdiction concurrent with that of the Federal government).

[130] *Compare id.* § 105(f) (no use of "exclusive" or "complete"), *with* § 107(c) ("Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) * * * * Section 107(c), would have been particularly important in the pre-IGRA environment in which the Restoration Act was negotiated and ultimately enacted. Because we conclude that the IGRA effects a partial implied repeal of the Restoration Act's gaming provisions, Section 107(c) is less relevant today.

[131] *Narragansett*, 19 F.3d at 702 (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987)).

the contrary, the Act specifically declares that it is not a grant of civil and criminal regulatory jurisdiction to the State.[132]

C. Section 107 of the Restoration Act and the IGRA are repugnant to each other.

Because the Tribe possesses sufficient jurisdiction to trigger application of the IGRA, we must determine whether the IGRA effected an implied repeal of any portion of the Restoration Act. When two federal statutes touch on the same subject matter, courts should attempt to give effect to both if they can be harmonized.[133] Therefore, "so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective."[134] However, if portions of the statutes are repugnant to each other, one must prevail

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[132] The second part of the Indian lands determination, whether the tribe exercises governmental power, is a more fact-based determination than the jurisdictional question, and does not require construction of the Restoration Act; therefore, we leave this determination to the NIGC. 2013 Wampanoag Opinion Letter, *supra* note 99, at 14-15. Nonetheless, we note that, unlike the settlement act at issue in *Narragansett*, which expressly limited the Narragansett's *exercise* of jurisdiction over its settlement lands, see 25 U.S.C. § 1771e, the Restoration Act contains no language whatsoever limiting the Tribe's exercise of governmental power on its reservation or tribal lands.

[133] *Narragansett*, 19 F.3d at 703.

[134] *Id.* at 703 (citing *Traynor* v. *Tumage*, 485 U.S. 535, 547-48 (1988); *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 432 n.43 (1972); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 82 (1871)).

over the other.[135] Even where the two statutes are not outright repugnant, "a repeal may be implied in cases where the later statutes covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.' "[136] When a later statute impliedly repeals a former statute, a partial repeal is preferred and only the parts of the former statute that are in plain conflict with the later should be nullified.[137]

We and the Fifth Circuit agree that the gaming provisions of the Restoration Act cannot be read in harmony with the IGRA.[138]

The Fifth Circuit concluded that, by enacting the Restoration Act, "Congress * * * intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas."[139] Approximately one year later, however, in enacting the IGRA, Congress "expressly preempt[ed] the field in the governance of gaming activities on Indian lands"[140] by creating a nationwide regulatory framework that "struck a 'finely-tuned balance between the interests of the states and the tribes' to remedy the *Cabazon Band*

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[135] *Id.* (citing *Tynen*, 78 U.S. (11 Wall.) at 92).

[136] *Id.* at 703-04 (citing, *inter alia, Posadas* v. *Nat'l City Bank*, 296 U.S. 497, 503-04 (1936); *Tynen*, 78 U.S. (11 Wall.) at 92).

[137] *Id.* at 704 n.19.

[138] See Part II.A, *supra.*

[139] *Ysleta del Sur*, 36 F.3d at 1334.

[140] 1988 Senate IGRA Report, *supra* note 36, at 6.

prohibition on state regulation of Indian gaming."[141] If, as the Fifth Circuit concluded, Section 107(a) was enacted to serve as surrogate federal law on the Tribe's reservation, and the IGRA was enacted to "expressly preempt the field" and to "str[ike] a 'finely-tuned balance between the interests of the states and the tribes,'" then Section 107(a) cannot be harmonized with the IGRA.

Although the Department, too, concludes that the Restoration Act and the IGRA cannot be reconciled, we respectfully follow a different path than did the Fifth Circuit. We interpret Section 107(a) as codifying the distinction, set forth in *Cabazon* and enacted in the IGRA, between civil/regulatory laws and criminal/prohibitory laws. In Section 107(a), Congress ensured that gaming prohibited by the State of Texas could not take place on the Tribe's reservation and tribal lands.[142] Under this interpretation, Section 107(a), in and of itself, is not repugnant to the IGRA.

