No. 10-50804

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS
Plaintiff – Appellee,
v.
YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY;
TRIBAL COUNCIL; ALBERT ALVIDREZ, Tribal Governor;
CARLOS HISA, Tribal Lieutenant Governor,
Defendants – Appellants

On Appeal from the United States District Court
For the Western District of Texas, El Paso,
No. 3:99-cv-00320-HLH

BRIEF OF APPELLEE

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December 13, 2010

CERTIFICATE OF INTERESTED PERSONS

As a governmental party, the Appellee is not required by Fifth Circuit Local Rule 28.2.1 to furnish a Certificate of Interested Persons.

/s/ William T. Deane
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Attorney for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee the State of Texas is certainly willing to participate in any oral argument, but oral argument is not necessary in this case due to lack of any substantial factual or legal questions asserted by this appeal.

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TO THE HONORABLE COURT OF APPEALS:

COMES NOW Plaintiff-Appellee the State of Texas and files this Brief and in support thereof would respectfully show the following:

STATEMENT OF FACTS

This Court has previously written an opinion concerning the origin of this litigation in *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, (5th Cir. 1994); *cert.*

denied 514 U.S. 1016, 115 S.Ct. 1358 (1995) (known as "*Ysleta I*"). In that opinion, this Court noted that the Defendant Ysleta del Sur Pueblo[1] ("the Tribe") was originally known as the Tiwa Tribe, and not federally recognized until 1968 with the passage of the Tiwa Indians Act, Pub.L. No. 90-287, 82 Stat. 93 (1968). Under the Tiwa Indians Act, the Plaintiff State of Texas administered all the affairs of the Tribe and the Tribe was subject to *all* the laws of the Plaintiff State of Texas, including the gaming laws. *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, 1327 (5th Cir. 1994). In December 1985 the Tribe sought fuller federal recognition and to meet opposition from the State of Texas adopted Resolution TC-02-86 on March 12, 1986 which stated in part that "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…" Id.*

"Ultimately the 100th Congress adopted H.R. 318 which became Public Law 100-89 and codified Section 107 of the Restoration Act at 25 U.S.C. § 1300g-6." *Id* at 1329. In order to secure passage of the Restoration Act by the 100th Congress the Tribe agreed to waive its sovereign immunity and 25 U.S.C. § 1300g-6(a) expressly recognizes that its Legislative history originated in the Tribe's Resolution TC-02-86 and went further to state that "All gaming activities which are prohibited by the laws of

[1] Plaintiff –Appellee will refer to all of the Defendants collectively as the "Tribe."

the State of Texas are prohibited on the reservation and on lands of the Tribe. Any violation of the prohibition provided in this section shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." *Id.*

Moreover, the Restoration Act, 25 U.C.C. §1300g-6(c) overwrote[2] the remaining provisions of §1300g-6(c) and §1300g-4(f) and provided for enforcement of this Legislative compromise between the Defendant Tribe and Plaintiff State of Texas regarding gaming violations of Texas laws could be enforced by Plaintiff State of Texas "…bringing an action in the courts of the United States to enjoin violations of the provisions of this section." 25 U.C.C. §1300g-6(c).

Plaintiff State of Texas on September 27, 1999[3] brought an action for permanent injunction to stop illegal gambling occurring in the Tribe's Speaking Rock Casino.[4] On September 27, 2001, (as modified on June 24, 2002) the district court entered its Order[5] finding that the Tribe operated "in excess of 1,000 slot machines" and granting an injunction based on conclusions of law which included:

> 2. The Speaking Rock Casino and Entertainment Center is a place where, among other activities, one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance

[2] *See, Ysleta I* opinion, 36 F.3d at pp. 1334-1335 and see 107(c) Restoration Act language which included "Notwithstanding section §1300g-4(f)" and "However, nothing in this section shall be construed as precluding…"
[3] *See*, *Ysleta II* opinion, *Texas v Ysleta Del Sur Pueblo*, 220 F.Supp.2d 668, 672 (W.D.Tex. 2001).
[4] *See*, *Ysleta II* opinion, 220 F.Supp.2d at p. 674. (W.D.Tex.2001).
[5] *See, Ysleta II* opinion, 220 F.Supp.2d at pp. 697-698 (W.D.Tex.2001).

