EXHIBIT C

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

SEP 10 2015

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.

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 In addition, we conclude that the IGRA impliedly repealed Section 107 of the Restoration Act, which concerns gaming.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.

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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).

[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").

Attachment A

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 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] 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

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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.

[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)).

the Secretary for the benefit of the 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 great uncertainty surrounding Indian gaming.[23] The Act was amended multiple times to address gaming.[24]

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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).

[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 on 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 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.

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 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.

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]

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[25] Tex. Const. art. 3, § 47(b)-(c) (as amended 1980). The Texas Constitution provided that "[t]e 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).

[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)).

[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)).

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

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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).

[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.")

[37] 25 U.S.C. § 2702(1).

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 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 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]

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[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.

[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).

[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*.

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] 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 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 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]

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[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.

[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.*

[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.

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 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 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 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,

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[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.

[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.

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

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

[69] *Id.* at *15.

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

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

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] 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 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]

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

[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).

[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.

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

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

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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).

[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.

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

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.

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] 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

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[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)).

[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 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).

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 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 103[d] 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 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 IGRA requires that a tribe possess legal

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[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 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.

[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

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 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 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

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governmental power . . . [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

[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)).

[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.

land—making it eligible for Indian gaming—the tribe has the exclusive right to regulate gaming on that land, and a state can extent 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 (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 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*

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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.*

[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)).

[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).

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 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, 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

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[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.

[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.").

[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).

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 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]

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) does not use the words "exclusive" or

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

"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 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 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]

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[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)).

[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)).

[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.

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* 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 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]

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[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.

[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.

[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).

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.

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.

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 existed at that time, before the IGRA was enacted.[154] Consequently, an interpretation of the two

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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)).

[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.

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

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] 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 dispositive 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 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

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[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).

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

[160] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (quoting *Mattz 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)).

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,

Venus McGhee Prince
Deputy Solicitor for Indian Affairs