However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of

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[141] *Texas* v. *United States*, 497 F.3d 491, 506-507 (5th Cir. 2007) (quoting *United States* v. *Spokane Tribe of Indians,* 139 F.3d 1297, 1301 (9th Cir. 1988)); see also *Cheyenne River Sioux Tribe* v. *South Dakota*, 830 F. Supp. 523, 526 (D.S.D. 1993) (citing 1988 Senate IGRA Report, *supra* note 36), *aff'd* 3 F.3d 273 (8th Cir. 1993).

[142] We are aware that the Fifth Circuit expressly rejected this interpretation. *Ysleta del Sur*, 36 F.3d at 1333-34. As set forth *supra*, the Department, as the agency with responsibility for implementing the Restoration Act, may adopt an alternative interpretation.

their provisions. The Restoration Act provides that violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas."[143] Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a).[144] The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme.[145]

Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

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[143] Restoration Act, *supra* note 2, § 107(a).

[144] *Id.* § 107(c).

[145] 18 U.S.C. §§ 1166-1168 (IGRA criminal laws and penalties; 25 U.S.C. § 2706(b)(10) (NIGC has authority to promulgate regulations for implementation of the IGRA; 25 U.S.C. § 2713 (civil penalties for violation of the IGRA); 25 C.F.R. Part 573 (Compliance and Enforcement); 25 C.F.R. Part 575 (Civil Fines).

D. In the conflict between Section 107 of the Restoration Act and the IGRA, the IGRA prevails, thus impliedly repealing Section 107.

As the Fifth Circuit noted in *Ysleta del Sur*, "repeals by implication are not favored."[146] Nonetheless, when two statutes cannot be reconciled, one must prevail over the other.[147] Here, our analysis diverges more sharply from that of the Fifth Circuit.

The general rule, as set forth by the *Narragansett* court, is that "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[148] In the conflict between Section 107 of the Restoration Act and the IGRA, this general rule suggests, absent good cause to the contrary, that the IGRA prevails. In addition, in its analysis of the interplay between the Restoration Act and the IGRA, not only did the Fifth Circuit neglect to apply or even acknowledge the Indian canon, it also failed to employ or even acknowledge "the general rule * * * that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[149] IGRA was enacted approximately one year after the Restoration Act.

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[146] *Ysleta del Sur*, 36 F.3d at 1335 (quoting *Crawford Fitting*, 482 U.S. at 442).

[147] *Narragansett*, 19 F.3d at 703.

[148] *Id.* at 704.

[149] *Narragansett*, 19 F.3d at 704 (*citing Watt* v. *Alaska*, 451 U.S. 259, 266 (1981)).

The Fifth Circuit held that the Restoration Act prevails because it, being applicable to only two tribes in a single state, is a specific statute and the IGRA, being of nationwide application, is a general statute.[150] However, the IGRA also is a specific statute because it is specifically directed to the issue of Indian gaming, while the Restoration Act is a general statute because its primary purpose is to restore the Federal trust relationship, with gaming constituting only one part of that statute. The district court in *Narragansett* concluded as much with respect to the Rhode Island Settlement Act.[151] Moreover, where "the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging the presumption" that Congress did not intend its later statute to act upon the earlier one.[152]

In addition, our conclusion that the IGRA prevails preserves the core of both acts. The primary purpose of the Restoration Act was to restore the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas.[153] The Act's gaming provisions were enacted to fill a legal and jurisdictional void that

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[150] *Ysleta del Sur*, 36 F.3d at 1335.

[151] *Rhode Island* v. *Narragansett Tribe of Indians*, 816 F. Supp. 796, 804 (D.R.I. 1993) (holding that, for purposes of gaming, the IGRA is a specific act and the tribe's settlement act is a general act), *aff'd* 19 F.3d 685.

[152] *Narragansett*, 19 F.3d at 704 n.21.

