

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

STATE OF TEXAS,

Plaintiff,

V.

**YSLETA DEL SUR PUEBLO,
TIGUA GAMING AGENCY, THE
TRIBAL COUNCIL, TRIBAL
GOVERNOR FRANCISCO PAIZ OR
HIS SUCCESSOR,**

Defendants.

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No. EP-99-CA-0320-KC

**PUEBLO DEFENDANTS' MOTION TO EXCLUDE EVIDENCE OFFERED BY
PLAINTIFF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

SUMMARY OF ISSUES TO BE DECIDED

1. Whether the testimony of Lieutenant Tom Loper, Sergeant James Ferguson, and Sergeant Marcos Martinez should be excluded from consideration of the Pueblo Defendants' Motion for Summary Judgment.

I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 37(b)(2)(A)(ii) and 56(c)(2), and Federal Rule of Evidence 403, the Pueblo Defendants move to exclude all testimony, evidence and argument in Plaintiff's Response to Pueblo Defendants' Motion for Summary Judgment (ECF No. 469) and Plaintiff's Response to Proposed Undisputed Facts (ECF No. 469-57) that arise from unauthorized clandestine undercover criminal operations conducted on Pueblo lands, beyond the authority of the State of Texas, and without the knowledge or consent of the Court or the Pueblo. Specifically, the Pueblo Defendants move to exclude testimony from the following individuals, including any exhibits cited therein, from consideration of the Pueblo Defendants' Motion for Summary Judgment (ECF No. 468):

- (1) Deposition of Lieutenant Tom Loper (dated May 12, 2014);
- (2) Deposition of Sergeant James Ferguson (dated May 12, 2014); and
- (3) Deposition of Sergeant Marcos Martinez (dated May 12, 2014).

Plaintiff relies on testimony of the above individuals to oppose the Pueblo Defendants' request for summary judgment. As argued below, Plaintiff was without authority and jurisdiction to send its criminal investigators onto federal lands held in trust for the benefit of the Pueblo Defendants and, in doing so, exceeded the parameters of the Restoration Act, 25 U.S.C. § 1300g-6(b), and this Court's Orders. Plaintiff should not be permitted to utilize information gathered in contravention of the law and governing court orders to oppose the Pueblo Defendants' Motion for Summary Judgment and such information should be excluded.¹

¹ This Motion incorporates by reference the Pueblo Defendants' Motion in Limine Regarding Improperly Gathered Evidence (ECF No. 415).

II. SUMMARY OF EVIDENCE AND TESTIMONY TO BE EXCLUDED

In Plaintiff's Response to Proposed Undisputed Facts (ECF No. 469-57), Plaintiff denies certain of the Pueblo Defendants' Proposed Undisputed Facts (ECF No. 168-1) with citation to deposition testimony of Lieutenant Tom Loper, Sergeant James Ferguson, and Sergeant Marcos Martinez. These denials include the following:

- Fact No. 4. *See* ECF No. 469-57 at 5-6 (citing the deposition testimony of Lt. Loper, Sgt. Ferguson, and Sgt. Martinez).
- Fact Nos. 10, 12, and 13. *See id.* at 9-12 (citing the deposition testimony of Lt. Loper, Sgt. Ferguson, and Sgt. Martinez).

The deposition testimony of these individuals is similarly cited throughout Plaintiff's Response to Pueblo Defendants' Motion for Summary Judgment (ECF No. 469). *See, e.g.*, ECF No. 469 at 1-2, 15-18 (citing testimony of Lt. Loper, Sgt. Ferguson, and Sgt. Martinez). The State of Texas has disclosed that the above individuals, among others employed by Plaintiff, conducted undercover operations at the Pueblo's Entertainment Centers on March 13-19, 2012; May 7-9, 2012; and July 9, 2013. *See* Plaintiff's First Amended Answers to Defendants' Interrogatories (Interrogatory No. 6), excerpts attached as Exhibit A; *see also* Plaintiff's Fifth Amended Motion for Contempt for Violation of September 27, 2001 Injunction (ECF No. 423 at 9-10) (describing that "undercover investigations were conducted by peace officers in the Criminal Investigations Division of the Office of Attorney General").

The majority of Plaintiff's denials and arguments contained in its Responses (ECF Nos. 469 & 469-57) are derived from and based upon unauthorized and illegal undercover operations. Whether this information may be discussed or considered, therefore, is a threshold issue.

III. ARGUMENT

A. LEGAL STANDARD

The admission or exclusion of a particular category of evidence is a matter that is committed to the sound discretion of the trial court. *F.D.I.C. v. Wheat*, 970 F.2d 124, 131 (5th Cir. 1992) (“appellate courts confer great deference on the trial court’s rulings on [evidentiary motions].”). Similarly, under Federal Rule of Civil Procedure 56(c)(2), a party “may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” As explained in more detail below, in consideration of the Pueblo Defendants’ Motion for Summary Judgment, this Court should exercise its discretion in this case to categorically exclude all testimony, evidence, questioning and argument concerning the State of Texas’ unauthorized clandestine undercover criminal operations conducted without jurisdiction or authority and in contravention of the Court’s orders.

B. **The Testimony of Undercover Investigators Should Be Excluded Because it Was Gathered Without Jurisdiction or Authority and in Violation of the Court’s Discovery Orders.**

There are two independent grounds for excluding the testimony of Plaintiff’s undercover investigators here. First, it may be excluded pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(ii) because it was gathered in violation of this Court’s discovery order. F.R.C.P. 37(b)(2)(A)(ii) (stating that a prohibition against “introducing designated matters in evidence” is a proper sanction for violation of a discovery order); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (striking a party’s expert witnesses for that party’s violation of a discovery order). Second, it may be excluded pursuant to Federal Rule of Evidence 403 because it was gathered in contravention of governing law and in violation of the Pueblo’s sovereign rights, and its use under such circumstances would be fundamentally unfair. *See Burkette v.*

Waring, No. 10-10230, 2010 WL 3419463, *4 (E.D. Mich. Aug. 27, 2010) (concluding that “fairness dictates” the exclusion of evidence wrongfully obtained in violation of a protective order).

The Ysleta Del Sur Pueblo’s Entertainment Centers, located on the Pueblo’s reservation, are not “public places” open to anyone who might choose to come in. To the contrary, no one is allowed on the Pueblo, including its Entertainment Centers, without the Pueblo’s consent, and even then those entering are subject to all restrictions and conditions imposed by the Pueblo. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (recognizing “inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter”); accord *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (“a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands”). And this power to exclude is even greater in the context of these unauthorized clandestine undercover operations conducted by the State of Texas in this case – where the State knows that it has no authority to do what it did. 25 U.S.C.A. § 1300g-6(b) (confirming that State of Texas has no “civil or criminal regulatory jurisdiction” on the Pueblo).

The Ysleta del Sur Pueblo is a federal Indian reservation that is held in trust by the Secretary of the Interior for the use and benefit of the tribe. 25 U.S.C.A. § 1300g-4(a). On such lands, “the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973) (citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)); see *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993) (“Absent explicit congressional direction to the contrary, we presume against a State’s having [] jurisdiction [] within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.”).

Moreover, the United States Constitution, through the Commerce Clause, vest plenary authority to the federal government to the exclusion of the states, unless Congress legislates to the contrary. U.S. Const., art. I, § 8, cl. 3 (authorizing Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); *see Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996) (“If anything, the Indian commerce clause accomplishes a greater transfer of power from the States to the Federal Government than does the interstate commerce clause. This is clear from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.”). Plaintiff has offered no justification for its violation of this constitutional mandate.

The Restoration Act recognizes the State of Texas’ lack of jurisdiction over the Pueblo and explicitly denies Plaintiff the jurisdiction to enter on the lands of the Pueblo. 25 U.S.C. § 1300g-6(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.”) (emphasis in original). Therefore, Congress has expressly declined to provide the State of Texas, including Plaintiff, with authority to assert criminal and civil jurisdiction within the boundaries of the Ysleta del Sur Pueblo. The clandestine undercover investigations, upon which Plaintiff relies in opposing the Pueblo Defendants’ Motion for Summary Judgment, violate Congress’ mandate.

In compliance with the Restoration Act, this Court and the Fifth Circuit carefully tailored a limited grant of authority to Plaintiff to *inspect* the Pueblo’s records to ensure compliance with the Order Granting Summary Judgment and Injunction (ECF No. 115), as amended. *Texas v. Ysleta Del Sur Pueblo*, 431 Fed. Appx. 326, 331 (5th Cir. 2011), *cert. den.* 132 S. Ct. 1028 (2012). Specifically, in its Order Regarding Defendants’ Motion to Modify Previous Order (ECF No. 324), this Court clarified that it would allow “representatives of the State limited

authority to conduct discovery to insure the Defendants' compliance with the injunction and contempt order." ECF No. 324 at p. 2. The Court also confirmed: "[t]hat portion of the order which granted periodic access to the books and records of the Casino should have been limited to that particular issue [of eight-liner devices], rather than being a broad grant of authority to rummage through all the books and records maintained by the Defendants." *Id.* The Court explained that this limitation was based on the Court's "intention to authorize continuing, limited discovery to verify the Defendants' compliance with the injunction and contempt order." *Id.* at pp. 2-3.

On appeal, the Fifth Circuit acknowledged that under this Court's Memorandum Opinion and Order Granting Motion for Contempt (ECF No. 281), and Order Regarding Defendants' Motion to Modify Previous Order (ECF No. 324), "state agents are only empowered to *inspect* those records." *Ysleta del Sur*, 431 Fed. Appx. at 331 (emphasis in original). After such an inspection, if the State "should find any irregularities, the State would have to return to the district court for further action." *Id.* The scope of this additional inspection authority is curtailed to avoid a judicial "grant of civil or criminal regulatory jurisdiction to the State of Texas" as that would be beyond the jurisdictional limitations expressly provided in the Restoration Act. 25 U.S.C. § 1300g-6(b).

In flagrant violation of this carefully crafted solution, and in admitted violation of its absence of power to do so, Plaintiff has conducted prohibited criminal undercover operations on the Pueblo's land. At no point has this Court or the Fifth Circuit modified the statutory restrictions on Plaintiff's jurisdiction to grant Plaintiff authority to send undercover officers of its criminal Law Enforcement Division onto the Pueblo to gather "evidence" for these civil proceedings. But Plaintiff did just that, in the process, violating not only this Court's Orders, but

also Congress' mandate that Plaintiff has no civil or criminal regulatory authority over the Pueblo. Yet Plaintiff has relied almost completely on testimony of its undercover investigators to oppose the Pueblo Defendants' Motion for Summary Judgment.

IV. CONCLUSION

This Court should enter an order excluding all testimony, evidence, questioning and argument derived from or based upon unauthorized clandestine undercover operations conducted on Pueblo lands, beyond the authority of the State of Texas, without the knowledge or consent of the Pueblo, and in violation of governing Court orders and federal law.

Dated: August 11, 2014

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2014, I caused a true and correct copy of the foregoing to be served electronically by the Court's CM/ECF system on the following counsel of record:

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