to win anything of value, as defined by Section 47.01(7) of the Texas Penal Code.[6]

3. The Speaking Rock Casino and Entertainment Center is a place where activities are conducted which include one or more of the activities described in Section 47.02(a), 47.03(a), 47.04(a), 47.05(a) and 47.06(a) of the Texas Penal Code.[7]

6. The Defendants' gaming activities on its reservation violate the Texas Penal Code and the Restoration Act, 25 U.S.C. § 1300g-1, et seq.[8]

9. The State of Texas is entitled to the issuance of an injunction against the Defendants, their agents, employees, and attorneys pursuant to the Texas Civil Practice and Remedies Code § 125.002 and § 125.022 and Rule 65 of the Federal Rules of Civil Procedure requiring said Defendants to cease and desist from operating, conducting, engaging in or allowing others to conduct, operate or engage in gaming and gambling activities on the Pueblo's reservation held herein to be in violation of the Texas Penal Code and prohibited by the Restoration Act, 25 U.S.C. § 1300g-b. The Restoration Act makes it clear that the State of Texas may seek injunctive relief in federal courts to enforce the Act's gaming ban.[9]

Despite the entry of the injunction Order in 2001, the Tribe persisted in gambling activities and as a result the Court enjoined *all* activities at Speaking Rock until the Tribe could submit specific proposals to modify the injunction.[10] As a result, the Tribe submitted a number of proposals for gambling which they alleged was within Texas

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[6] *See, Ysleta II* opinion, 220 F.Supp.2d at p. 691 (W.D.Tex.2001).
[7] *Id.*
[8] *See, Ysleta II* opinion, 220 F.Supp.2d at p. 695 (W.D.Tex.2001).
[9] *See, Ysleta II* opinion, 220 F.Supp.2d at p. 696 (W.D.Tex.2001).
[10] *See, Ysleta II* opinion, 220 F.Supp.2d at pp. 701-702 (W.D.Tex.2001). The Tribe must petition the court to modify the injunction if it wishes to re-start gambling activities at Speaking Rock Casino.

law, including the proposal to use eight-liner "gambling devices" as amusement machines under the "fuzzy animal"[11] exception provided in § 47.01(4)(B) of the Tex. Penal Code Ann. which provides that an illegal gambling device --

> (B) *does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance 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 Ann. § 47.01(4)(B) (emphasis added).

Plaintiff State of Texas objected to the proposal on the basis that these eight-liners are illegal gambling devices under Tex. Penal Code § 47.01(4) but the trial court overruled the Plaintiff's objection with a strict admonishment to the Tribe that "The Court concludes that the Tribe shall be permitted to offer eight-liners as an amusement device, but only to the extent that it strictly adheres to the prize limitations provided in § 47.01(4)(B). That is, the device must exclusively offer '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

[11] Tex. Penal Code Ann. § 47.01(4)(B) is often referred to as the "fuzzy animal" exception because such toys as fuzzy animals and other novelties are often offered to children as prizes for playing legal amusement games on machines not designed for illegal gambling activities.

times the amount charged to play the game or device once or $5, whichever is less.' The Court cautions that the Tribe in offering amusement devices is to strictly adhere to this language, and the case law interpreting it."[12]

In 2008, two officers from the Texas Department of Public Safety received a complaint and upon investigation of the Tribe's Speaking Rock Casino, discovered additional gambling violations. *See,* Doc. 281, USCA5 263. They found that when playing the eight-liner slot machines for cash, it was possible to win up to 400 times the amount of the bet, which violated the "10 times the amount charged to play the game or device once or $5, whichever is less" fuzzy animal exception in Tex. Penal Code Ann. § 47.01(4)(B). *See,* FN.3, Doc. 281, Order at USCA5 263. The trial court found *inter alia* that the Tribe's Casino issued Visa debit cards that could be exchanged for cash, which violated the "noncash merchandise prizes, toys, or novelties, or a representation of value" portion of the exception in Tex. Penal Code Ann. § 47.01(4)(B). *See*, Order at USCA5 264. The trial court found intent to violate the injunction from the use of signage at the Casino that invited the customer to "come on in and win some cash." *Id*. at USCA5 265. Following an evidentiary hearing, (*see,* USCA5 313-400), the trial court found that the "…Defendants (Tribe) have been operating gambling devices in violation of Texas law and in a manner prohibited by the

[12] *See*, *Ysleta II* opinion, 220 F.Supp.2d at p. 704 (W.D.Tex.2001).

injunction issued September 27, 2001 and modified May 17, 2002. Therefore the motion for contempt should be granted." *Id*. at USCA5 267. The civil contempt Order also contained provisions for a fine of five hundred dollars per day until the tribe ceases violation of the injunction (which was not included as an issue in this appeal) and a limited right of inspection of the Tribe's records, *Id*. at USCA5 268, which was later modified and limited further by the trial court's Order, Doc. 324, at USCA5 306, so that the monthly inspections by the Plaintiff State of Texas was as to "…records maintained by the Defendants with respect to the operation of the devices known as "eight-liners," for the purpose of verifying that such devices are not being operated in a manner contrary to the laws of the State of Texas or the terms of the injunction and contempt order in this case." *Id*. at USCA5 308.

SUMMARY OF THE ARGUMENT

At its core, the Tribe seeks by this appeal to undo the requirement Congress imposed on them in the Restoration Act, 25 U.S.C. § 1300g-1, et seq. to fully comply with the Plaintiff State of Texas' gambling laws. *See,* Restoration Act, 25 U.S.C. § 1300g-6(a) and § 1300g-6(c). That legislative requirement in 1300g-6(a) was based upon the Tribe's Resolution TC-02-86 pledge to comply with Texas gambling laws in order to secure the passage of the Restoration Act to provide federal recognition for the Tribe. The Tribe has not shown any intent to keep its pledge to Congress that it was not

interested in gambling, or that even if it were the Tribe would waive its sovereign immunity and agree to abide by Texas gambling laws as any citizen of Texas. Instead, by their continued actions here, the Tribe evidences its wish to continue earning millions of dollars in revenues generated by Casino operations each year[13] even though no citizen of Texas may do so.[14]

To do so, the Tribe needs to escape the Congressional limitations imposed upon it in the Restoration Act, 25 U.S.C. § 1300g-6(a) and § 1300g-6(c), as well as the previous injunction and contempt orders of the trial court which required the Tribe to live up to its Resolution promise to abide by Texas gambling laws. Accordingly, the Tribe now directly attacks the trial court's attempts to stop future violations of the injunction and contempt orders by attacking the limited inspection of Tribal records of eight-liner operations.

The Tribe argues that this limited inspection of Tribal records of eight-liner operations is a criminal sanction because it cannot be purged by some act of the Tribe. That argument is invalid, however, since the trial court ordered all eight-liner operations at Speaking Rock to cease until the Tribe submits a new written proposal to

[13] "The Tribe is engaged in the casino gambling enterprise for profit, receiving millions of dollars in revenues each year." *See*, *Ysleta II* opinion, 220 F.Supp.2d at p. 688 (W.D.Tex.2001).
[14] *Id.* at 690.

the trial court.[15] As a result, the limited inspection of Tribal records of eight-liner operations can only occur in the event the Tribe is still operating them in violation of the contempt Order. Only the Tribe controls whether or not it will continually violate the permanent injunction and contempt Orders prohibiting illegal gambling.

Should the Tribe choose instead to comply with those Orders at some future date, the Tribe is free to include in its own written proposal how the operations can be maintained in compliance with Texas gambling laws and the trial court may implement whatever procedures assure compliance both with the injunction and the Restoration Act requirements to cease violating Texas gambling laws. Until (or unless) the Tribe decides to follow the law, the limited inspection of Tribal records of eight-liner operations by the Plaintiff State of Texas was fully authorized by the violation of the 2001 permanent injunction Order and by the limitations on illegal gambling imposed by the Restoration Act.

ARGUMENT

I. The limited inspection of Tribal records of eight-liner operations was not a criminal contempt sanction since the Tribe controls whether or not it will continually violate the permanent injunction against illegal gambling.

"In a civil contempt proceeding, the movant must establish by clear and convincing evidence that (1) a court order was in effect, (2) the order required

[15] *See,* Footnote 10 *supra.*

specified conduct by the respondent, and (3) the respondent failed to comply with the court's order." *United States v. City of Jackson, Mississippi,* 359 F.3d 727, 731(5th Cir. 2004). Here, the Tribe does not contest any of the elements for the trial court finding of civil contempt. Instead, beginning at pages 12-13 of the Appellants' Brief, the Tribe argues that the right of limited inspection of eight-liner records to assure compliance with the contempt order that was granted to the Plaintiff State of Texas changes the proceeding from a civil contempt to a criminal contempt proceeding. In particular, the Tribe asserts that the limited right of inspection imposed by the Order for contempt is criminal, rather than civil because the Order, Doc. 281 at USCA5 264, as amended Doc. 324 at USCA5 306, violates the four *Rizzo*[16] factors and because it was "intended chiefly as a deterrent to offenses against the public" as a *Walling* public nuisance[17] rather than serve the purposes of the Plaintiff State of Texas. *See*, *Walling v. Crane*, 158 F.2d 80, 83 (5th Cir. 1946, reh den 1946).

A. The Tribe refused to do a commanded act.

The first *Rizzo* factor to determine whether the Order was civil contempt, rather than criminal contempt, requires Plaintiff State of Texas to show that the Tribe refused to do a commanded act (rather than committing a "forbidden act" which is criminal contempt). *See, United States v. Rizzo*, 539 F.2d 458, 463 (5th Cir. 1976). The Tribe

[16] *See*, *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976).

argues in their Appellants' Brief at p. 14 that the August 3, 2009 contempt Order, Doc. 281 at USCA5 264, "only identified purported actions that the court held were forbidden—specifically awarding a gift card as a representation of value that the court held was not "noncash merchandise" as required by Tex. Penal Code § 47.01(4)(B)." Although the trial court made such finding as a conclusion of law, this was not the genesis of the civil contempt Order itself. The original injunction Order, *Ysletta II*, 220 F.Supp. at 696, found "…pursuant to the Texas Civil Practice and Remedies Code § 125.002 and §125.022 and Rule 65 of the Federal Rules of Civil Procedure requiring said Defendants to cease and desist from operating, conducting, engaging in or allowing others to conduct, operate or engage in gaming and gambling activities on the Pueblo's reservation held herein to be in violation of the Texas Penal Code and prohibited by the Restoration Act, 25 U.S.C. § 1300g-b." *Id.* Likewise, the contempt Order contained similar language finding "Defendants (Tribe) 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." *Id*. at USCA5 267. This is much broader than the narrow grounds asserted by the Tribe at page 14 of their Appellants' Brief of "awarding a gift card as a representation of value."

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[17] *See,* Footnote 5 of Appellants' Brief at p. 13.

As a result, the commanded act here was to cease from engaging in "…gambling activities on the Pueblo's reservation held herein to be in violation of the Texas Penal Code and prohibited by the Restoration Act, 25 U.S.C. § 1300g-b" and, as shown in the contempt Order, that commandment was violated.

B. The Order for civil contempt was conditional.

The second *Rizzo* factor requires the Court to determine whether the Order of civil contempt is *conditional*, and may be lifted if the contemnor purges himself of the contempt, or if the Order is punishment for criminal contempt and is unconditional. At page 14 of the Appellants' Brief, the Tribe argues that "Ordering state agent access in perpetuity to confidential books and records …provides no mechanism by which the Pueblo can 'comply' and thereby avoid the sanction." *Id.*

The Order Granting Motion for Contempt Doc. 281, at USCA5 264, as amended by Doc. 324 at USCA5 306, established as current court ordered *status quo* that no gambling activity is currently permitted at the Tribe's Speaking Rock Casino.[18] In fact, the Order Regarding Defendants' Third Motion for Clarification (Doc. 282 at USCA5 269) specifically prohibits the use of eight-liners and the continued operation of any sweepstakes games without the submission and *prior approval* of the trial court, *Id.* at USCA5 270 ("More specific information would be required…" for eight-liners) and

[18] *See*, Footnote 10, *supra.*

USCA5 272 (No sweepstakes allowed "absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law."). *Id.*

Ironically, the monthly inspections complained about in this appeal would not be ripe for determination unless the Tribe is currently in violation of these trial court Orders to cease all eight-liner and sweepstakes gaming activities. That is, if the Tribe elected to cease all operations instantly on site at Speaking Rock Casino and wait for a ruling from the trial court on any purported *future operations*, which is the procedure contemplated in the Order Granting Motion for Contempt (Doc. # 281) and the original injunction, see *Ysleta II* opinion, 220 F.Supp.2d at pp. 701-702 (W.D.Tex.2001), then no monthly inspections by Plaintiff State of Texas would need to occur until after that ruling by the trial court on any future proposals for which the court "needs more information."

Indeed, as part of any approval process, the trial court is yet free to remove these limited monthly inspections, or enter whatever future orders are necessary to carry out both the injunction and the provisions of the Restoration Act, 25 U.S.C. §1300g-6(a). As a result, to argue this is a *permanent right of inspection* of books and records related to eight-liners could only exist in the event the Tribe has a bad-faith intent to continue operations of eight-liners at the Speaking Rock Casino without securing prior trial court approval for the same.

Here, as before, the trial court struggled with this same bad-faith intent by the Tribe, starting in 2001 when the original injunction Order required cessation of all gaming activities, and the Tribe moved to modify the injunction to permit some legal gaming. At that time, the trial court answered that "The Court believes it is unnecessary, and, indeed, that it would be unwise, to change the injunction in anticipation of possible future actions by the defendants to engage in legal gambling on the Tribe's reservation. The Court has enjoined the defendants' operations as a common and public nuisance under Texas law for violating the Restoration Act. After the illegal operations cease and the nuisance is fully abated, the defendants are, of course, free to petition the Court for a modification of any of the terms of the injunction that they believe might limit their ability to participate in any legal gaming activity for which they have qualified under Texas law. As of the date of the injunction, and as of this date, the defendants have not, so far as the record reveals, taken any of the steps necessary to qualify. 11/2/2001 Order at 3-4."

See, Ysleta II, 220 F.Supp.2d at 701.

The contempt Order's limited right of inspection of eight-liner books and records is therefore conditioned upon the Tribe's intent to continually violate the injunction and contempt Orders as well as the Restoration Act. That condition of operating eight-liners at Speaking Rock Casino is solely in the control of the Tribe. In

fact, it could only arise if the Tribe concedes that it is still operating eight-liners[19] that would be subject to limited inspection by the Plaintiff State of Texas.

The cases cited at p. 12 of the Tribe's Appellants' Brief such as *Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531 (1966) show that "The test may be stated as: what does the court primarily seek to accomplish by imposing sentence? Here the purpose was to obtain answers to the questions for the grand jury." *Id.* at 1535. In *Shillitani* the defendants were jailed pending their agreement to testify before the grand jury and the court held that "Despite the fact that Shillitani and Pappadio were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner-to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." *Id.,* at 1535. As shown above, the limited right of inspection is conditional and can be amended or eliminated at such time as the Tribe decides to seek permission from the trial court rather than to sin and ask for forgiveness after they are caught violating both the Restoration Act and the *Ysleta II* permanent injunction.

At p. 12 of the Tribe's Appellant Brief, they cite *In re Rumaker*, 646 F.2d 870,871 (5th Cir.) in which this Court held to be criminal contempt because "The

[19] As late as August 6, 2009 continued eight-liner gaming operations were verified by Doc. 295,

unconditional feature of the $500 fine precluded any mitigation by compliance with a Court order…Indeed, after the failure of the examiner to appear there was nothing he could do to purge the contempt." *Id*. at 871. *Rumaker* is unlike the instant case because to purge the limited right of inspection of eight-liner records, all the Tribe needs to do is to present a proposal to the trial court and allow the trial court to fashion whatever protections are necessary. Only the Tribe can decide to cease all eight-liner gambling activity and thus render the limited right of inspection moot. *In re Rumaker, id.*

C. The Order for civil contempt is part of the original cause of action.

The third *Rizzo* factor showing it is civil contempt rather than criminal contempt asks whether or not the action was brought in the name of the United States government as a criminal prosecution as a separate action, or was it a continuation of the original cause of action. At p. 15 of the Appellants' Brief, the Tribe cites to *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 31 S.Ct. 492 (1911) for support that this case was criminal contempt. However, a closer reading of *Gompers* would lead to the opposite conclusion. In *Gompers,* the Supreme Court held that "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the

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Plaintiff's Response at USCA5 288.

original cause." *Id.* at 499. As a result, applying the rule of *Gompers* to the instant case would demonstrate that this was a civil contempt proceeding, since the motion for contempt was prosecuted by the Plaintiff State of Texas as a party to the underlying litigation, the party acted as complainant in the contempt hearing (rather than having a criminal contempt motion brought in the name of the "United States") and "As such and through its counsel, acting in its name, it made consents, waivers, and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting a case of criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below." *Id.* at 499-500.