[153] Restoration Act, *supra* note 2, Title.

existed at that time, before the IGRA was enacted.[154] Consequently, an interpretation of the two statutes that finds that the IGRA impliedly repeals Section 107 of the Restoration Act nevertheless leaves the core of the Restoration Act intact.[155] Moreover, the IGRA filled the legal and jurisdictional gap that existed at the time the Restoration Act was enacted, further mitigating any harm from finding an implied repeal of Section 107. On the other hand, the IGRA by its plain language was intended to apply to all Indian tribes,[156] and one of its stated purposes was "to expressly preempt the field in the governance of gaming activities on Indian lands[.]"[157] Although Congress has expressly exempted certain tribes from the operation of the IGRA,[158]

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[154] See Part I.B, *supra*.

[155] *Cf. Narragansett*, 19 F.3d at 704 (reading the IGRA and the settlement act at issue such that the IGRA prevailed "leaves the heart of the Settlement Act untouched").

[156] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means *any* Indian tribe, band, nation, or other organized group or community of Indians which—(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government" (emphasis added).).

[157] 1988 Senate IGRA Report, *supra* note 36, at 6.

[158] See, *e.g.*, 25 U.S.C. § 9411 (the IGRA does not apply to the Catawba Indian Tribe of South Carolina); 25 U.S.C. § 1708(b) (Narragansett settlement lands are not "Indian lands" for purposes of the IGRA); see also *Passamaquoddy*, 75 F.3d 784 (holding that savings clause in the Maine Indian Claims Settlement Act, paired with the IGRA's lack of any specific reference to any applicability in the State of Maine, effectively exempted tribes within the State of Maine from operation of the IGRA).

to find such an exemption without any express statutory exemption would undermine the goal of a "comprehensive regulatory framework"[159] the IGRA.

Finally, our conclusion that the IGRA effects an implied repeal of the gaming provisions of the Restoration Act is the only conclusion that is consistent with the Indian canon of construction. When choosing between two reasonable interpretations of a statute enacted for the benefit of Indians, the Indian canon itself is not diapositive of the issue, but rather, it is an essential lens through which statute's text, "the 'surrounding circumstances,' and the 'legislative history' are to be examined."[160] The IGRA is a statute enacted for the benefit of Indians and Indian tribes.[161] Although the Fifth Circuit had previously recognized the role that the Indian canon plays in interpreting statutes enacted for the benefit of Indian tribes,[162] it did not employ, or even acknowledge, the relevance of the Indian canon to the determination of whether the IGRA

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[159] *Wells Fargo Bank*, 658 F.3d at 687.

[160] *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977) (quoting *Maltz* v. *Arnett*, 412 U.S. 481, 505 (1973)).

[161] 25 U.S.C. § 2702(1) (among purposes of the IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments"); see also *Artichoke Joe's Cal. Grand Casino* v. *Norton*, 353 F.3d 712, 730 (9th Cir. 2003) ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes" (citing IGRA's declaration of policy contained in 25 U.S.C. § 2702(1))).

[162] *Seminole Tribe of Fla.* v. *Butterworth*, 658 F.2d 310, 316 (1981) ("The Supreme Court * * * has stated that statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians" (quoting *Bryan*, 426 U.S. at 392)).

governs gaming on the Tribe's reservation and tribal lands. Therefore, we depart from the Fifth Circuit and apply the construction that favors the Tribe.

We conclude that the IGRA effects an implied repeal of Section 107 of the Restoration Act. In doing so, however, we note that our opinion does nothing to undermine the gaming prohibitions that currently exist in Texas law. The State already provides for bingo, which is the functional equivalent of the Class II gaming governed by the gaming ordinance that the Tribe submitted to the NIGC. Under the IGRA, the Tribe may not engage in Class III gaming unless it first reaches a compact with the State. In other words, our conclusion that the IGRA governs gaming on the Tribe's reservation and tribal lands preserves the authority of both the Tribe and the State to pursue their respective public policies toward gaming.

III. CONCLUSION

A comprehensive reading of the interplay between the Restoration Act and the IGRA leads us to conclude that the IGRA applies to the Ysleta del Sur Pueblo. The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by

the enactment of the IGRA, scarcely one year after the Restoration Act.

Because Section 107 of the Restoration Act contains enforcement provisions that are at odds with the IGRA, the two statutes cannot be harmonized. In that conflict, the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act. Our conclusion is consistent with the rule that favors the later-enacted statute, which in this case is the IGRA. In addition, an implied repeal of Section 107 leaves the core of the Restoration Act intact, while an implied exception to the IGRA would undermine the national regulatory scheme at that statute's core, and undermine its goal of providing opportunities for tribal economic development. This interpretation is consistent with the text of the IGRA, the legislative histories of both the Restoration Act and the IGRA, and the Indian canon of construction.

Therefore, in answer to your question, we conclude that the Restoration Act does not prohibit the Ysleta del Sur Pueblo from gaming on its Indian lands under IGRA.

Sincerely,

/s/ Venus McGhee Prince

Venus McGhee Prince
Deputy Solicitor for
Indian Affairs

[LOGO]

October 8, 2015

Nita Battise, Chairperson
Alabama-Coushatta Tribe of Texas
571 State Park Road 56
Livingston, TX 77351

RE: Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance and Resolution No. 2015-038.

Dear Chairperson Battise:

This letter responds to the request by the Alabama-Coushatta Tribe of Texas July 10, 2015, to the National Indian Gaming Commission to review and approve the Tribe's Class II gaming ordinance. The gaming ordinance was adopted by Resolution No. 2015-038 by the Alabama-Coushatta Tribal Council.

Resolution No. 2015-038 adopts the Tribal gaming ordinance, which was created to govern and regulate the operation of Class II gaming on the Tribe's *Indian lands*. Because the Tribe's ordinance permits it to conduct gaming on its *Tribal Indian lands*,[1] as defined by the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act)[2] an analysis of whether the Tribe's lands are eligible for gaming was necessary.

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[1] Alabama-Coushatta Tribe of Texas II Tribal Gaming Ordinance § 5.

[2] 25 U.S.C. §§ 731 *et seq*.

Analysis

The Alabama-Coushatta's ordinance permits it to conduct gaming on its *Tribal Indian lands*.[3] It defines *Indian Lands, Tribal Lands*, or *Tribal Indian lands* as all lands within the limits of the Tribe's Reservation. It additionally defines *Tribal Indian lands* "as lands acquired by the Secretary in trust prior to October 17, 1988, or those lands acquired by the Secretary in trust after October 17, 1988, that meet one or more of the exceptions set forth in 25 U.S.C. § 2719. Finally, the Tribe defines *Reservation* as it is defined in the Tribe's Restoration Act.

As discussed in greater detail below, the *Tribal lands* or *Tribal Indian lands* specified in the ordinance amendment are *Indian lands* as defined by IGRA and are eligible for gaming under the Act. The Restoration Act, however, provides a general grant of state jurisdiction over the Alabama-Coushatta's lands, through Public Law 280, and applies state gaming laws to the Tribe's lands, with a qualification. Accordingly, the Restoration Act must be taken into consideration as part of this ordinance review.

Jurisdiction

Because a similar question regarding the Ysleta del Sur Pueblo's Restoration act arose when the Pueblo submitted its ordinance to the NIGC for the

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[3] Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance § 5.

Chairman's approval, and the Secretary of the Interior administers tribal restoration acts, the NIGC Office of General Counsel sought the Department of Interior, Office of the Solicitor's opinion as to whether under the Restoration Act the Pueblo can game pursuant to IGRA on its Indian lands; specifically, whether the Pueblo possesses sufficient jurisdiction over its Restoration Act lands for IGRA to apply and if so, how to interpret the interface between IGRA and the Restoration Act.[4] Because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, that same jurisdictional analysis applies to the Alabama-Coushatta's portion of the Restoration Act.

As a preliminary analysis, we must examine the scope of IGRA to determine whether the NIGC has jurisdiction over the Tribe's Restoration Act lands or phrased alternatively, whether the Tribe's Restoration Act lands are exempt from IGRA's domain. Nothing in the IGRA's language or its legislative history indicates that the Tribe is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Tribe's land.

Next, we must look to the Office of the Solicitor's opinion on the Ysleta del Sur Pueblo. On September 10, 2010, the Office of the Solicitor concurred with our conclusion that IGRA applies to the Pueblo and further opined the Pueblo possesses sufficient legal jurisdiction over its settlement lands for IGRA to apply, that

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[4] May 29, 2015, Letter to Deputy Solicitor, Indian Affairs Venus Prince from NIGC General Counsel, Eric N. Shepard.

IGRA governs gaming on the Pueblo's reservation, and IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA.[5] Again, because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, the Office of the Solicitor's analysis applies to the Alabama-Coushatta. Therefore, the only remaining questions are whether those lands qualify as Indian lands as defined in IGRA and whether they are eligible for gaming.

Indian Lands

IGRA permits an Indian Tribe to "engage in, or license and regulate gaming on Indian lands with such Tribe's jurisdiction."[6] It defines *Indian lands* as all lands with the limits of any Indian Reservation.[7] In 1987, the Restoration Act established a reservation for the Alabama-Coushatta,[8] comprised of the Tribe's land holdings at that time.[9] Because the Tribe has a reservation—established a year before Congress passed IGRA—it has IGRA-defined *Indian lands.* Further, the Tribe identified in its ordinance that it authorizes gaming on its *Tribal Indian lands*—defined as all lands within the limits of its *Reservation.* The

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[5] September 10, 2015, Letter to NIGC General Counsel, Michael Hoenig, from Deputy Solicitor for Indian Affairs, Venus McGhee Prince. (*Attachment A.*)

[6] 25 U.S.C. § 2710(b)(1).

[7] 25 U.S.C. § 2703(4)(A); 25 C.F.R. § 502.12(a): "*Indian lands* means: (a) Land within the limits of an Indian reservation."

[8] 25 U.S.C. § 736(a)

[9] 25 U.S.C. § 731(3).

Alabama-Coushatta's ordinance limits where it can operate a class II gaming facility to its *Reservation*. Accordingly, the Restoration Act lands qualify as *Indian lands* under IGRA.

Finally, because the Tribe's Restoration Act, which created the reservation, pre-dates IGRA, an after-acquired land analysis is not necessary.[10]

Conclusion

In conclusion, because the Tribe possesses sufficient legal jurisdiction over its Restoration Act lands, IGRA applies. Further, because the lands qualify as *Indian lands* under IGRA, the lands are eligible for gaming under IGRA.

Thank you for bringing the amended gaming ordinance to our attention. The ordinance is approved, as it is consistent with the requirements of IGRA and NIGC regulations.

If you have any questions, please contact staff attorney Heather Corson at (202) 632-7003.

Sincerely,

/s/ Jonodev O. Chaudhuri
Jonodev O. Chaudhuri
Chairman

Enclosure

[10] See generally 25 U.S.C. § 2719.

cc: Fred Petti
Petti and Briones (via email, only:
fpetti@pettibriones.com)

25 U.S.C.A. § 2701

§ 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C.A. § 2702

§ 2702. Declaration of policy

The purpose of this chapter is—

(1) 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;

(2) 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 gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C.A. § 2703

§ 2703. Definitions

For purposes of this chapter—

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on

October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts

paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

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25 U.S.C.A. § 2704

§ 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership

on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate

member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of Title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of Title 5.

(3) All members of the Commission shall be reimbursed in accordance with Title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

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25 U.S.C.A. § 2705

§ 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

> **(1)** issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;
>
> **(2)** levy and collect civil fines as provided in section 2713(a) of this title;
>
> **(3)** approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

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25 U.S.C.A. § 2706

§ 2706. Powers of Commission

Effective: May 12, 2006

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent

a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the

enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Omitted

(d) Application of Government Performance and Results Act

(1) In general

In carrying out any action under this chapter, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285).

(2) Plans

In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

25 U.S.C.A. § 2707

§ 2707. Commission staffing

(a) General Counsel

The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of Title 5.

(b) Staff

The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of Title 5 governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) Temporary services

The Chairman may procure temporary and intermittent services under section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Federal agency personnel

Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the

personnel of such agency to the Commission to assist the Commission in carrying out its duties under this chapter, unless otherwise prohibited by law.

