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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	**No. 03:17-CV-00179 PRM**
v.	§	
	§	
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR,	§	
	§	
Defendants.	§	
	§	

PUEBLO DEFENDANTS' RESPONSE TO TEXAS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

RESPONSE

This litigation is the latest attempt by Plaintiff to have the federal courts declare gaming activity conducted on the reservation and lands of the Ysleta del Sur Pueblo to be in violation of federal law – specifically the Ysleta del Sur Pueblo Restoration Act. The Pueblo Defendants as the court has previously recognized "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." ECF No. 77 at 37. In their ongoing effort to comply with requirements of this "twilight zone" of uncertainty, the Pueblo Defendants have established a bingo regulatory system under the laws of the Pueblo under which the sovereign non-party Ysleta del Sur Pueblo Fraternal Organization ("Fraternal Organization") offers the gaming activity of bingo. That offering includes the use of aids to play bingo known as cardminders. As this Court confirmed when denying the Plaintiff's motion for preliminary injunction, these aids to play have been meticulously crafted precisely to comply with Texas law.

Plaintiff filed its Motion for Summary Judgment and Permanent Injunction ("Motion") seeking two separate remedies. First, that Plaintiff argues it is entitled to a declaratory judgment finding that the Pueblo's bingo *gaming activiy* violates Chapter 47 of the Texas Penal Code, and that the bingo gaming activity therefore constitutes a nuisance under Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a)(5). Second, Plaintiff asks the Court to enter a permanent "obey the law" injunction.

Throughout this case, Plaintiff has ignored the fact that bingo is the "gaming activity" and the bingo cardminders are simply an "aid to play." Plaintiff has instead argued that the bingo cardminders themselves offer the chance, to win a prize, for consideration. However, that is just what bingo is. The Bingo Enabling Act defines "[b]ingo" as "a specific game of chance, commonly

known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random." Op. Tex. Att'y Gen. No. GA-0541 (2007). Plaintiff also argues, without reference to any Texas law that might apply, that the cardminders exhibit "Vegas style qualities" and should for that reason alone be held to violate the federal Restoration Act. Now, after significant discovery, Plaintiff still takes that same position but this time citing every bingo regulation – not law – that exists. Plaintiff is well aware that the State of Texas has no regulatory jurisdiction over Defendant, but Plaintiff still seeks to have this Court force the Pueblo Defendants' "compliance with Texas regulations." (*See* Doc. 121, ¶ 157). This Court is also well aware of the federal "prohibition on the State's exercise of regulatory authority over Defendants . . . ." Doc. 77 at 37.

However, the Motion—and Plaintiff throughout this entire case—have failed to distinguish between what a law and what a regulation is.[1] Plaintiff has continually lumped both law and regulations into their pleadings and arguments in an effort to have this Court rule that the Pueblo's conduct violates federal law because Plaintiff thinks the bingo conducted by the Fraternal Organization looks bad. Yet in response to discovery by the Pueblo Defendants asking Plaintiff to identify the difference between a law and a rule, Plaintiff has responded:

> In some circumstances, there is a difference between the terms "law and "rule," while in others, there is not. It is possible for provisions called "rules" to apply with the force of law, depending upon the circumstances.[2]

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[1] *See*, e.g., Plaintiff's Response to Defendants' First Set of Interrogatories, NO. 3 (Exhibit F):
Do you contend that there is a difference between the terms "law" and "regulation"? If your answer is yes, please explain the difference.
ANSWER: Texas objects . . . that **the terms "law" and "regulation"** are not defined in these interrogatories, and **are vague, ambiguous, and subject to multiple interpretations**.

[2] October 4, 2018 Letter. Plaintiff provided a mirror response when asked about a difference between the terms "rule" and "regulation."

Plaintiff is not allowed to pick and choose under "some circumstances" when a law is a regulation or a rule, and therefore prohibited from enforcement on the Pueblo under the Restoration Act, and when it is not. Defendants have carefully developed the regulatory structure for the conduct of the gaming activity of bingo on the reservation and lands of the Pueblo, including allowing the aid to play of cardminders, and have done so to comply with the Restoration Act and this Court's orders. Therefore, Plaintiff's Motion should be denied. [3]

I. INTRODUCTION

Congress has confirmed the Pueblo's sovereign right to engage in all *gaming activity* not *prohibited* by *the laws of the State of Texas*. P.L. 100-89 Section 107(a).[4] This case requires the Court to apply this section of the Restoration Act, and in the process determine the meaning of the terms "gaming activity," "prohibited," and "laws of the State of Texas." Bingo is a gaming activity.[5] Bingo is not prohibited by the laws of the State of Texas. Electronic video devices that operate as card minders are not a "gaming activity." And the use of electronic video devices that

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[3] In addition to denying the Plaintiff's motion for summary judgment, after viewing the evidence the Court may enter judgment in favor of Plaintiff. 10A Wright, Miller & Kane § 2720 ("The weight of authority, however, is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under Rule 56."); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.71[3] (3d ed. 1999); *Goldstein v. Fidelity Insurance Underwriters, Inc.*, 86 F.3d 749 (7th Cir. 1996) ("[b]oth parties ... were on notice that summary judgment was being considered." *Id.* at 750. Simply because the district court agreed that the moving party "was right about the facts but wrong on his assertion that he was entitled to judgment as a matter of law" is insufficient to conclude that summary judgment is procedurally improper. *Id.* at 751.

[4] The Restoration Act, Pub. L. No. 100-89, 101 Stat. 66 (Aug. 6, 1987), was formerly codified at 25 U.S.C. 1300g-1, et seq. However, it is now omitted from the U.S. Code.

[5] See, e.g., Plaintiff's Response to Defendants' Request for Admission no. 12 (Exhibit E): Admit that bingo is a "gaming activity" under the Restoration Act.

RESPONSE: . . . Texas responds as follows: admit that games of chance, prize, and consideration are gaming activity under the Restoration Act; admit that games of chance, prize, and consideration are gaming activity under the Restoration Act; **admit that bingo as defined by the Bingo Enabling Act (TEX. OCC. CODE § 2001.001 *et seq.*) is a gaming activity under the Restoration Act.**

operate as card minders is not prohibited by the laws of the State of Texas. *See* Tex. Occ. Code Ann. § 2001.002(5) (defining bingo equipment as including an "electronic or mechanical cardminding device").[6] Congress has also confirmed that Texas' regulatory scheme cannot be applied by the Court to the Ysleta del Sur Pueblo. P.L. 100-89 Section 107(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.").

Over fifteen years ago, when the Pueblo was operating a Class III gaming facility, this Court entered an injunction prohibiting all gaming activity by the Pueblo. *Texas v. Ysleta Dl Sur Pueblo*, No. EP-99-CA-0320, ECF No. 115 (W.D. Tex. Order of Sept. 27, 2001) ("Ysleta I").[7] The Pueblo complied, and the Court then amended the injunction to allow the Pueblo to engage in gaming that is not prohibited by the laws of the State. *Id.* ECF No. 165 at 16 (Order of May 17, 2002) ("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. As such, the Tribe may participate in legal *gaming activities*." (Emphasis added)). This Court also confirmed that Texas cannot regulate the Pueblo's gaming activities. *Id.* at 17 ("The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the Commission. It is not.").

That injunction, and the disputes regarding its application and interpretation, led to a decade and a half of litigation in both the District Court and the Fifth Circuit. Ultimately, this Court

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[6] Although cited herein, the state statutes that discuss legal bingo do not apply to the Pueblo to the extent they are regulatory in nature and thus prohibited by the Restoration Act.

[7] Class III gaming under the Indian Gaming Regulatory Act means Las Vegas style gambling, and includes the gaming activities of craps, roulette, and card games such as poker and Blackjack. *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1333 (5th Cir. 1994) (identifying "gaming activities" at issue).

eliminated from the injunction the requirement that the Pueblo Defendants seek advisory opinions from the Court in advance by submitting proposals of any gaming activity. *Id.* at ECF No. 608 at 2 (Order of May 27, 2016).

Nevertheless, Plaintiff continues to ask this Court to return to the status of a regulatory body overseeing gaming activities on the Pueblo's reservation and lands. Texas Constitution Article 3, Section 47(b) allows bingo to be conducted in Texas, but limits its application to five categories of organizations, excluding Indian tribes. The Texas Constitution does not regulate the means by which bingo can be conducted. Instead, it leaves regulation to the legislature and executive branches of government, pursuant to which the means of conducting bingo are spelled out in various Texas regulations.

II. FACTUAL BACKGROUND

A. Is it Bingo?

The bingo offered on the Ysleta del Sur Pueblo's reservation at Speaking Rock Entertainment Center ("Speaking Rock") is charitable bingo conducted by the Fraternal Organization. All net profit received by the Fraternal Organization is directed to charitable causes including the Ysleta del Sur Pueblo to help meet governmental and charitable needs of the tribe including education, healthcare, public safety, economic development, cultural preservation, and recreation and wellness. *See*, e.g., preliminary injunction hearing testimony, Volume 1, at 197-212 (testimony of Tricia Boodhoo); at 212 to 227 (testimony of Frances Hernandez); at 227 to 239 (testimony of Anna Silvas) Exhibit J.

See Plaintiff's Ex. A. at 2:19 (entrance to Speaking Rock). At all times, there is a live bingo calling of numbers by a bingo caller.

See Plaintiff's Ex. A at 4:23 (showing bingo caller). Customers at Speaking Rock can play bingo using paper bingo cards, and can use aids to play including hand held bingo cardminders and stationary card minders.

[8]

All bingo numbers used on the stationary bingo card minders are from historical live ball draws made by a bingo ball caller during live games conducted at Speaking Rock.

[8] *See* Plaintiff's Exhibit A at 12:21.

[9]

The stationary cardminders operate as follows:

- All the bingo cardminders are bingo based and use historical ball draws. Ex. A at 27:17; 28:2-7.

- Bingo cardminders could have unlimited bingo cards. Ex. B at 22:12-13.

- The software for the bingo cardminders display bingo in entertaining fashion with graphics that have no bearing on the game, but it "it's still playing a bingo game." Ex. A 26:4-13.

- The gaming interface graphics, spinning wheels, lights, and sounds only purpose is entertainment. Ex. A at 38:11-17.

- "All of the games are bingo-based. They can choose their bingo cards, and then they would basically say, go ahead and play the game. Ex. A at 27:14-18.

- The bingo cards on each server are arranged on the server in a stack. Ex. A at 30:11-25; Ex. C at 26:12-25.

- The server (located at Speaking Rock) then pulls the next historical ball draw from the stack and when the player presses play, the server applies the numbers from that historical ball draw to the player's bingo cards to determine whether the bingo card the player has is a winner. The winning pattern will be displayed on the bingo card on the face of the cardminder. Ex. A at 34:23—35:3; 47:13-23; Ex. C at 24:18—25:3

- The determination of whether a player wins a prize is determined by "the balls that were drawn, the bingo card, and how many – how long it took to get a winning pattern and which winning pattern [was obtained]." Ex. A at 39:21-24.

Playing bingo using a stationary bingo cardminder

- A patron inserts cash or a ticket, punches a button, a bingo card appears and the bingo card gets daubed. Ex. B at 43:11-18; *see also* Ex. M.

- A "session will be established with that customer with the card monitor and with the back-end server. The System with check for a quorum [of at least two]. If the quorum is met, the

[9] *See* Plaintiff's Exhibit A at 28:54.

[bingo game] will proceed with the bingo play. Therefore, there must be two players for each game of bingo. Ex. C at 23:3-12.

- The player can choose between different bingo cards. Ex. A at 29:10-23.
- If a player doesn't choose a bingo card, players are "automatically given . . . the next card in the deck. The same way if you went to a bingo hall." Ex. A at 30. 4-8.
- "The game will draw historical ball draws . . . it contacts a server, gets the ball draws for that particular session, presents the ball draws for that session. And the game determines then, based on the balls that were drawn and the bingo card that they had, whether there was a win or not." Ex. A at 28:2-9.
- There are no random number generators. Ex. A at 56:18-23.
- There is no chance during bingo cardminders play. Because the bingo cardminders operate on historical ball draws, every game of bingo played is already determined before a player even plays the game of bingo on the cardminder. Ex. A at 28:2-7.

Bingo is a gaming activity that is not prohibited by Texas law. Plaintiff through its conflation of what is a law and what is a regulation has at best created a mixed question of law and fact.

III. STANDARD OF REVIEW

Summary judgment is only appropriate if no genuine issue of material fats exists. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for a summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Courts "may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* at 656.

Mixed questions of law and fact are questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982).

The issue of whether the activity at Speaking Rock is bingo as defined by Texas law is simple and straightforward. Whether the stationary card minders are just that – cardminders and an aide to play – is a mixed question of law and fact to be decided by this Court and a jury at trial.

IV. ARGUMENT

A. Bingo is a gaming activity that is not prohibited by the laws of the State of Texas.

Federal law confirms that the Pueblo may offer on its reservation and lands gaming activities that are not prohibited by the laws of the State of Texas. Bingo is a gaming activity that is not prohibited by the laws of the State of Texas. A subsidiary question is whether offering cardminders as an aid to play is itself a gaming activity, and if so, whether it is a gaming activity that is prohibited by the laws of the state of Texas. *See* Exhibits "H-1" and "H-2." If something is not a gaming activity, the Plaintiff has no authority to impose regulations upon it. If something is a gaming activity but is one not prohibited by the laws of the State of Texas, then it is not prohibited on the reservation and lands of the Ysleta del Sur Pueblo. However, if the answer is that a gaming activity is prohibited by the laws of the State of Texas (activity such as craps and roulette) then that gaming activity is prohibited on the reservation and lands of the Pueblo.[10]

[10] Once the Court has established a definition for "gaming activity," it will be up to the finder of fact to determine whether any given factual aspect of a specific bingo offering falls within the Court's definition. Attached as Exhibit H-1 and H-2 are flow charts representing Defendants understanding of the required analytical process.

The Restoration Act does not define the term "gaming activity." But the Fifth Circuit has addressed the proper definition of that term under the Restoration Act. In order to determine whether a bingo cardminder is a "gaming activity" and thus subject to prohibition under the Restoration Act, or instead only an aid to play subject not to Texas law but only Texas regulation, this Court must first define "gaming activity."[11]

When there is no statutory definition available, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning of the term [at issue] at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citation omitted). Applying this canon of construction here, the term "gaming activities" as used in Subsection 107(a) must be given its ordinary, contemporary, common meaning. That meaning is limited to the playing of the game, and cannot be extended to activities that do not impact the playing of the game.[12]

At the time Congress enacted the Restoration Act, the term "gaming activity" referred to an actual game of chance, not any restrictions governing the circumstances under which the game may be played. *See, e.g., U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990) (defining "[t]he gaming activity in issue" in that case as simply the game of blackjack, and not including state regulation imposed on the "gaming activity"). "The 'gaming activit[y]' is ... the

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[11] Once the Court has established a definition for "gaming activity," it will be up to the finder of fact to determine whether any given factual aspect of a specific bingo offering falls within the Court's definition. Attached as Exhibits H-1 and H-2 are flow charts representing Defendants' understanding of the required analytical process.

[12] Any definition extending beyond the playing of the game would render Subsection 6(b) superfluous, violating the fundamental principle of statutory construction that every clause of a statute should be given effect and no language treated as mere surplusage. *See Bailey v. U.S.*, 516 U.S. 137, 146 (1995); *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

gambling." *Harris v. Lake of Torches Resort & Casino*, 2015 WI App 37, ¶ 24, 363 Wis. 2d 656, 862 N.W.2d 903 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792, 134 S. Ct. 2024, 2033, 188 L. Ed. 2d 1071 (2014)). Indeed, in its 1994 opinion in this case the Fifth Circuit itself accepted and applied this definition of "gaming activities." *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1331 note 17 (5th Cir. 1994).

The term "gaming activities" in the Restoration Act cannot be read to incorporate any of the State's auxiliary regulatory restrictions. The State imposes these auxiliary regulatory restrictions, including licensing and other time, place and manner controls, to address the conduct of bingo operations subject to the state's full regulatory jurisdiction, which the Pueblo is not. These restrictions do not go to the playing of the game: the bingo game plays the same at 10 o'clock in the morning as it does at 10 o'clock at night; the bingo game plays the same whether the operator has a license, or it does not. Such restrictions that do not impact the playing of the "gaming activity" are regulatory and are therefore prohibited from application to the Pueblo by Subsection 107(b) of the Restoration Act. *See Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) ("[The Bingo Enabling Act] **regulates** all bingo-related activities, including the types of games played, game frequency and times, and bingo-employee qualifications." (emphasis added)).

As to the specific operations challenged by Plaintiff, none of the operations impact the playing of the game. The game plays exactly the same whether cash is put into a cardminder, or it is not. The game plays the same whether the cardminder tracks winnings, or it does not. And the game plays the same whether the cardminder dispenses a prize, or it does not. Plaintiff simply wishes to regulate the gaming activity of bingo when it is conducted on the Pueblo's reservation and lands, in violation of Restoration Act section 107(b).

Any other interpretation of "gaming activity prohibited by the laws of the State of Texas" eviscerates Congress' grant of gaming authority to the Pueblo, and its denial of regulatory power to the State of Texas. It strips both Subsection 107(a) and Subsection 107(b) of all meaning – the right of the Pueblo in subsection 107(a) to engage in all "gaming activities" not prohibited by Texas law disappears completely, as does the prohibition against Texas regulatory jurisdiction in Subsection 107(b).

B. Texas's Regulations Do Not Apply

No party in this pending action disputes that bingo is a gaming activity.[13] And the parties agree that bingo is not prohibited by the laws of the State of Texas.[14] Texas Constitution, article III, section 47(b), adopted in 1980 and known as the "bingo amendment" provides that "[t]he Legislature by law may authorize **and regulate** bingo games" conducted by certain entities. Tex. Const. Art. 3, § 47(b) (emphasis added).

The Bingo Enabling Act, passed by the Texas Legislature, serves both of these two functions: (1) it authorizes bingo; and (2) it regulates bingo by establishing a regulatory scheme overseen by the Texas Lottery Commission. *See* Tex. Occ. Code Ann. § 2001.001 *et seq.*; *see also Dep't of Texas,* 760 F.3d at 437 ("[W]e hold that the Bingo [Enabling] Act creates a regulatory regime that grants the Charities a benefit—in the form of a license—to conduct bingo games . . .").

Portions of the statute that are regulatory cannot apply to the Pueblo, and mere reference to or incorporation of regulatory requirements does nothing to change that result. Indeed, for this Court to hold otherwise would result in a judicial grant of regulatory jurisdiction to Texas that was

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[13] *See supra* note 5.

[14] The Pueblo is not restricted to offering "gaming activities" allowed by the State of Texas. It is only prohibited from offering gaming activities "prohibited by" the laws of the State of Texas.

denied to the state by Congress. *See Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.").

For bingo occurring within the regulatory jurisdiction of the state, this scheme provides a regulatory structure and regulatory directives. For bingo being offered pursuant to the Restoration Act,[15] the application of Texas' scheme is limited to the Constitution and those portions of the enabling act that are not part of the constitutional directive that the legislature "regulate" bingo games. *Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419, at *3 (W.D. Tex. Aug. 4, 2009) ("In 2002, Judge Eisele recognized the tension that existed between Chapter 2001 of the Texas Occupations Code on the one hand and the Restoration Act, 25 U.S.C. § 1300g, on the other."). Specifically, the Court has wrestled with where to draw the line between "inapplicable regulation" and a "prohibited gaming activity," and to do so in a way that would honor Congress' denial of "civil or criminal regulatory jurisdiction to the State of Texas." This tension was born in *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1335 (5th Cir. 1994) ("Ysleta I"), when the Fifth Circuit held that the Restoration Act "would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law."[16] *Id.* at 1335. The court's use of the phrase "surrogate

[15] Bingo is conducted pursuant to federal (not state) law and regulation at Fort Bliss. See Exhibit K (Fort Bliss Letter and attachments) and Exhibit L (email between counsel).

[16] Although on one occasion the Ysleta I Court refers to "surrogate federal law and regulations," any inclusion of "regulations" in that phrase is dicta, as the issue of the State's regulatory jurisdiction is specifically dealt with in the Restoration Act, and in any event the issue did not "[receive] the full and careful consideration of the court that uttered it." *U.S. v. Segura*, 747 F.3d 323, 328-29 (5th Cir. 2014) (holding a statement in previous Fifth Circuit case relied upon by appellant is dictum because the statement was not necessary to the resolution of the issue and the court did not rely upon it in rejecting the issue). Further, the inclusion of "regulations" by the Ysleta I Court is inconsistent with the plain language of the Restoration Act prohibiting State regulatory authority over Pueblo gaming. 25 U.S.C. § 1300g-6(b) ("No State regulatory

federal law" is problematic for two reasons: (1) Because it is dicta; and (2) because it was not called upon to analyze, nor did it analyze or consider, that state law was only assimilated into the Restoration Act's federal enforcement scheme to provide federal prosecutors with a mechanism to exercise federal "jurisdiction over any offense in violation of subsection (a) of this section." Subsection 107(c).

Plaintiff's Motion exploits this tension by repeatedly conflating Texas law and regulations interchangeably, and in the process ignores this Court's recognition of the problem that creates:

> Texas is advised to take account that this is not a Texas state court and the Pueblo Defendants are not the usual Texas citizens, rather they are a sovereign nation. **There are complex issues of federal law overlapping the interpretation of these Texas state gaming statutes that Texas has failed to acknowledge**.

No. 3:99-CV-00320-KC ECF 150 at 69-70 (emphasis added). Even through discovery, Plaintiff has not been able to articulate the difference between a law and a regulation.[17] However, Plaintiff's Motion is nothing short of a regulation minefield listing extensive regulations in an attempt to persuade this Court that bingo activity conducted on the Pueblo's reservation and lands is "unlawful." However, nowhere in Plaintiff's Motion does it define what Texas law is, nor define what are regulations that clearly cannot be used to limit or define the Tribe's gaming activity under Section 107(b).

C. No Texas Law Prohibits the Bingo Operations at Speaking Rock

Plaintiff recites Chapter 47 of the Texas Penal Code and states that because the bingo at Speaking Rock contains the elements of chance, prize, and considerations, the bingo at Speaking

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jurisdiction. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."). *See also State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CA-0320, ECF No. 115 (W.D. Tex. Order of Sept. 27, 2001) ("The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the Commission. It is not.").

[17] *Supra*, N. 1 and 2.

Rock violates Chapter 47 of the Texas Penal Code. However, every game of bingo, which is a lawful gaming activity under the laws of Texas, inherently consists of prize, chance, and consideration. Bingo is specifically allowed under the Texas Constitution, and is a gaming activity authorized under the Bingo Enabling Act. Plaintiff has failed to differentiate between a law and regulation, and therefore does not and cannot present any evidence as to which Texas laws the bingo cardminders are alleged to be violating. Further to that point, Plaintiff's own Motion admits: "[t]he Bingo Enabling Act does not expressly approve of nor directly contemplate, the use of historical ball draw date, and *the regulations* passed by the Texas Lottery Commission contemplate that bingo must be played as a live-called game." Doc. 146 at 16 (emphasis added).[18] Texas *law* does not prohibit historical ball draws, aids to play bingo, or the type of bingo being offered at Speaking Rock. *Id.*

Plaintiff argues that because the bingo cardminders look like Vegas, and because El Paso is not Vegas, these bingo cardminders are prohibited under the Restoration Act.[19] However, the Pueblo Defendants have meticulous and carefully designed a regulatory structure to ensure that bingo cardminders are offered as an aid to play and are therefore not gaming activities, and are outside the scope of Texas regulatory control. Plaintiff has failed to show that the following are "gaming activities" nor does it show that there are state law restrictions as to:

- How entertaining a game of bingo can be;
- Playing bingo has to be a social game;
- The use of pre-drawn games rather than a live reading of bingo calls;
- How well lit a bingo hall must be;
- Whether a bingo hall must have clocks;

[18] Plaintiff further points out that "Because there are no affirmative provisions of Texas law authorizing historical ball data, and there are affirmative provisions in Texas's regulations prohibiting it. Doc. 146 at 17.

[19] As Texas regulations concede, there is no requirement that bingo needs to look a certain way to be a legal gaming bingo. *See*, e.g. Pull-Tab Bingo authorized under Section 402.300 which does not look like "traditional bingo."

- Whether two players must socialize during a game of bingo;
- The use of historical ball draws
- Whether bingo cardminders may "mimic slot machines or the environment in which they are normally found."
- The amount of time it takes to play a game of bingo.

Additionally, there are no restrictions under Texas law regarding bingo cardminders as to the following:

- Bingo cardminders must be hand held; must be a certain size; can make noise, and if so the noise they can make; may include non-bingo entertainment on the card-minder screen; do not have to show the bingo card on the screen; do not have to be used in a social environment; may contain visual game reel on the screen. See Exhibits "B" and "M."

The Pueblo's bingo fits squarely in the definition of bingo.[20] The definition does not include any aids to play, such as bingo cardminders, confirming that aids to play are not part of the gaming activity of bingo.

D. Bingo at Speaking Rock does not constitute a nuisance

Plaintiff alleges that the Pueblo Defendants are violating Section 125.0015(a)(5) of the Texas Civil Practice and Remedies Code, because gambling, gambling promotion, or communicating gambling information is prohibited by the Penal Code. However, as detailed above, the conduct of bingo at Speaking Rock is in fact not prohibited by the Texas Penal Code – or any other law. Simply put, bingo is not a violation of Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a)(5) (West).

Typically, gambling violations are investigated by local district attorney's offices. Ex. D. at 24:11-15. However, Speaking Rock has received no complaints from its local district attorney. In fact, Speaking Rock has received tremendous support from local leaders and the City of El Paso.

[20] Op. Tex. Att'y Gen. No. GA-0541 (2007).

See Exhibit I (Ysleta I, ECF No. 358-1 (exhibit to prior filing by the Pueblo Defendants, Oct. 1, 2013).

When asked through discovery how many complaints Plaintiff had received concerning the bingo operations at Speaking Rock – the answer was "None."[21] However, there is rampant gambling occurring across the State of Texas, and across El Paso County, Texas by non-sovereign entities (subject to Texas's regulatory control) that is not being investigated. Ex. D at 10-12; 14-17-22; 35-36; ("everybody in El Paso is doing it"); *see* Exhibit L.

E. Plaintiff has not established any, let alone all four, of the necessary elements for issuance of a permanent injunction.

In the second request for relief in Plaintiff's Motion, it seeks another permanent injunction against Speaking Rock.[22] But oddly enough, nowhere does Plaintiff explain why another injunction is necessary, nor does it offer any insight into what the language of the injunction would be, and what it would "enjoin." If the Court rules that some aspect of the offering at Speaking Rock is unlawful, then that aspect of the operations cannot be conducted pursuant to the Court's order. An injunction adds nothing to the determination of the issues in this case. Instead, what Plaintiff seems to be seeking is an "obey the law" injunction, which is improper. Federal Rule of Civil Procedure 65(d)(1) provides, "Every order granting an injunction ... must set the reasons why it was issued; state its terms specifically; and describe in reasonable detail ... the act or acts sought to be restrained or required." Rule 65(d) therefore prohibits "general injunction[s] which in

[21] Exhibit F, Interrogatory No. 25.

[22] There is already an injunction in place. *See* Ysleta 1, ECF No. 625. This Court rejected Plaintiff's most recent request for contempt of the existing injunction stating: "[the court] reiterates that if Plaintiff can establish through "clear and convincing evidence" that Defendants have violated an Order of this Court in the instant case, a motion for civil contempt is appropriate in the instant case."

essence order [ ] a defendant to obey the law." *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).[23]

To obtain a permanent injunction, a plaintiff must establish (1) actual success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest." *Enrique Bernat F., S.A. v. Guadaljara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000).

But Plaintiff has not, and cannot, establish that there is a "substantial threat that it will suffer irreparable injury absent the injunction." If the court identifies a "gaming activity" being offered by these defendants that is "prohibited by the laws of the state of Texas" then these defendants cannot offer that gaming activity, period. An injunction does nothing to change that.

i. Plaintiff has not proven it will actually succeed on the merits.

Critically, and as noted above, the Texas Constitution and the Texas Bingo Enabling Act allow the gaming activity of bingo to be offered in Texas. Using an electronic or mechanical card minding device is not a gaming activity. And even if it were, using an electronic or mechanical card minding device is not prohibited by the laws of the State of Texas. The devices targeted by Plaintiff in this Motion are card minding devices – they contain no random number generators and are directly linked to and reveal the results of actual, live bingo games conducted within the Speaking Rock Entertainment Center. Plaintiff has not and cannot offer any evidence to the

[23] This Court has confirmed that the prohibition against advisory opinions precludes any order requiring these defendants to seek permission in advance for a proposed gaming activity. ECF No. 608 at 2 (Order of May 27, 2016).

contrary. Most importantly, Plaintiff has still not cited any prohibition in Texas law that the Pueblo Defendants are violating.

ii. Plaintiff has not proven a substantial threat of irreparable injury if the injunction is not issued.

The Fifth Circuit Court of Appeals has acknowledged that "[w]ithout question, the irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). Plaintiff has not addressed what injury it claims it will suffer should the status quo remain in place until the Court has the benefit of a fully developed factual case presented to it by the parties. Plaintiff's only claimed injury in the absence of a preliminary injunction is its broad reference to a "fundamental interest in enforcement of its laws." ECF No. 146 at 19. But Plaintiff offers no facts to support this and instead cites to two cases that concern injury when the state is the target of the court ordered injunction. *Id.* (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (discussing when "a State is enjoined by a court from effectuating statutes") (citations omitted); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (discussing "[w]hen a statute is enjoined")). Those cases are simply not applicable here, where it is Plaintiff itself that seeks the injunctive relief. Plaintiff is not being enjoined from enforcing its laws, indeed it claims to be doing so by filing this action. Requiring the State to prove the merits of its case, rather than through disfavored injunctive relief, is not "irreparable harm."

iii. Balance of equities undoubtedly favors the Pueblo Defendants and the services provided to its members.

The Pueblo and its people do not beg at the foot of the federal government for the resources needed to provide government services to its people. The Pueblo is a sovereign government with full sovereign authority to develop its own resources to support its government operations. See

Ysleta I, ECF No. 483 at 3-5 (Order of Sept. 24, 2014). In the Restoration Act, Congress confirmed the Pueblo's right to offer gaming to support its government functions, and Congress denied the State of Texas the power to impose civil or criminal regulations on those operations. The Attorney General's argument is not only an outrageous insult, it ignores the fact that the State of Texas itself uses government sponsored lotteries to help pay for government services. Tex. Gov't Code Ann. § 466.355.

iv. Plaintiff has not proven that a permanent injunction will not disserve the public interest.

Plaintiff fails to note that the Texas Legislature and Texas voters have authorized bingo in the State of Texas. *See Owens v. State*, 19 S.W.3d 480, 484 (Tex. App. 2000); Tex. Const. art. III sec. 47 ("The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b) [charitable bingo games], (d) [charitable raffles], and (e) [state operated lotteries] of this section."); Bingo Enabling Act, Tex. Occ. Code Ann. § 2001. Thus, Plaintiff cannot argue that bingo violates the public interest.

In contrast to the State's anemic reference to legislative interest, Pueblo Defendants have previously provided abundant evidence that all levels of local government and citizens support the activities at Speaking Rock. *See* Exhibit I (Ysleta I, ECF No. 358-1 (exhibit to prior filing by the Pueblo Defendants, Oct. 1, 2013) (citing letters and resolutions in support from City Council, County Judge, and clergy)). Plaintiff cannot capture the public interest in a single paragraph, particularly where Plaintiff omits the public interest expressed through the Texas Constitutional provisions allowing comprehensive gaming, including a State lottery and bingo.

CONCLUSION

For these reasons, the Court should deny Plaintiff's Motion for Summary Judgment.

Dated: December 5, 2018 Respectfully Submitted,

By: _____

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