

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,

1

lands in El Paso County, Texas.

The members of the Ysleta Del Sur Pueblo were recognized as a tribe as early as 1968, under the name "Tiwa Indians of Ysleta, Texas." The Tiwa Indians Act, Pub.L. 90-287, 82 Stat.93 (1968). However, full federal trust relationship between the United States Government and the Tribe was not established (or "restored") until the passage in 1987 of the Restoration Act, Pub.L. 100-89, 25 U.S.C. § 1300g. The Act re-designated the Tribe as the "Ysleta Del Sur Pueblo," and, critical to this case, provided the following:

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. 25 U.S.C. § 1300g-6(a).

Exclusive jurisdiction over violations of this subsection by the Tribe itself or any of its members was conferred upon the Courts of the United States. Section 1300g-6(c).

Notwithstanding the explicit restrictions on gaming activity enacted by Congress and accepted by the Tribe,¹ the latter filed a civil action in 1993, seeking to force the State to negotiate a tribal-state compact allowing gaming activities on its reservation. The Tribe's effort reached a dead end in the Court of Appeals, which held that (1) the gaming laws and regulations of the State of Texas operate as surrogate federal law on the Tribe's reservation, and (2) the Tribe must conform to those provisions of Texas law unless it persuades Congress to amend or repeal the Restoration

¹See Tribal Resolution No. T.C.-02-86, approved and certified on March 12, 1986 and referenced in 25 U.S.C. § 1306g-6(a).

Act. **Ysleta Del Sur Pueblo v. State of Texas**, 36 F.3d 1325, 1334-35 (5th Cir. 1994).

Undaunted by this legal setback, the Tribe proceeded to offer a variety of games of chance in the Speaking Rock Casino located on its reservation in the Ysleta neighborhood of El Paso, Texas. Although started as a bingo hall, the Casino expanded its operations to include slot machines, poker, blackjack, craps, and many other forms of gambling not authorized under Texas law. Members of the public by the thousands, who had no connection with the Tribe or its members, were invited to the Casino to indulge in the gambling it offered. In 1999, the Attorney General of Texas filed the instant civil action seeking to enjoin these operations.² After lengthy litigation, including appeals, this Court (Honorable G. Thomas Eisele) granted the relief sought by the State and ordered the Tribe to cease within 60 days all gambling operations in its Casino or any location on its reservation or lands. **State of Texas v. Ysleta Del Sur Pueblo, et al.**, 220 F.Supp.2d 668, 697-98 (W.D. Tex. 2001).

Following another unsuccessful appeal by the Tribe, the case returned to this Court, and the injunction was modified to clarify that the Tribe was not prohibited from engaging in those narrow categories of gaming activities which other private individuals and

²The Restoration Act provided in section 1306g-6(c) that the State is not precluded from bring suit to enjoin such violations. Due to State law limitations on the authority of the Attorney General to initiate civil litigation, the suit took the form of an action to abate a nuisance.

organizations are permitted to conduct. Specifically, the injunction was modified to permit the Tribe to do the following: (1) sell lottery tickets as an agent of the State of Texas; (2) operate amusement devices which comply with the provisions of section 47.01(4) of the Texas Penal Code; and (3) participate in third-party giveaway contests conducted by national vendors. 220 F.Supp.2d at 708 (W.D.Tex 2002).

B. AMUSEMENT DEVICES

In 2008, the Attorney General received information that the Casino was operating gaming devices which might be illegal under Texas law, and therefore in violation of the injunction in this case. Two officers of the Texas Department of Public Safety, Sergeants Wilbourn and Rodriguez, were dispatched to the Casino to investigate. What they found is not in substantial dispute. Inside the Casino were hundreds of machines commonly called "eight-liners." An eight-liner is an electronic or mechanical device that has been described as a "video poker" or "video lottery" machine. **See Owens v. State**, 19 S.W.3d 480, 481 (Tex.App.-Amarillo 2000, no pet.) The devices operate at least partially, if not entirely, by chance. At the Casino, a player operates the machine using a card which is purchased for cash. He decides how much to "bet," and if he is successful, the machine returns several times the amount of the bet.³

³Wilbourn testified that it was possible to win up to 400 times the amount of the bet. Neither he nor Rodriguez, in limited play, came close to hitting that kind of "jackpot."

The crucial fact lies in the manner in which the player's winnings are redeemed. The Casino issues the player a Visa debit card in the appropriate amount. In this case, both Welbourn and Rodriguez received a \$20.00 Visa card. It is undisputed that the debit cards can be used to purchase merchandise at any retail outlet that honors Visa cards. Welbourn verified this fact by using his card to buy a pair of jeans at a Walmart store the following day.

An electronic or mechanical device like an eight-liner is not prohibited under Texas law if it meets certain strict criteria. The definition of a "gambling device" in the Penal Code excludes any machine which "rewards the player exclusively with **noncash** merchandise prizes, toys or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less." Tex. Penal Code § 47.01(4)(B) (emphasis added). In the instant case, the Visa debit cards issued by the Tribe's Casino are not "noncash merchandise." The word "cash" is not limited to coins and paper money; it includes also the equivalent of money. **Hardy v. State**, 102 S.W.3d 123, 131 (Tex. 2003). A Visa card which can be used as a medium of exchange at most retail outlets simply does not qualify as a noncash merchandise prize, toy or novelty item which would fall within the exclusion in section 47.01(4)(B). **See Ysleta Del Sur Pueblo**, 220 F.Supp.2d at 704 n.5 (gift cards); **Hardy**, 103 S.W.3d at 132 (same).