(e) Administrative support services

The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

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25 U.S.C.A. § 2708

§ 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this chapter. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

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25 U.S.C.A. § 2709

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff

and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

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25 U.S.C.A. § 2710

§ 2710. Tribal gaming ordinances

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

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

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

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

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

> **(A)** such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> **(B)** the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

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

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

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

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

(i) to fund tribal government operations or programs;

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

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

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

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

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000

annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

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

(F) there is an adequate system which—

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

(ii) includes—

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

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

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

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

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

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

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

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

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the

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

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

> **(I)** such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,
>
> **(II)** income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,
>
> **(III)** not less than 60 percent of the net revenues is income to the Indian tribe, and
>
> **(IV)** the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

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

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

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

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

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

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

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

(B) has otherwise complied with the provisions of this section[1]

may petition the Commission for a certificate of self-regulation.

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

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

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

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

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

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

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

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

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

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

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

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

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

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

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

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

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

(A) authorized by an ordinance or resolution that—

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

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

(iii) is approved by the Chairman,

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

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

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

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

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

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

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

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

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

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

(iii) Notwithstanding any other provision of this subsection—

> **(I)** any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation

ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

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

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

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

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

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

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

(v) remedies for breach of contract;

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

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

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

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its

Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

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

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

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

> **(i)** any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> **(ii)** any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> **(iii)** any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of

the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

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

> **(I)** a Tribal-State compact has not been entered into under paragraph (3), and
>
> **(II)** the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

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

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

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

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

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

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

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

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

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

prescribe, in consultation with the Indian tribe, procedures—

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

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

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

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

(i) any provision of this chapter,

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

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

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

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

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

(e) Approval of ordinances

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

25 U.S.C.A. § 2711

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

> **(A)** the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;
>
> **(B)** a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and
>
> **(C)** a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that

exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The

Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the

conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

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25 U.S.C.A. § 2712

§ 2712. Review of existing ordinances and contracts

(a) Notification to submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or modification of management contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a), and the

management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

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25 U.S.C.A. § 2713

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances,

or resolutions approved under section[s] 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this

chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of Title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

25 U.S.C.A. § 2714

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

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25 U.S.C.A. § 2715

§ 2715. Subpoena and deposition authority

(a) Attendance, testimony, production of papers, etc.

By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Geographical location

The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Refusal of subpoena; court order; contempt

Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Depositions; notice

A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Oath or affirmation required

Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witness fees

Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

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25 U.S.C.A. § 2716

§ 2716. Investigative powers

(a) Confidential information

Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of Title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes,

ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) Attorney General

The Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of Federal law.

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25 U.S.C.A. § 2717

§ 2717. Commission funding

Effective: May 12, 2006

(a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each gaming operation that conducts a class II or class III gaming activity that is regulated by this chapter.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

> **(i)** no more than 2.5 percent of the first $1,500,000, and
>
> **(ii)** no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this chapter.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed 0.080 percent of the gross

gaming revenues of all gaming operations subject to regulation under this chapter.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this chapter for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718

of this title, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

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25 U.S.C.A. § 2717a

§ 2717a. Availability of class II gaming activity fees to carry out duties of Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 2717 of this title shall be available to carry out the duties of the Commission, to remain available until expended.

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25 U.S.C.A. § 2718

§ 2718. Authorization of appropriations

Effective: November 26, 1997

(a) Subject to section 2717 of this title, there are authorized to be appropriated, for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title.

(b) Notwithstanding section 2717 of this title, there are authorized to be appropriated to fund the operation of the Commission, $2,000,000 for fiscal year 1998, and $2,000,000 for each fiscal year thereafter. The amounts authorized to be appropriated in the preceding sentence shall be in addition to the amounts authorized to be appropriated under subsection (a).

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25 U.S.C.A. § 2719

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5108 and 5110 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

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25 U.S.C.A. § 2720

§ 2720. Dissemination of information

Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.

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25 U.S.C.A. § 2721

§ 2721. Severability

In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect.