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

STATE OF TEXAS,	§	
	§	
Plaintiff/Counter-Defendant	§	
	§	**No. 03:17-CV-00179 PRM**
v.	§	
	§	**PUEBLO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM**
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR,	§	
	§	
Defendants/Counter-Plaintiffs.	§	
	§	

INTRODUCTION

The Federal Rules of Civil Procedure grant the Pueblo, its Governor and its Tribal Council ("Counter-Plaintiffs") the right to amend their answer once, and add a counterclaim, as a matter of course so long as they do so within twenty-one days of filing their initial answer. Fed. R. Civ. P. 15. There is no dispute that Counter-Plaintiffs timely filed their counterclaim pursuant to the rule. The Counter-Defendant's lament regarding the timing of the Defendants' counterclaim is therefore without merit. Also of no consequence is the Counter-Defendant's assertion that it thinks the counterclaims overlap the relief it sought as Plaintiff, because it is the Counter-Plaintiffs' right to seek a declaratory judgment in any case or controversy properly before this Court regardless of whether other relief is or could be sought. Finally, sovereign immunity is not a bar to a declaratory judgment action seeking no relief other than a declaration that the Counter-Defendant is violating the Equal Protection guaranties in the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. The Counterclaims are Properly Before the Court.

The Counter-Defendant does not contest that the Counter-Plaintiffs properly have raised their counterclaims, nor does the Counter-Defendant argue that this Court cannot properly determine the counterclaims. Instead, as to the declaratory judgment sought in the counterclaim, the Counter-Defendant makes a host of procedural arguments, none of which have merit

A. Counter-Plaintiffs Timely Filed Their Counterclaim.

The Federal Rules of Civil Procedure provide that a party may amend a pleading once as a matter of course, within twenty-one days after serving the pleading. Fed. R. Civ. P. 15. The right to amend an answer as a matter of course includes the right to add a counterclaim:

> An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course . . . .

Fed. R. Civ. P. 13 advisory committee's note (2009 amend.). Counter-Plaintiffs had the right "as a matter of course" to amend their answer once, and add a counterclaim, so long as they did so within twenty-one days of filing their initial answer. There is no dispute that Counter-Plaintiffs timely filed their counterclaim pursuant to the rules.

B. Counter-Defendant's Argument on the Merits is Premature and Not Properly Raised by Motion to Dismiss the Counterclaims.

Counter-Defendant argues that the Counter-Plaintiffs' "claim that 'Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act,' . . . cannot be squared" with case law [ECF No. 97 at 4]. But this argument on the merits of the counterclaim is of no import in a motion to dismiss:

> [The Court's] task, then, is "to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success."

Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 854 (5th Cir. 2012) (citing and quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)).

C. The Counterclaim Seeks Declaratory Relief That is in Addition to the Relief Available to the Counter-Plaintiffs Through Successful Defense of the Claims Made Against Them In the First Amended Complaint.

The Counter-Defendant argues – incorrectly – that the counterclaims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. But they do not argue that the counterclaims fail to state a claim, and instead simply argue that they should be dismissed because they "seek declarations which will be necessarily decided on the merits of Texas's existing claims." *See* Counter-Def.'s Motion at 3. Not only did Counter-Defendant fail to explain why it believes that is so, the contention itself is not correct.

To determine whether the relief sought in the counterclaims "will be necessarily decided on the merits" of the Plaintiff's existing claims requires a review of the claims raised in the First Amended Complaint – something the Counter-Defendant did not include in its motion to dismiss. The First Amended Complaint contains two counts. Count I seeks a declaration that "the operation of 'electronic bingo' slot machines and the Tribe's card minder and paper-based bingo violate Texas law" [ECF No. 8 ¶ 31], and a declaration that "these activities" – i.e. "the operation of 'electronic bingo' slot machines and the Tribe's card minder and paper-based bingo" also "constitute a common nuisance." Similarly, Count II only seeks an improper "enforce the law" injunction "to prohibit the Pueblo Defendants from violating federalized Chapter 47 Texas Penal Codes prohibitions on illegal lotteries."

Both Counts focus entirely on alleged violations of Texas statutes. But whether regulatory requirements codified in statues are not being followed – which is the specific request

in the First Amended Complaint – is irrelevant because the Counter-Defendant has no regulatory authority over the operations at issue in this action.[1] As a result, neither Counts I or II, limited as both are to "the operation of 'electronic bingo' slot machines and the Tribe's card minder and paper-based bingo" necessarily requires a ruling based on the First Amended Complaint as to whether (1) the simple game of bingo is a "gaming activity" as that phrase is used in the Restoration Act, (2) the laws of the State of Texas do not prohibit bingo as the word "prohibit" is used in the Restoration Act,[2] (3) machines, card minders and paper bingo cards are an aid to bingo and not a "gaming activity" as that phrase is used in the Restoration Act, or (4) "the manner" in which bingo is conducted [i.e., the way it is conducted as opposed to the "gaming activity" of bingo itself] is not a "gaming activity" as that phrase is used in the Restoration Act.[3]

As to the fifth requested declaratory ruling, the Court is asked to address whether the Counter-Defendant is in violation of the Restoration Act because of the way it is pursuing efforts to prohibit the otherwise legal "gaming activity" of bingo from being offered by the Counter-Plaintiffs. This is not an issue addressed in the First Amended Complaint. And as to this issue, it is not the fact that the Counter-Defendant is pursing litigation. Instead this request asks the Court to address: (1) the way in which it is doing so, and (2) the propriety of other actions it is taking to promote bingo in Texas while seeking to prohibit the Counter-Plaintiff from offering bingo. So, by way of example, Counter-Defendant's admission in its motion to dismiss that

[1] Restoration Act 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").

[2] In *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1332-33 (5th Cir. 1994) the Court of Appeals addressed the meaning of the word "prohibited" as used in Section 107(a) of the Restoration Act.

[3] *See* ECF No. 57 (Pueblo Defendants' Memorandum of Law: The Need to Define or Identify "Gaming Activities," Dicta, and Surrogate Federal Law").

criminal prosecution is its motif for filing the First Amended Complaint concedes the legitimacy of the counterclaim request for a declaratory judgment that the Counter-Defendant is in violation of the Restoration Act. Specifically, at pages 8 through 10 of its motion to dismiss, Counter-Defendant argues in great detail that it is acting in a criminal law enforcement capacity in this litigation. Yet the Counter-Defendant: (1) has been reminded by this Court in unambiguous terms that it is not acting as a criminal prosecutor in Restoration Act civil actions;[4] (2) concedes it has no criminal authority under PL 280 or the Restoration Act over alleged criminal activity related to gaming on the Pueblo;[5] and (3) has been specifically barred by Congress from bringing criminal actions against these very Counter-Plaintiffs.[6] Yet still it persists in engaging in litigation prohibited to it under the Restoration Act. The Counter-Plaintiffs' request for declaratory judgment on this issue is in no way "duplicative" to the relief the Counter-Defendant seeks in either Count I or Count II of the First Amended Complaint. Instead, the Counter-Defendant's admission against interest in its motion to dismiss alone confirms the propriety of the Pueblo's counterclaim seeking a declaratory judgment that the Counter-Defendant's "efforts

[4] *See, e.g.*, Exhibit 1, relevant pages of transcript in *Texas v. Ysleta del Sur Pueblo*, No. 3:99-cv-320-KC, ECF No. 330 at p. 16 line 16 through p 18 line 14 (This Court refused to allow Plaintiff State of Texas to use criminal case exhibit stickers or identify its exhibits as "State's exhibits," requiring instead use of civil exhibit stickers identifying "Plaintiff's exhibits," stating "This is not a criminal prosecution in State Court, so I don't care if you're the State or whatever, you're the plaintiff." At p. 17 lines 8-10.

[5] *See, e.g.*, Exhibit 2, relevant pages of transcript in this pending action, Hearing on Plaintiff's Motion for Preliminary Injunction at p. 28 line 8 through p. 29 line 9 (counsel for the Plaintiff: "We haven't opted into that and 23 – could not pursue – we've never interpreted that to allow us to seek criminal relief under the Restora- -- the only relief that – that we have argued – the State of Texas has argued that we can pursue in federal court under the Restoration Act is civil injunctive relief." ECF No. 53.

[6] *See, e.g.*, Restoration Act 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.

to prohibit bingo from being offered at Speaking Rock violate the Restoration Act." Defs.' Countercl. ECF No. 87 at 13. Similarly, Counter-Defendant has enacted a bingo scheme intended to exclude the Pueblo from engaging in a "gaming activity" that is NOT prohibited by the "laws of the State of Texas." Counter-Defendant has then pressed the application of its scheme against the Counter-Plaintiff in litigation. *See, e.g.*, Order Regarding Interim Petition to Conduct Bingo in *Texas v. Ysleta del Sur Pueblo*, No. 3:99-cv-320-KC, ECF No. 323 at pp 2-3.[7]

These two examples alone are sufficient to confirm the propriety of the counterclaim requesting declaratory judgment as to whether the State of Texas is itself is in violation of the Restoration Act because of the way it is pursuing efforts to prohibit the otherwise legal "gaming activity" of bingo from being offered by the Counter-Plaintiffs. Indeed, these examples alone may well prove sufficient for a ruling in favor of the Counter-Plaintiffs on this very issue.

II. The Counterclaims Meet the Five Factors Applied by Federal Courts When Determining whether to Exercise Jurisdiction over Claims for Declaratory Relief.

Courts consider the following factors to determine whether they should exercise jurisdiction when declaratory relief is sought: (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*"; (4) whether the use of a declaratory action would increase friction between federal and state courts and improperly encroach on state jurisdiction, and (5) whether there is an alternative remedy that

[7] "Not every individual or organization can legally conduct bingo games in Texas; only 'authorized organizations' are permitted to do so. Only the following can qualify as authorized organizations: religious societies; nonprofit organizations; fraternal associations; veterans associations; and volunteer fire departments. The State of Texas has contended, and continues to contend, that the Tribe has failed to demonstrate that it fits within any of the categories established by the statute."

is better or more effective. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 579 (7th Cir. 1994) (citation omitted). The counterclaims are appropriate under all of these factors.

1. The Counterclaim Seeks to Settle the Long-Term Controversy.

The Pueblo's counterclaims seek declaratory relief to determine and resolve a decades long controversy, only one iteration of which is now being litigated in this case. When declaratory relief seeks to settle the actual controversy between the parties, the Declaratory Judgment Act and Article III of the U.S. Constitution presume jurisdiction. *Micron Tech., Inc v. Mosaid Techs., Inc.*, 518 F.3d 897, 901 (Fed. Cir. 2008) (holding that lower court erred in dismissing Plaintiff's claim for declaratory relief when record showed an actual controversy between the parties that was within the court's declaratory judgment jurisdiction). Over the past twenty-eight years, the Pueblo and the Counter-Defendant have engaged in a host of legal parries and thrusts, none of which has resolved the fundamental issue of what is a "gaming activity" as that term is used in the Restoration Act, and what is not a "gaming activity" but is instead an aid to play, or an impermissible attempt by the Counter-Defendant to regulate in contravention of the specific regulatory prohibition contained in Restoration Act Section 107(b) and Public Law 280. *See* 36 F.3d at 1334 (Confirming that Section 107(b) "is a restatement of Public law 280").

2. The Counterclaim Seeks to Clarify the Applicable Legal Standards.

Litigation over the past decades has never clarified the meaning of "gaming activity" in the Restoration Act, the scope of permissible aids to play a "gaming activity," or what is impermissible regulation under Section 107(b) and Public Law 280. Indeed, in its pending motion to dismiss the counterclaims the Counter-Defendant concedes that the parties disagree as to what characterizes bingo as a "gaming activity," and the Court's order requiring the Counter-

Defendant to show "'exactly which laws are being violated, and how exactly the machines [on the Pueblo's reservation] violate those laws.'" ECF No. 97 at 3 n. 2, quoting and citing ECF No. 77 at 29. The counterclaims ask the Court to clarify these legal standards.

3. There Is Io "Procedural Fencing" or "Race for *Res Judicata.*"

The counterclaims seek just what they say – a determination by this Court as to the meaning of critical words and phrases in the Restoration Act and application of that determination to the "gaming activity" of bingo, a judicial determination distinguishing aids to play from a "gaming activity," a determination as to the criminal prosecution claim by the Counter-Defendant in particular and as to the propriety of Counter-Defendant's conduct *vis a vis* these Counter-Plaintiffs in comparison to other groups in Texas, and a determination as to the Counter-Defendant's violation of the Counter-Plaintiffs' right to Equal Protection under the law. Moreover, there is no other pending litigation between these parties, so *res judicata* is not implicated.

4. There Can Be No Friction Between Federal and State Courts.

There is no pending or threatened action in state court regarding the claims and counterclaims in this case. Nor can the Counter-Defendants seek relief for their claims in state court. There can be no friction created between federal and state courts by the counterclaims. Moreover, the broad discretion courts have regarding whether to exercise jurisdiction over a declaratory judgment action "does not apply when there are no parallel state court proceedings." *Scottsdale Ins. Co. v. Detco Indus., Inc.*, 426 F.3d 994, 998 (8th Cir. 2005) (district court erred in dismissing declaratory judgment action).

5. The Requested Declaratory Judgment is the Best and Most Effective Remedy.

There is no better or more effective remedy than for this Court to exercise its jurisdiction over the counterclaims due to the unsettled issues presented in the counterclaims and the jurisdictional limitations in the Restoration Act. This Court has wrestled with these issues through years of litigation. The requested declaratory relief gives the Court the opportunity to settle what it believes the phrase "gaming activity" and the word "prohibited" mean as used in the Restoration Act, gives the Court the opportunity to confirm the limits on the Counter-Defendant's regulatory authority as provided in the Restoration Act, and gives the Court the opportunity to perhaps resolve once and for all the Pueblo's sovereign right to engage in gaming limited only by the phrase "gaming activity" in the Restoration Act.

III. The Court Has Jurisdiction to Enter a Declaratory Judgment Confirming Counter-Defendant's Ongoing Violation of Equal Protection Guaranties.

A. Declaratory Judgment Action Seeking to Confirm That Texas is Violating the Equal Protection Clause is not Barred by Sovereign Immunity.

As the Pueblo Defendants' pending motion to dismiss recognizes, and as the Counter-Defendant confirms in its pending motion to dismiss the counterclaims, sovereign immunity is a critical and key issue in this litigation between two sovereign governments. This Court must determine the sovereign right to immunity of all parties in this litigation.

In the pending motion the Counter-Defendant raises a Fed. R. Civ. P. 12(b)(1) facial challenge to the counterclaims based on its claim of sovereign immunity. In resolving this issue, the Court must consider the allegation in the counterclaims as true. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981) ("A motion to dismiss for lack of subject matter jurisdiction, Rule 12(b)(1), can be based on the lack of jurisdiction on the face of the complaint. If so, the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for

failure to state a claim is raised - the court must consider the allegations in the plaintiff's complaint as true"). Counter-Defendant's facial challenge mischaracterizes the relief sought by the Pueblo, its Governor and its Tribal Council. This is not a 42 U.S.C. § 1983 action, nor is it an action against a state officer under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).[8] The Counter-Defendants straw man arguments on those issues are without import to the pending motion.[9] These are declaratory judgment counterclaims properly brought pursuant to the Declaratory Judgment Act against the Counter-Defendant. The counterclaims do not seek any award of damages. Nor do they seek to enjoin further misconduct by the Counter-Defendant. The only relief sought is a declaratory judgement that this Counter-Defendant is violating these Counter-Plaintiffs' Constitutional right to Equal Protection under the Fourteenth Amendment to the United States Constitution. Sovereign immunity does not "preclude determination of the merits of [a party's] prayer for declaratory relief," especially as to a constitutional claim. *Clark v. U.S.*, 691 F.2d 837, 839 (7th Cir. 1982).

The Declaratory Judgment Act allows declaratory claims as follows:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

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[8] Although the Counter-Plaintiffs do not believe it is necessary, should the Court hold that the counterclaims must be raised by way of an *Ex Parte Young* pleading, the Counter-Plaintiffs should be given leave to so amend the counterclaims to name the Texas Attorney General. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981) ("[R]ule 15(a) severely restricts the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.' . . . [U]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial. . . . Amendment can be appropriate as late as trial or even after trial").

[9] There was no declaratory judgment claim or Equal Protection claim at issue in the 42 U.S.C. §1983 case relied upon by Counter-Defendant to support its argument for dismissal here. *Udeigwe v. Texas Tech Univ.*, No. 17-10874, 2018 WL 2186485, at *3 (5th Cir. May 11, 2018) ("To the extent that the pleadings and the briefing are unclear, the panel understands Udeigwe to be alleging violations of his right to procedural due process").

28 U.S.C. § 2201. The pending action is an actual controversy. The Counter-Defendant argues that this action is within this Court's jurisdiction.[10] The Pueblo, its Governor and its Tribal Council have filed an appropriate pleading. As a result, this Court "may declare the rights and other legal relations of any interested party seeking such declaration, **whether or not further relief is or could be sought**." *Id.* (emphasis added). As confirmed in the advisory note to Fed. R. Civ. P. 57:

> The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. . . . But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. . . . Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party . . . .

Fed. R. Civ. P. 57, advisory note.

The counterclaim asserts that the Counter-Defendant is treating the Pueblo, its Governor and Tribal Council members differently than similarly situated parties. It highlights how the Counter-Defendant's state constitutional and statutory bingo scheme excludes the Pueblo, its Governor and its Tribal Council members from the right to conduct charitable bingo in violation of Equal Protection guaranties. Indeed, this Court has held that the Counter-Defendant's constitutional and statutory bingo scheme specifically makes Indian Tribes ineligible to conduct bingo. That scheme therefore prohibits the Pueblo from conducting bingo as an Indian Tribe – while allowing that same right to five other categories of entities.[11] The Pueblo, its Governor and its Tribal Council simply seek a declaratory judgment that this targeting is a violation of the Equal Protection clause. There is no sovereign immunity protection prohibiting that relief

[10] This issue remains pending on the Pueblo's motion to dismiss.

[11] *E.g.*, Order Regarding Interim Petition to Conduct Bingo, *Texas v. Ysleta del Sur Pueblo*, No. 3:99-cv-320-KC, ECF No. 323 at 2-4.

because courts have jurisdiction over Equal Protection claims when the statutory scheme is "in fact" unconstitutional and "the continued implementation of such a scheme constitutes an ongoing violation of federal law." *Lynch v. Pub. Sch. Ret. Sys. of Mo., Bd. Of Trs.*, 27 F.3d 336, 339 (8th Cir. 1994) (reversing decision to dismiss plaintiff's equal protection claim because of sovereign immunity and holding that court "clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.").

B. Plaintiff Has Waived Its Immunity Through Its Affirmative Litigation Conduct.

Seeking an injunction in federal court is but one of a host of potential options available to the Counter-Defendant.[12] In choosing this option – affirmative litigation in this federal court – the Counter-Defendant has voluntarily waived any immunity it otherwise might have had: "A state may voluntarily waive its sovereign immunity by consenting to federal jurisdiction explicitly or by invoking that jurisdiction through its behavior." *Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 458 (7th Cir. 2011) (holding State sovereign immunity waived when it filed suit in federal court and availed itself of the advantages of a fresh lawsuit). Waiver of sovereign immunity by litigation conduct "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (holding state waived its sovereign immunity when it voluntarily removed case to federal court). In other words, a state cannot use its sovereign immunity as a "get-out-of-court-free card." *Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int'l*

[12] See ECF No. 54 at 8-10.

Software, Inc., 653 F.3d at 459 (quoting *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)).

Moreover, a state waives its immunity through litigation conduct when it voluntarily changes its behavior and demonstrates it is no longer defending the lawsuit. *Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d at 462. Specific to these parties, in 1993 the Pueblo filed suit against the Counter-Defendant seeking an order requiring it to negotiate a Class III casino style gaming compact with the Pueblo. Six years later, in 1999, Counter-Defendant (no longer defending itself) filed suit against the Pueblo. *Texas v. Ysleta del Sur Pueblo, et al.*, No. EP 99 CA-320-H, ECF Doc. No. 1. In 2016, the Court closed that case. *Texas v. Ysleta del Sur Pueblo, et al.*, No. EP 99 CA-320-KC, ECF Doc. No. 608. After that dismissal, Counter-Defendant once again filed suit against the Pueblo, its Governor and its Tribal Council in 2017. Over the years, Counter-Defendant has changed its litigation strategy from defending to attacking the Pueblo's right to engage in gaming activities.[13] The consistent consensual litigation initiated by the Counter-Defendant in lieu of other options available to it is a waiver of immunity that allows the counterclaims to proceed.

In *Board of Regents of University of Wisconsin System*, a state filed suit challenging an agency's decision to cancel a trademark registered by the state's university. 653 F.3d at 452. The Court examined each of the state's options, besides filing suit, because each carried "a different implication for sovereign immunity." *Id.* at 464. One option was for the State to "Do Nothing." *Id.* The Court explained that nothing forced the State to spend time in federal court

[13] The only decision Counter-Defendant cites in support of the proposition that by bringing this litigation it did not waive its immunity is *Beightler v. Office of Essex Cty. Prosecutor*, 342 F. App'x 829 (3d Cir. 2009). But the sovereign in that case was never anything except a defendant, and had "claimed sovereign immunity from the outset." 342 F. App'x at 832.

and the State could have found a new trademark or simply accepted the agency's decision. *Id.* 464-465. Given the Counter-Defendant's alleged great concern for proper regulation of gaming on the Pueblo, and given the specific and demonstrable expertise of the National Indian Gaming Commission in regulating Indian gaming, Counter-Defendant could concede that the NIGC's administrative determination that it has regulatory authority over gaming by the Pueblo was correct and entitled to deference by this Court. *Texas v. Ysleta del Sur Pueblo, et al.,* No. EP 99 CA-320-KC, ECF Doc. No. 608 pg. 19 ("Thus, NIGC's interpretation of the provisions of IGRA, and DOI's interpretations of the provisions of the Restoration Act, are interpretations potentially within the scope of agency announcements accorded Chevron deference."). Counter-Defendant's consistent, voluntary litigation in which it has achieved litigation advantages has waived its immunity as to the counterclaims.

CONCLUSION

The Pueblo, its Governor and its Tribal Council timely filed and served their counterclaims, in which they seek a declaratory judgment. They are entitled under the federal rules of civil procedure and applicable case law to do so, and they are entitled to the relief they have sought. The Counter-Defendant's procedural arguments are insufficient to deny these Counter-Plaintiffs their day in court, and in the context of a declaratory judgment neither does any sovereign immunity the Counter-Defendant might otherwise enjoy. This is particularly true when the counterclaims seek declaratory relief in an action brought by the Counter-Defendant, which should not thereafter be entitled to pick and choose the claims it wishes to defend. The Pueblo, its Governor and its Tribal Council respectfully ask the Court to deny the Counter-Defendant's Motion to Dismiss.

Dated: June 12, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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