During his visit to the Casino, Sergeant Wilbourn observed at least two prominently displayed signs which invited the visitor to "come on in and win some cash." While not dispositive of the issue in and of itself, the presence of these signs verifies the Court's conclusion that Casino payouts in cash or cash equivalents were fully intended, and not based on mistake or accident.

At the time Judge Eisele modified the injunction in this case to permit the operation of amusement devices of the kind allowed by section 47.01(4)(B), he admonished the Tribe "to strictly adhere" to the language of the statute and the case law interpreting it, and not to venture outside its boundaries. It appears that the Tribe has not heeded that admonition with respect to its prize awards.

In its response to the State's motion and amended motion for contempt, the Tribe has argued for the first time that section 47.01(4)(B) of the Penal Code is unconstitutional. That argument is untimely. If the Tribe believed that the statute was unconstitutional and void, it should have raised the issue years ago when the Court modified the injunction to permit the operation of eight-liners in conformity with the limitations contained in section 47.01(4)(B). It did not do so. In any event, the contention has no merit. Texas courts have had no difficulty in upholding the statute against constitutional challenges in cases specifically involving the operation of eight-liners. **See, e.g., Owens**, 19 S.W.3d at 484. This Court agrees that the statute is not void for vagueness, and that it passes both State and federal constitutional muster.

In an apparent afterthought, the Tribe also contends that the Plaintiff's motion for contempt amounts to "selective enforcement" of the Texas laws prohibiting illegal gaming. This argument is out of place. The Defendants are accused of violating the specific terms of an outstanding injunction, not with violating Texas gaming laws in general. In the context of this case, and the Plaintiff's motion for civil contempt, that "defense" is no defense at all.

In summary, the Plaintiff has shown by clear and convincing evidence that the Defendants are operating eight-liner devices in a manner that violates the terms of the modified injunction in this case, and that they are in contempt of that injunction.

C. SWEEPSTAKES

The Plaintiff's motion and amended motion for contempt focused solely upon the Defendants' operation of eight-liners. For reasons which are not at all clear, the subject of sweepstakes was first broached by the Defendants in their response to the Plaintiff's motion for contempt. It does not appear that the Defendants intended to interpose some form of counterclaim or request for declaratory relief. A response to a motion for contempt was clearly not a proper vehicle for either. The practical effect, however, was to draw a reply from the Plaintiff that offering Casino patrons a form of gaming with prepaid internet cards (another activity observed by Wilbourn and Rodriguez) was illegal under Texas law and not a permissible sweepstakes. Although the issue is outside the scope of the contempt motion, the Court will make the following comments.

The Court's order modifying the injunction in this case denies the Tribe's request to conduct a sweepstakes contest "absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law." 220 F.Supp.2d at 706. The Court never approved the activity described by Defendants as a "sweepstakes" in which the player pays cash to obtain a prepaid internet access card, then uses the card to activate a video terminal in search of a cash prize. Furthermore, the procedures which have been described bear more resemblance to a prohibited lottery than to a legal sweepstakes operation. **See** Tex. Penal Code § 47.01(7). They also resemble a sweepstakes proposal previously submitted by the Defendants, but disapproved by the Court in 2003. The bottom line is that the conduct of a sweepstakes by the Defendants requires Court approval of "a firm and detailed proposal."

D. CONCLUSION

The Plaintiff has sustained its burden of proving that the Defendants have been operating gambling devices in violation of Texas law and in a manner prohibited by the injunction issued September 27, 2001 and modified May 17, 2002. Therefore, the motion for contempt should be granted.

It is therefore ORDERED that the motion of Plaintiff State of Texas to hold the Defendants in civil contempt be, and it is hereby, GRANTED.

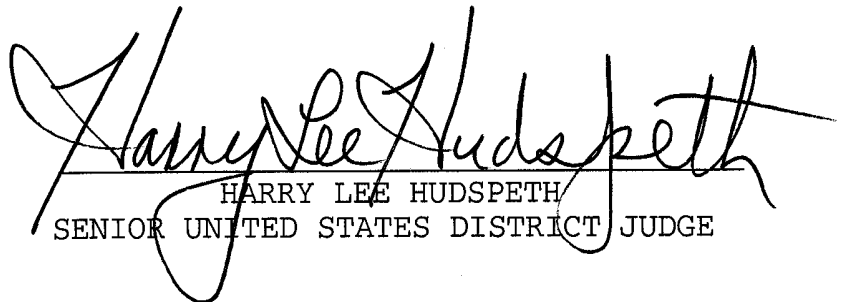
It is further ORDERED that Defendants Ysleta Del Sur Pueblo, Tigua Gaming Agency, the Tribal Council, Tribal Governor Francisco Paiz or his successor, and Lieutenant Governor Carlos Hisa or his successor forthwith CEASE and DESIST in the operation of gaming

devices in a manner that rewards the player with cash or the equivalent of cash, including but not limited to gift cards, credit cards, or debit cards, in violation of the Texas Penal Code and the injunction and modified injunction in this case.

It is further ORDERED that the Defendants above named, and all persons or entities acting in concert with them, allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to all books and records relating to the conduct of gaming to ensure continued compliance with the terms of the injunction.

It is further ORDERED that the Defendants pay a civil penalty in the amount of Five Hundred and no/100 Dollars (\$500.00) a day until they bring themselves into full compliance with the injunction of September 27, 2001 as modified on May 17, 2002, with such penalty to be paid into the Registry of the Court.

SIGNED AND ENTERED this 30th day of July, 2009.


HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE