IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-50400

STATE OF TEXAS,

Plaintiff-Appellee,

v.

YSLETA DEL SUR PUEBLO; THE TRIBAL COUNCIL; TRIBAL GOVERNOR MICHAEL SILVAS OR HIS SUCCESSOR,

Defendants-Appellants.

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

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(Filed Apr. 2, 2020)

Before DENNIS, GRAVES, and WILLETT, Circuit Judges.

DON R. WILLETT, Circuit Judge.

For a generation, the State of Texas and a federally recognized Indian tribe, the Ysleta del Sur Pueblo, have litigated the Pueblo's attempts to conduct various gaming activities on its reservation near El Paso. This latest case poses familiar questions that yield familiar answers: (1) which federal law governs the legality of the Pueblo's gaming operations—the Restoration Act

(which bars gaming that violates Texas law) or the more permissive Indian Gaming Regulatory Act (which "establish[es] . . . Federal standards for gaming on Indian lands"); and (2) whether the district court correctly enjoined the Pueblo's gaming operations. Our on-point precedent conclusively resolves this case. The Restoration Act controls, the Pueblo's gaming is prohibited, and we affirm.

I. BACKGROUND

A. The Restoration Act

In 1987, Congress passed and President Reagan signed the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act.[1] But the Pueblo's "restoration" came with a catch: In exchange for having its federal trust status restored,[2] the

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[1] Pub. L. 100-89; 25 U.S.C. § 1300g *et seq*. The updated United States Code omits the Restoration Act, but as we noted last year, "the Restoration Act is still in effect." *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 442 n.1 (5th Cir. 2019). The Act is available at https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg666.pdf.

[2] Pub. L. 100-89, 101 Stat 666 (1987); 25 U.S.C. § 1300g *et seq*. In 1968, Congress recognized the Pueblo as a tribe and transferred trust responsibilities to Texas. S. Rep. No. 100-90 (1987), at 7. In 1983, however, the Texas Attorney General decided that the State could not continue a trust relationship with any Indian tribe because such an agreement discriminates between tribal members and other Texans based on national origin in violation of the State Constitution. Jim Mattox, *Opinion Re: Enforcement of the Texas Parks and Wildlife Code within the Confines of the Alabama-Coushatta Indian Reservation*, No. JM-17 (Mar. 22,

Pueblo agreed that its gaming activities would comply with Texas law.

Section 107(a) of the Restoration Act is unequivocal:

> 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[.][3]

The Tribal Resolution is similarly clear. The Pueblo requested that Congress add language to § 107 "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." And it committed "to prohibit outright any gambling or bingo in any form on its reservation." Finally, § 107(c) gives Texas a mechanism to enforce the gaming ban: "bringing an action in the courts of the United States to enjoin violations of the provisions of this section."[4]

1983). So the Pueblo and another Texas tribe sought a federal trust relationship instead. *See* S. Rep. No. 100-90 (1987), at 7.

[3] Pub. L. 100-89, § 107(a); 25 U.S.C. § 1300g-6(a).

[4] Pub. L. 100-89, § 107(c); § 1300g-6(c).

B. The Indian Gaming Regulatory Act

Not all tribes fall under the Restoration Act. Many tribes conduct gaming operations under the less restrictive structure of the Indian Gaming Regulatory Act. Enacted one year after the Restoration Act, IGRA aimed to establish uniform standards "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."[5]

IGRA defines three classes of gaming, with varying levels of regulation:

- "Class I gaming" includes "social games solely for prizes of minimal value or traditional forms of Indian gaming" associated with "tribal ceremonies or celebrations."[6] IGRA tribes have "exclusive jurisdiction" over class I gaming.[7]
- "Class II gaming" includes bingo and card games "explicitly authorized" or "not explicitly prohibited" by state law.[8] But the definition excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[9]

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[5] 25 U.S.C. § 2701(5).

[6] *Id.* §§ 2703(6), 2710(a)(1).

[7] *Id.* § 2710(a)(1).

[8] *Id.* § 2703(7)(A).

[9] *Id.* §§ 2703(7)(A), (B).

IGRA tribes may regulate class II gaming provided that they issue a self-regulatory ordinance approved by the National Indian Gaming Commission, which administers IGRA.[10]

- "Class III gaming" includes all forms of gaming not included in class I or II, such as slot machines, roulette, and blackjack.[11] Class III gaming is prohibited unless the tribe obtains federal and state approval.[12]

C. The Pueblo's Gaming Activities & Prior Litigation

Since obtaining federal status under the Restoration Act, the Pueblo has repeatedly pursued gaming, and the State of Texas has repeatedly opposed it:

- ***Ysleta I***: In 1993, the Pueblo sued Texas, arguing that the State refused to negotiate a compact in good faith under IGRA that would permit Class III gaming.[13] We disagreed, explaining that "the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact."[14] We concluded

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[10] *Id.* § 2710(b).

[11] *Id.* § 2703(8).

[12] *Id.* § 2710(d).

[13] *Ysleta del Sur Pueblo v. Texas ("Ysleta I")*, 36 F.3d 1325, 1325 (5th Cir. 1994).

[14] *Id.* at 1335.

"not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the [] Pueblo are allowed under Texas law, which functions as surrogate federal law" on the lands of Restoration Act tribes.[15]

- ***Ysleta II***: In 1999, Texas sued the Pueblo to enjoin gaming on the reservation.[16] The district court granted summary judgment for the State.[17] It concluded that the Pueblo's gaming did not comply with Texas laws and regulations and forbade the Pueblo from engaging in "'regulated' gaming activities unless it complies with the pertinent regulations."[18] After considering equitable factors, the district court permanently enjoined the Pueblo from continuing its gaming activities.[19] We upheld the injunction.[20]

- **Other Litigation**: Further litigation ensued over the next two decades, including

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[15] *Id.*

[16] *Texas v. del Sur Pueblo* (*"Ysleta II"*), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001), *modified* (May 17, 2002), *aff'd sub nom. State v. del sur Pueblo*, 31 F. App'x 835 (5th Cir. 2002), *cert. denied*, 537 U.S. 815 (2002).

[17] *Id.* at 687.

[18] *Id.* at 690, 695–96.

[19] *Id.* at 695-97.

[20] *Ysleta*, 31 F. App'x at 835.

two determinations that the Pueblo was in contempt of the injunction.[21]

D. The Current Lawsuit

After a court enjoined the Pueblo's illegal "sweepstakes" gaming,[22] the Pueblo announced that it was "transitioning to bingo."[23] The State inspected the Pueblo's Speaking Rock Entertainment Center and found live-called bingo and thousands of machines that "look and sound like Las-Vegas-style slot machines" available to the public round the clock.

Texas sued to enjoin the Pueblo from operating these gaming activities, arguing that they violate Texas laws and regulations. The district court agreed and granted the State's motion for summary judgment. The Pueblo moved for reconsideration. Two weeks later, we reaffirmed in *Alabama-Coushatta* "that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations" on lands of tribes bound by the Restoration Act.[24]

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[21] *See generally Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x 326 (5th Cir. 2011); *Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *22–26 (W.D. Tex. May 27, 2016); *Texas v. Ysleta del sur Pueblo*, No. EP-99-CV-320-KC, 2015 WL 1003879, at *15–20 (W.D. Tex. Mar. 6, 2015).

[22] *See Ysleta del Sur Pueblo*, 2016 WL 3039991, at *26–27.

[23] *See* Marty Schladen, *Tiguas Ending Sweepstakes, Starting Bingo*, EL PASO TIMES (July 23, 2016), available at https://www.elpasotimes.com/story/news/local/el-paso/2016/07/23/tiguas-ending-sweepstakes-starting-bingo/87458650/.

[24] 918 F.3d at 449.

We also noted that "[t]hough *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."[25]

Soon after *Alabama-Coushatta*, the district court denied the Pueblo's motion for reconsideration and permanently enjoined the Pueblo's operations. But the district court granted the Pueblo's motion to stay the injunction pending appeal, declaring the permanent injunction "effective ninety (90) days after all opportunities for appeal have been exhausted."

II. Standard of Review

We review a trial court's grant of a permanent injunction for abuse of discretion.[26] A district court abuses its discretion if it (1) "relies on clearly erroneous factual findings" or "erroneous conclusions of law" when deciding to grant the injunction, or (2) "misapplies the factual or legal conclusions when fashioning its injunctive relief."[27] "Under this standard, the district court's ruling is entitled to deference."[28] "[B]ut we

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[25] *Id.* at 444 n.5.

[26] *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995).

[27] *Id.*

[28] *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (internal quotation marks omitted).

review *de novo* any questions of law underlying the district court's decision."[29]

III. DISCUSSION

As in previous cases, the Pueblo avers that IGRA, not the Restoration Act, governs its ability to conduct gaming on its reservation. As in previous cases, we disagree.

A. The Restoration Act governs the Pueblo's gaming activity.

Texas insists that the Restoration Act—not IGRA—controls. The Pueblo argues that the two laws can be read and applied harmoniously, but if not, IGRA controls. The district court determined that under our precedent the Restoration Act and IGRA are incompatible and that the specific provisions of the former prevail over the general provisions of the latter. The district court is correct.

Ysleta I—a case between the same two parties—is squarely on point. In *Ysleta I*, we determined that "(1) the Restoration Act and IGRA establish different regulatory regimes with regard to gaming,"[30] and

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[29] *Id.* (internal quotation marks omitted).

[30] We "f[ou]nd it significant that § 107(c) of the Restoration Act establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA." *Ysleta I*, 36 F.3d at 1334. Specifically, under Restoration Act § 107(c), Texas may sue in federal court to enjoin the Tribe's violation of § 107(a). 25 U.S.C. § 1300g–6(c).

"(2) the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue."[31] In other words, the Restoration Act "govern[s] the determination of whether gaming activities proposed by the [] Pueblo are allowed under Texas law, which functions as surrogate federal law."[32]

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[31] *Ysleta I*, 36 F.3d at 1332. As the Supreme Court has emphasized, "where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)) (brackets omitted). Here, Congress did not show a "clear intention" in IGRA (a general statute that applies to tribes nationwide) to repeal the Restoration Act (a specific statute that only applies to two Texas tribes). Nor did Congress include a blanket repealer clause as to other laws that conflict with IGRA. Rather, when enacting IGRA soon after the Restoration Act, Congress explicitly stated in two different provisions that IGRA should be considered in the context of other federal law. *See* 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) (explaining that tribes may engage in class II gaming if, among other things, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law"). Plus, as the *Ysleta I* court noted, "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." *Ysleta I*, 36 F.3d at 1335.

[32] *Id.* And, as we noted in *Ysleta I*, "[i]f the [Pueblo] wishes to vitiate [the gaming provisions] of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA." *Id.*

Just last year—twenty-five years after *Ysleta I*—we reaffirmed its reasoning and conclusion in *Alabama-Coushatta.*[33] And we re-reaffirm today[34]: The Restoration Act and IGRA erect fundamentally different regimes, and the Restoration Act—plus the Texas gaming laws and regulations it federalizes—provides the framework for determining the legality of gaming activities on the Pueblo's lands.

B. Under the Restoration Act, all of Texas's gaming restrictions operate as federal law on the Pueblo's reservations.

We held in *Ysleta I* and reaffirmed in *Alabama-Coushatta* that Texas gaming law "functions as surrogate federal law" on the land of Restoration Act tribes.[35] Indeed, the Pueblo agreed to the Restoration Act's gaming provisions as a condition necessary to

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[33] *Alabama-Coushatta*, 918 F.3d at 442.

[34] We follow a consistently applied rule of orderliness. Under this "well-settled Fifth Circuit rule," a panel "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." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). "For a Supreme Court decision to satisfy [the] rule of orderliness, it must be unequivocal, not a mere 'hint' of how the Court might rule in the future." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (quoting *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013)). And it "must be more than merely illuminating with respect to the case before" us. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 331 (5th Cir. 2013).

[35] *Ysleta I*, 36 F.3d at 1334–35; *Alabama-Coushatta*, 918 F.3d at 442.

gain the benefits of federal trust status. In this case, the Pueblo argues that § 107(a) of the Restoration Act does not bar its bingo activities because Texas *regulates* rather than *prohibits* bingo. The Pueblo contends that (1) "prohibit" has a special meaning in federal Indian law as used by the Supreme Court in *Cabazon Band*,[36] and (2) courts should apply the *Cabazon Band* criminal-prohibitory/civil-regulatory distinction as the Supreme Court did when applying IGRA.

This issue was also decided in *Ysleta I*. We 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."[37] And again, the Pueblo's tribal resolution urged Congress to pass "language 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

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[36] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[37] 36 F.3d at 1334 (emphasis added). To reach this conclusion, we considered the text and legislative history of the Restoration Act. *Id.* at 1333–34. The *Ysleta I* court emphasized the Pueblo's commitment to prohibit all gambling on their reservation, as memorialized in Tribal Resolution No. T.C.-02-86, which the Restoration Act incorporates in § 107(a). *Id.* Plus, the *Ysleta I* court noted that, as an enforcement mechanism, "Congress provided in § 107(a) that '[a]ny 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.' 25 U.S.C. § 1300g-6(a) (emphasis added). Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty?" *Id.*

land."[38] Under our rule of orderliness,[39] the Pueblo's arguments are foreclosed by decades-old precedent.[40] Like the district court, we conclude that, under *Ysleta I*, "the [Pueblo] is subject to Texas's regulations," which function as surrogate federal law.

C. The district court did not abuse its discretion by granting Texas injunctive relief against the Pueblo's gaming.

The Pueblo challenges a specific part of the district court's permanent injunction analysis: the balancing of equities. Specifically, the Pueblo asserts that the district court erred because the balance of equities did not favor a permanent injunction given the significant economic impact of their gaming operations.

Here, too, we side with the district court: "[A]lthough the Tribe has an interest in self-governance, the Tribe cannot satisfy that interest by engaging in illegal activity." Allowing ongoing operations would countenance ongoing violations. Yes, the Pueblo benefits

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[38] Tribal Resolution No. T.C.-02-86 (emphasis added).

[39] *See supra* note 34. The Pueblo has argued that the findings in *Ysleta I* are merely persuasive dicta, but the district court already rejected that argument in *Ysleta II*, which we summarily affirmed. *Ysleta II*, 220 F. Supp. 2d at 687. Even assuming it was dicta, "[w]e are free to disregard dicta from prior panel opinions when we find it unpersuasive." *Crose v. Humana Ins. Co.*, 823 F.3d 344, 349 n.1 (5th Cir. 2016) (internal quotation marks and citation omitted). Here, we do not.

[40] *Alabama-Coushatta*, 918 F.3d at 449 n.21 (quoting *Ysleta I*, 36 F.3d at 1333–34) (recognizing the rule of orderliness and reaffirming *Ysleta I*'s conclusion).

economically from gaming, but even if this is deemed a public interest rather than a private one, it is only achievable via unlawful gaming.[41] As the district court noted, Texas "and its citizens have an interest in enforcing State law, and seeking an injunction is the only way that the State may enforce its gaming law on the Pueblo reservation."[42] The balance of hardships tips unquestionably in the State's favor.

The district court in *Ysleta II* also weighed equitable factors and determined that "[t]he fruits of [the Pueblo's] unlawful enterprise are tainted by the illegal means by which those benefits have been obtained."[43] We summarily affirmed.[44] Here, too, "because the Tribe's operations run contrary to Texas's gaming law, the balance of equities weighs in favor of the State."[45] The district court did not abuse its discretion.

D. The Texas Attorney General had authority to bring this suit.

Finally, the Pueblo argues that Texas—through its Attorney General—lacked authority to seek relief under the Restoration Act. In prior litigation, the Pueblo has conceded Texas's authority to sue under the

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[41] *See Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015).

[42] *See* Restoration Act § 107(c).

[43] *Ysleta II*, 220 F. Supp. 2d at 697.

[44] *Ysleta*, 31 F. App'x at 835.

[45] *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2019 WL 639971, at *14 (W.D. Tex. Feb. 14, 2019).

Restoration Act.[46] But in this case, the Pueblo cites a 1999 district court order from a previous Restoration Act suit brought by Texas.[47] There, the district court initially questioned the Attorney General's authority to bring suit, but ultimately concluded, after Texas amended its complaint to include a state nuisance claim, that the Attorney General had the authority under both Texas and federal law to enjoin violations of the Restoration Act.[48]

The Pueblo seems to suggest that the Restoration Act alone doesn't provide the requisite authority to sue, yet it acknowledges that courts have held that Texas nuisance law provides an affirmative basis for the Attorney General to sue on the State's behalf. Notably, Texas invoked its nuisance laws when pursuing this case. So even assuming the 1999 district court

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[46] Brief of Appellants at 22, *Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x 326 (5th Cir. 2011) (No. 10-50804), 2010 WL 5625027 (contending that Congress limited Texas's remedies to "the right to bring an action in federal court to enjoin alleged violations of the 'gaming activities' section of the Restoration Act"); Brief of Appellants at 19, *Ysleta del Sur Pueblo v. Bush*, 192 F.3d 126 (5th Cir. 1999) (No. 98-50859), 1999 WL 33658598 (acknowledging that "[t]he State of Texas may bring an action in the courts of the United States to enjoin gaming activities of the Pueblo under the Restoration Act").

[47] *See Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 714 (W.D. Tex. 1999), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000)).

[48] *Ysleta II*, 220 F. Supp. 2d at 676 ("After the Attorney General filed an Amended Complaint, the district court, by its order of January 13, 2002, overruled another motion to dismiss, concluding that the Attorney General had the authority to bring this action.").

order stands for the claimed proposition, it matters not here.

Next, the Pueblo argues that Texas nuisance law—as amended in 2017—no longer provides an affirmative basis for Texas's suit. The amendments explain that "[t]his section does not apply to an activity exempted, authorized, or otherwise lawful activity regulated by federal law."[49] Even assuming this provision reaches gaming activities, the Pueblo's activity is not "exempted, authorized, or otherwise lawful activity regulated by federal law."[50] First, the Pueblo's gaming operation is not "exempted" from federal law; rather, it's explicitly subject to injunctive action in federal court if it's impermissible under Texas law.[51] Second, the Pueblo's gaming is not "authorized" by federal law; indeed, the Restoration Act explicitly prohibits the Pueblo's gaming activities: "All gaming activities which are prohibited by the laws of the state of Texas are hereby prohibited on the reservation and lands of the tribe."[52] Third, the Pueblo's gaming is not "regulated" by federal law, nor is it "otherwise lawful." As discussed, Texas gaming law—federalized through the

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[49] TEX. CIV. PRAC. & REM. CODE § 125.0015(e). According to the statute, this provision was added to *expand* the law to include web-based operations connected to specific forms of criminal activity, like prostitution. *See id.* § 125.0015(c). There is no indication that this provision relates to whether gambling is a common nuisance.

[50] *Id.* § 125.0015(e).

[51] 25 U.S.C. §§ 1300g-6(a), (c).

[52] *Id.* § 1300g-6(a).

Restoration Act—prohibits the Pueblo's activities.[53] Any argument that the Pueblo's illegal gaming is "exempted" yet also "authorized" by law is absurd. Multiple Federal courts have repeatedly recognized that Texas—through its Attorney General—possesses the capacity to sue under the Restoration Act.[54]

IV. CONCLUSION

Our settled precedent resolves this dispute: The Restoration Act governs the legality of the Pueblo's gaming activities and prohibits any gaming that violates Texas law. The district court correctly applied that straightforward precedent, and we AFFIRM the district court's judgment.

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[53] *Id.*

[54] *See*, *e.g.*, *Ysleta del Sur Pueblo*, 79 F. Supp. 2d at 710 ("[T]he Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations [of the Restoration Act]."); *Alabama-Coushatta Tribes of Tex. v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) ("The injunction sought by the State of Texas is authorized by both state and federal statutes."); *see also Ysleta del Sur Pueblo*, 2016 WL 3039991, at *27 (upholding the injunction sought by Texas against the Pueblo pursuant to the Restoration Act).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, **Plaintiff,** **v.** **YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,** **Defendants.**	§	
_____	§	**EP-17-CV-179-PRM**
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR, **Counter-Plaintiffs,** **v.** **KEN PAXTON, in his official capacity as Texas Attorney General,** **Counter-Defendant.**	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 14, 2019)

On this day, the Court considered Plaintiff State of Texas's "Motion for Summary Judgment and Permanent Injunction" (ECF No. 146) [hereinafter "Motion"], filed on November 14, 2018; Defendants Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Michael Silvas or his Successor's [hereinafter "Pueblo" or "the Tribe"] "Response to Texas' Motion for Summary Judgment and Permanent Injunction" (ECF No. 154) [hereinafter "Response"], filed on December 5, 2018; and Plaintiff State of Texas's "Reply in Support of Texas's Motion for Summary Judgment and Permanent Injunction" (ECF No. 157) [hereinafter "Reply"], filed on December 14, 2018. After due consideration, the Court is of the opinion that the Motion should be granted, for the reasons that follow.

I. BACKGROUND

A. History of the Restoration Act

In 1968, the United States Congress simultaneously recognized the Pueblo as a tribe and transferred any trust responsibilities regarding the Tribe to the State of Texas. S. Rep. No. 100-90 (1987), at 7. After the trust relationship was created, Texas held a 100-acre reservation in trust for the Tribe. *Id.* However, in 1983, Texas Attorney General Jim Mattox issued an opinion in which he concluded that the State may not maintain a trust relationship with an Indian Tribe. Jim Mattox, *Opinion Re: Enforcement of the Texas Parks and*

Wildlife Code within the Confines of the Alabama-Coushatta Indian Reservation, No. JM-17 (March 22, 1983). Mattox opined that a trust agreement with Indian tribes discriminates between members of a tribe and other Texas citizens on the basis of national origin in violation of the Texas Constitution. *Id.* Therefore, Mattox determined that no proper public purpose existed for the trust. *Id.* Accordingly, the Pueblo, alongside the Alabama-Coushatta Tribe in East Texas, sought to establish a federal trust relationship with the United States government. *See* S. Rep. No. 100-90 (1987), at 7.

In 1985, the House of Representatives, seeking to establish a federal trust relationship with the Tribe, passed House Resolution 1344 ("H.R. 1344"). Section 107 provided that:

> Gaming, lottery or bingo on the tribe's reservation and tribal lands shall only be conducted pursuant to a tribal ordinance or law approved by the Secretary of the Interior. Until amended as provided below, the tribal gaming laws, regulations, and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo.

131 Cong. Rec. H12012 (daily ed. Dec 16, 1985) (H.R. 1344 as passed by the House). However, several Texas officials remained concerned that the bill would allow high-stakes gaming on the Tribe's reservation. Thus, in

1986, the Tribe enacted Tribal Resolution No. TC-02-86[1] which, in relevant part, provided:

> WHEREAS, the Ysleta del Sur Pueblo has no interest in conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law; and,
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> . . .
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> WHEREAS, the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation; and,
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> . . .
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> WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient;
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> NOW, THEREFORE, BE IT RESOLVED, that the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§ 107] by striking all of that section as passed by the House

[1] A Tribal Resolution appears to be a way for a Tribe to communicate official opinions on political or public matters.

> of Representatives and substituting in its place language 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.

Thereafter, H.R. 1344 was introduced in the Senate, and the Senate modified § 107 to provide that "[g]aming, gambling, lottery or bingo, as defined by the laws and administrative regulations of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands." 132 Cong. Rec. S13634 (daily ed. Sept. 25, 1986) (H.R. 1433 as passed by the Senate). Thereafter, the bill died. *See* 132 Cong. Rec. S13735 (daily ed. Sept. 25, 1986).

A new bill was introduced, and in 1987, Congress enacted the Restoration Act to restore a federal trust relationship and federal assistance to the Tribe.[2] *See generally* Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987). In relevant part, § 107(a) of the Restoration Act 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 lands of the tribe." Subsection (a) also incorporates the aforementioned Tribal Resolution by reference, adding that the statute's gaming provisions are drafted "in accordance with the tribe's request in

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[2] For a more detailed account of the Restoration Act's legislative history, see *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994).

Tribal Resolution No. T.C.-02-86." Subsection (b) provides that "[n] othing in [§ 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Finally, subsection (c) describes the Act's enforcement mechanisms and gives the "United States . . . exclusive jurisdiction over any offense in violation of subsection (a)." Further, it provides that "nothing in [§ 107] 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."

B. Prior Litigation Regarding Gaming on the Pueblo Reservation

1. *Ysleta I*

In 1993, the Tribe sued the State and argued that, pursuant to the Indian Gaming Regulatory Act ("IGRA")[3], the State had failed to negotiate in good faith to form a Tribal-State compact concerning gaming on the Pueblo reservation. *Ysleta Del Sur Pueblo v. State of Tex.*, 852 F. Supp. 587, 590 (W.D. Tex. 1993), *rev'd*, 36 F.3d 1325 (5th Cir. 1994). The district court applied IGRA and concluded that the State was

[3] IGRA is a statute that governs gaming on myriad Indian reservations throughout the country. 25 U.S.C. §§ 2701, et seq. IGRA divides gaming into "class I," "class II," and "class III" gaming activities; whether a specific type of gaming is allowed on a reservation and how the gaming is regulated depends on which class of gaming activity is applicable. *See id.* §§ 2703, 2710. Additionally, IGRA requires that states negotiate in good faith if a tribe that wishes to engage in class III gaming requests such negotiations. *Id.* § 2710(d)(3)(a).

required to negotiate in good faith with the Tribe regarding casino-type gaming. *Id.* at 597. Further, the district court did not believe that the Restoration Act should have any effect on the relief that the Tribe requested. *Id.*

However, on appeal, the Fifth Circuit reversed the district court and determined that the Restoration Act—not IGRA—governs Pueblo gaming. *Id.* at 1332–33. *Ysleta del Sur Pueblo v. State of Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994). Specifically, the Fifth Circuit decided that "the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact." *Id.* at 1335. Moreover, the Fifth Circuit stated that, pursuant to the Restoration Act, "Texas's laws and regulations [] operate as surrogate federal law on the Tribe's reservation." *Id.* at 1334.

In reaching this conclusion, the Fifth Circuit rejected the Tribe's argument that the Restoration Act should be read to incorporate the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Id.* at 1334–34. In *Cabazon Band*, which was decided six months prior to the Restoration Act's enactment, the Supreme Court considered Pub. L. 280, which, among other things, granted California broad criminal jurisdiction over offenses committed by Indians but provided the State a more limited grant of civil jurisdiction over tribal reservations. 480 U.S. at 207 (citing Pub. L. 280, 67 Stat. 588 (1953), which is codified as 18 U.S.C. § 1162). To determine whether conduct falls within a state's jurisdiction

pursuant to Pub. L. 280, the Supreme Court recognized a distinction between "criminal/prohibitory" laws and "civil/regulatory" laws:

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Id. at 209. Consequently, if the Restoration Act incorporated *Cabazon Band*'s criminal-prohibitory/civil-regulatory dichotomy, then courts would consider whether Texas law permits the conduct at issue, subject to regulation, or prohibits the conduct outright. However, the Fifth Circuit determined that—even though some discussion regarding *Cabazon Band* occurred on the House floor—Congress as a whole did not intend to incorporate the criminalprohibitory/civil-regulatory dichotomy into Restoration Act. *Ysleta I*, 36 F.3d at 1334–34. Instead, all gaming activities prohibited by Texas laws and regulations are prohibited by the Restoration Act. *Id.*

Ultimately, the Fifth Circuit determined that the Tribe's suit against the State was barred by Eleventh Amendment immunity. *Id.* at 1336–37. Therefore, the case was remanded with instructions that the district court dismiss the Tribe's suit. *Id.* at 1337.

2. *Ysleta II*

In 1999, the State sued the Tribe and sought to enjoin gaming activities on the Pueblo reservation.[4] On September 27, 2001, summary judgment was granted in the State's favor. *Texas v. del Sur Pueblo* ("*Ysleta II*"), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001) (internal citations omitted), *modified* (May 17, 2002), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), *and aff'd sub nom. State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), *and order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009). In his Memorandum Opinion, Judge Eisele determined that the Tribe cannot engage in "'regulated' gaming activities unless it complies with the pertinent regulations." *Id.* at 690. The court determined that the Tribe's activities did not comply with Texas's laws and regulations. *Id.* at 695–96. Moreover, the court considered equitable factors and concluded that "[t]he fruits of [the Tribe's] unlawful enterprise are tainted by the illegal means by which those benefits have been obtained." *Id.* at 697. Accordingly, the Tribe was permanently enjoined from continuing its operations. *Id.* The injunction mandated that the Tribe and those affiliated with it terminate, inter alia,

- "[A]ll card games; all dice games; all games using one or more balls and or a spinning wheel and games involving a vertical spinning wheel, which require players to pay a monetary fee;"

[4] Litigation proceeded under cause number EP-99-CV-320.

- "Gambling activities played with cards, dice, balls, Keno tickets, bingo cards, slot machines, or any other gambling device;"
- "Providing to any person for his/her use a slot machine;"
- "Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to: [ ] Bingo or any variation thereof. . . ."

Permanent Injunction, *Ysleta II*, No. EP-99-CV-320 (W.D. Tex. Sept. 27, 2001), ECF No. 115 at 3–5. The Fifth Circuit summarily affirmed Judge Eisele's opinion. *State v. del sur Pueblo*, 31 F. App'x 835 (5th Cir. 2002).

In May 2002, the injunction was modified to clarify that the Tribe may engage in legal gaming activities. Order Modifying September 27, 2001 Injunction, *Ysleta II*, No. EP-99-CV-320 (W.D. Tex. May 17, 2002), ECF No. 165. Judge Eisele stated that "[t]he Tribe is bound, through the terms of the Restoration Act, to adhere to Texas gaming law. Not all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations." *Id.* at 16.

Significantly, the order modifying the injunction discussed charitable bingo. *Id.* at 14–17. In seeking modifications to the injunction, the Tribe sought to conduct charitable bingo without a license. *Id*. The

Tribe averred that, because § 107(b) of the Restoration Act does not give Texas regulatory jurisdiction over the Tribe, the Tribe should be permitted to operate bingo that is regulated by the Tribe's own commission rather than by Texas's bingo commission. *Id.* at 15. However, Judge Eisele made clear that the Tribe must, like other citizens, follow Texas gaming law. *Id.* Notably, Judge Eisele determined that the Tribe is not entitled to conduct bingo without a license because "the Tribe is subject to Texas gaming law on all matters, including participation in charitable bingo activities." *Id.*

C. The Relevant Facts Regarding This Litigation

The facts in this case are undisputed.[5] The lawsuit centers around the Tribe's activities at Speaking Rock Entertainment Center [hereinafter "Speaking Rock"], which is the primary location for the Tribe's gaming activities.[6] The Tribe's gaming operations are a significant source of employment for the Pueblo people, and

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[5] The Tribe asserts that "mixed question[s] of law and fact" exist in this case because it believes the State has "conflat[ed] what is a law and what is a regulation." Resp. 9. However, the Tribe does not dispute the facts that the State has alleged regarding the gaming operations; instead, the Tribe challenges the conclusions that the State draws from the available facts.

[6] Although the majority of the Tribe's operations occur at Speaking Rock, the Tribe also operates a smaller number of machines at the Socorro Tobacco Outlet. *See* Mot. Ex. F (Hisa Dep. Tr.), at 11:16–12:12. Thus, although the Court will refer to the Tribe's operations as those at "Speaking Rock," the Court's discussion applies to the one-touch machines located at the Socorro Tobacco Outlet, as well.

the Tribe uses the money raised at its casino to fund several important governmental initiatives, including education, healthcare, and cultural preservation. Resp. 6. The Pueblo's operations are not conducted pursuant to any license from the Texas Lottery Commission. Mot. Ex. K at 6.

On May 17, 2017, agents and attorneys representing Texas inspected Speaking Rock. Mot. 3. There, the State video-recorded the gaming operations at Speaking Rock and found that the Tribe operates stationary one-touch machines as well as live-called bingo. *See generally* Mot. Ex. A. The one-touch machines and live-called bingo are described below.

1. One-Touch Machines

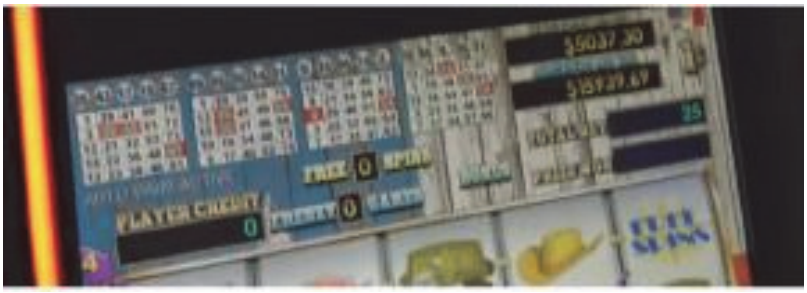
The Pueblo operate more than 2,500 one-touch machines. Mot. Ex. F (Hisa Dep. Tr.), at 11:16–12:12. The one-touch machines, which are available for play twenty-four hours a day, seven days a week ("24/7"), are lined in rows:

Mot. Ex. A. The machines have decorative outer wrapping and are labeled with different names—e.g., "Big Texas Payday," "Welcome to Fabulous Las Vegas," "Kitty City," and "Lucky Duck." *Id*. The machines display lights, sounds, and graphics for the purposes of entertainment. Mot. Ex. C (Eclipse Dep. Tr.), at 38:11–17.

To initiate a session on a one-touch machine, a player inserts either cash or a ticket that represents a cash value into the machine. Mot. Ex. A. Although the machines look similar to a traditional "slot machine," the underlying game is run by using historical bingo draws. Resp. Ex. A (Eclipse Dep. Tr.), at 24:24–25. Players are assigned a bingo card based on an electronically maintained stack of cards. *Id.* at 32:24–33:2. On some machines (but not all), after the card is assigned, the player has the option to operate the touch screen and select a different card from the stack. *Id.* at 33:3–8; Mot. Ex. I (Am. Amusement Dep. Tr.), at 31:19–22.

The historical bingo cards are displayed in different locations on on the game screens, typically above

or below the screen's graphics. Mot. Ex. A. For example, the "Big Texas Payday" design displays bingo cards on the top left corner of the screen:



Id. After selecting a card, the player presses a button, which represents the value that the player is betting during that session. *Id.* Then, the graphics on the screen move and the machine emits noise before displaying whether the player won any cash value. *Id.*

To determine if a player wins, the software applies a preset, historical ball draw to the card on the screen. Resp. Ex. A (Eclipse Dep. Tr.), at 34:25–35:3. If the player's card would have achieved a bingo based on the ball draw retrieved by the machine's software, then the player wins his session of play. *See id.* The Tribe provides historical ball draw data to the company that designs the software for the Tribe's one-touch machines, and the data is based on prior, actual (nonelectronic) bingo ball pulls conducted at Speaking Rock. *Id.* at 35:10–16, 79:1–12. Because the machines are configured to run based on historical bingo ball draws, the Pueblo refer to the machines as "stationary cardminders." Resp. 8–9.

If a player wins, then the player may use the value won in order to continue playing on that particular machine, print out a ticket reflecting a cash value and insert it into a different machine for play, or bring the ticket to a casino employee where he is entitled to exchange the ticket for its cash value. Mot. Ex. A.

2. Live-Called Bingo

Additionally, the Pueblo operate 24/7 live-called bingo games in their "Sovereign Bingo Lounge." *Id.* To play, a player may purchase either paper or electronic bingo cards. *Id.* If a player uses a paper bingo card, then the player manually marks the cards to determine whether he has achieved a bingo. *Id.* However, the electronic, handheld cardminders have the capacity to track the player's cards for him and will notify the player if he wins. *Id.* Thus, with the aid of an electronic cardminder, a player at Speaking Rock is able to play dozens of cards at the same time on one machine. The parties' briefing does not specify the precise number of cards that can be played on one electronic cardminding machine. However, the Tribe admits that the number is more than sixty-six. Mot. Ex. K.

II. LEGAL STANDARD

A. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Rogers v. Bromac Title Servs., LLC*, 755 F.3d 347, 350 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

"Under Federal Rule of Civil Procedure 56(c), the party moving for summary judgment bears the initial burden of . . . 'identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Norman v. Apache Corp*., 19 F.3d 1017, 1023 (5th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Rule 56(c) mandates the entry of summary judgment . . . upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 323. Where this is the case, "there can be 'no genuine issue as to any material fact,' since complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* (quoting Rule 56(c)).

In adjudicating a motion for summary judgment, a court "consider[s] evidence in the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in favor of that party." *Bluebonnet Hotel Ventures, LLC v. Wells Fargo Bank, N.A*., 754 F.3d 272, 276 (5th Cir. 2014).

III. ANALYSIS

Texas seeks a permanent injunction halting the Tribe's operations at Speaking Rock. The Tribe avers that it is not subject to the State's regulations. Resp. 13–15. Further, according to the Tribe, its operations at Speaking Rock are permissible forms of bingo. *Id.* at 15–17. For the reasons discussed below, the Court concludes that the Tribe is subject to the State's regulations. The Court also determines that the Tribe's operations violate Texas law. Finally, the Court is of the opinion that the Tribe should be enjoined from continuing its gaming operations at Speaking Rock.

A. Whether the State may enforce Texas regulations against the Tribe in federal court

The Tribe's Response principally focuses on the interaction between subsections (a) and (b) of the Restoration Act. Section 107(a) provides:

> (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.

According to the Tribe, the State has "failed to distinguish between what a law and what a regulation is." Resp. 3. The Tribe asserts that subsection (a) should be understood to convey that "Congress has confirmed the Pueblo's sovereign right to engage in all *gaming activity* not *prohibited by* the *laws of the State of Texas*." *Id.* at 4. The Pueblo's formulation of this provision is not a precise recitation of the Restoration Act's text. Subsection (a) does not affirmatively grant a right to engage in gaming; instead it prohibits illegal gaming.

Additionally, § 107(b) provides that, "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." The Tribe contends that subsection (b) demonstrates that "Congress has also confirmed that Texas' regulatory scheme cannot be applied by the Court to the Ysleta del Sur Pueblo." *Id.* at 5. However, although subsection (b) provides that Texas does not have "regulatory jurisdiction," subsection (b) does not provide that Texas's regulations are thus unenforceable against the Tribe in federal court. Importantly, the Tribe's formulation of subsection (b) does not reflect the Fifth Circuit's interpretation of the statute. Pursuant to *Ysleta I*, the Tribe is subject to Texas's regulations, and Texas may properly enforce its regulations in federal court.

Admittedly, the Restoration Act does not clearly define what "regulatory jurisdiction" means. However, in light of *Ysleta I*, there is no need to relitigate whether the Tribe must follow Texas regulations. Though an interpretation of subsection (b) that

incorporated *Cabazon Band* would distinguish between laws that prohibit conduct and those that permit but merely regulate conduct, the Fifth Circuit rejected this view. The Court recognizes the Tribe's frustration that *Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming. *See* Resp 14–15. Nonetheless, the Court is bound by Fifth Circuit precedent and understands Fifth Circuit case law to require that the Tribe follow Texas gaming regulations.

The Fifth Circuit considered this issue in *Ysleta I* and determined 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." 36 F.3d at 1334 (emphasis added). In reaching its decision, the Fifth Circuit considered the legislative history and text of the Restoration Act. *Id*. The Fifth Circuit focused on the Tribe's commitment to prohibit all gambling on the Reservation, as memorialized in Tribal Resolution No. T.C.-02-86, which is incorporated by reference in § 107(a) of the Restoration Act. *Id.*

The Tribe asserts that the Fifth Circuit's decision that Texas's regulations operate as "surrogate federal law" should be disregarded because, according to the Tribe, the statement is dicta and was not fully considered when written. Resp. 14 n.16. The Tribe previously raised this argument in *Ysleta II* before Judge Eisele, and Judge Eisele rejected the Tribe's contention:

> The question before the court was: Which statutory scheme, IGRA or the Restoration Act, governed the Tribe's casino operation? And, to resolve that question, the Fifth Circuit had to first determine the effect of the Restoration Act's § 107. Only after determining § 107's effect could it then decide whether the Restoration Act and IGRA had an actual conflict. Once the court found conflict, it was forced to decide which statute to apply, and, in so doing, concluded that the Restoration Act, as the specific statute, was applicable. Only after it decided that the Restoration Act applied could the court decide whether the Act had waived the State's sovereign immunity. If the court had determined that IGRA applied, or that the Restoration Act and IGRA followed the same basic statutory scheme regarding gaming, the result of the case would have been different. So the initial determination regarding the breadth of the Restoration Act's provisions on gaming was a necessary step toward the Court's final decision. And that determination being necessary, it cannot be dicta.

Ysleta II, 220 F. Supp. 2d at 687. Thus, Judge Eisele's reasoning supports that, because the Fifth Circuit needed to consider the breadth of the Restoration Act to make its decision, its determination that the State's regulations function as surrogate federal law is not dicta.

Significantly, even if it were dicta, the Fifth Circuit's decision would be highly persuasive. The Fifth Circuit fully considered the Restoration Act's text and

legislative history when determining whether the Tribe is subject to Texas's regulations via the Restoration Act, and no contrary opinion since then has been published by the Fifth Circuit. Accordingly, the Court would afford the Fifth Circuit's thorough reasoning great weight. *See*, *e.g.*, *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight. . . .") (O'Connor, J., concurring); *O'Dell v. N. River Ins. Co.*, 614 F. Supp. 1556, 1559 (W.D. La. 1985) ("As always, dicta by one panel stands as persuasive authority only, although it is entitled to great weight absent a contrary holding in the circuit.").

In sum, the Fifth Circuit decided that the Tribe is subject to Texas's gaming laws and regulations, which function as surrogate federal law pursuant to the Restoration Act.[7] Thus, the Tribe's insistence that Texas

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[7] The Court recognizes that the Pueblo and Alabama-Coushatta Tribes disagree with the Fifth Circuit's decision. The Tribes have petitioned Congress to amend the law in order to provide either that the Tribes may conduct gaming as allowed by IGRA or that the *Cabazon Band* criminal-prohibitory/civil-regulatory dichotomy should be read into the Restoration Act's text. *See*, *e.g.*, *Oversight Hearing on the Implementation of the Restoration Act Before the S. Comm. on Indian Affairs*, 107th Cong. (2002). The Tribes believe that courts have misinterpreted the Restoration Act's intended meaning. *See id.* at 4 (statement of Kevin Battise, Tribal Council Chairman, Alabama-Coushatta Indian Tribe of Texas) (noting that the Member who discussed *Cabazon Band* in front of the House of Representatives prior to House approval of the Restoration Act was the chairman of the House Insular Affairs Committee and suggesting that the Fifth Circuit should have accorded his statement greater weight). The Court notes

should only be able to enforce its laws, but not its regulations, conflicts with precedent. Accordingly, the Court need not distinguish between laws and regulations, as the Court concludes that it must enforce both.

B. Whether the gaming activities at Speaking Rock are prohibited by Texas laws or regulations

Next, the Court considers whether the gaming activities at Speaking Rock are barred by Texas gaming laws. As Judge Eisele noted, "[n]ot all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations." Order Modifying September 27, 2001 Injunction, *Ysleta II*, No. EP-99-CV-320 (W.D. Tex. May 17, 2002), ECF No. 165 at 3–5. Accordingly, determining whether the Pueblo operations are legal under Texas state law, which is federalized by the Restoration Act, requires careful consideration of Texas's statutory and regulatory scheme.

1. Texas Gaming Law

Two sources of Texas law are principally relevant here: first, the Bingo Enabling Act and, second, Texas's Charitable Bingo Administrative Rules. Below, the

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that, although the Tribes have made Congress aware of their concerns, Congress has not yet amended the Restoration Act. Thus, absent an act of Congress, the Fifth Circuit's interpretation of the Restoration Act, as articulated in *Ysleta I*, controls the Court's decision.

Court describes the relevant provisions of each scheme. Then, the Court considers whether the Tribe's operations at Speaking Rock comply with Texas law.[8]

a) Bingo Enabling Act

Pursuant to the Bingo Enabling Act, bingo may be conducted by authorized charitable organizations. *See generally* TEX. OCC. CODE § 2001. "Bingo" is "a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols conforming to randomly selected numbers or symbols." *Id.* § 2001.002(4). In most circumstances, unlicensed bingo is a third-degree felony.[9] *Id.* § 2001.551.

Limitations exist on the duration and frequency of bingo occasions.[10] An organization may only conduct

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[8] The Tribe seeks declarations that "bingo is a gaming activity" and that "the laws of the State of Texas do not prohibit bingo." Pueblo Defs.' First Am. Counterclaim 23, Sept. 7, 2018, ECF No. 121. Bingo is a gaming activity. However, the Court cannot accurately assert that Texas laws "do not prohibit" bingo. Instead, charitable bingo is allowable in some circumstances; however, it is illegal when it fails to conform with Texas's complex statutory and regulatory scheme.

[9] However, it is not a felony to conduct: small bingo games in a person's home for nominal prizes, bingo in a senior citizens' center or hospital for entertainment, or bingo for radio or television promotions as long as the participants are not required to pay to play. *Id.* § 2001.551.

[10] "'Bingo occasion' means a single gathering or session at which a bingo game or a series of bingo games, including selling and redeeming pull-tab bingo tickets, are conducted on the day

three bingo occasions per week, and each occasion may not exceed four hours. *Id.* § 2001.419(a), (b). Typically, no more than two bingo occasions may be conducted per day. *Id.* § 2001.419(c).

Additionally, the Bingo Enabling Act provides a detailed scheme regarding the use of bingo equipment employed as an aid to bingo. "Bingo equipment" is defined as:

> (i) a machine or other device from which balls or other items are withdrawn to determine the letters and numbers or other symbols to be called; (ii) an electronic or mechanical card-minding device; (iii) a pull-tab dispenser; (iv) a bingo card; (v) a bingo ball; and (vi) any other device commonly used in the direct operation of a bingo game[.]

Id. § 2001.002(5)(A). Bingo equipment may be used; however, the equipment must be supplied by licensed manufacturers and distributers. *Id.* § 2001.407.

Moreover, the Act provides specific limitations regarding the use of cardminding devices:

> A person may not use a card-minding device: (1) to generate or determine the random letters, numbers, or other symbols used in playing the bingo card played with the device's assistance; (2) as a receptacle for the deposit of tokens or money in payment for playing the bingo card played with the device's assistance;

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and at the times listed on the license issued to a licensed authorized organization." *Id.* § 2001.002(6).

> or (3) as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for the bingo card played with the device's assistance.

Id. § 2001.409.

b) Charitable Bingo Administrative Rules

The Texas Administrative Code further defines the term "cardminding device" as:

> A device used by a player to monitor bingo cards played at a licensed authorized organization's bingo occasion and which: (i) provides a means for the player to input or monitor called bingo numbers; (ii) compares the numbers entered or received against the numbers on the bingo cards stored in the memory of the device or loaded or otherwise enabled for play on the device; and (iii) identifies any winning bingo pattern(s) and prize levels.

TEX. ADMIN. CODE § 402.321. Players may use electronic cardminders, but any electronic cardminder may only play up to sixty-six cards at a time. *Id.* § 402.322(r).

Additionally, before a manufacturer furnishes a cardminding system to a bingo licensee, the system must have "first been tested and certified as compliant with the standards in [§ 402.324 of the Administrative Code] by an independent testing facility or the Commission's own testing lab." *Id.* § 402.324.

2. The Tribe's Operations

Next, the Court considers whether the Tribe's one-touch machines and live-called bingo comply with Texas law and, correspondingly, the Restoration Act. Notably, the Tribe has not obtained a license to conduct bingo from the Texas Lottery Commission, as required by the Bingo Enabling Act.

First, the Court determines whether the Pueblo's one-touch machines comply with the Bingo Enabling Act and Texas Administrative Code's requirements for electronic cardminders. Admittedly, the Tribe's one-touch machines look and sound like LasVegas-style slot machines. However, Texas law does not focus on how bingo equipment looks and sounds to determine whether it is legal. Instead, the law defines what may or may not be considered a legal cardminding device. For the reasons discussed below, the one-touch machines—although cleverly designed to select winners based on historical bingo pulls—fail to comply with Texas's scheme.

Pursuant to the Bingo Enabling Act, a cardminding device may not be used "to generate or determine the random letters, numbers, or other symbols used in playing the bingo card played with the device's assistance." TEX. OCC. CODE § 2001.409(a)(1). Philip Sanderson, who previously worked for the State and participated in drafting the rules regarding cardminding devices, testified about the Tribe's machines. Resp. Ex. B (Sanderson Dep. Tr.), at 19:14–20:2. Based on his knowledge of the machines and understanding of the

regulations, Mr. Sanderson opined that "[n]either the server nor the individual cardminding device contain a random number generator." *Id.* at 28:17–39:3. Specifically, because the software is configured to select the next bingo card from an electronically maintained stack of cards, rather than randomly choosing a card, Sanderson believes that the machine does not generate nor determine any random outcome. *Id.* The Court finds Mr. Sanderson's testimony to be persuasive and does not believe that the one-touch machines are random number generators.

Although the Court believes that the Tribe's machines do not randomly generate numbers, the one-touch machines fail to comply with other provisions in the Bingo Enabling Act. Specifically, the Bingo Enabling Act prohibits a cardminding device from being used "as a receptacle for the deposit of tokens or money in payment for playing the bingo card played with the device's assistance" or as "as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for the bingo card played with the device's assistance." TEX. OCC. CODE § 2001.409(a)(2), (3). Here, a game session on a one-touch machine is initiated by inserting either cash or a cash-value voucher into the machine. After the game session concludes, the machines provide a voucher that represents a cash value to players who have won the game. Accordingly, the one-touch machines do not comport with the Bingo Enabling Act's requirements for bingo cardminding devices.

In contrast to the one-touch machines, the Tribe's live-called bingo looks and sounds like traditional, preconceived notions of bingo. However, the Tribe's cardminders enable a participant to play more cards than Texas's regulations permit. The Texas Administrative Code only allows electronic cardminding machines to monitor up to sixty-six cards at one time; however, the Tribe has admitted that its machines allow players to play more than sixty-six cards.

Moreover, any cardminding device must be tested by an independent testing facility or the Commission's own testing lab in order to evaluate the machine's compliance with Texas law. The Tribe's software and devices are tested by an independent facility. Mot. Ex. M. However, the facility does not evaluate the machines for compliance with Texas law; instead, the facility has been provided different standards that are promulgated by the Pueblo Regulatory Commission. *See id.* (depicting the standards that the Pueblo Regulatory Commission provided to the testing facility). Therefore, the Tribe's machines are not properly tested for compliance with Texas state law.

Additionally, the Pueblo's operations exceed the scope of any bingo authorized by the Bingo Enabling Act. The Act allows for bingo to be conducted during four-hour sessions, three times per week. The Tribe's use of the machines and live-called bingo—which are available 24/7—far exceed the volume of charitable bingo authorized by Texas law.

In sum, the Court is of the opinion that the Tribe's bingo operations fail to comply with Texas law.

C. Whether an injunction should be issued

"The party seeking a permanent injunction must meet a four-part test. It must establish: (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006). "Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Thus, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

1. Success on the Merits

As discussed above, Texas has proven success on the merits. Specifically, Texas has shown that the Tribe's activities at Speaking Rock fail to comport with Texas law and regulations, which have been federalized via the Restoration Act. Although Texas has demonstrated success on the merits, "[a]n injunction is a matter of equitable discretion; it does not follow from

success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Accordingly, the Court next considers the other, equitable elements that must be met to issue an injunction.

2. Irreparable Harm

"In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981); *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975)); *see also ADT, LLC v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 694 (N.D. Tex. 2015) ("An injury is generally considered to be irreparable if the injury cannot be undone through monetary relief." (citing *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472–73 (5th Cir. 1985))).

In this case, monetary damages are inadequate because the State cannot seek them. The Restoration Act provides the State a single remedy: seeking an injunction in federal court. *See* Restoration Act § 107(c). Thus, if the Court were to determine that no injunction should be entered, the State would have no alternative course of action to enforce Texas law via the Restoration Act. Accordingly, no adequate remedy at law exists, and the Court is of the opinion that the State would suffer irreparable harm in the absence of an injunction.

Additionally, the State avers that it suffers irreparable injury when it is "prevented from enforcing its laws." Mot. 19. On this point, Texas cites cases holding that states suffer irreparable injury when enjoined from enforcing their laws. *Id.* (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.")). The Tribe notes that the cases the State relies on are not directly applicable here.[11] Resp. 20. In this case, no party seeks to enjoin the State from enforcing its laws; instead the State itself is pursuing an injunction against the Tribe. *Id.*

As a formal matter, being enjoined from enforcing laws is different than seeking an injunction against a party that is breaking the law. This is especially true because of the sweeping scope of an injunction that prevents a state from enforcing its laws. In this case, if an injunction were not issued, the State's gaming law

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[11] Further, the Tribe contends that "[r]equiring the State to prove the merits of its case, rather than through disfavored injunctive relief, is not 'irreparable harm.'" Resp. 20. Although the Tribe's argument lacks clarity, it appears that the Tribe believes that the State seeks to achieve an injunction without demonstrating success on the merits. That belief is incorrect. The Court notes that this factor—irreparable harm—is required *in addition to* success on the merits.

would not be wholly ineffective. Although Texas's gaming law would be unenforceable as to the Tribe, any harm that Texas would face from denying the public the enforcement of its laws would be more limited in scope than the type of broad-sweeping injunction at issue in *Planned Parenthood*.

However, as a practical matter, the interest protected in this case is the same: if the State is unable to enjoin the Tribe's gaming operations, then the State will be unable to seek other recourse so that it may effectively enforce its laws against the Tribe. The State and its citizens have an interest in enforcing State law, and seeking an injunction is the only way that the State may enforce its gaming law on the Pueblo reservation. Thus, in this case, due to the lack of other available remedies, the State's interest in enforcing its laws would be irreparably impaired if it cannot obtain an injunction against the Tribe.

In sum, the Court determines that the State has shown irreparable harm because, in the absence of an injunction, the State is unable to enforce Texas's gaming laws on the reservation as provided by the Restoration Act.

3. Balance of Equities & Public Interest

Because the parties are sovereigns who represent their respective constituents, the balance of equities and public interest are congruent: the Texas citizenry's interests align with the State's interest in enforcing its laws, and the Pueblo community's interest aligns with the Tribe's interests in maintaining its operations at Speaking Rock. Accordingly, the Court will analyze these factors together.

The Pueblo community relies on Speaking Rock to fund important governmental initiatives. As the Court noted in its March 29, 2018, "Order Regarding Magistrate's Report and Recommendation and Plaintiff's Application for Preliminary Injunction" (ECF No. 77) [hereinafter "Order Regarding R. & R."], courts have considered the importance of tribal self-governance and the impact of income lost by gaming when balancing the equities of a case. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (factoring in "the prospect of significant interference with tribal self-government" to the balance of the equities); *Seneca-Cayuga Tribe of Oklahoma v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (finding that the balance of equities tipped in favor of a tribe because the tribe stood to "lose income used to support social services for which federal funds have been reduced or are non-existent, and lose jobs employing Indians who face a [high] rate of unemployment").

Admittedly, neither of the aforementioned cases perfectly reflect the case at hand, specifically because the tribes in *Prairie Band* and *Seneca-Cayuga* did not seek to engage in illegal activity on their reservations. In *Prairie Band*, the Tribe enacted its own motor vehicle code and, seeking to have the State recognize its vehicle registrations, sued the State of Kansas. 253 F.3d at 1239. In affirming a preliminary injunction, the Tenth Circuit considered that tribes have an interest in self-governance and that registering vehicles is a governmental function. *Id.* at 1250–51.

Seneca-Cayuga raised an issue more similar to this case: two Tribes filed a federal action to enjoin a pending state-court suit in which Oklahoma sought to halt the Seneca-Cayuga and Quapaw Tribes from conducting bingo. 874 F.2d at 710. The Tenth Circuit determined that the Tribes were likely to prevail on the merits. *Id.* at 716. Accordingly, the court of appeals upheld a preliminary injunction because the Tribes faced a significant loss of tribal income and interference in self-government. *Id.* The State's interest—especially considering its low likelihood of success on the merits—did not outweigh the Tribes' interest. *Id.*

In this case, for similar reasons to those discussed in *Seneca-Cayuga*, the Court declined to grant a preliminary injunction during an earlier stage of this litigation. Order Regarding R. & R. 40–43. Specifically, the Court determined that the State had not shown a sufficient likelihood of success on the merits at the preliminary injunction stage. *Id.* at 28–38. Without a clear demonstration of success on the merits, a preliminary

injunction would unnecessarily impair the Tribe's self-governance. *Id.* However, the Court noted that it would "ultimately base its decision [regarding a permanent injunction] on the legality of the bingo machines at issue" and that the "revenue from Speaking Rock does not entitle Defendants to engage in illegal activity." *Id.* at 43 n.14.

Presently, the State has shown success on the merits. Therefore, although the Tribe has an interest in self-governance, the Tribe cannot satisfy that interest by engaging in illegal activity. Further, the Court cannot decline to enforce the Restoration Act, which is federal law. As Judge Eisele stated in 2001,

> [T]he Pueblo and its members, and others, have benefitted enormously from the Pueblo's illegal gambling operations, but this circumstance can not justify the clear violation of law. The fruits of this unlawful enterprise are tainted by the illegal means by which those benefits have been obtained.
>
> Under the law the court believes it has no choice but to enjoin the continued operation of this widespread common and public nuisance.[12] But, even assuming the court has

[12] The Court notes that, even though the Texas Remedies Code codifies a violation of gambling laws as a "common and public nuisance," *see* TEX. CIV. PRAC. & REM. CODE § 125.0015, the State does not suggest that the community considers Speaking Rock to be a nuisance of any sort. *See* Resp. Ex. F at 14–15. To the contrary, the Tribe has submitted evidence demonstrating that the community supports Speaking Rock and believes that Speaking Rock is a valuable community asset. Resp. Ex. I (collecting

> some discretion in the matter, it concludes that it would be an abuse of that discretion not to enjoin the gaming and gambling activities under the circumstances of this case.
>
> What the Defendants characterize as "equities" in this case are not such in the eyes of the law. They are matters which might, however, be brought to the attention of the Congress of the United States or the legislature of the State of Texas.

Ysleta II, 220 F. Supp. 2d at 697. Accordingly, because the Tribe's operations run contrary to Texas's gaming law, the balance of equities weighs in favor of the State.

In sum, the State has shown (1) success on the merits, (2) irreparable harm if no injunction is issued, (3) the balance of equities favors the State, and (4) an injunction would serve the public interest. Moreover, the Court is bound by the Restoration Act's text, as well as the Fifth Circuit's interpretation of the Act. Accordingly, the Court must enjoin the Tribe's gaming activities, which violate Texas law.

The Court is cognizant than an injunction will have a substantial impact on the Pueblo community.

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letters expressing community support). However, regardless of the chapter's title, Texas law does not require the State to prove that the Tribe's actions would be considered a nuisance based on general tort principles. Instead, the Texas statute provides a remedy for any gambling violation "as prohibited by the Penal Code." TEX. CIV. PRAC. & REM. CODE § 125.0015(a)(5). Thus, Texas law considers illegal gambling to be a nuisance per se even if the community does not.

Accordingly, the Court joins the refrain of Judges who have urged the Tribes bound by the Restoration Act to petition Congress to modify or replace the Restoration Act if they would like to conduct gaming on the reservation. *See Texas v. Alabama Coushatta Tribe of Texas*, 298 F. Supp. 3d 909, 925 (E.D. Tex. 2018) (stating that "[t]he plain language of the Restoration Act stands, as does the Fifth Circuit's undisturbed interpretation of the application of that Act" and that "[u]ntil Congress can be persuaded to amend or repeal the Restoration Act, . . . the Tribe must conform to the gaming laws and regulations of Texas").

Finally, the Court believes that, prior to entering a permanent injunction, the Court should receive input from the parties regarding the precise language of the injunction. As the Tribe has noted, an injunction may not simply command that a party "follow the law." Resp. 18. Instead, an injunction must be specific and state its terms in reasonable detail. Fed. R. Civ. P. 65(d). Thus, the Court invites each party to submit a proposed permanent injunction for the Court's consideration by March 1, 2019. Thereafter, the Court will consider the submissions, if any, and enter an injunction regarding the Tribe's operations.

IV. CONCLUSION

Accordingly, **IT IS ORDERED** that the State of Texas's "Motion for Summary Judgment and Permanent Injunction" (ECF No. 146) is **GRANTED**.

IT IS FURTHER ORDERED that the **March 4, 2019**, trial setting in this matter is **VACATED**.

IT IS FINALLY ORDERED that, in light of this Memorandum Opinion, each party may draft and submit a proposed permanent injunction, if it so chooses, by **March 1, 2019, at 5:00 p.m. Mountain Time**.

SIGNED this **14th day** of **February, 2019**.

/s/ Philip R. Martinez
PHILIP R. MARTINEZ
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, **Plaintiff,**	§	
v.	§	
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR, **Defendants.**	§	**No. EP-17-CV-179-PRM**

ORDER REGARDING MAGISTRATE'S REPORT AND RECOMMENDATION AND PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

(Filed Mar. 29, 2018)

On this day, the Court considered the "Report and Recommendation of the Magistrate Judge on the State of Texas's Motion for a Preliminary Injunction" (ECF No. 64) [hereinafter "R&R"], filed on January 29, 2018, the State of Texas's [hereinafter "Plaintiff" or "State" or "State of Texas"] "Objections to Report and Recommendation Pursuant to Federal Rule of Civil Procedure 72(b)" (ECF No. 68) [hereinafter "Objections"], filed on February 12, 2018, Ysleta del Sur Pueblo, the Tribal Council, and the Tribal Governor Carlos Hisa's

[hereinafter collectively referred to as "Defendants"] "Response to Plaintiff's Objections to Report and Recommendation" (ECF No. 71) [hereinafter "Response to Objections"], filed on February 26, 2018, and Plaintiff's "Reply in Support of Objections" (ECF No. 73), filed on March 5, 2018, in the above-captioned cause. In conjunction therewith, the Court considered Plaintiff's "Application for Preliminary Injunction" (ECF No. 9) [hereinafter "Application"], filed on August 15, 2017, Defendants' "Response in Opposition to Plaintiff's Application for Preliminary Injunction" (ECF No. 17) [hereinafter "Response to Application"], filed on September 12, 2017, and Plaintiff's "Reply in Support of Application for Preliminary Injunction" (ECF No. 18) [hereinafter "Reply Supporting Application"], filed on September 18, 2017, in the above-captioned cause.

I. BACKGROUND

A. Factual Background

As described in the Court's recent Order Denying Defendants' Motion to Dismiss (ECF No. 76), this case is the latest iteration of a long-running dispute between Plaintiff and Defendants regarding enforcement of Texas gaming law on the Ysleta del Sur Pueblo [hereinafter "Pueblo" or "Tribe"] reservation. While it is unnecessary to delve into a comprehensive history of the litigation and factual background, the Court will recite the facts relevant to analyzing the R&R and reaching a conclusion on the Application for Preliminary Injunction.

In 1987, the United States enacted the Restoration Act ("the Act"), which "restored federal tribal status to the Ysleta Del Sur Pueblo" from the State of Texas. Am. Compl. 3, Aug. 15, 2017, ECF No. 8. The Act delineates the nature of the federal trust relationship and contains provisions regarding, inter alia, federal recognition of the Tribe, the rights and privileges of the Tribe (including eligibility for federal services and assistance), the relationship between federal, state, and tribal authority, and permanent physical improvements on the reservation. *See generally* Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100–89, 101 Stat 666 (1987). Most importantly for purposes of this case, the Act governs "Gaming Activities" conducted on the reservation [hereinafter "Pueblo gaming"]. *Id.* at § 107.

Section 107 of the Act contains the provisions relevant to deciding whether to grant a preliminary injunction. Section 107(a), in pertinent part, provides that:

> 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.

Section 107(c) provides that "the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) [i.e., the section

prohibiting all gaming activities prohibited by the State of Texas]. . . ."

The effect of subsections (a) and (c) of the Act is to federalize Texas gaming law, which currently operates "as surrogate federal law on the Tribe's reservation in Texas." *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994). Essentially, any activity prohibited pursuant to Texas law is prohibited pursuant to federal law. While the State of Texas has many laws prohibiting gambling, the State does not consider all gaming activity to be unlawful gambling. Thus, "[n]ot all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations. As such, the Tribe may participate in legal gaming activities." *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 707 (W.D. Tex. 2001), *modified* (May 17, 2002), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), *and aff'd sub nom. State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), *and order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009) [hereinafter "Judge Eisele Order"]. Accordingly, the current dispute involves whether Defendants' operation of "electronic bingo" machines violates Texas gaming law and, thus, whether it violates federal law pursuant to the Act. Am. Compl. 6.

Specifically, Plaintiff alleges that Defendants are operating a "brazen form of illegal lottery" on their reservation, and therefore that the Tribe is in violation of the Act. Appl. 2. Plaintiff presents evidence of a physical inspection of the Speaking Rock Entertainment

Center ("Speaking Rock"), which is operated by Defendants. The physical inspection, which was submitted to the Court in the form of a video exhibit, revealed electronic bingo machines that "stood in rows in a dim, casino-like atmosphere, loud with the electronic bells, whistles, and theme songs of the machines and illuminated by their flashing lights." Appl. 4. The inspection further revealed that these machines announced "their maximum respective jackpots in blinking, marquis-style lights," that they were located near the facility's "large bar," that customers could "insert cash directly into the machine," and that the machines were available "to the public 24 hours a day, 7 days a week." *Id.* at 4–5. Finally, Plaintiff describes (and the video evidence supports) how the gameplay on the machines appears to mimic "slot machines"[1] rather than the game of bingo. *Id.* at 5. In essence, Plaintiff seeks injunctive relief to prohibit Defendants from offering these machines because the State believes, due to the machines' strong resemblance to illegal slot machines, that the Tribe is violating Texas gaming law.

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[1] Because Plaintiff does not give a description of what it believes a "slot machine" is, the Court will recognize the dictionary definition of this term as either: "a machine whose operation is begun by dropping a coin into a slot"; or "an originally coin-operated gambling machine that pays off according to the matching of symbols on wheels spun by a handle[.]" *Slot Machine*, Merriam-Webster Online Dictionary 2018.

B. Procedural Background

In 2002, Plaintiff obtained a permanent injunction "prohibiting the Tribe from engaging in illegal gambling in violation of Chapter 47 of the Texas Penal Code." Appl. 3. The parties have litigated the scope and applicability of the 2002 injunction before multiple judges throughout the last fifteen years under cause number 3:99-CV-320. In 2016, when Plaintiff learned of the machines at issue here, it filed a motion seeking contempt of the 2002 injunction. *Id.* However, Judge Cardone ruled that the motion was moot after Plaintiff informed the court that it had agreed with Defendants to conduct a voluntary visual inspection of the premises before moving forward with its suit. *See* Order 2, *Texas v. del Sur Pueblo*, 3:99-CV-320-KC (ECF No. 625), Mar. 10, 2017. Judge Cardone also expressed to the parties that she believed the proper "mechanism for addressing violations" of the Restoration Act was for the State of Texas to bring a new action for injunctive relief in federal court. *Id.* Thus, upon completing the inspection and believing Defendants were in violation of the Restoration Act, Plaintiff filed its Application.

Acting pursuant to its authority in 28 U.S.C. § 636, the Court referred Plaintiff's Application to a Magistrate Judge on September 11, 2017. The Magistrate Judge then filed an R&R regarding a disposition on the Application on January 29, 2018.

C. The Magistrate Judge's Recommendation

The Magistrate Judge [hereinafter "Magistrate"] recommends denying the Application because he suggests the Court lacks authority to issue an injunction in this situation. Specifically, the Magistrate relies on a general prudential principle that federal "courts have no power to enjoin the commission of a crime." R&R 3 (citing *United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969)). The Magistrate recognizes only three exceptional situations that permit federal courts to enjoin criminal activity: national emergencies, widespread public nuisances, and where a specific federal statutory grant of power to issue an injunction exists. *Id.* at 4 (citing *Jalas*, 409 F.2d at 360). Concluding that Pueblo gaming is not a widespread public nuisance or a national emergency, and that no specific statutory grant of power authorizes the Court to issue an injunction here, the Magistrate suggests that the Court lacks the power to issue an injunction. The Magistrate made no factual findings regarding the request for preliminary injunction. Finally, the Magistrate expresses "doubt" that subject-matter jurisdiction lies over this dispute. R&R 9.

After due consideration, the Court rejects the reasoning in the R&R. However, for the reasons explained in Section III, *infra*, the Court, nevertheless, will deny the Application.

II. THE REPORT AND RECOMMENDATION

A. Standard of Review

A district court may, on its own motion, refer a pending matter to a United States Magistrate Judge for a report and recommendation. 28 U.S.C. § 636(b)(1)(B). Once the Magistrate Judge enters a report and recommendation, any party may contest the report by filing written objections. *Id.* at § 636(b)(1)(C). If a party chooses to lodge objections, the district judge must then make a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*; *see also* W.D. Tex. Civ. R. App. C, Rule 4(b).

B. The Court Rejects the Reasoning in the R&R

Because Plaintiff objects to the fundamental premise of the R&R—that the Court lacks authority to issue an injunction here—the Court must review the entirety of the R&R's suggestions de novo. Like Plaintiff, the Court disagrees that it lacks the power to grant an injunction in this case. Instead, the Court holds that the rule prohibiting courts from enjoining criminal activity is inapplicable here. Further, even if it were applicable, the specific-grant-of-authority exception is satisfied, and the Court therefore has authority to issue an injunction. Finally, the Court holds that

Plaintiff properly invoked subject-matter jurisdiction in this case. The Court will discuss these issues in turn.

i. The Prohibition on Enjoining Criminal Activity is Inapplicable

The R&R relies on *United States v. Jalas* for the rule that the Court has no power to issue an injunction here.[2] 409 F. 2d 358 (7th Cir. 1969). In *Jalas*, the Government sought to enjoin Clarence Jalas from running for and serving in a leadership position of a labor union because that official had previously pled guilty to

[2] Defendants' Response to Plaintiff's Objections conspicuously omits any mention of *Jalas* or the prohibition against enjoining criminal activity. Thus, it is unclear whether Defendants even support the application of the rule in this case. Instead, Defendants' Response to Objections focuses on Plaintiff's alleged failure to adequately analyze the four injunction factors, contends that the attorney general lacks capacity to bring this claim, and argues that sovereign immunity bars this suit. *Id.* Defendants' sole endorsement of the rationale in the R&R is only loosely related to the actual rationale. Piggybacking off of the R&R's textualist interpretation of § 107(c) of the Restoration Act, Defendants make an entirely new argument about whether the Restoration Act provides Plaintiff with a private right of action to bring suit. Resp. to Obj. 5-9. This argument is completely unmoored from the prohibition against enjoining criminal activity on which the R&R relies. Regardless of the merits of their multiple new arguments, these new issues are entirely outside the scope of the R&R or Plaintiff's Objections thereto. Thus, they are not properly before the Court and the Court declines to address them here. *See United States v. Bonilla-Mungia*, 422 F.3d 316, 319 (5th Cir. 2005) ("[W]e will not consider new arguments first raised by an appellee in supplemental briefing on unrelated issues."); *Finley v. Johnson*, 243 F.3d 215, 219 n.3 (5th Cir. 2001) ("[I]ssues raised for the first time in objections to the report of a magistrate judge are not properly before the district judge.").

accepting a bribe. *Id.* The Government asserted that if Jalas took office, he would be criminally liable pursuant to 29 U.S.C. § 504 (the Labor-Management Disclosure Reporting Act), which institutes criminal penalties for serving as an officer in a labor union with a previous bribery conviction. *Id.* at 359. In declining the government's application for an injunction, the Court held that it had no power to enjoin the commission of a crime except in cases of "[n]ational emergencies, widespread public nuisances, and where a specific statutory grant of power exists" [hereinafter "*Jalas* Rule"]. *Id.* at 360. Concluding that none of those exceptions was satisfied, the Court noted that the "sole remedy for the complained-of-wrong is criminal prosecution," and remanded the case to the district court with instructions to dismiss. *Id.*

The *Jalas* rule is inapposite where, as here, the relevant federal statute under which the plaintiff brings suit provides for both civil and criminal remedies. The general prohibition against enjoining criminal activity has been consistently limited to situations where the statute under which the plaintiff seeks relief is "patently a criminal statute contemplating proceeding by indictment or information." *Id.* For example, in the context of Indian law, the Eighth Circuit rejected the R&R's approach in analogous circumstances involving the United States Government and the Santee Sioux Tribe. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998). There, the court overturned a district court order holding that the federal Government had no power to sue based on the

Jalas rule. The Santee Tribe was governed by the Indian Gaming Regulatory Act ("IGRA"), which, similar to the Restoration Act, made any violation of a Nebraska state gaming law a violation of the IGRA. *Id.* In rejecting the applicability of *Jalas*, the court relied on the fact that the IGRA was both criminal and civil in nature because it incorporated "Nebraska civil case law authorizing injunctive relief[.]" *Id.* Thus, the court concluded that "although potentially subject to criminal prosecution by the United States under the provisions of the IGRA, this activity is likewise subject to injunctive relief pursuant to applicable Nebraska law" and therefore that "the District Court should have enjoined [the activity] pursuant to Nebraska law."[3] *Id.*

Outside of the Indian law context, courts have reached the same conclusion: the *Jalas* rule does not apply to an activity subject to both criminal and civil remedies. *See United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) ("[A]cts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings. . . . A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes."); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987) ("No court, state or federal, is barred from enjoining activity that causes or threatens injury to

[3] The R&R distinguishes *Santee* in its explanation of why the activity in this case does not constitute a widespread public nuisance. R&R 8. However, the R&R does not discuss *Santee*'s holding to the extent it renders *Jalas* inapplicable in this case. Thus, the distinctions mentioned in the R&R do not serve to distinguish this case.

property merely because the activity, in addition to being tortious, is a violation of the criminal law."); *United States v. Prof'l Air Traffic Controllers Org. (PATCO)*, 653 F.2d 1134, 1142 (7th Cir. 1981) (holding that merely because "affirmative acts or omissions proscribed by a civil statute are also subject to criminal sanctions [it] does not ipso facto convert the civil proscription into criminal activity").

Further, where a statute expressly authorizes injunctive relief, "the existence of criminal or other legal sanctions d[oes] not require that the district court deny the requested injunctive relief." *United States v. Buttorff*, 761 F.2d 1056, 1064 (5th Cir. 1985).

Here, § 107 of the Restoration Act, unlike the relevant statute in *Jalas*, is not "patently a criminal statute contemplating proceeding by indictment or information."[4] Instead, the election of remedies—

[4] The R&R provides insufficient rationale for its conclusion that "the Restoration Act grants courts only limited *criminal* jurisdiction over gaming crimes that the Pueblo" commits, and that Texas state courts retain exclusive jurisdiction over any civil actions related to Pueblo gaming activity. R&R 5. Although not stated explicitly in the R&R, the Magistrate apparently read the grant of federal jurisdiction over "offenses" in violation of the Act as applying exclusively to criminal actions, not civil actions. *See* Nov. 13, 2017, Hr'g Tr. (ECF No. 50) 43:21-45:17. That is, only a federal prosecutor—the entity responsible for enforcing federal criminal law—may seek the "civil and criminal penalties" mentioned in the statute. R&R 9. However, as explained in more detail *infra*, reading the term "offense" as only applying to criminal actions by a prosecutor ignores the command in the second sentence of § 107(c). That sentence provides that "nothing in this section shall be construed as precluding the State of Texas" from pursuing an injunction against gaming activities. Construing the

including criminal and civil penalties—is reserved to the party bringing suit. This is evident from the Act's express provision that any violations "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." Restoration Act § 107(a). The laws of the State of Texas make certain gaming activity punishable by criminal penalties, see Tex. Penal Code Chapter 47, or subject to abatement/injunction as a nuisance, which includes civil penalties, see Tex. Civ. Prac. & Rem. Code § 125.0015 (defining a nuisance, for which the attorney general may seek injunctive relief, as "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code"). Thus, the Restoration Act allows the party seeking relief to elect either criminal or civil penalties, including an injunction. Moreover, § 107(c) specifically references the State's ability to bring an injunction. Regardless of whether this provision is sufficiently authoritative to confer jurisdiction, the drafters obviously contemplated the State's ability to seek injunctive relief, making it unlikely that they intended the Act's provisions to be limited to criminal enforcement. Thus, the Act is not strictly a

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word "offense" so narrowly that it undermines the State's ability to apply for an injunction contradicts the provision specifically directing courts not to construe the statute that way. Consistent with the command in the statue, the Court reads the term "offense" more broadly as referring to any act that violates, is inconsistent with, or fails to comply with the prohibition on gaming activities in subsection (a). Thus, the statute grants exclusive jurisdiction over disputes between the State of Texas and the Tribe regarding violations or failures to comply with subsection (a).

criminal statute like the statute in *Jalas*, and the Court retains power to enjoin violations of the Act.

ii. Even if the Prohibition on Enjoining Criminal Activity did Apply, the Restoration Act Provides a Specific Statutory Grant of Power

Even assuming arguendo that the prohibition against enjoining the commission of a crime is applicable here, the Court disagrees with the Magistrate that there is no specific grant of statutory authority to issue an injunction. *Jalas* noted exceptions to the prohibition on enjoining criminal activity where there is a national emergency, widespread public nuisance, or a specific grant of statutory power to grant an injunction.[5] 409

[5] The Court notes that the prohibition against enjoining criminal activity has had many historical exceptions, and is not strictly limited to the three mentioned in *Jalas*. *See*, *e.g.*, *Seifert v. Buhl Optical Co.*, 268 N.W. 784, 787 (1936) ("Suit may be brought by parties engaged in a profession or business to enjoin unfair trade and practice which would be injurious to their interests, and the fact that such practices are punishable by criminal penalties is immaterial."); *Dworken v. Apartment House Owners' Ass'n of Cleveland*, 176 N.E. 577, 580 (1931) (allowing private suit to enjoin the unlicensed practice of law); *In re Wood*, 194 Cal. 49, 55, 227 P. 908, 910 (1924) ("[W]here property rights are endangered, the fact that the acts are criminal will not prevent a court of equity from exercising its jurisdiction."). Indeed, even the Fifth Circuit recognizes a much broader exception to the rule for circumstances where "the prosecution of a criminal charge is not an adequate remedy. . . ." *Buttorff*, 761 F.2d at 1063. The Magistrate, in discussing only the limited exceptions mentioned by *Jalas*, failed to grapple with the broader exceptions recognized in this circuit and historically in other jurisdictions. Specifically, considering that courts consistently decline to apply this rule in the

F.2d at 360. The Magistrate suggests that none of these three exceptions applies here, and accordingly recommends denying the Application because the Court has no authority to issue an injunction.

In analyzing the specific-grant-of-jurisdiction exception, the Magistrate focuses exclusively on § 107(c) of the Act.[6] That section provides that "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." The Magistrate, though admitting that "a cursory reading of [this provision] appears to authorize Texas to seek injunctive relief in federal court," suggests that § 107(c) does not provide such authorization. Instead, adopting a strict textualist interpretation, the Magistrate suggests that the "nothing shall preclude" language is not an affirmative grant, but merely a statement that the statute should not be read to interfere with some other affirmative grant that Congress could theoretically provide if it so desired. *See* R&R 6 ("Not preventing injunctive relief is not the same as affirmatively authorizing it.").

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unique context of Indian gaming, the Magistrate failed to analyze whether an exception might be appropriate here.

[6] The R&R provides no analysis of whether § 107(a) provides a specific grant of power for the Court to issue an injunction. That section states that violations of the Act "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." Regardless of § 107(c), this provision appears to indicate Congress's intent to allow federal courts to grant civil relief.

However, the Fifth Circuit has squarely held that the Restoration Act *does* contain a specific grant of power for federal courts to enjoin violations of its gaming provision. *See Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994). In *Ysleta*, the Fifth Circuit was faced with the question of whether the IGRA, which was passed after the Restoration Act, impliedly repealed the Restoration Act. *Id.* at 1335. Before it could decide which statute applied, the court had to find that the two statutes were in conflict. *Id.* at 1334. In determining that the two statutes were incompatible, the 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. Specifically, it concluded that the Restoration Act authorizes the State of Texas "to file suit in a federal court to enjoin any violation by the Tribe of the provisions of § 107(a)[,]" which constitutes a "fundamentally different regime[]" than that contemplated in the IGRA. *Id.* Thus, relying on its determination that the State can seek an injunction in federal court pursuant to the Act, the court held that the statutes were in conflict, and that the Restoration Act ultimately governed the dispute. *Id.* at 1335.

Albeit in an attempt to answer a different question, the Fifth Circuit has explicitly held that the Restoration Act provides federal courts with power to issue an injunction sought by the State of Texas. The Magistrate does not cite this case in the R&R and provides no analysis as to why it does not constitute

binding precedent. The Court finds it difficult to reconcile the R&R with the *Ysleta* decision.

Moreover, even disregarding that Fifth Circuit opinion, the Court disagrees that the text of the Restoration Act so clearly dictates the Magistrate's recommended result. The text of the statute itself is, at a minimum, ambiguous regarding whether federal courts have power to enjoin violations of the Act. While the Court agrees that the language in § 107(c) could be reasonably interpreted in the manner the Magistrate suggests, the Court disagrees that this is the only reasonable interpretation. For instance, taken literally, § 107(c)'s command that "nothing in this section shall be construed as precluding the State of Texas" from seeking an injunction could mean Congress meant to foreclose *any* possible construction of the statute that precludes the State from bringing an injunction. That is, the Act expressly makes it impossible to give the statute any other meaning except one that results in the State's ability to bring suit. Failing to heed this portion of the statute, the Magistrate construes the text as solely providing jurisdiction over criminal actions (which can only be brought by a federal prosecutor), and not jurisdiction over civil injunction actions brought by the State of Texas. This reading precludes the State from bringing an action for injunctive relief, which directly contravenes the statute. Thus, an appeal strictly to the text leads to the conclusion that multiple plausible interpretations exist, if not indicating the opposite conclusion as that recommended in the R&R.

"When a statute is subject to differing interpretations, the court must 'examine its legislative history, predecessor statutes, pertinent court decisions, and post-enactment administrative interpretations.'" *Salazar v. Maimon*, 750 F.3d 514, 519 (5th Cir. 2014) (quoting *Rogers v. San Antonio*, 392 F.3d 758, 761 (5th Cir. 2004)). The Magistrate declined to utilize any of these other tools for divining legislative intent because he concluded that the Act unambiguously failed to provide a specific grant of power to issue an injunction. R&R 7. However, as demonstrated above, the language in the Act is susceptible to multiple plausible interpretations. Thus, the Court concludes that an appeal to these other indicators of legislative intent is appropriate here.[7]

In looking to both case law interpreting the Restoration Act and its legislative history, it is difficult to deny that the statute was intended to provide an affirmative grant of authority to courts to issue injunctions if sought by the State of Texas. First, in addition to the Fifth Circuit's 1994 *Ysleta* decision, numerous other judges have read the statute to provide courts with the ability to issue an injunction. *See Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x 326, 328 (5th Cir.

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[7] The Court notes that the Fifth Circuit itself appealed to legislative history extensively in attempting to discern the meaning of the Restoration Act. *See Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325 (5th Cir. 1994). Specifically, in determining that § 107(c) expressly authorizes courts to grant injunctive relief to the State of Texas, the court cited a Senate Select Committee on Indian Affairs Report that clarifies the meaning of that provision. *Id.* at 1334.

2011) ("The Restoration Act permits Texas to seek an injunction in federal court if the Tribe should engage in gaming activities prohibited by Texas law"; "In 1999, the Attorney General of Texas, using the avenue of relief permitted to the State under the Restoration Act, filed a civil suit in the district court to enjoin the activities of the Casino[.]"); *State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *1 (W.D. Tex. May 27, 2016) ("[T]he Restoration Act provides a mechanism for addressing violations of its provisions. That mechanism requires Texas to bring suit in this Court to challenge alleged violations of the Act, and allows this Court to enter an injunction, if warranted."); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) (concluding that "[t]he injunction sought by the State of Texas is authorized by both state and federal statutes" after analyzing the relevant provision of the Restoration Act); Judge Eisele Order 694, ("[T]he plain wording of sections 107(a) and (c) evince Congress's clear intent to limit the Tribe's sovereign immunity by allowing the State of Texas to enjoin reservation gambling using state anti-gaming laws."); *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999) ("[T]he Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations."), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000).

Further, the legislative history of the Restoration Act strongly suggests that Congress intended to provide federal courts with authority to issue an

injunction sought by the State of Texas. The present codified version of the Restoration Act originated in the House of Representatives in 1987. S. Rep. No. 100–90, at 7–8 (1987). After the House approved the bill, it proceeded to the Senate, where it was referred to the Senate Select Committee on Indian Affairs. *Id.* at 8. The Senate Committee unanimously recommended that the bill be voted upon favorably, as long as the House agreed to some of the Senate's amendments to the House version. *Id.* Those amendments, which were ultimately included in the final version of the bill, included a "[n]ew subsection[ ] 107(c)." *Id.* at 9. In the "Explanation of Amendments" section, Senator Daniel Inouye, on behalf of the Senate Committee, stated that this revision "make[s] it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban." *Id.* at 9. Further, in its "Section-By-Section Analysis," the Senate Committee reiterated that § 107(c) "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." *Id.* at 11 (emphasis added). The amendments suggested in the Senate Report were ultimately codified in the Restoration Act. These statements in the Senate Report strongly suggest Congress's intent to confer jurisdiction over civil enforcement actions brought by the State of Texas. Neither Defendants nor the R&R suggest any countervailing legislative history that calls this intent into question.

In sum, even assuming that the rule that courts should not enjoin criminal activity applies, the R&R still incorrectly suggests that the specific grant of authority exception is not satisfied here. The Court concludes, consistent with the pertinent case law and legislative history of § 107(c), that the Restoration Act does provide federal courts with such authority.

iii. Federal Question Jurisdiction Exists over this Dispute

The R&R, in its final section, raises doubts about federal jurisdiction over this dispute. R&R 8–9. The R&R suggests that because the Restoration Act only affirmatively provides criminal jurisdiction over Pueblo gaming, the United States Attorney is the only party that can bring suit, and he or she may only institute criminal proceedings. *Id.*

However, as explained previously, Congress intended to confer jurisdiction over suits by the State of Texas seeking injunctive relief. Thus, the Magistrate began with the flawed premise that the Restoration Act confers solely criminal jurisdiction and that the State is not authorized to bring this lawsuit. Moreover, regardless of whether the State of Texas is a proper party to bring this suit, the Magistrate does not explain why the Court would lack subject-matter jurisdiction over a dispute arising under federal law. No provision in the Restoration Act prohibits the Court from entertaining an action arising under the Act as a federal question pursuant to 28 U.S.C. § 1331.

The Magistrate appears to suggest that because the State does not retain a right to pursue a cause of action under the Restoration Act, the Court lacks jurisdiction over this dispute. However, this reasoning conflates the Court's ability to grant relief to Plaintiff with the Court's jurisdiction to hear the case. As many courts have counseled, federal courts retain jurisdiction over cases arising under federal law regardless of whether the court ultimately determines that a plaintiff has a right of action under the pertinent federal statute. *See Hondo Nat. Bank v. Gill Sav. Ass'n*, 696 F.2d 1095, 1102 n.2 (5th Cir. 1983) ("As we otherwise make plain, the denial of injunctive relief was proper, not for lack of jurisdiction, but because [the plaintiff] has no private right of action."); *Parra v. Pacificare of Ariz.*, Inc., 715 F.3d 1146, 1151–52 (9th Cir. 2013) (citing *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction.")) ("Subject matter jurisdiction exists to determine whether a federal statute provides a private right of action."). Thus, even if the Court held that the State of Texas has no right of action under the Restoration Act, the Court would still retain jurisdiction over the dispute.[8]

In sum, the Court rejects the Magistrate's rationale for denying Plaintiff's Application for Preliminary

[8] This holding is limited to the specific jurisdictional issue raised in the R&R. The Court does not pass upon Defendants' numerous arguments regarding sovereign immunity or other jurisdictional questions that they have made or will make in this litigation.

Injunction. However, after analyzing the four preliminary injunction factors, the Court agrees that Plaintiff's Application should be denied for the reasons that follow.

III. APPLICATION FOR PRELIMINARY INJUNCTION

A Legal Standard

A preliminary injunction is an "extraordinary and drastic remedy." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). In order to prevail on a motion for a preliminary injunction, it is the movant's burden to clearly establish: "(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) [that] his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) [that] granting the preliminary injunction will not disserve the public interest." *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016). "This is a 'difficult' and 'stringent' standard for the movant to meet." *Humana Ins. Co. v. Tenet Health Sys.*, No. 3:16-CV-2919-B, 2016 WL 6893629, at *11 (N.D. Tex. Nov. 21, 2016) (citing *Whitaker v. Livingston*, 732 F.3d 465, 469 (5th Cir. 2013) and *Janvey v. Alguire*, 647 F.3d 585, 591, 595 (5th Cir. 2011)). The decision regarding whether a plaintiff has carried its burden "is left to the sound discretion of the district court." *Kohr v. City of*

Houston, No. 4:17-CV-1473, 2017 WL 6619336, at *2 (S.D. Tex. Dec. 28, 2017).

Here, Plaintiff seeks a mandatory preliminary injunction. A mandatory preliminary injunction, as opposed to a prohibitory injunction, seeks to alter the status quo prior to litigation rather than maintain it. That is, it mandates that defendants take some action inconsistent with the status quo rather than prohibiting them from altering the status quo. While the mandatory/prohibitory distinction is not crucial to the inquiry, the Fifth Circuit has repeatedly held that mandatory injunctions warrant an even higher standard than prohibitory injunctions. *See Justin Indus., Inc. v. Choctaw Sec.*, L.P., 920 F.2d 262, 268 (5th Cir. 1990) ("[B]ecause [the plaintiff] is seeking a mandatory injunction, it bears the burden of showing a clear entitlement to the relief under the facts and the law."); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."); *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) (quoting *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958)) ("[W]hen a plaintiff applies for a mandatory preliminary injunction, such relief 'should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party.'").

B. Analysis

For the reasons described below, Plaintiff has not clearly established its right to the "extraordinary and drastic remedy" of a mandatory preliminary injunction in this case.

i. Substantial Likelihood of Success on the Merits

The Restoration Act prohibits all gaming activities that are unlawful pursuant to Texas law. However, the Act has been construed as allowing gaming activities that are legal under Texas law, such as certain forms of bingo. *See* Judge Eisele Order 690, 707. Thus, the question in this case is whether the specific Pueblo gaming activity at issue constitutes legal gaming or illegal gaming pursuant to Texas law. To award a preliminary injunction, Plaintiff must make a clear showing that it is substantially likely that Defendants are violating Texas law.

Here, Plaintiff's key piece of evidence is an inspection video depicting Plaintiff's counsel and its expert, Commander Guajardo, walking through the Speaking Rock Entertainment Center. *See* Appl. Ex. 1. The video shows rows of allegedly illegal machines in a casino-style atmosphere. *Id.* It further depicts Commander Guajardo playing the games offered on a random selection of these machines, showing how the gameplay appears to a user. Based on his experience depicted in the video, Commander Guajardo (along with another law enforcement officer with relevant experience who

viewed the video subsequently) testified that the devices depicted in the video violated the Texas Penal Code. *See* Nov. 13, 2017, Hr'g Tr. (ECF No. 50) 86:7–19 (testimony of Commander Guajardo that he believed the machines in Speaking Rock were "gambling devices" in violation of the Texas Penal Code); 190:24–191:9 (testimony of Lieutenant Ferguson that he believed the machines violated the Texas Penal Code). The current Director of the Charitable Bingo Operations Division with the Texas Lottery Commission, Alfonso Royal, corroborated this conclusion. *Id.* at 152:10–153:11 (testimony of Mr. Royal that he believed the machines were inconsistent with state bingo laws and that they would not be approved by the Texas Lottery Commission).

For multiple reasons, this evidence fails to establish a clear, substantial likelihood that the machines violate Texas law. First, Plaintiff fails in its Application to demonstrate to the Court exactly which laws are being violated, and how exactly the machines violate these laws. The Application contains only six sentences dedicated to explaining how the machines are illegal. However, as Defendants stress, the determination of what activities are prohibited by the State is incredibly nuanced. Instead of delving into this nuance, Plaintiff rests solely on the argument that the machines violate Texas Penal Code § 47.01(7) (defining illegal "lotteries") because they allow users to pay "cash consideration to play a game of chance for the opportunity to win cash prizes." Appl. 6. An illegal lottery, Plaintiff claims, is any game that includes the elements of chance,

prize, and consideration. Mot. 6. This argument ignores the fact that every game of bingo—which is admittedly a lawful, regulated activity in Texas—also satisfies the definition of an illegal lottery and is thus theoretically a violation of the Penal Code. *See State v. Amvets Post No. 80*, 541 S.W.2d 481, 483 (Tex. Civ. App.—Dallas 1976, no writ) ("[W]e issue our temporary injunction restraining [the defendant] and its officers and members from setting up, operating or promoting for gain bingo games or any other lottery scheme whereby one or more prizes are distributed by chance among persons paying for the privilege of participating[.]"). Indeed, after *State v. Amvets* squarely held that bingo constitutes an illegal lottery, the Texas legislature amended the state Constitution to exclude bingo from the definition of gambling, and passed the Bingo Enabling Act to define the parameters of legal bingo in the State. *See* Tex. Atty. Gen. Op. at *2, GA-0541 (2007), 2007 WL 1189841 (discussing the history of the bingo amendment to the Texas Constitution and the subsequent Bingo Enabling Act). Accordingly, Plaintiff's argument that Defendants are violating the Texas Penal Code does not advance the Court's understanding as to how the particular form of bingo at issue violates Texas law.

In its Reply Supporting Application, Plaintiff attempts to grapple with this issue, but once again fails to cite any pertinent laws that help the Court reach the clear conclusion that the machines in Speaking Rock are illegal. To support its argument, Plaintiff relies on (1) its own expert's opinion that the machines violate

the law, (2) an advisory opinion issued by its own office that suggested that certain types of electronic bingo are unconstitutional, and (3) Judge Eisele's 2001 Order allegedly requiring Defendants to obtain a license from the Texas Lottery Commission to engage in bingo.

However, none of these sources rely on positive provisions of Texas law that assist the Court in determining whether the present bingo operation is illegal. While the Court is mindful of Commander Guajardo's expert opinion regarding the legality of the machines at issue, Commander Guajardo offers no explanation for his legal conclusion besides that the machines offer games including the elements of chance, prize, and consideration. Appl. Ex. 2 at 1.17–18. As discussed previously, this is insufficient justification for an injunction here. Further, the cited advisory opinion concerns "the constitutionality of proposed legislation that would legalize the use of 'electronic pull-tab bingo'[9] by nonprofit organizations." Tex. Atty. Gen. Op. at *1, 2007 WL 1189841. Clearly, the opinion does not constitute state law, and does not directly answer the highly technical

[9] The Court is unclear as to what exactly constitutes "pull tab" bingo, or "electronic pull-tab bingo." The advisory opinion defines electronic pull-tab tickets as "an electronic ticket used in electronic pull-tab bingo that is issued from a finite deal of tickets in which some of the tickets have been designated in advance as winning tickets." Tex. Atty. Gen. Op. at *3, 2007 WL 1189841. Plaintiff has not explained how this opinion regarding electronic pull-tab bingo relates to the present dispute.

question of whether the machines at issue violate Texas law.[10]

Plaintiff also cites Judge Eisele's 2002 "Order Modifying Injunction" for the proposition that Defendants are violating state law because they do not have a permit from the Texas Lottery Commission to operate charitable bingo activities. *See Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 707 (W.D. Tex. 2001), *modified* (May 17, 2002). However, in that case Judge Eisele simply declined to issue a "declaration that various proposed activities [including bingo] do not violate this Court's injunction." Judge Eisele Order 702. In seeking a modification to the 2001 injunction, the Tribe submitted a proposal to Judge Eisele, which included an entirely separate regulatory system for tribal bingo. *Id.* at 707. While admitting it was a "close question," Judge Eisele held that "the Tribe should be required to procure a license from the Commission" before the court would "consider modifying the injunction to

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[10] While attorney general advisory opinions can be persuasive based on their reasoning, "courts are not bound by attorney general opinions." *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 333 (Tex. 2017). Here, the cited advisory opinion relies on various sources in reaching its conclusion about the prohibition on video bingo machines. Tex. Atty. Gen. Op. at *4, 2007 WL 1189841. However, none of the pertinent sources appear to be valid statutes included in any code provision on which Plaintiff bases its claims, including the Texas Penal Code or the Bingo Enabling Act. Plaintiff's brief reference to this advisory opinion fails to explain the current validity of the laws relied on in the opinion, and how the conclusions in the opinion regarding the constitutionality of proposed bingo legislation are applicable in this context.

permit charitable bingo activities by the Tribe" consistent with the Tribe's proposal. *Id.* This holding is not applicable in this context, where Plaintiff seeks a new preliminary injunction unrelated to the previous injunction. The Court is not being asked to modify the 2001 injunction, but rather whether Plaintiff has shown Defendants' conduct is unlawful pursuant to Texas law. Further, Judge Eisele never held that the exact conduct at issue was a violation of the 2001 injunction—he merely declined to preemptively permit certain bingo-related activities. Accordingly, while the Court reserves judgment on the legality of Defendants' conduct, Plaintiff's reliance on this holding does not show a clear likelihood of success on the merits.

Additionally, Plaintiff was unable to show at the evidentiary hearing how the machines at issue violate Texas law. While Plaintiff presented copious evidence that the machines emulate Las-Vegas-style slot machines, it cited no laws prohibiting bingo card-minders[11] from mimicking slot machines or the environment in which they are normally found.[12] *See* Nov. 13, 2017,

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[11] Defendant's expert defined a bingo card-minder as an "electromechanical device that enables players to play numerous cards of bingo as it's being played." Nov. 13, 2017, Hr'g Tr. 249:24–250:2.

[12] The only apparent nonconformity with Texas law that the Court is able to discern is that the machines accept cash and act "as a dispenser for the payment of a bingo prize" in violation of Texas Occupations Code § 2001.409. Defendants' expert admitted that this was the sole reason, in his opinion, that the machines did not perfectly align with state law. Nov. 14, 2017, Hr'g Tr. (ECF No. 51) 20:7–11. Defendants have explained their position that this statute applies only to "persons" and not to the Tribe,

Hr'g Tr. (ECF No. 50) 108:25–109:9 (Cross-examination of Commander Guajardo) ("Q. All right. Can we agree that Texas law does not . . . preclude a facility from having low light? A. True. Q. Or chimes, bells, and, whistles? A. True. Q. Or an absence of clocks? A. True. Q. Or Windows? A. True."). Further, Plaintiff has cited no law prohibiting the use of pre-drawn bingo games (i.e., reenactments of games that occurred previously rather than a live reading of bingo numbers), which Defendants claim form the basis of the games on their machines. In fact, Plaintiff's principal expert was not even familiar with this concept. *See id.* at 111:15–19.

In contrast, Defendants present their own expert, Philip Sanderson, who was formerly the Director of the Charitable Bingo Division of the Texas Lottery Commission from 2007–2012. *Id.* at 242:15–22. Defense counsel asked Sanderson meticulous questions about the details of Texas bingo law in an attempt to show that Defendants' activity is technically not prohibited

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which is not a "person" under federal law. *Id.* at 65:2–5. Plaintiff has not responded to this argument, and it is unclear whether the argument ultimately will bear fruit. Regardless, Plaintiff here seeks a wholesale prohibition on the devices at issue. While the potentially unlawful aspects of the machines may need to be altered or enjoined, these minor deviations do not indicate a substantial likelihood that Plaintiff will succeed in obtaining an injunction against any and all use of the devices. Further, Plaintiff did not affirmatively argue this point as a basis in its Application for Preliminary Injunction. As such, it is unclear to what extent it bases its request on these violations, and, if it does, Defendants were not afforded an opportunity to respond to this argument. Thus, the Court will decline to issue a preliminary injunction on this basis and defer judgment until both parties have an opportunity to argue this point fully.

because it falls under the charitable bingo exception to gambling under Texas law. *See generally id.* at 250:24–273:19. This testimony describes how bingo card-minders can be stationary rather than hand-held, are permitted to play up to sixty-six bingo cards at once, do not have to be a certain size, are not prohibited from making noise, may include non-bingo entertainment on the card-minder screen, do not have to show the actual bingo card on the screen, may be used in conjunction with pre-drawn bingo games, do not have to be used in a social environment, may contain buttons, and may contain visual "game reels" on the screen. *Id.* Further, Sanderson posits that that the casino-like atmosphere and availability of alcohol in bingo halls, which Plaintiff appears to object to at Speaking Rock, is fully authorized pursuant to state law. *Id.* Finally, Sanderson discusses how Defendants could constitute a charitable organization under Texas law, which is a prerequisite to operating a bingo hall. *Id.* In sum, Defendants' expert presents a compelling case that Defendants have carefully developed these machines to comply with state bingo laws. Thus, Sanderson's testimony supports the Court's conclusion that the legality of the machines in question will require a difficult, fact-intensive inquiry and assessment not easily resolved at this juncture. Hence, the Court finds that Plaintiff has not carried its burden of making a clear preliminary showing that the machines are unlawful.

Ultimately, the Court is tasked with enforcing the Restoration Act, which provides "[a]ll gaming activities which are prohibited by the laws of the State of Texas

are hereby prohibited on the reservation." Restoration Act § 107(a). This is an unusual statute that prohibits Defendants—who represent a sovereign entity—from engaging in certain activity outlawed by the State, but permits them to conduct other gaming activity permitted by the State. Adding to the exceptional nature of this statute is its prohibition on the State's exercise of regulatory authority over Defendants, which would normally help dictate what does and does not constitute unlawful gaming pursuant to state law. Defendants here exist in a twilight zone of state, federal, and sovereign authority where the outer legal limit of their conduct is difficult to assess with precision. The Court views the extensive litigation over gaming at Speaking Rock as a sort of trial-and-error process to test the limits of Texas law, with federal courts serving as an arbiter of those limits. In this case, contrary to the "brazen" lawlessness that Plaintiff alleges, Defendants argue (and it appears, at least preliminarily) that they have attempted to conform their conduct carefully to the exact specifications of Texas law. While the Court makes no judgment either way about whether these machines operate consistently with the law, Plaintiff has fallen short of its burden to clearly show a substantial likelihood that they are inconsistent.

ii. Substantial Threat that Plaintiff will Suffer Irreparable Injury

Plaintiff claims it will suffer irreparable injury because of the inability to enforce its own laws. Appl. 8. Plaintiff cites multiple cases for the proposition that the inability to enforce its own laws constitutes irreparable injury. *See*, *e.g.*, *Maryland v. King*, 567 U.S. 1301 (2012) (granting a stay of a Maryland Court of Appeals decision that invalidated a state law where the law at issue protected Maryland's "law enforcement and public safety interests" and thus the inability to enforce it constituted irreparable harm); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.").

At this juncture, the Court is not convinced that the State will suffer irreparable injury. Unlike the DNA collection law at issue in *King*, the bingo laws at issue do not provide the State of Texas with "a valuable tool for investigating unsolved crimes[,] thereby helping to remove violent offenders from the general population." *King*, 567 U.S. at *3. And, unlike in *Planned Parenthood*, the Court is not enjoining the State from enforcing its laws—the Court is declining to issue an injunction based on alleged violations of federal law.[13]

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[13] Plaintiff also made reference at the preliminary injunction hearing to *Idaho v. Coeur d'Alene Tribe*, which held that "the district court did not err in determining that the State would likely suffer irreparable harm to its economic and public policy interests if the Tribe were not enjoined from offering" gambling activities

While the State certainly has a significant interest in enforcement of the Restoration Act, the inability to assert that interest during the pendency of litigation to determine whether a violation has occurred does not amount to irreparable injury. The purpose of the irreparable harm inquiry at the preliminary injunction stage is to "prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *see also Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975) ("[T]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits."). Nothing about Defendants' continued operation of the gaming devices in question would render futile a full judgment on the merits later in this case. The Court can make a decision later that would be just as effective as a decision now. Thus, the underlying purpose of issuing a preliminary injunction would not be fulfilled by granting one here.

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that violated the IGRA. 794 F.3d 1039, 1046 (9th Cir. 2015). While this case does indicate that it is within the district court's discretion to find irreparable harm in similar situations, it does not mandate that courts do so as a matter of law. Here, unlike in *Coeur d'Alene*, it is unclear that there is even a violation of the pertinent federal statute. Further, the alleged violations in this case involve an activity (bingo) that, while heavily regulated, is permitted by the State. Thus, offering bingo or bingo-style activities does not fully contravene Texas public policy. Contrastingly, in *Coeur d'Alene*, the violations involved Texas Hold 'Em poker, an activity that the state "explicitly prohibited" in all situations. *Id.* at 1045.

iii. Whether Threatened Injury to Plaintiff Outweighs Threatened Harm to Defendant

Plaintiff characterizes the threatened injury it faces as a violation of Texas public policy and the will of the citizens of Texas. Defendants, meanwhile, provide extensive arguments and evidence detailing the "immediate, immense and irreparable" impact of a preliminary injunction in this case. Resp. to Appl. 10. This impact includes the potential loss of up to 734 jobs, 335 of which belong to tribal members (representing twenty-eight percent of the tribe's membership over the age of eighteen). *Id.* at Ex. B (Declaration of Tribal Governor Carlos Hisa). Further, an injunction would have a "devastating" impact on Pueblo government services supported by income from Speaking Rock. *Id.* Defendants provide uncontested evidence that income from Speaking Rock is the "largest source of funding" for services on the reservation including "Fire Safety and Operations, General and Housing Assistance to tribal elders, our tribal language restoration programs, scholarships for our children, our truancy prevention program, health care and veterans' services." *Id.*

Defendants offered multiple witnesses at the preliminary injunction hearing who are leaders of various tribal government divisions including the Director of Behavioral Health (who oversees mental health, alcohol/substance abuse, and child welfare programs), the Director of Economic Development (who oversees low-interest lending, financial literacy, tribal-owned business support, tax assistance, and job skills training

programs), and an employee of the Tribal Empowerment Department (who described early childhood education programs, library services, higher education financial assistance, and tutoring programs that the Department operates). *See generally* Nov. 13, 2017, Hr'g Tr. (ECF No. 50) 197–235. Each of these Tribal officers testified that their departments would lose 30%, 60%, and 85% of their funding, respectively, if Speaking Rock were to close. *Id.* The Director of the Economic Development Department testified that she would be forced to close her office completely without this funding. *Id.* The other department representatives testified that they would have to cut entire programs and conduct massive layoffs in the absence of Speaking Rock funds. *Id.* Plaintiff contested none of this evidence.

After balancing the equities, the Court concludes that Plaintiff has not demonstrated that the threat of noncompliance with its bingo laws and regulations outweighs the threatened harm to Defendants' community that an injunction might inflict, as well as the threat of interference with the Tribe's sovereign right to self-government. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (factoring in "the prospect of significant interference with tribal self-government" to the balance of the equities); *Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (finding in a gaming case that the balance of equities tipped in favor of a tribe because the tribe stood to "lose income used to support social services for which federal funds have been reduced or are non-existent, and

lose jobs employing Indians who face a [high] rate of unemployment[.]").

Arguably, Defendants may bear part of the responsibility for this threatened harm for having integrated an uncertain source of funding so deeply into their community fabric. However, this does not necessarily justify the potential harm to hundreds of tribal members who had no part in that decision. While the Court acknowledges and respects Plaintiff's right to effectuate the will of its citizenry through its laws, it is difficult to conclude that this abstract right outweighs the severe and tangible negative consequences of granting a preliminary injunction. Thus, the Court finds that Plaintiff has not met its burden of clearly demonstrating that its own harm outweighs the potential harm to Defendants.[14]

iv. Whether Granting the Preliminary Injunction will Disserve the Public Interest

Finally, the Court concludes that granting a preliminary injunction would disserve the public interest. In addition to the previous discussion about the impact on the Tribe, Defendants provide letters from multiple State residents from the surrounding area that claim to support Speaking Rock's mission and continued

[14] The Court notes that regardless of the potential impact of enforcing the Restoration Act, the Court will ultimately base its decision on the legality of the bingo machines at issue here. The alleged beneficial impact of revenue from Speaking Rock does not entitle Defendants to engage in illegal activity to ensure the facility's viability.

existence. *See* Resp. to Appl. Ex. C. (attaching a letter from a local pastor claiming that Speaking Rock "has had a very positive impact on the community," a letter from an El Paso City Council member claiming "unanimous" support among council members for Speaking Rock and lauding its "great cooperation" with the police department, and a letter from a county judge characterizing Speaking Rock as a "valuable community asset"). Contrarily, Plaintiff has provided no specific evidence of the impact on the State of Texas of the continued operation of Defendants' allegedly unlawful machines.

Further, denying an injunction here "promotes the paramount federal policy that Indians develop independent sources of income and strong self-government," *Seneca-Cayuga*, 874 F.2d at 716, and respects "Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development[,]" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983).

In this case, the Court holds that the State of Texas has not carried its heavy burden of showing a clear entitlement to the drastic remedy of a mandatory preliminary injunction. Thus, the Court concludes that declining to grant an injunction until it has completed a full review on the merits is a more judicious course.

IV. CONCLUSION

The Court concludes that while it adopts the R&R's suggestion to deny Plaintiff's Application for Preliminary Injunction, it rejects the reasoning on which the R&R is based. Unlike the Magistrate, the Court concludes that the State of Texas may pursue injunctive relief in federal court for violations of the Restoration Act. However, the Court finds that the State of Texas has not carried its burden of showing an entitlement to preliminary injunctive relief in this particular case.

Accordingly, **IT IS ORDERED** that the Magistrate's Report and Recommendation (ECF No. 64) is **ACCEPTED** insofar as it recommends denying preliminary injunctive relief, but **REJECTED** in its proposed reasoning.

IT IS **FURTHER ORDERED** that Plaintiff State of Texas's "Application for Preliminary Injunction" (ECF No. 9) is **DENIED**.

SIGNED this 29 day of March, 2018

/s/ Philip R. Martinez
PHILIP R. MARTINEZ
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50400

STATE OF TEXAS,

Plaintiff - Appellee

v.

YSLETA DEL SUR PUEBLO; THE TRIBAL COUNCIL; TRIBAL GOVERNOR MICHAEL SILVAS OR HIS SUCCESSOR,

Defendants - Appellants

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

ON PETITION FOR REHEARING EN BANC

(Filed May 12, 2020)

(Opinion _____, 5 Cir., ____, ____ F.3d ____)

Before Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR.

R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Don R. Willett
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS, **Plaintiff,**	§	
v.	§	
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR, **Defendants.**	§	
_____	§	**EP-17-CV-179-PRM**
YSLETA DEL SUR PUEBLO, the TRIBAL COUNCIL, and the TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR, **Counter-Plaintiffs,**	§	
v.	§	
KEN PAXTON, in his official capacity as Texas Attorney General, **Counter-Defendant.**	§	

ORDER STAYING PERMANENT INJUNCTION

Filed 03/28/19

On this day, the Court considered the "Pueblo Defendants' Motion and Memorandum in Support of Motion to Stay Judgment and Injunction Pending Appeal" (ECF No. 197) [hereinafter "Motion to Stay"], filed on March 22, 2019, and "Plaintiff Texas's Response to the Pueblo Defendants' Motion and Memorandum in Support of Motion to Stay Judgment and Injunction Pending Appeal" (ECF No. 200) [hereinafter "Response"], filed on March 27, 2019, in the above-captioned cause.[1] After due consideration, the Court is of the opinion that the Motion to Stay should be granted, for the reasons that follow.

I. LEGAL STANDARD

"The Supreme Court has repeatedly stated that a four-factor test governs a court's consideration of a motion for stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360 (5th Cir.

[1] The Tribe requested a hearing on its Motion to Stay. Pueblo Defs.' Request for Hearing, Mar. 22, 2019, ECF No. 199. After considering the parties' briefs, the Court is of the opinion that no hearing is necessary.

2013) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

Regarding the applicant's likelihood of success on the merits, "the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). Ultimately, a stay "is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 10–11 (1942).

II. ANALYSIS

The Court believes that its "Memorandum Opinion and Order" (ECF No. 183), entered on February 14, 2019, accurately applies the Fifth Circuit's decision in *Ysleta del sur Pueblo v. Texas* ("*Ysleta 1*"), 36 F.3d 1325, 1335 (5th Cir. 1994). Nonetheless, the Court recognizes that a higher court—the Fifth Circuit panel, the Fifth Circuit sitting en banc, or the United States Supreme Court—may carefully consider the meaning of "regulatory jurisdiction" and determine that the Permanent Injunction subjects the Tribe to regulatory jurisdiction. Significantly, the Court believes that the precise meaning of "regulatory jurisdiction," as used in § 107(b) of the Restoration Act, remains unclear. *See* Mem. Op. & Order 20 ("The Court recognizes the Tribe's frustration

that *Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming."). Since § 107(b)'s practical effect is a serious legal question, the Court is of the opinion that the Tribe has a sufficient likelihood of success on the merits to support a stay.

In addition, the Court believes that the balance of equities weighs heavily in favor of a stay. The State contends that the "Court has already weighed the equities" and that, in its Memorandum Opinion and Order, the Court resolved the equities in the State's favor. Resp. 5. However, when the Court previously balanced the equities, the Court did so based on its interpretation of § 107(b) of the Restoration Act. *See* Mem. Op. & Order 36–40. Now, in considering the Tribe's Motion to Stay, the Court is permitted to assume that the Fifth Circuit might determine that the Permanent Injunction subjects the Tribe to "regulatory jurisdiction." Therefore, the Court reweighs the equities in light of the anticipated appeal. Since the posture of a motion to stay is different than that of a motion for summary judgment, the Court may reach—and does reach—a different conclusion.

Regarding the harm faced by the parties, the Court has previously noted that the State has an interest in enforcing its laws. *See* Mem. Op. & Order 35-36. Notwithstanding the State's interest, the Court believes that the status quo should be maintained throughout the pendency of an appeal. Essentially, any harm to the State as a result of a stay is temporal: if a stay is granted, then the State's ability to enforce its

laws is frustrated only for the duration of an appeal. At the end of the appellate process, the State will be able to enforce the injunction if the Court of Appeals determines that the injunction should remain undisturbed.

On the other hand, the harm that the Tribe faces is truly irreparable. The injunction will impact the lives of many members of the Pueblo community. The Court is mindful that Speaking Rock is a primary employer for the Tribe's members and that Speaking Rock's revenue supports significant educational, governmental, and charitable initiatives. *See* Mot. to Stay 7–8. Specifically, the Tribe contends that "[i]n 2017, the aggregate economic impact of operations at Speaking Rock was $161.5 million, with $91.7 million in value-added, and 1,156 total jobs with labor income of approximately $39.3 million." *Id.* at 8. In the event that the Court's Memorandum Opinion is reversed on appeal, the longstanding effects associated with the loss of employment and a loss of funding for social services could not be ameliorated by reinstating Speaking Rock's bingo activities. On balance, the Court believes that the harm faced by the Tribe absent a stay exceeds the harm faced by the State. Thus, the equitable considerations support the issuance of a stay throughout the pendency of any appellate proceedings.

In conclusion, the Tribe presents a serious legal question on appeal, and the balance of equities heavily favors a stay. Accordingly, the Court concludes that enforcement of its February 14, 2019, Memorandum

Opinion and Order as well as its Permanent Injunction, entered on this date, should be stayed pending a final ruling on the Pueblo Defendants' appeal.

III. CONCLUSION

Accordingly, **IT IS ORDERED** that the "Pueblo Defendants' Motion and Memorandum in Support of Motion to Stay Judgment and Injunction Pending Appeal" (ECF No. 197) is **GRANTED**.

IT IS FURTHER ORDERED that enforcement of the "Memorandum Opinion and Order" (ECF No. 183), issued on February 14, 2019, and the Permanent Injunction, entered on this date, is STAYED pending a final ruling on the Pueblo Defendants' appeal of the Court's orders in the above-captioned cause.

IT IS FINALLY ORDERED that, if the Permanent Injunction remains undisturbed when the appellate process is complete, then the Permanent Injunction shall become effective ninety (90) days after all opportunities for appeal have been exhausted.[2]

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[2] Opportunities for appeal will be considered "exhausted" when the Tribe has no further avenues available for appeal—either because all possible appeals have been decided, or because the deadline to file any further appeals has passed.

SIGNED this 28 day of **March, 2019**.

/s/ Philip R. Martinez
PHILIP R. MARTINEZ
UNITED STATES
DISTRICT JUDGE

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.

[SEAL]

Ysleta del Sur Pueblo Council
Resolution Number TC-02-86

WHEREAS, on December 16, 1985, the United States House of Representatives passed H R 1344, a bill to provide for the restoration of the federal trust relationship to the Ysleta del Sur Pueblo (Tigua Indian Tribe of Texas), and H R 1344 is now before the United States Senate for consideration, and,

WHEREAS, after hearings on H R 1344 before the House Committee on Interior and Insular Affairs on October 17, 1985, the Comptroller of Public Accounts for the State of Texas raised concerns that H R. 1344 would permit the Tribe to conduct high stakes gambling and bingo operations to the detriment of existing charitable bingo operations in the State of Texas, and,

WHEREAS, the Comptroller urged members of the Texas Congressional Delegation to defeat H. R. 1344 unless the bill was amended to provide for direct application of state laws governing gaming and bingo on the reservation, and,

WHEREAS, the Ysleta del Sur Pueblo has no Interest an conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law, and,

WHEREAS, an response to the concerns voiced by the Comptroller and other officials, the Tribe attempted to insure that H. R 1344 would give the Tribe no competitive advantage in gaming operations by agreeing to amend H R 1344 to provide that any gaming activities on the reservation would be conducted pursuant to tribal law that would be required to be identical to state law, and N R 1344 was so amended by the House Interior Committee, and,

WHEREAS, some state officials and members of the Texas congressional delegation continue to express concern that H. R. 1344, as amended, does not provide adequate protection against high stakes gaming operations on the reservation, and,

WHEREAS, the proposal that H. R. 1344 be amended to make state gaming law applicable on the reservation continues to be wholly unsatisfactory to the Tribe in that It represents a substantial infringement upon the Tribes' power of self government, is Inconsistent with the central purposes of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other tribes who desire to operate gaming facilities and are presently resisting attempts by State to apply their law to reservation gaming activities, and,

WHEREAS, the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation, and,

WHEREAS, although the Tribe, as a matter of principle, sees no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country, the Tribe strongly believes that the controversy over gaming must not be permitted to jeopardize this important legislation, the purpose of which is to ensure the Tribe's survival, protect the Tribe's ancestral homelands and provide the Tribe with additional tools to become economically and socially self-sufficient,

NOW THEREFORE BE IT RESOLVED, that the Ysleta del Sur Pueblo respectfully requests its representatives in the United States and House of Representatives to amend Section 207 of H R 1344 by striking all of that section as passed by the House of Representatives and substituting in its place language 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

DATE: 3-12-86

APPROVED /s/ Miguel Pedraza
Miguel Pedraza Jr.
Governor

I certify that the foregoing Resolution has been approved and IS recorded in the Minutes of the March 12, 1986 Meeting of the Ysleta del Sur Pueblo – Council

DATE: March 12, 1986

CERTIFIED /s/ Raymond Ramirez
Raymond Ramirez
Superintendent