At pp. 15-20 of the Tribe's Appellants' Brief, the Tribe refers to references to a "criminal prosecution" found in witnesses, employers, labels on exhibits etc. all of which were continually and correctly overruled by the trial judge who made it quite clear he treated this as a civil contempt hearing, and nothing more. *See*, Appellants' Brief at pp. 15-20. This argument fails due to the same factors identified in *Gompers,* which found the proceeding to be civil contempt (31 S.Ct. at 502) and the cases where labeling of parties etc. were held irrelevant to the determination of civil as opposed to criminal contempt. *See*, e.g. *Shillitani,* 86 S.Ct. at 1535, where the court referred to the

action as "criminal contempt" and *Rumaker,* 646 F.2d at 871, where the court referred to the proceeding as a "civil" contempt proceeding.

Likewise, the Tribe's argument that the civil contempt Order for inspection of eight-liner records was "intended chiefly as a deterrent to offenses against the public" as a *Walling* public nuisance[20] also fails because as shown above, the Plaintiff State of Texas sought the contempt Order only for the purposes of enforcing the injunction and the provisions of the Restoration Act which apply Texas gambling laws to the Tribe's Speaking Rock Casino.

In *Walling,* this Court held that "Broadly speaking, a civil contempt is a failure of a litigant to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, but the courts also hold that a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended chiefly as a deterrent to offenses against the public. A criminal contempt is an act against the dignity or authority of the court, the majesty of the law, and, to use the language of Justice Cardozo, is for the 'vindication of the public justice.'" *Walling*, 158 F.2d at 83. The Tribe is confusing the role of the Plaintiff State of Texas as a complainant in a contempt hearing with the role of the State in prosecuting violations of criminal law in the name of the "State of Texas" (as

[20] *See*, Footnote 5 of Appellants' Brief at p. 13.

prosecution in the name of the "United States" in the *Gompers* opinion, described hereinabove). The Tribe had similar confusion, as noted in Doc. 281 at USCA5 260, when the tribe unsuccessfully argued that the Plaintiff State of Texas' motion for contempt was "selective enforcement of the Texas laws prohibiting illegal gaming." The trial court rejected that argument as well when it wrote that, "The Defendants are accused of violating the specific terms of an outstanding injunction, not with violating Texas gaming laws in general." *See*, Order at USCA5 266.

Likewise, this Court's *Walling* opinion is informative on another point bearing on continuation of the original proceeding—"It is noted that the proceeding here is a continuation of the original case. It is for the enforcement of rights which the Administrator claimed as having been granted to him in the injunction decree. The enforcement power of the Administrator is civil in its nature rather than criminal. He cannot prosecute offenders but can only request prosecution. His functions are, in part, performed on behalf of, but not in right of, employees because he has no authority to sue for wages due an employee without the latter's consent or against his will. The proceeding is remedial in its nature since the injunction was designed to secure for the Administrator, as well as others, a better enforcement of the Act. The statute authorizing the Administrator to proceed by injunction implies the further right in him to have an appropriate injunction made effective so as to preserve such benefits as were

conferred upon him, as complainant, by the injunction." *Walling*, 158 F.2d at 83. The Plaintiff State of Texas is in a similar position to the Administrator in *Walling* because the Plaintiff State of Texas, by virtue of the Restoration Act, cannot prosecute the Tribe for gambling violation in its State court system. Bu, the same Restoration Act provides for the effectiveness of its provisions being enhanced by the Plaintiff State of Texas' ability to bring injunctive, and now relief in civil contempt to make the Restoration Act more effective in prohibiting the Tribe from violating the same.

D. This was a civil contempt proceeding.

The fourth *Rizzo* factor requires that the notice for *criminal* contempt must indicate the criminal nature of the proceeding—which is irrelevant to this appeal since as shown above, the motion and proceeding was at all times a civil contempt proceeding.

II. The limited inspection of Tribal records of eight-liner operations by the Plaintiff State of Texas was fully authorized by both the violation of the 2001 permanent injunction Order and by the Restoration Act.

A. Restoration Act 107(a) and 107(c) control gaming.

At pp. 21-22 of the Tribe's Appellants' Brief, they acknowledge that the Restoration Act, 25 U.S.C. § 1300g-6(c) permits the Plaintiff State of Texas to bring and injunction action against the Tribe in federal court but now argue that the same Plaintiff State of Texas may not undertake "unsupervised , monthly regulatory review

of tribal documents on a federal enclave." To support this argument, they cite cases both by private parties seeking to enforce breach of contract rights[21] under the Restoration Act itself, and cases where other States attempting to tax personal property[22] of tribal members under Public Law 280, neither of which carry the day. In fact, this entire argument is foreclosed by this Court's prior *Ysleta I* decision in *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325, 1327 (5th Cir. 1994); *cert. denied*, 514 U.S. 1016 (1995). In *Ysleta I*, this Court held that "The Tribe's argument, however, misses the mark, because § 107(b), as opposed to §107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. In that sense *only,* § 107(b) is a restatement of Public Law 280. But it is § 107(a) that determines whether Texas "prohibits" certain gaming activities, and § 107(a) is *not* a restatement of Public Law 280." As the limited right of inspection of eight-liner books and records only obtains when the Tribe is in continuous violation of the original injunction for failing to submit a new proposal to operate either eight-liners or sweepstakes games on eight-liners, the timing of any future limited inspections is solely dependent upon the bad-faith actions of the Tribe in continuing to operate gaming at the Speaking Rock Casino even now, in violation of

[21] *See*, *Camp v. McDaniel*, 59 F.3d 548 (5th Cir. 1995).
[22] *Bryan v. Itaska County, Minnesota*, 426 U.S. 373, 96 S.Ct. 2101 (1976).

the trial court's specific orders to the contrary.[23] However, when the Tribe closes down all gaming and submits a proposal for new eight-liner use at Speaking Rock, at that time the trial court is free to address whatever type of inspection may or may not be necessary when this situation presents itself.

As a result, this limited right of inspection of eight-liner records is unlike any other examples cited in the cases by the Tribe because it is fully authorized by both the violation of the 2001 permanent injunction Order and by the Restoration Act. Here, the source of the remedy differs from the sources in all the cases cited by the Tribe at pp.21-30 of their Brief because the inspection remedy was not adopted by the State of Texas in the same way that the Texas Lottery Commission adopted 1 Tex. Admin.Code § 402.703(a) (2005) described at p. 24 of the Tribe's Brief. Nor was the inspection remedy attached to a contempt Order similar to the source of regulations or taxes are adopted by State governments. Here, the Tribe, rather than the State of Texas, has control over when, if ever, this right of inspection will be needed.

B. Limited right of inspection not a delegation of judicial authority.

At p. 25 of the Appellants' Brief, the Tribe argues that the limited right of inspection of the Tribe's eight-liner books while operating without trial court approval and under a finding of being in contempt is an improper delegation of judicial

[23] *See*, Footnote 10*, supra*.

authority. To support that argument they cite a 1933 Texas State Supreme Court opinion in *Morrow v. Corbin*, 62 S.W.2d 641, 645 (1933) which was not a contempt case, but rather involved a trial court attempting to certify questions to the court of appeals and higher courts to obtain an advisory opinion. *Id.,* at pp. 642-643.

The contempt Order on appeal in this action which offers only a limited right of inspection makes no such deference to the Plaintiff State of Texas. Plaintiff State of Texas is free to prosecute yet another injunctive or contempt action not by virtue of the contempt Order's limited inspection of eight-liner records, but instead by virtue of § 107(a) and 107(c) of the Restoration Act. The limited right of inspection, offered only during the interim time before the Tribe decides to comply with the original injunction and submit a new proposal for use of eight-liners, delegates no judicial decision-making to the Plaintiff State of Texas. In fact, like the power afforded to the Administrator in *Walling,* "The statute authorizing the Administrator to proceed by injunction implies the further right in him to have an appropriate injunction made effective so as to preserve such benefits as were conferred upon him, as complainant, by the injunction." *Walling*, 158 F.2d at 83.

Moreover, the criminal contempt cases cited at p. 26 of the Tribe's Brief are inapposite to the issues in this case because they involve questions arising in the criminal contempt context where the government is a party to the criminal prosecution,

not the movant in the contempt motion. In *Young v. United States ex. rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 107 S.Ct.2124 (1987), unlike the instant case, "Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in *Gompers,* criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not a part of the original cause.'" *Young* at 2136. Likewise, the reference to *Crowe v Smith*, 151 F.3d 217, 227-228 (5th Cir. 1998) is irrelevant to this case because this Court had already found that the fines imposed for past conduct rendered the proceeding a criminal contempt proceeding, and this requirements of an independent prosecutor flowed from that finding alone.

C. The Restoration Act authorizes State injunctive relief.

The Tribe, at p. 29 of their Brief, argues that "Because the law in this case is federal, and because the state is a party to civil litigation and as such has no applicable federal police power, it cannot be given authority to enforce federal law." The Tribe's Brief, from the outset, fails to identify the enforcement of federal law addressed therein.

Assuming the Tribe contests the right of the Plaintiff State of Texas to assert injunctive relief or seek contempt actions for violating Texas gambling laws—those issues were decided by this Court previously in *Ysleta I. See, Ysleta del Sur Pueblo v.*

State of Texas, 36 F.3d 1325, 1327 (5th Cir. 1994); *cert. denied*, 514 U.S. 1016 (1995). This Court held that "Rather, upon reviewing these materials, we are left with the unmistakable conclusion 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." *Ysleta I*, at p. 1334.

D. The Tigua Gaming Agency is unfit for enforcement duty.

The Tribe, at pp. 29-30 of Appellants' Brief, argues that "other alternatives were available to confirm the Pueblo's ongoing compliance with the district court's injunction. The district court could have ordered the defendant Tigua Gaming Agency to submit quarterly reports." To support their contention, the Tribe quotes from the *Ysleta II* opinion, *Texas v Ysleta Del Sur Pueblo*, 220 F.Supp.2d 668, 674 (W.D.Tex. 2001) where the trial court did not find inadequate regulatory oversight. The Tribe omitted reference however, to that same Tigua Gaming Agency in the August 3, 2009 contempt Order. *See*, USCA5 260, where the Tigua Gaming Agency is found to be in contempt of the 2001 injunction. *See*, Order, at USCA5 267.[24]

Moreover, the cases cited at p. 30 of the Tribe's Brief, *Natural Gas Pipeline Co. of America v. Energy Gathering Inc*., 86 F.3d 464, (5th Cir. 1996) and *Spallone v.*

[24] Ironically, the Tribe argues simultaneously (without explanation) that the Plaintiff State of Texas was disqualified to serve in this capacity since it too was a "party" to this litigation, see p. 26 Appellants' Brief.

United States, 493 U.S.265, 110 S.Ct. 625 (1990) do not support the Tribe's argument; because, unlike *Spallone* where City councilmembers were held in contempt before the City itself responded, *Id.* at 634-635, the trial court here limited the inspection to records of only the eight-liner machines, and granted the Tribe's previous objection that the inspection of all its books was too broad. *See,* Order filed August 3, 2010, USCA5 308.

Moreover, the facts of this case differ from the *Spallone* case because this right of inspection granted to the Plaintiff State of Texas only obtains if, in fact, eight-liners are being operated currently at Speaking Rock Casino in violation of the injunction because the Tribe has not yet obtained approval from the trial court to operate eight-liners.

CONCLUSION

Plaintiff State of Texas moves this Court to affirm the district court's contempt order allowing inspection of the records with respect to the operation of eight-liners. *See*, Orders at USAC5 260 and USCA5 306.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, in electronic form, has been filed with the clerk on December 13, 2010. I also certify that a true and correct copy of the foregoing document, in both paper and electronic form, was sent by certified mail on December 13, 2010, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed R. App. P. R. 32(a)(7).

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ECF CERTIFICATIONS

I certify that the required privacy redactions have been made pursuant to 5th Cir.R.25.2.13, the electronic submission is an exact copy of the paper submission, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated: December 13, 2010